

## Memorandum 90-122

Subject: Study L-3044 - Comprehensive Power of Attorney Statute

Attached to this memorandum is a staff draft of a comprehensive powers of attorney statute. This draft implements decisions made at the July meeting when the Commission reviewed Memorandum 90-85.

Policy and drafting issues are discussed in notes following the relevant sections of the draft. An overview of the statute appears in the text preceding the draft statute. Following the explanatory text are a summary and detailed outline of the statute which will help you orient yourselves in the new structure.

At the November meeting, we plan to proceed through the draft statute section by section, since this is its first hearing.

Preparation of the draft statute involved a number of compromises. The draft does not make any substantial revisions of the new Uniform Statutory Form Power of Attorney Act, enacted this session on Commission recommendation, even though this may result in some new inconsistencies. Nor have we attempted to make any substantive revisions in the statutes governing durable powers of attorney for health care. The process of reorganizing and fleshing out the statutes governing powers of attorney for property matters results in some new tensions between this law and the law concerning durable powers of attorney for health care. This is a familiar problem, but the new structure of the comprehensive statute and the greater coverage of the statutes concerning the power of attorney for property offer more opportunity for inconsistent treatment of these two types of powers.

The organization of the statute is somewhat arbitrary. This is inevitable since the different types of powers of attorney may be grouped in a variety of ways. There are durable powers and nondurable powers. There are powers of attorney for property and for health care. Durable powers of either type share certain characteristics, but for some purposes, nondurable and durable powers of attorney for property are more alike than are durable powers for property and for

health. There is even some overlap between the two types of durable powers. There are also some characteristics shared by statutory forms of powers of attorney for property and for health care that separate them from hand-crafted powers.

Ideally, there would be a large number of general provisions that applied to all types of powers, whether durable or nondurable, for property or for health care, statutory form or not. But the decision to leave durable powers for health care largely self-contained and unrevised militates against abstracting general provisions. As the draft statute now stands, the general provisions consist of definitions (many of which apply only in one realm) and the provisions governing judicial enforcement of duties of agents. The lack of truly general provisions is patched with some sections applicable to durable powers of attorney for health care that incorporate specific rules from the statutes governing durable powers of attorney for property.

Respectfully submitted,

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## TENTATIVE RECOMMENDATION

proposing the

## COMPREHENSIVE POWER OF ATTORNEY STATUTE

Background

The statutes governing powers of attorney are in need of reorganization and revision.<sup>1</sup> Since 1979, several bills have been enacted recognizing durable powers of attorney for property and for health care, providing statutory forms, specifying a procedure for enforcement of the duties of agents, and making a number of other changes in the law.<sup>2</sup> From the beginning of these reforms, the power

1. Power of attorney statutes consist of the following: Civil Code §§ 2400-2407 (Uniform Durable Power of Attorney Act), 2410-2423 (court enforcement of duties of attorney in fact), 2430-2444 (durable power of attorney for health care), 2450 (statutory short form power of attorney), 2475-2499.5 (Uniform Statutory Form Power of Attorney Act), 2500-2508 (statutory form durable power of attorney for health care), 2510-2513 (miscellaneous provisions relating to powers of attorney). See also Civil Code §§ 2019-2022 & 2295-2357 (general rules relating to agency); Prob. Code § 3720 (federal absentee's power of attorney).

2. Almost all of the legislation in this area was enacted on recommendation of the Law Revision Commission:

- *Recommendation Relating to Uniform Durable Power of Attorney Act*, 15 Cal. L. Revision Comm'n Reports 351 (1980) (enacted as 1981 Cal. Stat. ch. 511). For legislative history, see 16 Cal. L. Revision Comm'n Reports 25 (1982); *Report of Senate Committee on Judiciary on Assembly Bill 329*, 16 Cal. L. Revision Comm'n Reports 43 (1982).

- *Recommendation Relating to Durable Power of Attorney for Health Care Decisions*, 17 Cal. L. Revision Comm'n Reports 101 (1984) (enacted as 1983 Cal. Stat. ch. 1204). For legislative history, see 17 Cal. L. Revision Comm'n Reports 822 (1984); *Report of Assembly Committee on Judiciary on Senate Bill 762*, 17 Cal. L. Revision Comm'n Reports 889 (1984).

- *Recommendation Relating to Statutory Forms for Durable Powers of Attorney*, 17 Cal. L. Revision Comm'n Reports 701 (1984) (enacted as 1984 Cal. Stat. chs. 312 & 602). For legislative history, see 18 Cal. L. Revision Comm'n Reports 18 (1986); *Report of Assembly Committee on Judiciary on Senate Bill 1365*, 18 Cal. L. Revision Comm'n Reports 45 (1986).

- *Recommendation Relating to Durable Powers of Attorney*, 18 Cal. L. Revision Comm'n Reports 305 (1986) (enacted as 1985 Cal. Stat. ch. 403). For legislative history, see 18 Cal. L. Revision Comm'n Reports 216 (1986); *Communication from California Law Revision Commission Concerning Senate Bill 1270*, 18 Cal. L. Revision Comm'n Reports 379 (1986).

of attorney statutes have been added to the part of the Civil Code relating to agency. A shortage of space and available section numbers in this part of the Civil Code, in league with the piecemeal nature of the revisions over the past 12 years, has resulted in a disorganized set of statutes. In some cases it is difficult to determine whether a particular provision applies to all powers of attorney, to durable powers generally, or only to health care powers. The degree to which the different varieties of powers of attorney are subject to the general agency rules is also doubtful. The general agency rules are archaic, obscure, and incomplete.<sup>3</sup> They provide little practical

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• *Recommendation Relating to Springing Powers of Attorney*, 20 Cal. L. Revision Comm'n Reports 405 (1990) (enacted as part of 1990 Cal. Stat. ch. 986). For legislative history, see 20 Cal. L. Revision Comm'n Reports 2219 (1990).

• *Recommendation Relating to Uniform Statutory Form Power of Attorney Act*, 20 Cal. L. Revision Comm'n Reports 415 (1990) (enacted as part of 1990 Cal. Stat. ch. 986). For legislative history, see 20 Cal. L. Revision Comm'n Reports 2219 (1990); *Report of the California Law Revision Commission on Chapter 986 of the Statutes of 1990 (Senate Bill 1777)*, 20 Cal. L. Revision Comm'n Reports 2291 (1990).

The initial authorization in 1979 for a durable power provided only for a power lasting for one year after the principal's disability. See 1979 Cal. Stat. ch. 234 (enacting Civil Code § 2307.1, repealed by 1981 Cal. Stat. ch. 511, § 1). Civil Code Section 2307.1 was superseded by enactment of the California version of the Uniform Durable Power of Attorney Act (1979) in 1981. See *Recommendation Relating to Uniform Durable Power of Attorney Act*, 15 Cal. L. Revision Comm'n Reports 351, 359-60 (1980).

3. See Civil Code §§ 2019-2022, 2295-2357. Of the 51 agency sections appearing in the Civil Code of 1872, only four have been revised in nearly 120 years. The 1872 Code, drawn from the Field Civil Code proposed in New York, was prepared by revisers who "felt themselves under 'lash and spur'" to prepare a bill before the 1872 legislative session and who reported that they felt "embarrassment" in this revision. Revision Commission, *Final Note*, [Proposed] Revised Laws of the State of California in Four Codes: Civil Code 609 (1871). The Civil Code of 1872 was the subject of an unrelenting attack by Professor Pomeroy who argued in 1884 that the Revision Commission had created a great source of doubt, uncertainty, and error by the "constant, but wholly unnecessary practice, of abandoning well-known legal terms and phrases . . . and of adopting instead thereof an unknown and hitherto unused language and terminology." Quoted in Van Alstyne, *The California Civil Code*, in 6 West's Ann. Cal. Codes: Civil Code 1, 30 (1954). Pomeroy concluded that there was "hardly a definition, or a statement of doctrine in the whole work, the full meaning, force and effect of which can be apprehended or understood without a previous accurate knowledge of the common law doctrines and rules on the same subject matter." *Id.*

guidance to persons attempting to resolve issues that may arise in connection with powers of attorney.<sup>4</sup>

Durable powers of attorney have become an increasingly important tool in recent years.<sup>5</sup> This has, in turn, resulted in more legislative attention in several jurisdictions, as in California. A few states have enacted new comprehensive statutes which the Commission has drawn upon in the preparation of this proposal. Of particular

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4. Many of the general agency statutes are concerned with ratification and ostensible authority, matters that are either irrelevant or handled differently in the power of attorney statutes. The general agency statutes overlap and seem at cross-purposes in some instances, such as Sections 2019 (agent cannot exceed authority), 2315 (agent has authority conferred), 2319 (agent's necessary authority), 2320 (agent's power to disobey), and 2322 (limits on general authority). The language of many of these rules is so general and abstract as to provide almost no guidance at all. See Civil Code §§ 2298-2300, 2315-2320. Prof. Pomeroy concluded in 1884 that there was "hardly a definition, or a statement of doctrine in the whole work [Civil Code of 1872], the full meaning, force and effect of which can be apprehended or understood without a previous accurate knowledge of the common law doctrines and rules on the same subject matter." Quoted in Van Alstyne, *The California Civil Code*, in 6 West's Ann. Cal. Codes: Civil Code 1, 30 (1954).

5. Twenty-seven jurisdictions have adopted the Uniform Durable Power of Attorney Act in whole or substantial part. See 8A Unif. L. Ann. at 82 (West Supp. 1990). Durable powers of attorney in some form are available all fifty states and the District of Columbia. See Collin, Lombard, Moses, & Spitler, *Drafting the Durable Power of Attorney: A Systems Approach* 14 (2d ed. 1987). A different approach has been taken in Illinois and Oregon where all agencies have been made durable. See Ill. Ann. Stat. ch. 110½ ¶ 802-5 (Smith-Hurd Supp. 1990); Or. Rev. Stat. Ann. § 127.005(1) (Supp. 1990). For an overview of legislation nationally, see Collin, *Planning and Drafting Durable Powers of Attorney*, 15 Prob. Notes 27 (Am. C. Prob. Couns. 1989); Vignery, *Legislative Trends in Nonjudicial Surrogate Health Care Decision Making*, 23 Clearinghouse Rev. 422 (1989).

interest are the new statutes in Illinois (1987), Minnesota (1984), Missouri (1989), and Nebraska (1988).<sup>6</sup>

#### Scope of Proposed Comprehensive Statute

The proposed comprehensive power of attorney act would reorganize all of the power of attorney statutes appearing in Civil Code Sections 2400-2514.<sup>7</sup> The new comprehensive statute would be added to the Probate Code following provisions concerning guardianships and conservatorships. This is an appropriate location inasmuch as powers of attorney are commonly viewed as a substitute for conservatorships and trusts. Relocation of the power of attorney provisions in the Probate Code would group these statutes with other tools of the estate planning trade.<sup>8</sup>

Under this proposal, the power of attorney statutes would be severed from the general agency rules. This eliminates the guesswork and confusion that necessarily result from attempting to apply the general agency statutes to powers of attorney. The substance of any agency rules thought to be useful have been worked into the fabric of

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6. See Ill. Ann. Stat. ch. 110½ ¶¶ 802-1 to 802-11 (Smith-Hurd Supp. 1990); Minn. Stat. Ann. §§ 523.01-523.25 (West Supp. 1990); Mo. Ann. Stat. §§ 404.700-404.735 (Vernon 1990); Neb. Rev. Stat. §§ 49-1501 to 49-1561 (1988); see also Burns, *New Power of Attorney Statute*, 41 Bench & Bar of Minn., Dec. 1984, at 9; Eickhoff, *New Durable Power Law and Custodial Trust Act Amendments*, 45 J. Mo. B. 329 (1989); Missouri Bar Ass'n, *Missouri Probate and Trust Update--1989*, at 123-70; Zartman, *Illinois Power of Attorney Act*, 13 S. Ill. U.L.J. 1 (1988).

7. See note 1 *supra*.

8. Relocation to the Probate Code would be consistent with a process that began in 1931 when the Probate Code was first enacted, mainly from pieces pulled from the Civil Code. See Turrentine, *Introduction to the California Probate Code*, 52 West's Annotated California Codes: Probate Code 1, 27-30 (1954). This process continues today. Most recently, enactment of the Trust Law removed provisions relating to trusts to the Probate Code. See Prob. Code § 15000 *et seq.* Many other segments of the Civil Code have been removed over the years in the process of creating the Commercial Code, Corporations Code, Financial Code, Insurance Code, Labor Code, and Water Code.

the proposed power of attorney statute.<sup>9</sup> The general rules concerning agency would be left in place in the Civil Code with only a few conforming revisions required to remove material relevant only to powers of attorney.<sup>10</sup>

The Commission's tentative proposal would make most of its changes in the law relating to powers of attorney for property, because these statutes are incomplete and disorganized.<sup>11</sup> Much of the proposed legislation is directed toward supplying more detailed rules and filling gaps in existing coverage, rather than making any major substantive revisions.

The statutes relating to durable powers of attorney for health care<sup>12</sup> are largely self-contained and provide more detail with regard to duties, powers, and termination, as a consequence of their more recent enactment and special subject matter. Hence, the proposed legislation does not make many changes in these statutes.

#### Terminology

Definitions in existing law are found in a number of locations and may be incorporated by reference in other parts of the law.<sup>13</sup> The

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9. See, e.g., proposed Prob. Code §§ 4120 (continuing requirement that principal have capacity to contract in Civil Code § 2296), 4131 (drawn from termination rules in Civil Code §§ 2355-2356), 4145 (consistent with delegation rules in Civil Code § 2349).

10. See proposed amendments to Civil Code §§ 2355-2357; see also proposed Civil Code §§ 2023 & 2360 (limiting application of agency statutes).

11. "Power of attorney for property" is used to refer to all powers of attorney other than durable powers of attorney for health care. This usage is consistent with the terms used in practice. See, e.g., 1990 California Durable Power of Attorney Handbook § 1.1, at 2 (Cal. Cont. Ed. Bar).

12. See Civil Code §§ 2430-2444 (durable power of attorney for health care), 2500-2508 (statutory form durable power of attorney for health care); see also §§ 2410-2423 (court enforcement of duties of attorney in fact), 2511 (identity of principal).

13. See Civil Code §§ 2410 (definitions for purposes of article on court enforcement of duties of attorney in fact), 2430 (definitions under durable power of attorney for health care), 2514(a)(1) (incorporating definitions for purposes of springing power of attorney). Other sections provide quasi-definitions. See Civil Code §§ 2400 (defining durable power of attorney), 2504 (delineating the

proposed law collects these definitions in one place for convenient reference and also defines a number of other terms.

"Power of attorney" is defined as a written agency agreement executed by a natural person that grants powers to an agent. The proposed statute uses the term "agent" throughout instead of the more cumbersome and formal "attorney in fact." This is consistent with the usage in the statutory forms.<sup>14</sup> There is no purpose served by a special, more arcane language in the statutes than in the forms.

Confusion can result from the overlap of terminology in existing law, particularly in the case of "durable power of attorney." A durable power may be one that deals with property matters or health care, and may be a hand-drawn instrument or a statutory form. The proposed law introduces the term "durable power of attorney for property" as a short-hand for a durable power of attorney for purposes other than health care. This usage is consistent with terms commonly used.<sup>15</sup> It is recognized that there may be matters covered by a power of attorney for property that extend beyond the realm of property decisions, such as location of the principal's residence, transportation, companionship, and the like, that are personal in nature, although short of the exclusive jurisdiction of the durable

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meaning of "health care decisions" for purposes of statutory form durable power of attorney for health care).

14. See Civil Code §§ 2475 (Uniform Statutory Form Power of Attorney) & Comment, 2500 (statutory form durable power of attorney). On the other hand, "attorney in fact" is used in the durability language in Civil Code Section 2400 (patterned after the Uniform Durable Power of Attorney Act (1979)) and in the warning statement in Civil Code Section 2510(b).

15. See, e.g., 1990 California Durable Power of Attorney Handbook § 1.1, at 2 (Cal. Cont. Ed. Bar).



power of attorney for health care.<sup>16</sup> The proposed law also contains a series of definitions of the different varieties of statutory forms, nondurable powers, and springing powers, as well as other terms defined in existing law.

### Powers of Attorney for Property

#### Creation of Power of Attorney

The proposed law continues the requirements that a power of attorney for property be in writing and signed by the principal.<sup>17</sup> There is no requirement that the agent sign the instrument. It is not necessary to date a non-form power of attorney for property, nor to have it acknowledged.<sup>18</sup> Although the Commission considered alternatives, these aspects of existing law have been continued in order to preserve the flexibility of the power of attorney for property and to avoid unnecessarily invalidating powers of attorney.

#### Qualifications of Agent

Existing law imposes no particular qualifications on who may be an agent under a power of attorney for property,<sup>19</sup> although special

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16. "Health care" is defined as any "care, treatment, service, or procedure to maintain, diagnose, or treat an individual's physical or mental condition." See Civil Code § 2430(b); see also proposed Prob. Code § 4062.

17. See Civil Code §§ 2400; Montgomery & Wright, *Durable Powers of Attorney for Property Management*, 1990 California Durable Power of Attorney Handbook § 2.47, at 55 (Cal. Cont. Ed. Bar). There is no explicit general requirement in the statutes that a power of attorney be signed. The statutory forms require the principal's signature. See Civil Code § 2475 (Uniform Statutory Form Power of Attorney); see also Civil Code § 2500 (statutory form durable power of attorney for health care).

18. The statutory form power of attorney requires that it be both dated and acknowledged. See Civil Code § 2475. This requirement is appropriate in the statutory form because it is needed for purposes of uniformity and, being printed in the form, is likely to be complied with.

19. Civil Code Section 2400 provides that a durable power of attorney designates "another" as attorney in fact for the principal. The general agency rules provide somewhat over inclusively that "any person may be an agent." Civil Code § 2296.

restrictions apply in the case of a durable power of attorney for health care.<sup>20</sup> At a minimum, the agent should be a person with the capacity to contract.<sup>21</sup> The proposed law provides that any person (including natural persons and entities) who has the capacity to make a contract may be an agent. The proposed law also makes clear that designation of an unqualified person as an agent only subjects the unqualified person to removal, but does not affect the immunities of third persons nor the duties of the agent, even though unqualified.<sup>22</sup>

#### Multiple and Successor Agents

The proposed law provides explicitly for designation of multiple and successor agents in a power of attorney for property. The new statutory form power of attorney provides a place for designating multiple agents and for providing that they may act separately or jointly.<sup>23</sup> The proposed law provides authority for designating multiple agents and, if the power of attorney does not provide otherwise, specifies that the multiple agents must act unanimously. This is consistent with the default rule applicable under the statutory form power of attorney and with the law governing trustees.<sup>24</sup> The proposed law also adopts the trust rules permitting action by the remaining co-agents when one of the co-agents cannot act due to

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20. See Civil Code §§ 2432(b)-(c), 2432.5, 2500 (¶ 1 of statutory form durable power of attorney for health care).

21. Some commentators conclude that "[a]pparently a principal can appoint any mentally competent natural adult person who has not been deprived of his or her civil rights and can also appoint institutions." Montgomery & Wright, *Durable Powers of Attorney for Property Management*, 1990 California Durable Power of Attorney Handbook § 2.47, at 55 (Cal. Cont. Ed. Bar).

22. This provision is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.707(4) (Vernon 1990).

23. Civil Code § 2475. The statutory form does not provide the option of action by a majority of the designated agents.

24. Prob. Code § 15620.

absence, illness, or other temporary incapacity or when a co-agent's position has become vacant, such as through death or other termination of authority.<sup>25</sup>

In addition to multiple agents who have the same authority, the proposed law recognizes that the principal may designate different agents to perform separate functions, and may make the designations in one or more powers of attorney.<sup>26</sup> This recognizes that different agents may have expertise in different areas.<sup>27</sup>

The proposed law recognizes that the power of attorney may designate successor agents and provide the manner of their succession, also permits delegation of the power to select successors to another person.<sup>28</sup>

As in the case of trustees, the proposed law makes clear that co-agents and successor agents are not liable for the acts of other agents.<sup>29</sup>

#### Delegation of Agent's Authority

Existing law is unclear on the extent to which an agent may delegate authority under a power of attorney for property. The power of attorney statutes are silent on the matter, but the general agency statutes permit delegation (1) if the act is "purely mechanical," (2) if the act cannot be performed by the agent but can be by the subagent,

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25. See Prob. Code §§ 15621-15622.

26. This provision is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.707(1) (Vernon 1990).

27. See Montgomery & Wright, *Durable Powers of Attorney for Property Management*, 1990 California Durable Power of Attorney Handbook § 2.21, at 42 (Cal. Cont. Ed. Bar).

28. This provision is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.723(2)-(3) (Vernon 1990). This appears to be consistent with existing practice. See Montgomery & Wright, *Durable Powers of Attorney for Property Management*, 1990 California Durable Power of Attorney Handbook § 2.22, at 42 (Cal. Cont. Ed. Bar).

29. See Prob. Code §§ 16402(a), 16403(a).

(3) if it is the "usage of the place" to delegate the authority, or (4) if the delegation is authorized by the principal.<sup>30</sup> Under these general rules, a subagent is not responsible to the principal, nor is the original agent responsible to third persons for the acts of a "lawfully appointed" subagent.<sup>31</sup> The language of these statutes seems more appropriate to business agencies than to the normal power of attorney prepared by an individual.

The proposed law permits delegation, from time to time, of any or all powers under a durable power of attorney for property, subject to the directions or limitations expressed in the power of attorney. However, unlike the general agency rule, the original agent remains responsible to the principal for the exercise of the authority delegated.<sup>32</sup>

#### Compensation of Agents

Existing law provides no rules on compensation of agents, except that consideration is not necessary to make an agent's authority binding on the principal.<sup>33</sup> An agent under a power of attorney is generally not expected to receive compensation, since the agent is usually a friend or member of the principal's family who accepts the designation as an accommodation.<sup>34</sup> The proposed law provides that the agent is entitled to reasonable compensation and to reimbursement of

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30. See Civil Code § 2349.

31. See Civil Code §§ 2022, 2050, 2051; see also Civil Code § 2400.5 (proxy given by agent to exercise stock voting rights).

32. This provision is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.723(1) (Vernon 1990).

33. Civil Code § 2308. The statutory form power of attorney provides authority for the agent to reimburse expenditures properly made. Civil Code § 2485(i).

34. See Montgomery & Wright, *Durable Powers of Attorney for Property Management*, 1990 California Durable Power of Attorney Handbook § 2.51, at 57-58 (Cal. Cont. Ed. Bar); Missouri Bar Ass'n Comment to Mo. Ann. Stat. §§ 404.725 (Vernon 1990), Missouri Bar Ass'n, Missouri Probate and Trust Update--1989, at 156.

expenses.<sup>35</sup> This authority is comparable to the law applicable to compensation and reimbursement of trustees.<sup>36</sup> The default right to compensation and reimbursement is subject to control in the power of attorney. It is expected that most agents will serve without expecting compensation, but if the principal becomes incompetent and the agent is expected to incur substantial expenditures of time and money, compensation is entirely appropriate. In fact, not to provide for compensation may result in the failure of a durable power of attorney to carry out its purpose since the agent may be unwilling to continue without compensation and reimbursement.

#### Duty to Act

The existing statutes are silent as to what obligation, if any, a person designated as an agent has to accept the position or what obligation there is to continue acting as agent.<sup>37</sup> In the absence of a written acceptance, it appears that an agent is free to act or not to act, may refuse to act in future transactions after having acted in some matters, and can resign at will. This is consistent with the idea that a power of attorney in a private relationship typically is an accommodation between friends or relatives. Many practitioners reportedly have the attorney in fact sign the power as a routine matter "to establish the agent's acceptance of the authority granted by the principal and the concurrent responsibilities as an agent."<sup>38</sup> The Uniform Statutory Form Power of Attorney provides that "by accepting or

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35. This provision is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.725 (Vernon 1990).

36. See Prob. Code §§ 15681, 15684(a).

37. Some rules are suggested in the cases on agency: A gratuitous agent is bound by written acceptance, whether or not actually entering upon performance. See 2 B. Witkin, *Summary of California Law Agency and Employment* § 62, at 68 (9th ed. 1987).

38. Montgomery & Wright, *Durable Powers of Attorney for Property Management*, 1990 California Durable Power of Attorney Handbook § 2.47, at 55 (Cal. Cont. Ed. Bar).

acting under the appointment, the agent assumes the fiduciary and other legal responsibilities of an agent."<sup>39</sup>

The situation is more formal with regard to trustees. Under the Trust Law, if a trustee accepts the trust, the trustee becomes subject to all applicable duties to administer the trust, cannot later refuse to act, and may resign only by following the procedures prescribed in the statute or the trust instrument. A trustee accepts by signing the trust instrument or knowingly exercising powers under the trust, except in emergency situations.<sup>40</sup> Once the trustee has accepted the trust, the trustee has a duty to administer the trust that does not end until the trustee is removed or allowed to resign.<sup>41</sup>

The trend of modern statutes is to relieve the agent under a power of attorney from a duty to exercise the authority granted.<sup>42</sup> The proposed law adopts this approach, making clear that a person who is designated as an agent has no duty to exercise the authority conferred in the power of attorney.<sup>43</sup> This rule applies whether or not the principal has become incapacitated, is missing, or is otherwise unable to act, unless the agent has agreed expressly in writing to act for the principal in certain circumstances. In addition, the proposed law provides, contrary to the trust rule, that acting for the principal in

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39. See Civil Code § 2475. The full implication of this statement is unknown.

40. Prob. Code § 15600. Provision is also made for rejecting a trust or modification of a trust. See Prob. Code § 15601.

41. See Prob. Code §§ 15640-15645 (resignation and removal), 16000 (duty to administer trust).

42. For example, the Illinois statute provides that the agent has no duty to exercise powers granted or to assume control of or responsibility for the principal's property, care, or affairs, regardless of the principal's physical or mental condition. Ill. Ann. Stat. ch. 110½ ¶¶ 802-7 (Smith-Hurd Supp. 1990). See also Mo. Ann. Stat. § 404.705(4) (Vernon 1990).

43. This provision is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.705(4) (Vernon 1990).

one or more transactions does not obligate the agent to act for the principal in later transactions.

These rules are intended to facilitate use of powers of attorney.<sup>44</sup> It is believed that in the usual case, the principal wants someone to have the ability to act if something needs to be done, but rarely would expect to impose a duty to act on a family member or friend where the person chooses not to act. If potential agents understood that there was a duty to act, they might be reluctant to accept the designation in the first instance. Under the proposed rule, the agent may also merely wait until the situation arises and then determine whether to act. The agent may refuse to act because of the personal inconvenience at the time of becoming involved, or for any other reason and is not required to justify a decision not to act. The agent may believe that there are others in a better position to act for the principal or that the situation really warrants appointment of a court supervised guardian or conservator. However, once the agent undertakes to act under the power of attorney, the transaction is governed by the duties imposed in the law to act as a fiduciary.

#### General Duties of Agents

The power of attorney statutes do not provide any set of duties for the guidance of agents, even though an agent will normally be a nonprofessional. The general agency statutes are provide insufficient guidance. A few duties are scattered throughout the general agency statutes, such as the obligation not to exceed actual authority, to keep the principal informed, and not to commit fraud on the principal.<sup>45</sup> The agency statute also forbids violation of a number of duties applicable to trustees.<sup>46</sup> Agent's duties have been fleshed out

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44. This discussion draws on the Missouri Bar Association Comment to the new Missouri section. See Missouri Bar Ass'n, Missouri Probate and Trust Update--1989, at 123-70.

45. See, respectively, Civil Code §§ 2019, 2020, 2306.

46. See Civil Code § 2322(c), forbidding violation of duties of trustee under Prob. Code §§ 16002 (duty of loyalty), 16004 (duty to avoid conflict of interest), 16005 (duty not to undertake adverse trust), 16009 (duty to keep trust property separate and identified).

by commentators and the courts by reference to the Restatement on Agency and the duties of trustees.<sup>47</sup> But these sources will not be of much assistance to a friend or relative undertaking responsibilities under a power of attorney.

Other fiduciary laws typically provide a list of basic duties, including those applicable to guardians and conservators,<sup>48</sup> custodians under the Uniform Transfers to Minors Act,<sup>49</sup> personal representatives,<sup>50</sup> and trustees.<sup>51</sup> The Commission believes that it is appropriate to set out the basic duties of an agent under a power of attorney in the statute. The duties in the proposed law have been drawn from existing agency law, from the Trust Law, and from the law of other states. The proposed law provides the following duties: a duty of loyalty, a duty to avoid conflicts of interest, a duty not to undertake adverse responsibilities, a duty to keep the principal's property separate and identified, a duty to keep the principal informed and follow instructions, a duty to consult with other persons designated by the principal, a duty to keep records of transactions on behalf of the principal, a duty to use special skills, and a duty to reveal to third persons that the person is acting as an agent for the principal.

#### Standard of Care

The existing agency rules do not provide a positive statement of a standard of care. The courts, however, have read the statutes to

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47. See, e.g., 2 B. Witkin, *Summary of California Law Agency and Employment* §§ 41, 43, 48 (9th ed. 1987); Montgomery & Wright, *Durable Powers of Attorney for Property Management*, 1990 California Durable Power of Attorney Handbook § 2.64-2.67, at 67-71 (Cal. Cont. Ed. Bar).

48. See Prob. Code § 2101, 2107, 2109, 2350 *et seq.*

49. See Prob. Code § 3912.

50. See Prob. Code § 9600 *et seq.*

51. See Prob. Code § 16000 *et seq.*



impose a fiduciary standard on agents, typically the standard applicable to trustees.<sup>52</sup> The standard of care for trustees has undergone revision from time to time since the general principle analogizing agents to trustees was laid down.<sup>53</sup> Much of trust law is influenced by the skilled property management and investment services professional trustees are expected to provide.

The situation of a typical agent under a power of attorney for property is more analogous to a custodian under the Uniform Transfers to Minors Act<sup>54</sup> than a trustee. Accordingly, the proposed law provides a nonprofessional fiduciary standard of care. This standard requires the agent to observe the standard of care that would be observed by a prudent person dealing with property of another. If the agent is not compensated, the agent is not liable for losses to the principal's property unless the losses result from the agent's bad faith, intentional wrongdoing, or gross negligence. However, if the agent has special skills or was designated as an agent on the basis of representations of special skills, the agent is required to observe the standard of care that would be observed by those with similar skills.<sup>55</sup>

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52. See cases cited in 2 B. Witkin, *Summary of California Law Agency and Employment* §§ 41 (9th ed. 1987).

53. For background, see *Selected 1986 Trust and Probate Legislation*, 18 Cal. L. Revision Comm'n Reports 1201, 1238-42 (1986).

54. See Prob. Code § 3912(b).

55. This rule is consistent with the general rule concerning expert fiduciaries stated in the cases. See the discussions in *Estate of Collins*, 72 Cal. App. 3d 663, 673, 139 Cal. Rptr. 644 (1977); *Coberly v. Superior Court*, 231 Cal. App. 2d 685, 689, 42 Cal. Rptr. 64 (1965); *Estate of Beach*, 15 Cal. 3d 623, 635, 542 P.2d 994, 125 Cal. Rptr. 570 (1975) (bank as executor); see also Section 4169 (agent's duty to use special skills); Comment to Section 2401 (standard of care applicable to professional guardian or conservator of estate); Comment to Section 3912 (standard of care applicable to professional fiduciary acting as custodian under California Uniform Transfers to Minors Act); Comment to Section 16040 (standard of care applicable to expert trustee).

Powers of Agents

The general agency statutes contain a number of statements concerning the power and authority of agents,<sup>56</sup> but these statements are expressed in broad terms and in an artificial, legalistic language that is unlikely to be of much assistance to an agent under a power of attorney. By way of contrast, the Uniform Statutory Form Power of Attorney Act provides for grants of general powers which are amplified in highly detailed statutory language.<sup>57</sup> But if a principal sets out to draft his or her own power of attorney, the statute provides no real guidance. An attorney-drafted power of attorney should provide the necessary powers, but this will not always be the case. By way of comparison, the settlor of a trust may rely on the general powers provided in the Trust Law.<sup>58</sup>

The proposed law does not attempt to provide yet another statement of available powers. Instead, it provides a default rule, subject to control in the power of attorney, giving the agent all of the powers

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56. See, e.g., Civil Code §§ 2318 (agent has "actually such authority" as provided by title on agency unless "specifically deprived thereof" by the principal), 2307 (authority may be conferred by "a precedent authorization or a subsequent ratification"), 2315 ("agent has such authority as the principal, actually or ostensibly, confers upon him"), 2316 (actual authority is that intentionally conferred on the agent or that the principal "intentionally, or by want of ordinary care, allows the agent to believe himself to possess"), 2317 (ostensible authority is what the principal "intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess"), 2319 (agent has authority to do "everything necessary or proper and usual, in the ordinary course of business, for effecting the purpose of his agency"), 2320 (agent has power to disobey instructions where "clearly for the interest of his principal that he should do so, and there is not time to communicate with the principal), 2321 (if "authority is given partially in general and partially in specific terms, the general authority gives no higher powers than those specifically mentioned"), 2322 (general authority does not authorize the agent to act in his own name, unless it is in the usual course of business, to "define the scope of the agency," or to violate basic fiduciary principles concerning loyalty, conflict of interest, or commingling).

57. See Civil Code §§ 2475 (statutory form), 2480-2498 (construction of powers).

58. Prob. Code §§ 16200-16249.

available under a statutory form power of attorney that grants all powers. This means that the agent would have the power to engage in transactions with regard to real property, tangible personal property, stocks and bonds, commodities and options, banking, insurance, estates, trusts, and beneficiaries, claims and litigation, personal and family maintenance, benefits from social security, medicare, medicaid, or other governmental programs, or civil or military service, retirement plans, and tax matters.<sup>59</sup> In addition, the agent, unless limited in the power of attorney, would have the power to perform any act that an agent would perform for the purposes of the power of attorney under the prudent person standard of care.<sup>60</sup> The proposed law also authorizes the incorporation of powers by reference to power provisions in other statutes, such as the Trust Law.

The breadth of these powers may be restricted by a provision in the power of attorney limiting powers. In addition, there are a set of powers that may be exercised only if expressly enumerated in the power of attorney, such as the power to create, fund, or revoke a trust, to make, revoke, or disclaim a gift, to change beneficiary designations, or to nominate a conservator for the principal.<sup>61</sup> There is also a set of powers that may never be exercised by an agent under a power of attorney for property: making, amending, or revoking a will, making health care decisions, requiring or preventing the principal's taking any action against the principal's will, and doing anything that the

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59. See Civil Code § 2475.

60. This power is comparable to the power of an agent under Civil Code Section 2319(1) and of a trustee under Probate Code Section 16200(c).

61. This provision is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.710(6) (Vernon 1990). It is not clear whether an agent may nominate a conservator under existing law. See Montgomery & Wright, *Durable Powers of Attorney for Property Management*, 1990 California Durable Power of Attorney Handbook § 2.66, at 69 (Cal. Cont. Ed. Bar).

principal could not do assuming the principal has the capacity to contract.<sup>62</sup>

**Authority Where Principal Is Missing**

The proposed law contains a new provision making clear that the authority of an agent continues, and the power of attorney for property is not terminated, in a case where the principal is missing under circumstances such that it is not known whether the principal is alive or the principal is captured, interned, besieged, or held hostage or prisoner in a foreign country.<sup>63</sup> The agent may continue to exercise the authority conferred by the power of attorney until the principal returns, is declared dead, or is presumed dead under applicable law.<sup>64</sup> This authority applies both to durable and nondurable powers of attorney,<sup>65</sup> and notwithstanding any termination date stated in the power of attorney.

**Termination of Power of Attorney and Authority of Agent**

The general agency statute lists several events that act to terminate an agency. An "agency" is terminated "as to every person having notice thereof" by (1) expiration of its term, (2) extinction of its subject, (3) death of the agent, (4) the agent's renunciation of the agency, (5) the incapacity of the agent to act as such, (6) divorce, annulment, legal separation, between agent and principal, or

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62. This provision is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.710(7) (Vernon 1990). It is consistent with the general agency rule in Civil Code Section 2304.

63. This provision is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.714(3) (Vernon 1990). Minnesota law also makes clear that a missing principal is presumed to be living for the purposes of its power of attorney statute. See Minn. Stat. Ann. § 523.10 (West Supp. 1990).

64. See, e.g., Evid. Code § 667.

65. This provision does not apply to a power of attorney executed by a federal "absentee" (Prob. Code § 1403), which is governed by Probate Code Section 3720, part of the P.O.W.-M.I.A. Family Relief Act of 1972 (1972 Cal. Stat. ch. 988).

the filing of an action to do so, in the case of a federal "absentee."<sup>66</sup> Where the power of the agent is not coupled with an interest, an agency is also terminated by (7) revocation by the principal, (8) the principal's death, (9) or the principal's incapacity to contract (subject to durable power exception).<sup>67</sup> A good faith transaction of the agent without actual knowledge of items (7)-(9) is binding on the principal.<sup>68</sup> The power of attorney statute focuses on what does not terminate a durable or nondurable power, providing that the death of the principal does not terminate the agency as to anyone acting in good faith without actual knowledge of the principal's death.<sup>69</sup>

The proposed law reorganizes and combines these rules, but preserves most of their substance. Events that terminate a power of attorney for property, whether durable or nondurable, include (1) expiration of its term,<sup>70</sup> (2) extinction of its subject or fulfillment of its purpose, (3) revocation by the principal, (4) death of the principal, and (5) death, renunciation, incapacity, or other disqualification of all agents designated in the power of attorney. As under existing law, an agent or third person who do not have knowledge of a terminating event are protected from liability.<sup>71</sup> The agent's authority, as distinguished from the power of attorney itself, is terminated upon (1) renunciation by the agent, (2) the agent's incapacity, (3) removal of the agent by the principal or a court, and (4) death of the agent. Of course, any event that terminates the power of attorney also acts to terminate the authority of all agents under

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66. Civil Code § 2355.

67. Civil Code § 2356.

68. Civil Code § 2356(b).

69. Civil Code § 2403.

70. However, the term does not expire if the principal is missing or held captive, as noted under "Authority Where Principal Is Missing" *supra*.

71. See discussion under "Relations with Third Persons" *infra*.

the power, but as in the case of termination of the power of attorney, agents and third persons without knowledge of an event that terminates the agent's authority are protected. The existing rule that the agent's authority does not terminate if it is coupled with an interest in the subject of the agency<sup>72</sup> is continued in the proposed law.

In the case of a principal and agent who are married, the proposed law extends the rule applicable to federal absentees<sup>73</sup> and under the durable power of attorney for health care<sup>74</sup> to provide generally that dissolution or annulment terminates the agent's authority, unless the power of attorney provides otherwise. This general rule is limited to cases where the marriage between the principal and agent is dissolved or annulled and does not apply when a petition for dissolution, annulment, or separation is filed, as is the case with federal absentees.<sup>75</sup> This rule is appropriate in consideration of the broad powers that may be granted in a power of attorney for property. The general rule is also consistent with the rule applicable to wills that, upon the dissolution or annulment of the marriage of the testator, revokes a power of appointment conferred on the former spouse or appointment of the former spouse as executor, trustee, conservator, or guardian.<sup>76</sup>

#### Relations with Third Persons

Existing law provides a number of rules concerning the relation between agents and third persons, both in the general agency

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72. See Civil Code § 2356(a).

73. See Civil Code § 2355(f).

74. See Civil Code § 4315(e).

75. See Civil Code § 2355(f), enacted as part of the P.O.W.-M.I.A. Family Relief Act of 1972 (1972 Cal. Stat. ch. 988, § 1).

76. See Prob. Code §§ 6122(a)(2)-(3), 6226(a).

statutes<sup>77</sup> and in the power of attorney statutes.<sup>78</sup> These rules protect agents and third persons without knowledge of some event that would terminate the power of attorney or the authority of the agent. An agent's lack of knowledge of revocation or termination by death or incapacity may be formalized by the giving of an affidavit and the affidavit is deemed conclusive proof of the facts at the time it is given.<sup>79</sup> [A third person may be compelled to accept the authority of an agent under a statutory form power of attorney to the same extent as the principal could compel the third person to act.<sup>80</sup>]

The proposed law continues these principles of existing law, but adds several additional rules intended to make powers of attorney more effective. The proposed law sets forth a general duty on the part of third persons to accord the same rights and privileges with respect to the interests of the principal as if the principal were personally present and acting.<sup>81</sup> This duty may not be restricted by contract. In order to facilitate compliance with this duty, the proposed law protects a third person acting in good faith and protects the third person in relying on the representations of the agent. The proposed law lists a number of items that, in the absence of actual knowledge, a third person may rely on without any duty of inquiry, including (1) the authenticity of a certified copy of the power of attorney furnished by

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77. See, e.g., Civil Code §§ 2342 (warrant of authority), 2343 (agent's responsibility to third persons), 2355(a) (effect of notice on termination), 2356(b) (effect of lack of knowledge of termination of authority on bona fide transactions).

78. See Civil Code §§ 2403 (effect of death or incapacity of principal), 2404 (affidavit of lack of knowledge of termination of power), 2510(c) (good faith reliance in absence of required warning statement), 2512 (protection of person relying in good faith on durable power of attorney).

79. See Civil Code § 2404.

80. [Civil Code § 2480.5, as tentatively proposed in the Commission's *Tentative Recommendation Relating to Recognition of Agent's Authority Under Statutory Form Power of Attorney*.]

81. This provision is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.710(9) (Vernon 1990). It is consistent with the general agency rule in Civil Code Section 4319.

the agent, (2) the validity of the agent's designation, (3) that the agent is qualified to act, (4) the propriety of any act of the agent on the principal's behalf, (5) whether a future event or contingency that would terminate the power has occurred, (6) whether the principal is incapacitated or has been adjudicated to be incapacitated, (7) whether the agent is following any instructions received, (8) whether the agent's authority has been modified, (9) whether the agent's authority has been terminated, except by an express provision in the power of attorney showing the date on which the power of attorney terminates, (10) whether the power of attorney has been recorded, except as to transactions affecting real estate, (11) whether the principal had the capacity to execute the power of attorney, (12) whether the principal was subjected to duress, undue influence, or fraud, at the time of execution of the power of attorney, or the power of attorney was for any other reason void or voidable, if the power of attorney appears to be regular on its face, (13) whether the principal is alive, (14) whether the principal and agent were married at or after the time the power of attorney was created and whether the marriage has been dissolved or annulled, or (15) the truth or validity of any facts or statements made in an affidavit of the agent or successor with regard to the ability or capacity of the principal, the authority of the agent under the power of attorney, the happening of any event vesting authority in any successor or alternate agent, the identity or authority of a person designated in the power of attorney to designate a successor or alternate agent, or that the principal is alive.<sup>82</sup> The addition of this detail to the statute should provide answers to questions third persons may have that would not be answered by reference to general language giving a blanket excuse from liability for good faith reliance.

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82. This provision is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.719(1) (Vernon 1990).



The agent's affidavit is broadened and made more effective in the proposed law.<sup>83</sup> The affidavit may be given voluntarily or on demand of a third person. A third person who is furnished with an affidavit and refuses to accept the exercise of the agent's authority covered by the affidavit will be liable for attorney's fees in any judicial proceedings necessary to confirm the authority.

The proposed law also adds new provisions recognizing the right of third persons to require appropriate identification from the agent,<sup>84</sup> specifying when a third person who conducts activities through employees is charged with knowledge that would deprive the third person of statutory protections from liability,<sup>85</sup> and validating provisions in contracts between principals and third persons for the manner of giving notice to the third person of events that may affect the agent's authority.<sup>86</sup>

#### Durable Powers of Attorney for Health Care

The provisions concerning durable powers of attorney for health care<sup>87</sup> are continued in the proposed law with only a few minor changes. The changes involve technical references necessary because of

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83. [This provision is patterned on Probate Code Section 18100.5 in the Commission's *Tentative Recommendation Relating to Recognition of Trustees' Powers*.]

84. This provision is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.719(4) (Vernon 1990).

85. The information must be received at a home office or place where there is an employee who is responsible for acting on the information and the employee has a reasonable time within which to act in light of the procedure and facilities available to the third person in the regular course of its operations. This provision is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.719(3) (Vernon 1990).

86. This provision is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. §§ 404.710(10), 404.719(4) (Vernon 1990).

87. Civil Code §§ 2430-2444 (general provisions concerning durable power of attorney for health care), 2500-2508 (statutory form durable power of attorney for health care).

the relocation and renumbering of the sections. In addition, the general provisions governing durable powers of attorney for health care have been reordered in a more logical sequence. This permits grouping of like provisions, such as those concerning limitations on the use health care powers,<sup>88</sup> in a separate article for the convenience of persons using the statute.

#### Judicial Proceedings

The procedure for obtaining judicial interpretation and enforcement of duties of agent under powers of attorney<sup>89</sup> are reorganized in the proposed law, but remain substantively the same. This procedure applies to durable and nondurable powers of attorney for property, to durable powers of attorney for health care, and to statutory forms of both types of powers. Since existing law incorporates the procedures applicable to administration of decedents' estates' where the power of attorney statutes are not applicable,<sup>90</sup> relocation of the power of attorney statutes in the Probate Code has resulted in some technical reorganization and elimination of provisions covered by general Probate Code provisions.<sup>91</sup>

The proposed law also adds some new provisions clarifying the general jurisdiction and power of the superior court in dealing with powers of attorney,<sup>92</sup> solidifying the personal jurisdiction over

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88. See Civil Code §§ 2435, 2440-2443.

89. See Civil Code §§ 2410-2423.

90. Civil Code § 2417(e).

91. See, e.g., Civil Code § 2415 (verification of petitions) (unnecessary due to general provision in Prob. Code § 1021); Civil Code § 2417(c) (manner of mailing notice) (unnecessary due to general provision in Prob. Code § 1215); Civil Code § 2417(f) (order shortening time) (unnecessary due to general provision in Prob. Code § 1203(a)); Civil Code § 2418 (guardian ad litem) (unnecessary due to general provision in Prob. Code § 1003).

92. For comparable provisions, see Prob. Code §§ 7050 (decedents' estates), 17000-17001, 17004 (trusts).

agents,<sup>93</sup> and making clear that there is no right to a jury trial, consistent with the general rule with regard to fiduciaries.<sup>94</sup>

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93. For comparable provisions, see Prob. Code §§ 3902(b) (custodian under Uniform Transfers to Minors Act), 17003(a) (trustees).

94. This is comparable to the rule applicable elsewhere under the Probate Code. See Prob. Code §§ 1452 (guardianships and conservatorships), 7200 (decedents' estates), 17006 (trusts).

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SUMMARY OUTLINE

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DIVISION 4.5. POWERS OF ATTORNEY

§ 4000	PART 1. GENERAL PROVISIONS AND DEFINITIONS
§ 4000	Chapter 1. General Provisions
§ 4050	Chapter 2. Definitions
§ 4100	PART 2. POWERS OF ATTORNEY FOR PROPERTY
§ 4100	Chapter 1. General Provisions
§ 4120	Chapter 2. Creation, Effect, and Termination of Powers of Attorney for Property
§ 4140	Chapter 3. Agents Under Powers of Attorney for Property
§ 4140	Article 1. Agents
§ 4160	Article 2. Duties of Agents
§ 4180	Article 3. Powers of Agents
§ 4200	Chapter 4. Relations with Third Persons
§ 4250	Chapter 5. Uniform Statutory Form Power of Attorney
§ 4250	Article 1. General Provisions
§ 4270	Article 2. Construction of Powers
§ 4300	PART 3. DURABLE POWERS OF ATTORNEY FOR HEALTH CARE
§ 4300	Chapter 1. Durable Powers of Attorney for Health Care
§ 4300	Article 1. General Provisions
§ 4310	Article 2. Creation and Effect of Durable Power of Attorney for Health Care
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§ 4400	PART 4. COURT ENFORCEMENT OF DUTIES OF AGENTS UNDER POWERS OF ATTORNEY
§ 4400	Chapter 1. General Provisions
§ 4420	Chapter 2. Jurisdiction and Venue
§ 4440	Chapter 3. Petitions and Orders
§ 4460	Chapter 4. Appeals

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DETAILED OUTLINE

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DIVISION 4.5. POWERS OF ATTORNEY

PART 1. GENERAL PROVISIONS AND DEFINITIONS

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- § 4000. Short title
- § 4001. Relation to general agency law
- § 4002. General rule concerning application of division
- § 4003. Scope of division
- § 4004. Durable powers of attorney under law of another jurisdiction

Chapter 2. Definitions

- § 4050. Application of definitions
- § 4052. Agent
- § 4054. Community care facility
- § 4056. Durable power of attorney
- § 4058. Durable power of attorney for health care
- § 4060. Durable power of attorney for property
- § 4062. Health care
- § 4064. Health care decision
- § 4066. Health care provider
- § 4068. Nondurable power of attorney
- § 4070. Power of attorney
- § 4072. Power of attorney for property
- § 4074. Principal
- § 4076. Residential care facility for the elderly
- § 4078. Springing power of attorney
- § 4080. Statutory form durable power of attorney for health care
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- § 4084. Third person

PART 2. DURABLE POWERS OF ATTORNEY FOR PROPERTY AND OTHER MATTERS

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- § 4100. Application of part
- § 4101. Uniform Durable Power of Attorney Act
- § 4102. Form of durable power of attorney after January 1, 1993

Chapter 2. Creation, Effect, and Termination of Powers of Attorney

- § 4120. Creation of power of attorney
- § 4121. Permissible purposes
- § 4122. Requirements for durable power of attorney for property
- § 4123. Effect on agent's acts under durable power of attorney during principal's incapacity
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- § 4127. Lapse of time
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- § 4142. Multiple agents
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#### Article 2. Duties of Agents

- § 4160. When duties commence
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- § 4180. General powers of agent subject to limitations in power of attorney
- § 4181. Incorporation of powers
- § 4182. Grant of general powers without limitation
- § 4183. Grant of general powers for express purposes
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## Chapter 4. Relations with Third Persons

- § 4200. Third persons required to respect agent's authority
- § 4201. Immunities of third person
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- § 4206. When knowledge of employees charged to third person
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- § 4278. Estate, trust, and other beneficiary transactions
- § 4279. Claims and litigation
- § 4280. Personal and family maintenance
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- § 4282. Retirement plan transactions
- § 4283. Tax matters
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Article 2. Creation and Effect of Durable Power of Attorney for Health Care

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Chapter 4. Appeals

- § 4460. Appeal

PROPOSED LEGISLATION

Prob. Code §§ 4000-4460 (added). Powers of attorney

SEC. . Division 4.5 (commencing with Section 4000) is added to the Probate Code, to read:

DIVISION 4.5. POWERS OF ATTORNEY

PART 1. GENERAL PROVISIONS AND DEFINITIONS

Chapter 1. General Provisions

§ 4000. Short title

4000. This division shall be known and may be cited as the Power of Attorney Law.

Comment. Section 4000 is new and provides a convenient means of referring to this division. The Power of Attorney Law is largely self-contained. However, general provisions and definitions in other parts of the Probate Code apply to this division. See, e.g., Sections 2-12 (general provisions concerning interpretation of code and official comments), 29 ("conservatee"), 30 ("conservator"), 36 ("dissolution of marriage"), 39 ("fiduciary"), 56 ("person"), 62 ("property"), 68 ("real property"), 1000 (general rules of practice), 1001 (court rules and forms), 1003 (guardian ad litem), 1020-1023 (petitions), 1040-1050 (hearings and orders), 1200-1265 (notice). The general agency rules in the Civil Code do not apply to this division. See Section 4001.

§ 4001. Relation to general agency law

4001. The provisions concerning agency in Article 2 (commencing with Section 2019) of Chapter 2 of Title 6 of Part 4 of Division 3 the Civil Code and in Title 9 of Part 4 of Division 3 of the Civil Code do not apply to powers of attorney governed by this division.

Comment. Section 4001 makes clear that the general statutes applicable to agency in the Civil Code (Sections 2019-2022 and 2295-2356) are not applicable to powers of attorney. See Civil Code §§ 2023, 2360.

§ 4002. General rule concerning application of division

4002. Except as otherwise provided by statute:

(a) On and after January 1, 1993, this division applies to all

powers of attorney regardless of whether they were executed before, on, or after January 1, 1993.

(b) This division applies to all proceedings concerning powers of attorney commenced on or after January 1, 1993.

(c) This division applies to all proceedings concerning powers of attorney commenced before January 1, 1993, unless in the opinion of the court application of a particular provision of this division would substantially interfere with the effective conduct of the proceedings or the rights of the parties and other interested persons, in which case the particular provision of this division does not apply and prior law applies.

Comment. Section 4002 is comparable to Section 15001 (application of Trust Law). Subdivision (a) provides the general rule that this division applies to all powers of attorney, regardless of when created.

Subdivision (b) is a specific application of the general rule in subdivision (a). See Section 4400 *et seq.* (court enforcement of duties of agents under powers of attorney). Subdivision (c) provides discretion to the court to resolve problems arising in proceedings commenced before the operative date.

For special transitional provisions, see Sections 4102 (form of durable power of attorney after January 1, 1993), 4301 (form of durable power of attorney for health care after January 1, 1993); see also Section 4126(c) (springing powers).

See also Section 4070 ("power of attorney" defined).

#### § 4003. Scope of division

4003. (a) This division applies to the acts and transactions in this state of agents under powers of attorney executed in this state or by persons domiciled in this state.

(b) This division applies to acts and transactions of agents in this state or outside this state under powers of attorney that refer to the durable power of attorney law of California in the instrument creating the power of attorney, if any of the following conditions is satisfied:

(1) The principal or agent was a domiciliary of this state at the time the power of attorney was executed.

(2) The authority conferred on the agent by the power of attorney relate to property, acts, or transactions in this state.

(3) The acts and transactions of the agent occurred or were intended to occur in this state.

(4) The power of attorney was executed in this state.

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

(c) A power of attorney subject to this division under subdivision (b) remains subject to this division despite a subsequent change in domicile of the principal or the agent, or the removal from this state of property that was the subject of the power of attorney.

**Comment.** Section 4003 is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.730(1) (Vernon 1990). This section is comparable to Section 3902(a) (scope and jurisdiction under Uniform Transfers to Minors Act). See Comment to Section 3902.

See also Sections 62 ("property" defined), 4052 ("agent" defined), 4070 ("power of attorney" defined), 4074 ("principal" defined).

#### **§ 4004. Durable powers of attorney under law of another jurisdiction**

4004. A durable power of attorney that purports to have been made under the provisions of the Uniform Durable Power of Attorney Act or a substantially similar law of another state is governed by the law of that state and, if the power of attorney is durable where executed, it is durable and may be carried out and enforced in this state.

**Comment.** Section 4004 is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.730(5) (Vernon 1990). This section is comparable to Section 3902(c) (scope and jurisdiction under Uniform Transfers to Minors Act). This section promotes use and enforceability of durable powers of attorney.

See also Sections 74 ("state" defined), 4056 ("durable power of attorney" defined).

### **Chapter 2. Definitions**

#### **§ 4050. Application of definitions**

4050. Unless the provision or context otherwise requires, the definitions in this chapter govern the construction of this division.

**Comment.** Section 4050 restates the substance of the first clauses of former Civil Code Sections 2410 and 2430. Other relevant definitions are provided in Part 2 (commencing with Section 20) of Division 1. See, e.g., Sections 30 ("conservator" defined), 36 ("dissolution of marriage" defined), 56 ("person" defined), 62 ("property" defined).

#### **§ 4052. Agent**

4052. (a) "Agent" means a person designated to act for the principal in a power of attorney, whether known as an agent, attorney

in fact, or some other term.

(b) "Agent" includes a successor or alternate agent and an agent delegated authority by an agent.

Comment. Subdivision (a) of Section 4052 supersedes part of former Civil Code Section 2400 and former Civil Code Section 2410(a), and is comparable to the first sentence of Civil Code Section 2295. This division uses "agent" in place of "attorney in fact" which was used in many, but not all, provisions of former law. "Agent" is used throughout this division for consistency with the statutory forms which have adopted "agent" in an effort to make the form language as informal as practicable without impairing effectiveness or clarity.

Subdivision (b) is comparable to Section 84 ("trustee" includes successor trustee). See Sections 4142 (multiple agents), 4143 (successor agents), 4145 (delegation of agent's authority), 4351 (alternate agents under statutory form durable power of attorney for health care).

See also Sections 56 ("person" defined), 4070 ("power of attorney" defined), 4074 ("principal" defined).

#### § 4054. Community care facility

4054. "Community care facility" means a community care facility as defined in Section 1502 of the Health and Safety Code.

Comment. Section 4054 continues former Civil Code Section 2430(f) without change.

#### § 4056. Durable power of attorney

4056. (a) "Durable power of attorney" means a power of attorney (1) that is not affected by the principal's incapacity or that becomes effective upon the principal's incapacity and (2) that complies with the provisions of this division relating to durable powers of attorney.

(b) Depending on the context, "durable power of attorney" may refer to either a durable power of attorney for property under Part 2 or a durable power of attorney for health care under Part 3, or to both.

Comment. Section 4056 is new. Subdivision (a) states the essential element of all durable powers of attorney, whether for property or for health care, and whether executed under California law or the law of a sister state or other jurisdiction. See Sections 4003 (powers of attorney executed under laws of other jurisdiction), 4122 (requirements for durable power of attorney for property), 4310 (requirements for durable power of attorney for health care). See also Sections 4058 ("durable power of attorney for health care" defined), 4060 ("durable power of attorney for property" defined), 4070 ("power of attorney" defined), 4074 ("principal" defined).

Note. Subdivision (b) may not be needed if the sections are drafted with specific references to the type of durable power that they apply to.

**§ 4058. Durable power of attorney for health care**

4058. "Durable power of attorney for health care" means a durable power of attorney to the extent that it authorizes an agent to make health care decisions for the principal.

**Comment.** Section 4058 continues former Civil Code Section 2430(a) without change and continues the substance of former Civil Code Section 2410(b), except for the substitution of "agent" for "attorney in fact." See Section 4052 ("agent" defined). For provisions concerning durable powers of attorney for health care, see Sections 4300-4359, 4440, 4442. A single instrument may be both a durable power of attorney for health care, to the extent it authorizes an agent to make health care decisions, and a durable power of attorney for property, to the extent it authorizes the agent to make decisions concerning property and other matters. See Sections 4060 ("durable power of attorney for property" defined). However, such a dual purpose power of attorney must comply with the requirements applicable to both types of power of attorney. See also Section 4311(a) (printed form of durable power of attorney for health care used by person without legal counsel may not cover other matters).

See also Sections 4056 ("durable power of attorney" defined), 4064 ("health care decision" defined), 4074 ("principal" defined).

**§ 4060. Durable power of attorney for property**

4060. "Durable power of attorney for property" means a durable power of attorney other than a durable power of attorney for health care.

**Comment.** Section 4060 is new. This section provides a convenient way to identify durable powers of attorney other than durable powers of attorney for health care and recognizes a term used in practice. See, e.g., 1990 California Durable Power of Attorney Handbook § 1.1, at 2 (Cal. Cont. Ed. Bar). For provisions concerning durable powers of attorney for property, see Sections 4100-4285, 4440-4460. See also Sections 4056 ("durable power of attorney" defined), 4058 ("durable power of attorney for health care" defined).

**Note.** The word "property" may be too limited. There are some types of decisions and authority a principal may want to delegate to an agent that are not health care (as defined) but that do not relate to property except in the loosest sense, such as deciding where the principal will live, providing meals, hiring household employees, providing transportation, picking up mail, and other personal care matters. For now, the draft statute uses "power of attorney for property" to mean all authority in a power of attorney that is not covered by the special rules concerning health care. We could use the term "power of attorney for property and other matters" or some variation on this theme, but then the language becomes so cumbersome that it is annoying to use. Any suggestions for dealing with this dilemma would be appreciated.

**§ 4062. Health care**

4062. "Health care" means any care, treatment, service, or procedure to maintain, diagnose, or treat an individual's physical or mental condition, and includes decisions affecting the individual after death, including (1) making a disposition under the Uniform Anatomical Gift Act, Chapter 3.5 (commencing with Section 7150.5) of Part 1 of Division 7 of the Health and Safety Code, (2) authorizing an autopsy under Section 7113 of the Health and Safety Code, and (3) directing the disposition of remains under Section 7100 of the Health and Safety Code.

**Comment.** The first part of Section 4062 continues former Civil Code Section 2430(b) without change. This part of the definition of "health care" is the same in substance as the definition in Section 1 of the Uniform Law Commissioners' Model Health-Care Consent Act (1982). The reference to postdeath decisions has been added for consistency with the authority provided in Section 4312 (agent's authority to make health care decisions).

**Note.** There are varying opinions on what is encompassed by the definition of health care and the corresponding scope of the durable power of attorney for health care. The authors of a chapter on the durable power of attorney for health care in the 1990 California Durable Power of Attorney Handbook write as follows:

In the opinion of some attorneys, the definition of health care in CC § 2430 is broad enough to encompass all personal care questions, such as location of residence, companionship, recreational, hobby, and leisure time activities, handling mail, and medical and dental treatment. The DPAHC documents drafted by the authors include provisions addressing these concerns, although this broad reading of CC § 2430 is a minority view. The prevailing practice is to address these issues in a general durable power of attorney, not a DPAHC. The authors recognize that it is necessary to address these issues in both the DPAHC and the durable power of attorney (DPAP), with the agent under the DPAP contracting for services and the agent under the DPAHC addressing the details of personal care questions (e.g., choice of one skilled nursing facility over another or the decision to accept or refuse treatment). The drafting of the documents should be coordinated so the responsibilities of the agents are clearly delineated and not in conflict with each other.

Ronca & Woolpert, *The Durable Power of Attorney for Health Care, 1990 California Durable Power of Attorney Handbook* § 3.1, at 141 (Cal. Cont. Ed. Bar).

The staff has not attempted to resolve this issue. It is a difficult question of where to draw the line. If additional personal care matters are included in the DPAHC and the exclusivity principle is retained, the DPAP would be unduly restricted. We could explicitly authorize the DPAHC to cover something in the nature of nonproperty

personal care decisions, and retain the DPAHC monopoly only over the class of "health care decisions" as defined. Otherwise, we can leave the issue to the ingenuity of counsel, since it appears that a due regard for the issues involved and proper drafting will provide an adequate dual power of attorney, as suggested by the CEB authors.

**§ 4064. Health care decision**

4064. "Health care decision" means consent, refusal of consent, or withdrawal of consent to health care.

**Comment.** Section 4064 continues former Civil Code Section 2430(c) without change. See also Section 4062 ("health care" defined).

**§ 4066. Health care provider**

4066. "Health care provider" means a person who is licensed, certified, or otherwise authorized or permitted by the law of this state to administer health care in the ordinary course of business or practice of a profession.

**Comment.** Section 4066 continues former Civil Code Section 2430(d) without change. The definition of "health care provider" in this section is the same in substance as the definition in Section 1 of the Uniform Law Commissioners' Model Health-Care Consent Act (1982). See also Sections 56 ("person" defined), 4062 ("health care" defined).

**§ 4068. Nondurable power of attorney**

4068. "Nondurable power of attorney" means a power of attorney that is not a durable power of attorney.

**Comment.** Section 4068 is new. Prior law used a variety of language to describe powers of attorney that were not durable. See, e.g., former Civil Code §§ 2403, 2410(c), 2512, 2514(a)(2). See also 4058 ("durable power of attorney for health care" defined), 4070 ("power of attorney" defined).

**§ 4070. Power of attorney**

4070. (a) "Power of attorney" means a written agency agreement or other instrument, however denominated, that is executed by a natural person and grants powers to an agent. A power of attorney may be durable or nondurable, may grant powers with regard to property or health care or both, and may be executed on a statutory or other form that satisfies the requirements of this division.

(b) If a durable power of attorney gives an agent the power to exercise voting rights, a proxy given by the agent to another person to



exercise the voting rights is subject to all the provisions of law applicable to that proxy and the proxy is not a power of attorney subject to this division.

Comment. Subdivision (a) of Section 4070 restates the first sentence of former Civil Code Section 2410(c) without substantive change. "Agent" has been substituted for "attorney in fact." See Section 4052 ("agent" defined). Where a power of attorney authorizes the agent to take action both with respect to property matters and health care decisions, the provisions in this division relating to powers of attorney for property apply to the extent that the power of attorney concerns property and related matters and the provisions in this division that apply to durable powers of attorney for health care apply to the extent that the power of attorney relates to health care decisions. For relevant statutory forms, see Sections 4250 *et seq.* (Uniform Statutory Form Power of Attorney), 4350 *et seq.* (Statutory Form Durable Power of Attorney for Health Care).

Subdivision (b) continues former Civil Code Section 2400.5 without substantive change and supersedes the second sentence of former Civil Code Section 2410(c). For the rules applicable to proxy voting in business corporations, see Corp. Code § 705. For other statutes dealing with proxies, see Corp. Code §§ 178, 702, 5069, 5613 7613, 9417, 12405, 13242; Fin. Code §§ 5701, 5702, 5710, 6005. See also Civil Code § 2356(d) (proxy under general agency rules).

See also Sections 4052 ("agent" defined), 4056 ("durable power of attorney" defined), 4058 ("durable power of attorney for health care" defined), 4068 ("nondurable power of attorney" defined).

#### § 4072. Power of attorney for property

4072. "Power of attorney for property" means a power of attorney, whether durable or nondurable, other than a durable power of attorney for health care.

Comment. Section 4072 is new. This section provides a convenient way to identify durable and nondurable powers of attorney other than durable powers of attorney for health care. See Section 4060 & Comment ("durable power of attorney for property" defined). See also Sections 4058 ("durable power of attorney for health care" defined), 4060 ("durable power of attorney for property" defined), 4068 ("nondurable power of attorney" defined), 4070 ("power of attorney" defined).

#### § 4074. Principal

4074. "Principal" means a natural person who executes a power of attorney.

Comment. Section 4074 restates former Civil Code Section 2410(d) without substantive change. See Section 4070 ("power of attorney" defined).

**§ 4076. Residential care facility for the elderly**

4076. "Residential care facility for the elderly" means a residential care facility for the elderly as defined in Section 1569.2 of the Health and Safety Code.

**Comment.** Section 4076 continues former Civil Code Section 2430(f) without substantive change.

**§ 4078. Springing power of attorney**

4078. "Springing power of attorney" means a power of attorney stating that it becomes effective at a specified future time or on the occurrence of a specified event or contingency including, but not limited to, the subsequent incapacity of the principal. A springing power of attorney may be a durable power of attorney or a nondurable power of attorney.

**Comment.** Section 4078 continues former Civil Code Section 2514(a)(2) without change. See Section 4127 (springing power of attorney). See also Sections 4056 ("durable power of attorney" defined), 4068 ("nondurable power of attorney" defined), 4070 ("power of attorney" defined), 4074 ("principal" defined).

**Note.** For the sake of consistency, the definition of "springing power of attorney" is included here with the other definitions, even though it is only used in one section at this point.

**§ 4080. Statutory form durable power of attorney for health care**

4080. "Statutory form durable power of attorney for health care" means a durable power of attorney for health care that satisfies the requirements of Chapter 2 (commencing with Section 4350) of Part 3.

**Comment.** Section 4080 is new. See also Section 4058 ("durable power of attorney for health care" defined).

**§ 4082. Statutory form power of attorney**

4082. (a) "Statutory form power of attorney" means a power of attorney for property that satisfies the requirements of Chapter 5 (commencing with Section 4250) of Part 2.

(b) A statutory form power of attorney may also be referred to as a "Uniform Statutory Form Power of Attorney".

**Comment.** Section 4082 is new. See also Section 4072 ("power of attorney for property" defined). Subdivision (b) recognizes a variant name the form may take. See Section 4251 (statutory form power of attorney).

*Note.* This definition is not parallel with the other definitions which distinguish between property and health care powers of attorney, but it did not seem appropriate to tamper with a statute enacted only this year on Commission recommendation.

**§ 4084. Third person**

4084. "Third person" means any person, other than the principal, who acts on a request from, contracts with, relies on, or otherwise deals with an agent, and includes a person described as a third party.

*Comment.* Section 4084 is a new provision drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.703(10) (Vernon 1990). The reference to a "third party" is included for consistency with language used in elsewhere, such as the statutory form power of attorney. See Sections 4251 & 4252.

See also Section 56 ("person" defined), 4052 ("agent" defined), 4074 ("principal" defined).

**PART 2. POWERS OF ATTORNEY FOR PROPERTY**

**Chapter 1. General Provisions**

**§ 4100. Application of part**

4100. Except as otherwise provided, this part applies to powers of attorney for property, whether durable or nondurable, including statutory form powers of attorney. This part does not apply to durable powers of attorney for health care.

**Comment.** Section 4100 provides the scope of this part. If a section in this part refers to a "power of attorney," it applies to both durable and nondurable powers of attorney for property. If application is limited, the section will refer to either a durable power of attorney or a nondurable power of attorney. See, e.g., Sections 4122 (requirements for durable power of attorney for property), 4132 (termination of nondurable power of attorney for property). This part applies to statutory form powers of attorney since they are a variety of powers of attorney for property. However, this part does not apply to statutory form powers of attorney to the extent Chapter 5 (commencing with Section 4250) provides a special rule. See Section 4257 (general provisions applicable to statutory form) & Comment.

The provisions of this part do not apply to durable powers of attorney for health care, which are governed by Part 3 (commencing with Section 4300). In this respect, Section 4100 restates the last sentence of former Civil Code Section 2402(a) without substantive change.

See also Sections 4060 ("durable power of attorney for property" defined), 4058 ("durable power of attorney for health care" defined), 4068 ("nondurable power of attorney" defined).

**§ 4101. Uniform Durable Power of Attorney Act**

4101. Sections 4122, 4123, 4125, 4127, 4146, 4203, and 4204 may be cited as the Uniform Durable Power of Attorney Act.

**Comment.** Section 4101 restates former Civil Code Section 2406 without substantive change. See Section 2 (construction of provisions drawn from uniform acts). Section 4101 has the same purpose as the official text of Section 7 of the Uniform Durable Power of Attorney Act (1969).

**§ 4102. Form of durable power of attorney after January 1, 1993**

4102. Notwithstanding Section 4124:

(a) Except as provided in subdivision (b), on and after January 1, 1993, a printed form of a durable power of attorney may be sold or otherwise distributed if it satisfies the requirements of former Section 2510.5 of the Civil Code.

(b) A printed form of a durable power of attorney printed on or after January 1, 1986, that is sold or otherwise distributed in this state for use by a person who does not have the advice of legal counsel shall comply with former Section 2510 of the Civil Code or with Section 4124 of this code.

(c) A durable power of attorney for property executed on or after January 1, 1993, using a printed form that complied with subdivision (b) of former Section 2400 of the Civil Code, as originally enacted, or with former Section 2510 of the Civil Code, is as valid as if it had been executed using a printed form that complies with Section 4124 of this code.

Comment. Section 4102 supersedes former Civil Code Section 2510.5. This section permits continued use of printed forms that comply with former law, specifically former Civil Code Section 2400 (as enacted by 1981 Cal. Stat. ch. 511, § 4) and former Civil Code Section 2510 (as enacted by 1985 Cal. Stat. ch. 403, § 12). Subdivision (c) permits use of the earlier forms after January 1, 1993, the operative date of Section 4124. This section, like its predecessor, former Civil Code Section 2510.5, avoids the need to discard existing printed forms on the operative date of this division. However, as provided in subdivision (b), a form printed on or after January 1, 1993, may be sold or distributed in this state for use by a person who does not have the advice of legal counsel only if the form satisfies the requirements of former Civil Code Section 2510 or Probate Code Section 4124. Both provisions are acceptable because the wording changes are nonsubstantive. See Comment to Section 4124.

## Chapter 2. Creation, Effect, and Termination of Powers of Attorney for Property

### § 4120. Creation of power of attorney

4120. A natural person having the capacity to contract may create a power of attorney for property by signing a written instrument designating an agent and delegating powers to the agent to act on the principal's behalf.

Comment. Section 4120 provides the elements essential to creation of a power of attorney. The reference to the capacity to contract continues the requirement of general agency law in Civil Code Section 2296. As a general rule, a power of attorney is not required to be acknowledged, but if the agent under the power is expected to handle real property matters, acknowledgment is essential. See also Section 4251 (acknowledgment of Uniform Statutory Form Power of Attorney).

For provisions concerning the duties and powers of an agent, see Sections 4160-4187. See also Sections 4052 ("agent" defined), 4072 ("power of attorney for property" defined), 4074 ("principal" defined).

§ 4121. Permissible purposes

4121. In a power of attorney for property, a principal may delegate to an agent general powers to act in a fiduciary capacity on the principal's behalf with respect to all lawful subjects and purposes or with respect to one or more express subjects or purposes.

Comment. Section 4121 is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.710(1) (Vernon 1990). This section is consistent with the general agency rules in Civil Code Sections 2304 and 2305.

For provisions concerning the duties and powers of an agent, see Sections 4160-4187. See also Sections 4052 ("agent" defined), 4072 ("power of attorney for property" defined), 4074 ("principal" defined).

§ 4122. Requirements for durable power of attorney for property

4122. A durable power of attorney for property is a power of attorney by which a principal designates another person as his or her agent in writing and the power of attorney contains any of the following words:

(a) "This power of attorney shall not be affected by subsequent incapacity of the principal."

(b) "This power of attorney shall become effective upon the incapacity of the principal."

(c) Similar words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding the principal's subsequent incapacity or upon the occurrence of the principal's incapacity.

Comment. Section 4122 restates former Civil Code Section 2400 without substantive change. "Agent" has been substituted for "attorney in fact." See Section 4052 ("agent" defined). This section refers to a durable power of attorney for property, recognizing that this part does not apply to durable powers of attorney for health care. See Sections 4100 (application of part), 4300-4359 (durable powers of attorney for health care).

Section 4122 is similar to the official text of Section 1 of the Uniform Durable Power of Attorney Act (1984), Uniform Probate Code Section 5-501 (1989). See Section 2 (construction of provisions drawn from uniform acts). The reference in the Uniform Act to the principal's "disability" is omitted. Under Section 4132, it is the principal's incapacity to contract which would otherwise terminate the power of attorney. In addition, the phrase "or lapse of time" has not been included in the language set forth in subdivision (a) of Section 4122 because it is unnecessary. As a matter of law, unless a durable power of attorney states an earlier termination date, it remains valid regardless of any lapse of time since its creation. See Section

4131(a)(1) (termination of power of attorney at end of stated term).

The last clause in subdivision (c) concerning the occurrence of the principal's incapacity has been added to for consistency with the language in subdivision (b) which relates to springing powers of attorney.

See also Sections 4052 ("agent" defined), 4056 ("durable power of attorney" defined), 4070 ("power of attorney" defined), 4074 ("principal" defined), 4078 ("springing power of attorney" defined).

*Note.* Since this is the basic provision of the Uniform Durable Power of Attorney Act, the staff has not altered the wording to the extent we would normally. For example, "shall be exercisable" in subdivision (c) would usually be changed to "may be exercised" or "is exercisable." However, one of the drafting compromises made in preparation of this statute is to preserve language of the uniform acts where practicable, even though the act may be reorganized and split up. See Section 4101 for a list of sections that comprise the Uniform Durable Power of Attorney Act. We imagine that there is some benefit in retaining the flavor of the uniform act, if not its exact wording and structure, in the context of multistate transactions.

**§ 4123. Effect of agent's acts under durable power of attorney during principal's incapacity**

4123. All acts done by an agent pursuant to a durable power of attorney for property during any period of incapacity of the principal have the same effect and inure to the benefit of and bind the principal and his or her successors in interest as if the principal had the capacity to contract, notwithstanding any incapacity of the principal or any uncertainty as to whether the principal is dead or alive.

*Comment.* Section 4123 continues former Civil Code Section 2401 without substantive change, except for the addition of the last clause which is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.705(2) (Vernon 1990). "Agent" has been substituted for "attorney in fact." See Section 4052 ("agent" defined). The reference to a "durable power of attorney for property" has been substituted for the former reference to a "durable power of attorney."

Section 4123 is similar to the second sentence of the official text of Section 2 of the Uniform Durable Power of Attorney Act (1987), Uniform Probate Code Section 5-502 (1989). See Section 2 (construction of provisions drawn from uniform acts). This section omits the reference to the principal's "disability" found in the uniform act. Under Section 4132, it is the principal's incapacity to contract which would otherwise terminate the power of attorney.

See also Sections 4052 ("agent" defined), 4060 ("durable power of attorney for property" defined), 4074 ("principal" defined).

§ 4124. Warning statement in durable power of attorney for property

4124. (a) This section does not apply to either of the following:

(1) A statutory short form power of attorney under Section 4259.

(2) A statutory form power of attorney that satisfies the requirements of the Uniform Statutory Form Power of Attorney Act in Chapter 5 (commencing with Section 4250).

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

WARNING TO PERSON EXECUTING THIS DOCUMENT

This is an important legal document. It creates a durable power of attorney. Before executing this document, you should know these important facts:

This document may provide the person you designate as your agent with broad powers to manage, dispose, sell, and convey your real and personal property and to borrow money using your property as security for the loan.

These powers will exist for an indefinite period of time unless you limit their duration in this document. These powers will continue to exist notwithstanding your subsequent disability or incapacity.

You have the right to revoke or terminate this power of attorney.

If there is anything about this form that you do not understand, you should ask a lawyer to explain it to you.

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

Comment. Section 4124 restates former Civil Code Section 2510 without substantive change. "Agent" has been substituted for "attorney in fact." See Section 4052 ("agent" defined). The exclusion of durable powers of attorney for health care in the former provision is omitted as unnecessary. See Section 4060 ("durable power of attorney for property" defined), 4072 ("power of attorney for property" defined). Other provisions prescribe the contents of the warning statements for particular types of durable powers of attorney. See Sections 4251 (Uniform Statutory Form Power of Attorney), 4311 (durable power of attorney for health care), 4351 (statutory form durable power of attorney for health care). See also Section 4311(a) (introductory clause) (printed form of a durable power of attorney for health care to provide only authority to make health care decisions).

Section 4102 permits a printed form to be used after January 1, 1993, if the form complies with prior law. A form printed after



January 1, 1986, may be sold or otherwise distributed in this state only if it complies with the requirements of Section 4124 (or its predecessor, former Civil Code Section 2510). See Section 4102(b).

See also Sections 4052 ("agent" defined), 4060 ("durable power of attorney for property" defined), 4082 ("statutory form power of attorney" defined), 4084 ("third person" defined).

**§ 4125. Nomination of fiduciary in durable power of attorney**

4125. (a) A principal may nominate, by a durable power of attorney, a conservator of the person or estate or both, or a guardian of the person or estate or both, for consideration by the court if protective proceedings for the principal's person or estate are thereafter commenced.

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

**Comment.** Section 4125 continues former Civil Code Section 2402(b) without substantive change. This section is drawn from Section 3(b) of the Uniform Durable Power of Attorney Act (1979), Uniform Probate Code Section 5-503 (1989), but has been revised to make it consistent with the general provision for nomination of a conservator in Section 1810. See Section 2 (construction of provisions drawn from uniform acts). The second sentence of Section 3(b) of the Uniform Durable Power of Attorney Act (most recent nomination in a durable power shall be given effect) is not adopted in California. Thus, the principal may make a later nomination in a writing which is not a durable power of attorney and, if at that time the principal has sufficient capacity to form an intelligent preference (Section 1810), the later nomination will supersede an earlier nomination made in a durable power. This is consistent with the purpose and effect of Section 1810.

See also Section 4056 ("durable power of attorney" defined), 4074 ("principal" defined).

**Note.** Existing law is not clear to what extent this provision applies to durable powers of attorney for health care. Subdivision (a) of Civil Code Section 2402 excludes health care powers, but subdivision (b), from which draft Section 4125 comes, is silent. From this one could draw an implication that the nomination provision of subdivision (b) applies to both types of durable powers.

In the case of a conservator, it makes no difference, because this section validates any nomination of a guardian or conservator that complies with Section 1810, whether in a durable power or some other writing. The statutory form durable power of attorney for health care provides specifically in paragraph 10 for nomination of a conservator of the person. See draft Section 4351.

May a guardian be nominated in a durable power of attorney for

health care? Perhaps this is a trick question. A document drafted as a durable power of attorney for health care may name a guardian and that part of the instrument could be considered a durable power of attorney for property since it would satisfy all applicable requirements. (This would not be true for a printed form, however, which may only cover health care decisions. See draft Section 4311.)

Note that Section 4125 does not specifically authorize nomination in a nondurable power of attorney, although as a writing covered by subdivision (b), the nomination of a conservator of the estate would be effective under Section 1810.

We can conclude that draft Section 4125 is not an example of ideal drafting. The reason it remains in this form, however, is that it is existing law and is part of the Uniform Durable Power of Attorney Act.

#### § 4126. Springing power of attorney

4126. (a) In a springing power of attorney, the principal may designate one or more persons who, by a written declaration under penalty of perjury, have the power to determine conclusively that the specified event or contingency has occurred. The principal may designate the agent or another person to perform this function, either alone or jointly with other persons.

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

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

Comment. Section 4126 continues former Civil Code Section 2514(b)-(d) without substantive change. "Agent" has been substituted for "attorney in fact." See Section 4052 ("agent" defined).

This section is intended to make springing powers of attorney more effective by providing a mechanism for conclusively determining that the triggering event or contingency has occurred. See Section 4078 ("springing power of attorney" defined). Subdivision (a) makes clear that the principal may give the agent (or one or more other persons) the power to determine by written declaration under penalty of perjury that the event or contingency specified in the springing power of attorney has occurred so that the power of attorney is effective. This section does not apply to or affect springing powers of attorney

containing different procedures for determining whether the triggering event or contingency has occurred. This section applies only where the terms of subdivision (a) are satisfied.

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

A springing power of attorney may or may not be a durable power of attorney. A springing power that takes effect on the occurrence of a contingency other than the incapacity of the principal (such as, for example, the principal's failure to return from a vacation or business trip by a certain date) need not be a durable power of attorney. However, a springing power of attorney that takes effect upon the subsequent incapacity of the principal is necessarily a durable power of attorney, and the other rules concerning durable powers of attorney are applicable. See, e.g., Section 4122 (durable power of attorney for property).

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

See also Sections 4058 ("durable power of attorney for health care" defined), 4068 ("nondurable power of attorney" defined), 4070 ("power of attorney" defined), 4074 ("principal" defined).

*Note.* As drafted, this section does not apply to durable powers of attorney for health care.

#### § 4127. Lapse of time

4127. Unless a power of attorney for property states a time of termination, the power of attorney is exercisable notwithstanding any lapse of time since the execution of the power of attorney.

Comment. Section 4127 is the same in substance as the second sentence of the official text of Section 2 of the Uniform Durable Power of Attorney Act (1987), Uniform Probate Code Section 5-502 (1989). See Section 2 (construction of provisions drawn from uniform acts). See also Section 4072 ("power of attorney for property" defined).

#### § 4128. Application to principal's property

4128. A power of attorney, whether durable or nondurable, may by its terms apply to all or a portion of the real and personal property of the principal, whether owned by the principal at the time of the execution of the power of attorney or thereafter acquired or whether located in this state or elsewhere, without the need for a description of each item or parcel of property.

Comment. Section 4128 continues former Civil Code Section 2513 without substantive change. This section makes clear that a power of

attorney may by its terms apply to all real property of the principal, including after-acquired property, without the need for a specific description of the real property to which the power applies. This section is consistent with the Article 2 (commencing with Section 2460) of Chapter 3.

See also Sections 62 ("property" defined), 4060 ("durable power of attorney for property" defined), 4068 ("nondurable power of attorney" defined), 4072 ("power of attorney for property" defined), 4074 ("principal" defined).

**§ 4129. Variation of duties and liabilities between principal and agent**

4129. The principal and the person designated as the agent may enter into a written agreement that sets forth their duties and liabilities as between themselves and their successors and that expands or limits the application of this part, except as provided in Section 4186.

**Comment.** Section 4129 is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.717(4) (Vernon 1990). Section 4186 provides certain absolute limits on actions that may be taken by an agent under a power of attorney.

See also Sections 4052 ("agent" defined), 4074 ("principal" defined).

**§ 4130. Manner of modification or termination by principal**

4130. Except as provided by Section 4152, as between the principal and agent, a power of attorney for property may be modified or terminated by the principal as follows:

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

(b) When the principal informs the agent, orally or in writing, that the power of attorney is modified or terminated or when and under what circumstances it is modified or terminated.

(c) When the principal's legal representative, with approval of the court, informs the agent in writing that the power of attorney is modified or terminated or when and under what circumstances it is modified or terminated.

(d) When a written notice of modification or termination of the power of attorney is filed by the principal or the principal's legal representative for record in the office of the recorder of deeds in the city or county of the principal's domicile or, if the principal is a nondomiciliary of this state, in the jurisdiction of the agent's domicile last known to the principal, or in the jurisdiction where any property specifically referred to in the power of attorney is located.

**Comment.** Section 4130 is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.717(1) (Vernon 1990). This section provides that a power of attorney terminates on the date provided in the instrument or on the oral or written advice to the agent that the agent's powers are terminated. An agent can be simply fired as with any other employee or agent or the agent can be told that his or her authority has been changed, and no writing is required. To deal with the situation where the agent cannot be found for the communication, subdivision (d) provides for filing a notice of modification or termination with the recorder. The language is drafted in general terms since it is intended to apply to California recorders as well as similar officials in other jurisdictions. The act of recording imposes constructive knowledge on the agent for all documents recorded by the principal that relate to the power and for knowing whether the principal is alive. This corresponds with the duty of agents to keep in contact with their principal. See Section 4166. For other events that terminate a power of attorney, see Sections 4131, 4132. For events that terminate the authority of an agent, see Sections 4148, 4149.

See also Sections 4052 ("agent" defined), 4072 ("power of attorney for property" defined), 4074 ("principal" defined).

**§ 4131. Termination of power of attorney for property**

4131. (a) Except as provided in Section 4152 and subject to subdivision (b), a power of attorney for property, whether durable or nondurable, is terminated by any of the following events:

(1) Expiration of the term of the power of attorney, except as provided in Section 4147.

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

(3) Revocation of the power of attorney by the principal.

(4) Death of the principal.

(5) Death, renunciation, incapacity, or other disqualification of all agents designated in the power of attorney.

(b) An agent or third person who does not have notice of an event that terminates the power of attorney or the authority of an agent is protected from liability as provided in Chapter 4 (commencing with Section 4200).

**Comment.** Section 4131 is drawn from the general agency rules provided in Civil Code Sections 2355 and 2356. See Civil Code § 2360 (Civil Code §§ 2355 & 2356 inapplicable to powers of attorney). This section continues the substance of former law as to termination of powers of attorney. For a special rule as to termination of nondurable powers of attorney for property, see Section 4132.

The first clause of subdivision (a) recognizes the special rule

applicable to a power of attorney coupled with an interest provided in Section 4152. Subdivision (a)(1) is the same as Civil Code Section 2355(a), with the exception of the special case where a principal is missing or held captive in a foreign country as provided in Section 4147. Subdivision (a)(2) is the same as Civil Code Section 2356(b), but the reference to fulfillment of the purpose of the power of attorney is new. Subdivision (a)(3) is the same as Civil Code Section 2356(a)(1). Subdivision (a)(4) is the same as Civil Code Section 2356(a)(2). Subdivision (a)(5) is generalized from Civil Code Section 2355(c)-(f). See Section 4148 (termination of agent's authority).

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

See also Sections 4052 ("agent" defined), 4060 ("durable power of attorney for property" defined), 4068 ("nondurable power of attorney" defined), 4072 ("power of attorney for property" defined), 4084 ("third person" defined).

**§ 4132. Termination of nondurable power of attorney for property**

4132. (a) Except as provided in Section 4152 and subject to subdivision (b), a nondurable power of attorney for property is terminated by the incapacity of the principal to contract.

(b) An agent or third person who does not have notice of the incapacity of the principal in the case of a nondurable power of attorney for property is protected from liability as provided in Chapter 4 (commencing with Section 4200).

**Comment.** Subdivision (a) of Section 4132 restates the general agency rule in Civil Code Section 2356(a)(3) without substantive change. The first clause of subdivision (a) recognizes the special rule applicable to a power of attorney coupled with an interest provided in Section 4152. For other events that terminate a nondurable power of attorney for property, see Section 4131.

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

See also Sections 4052 ("agent" defined), 4060 ("durable power of attorney for property" defined), 4068 ("nondurable power of attorney" defined), 4072 ("power of attorney for property" defined), 4084 ("third person" defined).

**Note.** *As noted, this section preserves the rule that a nondurable power of attorney terminates upon the incapacity of the principal. This sounds good as a general rule, but can be difficult to apply in cases where the capacity of the principal is in doubt or subject to variation. It also operates harshly, since, in theory anyway, a temporary incapacity of the principal would wipe out any nondurable power of attorney, even though the principal could execute the same power after restoration to capacity. Perhaps it is not worth dealing with, but the Commission may wish to consider an alternative approach,*

such as the following from the Missouri Durable Power of Attorney Law (Mo. Ann. Stat. § 404.714(6) (Vernon 1990)):

6. *The authority of an agent, under a power of attorney that is not durable, is suspended during any period that the principal is disabled or incapacitated to the extent that the principal is unable to receive or evaluate information or to communicate decisions with respect to the subject of the power of attorney; and an agent exercising authority under a power of attorney that is not durable shall not act in the principal's behalf during any period that the agent knows the principal is so disabled or incapacitated.*

§ 4133. Certified copy of power of attorney

4133. (a) A certified copy of a power of attorney for property has the same force and effect as a power of attorney bearing the signature of the principal.

(b) A copy of a power of attorney for property may be certified by an official of a state or of a political subdivision of a state who is authorized to make certifications. The certification shall state that the certifying official has examined an original power of attorney and the copy and that the copy is a true and correct copy of the original power of attorney.

Comment. Section 4133 is drawn from Minnesota law. See Minn. Stat. Ann. § 523.06 (West Supp. 1990). This section facilitates use of a power of attorney executed in this state as well as powers of attorney executed in other states. See also Sections 74 ("state" defined), 4072 ("power of attorney for property" defined), 4074 ("principal" defined).

**Chapter 3. Agents Under Powers of Attorney for Property**

**Article 1. Agents**

§ 4140. Qualifications of agent

4140. Any person having the capacity to contract may be designated as an agent under a power of attorney for property.

Comment. Section 4140 supersedes the last part of Civil Code Section 2296 ("any person may be an agent") to the extent that it applied to agents under powers of attorney.

See also Sections 4052 ("agent" defined), 4072 ("power of attorney for property" defined), 4074 ("principal" defined).

Note. Although durable powers of attorney are analogized to conservatorships of the estate, this section would seem to provide a broader class of potential agents than could be appointed conservator

of the principal's estate. The staff considered suggesting a rule that any person who is qualified to be appointed as a conservator of the estate of the principal would be qualified to be an agent. But this rule would probably result in undue restrictions on the types of entities that could serve as agents. There is some appeal to the notion that only fiduciary-type artificial persons should serve as agents under durable powers of attorney, this has not apparently been the law in California, and would be overly restrictive in the case of nondurable powers. On the other hand, it is reported that "[p]ractically speaking, the principal may be unable to find an institution that is willing to serve as an agent" under a durable power of attorney for property. See Montgomery & Wright, *Durable Powers of Attorney for Property Management*, 1990 California Durable Power of Attorney Handbook § 2.46, at 55 (Cal. Cont. Ed. Bar).

**§ 4141. Effect of designating unqualified person as agent**

4141. The designation of a person not qualified to act as an agent for a principal under a power of attorney for property subjects the person to removal as agent, but does not affect the immunities of third persons nor relieve the unqualified person of any applicable duties to the principal or the principal's successors.

**Comment.** Section 4141 is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.707(4) (Vernon 1990). For provisions governing immunities of third persons, see Section 4200 et seq.

See also Sections 4052 ("agent" defined), 4072 ("power of attorney for property" defined), 4074 ("principal" defined), 4084 ("third person" defined).

**§ 4142. Multiple agents**

4142. (a) A principal may designate more than one agent in one or more powers of attorney for property and may provide that the authority conferred on two or more agents shall or may be exercised either jointly or severally or in a manner, with the priority and with respect to particular subjects, provided in the power of attorney.

(b) Unless otherwise provided in the power of attorney:

(1) A power vested in two or more agents may only be exercised by their unanimous action.

(2) If a vacancy occurs in the position of a co-agent, the remaining co-agent or co-agents may exercise the powers under the power of attorney as if they are the only agents.

(3) If a co-agent is unavailable to perform the duties of the co-agent because of absence, illness, or other temporary incapacity,



the remaining co-agent or co-agents may act under the power of attorney, as if they are the only agents, where necessary to accomplish the purposes of the power of attorney or to avoid irreparable injury to the principal's property.

(c) A co-agent need not indicate his or her capacity as a co-agent agent when dealing with third persons.

(d) A co-agent is not liable for the actions of other co-agents.

**Comment.** Subdivision (a) of Section 4142 is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.707(1) (Vernon 1990). The default rule requiring unanimous action in subdivision (b)(1) is the same in substance as the rule applicable under the statutory form power of attorney. See Section 4251. Subdivision (b) is comparable to the rules applicable to multiple trustees under Sections 15620-15622. Subdivision (c) is included for consistency with Section 4143(c) (capacity of successor agent). Subdivision (d) is comparable to the general rule as to cotrustees in Section 16402(a).

See also Sections 4052 ("agent" defined), 4072 ("power of attorney for property" defined), 4074 ("principal" defined).

**Note.** *As to subdivision (d), the Trust Law provides a lot more detail, making the general rule subject to exceptions where the cotrustee has participated in a breach, improperly delegated administration of the trust, approved, concealed, or acquiesced in the breach, negligently enagled the breach, or neglected to take reasonable steps to remedy the breach. We have chosen just to state the general rule in this section. Should more detail be added?*

**§ 4143. Successor agents**

4143. (a) The principal in a power of attorney for property may revocably designate one or more qualified persons as successor agents to exercise the authority granted in the power of attorney in the order designated in the authority of a prior designated agent terminates.

(b) The principal in a power of attorney may revocably grant a power to another person, designated by name, by office, or by function, including the initial and any successor agent, to revocably designate at any time one or more successor agents.

(c) A successor agent need not indicate his or her capacity as a successor agent when dealing with third persons.

(d) A successor agent is not liable for the actions of the predecessor agent.

**Comment.** Section 4143 is drawn in part from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.723(2)-(3) (Vernon

1990). For events that terminate the authority of an agent, see Section 4148. Subdivision (d) is comparable to the general rule as to successor trustees in Section 16403(a).

A successor agent is the same as an original agent under this division. See Section 4052(b) ("agent" includes successor or alternate agent). See also Sections 4060 ("durable power of attorney for property" defined), 4068 ("nondurable power of attorney" defined), 4072 ("power of attorney for property" defined), 4074 ("principal" defined).

*Note.* As to subdivision (d), the Trust Law provides more detail, making the general rule subject to exceptions where the successor knowingly permits the breach to continue, neglects to take steps to compel delivery from the predecessor, or neglects to take reasonable steps to remedy the breach. We have chosen just to state the general rule in this section as in the previous section. Should more detail be added?

#### § 4144. Compensation of agent

4144. Subject to the power of attorney and any separate agreement, an agent is entitled to reasonable compensation for services rendered to the principal as agent and to reimbursement for reasonable expenses incurred as a result of acting as agent.

*Comment.* Section 4144 is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.725 (Vernon 1990). This provision is comparable to Sections 15681 (trustee's compensation) and 15684(a) (reimbursement for trustee's expenses). In many situations a relative acting as an agent under a durable power of attorney expects to act for the principal as an accommodation. Normally, while the principal is not disabled, such service will be infrequent and will not involve substantial time. However, with the prospect that if the principal becomes disabled or incapacitated, substantial time, effort, and expense may be required of the agent and any successor agents extending over a long period of time, compensation may be important. A definite understanding regarding compensation may be included in the power of attorney or in a separate agreement. Reimbursement of expenses would be expected to include the cost of bookkeeping, tax, and legal services incurred by the agent in performing duties on the principal's behalf. It would also include the cost of preparing an accounting and any travel or personal expense incurred by the agent.

See Section 4161(b) (effect of compensation on standard of care). See also Sections 4052 ("agent" defined), 4070 ("power of attorney" defined), 4074 ("principal" defined).

*Note.* This section may be a departure from the expectations of some authorities. For example, the CEB Handbook contains the following:

*An agent rarely receives compensation, probably because family members and close family friends are usually appointed. Unless the document specifically authorizes compensation, the agent should never presume to use the principal's assets for compensation, because this could be*

construed to fall within the self-dealing prohibitions of Prob C § 16004.

Montgomery & Wright, Durable Powers of Attorney for Property Management, 1990 California Durable Power of Attorney Handbook § 2.51, at 57-58 (Cal. Cont. Ed. Bar).

**§ 4145. Delegation of agent's authority**

4145. (a) An agent from time to time may revocably delegate any or all of the powers granted in a power of attorney for property, whether durable or nondurable, to one or more qualified persons, subject to any directions or limitations of the principal expressed in the power of attorney, but the agent making the delegation remains responsible to the principal for the exercise or nonexercise of the powers delegated.

(b) A delegated agent need not indicate the agent's capacity as a delegated agent.

**Comment.** Section 4145 is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.723(1), (3) (Vernon 1990). This section is consistent with parts of the general agency rules on delegation in Civil Code Section 2349, but permits authorizes a broader delegation than the general agency rules. Delegation under this section may be particularly useful under a durable power of attorney where the principal is incapacitated and the agent needs to delegate authority under the power during a planned absence. However, the delegating agent remains responsible for the acts of subagents. If the principal is available and not incapacitated, the agent is expected to consult about any delegation. See Section 4166 (consultation with principal).

See also Sections 4052 ("agent" defined), 4060 ("durable power of attorney for property" defined), 4068 ("nondurable power of attorney" defined), 4072 ("power of attorney for property" defined), 4074 ("principal" defined).

**Note.** *The Trust Law takes a different approach to the liability of a trustee to beneficiaries for acts of agents employed by the trustee. Section 16401 provides in some detail that a trustee is not liable unless the breach has occurred where the trustee has the power to direct the act of the agent, where the trustee made an improper delegation, where reasonable care was not used in selecting the agent, where supervision of the agent was improper, where the trustee concealed the acts of the agent, or where the trustee neglects to take reasonable steps to compell redress of the agent's wrongs. If desired, we could adapt this sort of approach to this law. But we wonder if such formal rules are suited to powers of attorney. Perhaps powers of attorney have become more formal and extensive, and need to be treated more like trusts.*

**§ 4146. Relation of agent to court-appointed fiduciary**

4146. (a) If, following execution of a durable power of attorney for property, a court of the principal's domicile appoints a conservator of the estate, guardian of the estate, or other fiduciary charged with the management of all of the principal's property or all of the principal's property except specified exclusions, the agent is accountable to the fiduciary as well as to the principal. Except as provided in subdivision (b), the fiduciary has the same power to revoke or amend the durable power of attorney that the principal would have had if he or she were not incapacitated.

(b) If a conservator is appointed by a court of this state, the conservator can revoke or amend the durable power of attorney for property only if the court in which the conservatorship proceeding is pending has first made an order authorizing or requiring the fiduciary to revoke or amend the durable power of attorney and the revocation or amendment is in accord with the order.

**Comment.** Section 4146 continues former Civil Code Section 2402(a) without substantive change. "Agent" has been substituted for "attorney in fact." See Section 4052 ("agent" defined).

Subdivision (a) is substantially the same as the official text of Section 3(a) of the Uniform Durable Power of Attorney Act (1979), Uniform Probate Code Section 5-503(a) (1989), with several changes. "Conservator of the estate" has been substituted for "conservator." This change is consistent with the concept of the Uniform Act that the fiduciary to whom the agent under a durable power is accountable and who may revoke or amend the durable power includes only a fiduciary charged with the management of the principal's estate and does not include a person appointed only to exercise protective supervision over the person of the principal. See Unif. Durable Power of Attorney Act § 3 comment (1979); Unif. Prob. Code § 5-503 comment (1989). The reference in the Uniform Act to the principal's "disability" is not included. This omission conforms Section 4146 to other provisions of this part. The authority of the fiduciary to revoke or amend is the same as that provided by the official text of Section 3(a) of the Uniform Durable Power of Attorney Act, except for the requirement in subdivision (b) of prior court authorization for a California conservator to revoke or amend the power.

The exclusion of durable powers of attorney for health care from the coverage of this provision in former Civil Code Section 2402(a) is omitted because it is unnecessary. This part applies only to powers of attorney for property. See Section 4100 (application of part).

See also Section 39 ("fiduciary" defined), 4052 ("agent" defined), 4060 ("durable power of attorney for property" defined), 4074 ("principal" defined).

§ 4147. Agent's authority when principal missing or held captive in foreign country

4147. (a) If the principal is not available to communicate in person with the agent either because (1) the principal is missing under such circumstances that it is not known whether the principal is alive or dead or (2) the principal is captured, interned, besieged, or held hostage or prisoner in a foreign country, then the authority of an agent under a power of attorney for property, whether durable or nondurable, continues and is not terminated.

(b) The agent may continue to exercise the authority conferred by the power of attorney as provided in subdivision (a) until the principal returns, is publicly declared dead by a domestic or foreign governmental agency, or is presumed dead pursuant to Section 667 of the Evidence Code or a similar law of the place of the principal's last known domicile.

(c) The agent's authority continues as provided in this section notwithstanding a termination date in the power of attorney.

(d) This section does not apply in the case of a power of attorney executed by an absentee that is governed by Section 3720.

Comment. Section 4147 is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.714(3) (Vernon 1990). This section provides for a continuation of the agent's powers when the agent cannot communicate with the principal because the principal's whereabouts is unknown or the principal is being held against his or her will in a foreign country

As provided in subdivision (c), the agent's authority continues under this section notwithstanding an earlier termination date set out in the power of attorney. Of course, if the purpose of the power of attorney has been fulfilled, this section would not have any effect.

See also Sections 4052 ("agent" defined), 4056 ("durable power of attorney" defined), 4068 ("nondurable power of attorney" defined), 4070 ("power of attorney" defined), 4074 ("principal" defined).

Note. This section could have even broader effect and make springing powers of attorney that are contingent on incapacity come into force when the principal is missing, unless the power provides otherwise.

We have left Section 3720 pertaining to powers of attorney executed by federal "absentees" where it is, located with other provisions concerning management of property of absentees. Section 3720 could be moved to this part of the draft statute. It provides:

3720. If an absentee executed a power of attorney that expires during the period that occasions absentee status, the power of attorney continues in full force and effect until 30

*days after the absentee status is terminated. Any person who acts in reliance upon the power of attorney when accompanied by a copy of a certificate of missing status is not liable for relying and acting upon the power of attorney.*

**§ 4148. Termination of agent's authority**

4148. (a) Except as provided in Section 4152 and subject to subdivision (b), the authority of an agent under a power of attorney for property, whether durable or nondurable, is terminated by any of the following events:

- (1) Termination of the power of attorney.
- (2) Renunciation by the agent.
- (3) Incapacity of the agent.
- (4) Removal of the agent by the principal or by court order.
- (5) Death of the agent.

(b) An agent or third person who does not have notice of an event that terminates the power of attorney or the authority of an agent is protected from liability as provided in Chapter 4 (commencing with Section 4200).

**Comment.** Section 4148 is drawn in part from the general agency rules provided in Civil Code Section 2355. See Civil Code § 2360 (Civil Code § 2355 inapplicable to powers of attorney). This section thus continues the substance of former law as to termination of the authority of agents under powers of attorney.

The first clause in subdivision (a) recognizes the special rule applicable to a power of attorney coupled with an interest as provided in Section 4152. Subdivision (a)(1) provides that the authority of an agent necessarily ceases when the underlying power of attorney is terminated. See Section 4131 (termination of power of attorney for property). In a case where the principal is missing or held captive in a foreign country, the agent's authority does not terminate, as provided in Section 4147. Subdivision (a)(2) is the same as Civil Code Section 2355(b), but the reference to fulfillment of the purpose of the power of attorney is new. Subdivision (a)(3) is the same as Civil Code Section 2355(e). Subdivision (a)(5) is the same as Civil Code Section 2355(c).

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

See also Sections 4052 ("agent" defined), 4060 ("durable power of attorney for property" defined), 4068 ("nondurable power of attorney" defined), 4072 ("power of attorney for property" defined), 4084 ("third person" defined).

§ 4149. Effect of dissolution or annulment

4149. Unless the power of attorney expressly provides otherwise:

(a) If, after executing a power of attorney for property, the principal's marriage is dissolved or annulled, the dissolution or annulment revokes any designation of the former spouse as an agent for the principal. If the agent's authority is terminated solely by this subdivision, it is revived by the principal's remarriage to the agent.

(b) In a case where the principal has become an absentee as defined in Section 1403, if, after executing a power of attorney for property, the principal's marriage to the agent is dissolved or annulled, or the judicial or legal separation of the principal and agent is declared, or the agent commences an action for such relief, the agent's authority is terminated. If the agent's authority is terminated solely by this subdivision, it is revived by the principal's remarriage to or reconciliation with the agent.

Comment. Subdivision (a) of Section 4149 is generalized from Section 4315(e) (revocation of durable power of attorney for health care on dissolution or annulment) and part of former subdivision (f) of Civil Code Section 2355 (revocation in case federal absentee). The policy of subdivision (a) is comparable to Section 6122 (revocation of provisions in will after dissolution or annulment).

Subdivision (b) continues part of former subdivision (f) of Civil Code Section 2355 relating to the effect of a separation and filing a petition for dissolution or annulment in the case of federal absentees. The reference to contrary provisions "in writing" is omitted because it is unnecessary; powers of attorney are always required to be in writing. See Section 4070 ("power of attorney" defined).

See also Sections 4052 ("agent" defined), 4072 ("power of attorney for property" defined), 4074 ("principal" defined).

Note. Missouri law follows the federal absentee policy and terminates an agent's authority on "the filing of any action for divorce or dissolution of the marriage of the principal and the principal's agent who were married to each other at or subsequent to the time the power of attorney was created, unless the power of attorney provides otherwise." See Mo. Ann. Stat. § 404.717(a)(6) (Vernon 1990).

It should also be noted that this section applies both to durable and nondurable powers of attorney for property. Strictly speaking, a nondurable power of attorney need not be terminated by operation of law on dissolution, since the principal may terminate the power of attorney by taking appropriate action. Even if the statute provides for termination on dissolution, it would be prudent for the principal to take some action to make sure third persons are aware of the dissolution.

**§ 4150. Succession following termination of agent's authority**

4150. Where the authority of an agent under a power of attorney for property is terminated but the power of attorney is not terminated, if the power of attorney designates a successor agent or prescribes a procedure for designating a successor agent, then the authority provided in the power of attorney extends to and vests in the successor agent in place of the agent whose authority was terminated.

**Comment.** Section 4150 is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.717(2) (Vernon 1990). See Section 4143 (successor agents).

See also Sections 4052 ("agent" defined), 4072 ("power of attorney for property" defined).

**§ 4151. Agent's duties and powers on termination of authority**

4151. (a) Subject to the order of a court having jurisdiction of the agent or the principal's property, on termination of the agent's authority, the agent shall promptly deliver possession or control of the principal's property as follows:

(1) To a qualified successor agent, if any.

(2) If there is no qualified successor agent, to the principal or as directed by the principal, if the principal is not incapacitated.

(3) In the case of a nondurable power of attorney for property where the principal has become incapacitated, to the principal's conservator of the estate, guardian of the estate, or other fiduciary charged with management of the property in question, or as directed by the fiduciary.

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

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

(c) The agent has the powers reasonably necessary under the circumstances to perform the duties provided by this section.

**Comment.** Section 4151 is new. The rules concerning duties on termination of the agent's authority are drawn in part from Section 15644 (delivery of property by former trustee upon occurrence of vacancy) and from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.714(9) (Vernon 1990). For other rules concerning the



agent's relation with court-appointed fiduciaries under a durable power of attorney, see Section 4146.

See also Sections 4052 ("agent" defined), 4060 ("durable power of attorney for property" defined), 4068 ("nondurable power of attorney" defined), 4074 ("principal" defined).

**§ 4152. Power coupled with an interest**

4152. To the extent that the power of an agent is coupled with an interest in the subject of the power of attorney for property, the agent's authority is not terminated by the incapacity or death of the principal or by the revocation of the power of attorney, attempted removal of the agent, or the dissolution or annulment of the agent's marriage with the principal.

**Comment.** Section 4152 continues the special rule concerning powers coupled with interests provided in Civil Code Section 2356(a). This section provides an exception to Sections 4131 (termination of power of attorney for property), 4148 (termination of authority of agent), and 4149 (effect of dissolution or annulment).

See also 4052 ("agent" defined), 4072 ("power of attorney for property" defined), 4074 ("principal" defined).

**Article 2. Duties of Agents**

**§ 4160. When duties commence**

4160. (a) Except as provided in subdivision (c), a person who is designated as an agent under a power of attorney, whether durable or nondurable, has no duty to exercise the authority conferred in the power of attorney, regardless of whether the principal has become incapacitated, is missing, or is otherwise unable to act.

(b) Acting for the principal in one or more transactions does not obligate an agent to act for the principal in subsequent transactions.

(c) If an agent under a power of attorney has agreed expressly in writing to act for the principal in specified circumstances, the agent has a duty to act when the circumstances occur. The agreement to act on behalf of the principal is enforceable against the agent as a fiduciary without regard to whether there is any consideration to support a contractual obligation to do so.

**Comment.** Section 4160 is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.705(4) (Vernon 1990). Subdivision (a) makes clear that being named as an agent under a durable or nondurable power of attorney imposes no duty on the named person to act. This is true even if the agent knows of the designation

and has received the power of attorney. A duty to act under this part only arises by reason of an express agreement in writing, as provided in subdivision (c). Reliance is not sufficient to impose a legal duty to act, as provided in subdivision (b). This section recognizes that many powers of attorney are given and accepted as a gratuitous accommodation for the principal by the agent. The principal wants someone to have the ability to act if something needs to be done, but rarely would the principal expect to impose a duty to act on a friend or family member if the agent chooses not to do so. Consequently, unless the agent has agreed to act, accepting a power of attorney designation imposes no duty to act and the named person may even renounce the designation. The person named as agent may also merely wait until the situation arises and then determine whether to act. The person may refuse to act because of personal inconvenience at the time of becoming involved, or for any other reason, and is not required to justify a decision not to act. The person named as agent may believe that there are others in a better position to act for the principal or that the situation really warrants appointment of a court-supervised guardian or conservator. However, once the agent undertakes to act under the power of attorney, the transaction is governed by the duties imposed in the law to act as a fiduciary.

See also Sections 4052 ("agent" defined), 4060 ("durable power of attorney for property" defined), 4068 ("nondurable power of attorney" defined), 4074 ("principal" defined).

#### § 4161. Standard of care

4161. Subject to a provision in the power of attorney or in a separate agreement between the principal and agent:

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

(b) If an agent is not compensated, the agent is not liable for losses to the principal's property unless the losses result from the agent's bad faith, intentional wrongdoing, or gross negligence.

(c) An agent who has special skills or expertise or was designated as an agent on the basis of representations of special skills or expertise shall observe the standard of care that would be observed by others with the similar skills or expertise.

Comment. Section 4161 is a new provision. The introductory clause recognizes that the standard of care is subject to variation in the power of attorney or by agreement between the principal and agent. This provision is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.714(1) (Vernon 1990).

Subdivisions (a) and (b) are drawn from the standard applicable to custodians under Section 3912(b) in the California Uniform Transfers to

Minors Act. See also Section 4144 (compensation of agents). The prudent person standard in subdivision (a) is generally consistent with the standard applicable under general agency law. See Restatement (Second) of Agency § 379 (1958).

Subdivision (c) is consistent with the general rule concerning expert fiduciaries stated in the cases. See the discussions in Estate of Collins, 72 Cal. App. 3d 663, 673, 139 Cal. Rptr. 644 (1977); Coberly v. Superior Court, 231 Cal. App. 2d 685, 689, 42 Cal. Rptr. 64 (1965); Estate of Beach, 15 Cal. 3d 623, 635, 542 P.2d 994, 125 Cal. Rptr. 570 (1975) (bank as executor); see also Section 4169 (agent's duty to use special skills); Comment to Section 2401 (standard of care applicable to professional guardian or conservator of estate); Comment to Section 3912 (standard of care applicable to professional fiduciary acting as custodian under California Uniform Transfers to Minors Act); Comment to Section 16040 (standard of care applicable to expert trustee).

See also Sections 4052 ("agent" defined), 4072 ("power of attorney for property" defined), 4074 ("principal" defined).

#### § 4162. Duty of loyalty

4162. When acting under a power of attorney for property, the agent has a duty to act [solely] in the interest of the principal.

Comment. Section 4162 restates the substance of part of Civil Code Section 2322(c) which formerly applied to powers of attorney. The duty of loyalty is also consistent with Civil Code Section 2306 (agent not to defraud principal). Unlike Civil Code Section 2322(c), Section 4162 is stated as an affirmative duty, rather than a prohibition against violation of a duty applicable to trustees under Section 16002. The duty of loyalty of an agent to the principal is subject to the limitations in Section 4160 relating to commencement of the duties of an agent under a power of attorney.

See also Sections 4052 ("agent" defined), 4072 ("power of attorney for property" defined), 4074 ("principal" defined).

Note. We believe that this section is unrealistic, but it is continued here for now since it appears to be existing law. At a minimum, the word "solely" should probably be deleted. Missouri law provides that the agent is "under a duty to act in the interest of the principal and to avoid conflicts of interest that impair the ability . . . so to act." See Mo. Ann. Stat. § 404.714(1) (Vernon 1990). Consider the following provision from Illinois law:

*An agent who acts with due care for the benefit of the principal shall not be liable or limited merely because the agent also benefits from the act, has individual or conflicting interests in relation to the property, care or affairs of the principal or acts in a different manner with respect to the agency and the agent's individual interests.*

Ill. Ann. Stat. ch. 110½ ¶ 802-7 (Smith-Hurd Supp. 1990).

**§ 4163. Duty to avoid conflict of interest**

4163. (a) The agent has a duty not to use or deal with the principal's property for the agent's own profit or for any other purpose unconnected with the power of attorney for property, nor to take part in any transaction in which the agent has an interest adverse to the principal.

(b) The agent may not enforce any claim against the principal's property that the agent purchased after or in contemplation of designation as agent, but the court may allow the agent to be reimbursed from the principal's property the amount that the agent paid in good faith for the claim.

(c) A transaction between the agent and the principal that occurs during the existence of the power of attorney or while the agent's influence with the principal remains and by which the agent obtains an advantage from the principal is presumed to be a violation of the agent's fiduciary duties. This presumption is a presumption affecting the burden of proof. This subdivision does not apply to the provisions of an agreement between an agent and a principal relating to the hiring or compensation of the agent.

**Comment.** Section 4163 restates part of Civil Code Section 2322(c) which formerly applied to powers of attorney. Unlike Civil Code Section 2322(c), Section 4163 is stated as an affirmative duty, rather than a prohibition against violation of a duty applicable to trustees under Section 16004. The duty to avoid conflicts of interest is consistent with Civil Code Section 2306.

See also Sections 4052 ("agent" defined), 4072 ("power of attorney for property" defined), 4074 ("principal" defined).

**Note.** The Comment asserts that this section is consistent with Civil Code Section 2306. Section 2306 is an odd section which asserts the not very startling rule that an agent does not have authority to defraud the principal. The staff has not felt it necessary to provide such an obvious rule in this draft.

**§ 4164. Duty not to undertake adverse responsibilities**

4164. The agent under a power of attorney for one principal has a duty not to knowingly become an agent under a power of attorney for another principal where the interest of one principal is adverse in its nature to the interest of the other principal. The agent has a duty to eliminate the conflict or resign as agent when the conflict is discovered.

Comment. Section 4164 restates part of Civil Code Section 2322(c) which formerly applied to powers of attorney. Unlike Civil Code Section 2322(c), Section 4164 is stated as an affirmative duty, rather than a prohibition against violation of the duty applicable to trustees under Section 16005.

See also Sections 4052 ("agent" defined), 4072 ("power of attorney for property" defined), 4074 ("principal" defined).

**§ 4165. Duty to keep principal's property separate and identified**

4165. (a) The agent shall keep the principal's property separate and distinct from other property and accounts in a manner adequate to identify the property clearly as belonging to the principal.

(b) An agent holding property for a principal complies with subdivision (a) if the property is held in the name of the principal or in the name of the agent as agent for the principal.

Comment. Section 4165 is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.712 (Vernon 1990). This section is consistent with the general agency rule in Civil Code Section 2322(c) which formerly applied to powers of attorney. Unlike Civil Code Section 2322(c), Section 4165 is stated as an affirmative duty, rather than a prohibition against violation of a duty applicable to trustees under Section 16009.

See also Sections 4052 ("agent" defined), 4074 ("principal" defined).

**§ 4166. Duty to keep principal informed and follow instructions**

4166. On matters undertaken or to be undertaken on the principal's behalf and to the extent reasonably possible under the circumstances, an agent has a duty to keep in regular contact with the principal, to communicate with the principal, and to obtain and follow the instructions of the principal.

Comment. Section 4166 is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.714(2) (Vernon 1990). The duty to follow the principal's instructions is consistent with the general agency rule in Civil Code Sections 2019 and 2309. The duty to communicate with the principal is consistent with the general agency rule in Civil Code Sections 2020 and 2332. Section 4166 supersedes the general agency rule in Civil Code Section 2320 (power to disobey instructions), to the extent it applied to powers of attorney.

See also Sections 4052 ("agent" defined), 4074 ("principal" defined).

**§ 4167. Consultation**

4167. If, following execution of a power of attorney, the principal is absent or becomes wholly or partially incapacitated, or if

there is a question with regard to the ability or capacity of the principal to give instructions to and supervise the acts and transactions of the agent, an agent exercising authority under a power of attorney for property, whether durable or nondurable, may consult with any person previously designated by the principal for this purpose, and may also consult with and obtain information from the principal's spouse, physician, attorney, accountant, any member of the principal's family, or other person, business entity, or government agency with respect to matters to be undertaken on the principal's behalf and affecting the principal's personal affairs, welfare, family, property, and business interests.

Comment. Section 4167 is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.717(4) (Vernon 1990). This section does not provide anything inconsistent with permissible practice under former law, but is intended to recognize the desirability of consultation in appropriate circumstances and provide assurance to third persons that consultation with the agent is proper and does not contravene privacy rights.

See also Sections 4060 ("durable power of attorney for property" defined), 4068 ("nondurable power of attorney" defined), 4074 ("principal" defined).

Note. The staff is uncertain whether this section is useful. As noted in the comment, it does not provide anything remarkable. It does not establish any rights or provide for enforcement of its provisions. In this respect it is advisory. Should it be retained?

§ 4168. Duty to keep records

4168. (a) The agent shall keep complete records of all transactions entered into by the agent on behalf of the principal.

(b) The agent has no duty to render an account of transactions entered into on behalf of the principal, except in either of the following circumstances:

(1) At any time requested by the principal.

(2) Where the power of attorney requires the agent to account and specifies to whom the account is to be delivered.

(b) The following persons are entitled to examine and copy the records of the agent:

(1) The principal.

(2) The guardian or conservator of the estate of the principal while the principal is living.

(3) The personal representative of the principal's estate after the death of the principal.

Comment. Section 4168 is drawn from Minnesota law. See Minn. Stat. Ann. § 523.21 (West Supp. 1990).

See also Sections 4052 ("agent" defined), 4072 ("power of attorney for property" defined), 4074 ("principal" defined).

§ 4169. Duty to use special skills

4169. (a) An agent under a power of attorney for property has a duty to apply the full extent of the agent's skills.

(b) If the principal, in selecting the agent, has relied on the agent's representation of having special skills, the agent is held to the standard of the skills represented.

Comment. Section 4169 is comparable to Section 16014 applicable to trustees.

See also Sections 4052 ("agent" defined), 4072 ("power of attorney for property" defined), 4074 ("principal" defined).

§ 4170. Duty to reveal capacity as agent

4170. An agent acting for the principal under a power of attorney for property shall clearly indicate the agent's capacity in dealing with third persons.

Comment. Section 4170 is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.712(1) (Vernon 1990). This section is consistent with the general agency rule in Civil Code Section 2322(a). For provisions concerning relations with third persons, see Section 4200 *et seq.*

See also Sections 4052 ("agent" defined), 4072 ("power of attorney for property" defined), 4074 ("principal" defined), 4084 ("third person" defined).

**Article 3. Powers of Agents**

§ 4180. General powers of agent subject to limitations in power of attorney

4180. Subject to this article, an agent under a power of attorney for property has the following powers:

(a) The powers conferred in the power of attorney.

(b) Except as limited in the power of attorney, the powers conferred by statute, including all of the powers provided an agent under a statutory form power of attorney by Chapter 5 (commencing with Section 4250).

(c) Except as limited in the power of attorney, the power to perform any act that an agent under a power of attorney would perform for the purposes of the power of attorney under the standard of care provided in Section 4161.

Comment. Section 4180 is drawn from Section 16200 governing the general powers of a trustee. The introductory clause recognizes that there are specific limitations on the general powers granted by this section. See Sections 4185 (powers that must be enumerated), 4186 (excluded powers), 4187 (exercise of powers subject to duties). Subdivision (a) is consistent with the general agency rule in Civil Code Sections 2315 and 2318. Subdivision (b) provides for a broad set of powers including all powers provided an agent under a statutory form power of attorney. See Sections 4251, 4270-4285. Subdivision (c) is comparable to an agent's authority to do "everything necessary or proper and usual, in the ordinary course of business, for effecting the purpose of his agency" provided as to agents generally in Civil Code Section 2319(1).

See also Sections 4052 ("agent" defined), 4072 ("power of attorney for property" defined).

#### § 4181. Incorporation of powers

4181. (a) Subject to any limitations expressed in the power of attorney, a power of attorney for property may grant powers to the agent by incorporating powers by reference to another statute, including, but not limited to, the following:

(1) Powers of agents provided by the Uniform Statutory Form Power of Attorney Act, Chapter 5 (commencing with Section 4250).

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

(b) Unless otherwise provided in the power of attorney, incorporation by reference to another statute includes any amendments made to the incorporated provisions after the date of execution of the power of attorney.

Comment. Section 4181 is new. See also Sections 4052 ("agent" defined), 4072 ("power of attorney for property" defined), 4074 ("principal" defined).

#### § 4182. Grant of general powers without limitation

4182. If a power of attorney for property provides that general powers are granted to the agent and does not enumerate one or more express subjects or purposes for which general powers are conferred, the authority of the agent acting under the power of attorney includes



every action or power that an adult having the capacity to contract may carry out through an agent specifically authorized to take the action, with respect to any and all matters, except as provided in Sections 4185 and 4186.

Comment. Section 4182 is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.710(2) (Vernon 1990). Section 4185 lists actions that must be specifically authorized, and thus are not included in general powers. Section 4186 lists actions that may not be accomplished through a power of attorney.

See also Sections 4052 ("agent" defined), 4072 ("power of attorney for property" defined), 4074 ("principal" defined).

#### § 4183. Grant of general powers for express purposes

4183. If a power of attorney for property states that general powers are granted to an agent with respect to one or more express subjects or purposes for which general powers are conferred, the authority of the agent acting under the power of attorney includes every action or power, with respect to the specific subjects or purposes expressed in the power of attorney, that an adult with capacity to contract may carry out through an agent specifically authorized to take the action, with respect to any and all matters, except as provided in Sections 4185 and 4186.

Comment. Section 4183 is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.710(3) (Vernon 1990). Section 4185 lists actions that must be specifically authorized, and thus are not included in general powers. Section 4186 lists actions that may not be accomplished through a power of attorney.

See also Sections 4052 ("agent" defined), 4072 ("power of attorney for property" defined).

#### § 4184. Effect of grant of general powers

4184. (a) Except as provided in Sections 4185 and 4186, an agent with general powers has, with respect to the subjects or purposes for which the powers are conferred, all rights, power, and authority to act for the principal that the principal would have with respect to the principal's own property as an adult with capacity to contract.

(b) Without limiting the powers provided in subdivision (a), with respect to the subjects or purposes of the power of attorney for property, an agent with general powers has all of the powers provided in the Uniform Statutory Form Power of Attorney Act, Chapter 5 (commencing with Section 4250).

**Comment.** Section 4184 is drawn in part from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.710(4) (Vernon 1990). This section is consistent with the general agency rules in Civil Code Sections 2304 (authority conferable) and 2305 (agent's capacity to do what principal may do). Section 4185 lists actions that must be specifically authorized, and thus are not included in general powers. Section 4186 lists actions that may not be accomplished through a power of attorney.

See also Sections 4052 ("agent" defined), 4072 ("power of attorney for property" defined), 4074 ("principal" defined).

**§ 4185. Powers that must be specifically enumerated**

4185. No power of attorney for property, whether durable or nondurable, and whether it grants general powers for all subjects and purposes or with respect to express subjects or purposes, may be construed to grant power or authority to an agent to perform any of the following acts unless the acts are expressly authorized in the power of attorney:

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

(b) Fund with the principal's property a trust not created by the principal.

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

(d) Disclaim a gift or devise of property to or for the benefit of the principal.

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

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

(g) Nominate a guardian or conservator for the principal.

**Comment.** Section 4185 is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.710(6) (Vernon 1990). This section is consistent with the general agency rule in Civil Code Section 2304. It should also be noted that a power of attorney for property may not effectively authorize the making of any health care decisions. See Sections 4062 ("health care" defined), 4064 ("health care decision" defined), 4186(b) (health care decisions excluded), 4310 (requirements for durable power of attorney for health care).

See also Sections 4052 ("agent" defined), 4072 ("power of attorney for property" defined), 4074 ("principal" defined).

**Note.** The Missouri section also permits an agent to authorize an autopsy or postmortem examination and to make dispositions under the

*Uniform Anatomical Gift Act. We have not included these items here because, under California law, these decisions are considered to be part of "health care." See Civil Code §§ 2434(b) (authority to make health care decisions), 2500 ¶ 7 (statutory form durable power of attorney for health care). The definition of "health care" in draft Section 4062 has been drafted to include these post-death matters. Thus, they are the exclusive monopoly of durable powers of attorney for health care, and may not be handled, even with specific authorization, by a durable power of attorney for property.*

**§ 4186. Excluded powers**

4186. No power of attorney for property, whether durable or nondurable and whether or not it delegates general powers, may grant power to an agent to do any of the following:

- (a) Make, publish, declare, amend, or revoke the principal's will.
- (b) Make health care decisions.
- (c) Require the principal, against his or her will, to take any action or refrain from taking any action.
- (d) Take any actions specifically forbidden by the principal while having the capacity to contract.

**Comment.** Section 4186 is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.710(7) (Vernon 1990). This section is consistent with the general agency rule in Civil Code Section 2304. Subdivision (a) makes clear that a durable power of attorney under this part may not authorize health care decisions. See Sections 4300-4359 (durable powers of attorney for health care).

See also Sections 4052 ("agent" defined), 4064 ("health care decision" defined), 4072 ("power of attorney for property" defined), 4074 ("principal" defined).

**§ 4187. Exercise of powers subject to duties**

4187. The grant of a power to an agent, whether by the power of attorney, by statute, or by the court, does not in itself require or permit the exercise of the power. The exercise of a power by an agent is subject to the agent's fiduciary duties.

**Comment.** Section 4187 is drawn from Section 16202 (exercise of trustee's powers). See Sections 4160-4170 (duties of agents). See also 4052 ("agent" defined), 4070 ("power of attorney" defined).

**Chapter 4. Relations with Third Persons**

**§ 4200. Third persons required to respect agent's authority**

4200. An agent acting pursuant to the provisions of a power of attorney for property granting general powers shall be accorded the

same rights and privileges with respect to the [personal welfare,] property, and business interests of the principal, and if the power of attorney enumerates some express subjects or purposes, with respect to those subjects or purposes, as if the principal were personally present and acting or seeking to act. Any provision of law and any purported waiver, consent, or agreement executed or granted by the principal to the contrary is void and unenforceable.

Comment. Section 4200 is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.710(9) (Vernon 1990). This section provides the basic rule concerning the position of an agent: that the agent acts in place of the principal, within the scope of the power of attorney, and is to be treated as if it were the principal acting.

See also Sections 4052 ("agent" defined), 4060 ("durable power of attorney for property" defined), 4068 ("nondurable power of attorney" defined), 4072 ("power of attorney for property" defined), 4074 ("principal" defined), 4084 ("third person" defined).

Note. This section also raises issue of the scope of a durable power of attorney for property in its reference to "personal welfare." See the discussion of this issue in the Note following Section 4060 (definition of durable power of attorney for property).

§ 4201. Immunities of third person

4201. Without liability to the principal or the principal's successors in interest:

(a) A third person, acting in good faith, may rely and act on a power of attorney for property.

(b) With respect to the subjects and purposes encompassed by or separately expressed in the power of attorney, a third person may rely and act on the instructions of or otherwise contract and deal with the principal's agent.

(c) In the absence of actual knowledge, as provided in Section 4206, a third person is not responsible for determining and has no duty to inquire as to any of the following:

(1) The authenticity of a certified true copy of a power of attorney furnished by the agent.

(2) The validity of the designation of the agent.

(3) Whether the agent is qualified to act as an agent for the principal.

(4) The propriety of any act of the agent on the principal's behalf.

(5) Whether any future event, condition, or contingency making effective or terminating the authority conferred in a power of attorney has occurred.

(6) Whether the principal is incapacitated or has been adjudicated incapacitated.

(7) Whether the principal, the principal's legal representative, or a court has given the agent any instructions or the content of any instructions, or whether the agent is following any instructions received.

(8) Whether the authority granted in a power of attorney has been modified by the principal, a legal representative of the principal, or a court.

(9) Whether the authority of the agent has been terminated, except by an express provision in the power of attorney showing the date on which the power of attorney terminates.

(10) Whether the power of attorney, or any modification or termination thereof, has been recorded, except as to transactions affecting real estate.

(11) Whether the principal had legal capacity to execute the power of attorney at the time the power of attorney was executed.

(12) Whether, at the time the principal executed the power of attorney, the principal was subjected to duress, undue influence, or fraud, or the power of attorney was for any other reason void or voidable, if the power of attorney appears to be regular on its face.

(13) Whether the principal is alive.

(14) Whether the principal and agent were married at or after the time the power of attorney was created and whether the marriage has been dissolved or annulled.

(15) The truth or validity of any facts or statements made in an affidavit of the agent or successor with regard to the ability or capacity of the principal, the authority of the agent under the power of attorney, the happening of any event vesting authority in any successor or alternate agent, the identity or authority of a person designated in the power of attorney to designate a successor or alternate agent, or that the principal is alive.

Comment. Section 4201 is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.719(1) (Vernon 1990).

See also Sections 4052 ("agent" defined), 4072 ("power of attorney for property" defined), 4074 ("principal" defined), 4084 ("third person" defined).

**§ 4202. Reliance by third person on general powers**

4202. A third person may freely rely on, contract with, and deal with an agent delegated general powers under a power of attorney for property with respect to the subjects and purposes encompassed or expressed in the power of attorney without regard to whether the power of attorney expressly identifies the specific property, account, security, storage facility, or matter as being within the scope of a subject or purpose contained in the power of attorney, and without regard to whether the power of attorney expressly authorizes the specific act, transaction, or decision by the agent.

**Comment.** Section 4202 is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.710(8) (Vernon 1990).

See also Sections 4052 ("agent" defined), 4060 ("durable power of attorney for property" defined), 4068 ("nondurable power of attorney" defined), 4072 ("power of attorney for property" defined), 4084 ("third person" defined).

**§ 4203. Effect of death or incapacity of principal**

4203. (a) The death of a principal who has executed a power of attorney for property, whether durable or nondurable, does not revoke or terminate the agency as to the agent or a third person who, without actual knowledge of the principal's death, acts in good faith under the power of attorney. Any action so taken, unless otherwise invalid or unenforceable, binds the principal's successors in interest.

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

**Comment.** Section 4203 continues former Civil Code Section 2403 without substantive change. "Agent" has been substituted for "attorney in fact." See Section 4052 ("agent" defined). This section is the same in substance as the official text of Section 4 of The Uniform Durable Power of Attorney Act (1979), Uniform Probate Code Section

5-504 (1989), except that the reference to the principal's "disability" is omitted. Under Section 4132, it is the principal's incapacity to contract which would otherwise terminate the power of attorney.

See also Sections 4052 ("agent" defined), 4060 ("durable power of attorney for property" defined), 4068 ("nondurable power of attorney" defined), 4072 ("power of attorney for property" defined), 4074 ("principal" defined), 4084 ("third person" defined).

*Note.* This section uses the word "agency" which is not defined. See also draft Section 4070 ("power of attorney" defined). We have retained this usage since it comes from the Uniform Act and is not really confusing in context. "Agency" is vague, however, since it is not always possible to tell whether it refers to the authority of a particular agent or to the power of attorney. Draft Sections 4131 and 4148 distinguish between these concepts.

**§ 4204. Affidavit of lack of knowledge of termination of power**

4204. (a) As to acts undertaken in good faith reliance thereon, an affidavit executed by the agent under a power of attorney for property, whether durable or nondurable, stating that, at the time of the exercise of the power, the agent did not have actual knowledge of the termination of the power of attorney or the agent's authority by revocation or of the principal's death or incapacity is conclusive proof of the nonrevocation or nontermination of the power at that time. If the exercise of the power of attorney requires execution and delivery of any instrument that is recordable, the affidavit when authenticated for record is likewise recordable.

(b) If the agent furnishes an affidavit pursuant to subdivision (a), whether voluntarily or on demand, a third person dealing with the agent who refuses to accept the exercise of an agent's power covered by the affidavit is liable for attorney's fees incurred in an action or proceeding necessary to confirm the agent's qualifications or powers, unless the court determines that the third person believed in good faith that the agent was not qualified or was attempting to exceed or improperly exercise the agent's powers.

(c) A third person's failure to demand an affidavit under subdivision (a) does not affect the protection provided the third person by this chapter, and no inference as to whether a third person has acted in good faith may be drawn from the failure to demand an affidavit from the agent.

(d) This section does not affect any provision in a power of

attorney for its termination by expiration of time or occurrence of an event other than express revocation or a change in the principal's capacity.

Comment. Subdivisions (a) and (d) of Section 4204 continue former Civil Code Section 2404 without substantive change. "Agent" has been substituted for "attorney in fact." See Section 4052 ("agent" defined). A reference to the agent's authority has also been added in subdivision (a) for consistency with other provisions in this part. See, e.g., Section 4148 (termination of agent's authority). Subdivisions (a) and (d) are the same as the official text of Section 5 of the Uniform Durable Power of Attorney Act (1979), Uniform Probate Code Section 5-505 (1989), except that the reference to the principal's "disability" is omitted. Under Section 4132, it is the principal's incapacity to contract which would otherwise terminate the power of attorney.

Subdivisions (b) and (c) are analogous to the rule applicable to third persons dealing with trustees. See Section 18100.5(c)-(d) (reliance on trustee's affidavit, liability for attorney's fees) [as tentatively proposed in the *Tentative Recommendation Relating to Recognition of Trustees' Powers*]. Unless the court determines that the third person refused in good faith to rely on the agent's affidavit, subdivision (b) imposes liability on the third person for attorney's fees in a proceeding needed to confirm exercise of a power. This provision is intended to make agents' powers more effective and avoid the need to seek judicial confirmation of the existence of a power. The liability under subdivision (b) applies only where the agent gives an affidavit, whether voluntarily or on demand. If the agent has not executed an affidavit, a third person may refuse to recognize the agent's power even though the third person would be fully protected under Section 18100.

Subdivision (c) makes clear that the failure to require the agent to execute an affidavit does not affect the protection provided by Section 18100, and no inference as to whether a third person has acted in good faith should be drawn from the failure to request an affidavit from the agent. Consequently, a third person who satisfies the requirements of Section 18100 is fully protected. The availability of the affidavit procedure in this section is not intended in any way to detract from the general protection provided in Section 18100.

See also Sections 4052 ("agent" defined), 4060 ("durable power of attorney for property" defined), 4068 ("nondurable power of attorney" defined), 4072 ("power of attorney for property" defined), 4074 ("principal" defined).

Note. *Draft Section 4204 is comparable to the rule proposed for trusts in the Tentative Recommendation Relating Recognition of Trustees' Powers rather than the rule proposed for statutory forms in the Tentative Recommendation Relating to Recognition of Agent's Authority Under Statutory Form Power of Attorney. The stricter rule applicable to the statutory form is justified on the grounds that the statutory form is simple and easily examined and that its concepts are fleshed out in readily available statutory language. A hand-drawn power of attorney is more analogous to a trust, and it is appropriate to provide a bit more leeway for third persons who are expected to accept the authority of the agent.*



The draft section is also in line with the following provision from Illinois law:

Each person to whom a direction by the agent in accordance with the terms of the agency is communicated shall comply with that direction, and any person who fails to comply arbitrarily or without reasonable cause shall be subject to civil liability for any damages resulting from noncompliance.

See Ill. Ann. Stat. ch. 110<sup>1/2</sup> ¶ 802-8 (Smith-Hurd Supp. 1990).

**§ 4205. Identification of agent**

4205. A third person, when requested to engage in transactions with an agent on behalf of the principal, may require the agent to provide specimens of the agent's signature and any other information reasonably necessary or appropriate to facilitate the actions of the third person in transacting business with the agent.

**Comment.** Section 4205 is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.719(4) (Vernon 1990).

See also Sections 4052 ("agent" defined), 4074 ("principal" defined), 4084 ("third person" defined).

**§ 4206. When knowledge of employees charged to third person**

4206. A third person who conducts activities through employees is not charged under this chapter with actual knowledge of any fact relating to a power of attorney for property, nor of a change in the authority of an agent, unless both of the following requirements are satisfied:

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

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

**Comment.** Section 4206 is a new provision drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.719(3) (Vernon 1990).

See also Sections 4052 ("agent" defined), 4072 ("power of attorney for property" defined), 4084 ("third person" defined).

**§ 4207. Knowledge where principal is "absentee"**

4207. For the purposes of this chapter, in the case of a principal who is an absentee as defined in Section 1403, an agent or

third person shall be deemed to be without actual knowledge of the following:

(a) The principal's death or incapacity while the absentee continues in missing status and until the agent or third person receives notice of the determination of the absentee's death by the secretary concerned or the head of the department or agency concerned or the delegate of the secretary or head.

(b) Revocation by the principal during the period described in subdivision (a).

Comment. Section 4207 continues without substantive change the part of Civil Code Section 2357 that related to powers of attorney involving federal absentees. References to "agent or third person" have been substituted for the former references to "person" for clarity and conformity with the language of this division.

See also Sections 1403 ("absentee" defined), 1440 ("secretary concerned" defined), 4052 ("agent" defined), 4074 ("principal" defined), 4084 ("third person" defined).

**§ 4208. Protection of third person relying in good faith on durable power of attorney for property**

4208. (a) A third person who acts in good faith reliance on a power of attorney for property, whether durable or nondurable, is not liable to the principal or to any other person for so acting if all of the following requirements are satisfied:

(1) The power of attorney is presented to the third person by the agent designated in the power of attorney.

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

(3) The power of attorney includes a notary public's certificate of acknowledgment.

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

Comment. Section 4208 continues former Civil Code Section 2512, insofar as it applied to powers of attorney for property, without substantive change. "Agent" has been substituted for "attorney in fact." See Section 4052 ("agent" defined). This section is intended to ensure that a power of attorney for property, whether durable or nondurable, will be accepted and relied upon by third persons.

Section 4208 gives a third person immunity from liability only if all of the following requirements are satisfied:

(1) The third person must act in good faith reliance on the power of attorney.

(2) The person presenting the power of attorney must actually be the agent designated in the power of attorney. If the person purporting to be the agent is an imposter, the immunity does not apply.

(3) The power of attorney must appear to be valid on its face and must include a notary public's certificate of acknowledgment. The third person can rely in good faith upon the notary public's certificate of acknowledgment that the person who executed the power of attorney is the principal.

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

For other immunity provisions not affected by Section 4208, see, e.g., Sections 4124(c) (reliance in good faith upon durable power of attorney not containing "warning" statement required by Section 4124), 4201 (immunities of third person), 4202 (reliance by third person on general powers), 4203 (lack of knowledge of death or incapacity of principal). See also Prob. Code § 3720 ("Any person who acts in reliance upon the power of attorney of an absentee as defined in Probate Code Section 1403 when accompanied by a copy of a certificate of missing status is not liable for relying or acting upon the power of attorney."). Section 4208 does not apply to health care providers. See Sections 4100 (application of part), 4330 (immunities of health care provider).

See also Sections 4052 ("agent" defined), 4060 ("durable power of attorney for property" defined), 4068 ("nondurable power of attorney" defined), 4072 ("power of attorney for property" defined), 4084 ("third person" defined).

**§ 4209. Effect of contractual provision for notice**

4209. (a) This chapter does not preclude a third person from providing in a contract with the principal as to the procedure that shall be followed by the principal or the principal's agent in order to give a valid notice to the third person of any modification or termination of the designation of an agent by the principal under a power of attorney for property. A contractual provision for notice under this subdivision is valid and binding on the principal and the principal's successors as long as the contractual provision is reasonably capable of being carried out.

(b) A third person, when requested to engage in transactions with an agent on the principal's behalf, may prescribe the place and manner

in which the third person will be given any notice respecting the power of attorney for property and the time within which the third person is required to comply with any notice.

**Comment.** Section 4209 is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. §§ 404.710(10), 404.719(4) (Vernon 1990).

See also Sections 4052 ("agent" defined), 4072 ("power of attorney for property" defined), 4074 ("principal" defined), 4084 ("third person" defined).

**§ 4210. Liability between principal and third person**

4210. (a) As between the principal and a third person:

(1) The authority granted in a power of attorney terminates on the date of termination, if any, set out in the power of attorney or on the date when the third person acquires actual knowledge of the death of the principal or that the authority granted in the power of attorney has been suspended, modified, or terminated.

(2) The acts and transactions of an agent are binding on the principal and the principal's successors in interest in any situation in which a third person is entitled to rely under this chapter.

(b) This section does not prohibit the principal and a third person from entering into a written agreement that sets forth their duties and liabilities as between themselves and their successors, and which expands or limits the application of this chapter, except that an agreement may not limit or restrict the right of the principal to act with respect to the third person through an agent designated in a durable power of attorney.

**Comment.** Section 4210 is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.721 (Vernon 1990).

See also Sections 4052 ("agent" defined), 4072 ("power of attorney for property" defined), 4074 ("principal" defined), 4084 ("third person" defined).

Chapter 5. Uniform Statutory Form Power of Attorney

Note. This chapter continues Civil Code Sections 2450 and 2475-2499.5 which were enacted on Commission recommendation in the 1990 legislative session. See 1990 Cal. Stat. ch. 986 [SB 1777]. This chapter also includes the section proposed in the Commission's Tentative Recommendation Relating to Recognition of Agent's Authority Under Statutory Form Power of Attorney (September 1990). Some reorganization has been done, as explained in the Comments.

Article 1. General Provisions

§ 4250. Short title

4250. This chapter may be cited as the Uniform Statutory Form Power of Attorney Act.

Comment. Section 4250 continues former Civil Code Section 2482 without change. This chapter is substantially the same as the Uniform Statutory Form Power of Attorney Act (1988). Section 4250 is the same as Section 19 of the Uniform Act. As to the construction of uniform acts, see Section 2. See also Section 11 (severability of provisions).

§ 4251. Statutory form power of attorney

4251. The following statutory form power of attorney is legally sufficient when the requirements of Section 4252 are satisfied:

UNIFORM STATUTORY FORM POWER OF ATTORNEY
(California Probate Code § 4251)

NOTICE: THE POWERS GRANTED BY THIS DOCUMENT ARE BROAD AND SWEEPING. THEY ARE EXPLAINED IN THE UNIFORM STATUTORY FORM POWER OF ATTORNEY ACT (CALIFORNIA PROBATE CODE SECTIONS 4250-4285). IF YOU HAVE ANY QUESTIONS ABOUT THESE POWERS, OBTAIN COMPETENT LEGAL ADVICE. THIS DOCUMENT DOES NOT AUTHORIZE ANYONE TO MAKE MEDICAL AND OTHER HEALTH-CARE DECISIONS FOR YOU. YOU MAY REVOKE THIS POWER OF ATTORNEY IF YOU LATER WISH TO DO SO.

I \_\_\_\_\_
(your name and address)
appoint \_\_\_\_\_

(name and address of the person appointed, or of each person appointed if you want to designate more than one)

as my agent (attorney in fact) to act for me in any lawful way with respect to the following initialed subjects:

TO GRANT ALL OF THE FOLLOWING POWERS, INITIAL THE LINE IN FRONT OF (N) AND IGNORE THE LINES IN FRONT OF THE OTHER POWERS.

TO GRANT ONE OR MORE, BUT FEWER THAN ALL, OF THE FOLLOWING POWERS, INITIAL THE LINE IN FRONT OF EACH POWER YOU ARE GRANTING.

TO WITHHOLD A POWER, DO NOT INITIAL THE LINE IN FRONT OF IT. YOU MAY, BUT NEED NOT, CROSS OUT EACH POWER WITHHELD.

INITIAL

- \_\_\_\_\_ (A) Real property transactions.
- \_\_\_\_\_ (B) Tangible personal property transactions.
- \_\_\_\_\_ (C) Stock and bond transactions.
- \_\_\_\_\_ (D) Commodity and option transactions.
- \_\_\_\_\_ (E) Banking and other financial institution transactions.
- \_\_\_\_\_ (F) Business operating transactions.
- \_\_\_\_\_ (G) Insurance and annuity transactions.
- \_\_\_\_\_ (H) Estate, trust, and other beneficiary transactions.
- \_\_\_\_\_ (I) Claims and litigation.
- \_\_\_\_\_ (J) Personal and family maintenance.
- \_\_\_\_\_ (K) Benefits from social security, medicare, medicaid, or other governmental programs, or civil or military service.
- \_\_\_\_\_ (L) Retirement plan transactions.
- \_\_\_\_\_ (M) Tax matters.
- \_\_\_\_\_ (N) ALL OF THE POWERS LISTED ABOVE.

YOU NEED NOT INITIAL ANY OTHER LINES IF YOU INITIAL LINE (N).

**SPECIAL INSTRUCTIONS:**

ON THE FOLLOWING LINES YOU MAY GIVE SPECIAL INSTRUCTIONS LIMITING OR EXTENDING THE POWERS GRANTED TO YOUR AGENT.

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UNLESS YOU DIRECT OTHERWISE ABOVE, THIS POWER OF ATTORNEY IS EFFECTIVE IMMEDIATELY AND WILL CONTINUE UNTIL IT IS REVOKED.

This power of attorney will continue to be effective even though I become incapacitated.

STRIKE THE PRECEDING SENTENCE IF YOU DO NOT WANT THIS POWER OF ATTORNEY TO CONTINUE IF YOU BECOME INCAPACITATED.

EXERCISE OF POWER OF ATTORNEY WHERE MORE THAN ONE AGENT DESIGNATED

If I have designated more than one agent, the agents are to act \_\_\_\_\_.

IF YOU APPOINTED MORE THAN ONE AGENT AND YOU WANT EACH AGENT TO BE ABLE TO ACT ALONE WITHOUT THE OTHER AGENT JOINING, WRITE THE WORD "SEPARATELY" IN THE BLANK SPACE ABOVE. IF YOU DO NOT INSERT ANY WORD IN THE BLANK SPACE, OR IF YOU INSERT THE WORD "JOINTLY", THEN ALL OF YOUR AGENTS MUST ACT OR SIGN TOGETHER.

I agree that any third party who receives a copy of this document may act under it. Revocation of the power of attorney is not effective as to a third party until the third party has actual knowledge of the revocation. I agree to indemnify the third party for any claims that arise against the third party because of reliance on this power of attorney.

Signed this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_

\_\_\_\_\_  
(your signature)

\_\_\_\_\_  
(your social security number)

State of \_\_\_\_\_

County of \_\_\_\_\_

CERTIFICATE OF ACKNOWLEDGMENT OF NOTARY PUBLIC

State of California )

) ss.

County of \_\_\_\_\_)

On this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_ before me, \_\_\_\_\_, personally appeared \_\_\_\_\_ (name of notary public) \_\_\_\_\_ (name of

\_\_\_\_\_, personally known to me (or proved to me principal)

on the basis of satisfactory evidence) to be the person whose name is subscribed to this instrument, and acknowledged that he or she executed it.

NOTARY SEAL

\_\_\_\_\_  
(signature of notary public)

BY ACCEPTING OR ACTING UNDER THE APPOINTMENT, THE AGENT ASSUMES THE FIDUCIARY AND OTHER LEGAL RESPONSIBILITIES OF AN AGENT.

Comment. Section 4251 continues former Civil Code Section 2475 without change, except for the revision of cross-references to other provisions. Section 4251 is the same in substance as Section 1(a) of the Uniform Statutory Form Power of Attorney Act (1988), with the addition of provisions to permit designation of co-agents.

The provisions added by former Civil Code Section 2475 were drawn from the former Statutory Short Form Power of Attorney statute. See former Civil Code § 2450 (repealed by 1990 Cal. Stat. ch. 986, § 1). The acknowledgment portion of the form was revised to be consistent with the form used under California law. The word "incapacitated" was substituted for the words "disabled, incapacitated, or incompetent" used in the Uniform Act. This substitution conforms the statutory form to the California version of the Uniform Durable Power of Attorney Act. See Section 4122 requirements for creation of durable power of attorney).

Section 4251 provides the text of the form that is sufficient and necessary to bring this chapter into operation. The statutory form can be used in whole or part instead of individually drafted forms or forms adapted from a form book.

A form used to create a power of attorney subject to this chapter should use the language provided in Section 4251. Minor variances in wording will not take it out of the scope of the chapter. For example, the use of the language of the official text of the Uniform Act in the last paragraph of the text of the statutory form (protection of third party who receives a copy of the statutory form power of attorney and acts in reliance on it) instead of the language provided in Section 4251 does not take the form out of the scope of this chapter. See



Section 4252(a). Nor does the omission of the provisions relating to designation of co-agents take the form out of the scope of this chapter. See Section 4252(a).

After the introductory phrase, the term "agent" is used throughout the Uniform Act in place of the longer and less familiar "attorney in fact." Special effort is made throughout the Uniform Act to make the language as informal as possible without impairing its effectiveness.

The statutory form contains a list of powers. The powers listed relate to various separate classes of activities, except the last, which includes all the others. Health care matters are not included. See Sections 4062 ("health care" defined), 4064 ("health care decision" defined), 4100 (scope of this part). For a durable power of attorney form for health care matters, see Sections 4351.

Space is provided in the statutory form for "Special Instructions." In this space, the principal can add specially drafted provisions limiting or extending the powers granted to the agent. (If the space provided is not sufficient, a reference can be made in this space to an attached sheet or sheets, and the special provisions can be included on the attached sheet or sheets.)

The statutory form contains only a limited list of powers. If it is desired to give the agent the broadest possible powers, language similar to the following can be added under the "Special Instructions" portion of the form:

In addition to all of the powers listed in lines (A) to (M) above, I grant to my agent full power and authority to act for me, in any way which I myself could act if I were personally present and able to act, with respect to all other matters and affairs not listed in lines (A) to (M) above, but this authority does not include authority to make health care decisions.

Neither the form in this section, nor the constructional provisions in Sections 4270-4284, attempt to allow the grant of the power to make a will or to give the agent extensive estate planning authority, although several of the powers, especially lines (G), (H), and (L) of the statutory form, may be useful in planning the disposition of an estate. An individually tailored power of attorney can be used if the principal wants to give the agent extensive estate planning authority, or additional estate planning powers can be granted to the agent by stating those additional powers in the space provided in the form for "Special Instructions." For example, provisions like the following might be included under the special instructions portion of the statutory form:

In addition to the powers listed in lines (A) to (M) above, the agent is empowered to do all of the following:

(1) Establish a trust with property of the principal for the benefit of the principal and the spouse and descendants of the principal, or any one or more of them, upon such terms as the agent determines are necessary or proper, and transfer any property in which the principal has an interest to the trust.

(2) Exercise in whole or in part, release, or let lapse any power the principal may have under any trust whether or

not created by the principal, including any power of appointment, revocation, or withdrawal, but a trust created by the principal may only be modified or revoked by the agent as provided in the trust instrument.

(3) Make a gift, grant, or other transfer without consideration to or for the benefit of the spouse or descendants of the principal or a charitable organization, or more than one or all of them, either outright or in trust, including the forgiveness of indebtedness and the completion of any charitable pledges the principal may have made; consent to the splitting of gifts under Internal Revenue Code Section 2513, or successor sections, if the spouse of the principal makes gifts to any one or more of the descendants of the principal or to a charitable institution; pay any gift tax that may arise by reason of those gifts.

(4) Loan any of the property of the principal to the spouse or descendants of the principal, or their personal representatives or a trustee for their benefit, the loan bearing such interest, and to be secured or unsecured, as the agent determines advisable.

(5) In general, and in addition to all the specific acts enumerated, do any other act which the principal can do through an agent for the welfare of the spouse, children, or dependents of the principal or for the preservation and maintenance of other personal relationships of the principal to parents, relatives, friends, and organizations.

It should be noted that a trust may not be modified or revoked by an agent under a statutory form power of attorney unless it is expressly permitted by the instrument granting the power and by the trust instrument. See Section 15401(b).

Section 4254 and the statutory form itself make the power of attorney a durable power of attorney, remaining in effect after the incapacity of the principal, unless the person executing the form strikes out the language in the form that makes the instrument a durable power of attorney. See also Sections 4060 ("durable power of attorney for property" defined), 4068 ("nondurable power of attorney" defined).

The last paragraph of the text of the statutory form protects a third party who receives a copy of the statutory form power of attorney and acts in reliance on it. See also Section 4084 ("third person" defined). The statement in the statutory form -- that revocation of the power of attorney is not effective as to a third party until the third party has actual knowledge of the revocation -- is consistent with Sections 4203 (good faith reliance on power of attorney without actual knowledge of death or incapacity of principal), 4204 (affidavit of lack of knowledge of termination of power). See also Sections 4200 (third persons required to respect agent's authority), 4201 (immunities of third person), 4208 (protection of person who acts in good faith reliance upon power of attorney where specified requirements are satisfied). The protection provided by these sections and other immunities that may protect persons who rely on a power of attorney (see Section 4208(b)) apply to a statutory form power of attorney. See Section 4100 (application of part to statutory form power of attorney).

The language of the last portion of the text of the statutory form set out in Section 4251 substitutes the phrase "has actual knowledge of the revocation" for the phrase "learns of the revocation" which is used in the Uniform Act form. This substitution does not preclude use of a form including the Uniform Act language. See Section 4252(a) (third sentence).

Neither this section, nor the chapter as a whole, attempts to provide an exclusive method for creating a power of attorney. Other forms may be used and other law employed to create powers of attorney. See Section 4258. However, this chapter should be sufficient for most purposes.

For provisions relating to court enforcement of the duties of the agent, see Sections 4400-4460.

The form provided by Section 4251 supersedes the former statutory short form power of attorney under former Civil Code Sections 2450-2473 (repealed by 1990 Cal. Stat. ch. 986, § 1). But older forms consistent with former Civil Code Sections 2450-2473 are still effective. See Section 4259 & Comment.

See also Sections 4052 ("agent" defined), 4074 ("principal" defined), 4082 ("statutory form power of attorney" defined), 4084 ("third person" defined).

**§ 4252. Requirements for statutory form power of attorney**

4252. A statutory form power of attorney under this chapter is legally sufficient if all of the following requirements are satisfied:

(a) The wording of the form complies substantially with Section 4251. A form does not fail to comply substantially with Section 4251 merely because the form does not include the provisions of Section 4251 relating to designation of co-agents. A form does not fail to comply substantially with Section 4251 merely because the form uses the sentence "Revocation of the power of attorney is not effective as to a third party until the third party learns of the revocation" in place of the sentence "Revocation of the power of attorney is not effective as to a third party until the third party has actual knowledge of the revocation," in which case the form shall be interpreted as if it contained the sentence "Revocation of the power of attorney is not effective as to a third party until the third party has actual knowledge of the revocation."

(b) The form is properly completed.

(c) The signature of the principal is acknowledged.

**Comment.** Section 4252 continues former Civil Code Section 2476 without change, except for the revision of cross-references to other provisions. Section 4252 is the same in substance as Section 1(b) of the Uniform Statutory Form Power of Attorney Act (1988) with the

addition of the second and third sentences of subdivision (a). The added sentences make clear that use of a form that complies with the requirements of the official text of the Uniform Act satisfies the requirements of this section, even though the form used does not include the provisions included in Section 4251 for designation of co-agents and even though the form uses the language "learns of the revocation."

See also Sections 4052 ("agent" defined), 4074 ("principal" defined), 4084 ("third person" defined).

**§ 4253. Effect of initialing line in front of (N) in statutory form**

4253. If the line in front of (N) of the statutory form under Section 4251 is initialed, an initial on the line in front of any other power does not limit the powers granted by line (N).

**Comment.** Section 4253 continues former Civil Code Section 2479 without change, except for the revision of a cross-reference to another provision. Section 4253 is the same in substance as subsection (c) of Section 1 of the Uniform Statutory Form Power of Attorney Act (1988).

**§ 4254. Durability of statutory form power of attorney**

4254. A statutory form power of attorney legally sufficient under this chapter is durable to the extent that the power of attorney contains language, such as "This power of attorney will continue to be effective even though I become incapacitated," showing the intent of the principal that the power granted may be exercised notwithstanding later incapacity.

**Comment.** Section 4254 continues former Civil Code Section 2478 without substantive change. Section 4254 is the same in substance as Section 2 of the Uniform Statutory Form Power of Attorney Act (1988). The phrase "to the extent that durable powers are permitted by other law of this State," found in the Uniform Act, has been omitted as unnecessary. Durable powers of attorney are specifically authorized by Part 2 (commencing with Section 4100). The words "incapacitated" and "incapacity" are used in Section 4254 to conform to the form used in Section 4251 and to Section 4122 (California version of the Uniform Durable Power of Attorney Act).

A durable power of attorney under this chapter continues in effect when the principal becomes incapacitated. The form in Section 4251 includes a provision for continuance under those circumstances. That provision may be used or stricken at the discretion of the principal. The provision is consistent with Section 4122 (Uniform Durable Power of Attorney Act). See also Sections 4123 (effect of acts by agent during incapacity of principal), 4203 (good faith reliance upon power of attorney after death or incapacity of principal). As to the effect of appointment of a conservator of the estate, guardian of the estate, or other fiduciary charged with the management of the principal's property, see Section 4146.

See also Sections 4060 ("durable power of attorney for property" defined), 4074 ("principal" defined), 4082 ("statutory form power of attorney" defined).

**§ 4255. Springing statutory form power of attorney**

4255. (a) A statutory form power of attorney under this chapter that limits the power to take effect upon the occurrence of a specified event or contingency, including but not limited to the incapacity of the principal, may contain a provision designating one or more persons who, by a written declaration under penalty of perjury, have the power to determine conclusively that the specified event or contingency has occurred.

(b) A statutory form power of attorney that contains the provision described in subdivision (a) becomes effective when the person or persons designated in the power of attorney execute a written declaration under penalty of perjury that the specified event or contingency has occurred, and any person may act in reliance on the written declaration without liability to the principal or to any other person, regardless whether the specified event or contingency has actually occurred.

(c) The provision described in subdivision (a) may be included in the "Special Instructions" portion of the form set out in Section 4251.

(d) Subdivisions (a) and (b) do not provide the exclusive method by which a statutory form power of attorney under this chapter may be limited to take effect upon the occurrence of a specified event or contingency.

**Comment.** Section 4255 continues former Civil Code Section 2479 without substantive change. Section 4255 is not found in the Uniform Statutory Form Power of Attorney Act (1988). This section is drawn from Section 5-1602 of the New York General Obligations Law. A provision described in subdivision (a) protects a third person who relies on the declaration under penalty of perjury of the person or persons designated in the power of attorney that the specified event or contingency has occurred. The principal may designate the agent or another person, or several persons, to make this declaration.

Subdivision (d) makes clear that subdivisions (a) and (b) are not the exclusive method for creating a "springing power" (a power of attorney that goes into effect upon the occurrence of a specified event or contingency). The principal is free to set forth in a power of attorney under this chapter any provision the principal desires to provide for the method of determining whether the specified event or

contingency has occurred. For example, the principal may provide that his or her "incapacity" be determined by a court under Part 4 (commencing with Section 4400). See Section 4441(a). If the power of attorney provides only that it shall become effective "upon the incapacity of the principal," the determination whether the power of attorney is in effect also may be made under Part 4 (commencing with Section 4400).

See also Sections 4074 ("principal" defined), 4078 ("springing power of attorney" defined), 4082 ("statutory form power of attorney" defined).

**§ 4256. Compelling third person to honor statutory form power of attorney; liability for attorney's fees**

4256. (a) If a third person to whom a properly executed statutory form power of attorney under this chapter is presented refuses to honor the agent's authority under the power of attorney within a reasonable time, the third person may be compelled to honor the agent's authority under the power of attorney, in an action for this purpose brought against the third person, to the same extent as the principal would be able to compel the third person to honor the authority of the principal acting in the principal's own behalf.

(b) If an action is brought under this section, the court shall award attorney's fees to the agent if the court finds that the third person acted unreasonably in refusing to accept the agent's authority under the statutory form power of attorney.

(c) For the purpose of subdivision (b) and without limiting other grounds that may constitute a reasonable refusal to accept an agent's authority under a statutory form power of attorney, a third person does not act unreasonably in refusing to accept the agent's authority in any of the following circumstances:

(1) If the refusal is authorized or required by a provision of a state or federal statute or regulation.

(2) If the refusal is authorized or required by a written provision of a contract or agreement between the third person and the principal.

(d) Notwithstanding subdivision (c), a third person's refusal to accept an agent's authority under a statutory form power of attorney under this chapter is unreasonable if the only reason for the refusal is that the power of attorney is not on a form prescribed by the third person to whom the power of attorney is presented.

**Comment.** Section 4256 continues former Civil Code Section 2480.5 [as tentatively proposed in the Commission's *Tentative Recommendation Relating to Recognition of Agent's Authority Under Statutory Form Power of Attorney*] without change. Section 4256 is not found in the Uniform Statutory Form Power of Attorney Act (1988). Subdivisions (a) and (b) are drawn in part from Section 13105(b) (compelling payment or delivery under affidavit procedure for collection or transfer of personal property of small estate). See also Section 4204 (affidavit of lack of knowledge of termination of power of attorney).

Subdivision (a) permits an agent to bring an action to compel a third person to honor a statutory form power of attorney to the same extent as the principal, disregarding any legal disability, could bring an action to compel the third person to act. Under this rule, a third person who could not be forced to do business with the principal consequently may not be forced to deal with the agent. However, a third person who holds property of the principal, who owes a debt to the principal, or who is obligated by contract to the principal may be compelled to accept the agent's authority.

In addition, as provided in subdivision (b), if the refusal to deal with the agent is found to be unreasonable, the third person will also be liable for attorney's fees incurred in the action to compel compliance. The determination of reasonableness depends on the particular circumstances of each case. A person to whom the power of attorney is presented may, for example, act reasonably in refusing to accept the agent's authority where it is not clear that the power of attorney grants the agent authority with respect to the particular transaction. Likewise, a third person may reasonably refuse to honor the power of attorney if, for example, the person is not reasonably satisfied as to the identity of the agent or has information that would lead a reasonable person to question the validity of the power of attorney. See also Section 4208 (protection of person relying in good faith).

Subdivision (c) provides some specific guidelines as to the meaning of the reasonableness rule in subdivision (b) as it relates to the liability for attorney's fees. However, subdivision (d) makes clear that an institution's preference for its own power of attorney form is never a reasonable ground for refusing to accept the authority of an agent under a properly executed and effective statutory form power of attorney.

See also Sections 4052 ("agent" defined), 4074 ("principal" defined), 4082 ("statutory form power of attorney" defined), 4084 ("third person" defined).

**§ 4257. General provisions applicable to statutory form power of attorney**

4257. Unless there is a conflicting provision in this chapter, in which case the provision of this chapter governs, the other provisions of this division applicable to powers of attorney for property apply to a statutory form power of attorney.

**Comment.** Section 4257 restates the substance of former Civil Code Section 2480. Section 4257 makes clear that the general provisions that apply to powers of attorney for property generally apply to

statutory form powers of attorney under this chapter. Accordingly, the following provisions apply to a power of attorney under this chapter:

Section 4070(b) (proxies given by agent to exercise voting rights).

Section 4122 (requirements to create durable power of attorney). The statutory form set out in Section 4251 satisfies the requirements to create a durable power of attorney unless the provision making the power of attorney durable is struck out on the form.

Section 4123 (effect of acts by agent during incapacity of principal).

Section 4128 (application of power of attorney to all or part of principal's property; unnecessary to describe items or parcels of property).

Section 4146 (effect of appointment of a conservator of the estate or other fiduciary charged with the management of the principal's property).

Section 4203 (good faith reliance on power of attorney after death or incapacity of principal).

Section 4204 (good faith reliance on agent's affidavit as conclusive proof of the nonrevocation or nontermination of the power).

Section 4208 (protection against liability of person acting in good faith reliance upon power of attorney).

Sections 4400-4460 (court enforcement of agent's duties).

See also Sections 4072 ("power of attorney for property" defined), 4082 ("statutory form power of attorney" defined).

#### § 4258. Use of other forms

4258. Nothing in this chapter affects or limits the use of any other form for a power of attorney for property. Any form that complies with the requirements of any law other than the provisions of this chapter may be used in lieu of the form set forth in Section 4251, and none of the provisions of this chapter apply if such other form is used.

Comment. Section 4258 continues former Civil Code Section 2481 without substantive change. See also Section 4072 ("power of attorney for property" defined).

#### § 4259. Use of statutory form provided by repealed statutes

4259. (a) A statutory short form power of attorney executed before, on, or after the repeal of Chapter 3 (commencing with Section 2450) of Title 9 of Part 4 of the Civil Code by Chapter 986 of the Statutes of 1990, using a form that complied with former Section 2450 of the Civil Code, as originally enacted by Chapter 602 of the Statutes of 1984, or as amended by Chapter 403 of the Statutes of 1985, is as valid as if Chapter 3 (commencing with Section 2450) of Title 9 of Part 4 of the Civil Code had not been repealed by, and former Section 2511 of the Civil Code amended by, Chapter 986 of the Statutes of 1990.



(b) A statutory form power of attorney executed before, on, or after the repeal of Chapter 3.5 (commencing with Section 2475) of Title 9 of Part 4 of the Civil Code by the act that enacted this section, using a form that complied with the repealed chapter of the Civil Code is as valid as that chapter had not been repealed.

Comment. Subdivision (a) of Section 4259 restates former Civil Code Section 2450 without substantive change. The "statutory short form power of attorney" provided by former Civil Code Section 2450 was superseded by the Uniform Statutory Form Power of Attorney. See Prob. Code §§ 4250-4285 (continuing former Civil Code §§ 2475-2499). This section permits use of the earlier forms after January 1, 1991, when the "statutory short form" was repealed. This avoids the need to discard existing printed forms and protects the unwary person who uses a printed form prepared pursuant to the former provisions. However, the new form provided by Sections 4250-4285 (and former Civil Code §§ 2475-2499) should soon replace the older forms.

Note. Further consideration should be given to whether this section can be simplified, such as by validating in general language the use of forms that complied with the statute when they were printed.

## Article 2. Construction of Powers

Comment. This article (commencing with Section 4270) explains the powers listed in the statutory form in Section 4251. Section 4270 provides general powers that apply to all of the defined classes of authority listed in lines (A) through (M) of the statutory form, subject to any conditions set by the principal.

The language in Sections 4271-4283 makes explicit reference to authority that would be appropriate for each class of transaction. The language in those sections identifies activities that are typical responsibilities for the particular class of transaction.

Any of Sections 4271-4283, together with the general authority in Section 4270, gives the agent complete power for the class of transactions. The recitation of particular powers in each section explains the scope of the individual section and assures the user of this chapter and the form provided by this chapter that the matters that are the user's particular concern are covered by the chapter. As to use of a power executed outside this state, after-acquired property, use of the power with respect to property located outside this state, and exercise of the power outside this state, see Section 4284.

A general effect of this article is that the agent can exercise authority subject to the same conditions and limitations as the principal. In a few instances the limiting conditions are made explicit. For example, in Section 4276 it is stated that partnership powers are subject to the terms of the partnership agreement. But all authority is subject to conditions of fact and law that exist outside the chapter. For example, a collection agency could not escape regulation by acting under this power of attorney. See also Section 15401 (modifying or revoking trust).

Provisions of this article grant the agent authority to enforce rights of the principal "by litigation or otherwise" or to initiate litigation or to bring an action. These grants of authority do not affect the requirement of Code of Civil Procedure Section 367 that an action be prosecuted in the name of the real party in interest.

§ 4270. Construction of powers generally

4270. By executing a statutory form power of attorney with respect to a subject listed in Section 4251, the principal, except as limited or extended by the principal in the power of attorney, empowers the agent, for that subject, to do all of the following:

(a) Demand, receive, and obtain by litigation or otherwise, money or other thing of value to which the principal is, may become, or claims to be entitled, and conserve, invest, disburse, or use anything so received for the purposes intended.

(b) Contract in any manner with any person, on terms agreeable to the agent, to accomplish a purpose of a transaction, and perform, rescind, reform, release, or modify the contract or another contract made by or on behalf of the principal.

(c) Execute, acknowledge, seal, and deliver a deed, revocation, mortgage, lease, notice, check, release, or other instrument the agent considers desirable to accomplish a purpose of a transaction.

(d) Prosecute, defend, submit to arbitration, settle, and propose or accept a compromise with respect to, a claim existing in favor of or against the principal or intervene in litigation relating to the claim.

(e) Seek on the principal's behalf the assistance of a court to carry out an act authorized by the power of attorney.

(f) Engage, compensate, and discharge an attorney, accountant, expert witness, or other assistant.

(g) Keep appropriate records of each transaction, including an accounting of receipts and disbursements.

(h) Prepare, execute, and file a record, report, or other document the agent considers desirable to safeguard or promote the principal's interest under a statute or governmental regulation.

(i) Reimburse the agent for expenditures properly made by the agent in exercising the powers granted by the power of attorney.

(j) In general, do any other lawful act with respect to the subject.

**Comment.** Section 4270 continues former Civil Code Section 2485 without change, except for the revision of a cross-reference to another provision. Section 4270 is the same in substance as Section 3 of the Uniform Statutory Form Power of Attorney Act (1988). See the Comment to this article under the article heading. See also Sections 4400-4460 (court enforcement of agent's duties).

See also Sections 4052 ("agent" defined), 4074 ("principal" defined), 4082 ("statutory form power of attorney" defined).

**§ 4271. Real property transactions**

4271. In a statutory form power of attorney, the language granting power with respect to real property transactions empowers the agent to do all of the following:

(a) Accept as a gift or as security for a loan, reject, demand, buy, lease, receive, or otherwise acquire, an interest in real property or a right incident to real property.

(b) Sell, exchange, convey with or without covenants, quitclaim, release, surrender, mortgage, encumber, partition, consent to partitioning, subdivide, apply for zoning, rezoning, or other governmental permits, plat or consent to platting, develop, grant options concerning, lease, sublease, or otherwise dispose of, an interest in real property or a right incident to real property.

(c) Release, assign, satisfy, and enforce by litigation or otherwise, a mortgage, deed of trust, encumbrance, lien, or other claim to real property which exists or is asserted.

(d) Do any act of management or of conservation with respect to an interest in real property, or a right incident to real property, owned, or claimed to be owned, by the principal, including all of the following:

(1) Insuring against a casualty, liability, or loss.

(2) Obtaining or regaining possession, or protecting the interest or right, by litigation or otherwise.

(3) Paying, compromising, or contesting taxes or assessments, or applying for and receiving refunds in connection with them.

(4) Purchasing supplies, hiring assistance or labor, and making repairs or alterations in the real property.

(e) Use, develop, alter, replace, remove, erect, or install structures or other improvements upon real property in or incident to which the principal has, or claims to have, an interest or right.

(f) Participate in a reorganization with respect to real property or a legal entity that owns an interest in or right incident to real property and receive and hold shares of stock or obligations received in a plan of reorganization, and act with respect to them, including all of the following:

(1) Selling or otherwise disposing of them.

(2) Exercising or selling an option, conversion, or similar right with respect to them.

(3) Voting them in person or by proxy.

(g) Change the form of title of an interest in or right incident to real property.

(h) Dedicate to public use, with or without consideration, easements or other real property in which the principal has, or claims to have, an interest or right.

Comment. Section 4271 continues former Civil Code Section 2486 without change. Section 4271 is the same in substance as Section 4 of the Uniform Statutory Form Power of Attorney Act (1988). See the Comment to this article under the article heading. See also Section 4270 (construction of powers generally).

See also Sections 4052 ("agent" defined), 4074 ("principal" defined), 4082 ("statutory form power of attorney" defined).

**§ 4272. Tangible personal property transactions**

4272. In a statutory form power of attorney, the language granting power with respect to tangible personal property transactions empowers the agent to do all of the following:

(a) Accept as a gift or as security for a loan, reject, demand, buy, receive, or otherwise acquire ownership or possession of tangible personal property or an interest in tangible personal property.

(b) Sell, exchange, convey with or without covenants, release, surrender, mortgage, encumber, pledge, hypothecate, create a security interest in, pawn, grant options concerning, lease, sublease to others, or otherwise dispose of tangible personal property or an interest in tangible personal property.

(c) Release, assign, satisfy, or enforce by litigation or otherwise, a mortgage, security interest, encumbrance, lien, or other claim on behalf of the principal, with respect to tangible personal property or an interest in tangible personal property.

(d) Do an act of management or conservation with respect to tangible personal property or an interest in tangible personal property on behalf of the principal, including all of the following:

(1) Insuring against casualty, liability, or loss.

(2) Obtaining or regaining possession, or protecting the property or interest, by litigation or otherwise.

(3) Paying, compromising, or contesting taxes or assessments or applying for and receiving refunds in connection with taxes or assessments.

(4) Moving from place to place.

(5) Storing for hire or on a gratuitous bailment.

(6) Using, altering, and making repairs or alterations.

**Comment.** Section 4272 continues former Civil Code Section 2487 without change. Section 4272 is the same in substance as Section 5 of the Uniform Statutory Form Power of Attorney Act (1988). See the Comment to this article under the article heading. See also Section 4270 (construction of powers generally).

See also Sections 4052 ("agent" defined), 4074 ("principal" defined), 4082 ("statutory form power of attorney" defined).

#### **§ 4273. Stock and bond transactions**

4273. In a statutory form power of attorney, the language granting power with respect to stock and bond transactions empowers the agent to do all of the following:

(a) Buy, sell, and exchange stocks, bonds, mutual funds, and all other types of securities and financial instruments except commodity futures contracts and call and put options on stocks and stock indexes.

(b) Receive certificates and other evidences of ownership with respect to securities.

(c) Exercise voting rights with respect to securities in person or by proxy, enter into voting trusts, and consent to limitations on the right to vote.

**Comment.** Section 4273 continues former Civil Code Section 2488 without change. Section 4273 is the same in substance as Section 6 of the Uniform Statutory Form Power of Attorney Act (1988). See the Comment to this article under the article heading. See also Sections 4070(b) (proxies given by agent to exercise voting rights), 4270 (construction of powers generally).

See also Sections 70 ("security" defined), 4052 ("agent" defined), 4082 ("statutory form power of attorney" defined).

**§ 4274. Commodity and option transactions**

4274. In a statutory form power of attorney, the language granting power with respect to commodity and option transactions empowers the agent to do all of the following:

(a) Buy, sell, exchange, assign, settle, and exercise commodity futures contracts and call and put options on stocks and stock indexes traded on a regulated option exchange.

(b) Establish, continue, modify, and terminate option accounts with a broker.

**Comment.** Section 4274 continues former Civil Code Section 2489 without change. Section 4274 is the same in substance as Section 7 of the Uniform Statutory Form Power of Attorney Act (1988). See the Comment to this article under the article heading. See also Section 4270 (construction of powers generally).

See also Sections 4052 ("agent" defined), 4082 ("statutory form power of attorney" defined).

**§ 4275. Banking and other financial institution transactions**

4275. In a statutory form power of attorney, the language granting power with respect to banking and other financial institution transactions empowers the agent to do all of the following:

(a) Continue, modify, and terminate an account or other banking arrangement made by or on behalf of the principal.

(b) Establish, modify, and terminate an account or other banking arrangement with a bank, trust company, savings and loan association, credit union, thrift company, industrial loan company, brokerage firm, or other financial institution selected by the agent.

(c) Hire or close a safe deposit box or space in a vault.

(d) Contract to procure other services available from a financial institution as the agent considers desirable.

(e) Withdraw by check, order, or otherwise money or property of the principal deposited with or left in the custody of a financial institution.

(f) Receive bank statements, vouchers, notices, and similar documents from a financial institution and act with respect to them.

(g) Enter a safe deposit box or vault and withdraw or add to the contents.

(h) Borrow money at an interest rate agreeable to the agent and

pledge as security personal property of the principal necessary in order to borrow, pay, renew, or extend the time of payment of a debt of the principal.

(i) Make, assign, draw, endorse, discount, guarantee, and negotiate promissory notes, checks, drafts, and other negotiable or nonnegotiable paper of the principal, or payable to the principal or the principal's order, receive the cash or other proceeds of those transactions, and accept a draft drawn by a person upon the principal and pay it when due.

(j) Receive for the principal and act upon a sight draft, warehouse receipt, or other negotiable or nonnegotiable instrument.

(k) Apply for and receive letters of credit, credit cards, and traveler's checks from a financial institution, and give an indemnity or other agreement in connection with letters of credit.

(l) Consent to an extension of the time of payment with respect to commercial paper or a financial transaction with a financial institution.

Comment. Section 4275 continues former Civil Code Section 2490 without change. Section 4275 is the same in substance as Section 8 of the Uniform Statutory Form Power of Attorney Act (1988). See the Comment to this article under the article heading. See also Section 4270 (construction of powers generally).

See also Sections 40 ("financial institution" defined), 83 ("trust company" defined), 4052 ("agent" defined), 4074 ("principal" defined), 4082 ("statutory form power of attorney" defined).

#### § 4276. Business operating transactions

4276. In a statutory form power of attorney, the language granting power with respect to business operating transactions empowers the agent to do all of the following:

(a) Operate, buy, sell, enlarge, reduce, and terminate a business interest.

(b) To the extent that an agent is permitted by law to act for a principal and subject to the terms of the partnership agreement:

(1) Perform a duty or discharge a liability and exercise a right, power, privilege, or option that the principal has, may have, or claims to have, under a partnership agreement, whether or not the principal is a partner.

(2) Enforce the terms of a partnership agreement by litigation or otherwise.

(3) Defend, submit to arbitration, settle, or compromise litigation to which the principal is a party because of membership in the partnership.

(c) Exercise in person or by proxy, or enforce by litigation or otherwise, a right, power, privilege, or option the principal has or claims to have as the holder of a bond, share, or other instrument of similar character, and defend, submit to arbitration, settle, or compromise litigation to which the principal is a party because of a bond, share, or similar instrument.

(d) With respect to a business owned solely by the principal:

(1) Continue, modify, renegotiate, extend, and terminate a contract made with an individual or a legal entity, firm, association, or corporation by or on behalf of the principal with respect to the business before execution of the power of attorney.

(2) Determine the policy of the business as to (i) the location of its operation, (ii) the nature and extent of its business, (iii) the methods of manufacturing, selling, merchandising, financing, accounting, and advertising employed in its operation, (iv) the amount and types of insurance carried, and (v) the mode of engaging, compensating, and dealing with its accountants, attorneys, and other agents and employees.

(3) Change the name or form of organization under which the business is operated and enter into a partnership agreement with other persons or organize a corporation to take over all or part of the operation of the business.

(4) Demand and receive money due or claimed by the principal or on the principal's behalf in the operation of the business, and control and disburse the money in the operation of the business.

(e) Put additional capital into a business in which the principal has an interest.

(f) Join in a plan of reorganization, consolidation, or merger of the business.

(g) Sell or liquidate a business or part of it at the time and upon the terms the agent considers desirable.

(h) Represent the principal in establishing the value of a business under a buy-out agreement to which the principal is a party.



(i) Prepare, sign, file, and deliver reports, compilations of information, returns, or other papers with respect to a business which are required by a governmental agency or instrumentality or which the agent considers desirable, and make related payments.

(j) Pay, compromise, or contest taxes or assessments and do any other act which the agent considers desirable to protect the principal from illegal or unnecessary taxation, fines, penalties, or assessments with respect to a business, including attempts to recover, in any manner permitted by law, money paid before or after the execution of the power of attorney.

Comment. Section 4276 continues former Civil Code Section 2491 without change. Section 4276 is the same in substance as Section 9 of the Uniform Statutory Form Power of Attorney Act (1988). See the Comment to this article under the article heading. See also Section 4270 (construction of powers generally).

See also Sections 4052 ("agent" defined), 4074 ("principal" defined), 4082 ("statutory form power of attorney" defined).

§ 4277. Insurance and annuity transactions

4277. In a statutory form power of attorney, the language granting power with respect to insurance and annuity transactions empowers the agent to do all of the following:

(a) Continue, pay the premium or assessment on, modify, rescind, release, or terminate a contract procured by or on behalf of the principal which insures or provides an annuity to either the principal or another person, whether or not the principal is a beneficiary under the contract.

(b) Procure new, different, and additional contracts of insurance and annuities for the principal and the principal's spouse, children, and other dependents, and select the amount, type of insurance or annuity, and mode of payment.

(c) Pay the premium or assessment on, modify, rescind, release, or terminate a contract of insurance or annuity procured by the agent.

(d) Designate the beneficiary of the contract, but the agent may be named a beneficiary of the contract, or an extension, renewal, or substitute for it, only to the extent the agent was named as a beneficiary under a contract procured by the principal before executing the power of attorney.

(e) Apply for and receive a loan on the security of the contract of insurance or annuity.

(f) Surrender and receive the cash surrender value.

(g) Exercise an election.

(h) Change the manner of paying premiums.

(i) Change or convert the type of insurance contract or annuity as to any insurance contract or annuity with respect to which the principal has or claims to have a power described in this section.

(j) Change the beneficiary of a contract of insurance or annuity, but the agent may not be designated a beneficiary except to the extent permitted by subdivision (d).

(k) Apply for and procure government aid to guarantee or pay premiums of a contract of insurance on the life of the principal.

(l) Collect, sell, assign, hypothecate, borrow upon, or pledge the interest of the principal in a contract of insurance or annuity.

(m) Pay from proceeds or otherwise, compromise or contest, and apply for refunds in connection with, a tax or assessment levied by a taxing authority with respect to a contract of insurance or annuity or its proceeds or liability accruing by reason of the tax or assessment.

Comment. Section 4277 continues former Civil Code Section 2492 without change. Section 4277 is the same in substance as Section 10 of the Uniform Statutory Form Power of Attorney Act (1988). See the Comment to this article under the article heading. See also Section 4270 (construction of powers generally). Section 4277 covers, but is not limited to, life, accident, health, disability, or liability insurance and fire, marine, burglary, compensation, disability, liability, hurricane, earthquake, and casualty insurance.

See also Sections 4052 ("agent" defined), 4074 ("principal" defined), 4082 ("statutory form power of attorney" defined).

#### § 4278. Estate, trust, and other beneficiary transactions

4278. In a statutory form power of attorney, the language granting power with respect to estate, trust, and other beneficiary transactions, empowers the agent to act for the principal in all matters that affect a trust, probate estate, guardianship, conservatorship, escrow, custodianship, or other fund from which the principal is, may become, or claims to be entitled, as a beneficiary, to a share or payment, including the power to do all of the following:

(a) Accept, reject, disclaim, receive, receipt for, sell, assign,

release, pledge, exchange, or consent to a reduction in or modification of a share in or payment from the fund.

(b) Demand or obtain by litigation or otherwise money or other thing of value to which the principal is, may become, or claims to be entitled by reason of the fund.

(c) Initiate, participate in, and oppose litigation to ascertain the meaning, validity, or effect of a deed, will, declaration of trust, or other instrument or transaction affecting the interest of the principal.

(d) Initiate, participate in, and oppose litigation to remove, substitute, or surcharge a fiduciary.

(e) Conserve, invest, disburse, and use anything received for an authorized purpose.

(f) Transfer an interest of the principal in real property, stocks, bonds, accounts with financial institutions, insurance, and other property, to the trustee of a revocable trust created by the principal as settlor.

Comment. Section 4278 continues former Civil Code Section 2493 without change. Section 4278 is the same in substance as Section 11 of the Uniform Statutory Form Power of Attorney Act (1988). See the Comment to this article under the article heading. See also Section 4270 (construction of powers generally).

See also Sections 82 ("trust" defined), 4052 ("agent" defined), 4074 ("principal" defined), 4082 ("statutory form power of attorney" defined).

#### § 4279. Claims and litigation

4279. In a statutory form power of attorney, the language with respect to claims and litigation empowers the agent to do all of the following:

(a) Assert and prosecute before a court or administrative agency a claim, claim for relief, cause of action, counterclaim, cross-complaint, or offset, and defend against an individual, a legal entity, or government, including suits to recover property or other thing of value, to recover damages sustained by the principal, to eliminate or modify tax liability, or to seek an injunction, specific performance, or other relief.

(b) Bring an action to determine adverse claims, intervene in litigation, and act as amicus curiae.

(c) In connection with litigation:

(1) Procure an attachment, garnishment, libel, order of arrest, or other preliminary, provisional, or intermediate relief and use any available procedure to effect, enforce, or satisfy a judgment, order, or decree.

(2) Perform any lawful act, including acceptance of tender, offer of judgment, admission of facts, submission of a controversy on an agreed statement of facts, consent to examination before trial, and binding the principal in litigation.

(d) Submit to arbitration, settle, and propose or accept a compromise with respect to a claim or litigation.

(e) Waive the issuance and service of process upon the principal, accept service of process, appear for the principal, designate persons upon whom process directed to the principal may be served, execute and file or deliver stipulations on the principal's behalf, verify pleadings, seek appellate review, procure and give surety and indemnity bonds, contract and pay for the preparation and printing of records and briefs, receive and execute and file or deliver a consent, waiver, release, confession of judgment, satisfaction of judgment, notice, agreement, or other instrument in connection with the prosecution, settlement, or defense of a claim or litigation.

(f) Act for the principal with respect to bankruptcy or insolvency proceedings, whether voluntary or involuntary, concerning the principal or some other person, or with respect to a reorganization proceeding, or with respect to an assignment for the benefit of creditors, receivership, or application for the appointment of a receiver or trustee which affects an interest of the principal in property or other thing of value.

(g) Pay a judgment against the principal or a settlement made in connection with litigation and receive and conserve money or other thing of value paid in settlement of or as proceeds of a claim or litigation.

**Comment.** Section 4279 continues former Civil Code Section 2494 without change. Section 4279 is the same in substance as Section 12 of the Uniform Statutory Form Power of Attorney Act (1988). Subdivision (f) is clarified by adding a reference to an assignment for the benefit of creditors. See the Comment to this article under the article heading. See also Section 4270 (construction of powers generally).

See also Sections 4052 ("agent" defined), 4074 ("principal" defined), 4082 ("statutory form power of attorney" defined).

§ 4280. Personal and family maintenance

4280. In a statutory form power of attorney, the language granting power with respect to personal and family maintenance empowers the agent to do all of the following:

(a) Do the acts necessary to maintain the customary standard of living of the principal, the principal's spouse, children, and other individuals customarily or legally entitled to be supported by the principal, including providing living quarters by purchase, lease, or other contract, or paying the operating costs, including interest, amortization payments, repairs, and taxes on premises owned by the principal and occupied by those individuals.

(b) Provide for the individuals described in subdivision (a) all of the following:

(1) Normal domestic help.

(2) Usual vacations and travel expenses.

(3) Funds for shelter, clothing, food, appropriate education, and other current living costs.

(c) Pay for the individuals described in subdivision (a) necessary medical, dental, and surgical care, hospitalization, and custodial care.

(d) Continue any provision made by the principal, for the individuals described in subdivision (a), for automobiles or other means of transportation, including registering, licensing, insuring, and replacing them.

(e) Maintain or open charge accounts for the convenience of the individuals described in subdivision (a) and open new accounts the agent considers desirable to accomplish a lawful purpose.

(f) Continue payments incidental to the membership or affiliation of the principal in a church, club, society, order, or other organization and continue contributions to those organizations.

Comment. Section 4280 continues former Civil Code Section 2495 without change. Section 4280 is the same in substance as Section 13 of the Uniform Statutory Form Power of Attorney Act (1988). See the Comment to this article under the article heading. See also Section 4270 (construction of powers generally).

See also Sections 4052 ("agent" defined), 4074 ("principal" defined), 4082 ("statutory form power of attorney" defined).

**§ 4281. Benefits from social security, medicare, medicaid, or other governmental programs, or civil or military service**

4281. In a statutory form power of attorney, the language granting power with respect to benefits from social security, medicare, medicaid or other governmental programs, or civil or military service, empowers the agent to do all of the following:

(a) Execute vouchers in the name of the principal for allowances and reimbursements payable by the United States or a foreign government or by a state or subdivision of a state to the principal, including allowances and reimbursements for transportation of the individuals described in subdivision (a) of Section 4280, and for shipment of their household effects.

(b) Take possession and order the removal and shipment of property of the principal from a post, warehouse, depot, dock, or other place of storage or safekeeping, either governmental or private, and execute and deliver a release, voucher, receipt, bill of lading, shipping ticket, certificate, or other instrument for that purpose.

(c) Prepare, file, and prosecute a claim of the principal to a benefit or assistance, financial or otherwise, to which the principal claims to be entitled, under a statute or governmental regulation.

(d) Prosecute, defend, submit to arbitration, settle, and propose or accept a compromise with respect to any benefits the principal may be entitled to receive.

(e) Receive the financial proceeds of a claim of the type described in this section, conserve, invest, disburse, or use anything received for a lawful purpose.

**Comment.** Section 4281 continues former Civil Code Section 2496 without change, except for the revision of a cross-reference to another provision. Section 4281 is the same in substance as Section 14 of the Uniform Statutory Form Power of Attorney Act (1988). See the Comment to this article under the article heading. See also Section 4270 (construction of powers generally).

See also Sections 4052 ("agent" defined), 4074 ("principal" defined), 4082 ("statutory form power of attorney" defined).

**§ 4282. Retirement plan transactions**

4282. In a statutory form power of attorney, the language granting power with respect to retirement plan transactions empowers the agent to do all of the following:

(a) Select payment options under any retirement plan in which the principal participates, including plans for self-employed individuals.

(b) Designate beneficiaries under those plans and change existing designations.

(c) Make voluntary contributions to those plans.

(d) Exercise the investment powers available under any self-directed retirement plan.

(e) Make rollovers of plan benefits into other retirement plans.

(f) If authorized by the plan, borrow from, sell assets to, and purchase assets from the plan.

(g) Waive the right of the principal to be a beneficiary of a joint or survivor annuity if the principal is a spouse who is not employed.

Comment. Section 4282 continues former Civil Code Section 2497 without change. Section 4282 is the same in substance as Section 15 of the Uniform Statutory Form Power of Attorney Act (1988). See the Comment to this article under the article heading. See also Section 4270 (construction of powers generally).

See also Sections 4052 ("agent" defined), 4074 ("principal" defined), 4082 ("statutory form power of attorney" defined).

**§ 4283. Tax matters**

4283. In a statutory form power of attorney, the language granting power with respect to tax matters empowers the agent to do all of the following:

(a) Prepare, sign, and file federal, state, local, and foreign income, gift, payroll, Federal Insurance Contributions Act returns, and other tax returns, claims for refunds, requests for extension of time, petitions regarding tax matters, and any other tax-related documents, including receipts, offers, waivers, consents (including consents and agreements under Internal Revenue Code Section 2032A or any successor section), closing agreements, and any power of attorney required by the Internal Revenue Service or other taxing authority with respect to a tax year upon which the statute of limitations has not run and to the tax year in which the power of attorney was executed and any subsequent tax year.

(b) Pay taxes due, collect refunds, post bonds, receive confidential information, and contest deficiencies determined by the

Internal Revenue Service or other taxing authority.

(c) Exercise any election available to the principal under federal, state, local, or foreign tax law.

(d) Act for the principal in all tax matters for all periods before the Internal Revenue Service and any other taxing authority.

Comment. Section 4283 continues former Civil Code Section 2498 without change. Section 4283 is the same in substance as Section 16 of the Uniform Statutory Form Power of Attorney Act (1988). At the end of subdivision (a), reference is made to "a tax year upon which the statute of limitations has not run and to the tax year in which the power of attorney was executed and any subsequent tax year." This replaces the reference in the Uniform Act to "a tax year upon which the statute of limitations has not run and the following 25 tax years." This substitution is consistent with the power granted by subdivision (d) which extends to "all tax matters for all periods" and is not limited to particular tax years. See also the Comment to this article under the article heading and Section 4270 (construction of powers generally).

See also Sections 4052 ("agent" defined), 4074 ("principal" defined), 4082 ("statutory form power of attorney" defined).

**§ 4284. After-acquired property; property located outside this state; power exercised outside this state; power of attorney executed outside this state**

4284. The powers described in this article are exercisable equally with respect to an interest the principal has when the statutory form power of attorney is executed or acquires later, whether or not the property is located in this state, and whether or not the powers are exercised or the power of attorney is executed in this state.

Comment. Section 4284 continues former Civil Code Section 2499 without change. Section 4284 makes the power of attorney explicitly effective for property acquired at times and in places that might otherwise be subject to dispute. The section is the same in substance as Section 17 of the Uniform Statutory Form Power of Attorney Act (1988). See also Section 4128 (no need to describe each item or parcel of property).

See also Sections 4074 ("principal" defined), 4082 ("statutory form power of attorney" defined).

**§ 4285. Power to modify or revoke trust**

4285. A statutory form power of attorney under this chapter does not empower the agent to modify or revoke a trust created by the principal unless that power is expressly granted by the power of attorney. If a statutory form power of attorney under this chapter



empowers the agent to modify or revoke a trust created by the principal, the trust may only be modified or revoked by the agent as provided in the trust instrument.

Comment. Section 4285 continues former Civil Code Section 2499.5 without change. Section 4285 is a new provision not found in the Uniform Statutory Form Power of Attorney Act (1988).

The first sentence of Section 4285 makes clear that the agent has no power to modify or revoke a trust unless a specific provision is added to the statutory form giving the agent that power. The "Special Instructions" portion of the statutory form provides space for such a provision. The first sentence is a clarification that is consistent with the uniform act powers. See Section 11 of the Uniform Statutory Form Power of Attorney Act (1988), which does not give the agent the power to modify or revoke a trust created by the principal.

The second sentence of Section 4285 recognizes the requirement of Section 15401(b) which precludes modification or revocation of a trust by an agent unless the trust instrument expressly so permits.

See also Sections 82 ("trust" defined), 4052 ("agent" defined), 4074 ("principal" defined), 4082 ("statutory form power of attorney" defined).

**PART 3. DURABLE POWERS OF ATTORNEY FOR HEALTH CARE**

*Note.* This part continues the Civil Code provisions concerning durable powers of attorney for health care with very few changes. See Civil Code §§ 2430-2444, 2500-2508. The staff has resisted the temptation to work some of these provisions over, in view of their controversial nature and the memory of the struggle involved in their initial enactment. The sections in Chapter 1 have been reorganized, without having been rewritten. The statutory form in Chapter 2 has not even been reorganized, except for moving the short title to the front of the chapter.

**Chapter 1. Durable Powers of Attorney for Health Care**

**Article 1. General Provisions**

**§ 4300. Application of chapter**

4300. (a) A durable power of attorney executed after December 31, 1983, is effective to authorize the agent to make health care decisions for the principal only if the durable power of attorney complies with this chapter.

(b) A durable power of attorney executed before January 1, 1984, that specifically authorizes the agent to make decisions relating to the medical or health care of the principal shall be deemed to be valid under this chapter after January 1, 1984, notwithstanding that it fails to comply with the requirement of paragraph (2) of subdivision (a) of Section 4310 or subdivision (c) of Section 4311; but, to the extent that the durable power of attorney authorizes the agent to make health care decisions for the principal, the durable power of attorney is subject to all the provisions of this chapter and to Part 4 (commencing with Section 4400).

(c) Nothing in this chapter affects the validity of a decision made under a durable power of attorney before January 1, 1984.

**Comment.** Section 4300 continues former Civil Code Section 2431 without change, except for the substitution of "agent" for "attorney in fact." See Section 4052 ("agent" defined).

Subdivision (a) of Section 4300 makes clear that the requirements of this chapter must be satisfied if a durable power of attorney executed after December 31, 1983, is intended to authorize health care decisions. See also Section 4122 (durable power of attorney). Nothing in this chapter affects a durable power of attorney executed after December 31, 1983, insofar as it relates to matters other than health care decisions. See also Sections 4060 ("durable power of attorney for property" defined), 4064 ("health care decision" defined).

Subdivision (b) validates durable powers of attorney for health care executed before January 1, 1984, even though the witnessing or

acknowledgment requirement of Section 4310(a)(2) is not satisfied and even though the requirement of Section 4311(c) is not satisfied. However, after December 31, 1983, any such durable power of attorney is subject to the same provisions as a durable power of attorney executed after that date. See, e.g., Sections 4312 (agent not authorized to act if principal can give informed consent), 4320 (unauthorized types of health care), 4313 (examination and release of medical records), 4315 (revocation), 4330 (protections from liability), 4322 (consent of agent not authorized where principal objects to the health care or objects to the withholding or withdrawal of health care necessary to keep principal alive), 4324 (altering or forging, or concealing or withholding knowledge of revocation, of durable power of attorney for health care), 4321 (unauthorized acts or omissions), 4406 (exceptions to limitations in power of attorney), 4442 (grounds for petition). However, the limitation of the duration of the durable power of attorney for health care to seven years applies only to a durable power of attorney for health care executed after January 1, 1984. See Section 4316. A durable power of attorney for health care executed prior to that date is of unlimited duration unless the power of attorney otherwise provides.

Subdivision (c) makes clear that this chapter has no effect on decisions made before January 1, 1984, under durable powers of attorney executed before that date. The validity of such health care decisions is determined by the law that would apply if this chapter had not been enacted.

See also Sections 4052 ("agent" defined), 4056 ("durable power of attorney" defined), 4074 ("principal" defined), 4064 ("health care decision" defined).

*Note.* The seven-year limitation is the subject of another Commission recommendation. If the proposed legislation is enacted, this comment will be conformed.

**§ 4301. Form of durable power of attorney for health care after January 1, 1993**

4301. (a) Notwithstanding Section 4311, on and after January 1, 1986, a printed form of a durable power of attorney for health care may be sold or otherwise distributed if it complies with former Civil Code Section 2433 as amended by Section 5 of Chapter 312 of the Statutes of 1984, or with former Section 2433 of the Civil Code as in effect at the time of sale or distribution. However, any printed form of a durable power of attorney for health care printed on or after January 1, 1986, that is sold or otherwise distributed in this state for use by a person who does not have the advice of legal counsel shall comply with former Section 2433 of the Civil Code or Section 4311 of this code in effect at the time of printing.

(b) Notwithstanding Section 4314, a printed form of a durable power of attorney for health care may be sold or otherwise distributed

if it complies with former Section 2432 of the Civil Code as originally enacted, with former Section 2432 of the Civil Code as subsequently amended, or with Section 4310 of this code. However, any printed form of a durable power of attorney for health care printed on or after January 1, 1986, shall comply with the requirements of former Section 2432 of the Civil Code or Section 4310 of this code in effect at the time of printing.

(c) A durable power of attorney for health care executed on or after January 1, 1986, is not invalid if it complies with former Section 2432 of the Civil Code as originally enacted or as subsequently amended. A durable power of attorney for health care executed on or after January 1, 1986, using a printed form that complied with former Section 2433 of the Civil Code as amended by Section 5 of Chapter 312 of the Statutes of 1984, is as valid as if it had been executed using a printed form that complied with former Section 2433 of the Civil Code as thereafter amended or with Section 4311 of this code.

**Comment.** Section 4301 continues former Civil Code Section 2444 without substantive change, and applies the principles of the former section to the include the successor sections in this chapter.

Section 4301 permits a printed form of a durable power of attorney for health care to be used after the amendments to former Civil Code Sections 2432 and 2433 went into effect if the form complies with prior law. Section 4301 avoids the need to discard the existing supply of printed forms when the amendments go into effect. But a form printed after the amendments go into effect may be sold or otherwise distributed in this state for use by a person who does not have the advice of legal counsel only if the form complies with the requirements of Sections 4310 and 4311.

**Note.** Further consideration should be given to whether this section can be simplified, such as by validating in general language the use of forms that complied with the statute when they were printed.

#### **§ 4302. Other authority not affected**

4302. (a) Subject to Section 4312, nothing in this chapter affects any right a person may have to make health care decisions on behalf of another.

(b) This chapter does not affect the law governing health care treatment in an emergency.

**Comment.** Section 4302 continues former Civil Code Section 2439 without change, except for the revision of a cross-reference to another section and the substitution of a reference to "chapter" instead of

"article." Section 4302 makes clear that the enactment of this chapter has no effect on any right a person may have to consent for another or on emergency treatment. Thus, this chapter is cumulative to whatever other ways there may be to consent for another.

See also Sections 4062 ("health care" defined), 4064 ("health care decision" defined).

**Article 2. Creation and Effect of Durable Power of Attorney for Health Care**

**§ 4310. Requirements for durable power of attorney for health care**

4310. (a) An agent under a durable power of attorney may not make health care decisions unless all of the following requirements are satisfied:

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

(2) The durable power of attorney contains the date of its execution.

(3) The durable power of attorney is witnessed by one of the following methods:

(A) The durable power of attorney is signed by at least two witnesses each of whom witnessed either the signing of the instrument by the principal or the principal's acknowledgment of the signature or of the instrument, each witness making the following declaration in substance: "I declare under penalty of perjury under the laws of California that the person who signed or acknowledged this document is personally known to me to be the principal, or that the identity of the principal was proved to me by convincing evidence, that the principal signed or acknowledged this durable power of attorney in my presence, that the principal appears to be of sound mind and under no duress, fraud, or undue influence, that I am not the person appointed as agent by this document, and that I am not a health care provider, an employee of a health care provider, the operator of a community care facility, an employee of an operator of a community care facility, the operator of a residential care facility for the elderly, nor an employee of an operator of a residential care facility for the elderly." At least one of the witnesses must also have signed the following declaration: "I further declare under penalty of perjury under the laws of California that I am not related to the principal by blood, marriage, or adoption,



(c) A conservator may not be designated as the agent to make health care decisions under a durable power of attorney for health care executed by a person who is a conservatee under the Lanterman-Petris-Short Act, Part 1 (commencing with Section 5000) of Division 5 of the Welfare and Institutions Code, unless (1) the power of attorney is otherwise valid, (2) the conservatee is represented by legal counsel, and (3) the lawyer representing the conservatee signs a certificate stating in substance: "I am a lawyer authorized to practice law in the state where this power of attorney was executed, and the principal was my client at the time this power of attorney was executed. I have advised my client concerning his or her rights in connection with this power of attorney and the applicable law and the consequences of signing or not signing this power of attorney, and my client, after being so advised, has executed this power of attorney."

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

- (1) A health care provider.
- (2) An employee of a health care provider.
- (3) The agent.
- (4) The operator of a community care facility.
- (5) An employee of an operator of a community care facility.
- (6) The operator of a residential care facility for the elderly.
- (7) An employee of an operator of a residential care facility for the elderly.

(e) At least one of the persons used as a witness under subdivision (a) shall be a person who is not one of the following:

- (1) A relative of the principal by blood, marriage, or adoption.
- (2) A person who would be entitled to any portion of the estate of the principal upon his or her death under any will or codicil thereto of the principal existing at the time of execution of the durable power of attorney or by operation of law then existing.

(f) A durable power of attorney for health care is not effective if the principal is a patient in a skilled nursing facility as defined in subdivision (c) of Section 1250 of the Health and Safety Code at the time of its execution unless one of the witnesses is a patient advocate or ombudsman as may be designated by the State Department of Aging for

this purpose pursuant to any other applicable provision of law. The patient advocate or ombudsman shall include in the declaration required by subdivision (a) a declaration that he or she is serving as a witness as required by this subdivision. It is the intent of this subdivision to recognize that some patients in skilled nursing facilities are insulated from a voluntary decisionmaking role, by virtue of the custodial nature of their care, so as to require special assurance that they are capable of willfully and voluntarily executing a durable power of attorney for health care.

Comment. Section 4310 continues former Civil Code Section 2432 without change, except for the revision of cross-references to other provisions and the substitution of "agent" for "attorney in fact." See Section 4052 ("agent" defined).

Subdivision (a) makes clear that a durable power of attorney is not sufficient to enable the agent to consent to health care or make other health care decisions unless the durable power of attorney specifically authorizes health care decisions and the formalities of this section are satisfied. Subdivisions (d) and (e) limit the persons who may serve as witnesses. See also Sections 4122 (general requirements for durable power of attorney), 4311 (warning to person executing durable power of attorney for health care). See also Section 4300 (exception to formalities requirement for powers of attorney executed before operative date).

Subdivision (b) precludes the treating health care provider or an employee of the treating health care provider and other specified persons from acting as the agent under a durable power of attorney for health care. Subdivision (d) precludes health care providers in general and their employees and other specified persons from acting as witnesses to such powers of attorney. These limitations are included in recognition that Section 4330 provides protections from liability for a health care provider who relies in good faith on a decision of the agent. Subdivision (b) does not preclude a person from appointing, for example, a friend who is a doctor to be an agent under the durable power of attorney for health care, but if the doctor becomes a "treating health care provider" of the principal, the doctor is precluded from acting as the agent under the durable power of attorney for health care.

Subdivision (c) prescribes conditions that must be satisfied if a conservator is to be designated as the agent for a conservatee under the Lanterman-Petris-Short Act. This subdivision has no application where a person other than the conservator is to be designated as agent.

Subdivision (f) prescribes additional requirements where the principal is a patient in a nursing home.

As to the use of forms printed before January 1, 1986, see Section 4301.

See also Sections 4054 ("community care facility" defined), 4056 ("durable power of attorney" defined), 4058 ("durable power of attorney for health care" defined), 4064 ("health care decision" defined), 4066 ("health care provider" defined), 4074 ("principal" defined), 4076 ("residential care facility for the elderly" defined).



**§ 4311. Requirements for printed form of durable power of attorney for health care**

4311. (a) A printed form of a durable power of attorney for health care that is sold or otherwise distributed in this state for use by a person who does not have the advice of legal counsel shall provide no other authority than the authority to make health care decisions on behalf of the principal and shall contain, in not less than 10-point boldface type or a reasonable equivalent thereof, the following warning statement:

**WARNING TO PERSON EXECUTING THIS DOCUMENT**

This is an important legal document. Before executing this document, you should know these important facts:

This document gives the person you designate as your agent the power to make health care decisions for you. Your agent must act consistently with your desires as stated in this document or otherwise made known.

Except as you otherwise specify in this document, this document gives your agent the power to consent to your doctor not giving treatment or stopping treatment necessary to keep you alive.

Notwithstanding this document, you have the right to make medical and other health care decisions for yourself so long as you can give informed consent with respect to the particular decision. In addition, no treatment may be given to you over your objection, and health care necessary to keep you alive may not be stopped or withheld if you object at the time.

This document gives your agent authority to consent, to refuse to consent, or to withdraw consent to any care, treatment, service, or procedure to maintain, diagnose, or treat a physical or mental condition. This power is subject to any statement of your desires and any limitations that you include in this document. You may state in this document any types of treatment that you do not desire. In addition, a court can take away the power of your agent to make health care decisions for you if your agent (1) authorizes anything that is illegal, (2) acts contrary to your known desires, or (3) where your

desires are not known, does anything that is clearly contrary to your best interests.

Unless you specify a shorter period in this document, this power will exist for seven years from the date you execute this document and, if you are unable to make health care decisions for yourself at the time when this seven-year period ends, this power will continue to exist until the time when you become able to make health care decisions for yourself.

You have the right to revoke the authority of your agent by notifying your agent or your treating doctor, hospital, or other health care provider orally or in writing of the revocation.

Your agent has the right to examine your medical records and to consent to their disclosure unless you limit this right in this document.

Unless you otherwise specify in this document, this document gives your agent the power after you die to (1) authorize an autopsy, (2) donate your body or parts thereof for transplant or therapeutic or educational or scientific purposes, and (3) direct the disposition of your remains.

If there is anything in this document that you do not understand, you should ask a lawyer to explain it to you.

(b) The printed form described in subdivision (a) shall also include the following notice: "This power of attorney will not be valid for making health care decisions unless it is either (1) signed by two qualified adult witnesses who are personally known to you and who are present when you sign or acknowledge your signature or (2) acknowledged before a notary public in California."

(c) A durable power of attorney prepared for execution by a person resident in this state that permits the agent to make health care decisions and that is not a printed form shall include one of the following:

(1) The substance of the statements provided for in subdivision (a) in capital letters.

(2) A certificate signed by the principal's lawyer stating: "I am a lawyer authorized to practice law in the state where this power of

attorney was executed, and the principal was my client at the time this power of attorney was executed. I have advised my client concerning his or her rights in connection with this power of attorney and the applicable law and the consequences of signing or not signing this power of attorney, and my client, after being so advised, has executed this power of attorney."

(d) If a durable power of attorney includes the certificate provided for in paragraph (2) of subdivision (c) and permits the agent to make health care decisions for the principal, the applicable law of which the client is to be advised by the lawyer signing the certificate includes, but is not limited to, the matters listed in subdivision (a).

**Comment.** Section 4311 continues former Civil Code Section 2433 without change, except for the omission of the reference to "attorney in fact" in the warning statement in subdivision (a) and the substitution elsewhere of "agent" for "attorney in fact." See Section 4052 ("agent" defined).

Section 4311 sets out a warning statement that is required to be in certain printed forms if the durable power of attorney is designed to authorize health care decisions. The warning statement in subdivision (a) is comparable to the warning in Section 4351 (statutory form durable power of attorney for health care). See Comment to Section 4351.

A printed form of a durable power of attorney for health care sold in this state for use by a person who does not have the advice of legal counsel can deal only with the authority to make health care decisions. If a person wants to execute a durable power of attorney to deal with both health care decisions and property matters and the person wants to use a printed form, two different forms are required -- one for health care and another for property matters. However, a person who has the advice of a lawyer may cover both health care and property matters in one durable power of attorney. In this case, the warnings or certificate required by subdivision (c) must be included.

As to the use of forms printed before January 1, 1986, see Section 4315.

See also Sections 4056 ("durable power of attorney" defined), 4058 ("durable power of attorney for health care" defined), 4064 ("health care decision" defined), 4070 ("power of attorney" defined), 4074 ("principal" defined).

**Note.** *The seven-year limitation is the subject of another Commission recommendation. If the proposed legislation is enacted, this section will be conformed.*

**§ 4312. Agent's authority to make health care decisions**

4312. (a) Unless the durable power of attorney provides otherwise, the agent designated in a durable power of attorney for

health care who is known to the health care provider to be available and willing to make health care decisions has priority over any other person to act for the principal in all matters of health care decisions, but the agent does not have authority to make a particular health care decision if the principal is able to give informed consent with respect to that decision.

(b) Subject to any limitations in the durable power of attorney, the agent designated in a durable power of attorney for health care may make health care decisions for the principal, before or after the death of the principal, to the same extent as the principal could make health care decisions for himself or herself if the principal had the capacity to do so, including: (1) making a disposition under the Uniform Anatomical Gift Act, Chapter 3.5 (commencing with Section 7150.5) of Part 1 of Division 7 of the Health and Safety Code, (2) authorizing an autopsy under Section 7113 of the Health and Safety Code, and (3) directing the disposition of remains under Section 7100 of the Health and Safety Code. In exercising the authority under the durable power of attorney for health care, the agent has a duty to act consistent with the desires of the principal as expressed in the durable power of attorney or otherwise made known to the agent at any time or, if the principal's desires are unknown, to act in the best interests of the principal.

(c) Nothing in this chapter affects any right the person designated as agent may have, apart from the durable power of attorney for health care, to make or participate in the making of health care decisions on behalf of the principal.

Comment. Section 4312 continues former Civil Code Section 2434 without substantive change. "Agent" has been substituted for "attorney in fact." See Section 4052 ("agent" defined).

Subdivision (a) of Section 4312 gives the agent priority to make health care decisions if known to the health care provider to be available and willing to act. The power of attorney may vary this priority. Subdivision (a) also provides that the agent is not authorized to make health care decisions if the principal is able to give informed consent. The power of attorney may, however, give the agent authority to make health care decisions for the principal even though the principal is able to give informed consent, but the power of attorney is always subject to Section 4322 (if principal objects, agent not authorized to consent to health care or to the withholding or withdrawal of health care necessary to keep the principal alive).

Subdivision (b) authorizes the agent to make health care decisions, except as limited by the durable power of attorney for

health care. In exercising his or her authority, the agent has the duty to act consistent with the principal's desires if known or, if the principal's desires are unknown, to act in the best interests of the principal. This authority is subject to Section 4320 which precludes consent to certain specified types of treatment. See also Section 4321 (unauthorized acts or omissions). The principal is free to provide any limitations on types of treatment in the durable power of attorney that are desired. See also Sections 4400-4460 (court enforcement of duties of agent). The authority under subdivision (b) is limited by Section 4322 (agent not authorized to consent to health care, or to the withholding or withdrawal of health care necessary to keep the principal alive, if principal objects). An agent may, without liability, decline to act under the power of attorney. For example, the agent may not be willing to follow the desires of the principal as stated in the power of attorney because of changed circumstances. Subdivision (c) makes clear that, in such a case, the agent may make or participate in the making of health care decisions for the principal without being bound by the stated desires of the principal to the extent that the person designated as the agent has the right under the applicable law apart from the durable power of attorney.

As to the duration of the power of attorney, see Section 4316. See also Sections 4056 ("durable power of attorney" defined), 4058 ("durable power of attorney for health care" defined), 4064 ("health care decision" defined), 4066 ("health care provider" defined), 4074 ("principal" defined).

*Note.* With the expansion of the definition of health care to include postdeath decisions, drawn from this section, the listing of the three types of postdeath care in subdivision (b) is not really necessary. However, in line with our policy of leaving durable power of attorney for health care provisions alone as much as possible, the language has been retained.

#### **§ 4313. Availability of medical information to agent**

4313. Except to the extent the right is limited by the durable power of attorney for health care, an agent designated to make health care decisions under a durable power of attorney for health care has the same right as the principal to receive information regarding the proposed health care, to receive and review medical records, and to consent to the disclosure of medical records.

*Comment.* Section 4313 continues former Civil Code Section 2436 without substantive change. "Agent" has been substituted for "attorney in fact." See Section 4052 ("agent" defined).

Section 4313 makes clear that the agent can obtain and disclose information in the medical records of the principal. The power of attorney may limit the right of the agent, for example, by precluding examination of specified medical records or by providing that the examination of medical records is authorized only if the principal lacks the capacity to give informed consent. The right of the agent is subject to any limitations on the right of the patient to reach medical

records. See Health & Safety Code §§ 25253 (denial of right to inspect mental health records), 25256 (providing summary of record rather than allowing access to entire record).

See also Sections 4052 ("agent" defined), 4056 ("durable power of attorney" defined), 4062 ("health care" defined), 4064 ("health care decision" defined), 4074 ("principal" defined).

**§ 4314. Employee of health care provider, community care facility, or residential care facility**

4314. An employee of the treating health care provider or an employee of an operator of a community care facility or an employee of a residential care facility for the elderly may be designated as the agent to make health care decisions under a durable power of attorney for health care if (a) the employee so designated is a relative of the principal by blood, marriage, or adoption, and (b) the other requirements of this chapter are satisfied.

**Comment.** Section 4314 continues former Civil Code Section 2432.5 without substantive change. "Agent" has been substituted for "attorney in fact." See Section 4052 ("agent" defined).

Section 4314 provides a special exception to subdivision (b) of Section 4310 which prohibits an employee of the treating health care provider from being designated as agent to make health care decisions under a durable power of attorney. Under Section 4314, such a person may be so designated if the person is a relative of the principal and the other requirements of this chapter are satisfied. This will, for example, permit a nurse to serve as agent for the nurse's spouse when the spouse is being treated at the hospital where the nurse is employed.

See also Sections 4052 ("agent" defined), 4054 ("community care facility" defined), 4058 ("durable power of attorney for health care" defined), 4064 ("health care decision" defined), 4066 ("health care provider" defined), 4076 ("residential care facility for the elderly" defined).

**§ 4315. Revocation of durable power of attorney for health care**

4315. (a) At any time while the principal has the capacity to give a durable power of attorney for health care, the principal may do any of the following:

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

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

(b) If the principal notifies the health care provider orally or in writing that the authority granted to the agent to make health care

decisions is revoked, the health care provider shall make the notification a part of the principal's medical records and shall make a reasonable effort to notify the agent of the revocation.

(c) It is presumed that the principal has the capacity to revoke a durable power of attorney for health care. This presumption is a presumption affecting the burden of proof.

(d) Unless it provides otherwise, a valid durable power of attorney for health care revokes any prior durable power of attorney for health care.

(e) Unless the durable power of attorney for health care expressly provides otherwise, if after executing a durable power of attorney for health care the principal's marriage is dissolved or annulled, the dissolution or annulment revokes any designation of the former spouse as an agent to make health care decisions for the principal. If any designation is revoked solely by this subdivision, it is revived by the principal's remarriage to the former spouse.

(f) If authority granted by a durable power of attorney for health care is revoked under this section, a person is not subject to criminal prosecution or civil liability for acting in good faith reliance upon the durable power of attorney for health care unless the person has actual knowledge of the revocation.

Comment. Section 4315 continues former Civil Code Section 2437 without change, except for the substitution of "agent" for "attorney in fact" and some technical, nonsubstantive revisions. See Section 4052 ("agent" defined). This section makes clear that the principal can revoke the appointment of the agent or the authority granted to the agent by oral or written notification to the agent or health care provider. The principal may revoke the appointment or authority only if, at the time of revocation, the principal has sufficient capacity to give a durable power of attorney for health care. The burden of proof is on the person who seeks to establish that the principal did not have the capacity to revoke the appointment or authority. See subdivision (c). Although the authorization to act as agent to make health care decisions is revoked if the principal notifies the agent orally or in writing that the appointment of the agent is revoked, a health care provider is protected if the health care provider without knowledge of the revocation acts in good faith on a health care decision of the agent. See Section 4330 (immunities of health care provider).

Subdivision (b) is intended to preserve a record of a written or oral revocation. It also provides a means by which notice of an oral or written revocation to a health care provider may come to the attention of a successor health care provider and imposes a duty to make a reasonable effort to notify the agent of the revocation.

Subdivision (f) makes clear that a person is not liable for acting in good faith reliance upon the durable power of attorney unless the

person has actual knowledge of its revocation. This subdivision is a specific application of the general agency rule stated in Civil Code Section 2356(b) and is comparable to a provision found in the Natural Death Act. See Health & Safety Code § 7189(b). Although a person is protected if the person acts in good faith and without actual notice of the revocation, a person who withholds knowledge of the revocation is guilty of unlawful homicide where the death of the principal is hastened as a result of the failure to disclose the revocation. See Section 4313.

See also Sections 4052 ("agent" defined), 4058 ("durable power of attorney for health care" defined), 4064 ("health care decision" defined), 4074 ("principal" defined).

**§ 4316. Expiration of durable power of attorney for health care**

4316. Unless a shorter period is provided in the durable power of attorney for health care, a durable power of attorney for health care executed after January 1, 1984, expires seven years after the date of its execution unless at the end of the seven-year period the principal lacks the capacity to make health care decisions for himself or herself, in which case the durable power of attorney for health care continues in effect until the time when the principal regains the capacity to make health care decisions for himself or herself.

**Comment.** Section 4316 continues former Civil Code Section 2436.5 without change. Section 4316 limits the duration of a durable power of attorney for health care. The durable power of attorney may provide for a shorter duration, but the period of duration provided by Section 4316 may not be made longer by a provision in the durable power of attorney. The section does not apply to a durable power of attorney for health care executed before January 1, 1984, there being no limitation on the duration of such a durable power of attorney unless specified in the durable power of attorney.

See also Sections 4058 ("durable power of attorney for health care" defined), 4064 ("health care decision" defined), 4074 ("principal" defined).

**Note.** *The seven-year limitation is the subject of another Commission recommendation. If the proposed legislation is enacted, this section will be conformed.*

**Article 3. Limitations and Restrictions**

**§ 4320. Limitations on agent's authority**

4320. A power of attorney may not authorize the agent to consent to any of the following on behalf of the principal:

(a) Commitment to or placement in a mental health treatment facility.



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

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

(d) Sterilization.

(e) Abortion.

Comment. Section 4320 continues former Civil Code Section 2435 without substantive change. "Agent" has been substituted for "attorney in fact." See Section 4052 ("agent" defined). The word "durable" has been omitted because it the prohibition of this section applies to all powers of attorney. A power of attorney may not vary the limitations of this section. See also Section 4321 (unauthorized acts and omissions).

See also Sections 4056 ("durable power of attorney" defined), 4074 ("principal" defined).

#### § 4321. Unauthorized acts or omissions

4321. Nothing in this chapter shall be construed to condone, authorize, or approve mercy killing, or to permit any affirmative or deliberate act or omission to end life other than the withholding or withdrawal of health care pursuant to a durable power of attorney for health care so as to permit the natural process of dying. In making health care decisions under a durable power of attorney for health care, an attempted suicide by the principal shall not be construed to indicate a desire of the principal that health care treatment be restricted or inhibited.

Comment. Section 4321 continues former Civil Code Section 2443 without change, except for the substitution of a reference to "chapter" instead of "article." Section 4321 does not prevent the withholding or withdrawal of health care to permit the natural process of dying.

See also Sections 4054 ("community care facility" defined), 4058 ("durable power of attorney for health care" defined), 4064 ("health care decision" defined), 4074 ("principal" defined).

#### § 4322. Principal's objections

4322. Nothing in this chapter authorizes an agent to consent to health care, or to consent to the withholding or withdrawal of health care necessary to keep the principal alive, if the principal objects to the health care or to the withholding or withdrawal of the health care. In such a case, the case is governed by the law that would apply if there were no durable power of attorney for health care.

**Comment.** Section 4322 continues former Civil Code Section 2440 without change, except for the substitution of "agent" for "attorney in fact" and of a reference to "chapter" instead of "article." See Section 4052 ("agent" defined).

Section 4322 precludes the agent from consenting to treatment for the principal when the principal does not want the treatment or from consenting to the withholding or withdrawal of treatment necessary to keep the principal alive if the principal objects to withholding or stopping the treatment. This section does not limit any right the agent may have apart from the authority under the durable power of attorney for health care. See Section 4312(c).

See also Sections 4052 ("agent" defined), 4058 ("durable power of attorney for health care" defined), 4062 ("health care" defined).

**§ 4323. Restriction on execution of durable power of attorney for health care as condition for admission, treatment, or insurance**

4323. No health care provider, health care service plan, insurer issuing disability insurance, self-insured employee welfare plan, or nonprofit hospital plan or similar insurance plan, may condition admission to a facility, or the providing of treatment, or insurance, on the requirement that a patient execute a durable power of attorney for health care.

**Comment.** Section 4323 continues former Civil Code Section 2441 without change. Section 4323 is intended to eliminate the possibility that duress might be used by a health care provider or insurer to cause the patient to execute a durable power of attorney for health care.

See also Sections 4058 ("durable power of attorney for health care" defined), 4066 ("health care provider" defined).

**§ 4324. Alteration or forging, or concealment or withholding knowledge of revocation of durable power of attorney for health care**

4324. Any person who, except where justified or excused by law, alters or forges a durable power of attorney for health care of another, or willfully conceals or withholds personal knowledge of a revocation as provided under Section 4315, with the intent to cause a withholding or withdrawal of health care necessary to keep the principal alive contrary to the desires of the principal, and thereby, because of such act, directly causes health care necessary to keep the principal alive to be withheld or withdrawn and the death of the principal thereby to be hastened, is subject to prosecution for unlawful homicide as provided in Chapter 1 (commencing with Section 187) of Title 8 of Part 1 of the Penal Code.

Comment. Section 4324 continues former Civil Code Section 2442 without change, except for the revision of a cross-reference to another section. This section is drawn from Section 7194 of the Health and Safety Code (Natural Death Act).

See also Sections 4058 ("durable power of attorney for health care" defined), 4062 ("health care" defined), 4074 ("principal" defined).

#### Article 4. Protections and Immunities

##### § 4330. Immunities of health care provider

4330. (a) Subject to any limitations stated in the durable power of attorney for health care and to subdivision (b) and to Sections 4320, 4321, 4322, 4323, and 4324, a health care provider is not subject to criminal prosecution, civil liability, or professional disciplinary action except to the same extent as would be the case if the principal, having had the capacity to give informed consent, had made the health care decision on his or her own behalf under like circumstances, if the health care provider relies on a health care decision and both of the following requirements are satisfied:

(1) The decision is made by an agent who the health care provider believes in good faith is authorized under this chapter to make the decision.

(2) The health care provider believes in good faith that the decision is not inconsistent with the desires of the principal as expressed in the durable power of attorney for health care or otherwise made known to the health care provider, and, if the decision is to withhold or withdraw health care necessary to keep the principal alive, the health care provider has made a good faith effort to determine the desires of the principal to the extent that the principal is able to convey those desires to the health care provider and the results of the effort are made a part of the principal's medical records.

(b) Nothing in this chapter authorizes a health care provider to do anything illegal.

(c) Notwithstanding the health care decision of the agent designated by a durable power of attorney for health care, the health care provider is not subject to criminal prosecution, civil liability, or professional disciplinary action for failing to withdraw health care necessary to keep the principal alive.

**Comment.** Section 4330 continues former Civil Code Section 2438 without change, except for the revision of cross-references to other provisions, the substitution of "agent" for "attorney in fact," and other technical, nonsubstantive revisions. See Section 4052 ("agent" defined). Section 4330 implements this chapter by protecting the health care provider who acts in good faith reliance on a health care decision made by an agent pursuant to this chapter. The protection under Section 4330 is limited. A health care provider is not protected from liability for malpractice. Nor is a health care provider protected if the health care provider fails to provide the agent with the information necessary so that the agent can give informed consent. Nor is a health care provider authorized to do anything illegal. See also Sections 4320 (forms of treatment not authorized by durable power of attorney for health care), 4321 (unauthorized acts and omissions).

Subdivision (c) provides immunity to the health care provider insofar as there might otherwise be liability for failing to comply with a decision of the agent to withdraw consent previously given to provide health care necessary to keep the principal alive. This subdivision does not deal with providing health care necessary to keep the principal alive. The situations where such health care can be provided without informed consent (such as an emergency situation) continue to be governed by the law otherwise applicable.

See also Sections 4052 ("agent" defined), 4054 ("health care" defined), 4058 ("durable power of attorney for health care" defined), 4064 ("health care decision" defined), 4066 ("health care provider" defined), 4074 ("principal" defined), 4076 ("residential care facility for the elderly" defined).

**§ 4331. Convincing evidence of identity of principal**

4331. For the purposes of the declaration of witnesses required by Section 4310 or 4351, "convincing evidence" means the absence of any information, evidence, or other circumstances which would lead a reasonable person to believe that the person signing or acknowledging the durable power of attorney for health care as principal is not the individual he or she claims to be and any one of the following:

(a) Reasonable reliance on the presentation of any one of the following, if the document is current or has been issued within five years:

(1) An identification card or driver's license issued by the California Department of Motor Vehicles.

(2) A passport issued by the Department of State of the United States.

(b) Reasonable reliance on the presentation of any one of the following, if the document is current or has been issued within five years and contains a photograph and description of the person named on

it, is signed by the person, bears a serial or other identifying number, and, in the event that the document is a passport, has been stamped by the United States Immigration and Naturalization Service:

(1) A passport issued by a foreign government.

(2) A driver's license issued by a state other than California or by a Canadian or Mexican public agency authorized to issue drivers' licenses.

(3) An identification card issued by a state other than California.

(4) An identification card issued by any branch of the armed forces of the United States.

(c) If the principal is a patient in a skilled nursing facility, a witness who is a patient advocate or ombudsman may, for the purposes of Section 4310 or 4351, rely upon the representations of the administrators or staff of the skilled nursing facility, or of family members, as convincing evidence of the identity of the principal if the patient advocate or ombudsman believes that the representations provide a reasonable basis for determining the identity of the principal.

**Comment.** Section 4331 continues former Civil Code Section 2511 without substantive change. This section is drawn from Civil Code Section 1185 (acknowledgment of instrument by notary public), but is more restrictive because this section does not include the substance of Civil Code Section 1185(c)(1).

## Chapter 2. Statutory Form Durable Power of Attorney for Health Care

### § 4350. Short title

4350. This chapter shall be known and may be cited as the Keene Health Care Agent Act.

**Comment.** Section 4350 continues former Civil Code Section 2508 without change.

### § 4351. Statutory form durable power of attorney for health care

4351. The use of the following form in the creation of a durable power of attorney for health care under Chapter 1 (commencing with Section 4300) is lawful, and when used, the power of attorney shall be construed in accordance with this chapter and is subject to Chapter 1 (commencing with Section 4300), provided, however, that the use of a form previously authorized by this statute (at the time it was so authorized) remains valid.

STATUTORY FORM DURABLE POWER OF ATTORNEY FOR HEALTH CARE

(California Probate Code Section 4351)

WARNING TO PERSON EXECUTING THIS DOCUMENT

THIS IS AN IMPORTANT LEGAL DOCUMENT WHICH IS AUTHORIZED BY THE KEENE HEALTH CARE AGENT ACT. BEFORE EXECUTING THIS DOCUMENT, YOU SHOULD KNOW THESE IMPORTANT FACTS:

THIS DOCUMENT GIVES THE PERSON YOU DESIGNATE AS YOUR AGENT THE POWER TO MAKE HEALTH CARE DECISIONS FOR YOU. YOUR AGENT MUST ACT CONSISTENTLY WITH YOUR DESIRES AS STATED IN THIS DOCUMENT OR OTHERWISE MADE KNOWN.

EXCEPT AS YOU OTHERWISE SPECIFY IN THIS DOCUMENT, THIS DOCUMENT GIVES YOUR AGENT THE POWER TO CONSENT TO YOUR DOCTOR NOT GIVING TREATMENT OR STOPPING TREATMENT NECESSARY TO KEEP YOU ALIVE.

NOTWITHSTANDING THIS DOCUMENT, YOU HAVE THE RIGHT TO MAKE MEDICAL AND OTHER HEALTH CARE DECISIONS FOR YOURSELF SO LONG AS YOU CAN GIVE INFORMED CONSENT WITH RESPECT TO THE PARTICULAR DECISION. IN ADDITION, NO TREATMENT MAY BE GIVEN TO YOU OVER YOUR OBJECTION AT THE TIME, AND HEALTH CARE NECESSARY TO KEEP YOU ALIVE MAY NOT BE STOPPED OR WITHHELD IF YOU OBJECT AT THE TIME.

THIS DOCUMENT GIVES YOUR AGENT AUTHORITY TO CONSENT, TO REFUSE TO CONSENT, OR TO WITHDRAW CONSENT TO ANY CARE, TREATMENT, SERVICE, OR PROCEDURE TO MAINTAIN, DIAGNOSE, OR TREAT A PHYSICAL OR MENTAL CONDITION. THIS POWER IS SUBJECT TO ANY STATEMENT OF YOUR DESIRES AND ANY LIMITATIONS THAT YOU INCLUDE IN THIS DOCUMENT. YOU MAY STATE IN THIS DOCUMENT ANY TYPES OF TREATMENT THAT YOU DO NOT DESIRE. IN ADDITION, A COURT CAN TAKE AWAY THE POWER OF YOUR AGENT TO MAKE HEALTH CARE DECISIONS FOR YOU IF YOUR AGENT (1) AUTHORIZES ANYTHING THAT IS ILLEGAL, (2) ACTS CONTRARY TO YOUR KNOWN DESIRES, OR (3) WHERE YOUR DESIRES ARE NOT KNOWN, DOES ANYTHING THAT IS CLEARLY CONTRARY TO YOUR BEST INTERESTS.

UNLESS YOU SPECIFY A SHORTER PERIOD IN THIS DOCUMENT, THIS POWER WILL EXIST FOR SEVEN YEARS FROM THE DATE YOU EXECUTE AND, IF YOU ARE UNABLE TO MAKE HEALTH CARE DECISIONS FOR YOURSELF AT THE TIME WHEN THIS SEVEN-YEAR PERIOD ENDS, THIS POWER WILL CONTINUE TO EXIST UNTIL THE TIME WHEN YOU BECOME ABLE TO MAKE HEALTH CARE DECISIONS FOR YOURSELF.

YOU HAVE THE RIGHT TO REVOKE THE AUTHORITY OF YOUR AGENT BY NOTIFYING YOUR AGENT OR YOUR TREATING DOCTOR, HOSPITAL, OR OTHER HEALTH CARE PROVIDER ORALLY OR IN WRITING OF THE REVOCATION.

YOUR AGENT HAS THE RIGHT TO EXAMINE YOUR MEDICAL RECORDS AND TO CONSENT TO THEIR DISCLOSURE UNLESS YOU LIMIT THIS RIGHT IN THIS DOCUMENT.

UNLESS YOU OTHERWISE SPECIFY IN THIS DOCUMENT, THIS DOCUMENT GIVES YOUR AGENT THE POWER AFTER YOU DIE TO (1) AUTHORIZE AN AUTOPSY, (2) DONATE YOUR BODY OR PARTS THEREOF FOR TRANSPLANT OR THERAPEUTIC OR EDUCATIONAL OR SCIENTIFIC PURPOSES, AND (3) DIRECT THE DISPOSITION OF YOUR REMAINS.

THIS DOCUMENT REVOKES ANY PRIOR DURABLE POWER OF ATTORNEY FOR HEALTH CARE.

YOU SHOULD CAREFULLY READ AND FOLLOW THE WITNESSING PROCEDURE DESCRIBED AT THE END OF THIS FORM. THIS DOCUMENT WILL NOT BE VALID UNLESS YOU COMPLY WITH THE WITNESSING PROCEDURE.

IF THERE IS ANYTHING IN THIS DOCUMENT THAT YOU DO NOT UNDERSTAND, YOU SHOULD ASK A LAWYER TO EXPLAIN IT TO YOU.

YOUR AGENT MAY NEED THIS DOCUMENT IMMEDIATELY IN CASE OF AN EMERGENCY THAT REQUIRES A DECISION CONCERNING YOUR HEALTH CARE. EITHER KEEP THIS DOCUMENT WHERE IT IS IMMEDIATELY AVAILABLE TO YOUR AGENT AND ALTERNATE AGENTS OR GIVE EACH OF THEM AN EXECUTED COPY OF THIS DOCUMENT. YOU MAY ALSO WANT TO GIVE YOUR DOCTOR AN EXECUTED COPY OF THIS DOCUMENT.

DO NOT USE THIS FORM IF YOU ARE A CONSERVATEE UNDER THE LANTERMAN-PETRIS-SHORT ACT AND YOU WANT TO APPOINT YOUR CONSERVATOR AS YOUR AGENT. YOU CAN DO THAT ONLY IF THE APPOINTMENT DOCUMENT INCLUDES A CERTIFICATE OF YOUR ATTORNEY.

1. DESIGNATION OF HEALTH CARE AGENT.

I, \_\_\_\_\_

\_\_\_\_\_  
(Insert your name and address)

do hereby designate and appoint \_\_\_\_\_

\_\_\_\_\_  
(Insert name, address, and telephone number of one individual only as your agent to make health care decisions for you. None of the

following may be designated as your agent: (1) your treating health care provider, (2) a nonrelative employee of your treating health care provider, (3) an operator of a community care facility, (4) a nonrelative employee of an operator of a community care facility, (5) an operator of a residential care facility for the elderly, or (6) a nonrelative employee of an operator of a residential care facility for the elderly.)

as my agent to make health care decisions for me as authorized in this document. For the purposes of this document, "health care decision" means consent, refusal of consent, or withdrawal of consent to any care, treatment, service, or procedure to maintain, diagnose, or treat an individual's physical or mental condition.

2. CREATION OF DURABLE POWER OF ATTORNEY FOR HEALTH CARE. By this document I intend to create a durable power of attorney for health care under Sections 4300 to 4331, inclusive, of the California Probate Code. This power of attorney is authorized by the Keene Health Care Agent Act and shall be construed in accordance with the provisions of Sections 4350 to 4359, inclusive, of the California Civil Code. This power of attorney shall not be affected by my subsequent incapacity.

3. GENERAL STATEMENT OF AUTHORITY GRANTED. Subject to any limitations in this document, I hereby grant to my agent full power and authority to make health care decisions for me to the same extent that I could make such decisions for myself if I had the capacity to do so. In exercising this authority, my agent shall make health care decisions that are consistent with my desires as stated in this document or otherwise made known to my agent, including, but not limited to, my desires concerning obtaining or refusing or withdrawing life-prolonging care, treatment, services, and procedures.

(If you want to limit the authority of your agent to make health care decisions for you, you can state the limitations in paragraph 4 ("Statement of Desires, Special Provisions, and Limitations") below. You can indicate your desires by including a statement of your desires in the same paragraph.)



4. STATEMENT OF DESIRES, SPECIAL PROVISIONS, AND LIMITATIONS.

*(Your agent must make health care decisions that are consistent with your known desires. You can, but are not required to, state your desires in the space provided below. You should consider whether you want to include a statement of your desires concerning life-prolonging care, treatment, services, and procedures. You can also include a statement of your desires concerning other matters relating to your health care. You can also make your desires known to your agent by discussing your desires with your agent or by some other means. If there are any types of treatment that you do not want to be used, you should state them in the space below. If you want to limit in any other way the authority given your agent by this document, you should state the limits in the space below. If you do not state any limits, your agent will have broad powers to make health care decisions for you, except to the extent that there are limits provided by law.)*

In exercising the authority under this durable power of attorney for health care, my agent shall act consistently with my desires as stated below and is subject to the special provisions and limitations stated below:

(a) Statement of desires concerning life-prolonging care, treatment, services, and procedures:

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(b) Additional statement of desires, special provisions, and limitations:

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(You may attach additional pages if you need more space to complete your statement. If you attach additional pages, you must date and sign EACH of the additional pages at the same time you date and sign this document.)

5. INSPECTION AND DISCLOSURE OF INFORMATION RELATING TO MY PHYSICAL OR MENTAL HEALTH. Subject to any limitations in this document, my agent has the power and authority to do all of the following:

(a) Request, review, and receive any information, verbal or written, regarding my physical or mental health, including, but not limited to, medical and hospital records.

(b) Execute on my behalf any releases or other documents that may be required in order to obtain this information.

(c) Consent to the disclosure of this information.

*(If you want to limit the authority of your agent to receive and disclose information relating to your health, you must state the limitations in paragraph 4 ("Statement of Desires, Special Provisions, and Limitations") above.)*

6. SIGNING DOCUMENTS, WAIVERS, AND RELEASES. Where necessary to implement the health care decisions that my agent is authorized by this document to make, my agent has the power and authority to execute on my behalf all of the following:

(a) Documents titled or purporting to be a "Refusal to Permit Treatment" and "Leaving Hospital Against Medical Advice."

(b) Any necessary waiver or release from liability required by a hospital or physician.

7. AUTOPSY; ANATOMICAL GIFTS; DISPOSITION OF REMAINS. Subject to any limitations in this document, my agent has the power and authority to do all of the following:

(a) Authorize an autopsy under Section 7113 of the Health and Safety Code.

(b) Make a disposition of a part or parts of my body under the Uniform Anatomical Gift Act (Chapter 3.5 (commencing with Section 7150) of Part 1 of Division 7 of the Health and Safety Code).

(c) Direct the disposition of my remains under Section 7100 of the Health and Safety Code.

*(If you want to limit the authority of your agent to consent to an autopsy, make an anatomical gift, or direct the disposition of your remains, you must state the limitations in paragraph 4 ("Statement of Desires, Special Provisions, and Limitations") above.)*

8. DURATION.

*(Unless you specify a shorter period in the space below, this power of attorney will exist for seven years from the date you execute this document and, if you are unable to make health care decisions for yourself at the time when this seven-year period ends, the power will continue to exist until the time when you become able to make health care decisions for yourself.)*

This durable power of attorney for health care expires on \_\_\_\_\_

*(Fill in this space ONLY if you want the authority of your agent to end EARLIER than the seven-year period described above.)*

9. DESIGNATION OF ALTERNATE AGENTS.

*(You are not required to designate any alternate agents but you may do so. Any alternate agent you designate will be able to make the same health care decisions as the agent you designated in paragraph 1, above, in the event that agent is unable or ineligible to act as your agent. If the agent you designated is your spouse, he or she becomes ineligible to act as your agent if your marriage is dissolved.)*

If the person designated as my agent in paragraph 1 is not available or becomes ineligible to act as my agent to make a health care decision for me or loses the mental capacity to make health care decisions for me, or if I revoke that person's appointment or authority to act as my agent to make health care decisions for me, then I designate and appoint the following persons to serve as my agent to make health care decisions for me as authorized in this document, such persons to serve in the order listed below:

A. First Alternate Agent \_\_\_\_\_

*(Insert name, address, and telephone number of first alternate agent)*

B. Second Alternate Agent \_\_\_\_\_

*(Insert name, address, and telephone number of second alternate agent)*

10. NOMINATION OF CONSERVATOR OF PERSON.

*(A conservator of the person may be appointed for you if a court decides that one should be appointed. The conservator is responsible for your physical care, which under some circumstances includes making health care decisions for you. You are not required to nominate a conservator but you may do so. The court will appoint the person you nominate unless that would be contrary to your best interests. You may, but are not required to, nominate as your conservator the same person you named in paragraph 1 as your health care agent. You can nominate an individual as your conservator by completing the space below.)*

If a conservator of the person is to be appointed for me, I nominate the following individual to serve as conservator of the person \_\_\_\_\_

*(Insert name and address of person nominated as conservator of the person)*

11. PRIOR DESIGNATIONS REVOKED. I revoke any prior durable power of attorney for health care.

**DATE AND SIGNATURE OF PRINCIPAL**

**(YOU MUST DATE AND SIGN THIS POWER OF ATTORNEY)**

I sign my name to this Statutory Form Durable Power of Attorney for Health Care on \_\_\_\_\_ at \_\_\_\_\_, \_\_\_\_\_.  
(Date) (City) (State)

\_\_\_\_\_  
*(You sign here)*

(THIS POWER OF ATTORNEY WILL NOT BE VALID UNLESS IT IS SIGNED BY TWO QUALIFIED WITNESSES WHO ARE PRESENT WHEN YOU SIGN OR ACKNOWLEDGE YOUR SIGNATURE. IF YOU HAVE ATTACHED ANY ADDITIONAL PAGES TO THIS FORM, YOU MUST DATE AND SIGN EACH OF THE ADDITIONAL PAGES AT THE SAME TIME YOU DATE AND SIGN THIS POWER OF ATTORNEY.)

#### STATEMENT OF WITNESSES

(This document must be witnessed by two qualified adult witnesses. None of the following may be used as a witness: (1) a person you designate as your agent or alternate agent, (2) a health care provider, (3) an employee of a health care provider, (4) the operator of a community care facility, (5) an employee of an operator of a community care facility, (6) the operator of a residential care facility for the elderly, or (7) an employee of an operator of a residential care facility for the elderly. At least one of the witnesses must make the additional declaration set out following the place where the witnesses sign.)

(READ CAREFULLY BEFORE SIGNING. You can sign as a witness only if you personally know the principal or the identity of the principal is proved to you by convincing evidence.)

(To have convincing evidence of the identity of the principal, you must be presented with and reasonably rely on any one or more of the following:

(1) An identification card or driver's license issued by the California Department of Motor Vehicles that is current or has been issued within five years.

(2) A passport issued by the Department of State of the United States that is current or has been issued within five years.

(3) Any of the following documents if the document is current or has been issued within five years and contains a photograph and description of the person named on it, is signed by the person, and bears a serial or other identifying number:

(a) A passport issued by a foreign government that has been stamped by the United States Immigration and Naturalization Service.

(b) A driver's license issued by a state other than California or by a Canadian or Mexican public agency authorized to issue drivers' licenses.

(c) An identification card issued by a state other than California.

(d) An identification card issued by any branch of the armed forces of the United States.

(4) If the principal is a patient in a skilled nursing facility, a witness who is a patient advocate or ombudsman may rely upon the representations of the administrator or staff of the skilled nursing facility, or of family members, as convincing evidence of the identity of the principal if the patient advocate or ombudsman believes that the representations provide a reasonable basis for determining the identity of the principal.)

(Other kinds of proof of identity are not allowed.)

I declare under penalty of perjury under the laws of California that the person who signed or acknowledged this document is personally known to me (or proved to me on the basis of convincing evidence) to be the principal, that the principal signed or acknowledged this durable power of attorney in my presence, that the principal appears to be of sound mind and under no duress, fraud, or undue influence, that I am not the person appointed as agent by this document, and that I am not a health care provider, an employee of a health care provider, the operator of a community care facility, an employee of an operator of a community care facility, the operator of a residential care facility for the elderly, nor an employee of an operator of a residential care facility for the elderly.

Signature: \_\_\_\_\_ Residence Address: \_\_\_\_\_

Print Name: \_\_\_\_\_

Date: \_\_\_\_\_

Signature: \_\_\_\_\_ Residence Address: \_\_\_\_\_

Print Name: \_\_\_\_\_

Date: \_\_\_\_\_

(AT LEAST ONE OF THE ABOVE WITNESSES MUST ALSO SIGN THE FOLLOWING DECLARATION.)

I further declare under penalty of perjury under the laws of California that I am not related to the principal by blood, marriage,

or adoption, and, to the best of my knowledge, I am not entitled to any part of the estate of the principal upon the death of the principal under a will now existing or by operation of law.

Signature: \_\_\_\_\_

Signature: \_\_\_\_\_

**STATEMENT OF PATIENT ADVOCATE OR OMBUDSMAN**

*(If you are a patient in a skilled nursing facility, one of the witnesses must be a patient advocate or ombudsman. The following statement is required only if you are a patient in a skilled nursing facility -- a health care facility that provides the following basic services: skilled nursing care and supportive care to patients whose primary need is for availability of skilled nursing care on an extended basis. The patient advocate or ombudsman must sign both parts of the "Statement of Witnesses" above AND must also sign the following statement.)*

I further declare under penalty of perjury under the laws of California that I am a patient advocate or ombudsman as designated by the State Department of Aging and that I am serving as a witness as required by subdivision (f) of Section 4310 of the Probate Code.

Signature: \_\_\_\_\_

Comment. Section 4351 continues former Civil Code Section 2500 without change, except for the revision of cross-references to other provisions, the use of "agent" in place of "attorney in fact" in the warning statement, and other technical, nonsubstantive revisions. "Agent" has been substituted for "attorney in fact." See Section 4052 ("agent" defined).

Section 4351 is consistent with and subject to the substantive law applicable to a durable power of attorney for health care. See Sections 4300-4331 (durable power of attorney for health care), 4400-4460 (court review). However, in the statutory form durable power of attorney for health care, the warning set out in Section 4351 replaces the one set out in Section 4311. See also Section 4352 (warning or lawyer's certificate). Two witnesses are required for use of a statutory form durable power of attorney for health care; acknowledgment before a notary is not permitted. Compare Section 4351 with Section 4310(a)(2)(B) (acknowledgement before notary public). The last sentence of the fifth paragraph of the "warning" recognizes the authority given the court by Section 4442.

As to use of forms complying with former law, see Section 4355. See also Sections 4054 ("community care facility" defined), 4058 ("durable power of attorney for health care" defined), 4062 ("health care" defined), 4064 ("health care decision" defined), 4066 ("health care provider" defined), 4074 ("principal" defined), 4076 ("residential care facility for the elderly" defined).

*Note.* The seven-year limitation is the subject of another Commission recommendation. If the proposed legislation is enacted, this section will be conformed.

**§ 4352. Warning or lawyer's certificate**

4352. (a) Notwithstanding Section 4311, except as provided in subdivision (b), a statutory form durable power of attorney for health care, to be valid, shall contain, in not less than 10-point boldface type or a reasonable equivalent thereof, the warning statement which is printed in capital letters at the beginning of Section 4351.

(b) Subdivision (a) does not apply if the statutory form durable power of attorney for health care contains a certificate signed by the principal's lawyer stating: "I am a lawyer authorized to practice law in the state where this power of attorney was executed, and the principal was my client at the time when this power of attorney was executed. I have advised my client concerning his or her rights in connection with this power of attorney and the applicable law and the consequences of signing or not signing this power of attorney, and my client, after being so advised, has executed this power of attorney."

*Comment.* Section 4352 continues former Civil Code Section 2501 without change, except for the revision of cross-references to other provisions. This section makes invalid a statutory form durable power of attorney for health care that does not contain the warning or, in lieu of the warning, a lawyer's certificate. The warning set out in Section 4351 must be used in the statutory form instead of the warning set out in Section 4311.

See also Sections 4064 ("health care decision" defined), 4066 ("health care provider" defined), 4070 ("power of attorney" defined), 4076 ("residential care facility for the elderly" defined), 4080 ("statutory form durable power of attorney for health care" defined).

**§ 4353. Formal requirements**

4353. (a) Notwithstanding paragraph (3) of subdivision (a) of Section 4310, a statutory form durable power of attorney for health care is valid, and the designated agent may make health care decisions pursuant to such authority, only if it (1) contains the date of its



execution, (2) is signed by the principal, and (3) is signed by two qualified witnesses, each of whom executes, under penalty of perjury, the declaration set out in the first paragraph of the "Statement of Witnesses" in the form set out in Section 4351, and one of whom also executes the declaration under penalty of perjury set out in the second paragraph of the "Statement of Witnesses" in the form set out in Section 4351.

(b) Nothing in this section excuses compliance with the special requirements imposed by subdivisions (c) and (f) of Section 4310.

Comment. Section 4353 continues former Civil Code Section 2502 without change, except for the revision of cross-references to other provisions and the substitution of "agent" for "attorney in fact." See Section 4052 ("agent" defined).

Section 4353 is comparable to Section 4310. To be valid a statutory form durable power of attorney for health care must satisfy the requirements of both Section 4352 and 4353. It should be noted that a statutory form durable power of attorney for health care requires two witnesses and, unlike Section 4310, acknowledgement before a notary is not authorized.

See also Sections 4052 ("agent" defined), 4064 ("health care decision" defined), 4074 ("principal" defined), 4078 ("statutory form durable power of attorney for health care" defined).

**§ 4354. Requirements for statutory form**

4354. (a) Subject to subdivisions (b), (c), and (d), a power of attorney is a "statutory form durable power of attorney for health care," as this phrase is used in this chapter, if it meets both of the following requirements:

(1) It meets the requirements of Sections 4352 and 4353.

(2) It includes the exact wording of the text of paragraphs 1, 2, 3, and 4 of the form set out in Section 4351.

(b) A statutory form durable power of attorney for health care may include one or more or all of paragraphs 5 to 11, inclusive, of the form set out in Section 4351.

(c) A printed statutory form durable power of attorney for health care sold or otherwise distributed in this state for use by a person who does not have the advice of legal counsel shall contain the exact wording of the form set out in Section 4351, including the warning and instructions, and nothing else. Nothing in this subdivision prohibits selling or otherwise distributing with the printed form (1) material

that explains the form and its use if such material is separate from the printed form itself and is not a part of the form executed by the principal or (2) one or more additional pages that are separate from the printed form itself that a person may attach to the printed form as provided in subdivision (d) if the person so chooses.

(d) If one or more additional pages are attached to a statutory form durable power of attorney for health care as a statement, or additional statement, to be a part of subparagraph (a) or (b), or both, of paragraph 4 ("Statement of Desires, Special Provisions, and Limitations") of the form set forth in Section 4351, each of the additional pages shall be dated and signed by the principal at the same time the principal dates and signs the statutory form durable power of attorney for health care.

Comment. Section 4354 continues former Civil Code Section 2503 without change, except for the revision of cross-references to other provisions. This section permits use of a statutory form durable power of attorney for health care that omits portions of the form set out in Section 4351, such as, for example, the paragraph on "Duration." However, if the form is sold or distributed for use by a person who does not have a lawyer, the form must be exactly as set out in the statute with nothing omitted. Section 4354 also permits use of a printed statutory form that includes separate attached printed statements of desires, special provisions, and limitations, if the person using the form so desires, such as, for example, a statement that the health care agent is to confer with specified members of the principal's family who are reasonably available before making specified health care decisions or a statement that the health care agent is authorized and directed to arrange for health care of the principal by spiritual means through prayer in accordance with the tenets and practices of a recognized church or religious denomination by an accredited practitioner thereof. A separately printed statement of the principal's desires concerning life-prolonging care, treatment, services, and procedures may also be used. The statements of desires, special provisions, and limitations--whether or not printed--are, of course, subject to the provisions of Chapter 1 (commencing with Section 4300). See the introductory clause of Section 4351.

See also Sections 4074 ("principal" defined), 4080 ("statutory form durable power of attorney for health care" defined).

**§ 4355. Requirements for forms after January 1, 1993**

4355. (a) A statutory form durable power of attorney for health care executed on or after January 1, 1993, using a form that complies with former Section 2500 of the Civil Code is as valid as if it had been executed using a form that complies with Section 4351 of this code.

(b) Notwithstanding former Section 2501 of the Civil Code or Section 4352 of this code, a statutory form durable power of attorney for health care executed on or after January 1, 1993, is not invalid if it contains the warning using the language set forth in former Section 2500 of the Civil Code instead of the warning using the language set forth in Section 4351 of this code.

(c) For the purposes of subdivision (c) of former Section 2503 of the Civil Code and subdivision (c) of Section 4354 of this code, on and after January 1, 1993, a printed statutory form durable power of attorney for health care may be sold or otherwise distributed if it contains the exact wording of the form set out in former Section 2500 of the Civil Code or the exact wording of the form set out in Section 4351 of this code, including the warning and instructions, and nothing else; but any printed statutory form durable power of attorney for health care printed on or after January 1, 1993, that is sold or otherwise distributed in this state for use by a person who does not have the advice of legal counsel shall contain the exact wording of the form set out in Section 4351 of this code, including the warning and instructions, and nothing else.

Comment. Section 4355 supersedes former Civil Code Section 2503.5, but like the former section, this section permits continued use of the form prescribed under former law until existing supplies are exhausted. Section 4355 permits use of a form complying with former Civil Code Section 2500 (applicable from January 1, 1986, until January 1, 1993). Accordingly, after January 1, 1993, either the form set forth in former Civil Code Section 2500 or the form set forth in this section may be used. This avoids the need to discard existing printed forms on January 1, 1993. However, forms printed on or after January 1, 1993, must contain the exact wording of the form set out in Section 4351, including the warning and instructions, and nothing else.

Note. Further consideration should be given to whether this section can be simplified, such as by validating in general language the use of forms that complied with the statute when they were printed.

**§ 4356. Language conferring general authority**

4356. In a statutory form durable power of attorney for health care, the language conferring general authority with respect to "health care decisions" authorizes the agent to select and discharge physicians, dentists, nurses, therapists, and other health care professionals as the agent determines necessary to carry out the health care decisions the agent is authorized by the power of attorney to make.

Comment. Section 4356 continues former Civil Code Section 2504 without change, except for the substitution of "agent" for "attorney in fact." See Section 4052 ("agent" defined). See also Sections 4064 ("health care decision" defined), 4078 ("statutory form durable power of attorney for health care" defined).

**§ 4357. Effect of documents executed by agent**

4357. If a document described in paragraph 5 or 6 of the form set out in Section 4351 is executed on behalf of the principal by the agent in the exercise of authority granted to the agent by paragraph 5 or 6 of the form set out in Section 4351, the document has the same effect as if the principal had executed the document at the same time and under the same circumstances and had the capacity to execute the document at that time.

Comment. Section 4357 continues former Civil Code Section 2505 without change, except for the revision of cross-references to other provisions and the substitution of "agent" for "attorney in fact." See Section 4052 ("agent" defined). See also Sections 4074 ("principal" defined), 4078 ("statutory form durable power of attorney for health care" defined).

**§ 4358. Termination of authority; alternate agent**

4358. If the authority of the agent under the statutory form durable power of attorney for health care is terminated by the court under Part 4 (commencing with Section 4400), an alternate agent designated in the statutory form durable power of attorney for health care is not authorized to act as the agent unless the court so orders. In the order terminating the authority of the agent to make health care decisions for the principal, the court shall authorize the alternate agent, if any, designated in the statutory form durable power of attorney for health care to act as the agent to make health care decisions for the principal under the durable power of attorney for health care unless the court finds that authorizing that alternate agent to make health care decisions for the principal would not be in the best interests of the principal.

Comment. Section 4358 continues former Civil Code Section 2506 without change, except for the revision of a cross-reference to another provision and the substitution of "agent" for "attorney in fact." See Section 4052 ("agent" defined).

This section applies only where the authority of the agent in fact is terminated by the court. This section does not apply where the

agent dies or otherwise is not available or becomes ineligible to act as agent or loses the mental capacity to make health care decisions for the principal or where the principal revokes the agent's appointment or authority. See paragraph 9 (designation of alternate agents) of statutory form set forth in Section 4351. Where the court terminates the authority of the agent, Section 4358 applies and the alternate agent is not authorized to act as agent unless the court so orders. However, in this case, the court is required to authorize the alternate agent to act unless the court finds that would not be in the best interests of the principal.

See also Sections 4052 ("agent" defined), 4064 ("health care decision" defined), 4074 ("principal" defined), 4078 ("statutory form durable power of attorney for health care" defined).

**§ 4359. Use of other forms**

4359. Nothing in this chapter affects or limits the use of any other form for a durable power of attorney for health care. Any form complying with the requirements of Chapter 1 (commencing with Section 4300) may be used in lieu of the form provided by Section 4351, and none of the provisions of this chapter apply if such other form is used.

**Comment.** Section 4359 continues former Civil Code Section 2507 without change, except for the revision of cross-references to other provisions. This section makes clear that a person may use a durable power of attorney for health care that is not a statutory form durable power of attorney for health care under this chapter. The other durable power of attorney for health care -- whether a printed form or a specially drafted document -- must, of course, comply with the requirements of Sections 4300-4331 and is subject to the provisions of those sections.

PART 4. COURT ENFORCEMENT OF DUTIES OF AGENTS  
UNDER POWERS OF ATTORNEY

Chapter 1. General Provisions

§ 4400. Legislative intent

4400. It is the intent of the Legislature in enacting this part 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 part or otherwise invoked pursuant to law.

Comment. Section 4400 continues former Civil Code Section 2423 without substantive change. See also Section 4070 ("power of attorney" defined).

§ 4401. Application of part

4401. (a) Except as otherwise provided, this part applies to all powers of attorney, including the following:

- (1) Durable powers of attorney for property.
- (2) Durable powers of attorney for health care.
- (3) Statutory form powers of attorney.
- (4) Statutory form durable powers of attorney for health care.
- (5) Nondurable powers of attorney.

(b) This part does not apply to reciprocal or interinsurance exchanges and their contracts, subscribers, attorneys in fact, agents, and representatives.

Comment. Section 4401 provides the scope of this part. See also Sections 4058 ("durable power of attorney for health care" defined), 4060 ("durable power of attorney for property" defined), 4068 ("nondurable power of attorney" defined), 4082 ("statutory form power of attorney" defined), 4080 ("statutory form durable power of attorney for health care" defined).

Subdivision (b) continues former Civil Code Section 2420(b) without substantive change.

§ 4402. Cumulative remedies

4402. The remedies provided under this part are cumulative and nonexclusive.

Comment. Section 4402 continues former Civil Code Section 2420(a) without substantive change.

**§ 4403. Effect of provision in power attempting to make part inapplicable**

4403. Subject to Section 4404, this part applies notwithstanding any provision of the power of attorney to the contrary.

Comment. Section 4403 continues former Civil Code Section 2422 without substantive change, except that the reference to former Civil Code Section 2420 is omitted as surplus. See Section 4401(b) (exclusion of reciprocal or interinsurance exchanges). See also Section 4070 ("power of attorney" defined).

**§ 4404. Limitation of remedies by provision in power of attorney**

4404. Except as provided in Sections 4405 and 4406, a power of attorney may expressly eliminate the authority of any person listed in Section 4440 to petition the court under this part for any one or more of the purposes enumerated in Section 4441 or 4442 if both of the following requirements are met:

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

(b) The principal's lawyer signs a certificate stating in substance: "I am a lawyer authorized to practice law in the state where this power of attorney was executed, and the principal was my client at the time this power of attorney was executed. I have advised my client concerning his or her rights in connection with this power of attorney and the applicable law and the consequences of signing or not signing this power of attorney, and my client, after being so advised, has executed this power of attorney."

Comment. Section 4404 continues former Civil Code Section 2421(a) without substantive change. This section makes clear that a power of attorney may limit the applicability of this part only if it is executed with the advice and approval of the principal's counsel. This limitation is designed to ensure that the execution of a power of attorney that restricts the remedies of this part is accomplished knowingly by the principal. The inclusion of a provision in the power of attorney making this article inapplicable does not affect the right to resort to any other judicial remedies that may otherwise be available. See Section 4402 (cumulative remedies).

See also Sections 4070 ("power of attorney" defined), 4074 ("principal" defined).

§ 4403. Effect of provision in power attempting to make part inapplicable

4403. Subject to Section 4404, this part applies notwithstanding any provision of the power of attorney to the contrary.

Comment. Section 4403 continues former Civil Code Section 2422 without substantive change, except that the reference to former Civil Code Section 2420 is omitted as surplus. See Section 4401(b) (exclusion of reciprocal or interinsurance exchanges). See also Section 4070 ("power of attorney" defined).

§ 4404. Limitation of remedies by provision in power of attorney

4404. Except as provided in Sections 4405 and 4406, a power of attorney may expressly eliminate the authority of any person listed in Section 4440 to petition the court under this part for any one or more of the purposes enumerated in Section 4441 or 4442 if both of the following requirements are met:

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

(b) The principal's lawyer signs a certificate stating in substance: "I am a lawyer authorized to practice law in the state where this power of attorney was executed, and the principal was my client at the time this power of attorney was executed. I have advised my client concerning his or her rights in connection with this power of attorney and the applicable law and the consequences of signing or not signing this power of attorney, and my client, after being so advised, has executed this power of attorney."

Comment. Section 4404 continues former Civil Code Section 2421(a) without substantive change. This section makes clear that a power of attorney may limit the applicability of this part only if it is executed with the advice and approval of the principal's counsel. This limitation is designed to ensure that the execution of a power of attorney that restricts the remedies of this part is accomplished knowingly by the principal. The inclusion of a provision in the power of attorney making this article inapplicable does not affect the right to resort to any other judicial remedies that may otherwise be available. See Section 4402 (cumulative remedies).

See also Sections 4070 ("power of attorney" defined), 4074 ("principal" defined).



on the acts or proposed acts of the agent under the durable power of attorney for health care. See Section 4442(b).

See also Sections 4052 ("agent" defined), 4058 ("durable power of attorney for health care" defined), 4074 ("principal" defined).

**§ 4407. Application of decedents' estates provisions**

4407. Proceedings under this part are governed, whenever possible, by the provisions of this part, but where the provisions of this part do not appear applicable, the provisions of Part 1 (commencing with Section 7000) of Division 7 apply.

**Comment.** Section 4407 continues former Civil Code Section 2417(e) without substantive change, except that the reference to the provisions governing administration of decedents' estates is limited to the general provisions in Part 1 (commencing with Section 7000) rather than the entire division.

**Note.** *Should this provision be continued? It may not do any harm, but we are not certain what provisions it picks up. If we are able to identify any important provisions, it might be best to include them in this division rather than leaving the matter to guesswork.*

**§ 4424. Jury trial**

4424. There is no right to a jury trial in proceedings under this division.

**Comment.** Section 4424 is a new provision. This section is consistent with the rule applicable to other fiduciaries. See Sections 1452 (guardianships and conservatorships), 7200 (decedents' estates), 17006 (trusts).

**Chapter 2. Jurisdiction and Venue**

**§ 4420. Jurisdiction and authority of court or judge**

4420. (a) The superior court has jurisdiction of proceedings under this division.

(b) The court in proceedings under this division is a court of general jurisdiction and the court, or a judge of the court, has the same power and authority with respect to the proceedings as otherwise provided by law for a superior court, or a judge of the superior court, including, but not limited to, the matters authorized by Section 128 of the Code of Civil Procedure.

**Comment.** Section 4420 is comparable to Section 7050 governing the jurisdiction and authority of the court in proceedings concerning administration of decedents' estates. See Comment to Section 7050.

This section is consistent with prior law. See former Civil Code §§ 2415 (petition filed in superior court), 2417(e) (proceedings governed by decedents' estates provisions where no specific rule in power of attorney statute).

**§ 4421. Jurisdiction over agent**

4421. Subject to Section 4422, a person who acts as an agent under to a power of attorney governed by this division is subject to personal jurisdiction in this state with respect to matters relating to acts and transactions of the agent performed in this state, performed for a domiciliary of this state, or affecting property in this state.

**Comment.** Section 4421 is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.730(2) (Vernon 1990). This section is also comparable to Sections 3902(b) (jurisdiction over custodian under Uniform Transfers to Minors Act) and 17003(a) (jurisdiction over trustee). This section is intended to facilitate exercise of the court's power under this part when the court's jurisdiction is properly invoked. As recognized by the introductory clause, constitutional limitations on assertion of jurisdiction apply to the exercise of jurisdiction under this section. Consequently, appropriate notice must be given to an agent as a condition of personal jurisdiction. Cf. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

See also Sections 4052 ("agent" defined), 4070 ("power of attorney" defined), 4074 ("principal" defined).

**§ 4422. Basis of jurisdiction**

4422. The court may exercise jurisdiction in proceedings under this part on any basis permitted by Section 410.10 of the Code of Civil Procedure.

**Comment.** Section 4422 is comparable to Section 17004 (jurisdiction under Trust Law). This section recognizes that the court, in proceedings relating to powers of attorney under this part, may exercise jurisdiction on any basis that is not inconsistent with the California or United States Constitutions, as provided in Code of Civil Procedure Section 410.10. See generally Judicial Council Comment to Code Civ. Proc. § 410.10; Comment to Section 17004 (basis of jurisdiction under Trust Law).

**§ 4423. Venue**

4423. Proceedings under this part shall be commenced in the superior court of the county in which the agent is resident or, if the agent is not resident in this state, in any county of this state.

**Comment.** Section 4423 continues former Civil Code Section 2414 without substantive change. "Agent" has been substituted for "attorney

in fact." See Section 4052 ("agent" defined). This section recognizes that the agent may not be a resident of this state at the time the petition is filed. See Sections 4004 (durable powers of attorney under law of another jurisdiction), 4056(a) ("durable power of attorney" defined to include foreign durable powers).

### Chapter 3. Petitions and Orders

#### § 4440. Petitioners

4440. A petition may be filed under this part by any of the following:

- (a) The agent.
- (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 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.
- (h) A treating health care provider with respect to a durable power of attorney for health care.
- (i) A parent of the principal with respect to a durable power of attorney for health care.

Comment. Section 4440 continues former Civil Code Section 2411 without substantive change. "Agent" has been substituted for "attorney in fact." See Section 4052 ("agent" defined).

This section limits the persons who may file a petition under this article to the agent, the conservator of the principal, those having a present interest or an expectancy in the property of the principal, and a court investigator or public guardian. The agent is permitted to file a petition so that he or she may, for example, obtain a court review of a particular transaction. See also Sections 4402 (other remedies not affected), 4404 (restriction in power of attorney of right to file petition), 4441 (petition as to power of attorney for property), 4442 (petition with respect to durable power of attorney for health care).

See also Sections 4052 ("agent" defined), 4058 ("durable power of attorney for health care" defined), 4066 ("health care provider" defined), 4070 ("power of attorney" defined), 4074 ("principal" defined).

Note. Is the class of petitioners too limited? Is there a reason why the principal's grandchildren cannot petition (unless they qualify under subdivision (e))? In cases where the principal is incapacitated, or where the capacity of the principal is an issue, the Missouri statute permits a petition by the principal, the agent, an adult member of the principal's family, or "any person interested in the welfare of the principal." See Mo. Ann. Stat. §§ 404.727(1), (4)-(5) (Vernon 1990). Is the Commission interested in expanding the class of permissible petitioners in any respect?

§ 4441. Petition as to power of attorney for property

4441. With respect to a power of attorney for property, a petition may be filed under this part for any one or more of the following purposes:

(a) Determining whether the power of attorney for property is in effect or has terminated.

(b) Passing on the acts or proposed acts of the agent.

(c) Compelling the agent to submit the agent's accounts or report the agent's acts as agent to the principal, the spouse of the principal, the conservator of the person or the estate of the principal, or to any other person required by the court in its discretion, if the agent has failed to submit an accounting or report within 60 days after written request from the person filing the petition.

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

(1) The agent 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.

Comment. Section 4441 continues former Civil Code Section 2412 without substantive change. "Agent" has been substituted for "attorney in fact." See Section 4052 ("agent" defined).

The introductory clause limits the application of this section to powers of attorney for property. This section applies to petitions concerning both durable and nondurable powers of attorney for property. See Section 4072 ("power of attorney for property" defined). Section 4442 applies to petitions with respect to durable powers of attorney for health care.

Subdivision (a) makes clear that a petition may be filed to

determine whether the power of attorney was ever effective, thus permitting, for example, a determination that the power of attorney was invalid when executed because its execution was induced by fraud. See also Section 4141 (unqualified agent).

Subdivision (d) requires a court determination that the principal has become incapacitated before the court is authorized to declare the power of attorney terminated because the agent has violated or is unfit to perform the fiduciary duties under the power of attorney.

See also Sections 4052 ("agent" defined), 4072 ("power of attorney for property" defined), 4074 ("principal" defined).

**§ 4442. Petition as to durable power of attorney for health care**

4442. With respect to a durable power of attorney for health care, a petition may be filed under this part for any one or more of the following purposes:

(a) Determining whether the durable power of attorney for health care is in effect or has terminated.

(b) Determining whether the acts or proposed acts of the agent are consistent with the desires of the principal as expressed in the durable power of attorney for health care or otherwise made known to the court or, where the desires of the principal are unknown or unclear, whether the acts or proposed acts of the agent are in the best interests of the principal.

(c) Compelling the agent to report the agent's acts as agent to the principal, the spouse of the principal, the conservator of the person of the principal, or to any other person required by the court in its discretion, if the agent has failed to submit the report within 10 days after written request from the person filing the petition.

(d) Declaring that the durable power of attorney for health care is terminated upon a determination by the court that the agent has made a health care decision for the principal that authorized anything illegal or upon a determination by the court of both of the following:

(1) The agent has violated, has failed to perform, or is unfit to perform, the duty under the durable power of attorney for health care to act consistent with the desires of the principal or, where the desires of the principal are unknown or unclear, is acting (by action or inaction) in a manner that is clearly contrary to the best interests of the principal.

(2) At the time of the determination by the court, the principal

lacks the capacity to execute or to revoke a durable power of attorney for health care.

Comment. Section 4442 continues former Civil Code Section 2412.5 without substantive change. "Agent" has been substituted for "attorney in fact." See Section 4052 ("agent" defined). This section enumerates the purposes for which a petition may be filed under this part with respect to a durable power of attorney for health care. Section 4441 applies to petitions with respect to powers of attorney for property.

Under subdivision (b), the desires of the principal as expressed in the durable power of attorney for health care or otherwise made known to the court provide the standard for judging the acts of the agent. Subdivision (d) permits the court to terminate the durable power of attorney for health care where the agent is not complying with the duty to carry out the desires of the principal. These subdivisions adopt a standard based on the principal's desires in place of a general standard of what may constitute the best interests of the principal. An attempted suicide by the principal is not to be construed to indicate the principal's desire that health care be restricted or inhibited. See Section 4321 (unauthorized acts and omissions).

Where it is not possible to use a standard based on the principal's desires because those desires are not stated in the power of attorney or otherwise known or are unclear, subdivision (b) provides that the "best interests of the principal" standard be used.

Subdivision (d) permits termination of the durable power of attorney for health care not only where the agent, for example, is acting illegally or failing to perform his or her duties under the power of attorney or is acting contrary to the known desires of the principal but also where the desires of the principal are unknown or unclear and the agent is acting in a manner that is clearly contrary to the best interests of the principal. The desires of the principal may become unclear as a result of the developments in medical treatment techniques that have occurred since the desires were expressed by the principal, such developments having changed the nature or consequences of the treatment.

A durable power of attorney for health care may limit the authority to petition under this article. See Section 4404 (limitation by provision in power of attorney).

See also Sections 4052 ("agent" defined), 4058 ("durable power of attorney for health care" defined), 4064 ("health care decision" defined), 4074 ("principal" defined).

#### § 4443. Commencement of proceeding

4443. A proceeding under this part is commenced by filing a petition stating facts showing that the petition is authorized under this part, the grounds of the petition, and, if known to the petitioner, the terms of the power of attorney.

Comment. Section 2415 restates parts of former Civil Code Section 2415 without substantive change. The former reference to verification is omitted as unnecessary. See Section 1021 (verification required in proceedings under this code). The former reference to filing in the

superior court is restated in a different form in Section 4420. The language concerning the grounds of the petition is new and is drawn from Section 17201 (commencement of proceeding under Trust Law). See also Section 1041 (clerk to set matter for hearing).

**§ 4444. Dismissal of petition**

4444. The court may dismiss a petition if it appears that the proceeding is not reasonably necessary for the protection of the interests of the principal or the principal's estate and shall stay or dismiss the proceeding in whole or in part when required by Section 410.30 of the Code of Civil Procedure.

Comment. Section 4444 restates former Civil Code Section 2416 without substantive change. The dismissal standard has been revised to permit dismissal when the proceeding is not "reasonably necessary," rather than "necessary" as under the former statute. Under this section, the court has authority to stay or dismiss a proceeding in this state if, in the interest of substantial justice, the proceeding should be heard in a forum outside this state. See Code Civ. Proc. § 410.30. See also Section 4074 ("principal" defined).

**§ 4445. Notice of hearing**

4445. 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:

- (a) The agent if not the petitioner.
- (b) The principal if not the petitioner.
- (c) Any other persons the court in its discretion requires.

Comment. Section 4445 continues former Civil Code Section 2417(b) without substantive change. "Agent" has been substituted for "attorney in fact." See Section 4052 ("agent" defined). See also 4074 ("principal" defined).

**§ 4446. Power of court**

4446. The court may make all orders and take all other action necessary or proper to dispose of the matters presented by the petition.

Comment. Section 4446 continues former Civil Code Section 2413 without substantive change. The former reference to decrees has been omitted as unnecessary.

**§ 4447. Temporary health care order**

4447. With respect to a durable power of attorney for health care, the court in its discretion, upon a showing of good cause, may

issue a temporary order prescribing the health care of the principal until the disposition of the petition filed under Section 4442. If a durable power of attorney for health care is in effect and a conservator (including a temporary conservator) of the person is appointed for the principal, the court that appoints the conservator in its discretion, upon a showing of good cause, may issue a temporary order prescribing the health care of the principal, that order to continue in effect for such time as is ordered by the court but in no case longer than the time necessary to permit the filing and determination of a petition filed under Section 4442.

Comment. Section 4447 continues former Civil Code Section 2417(h) without substantive change. This section is intended to make clear that the court has authority to provide, for example, for the continuance of treatment necessary to keep the principal alive pending the court's action on the petition. See also Section 4446 (powers of court).

See also Sections 4058 ("durable power of attorney for health care" defined), 4062 ("health care" defined), 4074 ("principal" defined).

**§ 4448. Award of attorney's fees**

4448. In a proceeding under this part commenced by the filing of a petition by a person other than the agent, the court may in its discretion award reasonable attorney's fees to one of the following:

(a) The agent, if the court determines that the proceeding was commenced without any reasonable cause.

(b) The person commencing the proceeding, if the court determines that the agent 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 or of the person, as the case may be, after written request from the principal or conservator.

Comment. Section 4448 continues former Civil Code Section 2417(g) without substantive change. "Agent" has been substituted for "attorney in fact." See Section 4052 ("agent" defined).

**Chapter 3. Appeal**

**§ 4460. Appeal**

4460. An appeal may be taken from any of the following:



(a) Any final order made pursuant to subdivision (a), (b), or (d) of Section 4441 or subdivision (a), (b), or (d) of Section 4442.

(b) An order dismissing the petition or denying a motion to dismiss under Section 4444.

Comment. Section 4460 continues former Civil Code Section 2419 without substantive change. The reference to "decree" in former Civil Code Section 2419(a) is omitted as unnecessary.

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11/01/90CONFORMING REVISIONS AND REPEALSCivil Code § 2023 (added). Limitation on application of article

SEC. . Section 2023 is added to the Civil Code, to read:

2023. This article does not apply to powers of attorney governed by Division 4.5 (commencing with Section 4000) of the Probate Code.

Comment. Section 2023 is a new provision that makes clear that the general provisions concerning agency set out in Sections 2019-2022 have no application to powers of attorney governed by the Probate Code. See Prob. Code §§ 4001 (relation to general agency statutes), 4070 ("power of attorney" defined).

Civil Code § 2355 (amended). Means of termination of agency

SEC. . Section 2355 of the Civil Code is amended to read:

2355. An agency is terminated, as to every person having notice thereof, by any of the following:

- (a) The expiration of its term.
- (b) The extinction of its subject.
- (c) The death of the agent.
- (d) The agent's renunciation of the agency.
- (e) The incapacity of the agent to act as such.

~~(f) The divorce, dissolution, annulment, or adjudication of the nullity of marriage of, or the judicial or legal separation of, principal and attorney in fact, or commencement by the attorney in fact of an action for such relief, in the case of a power of attorney, if the attorney in fact was the spouse of the principal, and the principal has become an absentee as defined in Section 1403 of the Probate Code, unless the power of attorney expressly provides otherwise in writing.~~

Comment. Section 2355 is amended to delete subdivision (f) relating to the effect of divorce, dissolution, annulment, or separation of principal and agent under a power of attorney, or commencement of an action for these purposes by the agent, in cases involving "absentees." This provision is restated without substantive change in Probate Code Section 4149(b). Powers of attorney are governed by Division 4.5 (commencing with Section 4000) of the Probate Code. See Section 2360 (Civil Code agency rules inapplicable to powers of attorney under Probate Code). See also Prob. Code §§ 4001 (relation to general agency law), 4070 ("power of attorney" defined), 4131 (termination of power of attorney for property), 4132 (termination of nondurable power of attorney for property), 4148 (termination of agent's authority).

Civil Code § 2356 (amended). Termination of agency not coupled with interest; proxy

SEC. . 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 Articles 3 (commencing with Section 2400) and 5 (commencing with Section 2430) of Chapter 2.~~

(e) (d) 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.

Comment. Subdivision (d) of Section 2356, concerning powers of attorney, is deleted. Powers of attorney are governed by Division 4.5 (commencing with Section 4000) of the Probate Code, not by this title. See Section 2360 (Civil Code agency rules inapplicable to powers of attorney under Probate Code). See also Prob. Code §§ 4001 (relation to general agency law), 4070 ("power of attorney" defined), 4131 (termination of power of attorney for property), 4132 (termination of nondurable power of attorney for property), 4148 (termination of agent's authority), 4152 (power coupled with an interest), 4203 (effect of death or incapacity of principal).

Civil Code § 2357 (amended). Principal who is "absentee"

SEC. . Section 2357 of the Civil Code is amended to read:

2357. For the purposes of subdivision (b) of Section 2356 and ~~Sections 2403 and 2404~~, in the case of a principal who is an absentee

as defined in Section 1403 of the Probate Code, a person shall be deemed to be without actual knowledge of:

(a) The principal's death or incapacity while the absentee continues in missing status and until the person receives notice of the determination of the death of the absentee by the secretary concerned or the head of the department or agency concerned or the delegate of the secretary or head.

(b) Revocation by the principal during the period described in subdivision (a).

Comment. The references to former Sections 2403 and 2404 (durable powers of attorney) are deleted from Section 2357. Powers of attorney are governed by Division 4.5 (commencing with Section 4000) of the Probate Code, not by this title. See Section 2360 (Civil Code agency rules inapplicable to powers of attorney under Probate Code). See also Prob. Code §§ 4001 (relation to general agency law), 4070 ("power of attorney" defined). For a similar provision drawn from Civil Code Section 2357, see Probate Code Section 4207 (knowledge where principal is "absentee").

**Civil Code § 2360 (added). Limitation on application of chapter**

SEC. . Article 7 (commencing with Section 2360) is added to Chapter 1 of Title 9 of Part 4 of Division 3 of the Civil Code, to read:

Article 7. Limitation on Application of Chapter

**§ 2360. Limitation on application of chapter**

2360. This chapter does not apply to powers of attorney governed by Division 4.5 (commencing with Section 4000) of the Probate Code.

Comment. Section 2360 is a new provision that makes clear that the general provisions concerning agency set out in Sections 2295-2357 have no application to powers of attorney governed by the Probate Code. See Prob. Code §§ 4001 (relation of general agency statutes), 4070 ("power of attorney" defined).

**Civil Code §§ 2400-2407 (repealed). Uniform Durable Power of Attorney Act**

SEC. . Article 3 (commencing with Section 2400) of Chapter 2 of Title 9 of Part 4 of Division 3 of the Civil Code is repealed.

**§ 2400. Durable power of attorney**

Comment. Former Section 2400 is restated without substantive change in Probate Code Section 4122 (durable power of attorney for

property). See Comment to Prob. Code § 4122.

**§ 2400.5. Proxy given by agent to exercise voting rights**

**Comment.** Former Section 2400.5 is continued without substantive change in Probate Code Section 4070(b) (proxy excluded from definition of power of attorney). See Comment to Prob. Code § 4070.

**§ 2401. Effect of principal's incapacity**

**Comment.** Former Section 2401 is continued without substantive change in Probate Code Section 4123 (effect on agent's acts under durable power of attorney during principal's incapacity). See Comment to Prob. Code § 4123.

**§ 2402. Relation of agent to court-appointed fiduciary**

**Comment.** The first two sentences of subdivision (a) of former Section 2402 are continued without substantive change in Probate Code Section 4146 (relation of agent to court-appointed fiduciary). See Comment to Prob. Code § 4146. The substance of the last sentence of subdivision (a) is restated in Probate Code Section 4100 (part containing Probate Code Section 4146 not applicable to durable powers of attorney for health care).

Subdivision (b) is continued without substantive change in Probate Code Section 4125 (nomination of fiduciary in durable power of attorney for property). See Comment to Prob. Code § 4125.

**§ 2403. Death or incapacity of principal**

**Comment.** Former Section 2403 is continued without substantive change in Probate Code Section 4203 (effect of death or incapacity of principal). See Comment to Prob. Code § 4203.

**§ 2404. Affidavit of lack of knowledge of termination of power**

**Comment.** Former Section 2404 is continued without substantive change in Probate Code Section 4204 (affidavit of lack of knowledge of termination of power). See Comment to Prob. Code § 4204.

**§ 2405. Construction and application**

**Comment.** Former Section 2405 is superseded by Probate Code Section 2(b) (construction of uniform acts). See Comment to Prob. Code 2.

**§ 2406. Short title**

**Comment.** Former Section 2406 is restated without substantive change in Probate Code Section 4101 (Uniform Durable Power of Attorney Act). See Comment to Prob. Code § 4101.

**§ 2407. Severability**

**Comment.** Former Section 2407 is superseded by Probate Code Section 11 (severability).

Civil Code §§ 2410-2423 (repealed). Court enforcement of duties of attorney in fact

SEC. . Article 4 (commencing with Section 2410) of Chapter 2 of Title 9 of Part 4 of Division 3 of the Civil Code is repealed.

§ 2410. Definitions

Comment. Subdivision (a) of former Section 2410 is superseded by Probate Code Section 4052 ("agent" defined). See Comment to Prob. Code § 4052.

Subdivision (b) is continued without substantive change in Probate Code Section 4058 ("durable power of attorney for health care" defined). See Comment to Prob. Code § 4058.

The first sentence of subdivision (c) is restated without substantive change in Probate Code Section 4070(a) ("power of attorney" defined). The second sentence of subdivision (c) is superseded by Probate Code Section 4070(b) (exclusion from power of attorney). See Comment to Prob. Code § 4070.

Subdivision (d) is restated without substantive change in Probate Code Section 4074 ("principal" defined). See Comment to Prob. Code § 4074.

§ 2411. Petitioners

Comment. Former Section 2411 is continued without substantive change in Probate Code Section 4440 (petitioners). See Comment to Prob. Code § 4440.

§ 2412. Relief available

Comment. Former Section 2412 is continued without substantive change in Probate Code Section 4441 (petition as to power of attorney for property). See Comment to Prob. Code § 4441.

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

Comment. Former Section 2412.5 is continued without substantive change in Probate Code Section 4442 (petition as to durable power of attorney for health care). See Comment to Prob. Code § 4442.

§ 2413. Power of court

Comment. Former Section 2413 is continued without substantive change in Probate Code Section 4446 (power of court). See Comment to Prob. Code § 4446.

§ 2414. Venue

Comment. Former Section 2414 is continued without substantive change in Probate Code Section 4423 (venue). See Comment to Prob. Code § 4423.

**§ 2415. Verified petition; contents**

**Comment.** Former Section 2415 is restated without substantive change in Probate Code Sections 1021 (petition to be verified), 4420(a) (jurisdiction in superior court), and 4443 (commencement of proceeding). See Comment to Prob. Code § 4443.

**§ 2416. Dismissal of petition**

**Comment.** Former Section 2416 is restated without substantive change in Probate Code Section 4444 (dismissal of petition). See Comment to Prob. Code § 4444.

**§ 2417. Hearing**

**Comment.** Subdivision (a) of former Section 2417 is superseded by Probate Code Section 1041 (clerk to set matter for hearing).

Subdivision (b) is continued without substantive change in Probate Code Section 4445 (notice of hearing). See Comment to Prob. Code § 4445

The first sentence of subdivision (c) is superseded by Probate Code Section 1215 (manner of mailing notice). The second sentence is superseded by Probate Code Section 1216 (personal delivery instead of mailing).

Subdivision (d) is superseded by Probate Code Sections 1260 (proof of giving notice of hearing required and conclusiveness of order), 1261 (proof of mailing), 1264 (proof of personal delivery).

Subdivision (e) is continued without substantive change in Probate Code Section 4407 (application of decedents' estates provisions). See Comment to Prob. Code § 4407.

Subdivision (f) is superseded by Probate Code Section 1203(a) (order shortening time).

Subdivision (g) is continued without substantive change in Probate Code Section 4448 (award of attorney's fees). See Comment to Prob. Code § 4448.

Subdivision (h) is continued without substantive change in Probate Code Section 4447 (temporary health care order). See Comment to Prob. Code § 4447.

**§ 2418. Guardian ad litem**

**Comment.** Former Section 2418 is superseded by Probate Code Section 1003 (appointment of guardian ad litem).

**§ 2419. Appeal**

**Comment.** Former Section 2419 is continued without substantive change in Probate Code Section 4460 (appeal). See Comment to Prob. Code § 4460.

**§ 2420. Cumulative remedies**

**Comment.** Subdivision (a) of former Section 2420 is continued without substantive change in Probate Code Section 4402 (cumulative remedies).

Subdivision (b) is continued without substantive change in Probate Code Section 4401(b) (application of part).

**§ 2421. Limitation by provision in power of attorney**

**Comment.** Subdivision (a) of former Section 2421 is continued without substantive change in Probate Code Section 4404 (limitation of remedies by provision in power of attorney). See Comment to Prob. Code § 4404.

Subdivision (b) is continued without substantive change in Probate Code Section 4405 (right to petition under power of attorney for property). The cross-reference to subdivision (c) is omitted as unnecessary. See Comment to Prob. Code § 4405.

Subdivisions (c) and (d) are restated without substantive change in Probate Code Section 4406 (right to petition under durable power of attorney for health care). See Comment to Prob. Code § 4406.

**§ 2422. Application of article**

**Comment.** Former Section 2422 is restated without substantive change in Probate Code Section 4403 (effect of provision in power attempting to make part inapplicable). See Comment to Prob. Code § 4403.

**§ 2423. Legislative intent**

**Comment.** Former Section 2423 is continued without substantive change in Probate Code Section 4400 (legislative intent). See Comment to Prob. Code § 4400.

**Civil Code §§ 2430-2444 (repealed). Durable power of attorney for health care**

SEC. . Article 5 (commencing with Section 2430) of Chapter 2 of Title 9 of Part 4 of Division 3 of the Civil Code is repealed.

**§ 2430. Definitions**

**Comment.** The introductory clause of former Section 2430 is superseded by Probate Code Section 4050 (application of definitions).

Subdivision (a) is continued without substantive change in Probate Code Section 4058 ("durable power of attorney for health care" defined). See Comment to Prob. Code § 4058.

Subdivision (b) is continued without change in Probate Code Section 4062 ("health care" defined).

Subdivision (c) is continued without change in Probate Code Section 4064 ("health care decision" defined).

Subdivision (d) is continued without change in Probate Code Section 4066 ("health care provider" defined).

Subdivision (e) is superseded by Probate Code Section 56 ("person" defined).

Subdivision (f) is continued without change in Probate Code Section 4054 ("community care facility" defined).

Subdivision (g) is continued without substantive change in Probate Code Section 4076 ("residential care facility for the elderly" defined). See Comment to Prob. Code § 4076.



**§ 2431. Application of article**

**Comment.** Former Section 2431 is continued without substantive change in Probate Code Section 4300 (application of chapter). See Comment to Prob. Code § 4300.

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

**Comment.** Former Section 2432 is continued without substantive change in Probate Code Section 4310 (requirements for durable power of attorney for health care). See Comment to Prob. Code § 4310.

**§ 2432.5. Employee of health care provider, community care facility, or residential care facility**

**Comment.** Former Section 2432.5 is continued without substantive change in Probate Code Section 4314 (employee of health care provider, community care facility, or residential care facility). See Comment to Prob. Code § 4314.

**§ 2433. Requirements for printed form**

**Comment.** Former Section 2433 is continued without substantive change in Probate Code Section 4311 (requirements for printed form of durable power of attorney for health care). See Comment to Prob. Code § 4311.

**§ 2434. Attorney in fact's authority to make health care decisions**

**Comment.** Former Section 2434 is continued without substantive change in Probate Code Section 4312 (agent's authority to make health care decisions). See Comment to Prob. Code § 4312.

**§ 2435. Limitations on authority of attorney in fact**

**Comment.** Former Section 2435 is continued without substantive change in Probate Code Section 4320 (limitations on agent's authority). See Comment to Prob. Code § 4320.

**§ 2436. Availability of medical information to attorney in fact**

**Comment.** Former Section 2436 is continued without substantive change in Probate Code Section 4313 (availability of medical information to agent). See Comment to Prob. Code § 4313.

**§ 2436.5. Expiration of durable power of attorney for health care**

**Comment.** Former Section 2436.5 is continued without change in Probate Code Section 4316 (expiration of durable power of attorney for health care).

**§ 2437. Revocation of durable power of attorney for health care**

**Comment.** Former Section 2437 is continued without substantive change in Probate Code Section 4315 (revocation of durable power of attorney for health care). See Comment to Prob. Code § 4315.

**§ 2438. Immunities of health care provider**

**Comment.** Former Section 2438 is continued without substantive change in Probate Code Section 4330 (immunities of health care provider). See Comment to Prob. Code § 4330.

**§ 2439. Other authority not affected**

**Comment.** Former Section 2439 is continued without substantive change in Probate Code Section 4302 (other authority not affected). See Comment to Prob. Code § 4302.

**§ 2440. Principal's objections**

**Comment.** Former Section 2440 is continued without substantive change in Probate Code Section 4322 (principal's objections). See Comment to Prob. Code § 4322.

**§ 2441. Restriction on execution of durable power of attorney for health care as condition for admission, treatment, or insurance**

**Comment.** Former Section 2441 is continued without change in Probate Code Section 4323 (restriction on execution of durable power of attorney for health care as condition for admission, treatment, or insurance).

**§ 2442. Alteration or forging, or concealment or withholding knowledge of revocation of durable power of attorney for health care**

**Comment.** Former Section 2442 is continued without substantive change in Probate Code Section 4324 (alteration or forging, or concealment or withholding knowledge of revocation of durable power of attorney for health care). See Comment to Prob. Code § 4324.

**§ 2443. Construction of article**

**Comment.** Former Section 2443 is continued without substantive change in Probate Code Section 4321 (unauthorized acts or omissions). See Comment to Prob. Code § 4321.

**§ 2444. Forms**

**Comment.** Former Section 2444 is restated without substantive change in Probate Code Section 4301 (forms). See Comment to Prob. Code § 4301.

**Civil Code § 2450 (repealed). Statutory short form power of attorney**

SEC. . Chapter 3 (commencing with Section 2450) of Title 9 of Part 4 of Division 3 of the Civil Code is repealed.

**§ 2450. Use of statutory form provided by repealed statute**

**Comment.** Former Section 2450 is restated without substantive change in Probate Code Section 4259(a) (use of statutory form provided by repealed statute). See Comment to Prob. Code § 4259(a).

Civil Code §§ 2475-2499.5 (repealed). Uniform Statutory Form Power of Attorney Act

SEC. . Chapter 3.5 (commencing with Section 2430) of Title 9 of Part 4 of Division 3 of the Civil Code is repealed.

§ 2475. Statutory form

Comment. Former Section 2475 is continued without substantive change in Probate Code Section 4251 (statutory form power of attorney). See Comment to Prob. Code § 4251.

§ 2476. Requirements for statutory form power of attorney

Comment. Former Section 2476 is continued without substantive change in Probate Code Section 4252 (requirements for statutory form power of attorney). See Comment to Prob. Code § 4252.

§ 2477. Effect of initialing line in front of (N) in statutory form

Comment. Former Section 2477 is continued without substantive change in Probate Code Section 4253 (effect of initialing line in front of (N) in statutory form). See Comment to Prob. Code § 4253.

§ 2478. Durable power of attorney

Comment. Former Section 2478 is continued without change in Probate Code Section 4254 (durability of statutory form power of attorney).

§ 2479. Power of attorney that becomes effective upon occurrence of specified event or contingency

Comment. Former Section 2479 is continued without substantive change in Probate Code Section 4255 (springing statutory form power of attorney). See Comment to Prob. Code § 4255.

§ 2480. General provisions applicable to power under this chapter

Comment. Former Section 2481 is restated without substantive change in Probate Code Section 4257 (general provisions applicable to statutory form power of attorney). See Comment to Prob. Code § 4257.

§ 2480.5. Compelling third person to honor power of attorney

Comment. Former Section 2480.5 is continued without change in Probate Code Section 4256 (compelling third person to honor statutory form power of attorney).

§ 2481. Use of other forms

Comment. Former Section 2481 is continued without substantive change in Probate Code Section 4258 (use of other forms). See Comment to Prob. Code § 4258.

**§ 2482. Short title**

**Comment.** Former Section 2482 is continued without change in Probate Code Section 4250 (short title).

**§ 2483. Uniformity of construction**

**Comment.** Former Section 2483 is superseded by Probate Code Section 2(b) (construction of uniform acts). See Comment to Prob. Code 2.

**§ 2484. Partial invalidity**

**Comment.** Former Section 2484 is superseded by Probate Code Section 11 (severability).

**§ 2485. Construction of powers generally**

**Comment.** Former Section 2485 is continued without change in Probate Code Section 4270 (construction of powers generally). See Comment to Prob. Code § 4270.

**§ 2486. Real property transactions**

**Comment.** Former Section 2486 is continued without substantive change in Probate Code Section 4271 (real property transactions). See Comment to Prob. Code § 4271.

**§ 2487. Tangible personal property transactions**

**Comment.** Former Section 2487 is continued without change in Probate Code Section 4272 (tangible personal property transactions).

**§ 2488. Stock and bond transactions**

**Comment.** Former Section 2488 is continued without change in Probate Code Section 4273 (stock and bond transactions).

**§ 2489. Commodity and option transactions**

**Comment.** Former Section 2489 is continued without change in Probate Code Section 4274 (commodity and option transactions).

**§ 2490. Banking and other financial institution transactions**

**Comment.** Former Section 2490 is continued without change in Probate Code Section 4275 (banking and other financial institution transactions).

**§ 2491. Business operating transactions**

**Comment.** Former Section 2491 is continued without change in Probate Code Section 4276 (business operating transactions).

**§ 2492. Insurance and annuity transactions**

**Comment.** Former Section 2492 is continued without change in Probate Code Section 4277 (insurance and annuity transactions).

**§ 2493. Estate, trust, and other beneficiary transactions**

**Comment.** Former Section 2493 is continued without change in Probate Code Section 4278 (estate, trust, and other beneficiary transactions).

**§ 2494. Claims and litigation**

**Comment.** Former Section 2494 is continued without change in Probate Code Section 4279 (claims and litigation).

**§ 2495. Personal and family maintenance**

**Comment.** Former Section 2495 is continued without change in Probate Code Section 4280 (personal and family maintenance).

**§ 2496. Benefits from social security, medicare, medicaid, or other governmental programs, or civil or military service**

**Comment.** Former Section 2496 is continued without substantive change in Probate Code Section 4281 (benefits from social security, medicare, medicaid, or other governmental programs, or civil or military service). See Comment to Prob. Code § 4281.

**§ 2497. Retirement plan transactions**

**Comment.** Former Section 2497 is continued without change in Probate Code Section 4282 (retirement plan transactions).

**§ 2498. Tax matters**

**Comment.** Former Section 2498 is continued without change in Probate Code Section 4283 (tax matters).

**§ 2499. After-acquired property; property located outside this state; power exercised outside this state; power of attorney executed outside this state**

**Comment.** Former Section 2499 is continued without change in Probate Code Section 4284 (after-acquired property; property located outside this state; power exercised outside this state; power of attorney executed outside this state).

**§ 2499.5. Power to modify or revoke trust**

**Comment.** Former Section 2499.5 is continued without change in Probate Code Section 4285 (power to modify or revoke trust).

Civil Code §§ 2500-2508 (repealed). Statutory form durable power of attorney for health care

SEC. . Chapter 4 (commencing with Section 2500) of Title 9 of Part 4 of Division 3 of the Civil Code is repealed.

§ 2500. Statutory form of durable power of attorney for health care

Comment. Former Section 2500 is continued without substantive change in Probate Code Section 4351 (statutory form of durable power of attorney for health care). See Comment to Prob. Code § 4351.

§ 2501. Warning or lawyer's certificate

Comment. Former Section 2501 is continued without substantive change in Probate Code Section 4352 (warning or lawyer's certificate). See Comment to Prob. Code § 4352.

§ 2502. Formal requirements

Comment. Former Section 2502 is continued without substantive change in Probate Code Section 4353 (formal requirements). See Comment to Prob. Code § 4353.

§ 2503. Requirements for statutory form

Comment. Former Section 2503 is continued without substantive change in Probate Code Section 4354 (requirements for statutory form). See Comment to Prob. Code § 4354.

§ 2503.5. Requirements for forms after January 1, 1986

Comment. Former Section 2503.5 is superseded by Probate Code Section 4355 (requirements for forms after January 1, 1993). See Comment to Prob. Code § 4355.

§ 2504. Language conferring general authority

Comment. Former Section 2504 is continued without substantive change in Probate Code Section 4356 (language conferring general authority). See Comment to Prob. Code § 4356.

§ 2505. Effect of documents executed by agent

Comment. Former Section 2505 is continued without substantive change in Probate Code Section 4357 (effect of documents executed by agent). See Comment to Prob. Code § 4357.

§ 2506. Termination of authority; alternate agent

Comment. Former Section 2506 is continued without substantive change in Probate Code Section 4358 (termination of authority; alternate agent). See Comment to Prob. Code § 4358.

**§ 2507. Use of other forms**

**Comment.** Former Section 2507 is continued without substantive change in Probate Code Section 4359 (use of other forms). See Comment to Prob. Code § 4359.

**§ 2508. Short title**

**Comment.** Former Section 2508 is continued without change in Probate Code Section 4350 (short title).

**Civil Code §§ 2510-2514 (repealed). Miscellaneous provisions relating to powers of attorney**

SEC. . Chapter 5 (commencing with Section 2510) of Title 9 of Part 4 of Division 3 of the Civil Code is repealed.

**§ 2510. Warning statement in durable power of attorney**

**Comment.** Former Section 2510 is restated without substantive change in Probate Code Section 4124 (warning statement in durable power of attorney for property). See Comment to Prob. Code § 4124.

**§ 2510.5. Form of durable power of attorney after January 1, 1986**

**Comment.** Former Section 2510.5 is superseded by Probate Code Section 4102 (form of durable power of attorney after January 1, 1993). See Comment to Prob. Code § 4102.

**§ 2511. Convincing evidence of identity of principal**

**Comment.** Former Section 2511 is continued without substantive change in Probate Code Section 4332 (convincing evidence of identity of principal). See Comment to Prob. Code § 4331.

**§ 2512. Protection of person relying in good faith on durable power of attorney**

**Comment.** Former Section 2512 is continued without substantive change in Probate Code Section 4208 (protection of third person relying in good faith on durable power of attorney for property). See also Section 4330 (immunities of health care provider). See Comment to Prob. Code § 4208.

**§ 2513. Application to principal's property; description of items**

**Comment.** Former Section 2513 is continued without change in Probate Code Section 4128 (application to principal's property).

**§ 2514. Springing power of attorney**

**Comment.** The introductory clause of subdivision (a) of former Section 2514 is superseded by Probate Code Section 4050 (application of definitions). Paragraph (1) of subdivision (a) is restated without

substantive change in Probate Code Sections 4052 ("agent" defined), 4070 ("power of attorney" defined), and 4074 ("principal" defined). See Comment to Prob. Code § 4052 ("agent" replaces "attorney in fact"). Paragraph (2) of subdivision (a) is continued without change in Probate Code Section 4078 ("springing power of attorney" defined).

Subdivisions (b)-(d) are continued without substantive change in Probate Code Section 4126 (springing power of attorney). See Comment to Prob. Code § 4126.

Corp. Code § 702 (amended). Who may vote corporate shares

SEC. Section 702 of the Corporations Code is amended to read:

702. (a) Subject to subdivision (c) of Section 703, shares held by an administrator, executor, guardian, conservator or custodian may be voted by such holder either in person or by proxy, without a transfer of such shares into the holder's name; and shares standing in the name of a trustee may be voted by the trustee, either in person or by proxy, but no trustee shall be entitled to vote shares held by such trustee without a transfer of such shares into the trustee's name.

(b) Shares standing in the name of a receiver may be voted by such receiver; and shares held by or under the control of a receiver may be voted by such receiver without the transfer thereof into the receiver's name if authority to do so is contained in the order of the court by which such receiver was appointed.

(c) Subject to the provisions of Section 705 and except where otherwise agreed in writing between the parties, a shareholder whose shares are pledged shall be entitled to vote such shares until the shares have been transferred into the name of the pledgee, and thereafter the pledgee shall be entitled to vote the shares so transferred.

(d) Shares standing in the name of a minor may be voted and the corporation may treat all rights incident thereto as exercisable by the minor, in person or by proxy, whether or not the corporation has notice, actual or constructive, of the nonage, unless a guardian of the minor's property has been appointed and written notice of such appointment given to the corporation.

(e) If authorized to vote the shares by the power of attorney by which the ~~attorney-in-fact~~ agent was appointed, shares held by or under the control of an ~~attorney-in-fact~~ the agent may be voted and the corporation may treat all rights incident thereto as exercisable by the



~~attorney-in-fact~~ agent, in person or by proxy, without the transfer of the shares into the name of the ~~attorney-in-fact~~ agent.

Comment. Subdivision (e) of Section 702 is revised to replace "attorney in fact" with "agent" for conformity with the Power of Attorney Law in Division 4.5 (commencing with Section 4000) of the Probate Code.

Note. *Strictly speaking, this amendment is not necessary.*