#L-703 9/14/82

Memorandum 82-82

Subject: Study L-703 - Appointment of Health Care Representative

This memorandum considers comments we have received on the staff draft of the Recommendation Relating to Appointment of a Health Care Representative which was distributed after incorporating decisions made by the Commission at the July meeting. A copy of the draft recommendation is attached to this memorandum.

Summary of Reactions to Draft Recommendation and Staff Recommendation

We received several favorable comments, most of them very brief. (See Exhibits 5 and 6, attached to this memorandum, and Exhibit 5, attached to Memorandum 82-85.) Extensive comments were submitted by persons who oppose the recommendation as an infringement on the powers available to an attorney in fact under the Uniform Durable Power of Attorney Act. (See Exhibits 1, 4, and 8, attached to this memorandum.) On the other hand, another writer opposes the recommendation on the grounds that it lacks the safeguards of existing procedures for obtaining substitute consent. (See Exhibit 2, attached to this memorandum.)

In view of the variety and spirit of the opposition to the draft recommendation, the staff recommends that this subject be dropped for the time being. This is not to say there is no need for legislation in this area. (See the article from the Wall Street Journal attached as Exhibit 7.) However, the basic opposition to the tentative recommendation is based on the belief that the California durable power of attorney statute permits a person to designate a health care representative and thus avoid the need to satisfy the more stringent requirements of the tentative recommendation. Moreover, some persons who objected fear that approval of new statutory provisions will cast doubt on the ability to use the durable power of attorney statute to designate a health care representative. These objectors are members of a CEB panel that has been suggesting to the lawyers who attend the CEB program that the durable power of attorney statute be used to designate a health care representative.

The staff believes that there is doubt whether the California durable power of attorney statute extends to matters other than property

matters. The California statute contains a warning notice--not found in the Uniform Act--which is limited to property matters. Nevertheless, the staff believes that it would be wise to wait until the California courts have construed the California durable power of attorney statute before any new legislation is proposed relating to designation of a health care representative.

Consideration of Specific Comments

Specific points raised in the letters we received are discussed below.

Relation to Durable Power of Attorney

Mr. Leslie Rothenberg (see Exhibit 1) and Mr. Harley Spitler (see Exhibit 8) are particularly concerned with draft Section 53.200 which excludes an attorney in fact from making a health care decision or acting as a health care representative unless the formalities of appointment (requiring two witnesses and an acceptance) are complied with. Coincidentally Mr. Rothenberg and Mr. Spitler are involved in teaching a Continuing Education of the Bar course which in part proposes using a durable power of attorney to empower another person to make health care decisions. An illustrative form prepared for the CEB program is attached to Mr. Rothenberg's letter. (See Exhibit 1.) Mr. Rothenberg states that the Uniform Durable Power of Attorney Act (the California version appears at Civil Code §§ 2400-2407) permits delegation of authority to an agent or make any decisions that the principal could make for him or herself, "subject only to public policy limitations contained in case law or statutes, or by agreements made by the principal prior to any incapacity." Mr. Rothenberg notes that this view is supported by a comment of the Uniform Commissioners contained in a draft of the Uniform Health Care Consent Act.

Mr. Spitler concurs in this view and urges further study of what is now the Model Health Care Consent Act. (A copy of the model act is attached to this memorandum as Exhibit 9.) Earlier versions of this act have been considered by the Commission and provided the departure point for the draft statute. Mr. Spitler finds the argument that the Uniform Durable Power of Attorney Act does not authorize consent to health care to be "completely erroneous as a matter of statutory construction."

(See Exhibit 8, p. 2.) He also reports that the draftsmen of the durable power of attorney provisions in the Uniform Probate Code considered this problem and

> never perceived that anyone would conclude that the durable power was limited to property matters. There is neither history nor any decisional law to support your position. You should reconsider.

As indicated above, the staff proposes discontinuing study of this topic. However, we believe there is still substantial doubt about whether the Uniform Durable Power of Attorney Act was drafted with health care decisions in mind. We asssume that the courts will be called upon to decide this issue in the not too distant future if significant numbers of individuals execute powers of attorney with medical decision clauses. The conclusion of the draft recommendation as to the scope of a durable power of attorney is based on an analysis of the act itself and its official comments. (See note 6 on page 2 of the draft recommendation attached hereto.) This conclusion does not rest solely on the warning required to be inserted in printed forms for sale in this state as required by Civil Code Section 2400(b). There is absolutely no reference to health care decisions in the uniform act or its comments. There are numerous references to property matters. For example, the Commissioners' Prefatory Note states that the purpose of the original Uniform Probate Code provisions was "to recognize a form of senility insurance comparable to that available to relatively wealthy persons who use funded, revocable trusts for persons who are unwilling or unable to transfer assets as required to establish a trust." This Note also states that the act "validates post-mortem exercise of authority by agents who act in good faith and without actual knowledge of the principal's death"; this is clearly an inapplicable concern if we are concerned with health care. Section 3 of the uniform act (like Civil Code Section 2402) deals with the relation of the attorney in fact to court appointed fiduciaries: "conservator, guardian of the estate, or other fiduciary charged with the management of all of the principal's property or all of his property except specified exclusions." Note the omission of any reference to a guardian or conservator of the person, an omission carried into Civil Code Section 2402. These examples, and others that can be drawn from the uniform act, support the conclusion that there is doubt

about the power of an attorney in fact to make health care decisions. Whether as a matter of social policy an attorney in fact should be empowered to make such decisions is a separate question.

If draft Section 53.200 were revised to provide that the statute for appointment of a health care representative had no effect on the authority of an attorney in fact, we may assume that the opposition of Mr. Rothenberg and Mr. Spitler would be significantly decreased if not eliminated. The staff has not chosen to recommend this course, however, because we feel that if the power of attorney is adequate for the appointment of a health care representative, there is no sufficient argument for the draft statute. This view is also expressed by Mr. Hoffman (see Exhibit 4). In addition, it should be remembered that the draft statute permits a person to disqualify another from making health care decisions for the disqualifier, but the staff does not believe this is a significant enough provision to justify a recommendation to the Legislature.

If the Commission decides to continue with this study, however, there are some additional matters raised in the letters that need to be considered.

<u>Definition of Health Care Decision (§ 53.100)</u>

Mr. Spitler finds the definition of "health care decision" to be too limited (see Exhibit 8) and would revise this definition as follows:

> (a) "Health care decision" means consent, refusal to consent, or withdrawal of consent to any care, treatment, service, or procedure to maintain, diagnose, or treat a physical or mental condition <u>, even though such consent, refusal to consent, or withdrawal of consent, probably will result in death</u> .

The staff views this as a clarification rather than an expansion of the definition since the language of the definition is unlimited and is intended to cover decisions to withdraw life support systems and similarly significant matters. If the Commission desires to add language to this definition, the staff suggests that the word "probably" be stricken.

<u>Appointment of Health Care Representative by Person of Sound Mind (§ 53.110)</u>

Mr. John C. Lamb, Chair of the Committee on Legal Rights of the Handicapped of the Legal Services Section of the State Bar, considers it to be a major and perhaps insurmountable problem that the draft does not define "sound mind" and does not differentiate the concept from "capacity"

in the guardianship-conservatorship law. (See Exhibit 2.) This may be a weakness inherent in the concept of soundness of mind. As the Comment to draft Section 53.110 states, the standards are drawn from those provided for witnessed wills. The staff does not understand the need to relate "sound mind" to "capacity" under the guardianship-conservatorship law.

Appointment of Health Care Representative for Minor Child

Justice Kingsley notes that draft Section 53.110 is limited to appointment of a health care representative for the appointor and asks whether it is intended that the formalities of the draft statute are to be used where a parent delegates the power to consent to health care for his or her child. The draft statute is not intended to have any effect on the statute governing authorization of medical treatment of minors (see Civil Code Section 25.8) and we would add a provision to the statute or a comment to make this clear.

Relation of Health Care Representative to Court Appointed Conservator (§ 53.120)

Mr. Lamb proposes that a conservator with authority to consent to medical treatment should prevail over the health care representative. (Exhibit 2.) The argument is that a conservator can consent to medical treatment only after a court hearing where it is determined that the conservatee lacks capacity to give informed consent. Mr. Lamb believes that such safeguards are essential. This is a policy question for the Commission to decide. On the other side is the argument in favor of personal autonomy which holds that the freely selected and trusted appointee of the patient should have primary authority.

A related difficulty is raised by Mr. James F. Meade, Deputy County Counsel, Orange County, who writes that if a conservator is appointed under the Lanterman-Petris-Short Act, the health care representative should not have primary authority to make health care decisions in a case where the conservatee is involuntarily committed. (See Exhibit 5.) If the health care representative is uncooperative, it would defeat the purpose of the conservatorship. If we proceed with this topic, the staff proposes to make clear that the conservator has primary authority in this situation.

Power to Disqualify Persons from Making Health Care Decisions (§ 53.160)

Mr. Meade believes that there is a danger that a person might attempt to disqualify a public guardian or a conservator under Lanterman-Petris-Short from the power to make health care decisions by executing a disqualification under draft Section 53.160. (See Exhibit 5.) He suggests that Section 53.160 be revised to eliminate this possibility. The staff agrees that this section should be so limited. The Comment says that it is intended to give a person "the ability to disqualify a person (such as a close relative) who would otherwise have authority under case law to give consent to health care." We propose to add a subdivision providing that "nothing in this section authorizes the disqualification of a person authorized by court order to make health care decisions, and any such attempted disqualification is ineffective."

Limitations on Powers of Health Care Representative (§ 53.180)

Mr. Lamb writes that the health care representative should be prohibited from consenting to any experimental procedure and psychosurgery. (See Exhibit 2.) Draft Section 53.180 prohibits prescribing or administering an experimental drug or convulsive treatment, but not experimental procedures or psychosurgery. This provision is consistent with limitations on the powers of guardians and conservators (Prob. Code § 2356) and on court-authorized medical treatment (Prob. Code § 3211). If the Commission decides to proceed with this topic, we would give further consideration to Mr. Lamb's objection.

Court Enforcement of Duties of Health Care Representative (§ 53.190)

Mr. Spitler finds draft Section 53.190(b)(2) to be "nonsense." (See Exhibit 8, p. 2.) Draft Section 53.190 makes the procedure for enforcement of the duties under a power of attorney provided by Civil Code Sections 2410-2423 applicable to enforcement of the duties of a health care representative. This requires that important terms in Sections 2410-2423 be converted to the terms used in the health care representative statute. The provision objected to by Mr. Spitler provides that "conservator of the estate of the principal" in Sections 2410-2423 is to be read as "conservator of the person appointing the health care representative." Hence, where Section 2411 permits a petition by the conservator of the estate of the principal, as applied in this

context, it means that a conservator of the person (not of the estate) may petition. Similarly, Section 2421(b) provides that the conservator of the estate of the principal may petition notwithstanding any provision of the power of attorney; read with draft Section 53.190 this means that the conservator of the person of the appointor may petition notwithstanding any provision of the writing appointing the health care representative.

Respectfully submitted,

Stan G. Ulrich
Staff Counsel

Exhibit 1

LESLIE STEVEN ROTHENBERG
ATTORNEY AT LAW
TWO CENTURY PLAZA, SUITE 1800
2049 CENTURY PARK EAST
LOS ANGELES, CALIFORNIA 90067
(213) 557-0660

August 24, 1982

John H. DeMoully, Esq.
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94306

Re: Recommendation relating to
APPOINTMENT OF A HEALTH CARE REPRESENTATIVE

Dear John:

Following up our telephone conversation yesterday, I would like to express my concerns about the existing staff draft of the above-titled recommendation. To put my concerns in some context, I want to mention, as you already know, that I have developed expertise dealing with ethical and legal dilemmas arising out of medical treatment situations and that my legal practice is primarily devoted to consulting with physicians, hospitals and patients and their families on such matters. I am an Adjunct Assistant Professor of Medicine at UCLA School of Medicine and have served since 1980 as Co-Chairman of the Joint Committee on Biomedical Ethics of the Los Angeles County Bar and Medical Associations.

By coincidence, I also happen to be a member of a Continuing Education of the Bar program, currently being given in three cities in California, on "Using the New Durable Power of Attorney." In preparation for this program, my colleagues on this CEB panel, Harley J. Spitler of San Francisco and Francis J. Collin, Jr. of Napa, and I have spent numerous hours considering the possible use of this relatively new estate-planning document as a vehicle for authorizing a third person to make a variety of what we call "personal care" decisions for the principal, including medical treatment decisions. I enclose a copy of the durable power form which we are distributing to those attending our program solely for discussion purposes. You will note that the language on pages 1-5 of the form relating to health care decisions is quite specific and detailed, and contemplates a rather custom-drafted durable power which reflects the specific wishes of the person signing it rather than boiler-plate language with general authority. We are also equally concerned with protecting the rights of those who want maximal treatment and therapy in the face of a critical or terminal illness as we are in protecting the rights of those who want less than maximal or minimal treatment. For that reason, even in our form for discussion, we have included alternative language which can be adapted by attorneys to fit the specific wishes of their clients. We hope that the attorney in fact, under a durable power, can be an informed and thoughtful proxy decision-maker, making the decisions for the patient-principal that the patient would make for him-or-herself if the patient was physically able to do so.

My concern with the present draft stems in part from the fact that it may undermine our effort to encourage lawyers to articulate their clients' wishes in advance in a durable power by the draft's negative language about such durable powers.

In this connection, I refer to the discussion of durable powers in footnote 6 on page 2 of the draft, the text of section 53.200 and the accompanying comment on pages 12-13 of the draft, and the more ambiguous impact of proposed section 53.180(e) to the Uniform Durable Power of Attorney Act.

I personally believe that the Uniform Act, sections 2400-2407 of the Civil Code, permits a principal to delegate authority to an agent to make any decisions that the principal could make for him-or-herself, subject only to public policy limitations contained in case law or statutes, or by agreements made by the principal prior to any incapacity. I am unimpressed by the argument that the disclosure statement in section 2400(b), which doesn't mention personal care decisions, limits the Act to property decisions. First, the disclosure statement only applies to printed forms of durable powers, not to durable powers prepared by lawyers in their law offices. I am obviously biased in making the following statement, but I do believe that only durable powers which contain specific language approved by the client which gives authority to the agent to make medical treatment and other personal care decisions, should be honored by physicians and hospitals. These powers are too significant to be handled in printed forms with boiler-plate language. Unfortunately, the proposed section 53.200 makes no distinction between customized durable powers and stationery store forms. Secondly, the first draft of the Uniform Health Care Consent Act, presented to the National Conference of Commissioners on Uniform State Laws during their recent meeting in Monterey, contains the following language on page 15 at lines 7-9: "Section 6 is consistent with the Uniform Durable Power of Attorney Act. The appointment made under this section would be given effect without this Act in a jurisdiction that has enacted the Uniform Durable Power of Attorney Act." It's obvious that the Drafting Committee which prepared this draft believed that the Uniform Durable Power of Attorney Act applies to medical treatment and other personal care decisions in addition to financial and property issues.

Physicians and hospitals have legitimate concerns about their potential liability in receiving consent to treatment from persons other than the patient, but I find current practice in hospitals throughout the state to be one in which warm bodies accompanying unconscious, comatose or other uncommunicative patients are asked to sign forms on admission. This fulfills a clerical need to have forms signed by someone. Subsequent consent forms for surgery and other treatments are usually presented to family members if there are any available, or telephonic consent is obtained from the closest family member who can be reached. Yet, there is no statutory procedure for relying on family members except in the case of minors, where parents have the right to make medical treatment decisions. Hospitals have been forced to rationalize decisions made by spouses of adult patients or other family members, either by pointing to the California Supreme Court case of Farber v. Olkon (1953) 40 Cal.2d 503 [which dealt specifically with the rights of the parent of an adult incompetent child] or pointing to the dictum in Cobbs v. Grant (1972) 8 Cal.3d 229, 244 which refers to the authority of the nearest relative of minors or incompetents but relies on three cases which only involve minors. The problems today are with adult patients who cannot make decisions for themselves. The potential pitfall of the current draft of this recommendation is that hospitals and physicians may be left to decide for themselves which representatives of the patient they want to consult, something potentially adverse to the interests of the patient involved and the representative preferred

by the patient. I respect wishes made by an informed prospective patient, particularly if an attorney has attempted to articulate those preferences in a document as detailed as the durable power our CEB panel is recommending to California probate lawyers. The form for the appointment of a health care representative (your proposed section 53.210) does not contain any language which would indicate the wishes of the person signing the appointment with the sole exception of subject matter limitations on the power of the representative.

The people of this State are entitled to select representatives who will reflect their values and beliefs, religious and secular. The durable power lends itself to an articulation of these wishes much more satisfactorily than the simple form appointment of health care representative contemplated by this recommendation. At the very least, those wanting to be more specific in a durable power should not be prevented from serving as legal representatives of the patient. I am concerned that the simple incorporation of the forms in your proposed section 53.210 into the durable power will not solve the problem because of the different requirements for witnesses and the statements of those witnesses. For those who want simply to sign such forms, I have no quarrel with the proposed statute. I believe that the proposed statute can perform its function well without crippling the durable power.

If hospitals were to meet their technical obligation under current law, they would be filing thousands of petitions in the Superior Court, either under section 3200 of the Probate Code dealing with medical authorization of treatment without a conservatorship or under sections 1800 et seq. of the Probate Code dealing with conservatorships. Even if that approach were followed, the courts have now been told in an advisory opinion of the Attorney General's office (number 81-508 dated July 2, 1982) that they do not have jurisdiction to decide certain medical treatment questions involving critically or terminally ill patients.

Under these circumstances, and because I very much support the goal of this recommendation and the development of a statutory approach to medical treatment decisions made by selected agents of the patient, I respectfully urge the Commission and you to consider deferring approval of the current staff draft of this recommendation and requesting that the draft be reconsidered and resubmitted to the Commission at a later meeting after adequate consideration has been given to the issues raised above. There is not adequate time before the Commission's September meeting in San Diego to critique this draft in detail and recommend other language. I only obtained a copy of the draft last week and apologize for this relatively last-minute commentary on it.

I fear that the status of durable powers dealing with medical treatment and other personal care issues will be jeopardized by the language in this draft. If you and the Commission concur in that opinion, I shall be happy to offer my assistance in considering other language which might meet the objectives of the Commission while maximizing the options open to Californians to appoint health care representatives who will best represent their interests.

Thank you for considering this letter.

Sincerely,

CALIFORNIA CONTINUING EDUCATION OF THE BAR

USING THE NEW DURABLE POWER OF ATTORNEY

August/September 1982

Panel Handout

Harley J. Spitler (Moderator)
Cooley, Godward, Castro, Huddleson
& Tatum
San Francisco

Francis J. Collin, Jr.
Dickenson, Peatman & Fogarty
Napa

Leslie Steven Rothenberg
Los Angeles

SAN FRANCISCO -- Friday, August 20, 1:30 to 4:30 p.m.

SAN DIEGO -- Tuesday, August 31, 6:00 to 9:00 p.m.

LOS ANGELES -- Wednesday, September 8, 6:00 to 9:00 p.m.

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FORM

Recording requested by
and when recorded mail to:
JOHN O. JONES
123 Main Street
Podunk, CA 99999

DURABLE POWER OF ATTORNEY

I, JOHN O. JONES, a resident of Napa County, California, hereby appoint you, MARY T. JONES, as my attorney-in-fact to act for me and in my name as authorized in this document. By this document I intend to create a Durable Power of Attorney under California Civil Code Section 2400, et seq.

1. Your Powers. Your primary responsibility is to assure that I am adequately supported for the rest of my life. In order to accomplish this, I hereby give to you full power and authority to perform all acts that may be necessary to be done on my behalf as fully as I could do if personally present and able to act, including, but not limited to, the powers described in this paragraph 1. The powers granted to you in subparagraph A of this paragraph 1 regarding to my personal care shall be immediately effective and shall not be affected by my subsequent incapacity. The powers granted to you in subparagraph B of this paragraph 1 regarding my assets shall only become effective upon my incapacity, as defined in paragraph 8, and shall continue thereafter notwithstanding my incapacity. However, the powers granted to you under subparagraph B of this paragraph 1 shall cease if I regain my capacity.

In subparagraph A of this paragraph 1, I authorize you to make certain medical and psychiatric treatment decisions on my behalf. I am delegating this authority to you in order that you may exercise it promptly on my behalf and in my best interests without having to seek court authority for such decisions or court supervision of them under the California Probate Code....

[I also appoint you to act as my health care representative with authority to act for me in all matters of health care in accordance

This illustrative form is included for discussion only. It has not been edited by CEB

with Section 6 of the Uniform Health Care Consent Act.]

A. Powers Regarding My Personal Care. With respect to my personal care, you shall have the power to:

(1) Gain access to medical and other personal information. To request, review, and receive any information, verbal or written, regarding my personal affairs or my physical or mental health, including medical and hospital records, and to execute any releases or other documents that may be required in order to obtain this information. In order to assist you in exercising these powers I have made detailed waivers and authorizations in subparagraph D of paragraph 3 of this document.

(2) Employ and discharge others. To employ and discharge physicians, dentists, nurses, therapists and other professionals as you may deem necessary for my physical, mental and emotional well-being; and to pay them, or any of them, reasonable compensation. You may also employ and discharge barbers, beauticians, housekeepers, secretaries and others who are not health-care professionals; and pay them, or any of them, reasonable compensation.

(3) Consent, or refuse consent, to medical care. To give or withhold consent to medical care, surgery or any other medical procedures or tests; to arrange for my hospitalization, convalescent care or home care; and to revoke, withdraw, modify or change consent to such medical care, surgery, any other medical procedures or tests, hospitalization, convalescent care, or home care which I or you, as my agent, may have previously allowed or consent to which may have been implied due to emergency conditions. I ask you to be guided in making such decisions on what I have told you about my personal preferences regarding such care. Based

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on those same preferences, you may also summon paramedics or other emergency medical personnel and seek emergency treatment for me, or choose not to do so, as you deem appropriate given my wishes and my medical status at the time of the decision. You are authorized, when dealing with hospitals and physicians, to sign documents titled or purporting to be a "Refusal to Permit Treatment" and "Leaving Hospital Against Medical Advice" as well as any necessary waivers of or releases from liability required by the hospitals or physicians to implement my wishes regarding medical treatment or nontreatment.

(4) Consent, or refuse consent, to psychiatric care. Upon the execution of a certificate by two (2) independent psychiatrists who have examined me, who are licensed to practice in the state of my residence and in whose opinions I am in immediate need of hospitalization because of mental disorders, alcoholism or drug abuse, to arrange for voluntary admission to an appropriate hospital or institution for treatment of the diagnosed problem or disorder; to arrange for private psychiatric and psychological treatment for me; to refuse consent for any such hospitalization, institutionalization, and private psychiatric and psychological care; and to revoke, modify, withdraw or change consent to such hospitalization institutionalization and private treatment which I or you, as my agent, may have given at an earlier time.

(5) Refuse life-prolonging procedures. To request that aggressive medical therapy not be instituted or be discontinued, including (but not limited to) cardiopulmonary resuscitation, the implantation of a cardiac pacemaker, renal dialysis, parenteral feeding, the use of respirators or ventilators, blood transfusions, nasogastric tube use, intravenous feedings, endotracheal tube use, antibiotics, and organ transplants. You should try to discuss the

specifics of any such decision with me if I am able to communicate with you in any manner, even by blinking my eyes. If I am unconscious, comatose, senile, or otherwise unreachable by such communication, you should make the decision guided by any preferences which I may have previously expressed and the information given by the physicians treating me as to my medical diagnosis and prognosis. You may specifically request and concur with the writing of a "no-code" (do not resuscitate) order by the attending or treating physician.

(6) Provide relief from pain. To consent to and arrange for the administration of pain-relieving drugs of any type, or other surgical or medical procedures calculated to relieve my pain even though their use may lead to permanent physical damage, addiction or even hasten the moment of (but not intentionally cause) my death. You may also consent to and arrange for unconventional pain-relief therapies such as biofeedback, guided imagery, relaxation therapy, accupuncture, skin stimulation or cutaneous stimulation, and other therapies which I or you believe may be helpful to me.

(7) Protect my right of privacy. To exercise my right of privacy to make decisions regarding my medical treatment and my right to be left alone even though the exercise of my right might hasten death or be against conventional medical advice. You may take appropriate legal action, if necessary in your judgment, to enforce my right in this regard.

[ALTERNATE LANGUAGE FOR THOSE WISHING MAXIMUM MEDICAL CARE. Paragraphs (5), (6) and (7) are for those who wish minimal care.]

( ) Consent to medical care and furtherance of my wish for maximum care. To give consent for medical care, surgery, and other

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procedures and tests related to my health care, and to arrange for my hospitalization, convalescent care, or home care. Because of my personal desire to have my life prolonged to the greatest extent possible, including the rendering of maximum medical and surgical care available and likely to have the effect of prolonging my life, I instruct you to arrange for such maximum medical and surgical care to be provided to me for the purpose of prolonging my life and without regard to my medical or neurological diagnosis, condition or prognosis, and without regard to financial cost. As my agent, you may not consent to or concur with a "no-code" (do not resuscitate) order, nor may you refuse or withdraw consent to any such medical care, surgery or other procedure or test designed to prolong my life.

(8) Provide for my spiritual or religious needs. Knowing, as you do, my spiritual or religious preferences, to arrange for the presence and involvement of religious clergy or spiritual leaders in my care, provide them access to me at all times, maintain my memberships in religious or spiritual organizations or arrange for membership in such groups, and enhance my opportunities to derive comfort and spiritual satisfaction from such activities, including religious books, tapes, and other materials.

(9) Provide for my companionship. With a view to meeting my needs for companionship at a time when I am disabled or otherwise unable to arrange for that companionship myself, and with your knowledge of my needs and preferences, to arrange for such companionship for me as will respect my dignity and meet my needs and preferences. I shall seek to communicate my wishes in this

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regard to you from time to time, but if necessary, you may rely upon previously-expressed wishes in fulfilling this responsibility.

(10) Provide for my recreational and sports activities, and for travel. To arrange for opportunities for me to engage in recreational and sports activities, including travel, as my health permits. I shall seek to communicate my wishes in this regard to you from time to time, but if necessary, you may rely upon previously expressed preferences in fulfilling this responsiblity.

(11) Arrange my funeral and make anatomical gifts. To make advance arrangements for my funeral and burial, including the purchase of a burial plot and marker, and such other related arrangements, including anatomical gifts, as you deem advisable. I shall seek to communicate my wishes to you with respect to these matters and you should rely upon such wishes in exercising this power.

(12) Execute documents, enter into contracts, and pay reasonable compensation or costs in implementing the above powers. To sign, execute, deliver, acknowledge and make declarations in any document or documents that may be necessary, desirable, convenient or proper in order to exercise any of the powers described in this subparagraph A; to enter into contracts; and to pay reasonable compensation or costs in the exercise of any such powers.

B. Powers Regarding My Assets. In addition to the powers described in subparagraph A above, you shall have the following powers with respect to my assets:

(1) Invest, sell, purchase, lease, borrow, and encumber assets. To sell, lease, or invest assets in which I have an interest, to purchase assets or borrow money on my behalf and

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encumber any asset in which I have an interest as security for such borrowing;

(2) Deal with real property. With respect to real property, to contract for, purchase, and receive such property, and all deeds and other assurances therefor; to lease, sell, change the form of title, release, convey, mortgage, and convey by way of deed of trust, upon such terms and conditions and under such covenants, as you shall deem proper; to grant options; to eject, remove, or relieve tenants or other persons from, and recover possession of, such property by all lawful means; to collect, receive and receipt for rents and profits from such properties; to subdivide, develop or dedicate such property to public use and to dedicate easements to public use without consideration; and to maintain, protect, preserve, insure, repair, build upon, demolish, alter, or improve such property or any part of it;

(3) Collect and recover assets. To demand, sue for, and collect all such sums of money, debts, dues, accounts, legacies, bequests, interest, dividends, annuities and demands that are now or may later become due or payable to me, including any benefits payable by any governmental body or agency, and to take all lawful means to recover such assets, and to compromise claims for such assets and grant discharges for such assets in my name;

(4) Operate businesses. To continue the operation of any business owned by me for such time and in such manner as you shall deem advisable, including, but not limited to, paying my employees, providing employee's benefits, and paying all business related expenses, to transact every kind of business for me, in

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my name, as my act and deed, to incorporate any business of mine and put additional capital into such business, to join in any plan of reorganization or consolidation or merger of such business, or to sell or liquidate the business at such time and on such terms as you shall deem advisable, and to represent me in establishing the value of any business under any "buy-out" agreement to which I may be a party;

(5) Deal with insurance. To insure my life or the life of anyone in whom I have an insurable interest and to insure any asset in which I have an interest, to pay all insurance premiums, to select any options under such policies, to increase or decrease coverage under any such policy, to borrow against any such policy, to pursue all insurance claims on my behalf, to adjust insurance losses, to designate and change beneficiaries of insurance policies insuring my life and beneficiaries under any annuity contract in which I have an interest, to purchase or maintain any medical insurance on me, my spouse, or any of my descendants, or to cancel any of the policies described herein;

(6) Deal with financial institutions. To establish, maintain, or terminate bank accounts, security accounts, certificates of deposit, money market accounts, margin accounts, common trust funds, mutual funds, treasury bills and notes, and any other type of cash fund, cash equivalent or security in my sole name or jointly in my name with others, and to negotiate, endorse or transfer any checks or other instruments with respect to any such accounts, and to endorse, deposit, or collect any checks or drafts made payable to me or to my order;

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(7) Make gifts. To make gifts, grants or other transfers without consideration to or for the benefit of any one or more of my descendants, my spouse, or a charitable institution, either outright or in trust, including the foregiveness of indebtedness and the completion of any charitable pledges I may have made, to make payments for the college and post-graduate tuition and medical care of any descendant of mine, and to consent to the splitting of gifts under Internal Revenue Code §2513, or successor sections thereto, if my spouse makes gifts to any one or more of my descendants or to a charitable institution, and to pay any gift tax that may arise by reason of such gifts;

(8) Make loans. To loan any of my assets to my spouse and any descendant of mine, or their personal representatives or a trustee for their benefit, and such loans shall bear such interest, or no interest, and shall be secured or unsecured, as you shall deem advisable;

(9) Disclaim, renounce, and assign interests. To disclaim, renounce, or assign any gift, inheritance, bequest or right of succession, with or without consideration;

(10) Deal with trusts. To establish any trust with my assets for my benefit or for the benefit of any other person upon such terms as may be necessary or proper, to transfer any asset in which I have an interest to any such trust or to any trust that I may have created, and to exercise (in whole or in part), release, or let lapse any power I may have under any trust whether or not created by me, including any power of appointment, revocation or withdrawal;

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(11) Acquire "Flower Bonds". To purchase for me United States of America treasury bonds of the kind which are redeemable at par in payment of federal estate taxes, to borrow money and obtain credit in my name from any source for such purpose, to make, execute, endorse, and deliver promissory notes, bills of exchange, drafts, agreements, or other obligations for such bonds and, as security therefor, to pledge, mortgage, and assign any stock, bonds, securities, insurance values, and other properties, real or personal, in which I may have an interest, and to arrange for the safekeeping and custody of any such treasury bonds;

(12) Represent me in all tax matters. To prepare, sign, and file federal, state, or local, income, gift, other tax returns of all kinds, FICA returns, payroll tax returns, claims for refunds, requests for extensions of time, petitions to the tax court or other courts regarding tax matters, and any and all other tax related documents, including, without limitation, receipts, offers, waivers, consents (including, but not limited to, consents and agreements under Internal Revenue Code §2032A, or any successor section thereto), closing agreements and any power of attorney form required by the Internal Revenue Service, the Franchise Tax Board, or other taxing authority with respect to any tax year between 1982 and 20__; to pay taxes due, collect refunds, post bonds, receive confidential information, and contest deficiencies determined by the Internal Revenue Service, the California Franchise Tax Board, or other taxing authorities; to exercise any elections I may have under federal, state or local tax law; and generally to represent me in all tax matters and proceedings of all kinds and for all

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periods between 1982 and 20__ before all officers of the Internal Revenue Service, Franchise Tax Board, and any other taxing authority;

(13) Employ others. To employ and remove any domestic help, custodian, attorney, accountant, investment counsel or any other professional advisor to assist you in administering my property and to pay them reasonable compensation;

(14) Enter, establish, close, or maintain safe deposit boxes. To enter, establish, close, maintain and have access to any safe deposit box held in my name alone or jointly with another person whether or not the institution renting such box has its own form of power of attorney for such purposes and to remove all or any of the contents of such box;

(15) Deal with retirement plans. To select various payment options under any retirement plan in which I participate, including plans for self-employed individuals, make beneficiary designations under such plans and change any existing beneficiary designations, make voluntary contributions to such plans, make so-called "roll-overs" of plan benefits into other retirement plans, borrow from such plans if authorized by the plan, and sell assets to or purchase assets from the plan if authorized by the plan;

(16) Litigate. To prosecute, defend, compromise, or arbitrate any claims on my behalf in any local, state, or federal court or administrative body and to settle, appeal, or dismiss such actions;

(17) Support my dependants. To continue to support my spouse and my descendants in the same manner that I have supported them, or any of them, including, but not limited to, payments for their

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food, clothing and shelter (including the payment of real property taxes, payments on loans secured by my residence, and maintenance of my residence), medical, dental and psychiatric care, normal vacations and travel expenses, and the education of my children (including education at vocational and trade schools, training in music, stage, handicrafts, arts, and sports, special training provided at institutions for the mentally or physically handicapped, undergraduate and graduate study in any field at public or private universities, colleges or other institutions of higher learning), and in providing for such education you are authorized to pay for tuition, books and incidental charges made by the educational institutions, travel costs to and from such institutions, room and board, and a reasonable amount of spending money; and

(18) Miscellaneous powers. To open, read, respond to, and redirect my mail; cancel or continue and use any of my charge accounts and credit cards; cancel or continue any of my club, church or other organization memberships, and to continue any payments or contributions incidental to such memberships; take custody of all my important documents, including but not limited to, my will, trust agreements, deeds, leases, life insurance policies, contracts, and securities; to enter into oral or written agreements on my behalf; to support and maintain any animals I may own; to continue to pay any installment obligations I may incur; to execute, acknowledge, and deliver any agreement, stock power, deed, leases and assignments of leases, assignments of accounts receivable, and notices of the expected assignments of such accounts and cancellation of such notices, covenants, indentures, mortgages,

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deeds of trust and reconveyances thereunder, bills, bonds, notes, receipts, evidences of debt, releases and satisfaction of mortgage, judgments, and other debts, or any other document for the accomplishment of, or relating to, any acts authorized by this document; and to perform all, any, and every act required to be done as fully as I could do if personally present and able to act.

C. Restrictions on Powers. Notwithstanding the foregoing provisions of this paragraph 1, you (a) shall have no incidents of ownership over any life insurance policy in which I may own an interest and which insures your life, (b) are prohibited from appointing, assigning, or disclaiming any of my assets, interests, or rights having a value in excess of the federal gift tax annual exclusion amount in any one calendar year to yourself, your estate, your creditors, or the creditors of your estate, or from using my assets to discharge any of your legal obligations, including any obligation of support which you may owe to others (excluding me and those whom I am legally obligated to support), and the annual right to appoint, assign, or disclaim assets, interests, or rights to you or for your benefit within the federal gift tax annual exclusion amount shall be non-cumulative and shall lapse at the end of each calendar year, and (c) you shall not hold or exercise any powers which I may have over assets you have given to me or over assets held in an irrevocable trust of which you are a grantor.

D. Incidental Powers. In connection with the exercise of any of the powers described in this paragraph 1, you are authorized and empowered to perform any other act necessary or incidental to the exercise of such powers with the same validity and effect as if

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I were personally present, competent and personally exercised the powers myself.

2. Ratification. I hereby ratify and confirm all that you shall do or cause to be done under the authority granted in this document, and all promissory notes, bills of exchange, drafts, other obligations, agreements, stock powers, instruments, and other documents, signed, endorsed, drawn, accepted, made, executed or delivered by you shall bind me, my estate, my heirs, successors, and assigns.

3. Third Party Reliance. For the purpose of including any physician, hospital, bank, broker, custodian, insurer, lender, transfer agent, taxing authority, governmental agency, or other party to act in accordance with the powers granted in this document, I hereby represent, warrant, and agree that:

A. If this document is revoked or amended for any reason, I, my estate, my heirs, successors, and assigns will hold such party or parties harmless from any loss suffered, or liability incurred, by such party or parties in acting in accordance with this document prior to that party's receipt of written notice of any such termination or amendment.

B. The powers conferred on you by this document may be exercised by you alone and your signature or act under the authority granted in this document may be accepted by third parties as fully authorized by me and with the same force and effect as if I were personally present, competent, and acting on my own behalf.

C. No person who acts in reliance upon any representation you may make as to the scope of your authority granted under this

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document shall incur any liability to me, my estate, my heirs, successors or assigns for permitting you to exercise any such power, nor shall any person who deals with you be responsible to determine or insure the proper application of funds or property.

D. All third parties from whom you may request information regarding my health or personal affairs are hereby authorized to provide such information to you without limitation and are released from any legal liability whatsoever to me, my estate, my heirs, successors or assigns for complying with your requests. With specific reference to medical information, including information about my mental condition, I am authorizing in advance all physicians and psychiatrists who have treated me, and all other providers of heath care, including hospitals, to release to you all information or photocopies of any records which you may request. If I have the capacity to confirm this authorization at the time of the request, third parties may seek such confirmation from me if they so desire. If I do not have the capacity to make such a confirmation, all physicians, hospitals, and other health care providers are hereby authorized to treat your request as that of a legal representative of an incompetent patient (as contemplated by Section 56.11(c)(2) of the California Civil Code, or any successor section thereto) and to honor such requests on that basis. I hereby waive all privileges which may be applicable to such information and records, and to any communication pertaining to me and made in the course of a lawyer-client, physician-patient, psychiatrist-patient, clergyman-penitent, or sexual assault victim-counselor relationship.

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E. You shall have the right to seek appropriate court orders mandating acts which you deem appropriate if a third party refuses to comply with actions taken by you which are authorized by this document or enjoining acts by third parties which you have not authorized. In addition, you may sue a third party who fails to comply with actions I have authorized you take and demand damages, including punitive damages, on my behalf for such noncompliance.

4. Revocation and Amendment. I revoke all prior General Powers of Attorney that I may have executed and I retain the right to revoke or amend this document and to substitute other attorneys in your place. Amendments to this document shall be made in writing by me personally (not by you) and they shall be attached to the original of this document and recorded in the same county or counties as the original if the original is recorded.

5. Substitute Agents. If you resign, die, become incapacitated as defined in paragraph 8, or fail to act as agent for any other reason, then I appoint....

....[DONALD Q. SMITH as substitute attorney-in-fact, with all the same powers granted to you.]

....[the following individuals as substitute attorneys-in-fact, with all the same powers granted to you, and they shall serve in the following order: DONALD Q. SMITH; ANN BROWN.]

Your resignation as my agent, or the declination of any of the named substitute attorneys, shall be made in writing and shall be attached to the original of this document and recorded in the same county or counties as the original if the original is recorded.

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All references to you in this document shall include references to each of your substitutes.

6. Nomination of Conservator and Guardian Ad Litem. If at any time it becomes necessary to appoint a conservator of my estate or person, or both, I hereby nominate you as such conservator. If for any reason it becomes necessary to appoint a substitute conservator, then I nominate the substitute attorneys named in this document as substitute conservators to serve in the order named. I grant to my conservator all of the powers specified in the California Probate Code. My conservator shall serve in such capacity without bond, or, if a bond be required, I request that such bond be set as low as possible. I hereby revoke all prior conservatorship nominations that I have made.

If at any time it becomes necessary to appoint a guardian *ad litem* to represent me, I hereby nominate you as such guardian. If for any reason it becomes necessary to appoint a substitute guardian *ad litem*, then I appoint the substitute attorneys named in this document as substitute guardians to serve in the order named.

7. Nomination of My Children's Guardian. If a guardian is needed for any child of mine, then I nominate you to serve as the guardian of the person and estate of such child. If you resign, die, become incapacitated as defined in paragraph 8, or fail to act as such guardian for any other reason, then I nominate....

....[DONALD Q. SMITH as substitute guardian to serve in your place.]

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....[the following individuals as substitute guardians, and they shall serve in the following order: DONALD Q. SMITH; ANN BROWN.]

8. Determination of Incapacity and Capacity. For the purpose of this document, a person's incapacity shall be deemed to exist when the person's incapacity has been declared by a Court of competent jurisdiction, or when a conservator for such person has been appointed, or upon presentation of a certificate executed by two (2) physicians licensed to practice in the state of such person's residence which states the doctors' opinion that the person is (a) incapable of caring for himself or herself or (b) is physically or mentally incapable of managing his or her financial affairs. The effective date of such incapacity shall be the date of the decree adjudicating the incapacity, the date of the decree appointing the conservator, or the date of the doctors' certificate, as the case may be. A certified copy of the decree declaring incapacity or appointing a consevator, or the doctors' certificate, shall be attached to the original of this document and recorded in the same county or counties as the original if the original is recorded.

A person will be deemed to have regained capacity if there is a finding to that effect by a court of competent jurisdiction, or when a conservatorship for such person has been judicially terminated, or upon presentation of a certificate executed by two (2) physicians licensed to practice in the state of such person's residence which states the doctor's opinion that the person is (a) capable of caring for himself or herself, or (b) is physically or

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mentally capable of managing his or her financial affairs. A certified copy of the decree declaring such peson's capacity or terminating the conservatorship, or the doctor's certificate, shall be attached to the original of this document and recorded in the same county or counties as the original if the original is recorded.

I hereby voluntarily waive any physician-patient privilege or psychiatrist-patient privilege that may exist in my favor and I authorize physicians to examine me and disclose my physical or mental condition in order to determine my incapacity or capacity for purposes of this document.

9. Definition of Descendants. As used in this document, my "descendants" shall include my lineal issue of all degrees, and references to my descendants or children shall include descendants by adoption as well as by birth, and an adoption of such a descendant of mine by another within or without my family shall be disregarded for purposes of this document.

10. Photostatic Copies. Only one original of this document has been executed. All parties dealing with you are authorized to rely fully on a photostatic copy of the original executed document.

11. Severability. If any provision of this document is not enforceable or is not valid, the remaining provisions shall remain effective.

12. Exculpation. Neither you nor any of your substitutes shall incur any liability to me, my estate, my heirs, successors, or assigns for acting or refraining from acting hereunder, except for willful misconduct or gross negligence. Neither you nor your substitutes shall have responsibility to make my assets productive

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of income, to increase the value of my estate, to diversify my investments, or for entering transactions authorized by this document with yourself so long as you believe such actions are in my best interests or in the best interests of my estate and those interested in my estate.

13. Governing Law. This document shall be governed by the laws of the State of California in all respects, including its validity, construction, interpretation, and termination.

I execute this Durable Power of Attorney on ________________, 1982, at ________________, California.

____
Principal

Sample Signature of Attorney: ______________________________
Attorney-in-Fact

STATE OF CALIFORNIA)
) ss.
COUNTY OF)

On this _____ day of ___________, 1982, before me, the undersigned, a Notary Public in and for said County and State, personally appeared ______________________, known to me to be the person whose name is subscribed to the within Durable Power of Attorney and acknowledged to me that he executed the same.

WITNESS my hand and official seal.

____
Notary Public

[Seal]

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Exhibit 2

THE LEGAL SERVICES SECTION

OF THE STATE BAR OF CALIFORNIA

MARK N. AARONSON, *Chair*
CHARLES F. PALMER, *Chair-Designate*
PETER H. REID, *Secretary*
JOSEPH A. WALKER, *Treasurer*

EXECUTIVE COMMITTEE
MARK N. AARONSON, SAN FRANCISCO
YVONNE B. BURKE, LOS ANGELES
ROBERT M. CASSEL, SAN FRANCISCO
ROBERT J. COHEN, SANTA ANA
DAVID C. COLEMAN, III, MARTINEZ
TAMARA C. A. DAHN, AUBURN
JOEL H. GOLUB, SAN FRANCISCO
GREGORY E. KNOLL, SAN DIEGO
FREDERICK C. KRACKE, WALNUT CREEK
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CHARLES F. PALMER, LOS ANGELES
PETER H. REID, REDWOOD CITY
DANIEL N. SILVA, SAN FRANCISCO
JOSEPH A. WALKER, NEWPORT BEACH

555 FRANKLIN STREET
SAN FRANCISCO 94102-4498
TELEPHONE 561-8250
AREA CODE 415

August 31, 1982

Juan C. Rogers
Calif. Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94306

Re: Appointment of a Health Care Representative

Dear Mr. Rogers:

Pursuant to your correspondence to Pres Soberon and referral to Patricia Lee, Director of Legal Services, the Commission's Recommendation relating to Appointment of a Health Care Representative was submitted to the Legal Services Section's standing Committees on Legal Rights of the Handicapped and Legal Problems of Aging.

Since the comment period was so brief, I am only able to forward at this time the Handicapped Committee's comments on the Law Revision Commission's proposed legislation.

We hope you find the enclosed comments helpful and that further comments could still be timely submitted in late September.

Very truly yours,

Susan Mattox
Office of Legal Services
State Bar of California

cc: Mark Aaronson, Chair, Legal Services Section
Edward Feldman, Chair, Aging Committee
Patricia Lee, Director of Legal Services
Pres Soberon, Sections & Committees

JOHN C. LAMB
5 Foothill Road
San Anselmo, CA 94960
(415) 454-7061

August 25, 1982

Susan Mattox
State Bar of California
555 Franklin
San Francisco, CA 94102

Dear Susan:

You requested comments on CLRC proposed legislation relating to Appointment of a Health Care Representative.

Both Jim Preis and I, for this purpose representing the major disability groups on the Committee, feel that the proposed legislation is not needed, and in fact could be counterproductive if enacted in its present form. We both feel that existing law is adequate to provide appropriate substitute consent to medical treatment, and preferable to the proposal as far as our client groups are concerned. We would not encourage a process such as that proposed which allows substitute decision making on such a vital matter absent the safeguards in present law.

Some specific objections include:

§§5300, 53110: No attempt is made to define "sound mind" or to differentiate the concept from "capacity" or "incapacity" under conservatorships. I feel this is a major and perhaps insurmountable problem with the bill.

§53120(c): I believe that a conservator with authority to consent to medical treatment should prevail over the health care representative. A conservator (or limited conservator) can consent to medical treatment only after a court hearing where the court has determined that the conservatee lacks the capacity to give informed consent (or in an emergency). To my mind, such safeguards are essential if substitute decision making is to be allowed.

§53150: This section underscores the problems with the concept of "sound mind." It seems all too likely that an appointor who disagrees with a non-routine decision of the health care representative will be confronted with the practical burden of proving he is of sound mind. This burden will be all the more difficult since "sound mind" is not defined.

Jim Preis suggests the possibility of a presumption of sound mind, with a periodic showing of no sound mind once absence of sound mind has been established.

§53160 Comment: I am not aware of any authority in the developmental disability law field which allows a close relative (other than the parent of a minor or a conservator specifically granted such power) to consent to medical treatment on behalf of another person.

§53180: Prohibitions should include any experimental procedure, and psychosurgery.

I hope the foregoing will be useful to the drafters of the bill.

Very truly yours,

John C. Lamb
Chair, Committee on Legal
Rights of the Handicapped

JCL:jh

STATE OF CALIFORNIA
COURT OF APPEAL
SECOND DISTRICT—DIVISION FOUR
3580 WILSHIRE BOULEVARD
LOS ANGELES, CALIFORNIA 90010

ROBERT KINGSLEY
ASSOCIATE JUSTICE

August 17, 1982

California Law Revision Commission,
Room D-2,
4000 Middlefield Road,
Palo Alto, California 94306

Gentlemen:

I have before me five Tentative Recommendations for comment. I reply as follows:

(1) Tentative Recommendations re: Division of Joint Tenancy, etc.

I think this is an excellent idea. As you point out, it permits a rational division of marital assets, without being restrained by what, often, is an uniformed mode of taking title.

(2) Tentative Recommendation re: Missing Persons.
(3) Tentative Recommendation re: Report of Assessment of Proposed Limited Conservatee.
(4) Tentative Recommendation re: Disclaimers.

The recommendations seem well drawn; I express no opinion on the policy involved, except to state my view that the Disclaimer recommendation is useful insofar as it allows a federally proper disclaimer to operate in California.

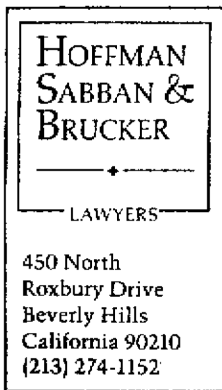
(5) Tentative Recommendation re: Appointment of a Health Care Representative.

The recommendation seems to deal only with the appointment by an adult for himself. However, in my experience, the most common use of an appointment is by a parent for a minor child. There are many cases where a minor child is, with parental consent, to be absent from home for an extended period -- to boarding school, summer camp, or a trip with a

friend or relative, for example. Is it intended that the formalities of the draft be used in such a case? If not, to avoid uncertainty, the draft should expressly exclude such types of appointment.

Sincerely,

Exhibit 4



450 North
Roxbury Drive
Beverly Hills
California 90210
(213) 274-1152

August 10, 1982

OUR FILE:

California Law Revision Commission
4000 Middlefield Road
Room D-2
Palo Alto, California 94306

Re: Recommendation Relating to Appointment of a Health Care Representative

Ladies and Gentlemen:

I am strongly opposed to the recommendation mentioned above. My opposition relates not to the notion that a person should be free to appoint a health care representative, but rather to the form in which this proposal is to be carried into effect.

In my practice, I am required to have a client sign numerous separate documents in connection with their estate planning. In a typical situation, my clients must sign a Will, Living Trust (and documents to transfer title to the Trust), Directive to Physicians and a Durable Power of Attorney. The recommendation would force me to prepare yet another separate document, with a separate body of rules governing form and the manner of execution.

Frankly, I can think of no adequate reason for not allowing a health care representative to be appointed at the same time and in the same document as a Directive to Physician or, better yet, at the same time and in the same document as a Durable Power of Attorney. Frankly, in almost all cases, I believe that the person holding the Durable Power of Attorney would be the same person as the health care representative.

I have no trouble with the notion that, in general, a power of attorney will not authorize the attorney to consent to health care, such as is stated in the comment to proposed Section 53.200. However, I urge you to adopt a form which would permit an individual to name a health care provider at the same time and in the same document that he appoints his attorney to act under a Durable Power of Attorney. The requirements of

witnesses, the signature of the health care representative, and similar technicalities, should be eliminated.

Please stop this proliferation of needlessly separate documents.

Very truly yours,

Paul Gordon Hoffman

PGH:sk

Exhibit 5

OFFICES OF

THE COUNTY COUNSEL
County Of Orange

HALL OF ADMINISTRATION • P. O. BOX 1379 • SANTA ANA, CA 92702 • 834-3300

ADRIAN KUYPER
COUNTY COUNSEL

WILLIAM J. McCOURT
CHIEF ASSISTANT

ROBERT F. NUTTMAN
ARTHUR C. WAHLSTEDT, JR.
ASSISTANTS

JOHN W. ANDERSON
LAURENCE M. WATSON
VICTOR T. BELLERUE
JOHN R. GRISET
CHARLES B. SEVIER
TERRY C. ANDRUS
TERRY E. DIXON
EDWARD N. DURAN
IRYNE C. BLACK
RICHARD D. OVIEDO
O.M. MOORE
JULEE ROBINSON
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R. DONALD McINTYRE
HOWARD SERBIN
M. TONI PERRY
DANIEL J. DIDIER
GENE AXELROD
ROBERT L. AUSTIN
DONALD H. RUBIN
DAVID R. CHAFFEE
BARBARA H. EVANS
CAROL D. BROWN
BARBARA L. STOCKER
DEPUTIES

August 18, 1982

California Law Revision Commission
400 Middlefield Road, Room D-2
Palo Alto, California 94306

Re: Proposed Revision to the Civil Code

Ladies and Gentlemen:

We have reviewed your Draft #L-703 relating to revision of the Civil Code to allow for appointment of a health care representative. It appears to be an excellent vehicle for enabling the appointor to transfer medical decision-making authority to a person whom he or she trusts. However, extension of the concept to decisions involving treatment of mental conditions presents substantial problems which render it of doubtful utility.

This is particularly true of the interaction of the proposed revision with the provisions of the Lanterman-Petris-Short (LPS) Act, Welfare and Institutions Code Section 5000 et seq. The provisions of that Act give the conservator the power to involuntary commit the conservatee to a mental health treatment facility.

The draft revision expressly divests the health care representative of such involuntary commitment power (Sec. 53.180(a)(1)) but otherwise essentially gives the health care representative preemptive priority over all other persons in making health care decisions for the appointor. When an LPS conservator is appointed in such a case, the conservator would have nothing more than the bare power to commit, with no authority to obtain treatment without the cooperation of the health care representative. Such a situation is, at best, awkward and defeats the purpose of conservatorship. At worst, it could result in a situation where the appointor/conservatee is committed, but the health care representative withholds consent to treatment. Such confinement without treatment has been held unconstitutional.

The provisions of Section 53.160 concerning "disqualification" also present problems of conflict with the LPS Act. Many of our "revolving door" mental patients might be sagacious enough, while not under conservatorship, to execute a disqualification of the Public Guardian. In the event of subsequent LPS appointment, the Public Guardian/conservator would again be left with the bare power of commitment, without power to treat.

To prevent these conflicts, you may want to consider the following revisions to the draft:

1. In Section 53.100, delete the words "or mental."

2. In Section 53.110, add subsection (f):

   "The powers and duties of a health care representative appointed under this Part are suspended during any period in which the appointor is involuntary detained pursuant to Chapter 2 of Part 1 of Division 5 of the Welfare and Institutions Code, or during which a conservator of the person of the appointor is appointed pursuant to Chapter 3 of Part 1 of Division 5 of the Welfare and Institutions Code."

3. In Section 53.160, add subsection (g):

   "A disqualification executed under this Section shall not be effective during any period in which the appointor is involuntarily detained pursuant to Chapter 2 of Part 1 of Division 5 of the Welfare and Institutions Code, or during which a conservator of the person of the appointor is appointed pursuant to Chapter 3 of Part 1 of Division 5 of the Welfare and Institutions Code."

Thank you for this opportunity to submit our comments.

Very truly yours,

ADRIAN KUYPER, COUNTY COUNSEL

By ______________________
James F. Meade, Deputy

JFM:mr

AMERICAN ASSOCIATION OF RETIRED PERSONS

AARP STATE LEGISLATIVE COMMITTEE

1271 B Pine Creek Way
Concord, CA 94520

August 29, 1982

John H. DeMoully, Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94306

Dear Mr. DeMoully:

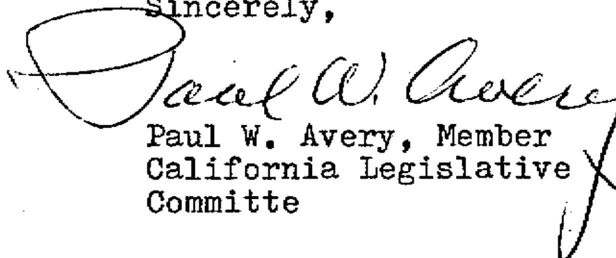
We have studied the Staff Draft Recommendations relating to the following:

Missing Persons,
Appointment of a Health Care Represenative, and
Report of Assessment of Proposed Limited Conservatee.

We find the proposals to be age related and in the best interests of older persons in California. Hence we will support effectuating legislation when the opportunity arises.

In a like manner, we find the Tentative Reccommendation relating to Disclaimer of Testamentary and Nontestamentary Interests quite appropriate and acceptable.

Sincerely,



Paul W. Avery, Member
California Legislative
Committe

Arthur F. Bouton
AARP President

Cyril F. Brickfield
Executive Director

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Exhibit 7

THE WALL STREET JOURNAL, Tuesday, September 7, 1982

Questions of Age

Doctors Debate Right To Stop 'Heroic' Effort To Keep Elderly Alive

They Try to Abide by Wishes Of Patients, but Ethical And Legal Knots Persist

Case for a 'Penultimate Will'

By LISA NELSON
Staff Reporter of THE WALL STREET JOURNAL

The 85-year-old woman lay bedridden in a nursing home unable to speak, her left side paralyzed by the irreversible effects of a stroke. The few photographs in her room showed her as a much younger woman—active, dynamic, a leader in the community.

Her doctors prescribed pills to bring down her blood pressure and thus lessen the likelihood of another stroke. The patient refused to take them.

"She implored us with her eyes, her hands and her tears not to make her take those pills," says Judith Ahronheim, a geriatric specialist at New York University Medical Center recalling an incident that occurred early in her medical training. "We tried to coax her," Dr. Ahronheim continues, adding that the medical staff was in doubt at first about how much the patient understood about her condition. Eventually, she says, the doctors became convinced that the woman was indeed lucid, but had grown weary of unceasing medical treatment and simply had decided to let nature take its course. "We felt we had no choice but to respect her wishes," Dr. Ahronheim says.

The patient died about a year later.

Life-or-Death Questions

Is there a point when doctors should stop treating severely debilitated elderly patients for whom there is no reasonable hope of benefit? Should quality of life become a weightier consideration than mere survival? Or, if the technology exists, should there always be an imperative to treat? And how is a doctor even to discern a patient's wishes, when that patient is comatose or senile?

Such questions are stirring heated controversy in hospitals and nursing homes. The ethical and legal issues are becoming more urgent as technology enables doctors to sustain life almost indefinitely and as the average patient population grows steadily older. (The segment of the U.S. population 75 years old and older increased more than 37% during the 1970s and continues to be one of the fastest-growing segments.)

"Human society has never before faced the issue of so many people living for so long with such severe impairment," says Nicholas Rango, a geriatric specialist and member of a project on ethics and geriatric medicine sponsored by the Hastings Center, which does medical-ethics research, and by Harvard Medical School.

Complicating the ethical issues are economic pressures. The burgeoning population of elderly, disabled patients strains limited medical resources. Leslie Libow, clinical director of the new geriatrics department at Mt. Sinai Medical Center in New York, observes: "Choices will have to be made. But how, and by whom?"

Physician as 'Cost-Saver'

Writing in the New York State Journal of Medicine, Dr. Libow cites a situation where four patients, all in their late 70s, were occupying beds in a hospital intensive-care ward. Eventually one of them—the least critically ill—had to be removed to free an intensive-care bed for a 49-year-old heart-attack patient. Setting up arbitrary criteria for such decisions, Dr. Libow says, risks "placing the physician in the role of 'cost-saver' for society, rather than as advocate and healer of the ill."

Indeed, the notion of withdrawing lifesaving or life-supporting treatment conflicts with the medical profession's oath to preserve life at all cost. But increasingly, disabled and chronically ill elderly patients are asking that such treatment be stopped. If the attending physician complies, he opens himself to possible charges of neglect—or even homicide. Conversely, doctors who continue treatment against a patient's will can face charges of assault.

For now, most physicians are lacking any firm ethical or legal guidelines. The courts have tended to uphold the wishes of terminal or comatose patients who ask—or who have previously documented a request—that "heroic" or "extraordinary" life-sustaining treatment be withheld. A far stickier area—and one in which there is scant legal precedent—concerns severely disabled patients who face no imminent threat of death but who ask that even routine medical procedures be stopped.

No specific cure exists for most of the chronic diseases that afflict the elderly: rheumatic disease, osteoporosis, arteriosclerosis, stroke, senile dementia and advanced cancer. In the past, pneumonia—once referred to as "the old man's friend"—often spared the aged from long years of disability and allowed them a relatively speedy and dignified death.

But, observes Alexander Leaf of Harvard Medical School writing in the New England Journal of Medicine, modern technology has removed this escape hatch. Dr. Leaf says that today's pacemakers, antibiotics and respirators "often resolve the immediate problem and return the patient again to a nursing home."

A Right to Choose

For a paralyzed stroke victim in her 80s, even an ordinary nasal feeding tube could be considered an "extraordinary" measure that, by indefinitely sustaining life, merely prolongs suffering. Paul Ramsey, professor of Christian ethics at Princeton, argues that this kind of patient has "a moral right to choose how to live her life while dying." Yet doctors confronting growing numbers of such patients are proceeding in "an ethical

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Questions of Age: May Physicians Stop 'Heroic' Effort to Sustain Life?

Continued From First Page

vacuum," says Dr. Rango of the Hastings-Harvard project.

Theologians offer no consensus. "Life is very sacred, but there are limits to the obligation to maintain it," says Father Albert Moraczewski, vice president of the Pope John XXIII Medical-Moral Research and Educational Center in St. Louis. But Rabbi Seymour Siegel, professor of ethics and theology at New York's Jewish Theological Seminary, argues, unless a person actually is in the throes of death, "life is life." He adds, "it is sacred and must always be maintained. Quality of life is not a relevant consideration."

Doctors continue to face the quandary. "Not to push with all available resources in every case leaves us open to accusation of presuming godlike powers in deciding who shall live and who shall die," writes Dr. Leaf, chairman of Harvard's department of preventive medicine. "On the other hand, to push with all available resources when the probability of improvement seems vanishingly small leaves us open to the accusation of presuming godlike powers of healing."

Physicians, who generally try to abide by a patient's wishes, find the task vastly complicated by the high incidence of depression and senility in elderly patients as a group.

Dr. Ahronheim at the NYU Medical Center warns of the perils of taking patients at their word. "Older people talk about death a lot—even healthy older people," the 38-year-old physician says. "They'll be depressed and they'll say, 'You know, you really shouldn't live this long. I really want to die.' "

Dr. Ahronheim recalls that once a very ill female patient asked her: "Doctor, why don't you just let me die?" When Dr. Ahronheim replied, "Because I really like having you around," the woman's face lit up. "She took my hand and said, 'Oh, thank you,' " Dr. Ahronheim recalls. Old people, she adds, "want to know there's a reason for them to be on this earth."

The physician's decision is even more difficult when a patient isn't lucid, or is only intermittently so. Doctors tell of patients beseeching them to cease all treatment in the morning, only to rescind the request by nightfall. When in doubt as to a patient's wishes, says Carl Eisdorfer, president of Montefiore Medical Center in the Bronx and a pyschiatrist specializing in geriatric problems, "the physician has an ethical obligation to err on the side of preserving life."

Doctors try when possible to consult closely with a patient's family, but even here they encounter a thicket of problems. Family members may be emotionally or physically distant, and a potential inheritance may influence their decision. The law varies from state to state as to who can give consent to stop treating an incompetent patient: the courts, the physician or the family.

Dr. Ahronheim recounts one instance when a family's decision tipped the scales. A 75-year-old senile woman with a history of diabetes and stroke had developed gangrene in one foot. Surgery was clearly indicated. After lengthy talks with her family, however, it was decided, Dr. Ahronheim says, "to let nature take its course. She died peacefully about a day and a half later." Dr. Ahronheim concedes that technically, the woman could have been saved. "But from what?" she asks.

Increasingly, such decisions are being referred to hospital ethics committees composed of doctors, nurses, social workers, lawyers and even philosophers. "I don't believe in physicians' assigning to themselves the responsibility for making those kinds of decisions in a social vacuum," says Dr. Rango of the Hastings-Harvard project. "Consultation is part of the moral obligation of the physician." When patients ask that treatment be terminated, a few nursing homes have begun asking them to document their request on official forms or at formal proceedings.

State legislatures have begun to grapple with the ethical issues involving dying patients. Thirteen states and the District of Columbia have passed legislation—known loosely as "natural death" statutes—that recognize the right of a terminally ill person to refuse treatment that could prolong his life.

An estimated five million Americans have drawn up "living wills" in which they request that extraordinary measures not be used to keep them alive when hope of recovery is gone. In this way, "the rights that exist for competents can be preserved when they become incompetent," says A. J. Levinson, executive director of Concern for Dying, a New York group that addresses the problems of dying patients and their families.

The flaw in most current legislation, according to Mrs. Levinson, is that it is restricted to terminally ill patients and is subject to interpretation. "What do you do," she asks, in cases such as stroke victims "when there is no disease that is going to bring about death instantly?"

As one solution, some advocate the use of a "penultimate will," which would be far more comprehensive. In this document, individuals would name a guardian who would protect their interests in the event that they become incompetent. They could also specify their attitudes about a wide range of treatment and care in their final years.

More and more states are establishing public guardianship programs, whereby elderly, incompetent patients without families are made wards of the state. The state director on aging, for example, is then responsible for protecting that patient against abuse, neglect and exploitation.

Lately, such public guardians have been swamped with requests to intervene in the life-or-death decisions involving whether to continue treating chronically ill elderly wards. Accordingly, several states have created advisory boards of doctors, attorneys and clergymen to weigh each case and make recommendations to the appointed guardians.

As life expectancy increases, so do the ethical and legal issues. Montefiore's Dr. Eisdorfer, for example, sees incompetency itself looming as "a major problem in the future." The incidence of senile dementia rises sharply with advancing age, he observes, from 10% of the population over 65 to 50% of those over 90. "Increasing longevity is going to push the number of demented persons up," Dr. Eisdorfer says. "Society will have to begin recognizing the consequences of being able to keep people alive."

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September 3, 1982

California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, California 94306

Re: Staff Draft # L-627: Appointment of a Health Care Representative

Gentlemen:

This letter contains my comments regarding the above Staff Draft # L-627.

At the present time I am a member of a three man panel which is presenting a C.E.B. program on "Using the New Durable Power of Attorney." The other two panelists are Francis J. Collin, Jr. and Leslie Steven Rothenberg.

The following are my comments:

1. Since your Staff Draft was prepared, the National Conference of Commissioners on Uniform State Laws has adopted a Model Health Care Consent Act at its July 20 - August 6, 1982 meeting in Monterey, California. I urge you to study that Act because it takes positions and makes proposals that are wholly contrary to your recommendations.

Most importantly, it takes the very sound position that there is total compatability between the durable power and the appointment of a health care representative. The provisions of proposed Civil Code Section 53.200 of your draft bill are both (i) wrong as a matter of substantive law and (ii) totally unwise and unsound as a matter of social policy. Similarly, your comment that:

> "This subdivision rejects the view that a power of attorney under the Uniform Durable Power of Attorney Act (see Sections 2400-2407) authorizes consent to health care."

is completely erroneous as a matter of statutory construction.

I am presently serving as a member of the Joint Editorial Board for the Uniform Probate Code. It contains some of the original draftsmen of the durable power sections (Article V, Part 5) of the Uniform Probate Code. I can assure you that the draftsmen of those sections (i) considered the use of the durable power in the health care area and (ii) never perceived that anyone would conclude that the durable power was limited to property matters. There is neither history nor any decisional law to support your position. You should reconsider.

2. The definition of "health care decision" is too limited. I am enclosing another definition for your consideration.

3. In section 53.190(b)(2) the phrase "conservator in the estate of the principal" is defined to mean "the conservator of the person of the individual who appointed the health care representative." This is nonsense. I really do not know what is intended by that definition.

I will greatly appreciate your sending me copies of any additional recommendations, memoranda or other writings which contain your recommendations or positions with respect to the appointment of a health care representative.

Sincerely,

Harley J. Spitler

HJS:bls
Enclosure

Proposed Section 53.100(a)

(a) "Health care decision" means consent, refusal to consent, or withdrawal of consent to any care, treatment, service, or procedure to maintain, diagnose, or treat a physical or mental condition, even though such consent, refusal to consent, or withdrawal of consent, probably will result in death.

Harley Spitler

FOR FINAL APPROVAL

MODEL HEALTH CARE CONSENT ACT

NATIONAL CONFERENCE OF COMMISSIONERS

ON UNIFORM STATE LAWS

MEETING IN ITS NINETY-FIRST YEAR
MONTEREY, CALIFORNIA

JULY 30 - AUGUST 6, 1982

MODEL HEALTH CARE CONSENT ACT

MODEL HEALTH CARE CONSENT ACT

SECTION 1. [Definitions.]

As used in this Act:

(1) "Adult" means an individual [18] or more years of age.

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

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

(4) "Minor" means an individual who is not an adult.

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

SECTION 2. [Individuals Who May Consent to Health Care.]

An individual, unless incapable of consenting under Section 3, may consent to health care for himself if he is:

(1) an adult;

(2) a minor, and

(i) is emancipated,

(ii) has attained the age of [14], is living apart from his parents or from an individual in loco parentis and is managing his own affairs, regardless of the source of his income,

(iii) is or has been married,

(iv) is in the military service of the United States, or

(v) is authorized to consent to the health care by any other law of this state.

SECTION 3. [Individuals Incapable of Consenting.]

An individual otherwise authorized under this Act may consent to health care unless, in the good faith opinion of the health care provider, the individual is incapable of making a decision regarding the proposed health care.

SECTION 4. [Individuals Who May Consent to Health Care for Others.]

(a) If an individual incapable of consenting under Section 3 has not appointed a health care representative under Section 6 or if the health care representative appointed under Section 6 is not reasonably available or declines to act for any reason, consent to health care may be given:

(1) by a guardian of the person, a representative appointed under Section 7, or a representative designated or appointed under other law of this state;

(2) if there is no guardian or other representative described in paragraph (1) or he is not reasonably available, declines to act, or his existence is unknown to the health care provider, by a spouse, parent, adult child, or adult sibling, unless disqualified under Section 8.

(b) Consent to health care for a minor not authorized to consent under Section 2 may be given:

(1) by a guardian of the person, a representative appointed under Section 7, or a representative designated or appointed under other law of this state;

(2) if there is no guardian or other representative described in paragraph (1) or he is not reasonably available, declines to act, or his existence is unknown to the health care provider, by a parent or an individual in loco parentis;

(3) if a parent or an individual in loco parentis is not reasonably available, declines to act, or is unknown to the health care provider, by an adult sibling of the minor.

(c) An individual delegated authority to consent under Section 5 has the same authority and responsibility as the individual delegating the authority.

(d) An individual authorized to consent for another under this section must act in good faith and in the best interest of the individual incapable of consenting.

SECTION 5. [Delegation of Power to Consent to Health Care for Another.]

(a) An individual authorized to consent to health care for another under subsection 4(a)(2), 4(b)(2) or 4(b)(3) who for a period of time will not be reasonably available to exercise the authority may delegate the authority to consent during that period to another not disqualified under Section 8. The delegation must be in writing and signed and may specify

conditions on the authority delegated. Unless the writing expressly provides otherwise, the delegatee may not delegate the authority to another.

(b) The delegator may revoke the delegation at any time by notifying orally or in writing the delegatee or the health care provider.

SECTION 6. [Health Care Representative: Appointment; Qualification; Powers; Revocation and Responsibility.]

(a) An individual who may consent to health care under Section 2 may appoint another as a health care representative to act for the appointor in matters affecting his health care.

(b) A health care representative appointed under this section must be an individual who may consent to health care under Section 2.

(c) An appointment and any amendment thereto must be in writing, signed by the appointor and a witness other than the health care representative and accepted in writing by the health care representative.

(d) The appointor may specify in the writing terms and conditions considered appropriate, including an authorization to the health care representative to delegate the authority to consent to another.

(e) The authority granted becomes effective according to the terms of the writing.

(f) The writing may provide that the authority does not commence until, or terminates when, the appointor becomes incapable of consenting. Unless expressly provided otherwise the authority granted in the writing is not affected if the appointor becomes incapable of consenting.

(g) Unless the writing provides otherwise, a health care representative appointed under this section who is reasonably available and willing to act has priority to act for the appointor in all matters of health care.

(h) In making all decisions regarding the appointor's health care, a health care representative appointed under this section must act (i) in the best interest of the appointor consistent with the purposes expressed in the appointment and (ii) in good faith.

(i) A health care representative who resigns or is unwilling to comply with the written appointment may exercise no further power under the appointment and shall so inform (i) the

appointor, (ii) the appointor's legal representative, if one is known, and (iii) the health care provider, if the health care representative knows there is one.

(j) An individual who is capable of consenting to health care may revoke:

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

(2) the authority granted to the health care representative by notifying the health care provider orally or in writing.

SECTION 7. [Court-Ordered Health Care or Court-Ordered Appointment of a Representative.]

(a) A health care provider or any interested individual may petition the [__________] court to make a health care decision or order health care for an individual incapable of consenting or to appoint a representative to act for that individual.

[(b) Reasonable notice of the time and place of hearing a petition under this section must be given to the individual incapable of consenting and to individuals in the classes described in Section 4 who are reasonably available.

(c) The court may modify or dispense with notice and hearing requirements if it finds that delay will have a serious, adverse effect upon the health of the individual.]

(d) If the court finds:

(1) a health care decision is required for the individual;

(2) the individual is incapable of consenting to health care; and

(3) there is no individual authorized to consent or an individual authorized to consent to health care is not reasonably available, declines to act, or is not acting in the best interest of the individual in need of health care, the court may order health care, appoint a representative to make a health care decision for the individual incapable of consenting to health care with such limitations on the authority of the representative as it considers appropriate, or order any other appropriate relief in the best interest of that individual.

SECTION 8. [Disqualification of Authorized Individuals.]

(a) An individual who may consent to health care for himself under Section 2 may disqualify others from consenting to health care for him.

1 (b) The disqualification must be in writing, signed by the
2 individual, and designate those disqualified.
3
4 (c) A health care provider with knowledge of a written
5 disqualification may not accept consent to health care from an
6 individual disqualified.
7
8 (d) An individual who knows he has been disqualified to
9 consent to health care for another may not act for the other
10 under this Act.
11
12 SECTION 9. [Limitations of Liability.]
13
14 (a) A health care provider acting or declining to act in
15 reliance on the consent or refusal of consent of an individual
16 who believed in good faith is authorized by this Act or other law
17 of this State to consent to health care is not subject to criminal
18 prosecution, civil liability, or professional disciplinary action on
19 the ground that the individual who consented or refused to
20 consent lacked authority or capacity.
21
22 (b) A health care provider who believes in good faith an
23 individual is incapable of consenting under Section 3 is not
24 subject to criminal prosecution, civil liability, or professional
25 disciplinary action for failing to follow that individual's direction.
26
27 (c) Any individual who in good faith believes he is
28 authorized to consent or refuse to consent to health care for
29 another under this Act or other law of the state is not subject
30 to criminal prosecution or civil liability on the ground he lacked
31 authority to consent.
32
33 SECTION 10. [Availability of Medical Information.]
34
35 An individual authorized to consent to health care for another
36 under this Act has the same right as does the individual for
37 whom he is acting to receive information relevant to the proposed
38 health care and to consent to the disclosure of medical records
39 to the proposed health care provider. [Disclosure of information
40 regarding the proposed health care to an individual authorized to
41 consent for another is not a waiver of an evidentiary privilege.]
42
43 SECTION 11. [Effect on Existing State Law.]
44
45 (a) This Act does not affect the law of this state
46 concerning an individual's authorization to make a health care
47 decision for himself or another to withdraw or withhold medical
48 care necessary to preserve or sustain life.
49
50 (b) This Act does not affect the requirements of any other
51 law of this state concerning consent to observation, diagnosis,
52 treatment or hospitalization for a mental illness.
53

(c) This Act does not authorize an individual to consent to any health care prohibited by the law of this state.

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

(e) This Act does not affect the law of this state concerning (i) the standard of care of a health care provider required in the administration of health care, (ii) when consent is required for health care, (iii) informed consent for health care, or (iv) consent to health care in an emergency.

(f) This Act does not prevent an individual capable of consenting to health care for himself or another under this Act, including those authorized under Sections 4, 5 and 6, from consenting to health care administered in good faith pursuant to religious tenets of the individual requiring health care.

SECTION 12. [Severability.]

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

SECTION 13. [Uniformity of Application and Construction.]

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

SECTION 14. [Short Title.]

This Act may be cited as the Uniform Health Care Consent Act.

SECTION 15. [Repeal.]

The following acts and parts of acts are repealed:

(1)

(2)

(3)

SECTION 16. [Time of Taking Effect.]

This Act shall take effect ____________________.

#L-703

STAFF DRAFT

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

APPOINTMENT OF A HEALTH CARE REPRESENTATIVE

July 30, 1982

Important Note. This staff draft of a recommendation reflects the Commission's tentative conclusions. It is being distributed to interested persons and organizations so that they can make their views known to the Commission. Any comments sent to the Commission will be considered at the Commission's September 1982 meeting when the Commission determines what recommendation, if any, it will make to the California Legislature. It is just as important to advise the Commission that you approve the draft as it is to advise the Commission that you object to the draft or that you believe that it needs to be revised.

COMMENTS ON THIS STAFF DRAFT SHOULD BE SENT TO THE COMMISSION NOT LATER THAN AUGUST 31, 1982.

The Commission often substantially revises tentative drafts as a result of the comments it receives. Hence, this staff draft is not necessarily the recommendation the Commission will submit to the Legislature.

California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94306

STATE OF CALIFORNIA

EDMUND G. BROWN JR., *Governor*

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LETTER OF TRANSMITTAL

The Law Revision Commission was authorized by Resolution Chapter 19 of the Statutes of 1979 to study the rights and disabilities of minors and incompetent persons. The Commission herewith submits its recommendation relating to one aspect of this topic--appointment of a health care representative.

This recommendation proposes that a person of sound mind be permitted to appoint a health care representative. The health care representative could make health care decisions for the appointor, particularly where the appointor later becomes incapable of making the decisions. The recommendation also proposes provisions that permit a person to disqualify another from making health care decisions on behalf of the person executing the disqualification.

#L-703

STAFF DRAFT

RECOMMENDATION

relating to

APPOINTMENT OF A HEALTH CARE REPRESENTATIVE

Background

Medical care may be given to an adult in the ordinary, nonemergency situation only with the person's informed consent.[1] If the person is incapable of giving informed consent, a substitute decision-making process is necessary. The authority to consent is vested in the person's closest available relative[2] or, if a conservatorship of the person has been established, the court or conservator may make the necessary decisions.[3] Short of establishing a conservatorship, there is statutory authority for obtaining a court order for medical treatment for a person who is unable to give informed consent.[4] However, there is no statute that specifically authorizes one person to appoint another to make health care decisions for the appointor.

An individual who is competent to make health care decisions nevertheless may want to delegate this decisional authority to a relative or friend. In addition, many persons want the assurance that some other individual whom they trust will make health care decisions on their behalf should they become incapable of making the decisions. In the interest of self-determination and individual autonomy, a person should

1. See Cobbs v. Grant, 8 Cal.3d 229, 242-44, 502 P.2d 1, 104 Cal. Rptr. 505 (1972) (dictum); 4 B. Witkin, Summary of California Law Torts §§ 199-205, at 2485-91 (8th ed. 1974); see also Welf. & Inst. Code §§ 5326.2-5326.5 (consent provisions relating to treatment of mental illness of persons involuntarily detained).

2. See Cobbs v. Grant, 8 Cal.3d 229, 502 P.2d 1, 104 Cal. Rptr. 505 (1972) (dictum).

3. See Prob. Code §§ 2354 (medical treatment of conservatee not adjudicated to lack capacity to give informed consent), 2355 (medical treatment of conservatee adjudicated to lack capacity to give informed consent), 2356 (limitations), 2357 (court ordered medical treatment).

4. See Prob. Code §§ 3200-3211.

have the power to select a health care representative as an alternative to leaving the authority to make health care decisions in the hands of a court.[5] Giving an individual this right would be consistent with the right to execute a durable power of attorney[6] and to nominate a conservator.[7]

Recommendations

The Law Revision Commission recommends enactment of a statute that specifically permits the appointment of a health care representative and that deals with the unique problems in this area.[8]

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5. For a discussion of the need to recognize a power in an individual to provide for health care in the eventuality of incompetence, see Alexander, Premature Probate: A Different Perspective on Guardianship for the Elderly, 31 Stan. L. Rev. 1003 (1979).

6. A person may execute a durable power of attorney that remains effective even if the principal becomes incompetent, thereby avoiding the need for establishing a court-supervised conservatorship. See Civil Code §§ 2400-2407. For background on this statute, see Recommendation Relating to Uniform Durable Power of Attorney Act, 15 Cal. L. Revision Comm'n Reports 357-62 (1980). However, a power of attorney, durable or not, is primarily a device for managing property. See W. Johnstone & G. Zillgitt, California Conservatorships § 1.13, at 6-7 (Cal. Cont. Ed. Bar 1968); 1 B. Witkin, Summary of California Law Agency and Employment §§ 120-122, at 730-31 (8th ed. 1973). But see Spitler, California's "New" Durable Power of Attorney Act--The Second Time Around, 3 CEB Est. Plan. R. 41, 43-45 (1981) (medical decisions under durable power of attorney act). The disclosure statement required by Civil Code Section 2400(b) to be in durable power of attorney forms printed in this state refers only to the power to deal with property. Nothing in the Prefatory Note or Comments to the Uniform Durable Power of Attorney Act (1979) recognizes the existence of any authority in an attorney in fact to make health care decisions. For this reason, it is unlikely that many health care providers would be willing to rely on the consent given by an attorney in fact under a durable power of attorney relating to the health care of the principal.

7. Prob. Code § 1810 (court to appoint nominee of proposed conservatee unless not in best interests).

8. The recommended statute does not prescribe the nature of the decision-making relationship between the appointor and the health care representative. The appointor can discuss the appointment with the health care representative and can make sure that the health care representative understands and is willing to comply with the appointor's desires. In addition, the written appointment may include instructions concerning the exercise of the authority conferred.

The recommended statute has the following features:

(1) Any adult or emancipated minor[9] of sound mind may appoint a health care representative. The appointment may specify limitations on the powers of the health care representative and may include instructions to the health care representative.

(2) The appointment of a health care representative must be in writing, signed by the appointor, and witnessed by two persons other than the health care representative.[10] The appointment does not become effective until it is signed by the health care representative.

(3) The health care representative has a general duty to act in the best interest of the appointor in carrying out the instructions in the appointment. Subject to any limitations provided by statute[11] or in the appointment, the health care representative may make health care decisions (consent to, refuse to consent to, or withdraw consent to health care)[12] for the appointor to the same extent that the appointor could do so with respect to his or her own health care.[13]

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9. For the purposes of the proposed law, an emancipated minor is one defined in Civil Code Section 62. Under that section, emancipated minors are persons under the age of 18 who have entered into a valid marriage (whether or not the marriage was terminated by dissolution), who are on active duty with the armed forces of the United States, or who have received a court declaration of emancipation pursuant to Civil Code Section 64. Emancipated minors are by statute considered to be adults for the purpose of consenting to medical, dental, or psychiatric care, without parental consent, knowledge, or liability. Civil Code § 63(a). See also Civil Code §§ 25.6 (consent by married minor), 25.7 (consent by minor in armed services).

10. The recommended statute includes a suggested form for the appointment.

11. The statute provides that the health care representative is subject to any directive under the Natural Death Act (see Health & Safety Code §§ 7185-7195) and is not authorized to consent to commitment to a mental health treatment facility, to the use of an experimental drug, or to convulsive treatment or sterilization. Comparable limitations are found in Probate Code Sections 2356 (limitations on powers of guardian or conservator) and 3211 (limitations on court-authorized medical treatment).

12. Health care is broadly defined to mean any care, treatment, service, or procedure to maintain, diagnose, or treat a physical or mental condition.

13. The health care representative also has access to information and medical records and is authorized to disclose medical information.

(4) If the health care representative is unwilling to follow instructions set forth in the appointment, the health care representative is precluded from exercising authority and must so notify the appointor, and the appointor's conservator of the person and health care provider, if any are known to the health care representative.

(5) The appointor may revoke the appointment or any specific authority of the health care representative at any time, either orally or in writing, if the appointor is of sound mind.

(6) An interested person[14] may obtain court review of the acts or proposed acts of the health care representative, and a court may revoke the appointment if the health care representative fails to perform properly the duties under the appointment.[15]

(7) A person may disqualify another from making health care decisions on behalf of the person executing the disqualification. The disqualification must be in writing and must designate the person who is disqualified.[16] It must be signed by the person executing it and by two witnesses. The disqualification may be revoked orally or in writing.

(8) Health care providers are protected from any civil or criminal liability and from professional disciplinary action for acting or refusing to act based on a good faith belief as to the health care representative's authority. A disqualification does not prevent a health care provider from relying on a consent given by the disqualified person unless the disqualification is known to the health care provider.

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14. Interested persons include health care representative, appointor, the spouse or any child of the appointor, the conservator of the person of the appointor, and the public guardian.

15. A court determination can also be obtained whether the appointment is still effective or has terminated and the court may require the health care representative to report his or her acts pursuant to the appointment.

16. The recommended statute includes a suggested form for disqualification of a person from making health care decisions.

Proposed Legislation

The Commission's recommendations would be effectuated by enactment of the following measure:

An act to add Part 2.2 (commencing with Section 53.100) to Division 1 of, and to amend Section 2356 of, the Civil Code, relating to consent to health care.

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

10040

Civil Code §§ 53.100-53.220 (added). Health care representative

SECTION 1. Part 2.2 (commencing with Section 53.100) is added to Division 1 of the Civil Code, to read:

PART 2.2. HEALTH CARE REPRESENTATIVE

40260

§ 53.100. Definitions

53.100. As used in this part:

(a) "Health care decision" means consent, refusal to consent, or withdrawal of consent to any care, treatment, service, or procedure to maintain, diagnose, or treat a physical or mental condition.

(b) "Health care representative" means a health care representative appointed under this part.

(c) "Person" means an individual who is 18 or more years of age or who is an emancipated minor under Section 62.

Comment. Subdivision (a) of Section 53.100 broadly defines a health care decision. Subdivision (b) provides a definition that facilitates drafting of this part. Subdivision (c) makes clear that emancipated minors under Section 62 are treated as adults in this part. Under Section 62, an emancipated minor is one who has entered into a valid marriage, is on active duty with the armed forces of the United States, or has received a judicial declaration of emancipation. See also Sections 25.6 (consent by married minor), 25.7 (consent by minor on active duty), 63(a) (emancipated minor treated as adult for purpose of consenting to health care).

§ 53.110. Appointment of health care representative

53.110. (a) A person may appoint another person as a health care representative under this part if at the time the appointment is made the appointor is of sound mind.

(b) An appointment of a health care representative shall be in writing and shall satisfy both of the following requirements:

(1) The appointment shall be signed either (A) by the appointor or (B) in the appointor's name by some other person in the appointor's presence and by the appointor's direction.

(2) The appointment shall be signed by at least two persons other than the health care representative each of whom witnessed either (A) the signing of the appointment by the appointor or (B) the appointor's acknowledgment either that the appointor signed the appointment or that the appointment is the appointor's.

(c) Each witness who signs the appointment shall certify both of the following:

(1) That the witness believes that the appointor was of sound mind at the time the appointor signed or acknowledged the appointment.

(2) That the witness has no knowledge of any facts indicating that the appointment was procured by duress, menace, fraud, or undue influence.

(d) The appointment is not effective until the health care representative accepts the appointment by signing the writing that makes the appointment.

(e) Unless the appointment otherwise specifically provides, the appointment is effective whether or not the appointor remains of sound mind or is or becomes incapable of making health care decisions.

Comment. Subdivision (a) of Section 53.110 permits an adult or emancipated minor (see Section 53.100(c) defining "person") to appoint another adult or emancipated minor as a health care representative empowered to make health care decisions on behalf of the appointor. See Section 53.120 (authority of health care representative).

Subdivisions (b), (c), and (d) provide the formalities for appointing a health care representative. The requirements of subdivision (b) are the same as provided for witnessed wills by Probate Code Section 201.010 as proposed in a separate recommendation. See Recommendation Relating to Wills and Intestate Succession, 16 Cal. L. Revision Comm'n Reports ____ (1982). Subdivision (c) provides a requirement drawn from the official form for "Proof of Subscribing Witness [To Will or Codicil]" (form approved by the Judicial Council, revised January 1, 1976). See also Section 53.210 (form for appointment).

Under subdivision (a) the appointor must be of sound mind at the time the appointment is made. If the appointor thereafter becomes of unsound mind, subdivision (e) provides that the appointment continues in force unless the appointment specifically provides that it terminates if the appointor becomes of unsound mind. See also Section 2356 (power of agent upon incapacity of principal). Subdivision (e) also makes clear that the appointment is effective whether or not the appointor has the capacity to give informed consent at the time the appointment is made or later loses that capacity. Appointment of a health care representative requires a lesser capacity than the capacity to give informed consent.

35098

§ 53.120. Authority of health care representative

53.120. (a) Subject to any limitations or instructions in the appointment and except as otherwise provided in this part, a health care representative may make health care decisions for the appointor to the same extent as the health care representative could make health care decisions for himself or herself.

(b) In making all health care decisions, the health care representative shall act in good faith and in the best interest of the appointor so as to carry out any instructions in the appointment.

(c) Unless the appointment provides otherwise, a health care representative who is reasonably available and willing to act has priority over any other person authorized to make health care decisions for the appointor.

Comment. Subdivision (a) of Section 53.120 gives the broadest possible authority to a health care representative, except as limited by statute or in the appointment. Subject to these limitations, a health care representative may make any decision relating to the appointor's health care that the representative could make with reference to his or her own health care. See also Sections 53.180 (limitations), 53.210 (form for appointment).

Subdivision (b) makes clear that the health care representative has a duty to carry out any instructions stated in the writing appointing the health care representative. Where the health care representative cannot in good faith and in the best interest of the appointor follow the instructions, the health care representative may not exercise any further authority under the appointment. See Section 53.140.

Subdivision (c) makes clear that a health care representative, as the voluntarily selected agent of the appointor, has primary authority in health care decisions. Of course, an appointor who is of sound mind has authority to overrule the health care representative or to revoke his or her authority. See Section 53.150. The appointment of a conservator of the person for the appointor does not affect the authority of the health care representative, but the conservator is authorized to petition the court in connection with the acts or omissions of the health care representative. See Section 53.190.

§ 53.130. Availability of medical information

53.130. A health care representative has the same right as the appointor to receive information regarding the proposed dealth care and to consent to the disclosure of medical records to the health care representative and to any proposed health care provider.

Comment. Section 53.130 makes clear that the health care representative can obtain and disclose information as necessary to exercise the authority given the health care representative.

969/040

§ 53.140. Resignation or refusal of health care representative to act

53.140. A health care representative who resigns or is unwilling to follow the instructions in the appointment may not exercise any further authority under the appointment and shall so inform all of the following:

(a) The appointor, whether or not the appointor is capable of giving consent to health care.

(b) The appointor's conservator of the person, if any, known to the health care representative.

(c) The appointor's health care provider, if any, known to the health care representative.

Comment. Section 53.140 makes clear that the authority of the health care representative can be exercised only in a manner consistent with the instructions (if any) stated in the writing appointing the health care representative. The section also requires that notice be given to specified persons of a resignation or unwillingness to follow the instructions. If the health care representative is unable in good faith to make an appropriate health care decision that is in the appointor's best interest (see Section 53.120) under the particular circumstances because of limitations the appointment places on his or her authority, the health care representative is not authorized to exceed the authority given by the appointment and must resign.

08370

§ 53.150. Revocation of appointment or authority of health care representative

53.150. (a) A person who has appointed a health care representative and is of sound mind may do any of the following:

(1) Revoke the appointment or authority of the health care representative by notifying the health care representative orally or in writing.

(2) Revoke any authority of the health care representative or a health care decision made by the health care representative by notifying the health care provider orally or in writing.

(b) A health care representative may exercise the authority granted in an appointment until the health care representative knows of the revocation of the appointment or the authority.

Comment. Although Section 53.150 does not permit the appointor to revoke the appointment or the authority if the appointor no longer has a sound mind, a court may revoke the appointment if the health care representative fails to perform duties in accord with the appointment or is unfit to do so. See Section 53.190.

08374

§ 53.160. Disqualification of persons from making health care decisions

53.160. (a) A person may disqualify another person from making health care decisions for him or her if at the time the disqualification is made the person making the disqualification is of sound mind.

(b) A disqualification under this section shall be in writing and shall satisfy both of the following requirements:

(1) The disqualification shall be signed either (A) by the person making it or (B) in that person's name by some other person in the presence of and by the direction of the person making the disqualification.

(2) The disqualification shall be signed by at least two persons each of whom witnessed either (A) the signing of the disqualification by the person making it or (B) that person's acknowledgment either that he or she signed the disqualification or that the disqualification is his or her act.

(c) Each witness who signs the disqualification shall certify both of the following:

(1) That the witness believes the person making the disqualification was of sound mind at the time the person signed or acknowledged the disqualification.

(2) That the witness has no knowledge of any facts indicating the disqualification was procured by duress, menace, fraud, or undue influence.

(d) A health care provider with knowledge of a disqualification made pursuant to this section may not rely on a health care decision from the disqualified person involving the health care of the person who made the disqualification.

(e) A person who knows that he or she has been disqualified pursuant to this section may not make a health care decision for the person who made the disqualification.

(f) A person who has made a disqualification under this section and is of sound mind may revoke the disqualification by a signed writing or, with respect to a particular health care decision, by notifying the health care provider orally or in writing.

Comment. Section 53.160 gives a person the ability to disqualify a person (such as a close relative) who would otherwise have authority under case law to give consent to health care on behalf of the person making the disqualification. See Section 53.220 (form for disqualification). See also Section 53.170(d) (health care provider not liable for refusal to follow direction of person believed to be disqualified). Subdivision (f) makes clear that a disqualification may be revoked, thereby restoring the person to any authority existing under other law to make health care decisions for the person.

08934

§ 53.170. Protection of health care provider from liability

53.170. A health care provider is not subject to criminal prosecution, civil liability, or professional disciplinary action based on any of the following:

(a) If the health care provider relies on a health care decision made by a health care representative who the health care provider believes in good faith is authorized by this part to make health care decisions.

(b) If the health care provider refuses to follow a health care decision of a health care representative who the health care provider believes in good faith is not capable of giving informed consent.

(c) If the health care provider refuses to follow a health care decision of a health care representative whose appointment or authority the health care provider believes in good faith has been revoked.

(d) If the health care provider refuses to follow a health care decision of a person who the health care provider believes in good faith has been disqualified from making health care decisions on behalf of another person.

(e) If the health care provider relies on a health care decision made by a person who was once disqualified but whom the health care provider believes in good faith has been restored to the authority to make health care decisions on behalf of another person by the revocation of the disqualification.

Comment. Section 53.170 implements this part by protecting the health care provider who acts in good faith in reliance on the provisions of this part.

10360

§ 53.180. Limitations on application of this part

53.180. (a) This part does not authorize a health care representative to consent to any of the following on behalf of the appointor:

(1) Commitment to a mental health treatment facility.

(2) Prescribing or administering an experimental drug (as defined in Section 26668 of the Health and Safety Code).

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

(4) Sterilization.

(b) The provisions of this part are subject to any valid and effective directive of the patient under Chapter 3.9 (commencing with Section 7185) of Part 1 of Division 7 of the Health and Safety Code (Natural Death Act).

(c) This part does not affect any requirement of notice to others of proposed health care under any other law.

(d) This part does not affect the law governing medical treatment in an emergency.

(e) Except as provided in subdivision (c) of Section 53.120 and Section 53.160, nothing in this part affects the law governing when one person may make health care decisions on behalf of another.

Comment. Subdivisions (a) and (b) of Section 53.180 are comparable to Probate Code Sections 2356 (limitations on powers of guardian or conservator) and 3211 (limitations on court-authorized medical treatment). Subdivision (c) is new. Subdivision (d) makes clear that consent of a health care representative is not required in an emergency situation. See generally Cobbs v. Grant, 8 Cal.3d 229, 243, 502 P.2d 1, 104 Cal. Rptr. 505 (1972) (consent implied in emergency). See also Bus. & Prof. Code §§ 2395 (emergency care at scene of accident), 2397 (emergency care in office or hospital). Subdivision (e) makes clear that this part has no effect on the law that determines who may consent on behalf of another (such as a close relative), but such a person will not have priority over a health care representative (Section 53.120) and such a person may be disqualified as one who can consent (Section 53.160).

§ 53.190. Court enforcement of duties of health care representative

53.190. (a) Article 4 (commencing with Section 2410) of Chapter 2 of Title 9 of Part 4 of Division 3 applies in cases where a health care representative has been appointed.

(b) For the purpose of applying Article 4 (commencing with Section 2410) of Chapter 2 of Title 9 of Part 4 of Division 3 as provided in subdivision (a):

(1) "Attorney in fact" as used in Article 4 means the health care representative.

(2) "Conservator of the estate of the principal" as used in Article 4 means the conservator of the person of the individual who appointed the health care representative.

(3) "Power of attorney" as used in Article 4 means the writing appointing the health care representative.

(4) "Principal" as used in Article 4 means the individual who appointed the health care representative.

Comment. Section 53.190 makes the procedure for enforcement of duties under a power of attorney applicable to cases where a health care representative has been appointed. This provides a procedure whereby a court may (1) determine whether the appointment of the health care representative is still effective or has terminated, (2) pass on the acts or proposed acts of the health care representative, or (3) compel the health care representative to submit a report of his or her acts as health care representative to the appointor, the spouse of the appointor, the conservator of the person of the appointor, or to such other person as the court in its discretion may require. See Section 2412. The court also may under Section 2412 terminate the appointment of a health care representative if all of the following are established: (1) The health care representative has violated or is unfit to perform the fiduciary duties under the appointment, (2) the appointor lacks capacity to give or to revoke an appointment, and (3) the termination of the appointment is in the best interest of the appointor.

16896

§ 53.200. Limitation of power of attorney

53.200. (a) An attorney in fact may not make a health care decision nor act as a health care representative unless the power of attorney meets the requirements of this part.

(b) Nothing in this part affects the validity of any health care decision made prior to January 1, 1984, and the validity of any such

health care decision is determined by the law that would be applicable if this part had not been enacted.

Comment. Subdivision (a) of Section 53.200 makes clear that a power of attorney, durable or otherwise, is not sufficient to enable the attorney in fact to consent to health care unless the formalities of this part are satisfied. See Section 53.110 (signature of witnesses and written acceptance by health care representative). This subdivision rejects the view that a power of attorney under the Uniform Durable Power of Attorney Act (see Sections 2400-2407) authorizes consent to health care.

Subdivision (b) makes clear that nothing in this part affects the validity of any health care decision made prior to January 1, 1984. However, on and after January 1, 1984, subdivision (a) makes clear that a health care decision may not be made under a power of attorney unless the power of attorney meets the requirements of this part.

09584 N/Z

§ 53.210. Form for appointment

53.210. An appointment of a health care representative shall be in substantially the following form:

APPOINTMENT OF HEALTH CARE REPRESENTATIVE

I, ____,
(name)

being of sound mind, voluntarily appoint ____________________
(name)

(whose current telephone number is ____________________)

and whose current address is ____________________)

as my health care representative authorized to act for me in all matters of health care, except as otherwise specified in this appointment.

This appointment is subject to the following limitations on the authority of the health care representative and instructions concerning exercise of that authority:

____

____

____

____

____

____

____

Should I become incapable of giving informed consent to my health care, this appointment /__/ remains effective.

/__/ terminates.

I understand that so long as I am of sound mind I may (1) revoke this appointment or authority by notifying the health care representative orally or in writing and (2) revoke any authority of the health care representative or any health care decision made by the health care representative by notifying the doctor or other health care provider orally or in writing.

(signature of appointor)

(street address)

(city, state)

(date)

- -

Statement of Witnesses

I certify that this appointment was signed by the person making it or that it was acknowledged by that person to be his or her appointment. I also certify that I believe that the person making this appointment is of sound mind and that I have no knowledge of any facts indicating that this appointment was procured by duress, menace, fraud, or undue influence.

(signature of witness)	(signature of witness)
(street address)	(street address)
(city, state)	(city, state)
(date)	(date)

- -

Acceptance by Health Care Representative

I, ______________________________, understand that
(name)

acceptance of this appointment as health care representative means that I have a duty to act in good faith and in the best interest of the person appointing me, and that I also have a duty to follow any instructions in the appointment. In the event I cannot do so, I will exercise no further power under the appointment and will inform the person appointing me, his or her conservator of the person if known to me, and his or her health care provider if known to me.

____
(signature of health care representative)

____
(street address)

____
(city, state)

____
(date)

Comment. Section 53.210 provides a form for appointment of a health care representative that complies with the requirements of this part.

10364

§ 53.220. Form for disqualification

53.220. A disqualification of a person from making health care decisions for another person shall be in substantially the following form:

DISQUALIFICATION OF PERSON FROM MAKING HEALTH CARE DECISIONS

I, ______________________________,
(name)

being of sound mind, disqualify the following person from making health care decisions on my behalf:

(name of person disqualified)

(street address if known)

(city, state, if known)

I understand that, unless I revoke this disqualification, the person named above is disqualified from making health care decisions on my behalf in any circumstances. I understand that so long as I am of sound mind I may revoke this disqualification by a signed writing or by notifying my doctor or other health care provider orally or in writing.

(signature of person making disqualification)

(street address)

(city, state)

(date)

Statement of Witnesses

I certify that this disqualification was signed by the person making it or that it was acknowledged by that person to be his or her disqualification of the named person. I also certify that I believe that the person making this disqualification is of sound mind and that I have no knowledge of any facts indicating that this disqualification was procured by duress, menace, fraud, or undue influence.

(signature of witness)	(signature of witness)
(street address)	(street address)
(city, state)	(city, state)
(date)	(date)

Comment. Section 53.220 provides a form for disqualifying other persons from making health care decisions on behalf of the person making the disqualification that complies with the requirements of Section 53.160.

39385

Civil Code § 2356 (amended). Termination of agency

SEC. 2. Section 2356 of the Civil Code is amended to read:

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

(1) Its revocation by the principal.

(2) The death of the principal.

(3) The incapacity of the principal to contract.

(b) Notwithstanding subdivision (a), any bona fide transaction entered into with such agent by any person acting withhout actual knowledge of such revocation, death, or incapacity shall be binding upon the principal, his or her heirs, devisees, legatees, and other successors in interest.

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

(d) With respect to a power of attorney, the provisions of this section are subject to the provisions of Article 3 (commencing with Section 2400) of Chapter 2.

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

(f) With respect to an appointment of a health care representative, the provisions of this section are subject to the provisions of Part 2.2 (commencing with Section 53.100) of Division 1.

Comment. Subdivision (f) is added to Section 2356 to make clear that the provisions concerning health care representatives prevail over the provisions of subdivisions (a) and (b) of Section 2356. Under Section 53.110, the appointment of a health care representative may remain effective even though the appointor later becomes incapable of consenting. See also Section 53.170 (protection of health care provider from liability).