

Memorandum 82-4

Subject: Study L-703 - Probate Law (Authority to Consent or Withhold Consent to Health Care of Another)

From time to time, the Commission has received suggestions that there is a need in California for legislation to permit a person to appoint another to make health care decisions for the person making the appointment. Such an appointment would be analogous to the appointment of a person under the Uniform Durable Power of Appointment Act to make decisions with respect to the estate of the person making the appointment. It is the staff's view that the Uniform Durable Power of Appointment Act as enacted in California does not authorize an appointment to make health care decisions.

A drafting committee of the National Conference of Commissioners on Uniform State Laws has prepared a working draft of a Uniform Power of Appointment to Consent to Health Care Act. A copy of the working draft is attached.

The staff believes that there is a real need for legislation on this subject. Accordingly, we believe that the working draft (revised to include a few revisions made by the Uniform Laws drafting committee) should be distributed to interested persons and organizations in California for review and comment. We have checked with the reporter for the Uniform Laws drafting committee and he believes such distribution would be appropriate. If we send out the working draft now, we most likely will be in a position to recommend the Uniform Act for enactment in 1983. The Uniform Act could be recommended for enactment in the form in which it is approved by the National Conference this summer. Or the Uniform Act could be recommended for enactment with such modifications as the Law Revision Commission believes are needed.

The attached letter of transmittal could be used to send out the working draft for review and comment. The letter of transmittal describes the purpose of the working draft and states briefly the existing law in California. The staff believes that the working draft is sufficiently well developed to justify its distribution at this time for review and

comment. Please read the working draft to determine whether you agree. We do not believe that it would be profitable for the Commission to undertake to perfect the draft before distributing it for review and comment.

Respectfully submitted,

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Executive Secretary

CALIFORNIA LAW REVISION COMMISSION

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LETTER OF TRANSMITTAL

In the ordinary, nonemergency case, medical treatment may be given to an adult only with that person's informed consent. If the person lacks the capacity to give informed consent or is otherwise unable to give informed consent, a substitute decision-making process is necessary. One alternative is the establishment of a conservatorship of the person so that the court or conservator may make medical decisions for the conservatee. In addition, Probate Code Sections 3200-3211 provide a procedure for court authorization of medical treatment where the patient has no conservator and there is no ongoing need for a conservatorship.

The existing law contains no provision that expressly permits a competent person to appoint a health care representative to make health care decisions for the person making the appointment should the person making the appointment become unable to make the decisions. The recently enacted Uniform Durable Power of Attorney Act (1981 Cal. Stats., ch. 511, enacting Civil Code §§ 2400-2407) does not specifically deal with this matter, and it is unlikely that a health care provider would be willing to rely on the authority of a durable power of attorney with respect to health care decisions. The lack of express statutory authority to designate a health care representative may require resort to a court proceeding to designate a person to make health care decisions. Enactment of such express authority would avoid the need for a court proceeding and would permit a competent person to designate a health care representative that the person trusts to make health care decisions.

The Commission has obtained a copy of a working draft of a Uniform Power of Appointment to Consent to Health Care Act. The National Conference of Commissioners on Uniform State Laws has not yet approved a Uniform Act on this subject. The working draft, a copy of which is enclosed, is presently under study by a drafting committee of the National Conference. It is likely that the National Conference will approve a Uniform Act on this subject this summer.

The Commission solicits your comments on whether legislation on this subject is needed in California. If so, should the enclosed draft be proposed for enactment in California substantially as drafted or with such modifications as you suggest? We will send your comments to the drafting committee of the National Conference, and the Law Revision Commission will consider your comments when the Commission determines what legislation, if any, to recommend for enactment at the 1983 session of the California Legislature.

We need your comments not later than April 1, 1982. We will appreciate your assistance.

D R A F T

FOR DISCUSSION ONLY

UNIFORM POWER OF APPOINTMENT TO CONSENT TO
HEALTH CARE ACT

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

December 11, 1981, Draft

The ideas and conclusions herein set forth, including drafts of proposed legislation, have not been passed upon by the Commissioners on Uniform State Laws. They do not necessarily reflect the views of the Committee, Reporters or Commissioners. Proposed statutory language, if any, may not be used to ascertain legislative meaning of any promulgated final law.

Appendix A

UNIFORM POWER OF APPOINTMENT
TO CONSENT TO HEALTH CARE ACT

SECTION 1. [Definitions.]

As used in this Act:

(1) "Health Care" means any care, treatment, service or procedure to maintain, diagnose or treat an individual's physical or mental condition.

(2) "Health care provider" means a person or institution providing health care.

(3) "Person" means an individual, corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership or association, or any other legal entity.

1 SECTION 2. [Health Care Representative; Appointment;
2 Qualification; Powers; Revocation and Immunity.]

3 (a) An individual authorized to consent to health care
4 under any law of this state may appoint another as a health care
5 representative to act for the appointor in all matters of health
6 care.

7 (b) A health care representative appointed under this
8 section must be an individual authorized to consent to health
9 care under the law of this state.

10 (c) The appointment shall be in writing and signed by the
11 appointor and one witness, other than the health care representa-
12 tive, who signed at the request of the appointor.

13 (d) The health care representative shall communicate accep-
14 tance of the appointment by signing the writing at the request of
15 the appointor.

16 (e) Unless the writing provides that the authority termi-
17 nates if the appointor becomes incapable of consenting, the
18 authority is effective even though the appointor becomes incap-
19 able of consenting.

20 (f) A health care representative appointed under this
21 section is authorized to act for the appointor whether or not the
22 appointor is capable of consenting unless the appointment
23 provides contrary direction.

24 (g)(1) The health care representative appointed under
25 this section is authorized to act for the appointor in all
26 matters of health care according to the terms of the appointment.

27 If no limitations are expressed, the health care representative
28 is authorized to consent to proposed health care, refuse to
29 consent to proposed health care, select from alternative
30 proposals for health care, or withdraw consent to health care
31 previously given.

32 (2) The health care representative appointed under
33 this section has a duty to act in good faith and with due regard
34 for the best interest of the appointor.

35 (3) If the health care representative believes that
36 the instructions in the writing appointing him are not in the
37 best interest of the appointor, he shall exercise no further
38 power under the appointment and shall so inform the appointor, if
39 the appointor is capable of consenting, his legal representative,
40 if he knows that there is one, and the health care provider, if
41 the health care representative knows that there is one.

42 (h) An individual who is capable of consenting to health
43 care may revoke:

44 (1) the appointment of the health care representative
45 at any time by notifying the health care representative orally or
46 in writing, or

47 (2) the authority granted to the health care repre-
48 sentative by notifying the health care provider orally or in
49 writing.

50 (i) A health care representative is not subject to
51 criminal prosecution or civil liability for exercising the
52 authority granted by this Act [if the action is in accordance
53 with the terms of the appointment] [if he acts in good faith]. A

54 health care representative is not subject to criminal prosecution
55 or civil liability for exercising the authority granted in an
56 appointment which has been revoked before receiving actual know-
57 ledge of the revocation.

58 (j) The appointment authorized by this section shall con-
59 form substantially to the following form:

60 Appointment of a Health Care Representative

61 I, the undersigned, this _____ day of _____ 19____,
62 being of sound mind, willfully and voluntarily appoint
63 _____ whose current telephone number and
64 address are _____
65 _____ as my
66 health care representative who is authorized to act for me in all
67 matters of health care, including giving consent to health care,
68 refusing consent to health care, selecting from alternative
69 proposals for health care, or withdrawing consent to health care
70 previously given except as otherwise specified in this document.

71 This appointment shall remain effective even though I may
72 subsequently become disabled or incapable of consenting to health
73 care.

74 This document is subject to the following special
75 conditions:

76 _____
77 _____

78 I (do) (do not) authorize my health care representative
 79 appointed by this document to delegate his/her decision-making
 80 power in accordance with Section 3 of the Uniform Power of
 81 Appointment For Consent To Health Care Act.

82

_____ (signed)

83

_____ (address)

84

85 I certify that the appointment was signed by the individual
 86 making this appointment. I have witnessed this document at
 87 his/her request.

88

_____ (signed)

89

_____ (address)

89

90

Acceptance by Health Care Representative

91 I, the undersigned health care representative understand
 92 that acceptance of this appointment means that I have a duty to

93 act in good faith and with due regard for the best interest of
94 the individual appointing me. I further understand that I have a
95 duty to follow any special instructions in the appointment and in
96 the event I cannot do so, I will exercise no further power under
97 the appointment and will inform the individual appointing me, if
98 that individual is competent, that individual's legal representa-
99 tive, if that person is known to me, and that individual's health
100 care provider if that person is known to me.

101

(signed)

102

(address)

103

1 SECTION 3. [Delegation of Power to Consent to Health Care
2 for Another.]

3 (a) Any individual authorized to consent to health care for
4 another under any law of this state who, for a period of time,
5 will not be reasonably available to exercise the authority, may
6 delegate to another individual in a writing signed by him the
7 authority to consent. There may be no further delegation under
8 this subsection unless the writing authorizing the delegation
9 specifically so provides.

10 (b) An individual authorized to consent to health care
11 under Section 2 may delegate to another individual in a writing
12 signed by him the authority to consent to health care if the
13 writing appointing him so specifies.

14 (c) The authority delegated is exercisable according to the
15 terms of the writing making the delegation for the period of time
16 the individual making the delegation will not be reasonably
17 available, but the delegated authority to act shall terminate [6]
18 months after the effective date of the writing.

1 SECTION 4. [Disqualification of Authorized Individuals.]

2 (a) An individual authorized to consent to health care
3 under the law of this state may disqualify another from con-
4 senting to health care on his behalf.

5 (b) The disqualification shall be in writing and signed by
6 the individual.

7 (c) The disqualified individual shall have no authority to
8 consent to health care on behalf of the one disqualifying him.

1 SECTION 5. [Immunity of Health Care Provider.]

2 (a) A health care provider acting or declining to act in
3 reliance on the consent or refusal of consent of an individual
4 who he believes in good faith is authorized by this Act or other
5 law of this state to consent to health care is not subject to
6 criminal prosecution, civil liability or professional discipli-
7 nary action on the ground that the individual who consented or
8 refused to consent lacked authority or capacity.

9 (b) A health care provider refusing to follow the direction
10 of an individual who he believes in good faith is incapable of
11 consenting is not subject to criminal prosecution, civil
12 liability, or professional disciplinary action for failing to
13 follow that individual's direction.

1 SECTION 6. [Availability of Medical Information.]

2 An individual authorized to consent for another under this
3 Act has the same right to receive information regarding the
4 proposed health care and to consent to the disclosure of medical
5 records to him and to any proposed health care provider as does
6 the individual for whom health care is proposed. [Disclosure of
7 the medical records to an individual authorized to consent for
8 another does not constitute a waiver of any evidentiary
9 privilege.]

1 SECTION 7. [Disclaimer Clause.]

2 (a) This Act does not authorize an individual to consent to
3 diagnosis or treatment of another for mental illness or to
4 the commitment of another to any hospital or mental health
5 facility for observation, diagnosis or treatment unless in
6 compliance with other state law.

7 (b) This Act does not authorize an individual to consent to
8 any health care or medical procedure prohibited by the law of
9 this state.

10 (c) This Act does not affect any requirement of notice to
11 others of proposed health care under any other law of this state.

12 (d) This Act does not affect any other law of this state
13 which provides when consent is required.

1 SECTION 8. [Severability.]

2 If any provision of this Act or the application hereof to
3 any person or circumstance is held invalid, the invalidity does
4 not affect other provisions or applications of the Act which can
5 be given effect without the invalid provision or application, and
6 to this end the provisions of this Act are severable.

1 SECTION 9. [Uniformity of Application and Construction.]

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

1 SECTION 10. [Short Title.]

2 This Act may be cited as the Uniform Power of Appointment
3 For Consent to Health Care Act.

1 SECTION 11. [Repeal.]

2 The following acts and parts of acts are repealed:

- 3 (1)
- 4 (2)
- 5 (3)

1 SECTION 12. [Time of Taking Effect.]

2 This Act shall take effect....