#L-703 3/14/83

Second Supplement to Memorandum 83-14

Subject: Study L-703 - Delegation of Authority to Make Health Care Decisions

Attached are additional letters received in response to the distribution of the staff draft of a Tentative Recommendation Relating to Durable Powers of Attorney to Make Health Care Decisions.

Senator Keene has introduced Senate Bill No. 762 which is a "spot bill" to provide for a durable power of attorney for health care. The spot bill will be amended after the Commission meeting to reflect the Commission's recommendation.

GENERAL REACTION

There appears to be general agreement that legislation is needed to make clear that authority can be delegated to make health care decisions, but there is disagreement in the proper approach.

Exhibit 1 is a letter from the American Association of Retired Persons indicating that "we enthusiastically support" the staff draft. Exhibit 10 is a letter from Byron Chell, Fair Oaks attorney, supporting the staff draft.

Exhibit 2 is a letter from Leslie Steven Rothenberg approving the staff draft and suggesting a technical revision (discussed below).

Exhibit 3 is a letter from Judith A. Schindler, court investigator, Alameda County Superior Court, expressing concern that the proposal will eliminate the need for a conservatorship and will avoid the investigations by the court investigator: Unless the court makes periodic reviews as is the case with conservatorships, how will abuses of the power of attorney come to the court's attention? The letter takes the view that medical care decisions should be made only under the guardianship-conservatorship law. But, as Judge Willard points out in Exhibit 1 to the First Supplement to Memorandum 83-14: "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." Accordingly, the recommended legislation avoids the need for a conservatorship to cover only medical consent in a case where a durable power of attorney covers property matters. The existing durable power of attorney statute has been well received and the staff believes

that this objection is one to the entire concept of a durable power of attorney rather than to the medical aspects of a durable power of attorney.

Exhibit 4 is a letter from a law firm that represents a large number of general acute care hospitals and other health care institutions. The letter "strongly supports" the Commission recommendation that the durable power of attorney statute be revised to provide expressly that durable power of attorney may authorize the attorney in fact to make health care decisions for the principal. You should read the letter.

Exhibit 5 is a letter from an attorney for the Veterans Administration stating that the recommendations "are commendable and hopefully will become a part of our state's law on January 1, 1984." The letter does raise one issue (discussed later) which the letter suggests needs clarification.

Exhibit 8 is a letter from Doctor Bordin representing the Bioethics Subcommittee of Alameda County. The letter approves the general approach of the staff draft and raises several matters of concern (discussed later).

Exhibits 6 (Legal Services Section) and 7 (Bioethics Committee of the Los Angeles County Bar Association) agree that there is a need to provide statutory authority to delegate medical care decisions but they believe that the Commission's original approach of a separate statute is far superior and certainly more preferable than the proposed amendments to the existing Uniform Durable Power of Attorney Act.

Exhibits 6 and 7 again raise the issue that the Commission discussed in some detail at the last meeting. At that meeting, the Commission decided to perfect the revisions to the durable power of attorney act and to submit a recommendation to the current session to eliminate the uncertainty as to whether a durable power of attorney could be used to authorize the attorney in fact to make medical care decisions for the principal. At the same time, the Commission suggested that the Estate Planning, Trusts and Probate Law Section of the State Bar cover medical care decisions as well as property management in drafting a "statutory durable power of attorney," similar to the statutory will. You should read Exhibits 6 and 7 and the Commission should again consider the question of whether it desires to recommend to the 1983 session legislation to deal with health care decisions under a durable power of attorney or to develop a separate statute for submission to a future session. The Commission should be aware, however, that it was the representatives of

the California Hospital Association who contacted Senator Keene and arranged for him to introduce the Commission's recommended legislation to make clear that a durable power of attorney can authorize the making of health care decisions.

In this supplement we will consider various suggestions made in Exhibits 6 and 7 that would limit the authority of the attorney in fact to make health care decisions under a durable power of attorney. The comments in these two exhibits are directed to the earlier Commission draft proposing a general statute. We will, however, review those comments in this supplement to the extent that they are relevant to the durable power of attorney recommendation.

It would be unfortunate if controversy over the best approach or details of the proposed legislation would result in its defeat in 1983. There will be enough controversy raised by the issue of whether one person should be given authority to refuse to consent to medical care or to terminate medical care for another person.

SPECIFIC SUGGESTIONS

The following is a discussion of various suggestions contained in the exhibits attached to this supplement. In the following discussion, a reference to the "staff draft" means the staff draft of a tentative recommendation attached to Memorandum 83-14. A reference to the "revised staff draft" means the revised staff draft attached as Exhibit 4 to the First Supplement to Memorandum 83-14.

§ 2438. Other law not affected (new section)

Leslie Steven Rothenberg (Exhibit 2) suggests that it be made clear that the proposed law does not "impair or supersede any legal right or legal responsibility which any person may have to effect the making of health care decisions in any lawful manner. In this respect, the provisions of this chapter are cumulative." In response to this suggestion, the staff suggests that a new section be added to the revised staff draft to read:

> 2438. (a) Subject to Section 2434, nothing in this article affects the law governing when one person may make health care decisions on behalf of another.
>
> (b) This article does not affect the law governing health care treatment in an emergency.

§ 2431. Application of article

The Bioethics Committee of the Los Angeles County Bar Association (hereinafter referred to as "Bioethics Committee") recommends that existing durable powers of attorney for health care be validated and that the limitations and restrictions imposed by the new statute be made applicable to these existing durable powers of attorney. A similar suggestion was made by Peter L. Muhs (Exhibit 3 to First Supplement to Memorandum 83-14). Upon further consideration, the staff recommends that the following be substituted for subdivision (b) of Section 2431 of the revised staff draft:

> (b) A durable power of attorney executed prior to January 1, 1984, that specifically authorizes the attorney in fact to make decisions relating to the medical or health care of the principal shall be deemed to be valid under this article after January 1, 1984, notwithstanding that it fails to comply with the requirements of subdivision (a) of Section 2432, but any such durable power of attorney is subject to all the provisions of this article and to Article 4 (commencing with Section 2410).

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

The Legal Services Section (Exhibit 6) is concerned that there are virtually no restrictions on who may become a health care representative. For example, should the administrator of a skilled nursing facility be allowed to receive such an appointment? The revised staff draft adds subdivision (b) to Section 2432 to preclude a health care provider or employee of a health care provider from serving as attorney in fact. See also subdivision (c) of the same section.

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

The Legal Services Section (Exhibit 6) believes that the conservator appointed by the court should have priority over the person designated in a durable power of attorney to make health care decisions. Subdivision (a) of Section 2434 of the revised staff draft gives priority to 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. The staff favors the present draft. We believe it would be undesirable to permit a person to institute a conservatorship proceeding in order to obtain priority over the person designated in the power of attorney. We prefer the scheme of the tentative recommendation, which is that someone else can be substituted for the

attorney in fact only if it is shown that the attorney in fact is not acting in the best interests of the patient in order to carry out the desires of the patient as expressed in the power of attorney.

The Legal Services Section (Exhibit 6) also believes that a decision of a health care representative should be valid only where either (a) the decision is assented to by the patient or (b) the patient expresses no decision. In other words, even if the patient is obviously incompetent to make the decision, if the patient says "no" to the proposed treatment, the attorney in fact cannot act and the matter must go to court and the judge must make the decision. The Bioethics Committee (Exhibit 7) would deal with this problem in a somewhat different way. The Committee would include the following provision in the statute:

> The health care representative has authority to exercise the powers of his or her appointment only when the appointor lacks the capacity or is unable to give informed consent to medical treatment, and only so long as the health care representative has capacity and is able to give informed consent.

The staff believes that the proposed legislation should make clear that the principal has priority over the attorney in fact to make a particular health decision if the principal has the capacity and is able to give informed consent under the particular circumstances. Accordingly, we recommend that subdivision (a) of Section 2434 be revised to read:

> (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 and having the capacity to make health care decisions has priority to act for the principal in all matters of health care, but the attorney in fact does not have priority over the principal with respect to a particular health care decision if the principal has the capacity to and is able to give informed consent with respect to that decision.

This draft recognizes that a patient who would be unable to give informed consent to a complex choice among various forms of medical treatment for a particular medical problem may nevertheless have the capacity to determine whether or not to consent to a simple form of medical treatment. Where the health care provider has doubt as to the capacity of the patient, the health care provider can require the consent of both the patient and the attorney in fact. If the health care provider believes that the patient cannot give informed consent but the patient objects to the choice of the attorney in fact, the health care provider will run a

risk of liability based on a later finding that there was no consent if the trier of fact later determines that the patient had the capacity to give informed consent. Hence, in a doubtful case, the health care provider ordinarily will not act without the patient's consent or a court determination that the patient lacks capacity to give informed consent.

§ 2433. Requirement for printed form

Section 2433 of the revised staff draft requires a warning statement on a printed form of a durable power of attorney for health care. Exhibit 8 (Alameda County Bioethics Subcommittee) is concerned that a printed form might not in selected situations provide sufficient insight into the principal's intent. It is suggested that "some type of brief, explanatory preamble might be required, or at least suggested, so that the basic intent of the principal might be memorialized. It was recognized that this would complicate and lengthen the printed form, but the committee was worried that a printed form might be too easy to fill out and formalize."

The problem with the printed form is that there is no printed form prescribed. The only requirement is the warning statement that would be required by Section 2433. The staff does not know how the suggestion of the Bioethics Subcommittee could be implemented. However, if the Estate Planning, Trust and Probate Law Section of the State Bar develops a statutory durable power of attorney, we can suggest that the suggestion of the Bioethics Subcommittee be considered.

A basic question is whether a person should be permitted to give a durable power of attorney for health care without the advice of counsel. The staff believes that this is something a person can and should be permitted to do without the expense of a lawyer.

§ 2434.5. Limitation concerning certain types of health care

An individual may determine while having full competence that should the individual be in need of confinement to a mental institution, a trusted relative or friend should be authorized in a durable power of attorney to give consent to the placement so that a legal proceeding to establish the incompetence and to confine the individual can be avoided. Later, if the person becomes in need of confinement to a mental institution, the person may object to the confinement. Should the durable power of attorney be given effect to permit "voluntary" placement in

these circumstances? There are other similar situations: administration of experimental drugs, convulsive treatment, psychosurgery, and sterilization. Exhibit 5 (lawyer for Veterans Administration), Exhibit 6 (Legal Services Section - expressing "concern that there are no restrictions on exercise of the authority. For example, there are no restrictions on commitment in a locked facility, on placement in a skilled nursing facility, on convulsive treatment, or on other areas of concern."), and Exhibit 7 (Bioethics Committee at page 9).

The proposed law could include a provision that these types of treatment are not authorized under the durable power of attorney unless specifically authorized. It could also be required, in addition, that the durable power of attorney could authorize such form or forms of treatment only if the principal had the advice of a lawyer at the time the durable power of attorney was executed. In addition, it could be required that the attorney execute a certificate that the principal understood the significance of including the provisions in the durable power of attorney. This scheme would preclude the inclusion of such authority except in the case where the principal, acting with the advice of counsel, determined to include the specific authority in the durable power of attorney. This scheme gives an individual the maximum flexibility in drafting a durable power of attorney for health care. However, it makes the statute more complex.

On the other hand, it should be recognized that the principal can restrict the forms of treatment in any way the principal desires by including the restriction in the durable power of attorney. However, the principal may not consider the possibility of the need for confinement in a mental institution and may not include any provision dealing with this situation. Also, the attorney who drafts the durable power of attorney may fail to include a provision dealing with this type of situation one way or another. Requiring specific authority in the durable power of attorney is a good way to be sure the issue is not overlooked in drafting the durable power of attorney.

On balance, the staff believes that it would be desirable to include the following provision in the proposed legislation:

> 2434.5. (a) Except as provided in subdivision (b), a durable power of attorney may not authorize the attorney in fact to consent to any of the following on behalf of the principal:
>
> (1) Commitment to or placement in a mental health treatment facility.

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

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

(4) Sterilization.

(b) A durable power of attorney for health care may authorize the attorney in fact to make health care decisions with respect to one or more of the matters listed in subdivision (a) only if both of the following requirements are satisfied:

(1) The durable power of attorney contains a clear and specific authorization to the attorney in fact to make health care decisions with respect to particular matter or matters.

(2) The principal at the time of execution of the durable power of attorney had the advice of a lawyer admitted to practice in this state and the durable power of attorney includes a certificate of such lawyer stating in substance as follows: "I am the lawyer for the principal under this durable power of attorney. In my opinion, the principal clearly has the capacity to execute this durable power of attorney. I have explained the significance of the provisions of this durable power of attorney to the principal, and, in my opinion, the principal fully understands the significance of those provisions."

(c) The principal may consent to a medical experiment (as defined in Section 24174 of the Health and Safety Code) or to the use of an experimental drug (as defined in Section 26668 of the Health and Safety Code) only if authorized by the durable power of attorney for health care and only as provided in Chapter 1.3 (commencing with Section 24170) of Division 20 and Article 4 (commencing with Section 26668) of Chapter 6 of Division 21 of the Health and Safety Code.

It should be recognized that another alternative is to prohibit entirely a durable power of attorney from giving authority to the attorney in fact to consent to any of the listed matters. There is a risk in including the provision for a certificate of the lawyer in the statute. The legislative committee might require such a certificate in every case, thus depriving the ordinary person of the benefits of the statute unless the person is willing to pay the lawyer's fee.

Court review

Exhibit 7 (Bioethics Subcommittee of Alameda County) indicates concern that the procedure for court review must be speedy and effective. The court review provisions are Civil Code Sections 2410-2423 as revised by Sections 3-8 of the staff draft of the recommendation attached to Memorandum 83-14. We have attached the existing text of Sections 2410-2423 as Exhibit 9. At the meeting, we will go through the provisions of the staff draft of the recommendation so the Commission can determine

whether the scheme provided is satisfactory. The staff believes the provisions are satisfactory.

Respectfully submitted,

John H. DeMoully
Executive Secretary

2d Supp Memo 83-14

EXHIBIT 1

AMERICAN ASSOCIATION OF RETIRED PERSONS

CALIFORNIA STATE LEGISLATIVE COMMITTEE

CHAIRMAN
Mr. Paul W. Avery
1271-B Pine Creek Way
Concord, CA 94520
(415) 676-2946

VICE CHAIRMAN
Mr. Clarence F. Nedom
4191 Sandburg Way
Irvine, CA 92715
(714) 552-8714

RECORDING SECRETARY
Dr. Wallace Hall
P.O. Box "H"
Belvedere, CA 94920
(415) 435-0695

CORRESPONDING SECRETARY
Mr. Frank Freeland
429 Dunster Drive, #2
Campbell, CA 95008
(408) 379-0782

March 7, 1983

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

Dear John:

After careful study of the legalized rationale regarding the tentative recommendation relating to 'DURABLE POWER OF ATTORNEY TO MAKE HEALTH CARE DECISIONS', it is our opinion that we enthusiastically support the enabling legislation when given the opportunity to do so.

Sincerely,

Paul W. Avery

Paul W. Avery
Chairman

Arthur F. Bouton
AARP President

Cyril F. Brickfield
Executive Director

National Headquarters: 1909 K Street N.W. Washington, D.C. 20049 (202) 872-4700

Exhibit 2

2d Supp. Memo 83-14

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

March 7, 1983

John H. Demoully, Esq.
Executive Director
California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94306

Re: Study L-703; Memorandum 83-14

Dear John:

Thank you for sending me a copy of the latest staff recommendation on authority to make health care decisions. I find the latest effort to be a very good one indeed and would like to add one suggestion, which you may have already considered.

I believe it important that no one have the impression that health care decisions can only be made by the use of durable powers, and for that reason, I wish to suggest for the Commission's consideration an additional section which parallels section 7193 of the Health and Safety Code, part of the California Natural Death Act. Perhaps it might say something to the effect of the following: "Nothing in this chapter shall impair or supersede any legal right or legal responsibility which any person may have to effect the making of health care decisions in any lawful manner. In such respect the provisions of this chapter are cumulative."

I hope to be present for the Commission meeting in Los Angeles on March 18 at 10:00 a.m.. I have a commitment across town at 1:00 p.m.. Thus, I hope it will be possible to address this recommendation (L-703) before noon. I understand that Harley Spitler is also planning to attend and would be grateful for the same scheduling, if possible.

Thanks very much, John, and best regards.

Sincerely,

Les

Leslie Steven Rothenberg

LSR:ms
cc: Harley J. Spitler, Esq.

2nd Supp. Memo 83-14 Exhibit 3

Alameda County Superior Court

ADMINISTRATION BUILDING
1221 OAK STREET, RM. 20
OAKLAND, CA 94612
(415) 874-7842

JUDITH A. SCHINDLER
COURT INVESTIGATOR

CONSTANCE S. CARLSON
SHAUNA G. GILLESPIE
LINDA J. KNOX
MEL L. LIPPMAN
ASSISTANT COURT INVESTIGATORS

TO: California Law Revision Commission

FROM: Judith A. Schindler, Court Investigator

DATE: March 10, 1983

RE: Durable Power of Attorney to Make Health Care Decisions

As the Court Investigator for the Alameda County Superior Court, I would like to express the concerns of myself and the entire Court Investigator staff regarding the durable power of attorney to make health care decisions.

According to your tentative recommendation, page 2, "Instead of leaving health care decisions to a judge, the individual may designate a trusted relative or friend to make the decision on his or her behalf if the need should arise." Let me point out that under the conservatorship law (Probate Code Section 1880) a conservator can be given medical authority. Let me also point out that the conservator who makes medical decisions can also be a relative or trusted friend, and the conservator, not the judge, would be making the health care decisions.

The Court Investigator's office reviews conservatorships on a biennial basis. The concerns of this office with the durable power of attorney is the lack of accountability or a method of review. In reviewing conservatorships over the last four years, I personally have encountered conservatees in marginal living situations and/or conservatees with questionable accountings of their estates on more than one occasion. Attached are a list of several cases and outcomes to show situations we encounter. Without the protection of the Court to review conservatorships, abuses of conservatorships would never come to the Court's attention where the situation can be rectified. With a durable power of attorney how would the Court, or any other agency or person able to file a petition under Civil Code Section 2411, be made aware of possible abuse? When a conservatorship is initiated it can be assumed all intentions are geared toward the best interest of the conservatee, however, as I have described, it does not always occur. What is to say there will not be some misuse or abuse under a durable power of attorney? The accountability is minimal at best. It is for these reasons that the appropriateness of this amendment, I feel is questionable.

JAS:gh

Biennial Review Interview
(P.C. 1851)
Court asked for review. Best Interests - Questions regarding medical care as well as gifts given by the conservator from the estate of the conservatee. Conservator ordered by the Court to make medical appointment for the conservatee and to no longer give gifts from the conservatee's estate.

Biennial Review Interview
(P.C. 1851)
Conservatee's clothing appeared minimal. Finding regarding Best Interests of person not made - clothing situation remedied.

Biennial Review Interview
(P.C. 1851)
Community contact. Reclusive 70 year old woman living in condemned home without utilities or food - successor conservator appointed.

Biennial Review Interview
(P.C. 1851)
Requested by Court. Questionable estate transactions, total estimated at $30,000.00. Also questionable safety factor. Conservator removed, successor conservator appointed.

Biennial Review Interview
(P.C. 1851)
Court asked for review. Court Investigator acquired information which led to removal of conservator. Questionable fraud of up to $63,000.00. Conservator surcharged approximately $122,000.00.

Biennial Review Interview
(P.C. 1851)
Conservatee stated questions regarding his estate. Asked for his attorney. Investigator contacted attorney. Attorney pursued the estate questions and retrieved portions of the estate for the conservatee.

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IN REPLY REFER TO:
SAN FRANCISCO OFFICE

March 10, 1983

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

Re: Tentative Recommendation Relating to Durable Power of Attorney to Make Health Care Decisions

Dear Mr. DeMoully:

As a firm which represents a large number of general acute care hospitals and other health care institutions in California, we are very interested in the Commission's recommendation regarding the durable power of attorney and would like to offer a few brief comments upon it.

First, we strongly support the Commission's recommendation that the durable power of attorney statute be revised to provide expressly that durable power of attorney may authorize the attorney in fact to make health care decisions for the principal. While we are aware that a substantial number of family and estate planning attorneys believe that the statute does give a person the ability to designate another person to make medical decisions, it is our own view, and that of other attorneys practicing in the medical and hospital area, that the matter is not quite so clear.

We note that the durable power of attorney law nowhere makes any specific reference to consent to medical treatment. In fact, it contains a number of phrases that could be read as limiting

its scope to decisions concerning the disposition of a person's assets or property. In any event, we have become accustomed to laws which speak in clear, explicit terms when granting others the right to direct medical treatment of incompetent persons [see, e.g., Cal. Probate Code §§2355-2357 (guardians and conservators with express authority to consent to medical treatment)]. In addition, we have advised our clients that it would be unwise, in the absence of statutory or decisional authority on point, for physicians and hospitals to assume that a person may designate another person to give consent on his behalf under the new durable power of attorney statute.

The Commission's recommendation is obviously of great interest to physicians and hospitals who must often deal with adult patients who are incompetent to consent to their own medical treatment and who are not subject to any conservatorship. We believe that the recommendation, should it become law, could be of great benefit to both patients and health care providers. It would allow individuals to exercise their power of self-determination through both their directions in the durable power of attorney itself and their choice of an attorney in fact who is knowledgeable about their values and preferences. This appears to be a procedure for making a "substituted judgment" for an incompetent that is vastly superior to others such as a court porceeding with the judge making the final decision about treatment. In addition, health care providers could look to the express power of the attorney in fact, as conditioned by the directions of the principal, for a legally sanctioned decision about the course of medical care or treatment the incompetent is to undergo and thus avoid possibly lengthy and cumbersome judicial proceedings which might excessively invade the patient's privacy.

We thank you for this opportunity to comment upon the Commissioner's recommendation.

Very truly yours,

Lawrence J. Nelson

LAWRENCE J. NELSON

LJN/ted

Office of District Counsel
11000 Wilshire Blvd.
Los Angeles CA 90024

Veterans Administration

March 3, 1983

In Reply Refer To: 344/02A9

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

SUBJ: Comments Regarding Tenative Recommendation Relating to Durable Power of Attorney to Make Health Care Decisions

Dear Commission:

Your proposed recommendations regarding the Durable Power of Attorney for Health Care Decisions are commendable and hopefully will become a part of our state's law on January 1, 1984. However, one issue needs clarification:

> What relationship will this law have to the existing law regarding psychiatric treatment?

Did you intend to have the Durable Power of Attorney for Health Care Decisions apply to any form of mental health treatment? The potential for conflict with existing state law and emerging constitutional principles, i.e. right to refuse treatment, may outweigh any benefit it would have in resolving already difficult consent issues in the treatment of mental illness. Your proposed Section 2430 states:

> "As used in this article, 'health care decision means 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."

Proposed Section 2433 states:

> "Subject to any limitations in the durable power of attorney, the attorney in fact 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 he or she had the capacity to do so."

California Law Revision Commission

I think you should reexamine and/or clarify the scope of health care consent as it applys to "mental conditions." You may have addressed this issue already but it is not clear from the proposed changes. Please refer to California Welfare and Institutions Code Sections 5000 et. seq. Below is a list of questions you might consider regarding the possible effect of this durable power of attorney in treating mental conditions:

1) Can people arguably "incompetent" be placed in a locked psychiatric facility by the attorney in fact as a voluntary patient having authority under a properly executed durable power of attorney?

2) Can a patient arguably "incompetent" be treated with psychotropic medications against his "will" by the consent of an attorney in fact?

3) What effect do the recommendations have on the requirements of consent to electroconvulsive therapy and psychosurgery which are established by statute?

4) What affect does this have on the waiving of any rights of the individual subject to a durable power of attorney?

5) Does he or she have a right to counsel to petition the court in matters of disagreement with the attorney in fact over issues of treatment?

Again, you may have already addressed these issues but it is not clear from the proposed changes. I offer this as a possible area of clarification. Thank you for considering my comments.

Respectfully,

ALAN K. ACHEN, Attorney

THE LEGAL SERVICES SECTION

OF THE STATE BAR OF CALIFORNIA

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AREA CODE 415

March 8, 1983

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

Re: Study L-703 - Delegation of Authority to Make Health Care Decisions

Dear Mr. DeMoully:

The Legal Problems of Aging Committee of the Legal Services Section of the State Bar of California has been following, with much interest, the proposals of the California Law Revision Commission related to the designation of "health care representatives". Most of the members of the Committee have extensive experience in representing elderly persons, and it has been from that perspective that we have approached this issue. The purpose of this letter is to set forth the concerns and comments of the Committee with respect to Study L-703.

The threshold question, of course, is whether there is even a need for such legislation. As the Law Revision Commission has recognized, there is currently authority for the courts to become involved in health care decisions (See Probate Code, §§ 2354 - 2357 and §§ 3200 - 3211), and there are attorneys who believe that the authority to make health care decisions can be delegated under the existing durable power of attorney statutes (See, e.g., the 1981 materials of the Continuing Education of the Bar on the durable power of attorney). However, the latter theory is clearly not uncontroverted (indeed, there appears to be little language in the statutes to support such a delegation of authority), and Probate Code provisions are not only time-consuming and expensive, but also remove the ability to shape the decision from the patient.

Therefore, in general, the Legal Problems of Aging Committee supports the Commission's efforts to devise a scheme for the delegation of authority to make health care decisions. The ability of a person to designate a "trusted relative or friend" to assent to or refuse medical treatment upon his or her incapacity, or upon his or her perceived incapacity, could be extremely useful. However, the Committee is equally convinced that such a delegation of authority can be extremely dangerous and could be vulnerable to abuse unless great care is taken in the drafting of the statute. It is this concern which lies behind the analysis which follows in this letter.

REJECTION OF DURABLE POWER OF ATTORNEY ACT PROVISIONS:

The Committee feels that the apparent current plan of the Commission to amend and supplement the existing Uniform Durable Power of Attorney Act, as set forth in Memorandum 83-2, is an unwise approach. We join with the Bioethics Committee of the Los Angeles County Bar Association in their rejection of that approach, and generally join with the Bioethics Committee's modification of the Staff Draft of July 31, 1982.

Of paramount concern to Committee members of this approach is the likelihood that unified, standard form durable powers of attorney will be sold and abused. Decisions as to use and distribution of personal and real property are substantially different than decisions as to medical treatment. Efforts to make those decisions seem synonymous should be discouraged. Additional concerns in this regard include:

1. A power of attorney concerning management of property might be intended to be exercised even though the principal has decision-making capacity, while a power of attorney concerning medical treatment should only be exercisable when such capacity is lacking or in question.

2. A unified standard form might lead unsophisticated principals to the belief that the law requires or recommends that the agent be the same person for each area.

3. A power of attorney form notarized for the purpose of encumbering real property might well be misconstrued as being notarized for the purpose of health care decisions.

In addition to the problems of blurred lines of distinction between the powers of attorney, the Committee has other concerns with the Staff Draft dated December 6, 1982. These include:

1. A concern whether there should be any restriction any person's ability to petition the court in the area of health care decisions, such as there is under Section 2421 under the traditional power of attorney.

2. A concern of whether Section 2435 is too broad in its grant of criminal, civil, and administrative immunity. The Committee believes that health care providers should not suffer greater liability because of the creation of such a scheme. On the other hand, the Committee also believes that health care providers should not reap a windfall of additional immunity, whether intended or not. The section should be reworded to make clear that no additional immunity is intended.

3. A concern of whether the hearing process provided in Section 2417 is appropriate. While under §2417(f) the court might shorten the notice period, the statute contemplates a minimum of 30 days, which may be inappropriate in the area of health care decisions.

4. A concern that there are no restrictions on exercise of the authority. For example, there are no restrictions on commitment in a locked facility, on placement in a skilled nursing facility, on convulsive treatment, or on other areas of concern.

5. A concern that the scheme does not require that the principal lack the capacity to make decisions before the power of attorney becomes effective. In this regard, the Committee agrees with the analysis of the Bioethics Committee.

Therefore, the Legal Problems of Aging Committee urges the Commission to abandon the approach of amending the Durable Power of Attorney Act.

ANALYSIS OF THE HEALTH CARE REPRESENTATIVE PROPOSAL:

The Committee specifically endorses the following aspects of the Los Angeles County Bar Association's Bioethics Committee's analysis:

1. That the appointment of a health care representative becomes effective only when the patient becomes unable to consent to or refuse treatment.

2. That §53.150 be amended by adding subsection (c) to deal with the potential problems of concurrent authority and the priority of authority.

3. That §53.120(b) be amended to require the representative, to the extent possible, to carry out the wishes of the patient, rather than second guessing the patient as to what is in his or her "best interests".

4. That the disqualification provisions of §53.160 be eliminated.

In addition, the Committee makes the following recommendations:

1. That a decision of a health care representative is valid only where either (a) it is assented to by the patient, or (b) the patient expresses no decision.

In other words, if the patient says "no" to any decision, that invalidates the decision. The key stumbling block to any health care representative scheme is the determination of when the appointer lacks the capacity to given informed consent. Indeed, it is not difficult to imagine that most useful scenario for the utilization of this scheme is the one where the patient desires the medical treatment but the health care provider is reluctant to proceed because of doubts about the patient's capacity. In that circumstance, all the health care provider would need would be the assurance of the additional assent of the health care representative.

In the case where the patient says "yes" and the health care representative says "no", the provider may then either decide that the patient retains the capacity to give informed consent and therefore the representative's decision is irrelevant (since he or she has no power), or the provider will have to utilize the court system procedures under the Probate Code.

In the case where the patient says "no" and the health care representative says "yes", the provider should either refuse to proceed or defer to the courts to determine the capacity of the patient.

The present scheme is deficient insofar as it places the burden on the non-consenting patient to petition the court and prove that he or she is of "sound mind". The health care representative system should only continue to the extent that there is agreement. Where such agreement is lacking, it is best to utilize the safeguards of the Probate Code procedures. The Committee does not presume that all health care representative appointments were made without fraud, undue influence, coercion, or mistake. The presence of attorneys, witnesses, or notaries public, while helping to reduce the dangers, do not eliminate them.

It should be noted, however, that a variance between the patient and the representative only negates the individual decision and does not automatically act to revoke the entire appointment. It may occur that the patient may be perfectly satisfied with the overall actions of the representative, but not be in accord with one particular decision. Because a new health care representative could be appointed or reappointed

only where the patient is "of sound mind", the patient should not be faced with the choice of going along with a decision or losing the assistance of the representative (with the representative's ability to review the medical records and advocate for the patient).

2. There should be some restriction on who may become a health care representative.

Under each of the schemes as drafted, there are virtually no restrictions on who may become a health care representative. The Committee is concerned about this. For example, should the administrator of a skilled nursing facility be allowed to receive such an appointment.

3. The health care representative should not have priority over a conservator of the person.

Under proposed §53.120(c), a health care representive would continue to have priority over all other persons, including a conservator of the person appointed by the court. While the appointer's preference of a health care representative should be given great deference by the conservatorship court, and joint conservators of the person might be considered (one for health care decisions and another for other daily living situations), the ultimate preference should probably go to the decision of the court which will be responsible for the person by virtue of the imposition of the conservatorship.

CONCLUSION:

The Legal Problems of Aging Committee believes that Commission should reconsider proposals before it prior to making a decision with respect to health care representative legislation. The Committee further urges the Commission to carefully consider the concerns advanced in this letter and advanced by the other commenters, including the Bioethics Committee. We further invite the Commission to call upon us for any further input you might desire in this area. Thank you for your consideration of our concerns.

Yours truly,

EDWARD FELDMAN, Chairperson
Legal Problems of Aging Committee

Gary T. Rowse, Chairperson
Legislative Subcommittee
Legal Problems of Aging Committee

cc Stan Ulrich
Susan Mattox

GTR/p

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March 4, 1983

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

Re: Study L-703
Delegation of Authority to Make Health Care Decisions

Dear John:

The Bioethics Committee of the Los Angeles County Bar Association has received the most recent staff draft of the tentative recommendation concerning the above, specifically, the proposed amendments to the current Uniform Durable Power of Attorney Act.

After reviewing this draft, it is our conclusion that all of the objections and comments which we made in writing to the Commission, as outlined in my letter and our written comments to you dated December 23, 1982, still remain in effect and apply equally to this new draft.

Our concerns have not been alleviated by this most recent draft, and we strongly urge the Commission to review our comments and suggested changes which we submitted to you in December, with a view toward amending this proposed bill.

In addition to our specific comments and suggestions, as outlined in our correspondence of December 23, 1982, we still believe our general comment that separate legislation and the original recommendation of the Commission is far superior and certainly more preferable than the proposed amendments to the existing Uniform Durable Power of Attorney Act.

I plan to appear in person at the Commission's scheduled meeting on March 18, 1983, at which time I will be happy to answer any questions which the Commission may have in this connection, and point out again our concerns and objections to this proposed legislation.

IRENE L. SILVERMAN
ATTORNEY AT LAW

For your information, I am enclosing herewith another copy of my letter to you dated December 23, 1982, and the Bioethics Committee's comments of the same date, attached to that letter.

In the meantime, should you have any questions regarding this matter, or wish additional information, please do not hesitate to call me.

Very truly yours,

Irene Silverman

IRENE L. SILVERMAN
Chairperson
Bioethics Committee of the Los Angeles County Bar Association

ILS:dh

encs.

cc: Jay N. Hartz
Richard S. Scott
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December 23, 1982

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

Re: Study L-703
Delegation of Authority to Make
Health Care Decisions

Dear John:

I enjoyed meeting you, Stan Ulrich and the rest of the commission members at the recent meeting in Los Angeles.

As was discussed at that meeting, the Bioethics Committee of the Los Angeles County Bar Association reviewed the staff draft of the proposed legislation concerning the appointment of a health care representative, as well as the commission's recommendations, and in light of the November meeting, I returned with the Commission's decision to attempt to incorporate the approach of appointing a health care representative into the existing Uniform Durable Power of Attorney Act.

The subcommittee formed to draft the recommendations and proposed changes, as well as the whole committee, believed after its comprehensive review, that a separate statute for this important area was a better approach, rather than attempting to change the current Uniform Durable Power of Attorney Act.

Accordingly, I am enclosing herewith the comments which the Bioethics Committee has drafted, as well as our proposed changes to your Staff Draft.

In preparing this draft, we reviewed all of the comments which the Commission received, together with the commission's recommendations and comments, as well as several other proposed model acts. Our unanimous conclusion was that the Staff Draft of July 31, 1982 was by far the best approach, and we proceeded from that point.

I have received the Tentative Recommendation relating to the Durable Power of Attorney to Make Health Care Decisions, and

IRENE L. SILVERMAN
ATTORNEY AT LAW

this was reviewed as well by the subcommittee.

The next general meeting of the Bioethics Committee will be held on January 12, 1982, at which time the entire committee will again review the comments and the Staff Draft of its Tentative Recommendation relating to the Durable Power of Attorney to Make Health Care Decisions.

I will be attending the January 21 hearing in connection with this matter, and hope that the Commission will consider the enclosed comments and revised draft.

In addition, I have asked for comments from the Probate Department of the Los Angeles Superior Court, and hope that I will be able to present those comments at the January 21 meeting.

For your information, I personally would like to call your attention to one particular area mentioned in our comments, and deleted by us in the proposed legislation. The subcommittee was not in unanimous agreement regarding §53.150, and the comments found on page 4 of our Memorandum.

Although we discussed this area i n depth, as stated above, our subcommittee was not in agreement with the meaning of "authority" in the Staff Draft. I, individually, believe that an authority granted in an appointment (meaning specific directions or instructions relating to treatment or non-treatment) should not be revoked orally, and must be revoked in writing. This, of course, assumes that such direction or authority can only be revoked while the appointor is competent. The subcommittee had discussed the concept of requiring any attempt at changing, modifying or revoking instructions, directions (authority) by requiring the execution of a new appointment document, however, after extensive discussion, decided to leave this out of the proposed legislation and our comments.

I believe this area should be considered by the Commission for the reason that a health care provider will most likely see the appointment document when accepting another individual to carry out the intentions of the incapacitated patient (appointor), and if such document contains specific instructions, any deviation or change from those instructions, would most assuredly be questioned. The other members of the subcommittee believed that by authorizing a health care provider to petition the court when there was a question such as an oral revocation of the written instructions in the appointment document adequately covered this point. They believed that an oral revocation should be authorized by a competent adult patient due to the fact, that as a practical matter, most individuals will not

IRENE L. SILVERMAN
ATTORNEY AT LAW

re-execute these appointment documents from time to time, as their ideas or desires change, if in fact, such desires or wishes do change, and that to require such in writing would be unduly burdensome.

I believe this requirement, although more restrictive, should be incorporated in any proposed legislation, due to the nature of the appointment itself, and the fact that there should be as little Court involvement as possible. More restrictive language in this area will in the long run afford more protection to those individuals and health care professionals involved, and leave less room for treatment or non-treatment that the patient did not wish to occur.

I look forward to seeing you again at the next hearing in January in San Francisco. In the meantime, should you have any questions, or require any additional information from the Committee, please do not hesitate to contact me.

Very truly yours,

Irene Silverman

IRENE L. SILVERMAN
Chairperson
Bioethics Committee of the
Los Angeles County Bar Association

ILS:dh
encs.
cc: Stan Ulrich
Staff Counsel - Law Revision Commission
Jay N. Hartz
Richard S. Scott
Roy Aaron, President, Los Angeles County Bar Association

M E M O R A N D U M

TO: California Law Revision Commission

FROM: Bioethics Committee of the
Los Angeles County Bar Association

DATE: December 23, 1982

RE: COMMENTS REGARDING PROPOSED HEALTH CARE REPRESENTATIVE LEGISLATION AND REVISED DRAFT OF PROPOSED LEGISLATION

The Comments contained herein on the Commission's recommendations and the Staff Drafts of the proposed legislation relating to the appointment of a Health Care Representative, do not represent the views of the Los Angeles County Bar Association, but only those of the Bioethics Committee thereof. These comments were drafted by a subcommitee of the Bioethics Committee, consisting of Irene L. Silverman (Chairperson of the Bioethics Committee), Richard S. Scott, and Jay N. Hartz.

INTRODUCTION

The Bioethics Committee of the Los Angeles County Bar Association ("the Committee") strongly supports the concept which the Commission is attempting to achieve through its proposed legislation, and believes that there is a significant need for such legislation.

The Committee has reviewed in detail the Commission's proposed legislation, as well as all of the comments thereto, and has also discussed and analyzed the possiblity of achieving similar results by amendments to the Uniform Durable Power of Attorney Act, contained in Civil Code §2400, et seq.

Having reviewed both approaches, it is the considered opinion of the Committee that the Commission's original approach is preferable, because:

(1) utilizing the durable power of attorney may encourage laymen wishing only to appoint a health care representative to execute a document conveying enormous power to another without a full appreciation of the extent of that power or an understanding of appropriate limitations to place on the power;

(2) accurate and informed usage of a durable power of attorney essentially requires the assistance of legal counsel, whereas the appointment of a health care representative should be an act which laymen could accomplish without legal assistance; and

(3) the Committee believes that the special and unique role of health care decisions deserves a separate and distinct vehicle for transferring that decision-making authority in anticipation of potential incapacity.

The Committee has reviewed, in addition to the Commission's drafts and all comments thereto, a variety of other proposed statutes and Model Acts dealing with health care decision-making, including the Uniform Power of Attorney Act, and the Commission's December 6, 1982 proposed modifications thereto. After this review, the Committee has concluded that the July 30, 1982 draft of the proposed Part 2.2 of the Civil Code presents the most workable format for providing adequate legislation.

The Committee has, therefore, made suggestions regarding the Commission's July 31, 1982 draft which are attached hereto. The basis for these recommendations is set forth below.

COMMENTS RE SPECIFIC MODIFICATIONS

§ 53.100

The definition of "health care representative" in Part (b) was ambiguous in that it defines a term by utilizing the same term. The Committee has utilized the phrase "individual appointed pursuant to § 53.110."

The Committee suggests the addition of a part (d) to define "health care provider," to permit use of that term in § 53.190 so as to provide that a health care provider may initiate a legal action to question the decision of a health care representative. It is most frequently health care providers who first encounter impending health care decisions which do not seem to be in the best interests of the appointor.

The committee has broadly defined "health care provider", but has limited the definition so that, for example, if an appointor is a patient in a hospital, only the physician or the hospital may bring an action to question the actions of a health care representative, and not each and every employee of the hospital.

The comments under this section should emphasize that an individual person is to be appointed as health care representative, thus precluding appointment of an entity such as a corporation, or of a group (e.g., "all one's adult children") for a joint or majority decision.

§ 53.110

Part (b)(2) was unclear. The Committee attempted to clarify what it understood the language to mean.

Part (e) was modified by the Committee, since it believes that it is unwise to encourage or permit persons capable of giving informed consent to delegate that right to another. Individual responsibility for such decisions should be encouraged. Additionally, enormous complexity could arise in the area of medical malpractice based upon lack of informed consent if such a substituted decision-maker were to be recognized when the appointor himself or herself was competent.

The Committee therefore suggests that the appointment become effective only when the appointor is not capable of giving informed consent, and only so long as the health care representative is capable of giving informed consent, as was earlier suggested in the revisions proposed by Lawrence J. Nelson, Esq. in correspondence to the Commission dated October 22, 1982 (Exhibit 6 to the Commission, First Supplement to Memo #82-82).

Parts (a) and (c) of this section use the term of "of sound mind"; while other sections use the standard "able to give informed consent". The Committee understands the two to be synonymous, but is unaware of any cases so stating. The Commission may wish to review the use of these phrases, and/or address this issue in its comments.

§ 53.120

The Committee suggests modifying part (b) to address the situation where no specific instructions have been set forth in the appointment. In such cases, the Committee recommends that the standard for the health care representative be stated to be that which the patient would choose for himself or herself if capable of doing so (the test utilized in Quinlan, Saikewicz, and many other cases), rather than the "best interests" of the patient, which could be taken to mean that which most people would choose under the circumstances instead of that which this person would choose. This is a critical issue which should be addressed, since it can be anticipated that many appointments will contain no special written instructions.

§ 53.130

The Committee found this uncertain and attempted to clarify the language.

§ 53.150

The Committee did not understand the use of the phrase "appointment or authority," in parts (a)(1) and (b), and believed that this phrase may raise questions as to what "authority" the health care representative has outside the appointment.

The Committee suggests deleting part (a)(2) because it assumes that the health care representative may act while the appointor is still capable of giving informed consent, a concept which the Committee recommends against, as set forth in the comments to § 53.110(e).

The Committee suggests the addition of a part (c) to state that if multiple appointments have been made, the last in time controls and all others are deemed revoked, unless the appointment states to the contrary. Contrary instructions might be given where a person appoints one person as health care representative to make only certain types of decisions, and another to make other types of health care decisions.

§ 53.160

The Committee recommends deletion of the "Disqualification" section completely, because:

(1) It is unnecessary because the purpose of the legislation is to establish a method for creating a substituted decision-maker, precisely because no such power exists now absent court appointment, and this section creates confusion by suggesting that a person other than a health care representative or a guardian or conservator may have a right to make health care decisions for another; and

(2) its only effect would seem to be to influence a court in determining who to appoint as conservator of the person, and since any writing or statement of intent is currently effective for that purpose, a code section formalizing such a process is not required.

§ 53.170

The Committee suggests deleting parts (d) and (e), since they deal with the effects of a person "disqualified" under § 53.160.

§ 53.180

With respect to Part (c), Probate Code §§ 1810, 1821, 1822, 3201, 3204 and 3206 should be amended to require notice

to any known health care representative of any proposed appointment of a conservator with powers to make health care decisions, or of any petitions under Probate Code § 3200, and to require an allegation in any such petition that there is no known health care representative able and willing to make medical care decisions. The interrelationships between this Act and the conservatorship proceedings under the Probate Code should be carefully considered.

The Committee understands the effect of § 53.180 to be that if the court appointed a conservator of the person, since such an appointment does not require a finding of incapacity, the conservatee could still appoint a health care representative, while under conservatorship, unless the court in the conservatorship proceedings finds that the conservatee lacks the capacity to give informed consent, as must occur if the court grants a conservator of the person authority to make health care decisions.

Modifications to part (e) are recommended for purposes of consistency with prior recommendations.

§ 53.190

The addition of part (c) is recommended to permit a health care provider to seek review of a seemingly improper or irrational decision by a health care representative, since health care providers are typically requested to carry out such decisions.

§ 53.200

Modification of part (a) is recommended to state that if the power of attorney format is utilized to appoint an attorney-in-fact as a health care representative, it becomes effective as to health care decision-making only when the principal lacks capacity to give informed consent, unlike a power of attorney as to other matters which may become effective immediately. Additionally, the section should be modified to state that even if the power of attorney format is utilized, the provisions and protections of this proposed legislation control as to the attorney-in-fact's conduct and responsibility as a health care representative.

Article 3, Durable Powers of Attorney Act §§ 2400-2407 should be amended to state that if, after January 1, 1984, the Act is to be used to appoint an attorney-in-fact as health care representative, the power of attorney must comply with the

requirements of this part, and the health care representative so appointed is subject to the provisions of this part.

§ 53.210

Minor changes are recommended for purposes of consistency with prior recommendations.

Modification of Part (b) is recommended to assure that those who executed a durable power of attorney prior to the effective date of this Act shall be deemed to have appointed a health care representative who shall be governed by the provisions of this part. This will avoid uncertainty as to the status of such appointments. This should not involve a large number of such appointments since the durable power of attorney provisions have only been in effect for a short time.

§ 53.220

Deletion of the entire section is suggested, consistent with the suggestion for deletion of § 53.160.

§ 53.230

The Committee recommends the addition of a § 53.230, which is modelled after Health and Safety Code § 7192, to state that refusal of care on behalf of an appointor does not constitute suicide, and execution of an appointment shall not affect insurance coverage. This section also prohibits anyone from requiring the execution of an appointment as a condition of being insured or of receiving health care.

COMMENTS

The Commission may wish to consider specifically addressing the impact of this proposed legislation on medical malpractice actions based on an alleged failure to obtain informed consent, and the ability, or lack thereof, of the health care representative to bring a medical malpractice action, or other action, to assert the rights of the appointor with respect to health care decisions.

If the recommendations of the Committee, or any of them, are accepted, the "comments" by the Commission should be reviewed to assure consistency with the changes.

[Comments of the Bioethics Committee of the Los Angeles County Bar Association - 12/17/82]

STATE OF CALIFORNIA LAW REVISION COMMISSION

PROPOSED LEGISLATION RE

APPOINTMENT OF A HEALTH CARE REPRESENTATIVE

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

§ 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~~ an individual appointed pursuant to § 53.110.

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

(d) "Health care provider" means any health care facility identified in Health and Safety Code § 1250, and any medical practitioner licensed pursuant to Division 2 of the Health and Safety Code. However, as used herein, "health care provider" shall not include any person licensed pursuant to Division 2 of the Business and Professions Code who treats the appointor primarily in a health care facility of the type identified in Health and Safety Code § 1250 as an employee of the health facility.

§ 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 acknowledgement either that the appointor signed the appointment, ~~or that the appointment is the appointor's~~ or that it was signed pursuant to the appointor's direction.

(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.~~ The health care representative has authority to exercise the powers of his or her appointment only when the appointor lacks the capacity or is unable to give informed consent to medical treatment, and only so long as the health care representative has capacity and is able to give informed consent.

§ 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, or if there are no instructions in the appointment, to carry out the desires of the appointor to the extent they have been made known to the health care representative.

(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.

§ 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 health care, to receive and review medical records, and to consent to the disclosure of medical records to ~~the~~ current health care ~~representative~~ providers and to any proposed health care provider.

§ 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.

§ 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 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.~~

(c) If multiple appointments have been executed, the one made last in time controls, and revokes all prior appointments unless contrary instructions are made in the subsequent appointment.

~~§ 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 acknowledgement 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.

§ 53.170. Protection of Health Care Provider and Representatives From Liability

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

(1) ~~(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.

(2) ~~(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.

(3) ~~(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.~~

(b) The health care representative shall be immune from civil or criminal liability for health care decisions made on behalf of an appointor in the good faith belief that the decisions were consistent with the desires of the appointor.

§ 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.

§ 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 when 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.

(c) A health care provider may bring an action under Article 4 (commencing with Section 2410) of Chapter 2 of Title 9 of Part 4 of Division 3.

§ 53.200. Limitation of Power of Attorney

53.200.

(a) After January 1, 1984, 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, and states that the appointment of an attorney-in-fact as health care representative does not become effective until the principal either lacks capacity, or is unable, to give informed consent, and states that the attorney-in-fact as health care representative is subject to all of the provisions of this part.

(b) Any durable power of attorney executed prior to January 1, 1984 which authorizes an attorney-in-fact to make health care decisions on behalf of the principal shall be deemed a valid appointment under this part, notwithstanding failure to comply with the requirements of Part (a) of this section, and the health care representative so appointed shall be subject to all of the provisions 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.~~

§ 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, _____(name)_____, understand that 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)

~~§ 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)

(street address)

(city, state)

(date)

(signature of witness)

(street address)

(city, state)

(date)

N E W! N E W! N E W!

§ 53.230. Prohibition of Requirement of Execution of Appointment

53.230

(a) Refusal of medical care by a health care representative on behalf of an appointor which results in the death of the appointor shall not constitute suicide of the appointor.

(b) The execution of an appointment pursuant to § 53.110, with or without specific instructions, shall not restrict, inhibit or impair in any manner the sale, procurement or issuance of any policy of life or health or disability insurance, nor shall it be deemed to modify the terms of an existing policy of life or health or disability insurance. No policy of life or health or disability insurance shall be legally impaired or invalidated in any manner by refusal of care on behalf of an insured appointor, notwithstanding any term of the policy to the contrary.

(c) No physician, health facility or other health provider, and no health care service plan, insurer issuing disability insurance, self-insured employee welfare benefit plan, or nonprofit hospital service plan, shall require any person to execute an appointment pursuant to § 53.110 as a condition for being insured for, or receiving, health care services.

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 without 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.

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2nd Supp. Memo 83-14 Exhibit 8

EDWARD HOWARD BORDIN, M.D., J.D.
ATTORNEY AT LAW
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CASTRO VALLEY, CALIFORNIA 94546
(415) 538-6696

March 11, 1983

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

Re: Study L-703
Delegation of Authority to Make Health Care Decisions

Dear Mr. Ulrich:

The Bioethics Subcommittee of the Alameda County Bar Association/Alameda-Contra Costa Medical Association has met and reviewed the staff draft of Study L-703, dated February 18, 1983.

It was the unanimous opinion of the committee that the general thrust of the proposed additions to the Civil Code was excellent. Again, as was the case with the adoption of Section 7185 et seq of the Health and Safety Code, California has an opportunity to demonstrate its leadership and foresight in the field of innovative Health Care legislation.

During the committee's review, however, several concerns were raised about the staff draft.

In reviewing Section 2432 (b), it was felt that although a printed form might prove the most convenient manner of appointment, it might not in selected situations provide sufficient insight into the principal's intent. Given the gravity of the decisions which the attorney in fact might make, and the endless number of possible factual situations which might arise, the brief printed form might not allow the attorney in fact or the involved health care providers to postulate what the principal would have decided in a similar situation.

It was suggested that some type of brief, explanatory preamble might be required, or at least suggested, so that the basic intent of the principal might be memorialized. It was recognized that this would complicate and lengthen the printed form, but the committee was worried that a printed form might be too easy to fill out and formalize.

In addition, the matter of the accountability of the attorney in fact was discussed at length. The proposed power will be used to make "life and death" decisions. The specter of conflict of interest

is always present. Although the purpose of the proposed legislation is to allow a responsible attorney in fact to make health care decisions without someone "second guessing" each decision, we still felt that provisions for speedy and effective review must be carefully delineated. We put ourselves in the shoes of a concerned next of kin, worried District Attorney, or affected health care provider dealing with an attorney in fact making decisions we felt were questionably in the best interests of the principal. Would Section 2421 provide the desired accountability? Although this might be a "worst case scenario", we nonetheless felt our concerns to be valid.

Overall, the committee felt that these, and the other objections to the proposed legislation sure to arise, to be ones which can be dealt with effectively. The County Bar and Medical Associations are pleased to have the opportunity to assist you with the drafting of this extremely significant legislation. We appreciate your keeping us current on the draft material. I will be in touch with you soon regarding the March 18th meeting.

Yours truly,

Edward Howard Bordin M.D., J.D.

EHB:kr

CC: Harold Norton, Bar Association
William Guertin, Medical Association
Irene L. Silverman, Bioethics Committee

Exhibit 9

Civil Code §§ 2410-2423

ARTICLE 4. COURT ENFORCEMENT OF DUTIES OF ATTORNEY IN FACT

Sec.
2410. Definitions.
2411. Petitioners.
2412. Petition; purposes.
2413. Powers of court.
2414. Venue.
2415. Petition; contents.
2416. Dismissal of petition.
2417. Hearing; service of notice; proof of service; laws applicable; attorney fees.
2418. Guardian ad litem.
2419. Appeal.
2420. Cumulative remedies; inapplicability to reciprocal or interinsurance exchanges.
2421. Elimination in power of attorney of authority to petition; exception.
2422. Application of article.
2423. Legislative intent.
2424 to 2462. Repealed.

Cross References

Application of 1981 addition, see note under § 2356.

§ 2410. Definitions

As used in this article:

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

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

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

(Added by Stats. 1981, c. 511, § 4.5.)

Former § 2410, repealed in 1929, see Title 10, post.

§ 2411. Petitioners

A petition may be filed under this article by any of the following:

(a) The attorney in fact.

(b) The principal.

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

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

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

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

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

(Added by Stats. 1981, c. 511, § 4.5.)

Former § 2411, repealed in 1929, see Title 10, post.

Cross References

Elimination of authority, see § 2421.

§ 2412. Petition; purposes

A petition may be filed under this article for any one or more of the following purposes:

(a) Determining whether the power of attorney is still effective or has terminated.

(b) Passing on the acts or proposed acts of the attorney in fact.

(c) Compelling the attorney in fact to submit his or her accounts or report his or her acts as attorney in fact to the principal, the spouse of the principal, the conservator of the person or the estate of the principal, or to such other person as the court in its discretion may require, if the attorney in fact has failed to submit an accounting and report within 60 days after written request from the person filing the petition.

(d) Declaring that the power of attorney is terminated upon a determination by the court of all of the following:

(1) The attorney in fact has violated or is unfit to perform the fiduciary duties under the power of attorney.

(2) At the time of the determination by the court, the principal lacks the capacity to give or to revoke a power of attorney.

(3) The termination of the power of attorney is in the best interests of the principal or the principal's estate.

(Added by Stats.1981, c. 511, § 4.5.)

Former § 2412, repealed in 1929, see Title 10, post.

Cross References

Appeal, see § 2419.
Elimination of authority, see § 2421.

§ 2413. Powers of court

The court may make all orders and decrees and take all other action necessary or proper to dispose of the matters presented by the petition.

(Added by Stats. 1981, c. 511, § 4.5.)

Former § 2413, repealed in 1929, see Title 10, post.

§ 2414. Venue

Proceedings under this article shall be commenced in the superior court of the county in which the attorney in fact is resident or, if the attorney in fact is not resident in this state, in any county of this state.

(Added by Stats. 1981, c. 511, § 4.5.)

Former § 2414, repealed in 1929, see Title 10, post.

§ 2415. Petition; contents

Each proceeding under this article shall be commenced by filing a verified petition in the superior court which shall state facts showing that the petition is authorized by this article and, if known to the petitioner, the terms of the power of attorney.

(Added by Stats. 1981, c. 511, § 4.5.)

Former § 2415, repealed in 1929, see Title 10, post.

§ 2416. Dismissal of petition

The court may dismiss a petition when it appears that the proceeding is not necessary for the protection of the interests of the principal or the principal's estate.

(Added by Stats. 1981, c. 511, § 4.5.)

Former § 2416, repealed in 1929, see Title 10, post.

Cross References

Appeal, see § 2419.

§ 2417. Hearing; service of notice; proof of service; laws applicable; attorney fees

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

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

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

(2) The principal if not the petitioner.

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

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

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

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

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

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

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

(2) The person commencing the proceeding if the court determines that the attorney in fact has clearly violated the fiduciary duties under the power of attorney or has failed without any reasonable cause or justification to submit accounts or report acts to the principal or conservator of the estate within 60 days after written request from the principal or conservator.

(Added by Stats. 1981, c. 511, § 4.5.)

Former § 2417, repealed in 1929, see Title 10, post.

§ 2418. Guardian ad litem

At any stage of a proceeding under this article, the court may appoint a guardian ad litem to represent the interests of a missing or incapacitated principal. Sections 373 and 373.5 of the Code of Civil Procedure do not apply to the appointment of a guardian ad litem under the provisions of this article.

(Added by Stats. 1981, c. 511, § 4.5.)

Former § 2418, repealed in 1929, see Title 10, post.

§ 2419. Appeal

An appeal may be taken from any final order or decree made pursuant to subdivision (a), (b), or (d) of Section 2412 or from an order dismissing the petition or denying a motion to dismiss under Section 2416.

(Added by Stats. 1981, c. 511, § 4.5.)

Former § 2419, repealed in 1929, see Title 10, post.

§ 2420. Cumulative remedies; inapplicability to reciprocal or interinsurance exchanges

(a) The remedies provided under this article are cumulative and nonexclusive.

(b) This article is not applicable to reciprocal or interinsurance exchanges and their contracts, subscribers, attorneys in fact, agents, and representatives.

(Added by Stats. 1981, c. 511, § 4.5.)

Former § 2420, repealed in 1929, see Title 10, post.

§ 2421. Elimination in power of attorney of authority to petition; exception

(a) Except as provided in subdivision (b), a power of attorney may expressly eliminate the authority of any person listed in Section 2411 to petition the court under this article for any one or more of the purposes enumerated in Section 2412 if both of the following requirements are met:

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

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

(b) Notwithstanding any provision of the power of attorney, the conservator of the estate of the principal may petition the court under this article for any one or more of the purposes enumerated in Section 2412.

(Added by Stats.1981, c. 511, § 4.5.)

Former § 2421, repealed in 1929, see Title 10, post.

§ 2422. Application of article

Subject to Sections 2420 and 2421, this article applies notwithstanding any provision of the power of attorney to the contrary.

(Added by Stats.1981, c. 511, § 4.5.)

Former § 2422, repealed in 1929, see Title 10, post.

§ 2423. Legislative intent

It is the intent of the Legislature in enacting this article that a power of attorney be exercisable free of judicial intervention subject to the jurisdiction of the courts of this state as invoked pursuant to this article or otherwise invoked pursuant to law.

(Added by Stats.1981, c. 511, § 4.5.)

Former § 2423, repealed in 1929, see Title 10, post.

BYRON CHELL · ATTORNEY
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FAIR OAKS, CALIFORNIA 95628
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March 10, 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

Dear Commission Members,

I am in receipt of the tentative recommendation relating to durable power of attorney to make health care decisions.

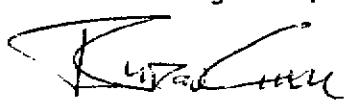
As an attorney very interested and involved in legal and medical issues, I strongly urge the Commission to move forward and approve the recommendations relating to health care decisions.

I am currently involved with several medical societies and facilities in the Sacramento area concerning the issues of withholding and withdrawing medical care and life support systems. The staff recommendations in this area will help clarify the point that a person ought be able to consider these issues and delegate another person to make such decisions should such decisions become necessary. If enacted, the recommendations would go a long way to help resolve the always present problems in these situations - What would the patient want? Who shall decide?

No doubt with the conclusion of the recent court action in Los Angeles there will be a cry for further legislation in this area. I am doubtful that any type comprehensive legislation can be properly drafted to deal with these many difficult situations but the tentative draft would make a good start

While having much more to say in regard to this area, at this time I shall simply urge support for the draft recommendations.

Best regards,



BYRON CHELL

BC:cdc

cc: Les Rothenberg