

## Memorandum 97-41

**Health Care Decisions: Staff Draft (Incorporating Uniform  
Health-Care Decisions Act into Probate Code)**

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This memorandum presents a first staff draft showing how the Uniform Health-Care Decisions Act and the California Natural Death Act could be combined in a reorganized Division 4.5 (Powers of Attorney and Health Care Decisions) of the Probate Code. At the meeting, we plan to focus on parts of the draft statute as well as some general issues, which are outlined below.

The following materials are attached to this memorandum as exhibits:

	<i>Exhibit pp.</i>
1. English & Meisel, <i>Uniform Health-Care Decisions Act Gives New Guidance, Estate Planning</i> , Nov.-Dec. 1994 . . . . .	1
2. James L. Deeringer, on behalf of State Bar Estate Planning, Trust and Probate Law Section Executive Committee (May 14, 1997) . . . . .	9
3. Kevin G. Staker, Staker & Associates, Camarillo (May 2, 1996) . . . . .	12
4. Secretary of State Form for Durable Power of Attorney for Health Care Registration . . . . .	13
5. James L. Deeringer, on behalf of State Bar Estate Planning, Trust and Probate Law Section Executive Committee (June 3, 1997) . . . . .	15
6. Paul Gordon Hoffman, Hoffman Sabban & Watenmaker, Los Angeles (July 8, 1996) . . . . .	18
7. Tina Chen, Univ. Penn. law student, Memo prepared for Commission, re <i>Recommendations for Rules Governing Surrogate Decisionmaking</i> (April 18, 1997) . . . . .	21

BACKGROUND

The Commission has considered a variety of health care decisionmaking issues in earlier memorandums. General issues of the scope of the study were considered in Memorandum 96-34 (May 1996 meeting) and Memorandum 96-39 (July 1996 meeting). The Natural Death Act was reviewed in detail in Memorandum 96-66 (January 1997 meeting). The terminology and advance health care directive provisions of the Uniform Health-Care Decisions Act (UHCDA) were considered in Memorandum 97-4 (April 1997 meeting).

The anchor of these discussions has been the Power of Attorney Law (PAL) (Prob. Code § 4000 *et seq.*) which includes the durable power of attorney for

health care and was enacted on Commission recommendation. The need to review the health care power statutes has been recognized for several years. And although the health care power statutes were moved to the Probate Code when the PAL was created out of the Civil Code in 1994, the Commission reserved the health care issues for later consideration. We are now conducting this second part of the power of attorney law reform and approaching the project from the perspective of the 1993 Uniform Health-Care Decisions Act.

The Commission has decided that the subject of the Natural Death Act (California's "living will" statute, Health & Safety Code 7185 *et seq.*) should be placed in the Probate Code with the PAL and that the UHCDA should be used as a model for its revision. The PAL itself should be reviewed from the perspective of the UHCDA.

The goal of these reforms will be to unite the law governing powers of attorney for health care, "living wills" and other health care instructions, and statutory surrogates and family consent. Of course, conservatorships and court authorized medical treatment are already covered in the Probate Code. This is the same goal sought by the UHCDA. (For an overview of the UHCDA, see Exhibit pp. 1-8.)

#### ISSUES TO BE CONSIDERED

The attached staff draft statute attempts to implement the Commission's overall policy directions and focus the discussion on specific language in context, as decided at the April meeting. Some broad issues are considered in this memorandum and specific issues and questions are scattered throughout the draft in Staff Notes. At the meeting, we will attempt to focus the discussion on draft language, but much of the drafting is very preliminary and is included to see how or whether it fits.

#### **Location and Organization**

The content of the draft is necessarily affected by its structure, and some strain is put on any organizational scheme by the set of subjects covered in this study. Commentary on the Uniform Health-Care Decisions Act cites the aggregation of these matters in a single, comprehensive act as a virtue, as opposed to much existing state legislation which "has developed in fits and starts, resulting in an often fragmented, incomplete, and sometimes inconsistent set of rules." (English & Meisel article, Exhibit p. 1.)

But in the California code system organized by broad subjects, there is no ideal location for the UHCDA. Perhaps the Health and Safety Code would be best, since it deals with health care and hospitals and currently includes the Natural Death Act. Maybe provisions concerning physicians should be in the appropriate part of the Business and Professions Code. The Civil Code contains rules on confidentiality of medical information (Civ. Code § 56 *et seq.*) and historically has contained law on almost every subject. Or maybe the Family Code is a good place, since the surrogacy rules focus on consent by family members. The Welfare and Institutions Code could also be considered.

The name of the Probate Code does not suggest that it is an appropriate place to put any health care decisionmaking law. But the name notwithstanding, it does contain the law on guardianships and conservatorships, court-ordered medical treatment, durable powers of attorney for health care, DNR instructions, the Secretary of State's health care power registry, and due process in competency determinations. In addition, the "probate court" traditionally exercises jurisdiction appropriate to determine issues arising in this area. So by a process of elimination, as well as by custom and familiarity, the Probate Code is the strongest candidate. There are some distinct advantages to using the Probate Code. It is more likely to be available than most other codes. Specialized codes such as the Health and Safety Code are not included in desk sets or 6-in-1 code publications. The Probate Code is better organized than most codes, and has a number of general and definitional provisions that improve usability. We do not believe that UHCDA should be distributed among different codes, and to that extent concur with the uniform act's goal of having a unified statute.

Once we have settled on the Probate Code, we must decide where to put the new material. This in part depends on how much the existing rules governing powers of attorney are going to be changed. Keep in mind that the 1994 PAL attempted to apply general provisions to all powers of attorney, whether for property, health, or other purposes. Are health care provisions in the PAL to be wrenched out of that law to be superseded by the UHCDA? If that were done (as recommended by the Uniform Commissioners), we would need to revise the PAL to merge the once-general rules into the now non-health care power of attorney law, since it would be inappropriate to preserve "general" rules that apply to only one type of instrument. This would also bring two Commission operating principles into play: (1) the Commission is reluctant to recommend substantial changes in recent legislation, and (2) the "Commission has

established that, as a matter of policy, unless there is a good reason for doing so, the Commission will not recommend to the Legislature changes in laws that have been enacted on Commission recommendation [Minutes, December 1971].”

There are a number of possibilities for placement of this material in the Probate Code:

- (1) **New Part (commencing with Section 850 or 900) in Division 2 (General Provisions)** —There are 17 parts in Division 2 covering a host of subjects. Part 17 concerns “legal mental capacity” and ends with Section 813. There is plenty of room in this division before Division 3 starts at Section 1000. A new Part 18 could be placed at Section 820 or 850 or 900.
- (2) **New Division 3.5 (commencing with Section 1300)** —The new division would follow General Provisions and precede Guardianship, Conservatorship, and Other Protective Proceedings (Division 4). There is sufficient room between Sections 1265 and 1400. This is our tentative choice for the best location.
- (3) **New Division 4.3 (commencing with Section 3950)** —This would locate the new division between Guardianships etc. (Division 4) ending with Section 3925 and the Power of Attorney Law (Division 4.5) starting with Section 4000.
- (4) **New Division 4.7 (commencing with Section 4950)** —This would follow right after the Power of Attorney Law, which ends at Section 4948. Division 5 (Multiple Party Accounts) starts with Section 5000, so there would not be very much room here, unless some of the provisions in Part 4 (Durable Powers of Attorney for Health Care) and Part 5 (Judicial Proceedings Concerning Powers of Attorney) were renumbered. This is not a bad alternative, since the provisions in Part 4 will need to be substantially revised anyway, but renumbering sections is never very popular with the bar and can cause confusion for the courts and others who use the statute. We doubt, however, that very many have found occasion to use these judicial proceeding sections, so the friction of renumbering would not be too great. This alternative also has the virtue of achieving a more logical order to the statutes than alternative (2), but it is more disruptive.
- (5) **New Division 12 (commencing with Section 22000)** —This would place the new statute at the end of the Probate Code, following Division 11 on Construction of Wills, Trusts, and Other Instruments (§§ 21101-21541). This provides plenty of room, but requires five-digit section numbers and estranges the statute from its related provisions.
- (6) **Revised Part 4 (commencing with Section 4600) of Division 4.5** —This would place the uniform act within the Power of Attorney Law. We would need to rename the division to reflect its broader scope. Since Part 4 (Durable Powers of Attorney for Health Care) will need to be substantially revised anyway, this alternative makes some sense. There is also plenty of room; Part 4 starts with Section 4600 and Part 5 starts with Section 4900. Additional restructuring may be needed as the drafting proceeds.

We saved the best alternative for last. The attached staff draft adopts the 6th alternative and adds one new wrinkle — by further dividing Division 4.5 into “titles” (which are not otherwise used in the Probate Code), the conflict can be minimized between statutes organized on the concept of powers of attorney

(mostly existing law) and the statutes organized on the concept of health care decisionmaking (UHCDA and NDA).

The new titles and the new and existing chapters in the draft statute are organized as follows:

**TITLE 1. POWERS OF ATTORNEY**

**PART 1. DEFINITIONS AND GENERAL PROVISIONS**

Chapter 1. Short Title and Definitions

Chapter 2. General Provisions

**PART 2. POWERS OF ATTORNEY GENERALLY**

Chapter 1. General Provisions

Chapter 2. Creation and Effect of Powers of Attorney

Chapter 3. Modification and Revocation of Powers of Attorney

Chapter 4. Attorneys-in-Fact

Chapter 5. Relations with Third Persons

**PART 3. UNIFORM STATUTORY FORM POWER OF ATTORNEY**

**TITLE 2. HEALTH CARE DECISIONS**

**PART 1. [UNIFORM] HEALTH CARE DECISIONS [ACT]**

Chapter 1. Definitions and General Provisions

Chapter 2. Durable Powers of Attorney for Health Care

Chapter 3. Advance Health Care Directives

Chapter 4. Optional Statutory Form of Advance Health Care Directive

Chapter 5. Health Care Surrogates

Chapter 6. Duties of Health Care Providers

Chapter 7. Immunities and Liabilities

**PART 2. ADVANCE HEALTH CARE DIRECTIVE REGISTRY**

**PART 3. REQUEST TO FOREGO RESUSCITATIVE MEASURES**

**TITLE 3. JUDICIAL PROCEEDINGS CONCERNING POWERS OF ATTORNEY  
AND HEALTH CARE DECISIONS**

Chapter 1. General Provisions

Chapter 2. Jurisdiction and Venue

Chapter 3. Petitions, Orders, Appeals

A complete outline showing article headings and a complete table of contents showing section headings are set out at the beginning of the attached staff draft.

The staff recognizes that these organizational issues can be intensely dull to consider and that it is difficult to decide on the best structure in the abstract. It is only in the drafting and review process that we will determine whether the approach outlined is workable. The staff made some preliminary attempts with drafting a separate division for insertion in the Probate Code, but the difficulties in linking the power of attorney statutes into a separate UHCDA division seemed to far outweigh any tensions created by placing the UHCDA in the same division

as the PAL. However, if it appears that another approach would be better, we can certainly try it out and see how it works.

### **Surrogacy**

California law does not codify general rules governing who may make health care decisions for an incompetent adult in the absence of an advance directive or court involvement. The patient information pamphlet (“Your Right To Make Decisions About Medical Treatment”) prepared by the California Consortium on Patient Self-Determination and adopted by the Department of Health Services contains the following:

#### **What if I’m too sick to decide?**

If you can’t make treatment decisions, your doctor will ask your closest available relative or friend to help decide what is best for you. Most of the time, that works. But sometimes everyone doesn’t agree about what to do. That’s why it is helpful if you say in advance what you want to happen if you can’t speak for yourself. There are several kinds of “advance directives” that you can use to say *what* you want and *who* you want to speak for you.

Discussions before the Commission and the limited amount of commentary received so far indicate general support for legislation in this area. Adoption of Section 5 of the UHCDA would fill this gap. To focus the discussion, the surrogacy rules drawn from the UHCDA are set out in Sections 4770-4778, at pp. 92-95 of the attached staff draft.

A concise overview of the UHCDA surrogacy rules is contained in the article by David English and Alan Meisel, included in the Exhibit at pages 6-8. You should read this part of the article for a brief discussion of the general law on surrogates and family consent and how it ties into the approach of the UHCDA. Also attached is an useful analysis of UHCDA Section 5 in light of California case law and some suggested approaches prepared by Tina Chen, a third-year law student at the University of Pennsylvania Law School who has been doing work for the Commission under Penn’s public interest program.

The draft statute simply presents the substance of the UHCDA in our style of using shorter sections. This language should help focus the Commission’s discussion of the issues raised by authorizing statutory surrogates to make health care decisions for adults who have not given advance directives.

As in the case of wills and trusts, most people do not execute a power of attorney for health care or an “individual instruction” or “living will.” Estimates vary, but it is a safe guess to say that fewer than 10% have advance directives. Consequently, from a public policy standpoint, the law governing advance directives affects far fewer people than a law on consent by family members and other surrogates. The staff believes that even if we were not considering the power of attorney for health care statute and the Natural Death Act or revision, addition of some form of surrogacy rules would be an important project. As the law of wills is complemented by the law of intestacy, so the power of attorney for health care needs to be complemented by an intestacy equivalent — surrogate health care decisionmaking.

After the Commission has completed its first review of the UHCDA surrogacy rules in the draft statute, when time permits the staff plans to offer additional surrogate consent possibilities drawn from the law of other states. For the time being, it is worth noting that New Mexico has revised its version of the UHCDA to set out the following surrogacy rules (N.M. Stat. Ann. § 24-7A-5 (1995)):

B. An adult or emancipated minor, while having capacity, may designate any individual to act as surrogate by personally informing the supervising health-care provider. In the absence of a designation, or if the designee is not reasonably available, any member of the following classes of the patient’s family who is reasonably available, in descending order of priority, may act as surrogate:

(1) the spouse, unless legally separated or unless there is a pending petition for annulment, divorce, dissolution of marriage or legal separation;

(2) an individual in a long-term relationship of indefinite duration with the patient in which the individual has demonstrated an actual commitment to the patient similar to the commitment of a spouse and in which the individual and the patient consider themselves to be responsible for each other’s well-being;

(3) an adult child;

(4) a parent;

(5) an adult brother or sister; or

(6) a grandparent.

C. If none of the individuals eligible to act as surrogate under Subsection B of this section is reasonably available, an adult who has exhibited special care and concern for the patient, who is

familiar with the patient's personal values and who is reasonably available may act as surrogate.

### **Warnings**

Existing law provides lengthy statutory form warnings in ALL CAPS and requires warnings in printed forms and a special warning in attorney-drafted forms. To what extent is this scheme needed? The staff hopes that these warnings can be simplified and eliminated unless really necessary. As they exist now, the warnings are probably an impediment to using the durable power of attorney for health care or are ignored due to their length and format. The draft statute adopts the UHCDA optional form (see draft Section 4761, pp. 70-79) in place of the existing statutory form (existing Section 4771, p. 79-89), and so eliminates one of the warning provisions. But the other provisions remain to be disposed of. See, e.g., existing Sections 4703-4704, pp. 53-56. The State Bar Estate Planning, Trust and Probate Law Section Executive Committee supports simplification of the warnings provisions. See Exhibit p. 15.

### **Other Issues**

Many additional issues will surface as the Commission and other interested persons review the draft. The draft statute does not begin to resolve the contradictory rules concerning revocation of advance directives. Another major area involves who can make capacity determinations and what standards should apply. See, e.g., Exhibit pp. 16-17 (remarks relayed from Marc Hankin). Witnessing requirements present a number of difficult issues, both technical drafting matters and political concerns.

Respectfully submitted,

Stan Ulrich  
Assistant Executive Secretary



# Uniform Health-Care Decisions Act Gives New Guidance

The Uniform Health-Care Decisions Act is comprehensive, facilitates making advance health-care directives, addresses decision making for individuals who failed to plan, and eliminates many of the restrictions of existing law.

by DAVID M. ENGLISH and ALAN MEISEL, Attorneys

Every state now has legislation authorizing the use of some form of advance health-care directive—a power of attorney, a living will, or, in most cases, both.<sup>1</sup> In addition, more than 30 states have “surrogate decision-making” statutes,<sup>2</sup> allowing family members and, in some instances, others to make health-care decisions for individuals who lack decision-making capacity and who have not executed an advance directive.

The premise of both the case law and these statutes is that competent persons have a common-law and possibly constitutional right of self-determination and the right to be free from unwanted interferences with their bodily integrity. In the health-care setting, this translates

into a right to make decisions about their care, including the right to decline treatment even when that decision would probably or even certainly lead to death. This right ordinarily is implemented through informed consent or refusal. Although decision making for competent patients presents few legal difficulties, the same cannot be said for patients who have lost capacity since they no longer can make a decision, informed or otherwise.

This existing legislation, however, has developed in fits and starts, resulting in an often fragmented, incomplete, and sometimes inconsistent set of rules. Statutes enacted within a single state sometimes conflict with each other, and conflicts between statutes of different states are common. In an increasingly mobile society where an advance health-care directive made in one state must frequently be implemented in another, there is a need for greater consistency.

Much of the present state legislation also inappropriately inhibits, rather than facilitates, the use of advance health-care directives. The execution requirements, for example, often go well beyond what is required even for the exe-

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cution of a will. Furthermore, many of the statutes unnecessarily limit the circumstances when life-sustaining treatment may be withheld or withdrawn to situations in which a person is either "terminally ill" or "permanently unconscious." There is a need for simplicity and greater flexibility.

**Under the Act, an individual instruction may be given as to any prospective health-care decision and similarly broad authority granted to an agent.**

The Uniform Health-Care Decisions Act (the Act), which was approved by the Uniform Law Commissioners in August 1993, was drafted with these problems very much in mind. Unlike most current state statutes dealing with medical decision making for patients who no longer possess the capacity to do so personally, the Act is comprehensive and will enable an enacting jurisdiction to replace its existing legislation on the subject with a single statute. Moreover, the overriding objective of the new Act is to facilitate the use of advance health-care directives. It is likely that the Act will serve as an influential model for many years to come. This Act is not

the Commissioners' first foray into the field of health-care decision making, but it is the most comprehensive. The 1982 Model Health-Care Consent Act<sup>3</sup> addressed primarily the authority of the family to make health-care decisions. The Uniform Rights of the Terminally Ill Act, in both its 1985<sup>4</sup> and 1989<sup>5</sup> versions, focused exclusively on the withdrawal or withholding of *life-sustaining* treatment. A state enacting the Health-Care Decisions Act should simultaneously repeal any of these other acts that are in force or any other advance directive or surrogate decision-making legislation.

### Background

Decision making about life-sustaining treatment has caused seemingly endless dilemmas for health-care professionals, the patients for whom they are responsible, the patients' families, and the courts, dating back at least to 1976 and the New Jersey Supreme Court's landmark *Quinlan* decision.<sup>6</sup> Although a strong judicial consensus has developed about the proper procedural and substantive standards for making decisions about forgoing life-sustaining treatment,<sup>7</sup> half the states still do not have any appellate law on the subject, and in those that do there are frequently significant gaps and uncertainties. The Supreme Court's first, and only, venture into this area is the 1990 *Cruzan* case,<sup>8</sup> which is a very narrow decision that merely upholds the constitutionality of a rule of law that only a few states have adopted in whole<sup>9</sup> or in part.<sup>10</sup>

Despite its narrowness, *Cruzan* acted as a catalyst to the passage of the federal Patient Self-Determination Act<sup>11</sup> (PSDA), also in 1990, and both *Cruzan* and the PSDA led to the enactment or amendment of a large number of living will, health-care power of attorney, and surrogate decision-making statutes. The purpose of all these statutes is to clarify, for patients who have lost their decision-making capacity, *who* has the authority to make health-care decisions (health-care power of attorney and surrogate decision-making statutes) or *what* that decision should be (living will statutes), or both.

The courts have shown a strong preference for attempting to effectuate the preferences of even incompetent patients. The courts have de-

1 See Meisel, *The Right to Die* (1994 Supp.) (Tables 10A-1 and 11-1) [hereinafter "Meisel"]. To obtain a copy of the Uniform Health-Care Decisions Act, contact the National Conference of Commissioners on Uniform State Laws, 676 North St. Clair St., Ste. 1700, Chicago, IL 60611. Phone: 312-913-0195. The Act is also published at 9 U.L.A. (Pt. 1) 93 (1994 Supp.).

2 Meisel, *supra*, (Table B-1).

3 9 U.L.A. (Pt. 1) 453 (1988).

4 9B U.L.A. 609 (1987).

5 9B U.L.A. 109 (1993 Supp.).

6 *In re Quinlan*, 70 N.J. 10, 355 A.2d 647 (1976).

7 Meisel, "The Legal Consensus about Forgoing Life-Sustaining Treatment: Its Status and Its Prospects," 2 Kennedy Inst. of Ethics J. 309 (1992); see also English, "Defining the Right to Die," 56 Law & Contemporary Problems 255 (1993).

8 *Cruzan v. Director*, 497 U.S. 261 (1990).

9 *In re O'Connor*, 72 N.Y.2d 517, 531 N.E.2d 607, 534 N.Y.S.2d 886 (1988).

10 *Cruzan v. Harmon*, 760 S.W.2d 408 (Mo., 1988), distinguished in *In re Warren*, 858 S.W.2d 263 (Mo. Ct. App., 1993).

11 P.L. 101-508 (1990).

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vised three standards to be applied in such situations, with the preferred standard being to give effect to any wishes the patient *did, in fact, express* either orally or in writing before losing decision-making capacity.<sup>12</sup> In practice, however, such evidence is often lacking. In that case, most courts allow the application of the substituted judgment standard under which a surrogate is empowered to make a decision for a patient based on the surrogate's knowledge of what the patient *would have wanted* had he or she, in fact, made a decision before losing capacity.<sup>13</sup> If there is inadequate evidence of the patient's wishes, some courts, but by no means all, empower a surrogate to make a decision based on the patient's best interests.<sup>14</sup>

Advance directive statutes are ordinarily intended not to prescribe substantive rules of law but rather to serve as a mechanism by which an individual's preferences about medical treatment may be ascertained when the patient is no longer capable of expressing those preferences personally and contemporaneously.<sup>15</sup>

### Overview of the Act

The Health-Care Decisions Act consists of 19 sections, but Sections 15 to 19 are boilerplate common to all uniform acts. The heart of the Act is found in Sections 1 to 14. Following a series of definitions (§ 1), the Act contains provisions on making and revoking advance health-care directives (§§ 2 and 3). An optional statutory form for making a directive is provided as well (§ 4).

The Act encourages and facilitates the use of advance health-care directives, but it also recognizes that many individuals fail to plan. Consequently, two back-up provisions are included. One is Section 5, which specifies when individuals other than a patient's agent or guardian may act as "surrogate" and make health-care decisions for the patient. The other is Section 6, addressing health-care decision making by guardians.

To assure the effectuation of a patient's right of self-determination, the Act requires providers to honor a patient's instructions about health care and to comply with a reasonable interpretation of the instruction and with a health-care

decision made by the patient's agent, guardian, or surrogate (§ 7(d)(1)). The only exceptions are for "reasons of conscience" by health-care professionals or as expressed in the policy of the health-care institution (§ 7(e)), or that treatment requested by an instruction or an agent is "medically ineffective" (§ 7(f)). In either of these cases, a health-care provider need not comply but must assist in the patient's transfer to another health-care provider or facility where compliance is assured (§ 7(g)).

Informed decision making requires access to health-care information. For this reason, Section 8 of the Act provides that a patient's agent, guardian, or surrogate has the same rights as the patient to request, receive, examine, copy, and consent to the disclosure of medical or any other health-care information.

To induce compliance with the Act, Section 9 provides certain immunities. An individual's agent or surrogate is typically a noncompensated volunteer. Consequently, it is inappropriate to hold an agent or surrogate to the onerous standards of general fiduciary law. Under the Act, an individual acting as a patient's agent or surrogate is not subject to civil or criminal liability for health-care decisions made in good faith. The Act also protects providers from liability for (1) complying with a health-care decision of a person apparently having authority to make such a decision for a patient; (2) declining to comply with the decision of a person based on a belief that the person lacks authority; and (3) assuming, when complying with an advance health-care directive, that the directive was valid when made and has not been revoked or terminated.

The Act includes several miscellaneous provisions. Monetary damages for intentional non-compliance are provided (§ 10). The principle of patient self-determination is reinforced

12 *Cruzan v. Harmon*, *supra* note 10; *In re O'Connor*, *supra* note 9. See generally Meisel, *supra* note 1, § 9.14A (1994 Supp.).

13 *In re Quinlan*, *supra* note 6; see generally Meisel, *supra* note 1, §§ 9.9 - 9.13 (1989 and 1994 Supp.).

14 *Rasmussen v. Fleming*, 154 Ariz. 207, 741 P.2d 674 (1987); *In re Drabick*, 200 Cal. App. 3d 185, 245 Cal. Rptr. 840 (1988); *In re Conroy*, 98 N.J. 321, 486 A.2d 1209 (1985). See generally Meisel, *supra* note 1, §§ 9.7 - 9.8 (1989 and 1994 Supp.).

15 *DeGrella v. Elston*, 858 S.W.2d 698 (Ky., 1993).

through a provision creating a presumption that an individual has capacity for all decisions relating to health care referred to in the Act (§ 11). To avoid a search for an original advance health-care directive when time may be critical or the original may be inaccessible, the Act makes clear that a copy has the same effect as the original (§ 12).

Consistent with the predominant trend in the case law against judicial involvement in right-to-die cases, the Act is generally to be effectuated without litigation. Nevertheless, situations will arise in which resort to the courts will be appropriate, for example, uncertainty about a patient's decision-making capacity, or the interpretation of an advance health-care directive, or disputes as to the proper course of treatment. For this reason, the Act creates a procedure for securing judicial relief (§ 14), although the section has a limited scope. Only those with a direct interest in a patient's care are permitted to file an action. Furthermore, the court may grant only equitable relief, which includes enjoining, directing, or determining the person who is authorized to make a health-care decision (§ 14). This section is not available to those whose primary aim is monetary damages.

### Health-care directives

Under the Act, an "advance health-care directive" refers to either a "power of attorney for health care" or an "individual instruction" (§ 1(1)). The latter term is used instead of "living will," a term that the Act avoids based on the assumption that it does more to confuse than to help. It is possible, though, that "living will" is a phrase so deeply ingrained that this or any effort to halt its usage will not succeed.

**Triggering conditions: type of medical condition.** Most existing advance directive legislation becomes effective only if a patient is in a "terminal condition" or is "permanently unconscious." Such restrictions have severely limited the usefulness of many state statutes and, indeed, have rendered them virtual nullities. The Act does not attempt to prescribe the circumstances when life-sustaining treatment may be withheld or withdrawn. An individual instruction may be given as to any prospective

health-care decision, and the authority that may be granted to an agent is similarly broad. The importance of this change cannot be overstated. What many people wish to avoid is not merely futile medical treatment when they are terminally ill or permanently unconscious, but also prolongation of their lives when their quality of life, as they would assess it themselves, is unacceptable (as is often seen in cases of serious dementia resulting from Alzheimer's disease, stroke, or other causes).

**Triggering conditions: loss of decision-making capacity.** Most people who want to engage in advance planning for future health-care decisions probably wish to do so only for situations in which their own decision-making capacity is temporarily or permanently lost. Thus, under a majority of existing statutes authorizing health-care powers of attorney, only springing powers are allowed. That is, the agent's authority becomes effective only upon a determination that the principal lacks capacity to make his own health-care decisions. Section 2(c) of the Act recognizes, however, that this wish may not be universal and therefore permits a principal to provide in the power of attorney that the agent's authority becomes effective either immediately or upon some event other than the loss of capacity. But if nothing is said in the power, the agent's authority is springing. It is the function of an individual's "primary physician" (defined in § 1(13)) to determine whether the individual has capacity to make his own health-care decisions (§ 2(d)). A judicial determination of incompetency is not required and is inconsistent with the Act's overall purpose of avoiding recourse to the courts for making decisions about life-sustaining treatment (§ 14 (comment)).

**Who may execute a directive.** A power of attorney for health care or individual instruction may be given by any adult or emancipated minor (§ 2(a)). The Act does not address the question of whether unemancipated but "mature minors" may make advance directives.<sup>16</sup>

**Execution requirements.** The Act keeps execution requirements to a minimum. This bias is based on two assumptions: (1) that the elaborate execution requirements found in many existing statutes make advance directives more

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difficult to execute and unnecessarily inhibit their use, thereby defeating the intent of advance directive legislation; and (2) that such requirements do little, if anything, to prevent fraud or enhance reliability.

A health-care power of attorney must be in writing and signed by the principal but need not be witnessed or acknowledged (§ 2(b)). An individual instruction may be either oral or written (§ 2(a)). Because of the presumed special vulnerability of individuals in long-term care settings, the Act disqualifies an unrelated owner, operator, or employee of a long-term health-care institution at which the principal is receiving care from acting as the principal's agent (§ 2(b)).

#### *Standard for decision making by agents.*

One of the most debated issues in decision making about life-sustaining treatment for patients who have lost capacity is the proper substantive standard (subjective, substituted judgment, best interests) for making this decision. The Act (§ 2(e)) follows the general trend of the case law by providing that the agent must comply with the principal's individual instructions if given, and any other of the principal's oral or written wishes of which the agent is aware.<sup>17</sup> Frequently, however, the principal's wishes are unknown. The Act then follows the dominant (though not quite as uniform)<sup>16</sup> trend in the case law, requiring that the agent act in the principal's best interest, as determined in light of the principal's personal values to the extent they are known.

**Scope of authority.** Persons empowered to make decisions under the Act for a patient who lacks capacity—whether an “agent,” “surrogate,” or “guardian”—are given broad authority. Decision makers may select and discharge health-care providers and institutions; approve or disapprove diagnostic tests, surgical procedures, programs of medication, and orders not to resuscitate; and give directions to provide, withhold, or withdraw artificial nutrition and hydration and all other forms of health care (§ 1(6)). Nevertheless, certain decisions are beyond the Act's scope. For instance, state statutes prohibiting assisted suicide or mercy killing are not overridden (§ 13(c)). Moreover, there are restrictions on the authority of an agent or surrogate

to consent to the admission of the principal or patient to a mental health institution (§ 13(e)).

**Revocation.** Just as a higher standard is imposed for the execution of a power of attorney for health care than for an individual instruction, so is a higher standard imposed for revocation of an agent's designation. A principal may revoke the designation of an agent only by a signed writing or by personally informing the supervising health-care provider (§ 3(a)). A spouse's designation as agent is also revoked by a decree of annulment, divorce, dissolution of marriage, or legal separation (§ 3(d)). An individual instruction, however, may be revoked in any manner that communicates an intent to revoke (§ 3(b)). There is no requirement of a writing or personal communication to the health-care provider.

#### **The optional form**

In drafting the Act, the optional form (§ 4) received more attention than any other section. The drafters unanimously concluded that (1) the Act should include a form, (2) its use should be optional, and (3) it should be written in a style accessible to the lay public.

The drafting committee opted for a single form that combines both the designation of an agent and the opportunity to give individual instructions, should the individual be so inclined. The committee favored comprehensiveness over brevity and included many provisions typical of forms drafted by attorneys. Even though a brief form would be easier to read and execute, it runs the risk of failing to deal with the many issues that an individual might wish to address.

**Practical advice.** Although an individual ideally should consult with his attorney or other qualified professional before making an advance health-care directive, the drafting com-

<sup>16</sup> In re E.G., 133 Ill. 2d 98, 139 Ill. Dec. 810, 549 N.E.2d 322 (1989); In re Swan, 569 A.2d 1202 (Me. 1990); In re Rosebush, 195 Mich. App. 675, 491 N.W.2d 633 (1992); In re Crum, 61 Ohio Misc. 2d 596, 580 N.E.2d 876 (Probate Ct. Franklin County, 1991); Belcher v. Charleston Area Medical Center, 422 S.E.2d 827 (W. Va., 1992). See generally Meisel, *supra* note 1, § 13.3 (1994 Supp.).

<sup>17</sup> See generally Meisel, *supra* note 1, §§ 9.9 - 9.13, 9.14A (1989 and 1994 Supp.).

<sup>18</sup> See generally Meisel, *supra* note 1, §§ 9.7 - 9.8 (1989 and 1994 Supp.).

## UNIFORM HEALTH-CARE DECISIONS ACT

mittee recognized that such consultation will frequently not occur. For this reason, the form includes an extended introductory explanation describing the contents of the form, various options, and procedures for completion. Also included in the explanation is practical advice on steps to take after the form's completion. The signer is advised to give a copy of the completed form to his physician, other health-care providers, and to any health-care agents he may have named. In addition, the signer is advised to talk to the designated agent to make sure that the agent understands the signer's wishes and is willing to take the responsibility.

**Preference for power of attorney.** The power of attorney appears first on the form so as to assure, to the extent possible, that it will come to the attention of a casual reader. This reflects the reality that the appointment of an agent is increasingly viewed, especially by physicians, as more helpful to the making of health-care decisions for incompetent patients than is the provision of specific instructions.

Because the variety of potential treatment decisions is virtually unlimited, the instructions part of the form is directed only at those types of care for which an individual is most likely to have special wishes or which can create a great deal of controversy in the clinical setting. Included are optional provisions relating to withdrawing or withholding treatment, supplying artificial nutrition and hydration, and providing pain relief. An individual, of course, is free to merely designate an agent and leave the instructions part of the form blank (although to guard against forgery, the better practice is to state that no instructions are being given). This allows the agent maximum flexibility to respond to the principal's current health-care needs:

**Organ and tissue donation.** Included in the form is space for an individual to express an intent to make an organ or tissue donation. It is included on the assumption that an advance health-care directive is more likely to come to light than a donor card. It is currently almost universal practice for organs not to be removed for donation, even when there is a valid donor card, unless there is also permission from the patient's next-of-kin. It remains to be seen

whether incorporating consent to donate in the statutory form, backed up by statutory provisions for enforcement of directives, will relax the policy of health-care institutions and organ procurement agencies of insisting on the permission of the next-of-kin.

**Designation of primary physician.** Finally, the form provides space for an individual to designate a primary physician. The vast majority of existing state statutes contain no such provision. In contrast, these statutes refer to, and impose obligations on, the "attending physician," a term that the Act specifically avoids and that is usually understood to mean the physician currently responsible for providing treatment and not the physician whom the patient would select if able to do so.

### Surrogates

The term "surrogate" is generally used to refer to one who has the authority to make a medical decision for another. There are several different kinds of surrogates. One is patient-designated and often referred to as a "proxy," though under the Act (and some existing statutes) this person is called an "agent." A "guardian" is a judicially appointed surrogate. An individual who is appointed by neither the patient nor a court, but who acts pursuant to custom, common law, or a "surrogate decision-making" statute is generally referred to simply as a "surrogate."

The reality is that a substantial majority of Americans fail to execute directives (as they fail to execute wills or purchase life insurance) because of their general unwillingness to plan for death. Furthermore, there is no reason to believe that this situation will change significantly even if the Act is widely enacted. Health-care decision making for individuals who fail to plan is therefore an important concern, and the Act (§ 5) provides for the designation of a decision maker in the absence of the written appointment of an agent or judicial appointment of a guardian, or if an agent or guardian has been appointed but is not "reasonably available." Following the common-law terminology, the Act refers to this decision maker as a "surrogate." The term "surrogate" applies as well to an agent who is orally appointed by the patient.

## UNIFORM HEALTH-CARE DECISIONS ACT

*Common-law status of decision making by families.* For incapacitated individuals who have failed to execute an advance directive and for whom no guardian has been appointed, health-care providers have traditionally turned to the family for a decision. Although this reliance on families is based primarily on medical custom, it has received judicial approval—and thus acquired the status of law—in almost all jurisdictions that have considered the issue.<sup>19</sup> Nonetheless, roughly half the states have no judicial decision on this point, and in those that do, there is sometimes uncertainty about its details. Furthermore, few of the cases address the issue of which family member has definitive authority, relying instead on the notion that there should be a consensus among available and interested family members. If consensus cannot be obtained, recourse to the courts may be the only alternative.

As a result of these uncertainties, a growing number of jurisdictions are enacting statutes validating a role for the family. Over 30 states currently have such "surrogate decision-making" (sometimes referred to as "family decision-making") statutes on the books. Most, however, tend to be limited in scope; some focus on only withdrawal or withholding of life-sustaining treatment, and some are specifically intended *not* to apply to life-sustaining treatment.<sup>20</sup> The surrogacy provision of the Act is intended to be comprehensive and to address these problems. A surrogate is empowered to make all "health-care decisions" (expansively defined in § 1(6)) for the affected individual.

*Triggering conditions.* The right of a surrogate to act is triggered by a determination that the patient lacks capacity to make his own health-care decisions. Not all patients are covered, however. A surrogate may make a health-care decision only for an adult or emancipated minor for whom no agent or guardian has been appointed or whose agent or guardian is not reasonably available (§ 5(a)). Unemancipated minors are excluded on the assumption that health-care decision making for them is best handled by separate legislation.

*Priority list.* The Act prescribes a priority list of those who may act as surrogate. The drafters

concluded that a priority list based on closeness of family relationship—as most existing legislation provides—does not necessarily reflect reality. Unmarried individuals in cohabiting relationships, for example, might be much more likely to prefer that their companions act on their behalf than their parents, siblings, or even their children.

For this reason, appearing first on the priority list is a new type of decision maker, the orally designated surrogate. This is to be distinguished from an agent, who can be appointed only by a writing signed by the principal, but the function is largely the same. Because of the risk of miscommunication of an individual's oral statement, however, some reliability of proof is required.<sup>21</sup> An individual may orally designate a surrogate only by personally informing the supervising health-care provider (§ 5(b)). The health-care provider is then in turn obligated to record the designation in the individual's health-care record (§ 7(b)).

If an individual has not designated a surrogate, or if the designee is not reasonably available, a rather standard family tree is followed: the spouse, followed by an adult child, a parent, and last an adult brother or sister (§ 5(b)). Should all classes of family members decline to act or otherwise not be reasonably available, a health-care decision may be made by another relative or friend who has exhibited special care and concern for the patient and who is familiar with the patient's personal values (§ 5(c)).

The surrogacy provision follows the overall preference for the effectuation of the Act without litigation, and therefore a health-care decision made by a surrogate is effective without judicial approval (§ 5(g)). This is consistent with the case law in the overwhelming majority of jurisdictions that have addressed this issue.<sup>22</sup> The Act imposes a requirement that upon assumption of authority, a surrogate must communicate

19 See generally Meisel, *supra* note 1, ch. 8 (1989 and 1994 Supp.).

20 See generally Meisel, *supra* note 1, § 8.17 (1994 Supp.).

21 *In re Browning*, 568 So. 2d 4 (Fla., 1990).

22 See generally Meisel, *supra* note 1, ch. 8 (1989 and 1994 Supp.).

23 English, "The UPC and the New Durable Powers," 27 Real Prop., Prob. & Tr. J. 333, 381-83 (1992).

## UNIFORM HEALTH-CARE DECISIONS ACT

that fact to the members of the patient's family who might otherwise be eligible to act as surrogate (§ 5(d)). Notice to the family is intended to enable them to monitor the course of treatment for their now incapacitated relative and to alert them to take appropriate action, such as seeking judicial review, should the need arise.

*Standard for decision making by surrogates.*

Like a patient-appointed agent, a surrogate is required by the Act, as he would be by case law, to make decisions for the patient in accordance with that patient's wishes. If the patient has made an advance directive that contains "individual instructions" (but has not designated an agent), the surrogate is bound to follow those instructions and "other wishes to the extent known to the surrogate" (§ 5(f)). If the patient's wishes are not known, the surrogate is bound to make decisions based on the patient's best interests, "consider[ing] the patient's personal values to the extent known to the surrogate." This is again consistent with case law and the obligation imposed on agents by the Act.

### Guardianship

For many (and perhaps the vast majority of) patients lacking capacity, family members or close friends will step in, assume responsibility, and work effectively with the health-care team to make decisions for the patient. For some individuals, surrogacy will not be an adequate solution. They may have no close family or friends, or none who is willing to act as surrogate. For others, a dispute among family members or between the family and the primary physician might arise, or a substantial conflict between the patient and potential surrogates might occur, which may be best resolved by a more formal appointment of a decision maker. In these cases, the Act recognizes the traditional answer of guardianship.

*Relationship to state guardianship statutes.*

Section 6 of the Act addresses health-care decision making by guardians, but it is not intended to be a comprehensive provision or to replace existing state statutes. The procedures for the appointment and monitoring of a guardian's ac-

tions continue to be controlled by state guardianship law.

*Standard for decision making.* The section instead addresses some major issues, the first of which is the substantive standard by which a guardian is to make decisions. The Act expresses a strong preference for honoring an individual instruction—a preference that it extends to guardianship. This is consistent with the case law about forgoing life-sustaining treatment. As previously mentioned, this case law exhibits a strong preference, and in some jurisdictions a requirement, for effectuating the patient's own wishes about the provision or forgoing of treatment. Under the Act, a guardian is required to honor a ward's individual instruction and may not revoke the instruction unless the appointing court expressly so authorizes (§ 6(a)).

*Preference for patient-selected decision maker.* The Act affirms that health-care decisions should, whenever possible, be made by the person whom the individual selects—a principle that it extends to guardianship. Under existing guardianship law in many states, a guardian has authority to revoke the ward's power of attorney and thereby remove the decision maker whom the ward had selected.<sup>23</sup> But the Act imposes a higher standard. A guardian may not revoke the ward's power of attorney for health care and remove the agent unless the appointing court expressly so authorizes (§ 6(a)). Furthermore, the Act provides that an agent's health-care decision takes precedence over that of a guardian unless there is a court order to the contrary (§ 6(b)).

### Conclusion

The Act represents a major advance over existing law. It is comprehensive, facilitates making advance health-care directives, addresses decision making for those who have failed to plan, and eliminates many of the current restrictions. The Act also provides physicians, health care administrators, and their legal counsel with increased assurance that they are on firm legal footing when implementing decisions to terminate life-sustaining medical treatment. ♦





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JAMES L. DEERINGER

May 14, 1997

Law Revision Commission  
RECEIVED

MAY 15 1997

File: \_\_\_\_\_

California Law Revision Commission  
4000 Middlefield Road  
Room D-1  
Palo Alto, CA 94303-4739  
Attn.: Stan Ulrich

Re: **Health Care Decisions (Study L-4000)**

Dear Stan:

After the April Law Revision Commission meeting, I prepared a comprehensive memorandum to the Executive Committee of the State Bar Estate Planning Trust and Probate Law Section discussing various issues presented by the Uniform Health Care Decisions Act and requesting the Committee's input. The Committee has responded to my various questions as follows:

1. **Should we use the term "advance health care directive" in California?** The Committee decided that the term "advance health care directive" should be a *generic* term which encompasses durable powers of attorney for health care, directives under the Natural Death Act, and all other individual documents within this general area. However, the Committee felt that it would be confusing if we were to replace the names of the individual documents we currently use in California.

2. **Should we consistently use the term "agent" for the person designated to make health care decisions?** Yes.

3. **What execution formalities should be required?** The Committee noted that all documents should have consistent execution formalities, either a notary or witnesses. It was close vote, but the Committee supported the current formalities as opposed to no formalities.

4. **Who may be an agent?** The Committee agreed that the Act describes who may or may not be an agent in one simple sentence in Section 2(b) and that

Probate Code Section 4702 does not really add much to the simple language of the Act. The Committee was principally concerned that the owner and operator of the health care facility be prohibited from serving as an agent.

5. Should the power be "springing" or immediately effective? We are comfortable with our current law on this point as it is expressed in Probate Code Section 4720. Although that section on its face is somewhat ambiguous, the Law Revision Commission comment clarifies the legislative intent.

6. Who should have authority to determine capacity? The Committee preferred to remain with California law, which does not contain any explicit statement of authority, and rejected the idea of authorizing a "primary physician" to make such determinations.

7. Do we like the optional form provided in Section 4 of the Act? The Committee members had not had a chance to review the Act's optional form by the time of its meeting, but it generally expressed the view that the simplified form contained in the Act is preferable to California's more long-winded version.

8. Should we enable people to orally designate a "surrogate" to make health care decisions? No definitive "up or down" vote was taken on this question. However, there was considerable discussion about the general topic. Several influential members of the Committee recognize that the medical profession tends in practice to accept decision-making by surrogates already, despite the lack of statutory authority for doing so, and these members do not want to frustrate the use of health care directives by retaining artificial legal barriers that are not much honored anyway. However, most members of the Committee believe that the potential for abuse with oral surrogacy is simply too great if it is statutorily authorized. Most appear to believe that the default option, where no formal appointment of an agent has been made, should be a statutory order of priority among family members similar to the laws of succession or the priorities for appointment of an administrator of an estate. The consensus appears to be that we should not adopt the surrogacy concept.

Despite all this discussion, the Committee was not able to reach one of the questions I raised in my memo, namely, the formalities of revocation. I intend to put this matter on the agenda again for our May 31, 1997 meeting to discuss this additional issue.

With regard to our legislative approach to the Uniform Act in general, the Committee feels that we should use the Uniform Act to make improvements to

existing California law rather than adopt the Act more or less wholesale and modifying it only at particular points where California law is clearly superior. We agree with your observation that the Act may have simply come along too late to form the backbone of our statute on this subject given how well developed our law has become in this area over the years.

Your consideration of these comments is much appreciated. Please feel free to contact me if you would like any clarification.

Very truly yours,



JAMES L. DEERINGER

JLD:crc

cc: Don Green  
Leah F. Granof  
Harley Spitler  
Matthew S. Rae, Jr.

W-174564.1

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

Law Revision Commission  
P 11119

MAY 06 1996

File: L-4000

Re: PROBATE CODE SECTION 4703

Dear Sir or Madam:

I believe the second sentence of the fourth paragraph in the Warning of the Health Care Durable Power would be more understandable (if I have guessed your intent) if it were worded as followed: "In addition, no treatment may be given to you over your objection, and you may overrule the stopping or withholding of health care necessary to keep you alive if you object at that time."

My client Walter Hicks points out that as worded it sounds as if one cannot stop or withhold medical treatment.

Should you have any questions, please do not hesitate to contact me.

Very truly yours,



KEVIN G. STAKER

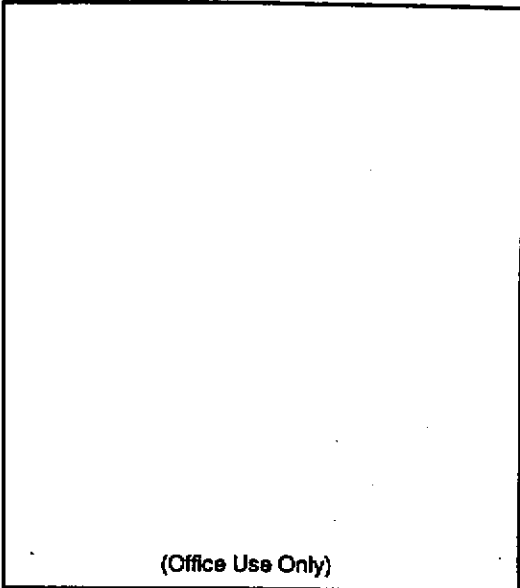
\kgs  
cc: Walter Hicks



# State of California

Bill Jones

Secretary of State



(Office Use Only)

## DURABLE POWER OF ATTORNEY FOR HEALTH CARE REGISTRATION

(Probate Code Sections 4800-4806)

### IMPORTANT: REGISTRANT NOTIFICATION

- The State Durable Power of Attorney for Health Care Registry is a non-compulsory filing. However, if any information on the registration form changes, or if the actual Durable Power of Attorney for Health Care (DPAHC) document is revoked, the registrant must notify the Secretary of State by filing an amendment or revocation form. A registrant must reregister upon execution of a subsequent durable power of attorney for health care.
- The registrant is hereby notified that a health care provider may not honor a Durable Power of Attorney for Health Care until it receives a copy from the registrant.

#### Instructions:

For a new filing or an amendment to a prior registration, complete the entire form. For a revocation of a DPAHC registration, complete items 1 through 8 and the signature block.

Mail to: Secretary of State, Special Filings Unit, P.O. Box 944225, Sacramento, CA 94244-2250  
(916) 653-3984

1. Please check one:

- New Filing. Include Filing Fee \$15.00.
- Amendment. Include Filing Fee of \$7.00.
- Revocation. NO FEE.

2. Registrant's Name: \_\_\_\_\_

3. Address: \_\_\_\_\_

4. Social Security Number: \_\_\_\_\_

5. Driver's License: \_\_\_\_\_ State Issued: \_\_\_\_\_

6. Other Identification: \_\_\_\_\_ State Issued: \_\_\_\_\_

7. Date of Birth: \_\_\_\_\_ Place of Birth: \_\_\_\_\_

8. Date DPAHC Executed, Amended, or Revoked: \_\_\_\_\_

9. Intended place of deposit or safekeeping of the DPAHC:

Name _____	( ) _____	Telephone Number _____
Street _____	City _____	State _____ Zip _____
Name _____	( ) _____	Telephone Number _____
Street _____	City _____	State _____ Zip _____

10. Name of Attorney in Fact: \_\_\_\_\_

a. Telephone Number of Attorney in Fact: ( ) \_\_\_\_\_

b. Mother's Maiden Name: \_\_\_\_\_

11. Name of Alternate Attorney in Fact: \_\_\_\_\_

a. Telephone Number of Alternate Attorney in Fact: ( ) \_\_\_\_\_

b. Mother's Maiden Name: \_\_\_\_\_

12. Other persons or entities authorized to receive registry information:

Name:

Mother's Maiden Name (If Applicable)

a. \_\_\_\_\_

a. \_\_\_\_\_

b. \_\_\_\_\_

b. \_\_\_\_\_

c. \_\_\_\_\_

c. \_\_\_\_\_

d. \_\_\_\_\_

d. \_\_\_\_\_

e. \_\_\_\_\_

e. \_\_\_\_\_

Dated: \_\_\_\_\_

\_\_\_\_\_  
Signature of Registrant

\_\_\_\_\_  
Print or Type Name of Registrant

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JAMES L. DEERING

June 3, 1997

VIA FACSIMILE [(415) 494-1827]

Stan Ulrich  
California Law Revision Commission  
4000 Middlefield Road, Room D-1  
Palo Alto, CA 94303-4739

Re. Health Care Decisionmaking

Dear Stan:

Thank you for your letter of May 29, 1997, concerning your draft statute for the new health care decisionmaking law. I discussed the matter with the Executive Committee of the Estate Planning Section at its May 31 meeting.

It appears that the most useful input for you at this point might be advice concerning the overall structure of the draft statute. Unfortunately, this is not the kind of question upon which the Executive Committee as a whole is able to give meaningful direction. When I described your basic drafting dilemma (i.e., how to incorporate the Natural Death Act provisions within the structure of the existing power of attorney law, and how to avoid conflict with the provisions of Title 1 concerning powers of attorney generally), only a couple of committee members (Don Green being one) appeared to follow my discussion. My conclusion, in which the committee concurred, is that we need to have two or three interested committee members sit down together and thrash through this draft. I am trying to organize that effort now.

The committee did have some input on a few of your more specific questions.

1. **Warnings.** We are not at all wedded to the existing statutory form warnings. While committee members did not have the UHCDA form language before them, the type of explanatory language they supported sounds very much like the UHCDA language. Everyone supported the idea of avoiding all capitals; all caps sections are hard to read, and clients tend to blow by them.

2. **Copies.** Copies should be as good as originals with respect to *all* health care related documents unless the principal provides otherwise in the document or the supervising health care provider has actual notice of circumstances that would render a copy unreliable.

3. **Revocation.** Don Green expressed a preference for a consistent rule for all powers of attorney. However, I should note that during the last telephone conference of the Elder Law Subcommittee, on May 15, several of the participants expressed support for our current revocation rule of Section 4727, which allows for oral revocation but requires the health care provider to note the revocation in the patient's medical records and make reasonable efforts to notify the agent of the revocation. Personally, I believe that the uniquely personal nature of health care decisionmaking, and the special intermediary role of the medical profession, make the administration of powers of attorney in that arena fundamentally different from their administration in the property arena. I would prefer to see a consistency in the revocation provisions for health care powers and individual directives and a somewhat higher standard for revocation of property powers (i.e., the existing standard of Section 4151). So there you have it: at least two conflicting views among the committee members.

4. **Capacity.** I discussed the capacity definition with Marc Hankin. He feels that the Section 4607 definition should simply make reference to the definition found in DPCDA (section 813).

Marc had a couple of other thoughts that I will pass along for your consideration. He feels that it is illogical to prohibit a health care provider from taking an action, pursuant to an advance directive, to which a patient objects, because in that situation the agent is making the decision precisely *because* the principal lacks capacity to make the decision himself. Marc recognizes that patients' rights advocates will strongly resist modifying Section 4724, but he feels that we should at least shift the burden to the patient to demonstrate that the proposed action is inappropriate.

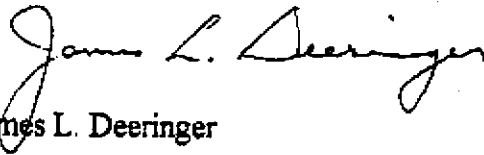
Current Sections 4941 and 4942, which provide for revocation of an agent's powers upon a proper showing, should also provide for *suspension* of the agent's powers pending a hearing on the revocation petition.



Finally, Marc believes that the section reciting the factors an agent should take into account in making decisions on behalf of the principal (I cannot locate the section number) should include consideration of the principal's capacity or lack thereof.

Please feel free to give me a call if you would like any clarification of this less-than-clear missal. I will be on vacation from June 6 - June 30, but I am flying back into town specifically to attend the June 12 CLRC meeting. As I schedule my plane flight from Orange County, I am trusting that this issue will in fact be taken up in the afternoon, as indicated on the agenda.

Very truly yours,



James L. Deeringer

JLD:jld

cc: Leah Granof  
Don Green

W-170007.1

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Law Revision Commission  
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JUL 10 1996

File: L-4000

July 8, 1996

Paul Gordon Hoffman

Mr. Stan Ulrich  
California Law Revision Commission  
Room D-1  
4000 Middlefield Road  
Palo Alto, CA 94303-4739

Re: Study L-4000: Health Care Decisions

Dear Mr. Ulrich:

This letter is written in response to Memorandum 96-39.

As a technical matter, I think the chart contained on page 15 is somewhat misleading. Durable Powers of Attorney must either be signed by two witnesses or by a notary public. Calif. Prob. Code Sections 4121, 4700-4703. The chart seems to indicate that having a signature by either witnesses or a notary public is optional, when in fact it is necessary to have one or the other. On the other hand, as I understand it from the memorandum, the UHCDA provides that while witnesses can sign the document, it is effective despite a lack of witnesses. In my view, that makes correct the notation that witnesses on a UHCDA are optional.

I support the repeal of the NDA, and the incorporation of the substance of its provisions into the Probate Code provisions for DPAHCs.

I also support the adoption of a "statutory surrogacy" to cover situations where a person has not signed a DPAHC. It seems to me that the conceptual framework of the law on health care surrogacy provisions should follow the pattern of appointment of a personal representative at death. In other words, California law provides for a prioritization of people who would serve as administrator of an estate if you die without a Will; but if you follow the proper formalities and leave a Will, then you can appoint whoever you want to serve as executor.

Mr. Stan Ulrich  
July 8, 1996  
Page 2

Similarly, California should provide a prioritization of people who can make medical decisions for you; but you should be able to override this by signing a document with appropriate formalities.

Assuming that California adopts a "statutory surrogacy" law, the problems will then revolve around how one can supersede that law and appoint someone other than the statutory surrogate. And, in turn, the real question is what formalities should be required for a DPAHC to be effective.

Problems will arise only in those cases where a person other than the person or persons holding the priority decision making position, seek to make the decisions over the objection of the person or persons whom the legislature has decided should be entitled to make the decisions. I suspect that the default provisions will reflect the wishes of most people. However, there may well be cases (for example, a dispute between the children from a prior marriage and a relatively new spouse; or a dispute between the family of a gay or lesbian individual and that individual's long time companion) where the emotions are high and the general rules may not reflect the wishes of the individual.

I would oppose allowing an oral appointment of a health care surrogate, for the same reasons we do not allow an oral Will. There is too great a potential for misunderstanding or fraudulent claims. You should note that California repealed the concept of nuncupative Wills, at the recommendation of the Law Revision Commission. Even nuncupative Wills (prior to their repeal) required the testimony of two witnesses in order to be valid.

I recognize that refusing to allow oral DPAHCs is at variance with the UHCDA, and in general I support the notion of adopting uniform acts without change in order to facilitate the ability of individuals to move from one state to another without the need for rewriting their estate planning documents. However, I believe that there are certain policy matters where a state may fairly decide to "draw the line" and vary from the uniform law.

The issue of sister state powers of attorney was raised in the Memorandum. I would note, however, that Probate Code Section 4653 provides that a DPAHC or similar instrument executed in another state or jurisdiction in compliance with the laws of that place will be valid. Presumably, the requirement of

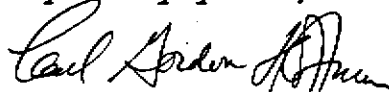
Mr. Stan Ulrich  
July 8, 1996  
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execution would invalidate a claim that an oral instruction, valid in another state, should suffice to make such an instruction valid in California.

I am somewhat less certain about the possibility of allowing a handwritten, but unwitnessed and unnotarized, DPAHC. California law permits a holographic Will to appoint an Executor and dispose of assets. Should there be more onerous provisions for the execution of a DPAHC?

It seems to me that somewhat greater protections should be required of an unwitnessed and unnotarized DPAHC than are required for a holographic Will. A holographic Will is enforced only after there has been a noticed court hearing on its validity. Typically, a DPAHC would be acted on without prior court review. Perhaps a reasonable compromise position would be that a holographic, or unwitnessed and unnotarized, DPAHC would be valid only if a court order is obtained, after appropriate notice to the persons who would be entitled to act as the surrogate in the absence of a DPAHC. In other words, the burden of proof, and the burden of acting to prove the document, should be greater with a document of more questionable reliability (a holograph), than with one of presumably greater reliability (one that is witnessed or notarized.)

Very truly yours,



Paul Gordon Hoffman

PGH:g

**To:** Stan Ulrich  
**From:** Tina Chen  
**Date:** April 18, 1997  
**RE:** Recommendations for Rules Governing Surrogate Decisionmaking

**Recommendations for Rules Governing Persons and Procedures for Making Health Care Decisions for an Incapacitated Adult Who Has Not Made an Advance Directive**

**1. Introduction**

The Uniform Health Care Decisions Act (UHCDA) allows an agent or a surrogate decisionmaker to make any health care decision unless limited by the patient.<sup>1</sup> This broad scope of an agent's or surrogate's authority makes the UHCDA very different from many existing state statutes.<sup>2</sup> Most existing state statutes are much more protective of the patient.<sup>3</sup> The UHCDA, on the other hand, places much more confidence in the agent or surrogate as the "best way to reinforce patient autonomy."<sup>4</sup> However, empirical studies "indicate that surrogate decisionmakers do little better than chance at replicating the patient's own choice."<sup>5</sup>

Although surrogate decisionmakers may not always be able to replicate a patient's own choice, allowing surrogate decisionmakers to make decisions for an incapacitated patient is the best way to protect the patient's rights. A patient has a constitutional right to make decisions concerning her own health care. In 1990, the Supreme Court found that competent adults have a constitutional right to direct or refuse medical treatment.<sup>6</sup> A patient

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<sup>1</sup> See Uniform Health-Care Decisions Act, Prefatory Note, at 1 [HEREINAFTER *Prefatory Note*].

<sup>2</sup> See Charles P. Sabatino, *Trends in Health Care Decisionmaking: The New Uniform Health Care Decisions Act: Paving a Health Care Decisions Superhighway?*, 53 MD. L. REV. 1238, 1250 (1994).

<sup>3</sup> See *id.*

<sup>4</sup> *Id.*

<sup>5</sup> Susan M. Wolf, *Shifting Paradigms in Bioethics and Health Law: The Rise of a New Pragmatism*, 20 AM. J. L. AND MED. 395, 404 (1994); see also Barber, at 1021, 493.

<sup>6</sup> See *Cruzan v. Comm'r, Missouri Dept. Of Health*, 497 U.S. 261 (1990). Nancy Cruzan sustained injuries from an automobile accident, which left her in a persistent vegetative state. See *id.* at 266. Unable to consume food, Cruzan was fed through a gastronomy feeding and hydration tube. See *id.* After five years and little change in her medical condition, Cruzan's parents petitioned for removal of the feeding tube. See *id.* at 267-68. The Supreme Court found that competent adults have a constitutional right to refuse any or all life-sustaining treatment. See *id.* at 278.

who is incapable of making a decision for herself therefore loses that right if no one else is permitted to make such a decision.

## **2. Standard for Determining Whether Treatment Is Appropriate: Patient's Wishes Govern**

The UHCDA was drafted "to ensure to the extent possible that decisions about an individual's health care will be governed by the individual's own desires concerning the issues to be resolved."<sup>7</sup> Under the UHCDA, an agent or surrogate must make decisions in the best interest of the patient, taking into account the patient's personal values and wishes.<sup>8</sup> In *Barber v. Superior Court*, the California Court of Appeals agreed that the "patient's interests and desires are the key ingredients of the decision-making process."<sup>9</sup> Thus, a California statute should also be drafted with the same goals.

Surrogates should use a three-tiered decisionmaking approach: 1) enforce the patient's express wishes if known, 2) exercise substituted judgment using what is known of the patient's values and wishes, 3) when not enough is known, decide in the patient's best interests.<sup>10</sup> This three-tiered approach is the best approach to ensure that the patient's wishes are met.

Some courts have indicated that the surrogate should use the "best interests" standard rather than the "substituted judgment" standard.<sup>11</sup> Under the "best interests" standard, the surrogate makes the choice that "most reasonable, competent patients" would make under the same circumstances.<sup>12</sup> The "best interests" standard, however, is less protective of a patient's own wishes and values than the "substituted judgment" standard. A surrogate should only use the "best interests" standard when he does not know enough

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<sup>7</sup> Prefatory Note, *supra* note 1, at 1.

<sup>8</sup> *See id.*

<sup>9</sup> *Barber v. Superior Court*, 147 Cal. App. 3d 1006, 1019, 195 Cal. Rptr. 484, 492 (1983).

<sup>10</sup> *See Wolf, supra* note 5, at 404. *See also* Uniform Health-Care Decisions Act at §5(f).

<sup>11</sup> *See* Mark Fowler, *Appointing An Agent to Make Medical Treatment Choices*, 84 Colum. L. Rev. 985, 1003, n. 122. (1984).

<sup>12</sup> *Id.*

about the patient's values to use the "substituted judgment" standard. In short, surrogates should use the three-tiered approach outlined above, as the three-tiered approach would most protect a patient's wishes.

The UHCDA does not provide any guidance for a surrogate in making a decision in the patient's best interests. The court in *Barber* suggested an approach in which the surrogate determines whether the benefits of the treatment is proportionate or disproportionate versus the burdens of the treatment.<sup>13</sup> The *Barber* court explains that "proportionate treatment is that which, in the view of the patient, has at least a reasonable chance of providing benefits to the patient, which benefits outweigh the burdens attendant to the treatment."<sup>14</sup> Thus, an "extremely painful or intrusive" treatment may be proportionate if the treatment would cure or significantly improve the patient's condition.<sup>15</sup> However, a "minimally painful or intrusive" treatment may be disproportionate if "the prognosis is virtually hopeless for any significant improvement in condition."<sup>16</sup> This terminology is confusing, raising the question as to who should act as the surrogate who determines whether the treatment is proportionate or disproportionate.

### 3. Choice of Surrogate Decisionmaker

When a patient is incapable of making health care decisions, a surrogate may make decisions for the patient. The *Barber* court determined that, absent legislation to the contrary, such conduct is lawful even without prior judicial approval.<sup>17</sup>

One study has found that 57 percent of people would want "a family member" to make a health care decision for them.<sup>18</sup> Thirty-one percent would want their doctor to make that decision; six percent would want their "doctor and family [or a] friend"; two

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<sup>13</sup> See *Barber*, *supra* note 9, at 1019, 491.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> See *Barber*, *supra* note 9, at 1021, 492.

<sup>18</sup> Fowler, *supra* note 11, at 1003.

percent would want a lawyer; two percent would want a close friend.<sup>19</sup> Only physicians can determine the medical prognosis of the patient. Ideally then, the surrogate and physician should both agree on the decision. However, such a requirement would not be practical because the attending physician may not be familiar with the patient's personal values and wishes.

Section 5(b) of the UHCDA provides that in the event a patient does not designate a surrogate or the designated surrogate is not "reasonably available," a family member will act as the surrogate.<sup>20</sup> Section 5(b) lists the family members, "in descending order of priority," as surrogates: "(1) the spouse, unless legally separated; (2) an adult child; (3) a parent; or (4) an adult brother or sister."<sup>21</sup> The UHCDA also provides that if none of the individuals listed in Section 5(b) is "reasonably available," then "an adult who has exhibited special care and concern for the patient, who is familiar with the patient's personal values, and who is reasonably available may act as surrogate."<sup>22</sup> The drafters of the UHCDA agree that this provision "is not tailored to every situation, but incorporates the presumed desires of a majority of those who find themselves so situated."<sup>23</sup>

Unfortunately, there are many situations to which Section 5 of the UHCDA is not tailored. The UHCDA does not address the situation in which a patient does not have any relatives or friends who are reasonably available.<sup>24</sup> Even if a patient's relatives are reasonably available, the patient may not have been close enough to the relatives for them to know the patient's wishes.

In such situations, should the attending physician then be allowed to act as a surrogate? The UHCDA does not list a physician as an individual eligible to be a surrogate. Physicians should be free "from possible contamination by self-interest or self-

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<sup>19</sup> *Id.*

<sup>20</sup> Uniform Health-Care Decisions Act, at §5(b).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at §5(c).

<sup>23</sup> *Id.* at Comment, §5.

<sup>24</sup> This situation may be more common in urban areas where there are more homeless people whose relatives are not reasonably available or easily identified.



protection concerns which would inhibit their independent medical judgments for the well-being of their dying patients.”<sup>25</sup>

Furthermore, a patient’s relatives may have interests adverse to the patient. For example, the relative may have an ulterior motive, a desire to inherit the patient’s property. There are many situations in which a patient’s relative may not have the patient’s best interests at heart. The decisionmaker should not be motivated by anything but concern for the welfare and dignity of the patient.

Although in most cases relatives will try to make decisions in the patient’s best interests, one cannot assume that a relative never has ulterior motives. California should not have a rigid rule like Section 5(b) of the UHCDA, listing surrogates in order of priority. Section 5(e) of the UHCDA provides that if members of one class do not agree on a decision, “the health-care provider shall comply with the decision of a majority of the members of that class . . . .”<sup>26</sup> However, the UHCDA does not address the situation in which a member of a class with lower priority disagrees with the decision. For example, the patient’s siblings may be more familiar with the patient’s wishes than the patient’s children, who, under the UHCDA, would have higher priority.

California law should address such a situation. The surrogates should not be listed in a rigid order of priority as in the UHCDA. There should be a list of surrogates similar to the list in Section 5(b) of the UHCDA (perhaps close personal friends should be added to the list), but the list should be in no particular order. The list of surrogates should not be exhaustive as there will inevitably be situations in which the list does not include the person who is most familiar with the patient’s wishes.<sup>27</sup> The list should merely be a list of *possible* surrogates. In the event of a disagreement among list members, the physician

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<sup>25</sup> *In re Quinlan*, 70 N.J. 10, 355 A.2d 647, 668 (1976).

<sup>26</sup> Uniform Health-Care Decisions Act, *supra* note 20, at §5(e).

<sup>27</sup> For example, the UHCDA list of surrogates does not include domestic partners, but domestic partners are often most familiar with the patient’s wishes.

shall comply with the decision of the majority of the list members as in Section 5(e) of the UHCDA.<sup>28</sup>

According to the Comment following Section 5 of the UHCDA, if “the members of the class . . . are evenly divided concerning the health-care decision, however, then the entire class is disqualified from making the decision and no individual having lower priority may act as surrogate.”<sup>29</sup> The Comment also provides that it may be “necessary to seek court determination of the issue” in such a situation.<sup>30</sup> A court ruling is probably the only to resolve this sort of conflict. Also, if someone wants to challenge a decision, a court is probably the best forum to review it.

### **Other Protective Rules**

The UHCDA has several rules that are important in protecting the rights of the patient. The UHCDA requires health-care providers and institutions to promptly notify the patient, to the extent possible, of the decision made and the identity of the decisionmaker before implementing any decision made on the patient’s behalf.<sup>31</sup> This provision adds to the protection of the patient from fraud without unreasonably adding to the health-care provider’s duties. The UHCDA also requires health-care providers to record in the patient’s medical file, when known, a patient’s advance directives, revocation of an advance directive, or a designation or disqualification of a surrogate.<sup>32</sup> These recording requirements also safeguard an patient against fraud as well as increase the likelihood that a patient’s wishes will be known and followed, without adding unreasonably to the health-care provider’s duties.

Finally, the statute should also make clear that the decision by the surrogate will not entail any potential civil or criminal liabilities.

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<sup>28</sup> See Uniform Health-Care Decisions Act, *supra* note 20, at §5(e).

<sup>29</sup> Uniform Health-Care Decisions Act, *supra* note 20, at §5 Comment.

<sup>30</sup> *Id.*

<sup>31</sup> See Uniform Health-Care Decisions Act, *supra* note 20, at §7(a).

<sup>32</sup> See *id.* at §7.

## **Conclusion**

Section 5 of the UHCDA provides a good framework for a statute on surrogacy health care decisionmaking. However, the UHCDA fails in comprehensiveness as it is not tailored to all cases. The UHCDA's rigid rules regarding the choice of a proper surrogate decisionmaker applies to the majority of cases, but there will be cases where it would not make sense to apply Section 5(b) of the UHCDA. Also, the UHCDA fails to provide any guidance to the surrogate in making the decision.

**STAFF DRAFT**

**HEALTH CARE DECISIONMAKING**

☞ **Staff Note.** The following draft represents the first pass at implementing the Uniform Health-Care Decisions Act (1993) in the Probate Code — specifically, within Division 4.5, the Power of Attorney Law.

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**STAFF DRAFT**

**HEALTH CARE DECISIONMAKING**

**Division Heading (amended)**

SEC. \_\_\_\_\_. The heading of Division 4.5 (commencing with Section 4000) of the Probate Code is amended to read:

**DIVISION 4.5. POWERS OF ATTORNEY AND ADVANCE  
HEALTH CARE DIRECTIVES**

☞ **Staff Note.** This draft includes the general provisions of the Power of Attorney Law (PAL) that are applicable to all powers of attorney, including health care powers that could be governed by the Uniform Health-Care Decisions Act. All general provisions from the PAL are included, however, even if they have no specific application to health care powers, e.g., Section 4001 identifying the Uniform Durable Power of Attorney Act. In future drafts, the more extraneous material will be omitted, but it is included here to give the full context of the draft.

The uniform act is mainly set forth in a new Title 2 (commencing with Section 4600), replacing the durable power of attorney for health care statute, including its statutory form (the “Keene Health Care Agent Act”). Provisions of the PAL that relate only to powers of attorney for property are not included.

Sections that probably do not need to be revised under the current draft approach are marked “[unchanged]” in the headline. Some Comments will need revision, even if the statute does not, and many of them are noted. In view of the recent vintage of the PAL, we need to preserve the legislative history in the existing Comments. Whether the “Comment” and “Original Comment” approach taken here is the best approach remains to be seen.

**Title Heading (added)**

SEC. \_\_\_\_\_. A title heading is added immediately preceding the heading of Part 1 (commencing with Section 4000) of Division 4.5 of the Probate Code, to read:

**TITLE 1. POWERS OF ATTORNEY**

**PART 1. DEFINITIONS AND GENERAL PROVISIONS**  
[heading unchanged]

**CHAPTER 1. SHORT TITLE AND DEFINITIONS**  
[heading unchanged]

**§ 4000 (amended). Short title**

4000. This division title may be cited as the Power of Attorney Law.

**Comment.** Section 4000 is amended the reflect reorganization of this division.

**Original Comment.** Section 4000 is new and provides a convenient means of referring to this division. The Power of Attorney Law is largely self-contained, but the general agency statutes are

1 applicable as provided in Section 4051. See also Section 20 *et seq.* (general definitions applicable  
2 in Probate Code depending on context).

3 ☞ **Staff Note.** The PAL now includes the procedural provisions that would be expanded in scope  
4 and designated as Title 3 of this division — outside the scope of the PAL as proposed in the  
5 amendment to Section 4000. We could continue to call the entire division the PAL or could  
6 provide that Title 1 and Title 3 constitute the PAL, but both of those approaches seem artificial.

7 **[unchanged] § 4001. Uniform Durable Power of Attorney Act**

8 4001. Sections 4124, 4125, 4126, 4127, 4206, 4304, and 4305 may be cited as  
9 the Uniform Durable Power of Attorney Act.

10 **Original Comment.** Section 4001 restates former Civil Code Section 2406 without substantive  
11 change. This section has the same purpose as the official text of Section 7 of the Uniform Durable  
12 Power of Attorney Act (1969). See also Sections 2(b) (construction of provisions drawn from  
13 uniform acts), 11 (severability).

14 **[unchanged] § 4010. Application of definitions**

15 4010. Unless the provision or context otherwise requires, the definitions in this  
16 chapter govern the construction of this division.

17 **Original Comment.** Section 4010 restates and generalizes the substance of the introductory  
18 clause of former Civil Code Section 2410.

19 ☞ **Staff Note.** The effect of Section 4010 is to apply the definitions in Title 1 to the entire  
20 division.

21 **[unchanged] § 4014. Attorney-in-fact**

22 4014. (a) “Attorney-in-fact” means a person granted authority to act for the  
23 principal in a power of attorney, regardless of whether the person is known as an  
24 attorney-in-fact or agent, or by some other term.

25 (b) “Attorney-in-fact” includes a successor or alternate attorney-in-fact and a  
26 person delegated authority by an attorney-in-fact.

27 **Comment.** [Reference to “agent” provisions of new Title 2 should be included in a revised  
28 Comment.]

29 **Original Comment.** Subdivision (a) of Section 4014 supersedes part of former Civil Code  
30 Section 2400 and former Civil Code Section 2410(a), and is comparable to the first sentence of  
31 Civil Code Section 2295.

32 Subdivision (b) is comparable to Section 84 (“trustee” includes successor trustee). See Sections  
33 4202 (multiple attorneys-in-fact), 4203 (successor attorneys-in-fact), 4205 (delegation of  
34 attorney-in-fact’s authority), 4771 (alternate attorneys-in-fact under statutory form durable power  
35 of attorney for health care). The purpose of subdivision (b) is to make clear that the rules  
36 applicable to attorneys-in-fact under the Power of Attorney Law apply as well to successors and  
37 alternates of the original attorney-in-fact, and to other persons who act in place of the attorney-in-  
38 fact.

39 See also Sections 4022 (“power of attorney” defined), 4026 (“principal” defined).

40 ☞ **Staff Note.** The definition of attorney-in-fact is the result of quite a bit of work when the PAL  
41 was drafted and we would prefer to leave it as it stands. The term is broad enough to cover health  
42 care agents, as the problem of some statutes referring to agents is not new. Accordingly, adding a  
43 new definition of “agent” with regard to health care powers, modeled on the Uniform Health-Care  
44 Decisions Act, does not create any new tension.

1 **[unchanged] § 4018. Durable power of attorney**

2 4018. “Durable power of attorney” means a power of attorney that satisfies the  
3 requirements for durability provided in Section 4124.

4 **Original Comment.** Section 4018 is a new section included for drafting convenience.

5 **[unchanged] § 4022. Power of attorney**

6 4022. “Power of attorney” means a written instrument, however denominated,  
7 that is executed by a natural person having the capacity to contract and that grants  
8 authority to an attorney-in-fact. A power of attorney may be durable or  
9 nondurable.

10 **Original Comment.** Section 4022 restates the first sentence of former Civil Code Section  
11 2410(c) without substantive change. See Sections 4120 (who may execute a power of attorney),  
12 4121 (formalities for executing power of attorney), 4123 (permissible purposes). See also  
13 Sections 4014 (“attorney-in-fact” defined), 4018 (“durable power of attorney” defined), 4609  
14 (“health care” defined).

15 **[unchanged] § 4026. Principal**

16 4026. “Principal” means a natural person who executes a power of attorney.

17 **Original Comment.** Section 4026 restates and generalizes former Civil Code Section 2410(d).  
18 See Section 4022 (“power of attorney” defined).

19 **[unchanged] § 4030. Springing power of attorney**

20 4030. “Springing power of attorney” means a power of attorney that by its terms  
21 becomes effective at a specified future time or on the occurrence of a specified  
22 future event or contingency, including, but not limited to, the subsequent  
23 incapacity of the principal. A springing power of attorney may be a durable power  
24 of attorney or a nondurable power of attorney.

25 **Original Comment.** Section 4030 continues former Civil Code Section 2514(a)(2) without  
26 substantive change. See Section 4129 (springing power of attorney). See also Sections 4018  
27 (“durable power of attorney” defined), 4022 (“power of attorney” defined), 4026 (“principal”  
28 defined).

29 **[unchanged] § 4034. Third person**

30 4034. “Third person” means any person other than the principal or attorney-in-  
31 fact.

32 **Original Comment.** Section 4034 is a new provision. For the purposes of this statute, a third  
33 person is a person who acts on a request from, contracts with, relies on, or otherwise deals with  
34 the attorney-in-fact. The Uniform Statutory Form Power of Attorney uses the equivalent term  
35 “third party.” See Sections 4401-4402.

36 See also Sections 4014 (“attorney-in-fact” defined), 4026 (“principal” defined).

CHAPTER 2. GENERAL PROVISIONS

[heading unchanged]

§ 4050 (amended). Types of powers of attorney governed by this division

SEC. \_\_\_\_\_. Section 4050 of the Probate Code is amended to read:

4050. (a) This division applies to the following:

(1) Durable powers of attorney.

(2) Statutory form powers of attorney under Part 3 (commencing with Section 4400).

(3) [Durable] powers of attorney for health care under ~~Part 4~~ Title 2 (commencing with Section 4600).

(4) Any other power of attorney that incorporates or refers to this division or the provisions of this division.

(b) This division does not apply to the following:

(1) A power of attorney to the extent that the authority of the attorney-in-fact is coupled with an interest in the subject of the power of attorney.

(2) Reciprocal or interinsurance exchanges and their contracts, subscribers, attorneys-in-fact, agents, and representatives.

(3) A proxy given by an attorney-in-fact to another person to exercise voting rights.

(c) This division is not intended to affect the validity of any instrument or arrangement that is not described in subdivision (a).

**Comment.** [This Comment will need to be revised.]

**Original Comment.** Section 4050 describes the types of instruments that are subject to the Power of Attorney Law. If a section in this division refers to a “power of attorney,” it generally refers to a durable power of attorney, but may, under certain circumstances, also apply to a nondurable power of attorney. For example, a statutory form power of attorney may be durable or nondurable. See Sections 4401, 4404. A nondurable power may incorporate provisions of this division, thereby becoming subject to its provisions as provided in Section 4050(a)(4).

Subdivision (b) makes clear that certain specialized types of power of attorney are not subject to the Power of Attorney Law. This list is not intended to be exclusive. See subdivision (c). Subdivision (b)(1) recognizes the special rule applicable to a power coupled with an interest in the subject of a power of attorney provided in Civil Code Section 2356(a). Subdivision (b)(2) continues the substance of the limitation in former Civil Code Section 2420(b) and broadens it to apply to the entire Power of Attorney Law. See Ins. Code § 1280 *et seq.* Subdivision (b)(3) restates former Civil Code Section 2400.5 without substantive change and supersedes the second sentence of former Civil Code Section 2410(c). For the rules applicable to proxy voting in business corporations, see Corp. Code § 705. For other statutes dealing with proxies, see Corp. Code §§ 178, 702, 5069, 5613, 7613, 9417, 12405, 13242; Fin. Code §§ 5701, 5702, 5710, 6005. See also Civ. Code § 2356(e) (proxy under general agency rules).

Subdivision (c) makes clear that this division does not affect the validity of other agencies and powers of attorney. The Power of Attorney Law thus does not apply to other specialized agencies, such as real estate agents under Civil Code Sections 2373-2382. As a corollary, an instrument denominated a power of attorney that does not satisfy the execution requirements for a power of attorney under this division may be valid under general agency law or other principles.

1 The general rules in this division are subject to the special rules applicable to statutory form  
2 powers of attorney in Part 3 (commencing with Section 4400) and to durable powers of attorney  
3 for health care in Part 4 (commencing with Section 4600). See also Section 4770 *et seq.* (statutory  
4 form durable power of attorney for health care).

5 See also Sections 4014 (“attorney-in-fact” defined), 4018 (“durable power of attorney”  
6 defined), 4022 (“power of attorney” defined), 4606 (“durable power of attorney for health care”  
7 defined).

8 ☞ **Staff Note.** This section illustrates some structural difficulties involved in trying to merge or  
9 coordinate California’s well-developed statutory power of attorney law with the Uniform Health-  
10 Care Decisions Act. A recurring technical issue involves whether we should continue to use the  
11 term “durable power of attorney for health care” as in existing law, or “power of attorney for  
12 health care” (which are all durable, unless otherwise provided) as used in the Uniform Health-  
13 Care Decisions Act. Tentatively, we have decided to continue using the “durable” version. See  
14 draft Section 4613 *infra*.

15 **[unchanged] § 4051. Relation to general agency law**

16 4051. Except where this division provides a specific rule, the general law of  
17 agency, including Article 2 (commencing with Section 2019) of Chapter 2 of Title  
18 6 of, and Title 9 (commencing with Section 2295) of, Part 4 of Division 3 of the  
19 Civil Code, applies to powers of attorney.

20 **Original Comment.** Section 4051 is new. This section makes clear that the general agency  
21 statutes and the common law of agency apply to powers of attorney under this division, except  
22 where this division provides a specific rule. See also Section 4022 (“power of attorney” defined).

23 ☞ **Staff Note.** The general law of agency may also apply to a patient’s designation of a  
24 surrogate. See draft Sections 4635 (“surrogate” defined), 4771 (designation of surrogate). This  
25 possibility does not seem to be of much practical concern, however, and the staff doesn’t propose  
26 to amend Section 4051 to cover such abstract applications.

27 **[unchanged] § 4052. Application of division to acts and transactions under power of**  
28 **attorney**

29 4052. (a) If a power of attorney provides that the Power of Attorney Law of this  
30 state governs the power of attorney or otherwise indicates the principal’s intention  
31 that the Power of Attorney Law of this state governs the power of attorney, this  
32 division governs the power of attorney and applies to acts and transactions of the  
33 attorney-in-fact in this state or outside this state where any of the following  
34 conditions is satisfied:

35 (1) The principal or attorney-in-fact was domiciled in this state when the  
36 principal executed the power of attorney.

37 (2) The authority conferred on the attorney-in-fact relates to property, acts, or  
38 transactions in this state.

39 (3) The acts or transactions of the attorney-in-fact occurred or were intended to  
40 occur in this state.

41 (4) The principal executed the power of attorney in this state.

42 (5) There is otherwise a reasonable relationship between this state and the  
43 subject matter of the power of attorney.



1 (b) If subdivision (a) does not apply to the power of attorney, this division  
2 governs the power of attorney and applies to the acts and transactions of the  
3 attorney-in-fact in this state where either of the following conditions is satisfied:

4 (1) The principal was domiciled in this state when the principal executed the  
5 power of attorney.

6 (2) The principal executed the power of attorney in this state.

7 (c) A power of attorney described in this section remains subject to this division  
8 despite a change in domicile of the principal or the attorney-in-fact, or the removal  
9 from this state of property that was the subject of the power of attorney.

10 **Original Comment.** Section 4052 is drawn from the Missouri Durable Power of Attorney  
11 Law. See Mo. Ann. Stat. § 404.730(1) (Vernon 1990). In part, this section is comparable to a  
12 provision of the Uniform Transfers to Minors Act. See Section 3902 & Comment. The power of  
13 attorney may also specify choice of law. Nothing in this section limits the jurisdiction exercisable  
14 under Code of Civil Procedure Section 410.10.

15 The rules in this section are subject to the general rules concerning the scope of the Power of  
16 Attorney Law set forth in Section 4050. See also Sections 4014 (“attorney-in-fact” defined), 4022  
17 (“power of attorney” defined), 4026 (“principal” defined), 4920-4923 (jurisdiction and venue).

18 **[unchanged] § 4053. Recognition of durable powers of attorney executed under law of**  
19 **another state**

20 4053. A durable power of attorney executed in another state or jurisdiction in  
21 compliance with the law of that state or jurisdiction or the law of this state is valid  
22 and enforceable in this state to the same extent as a durable power of attorney  
23 executed in this state, regardless of whether the principal is a domiciliary of this  
24 state.

25 **Comment.** [This Comment will need to be revised.]

26 **Original Comment.** Section 4053 is new. This section promotes use and enforceability of  
27 durable powers of attorney executed in other states. See also Section 4018 (“durable power of  
28 attorney” defined). For a special rule applicable to durable powers of attorney for health care  
29 executed in another jurisdiction, see Section 4653.

30 ☞ **Staff Note.** It is not clear why this section applies only to *durable* powers of attorney.

31 **[unchanged] § 4054. Application to existing powers of attorney and pending proceedings**

32 4054. Except as otherwise provided by statute:

33 (a) On and after January 1, 1995, this division applies to all powers of attorney  
34 regardless of whether they were executed before, on, or after January 1, 1995.

35 (b) This division applies to all proceedings concerning powers of attorney  
36 commenced on or after January 1, 1995.

37 (c) This division applies to all proceedings concerning powers of attorney  
38 commenced before January 1, 1995, unless the court determines that application of  
39 a particular provision of this division would substantially interfere with the  
40 effective conduct of the proceedings or the rights of the parties and other interested  
41 persons, in which case the particular provision of this division does not apply and  
42 prior law applies.

1 (d) Nothing in this division affects the validity of a power of attorney executed  
2 before January 1, 1995, that was valid under prior law.


3 **Original Comment (1994).** Section 4054 is comparable to Section 15001 (application of Trust  
4 Law). Subdivision (a) provides the general rule that this division applies to all powers of attorney,  
5 regardless of when created.

6 Subdivision (b) is a specific application of the general rule in subdivision (a). See Section 4900  
7 *et seq.* (judicial proceedings concerning powers of attorney). Subdivision (c) provides discretion  
8 to the court to resolve problems arising in proceedings commenced before the operative date.

9 For special transitional provisions, see Sections 4102 (durable power of attorney form), 4651  
10 (form of durable power of attorney for health care); see also Section 4129(c) (springing powers).

11 See also Section 4022 (“power of attorney” defined).

12 **Original Comment (1995).** Subdivision (d) is added to Section 4054 to make clear that  
13 enactment of the Power of Attorney Law is not intended to affect the validity of a pre-existing  
14 power of attorney. See Section 4050 (types of powers governed by Power of Attorney Law).  
15 Thus, for example, a durable power of attorney for property matters executed before January 1,  
16 1995, that is neither notarized nor witnessed, is not made invalid by the new execution formalities  
17 provided by Section 4121. Subdivision (d) is declaratory of, and not a change in, the law.

18  **Staff Note.** Transitional issues arising from revisions in this draft will have to be carefully  
19 considered once the draft takes shape.

21 PART 2 . POWERS OF ATTORNEY GENERALLY  
22 [heading unchanged]

23 CHAPTER 1. GENERAL PROVISIONS  
24 [heading unchanged]

25 **§ 4100 (amended). Application of part**

26 SEC. \_\_\_\_\_. Section 4100 of the Probate Code is amended to read:

27 4100. This part applies to all powers of attorney under this division, subject to  
28 any special rules applicable to statutory form powers of attorney under Part 3  
29 (commencing with Section 4400) or durable powers of attorney for health care  
30 under ~~Part 4~~ Title 2 (commencing with Section 4600).

31 **Comment.** Section 4100 is amended to revise a cross-reference. See Section 4600 *et seq.*  
32 (Uniform Health Care Decisions Act).

33 **Original Comment.** Section 4100 provides the scope of this part and makes clear that these  
34 general rules are subject to exceptions and qualifications in the case of certain special types of  
35 powers of attorney. See also Sections 4022 (“power of attorney” defined), 4606 (“durable power  
36 of attorney for health care” defined).

37 **[unchanged] § 4101. Priority of provisions of power of attorney**

38 4101. (a) Except as provided in subdivision (b), the principal may limit the  
39 application of any provision of this division by an express statement in the power  
40 of attorney or by providing an inconsistent rule in the power of attorney.


41 (b) A power of attorney may not limit either the application of a statute  
42 specifically providing that it is not subject to limitation in the power of attorney or  
43 a statute concerning any of the following:

- 1 (1) Warnings or notices required to be included in a power of attorney.
- 2 (2) Operative dates of statutory enactments or amendments.
- 3 (3) Execution formalities.
- 4 (4) Qualifications of witnesses.
- 5 (5) Qualifications of attorneys-in-fact.
- 6 (6) Protection of third persons from liability.

7 **Comment.** [This Comment will need to be revised.]

8 **Original Comment.** Section 4101 is new. This section makes clear that many of the statutory  
9 rules provided in this division are subject to express or implicit limitations in the power of  
10 attorney. If a statutory rule is not subject to control by the power of attorney, this is stated  
11 explicitly, either in a particular section or as to a group of sections. See, e.g., Sections 4130  
12 (inconsistent authority), 4151(a)(2) (revocation of power of attorney by writing), 4153(a)(2)-(3)  
13 (revocation of attorney-in-fact's authority), 4155 (termination of authority under nondurable  
14 power of attorney on principal's incapacity), 4206 (relation of attorney-in-fact to court-appointed  
15 fiduciary), 4207 (resignation of attorney-in-fact), 4232 (duty of loyalty), 4233 (duty to keep  
16 principal's property separate and identified), 4234(b) (authority to disobey instructions with court  
17 approval), 4236 (duty to keep records and account; availability of records to other persons), 4902  
18 (effect of provision in power of attorney attempting to limit right to petition), 4903 (limitations on  
19 right to petition).

20 See also Sections 4014 ("attorney-in-fact" defined), 4022 ("power of attorney" defined), 4026  
21 ("principal" defined).

22  **Staff Note.** This section presents the issue of whether "attorney-in-fact" should be  
23 supplemented with "agent" to point more directly to health care powers, or whether the broad  
24 definition of attorney-in-fact is sufficient. The same problem arises with use of "principal" — the  
25 term of choice in power of attorney law but not in the Uniform Health-Care Decisions Act.

## 26 § 4102 (amended?). Form of durable power of attorney after January 1, 1995

27 4102. Notwithstanding Section 4128:

28 (a) Except as provided in subdivision (b), on and after January 1, 1995, a printed  
29 form of a durable power of attorney may be sold or otherwise distributed if it  
30 satisfies the requirements of former Section 2510.5 of the Civil Code.

31 (b) A printed form of a durable power of attorney printed on or after January 1,  
32 1986, that is sold or otherwise distributed in this state for use by a person who  
33 does not have the advice of legal counsel shall comply with former Section 2510  
34 of the Civil Code or with Section 4128 of this code.

35 (c) A durable power of attorney executed on or after January 1, 1995, using a  
36 printed form that complies with subdivision (b) of former Section 2400 of the  
37 Civil Code, as enacted by Chapter 511 of the Statutes of 1981, or with former  
38 Section 2510 of the Civil Code, is as valid as if it had been executed using a  
39 printed form that complies with Section 4128 of this code.

40 **Original Comment.** Section 4102 supersedes former Civil Code Section 2510.5. This section  
41 permits continued use of printed forms that comply with former law, specifically former Civil  
42 Code Section 2400 (as enacted by 1981 Cal. Stat. ch. 511, § 4) and former Civil Code Section  
43 2510 (as enacted by 1985 Cal. Stat. ch. 403, § 12). Subdivision (c) permits use of the earlier  
44 forms after January 1, 1995, the operative date of Section 4128. This section, like its predecessor,  
45 former Civil Code Section 2510.5, avoids the need to discard existing printed forms on the  
46 operative date of this division. However, pursuant to subdivision (b), a form printed on or after

1 January 1, 1986, may be sold or distributed in this state for use by a person who does not have the  
2 advice of legal counsel only if the form satisfies the requirements of former Civil Code Section  
3 2510 or of Probate Code Section 4128. See also Section 4018 (“durable power of attorney”  
4 defined).

5 CHAPTER 2. CREATION AND EFFECT OF POWERS OF ATTORNEY  
6 [heading unchanged]

7 **[unchanged] § 4120. Who may execute a power of attorney**

8 4120. A natural person having the capacity to contract may execute a power of  
9 attorney.

10 **Original Comment.** Section 4120 states a requirement of general agency law, consistent with  
11 Civil Code Section 2296. See also Section 4022 (“power of attorney” defined).

12 **[unchanged] § 4121. Formalities for executing a power of attorney**

13 4121. A power of attorney is legally sufficient if all of the following  
14 requirements are satisfied:

15 (a) The power of attorney contains the date of its execution.

16 (b) The power of attorney is signed either (1) by the principal or (2) in the  
17 principal’s name by some other person in the principal’s presence and at the  
18 principal’s direction.

19 (c) The power of attorney is either (1) acknowledged before a notary public or  
20 (2) signed by at least two witnesses who satisfy the requirements of Section 4122.

21 **Original Comment.** Section 4121 provides the general execution formalities for a power of  
22 attorney under this division. A power of attorney that complies with this section is legally  
23 sufficient as a grant of authority to an attorney-in-fact. Special rules apply to a statutory form  
24 power of attorney. See Section 4402. Additional qualifications apply to witnesses for a durable  
25 power of attorney for health care. See Sections 4700, 4701, 4771.

26 The dating requirement in subdivision (a) generalizes the rule applicable to durable powers of  
27 attorney for health care under former Civil Code Section 2432(a)(2). This rule is also consistent  
28 with the statutory forms. See Sections 4401 (statutory form power of attorney), 4771 (statutory  
29 form durable power of attorney for health care).

30 In subdivision (b), the requirement that a power of attorney be signed by the principal or at the  
31 principal’s direction continues a rule implicit in former law. See former Civ. Code §§ 2400,  
32 2410(c). In addition, it generalizes the rule applicable to durable powers of attorney for health  
33 care under former Civil Code Section 2432.

34 The requirement that the power of attorney be either acknowledged or signed by two witnesses,  
35 in subdivision (c), generalizes part of the rule applicable to durable powers of attorney for health  
36 care under former Civil Code Section 2432(a)(3). Former general rules did not require either  
37 acknowledgment or witnessing. However, the statutory form power of attorney provided for  
38 acknowledgment. See former Civ. Code § 2475 (now Prob. Code § 4401). This rule still applies  
39 to the statutory form power of attorney; witnessing does not satisfy Section 4402. Subdivision (c)  
40 provides the general rule as to witnessing; specific qualifications for witnesses are provided in  
41 Section 4122.

42 Nothing in this section affects the requirements concerning recordable instruments. A power of  
43 attorney legally sufficient as a grant of authority under this division must satisfy the general rules  
44 concerning recordation in Civil Code Sections 1169-1231. To facilitate recordation of a power of  
45 attorney granting authority concerning real property, the power of attorney should be  
46 acknowledged before a notary, whether or not it is witnessed.

1 See also Sections 4022 (“power of attorney” defined), 4026 (“principal” defined).

2 ☞ **Staff Note.** The State Bar Estate Planning, Trust and Probate Law Section Executive  
3 Committee tends to support the existing formalities, rather than the no witnessing rule of the  
4 UHCDA. See Memorandum 97-41, Exhibit p. 9. For more discussion of this issue, see the Staff  
5 Note following draft Section 4701.

6 **§ 4122 (amended). Requirements for witnesses**

7 SEC. \_\_\_\_\_. Section 4122 of the Probate Code is amended to read:

8 4122. If the power of attorney is signed by witnesses, as provided in Section  
9 4121, the following requirements shall be satisfied:

10 (a) The witnesses shall be adults.

11 (b) The attorney-in-fact may not act as a witness.

12 (c) Each witness signing the power of attorney shall witness either the signing of  
13 the instrument by the principal or the principal’s acknowledgment of the signature  
14 or the power of attorney.

15 (d) In the case of a durable power of attorney for health care, the additional  
16 requirements of Section [4701].

17 **Original Comment.** Section 4122 generalizes witness qualifications from former Civil Code  
18 Section 2432(a)(3)(A) (first sentence) and (d)(3) (durable power of attorney for health care).  
19 Additional qualifications apply to witnesses for a durable power of attorney for health care, as  
20 recognized in subdivision (d). See also Section 4771 (statutory form durable power of attorney for  
21 health care). This section is not subject to limitation in the power of attorney. See Section 4101.

22 See also Sections 4014 (“attorney-in-fact” defined), 4022 (“power of attorney” defined), 4026  
23 (“principal” defined), 4606 (“durable power of attorney for health care” defined).

24 ☞ **Staff Note.** See Staff Notes following draft Sections 4121 and 4701.

25 **§ 4123 (amended). Permissible purposes**

26 SEC. \_\_\_\_\_. Section 4123 of the Probate Code is amended to read:

27 4123. (a) In a power of attorney, a principal may grant authority to an attorney-  
28 in-fact to act on the principal’s behalf with respect to all lawful subjects and  
29 purposes or with respect to one or more express subjects or purposes. The  
30 attorney-in-fact may be granted authority with regard to the principal’s property,  
31 personal care, health care, or any other matter.

32 (b) With regard to property matters, a power of attorney may grant authority to  
33 make decisions concerning all or part of the principal’s real and personal property,  
34 whether owned by the principal at the time of the execution of the power of  
35 attorney or thereafter acquired or whether located in this state or elsewhere,  
36 without the need for a description of each item or parcel of property.

37 (c) With regard to personal care, a power of attorney may grant authority to  
38 make decisions relating to the personal care of the principal, including, but not  
39 limited to, determining where the principal will live, providing meals, hiring  
40 household employees, providing transportation, handling mail, and arranging  
41 recreation and entertainment.



1 (d) With regard to health care, a power of attorney may grant authority to make  
2 health care decisions, both before and after the death of the principal, as provided  
3 in Part 4 Title 2 (commencing with Section 4600).

4 **Comment.** Subdivision (d) of Section 4123 is amended to revise a cross-reference. See Section  
5 4600 *et seq.* (Uniform Health Care Decisions Act).

6 **Original Comment.** Subdivision (a) of Section 4123 is new and is consistent with the general  
7 agency rules in Civil Code Sections 2304 and 2305. For provisions concerning the duties and  
8 powers of an attorney-in-fact, see Sections 4230-4266. See also Sections 4014 (“attorney-in-fact”  
9 defined), 4022 (“power of attorney” defined), 4026 (“principal” defined).

10 Subdivision (b) continues former Civil Code Section 2513 without substantive change. This  
11 subdivision makes clear that a power of attorney may by its terms apply to all real property of the  
12 principal, including after-acquired property, without the need for a specific description of the real  
13 property to which the power applies. This section is consistent with Section 4464 (after-acquired  
14 property under statutory form power of attorney).

15 Subdivision (c) is new and acknowledges the existing practice of providing authority to make  
16 personal care decisions in durable powers of attorney.

17 Subdivision (d) recognizes the special rules concerning health care decisions made by an  
18 attorney-in-fact under a power of attorney. See Sections 4609 (“health care” defined), 4612  
19 (“health care decision” defined).

20 **§ 4124 (amended?). Requirements for durable power of attorney**

21 SEC. \_\_\_\_\_. Section 4124 of the Probate Code is amended to read:

22 4124. A durable power of attorney is a power of attorney by which a principal  
23 designates another person as attorney-in-fact in writing and the power of attorney  
24 contains any of the following statements:

25 (a) “This power of attorney shall not be affected by subsequent incapacity of the  
26 principal.”

27 (b) “This power of attorney shall become effective upon the incapacity of the  
28 principal.”

29 (c) Similar words showing the intent of the principal that the authority conferred  
30 shall be exercisable notwithstanding the principal’s subsequent incapacity.

31 **Original Comment.** Section 4124 restates former Civil Code Section 2400 without substantive  
32 change. For special rules applicable to statutory form powers of attorney, see Sections 4401,  
33 4402. For special rules applicable to durable powers of attorney for health care, see Sections  
34 4703, 4771. See also Section 4050 (powers subject to this division).

35 Section 4124 is similar to the official text of Section 1 of the Uniform Durable Power of  
36 Attorney Act (1984), Uniform Probate Code Section 5-501 (1991). See Section 2(b)  
37 (construction of provisions drawn from uniform acts). The reference in the uniform act to the  
38 principal’s “disability” is omitted. Under Section 4155, it is the principal’s incapacity to contract  
39 which would otherwise terminate the power of attorney. In addition, the phrase “or lapse of time”  
40 has not been included in the language set forth in subdivision (a) of Section 4124 because it is  
41 unnecessary. As a matter of law, unless a durable power of attorney states an earlier termination  
42 date, it remains valid regardless of any lapse of time since its creation. See, e.g., Sections 4127  
43 (lapse of time), 4152(a)(1) (termination of attorney-in-fact’s authority pursuant to terms of power  
44 of attorney).

45 See also Sections 4014 (“attorney-in-fact” defined), 4018 (“durable power of attorney”  
46 defined), 4022 (“power of attorney” defined), 4026 (“principal” defined).

47 ☞ **Staff Note.** This section may need to be amended to recognize that powers of attorney for  
48 health care under the new Uniform Health-Care Decisions Act are durable by operation of law,

1 subject to the power of the principal to provide otherwise in the power. See UHCDA § 2(b) [draft  
2 Section 4751].

3 **[unchanged] § 4125. Effect of acts under durable power of attorney during principal’s**  
4 **incapacity**

5 4125. All acts done by an attorney-in-fact pursuant to a durable power of  
6 attorney during any period of incapacity of the principal have the same effect and  
7 inure to the benefit of and bind the principal and the principal’s successors in  
8 interest as if the principal had capacity.

9 **Original Comment.** Section 4125 continues former Civil Code Section 2401 without  
10 substantive change. This section is similar to the first sentence of the official text of Section 2 of  
11 the Uniform Durable Power of Attorney Act (1987), Uniform Probate Code Section 5-502 (1991).  
12 See Section 2(b) (construction of provisions drawn from uniform acts). This section omits the  
13 reference to the principal’s “disability” found in the uniform act. Under Section 4155, it is the  
14 principal’s incapacity to contract which would otherwise terminate the power of attorney.

15 See also Sections 4014 (“attorney-in-fact” defined), 4018 (“durable power of attorney”  
16 defined), 4026 (“principal” defined).

17 **[unchanged] § 4126. Nomination of conservator in durable power of attorney**

18 4126. (a) A principal may nominate, by a durable power of attorney, a  
19 conservator of the person or estate or both, or a guardian of the person or estate or  
20 both, for consideration by the court if protective proceedings for the principal’s  
21 person or estate are thereafter commenced.

22 (b) If the protective proceedings are conservatorship proceedings in this state,  
23 the nomination has the effect provided in Section 1810 and the court shall give  
24 effect to the most recent writing executed in accordance with Section 1810,  
25 whether or not the writing is a durable power of attorney.

26 **Original Comment.** Section 4126 continues former Civil Code Section 2402(b) without  
27 substantive change. This section is drawn from Section 3(b) of the Uniform Durable Power of  
28 Attorney Act (1979), Uniform Probate Code Section 5-503 (1991), but has been revised to make  
29 it consistent with the general provision for nomination of a conservator in Section 1810. See  
30 Section 2(b) (construction of provisions drawn from uniform acts). The second sentence of  
31 Section 3(b) of the Uniform Durable Power of Attorney Act (most recent nomination in a durable  
32 power shall be given effect) is not adopted in California. Thus, the principal may make a later  
33 nomination in a writing that is not a durable power of attorney and, if at that time the principal  
34 has sufficient capacity to form an intelligent preference (Section 1810), the later nomination will  
35 supersede an earlier nomination made in a durable power. This is consistent with the purpose and  
36 effect of Section 1810.

37 See also Section 4018 (“durable power of attorney” defined), 4026 (“principal” defined).

38 ☞ **Staff Note.** See the related provision in the Uniform Health Care Decisions Act which cuts  
39 across this provision, draft Section 4754 *infra*.

40 **[unchanged] § 4127. Lapse of time**

41 4127. Unless a power of attorney states a time of termination, the authority of  
42 the attorney-in-fact is exercisable notwithstanding any lapse of time since  
43 execution of the power of attorney.

44 **Original Comment.** Section 4127 is the same in substance as the second sentence of the  
45 official text of Section 2 of the Uniform Durable Power of Attorney Act (1987), Uniform Probate

1 Code Section 5-502 (1991). See Section 2(b) (construction of provisions drawn from uniform  
2 acts). See also Sections 4125 (effect of attorney-in-fact's acts under durable power of attorney  
3 during principal's incapacity), 4152 (termination of authority of attorney-in-fact).

4 See also Sections 4014 ("attorney-in-fact" defined), 4022 ("power of attorney" defined).

5 **§ 4128 (amended). Warning statement in durable power of attorney**

6 SEC. \_\_\_\_\_. Section 4128 of the Probate Code is amended to read:

7 4128. (a) Subject to subdivision (b), a printed form of a durable power of  
8 attorney that is sold or otherwise distributed in this state for use by a person who  
9 does not have the advice of legal counsel shall contain, in not less than 10-point  
10 boldface type or a reasonable equivalent thereof, the following warning statement:

11 NOTICE TO PERSON EXECUTING DURABLE  
12 POWER OF ATTORNEY

13 A durable power of attorney is an important legal document. By signing the  
14 durable power of attorney, you are authorizing another person to act for you, the  
15 principal. Before you sign this durable power of attorney, you should know these  
16 important facts:

17 Your agent (attorney-in-fact) has no duty to act unless you and your agent agree  
18 otherwise in writing.

19 This document gives your agent the powers to manage, dispose of, sell, and  
20 convey your real and personal property, and to use your property as security if  
21 your agent borrows money on your behalf.

22 Your agent will have the right to receive reasonable payment for services  
23 provided under this durable power of attorney unless you provide otherwise in this  
24 power of attorney.

25 The powers you give your agent will continue to exist for your entire lifetime,  
26 unless you state that the durable power of attorney will last for a shorter period of  
27 time or unless you otherwise terminate the durable power of attorney. The powers  
28 you give your agent in this durable power of attorney will continue to exist even if  
29 you can no longer make your own decisions respecting the management of your  
30 property.

31 You can amend or change this durable power of attorney only by executing a  
32 new durable power of attorney or by executing an amendment through the same  
33 formalities as an original. You have the right to revoke or terminate this durable  
34 power of attorney at any time, so long as you are competent.

35 This durable power of attorney must be dated and must be acknowledged before  
36 a notary public or signed by two witnesses. If it is signed by two witnesses, they  
37 must witness either (1) the signing of the power of attorney or (2) the principal's  
38 signing or acknowledgment of his or her signature. A durable power of attorney  
39 that may affect real property should be acknowledged before a notary public so  
40 that it may easily be recorded.



1 You should read this durable power of attorney carefully. When effective, this  
2 durable power of attorney will give your agent the right to deal with property that  
3 you now have or might acquire in the future. The durable power of attorney is  
4 important to you. If you do not understand the durable power of attorney, or any  
5 provision of it, then you should obtain the assistance of an attorney or other  
6 qualified person.

7 (b) Nothing in subdivision (a) invalidates any transaction in which a third person  
8 relied in good faith on the authority created by the durable power of attorney.

9 (c) This section does not apply to the following:

10 (1) A statutory form power of attorney under Part 3 (commencing with Section  
11 4400).

12 (2) A durable power of attorney for health care under ~~Part 4~~ Title 2  
13 (commencing with Section 4600).

14 **Comment.** Subdivision (c)(2) of Section 4128 is amended to revise a cross-reference. See  
15 Section 4600 *et seq.* (Uniform Health Care Decisions Act). [The original Comment will need to  
16 be further revised.]

17 **Original Comment.** The warning statement in subdivision (a) of Section 4128 replaces the  
18 statement provided in former Civil Code Section 2510(b). Subdivision (b) restates former Civil  
19 Code Section 2510(c) without substantive change. Subdivision (c) restates former Civil Code  
20 Section 2510(a) without substantive change, but the reference to statutory short form powers of  
21 attorney under former Civil Code Section 2450 is omitted as obsolete. This section is not subject  
22 to limitation in the power of attorney. See Section 4101(b).

23 Other provisions prescribe the contents of the warning statements for particular types of durable  
24 powers of attorney. See Section 4401 (statutory form power of attorney), 4703 (durable power of  
25 attorney for health care), 4771 (statutory form durable power of attorney for health care). See also  
26 Section 4703(a) (introductory clause) (printed form of durable power of attorney for health care  
27 to provide only authority to make health care decisions).

28 Section 4102 permits a printed form to be used after January 1, 1995, if the form complies with  
29 prior law. A form printed after January 1, 1986, may be sold or otherwise distributed in this state  
30 only if it complies with the requirements of Section 4128 (or its predecessor, former Civil Code  
31 Section 2510). See Section 4102(b).

32 See also Sections 4014 (“attorney-in-fact” defined), 4018 (“durable power of attorney”  
33 defined), 4026 (“principal” defined), 4034 (“third person” defined).

34 **[unchanged] § 4129. Springing power of attorney**

35 4129. (a) In a springing power of attorney, the principal may designate one or  
36 more persons who, by a written declaration under penalty of perjury, have the  
37 power to determine conclusively that the specified event or contingency has  
38 occurred. The principal may designate the attorney-in-fact or another person to  
39 perform this function, either alone or jointly with other persons.

40 (b) A springing power of attorney containing the designation described in  
41 subdivision (a) becomes effective when the person or persons designated in the  
42 power of attorney execute a written declaration under penalty of perjury that the  
43 specified event or contingency has occurred, and any person may act in reliance on  
44 the written declaration without liability to the principal or to any other person,  
45 regardless of whether the specified event or contingency has actually occurred.

1 (c) This section applies to a power of attorney whether executed before, on, or  
2 after January 1, 1991, if the power of attorney contains the designation described  
3 in subdivision (a).

4 (d) This section does not provide the exclusive method by which a power of  
5 attorney may be limited to take effect on the occurrence of a specified event or  
6 contingency.

7 **Original Comment.** Section 4129 continues former Civil Code Section 2514(b)-(e) without  
8 substantive change. This section is intended to make springing powers of attorney more effective  
9 by providing a mechanism for conclusively determining that the triggering event or contingency  
10 has occurred. See Section 4030 (“springing power of attorney” defined). Subdivision (a) makes  
11 clear that the principal may give the agent (or one or more other persons) the power to determine  
12 by written declaration under penalty of perjury that the event or contingency specified in the  
13 springing power of attorney has occurred so that the power of attorney is effective. This section  
14 does not apply to or affect springing powers of attorney containing different procedures for  
15 determining whether the triggering event or contingency has occurred. This section applies only  
16 where the terms of subdivision (a) are satisfied.

17 Subdivision (b) makes clear that the written declaration of the persons designated in the power  
18 of attorney is conclusive, even though it may turn out that the event or contingency did not occur,  
19 or that circumstances have returned to normal. The purpose of the conclusive written declaration  
20 is to permit other persons to act in reliance on the written declaration without liability.

21 A springing power of attorney may or may not be a durable power of attorney. A springing  
22 power that takes effect on the occurrence of a contingency other than the incapacity of the  
23 principal (such as, for example, the principal’s failure to return from a vacation or business trip by  
24 a certain date) need not be a durable power of attorney. However, a springing power of attorney  
25 that takes effect upon the incapacity of the principal is necessarily a durable power of attorney,  
26 and the other rules concerning durable powers of attorney are applicable.

27 Subdivision (c) makes clear that this section applies to powers of attorney executed before the  
28 operative date of this section if they contain the designation provided in subdivision (a).

29 See also Sections 4014 (“attorney-in-fact” defined), 4022 (“power of attorney” defined), 4026  
30 (“principal” defined).

31 **[unchanged] § 4130. Inconsistent authority**

32 4130. (a) If a principal grants inconsistent authority to one or more attorneys-in-  
33 fact in two or more powers of attorney, the authority granted last controls to the  
34 extent of the inconsistency.

35 (b) This section is not subject to limitation in the power of attorney.

36 **Original Comment.** Section 4130 is new. For a special rule applicable to durable powers of  
37 attorney for health care, see Section [4727(d)]. See also Sections 4014 (“attorney-in-fact”  
38 defined), 4022 (“power of attorney” defined), 4026 (“principal” defined).

39 **CHAPTER 3. MODIFICATION AND REVOCATION OF POWERS OF ATTORNEY**  
40 **[heading unchanged]**

41 ☞ **Staff Note.** Issues concerning modification and revocation of health care powers have not  
42 been resolved, even on a preliminary basis, in this draft. Some policy issues are presented in  
43 Memorandum 97-41.

44 **[unchanged] § 4150. Manner of modification of power of attorney**

45 4150. (a) A principal may modify a power of attorney as follows:

1 (1) In accordance with the terms of the power of attorney.

2 (2) By an instrument executed in the same manner as a power of attorney may be  
3 executed.

4 (b) An attorney-in-fact or third person who does not have notice of the  
5 modification is protected from liability as provided in Chapter 5 (commencing  
6 with Section 4300).

7 **Original Comment.** Section 4150 is new. The manner of modifying a power of attorney as  
8 provided in subdivision (a)(2) is more formal than the manner of revoking the attorney-in-fact's  
9 authority provided by Section 4153(a). Subdivision (a)(2) is subject to limitation in the power of  
10 attorney. See Section 4101 (priority of provisions of power of attorney).

11 See also Sections 4014 ("attorney-in-fact" defined), 4022 ("power of attorney" defined), 4026  
12 ("principal" defined), 4034 ("third person" defined).

13 **[unchanged] § 4151. Manner of revocation of power of attorney**

14 4151. (a) A principal may revoke a power of attorney as follows:

15 (1) In accordance with the terms of the power of attorney.

16 (2) By a writing. This paragraph is not subject to limitation in the power of  
17 attorney.

18 (b) An attorney-in-fact or third person who does not have notice of the  
19 revocation is protected from liability as provided in Chapter 5 (commencing with  
20 Section 4300).

21 **Original Comment.** Section 4151 is new. This section provides for revocation of the power of  
22 attorney in its entirety, as distinct from revocation or termination of the authority of the attorney-  
23 in-fact pursuant to Section 4152 or 4153. This section recognizes that a power of attorney may,  
24 for example, contain expressions of wishes, may nominate a conservator, or name a successor  
25 attorney-in-fact. These provisions may exist independent from the provisions granting authority  
26 to the attorney-in-fact. Revocation under this section revokes all provisions stated in the  
27 instrument, rather than modifying or terminating the authority of the attorney-in-fact. The rule in  
28 subdivision (a)(2) permitting revocation of a power of attorney by a writing executed by the  
29 principal acts as an escape hatch and is not subject to limitation in the power of attorney. See  
30 Section 4101(b) (exception to priority of provisions of power of attorney).

31 See also Sections 4014 ("attorney-in-fact" defined), 4022 ("power of attorney" defined), 4026  
32 ("principal" defined), 4034 ("third person" defined); Civ. Code § 1216 (recordation of revocation  
33 of recorded instruments).

34 **[unchanged] § 4152. Termination of attorney-in-fact's authority**

35 4152. (a) Subject to subdivision (b), the authority of an attorney-in-fact under a  
36 power of attorney is terminated by any of the following events:

37 (1) In accordance with the terms of the power of attorney.

38 (2) Extinction of the subject or fulfillment of the purpose of the power of  
39 attorney.

40 (3) Revocation of the attorney-in-fact's authority, as provided in Section 4153.

41 (4) Death of the principal, except as to specific authority permitted by statute to  
42 be exercised after the principal's death.

43 (5) Removal of the attorney-in-fact.

44 (6) Resignation of the attorney-in-fact.

1 (7) Incapacity of the attorney-in-fact, except that a temporary incapacity  
2 suspends the attorney-in-fact’s authority only during the period of the incapacity.

3 (8) Dissolution or annulment of the marriage of the attorney-in-fact and  
4 principal, as provided in Section 4154.

5 (9) Death of the attorney-in-fact.

6 (b) An attorney-in-fact or third person who does not have notice of an event that  
7 terminates the power of attorney or the authority of an attorney-in-fact is protected  
8 from liability as provided in Chapter 5 (commencing with Section 4300).

9 **Original Comment.** Section 4152 is drawn from the general agency rules provided in Civil  
10 Code Sections 2355 and 2356. This section continues the substance of former law as to  
11 termination of the authority of an attorney-in-fact under a power of attorney. For a special rule as  
12 to termination of nondurable powers of attorney on principal’s incapacity, see Section 4155.

13 Subdivision (a)(1) is the same as Civil Code Section 2355(a). Subdivision (a)(2) is the same as  
14 Civil Code Section 2355(b), but the reference to fulfillment of the purpose of the power of  
15 attorney is new. Subdivision (a)(3) is the same as Civil Code Section 2356(a)(1). These  
16 subdivisions recognize that the authority of an attorney-in-fact necessarily ceases when the  
17 underlying power of attorney is terminated.

18 Subdivision (a)(4) is the same as Civil Code Section 2356(a)(2), but recognizes that certain  
19 tasks may remain to be performed after death. See, e.g., Sections 4238 (attorney-in-fact’s duties  
20 on termination of authority), 4609 (“health care” defined to include post-death decisions), 4720  
21 (authority to make health care decisions, including certain post-death decisions).

22 Subdivision (a)(5) is generalized from Civil Code Section 2355(c)-(f). Subdivision (a)(6) is  
23 similar to Civil Code Section 2355(d) (renunciation by agent). For the manner of resignation, see  
24 Section 4207. Subdivision (a)(7) is similar to Civil Code Section 2355(e). Subdivision (a)(8)  
25 cross-refers to the rules governing the effect of dissolution and annulment of marriage.  
26 Subdivision (a)(9) is the same as Civil Code Section 2355(c).

27 Subdivision (b) preserves the substance of the introductory clause of Civil Code Section 2355  
28 and Civil Code Section 2356(b), which protect persons without notice of events that terminate an  
29 agency.

30 See also Sections 4014 (“attorney-in-fact” defined), 4022 (“power of attorney” defined), 4026  
31 (“principal” defined), 4034 (“third person” defined); Civ. Code § 1216 (recordation of revocation  
32 of recorded instruments).

33 **[unchanged] § 4153. Manner of revocation of attorney-in-fact’s authority**

34 4153. (a) The authority of an attorney-in-fact under a power of attorney may be  
35 revoked as follows:

36 (1) In accordance with the terms of the power of attorney.

37 (2) Where the principal informs the attorney-in-fact orally or in writing that the  
38 attorney-in-fact’s authority is revoked or when and under what circumstances it is  
39 revoked. This paragraph is not subject to limitation in the power of attorney.

40 (3) Where the principal’s legal representative, with approval of the court as  
41 provided in Section 4206, informs the attorney-in-fact in writing that the attorney-  
42 in-fact’s authority is revoked or when and under what circumstances it is revoked.  
43 This paragraph is not subject to limitation in the power of attorney.

44 (b) An attorney-in-fact or third person who does not have notice of the  
45 revocation is protected from liability as provided in Chapter 5 (commencing with  
46 Section 4300).

1       **Original Comment.** Section 4153 is new. The rules concerning revocation of the attorney-in-  
2 fact’s authority by the principal are not as strict as the rules on modification of the power of  
3 attorney. Compare subdivision (a)(2) with Section 4150(a)(2). No writing is required to revoke  
4 the attorney-in-fact’s authority, and if a writing is used, it need not be witnessed or notarized to be  
5 effective between the principal and attorney-in-fact.

6       See also Sections 4014 (“attorney-in-fact” defined), 4022 (“power of attorney” defined), 4026  
7 (“principal” defined), 4034 (“third person” defined); Civ. Code § 1216 (recordation of revocation  
8 of recorded instruments).

9       **[unchanged] § 4154. Effect of dissolution or annulment**

10       4154. (a) If after executing a power of attorney the principal’s marriage to the  
11 attorney-in-fact is dissolved or annulled, the principal’s designation of the former  
12 spouse as an attorney-in-fact is revoked.

13       (b) If the attorney-in-fact’s authority is revoked solely by subdivision (a), it is  
14 revived by the principal’s remarriage to the attorney-in-fact.

15       **Original Comment.** Section 4154 is generalized from former Civil Code Section 2437(e)  
16 (revocation of durable power of attorney for health care on dissolution or annulment) and part of  
17 former subdivision (f) of Civil Code Section 2355 (revocation in case of federal absentee  
18 principal). This section is also comparable to Section 6122(a)-(b) (revocation of provisions in will  
19 after dissolution or annulment). For special rules applicable to a federal “absentee” (as defined in  
20 Section 1403), see Section 3722.

21       This section is subject to limitation by the power of attorney. See Section 4101 (priority of  
22 provisions of power of attorney).

23       See also Sections 4014 (“attorney-in-fact” defined), 4022 (“power of attorney” defined), 4026  
24 (“principal” defined); Civ. Code § 1216 (recordation of revocation of recorded instruments).

25       **[unchanged] § 4155. Termination of authority under nondurable power of attorney on**  
26       **principal’s incapacity**

27       4155. (a) Subject to subdivision (b), the authority of an attorney-in-fact under a  
28 nondurable power of attorney is terminated by the incapacity of the principal to  
29 contract.

30       (b) An attorney-in-fact or third person who does not have notice of the  
31 incapacity of the principal is protected from liability as provided in Chapter 5  
32 (commencing with Section 4300).

33       (c) This section is not subject to limitation in the power of attorney.

34       **Original Comment.** Subdivision (a) of Section 4155 restates the general agency rule in Civil  
35 Code Section 2356(a)(3) without substantive change.

36       Subdivision (b) preserves the substance of the introductory clause of Civil Code Section 2355  
37 and Civil Code Section 2356(b) protecting persons without notice of events that terminate an  
38 agency.

39       See also Sections 4014 (“attorney-in-fact” defined), 4018 (“durable power of attorney”  
40 defined), 4022 (“power of attorney” defined), 4026 (“principal” defined), 4034 (“third person”  
41 defined); Civ. Code § 1216 (recordation of revocation of recorded instruments).



CHAPTER 4. ATTORNEYS-IN-FACT  
[heading unchanged]

Article 1. Qualifications and Authority of Attorneys-in-Fact  
[heading unchanged]

**[unchanged] § 4200. Qualifications of attorney-in-fact**

4200. Only a person having the capacity to contract is qualified to act as an attorney-in-fact.

**Original Comment.** Section 4200 supersedes the last part of Civil Code Section 2296 (“any person may be an agent”) to the extent that it applied to attorneys-in-fact under powers of attorney. For special limitations on attorneys-in-fact under durable powers of attorney for health care, see Sections 4700(b)-(c), 4720.

See also Sections 56 (“person” defined), 4014 (“attorney-in-fact” defined).

**[unchanged] § 4201. Effect of designating unqualified person as attorney-in-fact**

4201. Designating an unqualified person as an attorney-in-fact does not affect the immunities of third persons nor relieve the unqualified person of any applicable duties to the principal or the principal’s successors.

**Original Comment.** Section 4201 is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.707(4) (Vernon 1990). For provisions governing immunities of third persons, see Section 4300 *et seq.*

See also Sections 4014 (“attorney-in-fact” defined), 4026 (“principal” defined), 4034 (“third person” defined).

**[unchanged] § 4202. Multiple attorneys-in-fact**

4202. (a) A principal may designate more than one attorney-in-fact in one or more powers of attorney.

(b) Authority granted to two or more attorneys-in-fact is exercisable only by their unanimous action.

(c) If a vacancy occurs, the remaining attorneys-in-fact may exercise the authority conferred as if they are the only attorneys-in-fact.

(d) If an attorney-in-fact is unavailable because of absence, illness, or other temporary incapacity, the other attorneys-in-fact may exercise the authority under the power of attorney as if they are the only attorneys-in-fact, where necessary to accomplish the purposes of the power of attorney or to avoid irreparable injury to the principal’s interests.

(e) An attorney-in-fact is not liable for the actions of other attorneys-in-fact, unless the attorney-in-fact participates in, knowingly acquiesces in, or conceals a breach of fiduciary duty committed by another attorney-in-fact.

**Original Comment.** Subdivision (a) of Section 4202 is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.707(1) (Vernon 1990). This section is subject to limitation in the power of attorney. See Section 4101 (priority of provisions of power of attorney). The power of attorney may provide that the authority conferred on two or more attorneys-in-fact shall or may be exercised either jointly or severally or in a manner, with the priority, and with respect to particular subjects, provided in the power of attorney.

1 The default rule requiring unanimous action in subdivision (b) is the same in substance as the  
2 rule applicable under the statutory form power of attorney. See Section 4401.

3 Subdivisions (b)-(d) are comparable to the rules applicable to multiple trustees under Sections  
4 15620-15622.

5 Subdivision (e) is comparable to the general rule as to cotrustees in Section 16402(a).

6 See also Sections 4014 (“attorney-in-fact” defined), 4022 (“power of attorney” defined), 4026  
7 (“principal” defined).

8 **§ 4203 (amended). Successor attorneys-in-fact**

9 SEC. \_\_\_\_\_. Section 4203 of the Probate Code is amended to read:

10 4203. (a) A principal may designate one or more successor attorneys-in-fact to  
11 act if the authority of a predecessor attorney-in-fact terminates.

12 (b) The principal may grant authority to another person, designated by name, by  
13 office, or by function, including the initial and any successor attorneys-in-fact, to  
14 designate at any time one or more successor attorneys-in-fact. This subdivision  
15 does not apply to a durable power of attorney for health care under ~~Part 4~~ Title 2  
16 (commencing with Section 4600).

17 (c) A successor attorney-in-fact is not liable for the actions of the predecessor  
18 attorney-in-fact.

19 **Comment.** Subdivision (b) of Section 4203 is amended to revise a cross-reference. See Section  
20 4600 *et seq.* (Uniform Health Care Decisions Act).

21 **Original Comment.** Section 4203 is drawn in part from the Missouri Durable Power of  
22 Attorney Law. See Mo. Ann. Stat. § 404.723(2)-(3) (Vernon 1990). For events that terminate the  
23 authority of an attorney-in-fact, see Section 4152.

24 Subdivision (c) is drawn from the general rule as to successor trustees in Section 16403(a).

25 A successor attorney-in-fact is the same as an original attorney-in-fact under this division. See  
26 Section 4014(b) (“attorney-in-fact” includes successor or alternate attorney-in-fact). See also  
27 Sections 4018 (“durable power of attorney” defined), 4022 (“power of attorney” defined), 4026  
28 (“principal” defined).

29 **[unchanged] § 4204. Compensation of attorney-in-fact**

30 4204. An attorney-in-fact is entitled to reasonable compensation for services  
31 rendered to the principal as attorney-in-fact and to reimbursement for reasonable  
32 expenses incurred as a result of acting as attorney-in-fact.

33 **Original Comment.** Section 4204 is drawn from the Missouri Durable Power of Attorney  
34 Law. See Mo. Ann. Stat. § 404.725 (Vernon 1990). This section is comparable to Sections 15681  
35 (trustee’s compensation) and 15684(a) (reimbursement for trustee’s expenses). In many  
36 situations, a relative acting as an attorney-in-fact under a durable power of attorney expects to act  
37 for the principal as an accommodation. Normally, while the principal is not disabled, such service  
38 will be infrequent and will not involve substantial time. However, with the prospect that if the  
39 principal becomes disabled or incapacitated, substantial time, effort, and expense may be required  
40 of the attorney-in-fact and any successor attorneys-in-fact extending over a long period of time,  
41 compensation may be important. A definite understanding regarding compensation may be  
42 included in the power of attorney or in a separate agreement. Reimbursement of expenses would  
43 be expected to include the cost of bookkeeping, tax, and legal services incurred by the attorney-  
44 in-fact in performing duties on the principal’s behalf. It would also include the cost of preparing  
45 an accounting and any travel or personal expense incurred by the attorney-in-fact. This section is  
46 subject to limitation in the power of attorney. See Section 4101 (priority of provisions of power of  
47 attorney).

1 See Section 4231(b) (effect of compensation on standard of care). See also Sections 4014  
2 (“attorney-in-fact” defined), 4026 (“principal” defined).

3 **[unchanged] § 4205. Delegation of attorney-in-fact’s authority**

4 4205. (a) An attorney-in-fact may revocably delegate authority to perform  
5 mechanical acts to one or more persons qualified to exercise the authority  
6 delegated.

7 (b) The attorney-in-fact making a delegation remains responsible to the principal  
8 for the exercise or nonexercise of the delegated authority.

9 **Original Comment.** Subdivision (a) of Section 4205 is drawn from Civil Code Section 2349.  
10 As provided in subdivision (b), delegation does not relieve the attorney-in-fact of responsibility  
11 for the acts of subagents. This section is subject to limitation in the power of attorney. See Section  
12 4101 (priority of provisions of power of attorney).

13 See also Sections 4014 (“attorney-in-fact” defined), 4026 (“principal” defined).

14 **§ 4206 (amended). Relation of attorney-in-fact to court-appointed fiduciary**

15 SEC. \_\_\_\_\_. Section 4206 of the Probate Code is amended to read:

16 4206. (a) If, following execution of a durable power of attorney, a court of the  
17 principal’s domicile appoints a conservator of the estate, guardian of the estate, or  
18 other fiduciary charged with the management of all of the principal’s property or  
19 all of the principal’s property except specified exclusions, the attorney-in-fact is  
20 accountable to the fiduciary as well as to the principal. Except as provided in  
21 subdivision (b), the fiduciary has the same power to revoke or amend the durable  
22 power of attorney that the principal would have had if not incapacitated, subject to  
23 any required court approval.

24 (b) If a conservator of the estate is appointed by a court of this state, the  
25 conservator can revoke or amend the durable power of attorney only if the court in  
26 which the conservatorship proceeding is pending has first made an order  
27 authorizing or requiring the fiduciary to modify or revoke the durable power of  
28 attorney and the modification or revocation is in accord with the order.

29 (c) This section does not apply to a durable power of attorney for health care  
30 under Title 2 (commencing with Section 4600).

31 (d) This section is not subject to limitation in the power of attorney.

32 **Comment.** Subdivision (c) of Section 4206 is amended to refer to the provisions governing the  
33 durable power of attorney for health care. See Section 4600 *et seq.* (Uniform Health Care  
34 Decisions Act).

35 **Original Comment.** Section 4206 continues former Civil Code Section 2402(a) without  
36 substantive change. Subdivision (a) is substantially the same as the official text of Section 3(a) of  
37 the Uniform Durable Power of Attorney Act (1979), Uniform Probate Code Section 5-503(a)  
38 (1991), with several clarifying changes. “Conservator of the estate” has been substituted for  
39 “conservator.” This change is consistent with the concept of the uniform act that the fiduciary to  
40 whom the attorney-in-fact under a durable power is accountable and who may revoke or amend  
41 the durable power includes only a fiduciary charged with the management of the principal’s estate  
42 and does not include a person appointed only to exercise protective supervision over the person of  
43 the principal. See Unif. Durable Power of Attorney Act § 3 comment (1979); Unif. Prob. Code §  
44 5-503 comment (1991). The reference in the uniform act to the principal’s “disability” is omitted  
45 to conform with other provisions of this division. The authority of the fiduciary to revoke or



1 amend is the same as in the official text of Section 3(a) of the Uniform Durable Power of  
2 Attorney Act, except that the possibility of a requirement of court approval is recognized, as in  
3 subdivision (b) which applies to California conservators.

4 For provisions concerning the powers of conservators, see, e.g., Sections 2252 (powers of  
5 temporary conservator), 2403 (petition for instructions), 2580 (petition for proposed action). See  
6 also Sections 2(b) (construction of provisions drawn from uniform acts), 4014 (“attorney-in-fact”  
7 defined), 4018 (“durable power of attorney” defined), 4026 (“principal” defined).

8 ☞ **Staff Note.** Most references of the type in subdivision (c) refer to the relevant group of  
9 sections. For consistency, references like this one should be amended. However, an alternative  
10 would be to strip off the reference to (now) Title 2 and let the words stand on their own.

11 **[unchanged] § 4207. Resignation of attorney-in-fact**

12 4207. (a) An attorney-in-fact may resign by any of the following means:

13 (1) If the principal is competent, by giving notice to the principal.

14 (2) If a conservator has been appointed, by giving notice to the conservator.

15 (3) On written agreement of a successor who is designated in the power of  
16 attorney or pursuant to the terms of the power of attorney to serve as attorney-in-  
17 fact.

18 (4) Pursuant to a court order.

19 (b) This section is not subject to limitation in the power of attorney.

20 **Original Comment.** Section 4207 is new. For judicial procedures for approving the attorney-  
21 in-fact’s resignation, see Sections 4941(e) (petition as to power of attorney other than durable  
22 power of attorney for health care), 4942(e) (petition as to durable power of attorney for health  
23 care).

24 See also Sections 4014 (“attorney-in-fact” defined), 4022 (“power of attorney” defined), 4026  
25 (“principal” defined).

26 Article 2. Duties of Attorneys-in-Fact  
27 [heading unchanged]

28 **[unchanged] § 4230. When duties commence**

29 4230. (a) Except as provided in subdivisions (b) and (c), a person who is  
30 designated as an attorney-in-fact has no duty to exercise the authority granted in  
31 the power of attorney and is not subject to the other duties of an attorney-in-fact,  
32 regardless of whether the principal has become incapacitated, is missing, or is  
33 otherwise unable to act.

34 (b) Acting for the principal in one or more transactions does not obligate an  
35 attorney-in-fact to act for the principal in a subsequent transaction, but the  
36 attorney-in-fact has a duty to complete a transaction that the attorney-in-fact has  
37 commenced.

38 (c) If an attorney-in-fact has expressly agreed in writing to act for the principal,  
39 the attorney-in-fact has a duty to act pursuant to the terms of the agreement. The  
40 agreement to act on behalf of the principal is enforceable against the attorney-in-  
41 fact as a fiduciary regardless of whether there is any consideration to support a  
42 contractual obligation.

1       **Original Comment.** Section 4230 is drawn in part from the Missouri Durable Power of  
2 Attorney Law. See Mo. Ann. Stat. § 404.705(4) (Vernon 1990). Subdivision (a) makes clear that  
3 being named as an attorney-in-fact under a durable or nondurable power of attorney imposes no  
4 duty on the named person to act. This is true even if the attorney-in-fact knows of the designation  
5 and has received the power of attorney. A duty to act under this part arises only by reason of an  
6 express agreement in writing, as provided in subdivision (c). Reliance is not sufficient to impose a  
7 legal duty to act, as provided in subdivision (b). However, if the attorney-in-fact commences a  
8 particular transaction, it must be completed.

9       This section recognizes that many powers of attorney are given and accepted as a gratuitous  
10 accommodation by the attorney-in-fact. The principal wants someone to have the ability to act if  
11 something needs to be done, but rarely would the principal expect to impose a duty to act on a  
12 friend or family member if the attorney-in-fact chooses not to do so. Consequently, unless the  
13 attorney-in-fact has agreed to act, accepting a power of attorney designation imposes no duty to  
14 act and the named person may even renounce the designation. The person named as attorney-in-  
15 fact may also merely wait until the situation arises and then determine whether to act. The person  
16 may refuse to act because of personal inconvenience at the time of becoming involved, or for any  
17 other reason, and is not required to justify a decision not to act. The person named as attorney-in-  
18 fact may believe that there are others in a better position to act for the principal or that the  
19 situation really warrants appointment of a court-supervised guardian or conservator. However,  
20 once the attorney-in-fact agrees in writing to act under the power of attorney, the transaction is  
21 governed by the duties imposed in the law to act as a fiduciary. See subdivision (c).

22       See also Sections 4014 (“attorney-in-fact” defined), 4022 (“power of attorney” defined), 4026  
23 (“principal” defined).

24       **[unchanged] § 4231. Duty of care and skill; liability for losses**

25       4231. (a) Except as provided in subdivisions (b) and (c), in dealing with property  
26 of the principal, an attorney-in-fact shall observe the standard of care that would  
27 be observed by a prudent person dealing with property of another and is not  
28 limited by any other statute restricting investments by fiduciaries.

29       (b) If an attorney-in-fact is not compensated, the attorney-in-fact is not liable for  
30 a loss to the principal’s property unless the loss results from the attorney-in-fact’s  
31 bad faith, intentional wrongdoing, or gross negligence.

32       (c) An attorney-in-fact who has special skills or expertise or was designated as  
33 an attorney-in-fact on the basis of representations of special skills or expertise  
34 shall observe the standard of care that would be observed by others with similar  
35 skills or expertise.

36       **Original Comment.** Subdivisions (a) and (b) of Section 4231 are drawn from the standard  
37 applicable to custodians under Section 3912(b) (California Uniform Transfers to Minors Act). See  
38 also Section 4204 (compensation of attorneys-in-fact). The prudent person standard in  
39 subdivision (a) is generally consistent with the standard applicable under general agency law. See  
40 Restatement (Second) of Agency § 379 (1957).

41       Subdivision (c) is consistent with the general rule concerning expert fiduciaries stated in the  
42 cases. See the discussions in Estate of Beach, 15 Cal. 3d 623, 635, 542 P.2d 994, 125 Cal. Rptr.  
43 570 (1975) (bank as executor); Estate of Collins, 72 Cal. App. 3d 663, 673, 139 Cal. Rptr. 644  
44 (1977); Coberly v. Superior Court, 231 Cal. App. 2d 685, 689, 42 Cal. Rptr. 64 (1965); see also  
45 Section 4237 (attorney-in-fact’s duty to use special skills); Section 2401 Comment (standard of  
46 care applicable to professional guardian or conservator of estate); Section 3912 Comment  
47 (standard of care applicable to professional fiduciary acting as custodian under California  
48 Uniform Transfers to Minors Act); Section 16040 Comment (standard of care applicable to expert  
49 trustee).

1 This section is subject to limitation in the power of attorney. See Section 4101 (priority of  
2 provisions of power of attorney).

3 See also Sections 4014 (“attorney-in-fact” defined), 4026 (“principal” defined).

4 **[unchanged] § 4232. Duty of loyalty**

5 4232. (a) An attorney-in-fact has a duty to act solely in the interest of the  
6 principal and to avoid conflicts of interest.

7 (b) An attorney-in-fact is not in violation of the duty provided in subdivision (a)  
8 solely because the attorney-in-fact also benefits from acting for the principal, has  
9 conflicting interests in relation to the property, care, or affairs of the principal, or  
10 acts in an inconsistent manner regarding the respective interests of the principal  
11 and the attorney-in-fact.

12 **Original Comment.** The first sentence of Section 4232 restates the substance of part of Civil  
13 Code Section 2322(c) in the general agency rules. The duty of loyalty is also consistent with Civil  
14 Code Section 2306 (agent not to defraud principal). Unlike Civil Code Section 2322(c), Section  
15 4232 is stated as an affirmative duty, rather than a prohibition against violation of duties  
16 applicable to trustees under Sections 16002 and 16004. The duty of loyalty of an attorney-in-fact  
17 to the principal is subject to the limitations in Section 4230 relating to commencement of the  
18 duties of an attorney-in-fact under a power of attorney.

19 See also Sections 4014 (“attorney-in-fact” defined), 4022 (“power of attorney” defined), 4026  
20 (“principal” defined).

21 **[unchanged] § 4233. Duty to keep principal’s property separate and identified**

22 4233. (a) The attorney-in-fact shall keep the principal’s property separate and  
23 distinct from other property in a manner adequate to identify the property clearly  
24 as belonging to the principal.

25 (b) An attorney-in-fact holding property for a principal complies with  
26 subdivision (a) if the property is held in the name of the principal or in the name of  
27 the attorney-in-fact as attorney-in-fact for the principal.

28 **Original Comment.** Section 4233 is drawn from the Missouri Durable Power of Attorney  
29 Law. See Mo. Ann. Stat. § 404.712 (Vernon 1990). This section is consistent with the general  
30 agency rule in Civil Code Section 2322(c) which formerly applied to powers of attorney. Unlike  
31 Civil Code Section 2322(c), Section 4233 is stated as an affirmative duty, rather than a  
32 prohibition against violation of a duty applicable to trustees under Section 16009.

33 See also Sections 4014 (“attorney-in-fact” defined), 4022 (“power of attorney” defined), 4026  
34 (“principal” defined).

35 **[unchanged] § 4234. Duty to keep principal informed and follow instructions**

36 4234. (a) To the extent reasonably practicable under the circumstances, an  
37 attorney-in-fact has a duty to keep in regular contact with the principal, to  
38 communicate with the principal, and to follow the instructions of the principal.

39 (b) With court approval, the attorney-in-fact may disobey instructions of the  
40 principal.

41 **Original Comment.** Section 4234 is drawn from general agency rules. The duty to follow the  
42 principal’s instructions is consistent with the general agency rule in Civil Code Section 2309. See  
43 also Civ. Code § 2019 (agent not to exceed limits of actual authority). The duty to communicate

1 with the principal is consistent with the general agency rule in Civil Code Sections 2020 and  
2 2332.

3 Subdivision (b) is a limitation on the general agency rule in Civil Code Section 2320 (power to  
4 disobey instructions). For provisions relating to judicial proceedings, see Section 4900 *et seq.*

5 See also Sections 4014 (“attorney-in-fact” defined), 4022 (“power of attorney” defined), 4026  
6 (“principal” defined).

7 **[unchanged] § 4235. Consultation and disclosure**

8 4235. If the principal becomes wholly or partially incapacitated, or if there is a  
9 question concerning the capacity of the principal to give instructions to and  
10 supervise the attorney-in-fact, the attorney-in-fact may consult with a person  
11 previously designated by the principal for this purpose, and may also consult with  
12 and obtain information needed to carry out the attorney-in-fact’s duties from the  
13 principal’s spouse, physician, attorney, accountant, a member of the principal’s  
14 family, or other person, business entity, or government agency with respect to  
15 matters to be undertaken on the principal’s behalf and affecting the principal’s  
16 personal affairs, welfare, family, property, and business interests. A person from  
17 whom information is requested shall disclose relevant information to the attorney-  
18 in-fact. Disclosure under this section is not a waiver of any privilege that may  
19 apply to the information disclosed.

20 **Original Comment.** Section 4235 is drawn from the Missouri Durable Power of Attorney  
21 Law. See Mo. Ann. Stat. § 404.714(4) (Vernon 1990). This section does not provide anything  
22 inconsistent with permissible practice under former law, but is intended to recognize the  
23 desirability of consultation in appropriate circumstances and provide assurance to third persons  
24 that consultation with the attorney-in-fact is proper and does not contravene privacy rights. As to  
25 the right to obtain medical records under the durable power of attorney for health care, see  
26 Section 4721. See also Section 4455(f) (receipt of bank statements, etc., under statutory form  
27 powers of attorney). The right to obtain information may be enforced pursuant to Section 4941(f).

28 See also Sections 4014 (“attorney-in-fact” defined), 4026 (“principal” defined).

29 **[unchanged] § 4236. Duty to keep records and account; availability of records to other**  
30 **persons**

31 4236. (a) The attorney-in-fact shall keep records of all transactions entered into  
32 by the attorney-in-fact on behalf of the principal.

33 (b) The attorney-in-fact does not have a duty to make an account of transactions  
34 entered into on behalf of the principal, except in the following circumstances:

35 (1) At any time requested by the principal.

36 (2) Where the power of attorney requires the attorney-in-fact to account and  
37 specifies to whom the account is to be made.

38 (3) On request by the conservator of the estate of the principal while the  
39 principal is living.

40 (4) On request by the principal’s personal representative or successor in interest  
41 after the death of the principal.

42 (5) Pursuant to court order.

43 (c) The following persons are entitled to examine and copy the records kept by  
44 the attorney-in-fact:

- 1 (1) The principal.
- 2 (2) The conservator of the estate of the principal while the principal is living.
- 3 (3) The principal's personal representative or successor in interest after the death
- 4 of the principal.
- 5 (4) Any other person, pursuant to court order.
- 6 (d) This section is not subject to limitation in the power of attorney.

7 **Original Comment.** Section 4236 is drawn in part from Minnesota law. See Minn. Stat. Ann. §  
8 523.21 (West Supp. 1994). For provisions relating to judicial proceedings, see Section 4900 *et*  
9 *seq.*

10 See also Sections 4014 ("attorney-in-fact" defined), 4022 ("power of attorney" defined), 4026  
11 ("principal" defined).

12 **[unchanged] § 4237. Duty to use special skills**

13 4237. An attorney-in-fact with special skills has a duty to apply the full extent of  
14 those skills.

15 **Original Comment.** Section 4237 is comparable to Section 16014(a) applicable to trustees.  
16 See also Section 4231(c) (expert standard of care). This section is subject to limitation in the  
17 power of attorney. See Section 4101 (priority of provisions of power of attorney).

18 See also Section 4014 ("attorney-in-fact" defined).

19 **[unchanged] § 4238. Attorney-in-fact's duties on termination of authority**

20 4238. (a) On termination of an attorney-in-fact's authority, the attorney-in-fact  
21 shall promptly deliver possession or control of the principal's property as follows:

22 (1) If the principal is not incapacitated, to the principal or as directed by the  
23 principal.

24 (2) If the principal is incapacitated, to the following persons with the following  
25 priority:

26 (A) To a qualified successor attorney-in-fact.

27 (B) As to any community property, to the principal's spouse.

28 (C) To the principal's conservator of the estate or guardian of the estate.

29 (3) In the case of the death of the principal, to the principal's personal  
30 representative, if any, or the principal's successors.

31 (b) On termination of an attorney-in-fact's authority, the attorney-in-fact shall  
32 deliver copies of any records relating to transactions undertaken on the principal's  
33 behalf that are requested by the person to whom possession or control of the  
34 property is delivered.

35 (c) Termination of an attorney-in-fact's authority does not relieve the attorney-  
36 in-fact of any duty to render an account of actions taken as attorney-in-fact.

37 (d) The attorney-in-fact has the powers reasonably necessary under the  
38 circumstances to perform the duties provided by this section.

39 **Original Comment.** Section 4238 is new. The rules concerning duties on termination of the  
40 attorney-in-fact's authority are drawn in part from Section 15644 (delivery of property by former  
41 trustee upon occurrence of vacancy). This section is subject to limitation in the power of attorney.  
42 See Section 4101 (priority of provisions of power of attorney). For other rules concerning the  
43 attorney-in-fact's relation with court-appointed fiduciaries under a durable power of attorney, see  
44 Section 4206.



1 See also Sections 4014 (“attorney-in-fact” defined), 4026 (“principal” defined).

2 Article 3. Authority of Attorneys-in-Fact  
3 [heading unchanged]

4 § 4260 (amended). Limitation on article

5 SEC. \_\_\_\_\_. Section 4260 of the Probate Code is amended to read:

6 4260. This article does not apply to the following:

7 (a) Statutory form powers of attorney under Part 3 (commencing with Section  
8 4400).

9 (b) Durable powers of attorney for health care under ~~Part 4~~ Title 2 (commencing  
10 with Section 4600).

11 **Comment.** Subdivision (b) of Section 4260 is amended to revise a cross-reference. See Section  
12 4600 *et seq.* (Uniform Health Care Decisions Act).

13 **Original Comment.** Section 4260 limits the application of this article. Statutory form powers  
14 of attorney and durable power of attorney for health care have special rules concerning the  
15 authority of attorneys-in-fact.

16 [unchanged] § 4261. General power of attorney

17 4261. If a power of attorney grants general authority to an attorney-in-fact and is  
18 not limited to one or more express actions, subjects, or purposes for which general  
19 authority is conferred, the attorney-in-fact has all the authority to act that a person  
20 having the capacity to contract may carry out through an attorney-in-fact  
21 specifically authorized to take the action.

22 **Original Comment.** Section 4261 is new and provides for the broadest possible authority in a  
23 general power of attorney. For specific limitations applicable to this section, see Sections 4264  
24 (authority that must be specifically granted), 4265 (actions that may not be taken by an attorney-  
25 in-fact).

26 See also Sections 4014 (“attorney-in-fact” defined), 4022 (“power of attorney” defined).

27 [unchanged] § 4262. Limited power of attorney

28 4262. Subject to this article, if a power of attorney grants limited authority to an  
29 attorney-in-fact, the attorney-in-fact has the following authority:

30 (a) The authority granted in the power of attorney, as limited with respect to  
31 permissible actions, subjects, or purposes.

32 (b) The authority incidental, necessary, or proper to carry out the granted  
33 authority.

34 **Original Comment.** Section 4262 is drawn from Section 16200 governing the general powers  
35 of a trustee. The introductory clause recognizes that there are specific limitations on the general  
36 powers granted by this section. See Sections 4264 (authority that must be specifically granted),  
37 4265 (excluded authority), 4266 (exercise of authority subject to duties). Subdivision (a) is  
38 consistent with the general agency rules in Civil Code Sections 2315 and 2318. Subdivision (b) is  
39 comparable to an agent’s authority to do “everything necessary or proper and usual, in the  
40 ordinary course of business, for effecting the purpose of his agency,” which is provided as to  
41 agents generally in Civil Code Section 2319(1).

42 See also Sections 4014 (“attorney-in-fact” defined), 4022 (“power of attorney” defined).

1 **[unchanged] § 4263. Incorporation of authority**

2 4263. (a) A power of attorney may grant authority to the attorney-in-fact by  
3 incorporating powers by reference to another statute, including, but not limited to,  
4 the following:

5 (1) Powers of attorneys-in-fact provided by the Uniform Statutory Form Power  
6 of Attorney Act (Part 3 (commencing with Section 4400)).

7 (2) Powers of guardians and conservators provided by Chapter 5 (commencing  
8 with Section 2350) and Chapter 6 (commencing with Section 2400) of Part 4 of  
9 Division 4.

10 (3) Powers of trustees provided by Chapter 2 (commencing with Section 16200)  
11 of Part 4 of Division 9.

12 (b) Incorporation by reference to another statute includes any amendments made  
13 to the incorporated provisions after the date of execution of the power of attorney.

14 **Original Comment.** Section 4263 is new. Subdivision (b) is subject to limitation in the power  
15 of attorney. See Section 4101 (priority of provisions of power of attorney).

16 See also Sections 4014 (“attorney-in-fact” defined), 4022 (“power of attorney” defined).

17 **[unchanged] § 4264. Authority that must be specifically granted**

18 4264. A power of attorney may not be construed to grant authority to an  
19 attorney-in-fact to perform any of the following acts unless expressly authorized in  
20 the power of attorney:

21 (a) Create, modify, or revoke a trust.

22 (b) Fund with the principal’s property a trust not created by the principal or a  
23 person authorized to create a trust on behalf of the principal.

24 (c) Make or revoke a gift of the principal’s property in trust or otherwise.

25 (d) Exercise the right to make a disclaimer on behalf of the principal. This  
26 subdivision does not limit the attorney-in-fact’s authority to disclaim a detrimental  
27 transfer to the principal with the approval of the court.

28 (e) Create or change survivorship interests in the principal’s property or in  
29 property in which the principal may have an interest.

30 (f) Designate or change the designation of beneficiaries to receive any property,  
31 benefit, or contract right on the principal’s death.

32 (g) Make a loan to the attorney-in-fact.

33 **Original Comment.** Section 4264 is drawn in part from the Missouri Durable Power of  
34 Attorney Law. See Mo. Ann. Stat. § 404.710(6) (Vernon 1990). This section is consistent with the  
35 general agency rule in Civil Code Section 2304. Subdivision (d) is intended to permit the  
36 attorney-in-fact to make a disclaimer of a donative transfer of property where, for example,  
37 acceptance of the property would make the principal liable for the cleanup of hazardous or toxic  
38 materials.

39 See also Sections 4014 (“attorney-in-fact” defined), 4022 (“power of attorney” defined), 4026  
40 (“principal” defined).

41 **[unchanged] § 4265. Excluded authority**

42 4265. A power of attorney may not authorize an attorney-in-fact to perform any  
43 of the following acts:

- 1 (a) Make, publish, declare, amend, or revoke the principal’s will.
- 2 (b) Consent to any action under a durable power of attorney for health care
- 3 forbidden by Section 4722.

4 **Original Comment.** Section 4265 is consistent with the general agency rule in Civil Code  
5 Section 2304. See also Sections 4014 (“attorney-in-fact” defined), 4022 (“power of attorney”  
6 defined), 4026 (“principal” defined), 4606 (“durable power of attorney for health care” defined).

7 **[unchanged] § 4266. Exercise of authority subject to duties**

8 4266. The grant of authority to an attorney-in-fact, whether by the power of  
9 attorney, by statute, or by the court, does not in itself require or permit the exercise  
10 of the power. The exercise of authority by an attorney-in-fact is subject to the  
11 attorney-in-fact’s fiduciary duties.

12 **Original Comment.** Section 4266 is drawn from Section 16202 (exercise of trustee’s powers).  
13 See Sections 4230-4238 (duties of attorneys-in-fact). See also 4014 (“attorney-in-fact” defined),  
14 4022 (“power of attorney” defined).

15 **CHAPTER 5. RELATIONS WITH THIRD PERSONS**  
16 [heading unchanged]

17 **[unchanged] § 4300. Third persons required to respect attorney-in-fact’s authority**

18 4300. A third person shall accord an attorney-in-fact acting pursuant to the  
19 provisions of a power of attorney the same rights and privileges that would be  
20 accorded the principal if the principal were personally present and seeking to act.  
21 However, a third person is not required to honor the attorney-in-fact’s authority or  
22 conduct business with the attorney-in-fact if the principal cannot require the third  
23 person to act or conduct business in the same circumstances.

24 **Original Comment.** Section 4300 is new. This section provides the basic rule concerning the  
25 position of an attorney-in-fact: that the attorney-in-fact acts in place of the principal, within the  
26 scope of the power of attorney, and is to be treated as if the principal were acting. The second  
27 sentence generalizes a rule in former Civil Code Section 2480.5, which was applicable only to the  
28 Uniform Statutory Form Power of Attorney. Under this rule, a third person may be compelled to  
29 honor a power of attorney only to the extent that the principal, disregarding any legal disability,  
30 could bring an action to compel the third person to act. A third person who could not be forced to  
31 do business with the principal consequently may not be forced to deal with the attorney-in-fact.  
32 However, a third person who holds property of the principal, who owes a debt to the principal, or  
33 who is obligated by contract to the principal may be compelled to accept the attorney-in-fact’s  
34 authority.

35 This general rule is subject to some specific exceptions. See, e.g., Sections 4309 (prior breach  
36 by attorney-in-fact), 4310 (transactions relating to accounts and loans in financial institution),  
37 4720 (attorney-in-fact’s authority to make health care decisions).

38 See also Sections 4014 (“attorney-in-fact” defined), 4022 (“power of attorney” defined), 4026  
39 (“principal” defined), 4034 (“third person” defined).

40 **[unchanged] § 4301. Reliance by third person on general authority**

41 4301. A third person may rely on, contract with, and deal with an attorney-in-  
42 fact with respect to the subjects and purposes encompassed or expressed in the



1 power of attorney without regard to whether the power of attorney expressly  
2 authorizes the specific act, transaction, or decision by the attorney-in-fact.

3 **Original Comment.** Section 4301 is drawn from the Missouri Durable Power of Attorney  
4 Law. See Mo. Ann. Stat. § 404.710(8) (Vernon 1990). This general rule is subject to specific  
5 limitations provided elsewhere. See, e.g., Sections 4264 (authority that must be specifically  
6 granted), 4722 (limitations on attorney-in-fact’s authority under durable power of attorney for  
7 health care).

8 See also Sections 4014 (“attorney-in-fact” defined), 4022 (“power of attorney” defined), 4034  
9 (“third person” defined).

10 **[unchanged] § 4302. Identification of attorney-in-fact and principal**

11 4302. When requested to engage in transactions with an attorney-in-fact, a third  
12 person, before incurring any duty to comply with the power of attorney, may  
13 require the attorney-in-fact to provide identification, specimens of the signatures  
14 of the principal and the attorney-in-fact, and any other information reasonably  
15 necessary or appropriate to identify the principal and the attorney-in-fact and to  
16 facilitate the actions of the third person in transacting business with the attorney-  
17 in-fact. A third person may require an attorney-in-fact to provide the current and  
18 permanent residence addresses of the principal before agreeing to engage in a  
19 transaction with the attorney-in-fact.

20 **Original Comment.** Section 4302 is drawn in part from the Missouri Durable Power of  
21 Attorney Law. See Mo. Ann. Stat. § 404.719(4) (Vernon 1990). See also former Civ. Code §  
22 2512(a)(1) (presentation by attorney-in-fact named in power of attorney) & Comment.

23 For a special rule applicable to identification of the principal under a durable power of attorney  
24 for health care, see Section 4751. See also Sections 4014 (“attorney-in-fact” defined), 4022  
25 (“power of attorney” defined), 4026 (“principal” defined), 4034 (“third person” defined).

26 **[unchanged] § 4303. Protection of third person relying in good faith on power of attorney**

27 4303. (a) A third person who acts in good faith reliance on a power of attorney is  
28 not liable to the principal or to any other person for so acting if all of the following  
29 requirements are satisfied:

30 (1) The power of attorney is presented to the third person by the attorney-in-fact  
31 designated in the power of attorney.

32 (2) The power of attorney appears on its face to be valid.

33 (3) The power of attorney includes a notary public’s certificate of  
34 acknowledgment or is signed by two witnesses.

35 (b) Nothing in this section is intended to create an implication that a third person  
36 is liable for acting in reliance on a power of attorney under circumstances where  
37 the requirements of subdivision (a) are not satisfied. Nothing in this section affects  
38 any immunity that may otherwise exist apart from this section.

39 **Original Comment.** Section 4303 continues former Civil Code Section 2512 without  
40 substantive change, with the addition of the witnessing rule in subdivision (a)(3). This section is  
41 intended to ensure that a power of attorney, whether durable or nondurable, will be accepted and  
42 relied on by third persons. The person presenting the power of attorney must actually be the  
43 attorney-in-fact designated in the power of attorney. If the person purporting to be the attorney-in-  
44 fact is an impostor, the immunity does not apply. The third person can rely in good faith on the

1 notary public's certificate of acknowledgment or the signatures of the witnesses that the person  
2 who executed the power of attorney is the principal.

3 Subdivision (b) makes clear that this section provides an immunity from liability where the  
4 requirements of the section are satisfied. This section has no relevance in determining whether or  
5 not a third person who acts in reliance on a power of attorney is liable under the circumstances  
6 where, for example, the power of attorney does not include a notary public's certificate of  
7 acknowledgment.

8 For other immunity provisions not affected by Section 4303, see, e.g., Sections 4128(b)  
9 (reliance in good faith on durable power of attorney not containing "warning" statement required  
10 by Section 4128), 4301 (reliance by third person on general authority), 4304 (lack of knowledge  
11 of death or incapacity of principal). See also Section 3720 ("Any person who acts in reliance  
12 upon the power of attorney [of an absentee as defined in Section 1403] when accompanied by a  
13 copy of a certificate of missing status is not liable for relying and acting upon the power of  
14 attorney."). Section 4303 does not limit the immunity of health care providers. See Sections 4100  
15 (application of general rules), 4750 (immunities of health care provider); see also Section 4050  
16 Comment (powers subject to this division).

17 See also Sections 4014 ("attorney-in-fact" defined), 4018 ("durable power of attorney"  
18 defined), 4022 ("power of attorney" defined), 4026 ("principal" defined), 4034 ("third person"  
19 defined).

20 **[unchanged] § 4304. Effect of death or incapacity of principal**

21 4304. (a) The death of a principal who has executed a power of attorney,  
22 whether durable or nondurable, does not revoke or terminate the agency as to the  
23 attorney-in-fact or a third person who, without actual knowledge of the principal's  
24 death, acts in good faith under the power of attorney. Any action so taken, unless  
25 otherwise invalid or unenforceable, binds the principal's successors in interest.

26 (b) The incapacity of a principal who has previously executed a nondurable  
27 power of attorney does not revoke or terminate the agency as to the attorney-in-  
28 fact or a third person who, without actual knowledge of the incapacity of the  
29 principal, acts in good faith under the power of attorney. Any action so taken,  
30 unless otherwise invalid or unenforceable, binds the principal and the principal's  
31 successors in interest.

32 **Original Comment.** Section 4304 continues former Civil Code Section 2403 without  
33 substantive change. This section is the same in substance as the official text of Section 4 of the  
34 Uniform Durable Power of Attorney Act (1979), Uniform Probate Code Section 5-504 (1990),  
35 except that the reference to the principal's "disability" is omitted. See Section 2(b) (construction  
36 of provisions drawn from uniform acts). Under Section 4155, it is the principal's incapacity to  
37 contract which would otherwise terminate the power of attorney.

38 See also Sections 4014 ("attorney-in-fact" defined), 4018 ("durable power of attorney"  
39 defined), 4022 ("power of attorney" defined), 4026 ("principal" defined), 4034 ("third person"  
40 defined).

41 **[unchanged] § 4305. Affidavit of lack of knowledge of termination of power**

42 4305. (a) As to acts undertaken in good faith reliance thereon, an affidavit  
43 executed by the attorney-in-fact under a power of attorney, whether durable or  
44 nondurable, stating that, at the time of the exercise of the power, the attorney-in-  
45 fact did not have actual knowledge of the termination of the power of attorney or  
46 the attorney-in-fact's authority by revocation or of the principal's death or

1 incapacity is conclusive proof of the nonrevocation or nontermination of the power  
2 at that time. If the exercise of the power of attorney requires execution and  
3 delivery of any instrument that is recordable, the affidavit when authenticated for  
4 record is likewise recordable.

5 (b) This section does not affect any provision in a power of attorney for its  
6 termination by expiration of time or occurrence of an event other than express  
7 revocation or a change in the principal's capacity.

8 **Original Comment.** Section 4305 continues former Civil Code Section 2404 without  
9 substantive change. A reference to termination of the attorney-in-fact's authority by revocation  
10 has also been added in subdivision (a) for consistency with other provisions in this part. See, e.g.,  
11 Section 4152 (termination of attorney-in-fact's authority). This section is the same as the official  
12 text of Section 5 of the Uniform Durable Power of Attorney Act (1979), Uniform Probate Code  
13 Section 5-505 (1990), except that the reference to the principal's "disability" is omitted. See  
14 Section 2(b) (construction of provisions drawn from uniform acts). Under Section 4155, it is the  
15 principal's incapacity to contract which would otherwise terminate the power of attorney.

16 See also Sections 4014 ("attorney-in-fact" defined), 4018 ("durable power of attorney"  
17 defined), 4022 ("power of attorney" defined), 4026 ("principal" defined).

18 **[unchanged] § 4306. Reliance on attorney-in-fact's affidavit**

19 4306. (a) If an attorney-in-fact furnishes an affidavit pursuant to Section 4305,  
20 whether voluntarily or on demand, a third person dealing with the attorney-in-fact  
21 who refuses to accept the exercise of the attorney-in-fact's authority referred to in  
22 the affidavit is liable for attorney's fees incurred in an action or proceeding  
23 necessary to confirm the attorney-in-fact's qualifications or authority, unless the  
24 court determines that the third person believed in good faith that the attorney-in-  
25 fact was not qualified or was attempting to exceed or improperly exercise the  
26 attorney-in-fact's authority.

27 (b) The failure of a third person to demand an affidavit pursuant to Section 4305  
28 does not affect the protection provided the third person by this chapter, and no  
29 inference as to whether a third person has acted in good faith may be drawn from  
30 the failure to demand an affidavit from the attorney-in-fact.

31 **Original Comment.** Section 4306 is analogous to the rule applicable to third persons dealing  
32 with trustees. See Section 18100.5(g)-(h) (reliance on trustee's certificate, liability for attorney's  
33 fees). For a special rule applicable to statutory form powers of attorney, see Section 4406. Unless  
34 the court determines that the third person refused in good faith to rely on the attorney-in-fact's  
35 affidavit, subdivision (a) imposes liability on the third person for attorney's fees in a proceeding  
36 needed to confirm exercise of a power. This provision is intended to make powers of attorney  
37 more effective and avoid the need to seek judicial confirmation of the existence of a power. The  
38 liability under subdivision (a) applies only where the attorney-in-fact executes an affidavit,  
39 whether voluntarily or on demand. If the attorney-in-fact has not executed an affidavit, a third  
40 person may refuse to recognize the attorney-in-fact's authority even though the third person  
41 would be fully protected under this chapter.

42 Subdivision (b) makes clear that the failure to require the attorney-in-fact to execute an  
43 affidavit does not affect the protection provided to the third person by this chapter, and no  
44 inference as to whether a third person has acted in good faith should be drawn from the failure to  
45 request an affidavit. Consequently, a third person who satisfies the requirements of this chapter is  
46 fully protected. The availability of the affidavit is not intended to detract from the general  
47 protection provided in this chapter.

1 See also Sections 4014 (“attorney-in-fact” defined), 4034 (“third person” defined).

2 **§ 4307 (amended). Certified copy of power of attorney**

3 SEC. \_\_\_\_\_. Section 4307 of the Probate Code is amended to read:

4 4307. (a) A copy of a power of attorney certified under this section has the same  
5 force and effect as the original power of attorney.

6 (b) A copy of a power of attorney may be certified by any of the following:

7 (1) An attorney authorized to practice law in this state.

8 (2) A notary public in this state.

9 (3) An official of a state or of a political subdivision who is authorized to make  
10 certifications.

11 (c) The certification shall state that the certifying person has examined the  
12 original power of attorney and the copy and that the copy is a true and correct copy  
13 of the original power of attorney.

14 (d) Nothing in this section is intended to create an implication that a third person  
15 may be liable for acting on good faith reliance on a copy of a power of attorney  
16 that has not been certified under this section.

17 (e) This section does not limit the use of a copy of a written advance health care  
18 directive as provided in Section 4655.

19 **Comment.** Subdivision (e) is added to Section 4307 to recognize the special rule applicable to  
20 written advance health care directives and related papers in the Uniform Health Care Decisions  
21 Act.

22 **Original Comment.** Section 4307 is new. This section facilitates use of a power of attorney  
23 executed in this state as well as powers of attorney executed in other states. Subdivision (d)  
24 makes clear that certification under this section is not a requirement for use of copies of powers of  
25 attorney. This recognizes, for example, the existing practice of good faith reliance on copies of  
26 durable powers of attorney for health care. See Section 4750 (immunities of health care provider).

27 See also Section 4022 (“power of attorney” defined).

28 ☞ **Staff Note.** See the Staff Note following draft Section 4655 *infra*.

29 **[unchanged] § 4308. When third person charged with employee’s knowledge**

30 4308. (a) A third person who conducts activities through employees is not  
31 charged under this chapter with actual knowledge of any fact relating to a power of  
32 attorney, nor of a change in the authority of an attorney-in-fact, unless both of the  
33 following requirements are satisfied:

34 (1) The information is received at a home office or a place where there is an  
35 employee with responsibility to act on the information.

36 (2) The employee has a reasonable time in which to act on the information using  
37 the procedure and facilities that are available to the third person in the regular  
38 course of its operations.

39 (b) Knowledge of an employee in one branch or office of an entity that conducts  
40 business through branches or multiple offices is not attributable to an employee in  
41 another branch or office.

42 **Original Comment.** Section 4308 is new. Subdivision (a) is drawn from the Missouri Durable  
43 Power of Attorney Law. See Mo. Ann. Stat. § 404.719(3) (Vernon 1990).

1 See also Sections 4014 (“attorney-in-fact” defined), 4022 (“power of attorney” defined), 4034  
2 (“third person” defined).

3 **[unchanged] § 4309. Prior breach by attorney-in-fact**

4 4309. Nothing in this chapter requires a third person to engage in any transaction  
5 with an attorney-in-fact if the attorney-in-fact has previously breached any  
6 agreement with the third person.

7 **Original Comment.** Section 4309 is new. See also Sections 4014 (“attorney-in-fact” defined),  
8 4034 (“third person” defined).

9 **[unchanged] § 4310. Accounts and loans**

10 4310. Without limiting the generality of Section 4300, nothing in this chapter  
11 requires a financial institution to open a deposit account for a principal at the  
12 request of an attorney-in-fact if the principal is not currently a depositor of the  
13 financial institution or to make a loan to the attorney-in-fact on the principal’s  
14 behalf if the principal is not currently a borrower of the financial institution.

15 **Original Comment.** Section 4310 is new. See also Sections 21 (“account” defined), 40  
16 (“financial institution” defined), 4014 (“attorney-in-fact” defined), 4026 (“principal” defined).

17 **PART 3 . UNIFORM STATUTORY FORM**  
18 **POWER OF ATTORNEY**

19 ☞ **Staff Note.** The Uniform Statutory Form Power of Attorney (Prob. Code §§ 4400-4465)  
20 relates only to property matters and is not relevant to this study. Consequently, this part is not  
21 reproduced here.

22 \* \* \* \* \*

23

1 **Part Heading (repealed)**

2 SEC. \_\_\_\_\_. The heading of Part 4 (commencing with Section 4600) of Division  
3 4.5 of the Probate Code is repealed.

4 ~~PART 4. DURABLE POWERS OF~~  
5 ~~ATTORNEY FOR HEALTH CARE~~

6 **Title Heading and Part Heading (added)**

7 SEC. \_\_\_\_\_. A title heading and a part heading are added immediately preceding  
8 the heading of Chapter 1 (commencing with Section 4600) of Part 4 of Division  
9 4.5 of the Probate Code, to read:

10 TITLE 2. HEALTH CARE DECISIONS

11 PART 1. [UNIFORM] HEALTH CARE DECISIONS [ACT]

12 ☞ **Staff Note.** The issues of structure and the best location for the proposed statutory changes are  
13 discussed in Memorandum 97-41. Depending on the degree of variation from the Uniform  
14 Health-Care Decisions Act (and it looks to the staff like it will be substantial), it may not be  
15 appropriate to designate this part as the “Uniform Health Care Decisions Act.”

16 CHAPTER 1. DEFINITIONS AND GENERAL PROVISIONS  
17 [heading unchanged]

18 **Prob. Code §§ 4600-4621 (repealed)**

19 SEC. \_\_\_\_\_. Article 1 (commencing with Section 4600) of Chapter 1 of Part 4 of  
20 Division 4.5 of the Probate Code is repealed.

21 ☞ **Staff Note.** The language of the existing definitions is set out below for reference purposes,  
22 along with Comments showing disposition in the staff draft. It would be possible to revise the  
23 definitions article by means of amending and renumbering existing sections and addition of new  
24 sections, instead of repealing and adding the entire article. The repeal and add process is simpler  
25 and easier to read and understand, although it is more difficult to see specific language changes.

26 Article 1. Definitions

27 **§ 4600 (repealed). Application of definitions**

28 ~~4600. Unless the provision or context otherwise requires, the definitions in this~~  
29 ~~article govern the construction of this part.~~

30 **Comment.** Former Section 4600 is continued without change in Section 4601. Former Section  
31 4600 restated the substance of the first clause of former Civil Code Section 2410.



1 **§ 4603 (repealed). Community care facility**

2 ~~4603. “Community care facility” means a community care facility as defined in~~  
3 ~~Section 1502 of the Health and Safety Code.~~

4 **Comment.** Former Section 4603 is continued without change in Section 4611. Former Section  
5 4603 continued former Civil Code Section 2430(f) without change.

6 **§ 4606 (repealed). Durable power of attorney for health care**

7 ~~4606. “Durable power of attorney for health care” means a durable power of~~  
8 ~~attorney to the extent that it authorizes an attorney-in-fact to make health care~~  
9 ~~decisions for the principal.~~

10 **Comment.** Former Section 4606 is continued in Section 4613 without substantive change.

11 **Original Comment.** Section 4606 continues former Civil Code Section 2430(a) without  
12 change and continues the substance of former Civil Code Section 2410(b).

13 See also Sections 4014 (“attorney-in-fact” defined), 4018 (“durable power of attorney”  
14 defined), 4026 (“principal” defined), 4612 (“health care decision” defined).

15 **§ 4609 (repealed). Health care**

16 ~~4609. “Health care” means any care, treatment, service, or procedure to~~  
17 ~~maintain, diagnose, or treat an individual’s physical or mental condition and~~  
18 ~~includes decisions affecting the principal after death.~~

19 **Comment.** The first part of former Section 4609 is continued without substantive change in  
20 Section 4615. The last clause concerning decisions affecting the principal after death is not  
21 continued in the new definition, but the authority described is continued in Section \_\_\_\_.

22 **Original Comment.** The first part of Section 4609 continues former Civil Code Section  
23 2430(b) without substantive change. As to certain decisions after the principal’s death, see  
24 Section 4720(b). See also Section 4026 (“principal” defined).

25 **§ 4612 (repealed). Health care decision**

26 ~~4612. “Health care decision” means consent, refusal of consent, or withdrawal of~~  
27 ~~consent to health care, or a decision to begin, continue, increase, limit, discontinue,~~  
28 ~~or not to begin any health care.~~

29 **Comment.** Former Section 4612 is superseded by Section 4617.

30 **Original Comment.** The first part of Section 4612 continues former Civil Code Section  
31 2430(c) (consent, refusal, or withdrawal). The remainder of this section is new and provides  
32 additional detail concerning health care decisions. This is not intended as a substantive change.  
33 See also Section 4609 (“health care” defined).

34 **§ 4615 (repealed). Health care provider**

35 ~~4615. “Health care provider” means a person who is licensed, certified, or~~  
36 ~~otherwise authorized or permitted by the law of this state to administer health care~~  
37 ~~in the ordinary course of business or practice of a profession.~~

38 **Comment.** Former Section 4615 is continued without substantive change in Section 4621.  
39 Former Section 4615 continued former Civil Code Section 2430(d) without change. The  
40 definition of “health care provider” in this section is the same in substance as the definition in  
41 Section 1 of the Uniform Law Commissioner’s Model Health-Care Consent Act (1982). See also  
42 Section 4609 (“health care” defined).

1 **§ 4618 (repealed). Residential care facility for the elderly**

2 ~~4618. “Residential care facility for the elderly” means a residential care facility~~  
3 ~~for the elderly as defined in Section 1569.2 of the Health and Safety Code.~~

4 **Comment.** Former Section 4618 is continued without change in Section 4631. Former Section  
5 4618 continued former Civil Code Section 2430(g) without substantive change.

6 **§ 4621 (repealed). Statutory form durable power of attorney for health care**

7 ~~4621. “Statutory form durable power of attorney for health care” means a~~  
8 ~~durable power of attorney for health care that satisfies the requirements of Chapter~~  
9 ~~3 (commencing with Section 4770).~~

10 **Comment.** Former Section 4621 is not continued. For the optional statutory form of an  
11 advance health care directive, see Section 4761.

12 **Prob. Code §§ 4600-4635 (added). Definitions**

13 SEC. \_\_\_\_\_. Article 1 (commencing with Section 4600) is added to Chapter 1 of  
14 Part 1 of Title 2 of Division 4.5 of the Probate Code, to read:

15 Article 1. Short Title and Definitions

16 **§ 4600 (added). Short title**

17 4600. This part may be cited as the [Uniform] Health Care Decisions Act.

18 **Comment.** Section 4600 provides a convenient method of referring to this part. It has the same  
19 purpose as Section 16 of the Uniform Health-Care Decisions Act (1993). In Comments to  
20 sections in this part and elsewhere, a reference to the “Uniform Health Care Decisions Act”  
21 means the California version, this part (commencing with Section 4600). A reference to the  
22 “Uniform Health-Care Decisions Act (1993)” or the “uniform act” (in context) means the official  
23 text of the uniform act approved by the National Conference of Commissioners on Uniform State  
24 Laws.

25 Some general provisions included in the Uniform Health-Care Decisions Act (1993) are  
26 generalized elsewhere in this code. See Sections 2(b) (construction of provisions drawn from  
27 uniform acts) (*cf.* UHCDA § 15), 11 (severability) (*cf.* UHCDA § 17).

28 ☞ **Staff Note.** See the Staff Note following the title heading *supra*. Whether or not the word  
29 “Uniform” is omitted, the Comment should catalog the sections in this title that are the same as or  
30 drawn from the Uniform Health-Care Decisions Act.

31 **§ 4601 (added). Application of definitions**

32 4601. Unless the provision or context otherwise requires, the definitions in this  
33 article govern the construction of this title.

34 **Comment.** Section 4601 serves the same purpose as former Section 4600. The application of  
35 these definitions is not restricted to the Uniform Health Care Decisions Act in this part, but  
36 extends where appropriate to other parts in this title, as recognized in the language of Section  
37 4601. See, e.g., Sections \_\_\_\_\_ (using “health care provider”), \_\_\_\_\_ (using “physician”).

38 Some definitions included in the Uniform Health-Care Decisions Act of 1993 are generalized  
39 elsewhere in this code. See Sections 56 (“person” defined) (*cf.* uniform act Section 1(15)), 74  
40 (“state” defined) (*cf.* uniform act Section 1(15)).



1 **§ 4603 (added). Advance health-care directive; advance directive**

2 4603. “Advance health care directive” means an individual instruction or a  
3 durable power of attorney for health care. “Advance directive” has the same  
4 meaning as “advance health care directive.”

5 **Comment.** Section 4603 is new. The first sentence is the same as Section 1(1) of the Uniform  
6 Health-Care Decisions Act (1993), except that “durable” has been added for consistency with  
7 prior law and “health care” is not hyphenated. The second sentence recognizes that “advance  
8 directive” is commonly used in practice as a shorthand for “advance health care directive.”  
9 Statutory language also may use the shorter term. See, e.g., Section 4800. A declaration or  
10 directive under the repealed Natural Death Act (former Health & Safety Code § 7185 *et seq.*) is a  
11 type of advance directive.

12 **Background from Uniform Act.** The term “advance health-care directive” appears in the  
13 federal Patient Self-Determination Act enacted as Sections 4206 and 4751 of the Omnibus Budget  
14 Reconciliation Act of 1990 and has gained widespread usage among health-care professionals.

15 [Adapted from Unif. Health-Care Decisions Act § 1(1) comment (1993).]

16 ☞ **Staff Note.** The State Bar Estate Planning, Trust and Probate Law Section Executive  
17 Committee has cautiously decided that “advance health care directive” should be used as a  
18 “generic” term, but the Executive Committee “felt that it would be confusing if we were to  
19 replace the names of the individual documents currently use[d] in California.” See Memorandum  
20 97-41, Exhibit p. 9.

21 We have also flagged this definition for consideration when transitional issues are addressed,  
22 since it will need to be clear that declarations or directives under the Natural Death Act are  
23 advance directives.

24 **§ 4605 (added). Agent**

25 4605. “Agent” means an individual designated in a durable power of attorney for  
26 health care to make a health care decision for the individual granting the power.

27 **Comment.** Section 4605 is a new provision and is the same as Section 1(2) of the Uniform  
28 Health-Care Decisions Act (1993), except that “durable” has been added for consistency with  
29 prior law. “Attorney-in-fact” is an equivalent term used in the Power of Attorney Law. See  
30 Section 4014 (“attorney-in-fact” defined).

31 **Background from Uniform Act.** The definition of “agent” is not limited to a single individual.  
32 The Act permits the appointment of co-agents and alternate agents.

33 [Adapted from Unif. Health-Care Decisions Act § 1(2) comment (1993).]

34 ☞ **Staff Note.** This language is less formal and technical than existing the durable power of  
35 attorney for health care, which consistently uses “principal” when referring to a person who  
36 executes a power of attorney and avoids casual references to “power” since a power of attorney  
37 may grant any number of “powers.” Of course, in context the uniform act language is clear  
38 enough, but the less formal approach does represent a departure from the PAL.

39 The Commission has decided to use “agent” in the health care power provisions. This is  
40 supported by the State Bar Estate Planning, Trust and Probate Law Section Executive Committee.  
41 See Memorandum 97-41, Exhibit p. 9.

42 **§ 4607 (added). Capacity**

43 4607. “Capacity” means an individual’s ability to understand the significant  
44 benefits, risks, and alternatives to proposed health care and to make and  
45 communicate a health care decision.

46 **Comment.** Section 4607 is a new provision and is the same as Section 1(3) of the Uniform  
47 Health-Care Decisions Act (1993).

1 **Background from Uniform Act.**

2 [Adapted from Unif. Health-Care Decisions Act § 1(3) comment (1993).]

3 ☞ **Staff Note.** Marc Hankin, on the State Bar Estate Planning, Trust and Probate Law Section  
4 Executive Committee, and who was instrumental in recent legislation concerning judicial  
5 determinations of capacity, suggests incorporation of the definition in Probate Code Section 813  
6 (see Memorandum 97-41, Exhibit pp. 16), which reads as follows:

7 **§ 813. Capacity to give informed consent to proposed medical treatment**

8 813. (a) For purposes of a judicial determination, a person has the capacity to give informed  
9 consent to a proposed medical treatment if the person is able to do all of the following:

10 (1) Respond knowingly and intelligently to queries about that medical treatment.

11 (2) Participate in that treatment decision by means of a rational thought process.

12 (3) Understand all of the following items of minimum basic medical treatment information  
13 with respect to that treatment:

14 (A) The nature and seriousness of the illness, disorder, or defect that the person has.

15 (B) The nature of the medical treatment that is being recommended by the person's health  
16 care providers.

17 (C) The probable degree and duration of any benefits and risks of any medical intervention  
18 that is being recommended by the person's health care providers, and the consequences of  
19 lack of treatment.

20 (D) The nature, risks, and benefits of any reasonable alternatives.

21 (b) A person who has the capacity to give informed consent to a proposed medical  
22 treatment also has the capacity to refuse consent to that treatment.

23 Note that this provision currently applies to judicial determinations of capacity. The UHCDA  
24 provision in draft Section 4607 is simpler and more general. A possible approach to preserving  
25 the UHCDA simplicity but also taking advantage of the DPCDA refinements would be to  
26 encourage or require consideration of the factors in Section 813 in capacity determinations made  
27 under the UHCDA.

28 Section 811 specifically provides that the Due Process in Competency Determinations Act does  
29 not affect nonjudicial procedures for determining capacity in long-term care facilities under  
30 Health and Safety Code Section 1418.8 “nor increase or decrease the burdens of documentation  
31 on, or potential liability of, physicians and surgeons who, outside the judicial context, determine  
32 the capacity of patients to make a medical decision.” Prob. Code § 811(e). Health and Safety  
33 Code Section 1418.8(b) provides the following capacity standard: “a resident lacks capacity to  
34 make a decision regarding his or her health care if the resident is unable to understand the nature  
35 and consequences of the proposed medical intervention, including its risks and benefits, or is  
36 unable to express a preference regarding the intervention.”

37 **§ 4609 (added). Conservator**

38 4609. “Conservator” means a court-appointed conservator having authority to  
39 make a health care decision for a conservatee.

40 **Comment.** Section 4609 is a new provision and serves the same purpose as Section 1(4) of the  
41 Uniform Health-Care Decisions Act (1993) (definition of “guardian”).

42 ☞ **Staff Note.** Is this needed? The Uniform Health-Care Decisions Act defines guardian to  
43 include both conservator.

44 **§ 4611 (added). Community care facility**

45 4611. “Community care facility” means a “community care facility” as defined  
46 in Section 1502 of the Health and Safety Code.

1 **Comment.** Section 4611 continues former Section 4603 without substantive change.

2 **§ 4613 (added). Durable power of attorney for health care**

3 4613. “Durable power of attorney for health care” means a durable power of  
4 attorney to the extent that it authorizes an agent to make health care decisions for  
5 the principal.

6 **Comment.** Section 4613 supersedes former Section 4606 (defining “durable power of attorney  
7 for health care”) and is the same as Section 1(12) of the Uniform Health-Care Decisions Act  
8 (1993).

9 ☞ **Staff Note.** At one stage of this draft, the staff had attempted to use “power of attorney for  
10 health care” — without the “durable” — to conform to the UHCDA usage and also to simplify  
11 the language. However, this would require many amendments just for a taste change. And it  
12 occurs to the staff that the DPAHC is fairly well imbedded in California usage, even having  
13 acquired a special pronunciation, “Dee-Pack.” Consequently, we have decided to retain the  
14 existing usage unless there is significant sentiment to change it. UHCDA Section 1(12) reads:  
15 “‘Durable power of attorney for health care’ means the designation of an agent to make health-  
16 care decisions for the individual granting the power.”

17 **§ 4615 (added). Health care**

18 4615. “Health care” means any care, treatment, service, or procedure to  
19 maintain, diagnose, or otherwise affect an individual’s physical or mental  
20 condition.

21 **Comment.** Section 4615 continues the first part of former Section 4609 without substantive  
22 change and is the same as Section 1(5) of the Uniform Health-Care Decisions Act (1993).

23 **Background from Uniform Act.** The definition of “health care” is to be given the broadest  
24 possible construction. It includes the types of care referred to in the definition of “health-care  
25 decision” [Prob. Code § 4615], and to care, including custodial care, provided at a “health-care  
26 institution” [Prob. Code § 4617]. It also includes non-medical remedial treatment.

27 [Adapted from Unif. Health-Care Decisions Act § 1(5) comment (1993).]

28 ☞ **Staff Note.**

29 **§ 4617 (added). Health-care decision**

30 4617. “Health-care decision” means a decision made by an individual or the  
31 individual’s agent, guardian, conservator, or surrogate, regarding the individual’s  
32 health care, including the following:

33 (a) Selection and discharge of health care providers and institutions.

34 (b) Approval or disapproval of diagnostic tests, surgical procedures, programs of  
35 medication, and orders not to resuscitate.

36 (c) Directions to provide, withhold, or withdraw artificial nutrition and hydration  
37 and all other forms of health care.

38 **Comment.** Section 4617 supersedes former Section 4612 and is the same in substance as  
39 Section 1(6) of the Uniform Health-Care Decisions Act (1993).

40 ☞ **Staff Note.** This section reads quite a bit differently from the existing definition:

41 4612. “Health care decision” means consent, refusal of consent, or withdrawal of consent to  
42 health care, or a decision to begin, continue, increase, limit, discontinue, or not to begin any  
43 health care.

1 The Uniform Health-Care Decisions Act definition appears to be broad enough to cover all  
2 aspects of health care decisionmaking described in existing law. Consider, however, whether the  
3 UHCDA language might be provocative in ways that existing law is not.

4 **§ 4619 (added). Health-care institution**

5 4619. “Health-care institution” means an institution, facility, or agency licensed,  
6 certified, or otherwise authorized or permitted by [the] law [of this state] to  
7 provide health care in the ordinary course of business.

8 **Comment.** Section 4619 a new provision and is the same as Section 1(7) of the Uniform  
9 Health-Care Decisions Act (1993).

10 **Background from Uniform Act.** The term “health-care institution” includes a hospital,  
11 nursing home, residential-care facility, home health agency, or hospice.

12 [Adapted from Unif. Health-Care Decisions Act § 1(7) comment (1993).]

13 ☞ **Staff Note.** The language in brackets is added for consistency with draft Section 4619.

14 **§ 4621 (added). Health-care provider**

15 4621. “Health-care provider” means an individual who is licensed, certified, or  
16 otherwise authorized or permitted by [the] law [of this state] to provide health care  
17 in the ordinary course of business or practice of a profession.

18 **Comment.** Section 4621 continues former Section 4615 without substantive change and is the  
19 same in substance as Section 1(8) of the Uniform Health-Care Decisions Act (1993). This section  
20 also continues former Health and Safety Code Section 7186(c) (Natural Death Act) without  
21 substantive change.

22 ☞ **Staff Note.** The language in brackets is from existing Section 4615. Is it needed?

23 **§ 4623 (added). Individual instruction**

24 4623. “Individual instruction” means a individual’s [written or oral] direction  
25 concerning a health-care decision for herself or himself.

26 **Comment.** Section 4623 is a new provision and is the same in substance as Section 1(9) of the  
27 Uniform Health-Care Decisions Act (1993).

28 **Background from Uniform Act.** The term “individual instruction” includes any type of  
29 written or oral direction concerning health-care treatment. The direction may range from a written  
30 document which is intended to be effective at a future time if certain specified conditions arise  
31 and for which a form is provided in Section 4 [Prob. Code §§ 4761], to the written consent  
32 required before surgery is performed, to oral directions concerning care recorded in the health-  
33 care record. The instruction may relate to a particular health-care decision or to health care in  
34 general.

35 [Adapted from Unif. Health-Care Decisions Act § 1(9) comment (1993).]

36 ☞ **Staff Note.** The staff is still not enthusiastic about this term. Delaware, Maine, and New  
37 Mexico use it (Maine and New Mexico having enacted the Uniform Health-Care Decisions Act),  
38 but other states use terms such as “health care instruction” (Connecticut, Maryland & Oregon,  
39 “instruction regarding health care” (Minnesota), and “medical treatment instruction” (Hawaii).  
40 For purposes of the present draft, we have used the official text term, but the Commission may  
41 want to consider whether a more expressive term should be used instead, such as “health care  
42 instruction.”

43 This section also raises the issue of whether we should continue to use “natural person” as in  
44 existing power of attorney law, or switch to “individual.” As discussed in Memorandum 97-4

1 (considered at the April meeting), the section has been expanded to include some of the language  
2 from the UHCDA comment (in brackets).

3 **§ 4625 (added). Physician**

4 4625. “Physician” means a physician and surgeon licensed by the Medical Board  
5 of California or the Osteopathic Medical Board of California.

6 **Comment.** Section 4625 continues and generalizes former Health and Safety Code Section  
7 7186(g) (Natural Death Act) and is the same in substance as Section 1(11) of the Uniform Health-  
8 Care Decisions Act (1993).

9 ☞ **Staff Note.** Uniform Health-Care Decisions Act Section 1(11) reads: “‘Physician’ means an  
10 individual authorized to practice medicine [or osteopathy] under [appropriate statute].” As noted,  
11 the draft section is from the Natural Death Act.

12 Currently, the Probate Code does not define “physician.” The DPAHC uses the term without  
13 defining it or uses the phrase “physician and surgeon” which is a term of art meaning a licensed  
14 medical doctor. The staff believes that the term “physician and surgeon” is awkward and impairs  
15 the readability of already complicated statutes. In some contexts, a literal reading can lead a  
16 person to think that two signatures or approvals are required: one from a physician and one from a  
17 surgeon. (See, e.g., Prob. Code § 4753(b) [now fixed in draft Section 4820]: “A ‘request to forego  
18 resuscitative measures’ shall be a written document, signed by the individual, or a legally  
19 recognized surrogate health care decisionmaker and a physician and surgeon, that directs....”)  
20 Consistent and comprehensive use of the defined term “physician” as set out in draft Section 4625  
21 should avoid these problems.

22 **§ 4627 (added). Primary physician**

23 4627. “Primary physician” means a physician designated by an individual or the  
24 individual’s agent, guardian, or surrogate, to have primary responsibility for the  
25 individual’s health care or, in the absence of a designation or if the designated  
26 physician is not reasonably available, a physician who undertakes the  
27 responsibility.

28 **Comment.** Section 4627 continues and generalizes former Health and Safety Code Section  
29 7186(a) (“attending physician” defined) and is the same as Section 1(13) of the Uniform Health-  
30 Care Decisions Act (1993).

31 **Background from Uniform Act.** The Act employs the term “primary physician” instead of  
32 “attending physician.” The term “attending physician” could be understood to refer to any  
33 physician providing treatment to the individual, and not to the physician whom the individual, or  
34 agent, guardian, or surrogate, has designated or, in the absence of a designation, the physician  
35 who has undertaken primary responsibility for the individual’s health care.

36 [Adapted from Unif. Health-Care Decisions Act § 1(13) comment (1993).]

37 **§ 4629 (added). Reasonably available**

38 4629. “Reasonably available” means readily able to be contacted without undue  
39 effort and willing and able to act in a timely manner considering the urgency of the  
40 patient’s health-care needs.

41 **Comment.** Section 4629 is the same as Section 1(14) of the Uniform Health-Care Decisions  
42 Act (1993).

43 **Background from Uniform Act.** The term “reasonably available” is used in the Act to  
44 accommodate the reality that individuals will sometimes not be timely available. The term is  
45 incorporated into the definition of “supervising health-care provider” [Prob. Code § 4635]. It



1 appears in the optional statutory form (Section 4) [Prob. Code §§ 4761] to indicate when an  
2 alternate agent may act. In Section 5 [Prob. Code §§ 4770-4771] it is used to determine when a  
3 surrogate will be authorized to make health-care decisions for an individual, and if so, which class  
4 of individuals has authority to act.

5 [Adapted from Unif. Health-Care Decisions Act § 1(14) comment (1993).]

6 **§ 4631 (added). Residential care facility for the elderly**

7 4631. “Residential care facility for the elderly” means a “residential care facility  
8 for the elderly” as defined in Section 1569.2 of the Health and Safety Code.

9 **Comment.** Section 4631 continues former Section 4618 without substantive change.

10 **§ 4633 (added). Supervising health-care provider**

11 4633. “Supervising health-care provider” means the primary physician or, if  
12 there is no primary physician or the primary physician is not reasonably available,  
13 the health-care provider who has undertaken primary responsibility for an  
14 individual’s health care.

15 **Comment.** Section 4633 is a new provision and is the same as Section 1(16) of the Uniform  
16 Health-Care Decisions Act (1993).

17 **Background from Uniform Act.** The definition of “supervising health-care provider”  
18 accommodates the circumstance that frequently arises where care or supervision by a physician  
19 may not be readily available. The individual’s primary physician is to assume the role, however,  
20 if reasonably available.

21 [Adapted from Unif. Health-Care Decisions Act § 1(16) comment (1993).]

22 **§ 4635 (added). Surrogate**

23 4635. “Surrogate” means an individual, other than a patient’s agent or  
24 conservator, authorized under this part to make a health care decision for the  
25 patient.

26 **Comment.** Section 4635 is a new provision and is the same as Section 1(17) of the Uniform  
27 Health-Care Decisions Act (1993), except that this section refers to “conservator” instead of  
28 “guardian.”

29 **Background from Uniform Act.** The definition of “surrogate” refers to the individual having  
30 present authority under Section 5 [Prob. Code § 4770 *et seq.*] to make a health-care decision for a  
31 patient. It does not include an individual who might have such authority under a given set of  
32 circumstances which have not occurred.

33 [Adapted from Unif. Health-Care Decisions Act § 1(17) comment (1993).]

34 ☞ **Staff Note.** We may want to refer to both guardians and conservators, but for now, we have  
35 been drafting based on the California usage.

36 **Article 2. General Provisions**  
37 [heading unchanged]

38 ☞ **Staff Note.** The transitional provisions in this article will need to be carefully considered to  
39 see if they are still needed, particularly the rules in Section 4654 relating to the old seven-year  
40 powers. In any event, the sections should be put in logical order, with the more important general  
41 provisions placed first, followed by the transitional rules.

1 **§ 4650 (amended). Application of chapter**

2 SEC. \_\_\_\_\_. Section 4650 of the Probate Code is amended to read:

3 4650. (a) A durable power of attorney executed on or after January 1, 1984, is  
4 effective to authorize the attorney-in-fact to make health care decisions for the  
5 principal only if the durable power of attorney complies with this [chapter].

6 (b) A durable power of attorney executed before January 1, 1984, that  
7 specifically authorizes the attorney-in-fact to make decisions relating to the  
8 medical or health care of the principal shall be deemed to be valid under this  
9 [chapter] after January 1, 1984, notwithstanding that it fails to comply with  
10 subdivision (a) or (c) of Section 4121 or subdivision (a) of Section 4704; but, to  
11 the extent that the durable power of attorney authorizes the attorney-in-fact to  
12 make health care decisions for the principal, the durable power of attorney is  
13 subject to all the provisions of this [chapter] and to ~~Part 5~~ Title 3 (commencing  
14 with Section 4900).

15 (c) Nothing in this chapter affects the validity of a decision made under a durable  
16 power of attorney before January 1, 1984.


17 **Comment.** Subdivision (b) of Section 4650 is amended to revise a cross-reference.

18 **Original Comment.** Section 4650 continues former Civil Code Section 2431 without  
19 substantive change. Subdivision (a) of Section 4650 makes clear that the requirements of this  
20 chapter must be satisfied if a durable power of attorney executed after December 31, 1983, is  
21 intended to authorize health care decisions. Nothing in this chapter affects a durable power of  
22 attorney executed after December 31, 1983, insofar as it relates to matters other than health care  
23 decisions. See also Sections 4018 (“durable power of attorney” defined), 4612 (“health care  
24 decision” defined).

25 Subdivision (b) validates durable powers of attorney for health care executed before January 1,  
26 1984, even though the witnessing or acknowledgment requirement applicable under Sections  
27 4121(c) and 4700(b) is not satisfied and even though the requirement of a warning statement or  
28 certificate under Section 4704 is not satisfied. However, after December 31, 1983, any such  
29 durable power of attorney is subject to the same provisions as a durable power of attorney  
30 executed after that date. See, e.g., Sections 4720 (attorney-in-fact not authorized to act if principal  
31 can give informed consent), 4721 (availability of medical information to attorney-in-fact), 4722  
32 (limitations on attorney-in-fact’s authority), 4723 (unauthorized acts and omissions), 4724  
33 (consent of attorney-in-fact not authorized where principal objects to the health care or objects to  
34 the withholding or withdrawal of health care necessary to keep principal alive), 4726 (altering or  
35 forging, or concealing or withholding knowledge of revocation, of durable power of attorney for  
36 health care), 4727 (revocation), 4750 (immunities of health care provider), 4903 (exceptions to  
37 limitations in power of attorney on right to petition), 4942 (grounds for petition).

38 Subdivision (c) makes clear that this chapter has no effect on decisions made before January 1,  
39 1984, under durable powers of attorney executed before that date. The validity of such health care  
40 decisions is determined by the law that would apply if this chapter had not been enacted.

41 See also Sections 4014 (“attorney-in-fact” defined), 4018 (“durable power of attorney”  
42 defined), 4026 (“principal” defined), 4612 (“health care decision” defined).

43  **Staff Note.** This is one of several legacy transitional provisions that will need to be carefully  
44 reviewed when the draft statute is completed.

1 § 4651 (amended). Form of durable power of attorney for health care after January 1, 1995

2 SEC. \_\_\_\_\_. Section 4651 of the Probate Code is amended to read:

3 4651. (a) Notwithstanding Section [4703], on and after January 1, 1986, a  
4 printed form of a durable power of attorney for health care may be sold or  
5 otherwise distributed if it complies with former Section 2433 of the Civil Code as  
6 amended by Section 5 of Chapter 312 of the Statutes of 1984, or with former  
7 Section 2433 of the Civil Code as in effect at the time of sale or distribution.  
8 However, any printed form of a durable power of attorney for health care printed  
9 on or after January 1, 1986, that is sold or otherwise distributed in this state for use  
10 by a person who does not have the advice of legal counsel shall comply with  
11 former Section 2433 of the Civil Code or Section [4703] of this code in effect at  
12 the time of printing.

13 (b) Notwithstanding Section [4700], a printed form of a durable power of  
14 attorney for health care may be sold or otherwise distributed if it complies with  
15 former Section 2432 of the Civil Code as enacted by Section 10 of Chapter 1204  
16 of the Statutes of 1983 or as subsequently amended, or with Section [4700] of this  
17 code. However, any printed form of a durable power of attorney for health care  
18 printed on or after January 1, 1986, shall comply with the requirements of former  
19 Section 2432 of the Civil Code or Section [4700] of this code in effect at the time  
20 of printing.

21 (c) A durable power of attorney for health care executed on or after January 1,  
22 1986, is not invalid if it complies with former Section 2432 of the Civil Code as  
23 originally enacted or as subsequently amended. A durable power of attorney for  
24 health care executed on or after January 1, 1986, using a printed form that  
25 complied with former Section 2433 of the Civil Code, as amended by Section 5 of  
26 Chapter 312 of the Statutes of 1984, is as valid as if it had been executed using a  
27 printed form that complied with former Section 2433 of the Civil Code as  
28 thereafter amended or with Section [4703] of this code.

29 **Original Comment.** Section 4651 continues former Civil Code Section 2444 without  
30 substantive change, and applies the principles of the former section to the successor sections in  
31 this chapter.

32 Section 4651 permits a printed form of a durable power of attorney for health care to be used  
33 after the amendments to former Civil Code Sections 2432 and 2433 went into effect if the form  
34 complies with prior law. Section 4651 avoids the need to discard the existing supply of printed  
35 forms when the amendments go into effect. But a form printed after the amendments go into  
36 effect may be sold or otherwise distributed in this state for use by a person who does not have the  
37 advice of legal counsel only if the form complies with the requirements of Sections 4700 and  
38 4703.

39 See also Section 4606 (“durable power of attorney for health care” defined).

40 ☞ **Staff Note.** This is one of several legacy transitional provisions that will need to be carefully  
41 reviewed when the draft statute is completed. At some point, validation of the sale of ancient  
42 printed forms needs to cease.



1 **§ 4652 (amended). Other authority not affected**

2 SEC. \_\_\_\_\_. Section 4652 of the Probate Code is amended to read:

3 4652. (a) Subject to Sections 4720 and 4946, nothing in this ~~part~~ title affects any  
4 right a person may have to make health care decisions on behalf of another if the  
5 attorney-in-fact and any successor attorney-in-fact are unavailable, unwilling, or  
6 unable to make health care decisions on behalf of the principal.

7 (b) This part does not affect the law governing health care treatment in an  
8 emergency.

9 (c) This title does not affect the right of an individual to make health care  
10 decisions while having the capacity to do so.

11 (d) An individual is presumed to have capacity to make a health care decision, to  
12 give or revoke an advance health care directive, and to designate or disqualify a  
13 surrogate.

14 **Comment.** Section 4652 is amended to add subdivisions (c) and (d), which are the same in  
15 substance as Section 11 of the Uniform Health-Care Decisions Act (1993).

16 **Background from Uniform Act.** Section 11 reinforces the principle of patient autonomy by  
17 providing a rebuttable presumption that an individual has capacity for all decisions relating to  
18 health care referred to in the Act.

19 [Adapted from Unif. Health-Care Decisions Act § 11 comment (1993).]

20 **Original Comment.** Section 4652 continues former Civil Code Section 2439 without change,  
21 except for the revision of a cross-reference to another section and the substitution of a reference to  
22 “part” instead of “article.” Section 4652 makes clear that the enactment of this part has no effect  
23 on any right a person may have to consent for another or on emergency treatment. Thus, this title  
24 is cumulative to whatever other ways there may be to consent for another individual.

25 See also Sections 4609 (“health care” defined), 4612 (“health care decision” defined).

26 **Note.** This section was amended by 1995 Cal. Stat. ch. 417, § 1.

27 **§ 4653 (amended). Validity of durable power of attorney for health care executed in another**  
28 **jurisdiction**

29 SEC. \_\_\_\_\_. Section 4653 of the Probate Code is amended to read:

30 4653. A ~~durable power of attorney for health care~~ written advance health care  
31 directive or similar instrument executed in another state or jurisdiction in  
32 compliance with the laws of that state or jurisdiction or of this state, ~~shall be~~ is  
33 valid and enforceable in this state to the same extent as a durable power of  
34 attorney for health care written advance health care directive validly executed in  
35 this state.

36 **Comment.** Section 4653 is amended to apply to written advance health care directives, which  
37 includes both durable powers of attorney for health care and written individual instructions. This  
38 section is consistent with Section 2(h) of the Uniform Health-Care Decisions Act (1993), as  
39 applied to instruments. See also Section 4752 (presumption concerning instrument executed in  
40 another jurisdiction).

41 For the rule applicable to powers of attorney generally, see Section 4053.

42 **Background from Uniform Act.** Section 2(h) validates advance health-care directives which  
43 conform to the Act, regardless of when or where executed or communicated. This includes an  
44 advance health-care directive which would be valid under the Act but which was made prior to  
45 the date of its enactment and failed to comply with the execution requirements then in effect. It

1 also includes an advance health-care directive which was made in another jurisdiction but which  
2 does not comply with that jurisdiction’s execution or other requirements.

3 [Adapted from Unif. Health-Care Decisions Act § 2(h) comment (1993).]

4 See also Section 4606 (“durable power of attorney for health care” defined).

5 ☞ **Staff Note.** The uniform act provision is not limited to *written* advance directive:

6 2(h) An advance health care directive is valid for purposes of this [Act] if it complies with  
7 this [Act], regardless of when or where executed or communicated.

8 Should Section 4653 also validate oral instructions communicated under the law of another state?  
9 The purpose seems to be to recognize communication of an oral individual instruction even  
10 though it may have occurred outside California or where it is an interstate communication. The  
11 UHCDA language would validate an instruction given by a patient on vacation in Florida to a  
12 doctor in Florida or the patient’s doctor in California, without raising any technical issues of  
13 where the communication took place or what law might otherwise govern its effect.

14 Now that the opportunity presents itself, we need to devote some effort to reorganizing Sections  
15 4653 (validity of foreign power) and 4752 (presumption concerning foreign power).

16 **§ 4654 (amended?). Durable power of attorney for health care subject to former 7-year limit**

17 4654. (a) This section applies only to a durable power of attorney for health care  
18 that satisfies one of the following requirements:

19 (1) The power of attorney was executed after January 1, 1984, but before  
20 January 1, 1992.

21 (2) The power of attorney was executed on or after January 1, 1992, and contains  
22 a warning statement that refers to a seven-year limit on its duration.

23 (b) Unless a shorter period is provided in the durable power of attorney for  
24 health care, a durable power of attorney for health care described in subdivision (a)  
25 expires seven years after the date of its execution unless at the end of the seven-  
26 year period the principal lacks the capacity to make health care decisions for  
27 himself or herself, in which case the durable power of attorney for health care  
28 continues in effect until the time when the principal regains the capacity to make  
29 health care decisions for himself or herself.

30 **Original Comment.** Section 4654 continues former Civil Code Section 2436.5 without change.  
31 This section restricts the former seven-year limit for a durable power of attorney for health care  
32 (1) to powers executed between January 1, 1984 and December 31, 1991, and (2) to powers  
33 containing a warning statement that refers to a seven-year limit on duration. For a durable power  
34 of attorney for health care executed on or after January 1, 1992, that does not contain a warning  
35 statement that refers to a seven-year limit on its duration, there is no statutory limit, but only the  
36 limit, if any, provided in the durable power itself.

37 See also Sections 4026 (“principal” defined), 4606 (“durable power of attorney for health care”  
38 defined), 4612 (“health care decision” defined).

39 ☞ **Staff Note.** This is one of several legacy transitional provisions that will need to be carefully  
40 reviewed when the draft statute is completed.

41 **§ 4655 (added). Use of copy of written advance health care directive and other papers**

42 SEC. \_\_\_\_\_. Section 4655 is added to the Probate Code, to read:

43 4655. A copy of a written advance health care directive, revocation of an  
44 advance health care directive, or designation or disqualification of a surrogate has  
45 the same effect as the original.

1 **Comment.** Section 4655 provides a special rule permitting the use of copies under this title. It  
2 is the same as Section 12 of the Uniform Health-Care Decisions Act (1993). With respect to  
3 powers of attorney for health care, this section provides an exception to the general rules provided  
4 in Section 4307 and is consistent with the policy expressed in Section 4307(d).

5 **Background from Uniform Act.** The need to rely on an advance health-care directive may  
6 arise at times when the original is inaccessible. For example, an individual may be receiving care  
7 from several health-care providers or may be receiving care at a location distant from that where  
8 the original is kept. To facilitate prompt and informed decision making, this section provides that  
9 a copy of a valid written advance health-care directive, revocation of an advance health-care  
10 directive, or designation or disqualification of a surrogate has the same effect as the original.

11 [Adapted from Unif. Health-Care Decisions Act § 12 comment (1993).]

12 ☞ **Staff Note.** We face both substantive and organizational issues with Section 4307 and  
13 UHCDA Section 12. Section 4307 is located in the general provisions of the Power of Attorney  
14 Law and provides stricter, more technical rules on the use of copies. These rules were worked  
15 over at some length to achieve general acceptance when the PAL was enacted. Banks, title  
16 companies, and notaries were involved in working out the final version in existing law. Those  
17 interests should not necessarily determine the approach to be taken with health care powers and  
18 other papers covered by draft Section 4655. Note, however, that Section 4307(d) makes clear that  
19 the technical rules on use of copies of powers do not prevent a third person from relying in good  
20 faith on a copy that does not comply. For discussion purposes, the draft section adopts the  
21 UHCDA rule which does not impose the technical rules of existing law.

22 The State Bar Estate Planning, Trust and Probate Law Section Executive Committee suggests  
23 that “copies should be as good as originals with respect to *all* health care related documents  
24 unless the principal provides otherwise in the document or the supervising health care provider  
25 has actual notice of circumstances that would render a copy unreliable.” See Memorandum 97-41,  
26 Exhibit p. 16.

27 **§ 4656 (added). Legislative findings**

28 SEC. \_\_\_\_\_. Section 4656 is added to the Probate Code, to read:

29 4656. The Legislature finds the following:

30 (a) An adult person has the fundamental right to control the decisions relating to  
31 the rendering of his or her own medical care, including the decision to have life-  
32 sustaining treatment withheld or withdrawn in instances of a [terminal condition or  
33 permanent unconscious condition].

34 (b) Modern medical technology has made possible the artificial prolongation of  
35 human life beyond natural limits. In the interest of protecting individual autonomy,  
36 such prolongation of the process of dying for a person with a [terminal condition  
37 or permanent unconscious condition] for whom continued medical treatment does  
38 not improve the prognosis for recovery may violate patient dignity and cause  
39 unnecessary pain and suffering, while providing nothing medically necessary or  
40 beneficial to the person.

41 (c) In recognition of the dignity and privacy that a person has a right to expect,  
42 the law recognizes that an adult has the right to make a written declaration  
43 instructing his or her physician to withhold or withdraw life-sustaining treatment  
44 in the event of a [terminal condition or permanent unconscious condition], in the  
45 event that the person is unable to make those decisions for himself or herself.

46 [(d) This title is in the interest of the public health and welfare.]

1 **Comment.** Section 7156 continues the basic substance of legislative findings set out in former  
2 Health and Safety Code Section 7185.5 (Natural Death Act). These findings, in an earlier form,  
3 have been relied upon by the courts. Conservatorship of Drabick, 200 Cal. App. 3d 185, 206, 245  
4 Cal. Rptr. 840, 853 (1988); Bouvia v. Superior Court, 179 Cal. App. 3d 1127, 1137, 225 Cal.  
5 Rptr. 297, 302 (1986); Bartling v. Superior Court, 163 Cal. App. 3d 186, 194-95, 209 Cal. Rptr.  
6 220, 224-25 (1984); Barber v. Superior Court, 147 Cal. App. 3d 1006, 1015-16, 195 Cal. Rptr.  
7 484, 489-90 (1983). Parts of former Health and Safety Code Section 7185.5 that are more  
8 appropriate to substantive provisions are not continued here. See Sections \_\_\_\_ & 4900 (exercise  
9 free of judicial approval), \_\_\_\_.

10 ☞ **Staff Note.** The Commission normally avoids statements of intent in statutes, but since the  
11 NDA language has been important in several leading cases, this presents the unusual case where  
12 intent language should be carried forward.

13 CHAPTER 2. DURABLE POWERS OF ATTORNEY FOR HEALTH CARE  
14 [heading unchanged]

15 Article 1. Creation and Effect of Durable Power of Attorney for Health Care  
16 [heading unchanged]

17 § 4700 (amended). Requirements for power of attorney for health care

18 SEC. \_\_\_\_\_. Section 4700 of the Probate Code is amended to read:

19 4700. An ~~attorney-in-fact~~ agent under a durable power of attorney may not make  
20 health care decisions unless the durable power of attorney satisfies all of the  
21 following requirements:

22 (a) The power of attorney specifically grants authority to the ~~attorney-in-fact~~  
23 agent to make health care decisions.

24 (b) The power of attorney is executed as provided in Section 4121.

25 (c) The power of attorney satisfies the requirements of this article.

26 **Comment.**

27 **Original Comment.** Section 4700 restates the first part of former Civil Code Section 2432(a)  
28 without substantive change. Subdivision (a) continues former Civil Code Section 2432(a)(1)  
29 without substantive change. The dating requirement of former Civil Code Section 2432(a)(2) is  
30 continued in Section 4121(a), which is applicable to all powers of attorney under this division,  
31 and which is incorporated in subdivision (b). The option of using a notary public or two witnesses  
32 under former Civil Code Section 2432(a)(3) is continued through the incorporation of the general  
33 execution requirements in Section 4121(c). As to special rules concerning qualifications of  
34 witnesses under a durable power of attorney for health care, see Section 4701. See also Section  
35 4650 (exception to formalities requirement for powers of attorney executed before operative  
36 date).

37 See also Sections 4014 (“attorney-in-fact” defined), 4606 (“durable power of attorney for  
38 health care” defined), 4612 (“health care decision” defined).

39 ☞ **Staff Note.** This section is amended according to the policy of using “agent” with respect to  
40 health care matters.

1 [unchanged] § 4701. Additional requirements for witnesses of durable power of attorney for  
2 health care

3 4701. If the durable power of attorney for health care is signed by witnesses, as  
4 provided in Section 4121, in addition to the requirements applicable to witnesses  
5 under Section 4122, the following requirements shall be satisfied:

6 (a) None of the following persons may act as a witness:

7 (1) The principal's health care provider or an employee of the principal's health  
8 care provider.

9 (2) The operator or an employee of a community care facility.

10 (3) The operator or an employee of a residential care facility for the elderly.

11 (b) Each witness shall make the following declaration in substance:

12 "I declare under penalty of perjury under the laws of California that the  
13 person who signed or acknowledged this document is personally known to  
14 me to be the principal, or that the identity of the principal was proved to me  
15 by convincing evidence, that the principal signed or acknowledged this  
16 durable power of attorney in my presence, that the principal appears to be of  
17 sound mind and under no duress, fraud, or undue influence, that I am not the  
18 person appointed as attorney-in-fact by this document, and that I am not the  
19 principal's health care provider, an employee of the principal's health care  
20 provider, the operator of a community care facility, an employee of an  
21 operator of a community care facility, the operator of a residential care  
22 facility for the elderly, nor an employee of an operator of a residential care  
23 facility for the elderly."

24 (c) At least one of the witnesses shall be a person who is not one of the  
25 following:

26 (1) A relative of the principal by blood, marriage, or adoption.

27 (2) A person who would be entitled to any portion of the principal's estate upon  
28 the principal's death under a will existing at the time of execution of the durable  
29 power of attorney for health care or by operation of law then existing.

30 (d) The witness satisfying the requirement of subdivision (c) shall also sign the  
31 following declaration in substance:

32 "I further declare under penalty of perjury under the laws of California that I am  
33 not related to the principal by blood, marriage, or adoption, and, to the best of my  
34 knowledge, I am not entitled to any part of the principal's estate upon the  
35 principal's death under a will now existing or by operation of law."

36 (e) If the principal is a patient in a skilled nursing facility, as defined in  
37 subdivision (c) of Section 1250 of the Health and Safety Code, at the time the  
38 durable power of attorney for health care is executed, the power of attorney is not  
39 effective unless a patient advocate or ombudsman as may be designated by the  
40 Department of Aging for this purpose pursuant to any other applicable provision  
41 of law signs the instrument as a witness, either as one of two witnesses or in  
42 addition to notarization pursuant to subdivision (c) of Section 4121. The patient



1 advocate or ombudsman shall declare that he or she is serving as a witness as  
2 required by this subdivision. It is the intent of this subdivision to recognize that  
3 some patients in skilled nursing facilities are insulated from a voluntary  
4 decisionmaking role, by virtue of the custodial nature of their care, so as to require  
5 special assurance that they are capable of willfully and voluntarily executing a  
6 durable power of attorney for health care.

7 **Original Comment.** Section 4701 restates parts of former Civil Code Section 2432 without  
8 substantive change. Subdivision (a) (along with the incorporated rules of Section 4122) continues  
9 former Civil Code Section 2432(d) without substantive change. Subdivision (b) continues the first  
10 declaration in former Civil Code Section 2432(a)(3)(A) without substantive change. Subdivision  
11 (c) continues former Civil Code Section 2432(e) without substantive change. Subdivision (d)  
12 continues the second declaration in former Civil Code Section 2432(a)(3)(A) without substantive  
13 change. Subdivision (e) continues former Civil Code Section 2432(f) without substantive change.  
14 For additional witnessing requirements, see Section 4121.

15 See also Sections 4014 (“attorney-in-fact” defined), 4026 (“principal” defined), 4603  
16 (“community care facility” defined), 4606 (“durable power of attorney for health care” defined),  
17 4615 (“health care provider” defined), 4618 (“residential care facility for the elderly” defined).

18  **Staff Note.**

19 (1) The issue of witnessing requirements has not been resolved in this draft. The staff believes  
20 that the issue need further discussion before we can draft any changes in existing law. At the  
21 January meeting, the Commission decided in general to pursue the possibility of adopting the  
22 approach of the Uniform Health-Care Decisions Act, which does not require any witnesses. The  
23 staff believes that such an approach is politically unworkable in California, but we could be  
24 wrong. However, judging by the frequency with which the witnessing rules in the health care  
25 power statutes and similar provisions have been amended and the experience we have had in the  
26 original enactments of Commission-sponsored legislation, the staff is pessimistic that most of  
27 these formalities and ostensible protections can be eliminated. Consider also that in the 1994 PAL  
28 legislation, the Commission imposed new witnessing and other execution requirements on  
29 durable powers of attorney for property, which had not been subject to any witnessing or dating  
30 requirements before that time. It would be anomalous to eliminate witnessing in the health care  
31 power statute which was the source of the now general requirement of two witnesses (or  
32 notarization).

33 The State Bar Estate Planning, Trust and Probate Law Section Executive Committee has  
34 suggested the approach of imposing “consistent execution formalities, either a notary or  
35 witnesses.” See Memorandum 97-41, Exhibit p. 9. The letter reports that it was a “close vote, but  
36 the Committee supported the current formalities as opposed to no formalities.” The staff would  
37 add that if there is to be consistency, and if we are not to revisit the property power of attorney  
38 provisions, then we should keep the witness or notary option. Providing alternatives should be  
39 preferable, from the perspective of the UHCDA and others who would prefer to eliminate  
40 witnessing formalities, to requiring two witnesses. Requiring notarization alone would defeat the  
41 purpose of the statute entirely.

42 Paul Gordon Hoffman generally favors existing formalities. See Memorandum 97-41, Exhibit  
43 pp. 19-20. He raises the issue of whether a “holographic” advance health care directive should be  
44 exempted to some degree from the more onerous execution requirements generally applicable.

45 A commonly expressed notion in these discussions is the need to try to simplify execution  
46 requirements and optimize consistency across classes of instruments. Thus, we would tend to  
47 disfavor

48 (2) Similar witnessing rules apply under Health and Safety Code Sections 7165(a) (second &  
49 third sentences) and 7187 in the Natural Death Act:

50 § 7165(a). ... The declaration shall be signed by the declarant, or another at the declarant’s  
51 direction and in the declarant’s presence, and witnessed by two individuals at least one of

1 whom may not be a person who is entitled to any portion of the estate of the qualified patient  
2 upon his or her death under any will or codicil thereto of the qualified patient existing at the  
3 time of execution of the declaration or by operation of law. In addition, a health care provider,  
4 an employee of a health care provider, the operator of a community care facility, an employee  
5 of an operator of a community care facility, In addition, a health care provider, an employee  
6 of a health care provider, the operator of a community care facility, an employee of an  
7 operator of a community care facility, the operator of a residential care facility for the elderly,  
8 or an employee of an operator of a residential care facility for the elderly may not be a  
9 witness.

10 § 7187. A declaration shall have no force or effect if the declarant is a patient in a skilled  
11 nursing facility as defined in subdivision (c) of Section 1250, or a long-term health care  
12 facility as defined in subdivision (a) of Section 1418, at the time the declaration is executed  
13 unless one of the two witnesses to the declaration is a patient advocate or ombudsman as may  
14 be designated by the State Department of Aging for this purpose pursuant to any other  
15 applicable provision of law.

16 (3) This section is also an example of a provision that would have to be amended to delete  
17 references to “durable” if we adopt the UHCDA term “power of attorney for health care” in place  
18 of the existing “durable power of attorney for health care.”

19 **[unchanged] § 4702. Limitations on who may be attorney-in-fact**

20 4702. (a) Except as provided in subdivision (b), the following persons may not  
21 exercise authority to make health care decisions under a durable power of attorney:

22 (1) The treating health care provider or an employee of the treating health care  
23 provider.

24 (2) An operator or employee of a community care facility.

25 (3) An operator or employee of a residential care facility for the elderly.

26 (b) An employee of the treating health care provider or an employee of an  
27 operator of a community care facility or an employee of a residential care facility  
28 for the elderly may be designated as the attorney-in-fact to make health care  
29 decisions under a durable power of attorney for health care if both of the following  
30 requirements are met:

31 (1) The employee is a relative of the principal by blood, marriage, or adoption,  
32 or the employee is employed by the same treating health care provider, community  
33 care facility, or residential care facility for the elderly that employs the principal.

34 (2) The other requirements of this chapter are satisfied.

35 (c) Except as provided in subdivision (b), if a health care provider becomes the  
36 principal’s treating health care provider, the health care provider or an employee  
37 of the health care provider may not exercise authority to make health care  
38 decisions under a durable power of attorney.

39 (d) A conservator may not be designated as the attorney-in-fact to make health  
40 care decisions under a durable power of attorney for health care executed by a  
41 person who is a conservatee under the Lanterman-Petris-Short Act (Part 1  
42 commencing with Section 5000) of Division 5 of the Welfare and Institutions  
43 Code), unless all of the following are satisfied:

44 (1) The power of attorney is otherwise valid.

45 (2) The conservatee is represented by legal counsel.

1 (3) The lawyer representing the conservatee signs a certificate stating in  
2 substance:

3 “I am a lawyer authorized to practice law in the state where this power of  
4 attorney was executed, and the principal was my client at the time this power  
5 of attorney was executed. I have advised my client concerning his or her  
6 rights in connection with this power of attorney and the applicable law and  
7 the consequences of signing or not signing this power of attorney, and my  
8 client, after being so advised, has executed this power of attorney.”

9 **Original Comment.** Subdivision (a) of Section 4702 continues former Civil Code Section  
10 2432(b)(1) without substantive change. Subdivision (a), along with Section 4701, which  
11 precludes health care providers in general and their employees and other specified persons from  
12 acting as witnesses to durable powers of attorney for health care, recognizes that Section 4750  
13 provides protections from liability for a health care provider who relies in good faith on a  
14 decision of the attorney-in-fact. Subdivision (a) does not preclude a person from appointing, for  
15 example, a friend who is a doctor as the attorney-in-fact under the person’s durable power of  
16 attorney for health care, but if the doctor becomes the person’s “treating health care provider,” the  
17 doctor is precluded from acting as the attorney-in-fact under the durable power of attorney for  
18 health care.

19 Subdivision (b) continues former Civil Code Section 2432.5 without substantive change.  
20 Subdivision (b) provides a special exception to subdivisions (a) and (c). This will, for example,  
21 permit a nurse to serve as attorney-in-fact for the nurse’s spouse when the spouse is being treated  
22 at the hospital where the nurse is employed.

23 Subdivision (c) continues former Civil Code Section 2432(b)(2) without substantive change.

24 Subdivision (d) continues former Civil Code Section 2432(c) without substantive change. This  
25 subdivision prescribes conditions that must be satisfied if a conservator is to be designated as the  
26 attorney-in-fact for a conservatee under the Lanterman-Petris-Short Act. This subdivision has no  
27 application where a person other than the conservator is to be designated as attorney-in-fact.

28 See also Sections 4014 (“attorney-in-fact” defined), 4018 (“durable power of attorney”  
29 defined), 4026 (“principal” defined), 4603 (“community care facility” defined), 4606 (“durable  
30 power of attorney for health care” defined), 4612 (“health care decision” defined), 4615 (“health  
31 care provider” defined), 4618 (“residential care facility for the elderly” defined).

32 ☞ **Staff Note.** See the Staff Note to Section 4701.

33 **§ 4703 (amended). Requirements for printed form of durable power of attorney for health**  
34 **care**

35 SEC. \_\_\_\_\_. Section 4703 of the Probate Code is amended to read:

36 4703. (a) A printed form of a durable power of attorney for health care that is  
37 sold or otherwise distributed in this state for use by a person who does not have  
38 the advice of legal counsel shall provide no other authority than the authority to  
39 make health care decisions on behalf of the principal and shall contain, in not less  
40 than 10-point boldface type or a reasonable equivalent thereof, the following  
41 warning statement:



**WARNING TO PERSON EXECUTING  
THIS DOCUMENT**

1  
2  
3 This is an important legal document. Before executing this document, you  
4 should know these important facts:

5 This document gives the person you designate as your agent (the attorney-in-  
6 fact) the power to make health care decisions for you. Your agent must act  
7 consistently with your desires as stated in this document or otherwise made  
8 known.

9 Except as you otherwise specify in this document, this document gives your  
10 agent the power to consent to your doctor not giving treatment or stopping  
11 treatment necessary to keep you alive.

12 Notwithstanding this document, you have the right to make medical and other  
13 health care decisions for yourself so long as you can give informed consent with  
14 respect to the particular decision. In addition, no treatment may be given to you  
15 over your objection, and health care necessary to keep you alive may not be  
16 stopped or withheld if you object at the time.

17 This document gives your agent authority to consent, to refuse to consent, or to  
18 withdraw consent to any care, treatment, service, or procedure to maintain,  
19 diagnose, or treat a physical or mental condition. This power is subject to any  
20 statement of your desires and any limitations that you include in this document.  
21 You may state in this document any types of treatment that you do not desire. In  
22 addition, a court can take away the power of your agent to make health care  
23 decisions for you if your agent (1) authorizes anything that is illegal, (2) acts  
24 contrary to your known desires, or (3) where your desires are not known, does  
25 anything that is clearly contrary to your best interests.

26 This power will exist for an indefinite period of time unless you limit its duration  
27 in this document.

28 You have the right to revoke the authority of your agent by notifying your agent  
29 or your treating doctor, hospital, or other health care provider orally or in writing  
30 of the revocation.

31 Your agent has the right to examine your medical records and to consent to their  
32 disclosure unless you limit this right in this document.

33 Unless you otherwise specify in this document, this document gives your agent  
34 the power after you die to (1) authorize an autopsy, (2) donate your body or parts  
35 thereof for transplant or therapeutic or educational or scientific purposes, and (3)  
36 direct the disposition of your remains.

37 If there is anything in this document that you do not understand, you should ask  
38 a lawyer to explain it to you.

39 (b) The printed form described in subdivision (a) shall also include the following  
40 notice:

41 “This power of attorney will not be valid for making health care decisions  
42 unless it is either (1) signed by two qualified adult witnesses who are present

1 when you sign or acknowledge your signature or (2) acknowledged before a  
2 notary public in California.”

3 (c) This section does not apply to the statutory form provided by Section 4771  
4 4761.

5 **Comment.** .... Subdivision (c) is amended to revise a cross-reference to the statutory form of  
6 the advance health care directive that supersedes the former statutory form durable power of  
7 attorney for health care.

8 **Original Comment (1994).** Subdivisions (a) and (b) of Section 4703 continue former Civil  
9 Code Section 2433(a)-(b) without change, except that the statement in former Civil Code Section  
10 2433(b) that the witnesses had to be personally known to the principal has been deleted, since it  
11 was not consistent with other substantive requirements. Subdivision (c) makes clear that the  
12 statutory form is independent of the requirements of this section.

13 Section 4703 sets out a warning statement that is required to be in certain printed forms if the  
14 durable power of attorney is designed to authorize health care decisions. The warning statement  
15 in subdivision (a) is comparable to the warning in Section 4771 (statutory form durable power of  
16 attorney for health care). See Section 4771 Comment.

17 A printed form of a durable power of attorney for health care sold in this state for use by a  
18 person who does not have the advice of legal counsel can deal only with the authority to make  
19 health care decisions. If a person wants to execute a durable power of attorney to deal with both  
20 health care decisions and property matters and the person wants to use a printed form, two  
21 different forms are required — one for health care and another for property matters. However, a  
22 person who has the advice of a lawyer may cover both health care and property matters in one  
23 durable power of attorney. In this case, the warnings or certificate required by Section 4704 must  
24 be included.

25 See also Sections 4014 (“attorney-in-fact” defined), 4026 (“principal” defined), 4606 (“durable  
26 power of attorney for health care” defined), 4612 (“health care decision” defined).

27 **Original Comment (1995).** Subdivision (b) of Section 4703 is amended to delete the surplus  
28 word “and.” This is a technical, nonsubstantive change.

29 ☞ **Staff Note.** This section will need to be revised for consistency with the new form warning  
30 language. The State Bar Estate Planning, Trust and Probate Law Section Executive Committee  
31 appears to favor simplification of warnings in this statute. See Memorandum 97-41, Exhibit p. 15.

32 **§ 4704 (amended). Warnings in durable power of attorney for health care not on printed**  
33 **form**

34 SEC. \_\_\_\_\_. Section 4704 of the Probate Code is amended to read:

35 4704. (a) A durable power of attorney prepared for execution by a person  
36 resident in of this state that permits ~~the attorney-in-fact~~ an agent to make health  
37 care decisions and that is not a printed form shall include one of the following:

38 (1) The substance of the statements provided in subdivision (a) of Section  
39 4703 in capital letters not less than 10-point boldface type or a reasonable  
40 equivalent thereof.

41 (2) A certificate signed by the principal’s lawyer stating:

42 “I am a lawyer authorized to practice law in the state where this power of  
43 attorney was executed, and the principal was my client at the time this power  
44 of attorney was executed. I have advised my client concerning his or her  
45 rights in connection with this power of attorney and the applicable law and

1 the consequences of signing or not signing this power of attorney, and my  
2 client, after being so advised, has executed this power of attorney.”

3 (b) If a durable power of attorney includes the certificate provided for in  
4 paragraph (2) of subdivision (a) and permits the attorney-in-fact to make health  
5 care decisions for the principal, the applicable law of which the client is to be  
6 advised by the lawyer signing the certificate includes, but is not limited to, the  
7 matters listed in subdivision (a) of Section 4703.

8 **Comment.** Subdivision (a)(1) of Section 4704 is amended for consistency with Section 4703.  
9 Other technical, nonsubstantive changes are made.

10 **Original Comment.** Section 4704 continues former Civil Code Section 2433(c)-(d) without  
11 substantive change. See also Sections 4014 (“attorney-in-fact” defined), 4018 (“durable power of  
12 attorney” defined), 4026 (“principal” defined), 4606 (“durable power of attorney for health care”  
13 defined), 4612 (“health care decision” defined).

14 ☞ **Staff Note.** Consideration should be given as to whether this section should be retained. The  
15 staff would repeal it. The State Bar Estate Planning, Trust and Probate Law Section Executive  
16 Committee is “not at all wedded to the existing statutory form warnings,” which may also support  
17 repeal or amendment of this section. See Memorandum 97-41, Exhibit p. 15.

18 Article 2. Authority of Attorney-in-Fact Under Durable  
19 Power of Attorney for Health Care  
20 [heading unchanged]

21 **§ 4720 (amended). Attorney-in-fact’s authority to make health care decisions**

22 SEC. \_\_\_\_\_. Section 4720 of the Probate Code is amended to read:

23 4720. (a) Unless the durable power of attorney provides otherwise, the attorney-  
24 in-fact agent designated in a durable power of attorney for health care who is  
25 known to the health care provider to be available and willing to make health care  
26 decisions has priority over any other person to act for the principal in all matters of  
27 health care decisions, but the attorney-in-fact agent does not have authority to  
28 make a particular health care decision if the principal is able to give informed  
29 consent with respect to that decision.

30 (b) Subject to any limitations in the durable power of attorney, the attorney-in-  
31 fact agent designated in a durable power of attorney for health care may make  
32 health care decisions for the principal, effective before or after the death of the  
33 principal, to the same extent as the principal could make health care decisions if  
34 the principal had the capacity to do so, including the following:

35 (1) Making a disposition under the Uniform Anatomical Gift Act (Chapter 3.5  
36 (commencing with Section 7150) of Part 1 of Division 7 of the Health and Safety  
37 Code).

38 (2) Authorizing an autopsy under Section 7113 of the Health and Safety Code.

39 (3) Directing the disposition of remains under Section 7100 of the Health and  
40 Safety Code.

41 (c) In exercising the authority under the durable power of attorney for health  
42 care, the attorney-in-fact agent has a duty to act consistent with the desires of the

1 principal as expressed in the durable power of attorney or otherwise made known  
2 to the ~~attorney-in-fact~~ agent at any time or, if the principal's desires are unknown,  
3 to act in the best interests of the principal. The agent shall consider the principal's  
4 personal values to the extent known to the agent.

5 (d) Nothing in this chapter affects any right the person designated as ~~attorney-in-~~  
6 ~~fact~~ agent may have, apart from the durable power of attorney for health care, to  
7 make or participate in the making of health care decisions on behalf of the  
8 principal.

9 **Comment.** Subdivision (c) of Section 4720 is amended to add the last sentence, drawn from  
10 Section 2(e) of the Uniform Health-Care Decisions Act (1993). Technical amendments are made  
11 to conform to the language of this title. See Section \_\_\_\_ (“agent” defined).

12 **Background from Uniform Act.** Section 2(e) requires the agent to follow the principal's  
13 individual instructions and other expressed wishes to the extent known to the agent. To the extent  
14 such instructions or other wishes are unknown, the agent must act in the principal's best interest.  
15 In determining the principal's best interest, the agent is to consider the principal's personal values  
16 to the extent known to the agent. The Act does not prescribe a detailed list of factors for  
17 determining the principal's best interest but instead grants the agent discretion to ascertain and  
18 weigh the factors likely to be of importance to the principal.

19 [Adapted from Unif. Health-Care Decisions Act § 2(e) comment (1993).]

20 **Original Comment.** Section 4720 continues former Civil Code Section 2434 without  
21 substantive change.

22 Subdivision (a) of Section 4720 gives the attorney-in-fact priority to make health care decisions  
23 if known to the health care provider to be available and willing to act. The power of attorney may  
24 vary this priority. Subdivision (a) also provides that the attorney-in-fact is not authorized to make  
25 health care decisions if the principal is able to give informed consent. The power of attorney may,  
26 however, give the attorney-in-fact authority to make health care decisions for the principal even  
27 though the principal is able to give informed consent, but the power of attorney is always subject  
28 to Section 4724 (if principal objects, attorney-in-fact not authorized to consent to health care or to  
29 the withholding or withdrawal of health care necessary to keep the principal alive).

30 Subdivision (b) authorizes the attorney-in-fact to make health care decisions, except as limited  
31 by the durable power of attorney for health care. As provided in subdivision (c), in exercising his  
32 or her authority, the attorney-in-fact has the duty to act consistent with the principal's desires if  
33 known or, if the principal's desires are unknown, to act in the best interests of the principal. This  
34 authority is subject to Section 4722 which precludes consent to certain specified types of  
35 treatment. See also Section 4723 (unauthorized acts and omissions). The principal is free to  
36 provide any limitations on types of treatment in the durable power of attorney that are desired.  
37 See also Sections 4900 *et seq.* (judicial proceedings concerning powers of attorney). The  
38 authority under subdivision (b) is limited by Section 4724 (attorney-in-fact not authorized to  
39 consent to health care, or to the withholding or withdrawal of health care necessary to keep the  
40 principal alive, if principal objects). An attorney-in-fact may, without liability, decline to act  
41 under the power of attorney. For example, the attorney-in-fact may not be willing to follow the  
42 desires of the principal as stated in the power of attorney because of changed circumstances.  
43 Subdivision (d) makes clear that, in such a case, the attorney-in-fact may make or participate in  
44 the making of health care decisions for the principal without being bound by the stated desires of  
45 the principal to the extent that the person designated as the attorney-in-fact has the right under the  
46 applicable law apart from the durable power of attorney.

47 The description of certain post-death decisions in subdivision (b) is not intended to limit the  
48 authority to make such decisions under the governing statutes in the Health and Safety Code.

49 See also Sections 4014 (“attorney-in-fact” defined), 4018 (“durable power of attorney”  
50 defined), 4026 (“principal” defined), 4606 (“durable power of attorney for health care” defined),  
51 4612 (“health care decision” defined), 4615 (“health care provider” defined).

1   ☞ **Staff Note**

2   (1) The Uniform Health-Care Decisions Act provision reads as follows:

3       2(e) An agent shall make a health care decision in accordance with the principal's  
4       individual instructions, if any, and other wishes to the extent known to the agent. Otherwise,  
5       the agent shall make the decision in accordance with the agent's determination of the  
6       principal's best interest. In determining the principal's best interest, the agent shall consider  
7       the principal's personal values to the extent known to the agent.

8   The staff proposes only to add the "personal value" provision to the existing, more detailed  
9   provision.

10   (2) As discussed in Memorandum 97-4 (April meeting), it is not clear whether the introductory  
11   qualifying language in subdivision (a) applies only to the first clause or also to the final clause.  
12   The Comment makes clear that it applies to both, but the section can be read both ways. The staff  
13   believes the language should be revised for clarity because this is a crucial issue — can a  
14   principal delegate authority to make health care decisions to be exercised when the principal has  
15   capacity. As set out in draft Section 4752, the UHCDA provides: "Unless otherwise specified in a  
16   power of attorney for health care, the authority of an agent becomes effective only on a  
17   determination that the principal lacks capacity, and ceases to be effective on a determination that  
18   the principal has recovered capacity." Obviously, the overlap and inconsistencies between these  
19   sections remains to be resolved.

20   The State Bar Estate Planning, Trust and Probate Law Section Executive Committee is reported  
21   as being "comfortable with our current law on this point as it is expressed in Probate Code  
22   Section 4720." See Memorandum 97-41, Exhibit p. 10.

23   **§ 4721 (repealed). Availability of medical information to attorney-in-fact**

24   SEC. \_\_\_\_\_. Section 4721 of the Probate Code is repealed.

25   ~~4721. Except to the extent the right is limited by the durable power of attorney~~  
26   ~~for health care, an attorney-in-fact designated to make health care decisions under~~  
27   ~~a durable power of attorney for health care has the same right as the principal to~~  
28   ~~receive information regarding the proposed health care, to receive and review~~  
29   ~~medical records, and to consent to the disclosure of medical records.~~

30   **Comment.** Former Section 4721 is generalized in Section \_\_\_\_ [UHCDA § 8] (right to health  
31   care information).

32   **§ 4722 (amended). Limitations on attorney-in-fact's authority**

33   SEC. \_\_\_\_\_. Section 4722 of the Probate Code is amended to read:

34   4722. ~~A power of attorney may not authorize the attorney-in-fact to~~ This title  
35   ~~does not authorize~~ consent to any of the following on behalf of the principal  
36   patient:

37   (a) Commitment to or placement in a mental health treatment facility.

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

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

42   (d) Sterilization.

43   (e) Abortion.

44   **Comment.** Section 4722 is amended for consistency with the broader scope of the Uniform  
45   Health-Care Decisions Act.



1 **Original Comment.** Section 4722 continues former Civil Code Section 2435 without  
2 substantive change. The word “durable” has been omitted because the prohibition of this section  
3 applies to all powers of attorney. A power of attorney may not vary the limitations of this section.  
4 See also Section 4723 (unauthorized acts and omissions).

5 See also Sections 4014 (“attorney-in-fact” defined), 4022 (“power of attorney” defined), 4026  
6 (“principal” defined).

7 ☞ **Staff Note**

8 (1) Section 13(e) Uniform Health-Care Decisions Act permits admission to mental health care  
9 institutions if explicitly stated in the advance directive:

10 13(e) This [Act] does not authorize an agent or surrogate to consent to the admission of an  
11 individual to a mental health care institution unless the individual’s written advance health  
12 care directive expressly so provides.

13 Should we consider the limitations in Section 4722 for revision?

14 (2) This section will need to be moved from the power of attorney provisions to the general  
15 provisions since it covers advance directives and surrogate decisionmaking.

16 **§ 4723 (amended). Unauthorized acts and omissions**

17 SEC. \_\_\_\_\_. Section 4723 of the Probate Code is amended to read:

18 4723. (a) Nothing in this chapter title shall be construed to condone, authorize,  
19 or approve mercy killing, assisted suicide, or euthanasia, or to permit any  
20 affirmative or deliberate act or omission to end life other than the withholding or  
21 withdrawal of health care pursuant to a ~~durable power of attorney for health care~~  
22 an advance health care directive or by a surrogate so as to permit the natural  
23 process of dying.

24 (b) In making health care decisions under a ~~durable power of attorney for health~~  
25 ~~care~~ this title, an attempted suicide by the ~~principal patient~~  
26 to indicate a desire of the ~~principal patient~~ that health care treatment be restricted  
27 or inhibited.

28 **Comment.** Section 4723 is amended for consistency with Section 13(c) of the Uniform Health-  
29 Care Decisions Act (1993) and to conform to the broader scope of this title. The section has also  
30 been amended to insert subdivision breaks.

31 ☞ **Staff Note.** UHCDA Section 13(b) reads: “This [Act] does not authorize mercy killing,  
32 assisted suicide, euthanasia, or the provision, withholding, or withdrawal of health care, to the  
33 extent prohibited by other statutes of this State.” The uniform act provision is essentially a  
34 recognition of other statutes, but in California law, Section 4723 is probably one of the main  
35 substantive provisions. Accordingly, the draft amendment makes some language changes without  
36 altering the purpose of the section.

37 ☞ **Staff Note.** This section will need to be moved from the power of attorney provisions to the  
38 general provisions since it covers advance directives and surrogate decisionmaking.

39 **§ 4724 (amended). Patient’s objections**

40 SEC. \_\_\_\_\_. Section 4724 of the Probate Code is amended to read:

41 4724. Nothing in this chapter title authorizes ~~an attorney-in-fact to~~ consent to  
42 health care, or to consent to the withholding or withdrawal of health care necessary  
43 to keep the principal alive, if the ~~principal patient~~ objects to the health care or to  
44 the withholding or withdrawal of the health care. In such a case this situation, the

1 case is governed by the law that would apply if there were no ~~durable power of~~  
2 ~~attorney for health care~~ advance health care directive or surrogate decisionmaker.

3 **Comment.** Section 4724 is amended for consistency with the broader scope of the Uniform  
4 Health Care Decisions Act.

5 **Original Comment.** Section 4724 continues former Civil Code Section 2440 without change,  
6 except for the substitution of a reference to “chapter” instead of “article.”

7 Section 4724 precludes the attorney-in-fact from consenting to treatment for the principal, if the  
8 principal does not want the treatment, or from consenting to the withholding or withdrawal of  
9 treatment necessary to keep the principal alive, if the principal objects to withholding or stopping  
10 the treatment. This section does not limit any right the attorney-in-fact may have apart from the  
11 authority under the durable power of attorney for health care. See Section 4720(d).

12 See also Sections 4014 (“attorney-in-fact” defined), 4026 (“principal” defined), 4606 (“durable  
13 power of attorney for health care” defined), 4609 (“health care” defined).

14 ☞ **Staff Note.** This section will need to be moved from the power of attorney provisions to the  
15 general provisions since it covers advance directives and surrogate decisionmaking.

16 **§ 4725 (amended?). Restriction on execution of advance directive as condition for**  
17 **admission, treatment, or insurance**

18 SEC. \_\_\_\_\_. Section 4725 of the Probate Code is amended to read:

19 4725. No health care provider, health care service plan, insurer issuing disability  
20 insurance, self-insured employee welfare plan, or nonprofit hospital plan or similar  
21 insurance plan, may condition admission to a facility, or the providing of  
22 treatment, or insurance, on the requirement that a patient execute a durable power  
23 of attorney for health care.

24 **Original Comment.** Section 4725 continues former Civil Code Section 2441 without change.  
25 This section is intended to eliminate the possibility that duress might be used by a health care  
26 provider or insurer to cause the patient to execute a durable power of attorney for health care.

27 See also Sections 4606 (“durable power of attorney for health care” defined), 4615 (“health  
28 care provider” defined).

29 ☞ **Staff Note.** This section will need to be moved from the power of attorney provisions to the  
30 general provisions since it should cover advance directives generally. Alternatively, the statute  
31 could continue the existing statutes here governing durable powers of attorney for health care and  
32 provide additional rules governing written individual instructions (the other class of written  
33 advance health care directives).

34 **§ 4726 (amended). Alteration or forging, or concealment or withholding knowledge of**  
35 **revocation of written advance health care directive**

36 SEC. \_\_\_\_\_. Section 4726 of the Probate Code is amended to read:

37 4726. Any person who, except where justified or excused by law, alters or forges  
38 a ~~durable power of attorney for health care~~ written advance health care directive of  
39 another, or willfully conceals or withholds personal knowledge of a revocation as  
40 provided under Section [4727], with the intent to cause a withholding or  
41 withdrawal of health care necessary to keep the principal alive contrary to the  
42 desires of the principal, and thereby, because of that act, directly causes health care  
43 necessary to keep the principal alive to be withheld or withdrawn and the death of  
44 the principal thereby to be hastened, is subject to prosecution for unlawful

1 homicide as provided in Chapter 1 (commencing with Section 187) of Title 4 of  
2 Part 1 of the Penal Code.

3 **Comment.** Section 4726 is amended to reflect the broader scope of this title.

4 **Original Comment.** Section 4726 continues former Civil Code Section 2442 without change,  
5 except for the revision of a cross-reference to another section. This section is similar to Health  
6 and Safety Code Section 7191(d) (Natural Death Act).

7 See also Sections 4026 (“principal” defined), 4606 (“durable power of attorney for health care”  
8 defined), 4609 (“health care” defined).

9 ☞ **Staff Note.** This section will need to be moved from the power of attorney provisions to the  
10 general provisions since it should cover written advance directives generally.

11 **§ 4727 (amended). Revocation of durable power of attorney for health care**

12 SEC. \_\_\_\_\_. Section 4727 of the Probate Code is amended to read:

13 4727. (a) At any time while the principal has the capacity to give a durable  
14 power of attorney for health care, the principal may do any of the following:

15 (1) Revoke the appointment of the ~~attorney-in-fact~~ agent under the durable  
16 power of attorney for health care by notifying the ~~attorney-in-fact~~ agent orally or  
17 in writing.

18 (2) Revoke the authority granted to the ~~attorney-in-fact~~ agent to make health care  
19 decisions by notifying the [health care provider] orally or in writing.

20 (b) If the principal notifies the health care provider orally or in writing that the  
21 authority granted to the ~~attorney-in-fact~~ agent to make health care decisions is  
22 revoked, the health care provider shall make the notification a part of the  
23 principal’s medical records and shall make a reasonable effort to notify the  
24 ~~attorney-in-fact~~ agent of the revocation.

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

28 (d) Unless it provides otherwise, a valid durable power of attorney for health  
29 care revokes any prior durable power of attorney for health care.

30 (e) Unless the durable power of attorney for health care expressly provides  
31 otherwise, if after executing a durable power of attorney for health care the  
32 principal’s marriage is dissolved or annulled, the dissolution or annulment revokes  
33 any designation of the former spouse as an ~~attorney-in-fact~~ agent to make health  
34 care decisions for the principal. If any designation is revoked solely by this  
35 subdivision, it is revived by the principal’s remarriage to the former spouse.

36 (f) If authority granted by a durable power of attorney for health care is revoked  
37 under this section, a person is not subject to criminal prosecution or civil liability  
38 for acting in good faith reliance upon the durable power of attorney for health care  
39 unless the person has actual knowledge of the revocation.

40 **Comment.**

41 **Original Comment.** Section 4727 continues former Civil Code Section 2437 without change,  
42 except for some technical, nonsubstantive revisions. This section makes clear that the principal  
43 can revoke the appointment of the attorney-in-fact or the authority granted to the attorney-in-fact



1 by oral or written notification to the attorney-in-fact or health care provider. The principal may  
2 revoke the appointment or authority only if, at the time of revocation, the principal has sufficient  
3 capacity to give a durable power of attorney for health care. The burden of proof is on the person  
4 who seeks to establish that the principal did not have the capacity to revoke the appointment or  
5 authority. See subdivision (c). Although the authorization to act as attorney-in-fact to make health  
6 care decisions is revoked if the principal notifies the attorney-in-fact orally or in writing that the  
7 appointment of the attorney-in-fact is revoked, a health care provider is protected if the health  
8 care provider without knowledge of the revocation acts in good faith on a health care decision of  
9 the attorney-in-fact. See Section 4750 (immunities of health care provider).

10 Subdivision (b) is intended to preserve a record of a written or oral revocation. It also provides  
11 a means by which notice of an oral or written revocation to a health care provider may come to  
12 the attention of a successor health care provider and imposes a duty to make a reasonable effort to  
13 notify the attorney-in-fact of the revocation.

14 Subdivision (d) is consistent with Health and Safety Code Section 7193 (Natural Death Act).

15 Subdivision (f) makes clear that a person is not liable for acting in good faith reliance upon the  
16 durable power of attorney unless the person has actual knowledge of its revocation. This  
17 subdivision is a specific application of the general agency rule stated in Civil Code Section  
18 2356(b) and is comparable to a provision of the Natural Death Act. See Health & Safety Code §  
19 7190.5. Although a person is protected if the person acts in good faith and without actual notice  
20 of the revocation, a person who withholds knowledge of the revocation is guilty of unlawful  
21 homicide where the death of the principal is hastened as a result of the failure to disclose the  
22 revocation. See Section 4726.

23 See also Sections 4014 (“attorney-in-fact” defined), 4026 (“principal” defined), 4606 (“durable  
24 power of attorney for health care” defined), 4612 (“health care decision” defined), 4615 (“health  
25 care provider” defined).

26  **Staff Note**

27 (1) This section needs to be revised and reorganized, with a view toward enacting shorter  
28 sections, generalizing provisions to apply to advance directives generally where appropriate, and  
29 combining with provisions drawn from the UHCDA. Section 4727 was carried forward to the  
30 Probate Code from the Civil Code in this form because the Commission was not attempting to  
31 revise the health care power statutes in the course of preparing the Power of Attorney Law.

32 (2) Oral revocation, regardless of the patient’s competence, is also provided in the Natural  
33 Death Act (Health & Safety Code § 7188):


34 7188. (a) A declarant may revoke a declaration at any time and in any manner, without  
35 regard to the declarant’s mental or physical condition. A revocation is effective upon its  
36 communication to the attending physician or other health care provider by the declarant or a  
37 witness to the revocation.

38 (b) The attending physician or other health care provider shall make the revocation a part of  
39 the declarant’s medical record.

40 (3) Marc Hankin believes that “it is illogical to prohibit a health care provider from taking an  
41 action, pursuant to an advance directive, to which a patient objects, because in that situation the  
42 agent is making the decision precisely *because* the principal lacks capacity to make the decision  
43 himself.” See Memorandum 97-41, Exhibit p. 16.

44 **Prob. Code §§ 4750-4753 (repealed). Protections and immunities**

45 SEC. \_\_\_\_\_. Article 3 (commencing with Section 4750) of Chapter 2 of Part 4 of  
46 Division 4.5 of the Probate Code is repealed.

47  **Staff Note.** This article is moved to Chapter 7 (commencing with Section 4790) and  
48 combined with the related provisions from the Uniform Health-Care Decisions Act. The repealed  
49 text is set out here for reference purposes.

Article 3. Protections and Immunities

§ 4750 (repealed). Immunities of health care provider

4750. (a) Subject to any limitations stated in the durable power of attorney for health care and to subdivision (b) and to Sections 4722, 4723, 4724, 4725, and 4726, a health care provider is not subject to criminal prosecution, civil liability, or professional disciplinary action except to the same extent as would be the case if the principal, having had the capacity to give informed consent, had made the health care decision on his or her own behalf under like circumstances, if the health care provider relies on a health care decision and both of the following requirements are satisfied:

(1) The decision is made by an attorney-in-fact who the health care provider believes in good faith is authorized under this chapter to make the decision.

(2) The health care provider believes in good faith that the decision is not inconsistent with the desires of the principal as expressed in the durable power of attorney for health care or otherwise made known to the health care provider, and, if the decision is to withhold or withdraw health care necessary to keep the principal alive, the health care provider has made a good faith effort to determine the desires of the principal to the extent that the principal is able to convey those desires to the health care provider and the results of the effort are made a part of the principal's medical records.

(b) Nothing in this chapter authorizes a health care provider to do anything illegal.

(c) Notwithstanding the health care decision of the attorney-in-fact designated by a durable power of attorney for health care, the health care provider is not subject to criminal prosecution, civil liability, or professional disciplinary action for failing to withdraw health care necessary to keep the principal alive.

**Comment.**

**Original Comment.** Section 4750 continues former Civil Code Section 2438 without change, except for the revision of cross-references to other provisions and other technical, nonsubstantive revisions.

Section 4750 implements this chapter by protecting the health care provider who acts in good faith reliance on a health care decision made by an agent pursuant to this chapter. The protection under Section 4750 is limited. A health care provider is not protected from liability for malpractice. Nor is a health care provider protected if the health care provider fails to provide the agent with the information necessary so that the attorney-in-fact can give informed consent. Nor is a health care provider authorized to do anything illegal. See also Sections 4722 (forms of treatment not authorized by durable power of attorney for health care), 4723 (unauthorized acts and omissions).

Subdivision (c) provides immunity to the health care provider insofar as there might otherwise be liability for failing to comply with a decision of the attorney-in-fact to withdraw consent previously given to provide health care necessary to keep the principal alive. This subdivision does not deal with providing health care necessary to keep the principal alive. The situations where such health care can be provided without informed consent (such as an emergency situation) continue to be governed by the law otherwise applicable.

1 See also Sections 4014 (“attorney-in-fact” defined), 4026 (“principal” defined), 4606 (“durable  
2 power of attorney for health care” defined), 4609 (“health care” defined), 4612 (“health care  
3 decision” defined), 4615 (“health care provider” defined), 4618 (“residential care facility for the  
4 elderly” defined).

5 **§ 4751 (repealed). Convincing evidence of identity of principal**

6 ~~4751. For the purposes of the declaration of witnesses required by Section 4701  
7 or 4771, “convincing evidence” means the absence of any information, evidence,  
8 or other circumstances which would lead a reasonable person to believe that the  
9 person signing or acknowledging the durable power of attorney for health care as  
10 principal is not the individual he or she claims to be and any one of the following:~~

11 ~~(a) Reasonable reliance on the presentation of any one of the following, if the  
12 document is current or has been issued within five years:~~

13 ~~(1) An identification card or driver’s license issued by the California Department  
14 of Motor Vehicles.~~

15 ~~(2) A passport issued by the Department of State of the United States.~~

16 ~~(b) Reasonable reliance on the presentation of any one of the following, if the  
17 document is current or has been issued within five years and contains a photograph  
18 and description of the person named on it, is signed by the person, bears a serial or  
19 other identifying number, and, in the event that the document is a passport, has  
20 been stamped by the United States Immigration and Naturalization Service:~~

21 ~~(1) A passport issued by a foreign government.~~

22 ~~(2) A driver’s license issued by a state other than California or by a Canadian or  
23 Mexican public agency authorized to issue drivers’ licenses.~~

24 ~~(3) An identification card issued by a state other than California.~~

25 ~~(4) An identification card issued by any branch of the armed forces of the United  
26 States.~~

27 ~~(c) If the principal is a patient in a skilled nursing facility, a witness who is a  
28 patient advocate or ombudsman may, for the purposes of Section 4701 or 4771,  
29 rely upon the representations of the administrators or staff of the skilled nursing  
30 facility, or of family members, as convincing evidence of the identity of the  
31 principal if the patient advocate or ombudsman believes that the representations  
32 provide a reasonable basis for determining the identity of the principal.~~

33 **Comment.**

34 **Original Comment.** Section 4751 continues former Civil Code Section 2511 without  
35 substantive change. This section is drawn from Civil Code Section 1185 (acknowledgment of  
36 instrument by notary public), but is more restrictive because this section does not include the  
37 substance of Civil Code Section 1185(c)(1).

38 See also Sections 4026 (“principal” defined), 4606 (“durable power of attorney for health care”  
39 defined).

40 **§ 4752 (repealed). Presumption concerning power executed in other jurisdiction**

41 ~~4752. In the absence of knowledge to the contrary, a physician and surgeon or  
42 other health care provider may presume that a durable power of attorney for health~~

1 care or similar instrument, whether executed in another state or jurisdiction or in  
2 this state, is valid.

3 **Comment.**

4 **Original Comment.** Section 4752 continues former Civil Code Section 2438.5 without change.  
5 See also Sections 4606 (“durable power of attorney for health care” defined), 4615 (“health care  
6 provider” defined).

7 **§ 4753 (repealed). Request to forego resuscitative measures**

8 4753. (a) A health care provider who honors a request to forego resuscitative  
9 measures, as defined in subdivision (b), shall not be subject to criminal  
10 prosecution, civil liability, discipline for unprofessional conduct, administrative  
11 sanction, or any other sanction, as a result of his or her reliance upon that request,  
12 if the health care provider: (1) believes in good faith that the action or decision is  
13 consistent with this section, and (2) has no knowledge that the action or decision  
14 would be inconsistent with a health care decision that the individual signing the  
15 request would have made on his or her own behalf under like circumstances.

16 (b) A “request to forego resuscitative measures” shall be a written document,  
17 signed by (1) the individual, or a legally recognized surrogate health care  
18 decisionmaker, and (2) a physician and surgeon, that directs a health care provider  
19 to forego resuscitative measures. For the purpose of this section, a “request to  
20 forego resuscitative measures” shall include a prehospital “do not resuscitate”  
21 form as developed by the Emergency Medical Services Authority or other  
22 substantially similar form. A request to forego resuscitative measures may also be  
23 evidenced by a medallion engraved with the words “do not resuscitate” or the  
24 letters “DNR”, a patient identification number, and a 24-hour toll-free telephone  
25 number, issued by a person pursuant to an agreement with the Emergency Medical  
26 Services Authority.

27 (c) Request to forego resuscitative measures forms printed after January 1, 1995,  
28 shall contain the following:

29 “By signing this form, the surrogate acknowledges that this request to forego  
30 resuscitative measures is consistent with the known desires of, and with the best  
31 interest of, the individual who is the subject of the form.”

32 (d) A substantially similar printed form shall be valid and enforceable if all of  
33 the following conditions are met:

34 (1) It is signed by the individual, or the individual’s legally recognized surrogate  
35 health care decisionmaker, and a physician and surgeon.

36 (2) It directs health care providers to forego resuscitative measures.

37 (3) It contains all other information required by this section.

38 (e) In the absence of knowledge to the contrary, a health care provider may  
39 presume that a request to forego resuscitative measures is valid and unrevoked.

40 (f) This section shall apply whether the individual is within or outside a hospital  
41 or other health care facility.

1       (g) For purposes of this section “health care provider” shall include, but not be  
2 limited to, those persons described in Section 4615, and emergency response  
3 employees, including, but not limited to, firefighters, law enforcement officers,  
4 emergency medical technicians I and II, paramedics, or employees or volunteer  
5 members of legally organized and recognized volunteer organizations, who are  
6 trained in accordance with standards adopted as regulations by the Emergency  
7 Medical Services Authority pursuant to Sections 1797.170, 1797.171, 1797.172,  
8 1797.182, and 1797.183 of the Health and Safety Code to respond to medical  
9 emergencies in the course of performing their volunteer or employee duties with  
10 the organization.

11       (h) This section does not repeal or narrow current laws relating to health care  
12 decisionmaking, including the provisions governing the use of the Durable Power  
13 of Attorney for Health Care contained in this chapter, and the provisions relating  
14 to the use of declarations concerning life sustaining treatments pursuant to the  
15 Natural Death Act (Chapter 3.9 (commencing with Section 7185) of Part 1 of  
16 Division 7 of the Health and Safety Code).

17       **Comment.** Former Section 4753 is continued in Part 2 (commencing with Section 4820)  
18 without substantive change.

1 **Prob. Code §§ 4750-4754 (added). Advance health care directives**

2 SEC. \_\_\_\_\_. Chapter 3 (commencing with Section 4750) is added to Part 1 of  
3 Title 2 of Division 4.5 of the Probate Code, to read:

4 CHAPTER 3. ADVANCE HEALTH CARE DIRECTIVES

5 **§ 4750 (added). Individual instruction**

6 4750. An adult [or emancipated minor] may give an individual instruction for  
7 health care. The instruction may be oral or written. The instruction may be limited  
8 to take effect only if a specified condition arises.

9 **Comment.** Section 4750 is drawn from Section 2(a) of the Uniform Health-Care Decisions Act  
10 (1993). This section continues the substance of part of former Health and Safety Code Section  
11 7186.5 (Natural Death Act).

12 **Background from Uniform Act.** The individual instruction authorized in Section 2(a) may but  
13 need not be limited to take effect in specified circumstances, such as if the individual is dying. An  
14 individual instruction may be either written or oral.

15 [Adapted from Unif. Health-Care Decisions Act § 2(a) comment (1993).]

16 ☞ **Staff Note.** Should the statute refer specifically to emancipated minors or rely on the general  
17 statutes that govern the powers of emancipated minors. See generally Fam. Code §§ 6500 *et seq.*  
18 (minors), 7000 *et seq.* (Emancipation of Minors Law), 7050(e)(1) (consent to medical care),  
19 (e)(2) (delegation of power); Prob. Code §§ 4121, 4700. Note that the NDA is limited to persons  
20 18 or older, which might exclude emancipated minors, although we have not researched the issue.  
21 Existing power of attorney law is drafted on the basis of a person “having the capacity to  
22 contract,” thus picking up appropriate emancipated minors under general rules determining when  
23 they have the power to contract. See Sections 4022, 4120.

24 **§ 4751 (added). Power of attorney for health care**

25 4751. An adult or [emancipated minor] may execute a power of attorney for  
26 health care, as provided in [Article 1 (commencing with Section 4700 of Chapter  
27 2)]. A power of attorney may authorize the agent to make health care decisions as  
28 provided in [Article 2 (commencing with Section 4720 of Chapter 2)], and may  
29 also include individual instructions.

30 **Comment.** Section 4751 is drawn from the first and third sentences of Section 2(b) of the  
31 Uniform Health-Care Decisions Act (1993).

32 **Background from Uniform Act.** Section 2(b) authorizes a power of attorney for health care to  
33 include instructions regarding the principal’s health care. This provision has been included in  
34 order to validate the practice of designating an agent and giving individual instructions in one  
35 document instead of two. The authority of an agent falls within the discretion of the principal as  
36 expressed in the instrument creating the power and may extend to any health-care decision the  
37 principal could have made while having capacity. [See Prob. Code § 4720(b).]

38 Section 2(b) excludes the oral designation of an agent. Section 5(b) [Prob. Code § 4771]  
39 authorizes an individual to orally designate a surrogate by personally informing the supervising  
40 health-care provider. A power of attorney for health care, however, must be in writing and signed  
41 by the principal, [although it need not be witnessed or acknowledged].

42 [Adapted from Unif. Health-Care Decisions Act § 2(b) comment (1993).]



1   ☞ **Staff Note**

2   (1) This provision functions mainly to incorporate the relevant parts of the Power of Attorney  
3 Law within the advance directives provisions, following the logic of the Uniform Health Care  
4 Decisions Act. But the clarification that a power of attorney may include individual health care  
5 instructions is new and useful. The uniform act provision reads in full as follows:

6       2(b) An adult or emancipated minor may execute a power of attorney for health care, which  
7 may authorize the agent to make any health care decision the principal could have made while  
8 having capacity. The power must be in writing and signed by the principal. The power  
9 remains in effect notwithstanding the principal's later incapacity and may include individual  
10 instructions. Unless related to the principal by blood, marriage, or adoption, an agent may not  
11 be an owner, operator, or employee of [a residential long-term health care institution] at  
12 which the principal is receiving care.

13   (2) See the Staff Note following Section 4750 concerning emancipated minors.

14   **§ 4752 (added). Agent's authority**

15   4752. Unless otherwise specified in a power of attorney for health care, the  
16 authority of an agent becomes effective only on a determination that the principal  
17 lacks capacity, and ceases to be effective on a determination that the principal has  
18 recovered capacity.

19   **Comment.** Section 4752 is drawn from Section 2(c) of the Uniform Health-Care Decisions Act  
20 (1993).

21   **Background from Uniform Act.** Section 2(c) provides that the authority of the agent to make  
22 health-care decisions ordinarily does not become effective until the principal is determined to lack  
23 capacity and ceases to be effective should the principal recover capacity. A principal may  
24 provide, however, that the authority of the agent becomes effective immediately or upon the  
25 happening of some event other than the loss of capacity but may do so only by an express  
26 provision in the power of attorney. For example, a mother who does not want to make her own  
27 health-care decisions but prefers that her daughter make them for her may specify that the  
28 daughter as agent is to have authority to make health-care decisions immediately. The mother in  
29 that circumstance retains the right to later revoke the power of attorney as provided in Section 3  
30 [Prob. Code §§ \_\_\_\_-\_\_\_\_].

31   [Adapted from Unif. Health-Care Decisions Act § 2(c) comment (1993).]

32   **§ 4753 (added). Capacity determinations by primary physician**

33   4753. Unless otherwise specified in a written advance health care directive, a  
34 determination that an individual lacks or has recovered capacity, or that another  
35 condition exists that affects an individual instruction or the authority of an agent,  
36 shall be made by the primary physician.

37   **Comment.** Section 4753 is drawn from Section 2(d) of the Uniform Health-Care Decisions Act  
38 (1993)

39   **Background from Uniform Act.** Section 2(d) provides that unless otherwise specified in a  
40 written advance health-care directive, a determination that a principal has lost or recovered  
41 capacity to make health-care decisions must be made by the primary physician. For example, a  
42 principal might specify that the determination of capacity is to be made by the agent in  
43 consultation with the primary physician. Or a principal, such as a member of the Christian  
44 Science faith who relies on a religious method of healing and who has no primary physician,  
45 might specify that capacity be determined by other means. In the event that multiple decision  
46 makers are specified and they cannot agree, it may be necessary to seek court instruction as  
47 authorized by Section 14 [Prob. Code § 4942].

1 Section 2(d) also provides that unless otherwise specified in a written advance health-care  
2 directive, the existence of other conditions which affect an individual instruction or the authority  
3 of an agent must be determined by the primary physician. For example, an individual might  
4 specify that an agent may withdraw or withhold treatment that keeps the individual alive only if  
5 the individual has an incurable and irreversible condition that will result in the individual's death  
6 within a relatively short time. In that event, unless otherwise specified in the advance health-care  
7 directive, the determination that the individual has that condition must be made by the primary  
8 physician.

9 [Adapted from Unif. Health-Care Decisions Act § 2(d) comment (1993).]

10 **§ 4754 (added). Nomination of conservator in written advance health care directive**

11 4754. (a) A written advance health care directive that is not a durable power of  
12 attorney may include the individual's nomination of a conservator or guardian of  
13 the person for consideration by the court if protective proceedings for the  
14 principal's person or estate are thereafter commenced.

15 (b) If the protective proceedings are conservatorship proceedings in this state,  
16 the nomination has the effect provided in Section 1810 and the court shall give  
17 effect to the most recent writing executed in accordance with Section 1810,  
18 whether or not the writing is a written advance health care directive.

19 (c) Nomination of a conservator or guardian in a durable power of attorney is  
20 governed by Section 4126.

21 **Comment.** Subdivisions (a) and (b) of Section 4754 apply the durable power of attorney rule  
22 under Section 4126 to other written advance directives, i.e., individual instructions. Subdivision  
23 (c) provides a cross-reference to the general provision applicable to durable powers of attorney.  
24 This section implements the same purpose as Section 2(g) of the Uniform Health-Care Decisions  
25 Act (1993).

26 ☞ **Staff Note.** This section illustrates the drafting complications arising from organizing general  
27 rules based on two overlapping concepts: powers of attorney and written advance health care  
28 directives. As drafted, the principal can nominate a conservator of the person or estate in a  
29 *durable* power of attorney for property or health care. A written advance health care directive, if it  
30 is not a durable power of attorney, can only nominate a conservator of the person. In other words,  
31 an individual instruction concerning a person's desired health care is not the instrument for  
32 dealing with estate matters. However, the law currently permits a durable power of attorney for  
33 health care to nominate a conservator of the estate, so the argument could be made that draft  
34 Section 4754 should not be limited to nomination of a conservator of the person.

35 As to the drafting problems, it would be inappropriate from an organizational standpoint to add  
36 written advance health care directives to Section 4126. Conversely, draft Section 4754 cannot  
37 deal with nominations in powers of attorney for property. The proposed solution is to limit the  
38 draft section to written advance directives that are not already covered by Section 4126 and  
39 include a cross-reference to avoid the implication that a nomination cannot be included in a  
40 written advance directive that is a durable power of attorney.



1 **Prob. Code §§ 4760-4761 (added). Statutory Form Advance Health Care Directive**

2 SEC. \_\_\_\_\_. Chapter 4 (commencing with Section 4760) is added to Part 1 of  
3 Title 2 of Division 4.5 of the Probate Code, to read:

4 CHAPTER 4. OPTIONAL STATUTORY FORM OF  
5 ADVANCE HEALTH CARE DIRECTIVE

6 **§ 4760 (added). Authorization for statutory form of advance health care directive**

7 4760. The form provided in Section 4761 may, but need not, be used to create an  
8 advance health care directive. The other sections of this [division] govern the  
9 effect of the form or any other writing used to create an advance health care  
10 directive. An individual may complete or modify all or any part of the form.

11 **Comment.** Section 4760 is drawn from the introductory paragraph of Section 4 of the Uniform  
12 Health-Care Decisions Act (1993).

13 **§ 4761 (added). Optional form of advance health care directive**

14 4761. The statutory advance health care directive form is as follows:

15 ADVANCE HEALTH CARE DIRECTIVE  
16 (California Probate Code Section 4761)

17 **Explanation**

18 You have the right to give instructions about your own health care. You also  
19 have the right to name someone else to make health care decisions for you. This  
20 form lets you do either or both of these things. It also lets you express your wishes  
21 regarding donation of organs and the designation of your primary physician. If you  
22 use this form, you may complete or modify all or any part of it. You are free to use  
23 a different form.

24 Part 1 of this form is a power of attorney for health care. Part I lets you name  
25 another individual as agent to make health care decisions for you if you become  
26 incapable of making your own decisions or if you want someone else to make  
27 those decisions for you now even though you are still capable. You may also name  
28 an alternate agent to act for you if your first choice is not willing, able, or  
29 reasonably available to make decisions for you. Unless related to you, your agent  
30 may not be an owner, operator, or employee of [a residential long-term health care  
31 institution] at which you are receiving care.

32 Unless the form you sign limits the authority of your agent, your agent may  
33 make all health care decisions for you. This form has a place for you to limit the  
34 authority of your agent. You need not limit the authority of your agent if you wish  
35 to rely on your agent for all health care decisions that may have to be made. If you  
36 choose not to limit the authority of your agent, your agent will have the right to:

- 1 (a) consent or refuse consent to any care, treatment, service, or procedure to
- 2 maintain, diagnose, or otherwise affect a physical or mental condition;
- 3 (b) select or discharge health care providers and institutions;
- 4 (c) approve or disapprove diagnostic tests, surgical procedures, programs of
- 5 medication, and orders not to resuscitate; and
- 6 (d) direct the provision, withholding, or withdrawal of artificial nutrition
- 7 and hydration and all other forms of health care.

8 Part 2 of this form lets you give specific instructions about any aspect of your  
9 health care. Choices are provided for you to express your wishes regarding the  
10 provision, withholding, or withdrawal of treatment to keep you alive, including the  
11 provision of artificial nutrition and hydration, as well as the provision of pain  
12 relief. Space is also provided for you to add to the choices you have made or for  
13 you to write out any additional wishes.

14 Part 3 of this form lets you express an intention to donate your bodily organs and  
15 tissues following your death.

16 Part 4 of this form lets you designate a physician to have primary responsibility  
17 for your health care.

18 After completing this form, sign and date the form at the end. It is recommended  
19 but not required that you request two other individuals to sign as witnesses. Give a  
20 copy of the signed and completed form to your physician, to any other health care  
21 providers you may have, to any health care institution at which you are receiving  
22 care, and to any health care agents you have named. You should talk to the person  
23 you have named as agent to make sure that he or she understands your wishes and  
24 is willing to take the responsibility.

25 You have the right to revoke this advance health care directive or replace this  
26 form at any time.

27 \* \* \* \* \*

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PART 1  
POWER OF ATTORNEY FOR HEALTH CARE

(1) DESIGNATION OF AGENT: I designate the following individual as my agent to make health care decisions for me:

---

(name of individual you choose as agent)

---

(address) (city) (state) (zip code)

---

(home phone) (work phone)

OPTIONAL: If I revoke my agent’s authority or if my agent is not willing, able, or reasonably available to make a health care decision for me, I designate as my first alternate agent:

---

(name of individual you choose as first alternate agent)

---

(address) (city) (state) (zip code)

---

(home phone) (work phone)

OPTIONAL: If I revoke the authority of my agent and first alternate agent or if neither is willing, able, or reasonably available to make a health care decision for me, I designate as my second alternate agent:

---

(name of individual you choose as second alternate agent)

---

(address) (city) (state) (zip code)

---

(home phone) (work phone)

1 (2) AGENT’S AUTHORITY: My agent is authorized to make all health care decisions  
2 for me, including decisions to provide, withhold, or withdraw artificial nutrition and  
3 hydration and all other forms of health care to keep me alive, except as I state here:  
4

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5  
6  
7 (Add additional sheets if needed.)

---

8 (3) WHEN AGENT’S AUTHORITY BECOMES EFFECTIVE: My agent’s authority  
9 becomes effective when my primary physician determines that I am unable to make my  
10 own health care decisions unless I mark the following box. If I mark this box , my  
11 agent’s authority to make health care decisions for me takes effect immediately.

12 (4) AGENT’S OBLIGATION: My agent shall make health care decisions for me in  
13 accordance with this power of attorney for health care, any instructions I give in Part 2 of  
14 this form, and my other wishes to the extent known to my agent. To the extent my wishes  
15 are unknown, my agent shall make health care decisions for me in accordance with what  
16 my agent determines to be in my best interest. In determining my best interest, my agent  
17 shall consider my personal values to the extent known to my agent.

18 (5) NOMINATION OF [GUARDIAN]: If a [guardian] of my person needs to be  
19 appointed for me by a court, I nominate the agent designated in this form. If that agent is  
20 not willing, able, or reasonably available to act as [guardian], I nominate the alternate  
21 agents whom I have named, in the order designated.

22 PART 2  
23 INSTRUCTIONS FOR HEALTH CARE

24 If you are satisfied to allow your agent to determine what is best for you in making end-  
25 of-life decisions, you need not fill out this part of the form. If you do fill out this part of  
26 the form, you may strike any wording you do not want.

27 (6) END-OF-LIFE DECISIONS: I direct that my health care providers and others  
28 involved in my care provide, withhold, or withdraw treatment in accordance with the  
29 choice I have marked below:

30  (a) Choice Not To Prolong Life

31 I do not want my life to be prolonged if (1) I have an incurable and irreversible  
32 condition that will result in my death within a relatively short time, (2) I become  
33 unconscious and, to a reasonable degree of medical certainty, I will not regain  
34 consciousness, or (3) the likely risks and burdens of treatment would outweigh the  
35 expected benefits, OR

1      (b) Choice To Prolong Life

2     I want my life to be prolonged as long as possible within the limits of generally  
3     accepted health care standards.

4     (7) ARTIFICIAL NUTRITION AND HYDRATION: Artificial nutrition and hydration  
5     must be provided, withheld, or withdrawn in accordance with the choice I have made in  
6     paragraph (6) unless I mark the following box. If I mark this box , artificial nutrition  
7     and hydration must be provided regardless of my condition and regardless of the choice I  
8     have made in paragraph (6).

9     (8) RELIEF FROM PAIN: Except as I state in the following space, I direct that  
10    treatment for alleviation of pain or discomfort be provided at all times, even if it hastens  
11    my death:  
12

13

14

(Add additional sheets if needed.)

15    (9) OTHER WISHES: (If you do not agree with any of the optional choices above and  
16    wish to write your own, or if you wish to add to the instructions you have given above,  
17    you may do so here.) I direct that:  
18

19

20

(Add additional sheets if needed.)

21

### PART 3

22

### DONATION OF ORGANS AT DEATH

23

(OPTIONAL)

24    (10) Upon my death (mark applicable box):

25

(a) I give any needed organs, tissues, or parts, OR

26

(b) I give the following organs, tissues, or parts only.

27

(c) My gift is for the following purposes (strike any of the following you do not  
28    want):

29

(1) Transplant

30

(2) Therapy

31

(3) Research

32

(4) Education

PART 4  
PRIMARY PHYSICIAN  
(OPTIONAL)

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(11) I designate the following physician as my primary physician:

(name of physician)

(address) (city) (state) (zip code)

(phone)

OPTIONAL: If the physician I have designated above is not willing, able, or reasonably available to act as my primary physician, I designate the following physician as my primary physician:

(name of physician)

(address) (city) (state) (zip code)

(phone)

\*\*\*\*\*

(12) EFFECT OF COPY: A copy of this form has the same effect as the original.

(13) SIGNATURES: Sign and date the form here:

(date)

(sign your name)

(address)

(print your name)

(city)

(state)

1 (Optional) SIGNATURES OF WITNESSES:

2 First witness

Second witness

\_\_\_\_\_  
(print name)

\_\_\_\_\_  
(print name)

\_\_\_\_\_  
(address)

\_\_\_\_\_  
(address)

\_\_\_\_\_  
(city)

\_\_\_\_\_  
(state)

\_\_\_\_\_  
(city)

\_\_\_\_\_  
(state)

\_\_\_\_\_  
(signature of witness)

\_\_\_\_\_  
(signature of witness)

\_\_\_\_\_  
(date)

\_\_\_\_\_  
(date)

3

PART 5

4

SPECIAL WITNESS REQUIREMENT

5

(14) The following statement is required only if you are a patient in a skilled nursing facility — a health care facility that provides the following basic services: skilled nursing care and supportive care to patients whose primary need is for availability of skilled nursing care on an extended basis. The patient advocate or ombudsman must sign the following statement:

6

7

8

9

10

**Statement of Patient Advocate or Ombudsman**

11

I declare under penalty of perjury under the laws of California that I am a patient advocate or ombudsman as designated by the State Department of Aging and that I am serving as a witness as required by [subdivision (e) of Section 4701 of the Probate Code].

12

13

14

\_\_\_\_\_  
(date)

\_\_\_\_\_  
(sign your name)

\_\_\_\_\_  
(address)

\_\_\_\_\_  
(print your name)

\_\_\_\_\_  
(city)

\_\_\_\_\_  
(state)

15



1 **Comment.** Section 4761 provides the contents of the optional statutory form for the Advance  
2 Health Care Directive. Parts 1-4 of this form are drawn from Section 4 of the Uniform Health-  
3 Care Decisions Act (1993) and supersede the Statutory Form Durable Power of Attorney for  
4 Health Care in former Section 4771. Part 5 continues a portion of the former statutory form  
5 applicable to patients in skilled nursing facilities.

6 **Background from Uniform Act.** The optional form set forth in this section incorporates the  
7 [Section 2] requirements applicable to advance health-care directives. There are four parts to the  
8 form. An individual may complete all or any parts of the form. Any part of the form left blank is  
9 not to be given effect. For example, an individual may complete the instructions for health care  
10 part of the form alone. Or an individual may complete the power of attorney for health care part  
11 of the form alone. Or an individual may complete both the instructions and power of attorney for  
12 health care parts of the form. An individual may also, but need not, complete the parts of the form  
13 pertaining to donation of bodily organs and tissue and the designation of a primary physician.

14 Part 1, the power of attorney for health care, appears first on the form in order to ensure to the  
15 extent possible that it will come to the attention of a casual reader. This reflects the reality that the  
16 appointment of an agent is a more comprehensive approach to the making of health-care  
17 decisions than is the giving of an individual instruction, which cannot possibly anticipate all  
18 future circumstances which might arise.

19 Part 1(1) of the power of attorney for health care form requires only the designation of a single  
20 agent, but with opportunity given to designate a single first alternate and a single second alternate,  
21 if the individual chooses. No provision is made in the form for the designation of co-agents in  
22 order not to encourage the practice. Designation of co-agents is discouraged because of the  
23 difficulties likely to be encountered if the co-agents are not all readily available or do not agree. If  
24 co-agents are appointed, the instrument should specify that either is authorized to act if the other  
25 is not reasonably available. It should also specify a method for resolving disagreements.

26 Part 1(2) of the power of attorney for health care form grants the agent authority to make all  
27 health-care decisions for the individual subject to any limitations which the individual may state  
28 in the form. Reference is made to artificial nutrition and hydration and other forms of treatment to  
29 keep an individual alive in order to ensure that the individual is aware that those are forms of  
30 health care that the agent would have the authority to withdraw or withhold absent specific  
31 limitation.

32 Part 1(3) of the power of attorney for health care form provides that the agent's authority  
33 becomes effective upon a determination that the individual lacks capacity, but as authorized by  
34 [Section 2(c)] a box is provided for the individual to indicate that the authority of the agent takes  
35 effect immediately.

36 Part 1(4) of the power of attorney for health care form directs the agent to make health-care  
37 decisions in accordance with the power of attorney, any instructions given by the individual in  
38 Part 2 of the form, and the individual's other wishes to the extent known to the agent. To the  
39 extent the individual's wishes in the matter are not known, the agent is to make health-care  
40 decisions based on what the agent determines to be in the individual's best interest. In  
41 determining the individual's best interest, the agent is to consider the individual's personal values  
42 to the extent known to the agent. Section 2(e) imposes this standard, whether or not it is included  
43 in the form, but its inclusion in the form will bring it to the attention of the individual granting the  
44 power, to the agent, to any guardian or surrogate, and to the individual's health-care providers.

45 Part 1(5) of the power of attorney for health care form nominates the agent, if available, able,  
46 and willing to act, otherwise the alternate agents in order of priority stated, as guardians of the  
47 person for the individual. This provision is included in the form for two reasons. First, if an  
48 appointment of a guardian becomes necessary the agent is the one whom the individual would  
49 most likely want to serve in that role. Second, the nomination of the agent as guardian will reduce  
50 the possibility that someone other than the agent will be appointed as guardian who could use the  
51 position to thwart the agent's authority.

52 Because the variety of treatment decisions to which health-care instructions may relate is  
53 virtually unlimited, Part 2 of the form does not attempt to be comprehensive, but is directed at the

1 types of treatment for which an individual is most likely to have special wishes. Part 2(6) of the  
2 form, entitled “End-of-Life Decisions”, provides two alternative choices for the expression of  
3 wishes concerning the provision, withholding, or withdrawal of treatment. Under the first choice,  
4 the individual’s life is not to be prolonged if the individual has an incurable and irreversible  
5 condition that will result in death within a relatively short time, if the individual becomes  
6 unconscious and, to a reasonable degree of medical certainty, will not regain consciousness, or if  
7 the likely risks and burdens of treatment would outweigh the expected benefits. Under the second  
8 choice, the individual’s life is to be prolonged within the limits of generally accepted health-care  
9 standards. Part 2(7) of the form provides a box for an individual to mark if the individual wishes  
10 to receive artificial nutrition and hydration in all circumstances. Part 2(8) of the form provides  
11 space for an individual to specify any circumstance when the individual would prefer not to  
12 receive pain relief. Because the choices provided in Parts 2(6) to 2(8) do not cover all possible  
13 situations, Part 2(9) of the form provides space for the individual to write out his or her own  
14 instructions or to supplement the instructions given in the previous subparts of the form. Should  
15 the space be insufficient, the individual is free to add additional pages.

16 The health-care instructions given in Part 2 of the form are binding on the agent, any guardian,  
17 any surrogate, and, subject to exceptions specified in [Section 7(e)-(f)], on the individual’s health-  
18 care providers. Pursuant to [Section 7(d)], a health-care provider must also comply with a  
19 reasonable interpretation of those instructions made by an authorized agent, guardian, or  
20 surrogate.

21 Part 3 of the form provides the individual an opportunity to express an intention to donate  
22 bodily organs and tissues at death. The options provided are derived from a suggested form in the  
23 Comment to Section 2 of the Uniform Anatomical Gift Act (1987). [See Health & Safety Code §  
24 7150 *et seq.*]

25 Part 4 of the form provides space for the individual to designate a primary physician should the  
26 individual choose to do so. Space is also provided for the designation of an alternate primary  
27 physician should the first designated physician not be available, able, or willing to act.

28 Paragraph (12) of the form conforms with the provisions of [Section 12] by providing that a  
29 copy of the form has the same effect as the original.

30 **[The Act does not require witnessing, but to encourage the practice the form provides**  
31 **space for the signatures of two witnesses.]**

32 The form does not require formal acceptance by an agent. Formal acceptance by an agent has  
33 been omitted not because it is an undesirable practice but because it would add another stage to  
34 executing an advance health-care directive, thereby further reducing the number of individuals  
35 who will follow through and create directives. However, practitioners who wish to adapt this  
36 form for use by their clients are strongly encouraged to add a formal acceptance. Designated  
37 agents have no duty to act until they accept the office either expressly or through their conduct.  
38 Consequently, requiring formal acceptance reduces the risk that a designated agent will decline to  
39 act when the need arises. Formal acceptance also makes it more likely that the agent will become  
40 familiar with the principal’s personal values and views on health care. While the form does not  
41 require formal acceptance, the explanation to the form does encourage principals to talk to the  
42 person they have named as agent to make certain that the designated agent understands their  
43 wishes and is willing to take the responsibility.

44 [Adapted from Unif. Health-Care Decisions Act § 4 comment (1993).]  
45

46 **Part of Comment to existing Section 4771:** Section 4771 is consistent with and subject to the  
47 substantive law applicable to a durable power of attorney for health care. See Sections 4600-4779  
48 (durable power of attorney for health care), 4900-4948 (court review). However, in the statutory  
49 form durable power of attorney for health care, the warning set forth in Section 4771 replaces the  
50 one set forth in Section 4703. See also Section 4772 (warning or lawyer’s certificate). Two  
51 witnesses are required for use of a statutory form durable power of attorney for health care;  
52 acknowledgment before a notary is not permitted. Compare Section 4771 with Section 4700(b)  
53 (incorporating rules in Section 4121 permitting acknowledgment before notary public). The last

1 sentence of the fifth paragraph of the “warning” recognizes the authority given the court by  
2 Section 4942.

3 As to use of forms complying with former law, see Section 4775. See also Sections 4014  
4 (“attorney-in-fact” defined to include agent), 4026 (“principal” defined), 4603 (“community care  
5 facility” defined), 4606 (“durable power of attorney for health care” defined), 4609 (“health care”  
6 defined), 4612 (“health care decision” defined), 4615 (“health care provider” defined), 4618  
7 (“residential care facility for the elderly” defined).

8 ☞ **Staff Note.** The form will need to be conformed to any substantive changes that are made,  
9 such as with regard to witnessing requirements and special limitations and certifications  
10 concerning particular types of patients.

11  
12 **Prob. Code §§ 4770-4779 (repealed). Statutory Form Durable Power of Attorney for Health**  
13 **Care**

14 SEC. \_\_\_\_\_. Chapter 3 (commencing with Section 4770) of Part 4 of Division 4.5  
15 of the Probate Code is repealed.

16 ☞ **Staff Note.** The text of the existing statutory form that would be repealed is set out here for  
17 reference purposes, although it would not be reprinted in a bill.

18 ~~CHAPTER 3. STATUTORY FORM DURABLE POWER OF~~  
19 ~~ATTORNEY FOR HEALTH CARE~~

20 ~~§ 4770 (repealed). Short title~~

21 ~~4770. This chapter shall be known and may be cited as the Keene Health Care~~  
22 ~~Agent Act.~~

23 ~~**Comment.** Former Section 4770 is not continued. See new Section 4770 (optional form under~~  
24 ~~Uniform Health Care Decisions Act).~~

25 ~~§ 4771 (repealed). Statutory form durable power of attorney for health care~~

26 ~~4771. The use of the following form in the creation of a durable power of~~  
27 ~~attorney for health care under Chapter 1 (commencing with Section 4600) is~~  
28 ~~lawful, and when used, the power of attorney shall be construed in accordance~~  
29 ~~with this chapter and is subject to Chapter 1 (commencing with Section 4600),~~  
30 ~~provided, however, that the use of a form previously authorized by this statute (at~~  
31 ~~the time it was so authorized) remains valid.~~

32 ~~STATUTORY FORM~~

33 ~~DURABLE POWER OF ATTORNEY~~  
34 ~~FOR HEALTH CARE~~

35 ~~(California Probate Code Section 4771)~~

36 ~~WARNING TO PERSON EXECUTING THIS DOCUMENT~~

1 THIS IS AN IMPORTANT LEGAL DOCUMENT WHICH IS AUTHORIZED  
2 BY THE KEENE HEALTH CARE AGENT ACT. BEFORE EXECUTING THIS  
3 DOCUMENT, YOU SHOULD KNOW THESE IMPORTANT FACTS:

4 THIS DOCUMENT GIVES THE PERSON YOU DESIGNATE AS YOUR  
5 AGENT (THE ATTORNEY-IN-FACT) THE POWER TO MAKE HEALTH  
6 CARE DECISIONS FOR YOU. YOUR AGENT MUST ACT CONSISTENTLY  
7 WITH YOUR DESIRES AS STATED IN THIS DOCUMENT OR OTHERWISE  
8 MADE KNOWN.

9 EXCEPT AS YOU OTHERWISE SPECIFY IN THIS DOCUMENT, THIS  
10 DOCUMENT GIVES YOUR AGENT THE POWER TO CONSENT TO YOUR  
11 DOCTOR NOT GIVING TREATMENT OR STOPPING TREATMENT  
12 NECESSARY TO KEEP YOU ALIVE.

13 NOTWITHSTANDING THIS DOCUMENT, YOU HAVE THE RIGHT TO  
14 MAKE MEDICAL AND OTHER HEALTH CARE DECISIONS FOR  
15 YOURSELF SO LONG AS YOU CAN GIVE INFORMED CONSENT WITH  
16 RESPECT TO THE PARTICULAR DECISION. IN ADDITION, NO  
17 TREATMENT MAY BE GIVEN TO YOU OVER YOUR OBJECTION AT THE  
18 TIME, AND HEALTH CARE NECESSARY TO KEEP YOU ALIVE MAY NOT  
19 BE STOPPED OR WITHHELD IF YOU OBJECT AT THE TIME.

20 THIS DOCUMENT GIVES YOUR AGENT AUTHORITY TO CONSENT, TO  
21 REFUSE TO CONSENT, OR TO WITHDRAW CONSENT TO ANY CARE,  
22 TREATMENT, SERVICE, OR PROCEDURE TO MAINTAIN, DIAGNOSE, OR  
23 TREAT A PHYSICAL OR MENTAL CONDITION. THIS POWER IS  
24 SUBJECT TO ANY STATEMENT OF YOUR DESIRES AND ANY  
25 LIMITATIONS THAT YOU INCLUDE IN THIS DOCUMENT. YOU MAY  
26 STATE IN THIS DOCUMENT ANY TYPES OF TREATMENT THAT YOU  
27 DO NOT DESIRE. IN ADDITION, A COURT CAN TAKE AWAY THE  
28 POWER OF YOUR AGENT TO MAKE HEALTH CARE DECISIONS FOR  
29 YOU IF YOUR AGENT (1) AUTHORIZES ANYTHING THAT IS ILLEGAL,  
30 (2) ACTS CONTRARY TO YOUR KNOWN DESIRES, OR (3) WHERE YOUR  
31 DESIRES ARE NOT KNOWN, DOES ANYTHING THAT IS CLEARLY  
32 CONTRARY TO YOUR BEST INTERESTS.

33 THE POWERS GIVEN BY THIS DOCUMENT WILL EXIST FOR AN  
34 INDEFINITE PERIOD OF TIME UNLESS YOU LIMIT THEIR DURATION IN  
35 THIS DOCUMENT.

36 YOU HAVE THE RIGHT TO REVOKE THE AUTHORITY OF YOUR  
37 AGENT BY NOTIFYING YOUR AGENT OR YOUR TREATING DOCTOR,  
38 HOSPITAL, OR OTHER HEALTH CARE PROVIDER ORALLY OR IN  
39 WRITING OF THE REVOCATION.

40 YOUR AGENT HAS THE RIGHT TO EXAMINE YOUR MEDICAL  
41 RECORDS AND TO CONSENT TO THEIR DISCLOSURE UNLESS YOU  
42 LIMIT THIS RIGHT IN THIS DOCUMENT.

1 UNLESS YOU OTHERWISE SPECIFY IN THIS DOCUMENT, THIS  
2 DOCUMENT GIVES YOUR AGENT THE POWER AFTER YOU DIE TO (1)  
3 AUTHORIZE AN AUTOPSY, (2) DONATE YOUR BODY OR PARTS  
4 THEREOF FOR TRANSPLANT OR THERAPEUTIC OR EDUCATIONAL OR  
5 SCIENTIFIC PURPOSES, AND (3) DIRECT THE DISPOSITION OF YOUR  
6 REMAINS.

7 THIS DOCUMENT REVOKES ANY PRIOR DURABLE POWER OF  
8 ATTORNEY FOR HEALTH CARE.

9 YOU SHOULD CAREFULLY READ AND FOLLOW THE WITNESSING  
10 PROCEDURE DESCRIBED AT THE END OF THIS FORM. THIS  
11 DOCUMENT WILL NOT BE VALID UNLESS YOU COMPLY WITH THE  
12 WITNESSING PROCEDURE.

13 IF THERE IS ANYTHING IN THIS DOCUMENT THAT YOU DO NOT  
14 UNDERSTAND, YOU SHOULD ASK A LAWYER TO EXPLAIN IT TO YOU.

15 YOUR AGENT MAY NEED THIS DOCUMENT IMMEDIATELY IN CASE  
16 OF AN EMERGENCY THAT REQUIRES A DECISION CONCERNING  
17 YOUR HEALTH CARE. EITHER KEEP THIS DOCUMENT WHERE IT IS  
18 IMMEDIATELY AVAILABLE TO YOUR AGENT AND ALTERNATE  
19 AGENTS OR GIVE EACH OF THEM AN EXECUTED COPY OF THIS  
20 DOCUMENT. YOU MAY ALSO WANT TO GIVE YOUR DOCTOR AN  
21 EXECUTED COPY OF THIS DOCUMENT.

22 DO NOT USE THIS FORM IF YOU ARE A CONSERVATEE UNDER THE  
23 LANTERMAN-PETRIS SHORT ACT AND YOU WANT TO APPOINT YOUR  
24 CONSERVATOR AS YOUR AGENT. YOU CAN DO THAT ONLY IF THE  
25 APPOINTMENT DOCUMENT INCLUDES A CERTIFICATE OF YOUR  
26 ATTORNEY.

27 1. DESIGNATION OF HEALTH CARE AGENT.

28 I, \_\_\_\_\_

29 \_\_\_\_\_ (Insert your name and address)

30 do hereby designate and appoint \_\_\_\_\_

31 \_\_\_\_\_

32 (Insert name, address, and telephone number of one individual only as your agent to make  
33 health care decisions for you. None of the following may be designated as your agent: (1)  
34 your treating health care provider, (2) a nonrelative employee of your treating health care  
35 provider, (3) an operator of a community care facility, (4) a nonrelative employee of an  
36 operator of a community care facility, (5) an operator of a residential care facility for the  
37 elderly, or (6) a nonrelative employee of an operator of a residential care facility for the  
38 elderly.)

39 as my agent to make health care decisions for me as authorized in this document.  
40 For the purposes of this document, "health care decision" means consent, refusal  
41 of consent, or withdrawal of consent to any care, treatment, service, or procedure  
42 to maintain, diagnose, or treat an individual's physical or mental condition.



1 ~~2. CREATION OF DURABLE POWER OF ATTORNEY FOR HEALTH CARE.~~

2 ~~By this document I intend to create a durable power of attorney for health care~~  
3 ~~under Sections 4600 to 4752, inclusive, of the California Probate Code. This~~  
4 ~~power of attorney is authorized by the Keene Health Care Agent Act and shall be~~  
5 ~~construed in accordance with the provisions of Sections 4770 to 4779, inclusive,~~  
6 ~~of the Probate Code. This power of attorney shall not be affected by my~~  
7 ~~subsequent incapacity.~~

8 ~~3. GENERAL STATEMENT OF AUTHORITY GRANTED.~~

9 ~~Subject to any limitations in this document, I hereby grant to my agent full~~  
10 ~~power and authority to make health care decisions for me to the same extent that I~~  
11 ~~could make those decisions for myself if I had the capacity to do so. In exercising~~  
12 ~~this authority, my agent shall make health care decisions that are consistent with~~  
13 ~~my desires as stated in this document or otherwise made known to my agent,~~  
14 ~~including, but not limited to, my desires concerning obtaining or refusing or~~  
15 ~~withdrawing life-prolonging care, treatment, services, and procedures.~~

16 ~~(If you want to limit the authority of your agent to make health care decisions for~~  
17 ~~you, you can state the limitations in paragraph 4 (“Statement of Desires, Special~~  
18 ~~Provisions, and Limitations”) below. You can indicate your desires by including a~~  
19 ~~statement of your desires in the same paragraph.)~~

20 ~~4. STATEMENT OF DESIRES, SPECIAL PROVISIONS, AND LIMITATIONS.~~

21 ~~(Your agent must make health care decisions that are consistent with your known~~  
22 ~~desires. You can, but are not required to, state your desires in the space provided~~  
23 ~~below. You should consider whether you want to include a statement of your~~  
24 ~~desires concerning life-prolonging care, treatment, services, and procedures. You~~  
25 ~~can also include a statement of your desires concerning other matters relating to~~  
26 ~~your health care. You can also make your desires known to your agent by~~  
27 ~~discussing your desires with your agent or by some other means. If there are any~~  
28 ~~types of treatment that you do not want to be used, you should state them in the~~  
29 ~~space below. If you want to limit in any other way the authority given your agent~~  
30 ~~by this document, you should state the limits in the space below. If you do not~~  
31 ~~state any limits, your agent will have broad powers to make health care decisions~~  
32 ~~for you, except to the extent that there are limits provided by law.)~~

33 ~~In exercising the authority under this durable power of attorney for health care,~~  
34 ~~my agent shall act consistently with my desires as stated below and is subject to~~  
35 ~~the special provisions and limitations stated below:~~

36 ~~(a) Statement of desires concerning life-prolonging care, treatment, services, and~~  
37 ~~procedures:~~

38 ~~[lines omitted]~~

39 ~~(b) Additional statement of desires, special provisions, and limitations:~~

40 ~~[lines omitted]~~

1 ~~(You may attach additional pages if you need more space to complete your~~  
2 ~~statement. If you attach additional pages, you must date and sign EACH of the~~  
3 ~~additional pages at the same time you date and sign this document.)~~

4 ~~5. INSPECTION AND DISCLOSURE OF INFORMATION RELATING TO MY~~  
5 ~~PHYSICAL OR MENTAL HEALTH.~~

6 ~~Subject to any limitations in this document, my agent has the power and~~  
7 ~~authority to do all of the following:~~

8 ~~(a) Request, review, and receive any information, verbal or written, regarding~~  
9 ~~my physical or mental health, including, but not limited to, medical and hospital~~  
10 ~~records.~~

11 ~~(b) Execute on my behalf any releases or other documents that may be required~~  
12 ~~in order to obtain this information.~~

13 ~~(c) Consent to the disclosure of this information.~~

14 ~~(If you want to limit the authority of your agent to receive and disclose~~  
15 ~~information relating to your health, you must state the limitations in paragraph 4~~  
16 ~~("Statement of Desires, Special Provisions, and Limitations") above.)~~

17 ~~6. SIGNING DOCUMENTS, WAIVERS, AND RELEASES.~~

18 ~~Where necessary to implement the health care decisions that my agent is~~  
19 ~~authorized by this document to make, my agent has the power and authority to~~  
20 ~~execute on my behalf all of the following:~~

21 ~~(a) Documents titled or purporting to be a "Refusal to Permit Treatment" and~~  
22 ~~"Leaving Hospital Against Medical Advice."~~

23 ~~(b) Any necessary waiver or release from liability required by a hospital or~~  
24 ~~physician.~~

25 ~~7. AUTOPSY; ANATOMICAL GIFTS; DISPOSITION OF REMAINS.~~

26 ~~Subject to any limitations in this document, my agent has the power and~~  
27 ~~authority to do all of the following:~~

28 ~~(a) Authorize an autopsy under Section 7113 of the Health and Safety Code.~~

29 ~~(b) Make a disposition of a part or parts of my body under the Uniform~~  
30 ~~Anatomical Gift Act (Chapter 3.5 (commencing with Section 7150) of Part 1 of~~  
31 ~~Division 7 of the Health and Safety Code).~~

32 ~~(c) Direct the disposition of my remains under Section 7100 of the Health and~~  
33 ~~Safety Code.~~

34 ~~(If you want to limit the authority of your agent to consent to an autopsy, make an~~  
35 ~~anatomical gift, or direct the disposition of your remains, you must state the~~  
36 ~~limitations in paragraph 4 ("Statement of Desires, Special Provisions, and~~  
37 ~~Limitations") above.)~~



1 ~~8. DURATION.~~

2 ~~(Unless you specify otherwise in the space below, this power of attorney will exist~~  
3 ~~for an indefinite period of time.)~~

4 ~~This durable power of attorney for health care expires on~~  
5 \_\_\_\_\_

6 ~~(Fill in this space ONLY if you want to limit the duration of this power of~~  
7 ~~attorney.)~~

8 ~~9. DESIGNATION OF ALTERNATE AGENTS.~~

9 ~~(You are not required to designate any alternate agents but you may do so. Any~~  
10 ~~alternate agent you designate will be able to make the same health care decisions~~  
11 ~~as the agent you designated in paragraph 1, above, in the event that agent is unable~~  
12 ~~or ineligible to act as your agent. If the agent you designated is your spouse, he or~~  
13 ~~she becomes ineligible to act as your agent if your marriage is dissolved.)~~

14 ~~If the person designated as my agent in paragraph 1 is not available or becomes~~  
15 ~~ineligible to act as my agent to make a health care decision for me or loses the~~  
16 ~~mental capacity to make health care decisions for me, or if I revoke that person's~~  
17 ~~appointment or authority to act as my agent to make health care decisions for me,~~  
18 ~~then I designate and appoint the following persons to serve as my agent to make~~  
19 ~~health care decisions for me as authorized in this document, these persons to serve~~  
20 ~~in the order listed below:~~

21 ~~A. First Alternate Agent [blank lines omitted]~~

22 ~~–(Insert name, address, and telephone number of first alternate agent)~~

23 ~~B. Second Alternate Agent [blank lines omitted]~~

24 ~~–(Insert name, address, and telephone number of second alternate agent)~~

25 ~~10. NOMINATION OF CONSERVATOR OF PERSON.~~

26 ~~(A conservator of the person may be appointed for you if a court decides that one~~  
27 ~~should be appointed. The conservator is responsible for your physical care, which~~  
28 ~~under some circumstances includes making health care decisions for you. You are~~  
29 ~~not required to nominate a conservator but you may do so. The court will appoint~~  
30 ~~the person you nominate unless that would be contrary to your best interests. You~~  
31 ~~may, but are not required to, nominate as your conservator the same person you~~  
32 ~~named in paragraph 1 as your health care agent. You can nominate an individual~~  
33 ~~as your conservator by completing the space below.)~~

34 ~~If a conservator of the person is to be appointed for me, I nominate the following~~  
35 ~~individual to serve as conservator of the person:~~

36 \_\_\_\_\_  
37 ~~(Insert name and address of person nominated as conservator of the person)~~

1 ~~11. PRIOR DESIGNATIONS REVOKED. I revoke any prior durable power of~~  
2 ~~attorney for health care.~~

3 **DATE AND SIGNATURE OF PRINCIPAL**

4 ~~(YOU MUST DATE AND SIGN THIS POWER OF ATTORNEY)~~

5 I sign my name to this Statutory Form Durable Power of Attorney for Health  
6 Care on \_\_\_\_\_

7 \_\_\_\_\_ (Date)

8 at \_\_\_\_\_, \_\_\_\_\_

9 \_\_\_\_\_ (City) \_\_\_\_\_ (State)

10 \_\_\_\_\_  
11 \_\_\_\_\_ (You sign here)

12 ~~(THIS POWER OF ATTORNEY WILL NOT BE VALID UNLESS IT IS~~  
13 ~~SIGNED BY TWO QUALIFIED WITNESSES WHO ARE PRESENT WHEN~~  
14 ~~YOU SIGN OR ACKNOWLEDGE YOUR SIGNATURE. IF YOU HAVE~~  
15 ~~ATTACHED ANY ADDITIONAL PAGES TO THIS FORM, YOU MUST~~  
16 ~~DATE AND SIGN EACH OF THE ADDITIONAL PAGES AT THE SAME~~  
17 ~~TIME YOU DATE AND SIGN THIS POWER OF ATTORNEY.)~~

18 **STATEMENT OF WITNESSES**

19 ~~(This document must be witnessed by two qualified adult witnesses. None of the~~  
20 ~~following may be used as a witness: (1) a person you designate as your agent or~~  
21 ~~alternate agent, (2) a health care provider, (3) an employee of a health care~~  
22 ~~provider, (4) the operator of a community care facility, (5) an employee of an~~  
23 ~~operator of a community care facility, (6) the operator of a residential care facility~~  
24 ~~for the elderly, or (7) an employee of an operator of a residential care facility for~~  
25 ~~the elderly. At least one of the witnesses shall make the additional declaration set~~  
26 ~~out following the place where the witnesses sign.)~~

27 ~~(READ CAREFULLY BEFORE SIGNING. You can sign as a witness only if you~~  
28 ~~personally know the principal or the identity of the principal is proved to you by~~  
29 ~~convincing evidence.)~~

30 ~~(To have convincing evidence of the identity of the principal, you must be~~  
31 ~~presented with and reasonably rely on any one or more of the following:~~

32 ~~(1) An identification card or driver's license issued by the California Department~~  
33 ~~of Motor Vehicles that is current or has been issued within five years.~~

34 ~~(2) A passport issued by the Department of State of the United States that is~~  
35 ~~current or has been issued within five years.~~

~~(3) Any of the following documents if the document is current or has been issued within five years and contains a photograph and description of the person named on it, is signed by the person, and bears a serial or other identifying number:~~

~~(a) A passport issued by a foreign government that has been stamped by the United States Immigration and Naturalization Service.~~

~~(b) A driver's license issued by a state other than California or by a Canadian or Mexican public agency authorized to issue drivers' licenses.~~

~~(c) An identification card issued by a state other than California.~~

~~(d) An identification card issued by any branch of the armed forces of the United States.~~

~~(4) If the principal is a patient in a skilled nursing facility, a witness who is a patient advocate or ombudsman may rely upon the representations of the administrator or staff of the skilled nursing facility, or of family members, as convincing evidence of the identity of the principal if the patient advocate or ombudsman believes that the representations provide a reasonable basis for determining the identity of the principal.)~~

~~(Other kinds of proof of identity are not allowed.)~~

~~I declare under penalty of perjury under the laws of California that the person who signed or acknowledged this document is personally known to me (or proved to me on the basis of convincing evidence) to be the principal, that the principal signed or acknowledged this durable power of attorney in my presence, that the principal appears to be of sound mind and under no duress, fraud, or undue influence, that I am not the person appointed as agent by this document, and that I am not a health care provider, an employee of a health care provider, the operator of a community care facility, an employee of an operator of a community care facility, the operator of a residential care facility for the elderly, nor an employee of an operator of a residential care facility for the elderly.~~

~~Signature: \_\_\_\_\_ Residence Address: \_\_\_\_\_~~

~~Print Name: \_\_\_\_\_~~

~~Date: \_\_\_\_\_~~

~~Signature: \_\_\_\_\_ Residence Address: \_\_\_\_\_~~

~~Print Name: \_\_\_\_\_~~

~~Date: \_\_\_\_\_~~

~~(AT LEAST ONE OF THE ABOVE WITNESSES MUST ALSO SIGN THE FOLLOWING DECLARATION.)~~

~~I further declare under penalty of perjury under the laws of California that I am not related to the principal by blood, marriage, or adoption, and, to the best of my knowledge, I am not entitled to any part of the principal's estate upon the principal's death under a will now existing or by operation of law.~~

1 Signature: \_\_\_\_\_

2 Signature: \_\_\_\_\_


3 **STATEMENT OF PATIENT ADVOCATE OR OMBUDSMAN**

4 ~~(If you are a patient in a skilled nursing facility, one of the witnesses must be a~~  
5 ~~patient advocate or ombudsman. The following statement is required only if you~~  
6 ~~are a patient in a skilled nursing facility — a health care facility that provides the~~  
7 ~~following basic services: skilled nursing care and supportive care to patients~~  
8 ~~whose primary need is for availability of skilled nursing care on an extended basis.~~  
9 ~~The patient advocate or ombudsman must sign both parts of the “Statement of~~  
10 ~~Witnesses” above AND must also sign the following statement.)~~

11 I further declare under penalty of perjury under the laws of California that I am a  
12 patient advocate or ombudsman as designated by the State Department of Aging  
13 and that I am serving as a witness as required by subdivision (e) of Section 4701  
14 of the Probate Code.

15 Signature: \_\_\_\_\_

16 **Comment.** The statutory form durable power of attorney for health care provided in former  
17 Section 4771 is superseded by the new optional statutory form for an advance health care  
18 directive under the Uniform Health Care Decisions Act in new Section 4771.

19  **Staff Note.** One of the needed reforms we hope this study can accomplish is the elimination  
20 of the all-cap notice in the statutory form. The State Bar Estate Planning, Trust and Probate Law  
21 Section Executive Committee “generally expressed the view that the simplified form contained in  
22 the Act is preferable to California’s more long-winded version.” See Memorandum 97-41,  
23 Exhibit p. 10 “Everyone supported the idea of avoiding all capitals; all caps sections are hard to  
24 read, and clients tend to blow by them.” See Memorandum 97-41, Exhibit p. 15.

25 **§ 4772 (repealed). Warning or lawyer’s certificate**

26 ~~4772. (a) Notwithstanding Section 4703, except as provided in subdivision (b), a~~  
27 ~~statutory form durable power of attorney for health care, to be valid, shall contain,~~  
28 ~~in not less than 10-point boldface type or a reasonable equivalent thereof, the~~  
29 ~~warning statement that is set forth in capital letters at the beginning of Section~~  
30 ~~4771.~~

31 ~~(b) Subdivision (a) does not apply if the statutory form durable power of~~  
32 ~~attorney for health care contains a certificate signed by the principal’s lawyer~~  
33 ~~stating the following:~~

34 ~~“I am a lawyer authorized to practice law in the state where this power of attorney~~  
35 ~~was executed, and the principal was my client at the time when this power of~~  
36 ~~attorney was executed. I have advised my client concerning his or her rights in~~  
37 ~~connection with this power of attorney and the applicable law and the~~  
38 ~~consequences of signing or not signing this power of attorney, and my client, after~~  
39 ~~being so advised, has executed this power of attorney.”~~

1 **Comment.**

2 **Original Comment.** Section 4772 continues former Civil Code Section 2501 without  
3 substantive change. This section invalidates a statutory form durable power of attorney for health  
4 care that does not contain the statutory warning or, in lieu of the warning, a lawyer’s certificate.  
5 The warning set forth in Section 4771 must be used in the statutory form instead of the warning  
6 set forth in Section 4703.

7 See also Sections 4026 (“principal” defined), 4621 (“statutory form durable power of attorney  
8 for health care” defined).

9 **§ 4773 (repealed). Formal requirements**

10 ~~4773. (a) Notwithstanding subdivision (c) of Section 4121, a statutory form~~  
11 ~~durable power of attorney for health care is valid, and the designated attorney-in-~~  
12 ~~fact may make health care decisions pursuant to its authority, only if it (1) contains~~  
13 ~~the date of its execution, (2) is signed by the principal, and (3) is signed by two~~  
14 ~~qualified witnesses, each of whom executes, under penalty of perjury, the~~  
15 ~~declaration set forth in the first paragraph of the “Statement of Witnesses” in the~~  
16 ~~form set forth in Section 4771, and one of whom also executes the declaration~~  
17 ~~under penalty of perjury set forth in the second paragraph of the “Statement of~~  
18 ~~Witnesses” in the form set forth in Section 4771.~~

19 ~~(b) Nothing in this section excuses compliance with the special requirements~~  
20 ~~imposed by subdivision (c) of Section 4701 and subdivision (d) of Section 4702.~~

21 **Comment.**

22 **Original Comment.** Section 4773 continues former Civil Code Section 2502 without change,  
23 except for the revision of cross-references.

24 Section 4773 is comparable to Section 4700. To be valid, a statutory form durable power of  
25 attorney for health care must satisfy the requirements of Sections 4772 and 4773. It should be  
26 noted that a statutory form durable power of attorney for health care requires two witnesses and,  
27 unlike the general rule under Section 4700(b) (incorporating execution rules of Section 4121),  
28 acknowledgment before a notary is not authorized.

29 See also Sections 4014 (“attorney-in-fact” defined), 4026 (“principal” defined), 4612 (“health  
30 care decision” defined), 4621 (“statutory form durable power of attorney for health care”  
31 defined).

32 **§ 4774 (repealed). Requirements for statutory form**

33 ~~4774. (a) Subject to subdivisions (b), (c), and (d), a power of attorney is a~~  
34 ~~“statutory form durable power of attorney for health care,” as this phrase is used in~~  
35 ~~this chapter, if it meets both of the following requirements:~~

36 ~~(1) It meets the requirements of Sections 4772 and 4773.~~

37 ~~(2) It includes the exact wording of the text of paragraphs 1, 2, 3, and 4 of the~~  
38 ~~form set forth in Section 4771.~~

39 ~~(b) A statutory form durable power of attorney for health care may include one~~  
40 ~~or more or all of paragraphs 5 to 11, inclusive, of the form set forth in Section~~  
41 ~~4771.~~

42 ~~(c) A printed statutory form durable power of attorney for health care sold or~~  
43 ~~otherwise distributed in this state for use by a person who does not have the advice~~  
44 ~~of legal counsel shall contain the exact wording of the form set forth in Section~~

1 4771, including the warning and instructions, and nothing else. Nothing in this  
2 subdivision prohibits selling or otherwise distributing with the printed form (1)  
3 material that explains the form and its use if the material is separate from the  
4 printed form itself and is not a part of the form executed by the principal or (2) one  
5 or more additional pages that are separate from the printed form itself that a person  
6 may attach to the printed form as provided in subdivision (d) if the person so  
7 chooses.

8 (d) If one or more additional pages are attached to a statutory form durable  
9 power of attorney for health care as a statement, or additional statement, to be a  
10 part of subparagraph (a) or (b), or both, of paragraph 4 (“Statement of Desires,  
11 Special Provisions, and Limitations”) of the form set forth in Section 4771, each of  
12 the additional pages shall be dated and signed by the principal at the same time the  
13 principal dates and signs the statutory form durable power of attorney for health  
14 care.

15 **Comment.**

16 **Original Comment.** Section 4774 continues former Civil Code Section 2503 without  
17 substantive change. This section permits use of a statutory form durable power of attorney for  
18 health care that omits portions of the form set forth in Section 4771, such as, for example, the  
19 paragraph on “Duration.” However, if the form is sold or distributed for use by a person who does  
20 not have a lawyer, the form must be exactly as set forth in the statute with nothing omitted.  
21 Section 4774 also permits use of a printed statutory form that includes separate attached printed  
22 statements of desires, special provisions, and limitations, if the person using the form so desires,  
23 such as, for example, a statement that the health care attorney-in-fact is to confer with specified  
24 members of the principal’s family who are reasonably available before making specified health  
25 care decisions or a statement that the attorney-in-fact is authorized and directed to arrange for  
26 care of the principal by spiritual means through prayer in accordance with the tenets and practices  
27 of a recognized church or religious denomination by an accredited practitioner thereof. A  
28 separately printed statement of the principal’s desires concerning life-prolonging care, treatment,  
29 services, and procedures may also be used. The statements of desires, special provisions, and  
30 limitations — whether or not printed — are, of course, subject to the other rules in this part  
31 concerning durable powers of attorney for health care.

32 See also Sections 4022 (“power of attorney” defined), 4026 (“principal” defined), 4621  
33 (“statutory form durable power of attorney for health care” defined).

34 **§ 4775 (repealed). Use of forms valid under prior law**

35 4775. (a) A statutory form durable power of attorney for health care executed on  
36 or after January 1, 1992, using a form that complies with former Section 2500 of  
37 the Civil Code is as valid as if it had been executed using a form that complies  
38 with Section 4771 of this code.

39 (b) Notwithstanding former Section 2501 of the Civil Code or Section 4772 of  
40 this code, a statutory form durable power of attorney for health care executed on or  
41 after January 1, 1992, is not invalid if it contains the warning using the language  
42 set forth in former Section 2500 of the Civil Code instead of the warning using the  
43 language set forth in Section 4771 of this code.

44 (c) For the purposes of subdivision (c) of former Section 2503 of the Civil Code  
45 and subdivision (c) of Section 4774 of this code, on and after January 1, 1992, a




1 ~~printed statutory form durable power of attorney for health care may be sold or~~  
2 ~~otherwise distributed if it contains the exact wording of the form set forth in~~  
3 ~~former Section 2500 of the Civil Code or the exact wording of the form set forth in~~  
4 ~~Section 4771 of this code, including the warning and instructions, and nothing~~  
5 ~~else; but any printed statutory form durable power of attorney for health care~~  
6 ~~printed on or after January 1, 1992, that is sold or otherwise distributed in this state~~  
7 ~~for use by a person who does not have the advice of legal counsel shall contain the~~  
8 ~~exact wording of the form set forth in former Section 2500 of the Civil Code or the~~  
9 ~~exact wording of the form set forth in Section 4771 of this code, including the~~  
10 ~~warning and instructions, and nothing else.~~

11 **Comment.**

12 **Original Comment.** Section 4775 supersedes former Civil Code Section 2503.5, but like the  
13 former section, this section permits continued use of the form prescribed under former law until  
14 existing supplies are exhausted. Section 4775 permits use of a form complying with former Civil  
15 Code Section 2500 (applicable from January 1, 1986, until January 1, 1992). Accordingly, after  
16 January 1, 1992, either the form set forth in former Civil Code Section 2500 or the form set forth  
17 in Section 4771 may be used. This avoids the need to discard existing printed forms as of January  
18 1, 1992. However, forms printed on or after January 1, 1992, must contain the exact wording of  
19 the form set forth in Section 4771 or former Civil Code Section 2500, including the warning and  
20 instructions, and nothing else.

21 See also Section 4621 (“statutory form durable power of attorney for health care” defined).

22  **Staff Note.** Some sort of validating provision will be necessary, but it would be an  
23 improvement in the statute if it could be simplified.

24 **[to be moved?] § 4776. Language conferring general authority**

25 4776. In a statutory form durable power of attorney for health care, the language  
26 conferring general authority with respect to “health care decisions” authorizes the  
27 attorney-in-fact to select and discharge physicians, dentists, nurses, therapists, and  
28 other health care professionals as the attorney-in-fact determines necessary to  
29 carry out the health care decisions the attorney-in-fact is authorized by the power  
30 of attorney to make.

31 **Comment.**

32 **Original Comment.** Section 4776 continues former Civil Code Section 2504 without change.  
33 See also Sections 4014 (“attorney-in-fact” defined), 4612 (“health care decision” defined), 4621  
34 (“statutory form durable power of attorney for health care” defined).

35 **[to be moved?] § 4777. Effect of documents executed by attorney-in-fact**

36 4777. If a document described in paragraph 5 or 6 of the form set forth in  
37 Section 4771 is executed on behalf of the principal by the attorney-in-fact in the  
38 exercise of authority granted to the attorney-in-fact by paragraph 5 or 6 of the form  
39 set forth in Section 4771, the document has the same effect as if the principal had  
40 executed the document at the same time and under the same circumstances and  
41 had the capacity to execute the document at that time.

42 **Comment.**



1     **Original Comment.** Section 4777 continues former Civil Code Section 2505 without  
2 substantive change. See also Sections 4014 (“attorney-in-fact” defined), 4026 (“principal”  
3 defined).

4     **[to be moved?] § 4778. Termination of authority; alternate attorney-in-fact**

5     4778. If the authority of the attorney-in-fact under the statutory form durable  
6 power of attorney for health care is terminated by the court under Part 5  
7 (commencing with Section 4900), an alternate attorney-in-fact designated in the  
8 statutory form durable power of attorney for health care is not authorized to act as  
9 the attorney-in-fact unless the court so orders. In the order terminating the  
10 authority of the attorney-in-fact to make health care decisions for the principal, the  
11 court shall authorize the alternate attorney-in-fact, if any, designated in the  
12 statutory form durable power of attorney for health care to act as the attorney-in-  
13 fact to make health care decisions for the principal under the durable power of  
14 attorney for health care unless the court finds that authorizing that alternate  
15 attorney-in-fact to make health care decisions for the principal would not be in the  
16 best interests of the principal.

17     **Comment.**

18     **Original Comment.** Section 4778 continues former Civil Code Section 2506 without  
19 substantive change. This section applies only where the authority of the attorney-in-fact in fact is  
20 terminated by the court. This section does not apply where the attorney-in-fact dies or otherwise  
21 is not available or becomes ineligible to act as attorney-in-fact or loses the mental capacity to  
22 make health care decisions for the principal or where the principal revokes the attorney-in-fact’s  
23 appointment or authority. See paragraph 9 (designation of alternate attorneys-in-fact) of statutory  
24 form set forth in Section 4771. Where the court terminates the authority of the attorney-in-fact,  
25 Section 4778 applies and the alternate attorney-in-fact is not authorized to act as attorney-in-fact  
26 unless the court so orders. However, in this case, the court is required to authorize the alternate  
27 attorney-in-fact to act unless the court finds that would not be in the best interests of the principal.

28     See also Sections 4014 (“attorney-in-fact” defined), 4026 (“principal” defined), 4612 (“health  
29 care decision” defined), 4621 (“statutory form durable power of attorney for health care”  
30 defined).

31     **[to be moved?] § 4779. Use of other forms**

32     4779. Nothing in this chapter affects or limits the use of any other form for a  
33 durable power of attorney for health care. Any form complying with the  
34 requirements of Chapter 1 (commencing with Section 4600) may be used in lieu of  
35 the form provided by Section 4771, and none of the provisions of this chapter  
36 apply if the other form is used.

37     **Comment.**

38     **Original Comment.** Section 4779 continues former Civil Code Section 2507 without  
39 substantive change. This section makes clear that a person may use a durable power of attorney  
40 for health care that is not a statutory form durable power of attorney for health care under this  
41 chapter. The other durable power of attorney for health care — whether a printed form or a  
42 specially drafted document — must, of course, comply with the requirements of Sections 4600-  
43 4752 and is subject to the provisions of those sections.

1 **Prob. Code §§ 4770-4778 (added). Health care surrogates**

2 SEC. \_\_\_\_\_. Chapter 5 (commencing with Section 4770) is added to Part 1 of  
3 Title 2 of the Probate Code, to read:

4 CHAPTER 5. HEALTH CARE SURROGATES

5 ☞ **Staff Note.** This chapter presents the one major topic in this study that the Commission has  
6 not considered. Unlike the other principles covered by the Uniform Health-Care Decisions Act  
7 (powers of attorney and “living wills,” existing California law does not provide statutory  
8 surrogacy or family consent rules. For an brief introduction to some of the issues, see  
9 Memorandum 97-41.

10 **§ 4770 (added). Authority of surrogate to make health care decisions**

11 4770. A surrogate may make a health care decision for a patient who is an adult  
12 [or emancipated minor] if (1) the patient has been determined by the primary  
13 physician to lack capacity and (2) no agent or [guardian] has been appointed or the  
14 agent or [guardian] is not reasonably available.

15 **Comment.** Section 4770 is drawn from Section 5(a) of the Uniform Health-Care Decisions Act  
16 (1993).

17 **Background from Uniform Act.** Section 5(a) authorizes a surrogate to make a health-care  
18 decision for a patient who is an adult or emancipated minor if the patient lacks capacity to make  
19 health-care decisions and if no agent or guardian has been appointed or the agent or guardian is  
20 not reasonably available. Health-care decision making for unemancipated minors is not covered  
21 by this section. The subject of consent for treatment of minors is a complex one which in many  
22 states is covered by a variety of statutes and is therefore left to other state law.

23 [Adapted from Unif. Health-Care Decisions Act § 5(a) comment (1993).]

24 **§ 4771 (added). Designation or determination of surrogate**

25 4771. (a) An adult [or emancipated minor] may designate any [individual] to act  
26 as surrogate by personally informing the supervising health care provider.

27 (b) In the absence of a designation, or if the designee is not reasonably available,  
28 any member of the following classes of the patient’s family who is reasonably  
29 available, in descending order of priority, may act as surrogate:

30 (1) The spouse, unless legally separated.

31 (2) An adult child.

32 (3) A parent.

33 (4) An adult brother or sister.

34 (c) If none of the individuals eligible to act as surrogate under subdivision (a) or  
35 (b) is reasonably available, an adult who has exhibited special care and concern for  
36 the patient, who is familiar with the patient’s personal values, and who is  
37 reasonably available may act as surrogate.

38 **Comment.** Section 4771 is drawn from Section 5(b)-(c) of the Uniform Health-Care Decisions  
39 Act (1993).

40 **Background from Uniform Act.** While a designation of an agent in a written power of  
41 attorney for health care is preferred, situations may arise where an individual will not be in a  
42 position to execute a power of attorney for health care. In that event, subsection (b) affirms the

1 principle of patient autonomy by allowing an individual to designate a surrogate by personally  
2 informing the supervising health-care provider. The supervising health-care provider would then,  
3 in accordance with Section 7(b), be obligated to promptly record the designation in the  
4 individual's health-care record. An oral designation of a surrogate made by a patient directly to  
5 the supervising health-care provider revokes a previous designation of an agent. See Section 3(a).

6 If an individual does not designate a surrogate or if the designee is not reasonably available,  
7 subsection (b) applies a default rule for selecting a family member to act as surrogate. Like all  
8 default rules, it is not tailored to every situation, but incorporates the presumed desires of a  
9 majority of those who find themselves so situated. The relationships specified in subsection (b)  
10 include those of the half-blood and by adoption, in addition to those of the whole blood.

11 Subsection (c) permits a health-care decision to be made by a more distant relative or unrelated  
12 adult with whom the individual enjoys a close relationship but only if all family members  
13 specified in subsection (b) decline to act or are otherwise not reasonably available. Consequently,  
14 those in non-traditional relationships who want to make certain that health-care decisions are  
15 made by their companions should execute powers of attorney for health care designating them as  
16 agents or, if that has not been done, should designate them as surrogates.

17 Subsections (b) and (c) permit any member of a class authorized to serve as surrogate to  
18 assume authority to act even though there are other members in the class.

19 [Adapted from Unif. Health-Care Decisions Act § 5(b)-(c) comments (1993).]

20 ☞ **Staff Note.** Should “individual” in the first clause of subdivision (a) be “adult” for  
21 consistency with other provisions, such as subdivision (b)(2), (b)(4), and (c)?

## 22 § 4772 (added). Communication of surrogate's assumption of authority

23 4772. A surrogate shall communicate his or her assumption of authority as  
24 promptly as practicable to the members of the patient's family specified in  
25 subsection (b) who can be readily contacted.

26 **Comment.** Section 4772 is drawn from Section 5(d) of the Uniform Health-Care Decisions Act  
27 (1993).

28 **Background from Uniform Act.** Subsection (d) requires a surrogate who assumes authority to  
29 act to immediately so notify the members of the patient's family who in given circumstances  
30 would be eligible to act as surrogate. Notice to the specified family members will enable them to  
31 follow health-care developments with respect to their now incapacitated relative. It will also alert  
32 them to take appropriate action, including the appointment of a guardian or the commencement of  
33 judicial proceedings under Section 14, should the need arise.

34 [Adapted from Unif. Health-Care Decisions Act § 5(d) comment (1993).]

## 35 § 4773 (added). Conflicts between surrogates

36 4773. If more than one member of a class assumes authority to act as surrogate,  
37 and they do not agree on a health care decision and the supervising health care  
38 provider is so informed, the supervising health care provider shall comply with the  
39 decision of a majority of the members of that class who have communicated their  
40 views to the provider. If the class is evenly divided concerning the health care  
41 decision and the supervising health care provider is so informed, that class and all  
42 individuals having lower priority are disqualified from making the decision.

43 **Comment.** Section 4773 is drawn from Section 5(e) of the Uniform Health-Care Decisions Act  
44 (1993).

45 **Background from Uniform Act.** Section 5(e) addresses the situation where more than one  
46 member of the same class has assumed authority to act as surrogate and a disagreement over a  
47 health-care decision arises of which the supervising health-care provider is informed. Should that

1 occur, the supervising health-care provider must comply with the decision of a majority of the  
2 members of that class who have communicated their views to the provider. If the members of the  
3 class who have communicated their views to the provider are evenly divided concerning the  
4 health-care decision, however, then the entire class is disqualified from making the decision and  
5 no individual having lower priority may act as surrogate. When such a deadlock arises, it may be  
6 necessary to seek court determination of the issue as authorized by [Section 14].

7 [Adapted from Unif. Health-Care Decisions Act § 5(e) comment (1993).]

8 **§ 4774 (added). Principles governing surrogate’s health care decisions**

9 4774. A surrogate shall make a health care decision in accordance with the  
10 patient’s individual instructions, if any, and other wishes to the extent known to  
11 the surrogate. Otherwise, the surrogate shall make the decision in accordance with  
12 the surrogate’s determination of the patient’s best interest. In determining the  
13 patient’s best interest, the surrogate shall consider the patient’s personal values to  
14 the extent known to the surrogate.

15 **Comment.** Section 4774 is drawn from Section 5(f) of the Uniform Health-Care Decisions Act  
16 (1993).

17 **Background from Uniform Act.** Section 5(f) imposes on surrogates the same standard for  
18 health-care decision making as is prescribed for agents in Section 2(e) [Prob. Code § \_\_\_\_]. The  
19 surrogate must follow the patient’s individual instructions and other expressed wishes to the  
20 extent known to the surrogate. To the extent such instructions or other wishes are unknown, the  
21 surrogate must act in the patient’s best interest. In determining the patient’s best interest, the  
22 surrogate is to consider the patient’s personal values to the extent known to the surrogate.

23 [Adapted from Unif. Health-Care Decisions Act § 5(f) comment (1993).]

24 **§ 4775 (added). Exercise of authority free of judicial approval**

25 4775. A health care decision made by a surrogate for a patient is effective  
26 without judicial approval.

27 **Comment.** Section 4775 is drawn from Section 5(g) of the Uniform Health-Care Decisions Act  
28 (1993). For a related provision concerning powers of attorney

29 **Background from Uniform Act.** Section 5(g) provides that a health-care decision made by a  
30 surrogate is effective without judicial approval. A similar provision applies to health-care  
31 decisions made by agents (Section 2(f)) [Prob. Code § \_\_\_\_] or guardians (Section 6(c)) [Prob.  
32 Code § \_\_\_\_].

33 [Adapted from Unif. Health-Care Decisions Act § 5(g) comment (1993).]

34 **§ 4776 (added). Disqualification of surrogate**

35 4776. An individual at any time may disqualify another person, including a  
36 member of the individual’s family, from acting as the individual’s surrogate by a  
37 signed writing or by personally informing the supervising health care provider of  
38 the disqualification.

39 **Comment.** Section 4776 is drawn from Section 5(h) of the Uniform Health-Care Decisions Act  
40 (1993).

41 **Background from Uniform Act.** Section 5(h) permits an individual to disqualify any family  
42 member or other individual from acting as the individual’s surrogate, including disqualification of  
43 a surrogate who was orally designated.

44 [Adapted from Unif. Health-Care Decisions Act § 5(h) comment (1993).]

1 **§ 4777 (added). Limitation on who may act as surrogate**

2 4777. Unless related to the patient by blood, marriage, or adoption, a surrogate  
3 may not be an owner, operator, or employee of [a residential long-term health care  
4 institution] at which the patient is receiving care.

5 **Comment.** Section 4777 is drawn from Section 5(i) of the Uniform Health-Care Decisions Act  
6 (1993).

7 **Background from Uniform Act.** Section 5(i) disqualifies an owner, operator, or employee of a  
8 residential long-term health-care institution at which a patient is receiving care from acting as the  
9 patient's surrogate unless related to the patient by blood, marriage, or adoption. This  
10 disqualification is similar to that for appointed agents. See Section 2(b) & comment [Prob. Code §  
11 \_\_\_\_].

12 [Adapted from Unif. Health-Care Decisions Act § 5(i) comment (1993).]

13 **§ 4778 (added). Declaration of surrogate's authority**

14 4778. A supervising health care provider may require an individual claiming the  
15 right to act as surrogate for a patient to provide a written declaration under penalty  
16 of perjury stating facts and circumstances reasonably sufficient to establish the  
17 claimed authority.

18 **Comment.** Section 4778 is drawn from Section 5(j) of the Uniform Health-Care Decisions Act  
19 (1993).

20 **Background from Uniform Act.** Section 5(j) permits a supervising health-care provider to  
21 require an individual claiming the right to act as surrogate to provide a written declaration under  
22 penalty of perjury stating facts and circumstances reasonably sufficient to establish the claimed  
23 relationship. The authority to request a declaration is included to permit the provider to obtain  
24 evidence of claimed authority. A supervising health-care provider, however, does not have a duty  
25 to investigate the qualifications of an individual claiming authority to act as surrogate, and  
26 Section 9(a) protects a health-care provider or institution from liability for complying with the  
27 decision of such an individual, absent knowledge that the individual does not in fact have such  
28 authority.

29 [Adapted from Unif. Health-Care Decisions Act § 5(j) comment (1993).]

30 **Prob. Code §§ 4780-4787 (added). Duties of health care providers**

31 SEC. \_\_\_\_\_. Chapter 6 (commencing with Section 4780) is added to Part 1 of  
32 Title 2 of Division 4.5 of the Probate Code, to read:

33 **CHAPTER 6. DUTIES OF HEALTH CARE PROVIDERS**

34 **§ 4780 (added). Duty of health care provider to communicate**

35 4780. Before implementing a health care decision made for a patient, a  
36 supervising health care provider, if possible, shall promptly communicate to the  
37 patient the decision made and the identity of the person making the decision.

38 **Comment.** Section 4780 is drawn from Section 7(a) of the Uniform Health-Care Decisions Act  
39 (1993).

40 **Background from Uniform Act.** Section 7(a) further reinforces the Act's respect for patient  
41 autonomy by requiring a supervising health-care provider, if possible, to promptly communicate  
42 to a patient, prior to implementation, a health-care decision made for the patient and the identity  
43 of the person making the decision.



[Adapted from Unif. Health-Care Decisions Act § 7(a) comment (1993).]

**§ 4781 (added). Duty of supervising health care provider to record relevant information**

4781. A supervising health care provider who knows of the existence of an advance health care directive, a revocation of an advance health care directive, or a designation or disqualification of a surrogate, shall promptly record its existence in the patient's health care record and, if it is in writing, shall request a copy and if one is furnished shall arrange for its maintenance in the health care record.

**Comment.** Section 4781 is drawn from Section 7(b) of the Uniform Health-Care Decisions Act (1993).

**Background from Uniform Act.** The recording requirement in Section 7(b) reduces the risk that a health-care provider or institution, or agent, guardian or surrogate, will rely on an outdated individual instruction or the decision of an individual whose authority has been revoked.

[Adapted from Unif. Health-Care Decisions Act § 7(b) comment (1993).]

**§ 4782 (added). Duty of primary physician to record relevant information**

4782. A primary physician who makes or is informed of a determination that a patient lacks or has recovered capacity, or that another condition exists which affects an individual instruction or the authority of an agent, [guardian], or surrogate, shall promptly record the determination in the patient's health care record and communicate the determination to the patient, if possible, and to any person then authorized to make health care decisions for the patient.

**Comment.** Section 4782 is drawn from Section 7(c) of the Uniform Health-Care Decisions Act (1993).

**Background from Uniform Act.** Section 7(c) imposes recording and communication requirements relating to determinations that may trigger the authority of an agent, guardian or surrogate to make health-care decisions on an individual's behalf. The determinations covered by these requirements are those specified in Sections 2(c)-(d) and 5(a) [Prob. Code §§ \_\_\_\_ and \_\_\_\_, respectively].

[Adapted from Unif. Health-Care Decisions Act § 7(c) comment (1993).]

**§ 4783 (added). Obligations of health care provider**

4783. Except as provided in Section 4784, a health care provider or institution providing care to a patient shall do the following:

(a) Comply with an individual instruction of the patient and with a reasonable interpretation of that instruction made by a person then authorized to make health care decisions for the patient.

(b) Comply with a health care decision for the patient made by a person then authorized to make health care decisions for the patient to the same extent as if the decision had been made by the patient while having capacity.

**Comment.** Section 4783 is drawn from Section 7(d) of the Uniform Health-Care Decisions Act (1993).

**Background from Uniform Act.** Section 7(d) requires health-care providers and institutions to comply with a patient's individual instruction and with a reasonable interpretation of that instruction made by a person then authorized to make health-care decisions for the patient. A health-care provider or institution must also comply with a health-care decision made by a person

1 then authorized to make health-care decisions for the patient to the same extent as if the decision  
2 had been made by the patient while having capacity. These requirements help to protect the  
3 patient’s rights to autonomy and self-determination and validate and seek to effectuate the  
4 substitute decision making authorized by the Act.

5 [Adapted from Unif. Health-Care Decisions Act § 7(d) comment (1993).]

6 **§ 4784 (added). Health care provider’s right to decline**

7 4784. (a) A health care provider may decline to comply with an individual  
8 instruction or health care decision for reasons of conscience. A health care  
9 institution may decline to comply with an individual instruction or health care  
10 decision if the instruction or decision is contrary to a policy of the institution  
11 which is expressly based on reasons of conscience and if the policy was timely  
12 communicated to the patient or to a person then authorized to make health care  
13 decisions for the patient.

14 (b) A health care provider or institution may decline to comply with an  
15 individual instruction or health care decision that requires medically ineffective  
16 health care or health care contrary to generally accepted health care standards  
17 applicable to the health care provider or institution.

18 **Comment.** Section 4784 is drawn from Section 7(e)-(f) of the Uniform Health-Care Decisions  
19 Act (1993).

20 **Background from Uniform Act.** Not all instructions or decisions must be honored, however.  
21 Section 7(e) [Prob. Code § \_\_\_\_ (a)] authorizes a health-care provider to decline to comply with  
22 an individual instruction or health-care decision for reasons of conscience. Section 7(e) also  
23 allows a health-care institution to decline to comply with a health-care instruction or decision if  
24 the instruction or decision is contrary to a policy of the institution which is expressly based on  
25 reasons of conscience and if the policy was timely communicated to the patient or to an  
26 individual then authorized to make health-care decisions for the patient.

27 Section 7(f) [Prob. Code § \_\_\_\_ (b)] further authorizes a health-care provider or institution to  
28 decline to comply with an instruction or decision that requires the provision of care which would  
29 be medically ineffective or contrary to generally accepted health-care standards applicable to the  
30 provider or institution. “Medically ineffective health care”, as used in this section, means  
31 treatment which would not offer the patient any significant benefit.

32 [Adapted from Unif. Health-Care Decisions Act § 7(e)-(f) comment (1993).]

33 **§ 4785 (added). Obligations of declining health care provider or institution**

34 4785. A health care provider or institution that declines to comply with an  
35 individual instruction or health care decision shall do all of the following:

36 (a) Promptly so inform the patient, if possible, and any person then authorized to  
37 make health care decisions for the patient.

38 (b) Provide continuing care to the patient until a transfer can be effected.

39 (c) Unless the patient or person then authorized to make health care decisions for  
40 the patient refuses assistance, immediately make all reasonable efforts to assist in  
41 the transfer of the patient to another health care provider or institution that is  
42 willing to comply with the instruction or decision.

43 **Comment.** Section 4785 is drawn from Section 7(g) of the Uniform Health-Care Decisions Act  
44 (1993).



1       **Background from Uniform Act.** Section 7(g) requires a health-care provider or institution that  
2 declines to comply with an individual instruction or health-care decision to promptly  
3 communicate the refusal to the patient, if possible, and to any person then authorized to make  
4 health-care decisions for the patient. The provider or institution also must provide continuing care  
5 to the patient until a transfer can be effected. In addition, unless the patient or person then  
6 authorized to make health-care decisions for the patient refuses assistance, the health-care  
7 provider or institution must immediately make all reasonable efforts to assist in the transfer of the  
8 patient to another health-care provider or institution that is willing to comply with the instruction  
9 or decision.

10       [Adapted from Unif. Health-Care Decisions Act § 7(g) comment (1993).]

11       **§ 4786 (added). Restriction on requiring or prohibiting advance directive**

12       4786. A health care provider or institution may not require or prohibit the  
13 execution or revocation of an advance health care directive as a condition for  
14 providing health care.

15       **Comment.** Section 4786 is drawn from Section 7(h) of the Uniform Health-Care Decisions Act  
16 (1993).

17       **Background from Uniform Act.** Section 7(h), forbidding a health-care provider or institution  
18 to condition provision of health care on execution, non-execution, or revocation of an advance  
19 health-care directive, tracks the provisions of the federal Patient Self-Determination Act. 42  
20 U.S.C. §§ 1395cc(f)(1)(C) (Medicare), 1396a(w)(1)(C) (Medicaid).

21       [Adapted from Unif. Health-Care Decisions Act § 7(h) comment (1993).]

22       **§ 4787 (added). Right to health-care information**

23       4787. Unless otherwise specified in an advance health care directive, a person  
24 then authorized to make health care decisions for a patient has the same rights as  
25 the patient to request, receive, examine, copy, and consent to the disclosure of  
26 medical or any other health care information.

27       **Comment.** Section 4787 is drawn from Section 8 of the Uniform Health-Care Decisions Act  
28 (1993). This section continues former Section 4721 without substantive change, but is broader in  
29 scope since it covers all persons authorized to make health care decisions a patient, not just  
30 agents.

31       **Background from Uniform Act.** An agent, conservator, [guardian,] or surrogate stands in the  
32 shoes of the patient when making health-care decisions. To assure fully informed  
33 decisionmaking, this section provides that a person who is then authorized to make health-care  
34 decisions for a patient has the same right of access to health-care information as does the patient  
35 unless otherwise specified in the patient’s advance health-care directive.

36       [Adapted from Unif. Health-Care Decisions Act § 8 comment (1993).]

37       **Former Section 4721 Comment.** Section 4721 continues former Civil Code Section 2436  
38 without substantive change. Section 4721 makes clear that the attorney-in-fact can obtain and  
39 disclose information in the medical records of the principal. The power of attorney may limit the  
40 right of the attorney-in-fact, for example, by precluding examination of specified medical records  
41 or by providing that the examination of medical records is authorized only if the principal lacks  
42 the capacity to give informed consent. The right of the attorney-in-fact is subject to any  
43 limitations on the right of the patient to reach medical records. See Health & Safety Code §§  
44 1795.14 (denial of right to inspect mental health records), 1795.20 (providing summary of record  
45 rather than allowing access to entire record).

46       See also Sections 4014 (“attorney-in-fact” defined), 4026 (“principal” defined), 4606 (“durable  
47 power of attorney for health care” defined), 4609 (“health care” defined), 4612 (“health care  
48 decision” defined).

1 **Prob. Code §§ 4790-\_\_\_\_ (added). Immunities and liabilities**

2 SEC. \_\_\_\_\_. Chapter 7 (commencing with Section 4790) is added to Part 1 of  
3 Title 2 of Division 4.5 of the Probate Code, to read:

4 **CHAPTER 7. IMMUNITIES AND LIABILITIES**

5 ☞ **Staff Note.** This chapter is planned to combine the relevant provisions of existing law (mainly  
6 from Sections 4750-4752) and Uniform Health-Care Decisions Act Sections 9 & 10.

7 **§ 4790 (added). Immunities of health care provider or institution**

8 4790. A health care provider or institution acting in good faith and in accordance  
9 with generally accepted health care standards applicable to the health care provider  
10 or institution is not subject to civil or criminal liability or to discipline for  
11 unprofessional conduct for any of the following conduct:

12 (a) Complying with a health care decision of a person apparently having  
13 authority to make a health care decision for a patient, including a decision to  
14 withhold or withdraw health care.

15 (b) Declining to comply with a health care decision of a person based on a belief  
16 that the person then lacked authority.

17 (c) Complying with an advance health care directive and assuming that the  
18 directive was valid when made and has not been revoked or terminated.

19 **Comment.** Section 4790 is drawn from Section 9(a) of the Uniform Health-Care Decisions Act  
20 (1993).

21 **Background from Uniform Act.** Section 9 [Prob. Code §§ \_\_\_\_ & \_\_\_\_] grants broad protection  
22 from liability for actions taken in good faith. Section 9(a) permits a health-care provider or  
23 institution to comply with a health-care decision made by a person appearing to have authority to  
24 make health-care decisions for a patient; to decline to comply with a health-care decision made by  
25 a person believed to be without authority; and to assume the validity of and to comply with an  
26 advance health-care directive. Absent bad faith or actions taken that are not in accord with  
27 generally accepted health-care standards, a health-care provider or institution has no duty to  
28 investigate a claim of authority or the validity of an advance health-care directive.

29 [Adapted from Unif. Health-Care Decisions Act § 9(a) comment (1993).]

30 **§ 4791 (added). Immunities of agent and surrogate**

31 4791. An individual acting as agent or surrogate under this [part] is not subject  
32 to civil or criminal liability or to discipline for unprofessional conduct for health  
33 care decisions made in good faith.

34 **Comment.** Section 4791 is drawn from Section 9(b) of the Uniform Health-Care Decisions Act  
35 (1993).

36 **Background from Uniform Act.** Section 9(b) protects agents and surrogates acting in good  
37 faith from liability for making a health-care decision for a patient. Also protected from liability  
38 are individuals who mistakenly but in good faith believe they have the authority to make a health-  
39 care decision for a patient. For example, an individual who has been designated as agent in a  
40 power of attorney for health care might assume authority unaware that the power has been  
41 revoked. Or a family member might assume authority to act as surrogate unaware that a family  
42 member having a higher priority was reasonably available and authorized to act.

1 [Adapted from Unif. Health-Care Decisions Act § 9(b) comment (1993).]

2 **§ 4792 (added). Statutory damages**

3 4792. (a) A health care provider or institution that intentionally violates this  
4 [part] is subject to liability to the aggrieved individual for damages of \$[500] or  
5 actual damages resulting from the violation, whichever is greater, plus reasonable  
6 attorney's fees.

7 (b) A person who intentionally falsifies, forges, conceals, defaces, or obliterates  
8 an individual's advance health care directive or a revocation of an advance health  
9 care directive without the individual's consent, or who coerces or fraudulently  
10 induces an individual to give, revoke, or not to give an advance health care  
11 directive, is subject to liability to that individual for damages of \$[2,500] or actual  
12 damages resulting from the action, whichever is greater, plus reasonable attorney's  
13 fees.

14 **Comment.** Section 4792 is drawn from Section 10 of the Uniform Health-Care Decisions Act  
15 (1993).

16 **Background from Uniform Act.** Conduct which intentionally violates the Act and which  
17 interferes with an individual's autonomy to make health-care decisions, either personally or  
18 through others as provided under the Act, is subject to civil damages rather than criminal  
19 penalties out of a recognition that prosecutions are unlikely to occur. The legislature of an  
20 enacting state will have to determine the amount of damages which needs to be authorized in  
21 order to encourage the level of potential private enforcement actions necessary to effect  
22 compliance with the obligations and responsibilities imposed by the Act. The damages provided  
23 by this section do not supersede but are in addition to remedies available under other law.

24 [Adapted from Unif. Health-Care Decisions Act § \_\_\_\_ comment (1993).]

25 **[§ 4750 (continued?). Immunities of health care provider**

26 [4750]. (a) Subject to any limitations stated in the durable power of attorney for  
27 health care and to subdivision (b) and to Sections 4722, 4723, 4724, 4725, and  
28 4726, a health care provider is not subject to criminal prosecution, civil liability, or  
29 professional disciplinary action except to the same extent as would be the case if  
30 the principal, having had the capacity to give informed consent, had made the  
31 health care decision on his or her own behalf under like circumstances, if the  
32 health care provider relies on a health care decision and both of the following  
33 requirements are satisfied:

34 (1) The decision is made by an attorney-in-fact who the health care provider  
35 believes in good faith is authorized under this chapter to make the decision.

36 (2) The health care provider believes in good faith that the decision is not  
37 inconsistent with the desires of the principal as expressed in the durable power of  
38 attorney for health care or otherwise made known to the health care provider, and,  
39 if the decision is to withhold or withdraw health care necessary to keep the  
40 principal alive, the health care provider has made a good faith effort to determine  
41 the desires of the principal to the extent that the principal is able to convey those  
42 desires to the health care provider and the results of the effort are made a part of  
43 the principal's medical records.

1 (b) Nothing in this chapter authorizes a health care provider to do anything  
2 illegal.

3 (c) Notwithstanding the health care decision of the attorney-in-fact designated by  
4 a durable power of attorney for health care, the health care provider is not subject  
5 to criminal prosecution, civil liability, or professional disciplinary action for  
6 failing to withdraw health care necessary to keep the principal alive.

7 **Original Comment.** Section 4750 continues former Civil Code Section 2438 without change,  
8 except for the revision of cross-references to other provisions and other technical, nonsubstantive  
9 revisions.

10 Section 4750 implements this chapter by protecting the health care provider who acts in good  
11 faith reliance on a health care decision made by an agent pursuant to this chapter. The protection  
12 under Section 4750 is limited. A health care provider is not protected from liability for  
13 malpractice. Nor is a health care provider protected if the health care provider fails to provide the  
14 agent with the information necessary so that the attorney-in-fact can give informed consent. Nor  
15 is a health care provider authorized to do anything illegal. See also Sections 4722 (forms of  
16 treatment not authorized by durable power of attorney for health care), 4723 (unauthorized acts  
17 and omissions).

18 Subdivision (c) provides immunity to the health care provider insofar as there might otherwise  
19 be liability for failing to comply with a decision of the attorney-in-fact to withdraw consent  
20 previously given to provide health care necessary to keep the principal alive. This subdivision  
21 does not deal with providing health care necessary to keep the principal alive. The situations  
22 where such health care can be provided without informed consent (such as an emergency  
23 situation) continue to be governed by the law otherwise applicable.

24 See also Sections 4014 (“attorney-in-fact” defined), 4026 (“principal” defined), 4606 (“durable  
25 power of attorney for health care” defined), 4609 (“health care” defined), 4612 (“health care  
26 decision” defined), 4615 (“health care provider” defined), 4618 (“residential care facility for the  
27 elderly” defined).

28 **[§ 4751 (continued?). Convincing evidence of identity of principal**

29 [4751]. For the purposes of the declaration of witnesses required by Section  
30 4701 or 4771, “convincing evidence” means the absence of any information,  
31 evidence, or other circumstances which would lead a reasonable person to believe  
32 that the person signing or acknowledging the durable power of attorney for health  
33 care as principal is not the individual he or she claims to be and any one of the  
34 following:

35 (a) Reasonable reliance on the presentation of any one of the following, if the  
36 document is current or has been issued within five years:

37 (1) An identification card or driver’s license issued by the California Department  
38 of Motor Vehicles.

39 (2) A passport issued by the Department of State of the United States.

40 (b) Reasonable reliance on the presentation of any one of the following, if the  
41 document is current or has been issued within five years and contains a photograph  
42 and description of the person named on it, is signed by the person, bears a serial or  
43 other identifying number, and, in the event that the document is a passport, has  
44 been stamped by the United States Immigration and Naturalization Service:

45 (1) A passport issued by a foreign government.

1 (2) A driver’s license issued by a state other than California or by a Canadian or  
2 Mexican public agency authorized to issue drivers’ licenses.

3 (3) An identification card issued by a state other than California.

4 (4) An identification card issued by any branch of the armed forces of the United  
5 States.

6 (c) If the principal is a patient in a skilled nursing facility, a witness who is a  
7 patient advocate or ombudsman may, for the purposes of Section 4701 or 4771,  
8 rely upon the representations of the administrators or staff of the skilled nursing  
9 facility, or of family members, as convincing evidence of the identity of the  
10 principal if the patient advocate or ombudsman believes that the representations  
11 provide a reasonable basis for determining the identity of the principal.

12 **Original Comment.** Section 4751 continues former Civil Code Section 2511 without  
13 substantive change. This section is drawn from Civil Code Section 1185 (acknowledgment of  
14 instrument by notary public), but is more restrictive because this section does not include the  
15 substance of Civil Code Section 1185(c)(1).

16 See also Sections 4026 (“principal” defined), 4606 (“durable power of attorney for health care”  
17 defined).

18 **[§ 4752 (continued?). Presumption concerning power executed in other jurisdiction**

19 [4752]. In the absence of knowledge to the contrary, a physician and surgeon or  
20 other health care provider may presume that a durable power of attorney for health  
21 care or similar instrument, whether executed in another state or jurisdiction or in  
22 this state, is valid.

23 **Original Comment.** Section 4752 continues former Civil Code Section 2438.5 without change.  
24 See also Sections 4606 (“durable power of attorney for health care” defined), 4615 (“health care  
25 provider” defined).

1 **Chapter Heading (repealed)**

2 SEC. \_\_\_\_\_. The heading of Chapter 4 (commencing with Section 4800) of Part 4  
3 of Division 4.5 of the Probate Code is repealed.

4 ~~CHAPTER 4. REGISTRATION OF THE DURABLE POWERS OF~~  
5 ~~ATTORNEY FOR HEALTH CARE WITH SECRETARY OF STATE~~

6 **Part Heading (added)**


7 SEC. \_\_\_\_\_. A part heading added immediately preceding Section 4800 of the  
8 Probate Code, to read:

9 **PART 2 . ADVANCE HEALTH CARE DIRECTIVE REGISTRY**

10 **§ 4800 (amended). Registry system established by Secretary of State**

11 SEC. \_\_\_\_\_. Section 4800 of the Probate Code is amended to read:  
12 4800. The Secretary of State shall establish a registry system by which any  
13 person who has executed a ~~durable power of attorney for health care~~ a written  
14 advance health care directive may register in a central information center  
15 information regarding the ~~durable power of attorney for health care~~ advance  
16 directive, making that information available upon request to any health care  
17 provider, the public guardian, or other person authorized by the registrant.  
18 Information that may be received and released is limited to the registrant's name,  
19 social security or driver's license or other individual identifying number  
20 established by law, if any, address, date and place of birth, the intended place of  
21 deposit or safekeeping of the ~~durable power of attorney for health care~~ advance  
22 directive, and the name and telephone number of the ~~attorney in fact~~ agent and any  
23 alternative ~~attorney in fact~~ agent. The Secretary of State, at the request of the  
24 registrant, may transmit the information he or she receives regarding the ~~durable~~  
25 ~~power of attorney for health care~~ advance health care directive to the registry  
26 system of another jurisdiction as identified by the registrant. The Secretary of State  
27 may charge a fee to each registrant in an amount such that, when all fees charged  
28 to registrants are aggregated, the aggregated fees do not exceed the actual cost of  
29 establishing and maintaining the registry.

30 **Comment.** Section 4800 is amended to apply to written advance health care directives instead  
31 of the more limited class of durable powers of attorney for health care. See Section 4603  
32 ("advance health care directive" defined).

33  **Staff Note.** This registry scheme is implemented through a form issued by the Secretary of  
34 State. See See Memorandum 97-41, Exhibit pp. 13-14. Informal conversations suggest that very  
35 few forms have been filed (around 80 was one estimate) and that there have been no inquiries  
36 directed to the registry seeking information.



1 **[unchanged] § 4801. Identity and fees**

2 4801. The Secretary of State shall establish procedures to verify the identities of  
3 health care providers, the public guardian, and other authorized persons requesting  
4 information pursuant to Section 4800. No fee shall be charged to any health care  
5 provider, the public guardian, or other authorized person requesting information  
6 pursuant to Section 4800.

7 **§ 4802 (amended). Notice**

8 SEC. \_\_\_\_\_. Section 4802 of the Probate Code is amended to read:

9 4802. The Secretary of State shall establish procedures to advise each registrant  
10 of the following:

11 (a) A health care provider may not honor a ~~durable power of attorney for health~~  
12 ~~care~~ written advance health care directive until it receives a copy from the  
13 registrant.

14 (b) Each registrant must notify the registry upon revocation of the ~~durable power~~  
15 ~~of attorney for health care~~ advance directive.

16 (c) Each registrant must reregister upon execution of a subsequent ~~durable power~~  
17 ~~of attorney for health care~~ advance directive.

18 **Comment.** Section 4802 is amended to apply to written advance health care directives instead  
19 of the more limited class of durable powers of attorney for health care. See Section 4603  
20 (“advance health care directive” defined).

21 **§ 4804 (amended). Effect of failure to register**

22 SEC. \_\_\_\_\_. Section 4804 of the Probate Code is amended to read:

23 4804. Failure to register with the Secretary of State ~~shall not invalidate any~~  
24 ~~durable power of attorney for health care~~ does not affect any advance health care  
25 directive.

26 **Comment.** Section 4804 is amended to apply to written advance health care directives instead  
27 of the more limited class of durable powers of attorney for health care. See Section 4603  
28 (“advance health care directive” defined).

29 **§ 4805 (amended). Effect of registration on revocation and validity**

30 SEC. \_\_\_\_\_. Section 4805 of the Probate Code is amended to read:

31 4805. Registration with the Secretary of State ~~shall~~ does not affect the ability of  
32 the registrant to revoke that ~~durable power of attorney~~ advance health care  
33 directive or a later executed ~~power~~ advance directive, nor ~~shall~~ does registration  
34 raise any presumption of validity or superiority among any competing ~~powers~~  
35 advance directives or revocations.

36 **Comment.** Section 4805 is amended to apply to written advance health care directives instead  
37 of the more limited class of durable powers of attorney for health care. See Section 4603  
38 (“advance health care directive” defined).



1 § 4806 (amended). Effect on health care provider

2 SEC. \_\_\_\_\_. Section 4806 of the Probate Code is amended to read:

3 4806. Nothing in this chapter shall be construed to require a health care provider  
4 to request from the registry information about whether a patient has executed a  
5 ~~durable power of attorney for health care~~ an advance health care directive. Nothing  
6 in this chapter shall be construed to affect the duty of a health care provider to  
7 provide information to a patient regarding advance health care directives pursuant  
8 to any provision of federal law.

9 **Comment.** Section 4806 is amended to apply to written advance health care directives instead  
10 of the more limited class of durable powers of attorney for health care. See Section 4603  
11 (“advance health care directive” defined).

12 **Prob. Code §§ 4820-4827 (added). Request to forego resuscitative measures**

13 SEC. \_\_\_\_\_. Part 3 (commencing with Section 4820) is added to Title 2 of  
14 Division 4.5 of the Probate Code, to read:

15 PART 3 . REQUEST TO FOREGO  
16 RESUSCITATIVE MEASURES

17 § 4820 (added). “Request to forego resuscitative measures”

18 4820. As used in this part:

19 (a) “Request to forego resuscitative measures” means a written document, signed  
20 by (1) an individual, or [a legally recognized surrogate health care decisionmaker],  
21 and (2) a physician, that directs a health care provider to forego resuscitative  
22 measures for the individual.

23 (b) “Request to forego resuscitative measures” includes a prehospital “do not  
24 resuscitate” form as developed by the Emergency Medical Services Authority or  
25 other substantially similar form.

26 (c) A request to forego resuscitative measures may also be evidenced by a  
27 medallion engraved with the words “do not resuscitate” or the letters “DNR,” a  
28 patient identification number, and a 24-hour toll-free telephone number, issued by  
29 a person pursuant to an agreement with the Emergency Medical Services  
30 Authority.

31 **Comment.** Section 4820 continues former Section 4753(b) without substantive change. The  
32 phrase “for the individual” has been added at the end of subdivision (a) for clarity. The former  
33 reference to “physician and surgeon” has been changed to “physician” for clarity. See Section  
34 4623 (“physician” defined).

35 ☞ **Staff Note.** The terminology of this section will need to be checked for consistency with the  
36 language of Part 1. In this draft, we intend to umbrella these related parts under the general  
37 definitions in Part 1, even though they are not part of the uniform act.

38 DNR orders are also referred to in Health and Safety Code Section 128735.

1 **§ 4821 (added). “Health care provider”**

2 4821. As used in this part, “health care provider” includes, but is not limited to,  
3 the following:

4 (a) Persons described in Section 4621.

5 (b) Emergency response employees, including, but not limited to, firefighters,  
6 law enforcement officers, emergency medical technicians I and II, paramedics, and  
7 employees and volunteer members of legally organized and recognized volunteer  
8 organizations, who are trained in accordance with standards adopted as regulations  
9 by the Emergency Medical Services Authority pursuant to Sections 1797.170,  
10 1797.171, 1797.172, 1797.182, and 1797.183 of the Health and Safety Code to  
11 respond to medical emergencies in the course of performing their volunteer or  
12 employee duties with the organization.

13 **Comment.** Section 4821 continues former Section 4753(h) without substantive change.

14 ☞ **Staff Note.** The correct incorporation under subdivision (a) will need to be checked.

15 **§ 4823 (added). Immunity for honoring request to forego resuscitative measures**

16 4823. A health care provider who honors a request to forego resuscitative  
17 measures is not subject to criminal prosecution, civil liability, discipline for  
18 unprofessional conduct, administrative sanction, or any other sanction, as a result  
19 of his or her reliance on the request, if the health care provider (1) believes in good  
20 faith that the action or decision is consistent with this section, and (2) has no  
21 knowledge that the action or decision would be inconsistent with a health care  
22 decision that the individual signing the request would have made on his or her own  
23 behalf under like circumstances.

24 **Comment.** Section 4823 continues former Section 4753(a) without substantive change.

25 ☞ **Staff Note.** The terminology of this section will need to be checked for consistency with the  
26 language of Part 1.

27 **§ 4824 (added). Request to forego resuscitative measures forms**

28 4824. (a) Request to forego resuscitative measures forms printed after January 1,  
29 1995, shall contain the following:

30 “By signing this form, the surrogate acknowledges that this request to forego  
31 resuscitative measures is consistent with the known desires of, and with the  
32 best interest of, the individual who is the subject of the form.”

33 (b) A substantially similar printed form is valid and enforceable if all of the  
34 following conditions are met:

35 (1) The form is signed by the individual, or the individual’s legally recognized  
36 surrogate health care decisionmaker, and a physician.

37 (2) The form directs health care providers to forego resuscitative measures.

38 (3) The form contains all other information required by this section.

39 **Comment.** Section 4824 continues former Section 4753(d) without substantive change.

1 **§ 4825 (added). Presumption of validity**

2 4825. In the absence of knowledge to the contrary, a health care provider may  
3 presume that a request to forego resuscitative measures is valid and unrevoked.

4 **Comment.** Section 4825 continues former Section 4753(e) without change.

5 ☞ **Staff Note.** The terminology of this section will need to be checked for consistency with the  
6 language of Part 1.

7 **§ 4826 (added). Application of part**

8 4826. This part applies regardless of whether the individual is within or outside a  
9 hospital or other health care facility.

10 **Comment.** Section 4826 continues former Section 4753(f) without substantive change.

11 **§ 4827 (added). Relation to other law**

12 4827. This part does not repeal or narrow current laws relating to health care  
13 decisionmaking, including the provisions governing the use of the [Durable Power  
14 of Attorney for Health Care contained in this chapter], and the provisions relating  
15 to the use of [declarations concerning life sustaining treatments pursuant to the  
16 Natural Death Act (Chapter 3.9 (commencing with Section 7185) of Part 1 of  
17 Division 7 of the Health and Safety Code)].

18 **Comment.** Section 4827 continues former Section 4753(a) without substantive change.

19 ☞ **Staff Note.** The terminology and cross-references in this section will need to be checked for  
20 consistency with the language of Part 1.



1 **Part Heading (repealed)**

2 SEC. \_\_\_\_\_. The heading of Part 5 (commencing with Section 4900) of Division  
3 4.5 of the Probate Code is repealed.

4 ~~PART 5. JUDICIAL PROCEEDINGS~~  
5 ~~CONCERNING POWERS OF ATTORNEY~~

6 **Title Heading (added)**

7 SEC. \_\_\_\_\_. A title heading is added immediately preceding Section 4900 of the  
8 Probate Code, to read.

9 TITLE 3. JUDICIAL PROCEEDINGS CONCERNING POWERS OF  
10 ATTORNEY AND HEALTH CARE DECISIONS

11 ☞ **Staff Note.** With its typical economy, the Uniform Health-Care Decisions Act disposes of the  
12 subject matter of Sections 4900-4948 as follows:

13 **UHCDA Section 14. Judicial relief**

14 On petition of a patient, the patient's agent, guardian, or surrogate, a health-care provider or  
15 institution involved with the patient's care, or an individual described in Section 5(b) or (c),  
16 the [appropriate] court may enjoin or direct a health-care decision or order other equitable  
17 relief. A proceeding under this section is governed by [here insert appropriate reference to the  
18 rules of procedure or statutory provisions governing expedited proceedings and proceedings  
19 affecting incapacitated persons].

20 **Comment**

21 While the provisions of the Act are in general to be effectuated without litigation, situations  
22 will arise where judicial proceedings may be appropriate. For example, the members of a  
23 class of surrogates authorized to act under Section 5 may be evenly divided with respect to  
24 the advisability of a particular health-care decision. In that circumstance, authorization to  
25 proceed may have to be obtained from a court. Examples of other legitimate issues that may  
26 from time to time arise include whether an agent or surrogate has authority to act and whether  
27 an agent or surrogate has complied with the standard of care imposed by Sections 2(e) and  
28 5(f).

29 This section has a limited scope. The court under this section may grant only equitable  
30 relief. Other adequate avenues exist for those who wish to pursue money damages. The class  
31 of potential petitioners is also limited to those with a direct interest in a patient's health care.

32 The final portion of this section has been placed in brackets in recognition of the fact that  
33 states vary widely in the extent to which they codify procedural matters in a substantive act.  
34 The legislature of an enacting jurisdiction is encouraged, however, to cross-reference to its  
35 rules on expedited proceedings or rules on proceedings affecting incapacitated persons. The  
36 legislature of an enacting jurisdiction which wishes to include a detailed procedural provision  
37 in its adoption of the Act may want to consult Guidelines for State Court Decision Making in  
38 Life-Sustaining Medical Treatment Cases (2d ed. 1992), published by the National Center for  
39 State Courts.

40 Of course, the PAL procedure covers matters meant to be incorporated in the Uniform Health-  
41 Care Decisions Act language and also governs powers of attorney for property. In light of the  
42 highly developed language of California law, its recent enactment, and sometimes intensely

1 negotiated content, the staff proposes to continue the existing statute with modifications needed to  
2 conform to the language and concepts of the UHCDA.

3 CHAPTER 1. GENERAL PROVISIONS  
4 [heading unchanged]

5 **§ 4900 (amended). Power of attorney freely exercisable**

6 SEC. \_\_\_\_\_. Section 4900 of the Probate Code is amended to read:

7 4900. A Subject to this title:

8 (a) A power of attorney or other advance health care directive is exercisable free  
9 of judicial intervention, ~~subject to this part.~~

10 (b) A decision made by an attorney-in-fact for a principal is effective without  
11 judicial approval.

12 (c) A health care decision made by a surrogate for a patient is effective without  
13 judicial approval.

14 **Comment.** Subdivisions (b) and (c) of Section 4900 are drawn from Sections 2(f) and 5(g) of  
15 the Uniform Health-Care Decisions Act (1993).

16 **Original Comment.** Section 4900 continues former Civil Code Section 2423 without  
17 substantive change. The language of this section has been recast to provide a rule, rather than an  
18 expression of legislative intent. See also Section 4022 (“power of attorney” defined).

19 **§ 4901 (amended). Cumulative remedies**

20 SEC. \_\_\_\_\_. Section 4901 of the Probate Code is amended to read:

21 4901. The remedies provided in this ~~part~~ title are cumulative and not exclusive  
22 of any other remedies provided by law.

23 **Comment.**

24 **Original Comment.** Section 4901 continues former Civil Code Section 2420(a) without  
25 substantive change.

26 **§ 4902 (amended). Effect of provision in power of attorney attempting to limit right to**  
27 **petition**

28 SEC. \_\_\_\_\_. Section 4902 of the Probate Code is amended to read:

29 4902. Except as provided in Section 4903, this ~~part~~ title is not subject to  
30 limitation in the power of attorney or advance health care directive.

31 **Comment.**

32 **Original Comment.** Section 4902 continues former Civil Code Section 2422 without  
33 substantive change. See also Sections 4022 (“power of attorney” defined), 4101(b) (general rule  
34 on limitations provided in power of attorney).

35 **§ 4903 (amended). Limitations on right to petition**

36 SEC. \_\_\_\_\_. Section 4903 of the Probate Code is amended to read:

37 4903. (a) Subject to subdivision (b), a power of attorney or advance health care  
38 directive may expressly eliminate the authority of a person listed in Section 4940  
39 to petition the court for any one or more of the purposes enumerated in Section  
40 4941 or 4942 if both of the following requirements are satisfied:

1 (1) The power of attorney is executed by the principal at a time when the  
2 principal has the advice of a lawyer authorized to practice law in the state where  
3 the power of attorney is executed.

4 (2) The principal’s lawyer signs a certificate stating in substance:

5 “I am a lawyer authorized to practice law in the state where this power of  
6 attorney was executed, and the principal was my client at the time this power  
7 of attorney was executed. I have advised my client concerning his or her  
8 rights in connection with this power of attorney and the applicable law and  
9 the consequences of signing or not signing this power of attorney, and my  
10 client, after being so advised, has executed this power of attorney.”

11 (b) A power of attorney may not limit the authority of the following persons to  
12 petition under this part title:

13 (1) The attorney-in-fact, the principal, the conservator of the estate of the  
14 principal, or the public guardian, with respect to a petition for a purpose specified  
15 in Section 4941.

16 (2) The conservator of the person of the principal, with respect to a petition  
17 relating to a durable power of attorney for health care for a purpose specified in  
18 subdivision (a), (c), or (d) of Section 4942.

19 (3) The attorney-in-fact, with respect to a petition relating to a durable power of  
20 attorney for health care for a purpose specified in subdivision (a) or (b) of Section  
21 4942.

22 **Comment.**

23 **Original Comment.** Subdivision (a) of Section 4903 continues former Civil Code Section  
24 2421(a) without substantive change. This subdivision makes clear that a power of attorney may  
25 limit the applicability of this part only if it is executed with the advice and approval of the  
26 principal’s counsel. This limitation is designed to ensure that the execution of a power of attorney  
27 that restricts the remedies of this part is accomplished knowingly by the principal. The inclusion  
28 of a provision in the power of attorney making this part inapplicable does not affect the right to  
29 resort to any judicial remedies that may otherwise be available.

30 Subdivision (b) restates former Civil Code Section 2421(b), (c), and (d) without substantive  
31 change, except as explained below.

32 Subdivision (b)(1) continues without substantive change, the provision in former Civil Code  
33 Section 2421(b) concerning a conservator’s right to petition under Section 4941 (non-health care  
34 power of attorney), notwithstanding a limitation in the instrument. This authority is extended by  
35 subdivision (b)(1) to the attorney-in-fact, principal, and public guardian. See Section 4940(a)  
36 (attorney-in-fact), (b) (principal), (e) (conservator), (g) (public guardian).

37 Subdivision (b)(2)-(3) restates former Civil Code Section 2421(c)-(d) without substantive  
38 change. These paragraphs specify the purposes for which a conservator of the person or an  
39 attorney-in-fact may petition the court under this part with respect to a durable power of attorney  
40 for health care. The rights provided in these paragraphs cannot be limited by a provision in the  
41 power of attorney, but the power of attorney may restrict or eliminate the right of any other  
42 persons to petition the court under this part if the principal has the advice of legal counsel and the  
43 other requirements of subdivision (a) are met. See Section 4902 (effect of provision in power of  
44 attorney attempting to limit right to petition).

45 Under subdivision (b)(2), the conservator of the person may obtain a determination of whether  
46 the durable power of attorney for health care is in effect or has terminated, despite a contrary  
47 provision in the power of attorney. See Section 4942(a). The conservator of the person may



1 obtain a court order requiring the attorney-in-fact to report the attorney-in-fact’s acts under the  
2 durable power of attorney for health care if the attorney-in-fact fails to submit such a report  
3 within 10 days after a written request. See Section 4942(c). The conservator of the person may  
4 obtain a court determination that the durable power of attorney for health care is terminated if the  
5 court finds that the attorney-in-fact is acting illegally or is not performing the duty under the  
6 durable power of attorney for health care to act consistently with the desires of the principal or,  
7 where the principal’s desires are unknown or unclear, is acting in a manner that is clearly contrary  
8 to the best interests of the principal. See Section 4942(d). See also Section 4942 Comment.

9 Under subdivision (b)(3), the attorney-in-fact may obtain a determination of whether the  
10 durable power of attorney for health care is in effect or has terminated, despite a contrary  
11 provision in the power of attorney. See Section 4942(a). The attorney-in-fact may also obtain a  
12 court order passing on the acts or proposed acts of the attorney-in-fact under the durable power of  
13 attorney for health care. See Section 4942(b).

14 See also Sections 4014 (“attorney-in-fact” defined), 4022 (“power of attorney” defined), 4026  
15 (“principal” defined), 4606 (“durable power of attorney for health care” defined).

16 **[unchanged] § 4904. Jury trial**

17 4904. There is no right to a jury trial in proceedings under this division.

18 **Original Comment.** Section 4904 is a new provision. This section is consistent with the rule  
19 applicable to other fiduciaries. See Prob. Code §§ 1452 (guardianships and conservatorships),  
20 7200 (decedents’ estates), 17006 (trusts).

21 **[unchanged] § 4905. Application of general procedural rules**

22 4905. Except as otherwise provided in this division, the general provisions in  
23 Division 3 (commencing with Section 1000) apply to proceedings under this  
24 division.

25 **Original Comment.** Section 4905 provides a cross reference to the general procedural rules  
26 that apply to this division. See, e.g., Sections 1003 (guardian ad litem) (superseding former Civil  
27 Code Section 2418), 1021 (verification required) (superseding part of former Civil Code Section  
28 2415), 1041 (clerk to set matters for hearing) (superseding former Civil Code Section 2417(a)),  
29 1046 (hearing and orders) (superseding former Civil Code Section 2413), 1203 (order shortening  
30 time for notice) (superseding former Civil Code Section 2417(f)), 1215-1216 (service)  
31 (superseding former Civil Code Section 2417(c)), 1260 (proof of service) (superseding former  
32 Civil Code Section 2417(d)).

33 **CHAPTER 2. JURISDICTION AND VENUE**

34 [heading unchanged]

35 **[unchanged] § 4920. Jurisdiction and authority of court or judge**

36 4920. (a) The superior court has jurisdiction in proceedings under this division.

37 (b) The court in proceedings under this division is a court of general jurisdiction  
38 and the court, or a judge of the court, has the same power and authority with  
39 respect to the proceedings as otherwise provided by law for a superior court, or a  
40 judge of the superior court, including, but not limited to, the matters authorized by  
41 Section 128 of the Code of Civil Procedure.

42 **Original Comment.** Section 4920 is comparable to Section 7050 governing the jurisdiction  
43 and authority of the court in proceedings concerning administration of decedents’ estates. See  
44 Section 7050 Comment. This section is consistent with prior law. See former Civ. Code §§ 2415

1 (petition filed in superior court), 2417(e) (proceedings governed by decedents' estates provisions  
2 where no specific rule in power of attorney statute).

3 **[unchanged] § 4921. Basis of jurisdiction**

4 4921. The court may exercise jurisdiction in proceedings under this division on  
5 any basis permitted by Section 410.10 of the Code of Civil Procedure.

6 **Original Comment.** Section 4921 is comparable to Section 17004 (jurisdiction under Trust  
7 Law). This section recognizes that the court, in proceedings relating to powers of attorney under  
8 this division, may exercise jurisdiction on any basis that is not inconsistent with the California or  
9 United States Constitutions, as provided in Code of Civil Procedure Section 410.10. See generally  
10 Judicial Council Comment to Code Civ. Proc. § 410.10; Prob. Code § 17004 Comment (basis of  
11 jurisdiction under Trust Law).

12 **§ 4922 (amended). Jurisdiction over attorney-in-fact**

13 SEC. \_\_\_\_\_. Section 4922 of the Probate Code is amended to read:

14 4922. Without limiting Section 4921, a person who acts as an attorney-in-fact  
15 under a power of attorney governed by this division or an agent or surrogate under  
16 an advance health care directive governed by this division is subject to personal  
17 jurisdiction in this state with respect to matters relating to acts and transactions of  
18 the attorney-in-fact, agent, or surrogate performed in this state or affecting  
19 property or a principal or patient in this state.

20 **Comment.** Section 4922 is amended to reflect the broadened scope of this division resulting  
21 from addition of the Uniform Health Care Decisions Act, Section 4600 *et seq.*

22 **Original Comment.** Section 4922 is new. It is comparable to Sections 3902(b) (jurisdiction  
23 over custodian under Uniform Transfers to Minors Act) and 17003(a) (jurisdiction over trustee).  
24 This section is intended to facilitate exercise of the court's power under this part when the court's  
25 jurisdiction is properly invoked. As recognized by the introductory clause, constitutional  
26 limitations on assertion of jurisdiction apply to the exercise of jurisdiction under this section.  
27 Consequently, appropriate notice must be given to an attorney-in-fact as a condition of personal  
28 jurisdiction. *Cf.* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

29 See also Sections 4014 ("attorney-in-fact" defined), 4022 ("power of attorney" defined), 4026  
30 ("principal" defined).

31 **§ 4923 (amended). Venue**

32 SEC. \_\_\_\_\_. Section 4923 of the Probate Code is amended to read:

33 4923. The proper county for commencement of a proceeding under this division  
34 shall be determined in the following order of priority:

- 35 (a) The county in which the principal or patient resides.  
36 (b) The county in which the attorney-in-fact or surrogate resides.  
37 (c) A county in which property subject to the power of attorney is located.  
38 (d) Any other county that is in the principal's or patient's best interest.

39 **Comment.** Section 4923 is amended to reflect the broadened scope of this division resulting  
40 from addition of the Uniform Health Care Decisions Act, Section 4600 *et seq.*

41 **Original Comment.** Section 4923 supersedes former Civil Code Section 2414. This section is  
42 drawn from the rules applicable to guardianships and conservatorships. See Sections 2201-2202.  
43 See also Section 4053 (durable powers of attorney under law of another jurisdiction).

CHAPTER 3. PETITIONS, ORDERS, APPEALS  
[heading unchanged]

§ 4940 (amended). Petitioners

SEC. \_\_\_\_\_. Section 4940 of the Probate Code is amended to read:  
4940. Subject to Section 4903, a petition may be filed under this part title by any of the following persons:

- (a) The attorney-in-fact or surrogate.
- (b) The principal or person who executed an advance health care directive.
- (c) The spouse of the principal or person who executed an advance health care directive.
- (d) A relative of the principal or person who executed an advance health care directive.
- (e) The conservator of the person or estate of the principal or person who executed an advance health care directive.
- (f) The court investigator, described in Section 1454, of the county where the power of attorney or advance health care directive was executed or where the principal or person who executed an advance health care directive resides.
- (g) The public guardian of the county where the power of attorney or advance health care directive was executed or where the principal or person who executed an advance health care directive resides.
- (h) A treating supervising health care provider, with respect to a durable power of attorney for health care advance health care directive.
- (i) The personal representative or trustee of the principal's estate.
- (j) The principal's successor in interest.
- (k) A person who is requested in writing by an attorney-in-fact to take action.
- (l) Any other interested person or friend of the principal or person executing an advance health care directive.

**Comment.** Section 4923 is amended to reflect the broadened scope of this division resulting from addition of the Uniform Health Care Decisions Act, Section 4600 *et seq.*

**Original Comment.** Section 4940 continues former Civil Code Section 2411 without substantive change, and expands the class of petitioners to include relatives (subdivision (d)), third persons who are requested to honor the power of attorney (subdivision (k)), and any other interested persons or friends of the principal (subdivision (l)). These additions are drawn from the comparable rules governing petitioners for appointment of a conservator under Section 1820. The purposes for which a person may file a petition under this part are limited by other rules. See Sections 4902 (effect of provision in power of attorney attempting to limit right to petition), 4903 (limitations on right to petition), 4942 (petition with respect to durable power of attorney for health care); see also Section 4901 (other remedies not affected).

See also Sections 4014 (“attorney-in-fact” defined), 4022 (“power of attorney” defined), 4026 (“principal” defined), 4606 (“durable power of attorney for health care” defined), 4615 (“health care provider” defined).

☞ **Staff Note.** This section needs further analysis to determine the extent to which it should apply to surrogates making health care decisions and to describe the appropriate coverage with regard to decisions made pursuant to individual instructions.

1 § 4941 (amended). Petition as to powers of attorney other than durable power of attorney  
2 for health care

3 SEC. \_\_\_\_\_. Section 4941 of the Probate Code is amended to read:

4 4941. With respect to a power of attorney other than a durable power of attorney  
5 for health care, a petition may be filed under this part title for any one or more of  
6 the following purposes:

7 (a) Determining whether the power of attorney is in effect or has terminated.

8 (b) Passing on the acts or proposed acts of the attorney-in-fact, including  
9 approval of authority to disobey the principal's instructions pursuant to  
10 subdivision (b) of Section 4234.

11 (c) Compelling the attorney-in-fact to submit the attorney-in-fact's accounts or  
12 report the attorney-in-fact's acts as attorney-in-fact to the principal, the spouse of  
13 the principal, the conservator of the person or the estate of the principal, or to any  
14 other person required by the court in its discretion, if the attorney-in-fact has failed  
15 to submit an accounting or report within 60 days after written request from the  
16 person filing the petition.

17 (d) Declaring that the authority of the attorney-in-fact is revoked on a  
18 determination by the court of all of the following:

19 (1) The attorney-in-fact has violated or is unfit to perform the fiduciary duties  
20 under the power of attorney.

21 (2) At the time of the determination by the court, the principal lacks the capacity  
22 to give or to revoke a power of attorney.

23 (3) The revocation of the attorney-in-fact's authority is in the best interest of the  
24 principal or the principal's estate.

25 (e) Approving the resignation of the attorney-in-fact:

26 (1) If the attorney-in-fact is subject to a duty to act under Section 4230, the court  
27 may approve the resignation, subject to any orders the court determines are  
28 necessary to protect the principal's interests.

29 (2) If the attorney-in-fact is not subject to a duty to act under Section 4230, the  
30 court shall approve the resignation, subject to the court's discretion to require the  
31 attorney-in-fact to give notice to other interested persons.

32 (f) Compelling a third person to honor the authority of an attorney-in-fact.

33 **Comment.** The introductory language of Section 4941 is amended to reflect the new structure  
34 of this division.

35 **Original Comment.** Section 4941 continues former Civil Code Section 2412 without  
36 substantive change, except as noted below.

37 The introductory clause limits the application of this section to non-health care powers of  
38 attorney. This section applies to petitions concerning both durable and nondurable powers of  
39 attorney. See Sections 4022 ("power of attorney" defined), 4050 (scope of division). For the  
40 section governing petitions with respect to durable powers of attorney for health care, see Section  
41 4942.

42 Subdivision (a) makes clear that a petition may be filed to determine whether the power of  
43 attorney was ever effective, thus permitting, for example, a determination that the power of  
44 attorney was invalid when executed because its execution was induced by fraud. See also Section  
45 4201 (unqualified attorney-in-fact).

1 The authority to petition to disobey the principal’s instructions in subdivision (b) is new. This is  
2 a limitation on the general agency rule in Civil Code Section 2320. See Section 4234 (duty to  
3 follow instructions) & Comment.

4 Subdivision (d) requires a court determination that the principal has become incapacitated  
5 before the court is authorized to declare the power of attorney terminated because the attorney-in-  
6 fact has violated or is unfit to perform the fiduciary duties under the power of attorney.

7 Subdivision (e) is a new procedure for accepting the attorney-in-fact’s resignation. The court’s  
8 discretion in this type of case depends on whether the attorney-in-fact is subject to any duty to act  
9 under Section 4230, as in the situation where the attorney-in-fact has agreed in writing to act or is  
10 involved in an ongoing transaction. Under subdivision (e)(1) the court may make any necessary  
11 protective order. Under subdivision (e)(2), the court’s discretion is limited to requiring that notice  
12 be given to others who may be expected to look out for the principal’s interests, such as a public  
13 guardian or a relative. In addition, the attorney-in-fact is required to comply with the statutory  
14 duties on termination of authority. See Section 4238. The availability of this procedure is not  
15 intended to imply that an attorney-in-fact must or should petition for judicial acceptance of a  
16 resignation where the attorney-in-fact is not subject to a duty to act.

17 Subdivision (f) provides a remedy to achieve compliance with the power of attorney through  
18 recognition of the attorney-in-fact’s authority. This remedy is also available to compel disclosure  
19 of information under Section 4235 (consultation and disclosure). The former limitation of the  
20 provision in subdivision (f) to statutory form powers of attorney has been eliminated. See Section  
21 4300 *et seq.* (relations with third persons).

22 A power of attorney may limit the authority to petition under this part. See Sections 4902  
23 (effect of provision in power of attorney attempting to limit right to petition), 4903 (limitations on  
24 right to petition).

25 See also Sections 4014 (“attorney-in-fact” defined), 4022 (“power of attorney” defined), 4026  
26 (“principal” defined).

27 **§ 4942 (amended). Petition as to durable power of attorney for health care**

28 SEC. \_\_\_\_\_. Section 4942 of the Probate Code is amended to read:

29 4942. With respect to a durable power of attorney for health care, a petition may  
30 be filed under this part title for any one or more of the following purposes:

31 (a) Determining whether the durable power of attorney for health care is in effect  
32 or has terminated.

33 (b) Determining whether the acts or proposed acts of the ~~attorney-in-fact~~ agent  
34 are consistent with the desires of the principal as expressed in the durable power of  
35 attorney for health care or otherwise made known to the court or, where the desires  
36 of the principal are unknown or unclear, whether the acts or proposed acts of the  
37 ~~attorney-in-fact~~ agent are in the best interests of the principal.

38 (c) Compelling the ~~attorney-in-fact~~ agent to report ~~the attorney-in-fact’s~~ agent’s  
39 acts as ~~attorney-in-fact~~ agent to the principal, the spouse of the principal, the  
40 conservator of the person of the principal, or to any other person required by the  
41 court in its discretion, if the ~~attorney-in-fact~~ agent has failed to submit the report  
42 within 10 days after written request from the person filing the petition.

43 (d) Declaring that the durable power of attorney for health care is terminated  
44 upon a determination by the court that the ~~attorney-in-fact~~ agent has made a health  
45 care decision for the principal that authorized anything illegal or upon a  
46 determination by the court of both of the following:



1 (1) The ~~attorney-in-fact~~ agent has violated, has failed to perform, or is unfit to  
2 perform, the duty under the durable power of attorney for health care to act  
3 consistent with the desires of the principal or, where the desires of the principal are  
4 unknown or unclear, is acting (by action or inaction) in a manner that is clearly  
5 contrary to the best interests of the principal.

6 (2) At the time of the determination by the court, the principal lacks the capacity  
7 to execute or to revoke a durable power of attorney for health care.

8 (e) Approving the resignation of the ~~attorney-in-fact~~ agent:

9 (1) If the ~~attorney-in-fact~~ agent is subject to a duty to act under Section 4230, the  
10 court may approve the resignation, subject to any orders the court determines are  
11 necessary to protect the principal's interests.

12 (2) If the ~~attorney-in-fact~~ agent is not subject to a duty to act under Section 4230,  
13 the court shall approve the resignation, subject to the court's discretion to require  
14 the ~~attorney-in-fact~~ agent to give notice to other interested persons.

15 **Comment.** The introductory language of Section 4942 is amended to reflect the new structure  
16 of this division. References to "attorney-in-fact" have been replaced with "agent" for consistency  
17 with the language of the Uniform Health Care Decisions Act, Section 4600 *et seq.*

18 **Original Comment.** Section 4942 continues former Civil Code Section 2412.5 without  
19 substantive change, except as noted below. This section enumerates the purposes for which a  
20 petition may be filed under this part with respect to a durable power of attorney for health care.  
21 For the provision governing petitions with respect to other powers of attorney, see Section 4941.

22 Under subdivision (b), the desires of the principal as expressed in the durable power of attorney  
23 for health care or otherwise made known to the court provide the standard for judging the acts of  
24 the attorney-in-fact. Subdivision (d) permits the court to terminate the durable power of attorney  
25 for health care where the attorney-in-fact is not complying with the duty to carry out the desires  
26 of the principal. These subdivisions adopt a standard based on the principal's desires in place of a  
27 general standard of what may constitute the best interests of the principal. An attempted suicide  
28 by the principal is not to be construed to indicate the principal's desire that health care be  
29 restricted or inhibited. See Section 4723 (unauthorized acts and omissions).

30 Where it is not possible to use a standard based on the principal's desires because those desires  
31 are not stated in the power of attorney or otherwise known or are unclear, subdivision (b)  
32 provides that the "best interests of the principal" standard be used.

33 Subdivision (d) permits termination of the durable power of attorney for health care not only  
34 where the attorney-in-fact, for example, is acting illegally or failing to perform his or her duties  
35 under the power of attorney or is acting contrary to the known desires of the principal, but also  
36 where the desires of the principal are unknown or unclear and the attorney-in-fact is acting in a  
37 manner that is clearly contrary to the best interests of the principal. The desires of the principal  
38 may become unclear as a result of the developments in medical treatment techniques that have  
39 occurred since the desires were expressed by the principal, such developments having changed  
40 the nature or consequences of the treatment.

41 Subdivision (e) is new. See Section 4941(e) Comment. The availability of this procedure is not  
42 intended to imply that an attorney-in-fact must or should petition for judicial acceptance of a  
43 resignation where the attorney-in-fact is not subject to a duty to act.

44 A durable power of attorney for health care may limit the authority to petition under this part.  
45 See Sections 4902 (effect of provision in power of attorney attempting to limit right to petition),  
46 4903 (limitations on right to petition).

47 See also Sections 4014 ("attorney-in-fact" defined), 4026 ("principal" defined), 4606 ("durable  
48 power of attorney for health care" defined), 4612 ("health care decision" defined).

1 ☞ **Staff Note.** For the time being, we have left this section applicable only to powers of attorney,  
2 and have resisted expanding it to cover individual instructions or decisions made by surrogates.  
3 These matters are better handled in new sections, perhaps drawn from the UHCDA.

4 **§ 4943 (amended). Commencement of proceeding**

5 SEC. \_\_\_\_\_. Section 4943 of the Probate Code is amended to read:

6 4943. A proceeding under this ~~part~~ title is commenced by filing a petition stating  
7 facts showing that the petition is authorized under this ~~part~~ title, the grounds of the  
8 petition, and, if known to the petitioner, the terms of the power of attorney or  
9 advance health care directive in question.

10 **Comment.** Section 4943 is amended to reflect the new structure and scope of this division.

11 **Original Comment.** Section 4943 restates parts of former Civil Code Section 2415 without  
12 substantive change. The former reference to filing in the superior court is restated in a different  
13 form in Section 4920. The language concerning the grounds of the petition is new and is drawn  
14 from Section 17201 (commencement of proceeding under Trust Law). A petition is required to be  
15 verified. See Section 1021.

16 See also Section 4022 (“power of attorney” defined).

17 **§ 4944 (amended). Dismissal of petition**

18 SEC. \_\_\_\_\_. Section 4944 of the Probate Code is amended to read:

19 4944. The court may dismiss a petition if it appears that the proceeding is not  
20 reasonably necessary for the protection of the interests of the patient or the  
21 principal or the principal’s estate and shall stay or dismiss the proceeding in whole  
22 or in part when required by Section 410.30 of the Code of Civil Procedure.

23 **Comment.** Section 4944 is amended to reflect the broadened scope of this division.

24 **Original Comment.** Section 4944 restates former Civil Code Section 2416 without substantive  
25 change. The dismissal standard has been revised to permit dismissal when the proceeding is not  
26 “reasonably necessary,” rather than “necessary” as under the former statute. Under this section,  
27 the court has authority to stay or dismiss a proceeding in this state if, in the interest of substantial  
28 justice, the proceeding should be heard in a forum outside this state. See Code Civ. Proc. §  
29 410.30.

30 See also Section 4026 (“principal” defined).

31 **§ 4945 (amended). Notice of hearing**

32 SEC. \_\_\_\_\_. Section 4945 of the Probate Code is amended to read:

33 4945. (a) Subject to subdivision (b), at least 15 days before the time set for  
34 hearing, the petitioner shall serve notice of the time and place of the hearing,  
35 together with a copy of the petition, on the following:

36 (1) The attorney-in-fact [or agent] if not the petitioner.

37 (2) The principal [or patient] if not the petitioner.

38 (b) In the case of a petition to compel a third person to honor the authority of an  
39 attorney-in-fact, notice of the time and place of the hearing, together with a copy  
40 of the petition, shall be served on the third person in the manner provided in  
41 Chapter 4 (commencing with Section 413.10) of Title 5 of Part 2 of the Code of  
42 Civil Procedure.

43 **Comment.**



1       **Original Comment.** Subdivision (a) of Section 4945, pertaining to internal affairs of the power  
2 of attorney, continues former Civil Code Section 2417(b) without substantive change, except that  
3 the notice period is changed to 15 days for consistency with conservatorship proceedings. See  
4 Section 1460.

5       Subdivision (b) provides a special rule applicable to service of notice in proceedings involving  
6 third persons, i.e., not internal affairs of the power of attorney. See Section 4941(f) (petition to  
7 compel third person to honor attorney-in-fact’s authority).

8       See also Sections 4014 (“attorney-in-fact” defined), 4026 (“principal” defined).

9       ☞ **Staff Note.** Once again, the scope and overlapping terminology issues are present.  
10 Subdivision (a)(1) is technically sufficient to cover health care agents, but is it misleading? In  
11 general provisions, particularly in this title, should attorney-in-fact always be paired with agent  
12 when the section applies to both property and health care powers?

13       **§ 4946 (amended). Temporary health care order**

14       SEC. \_\_\_\_\_. Section 4946 of the Probate Code is amended to read:

15       4946. With respect to [~~a durable power of attorney for health care~~ an advance  
16 health care directive], the court in its discretion, upon a showing of good cause,  
17 may issue a temporary order prescribing the health care of the [~~principal patient~~]  
18 until the disposition of the petition filed under Section [4942]. If a [durable power  
19 of attorney for health care] is in effect and a conservator (including a temporary  
20 conservator) of the person is appointed for the principal, the court that appoints the  
21 conservator in its discretion, upon a showing of good cause, may issue a temporary  
22 order prescribing the health care of the principal, that order to continue in effect  
23 for such time as is ordered by the court but in no case longer than the time  
24 necessary to permit the filing and determination of a petition filed under Section  
25 [4942].

26       **Comment.**

27       **Original Comment.** Section 4946 continues former Civil Code Section 2417(h) without  
28 substantive change. This section is intended to make clear that the court has authority to provide,  
29 for example, for the continuance of treatment necessary to keep the principal alive pending the  
30 court’s action on the petition. See also Section 1046 (court authority to make appropriate orders).

31       See also Sections 4026 (“principal” defined), 4606 (“durable power of attorney for health care”  
32 defined), 4609 (“health care” defined).

33       **§ 4947 (amended). Award of attorney’s fees**

34       SEC. \_\_\_\_\_. Section 4947 of the Probate Code is amended to read:

35       4947. In a proceeding under this part title commenced by the filing of a petition  
36 by a person other than the attorney-in-fact, the court may in its discretion award  
37 reasonable attorney’s fees to one of the following:

38       (a) The attorney-in-fact, if the court determines that the proceeding was  
39 commenced without any reasonable cause.

40       (b) The person commencing the proceeding, if the court determines that the  
41 attorney-in-fact has clearly violated the fiduciary duties under the power of  
42 attorney or has failed without any reasonable cause or justification to submit  
43 accounts or report acts to the principal or conservator of the estate or of the person,  
44 as the case may be, after written request from the principal or conservator.

1       **Comment.**

2       **Original Comment.** Section 4947 continues former Civil Code Section 2417(g) without  
3 substantive change. See Sections 4014 (“attorney-in-fact” defined), 4022 (“power of attorney”  
4 defined), 4026 (“principal” defined).

5       **[unchanged] § 4948. Appeal**

6       4948. An appeal may be taken from any of the following:

7       (a) Any final order made pursuant to Section 4941, except an order pursuant to  
8 subdivision (c) of Section 4941.

9       (b) Any final order made pursuant to Section 4942, except an order pursuant to  
10 subdivision (c) of Section 4942.

11       (c) An order dismissing the petition or denying a motion to dismiss under  
12 Section 4944.

13       **Original Comment.** Section 4948 continues former Civil Code Section 2419 without  
14 substantive change. The language of the section has been recast to note the exception to the right  
15 to appeal, rather than listing the appealable orders under Sections 4941 and 4942. This has the  
16 effect of continuing the former rule that all orders are appealable except orders requiring the  
17 attorney-in-fact to account. This also remedies an omission that occurred when the authority to  
18 petition to compel a third person to honor the attorney-in-fact’s authority under a statutory form  
19 power of attorney was added to former Civil Code Section 2412. See 1992 Cal. Stat. ch. 178, § 3.  
20 The reference to “decree” in former Civil Code Section 2419(a) is omitted as unnecessary.

1 CONFORMING REVISIONS AND REPEALS

2 **Health & Safety Code §§ 7185-7194.5 (repealed). Natural Death Act**

3 SEC. \_\_\_\_\_. Chapter 3.9 (commencing with Section 7185) of Part 1 of Division 7  
4 of the Health and Safety Code is repealed.

5 ☞ **Staff Note.** The Commission decided at the July 1996 meeting to repeal the Natural Death  
6 Act and subsume its provisions into the Uniform Health-Care Decisions Act, which is the  
7 successor uniform act to the Uniform Rights of the Terminally Ill Act (which is similar to the  
8 NDA). This decision has been supported by everyone who has commented on the issue thus far.  
9 See also Health & Safety Code § 7194.5 (NDA to be interpreted in conformity with URTIA).

10 **§ 7185 (repealed). Citation**

11 ~~7185. This act shall be known and may be cited as the Natural Death Act.~~

12 **Comment.** Former Section 7185 is not continued. For transitional provisions, see Prob. Code §  
13 \_\_\_\_.

14 **§ 7185.5 (repealed). Legislative findings and declarations**

15 ~~7185.5. (a) The Legislature finds that an adult person has the fundamental right~~  
16 ~~to control the decisions relating to the rendering of his or her own medical care,~~  
17 ~~including the decision to have life-sustaining treatment withheld or withdrawn in~~  
18 ~~instances of a terminal condition or permanent unconscious condition.~~

19 ~~(b) The Legislature further finds that modern medical technology has made~~  
20 ~~possible the artificial prolongation of human life beyond natural limits.~~

21 ~~(c) The Legislature further finds that, in the interest of protecting individual~~  
22 ~~autonomy, such prolongation of the process of dying for a person with a terminal~~  
23 ~~condition or permanent unconscious condition for whom continued medical~~  
24 ~~treatment does not improve the prognosis for recovery may violate patient dignity~~  
25 ~~and cause unnecessary pain and suffering, while providing nothing medically~~  
26 ~~necessary or beneficial to the person.~~

27 ~~(d) In recognition of the dignity and privacy that a person has a right to expect,~~  
28 ~~the Legislature hereby declares that the laws of the State of California shall~~  
29 ~~recognize the right of an adult person to make a written declaration instructing his~~  
30 ~~or her physician to withhold or withdraw life-sustaining treatment in the event of a~~  
31 ~~terminal condition or permanent unconscious condition, in the event that the~~  
32 ~~person is unable to make those decisions for himself or herself.~~

33 ~~(e) The Legislature further declares that, in the absence of controversy, a court~~  
34 ~~normally is not the proper forum in which to make decisions regarding life-~~  
35 ~~sustaining treatment.~~

36 ~~(f) To avoid treatment that is not desired by a person in a terminal condition or~~  
37 ~~permanent unconscious condition, the Legislature declares that this chapter is in~~  
38 ~~the interest of the public health and welfare.~~

39 **Comment.** The substance of former Section 7185 is continued in Probate Code Sections \_\_\_\_  
40 (legislative findings), \_\_\_\_ (preference against judicial proceedings)....

1 **§ 7186 (repealed). Definitions**

2 7186. As used in this chapter, unless the context otherwise requires:

3 (a) ~~“Attending physician” means the physician who has primary responsibility~~  
4 ~~for the treatment and care of the patient.~~

5 (b) ~~“Declaration” means a writing executed in accordance with the requirements~~  
6 ~~of subdivision (a) of Section 7186.5.~~

7 (c) ~~“Health care provider” means a person who is licensed, certified, or~~  
8 ~~otherwise authorized by the law of this state to administer health care in the~~  
9 ~~ordinary course of business or practice of a profession.~~

10 (d) ~~“Life-sustaining treatment” means any medical procedure or intervention~~  
11 ~~that, when administered to a qualified patient, will serve only to prolong the~~  
12 ~~process of dying or an irreversible coma or persistent vegetative state.~~

13 (e) ~~“Permanent unconscious condition” means an incurable and irreversible~~  
14 ~~condition that, within reasonable medical judgment, renders the patient in an~~  
15 ~~irreversible coma or persistent vegetative state.~~

16 (f) ~~“Person” means an individual, corporation, business trust, estate, trust,~~  
17 ~~partnership, limited liability company, association, joint venture, government,~~  
18 ~~governmental subdivision or agency, or any other legal or commercial entity.~~

19 (g) ~~“Physician” means a physician and surgeon licensed by the Medical Board of~~  
20 ~~California or the Osteopathic Medical Board of California.~~

21 (h) ~~“Qualified patient” means a patient 18 or more years of age who has~~  
22 ~~executed a declaration and who has been diagnosed and certified in writing by the~~  
23 ~~attending physician and a second physician who has personally examined the~~  
24 ~~patient to be in a terminal condition or permanent unconscious condition.~~

25 (i) ~~“State” means a state of the United States, the District of Columbia, the~~  
26 ~~Commonwealth of Puerto Rico, or a territory or insular possession subject to the~~  
27 ~~jurisdiction of the United States.~~

28 (j) ~~“Terminal condition” means an incurable and irreversible condition that,~~  
29 ~~without the administration of life-sustaining treatment, will, within reasonable~~  
30 ~~medical judgment, result in death within a relatively short time.~~

31 **Comment.** Subdivision (a) of former Section 7186 is continued in Probate Code Section 4627  
32 (“primary physician” defined) without substantive change. Subdivision (b) is superseded by  
33 Probate Code Section 4601 (“advance health care directive” defined). Subdivision (c) is  
34 continued in Probate Code Section 4621 without substantive change. Subdivisions (d) and (e) are  
35 not continued. Subdivision (f) is unnecessary in view of Probate Code Section 56 (“person”  
36 defined). Subdivision (g) is continued in Probate Code Section 4625 without change. Subdivision  
37 (h) is superseded by Probate Code Sections 4750 (who may give individual instruction) and \_\_\_\_  
38 (witnessing requirements). Subdivision (i) is unnecessary in view of Probate Code Section 74  
39 (“state” defined). Subdivision (j) is not continued.

40 **§ 7186.5 (repealed). Declaration governing life-sustaining treatment**

41 7186.5. (a) ~~An individual of sound mind and 18 or more years of age may~~  
42 ~~execute at any time a declaration governing the withholding or withdrawal of life-~~  
43 ~~sustaining treatment. The declaration shall be signed by the declarant, or another at~~  
44 ~~the declarant’s direction and in the declarant’s presence, and witnessed by two~~

1 individuals at least one of whom may not be a person who is entitled to any  
2 portion of the estate of the qualified patient upon his or her death under any will or  
3 codicil thereto of the qualified patient existing at the time of execution of the  
4 declaration or by operation of law. In addition, a health care provider, an employee  
5 of a health care provider, the operator of a community care facility, an employee  
6 of an operator of a community care facility, the operator of a residential care  
7 facility for the elderly, or an employee of an operator of a residential care facility  
8 for the elderly may not be a witness.

9 (b) A declaration shall substantially contain the following provisions:

10 **DECLARATION**

11 If I should have an incurable and irreversible condition that has been diagnosed  
12 by two physicians and that will result in my death within a relatively short time  
13 without the administration of life-sustaining treatment or has produced an  
14 irreversible coma or persistent vegetative state, and I am no longer able to make  
15 decisions regarding my medical treatment, I direct my attending physician,  
16 pursuant to the Natural Death Act of California, to withhold or withdraw  
17 treatment, including artificially administered nutrition and hydration, that only  
18 prolongs the process of dying or the irreversible coma or persistent vegetative state  
19 and is not necessary for my comfort or to alleviate pain.

20 If I have been diagnosed as pregnant, and that diagnosis is known to my  
21 physician, this declaration shall have no force or effect during my pregnancy.

22 ~~Signed this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_~~

23 ~~Signature \_\_\_\_\_~~

24 ~~Address \_\_\_\_\_~~

25 ~~The declarant voluntarily signed this writing in my presence. I am not a health~~  
26 ~~care provider, an employee of a health care provider, the operator of a community~~  
27 ~~care facility, an employee of an operator of a community care facility, the operator~~  
28 ~~of a residential care facility for the elderly, or an employee of an operator of a~~  
29 ~~residential care facility for the elderly.~~

30 ~~Witness \_\_\_\_\_~~

31 ~~Address \_\_\_\_\_~~

32 ~~The declarant voluntarily signed this writing in my presence. I am not entitled to~~  
33 ~~any portion of the estate of the declarant upon his or her death under any will or~~  
34 ~~codicil thereto of the declarant now existing or by operation of law. I am not a~~  
35 ~~health care provider, an employee of a health care provider, the operator of a~~  
36 ~~community care facility, an employee of an operator of a community care facility,~~

1 ~~the operator of a residential care facility for the elderly, or an employee of an~~  
2 ~~operator of a residential care facility for the elderly.~~

3 ~~Witness \_\_\_\_\_~~

4 ~~Address \_\_\_\_\_~~

5 ~~(c) A physician or other health care provider who is furnished a copy of the~~  
6 ~~declaration shall make it a part of the declarant's medical record and, if unwilling~~  
7 ~~to comply with the declaration, promptly so advise the declarant.~~

8 **Comment.** The first sentence of former Section 7186.5(a) is superseded by Probate Code  
9 Section 4750 (who may give individual instruction). The second and third sentences are  
10 [continued without substantive change] in Probate Code Section [4701].

11 The declaration form in subdivision (b) is superseded by the optional form an the advance  
12 health care directive in Probate Code Section 4761 and related provisions. See Prob. Code §§  
13 \_\_\_\_\_. For transitional provisions relating to declarations executed under the repealed Natural  
14 Death Act, see Prob. Code § \_\_\_\_\_.

15 The record-keeping duty in subdivision (c) is continued in Probate Code Section \_\_\_\_\_ without  
16 substantive change.

17 **§ 7187 (repealed). Skilled nursing facility or long-term health care facility**

18 ~~7187. A declaration shall have no force or effect if the declarant is a patient in a~~  
19 ~~skilled nursing facility as defined in subdivision (c) of Section 1250, or a long-~~  
20 ~~term health care facility as defined in subdivision (a) of Section 1418, at the time~~  
21 ~~the declaration is executed unless one of the two witnesses to the declaration is a~~  
22 ~~patient advocate or ombudsman as may be designated by the State Department of~~  
23 ~~Aging for this purpose pursuant to any other applicable provision of law.~~

24 **Comment.** Former Section 7187 is [continued without substantive change] in Probate Code  
25 Section [4701].

26 **§ 7187.5 (repealed). When declaration becomes operative**

27 ~~7187.5. A declaration becomes operative when (a) it is communicated to the~~  
28 ~~attending physician and (b) the declarant is diagnosed and certified in writing by~~  
29 ~~the attending physician and a second physician who has personally examined the~~  
30 ~~declarant to be in a terminal condition or permanent unconscious condition and no~~  
31 ~~longer able to make decisions regarding administration of life-sustaining~~  
32 ~~treatment. When the declaration becomes operative, the attending physician and~~  
33 ~~other health care providers shall act in accordance with its provisions or comply~~  
34 ~~with the transfer requirements of Section 7190.~~

35 **Comment.** Former Section 7187.5 is [superseded] by Probate Code Section \_\_\_\_\_.

36 **§ 7188 (repealed). Revocation**

37 ~~7188. (a) A declarant may revoke a declaration at any time and in any manner,~~  
38 ~~without regard to the declarant's mental or physical condition. A revocation is~~  
39 ~~effective upon its communication to the attending physician or other health care~~  
40 ~~provider by the declarant or a witness to the revocation.~~



1     ~~(b) The attending physician or other health care provider shall make the~~  
2 ~~revocation a part of the declarant's medical record.~~

3     ~~**Comment.** Former Section 7188 is [superseded] by Probate Code Section \_\_\_\_.~~

4     ~~**§ 7189 (repealed). Determination that declarant is in terminal or permanent unconscious**~~  
5 ~~**condition**~~

6     ~~7189. Upon determining that the declarant is in a terminal condition or~~  
7 ~~permanent unconscious condition, the attending physician who knows of a~~  
8 ~~declaration shall record the determination and the terms of the declaration in the~~  
9 ~~declarant's medical record and file a copy of the declaration in the record.~~

10    ~~**Comment.** Former Section 7189 is [superseded] by Probate Code Section \_\_\_\_.~~

11    ~~**§ 7189.5 (repealed). Patient's right to make decisions concerning life-sustaining treatment**~~

12    ~~7189.5. (a) A qualified patient may make decisions regarding life-sustaining~~  
13 ~~treatment as long as the patient is able to do so.~~

14    ~~(b) This chapter does not affect the responsibility of the attending physician or~~  
15 ~~other health care provider to provide treatment for a patient's comfort care or~~  
16 ~~alleviation of pain.~~

17    ~~(c) The declaration of a qualified patient known to the attending physician to be~~  
18 ~~pregnant shall not be given effect as long as the patient is pregnant.~~

19    ~~**Comment.** Former Section 7189.5 is [superseded] by Probate Code Section \_\_\_\_.~~

20    ~~**§ 7190 (repealed). Duties of health care provider unwilling to comply with chapter**~~

21    ~~7190. An attending physician or other health care provider who is unwilling to~~  
22 ~~comply with this chapter shall take all reasonable steps as promptly as practicable~~  
23 ~~to transfer care of the declarant to another physician or health care provider who is~~  
24 ~~willing to do so.~~

25    ~~**Comment.** Former Section 7190 is [continued] in Probate Code Section \_\_\_\_ without~~  
26 ~~substantive change.~~

27    ~~**§ 7190.5 (repealed). Liability and professional discipline**~~

28    ~~7190.5. (a) A physician or other health care provider is not subject to civil or~~  
29 ~~criminal liability, or discipline for unprofessional conduct, for giving effect to a~~  
30 ~~declaration in the absence of knowledge of the revocation of a declaration.~~

31    ~~(b) A physician or other health care provider, whose action under this chapter is~~  
32 ~~in accord with reasonable medical standards, is not subject to criminal prosecution,~~  
33 ~~civil liability, discipline for unprofessional conduct, administrative sanction, or~~  
34 ~~any other sanction if the physician or health care provider believes in good faith~~  
35 ~~that the action is consistent with this chapter and the desires of the declarant~~  
36 ~~expressed in the declaration.~~

37    ~~**Comment.** Former Section 7190.5 is [superseded] by Probate Code Section \_\_\_\_.~~



1 **§ 7191 (repealed). Specified conduct as misdemeanor; prosecution of specified conduct as**  
2 **unlawful homicide**

3 7191. (a) A physician or other health care provider who willfully fails to transfer  
4 the care of a patient in accordance with Section 7190 is guilty of a misdemeanor.

5 (b) A physician who willfully fails to record a determination of terminal  
6 condition or permanent unconscious condition or the terms of a declaration in  
7 accordance with Section 7189 is guilty of a misdemeanor.

8 (c) An individual who willfully conceals, cancels, defaces, or obliterates the  
9 declaration of another individual without the declarant's consent or who falsifies  
10 or forges a revocation of the declaration of another individual is guilty of a  
11 misdemeanor.

12 (d) An individual who falsifies or forges the declaration of another individual, or  
13 willfully conceals or withholds personal knowledge of a revocation under Section  
14 7188, with the intent to cause a withholding or withdrawal of life-sustaining  
15 treatment contrary to the wishes of the declarant, and thereby, because of that act,  
16 directly causes life-sustaining treatment to be withheld or withdrawn and death to  
17 thereby be hastened, shall be subject to prosecution for unlawful homicide as  
18 provided in Chapter 1 (commencing with Section 187) of Title 8 of Part 1 of the  
19 Penal Code.

20 (e) A person who requires or prohibits the execution of a declaration as a  
21 condition for being insured for, or receiving, health care services is guilty of a  
22 misdemeanor.

23 (f) A person who coerces or fraudulently induces an individual to execute a  
24 declaration is guilty of a misdemeanor.

25 (g) The sanctions provided in this section do not displace any sanction applicable  
26 under other law.

27 **Comment.** Former Section 7191 is [superseded] by Probate Code Section \_\_\_\_.

28 **§ 7191.5 (repealed). Effect of death on life insurance or annuity; declaration as condition for**  
29 **insurance or receipt of health care services; effect of chapter on patient's right to decide**

30 7191.5. (a) Death resulting from the withholding or withdrawal of a life-  
31 sustaining treatment in accordance with this chapter does not constitute, for any  
32 purpose, a suicide or homicide.

33 (b) The making of a declaration pursuant to Section 7186.5 does not affect in  
34 any manner the sale, procurement, or issuance of any policy of life insurance or  
35 annuity, nor does it affect, impair, or modify the terms of an existing policy of life  
36 insurance or annuity. A policy of life insurance or annuity is not legally impaired  
37 or invalidated by the withholding or withdrawal of life-sustaining treatment from  
38 an insured, notwithstanding any term to the contrary.

39 (c) A person may not prohibit or require the execution of a declaration as a  
40 condition for being insured for, or receiving, health care services.

41 (d) This chapter creates no presumption concerning the intention of an individual  
42 who has revoked or has not executed a declaration with respect to the use,

1 withholding, or withdrawal of life-sustaining treatment in the event of a terminal  
2 condition or permanent unconscious condition.

3 (e) This chapter does not affect the right of a patient to make decisions regarding  
4 use of life-sustaining treatment, so long as the patient is able to do so, or impair or  
5 supersede a right or responsibility that a person has to effect the withholding or  
6 withdrawal of medical care.

7 (f) This chapter does not require any physician or other health care provider to  
8 take any action contrary to reasonable medical standards.

9 (g) This chapter does not condone, authorize, or approve mercy killing or  
10 assisted suicide or permit any affirmative or deliberate act or omission to end life  
11 other than to permit the natural process of dying.

12 (h) The rights granted by this chapter are in addition to, and not in derogation of,  
13 rights under any other statutory or case law.

14 **Comment.** Former Section 7191.5 is [superseded] by Probate Code Section \_\_\_\_.

15 **§ 7192 (repealed). Presumption of validity of declaration**

16 7192. In the absence of knowledge to the contrary, a physician or other health  
17 care provider may presume that a declaration complies with this chapter and is  
18 valid.

19 **Comment.** Former Section 7192 is [continued] in Probate Code Section \_\_\_\_ without  
20 substantive change.

21 **§ 7192.5 (repealed). Validity of declarations executed in another state**

22 7192.5. An instrument governing the withholding or withdrawal of life-  
23 sustaining treatment executed in another state in compliance with the law of that  
24 state or of this state is valid for purposes of this chapter.

25 **Comment.** Former Section 7192.5 is [continued] in Probate Code Section \_\_\_\_ without  
26 substantive change.

27 **§ 7193 (repealed). Effect of Durable Power of Attorney for Health Care**

28 7193. A Durable Power of Attorney for Health Care shall prevail over a  
29 declaration executed pursuant to this chapter unless expressly provided otherwise  
30 in the Durable Power of Attorney for Health Care.

31 **Comment.** Former Section 7193 is [continued] in Probate Code Section \_\_\_\_ without  
32 substantive change.

33 **§ 7193.5 (repealed). Instruments to be given effect**

34 7193.5. The following instruments shall be given effect pursuant to the  
35 provisions of this chapter:

36 (a) An instrument executed before January 1, 1992, that substantially complies  
37 with subdivision (a) of Section 7186.5.

38 (b) An instrument governing the withholding or withdrawal of life-sustaining  
39 treatment executed in another state that does not comply with the law of that state  
40 but substantially complies with the law of this state.

1     **Comment.** Former Section 7193.5 is [continued] in Probate Code Section \_\_\_\_ without  
2 substantive change.

3     **§ 7194 (repealed). Severability clause**

4     ~~7194. If any provision of this chapter or its application to any person or~~  
5 ~~circumstance is held invalid, the invalidity shall not affect other provisions or~~  
6 ~~applications of this chapter which can be given effect without the invalid provision~~  
7 ~~or application, and to this end the provisions of this chapter are severable.~~

8     **Comment.** Former Section 7194 is superseded by Probate Code Section 11.

9     **§ 7194.5 (repealed). Conformity with Uniform Rights of the Terminally Ill Act**

10     ~~7194.5. To the extent that a provision of this chapter conforms to the Uniform~~  
11 ~~Rights of the Terminally Ill Act, that provision shall be applied and construed to~~  
12 ~~effectuate its general purpose to make uniform the law with respect to the subject~~  
13 ~~of this chapter among states enacting it.~~

14     **Comment.** Former Section 7194.5 is superseded by Probate Code Section 2(b) (construction of  
15 provisions drawn from uniform acts).

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