#L-703 3/7/83

First Supplement to Memorandum 83-14

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

Senator Keene has agreed to introduce a bill to effectuate the Commission's Recommendation Relating to Durable Power of Attorney to Make Health Care Decisions. A staff draft of this recommendation is attached to Memorandum 83-14. Senator Keene will introduce a "spot" bill and the recommended legislation will be added as an amendment to this bill.

Senator Keene wants the proposed legislation to cover two matters not covered in the staff draft of the recommendation. His experience in health care matters gives him considerable insight into matters that should be covered by the bill. Senator Keene's two matters are discussed below.

We also received three letters on the staff draft. One letter is from Judge Robert R. Willard who wholeheartedly supports the staff draft. See Exhibit 1 attached. The other two letters (Exhibits 2 and 3) approve the approach of the staff draft but suggest revisions. The revisions suggested are discussed below.

Attached as Exhibit 4 to this supplement is a redraft of the new article contained in the staff draft attached to Memorandum 83-14. The primary purpose of the redraft is to make the changes that Senator Keene requested. The redraft and the relevant comments made in the letters attached as exhibits are discussed below. A note following each section of the redraft indicates new provisions that were not included in the staff draft attached to Memorandum 83-14. Unless otherwise indicated, references to sections in the following discussion are references to the redraft attached as Exhibit 4.

§ 2431. Application of article

Peter L. Muhs (Exhibit 3) believes that the new law should apply to powers of attorney executed before January 1, 1984, if the power of attorney makes specific reference to "medical" or "health" care for the grantor of the power of attorney. Such a power of attorney may not be valid under existing law to give authorization to deal with health care matters. The staff is concerned that this proposal would validate a power of attorney that was not witnessed or acknowledged before a notary public.

Mr. Muhs is concerned that the proposed legislation will invalidate the existing powers of attorney. The proposed legislation will have no effect on the validity of these powers of attorney. If they are valid now, they will continue to be valid.

Mr. Muhs is concerned that the health care provider will be confused because the health care provider will have to determine the date of execution to determine the applicable law. However, this would appear to be less confusing to the health care provider than a provision that makes valid a power of attorney executed before the effective date that does not have the witnesses required by the new law. Thus, the least confusing rule is that a power of attorney executed after the effective date must comply with certain formalities and has a specified effect and ones executed prior to that date are not affected by the new law.

The staff suspects that many durable powers of attorney that are executed before January 1, 1984, will satisfy the requirements of the new law because they will be acknowledged before a notary public. This will be the case if they give the attorney in fact the power to deal with real property; otherwise, the power of attorney will not be recordable and there will be a gap in the recorded chain of title if the attorney in fact conveys real property of the principal.

Consideration might be given to making the new law apply to a durable power of attorney for health care executed before January 1, 1984, if the power of attorney satisfied the requirements of the new law. Other powers of attorney that are executed before January 1, 1984, but do not comply with the requirements of the new law would continue to be governed by the law that would apply had the new law not been enacted.

§ 2432. Requirements for durable power of attorney for health care

Senator Keene wants to add a provision to the recommended legislation that would provide in substance that no treating health care provider or employee of a treating health care provider can serve as an attorney in fact. In response, the staff has added a definition of "health care provider" in Section 2430 and a substantive provision as subdivision (b) to Section 2432. See Exhibit 4 attached. We think in the context "health care provider" means treating health care provider, so we have omitted "treating."

Paul Gordon Hoffman (Exhibit 2) in the last paragraph of his letter asks various questions concerning who may serve as a witness. Some, but

not all, of these questions are answered by subdivision (c) of Section 2432. See Exhibit 4 attached.

§ 2434. Authority of attorney in fact to make health care decisions

Senator Keene raised the question of what priority, if any, the attorney in fact has to make health care decisions. What if the principal's brother is the attorney in fact and consents to medical treatment, but the spouse of the principal is present and objects to the treatment? Senator Keene did not ask that a provision be added to deal with priority, but subdivision (a) has been added to Section 2434 in Exhibit 4 to deal with this problem. The provision is drawn from the Uniform Law Commissioners' Model Health-Care Consent Act.

Exhibit 2 raises the question of the relationship between the authority of the attorney in fact to revoke or override the intentions expressed in the Directive to Physicians authorized by Section 7185 et seq. of the Health and Safety Code. We do not want to amend the Natural Death Act, but we have added the following sentence to the Comment to Section 2434 to deal with this question:

> Unless the durable power of attorney provides otherwise, the health care decisions of the attorney in fact take priority over a Directive to Physicians under Sections 7185-7195 of the Health and Safety Code.

§ 2436. Revocation

This is a new section. Senator Keene is concerned that there is no provision in the recommended legislation concerning an oral revocation of a durable power of attorney for health care. Can the health care provider accept the consent from the attorney in fact if some other person claims that the durable power was orally revoked by the patient? Senator Keene desires that a provision be added to the recommended legislation that oral revocation is effective only upon communication to the person who is the treating health care provider at the time of the communication. He also wants to impose a duty on the health care provider receiving such communication to make the substance of the communication a part of the medical record of the principal. In response to this suggestion, the staff has added Section 2436 in the attached draft.

Subdivision (a) of Section 2436 is drawn from the Uniform Law Commissioners' Model Health-Care Consent Act. Revocation of the appointment of the attorney in fact can be accomplished by notifying the attorney in fact orally or in writing that the appointment is revoked. The

health care provider who relies on the authority is protected, however, even if the authority has been revoked, if the health care provider acts in good faith. See Section 2437.

Subdivision (b) is not found in the Model Act. See the Comment to Section 2436 for a discussion of this provision.

§ 2437. Protection of health care provider from liability

Exhibit 2 raises a question concerning the use of the phrase "best interests of the principal" in subdivision (b) of what is Section 2437 in the attached revised draft. The concern is that the provision may permit the health care provider to second guess the decisions of the principal.

The staff is not concerned about the use of the phrase in Section 2437. There is nothing in the section or proposed legislation that requires a health care provider to act. The only purpose of the language in subdivision (b) of Section 2437 is to give immunity to the health care provider, and the staff believes that immunity should be given only where the requirements of subdivision (b) are satisfied.

§ 2412.5. Petition with respect to durable power of attorney for health care

Section 2412.5 is found in the draft attached to Memorandum 83-14.

Exhibit 2 raises the same question concerning the "best interests of the principal" standard appearing in the proposed Section 2412.5(b). The fear is that this standard may permit the court to second guess the decisions of the attorney-in-fact.

It should be noted that an express provision in the durable power of attorney can limit the right to petition under Section 2412.5. Although such a provision does not preclude a conservator of the person of the principal from petitioning under subdivisions (a), (c), or (d) of Section 2412.5, the provision is effective to prevent any petition under subdivision (b) of Section 2412.5. Accordingly, it will be up to the principal to determine whether subdivision (b) is to apply. The use of a printed durable power of attorney for health care will not, however, be effective to preclude review of proposed acts or acts under subdivision (b) of Section 2412.5. See Section 2421.

Exhibit 2 also suggests that the phrase "or otherwise made known to the court" be added to paragraph (2) of subdivision (d) of Section 2412.5. The omission of this phrase from this paragraph was intentional.

The durable power can be terminated only where such termination is in the best interests of the principal in order to carry out the desires of the principal as expressed in the power of attorney. Should the desires of the principal as otherwise made known to the court be considered in determining whether the durable power of attorney should be terminated in order to carry out the desires of the principal?

Respectfully submitted,

John H. DeMoully
Executive Secretary

CHAMBERS OF
The Superior Court
VENTURA, CALIFORNIA
ROBERT R. WILLARD, JUDGE

February 25, 1983

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

Re: Durable Power of Attorney to make Health Care Decisions

Gentlemen:

I have reviewed your tentative recommendation relating to durable power of attorney to make health care decisions, and wholeheartedly concur.

As presiding judge of the Probate Department of the Ventura County Superior Court for approximately the past ten years, it is my impression that the great majority of petitions for conservatorship seek adjudication that the proposed conservatee lacks capacity to give informed consent for medical treatment.

If the medical consent problem is clearly solved by a power of attorney that also solves the property management problem, many conservatorship proceedings would be unnecessary.

Sincerely,

Robert R. Willard

Robert R. Willard
Judge of the Superior Court

RRW:vm

HOFFMAN SABBAN & BRUCKER
LAWYERS
450 North
Roxbury Drive
Beverly Hills
California 90210
(213) 274-1152

OUR FILE:

February 28, 1983

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

Re: Staff Draft - Tentative Recommendation Relating to Durable Power of Attorney to Make Health Care Decisions (#L-703)

Ladies and Gentlemen:

The current staff draft referred to above is a distinct improvement over the staff draft circulated at the end of last year. In particular, I applaud your decision to allow the Durable Power of Attorney to be included in a general "property" power of attorney.

I suggest that the Commission deal with the relationship between the Durable Power of Attorney to Make Health Care Decisions, and the Directive to Physicians authorized under Section 7185, et seq. of the Health and Safety Code. For example, should the holder of the power of attorney be authorized to revoke or override the intentions expressed in the Directive to Physicians?

I am somewhat concerned about the "best interests of the principal" standard expressed in proposed Sections 2412.5(b) and 2435(b). It appears to me that this standard requires the court or health care provider, respectively, to second guess the decisions of the attorney-in-fact. A principal purpose of executing a power of attorney is to vest decision-making power in a person in whom the principal has confidence. Such a provision undercuts a principal purpose of the Act. The standard should be changed to give the attorney-in-fact greater freedom to act.

Section 2412.5(d)(2) should be amended by adding the words "or otherwise made known to the court" to the end of the section, in order to conform with similar language in Section 2412.5(b).

HOFFMAN
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BRUCKER
LAWYERS

Section 2432(a)(2)(A) permits a Durable Power of Attorney to be validly executed if signed by at least two witnesses who are present when the Durable Power of Attorney is signed by the principal. However, there are no indications as to who may serve as a witness. For example, may the attorney-in-fact serve as a witness? May the lawyer signing pursuant to Section 2421(a)(2) serve as a witness? Must the witnesses be adults? Do the same rules regarding witnessing of Wills apply to the witnessing of a Durable Power of Attorney?

Very truly yours,

Paul Gordon Hoffman

PGH:sk

LAW OFFICES

COOPER, WHITE & COOPER

A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS

101 CALIFORNIA STREET - SIXTEENTH FLOOR

SAN FRANCISCO, CALIFORNIA 94111

(415) 433-1900

SHELDON G. COOPER
JOHN E. SCHAEFFER*
R. BARRY CHURTON*
JAMES MURAD*
EDWARD J. WYNNE, JR.
ROBERT R. CALLAN
ALAN C. FREELAND*
DAVID W. TUCKER
JOHN D. MAHONEY
E. GARTH BLACK
PETER L. MUHS*
MARGARET HART EDWARDS
BEVERLY BREWSTER
CAREY F. CORBALEY
JAMES W. POINDEXTER
LAWRENCE J. SISKIND
JOYCE S. JABER
JAMES M. WAGSTAFFE
THOMAS J. STIKKER
BARRY J. KRAMER

ROBERT M. RAYMER*
CHARLES W. KENADY*
J. RAYMOND HEALY
W. RONALD INGRAM*
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NEIL L. SHAPIRO
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JOHN P. MAKIN
ANDREW H. TROTT
JED E. SOLOMON
JAY G. CHAFETZ
MARIA L. JOSEPH
KENNETH J. COHEN

ALLEN M. SINGER
JAMES B. FRANKEL
OF COUNSEL

CABLE ADDRESS
"SCOOP"

TELECOPIER
(415) 433-5530

* PROFESSIONAL CORPORATION

March 1, 1983

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

Re: Tentative Recommendation Relating to Durable Power of Attorney to make Health Care Decisions - # L-703

Gentlemen:

I have reviewed your staff draft of Tentative Recommendation Relating to Durable Power of Attorney to make Health Care Decisions, and believe generally that this is a wise addition to the powers which may be delegated to an attorney in fact.

However, there is one aspect relating to the effective date which I disagree with. Contrary to your proposed §2431(b), I believe the new law should be effected not only for powers of attorney executed after December 31, 1983 but also to ratify expressly the delegation of such powers in a document executed before that date which specifically refers to "medical" or "health" care for the grantor of the power of attorney.

I recognize that the modification I am suggesting might be viewed as changing the ground rules under which a power of attorney was given, and thus defeating the expectations of a person executing such a power of attorney. However, I think it most unlikely that anyone who executes a power of attorney granting either "medical" or "health" care decisions to another did not in fact intend to give such power, and for a document with that sort of specificity, the grantor's wishes should be honored. There are several powers of attorney I have drafted which contain similar language and I know that my clients will not understand if because of your proposed effective date their wishes

are not to be honored. Further, the burden of recalling which clients have such a power of attorney and of making the necessary modification, if undertaken for all clients of my law firm, would be a substantial one.

From the other point of view, that of the health care provider, I believe the transition date will also provide some difficulty, since a doctor, nursing home operator, or other person will need to determine whether the power of attorney was executed before or after the effective date of the statute. While it is, in theory, relatively easy for attorneys to remember that statutes have an effective date, other personnel may well become confused and act in good faith under the new law with an "old" power of attorney which nonetheless has the statute's specified language. Such a person should not be put at risk by the uncertainty cited as the reason for modifiying existing law in this area.

Thank you for your consideration of my comments.

Sincerely,

Peter L. Muhs

PLM:ccc

Exhibit 4

404/081

Civil Code §§ 2430-2437 (added). Durable power of attorney for health care

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

Article 5. Durable Power of Attorney for Health Care

§ 2430. Definitions

2430. As used in this article:

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

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

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

(d) "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.

(e) "Person" includes an individual, corporation, partnership, association, the State, a city, county, city and country, or other public entity or governmental subdivision or agency, or any other legal entity.

Comment. The definitions of "health care" and "health care provider" in Section 2430 are the same in substance as the definitions of those terms found in Section 1 of the Uniform Law Commissioners' Model Health-Care Consent Act.

Note. The definitions in subdivisions (a), (d), and (e) are new.

405/358

§ 2431. Application of article

2431. (a) A durable power of attorney executed after December 31, 1983, is effective to authorize the attorney in fact to make health care

decisions for the principal only if the power of attorney complies with this article.

(b) This article does not apply where the durable power of attorney was executed before January 1, 1984. Nothing in this article affects the validity of a durable power of attorney executed before January 1, 1984, or the validity of a decision made under such durable power of attorney, regardless of whether the decision is made before or after January 1, 1984. The validity of such a durable power of attorney or of such a decision shall be determined by the law that would apply if this article had not been enacted.

Comment. Subdivision (a) of Section 2431 makes clear that the additional requirements of this article must be satisfied if a durable power of attorney executed after December 31, 1983, is intended to authorize health care decisions. See Section 2400 (durable power of attorney). Nothing in this article affects a durable power of attorney executed after December 31, 1983, insofar as it relates to matters other than health care decisions. See Section 2430 ("health care decision" defined).

Subdivision (b) makes clear that enactment of this article has no effect on durable powers of attorney executed before January 1, 1984. Moreover, this article has no effect on decisions made under durable powers of attorney executed before that date. The validity of a health care decision made before or after January 1, 1984, pursuant to a durable power of attorney executed before that date is determined by the law that would apply if this article had not been enacted. See California Law Revision Commission, Recommendation Relating to Durable Power of Attorney to Make Health Care Decisions (March 1983).

Note. No change has been made in this section.

405/410

§ 2432. Requirements for durable power of attorney for health care

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

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

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

(b) Neither the health care provider nor an employee of the health care provider may be designated as the attorney in fact to make health care decisions under a durable power of attorney.

(c) None of the following may be used as a witness under subdivision (a):

(1) The health care provider.

(2) An employee of the health care provider.

(3) The attorney in fact.

Comment. Subdivision (a) of Section 2432 makes clear that a durable power of attorney is not sufficient to enable the attorney in fact to consent to health care or make other health care decisions unless the formalities of this section are satisfied. See also Sections 2400 (general requirements for durable power of attorney), 2433 (requirements for printed form).

Subdivisions (b) and (c) preclude the health care provider or an employee of the health care provider from being used as a witness to a durable power of attorney for health care or acting as the attorney in fact under such a durable power of attorney. These limitations are included in recognition that Section 2437 provides protections from liability to a health care provider who relies in good faith on a decision of the attorney in fact.

Note. Subdivisions (b) and (c) are new.

4997

§ 2433. Requirements for printed form

2433. A printed form of a durable power of attorney sold in this state for use by a person who does not have the advice of legal counsel shall include the following notice in 10-point bold face type, in addition to the warning required by subdivision (b) of Section 2400, if it permits the attorney in fact to make health care decisions: "This document gives the person you designate as your attorney in fact the power to make health care decisions for you, subject to any limitations you include in this document. The power to make health care decisions for you may include consent, refusal of consent, or withdrawal of consent to any care, treatment, service, or procedure to maintain, diagnose, or treat a physical or mental condition. This power of attorney will not be valid for making health care decisions unless it is either (1) signed by two witnesses who are present when you sign or acknowledge your signature or (2) acknowledged before a notary public in California."

Comment. Section 2433 provides an additional warning required to be in certain printed forms if the durable power of attorney is designed to authorize health care decisions.

Note. This continues a prior provision without change.

3594

§ 2434. Authority of attorney in fact to make health care decisions

2434. (a) Unless the durable power of attorney provides otherwise, the attorney in fact designated in a durable power of attorney for health care who is known to the health care provider to be reasonably available and willing to make health care decisions has priority to act for the principal in all matters of health care.

(b) Subject to any limitations in the durable power of attorney, the attorney in fact designated in a durable power of attorney for health care may make health care decisions for the principal to the same extent as the principal could make health care decisions for himself or herself if the principal had the capacity to do so.

Comment. Subdivision (a) of Section 2434 gives the attorney in fact priority to make health care decisions if known to the health care provider to be reasonably available and willing to act. The power of attorney may vary this priority. Unless the power of attorney provides otherwise, the health care decisions of the attorney in fact take priority over a directive to physicians under Sections 7185-7195 of the Health and Safety Code.

Subdivision (b) gives the broadest possible authority to an attorney in fact authorized to make health care decisions, except as limited by the power of attorney. See also Sections 2410-2423 (court enforcement of duties of attorney in fact).

Note. Subdivision (a) is new.

043/196

§ 2435. Availability of medical information to attorney in fact

2435. An attorney in fact authorized to make health care decisions under a durable power of attorney has the same right as the principal to receive information regarding the proposed health care, to receive and review medical records, and to consent to the disclosure of medical records.

Comment. Section 2435 makes clear that the attorney in fact can obtain and disclose information as necessary to exercise the authority given in the durable power of attorney.

Note. This continues existing section without change.

§ 2436. Revocation

2436. (a) At any time while the principal has the capacity to give a durable power of attorney for health care, the principal may do any of the following:

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

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

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

Comment. Section 2436 makes clear that the principal can revoke the appointment of the attorney in fact or the authority granted to the attorney in fact by oral or written notification to the attorney in fact or health care provider. The principal may revoke the appointment or authority only if, at the time of revocation, the principal has sufficient capacity to give a durable power of attorney for health care. Although the authorization to act as attorney in fact to make health care decisions is revoked if the principal notifies the attorney in fact orally or in writing that the appointment of the attorney in fact is revoked, a health care provider is protected if the health care provider without knowledge of the revocation acts in good faith on a health care decision of the attorney in fact. See Section 2437.

Subdivision (b) is included to preserve a record of a written or oral revocation. It also provides a means by which notice of an oral or written revocation to a health care provider may come to the attention of a successor health care provider.

Note. This is a new provision.

3516

§ 2437. Protection of health care provider from liability

2437 A health care provider is not subject to criminal prosecution, civil liability, or professional disciplinary action where the health care provider relies on a health care decision and both of the following requirements are satisfied:

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

(b) The health care provider believes in good faith that the decision is in the best interests of the principal in order to carry out the desires of the principal as expressed in the durable power of attorney or otherwise known to the health care provider.

Comment. Section 2437 implements this article by protecting the health care provider who acts in good faith in reliance on a health care decision made by an attorney in fact pursuant to this article.

Note. This section is continued without change.