

Memorandum 91-40

Subject: Study L-3044 - Comprehensive Powers of Attorney Statute
(Comments of Beverly Hills Bar Association; Renumbered
Staff Draft)

This memorandum considers comments we have received on the comprehensive power of attorney draft statute which was first distributed in November 1990 (attached to Memorandum 90-122). Attached to this memorandum are two letters from Janice Fogg on behalf of the Legislative Committee of the Probate, Trust and Estate Planning Section of the Beverly Hills Bar Association. These comments are reviewed later in this memorandum.

Revised Staff Draft -- the Civil Code Version

Also attached to this memorandum is a revised staff draft of the comprehensive power of attorney statute. The sections in the revised draft are substantively identical to the corresponding sections in the first draft. We do not expect those who have carefully reviewed the first draft to repeat their efforts. The main purpose of the revised draft is to present the project in the form of a revision of the Civil Code. The first draft took the approach of moving the power of attorney sections to the Probate Code.

The revised draft -- the Civil Code version -- is offered for consideration to deal with a concern that has been expressed from time to time to the effect that the power of attorney statutes "should stay where they are" and that any needed or desired revisions should be made in the Civil Code. For some, the concern over whether the statute should be located in the Probate Code or the Civil Code has been a stumbling block impeding progress in considering the substance of the draft statute. The revised draft represents one way of keeping the statute in the Civil Code.

The Civil Code version has another important advantage. It does not revise the substantive rules concerning the durable power of

attorney for health care (Civil Code §§ 2430-2444) or the statutory form durable power of attorney for health care (Civil Code §§ 2500-2508). The form set out in Civil Code Section 2500 is unchanged.

Nor does the Civil Code version make changes in the newly enacted Uniform Statutory Form Power of Attorney Act (Civil Code §§ 2475-2499.5).

The Civil Code version thus focuses on the purpose of this project -- the revision, organization, and supplementation of the statutes concerning non-health care powers of attorney. While earlier memorandums have been consistently clear that the project did not involve a review of the durable power of attorney for health care, the inclusion of those statutes in the earlier draft may have caused confusion and may have encouraged some who believe those statutes need review to substantially broaden the scope of the project.

Review of the health care powers would be a separate project. It is not one that the staff has suggested or that the Commission has decided to undertake. This is not to say that it would not be a worthy project -- it is just not the project the Commission is engaged in. Nor does the study of the other parts of the power of attorney statutes preclude consideration of the health care power by the Commission or by other interested groups. In fact, any future revision of the health care power would be facilitated by cleaning up the structure of the existing statutes which are disorganized and inconsistent.

The staff believes that work should proceed on the power of attorney revision project as conceived in early 1990. A draft statute has been available for bar review since November 1990 and was scheduled for consideration at the January 1991 meeting and the April 1991 meeting. We now have comments from the Beverly Hills Bar Committee and they should be considered.

Location of Power of Attorney Statute

The Commission may want to make a decision about the location of the power of attorney statute. This is not really a substantive issue, but it may be controversial. You have seen a draft of the statute as it might appear in the Probate Code (as Sections 4000-4460). Now you have a Civil Code version for comparison.

There are at least three reasonable alternative locations:

(1) Probate Code § 4000 et seq. This is the first draft, attached to Memorandum 90-122.

• Advantages:

(a) There is plenty of room in the Probate Code to permit intelligent reorganization of the statutes and keep integer section numbers.

(b) The statute can tie into the general provisions in the Probate Code that the Commission has worked on for the past several years, such as notice rules, definitions, guardian ad litem.

(c) Durable powers of attorney have taken on aspects of trusts and conservatorships, and are common tools in estate planning. The attorney in fact is subject to fiduciary duties, like other fiduciaries. It is logical to keep this law in one place.

• Disadvantages:

(a) Not all powers of attorney have an estate planning flavor, so to that extent it is not appropriate to remove the statute from the Civil Code.

(b) Statutory forms would have to be reprinted as in other cases where the statutes have been amended in the past.

(2) Civil Code § 2400.010 et seq. This is the draft attached to this memorandum.

• Advantages:

(a) The statutory forms and the durable power of attorney for health care statute do not have to be revised, except to make some purely technical cross-reference changes.

(b) Statutory forms would not have to be reprinted.

(c) It is convenient to have the powers of attorney stay where they have been since 1979.

(d) Some find it useful to keep powers of attorney next to the Field Code agency statutes.

• Disadvantages:

(a) Decimal section numbers are required to fit the statute into the available space (unless a monster is created by locating the main statute following the forms and the durable power of attorney for health care statute).

(b) The advantages of moving to the Probate Code are lost, such as general procedural, notice, and definitional sections.

(3) Civil Code § ??? et seq. This alternative would keep the power of attorney statutes in the Civil Code, but relocate them at the end of the code where there is more room.

• Advantages:

(a) The statute could be organized as in the Probate Code option, avoiding the need to use decimal section numbers.

(b) The statute would remain in the Civil Code where some feel it is more appropriate since not all powers are estate planning instruments.

• Disadvantages:

This option combines the disadvantages of alternative (1) and (2), satisfying only the abstract notion that the Civil Code is a more appropriate location.

For drafting convenience, it would be useful for the staff to know where the statute is likely to be located. While we believe that some of the objections to the first draft would abate if the statute were placed in the Civil Code, after going through the exercise of preparing a Civil Code draft, we don't know whether it will make the pro-Civil Code faction happy.

Beverly Hills Bar Committee Comments

Now to the substantive issues. The following discussion concerns the points raised in the two letters from the Legislative Committee of the Probate, Trust and Estate Planning Section of the Beverly Hills Bar Association attached as exhibits. The discussion is directed toward the attached revised draft which is substantively the same as the draft referred to in the letters.

Dating Forms

The Beverly Hills Bar Committee suggests that power of attorney forms be required to be dated. (Exhibit 1, item 1.) The Committee notes that without a date, it would be difficult to determine whether the principal had capacity when the power was executed.

The Commission considered this issue at the July 1990 meeting in connection with Memorandum 90-85, the basic policy memorandum. The arguments on both sides were presented -- in fact, the staff memorandum argued for dating, although the staff was split on the issue. The Commission recognized the point raised by the Beverly Hills Bar Committee, but ultimately accepted the position that a dating requirement would unnecessarily invalidate some powers of attorney drawn by unsophisticated persons who inadvertently omit the date. It should also be noted that the statutory form power of attorney in Section 2475 requires dating.

Acknowledgment

The Beverly Hills Bar Committee suggests that "[i]f the legislation does not require acknowledgement of a Power of Attorney, . . . there be a warning in the form that the Power of Attorney is not valid for transfer of real property unless it is acknowledged." (Exhibit 1, item 2.)

Acknowledgement is needed only for real property matters. Hence, the Commission has declined to require acknowledgment generally, even though it may be good practice. If the Beverly Hills Bar Committee is mainly concerned with the statutory form, it should be noted that Section 2475 does require acknowledgment.

§ 2402.030. "Agent" [first draft § 4052]

The Beverly Hills Bar Committee suggests an amendment to Civil Code Section 1095 to change "attorney in fact" to "agent" for consistency with the terminology of the draft statute. (Exhibit 1, item 3.)

The definition of "agent" includes "attorney in fact", so there is no real need to make such an amendment. We have not sought out other usages of "attorney in fact" for this reason. In addition, it is not yet clear whether we will be sticking with the "agent" language. The staff favors it and the Commission has tentatively approved it, but we are aware of some dissent on the point. In addition, if the Civil Code version of the statute is approved as it now stands, there will be inconsistent usage in the power of attorney statutes themselves, since the Civil Code version does not make all of the conforming language changes in the other parts of the power of attorney statutes that the first draft did.

§ 2402.110. Durable power of attorney for property [first draft § 4060]

The Beverly Hills Bar Committee thinks "durable power of attorney for property" is too limited and that adding "and other matters" is too cumbersome. (Exhibit 2, item 1.) The staff tends to agree, but as suggested in the staff note following draft Section 2402.110, we have not found an answer yet. The Beverly Hills Bar Committee suggests using "durable power of attorney (non-health care)" with the parenthetical optional.

The usage reflected in the draft statutes is consistent with the terminology in the CEB Handbook. While we recognize that it is not perfect, it is simple and generally descriptive. The Beverly Hills Bar Committee suggestion seems cumbersome to us. The use of parenthesis is not ideal, nor are we clear on how the parenthetical would be optional. If the durable power of attorney for health care were to be known as the "durable power of attorney (health care)" there would at least be some desirable parallelism, but we do not see this as a realistic option. Perhaps a better term than "durable power of attorney for property" will surface as the Commission deals with the issues raised concerning the scope of the two types of power.

§ 2402.130. "Health care" defined [first draft § 4062]

The Beverly Hills Bar Committee suggests that directions concerning location of residence and other personal care issues (other than health care) should be valid in both types of power of attorney.

The staff agrees and we believe that this is the result under the statute. Any problem is resolved by considering a durable power of attorney for health care to be a "normal" durable power of attorney to the extent that it deals with non-health care issues. This works because a validly executed DPAHC satisfies the requirements for a DPAP. (This would be trickier in the case of printed forms, however, which have a number of technical requirements.) The only important limitation is that "health care" (as defined) can only be covered in a DPAHC, meaning that the more restrictive execution requirements applicable to that type of power must be satisfied.

§ 2410.150. Certified copy of power of attorney [first draft § 4133]

The Beverly Hills Bar Committee suggests that draft Section 2410.150 providing for certification of a copy of the power of attorney be made more explicit. (Exhibit 1, item 4.) They ask whether a notary would be able to certify a copy.

Draft Section 2410.150 is drawn from Minnesota law. It is worded in general terms so that it can be applied to powers certified in other jurisdictions. We do not see that "official" includes notaries. Perhaps we should say "public official."

The broader question is whether this section is desirable. When the Commission considered the matter in July 1990, the staff was asked to include a section concerning use of copies for discussion and comment. The Beverly Hills Bar Committee seems to be saying that it would be a useful provision if made more explicit. We gather that there is some concern about "certification" by notaries and perhaps others who might arguably be "officials." The principle of the section seems useful. As noted in Memorandum 90-85, one suggestion is that photocopies might be sufficient if the power of attorney authorizes their use. It seems to be overly strict to require use of the original at all times. In fact, a certified copy might be even more impressive than an original, assuming there is a way to obtain certification.

There is no general provision permitting certification by county clerks. Perhaps there should be -- it could even be a revenue generator. A certified copy is available when the original is on file with the county clerk, but not otherwise. Thus, the utility of the proposed section is limited. The staff suggests that if practitioners do not think the section would be useful in its limited form, the section should be omitted.

§ 2415.030. Multiple agents [first draft § 4142]

§ 2415.040. Successor agents [first draft § 4143]

Subdivision (d) in each section states the simple rule that a co-agent or successor agent is not liable for the actions of other co-agents or predecessors. The Staff Note to each section asks whether the detailed exceptions to this rule provided in the Trust Law should be included. They were omitted from the draft statute because we assume that few powers of attorney have co-agents and the detail in the Trust Law seemed overly technical in the power of attorney context.

The Beverly Hills Bar Committee would include the exceptions to the general rule, either by providing similar rules in the power of attorney statute or by reference to the Trust Law. (Exhibit 2, item 3.)

The staff proposes to add the following limited exceptions to the general rules:

§ 2415.030. Multiple agents

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

co-agents, unless the co-agent participates in, knowingly acquiesces in, or conceals a breach of fiduciary duty committed by another co-agent.

§ 2415.040. Successor agents

. . . .
(d) A successor agent is not liable for the actions of the predecessor agent, unless the successor agent improperly permits the predecessor agent's breach of fiduciary duty to continue.

These simpler statements omit the more stringent rules applicable to trustees, such as the exception where "a trustee neglects to take reasonable steps to compel the cotrustee to redress a breach of trust in a case where the trustee knows or has information from which the trustee reasonably should have known of the breach." Prob. Code § 16402(b)(5). The suggested approach is consistent with the more informal nature of powers of attorney and the more limited duties imposed on attorneys in fact.

§ 2415.050. Compensation of agent [first draft § 4144]

The Beverly Hills Bar Committee thinks that most principals assume their agents will serve without compensation and that the default rule in the statute should be that the agent is not to be compensated unless the instrument provides for compensation. (Exhibit 2, item 4.) The assumption behind the Missouri rule set out in draft Section 2415.050 is that most agents under powers of attorney will in fact not seek compensation, but that it is a good idea to provide the right to take care of cases where the duties under the power are time-consuming. Otherwise, the named agent may not be willing to act or continue acting, with the result that the principal's intentions in executing the durable power are defeated. A well-drawn power of attorney can deal with the problem no matter what the statutory default rule might be. The question the Commission needs to decide is what should be the rule where the power of attorney is silent on the issue.

§ 2415.100. Effect of dissolution or annulment [first draft § 4149]

The Beverly Hills Bar Committee recommends that this section terminating the agent's authority on dissolution or annulment of the

agent's marriage to the principal should also apply in the event of legal separation. (Exhibit 2, item 5.) As set out in the draft statute, the rule in subdivision (a) was limited to dissolution and annulment for consistency with the rule of Civil Code Section 4315(e) applicable to durable powers of attorney for health care. The staff believes that the default rule should be the same for both types of powers of attorney. We were reluctant to propose changing the existing rule concerning health care powers since it had been carefully considered and to change it now would require yet another transitional provision.

§ 2514.010. Petitioners [first draft § 4440]

The Beverly Hills Bar Committee suggests that any person interested in the welfare of the principal should be permitted to petition for court review of the power of attorney or actions of the agent. (Exhibit 2, item 6.) This language is drawn from the Missouri statute discussed in the Staff Note following the section.

In considering this issue, it should be remembered that the principal can restrict the authority of any person listed in Section 2514.010 with the advice of an attorney, as provided in Section 2510.050 and subject to some exceptions provided in Sections 2510.060 and 2510.070.

Respectfully submitted,

Stan Ulrich
Staff Counsel

VALENSI, ROSE & MAGARAM PROFESSIONAL LAW CORPORATION

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CA LAW REV. COMM'N

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March 22, 1991

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

Attention: Stan Ulrich, Staff Counsel

Re: Study L-3044, Memorandum 90-122

Ladies and Gentlemen:

The Legislative Committee of the Probate, Trust & Estate Planning Section of the Beverly Hills Bar Association has commenced its review and discussion of the above Memorandum, and it has the following preliminary comments:

1. The legislation should require that Power of Attorney forms be dated. In the event there is a question as to the capacity of the principal to execute a Power of Attorney, there would be no way to determine such capacity if the form were undated.
2. If the legislation does not require acknowledgment of a Power of Attorney, we recommend that there be a warning in the form that the Power of Attorney is not valid for transfer of real property unless it is acknowledged.
3. Current Civil Code §1095 specifies the manner of signing of a document by an attorney in fact. The committee recommends that a similar provision, reflecting the substitution of the term "agent" for the term "attorney in fact," be included in the new legislation.

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4. Proposed §4133 provides that 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. Who would be authorized to make such a certification if the document is not acknowledged and is not filed in any court proceeding? Is a notary public authorized to make such a certification? The committee recommends that the procedure for certification be more explicit.

The committee will continue its review of the proposed legislation at its next meeting in early April, and we will FAX any additional comments to you prior to your April 12th meeting.

Sincerely,



Janice Fogg
Legislative Committee
Probate, Trust & Estate Planning Section
Beverly Hills Bar Association

JF/ldi

cc: Lisa C. Alexander, Esq., Chair of Committee
Kenneth G. Petrulis, Esq., Chair of PTEP Section
Phyllis Cardoza, Administrative Vice Chair

MAY 22 1991

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May 20, 1991.

California Law Revision Commission
 4000 Middlefield Road, Suite D-2
 Palo Alto, California 94303-4739

Re: Study L-3044, Memorandum 90-122
Comprehensive Power of Attorney Statute

Ladies and Gentlemen:

This letter supplements the March 22, 1991, letter from the undersigned on behalf of the Legislative Committee of the Probate, Trust & Estate Planning Section of the Beverly Hills Bar Association regarding the above Memorandum. The Committee has the following additional comments and recommendations:

1. §4060: We agree that the title "Durable Power of Attorney for Property" may be too limiting but also feel that "Durable Power of Attorney for Property and Other Matters" is too cumbersome. We would suggest the term "Durable Power of Attorney (Non-Health Care)," with the parenthetical optional.

2. §4062: Although it would certainly be advisable for an attorney to draft Health Care and Non-Health Care Durable Powers so that the responsibilities of agents are coordinated and clearly delineated, the Committee feels that the statute should not place restrictions on either document with respect to decisions such as location of residence and other personal care questions; rather, directions regarding such matters should be valid if they are included in either document.

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3. §4142: With regard to the liability of an agent for the acts of co-agents, the statute should be similar to trust law, either by reference (e.g. to §§16402 and 16403 of the Probate Code) or, preferably, by restating those provisions.

4. §4144: The Committee feels that most principals assume that their agent will serve without compensation. Rather than authorizing compensation in the event the instrument is silent, the statute should require that the agent not be compensated unless the instrument provides otherwise.

5. §4149: We recommend that this section apply to legal separation, as well as dissolution and annulment. The Committee notes that language regarding the effect of a dissolution, annulment or legal separation on a power of attorney should be included in the notice contained in the Final Judgment.

6. §4440: The Committee agrees with the staff comment that the proposed list of individuals is too limited. Any person interested in the welfare of the principal should be permitted to petition the court for the purposes set forth in §4442.

Because of a limited amount of time available for discussion, the Committee focused its discussion on those proposed code sections where the staff had raised questions, and it did not discuss the entire proposed division of the code in detail. If you would like any further input from the Committee in connection with any particular proposed code section, please feel free to contact me.

Sincerely,



Janice Fogg,
VALENSI, ROSE & MAGARAM, PLC

JF/ldi

cc: Phyllis Cardoza, Administrative Vice Chair
Kenneth G. Petrulis, Chair of PTEP Section

TENTATIVE RECOMMENDATION

proposing the

COMPREHENSIVE POWER OF ATTORNEY STATUTE

Background

The statutes governing powers of attorney are in need of reorganization and revision.¹ 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.² 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 statutes are archaic, obscure, and incomplete.³ They provide little practical

* *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).

[* *Recommendation Relating to Elimination of Seven-Year Limit for Durable Power of Attorney for Health Care*, 20 Cal. L. Revision Comm'n Reports 2605 (1990) (enacted as 1991 Cal. Stat. ch. [AB 793]). For legislative history, see 21 Cal. L. Revision Comm'n Reports [] (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

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

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

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.*

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 in 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).⁶

Scope of Proposed Comprehensive Statute

The proposed comprehensive power of attorney act would restructure the power of attorney statutes appearing in Civil Code Sections 2400-2514,⁷ grouping them as a new Title 10. The provisions governing the durable power of attorney for health care would not be revised and the statutory forms provided by existing law would remain unchanged.⁸

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

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. See Civil Code §§ 2430-2444 (durable power of attorney for health care), 2450 (statutory form provided by repealed statute), 2475-2499.5 (Uniform Statutory Form Power of Attorney), 2500-2508 (statutory form durable power of attorney for health care).

9. See, e.g., proposed Civil Code §§ 2410.010 (continuing requirement that principal have capacity to contract in Section 2296), 2410.130 (drawn from termination rules in Sections 2355-2356), 2415.060 (consistent with delegation rules in Section 2349).

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

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.¹¹ 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 care¹² 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. The proposed statute does not make substantive 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.¹³ 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

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., 1991 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 meaning of "health care decisions" for purposes of statutory form durable power of attorney for health care).

usage in the statutory forms.¹⁴ 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.¹⁵ 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 coverage of the durable power of attorney for health care.¹⁶ 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.¹⁷

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., 1991 California Durable Power of Attorney Handbook § 1.1, at 2 (Cal. Cont. Ed. Bar).

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 Section 2402.120.

17. See Civil Code §§ 2400; Montgomery & Wright, *Durable Powers of Attorney for Property Management*, 1991 California Durable Power of Attorney Handbook § 2.47, at 56 (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

There is no requirement that the agent sign the instrument. It is not necessary to date a non-form power of attorney for property, or to have it acknowledged.¹⁸ 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,¹⁹ although special restrictions apply in the case of a durable power of attorney for health care.²⁰ At a minimum, the agent should be a person with the capacity to contract.²¹ 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

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.

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*, 1991 California Durable Power of Attorney Handbook § 2.46, at 55-56 (Cal. Cont. Ed. Bar).

unqualified person to removal, but does not affect the immunities of third persons nor the duties of the agent, even though unqualified.²²

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.²³ 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.²⁴ 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 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.²⁵

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.²⁶ This recognizes that different agents may have expertise in different areas.²⁷

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.

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*, 1991 California Durable Power of Attorney Handbook § 2.21, at 42 (Cal. Cont. Ed. Bar).

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

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.²⁹

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, (3) if it is the "usage of the place" to delegate the authority, or (4) if the delegation is authorized by the principal.³⁰ 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.³¹ 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

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*, 1991 California Durable Power of Attorney Handbook § 2.22, at 42-43 (Cal. Cont. Ed. Bar).

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

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).

responsible to the principal for the exercise of the authority delegated.³²

Compensation of Agents

Existing statutory law provides no rules on compensation of agents, except that consideration is not necessary to make an agent's authority binding on the principal.³³ 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.³⁴ The proposed law provides that the agent is entitled to reasonable compensation and to reimbursement of expenses.³⁵ This authority is comparable to the law applicable to compensation and reimbursement of trustees.³⁶ 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.

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(1).

34. See Montgomery & Wright, *Durable Powers of Attorney for Property Management*, 1991 California Durable Power of Attorney Handbook § 2.51, at 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.

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).

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.³⁷ 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."³⁸ The Uniform Statutory Form Power of Attorney provides that "by accepting or acting under the appointment, the agent assumes the fiduciary and other legal responsibilities of an agent."³⁹

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.⁴⁰ Once the trustee has accepted the trust,

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*, 1991 California Durable Power of Attorney Handbook § 2.47, at 56 (Cal. Cont. Ed. Bar).

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.

the trustee has a duty to administer the trust that does not end until the trustee is removed or allowed to resign.⁴¹

The trend of modern statutes is to relieve the agent under a power of attorney from a duty to exercise the authority granted.⁴² 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.⁴³ 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 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.⁴⁴ 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 understand that there is a duty to act, they may 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

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).

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.

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 fiduciary duties imposed in the law.

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 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.⁴⁵ The agency statute also forbids violation of a number of duties applicable to trustees.⁴⁶ Agents' duties have been fleshed out by commentators and the courts by reference to the Restatement on Agency and the duties of trustees.⁴⁷ 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, such as statutes applicable to guardians and conservators,⁴⁸ custodians under the Uniform Transfers to Minors Act,⁴⁹ personal

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).

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*, 1991 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.

representatives,⁵⁰ and trustees.⁵¹ The Commission believes that it is appropriate to set out in the statute the basic duties of an agent under a power of attorney. The duties in the proposed law have been drawn from existing agency law, from the Trust Law, and from the relevant laws in 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 impose a fiduciary standard on agents, typically the standard applicable to trustees.⁵² The standard of care for trustees has undergone revision from time to time since the general principle analogizing agents to trustees was laid down.⁵³ 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 Act⁵⁴ than to a trustee. Accordingly, the proposed law provides a nonprofessional fiduciary standard of care. This standard

50. See Prob. Code § 9600 *et seq.*

51. See Prob. Code § 16000 *et seq.*

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).

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.⁵⁵

Powers of Agents

The general agency statutes contain a number of statements concerning the power and authority of agents,⁵⁶ but these statements

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).

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).

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 that are amplified in highly detailed statutory language.⁵⁷ 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.⁵⁸

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 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.⁵⁹ 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.⁶⁰ 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

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

58. Prob. Code §§ 16200-16249.

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).

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.⁶¹ There is also a set of powers that can 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 principal could not do assuming the principal has the capacity to contract.⁶²

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.⁶³ 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.⁶⁴ This authority applies both to durable and nondurable powers of

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*, 1991 California Durable Power of Attorney Handbook § 2.66, at 70 (Cal. Cont. Ed. Bar).

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.

attorney,⁶⁵ 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 the filing of an action to do so, in the case of a federal "absentee."⁶⁶ 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).⁶⁷ A good faith transaction of the agent without actual knowledge of items (7)-(9) is binding on the principal.⁶⁸ 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.⁶⁹

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)

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).

66. Civil Code § 2355.

67. Civil Code § 2356.

68. Civil Code § 2356(b).

69. Civil Code § 2403.

expiration of its term,⁷⁰ (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.⁷¹ 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, or (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 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 agency⁷² 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 absentees⁷³ and under the durable power of attorney for health care⁷⁴ 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.⁷⁵ Termination on dissolution or annulment is appropriate

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*.

72. See Civil Code § 2356(a).

73. See Civil Code § 2355(f).

74. See Civil Code § 2437(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).

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.⁷⁶

Relations with Third Persons

Existing law provides a number of rules concerning the relation between agents and third persons, both in the general agency statutes⁷⁷ and in the power of attorney statutes.⁷⁸ 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.⁷⁹ [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.⁸⁰]

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

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

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 proposed in the Commission's *Recommendation Relating to Recognition of Agent's Authority Under Statutory Form Power of Attorney.*]

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.⁸¹ 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 assume validity and rely on the power without any duty of inquiry, including inquiring into (1) the authenticity of a certified copy of the power of attorney furnished by 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

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.

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.⁸² 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.

The agent's affidavit is broadened and made more effective in the proposed law.⁸³ The affidavit may be given voluntarily or in response to the request of a third person. A third person who is given 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 agent's authority.

The proposed law also adds new provisions recognizing the right of third persons to require appropriate identification from the agent,⁸⁴ 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,⁸⁵ and validating provisions in contracts between principals and third persons for the manner of

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

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).

giving notice to the third person of events that may affect the agent's authority.⁸⁶

Durable Powers of Attorney for Health Care

The provisions concerning durable powers of attorney for health care⁸⁷ are continued in the proposed law with only a few minor changes. The changes involve technical references necessary because of 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,⁸⁸ 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 agents under powers of attorney⁸⁹ 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.

The proposed law also adds some new provisions clarifying the general jurisdiction and power of the superior court in dealing with powers of attorney,⁹⁰ solidifying the personal jurisdiction over

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).

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

89. See Civil Code §§ 2410-2423.

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

agents,⁹¹ and making clear that there is no right to a jury trial, consistent with the general rule concerning fiduciaries.⁹²

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

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

SUMMARY OUTLINE

CIVIL CODE

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- § 2400.010 **SUBTITLE 1. GENERAL PROVISIONS AND DEFINITIONS**
- § 2400.010 Chapter 1. General Provisions
§ 2402.010 Chapter 2. Definitions
- § 2405.010 **SUBTITLE 2. POWERS OF ATTORNEY FOR PROPERTY**
- § 2405.010 Chapter 1. General Provisions
§ 2410.010 Chapter 2. Creation, Effect, and Termination of
 Powers of Attorney for Property
§ 2415.010 Chapter 3. Agents Under Powers of Attorney for
 Property
§ 2415.010 Article 1. Agents
§ 2418.010 Article 2. Duties of Agents
§ 2421.010 Article 3. Powers of Agents
§ 2425.010 Chapter 4. Relations with Third Persons
- § 2430 ***SUBTITLE 3. DURABLE POWERS OF ATTORNEY FOR HEALTH CARE ****
- § 2450 ***SUBTITLE 4. STATUTORY FORMS***
- § 2450 *Chapter 1. Use of Statutory Form Provided by Repealed
 Statute **
- § 2475 *Chapter 2. Uniform Statutory Form Power of Attorney **
§ 2475 Article 1. General Provisions *
§ 2485 Article 2. Construction of Powers *
§ 2500 *Chapter 3. Statutory Form Durable Powers of Attorney
 for Health Care **
- § 2510.010 **SUBTITLE 5. JUDICIAL PROCEEDINGS CONCERNING POWERS OF
 ATTORNEY**
- § 2510.010 Chapter 1. General Provisions
§ 2512.010 Chapter 2. Jurisdiction and Venue
§ 2514.010 Chapter 3. Petitions, Orders, Appeals

* Headings in italics indicate unchanged statutes, except for some technical revisions of cross-references and changing "article" to "subtitle."

DETAILED OUTLINE

TITLE 10. POWERS OF ATTORNEY**SUBTITLE 1. GENERAL PROVISIONS AND DEFINITIONS****Chapter 1. General Provisions**

- § 2400.010. Short title
- § 2400.020. Relation to general agency law
- § 2400.030. General rule concerning application of division
- § 2400.040. Scope of division
- § 2400.050. Durable powers of attorney under law of another jurisdiction

Chapter 2. Definitions

- § 2402.010. Application of definitions
- § 2402.030. Agent
- § 2402.050. Community care facility
- § 2402.070. Durable power of attorney
- § 2402.090. Durable power of attorney for health care
- § 2402.110. Durable power of attorney for property
- § 2402.130. Health care
- § 2402.150. Health care decision
- § 2402.170. Health care provider
- § 2402.190. Nondurable power of attorney
- § 2402.210. Power of attorney
- § 2402.230. Power of attorney for property
- § 2402.250. Principal
- § 2402.270. Residential care facility for the elderly
- § 2402.290. Springing power of attorney
- § 2402.310. Statutory form durable power of attorney for health care
- § 2402.330. Statutory form power of attorney
- § 2402.350. Third person

**SUBTITLE 2. DURABLE POWERS OF ATTORNEY FOR PROPERTY
AND OTHER MATTERS****Chapter 1. General Provisions**

- § 2405.010. Application of subtitle
- § 2405.020. Uniform Durable Power of Attorney Act
- § 2405.030. Form of durable power of attorney after January 1, 1993

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

- § 2410.010. Creation of power of attorney
- § 2410.020. Permissible purposes
- § 2410.030. Requirements for durable power of attorney for property

- § 2410.040. Effect on agent's acts under durable power of attorney during principal's incapacity
- § 2410.050. Warning statement in durable power of attorney for property
- § 2410.060. Nomination of fiduciary in durable power of attorney
- § 2410.070. Springing power of attorney
- § 2410.080. Lapse of time
- § 2410.090. Application to principal's property
- § 2410.110. Variation of duties and liabilities between principal and agent
- § 2410.120. Manner of modification or termination by principal
- § 2410.130. Termination of power of attorney for property
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Chapter 3. Agents Under Powers of Attorney for Property

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- § 2415.010. Qualifications of agent
- § 2415.020. Effect of designating unqualified person as agent
- § 2415.030. Multiple agents
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- § 2415.080. Agent's authority when principal missing or held captive in foreign country
- § 2415.090. Termination of agent's authority
- § 2415.100. Effect of dissolution or annulment
- § 2415.110. Succession following termination of agent's authority
- § 2415.120. Agent's duties and powers on termination of authority
- § 2415.130. Power coupled with an interest

Article 2. Duties of Agents

- § 2418.010. When duties commence
- § 2418.020. Standard of care and liability for losses
- § 2418.030. Duty of loyalty
- § 2418.040. Duty to avoid conflict of interest
- § 2418.050. Duty not to undertake adverse responsibilities
- § 2418.060. Duty to keep principal's property separate and identified
- § 2418.070. Duty to keep principal informed and follow instructions
- § 2418.080. Consultation
- § 2418.090. Duty to keep records
- § 2418.100. Duty to use special skills
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Article 3. Powers of Agents

- § 2421.010. General powers of agent subject to limitations in power of attorney
- § 2421.020. Incorporation of powers
- § 2421.030. Grant of general powers without limitation
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- § 2421.050. Effect of grant of general powers
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Chapter 4. Relations with Third Persons

- § 2425.010. Third persons required to respect agent's authority
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- § 2425.040. Effect of death or incapacity of principal
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SUBTITLE 3. DURABLE POWERS OF ATTORNEY FOR HEALTH CARE

- § 2430. *Definitions*
- § 2431. *Application of chapter*
- § 2432. *Requirements for durable power of attorney for health care*
- § 2432.5. *Employee of health care provider, community care facility, or residential care facility*
- § 2433. *Requirements for printed form of durable power of attorney for health care*
- § 2434. *Agent's authority to make health care decisions*
- § 2435. *Limitations on agent's authority*
- § 2436. *Availability of medical information to agent*
- § 2436.5. *Expiration of durable power of attorney for health care*
- § 2437. *Revocation of durable power of attorney for health care*
- § 2438. *Immunities of health care provider*
- § 2439. *Other authority not affected*
- § 2440. *Principal's objections*
- § 2441. *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*
- § 2443. *Unauthorized acts and omissions*
- § 2444. *Forms*
- § 2445. *Convincing evidence of identity of principal*

SUBTITLE 4. STATUTORY FORMS

Chapter 1. Use of Statutory Form Provided by Repealed Statute

- § 2450. *Use of statutory form provided by repealed statute*

Chapter 2. Uniform Statutory Form Power of Attorney

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- § 2475. Statutory form power of attorney
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- § 2477. Effect of initialing line in front of (N) in statutory form
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- § 2480. General provisions applicable to power under this chapter
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- § 2481. Use of other forms
- § 2482. Short title
- § 2483. Uniformity of construction
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Article 2. Construction of Powers

- § 2485. Construction of powers generally
- § 2486. Real property transactions
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- § 2491. Business operating transactions
- § 2492. Insurance and annuity transactions
- § 2493. Estate, trust, and other beneficiary transactions
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- § 2497. Retirement plan transactions
- § 2498. Tax matters
- § 2499. 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

Chapter 3. Statutory Form Durable Power of Attorney for Health Care

- § 2500. Statutory form durable power of attorney for health care
- § 2501. Warning or lawyer's certificate
- § 2502. Formal requirements
- § 2503. Requirements for statutory form
- § 2503.5. Requirements for forms
- § 2504. Language conferring general authority
- § 2505. Effect of documents executed by agent
- § 2506. Termination of authority; alternate agent
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SUBTITLE 5. JUDICIAL PROCEEDINGS CONCERNING POWERS OF ATTORNEY

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- § 2510.010. Legislative intent
- § 2510.020. Application of subtitle
- § 2510.030. Cumulative remedies
- § 2510.040. Effect of provision in power attempting to make subtitle inapplicable
- § 2510.050. Limitation of remedies by provision in power of attorney
- § 2510.060. Right to petition under power of attorney for property
- § 2510.070. Right to petition under durable power of attorney for health care
- § 2510.080. Application of decedents' estates provisions
- § 2510.090. Jury trial

Chapter 2. Jurisdiction and Venue

- § 2512.010. Jurisdiction and authority of court or judge
- § 2512.020. Jurisdiction over agent
- § 2512.030. Basis of jurisdiction
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- § 2514.010. Petitioners
- § 2514.020. Petition as to power of attorney for property
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- § 2514.040. Commencement of proceeding
- § 2514.050. Dismissal of petition
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- § 2514.080. Proof of service
- § 2514.090. Power of court
- § 2514.100. Temporary health care order
- § 2514.110. Award of attorney's fees
- § 2514.120. Guardian ad litem
- § 2514.130. Appeal

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PROPOSED LEGISLATION

Staff Note. The bracketed section numbers in the section headings refer to the earlier staff draft statute distributed with Memorandum 90-122. This is intended to assist those who have reviewed the earlier draft and to help coordinate comments directed to the earlier section numbers.

Civil Code §§ 2400.010-2514.130 (added). Powers of attorney

SEC. . Title 10 (commencing with Section 2400.010) is added to Part 4 of Division 3 of the Civil Code, to read:

TITLE 10. POWERS OF ATTORNEY

SUBTITLE 1. GENERAL PROVISIONS AND DEFINITIONS

Chapter 1. General Provisions

§ 2400.010. Short title [4000]

2400.010. This title shall be known and may be cited as the Power of Attorney Law.

Comment. Section 2400.010 is new and provides a convenient means of referring to this title. The Power of Attorney Law is largely self-contained. See also Section 14 (general definitions). The general agency rules in the Civil Code do not apply to this title. See Section 2400.020.

§ 2400.020. Relation to general agency law [4001]

2400.020. The provisions concerning agency in Article 2 (commencing with Section 2019) of Chapter 2 of Title 6 and in Title 9 do not apply to powers of attorney governed by this title.

Comment. Section 2400.020 makes clear that the general statutes applicable to agency (Sections 2019-2022 and 2295-2356) are not applicable to powers of attorney. See Sections 2023, 2360.

§ 2400.030. General rule concerning application of title [4002]

2400.030. Except as otherwise provided by statute:

(a) On and after January 1, 1993, this title applies to all powers of attorney regardless of whether they were executed before, on, or after January 1, 1993.

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

(c) This title 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 title 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 title does not apply and prior law applies.

Comment. Section 2400.030 is comparable to Probate Code Section 15001 (application of Trust Law). Subdivision (a) provides the general rule that this title 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 2510.010 *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 2405.030 (form of durable power of attorney), 2444 (form of durable power of attorney for health care); see also Section 2410.070(c) (springing powers).

See also Section 2402.210 ("power of attorney" defined).

§ 2400.030. Scope of title [4003]

2400.030. (a) This title applies to the acts and transactions in this state of an agent under a power of attorney executed in this state or by a person domiciled in this state.

(b) This title applies to acts and transactions of an agent in this state or outside this state under a power of attorney that refers 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 title under subdivision (b) remains subject to this title 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 2400.030 is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.730(1) (Vernon 1990). This section is comparable to Probate Code Section 3902(a) (scope and jurisdiction under Uniform Transfers to Minors Act). See Prob. Code § 3902 Comment.

See also Section 2402.030 ("agent" defined), 2402.210 ("power of attorney" defined), 2402.250 ("principal" defined).

§ 2400.040. Durable powers of attorney under law of another jurisdiction [4004]

2400.040. A 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 2400.040 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 Section 2402.070 ("durable power of attorney" defined).

Chapter 2. Definitions

§ 2402.010. Application of definitions [4050]

2402.010. Unless the provision or context otherwise requires, the definitions in this chapter govern the construction of this title.

Comment. Section 2402.010 restates the substance of the first clauses of former Section 2410.

§ 2402.030. Agent [4052]

2402.030. (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 2402.030 supersedes part of former Section 2400 and former Section 2410(a), and is comparable to

the first sentence of Section 2295. This title uses "agent" in place of "attorney in fact" which was used in many, but not all, provisions of former law. "Agent" is generally used in this title 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 Probate Code Section 84 ("trustee" includes successor trustee). See Sections 2415.030 (multiple agents), 2415.040 (successor agents), 2415.060 (delegation of agent's authority), 2500 (alternate agents under statutory form durable power of attorney for health care).

See also Sections 2402.210 ("power of attorney" defined), 2402.250 ("principal" defined).

§ 2402.070. Durable power of attorney [4056]

2402.070. (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 title 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 or a durable power of attorney for health care, or to both.

Comment. Section 2402.070 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 2400.030 (powers of attorney executed under laws of other jurisdiction), 2410.030 (requirements for durable power of attorney for property), 2432 (requirements for durable power of attorney for health care). See also Sections 2402.090 ("durable power of attorney for health care" defined), 2402.110 ("durable power of attorney for property" defined), 2402.210 ("power of attorney" defined), 2402.250 ("principal" defined).

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

§ 2402.090. Durable power of attorney for health care [4058]

2402.090. "Durable power of attorney for health care" means a durable power of attorney for health care as defined in subdivision (a) of Section 2430.

Comment. Section 2402.090 incorporates the definition provided by Section 2430(a) and continues the substance of former Section 2410(b). For provisions concerning durable powers of attorney for health care,

see Sections 2430-2445, 2500-2508, 2514.010, 2514.030. 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 2402.110 ("durable power of attorney for property" defined). However, a dual-purpose power of attorney must comply with the requirements applicable to both types of power of attorney. See also Section 2433(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 2402.070 ("durable power of attorney" defined), 2402.150 ("health care decision" defined), 2402.250 ("principal" defined).

§ 2402.110. Durable power of attorney for property [4060]

2402.110. "Durable power of attorney for property" means a durable power of attorney other than a durable power of attorney for health care.

Comment. Section 2402.110 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., 1991 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 2405.010-2425.110, 2450-2499.5, 2514.010-2514.130. See also Sections 2402.070 ("durable power of attorney" defined), 2402.090 ("durable power of attorney for health care" defined).

Staff 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.*

§ 2402.130. Health care [4062]

2402.130. "Health care" means health care as defined in subdivision (b) of Section 2430 [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 2402.130 incorporates the definition provided by Section 2430(b). See Comment to Section 2430(b). [The reference to postdeath decisions has been added for consistency with the authority provided in Section 2434 (agent's authority to make health care decisions).]

Staff 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 1991 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, 1991 California Durable Power of Attorney Handbook* § 3.1, at 137 (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.

§ 2402.150. Health care decision [4064]

2402.150. "Health care decision" means health care decision as defined in subdivision (c) of Section 2430.

Comment. Section 2402.150 incorporates the definition provided by Section 2430(c). See also Section 2402.130 ("health care" defined).

§ 2402.190. Nondurable power of attorney [4068]

2402.190. "Nondurable power of attorney" means a power of attorney that is not a durable power of attorney.

Comment. Section 2402.190 is new. Prior law used a variety of terms to describe powers of attorney that were not durable. See, e.g., former Sections 2403, 2410(c), 2512, 2514(a)(2). See also 2402.090 ("durable power of attorney for health care" defined), 2402.210 ("power of attorney" defined).

§ 2402.210. Power of attorney [4070]

2402.210. (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 title.

(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 title.

Comment. Subdivision (a) of Section 2402.210 restates the first sentence of former Section 2410(c) without substantive change. "Agent" has been substituted for "attorney in fact." See Section 2402.030 ("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 title 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 title 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 2475 *et seq.* (Uniform Statutory Form Power of Attorney), 2500 *et seq.* (Statutory Form Durable Power of Attorney for Health Care).

Subdivision (b) continues former Section 2400.5 without substantive change and supersedes the second sentence of former 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 Section 2356(d) (proxy under general agency rules).

See also Sections 2402.030 ("agent" defined), 2402.070 ("durable power of attorney" defined), 2402.090 ("durable power of attorney for

health care" defined), 2402.190 ("nondurable power of attorney" defined).

§ 2402.230. Power of attorney for property [4072]

2402.230. "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 2402.230 is new. This section provides a convenient way to identify durable and nondurable powers of attorney that are not durable powers of attorney for health care. See Section 2402.110 & Comment ("durable power of attorney for property" defined). See also Sections 2402.090 ("durable power of attorney for health care" defined), 2402.110 ("durable power of attorney for property" defined), 2402.190 ("nondurable power of attorney" defined), 2402.210 ("power of attorney" defined).

§ 2402.250. Principal [4074]

2402.250. "Principal" means a natural person who executes a power of attorney.

Comment. Section 2402.250 restates and generalizes former Section 2410(d). See Section 2402.210 ("power of attorney" defined).

§ 2402.290. Springing power of attorney [4078]

2402.290. "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 2402.290 continues former Section 2514(a)(2) without change. See Section 2410.080 (springing power of attorney). See also Sections 2402.070 ("durable power of attorney" defined), 2402.190 ("nondurable power of attorney" defined), 2402.210 ("power of attorney" defined), 2402.250 ("principal" defined).

Staff 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 other section.

§ 2402.310. Statutory form durable power of attorney for health care [4080]

2402.310. "Statutory form durable power of attorney for health care" means a durable power of attorney for health care that satisfies

the requirements of Chapter 3 (commencing with Section 2500) of Subtitle 4.

Comment. Section 2402.310 is new. See also Section 2402.090 ("durable power of attorney for health care" defined).

§ 2402.330. Statutory form power of attorney [4082]

2402.330. (a) "Statutory form power of attorney" means a power of attorney for property that satisfies the requirements of Chapter 2 (commencing with Section 2475) of Subtitle 4.

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

Comment. Section 2402.330 is new. See also Section 2402.230 ("power of attorney for property" defined). Subdivision (b) recognizes a variant name the form may take. See Section 2475 (statutory form power of attorney).

Staff Note. *This definition is not parallel with the other definitions which distinguish between property and health care powers of attorney, but the variation seems harmless, and the alternative awkward.*

§ 2402.350. Third person [4084]

2402.350. "Third person" means any person, other than the principal or agent, 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 2402.350 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 elsewhere, such as the statutory form power of attorney. See Sections 2475 & 2476.

See also Section 2402.030 ("agent" defined), 2402.250 ("principal" defined).

SUBTITLE 2. POWERS OF ATTORNEY FOR PROPERTY

Chapter 1. General Provisions

§ 2405.010. Application of subtitle [4100]

2405.010. Except as otherwise provided by statute, this subtitle applies to powers of attorney for property, whether durable or nondurable, including statutory form powers of attorney. This subtitle does not apply to durable powers of attorney for health care.

Comment. Section 2405.010 provides the scope of this subtitle. If a section in this subtitle 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 2410.030 (requirements for durable power of attorney for property), 2410.140 (termination of nondurable power of attorney for property). This subtitle applies to statutory form powers of attorney since they are a variety of powers of attorney for property. However, this subtitle does not apply to statutory form powers of attorney to the extent Chapter 2 (commencing with Section 2475) of Subtitle 4 provides a special rule. See Section 2480 (general provisions applicable to statutory form) & Comment.

The provisions of this subtitle do not apply to durable powers of attorney for health care, which are governed by Subtitle 3 (commencing with Section 2430). See also Sections 2500-2508 (statutory form durable power of attorney for health care). In this respect, Section 2405.010 restates the last sentence of former Section 2402(a) without substantive change.

See also Sections 2402.110 ("durable power of attorney for property" defined), 2402.090 ("durable power of attorney for health care" defined), 2402.190 ("nondurable power of attorney" defined).

§ 2405.020. Uniform Durable Power of Attorney Act [4101]

2405.020. (a) Sections 2410.030, 2410.040, 2410.060, 2410.080, 2415.070, 2425.040, and 2425.050 may be cited as the Uniform Durable Power of Attorney Act.

(b) The act shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this article among states enacting it.

(c) If any provision of the act or its application to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of the act are severable.

Comment. Subdivision (a) of Section 2405.020 restates former Section 2406 without substantive change. Subdivision (a) has the same purpose as the official text of Section 7 of the Uniform Durable Power of Attorney Act (1969).

Subdivision (b) continues former Section 2405 without substantive change.

Subdivision 9c) continues former Section 2407 without substantive change.

§ 2405.030. Form of durable power of attorney after January 1, 1993
[4102]

2405.030. Notwithstanding Section 2410.050:

(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.

(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 or with Section 2410.050.

(c) A durable power of attorney for property executed on or after January 1, 1993, using a printed form that complies with subdivision (b) of former Section 2400, as originally enacted, or with former Section 2510, is as valid as if it had been executed using a printed form that complies with Section 2410.050.

Comment. Section 2405.030 supersedes former Section 2510.5. This section permits continued use of printed forms that comply with former law, specifically former Section 2400 (as enacted by 1981 Cal. Stat. ch. 511, § 4) and former 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 2410.050. This section, like its predecessor, former Section 2510.5, avoids the need to discard existing printed forms on the operative date of this title. However, pursuant to 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 Section 2510 or Section 2410.050. Both provisions are acceptable because the wording changes are nonsubstantive. See Comment to Section 2410.050.

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

§ 2410.010. Creation of power of attorney [4120]

2410.010. 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 2410.010 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 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 2475 (acknowledgment of Uniform Statutory Form Power of Attorney).

For provisions concerning the duties and powers of an agent, see Sections 2418.010-2421.080. See also Sections 2402.030 ("agent" defined), 2402.230 ("power of attorney for property" defined), 2402.250 ("principal" defined).

§ 2410.020. Permissible purposes [4121]

2410.020. 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 2410.020 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 Sections 2304 and 2305.

For provisions concerning the duties and powers of an agent, see Sections 2418.010-2421.080. See also Sections 2402.030 ("agent" defined), 2402.230 ("power of attorney for property" defined), 2402.250 ("principal" defined).

§ 2410.030. Requirements for durable power of attorney for property [4122]

2410.030. 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 statements:

(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 2410.030 restates former Section 2400 without substantive change. "Agent" has been substituted for "attorney in fact." See Section 2402.030 ("agent" defined). This section refers to a durable power of attorney for property, recognizing that this subtitle does not apply to durable powers of attorney for health care. See Sections 2405.010 (application of subtitle), 2430-2445 (durable powers of attorney for health care).

Section 2410.030 is similar to the official text of Section 1 of the Uniform Durable Power of Attorney Act (1984), Uniform Probate Code Section 5-501 (1990). See Section 2405.020 (construction of provisions drawn from uniform acts). The reference in the Uniform Act to the principal's "disability" is omitted. Under Section 2410.140, 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 2410.030 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 2410.130(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 for consistency with the language in subdivision (b) which relates to springing powers of attorney.

See also Sections 2402.030 ("agent" defined), 2402.070 ("durable power of attorney" defined), 2402.210 ("power of attorney" defined), 2402.250 ("principal" defined), 2402.290 ("springing power of attorney" defined).

Staff 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 normally would. 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 uniform acts where practicable, even though in this case the act has been reorganized. See Section 2405.020 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.

§ 2410.040. Effect of agent's acts under durable power of attorney during principal's incapacity [4123]

2410.040. 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 the principal's successors in interest as if the principal had capacity, notwithstanding any incapacity of the principal or any uncertainty as to whether the principal is dead or alive.

Comment. Section 2410.040 continues former 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 2402.030 ("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 2410.040 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 (1990). See Section 2405.020 (construction of provisions drawn from uniform acts). This section omits the reference to the principal's "disability" found in the uniform act. Under Section 2410.140, it is the principal's incapacity to contract which would otherwise terminate the power of attorney.

See also Sections 2402.030 ("agent" defined), 2402.110 ("durable power of attorney for property" defined), 2402.250 ("principal" defined).

§ 2410.050. Warning statement in durable power of attorney for property [4124]

2410.050. (a) This section does not apply to either of the following:

(1) A statutory short form power of attorney under Section 2450.

(2) A statutory form power of attorney that satisfies the requirements of the Uniform Statutory Form Power of Attorney Act in Chapter 2 (commencing with Section 2475) of Subtitle 4.

(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 2410.050 restates former Section 2510 without substantive change. "Agent" has been substituted for "attorney in fact." See Section 2402.030 ("agent" defined). The exclusion of durable powers of attorney for health care in the former provision is omitted as unnecessary. See Section 2402.110 ("durable power of attorney for property" defined), 2402.230 ("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 2475 (Uniform Statutory Form Power of Attorney), 2433 (durable power of attorney for health care), 2500 (statutory form durable power of attorney for health care). See also Section 2433(a) (introductory clause) (printed form of a durable power of attorney for health care to provide only authority to make health care decisions).

Section 2405.030 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 2410.050 (or its predecessor, former Section 2510). See Section 2405.030(b).

See also Sections 2402.030 ("agent" defined), 2402.110 ("durable power of attorney for property" defined), 2402.330 ("statutory form power of attorney" defined), 2402.350 ("third person" defined).

§ 2410.060. Nomination of fiduciary in durable power of attorney [4125]

2410.060. (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 of the Probate Code 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 2410.060 continues former 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 (1990), but has been revised to make it consistent with the general provision for nomination of a conservator in Probate Code Section 1810. See Section 2405.020 (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 (Prob. Code § 1810), the later nomination will supersede an earlier nomination made in a durable power. This is consistent with the purpose and effect of Probate Code Section 1810.

See also Section 2402.070 ("durable power of attorney" defined), 2402.250 ("principal" defined).

Staff 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 2410.060 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 Probate Code 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.

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.)

Note that Section 2410.060 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 2410.060 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.

§ 2410.070. Springing power of attorney [4126]

2410.070. (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 2410.070 continues former Section 2514(b)-(d) without substantive change. "Agent" has been substituted for "attorney in fact." See Section 2402.030 ("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 2402.290 ("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 2410.030 (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 2402.190 ("nondurable power of attorney" defined), 2402.210 ("power of attorney" defined), 2402.250 ("principal" defined).

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

§ 2410.080. Lapse of time [4127]

2410.080. 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 2410.080 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 (1990). See Section 2405.020 (construction of provisions drawn from uniform acts). See also Section 2402.230 ("power of attorney for property" defined).

§ 2410.090. Application to principal's property [4128]

2410.090. 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 2410.090 continues former 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 Section 2499 (after-acquired property under statutory form power of attorney).

See also Sections 2402.110 ("durable power of attorney for property" defined), 2402.190 ("nondurable power of attorney" defined), 2402.230 ("power of attorney for property" defined), 2402.250 ("principal" defined).

§ 2410.110. Variation of duties and liabilities between principal and agent [4129]

2410.110. 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 subtitle, except as provided in Section 2421.070.

Comment. Section 2410.110 is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.717(4) (Vernon 1990). Section 2421.070 provides certain absolute limits on actions that may be taken by an agent under a power of attorney.

See also Sections 2402.030 ("agent" defined), 2402.250 ("principal" defined).

§ 2410.120. Manner of modification or termination by principal [4130]

2410.120. Except as provided by Section 2415.130, 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 2410.120 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 2418.070. For other events that terminate a power of attorney, see Sections 2410.130, 2410.140. For events that terminate the authority of an agent, see Sections 2415.090, 2415.100.

See also Sections 2402.030 ("agent" defined), 2402.230 ("power of attorney for property" defined), 2402.250 ("principal" defined).

§ 2410.130. Termination of power of attorney for property [4131]

2410.130. (a) Except as provided in Section 2415.130 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 2415.080.

(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 2425.010).

Comment. Section 2410.130 is drawn from the general agency rules provided in Sections 2355 and 2356. See Section 2360 (Sections 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 2410.140.

The first clause of subdivision (a) recognizes the special rule applicable to a power of attorney coupled with an interest provided in Section 2415.130. Subdivision (a)(1) is the same as 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 2415.080. Subdivision (a)(2) is the same as 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 Section 2356(a)(1). Subdivision (a)(4) is the same as Section 2356(a)(2). Subdivision (a)(5) is generalized from Section 2355(c)-(f). See Section 2415.090 (termination of agent's authority).

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

See also Sections 2402.030 ("agent" defined), 2402.110 ("durable power of attorney for property" defined), 2402.190 ("nondurable power of attorney" defined), 2402.230 ("power of attorney for property" defined), 2402.350 ("third person" defined).

§ 2410.140. Termination of nondurable power of attorney for property
[4132]

2410.140. (a) Except as provided in Section 2415.130 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 2425.010).

Comment. Subdivision (a) of Section 2410.140 restates the general agency rule in 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 2415.130. For other events that terminate a nondurable power of attorney for property, see Section 2410.130.

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

See also Sections 2402.030 ("agent" defined), 2402.110 ("durable power of attorney for property" defined), 2402.190 ("nondurable power of attorney" defined), 2402.230 ("power of attorney for property" defined), 2402.350 ("third person" defined).

Staff 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.

§ 2410.150. Certified copy of power of attorney [4133]

2410.150. (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 2410.150 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 2402.230 ("power of attorney for property" defined), 2402.250 ("principal" defined).

Chapter 3. Agents Under Powers of Attorney for Property

Article 1. Agents

§ 2415.010. Qualifications of agent [4140]

2415.010. Any person having the capacity to contract may be designated as an agent under a power of attorney for property.

Comment. Section 2415.010 supersedes the last part of Section 2296 ("any person may be an agent") to the extent that it applied to agents under powers of attorney.

See also Sections 2402.030 ("agent" defined), 2402.230 ("power of attorney for property" defined), 2402.250 ("principal" defined).

Staff 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, 1991 California Durable Power of Attorney Handbook § 2.46, at 56 (Cal. Cont. Ed. Bar).

§ 2415.020. Effect of designating unqualified person as agent [4141]

2415.020. The designation of a person not qualified to act as an agent 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 2415.020 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 2425.010 et seq.

See also Sections 2402.030 ("agent" defined), 2402.230 ("power of attorney for property" defined), 2402.250 ("principal" defined), 2402.350 ("third person" defined).

§ 2415.030. Multiple agents [4142]

2415.030. (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 2415.030 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 2475. Subdivision (b) is comparable to the rules applicable to multiple trustees under Probate Code Sections 15620-15622. Subdivision (c) is included for consistency with Section 2415.040(c) (capacity of successor agent). Subdivision (d) is comparable to the general rule as to cotrustees in Probate Code Section 16402(a).

See also Sections 2402.030 ("agent" defined), 2402.230 ("power of attorney for property" defined), 2402.250 ("principal" defined).

Staff 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 enabled 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?

§ 2415.040. Successor agents [4143]

2415.040. (a) The principal in a power of attorney for property may 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 2415.040 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 2415.090. Subdivision (d) is comparable to the general rule as to successor trustees in Probate Code Section 16403(a).

A successor agent is the same as an original agent under this title. See Section 2402.030(b) ("agent" includes successor or alternate agent). See also Sections 2402.110 ("durable power of attorney for property" defined), 2402.190 ("nondurable power of attorney" defined), 2402.230 ("power of attorney for property" defined), 2402.250 ("principal" defined).

Staff 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?

§ 2415.050. Compensation of agent [4144]

2415.050. 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 2415.050 is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.725 (Vernon 1990). This provision is comparable to Probate Code 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 2418.020(b) (effect of compensation on standard of care). See also Sections 2402.030 ("agent" defined), 2402.210 ("power of attorney" defined), 2402.250 ("principal" defined).

Staff 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, 1991 California Durable Power of Attorney Handbook § 2.51, at 58 (Cal. Cont. Ed. Bar).

§ 2415.060. Delegation of agent's authority [4145]

2415.060. (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 2415.060 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 Section 2349, but permits 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 2418.070 (consultation with principal).

See also Sections 2402.030 ("agent" defined), 2402.110 ("durable power of attorney for property" defined), 2402.190 ("nondurable power

of attorney" defined), 2402.230 ("power of attorney for property" defined), 2402.250 ("principal" defined).

Staff Note. The Trust Law takes a different approach to the liability of a trustee to beneficiaries for acts of agents employed by the trustee. Probate Code 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 compel 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.

§ 2415.070. Relation of agent to court-appointed fiduciary [4146]

2415.070. (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 2415.070 continues former Section 2402(a) without substantive change. "Agent" has been substituted for "attorney in fact." See Section 2402.030 ("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) (1990), 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 (1990). The reference in the Uniform Act to the principal's "disability" is not included. This omission conforms Section 2415.070 to other provisions of this subtitle. 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 Section 2402(a) is omitted because it is unnecessary. This subtitle applies only to powers of attorney for property. See Section 2405.010 (application of subtitle).

See also Sections 2402.030 ("agent" defined), 2402.110 ("durable power of attorney for property" defined), 2402.250 ("principal" defined).

§ 2415.080. Agent's authority when principal missing or held captive in foreign country [4147]

2415.080. (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 of the Probate Code.

Comment. Section 2415.080 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 2402.030 ("agent" defined), 2402.070 ("durable power of attorney" defined), 2402.190 ("nondurable power of attorney" defined), 2402.210 ("power of attorney" defined), 2402.250 ("principal" defined).

***Staff 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 Probate Code 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.

§ 2415.090. Termination of agent's authority [4148]

2415.090. (a) Except as provided in Section 2415.130 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 2425.010).

Comment. Section 2415.090 is drawn in part from the general agency rules provided in Section 2355. See Section 2360 (Section 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 2415.130. Subdivision (a)(1) provides that the authority of an agent necessarily ceases when the underlying power of attorney is terminated. See Section 2410.130 (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 2415.080. Subdivision (a)(2) is the same as 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 Section 2355(e). Subdivision (a)(5) is the same as Section 2355(c).

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

See also Sections 2402.030 ("agent" defined), 2402.110 ("durable power of attorney for property" defined), 2402.190 ("nondurable power of attorney" defined), 2402.230 ("power of attorney for property" defined), 2402.350 ("third person" defined).

§ 2415.100. Effect of dissolution or annulment [4149]

2415.100. 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 of the Probate Code, 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 2415.100 is generalized from Section 2437(e) (revocation of durable power of attorney for health care on dissolution or annulment) and part of former subdivision (f) of Section 2355 (revocation in case federal absentee). The policy of subdivision (a) is comparable to Probate Code Section 6122 (revocation of provisions in will after dissolution or annulment).

Subdivision (b) continues part of former subdivision (f) of 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 2402.210 ("power of attorney" defined).

See also Sections 2402.030 ("agent" defined), 2402.230 ("power of attorney for property" defined), 2402.250 ("principal" defined).

Staff 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.

§ 2415.110. Succession following termination of agent's authority
[4150]

2415.110. 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 2415.110 is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.717(2) (Vernon 1990). See Section 2415.040 (successor agents).

See also Sections 2402.030 ("agent" defined), 2402.230 ("power of attorney for property" defined).

§ 2415.120. Agent's duties and powers on termination of authority
[4151]

2415.120. (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 2415.120 is new. The rules concerning duties on termination of the agent's authority are drawn in part from Probate Code 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 2415.070.

See also Sections 2402.030 ("agent" defined), 2402.110 ("durable power of attorney for property" defined), 2402.190 ("nondurable power of attorney" defined), 2402.250 ("principal" defined).

§ 2415.130. Power coupled with an interest [4152]

2415.130. 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 2415.130 continues the special rule concerning powers coupled with interests provided in Section 2356(a). This section provides an exception to Sections 2410.130 (termination of power of attorney for property), 2415.090 (termination of authority of agent), and 2415.100 (effect of dissolution or annulment).

See also 2402.030 ("agent" defined), 2402.230 ("power of attorney for property" defined), 2402.250 ("principal" defined).

Article 2. Duties of Agents

§ 2418.010. When duties commence [4160]

2418.010. (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 2418.010 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 subtitle 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 2402.030 ("agent" defined), 2402.110 ("durable power of attorney for property" defined), 2402.190 ("nondurable power of attorney" defined), 2402.250 ("principal" defined).

§ 2418.020. Standard of care and liability for losses [4161]

2418.020. 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 2418.020 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 Probate Code Section 3912(b) in the California Uniform Transfers to Minors Act. See also Section 2415.050 (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 2418.100 (agent's duty to use special skills); Comment to Prob. Code § 2401 (standard of care applicable to professional guardian or conservator of estate); Comment to Prob. Code § 3912 (standard of care applicable to professional fiduciary acting as custodian under California Uniform Transfers to Minors Act); Comment to Prob. Code § 16040 (standard of care applicable to expert trustee).

See also Sections 2402.030 ("agent" defined), 2402.230 ("power of attorney for property" defined), 2402.250 ("principal" defined).

§ 2418.030. Duty of loyalty [4162]

2418.030. 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 2418.030 restates the substance of part of Section 2322(c) which formerly applied to powers of attorney. The duty of loyalty is also consistent with Section 2306 (agent not to defraud principal). Unlike Section 2322(c), Section 2418.030 is stated as an affirmative duty, rather than a prohibition against violation of a duty

applicable to trustees under Probate Code Section 16002. The duty of loyalty of an agent to the principal is subject to the limitations in Section 2418.010 relating to commencement of the duties of an agent under a power of attorney.

See also Sections 2402.030 ("agent" defined), 2402.230 ("power of attorney for property" defined), 2402.250 ("principal" defined).

Staff 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. 110^{1/2} ¶ 802-7 (Smith-Hurd Supp. 1990).

§ 2418.040. Duty to avoid conflict of interest [4163]

2418.040. (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 2418.040 restates part of Section 2322(c) which formerly applied to powers of attorney. Unlike Section 2322(c),

Section 2418.040 is stated as an affirmative duty, rather than a prohibition against violation of a duty applicable to trustees under Probate Code Section 16004. The duty to avoid conflicts of interest is consistent with Section 2306.

See also Sections 2402.030 ("agent" defined), 2402.230 ("power of attorney for property" defined), 2402.250 ("principal" defined).

Staff Note. The Comment asserts that this section is consistent with 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.

§ 2418.050. Duty not to undertake adverse responsibilities [4164]

2418.050. 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 2418.050 restates part of Section 2322(c) which formerly applied to powers of attorney. Unlike Section 2322(c), Section 2418.050 is stated as an affirmative duty, rather than a prohibition against violation of the duty applicable to trustees under Probate Code Section 16005.

See also Sections 2402.030 ("agent" defined), 2402.230 ("power of attorney for property" defined), 2402.250 ("principal" defined).

§ 2418.060. Duty to keep principal's property separate and identified [4165]

2418.060. (a) The agent shall keep the principal's property separate and distinct from other property 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 2418.060 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 Section 2322(c) which formerly applied to powers of attorney. Unlike Section 2322(c), Section 2418.060 is stated as an affirmative duty, rather than a prohibition against violation of a duty applicable to trustees under Probate Code Section 16009.

See also Sections 2402.030 ("agent" defined), 2402.250 ("principal" defined).

§ 2418.070. Duty to keep principal informed and follow instructions
[4166]

2418.070. 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 2418.070 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 Sections 2019 and 2309. The duty to communicate with the principal is consistent with the general agency rule in Sections 2020 and 2332. Section 2418.070 supersedes the general agency rule in Section 2320 (power to disobey instructions), to the extent it applied to powers of attorney.

See also Sections 2402.030 ("agent" defined), 2402.250 ("principal" defined).

§ 2418.080. Consultation [4167]

2418.080. 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 2418.080 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 2402.110 ("durable power of attorney for property" defined), 2402.190 ("nondurable power of attorney" defined), 2402.250 ("principal" defined).

Staff 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?

§ 2418.090. Duty to keep records [4168]

2418.090. (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 2418.090 is drawn from Minnesota law. See Minn. Stat. Ann. § 523.21 (West Supp. 1990).

See also Sections 2402.030 ("agent" defined), 2402.230 ("power of attorney for property" defined), 2402.250 ("principal" defined).

§ 2418.100. Duty to use special skills [4169]

2418.100. (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 2418.100 is comparable to Probate Code Section 16014 applicable to trustees. See also Section 2418.020(c) (expert standard of care).

See also Sections 2402.030 ("agent" defined), 2402.230 ("power of attorney for property" defined), 2402.250 ("principal" defined).

§ 2418.110. Duty to reveal capacity as agent [4170]

2418.110. 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 2418.110 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 Section 2322(a). For provisions concerning relations with third persons, see Section 2425.010 *et seq.*

See also Sections 2402.030 ("agent" defined), 2402.230 ("power of attorney for property" defined), 2402.250 ("principal" defined), 2402.350 ("third person" defined).

Article 3. Powers of Agents**§ 2421.010. General powers of agent subject to limitations in power of attorney [4180]**

2421.010. 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 2 (commencing with Section 2475) of Subtitle 4.

(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 2418.020.

Comment. Section 2421.010 is drawn from Probate Code 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 2421.060 (powers that must be enumerated), 2421.070 (excluded powers), 2421.080 (exercise of powers subject to duties). Subdivision (a) is consistent with the general agency rule in 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 2475, 2485-2499.5. 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 Section 2319(1).

See also Sections 2402.030 ("agent" defined), 2402.230 ("power of attorney for property" defined).

§ 2421.020. Incorporation of powers [4181]

2421.020. (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 2 (commencing with Section 2475) of Subtitle 4.

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

(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 2421.020 is new. See also Sections 2402.030 ("agent" defined), 2402.230 ("power of attorney for property" defined), 2402.250 ("principal" defined).

§ 2421.030. Grant of general powers without limitation [4182]

2421.030. 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 2421.060 and 2421.070.

Comment. Section 2421.030 is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.710(2) (Vernon 1990). Section 2421.060 lists actions that must be specifically authorized, and thus are not included in general powers. Section 2421.070 lists actions that may not be accomplished through a power of attorney.

See also Sections 2402.030 ("agent" defined), 2402.230 ("power of attorney for property" defined), 2402.250 ("principal" defined).

§ 2421.040. Grant of general powers for express purposes [4183]

2421.040. 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 express subjects or purposes, 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 2421.060 and 2421.070.

Comment. Section 2421.040 is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.710(3) (Vernon 1990). Section 2421.060 lists actions that must be specifically authorized, and thus are not included in general powers. Section 2421.070 lists actions that may not be accomplished through a power of attorney.

See also Sections 2402.030 ("agent" defined), 2402.230 ("power of attorney for property" defined).

§ 2421.050. Effect of grant of general powers [4184]

2421.050. (a) Except as provided in Sections 2421.060 and 2421.070, 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 2 (commencing with Section 2475) of Subtitle 4.

Comment. Section 2421.050 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 Sections 2304 (authority conferable) and 2305 (agent's capacity to do what principal may do). Section 2421.060 lists actions that must be specifically authorized, and thus are not included in general powers. Section 2421.070 lists actions that may not be accomplished through a power of attorney.

See also Sections 2402.030 ("agent" defined), 2402.230 ("power of attorney for property" defined), 2402.250 ("principal" defined).

§ 2421.060. Powers that must be specifically enumerated [4185]

2421.060. 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 2421.060 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 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 2402.130 ("health care" defined), 2402.150 ("health care decision" defined), 2421.070(b) (health care decisions excluded), 2432 (requirements for durable power of attorney for health care).

See also Sections 2402.030 ("agent" defined), 2402.230 ("power of attorney for property" defined), 2402.250 ("principal" defined).

Staff 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 2402.130 has been written 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.*

§ 2421.070. Excluded powers [4186]

2421.070. 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 2421.070 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 Section 2304. Subdivision (a) makes clear that a durable power of attorney under this subtitle may not authorize health care decisions. See Sections 2430-2445 (durable powers of attorney for health care).

See also Sections 2402.030 ("agent" defined), 2402.150 ("health care decision" defined), 2402.230 ("power of attorney for property" defined), 2402.250 ("principal" defined).

§ 2421.080. Exercise of powers subject to duties [4187]

2421.080. 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 2421.080 is drawn from Probate Code Section 16202 (exercise of trustee's powers). See Sections 2418.010-2418.110 (duties of agents). See also 2402.030 ("agent" defined), 2402.210 ("power of attorney" defined).

Chapter 4. Relations with Third Persons

§ 2425.010. Third persons required to respect agent's authority [4200]

2425.010. 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 2425.010 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 2402.030 ("agent" defined), 2402.110 ("durable power of attorney for property" defined), 2402.190 ("nondurable power of attorney" defined), 2402.230 ("power of attorney for property" defined), 2402.250 ("principal" defined), 2402.350 ("third person" defined).

Staff 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 Staff Note following Section 2402.110 (definition of durable power of attorney for property).

§ 2425.020. Immunities of third person [4201]

2425.020. 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 2425.070, 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 2425.020 is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.719(1) (Vernon 1990).

See also Sections 2402.030 ("agent" defined), 2402.230 ("power of attorney for property" defined), 2402.250 ("principal" defined), 2402.350 ("third person" defined).

§ 2425.030. Reliance by third person on general powers [4202]

2425.030. 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 2425.030 is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.710(8) (Vernon 1990).

See also Sections 2402.030 ("agent" defined), 2402.110 ("durable power of attorney for property" defined), 2402.190 ("nondurable power of attorney" defined), 2402.230 ("power of attorney for property" defined), 2402.350 ("third person" defined).

§ 2425.040. Effect of death or incapacity of principal [4203]

2425.040. (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 2425.040 continues former Section 2403 without substantive change. "Agent" has been substituted for "attorney in fact." See Section 2402.030 ("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 (1990), except that the reference to the principal's "disability" is omitted. Under Section 2410.140, it is the principal's incapacity to contract which would otherwise terminate the power of attorney.

See also Sections 2402.030 ("agent" defined), 2402.110 ("durable power of attorney for property" defined), 2402.190 ("nondurable power of attorney" defined), 2402.230 ("power of attorney for property" defined), 2402.250 ("principal" defined), 2402.350 ("third person" defined).

Staff Note. This section uses the word "agency" which is not defined. See also draft Section 2402.210 ("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 2410.130 and 2415.090 distinguish between these concepts.

§ 2425.050. Affidavit of lack of knowledge of termination of power
[4204]

2425.050. (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 2425.050 continue former Section 2404 without substantive change. "Agent" has been substituted for "attorney in fact." See Section 2402.030 ("agent" defined). A reference to the agent's authority has also been added in subdivision (a) for consistency with other provisions in this subtitle. See, e.g., Section 2415.090 (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 (1990), except that the reference to the principal's "disability" is omitted. Under Section 2410.140, 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 Prob. Code § 18100.5(c)-(d) (reliance on trustee's affidavit, liability for attorney's fees) [as proposed in the *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 Probate Code 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 Probate Code 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 Probate Code Section 18100.

See also Sections 2402.030 ("agent" defined), 2402.110 ("durable power of attorney for property" defined), 2402.190 ("nondurable power of attorney" defined), 2402.230 ("power of attorney for property" defined), 2402.250 ("principal" defined).

Staff Note. Draft Section 2425.050 is comparable to the rule proposed for trusts in the *Recommendation Relating to Recognition of Trustees' Powers* rather than the rule proposed for statutory forms in the *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 $\frac{1}{2}$ ¶ 802-8 (Smith-Hurd Supp. 1990).

§ 2425.060. Identification of agent [4205]

2425.060. 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 2425.060 is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.719(4) (Vernon 1990).

See also Sections 2402.030 ("agent" defined), 2402.250 ("principal" defined), 2402.350 ("third person" defined).

§ 2425.070. When knowledge of employees charged to third person [4206]

2425.070. 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 2425.070 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 2402.030 ("agent" defined), 2402.230 ("power of attorney for property" defined), 2402.350 ("third person" defined).

§ 2425.080. Knowledge where principal is "absentee" [4207]

2425.080. For the purposes of this chapter, in the case of a principal who is an absentee as defined in Section 1403 of the Probate Code, 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 2425.080 continues without substantive change the part of 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 title.

See also Sections 2402.030 ("agent" defined), 2402.250 ("principal" defined), 2402.350 ("third person" defined); Prob. Code §§ 1403 ("absentee" defined), 1440 ("secretary concerned" defined).

§ 2425.090. Protection of third person relying in good faith on durable power of attorney for property [4208]

2425.090. (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 2425.090 continues former 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 2402.030 ("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 2425.090 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 2425.090, see, e.g., Sections 2410.050(c) (reliance in good faith upon durable power of attorney not containing "warning" statement required by Section 2410.050), 2425.020 (immunities of third person), 2425.030 (reliance by third person on general powers), 2425.040 (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 2425.090 does not apply to health care providers. See Sections 2405.010 (application of subtitle), 2438 (immunities of health care provider).

See also Sections 2402.030 ("agent" defined), 2402.110 ("durable power of attorney for property" defined), 2402.190 ("nondurable power of attorney" defined), 2402.230 ("power of attorney for property" defined), 2402.350 ("third person" defined).

§ 2425.100. Effect of contractual provision for notice [4209]

2425.100. (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 2425.100 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 2402.030 ("agent" defined), 2402.230 ("power of attorney for property" defined), 2402.250 ("principal" defined), 2402.350 ("third person" defined).

§ 2425.110. Liability between principal and third person [4210]

2425.110. (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 2425.110 is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.721 (Vernon 1990).

See also Sections 2402.030 ("agent" defined), 2402.230 ("power of attorney for property" defined), 2402.250 ("principal" defined), 2402.350 ("third person" defined).

SUBTITLE 3. DURABLE POWERS OF ATTORNEY FOR HEALTH CARE

Staff Note. This subtitle consists of Civil Code Sections 2430-2445. Some technical amendments in several sections are needed to adjust section numbers and to change "article" to "chapter." Otherwise, no changes are made in these sections.

SUBTITLE 4. STATUTORY FORMS

Staff Note. This subtitle consists of Civil Code Sections 2450-2508. Some technical amendments in several sections are needed to adjust section numbers and to change "article" to "chapter." Otherwise, no changes are made in these sections.

SUBTITLE 5. JUDICIAL PROCEEDINGS CONCERNING POWERS OF ATTORNEY**Chapter 1. General Provisions****§ 2510.010. Legislative intent [4400]**

2510.010. It is the intent of the Legislature in enacting this subtitle 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 subtitle or otherwise invoked pursuant to law.

Comment. Section 2510.010 continues former Section 2423 without substantive change. See also Section 2402.210 ("power of attorney" defined).

§ 2510.020. Application of subtitle [4401]

2510.020. (a) Except as otherwise provided, this subtitle 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 subtitle does not apply to reciprocal or interinsurance exchanges and their contracts, subscribers, attorneys in fact, agents, and representatives.

Comment. Section 2510.020 provides the scope of this subtitle. See also Sections 2402.090 ("durable power of attorney for health care" defined), 2402.110 ("durable power of attorney for property" defined), 2402.190 ("nondurable power of attorney" defined), 2402.330 ("statutory form power of attorney" defined), 2402.310 ("statutory form durable power of attorney for health care" defined).

Subdivision (b) continues former Section 2420(b) without substantive change.

§ 2510.030. Cumulative remedies [4402]

2510.030. The remedies provided under this subtitle are cumulative and nonexclusive.

Comment. Section 2510.030 continues former Section 2420(a) without substantive change.

§ 2510.040. Effect of provision in power attempting to make subtitle inapplicable [4403]

2510.040. Subject to Section 2510.050, this subtitle applies notwithstanding any provision of the power of attorney to the contrary.

Comment. Section 2510.040 continues former Section 2422 without substantive change, except that the reference to former Section 2420 is omitted as surplus. See Section 2510.020(b) (exclusion of reciprocal or interinsurance exchanges). See also Section 2402.210 ("power of attorney" defined).

§ 2510.050. Limitation of remedies by provision in power of attorney [4404]

2510.050. Except as provided in Sections 2510.060 and 2510.070, a power of attorney may expressly eliminate the authority of any person listed in Section 2514.010 to petition the court under this subtitle for any one or more of the purposes enumerated in Section 2510.020 or 2514.030 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 2510.050 continues former Section 2421(a) without substantive change.

This section makes clear that a power of attorney may limit the applicability of this subtitle 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 subtitle 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 2510.030 (cumulative remedies).

See also Sections 2402.210 ("power of attorney" defined), 2402.250 ("principal" defined).

§ 2510.060. Right to petition under power of attorney for property [4405]

2510.060. Notwithstanding any provision of a power of attorney for property, the conservator of the estate of the principal may petition the court under this subtitle for any one or more of the purposes enumerated in Section 2510.020.

Comment. Section 2510.060 continues former Section 2421(b) without substantive change. See also Sections 2402.210 ("power of attorney" defined), 2402.250 ("principal" defined).

§ 2510.070. Right to petition under durable power of attorney for health care [4406]

2510.070. Notwithstanding any provision of a durable power of attorney for health care:

(a) The conservator of the person of the principal may petition the court under this subtitle for any of the purposes enumerated in subdivisions (a), (c), and (d) of Section 2514.030.

(b) The agent may petition the court under this subtitle for any of the purposes enumerated in subdivisions (a) and (b) of Section 2514.030.

Comment. Section 2510.070 restates former Section 2421(c)-(d) without substantive change.

This section specifies the purposes for which a conservator of the person or an agent may petition the court under this subtitle with respect to a durable power of attorney for health care. The rights provided by this section cannot be limited by a provision in the power of attorney, but the power of attorney may restrict or eliminate the right of any other persons to petition the court under this subtitle if the principal has the advice of legal counsel and the other requirements of Section 2510.050 are met.

Under subdivision (a), the conservator of the person may obtain a determination of whether the durable power of attorney for health care is in effect or has terminated, despite a contrary provision in the power of attorney. See Section 2514.030(a). The conservator of the person may obtain a court order requiring the agent to report the agent's acts under the durable power of attorney for health care if the agent fails to submit such a report within 10 days after a written request. See Section 2514.030(c). The conservator of the person may obtain a court determination that the durable power of attorney for health care is terminated if the court finds that the agent is acting illegally or is not performing the duty under the durable power of attorney for health care to act consistently with the desires of the principal or, where the principal's desires are unknown or unclear, is acting in a manner that is clearly contrary to the best interests of the principal. See Section 2514.030(d). See also the Comment to Section 2514.030.

Under subdivision (b), the agent may obtain a determination of whether the durable power of attorney for health care is in effect or has terminated, despite a contrary provision in the power of attorney. See Section 2514.030(a). The agent may also obtain a court order passing on the acts or proposed acts of the agent under the durable power of attorney for health care. See Section 2514.030(b).

See also Sections 2402.030 ("agent" defined), 2402.090 ("durable power of attorney for health care" defined), 2402.250 ("principal" defined).

§ 2510.080. Application of decedents' estates provisions [4407]

2510.080. Proceedings under this subtitle are governed, whenever possible, by the provisions of this subtitle, but where the provisions of this subtitle do not appear applicable, the provisions of Part 1 (commencing with Section 7000) of Division 7 of the Probate Code apply.

Comment. Section 2510.080 continues former 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) of Division 7 of the Probate Code rather than the entire division.

Staff 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 title rather than leaving the matter to guesswork.*

§ 2510.090. Jury trial [4424]

2510.090. There is no right to a jury trial in proceedings under this title.

Comment. Section 2510.090 is a new provision. This section is consistent with the rule applicable to other fiduciaries. See Prob. Code §§ 1452 (guardianships and conservatorships), 7200 (decedents' estates), 17006 (trusts).

Chapter 2. Jurisdiction and Venue

§ 2512.010. Jurisdiction and authority of court or judge [4420]

2512.010. (a) The superior court has jurisdiction of proceedings under this title.

(b) The court in proceedings under this title 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 2512.010 is comparable to Probate Code Section 7050 governing the jurisdiction and authority of the court in proceedings concerning administration of decedents' estates. See Comment to Prob. Code § 7050. This section is consistent with prior law. See former Sections 2415 (petition filed in superior court), 2417(e) (proceedings governed by decedents' estates provisions where no specific rule in power of attorney statute).

§ 2512.020. Jurisdiction over agent [4421]

2512.020. Subject to Section 2512.030, a person who acts as an agent under a power of attorney governed by this title 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 2512.020 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 Probate Code 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 subtitle 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 2402.030 ("agent" defined), 2402.210 ("power of attorney" defined), 2402.250 ("principal" defined).

§ 2512.030. Basis of jurisdiction [4422]

2512.030. The court may exercise jurisdiction in proceedings under this subtitle on any basis permitted by Section 410.10 of the Code of Civil Procedure.

Comment. Section 2512.030 is comparable to Probate Code Section 17004 (jurisdiction under Trust Law). This section recognizes that the court, in proceedings relating to powers of attorney under this subtitle, 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 Prob. Code § 17004 (basis of jurisdiction under Trust Law).

§ 2512.040. Venue [4423]

2512.040. Proceedings under this subtitle 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 2512.040 continues former Section 2414 without substantive change. "Agent" has been substituted for "attorney in fact." See Section 2402.030 ("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 2400.040 (durable powers of attorney under law of another jurisdiction), 2402.070(a) ("durable power of attorney" defined to include foreign durable powers).

Chapter 3. Petitions, Orders, Appeals

§ 2514.010. Petitioners [4440]

2514.010. A petition may be filed under this subtitle 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 Probate Code, of the county where the power of attorney was executed or where the principal resides.
- (g) The public guardian of the county where the power of attorney was executed or where the principal resides.
- (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 2514.010 continues former Section 2411 without substantive change. "Agent" has been substituted for "attorney in fact." See Section 2402.030 ("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 2510.030 (other remedies not affected), 2510.050 (restriction in power of attorney of right to file petition), 2510.020 (petition as to power of attorney for property), 2514.030 (petition with respect to durable power of attorney for health care).

See also Sections 2402.030 ("agent" defined), 2402.090 ("durable power of attorney for health care" defined), 2402.170 ("health care

provider" defined), 2402.210 ("power of attorney" defined), 2402.250 ("principal" defined).

Staff 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?*

§ 2510.020. Petition as to power of attorney for property [4441]

2510.020. With respect to a power of attorney for property, a petition may be filed under this subtitle 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 2510.020 continues former Section 2412 without substantive change. "Agent" has been substituted for "attorney in fact." See Section 2402.030 ("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 2402.230 ("power of attorney for property"

defined). Section 2514.030 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 2415.020 (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 2402.030 ("agent" defined), 2402.230 ("power of attorney for property" defined), 2402.250 ("principal" defined).

§ 2514.030. Petition as to durable power of attorney for health care
[4442]

2514.030. With respect to a durable power of attorney for health care, a petition may be filed under this subtitle 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 2514.030 continues former Section 2412.5 without substantive change. "Agent" has been substituted for "attorney in fact." See Section 2402.030 ("agent" defined). This section enumerates the purposes for which a petition may be filed under this subtitle with respect to a durable power of attorney for health care. Section 2510.020 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 2443 (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 2510.050 (limitation by provision in power of attorney).

See also Sections 2402.030 ("agent" defined), 2402.090 ("durable power of attorney for health care" defined), 2402.150 ("health care decision" defined), 2402.250 ("principal" defined).

§ 2514.040. Commencement of proceeding [4443]

2514.040. (a) A proceeding under this subtitle is commenced by filing a verified petition stating facts showing that the petition is authorized under this subtitle, the grounds of the petition, and, if

known to the petitioner, the terms of the power of attorney.

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

Comment. Subdivision (a) of Section 2514.040 restates parts of former Section 2415 without substantive change. The former reference to filing in the superior court is restated in a different form in Section 2512.010. The language concerning the grounds of the petition is new and is drawn from Probate Code Section 17201 (commencement of proceeding under Trust Law).

Subdivision (b) restates former Section 2417(a) without substantive change.

§ 2514.050. Dismissal of petition [4444]

2514.050. 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 2514.050 restates former 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 2402.250 ("principal" defined).

§ 2514.060. Notice of hearing [4445]

2514.060. 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 2514.060 continues former Section 2417(b) without substantive change. "Agent" has been substituted for "attorney in fact." See Section 2402.030 ("agent" defined). See also 2402.250 ("principal" defined).

§ 2514.070. Service of notice

2514.070. Service shall be made by mailing to the last known address of the person required to be served unless the court in its

discretion requires that notice be served in some other manner. Personal delivery is the equivalent of mailing.

Comment. Section 2514.070 continues former Section 2417(c) without change.

§ 2514.080. Proof of service

2514.080. Proof of compliance with Sections 2514.060 and 2514.070 shall be made at or before the hearing. If it appears to the satisfaction of the court that the notice has been given as required, the court shall so find in its order, and the order, when it becomes final, is conclusive on all persons.

Comment. Section 2514.080 restates former Section 2417(d) without substantive change.

§ 2514.090. Power of court [4446]

2514.090. (a) The court may make all orders and take all other action necessary or proper to dispose of the matters presented by the petition.

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

Comment. Subdivision (a) of Section 2514.090 continues former Section 2413 without substantive change. The former reference to decrees has been omitted as unnecessary.

Subdivision (b) continues former Section 2417(f) without substantive change.

§ 2514.100. Temporary health care order [4447]

2514.100. 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 2514.030. 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 2514.030.

Comment. Section 2514.100 continues former 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 2514.090 (powers of court).

See also Sections 2402.090 ("durable power of attorney for health care" defined), 2402.130 ("health care" defined), 2402.250 ("principal" defined).

§ 2514.110. Award of attorney's fees [4448]

2514.110. In a proceeding under this subtitle 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 2514.110 continues former Section 2417(g) without substantive change. "Agent" has been substituted for "attorney in fact." See Section 2402.030 ("agent" defined).

§ 2514.120. Guardian ad litem

2514.120. At any stage of a proceeding under this subtitle, the court may appoint a guardian ad litem to represent the interests of a missing or incapacitated principal. Sections 373 and 373.5 of the Code of Civil Procedure do not apply to the appointment of a guardian ad litem under the provisions of this subtitle.

Comment. Section 2514.120 restates former Section 2418 without substantive change. See also Section 2402.250 ("principal" defined).

§ 2514.130. Appeal [4460]

2514.130. An appeal may be taken from any of the following:

(a) Any final order made pursuant to subdivision (a), (b), or (d) of Section 2510.020 or subdivision (a), (b), or (d) of Section 2514.030.

(b) An order dismissing the petition or denying a motion to dismiss under Section 2514.050.

Comment. Section 2514.130 continues former Section 2419 without substantive change. The reference to "decree" in former Section 2419(a) is omitted as unnecessary.

CONFORMING 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 Title 10 (commencing with Section 2400.010).

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 Title 10. See Sections 2400.020 (relation to general agency statutes), 2402.210 ("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 Section 2415.100(b). Powers of attorney are governed by Title 10 (commencing with Section 2400.010). See Section 2360 (general agency rules inapplicable to powers of attorney under Title 10). See also Sections 2400.020 (relation to general agency law), 2402.210 ("power of attorney" defined), 2410.130 (termination of power of attorney for property), 2410.140 (termination of nondurable power of attorney for property), 2415.090 (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 Title 10 (commencing with Section 2400.010), not by this title. See Section 2360 (general agency rules inapplicable to powers of attorney under Title 10). See also Sections 2400.020 (relation to general agency law), 2402.210 ("power of attorney" defined), 2410.130 (termination of power of attorney for property), 2410.140 (termination of nondurable power of attorney for property), 2415.090 (termination of agent's authority), 2415.130 (power coupled with an interest), 2425.040 (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 Title 10 (commencing with Section 2400.010), not by this title. See Section 2360 (general agency rules inapplicable to powers of attorney under Title 10). See also Sections 2400.020 (relation to general agency law), 2402.210 ("power of attorney" defined). For a similar provision drawn from Section 2357, see Section 2425.080 (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 Title 10 (commencing with Section 2400.010).

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 Title 10 (commencing with Section 2400.010). See Sections 2400.020 (relation of general agency statutes), 2402.210 ("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 Section 2410.030 (durable power of attorney for property). See Comment to Section 2410.030.

§ 2400.5. Proxy given by agent to exercise voting rights

Comment. Former Section 2400.5 is continued without substantive change in Section 2402.210(b) (proxy excluded from definition of power of attorney). See Comment to Section 2402.210.

§ 2401. Effect of principal's incapacity

Comment. Former Section 2401 is continued without substantive change in Section 2410.040 (effect on agent's acts under durable power of attorney during principal's incapacity). See Comment to Section 2410.040.

§ 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 Section 2415.070 (relation of agent to court-appointed fiduciary). See Comment to Section 2415.070. The substance of the last sentence of subdivision (a) is restated in Section 2405.010 (subtitle containing Section 2415.070 not applicable to durable powers of attorney for health care).

Subdivision (b) is continued without substantive change in Section 2410.060 (nomination of fiduciary in durable power of attorney for property). See Comment to Section 2410.060.

§ 2403. Death or incapacity of principal

Comment. Former Section 2403 is continued without substantive change in Section 2425.040 (effect of death or incapacity of principal). See Comment to Section 2425.040.

§ 2404. Affidavit of lack of knowledge of termination of power

Comment. Former Section 2404 is continued without substantive change in Section 2425.050 (affidavit of lack of knowledge of termination of power). See Comment to Section 2425.050.

§ 2405. Construction and application

Comment. Former Section 2405 is restated without substantive change in Section 2405.020(b).

§ 2406. Short title

Comment. Former Section 2406 is restated without substantive change in Section 2405.020 (Uniform Durable Power of Attorney Act). See Comment to Section 2405.020.

§ 2407. Severability

Comment. Former Section 2407 is restated without substantive change in Section 2405.020(c).

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 Section 2402.030 ("agent" defined). See Comment to Section 2402.030.

Subdivision (b) is continued without substantive change in Section 2402.090 ("durable power of attorney for health care" defined). See Comment to Section 2402.090.

The first sentence of subdivision (c) is restated without substantive change in Section 2402.210(a) ("power of attorney" defined). The second sentence of subdivision (c) is superseded by Section 2402.210(b) (exclusion from power of attorney). See Comment to Section 2402.210.

Subdivision (d) is restated without substantive change in Section 2402.250 ("principal" defined). See Comment to Section 2402.250.

§ 2411. Petitioners

Comment. Former Section 2411 is continued without substantive change in Section 2514.010 (petitioners). See Comment to Section 2514.010.

§ 2412. Relief available

Comment. Former Section 2412 is continued without substantive change in Section 2510.020 (petition as to power of attorney for property). See Comment to Section 2510.020.

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

Comment. Former Section 2412.5 is continued without substantive change in Section 2514.030 (petition as to durable power of attorney for health care). See Comment to Section 2514.030.

§ 2413. Power of court

Comment. Former Section 2413 is continued without substantive change in Section 2514.090 (power of court). See Comment to Section 2514.090.

§ 2414. Venue

Comment. Former Section 2414 is continued without substantive change in Section 2512.040 (venue). See Comment to Section 2512.040.

§ 2415. Verified petition; contents

Comment. Former Section 2415 is restated without substantive change in Sections 1021 (petition to be verified), 2512.010(a) (jurisdiction in superior court), and 2514.040 (commencement of proceeding). See Comment to Section 2514.040.

§ 2416. Dismissal of petition

Comment. Former Section 2416 is restated without substantive change in Section 2514.050 (dismissal of petition). See Comment to Section 2514.050.

§ 2417. Hearing

Comment. Subdivision (a) of former Section 2417 is restated without substantive change in Section 2514.040(b) (clerk to set matter for hearing).

Subdivision (b) is restated without substantive change in Section 2514.060 (notice of hearing). See Comment to Section 2514.060

Subdivision (c) is continued without change in Section 2514.070 (service of notice).

Subdivision (d) is restated without substantive change in Section 2514.080 (proof of service).

Subdivision (e) is restated without substantive change in Section 2510.080 (application of decedents' estates provisions). See Comment to Section 2510.080.

Subdivision (f) is restated without substantive change in Section 2514.090(b) (order shortening time).

Subdivision (g) is continued without substantive change in Section 2514.110 (award of attorney's fees). See Comment to Section 2514.110.

Subdivision (h) is continued without substantive change in Section 2514.100 (temporary health care order). See Comment to Section 2514.100.

§ 2418. Guardian ad litem

Comment. Former Section 2418 is restated without substantive change in Section 2514.120 (appointment of guardian ad litem).

§ 2419. Appeal

Comment. Former Section 2419 is continued without substantive change in Section 2514.130 (appeal). See Comment to Section 2514.130.

§ 2420. Cumulative remedies

Comment. Subdivision (a) of former Section 2420 is continued without substantive change in Section 2510.030 (cumulative remedies).

Subdivision (b) is continued without substantive change in Section 2510.020(b) (application of title).

§ 2421. Limitation by provision in power of attorney

Comment. Subdivision (a) of former Section 2421 is continued without substantive change in Section 2510.050 (limitation of remedies

by provision in power of attorney). See Comment to Section 2510.050.

Subdivision (b) is continued without substantive change in Section 2510.060 (right to petition under power of attorney for property). The cross-reference to subdivision (c) is omitted as unnecessary. See Comment to Section 2510.060.

Subdivisions (c) and (d) are restated without substantive change in Section 2510.070 (right to petition under durable power of attorney for health care). See Comment to Section 2510.070.

§ 2422. Application of article

Comment. Former Section 2422 is restated without substantive change in Section 2510.040 (effect of provision in power attempting to make part inapplicable). See Comment to Section 2510.040.

§ 2423. Legislative intent

Comment. Former Section 2423 is continued without substantive change in Section 2510.010 (legislative intent). See Comment to Section 2510.010.

Heading of Article 5 (commencing with Section 2430) (repealed)

SEC. . The heading of Article 5 (commencing with Section 2430) of Chapter 2 of Title 9 of Part 4 of Division 3 of the Civil Code is repealed.

~~Article 5. Durable Power of Attorney for Health Care~~

Heading for Subtitle 3 (commencing with Section 2430) (added)

SEC. . A heading is added immediately preceding Section 2430 of the Civil Code, to read:

SUBTITLE 3. DURABLE POWERS OF ATTORNEY FOR HEALTH CARE

Civil Code § 2430 (technical amendment). Definitions

Comment. Section 2430 is amended to change "article" to "subtitle." This is a technical, nonsubstantive change.

Civil Code § 2431 (technical amendment). Application of article

Comment. Section 2431 is amended to correct a cross-reference and to change "article" to "subtitle." These are technical, nonsubstantive changes.

Civil Code § 2432.5 (technical amendment). Employee of health care provider, community care facility, or residential care facility

Comment. Section 2432.5 is amended to change "article" to "subtitle." This is a technical, nonsubstantive change.

Civil Code § 2434 (technical amendment). Attorney in fact's authority to make health care decisions

Comment. Section 2434 is amended to change "article" to "subtitle." This is a technical, nonsubstantive change.

Civil Code § 2438 (technical amendment). Immunities of health care provider

Comment. Section 2438 is amended to change "article" to "subtitle." These are technical, nonsubstantive changes.

Civil Code § 2439 (technical amendment). Other authority not affected

Comment. Section 2439 is amended to change "article" to "subtitle." These are technical, nonsubstantive changes.

Civil Code § 2440 (technical amendment). Principal's objections

Comment. Section 2440 is amended to change "article" to "subtitle." This is a technical, nonsubstantive change.

Civil Code § 2443 (technical amendment). Construction of article

Comment. Section 2443 is amended to change "article" to "subtitle." This is a technical, nonsubstantive change.

Civil Code § 2445 (added). Convincing evidence of identity of principal

SEC. Section 2445 is added to the Civil Code, to read:

2445. For the purposes of the declaration of witnesses required by Section 2432 or 2500, "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 2432 or 2500, 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 2445 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).

Heading of Chapter 3 (commencing with Section 2450) (repealed)

SEC. . The heading of Chapter 3 (commencing with Section 2450) of Title 9 of Part 4 of Division 3 of the Civil Code is repealed.

~~Chapter 3.—Statutory Short Form Power of Attorney~~

Headings for Subtitle 4 and Chapter 1 (commencing with Section 2450) (added)

SEC. . A subtitle heading and a chapter heading are added immediately preceding Section 2450 of the Civil Code, to read:

SUBTITLE 4. STATUTORY FORMS

Chapter 1. Use of Statutory Form Provided by Repealed Statute

Heading of Chapter 3.5 (commencing with Section 2475) (repealed)

SEC. . The heading of Chapter 3.5 (commencing with Section 2475) of Title 9 of Part 4 of Division 3 of the Civil Code is repealed.

~~Chapter 3.5. Uniform Statutory Form Power of Attorney Act~~

Heading of Chapter 2 (commencing with Section 2475) (added)

SEC. . A chapter heading is added immediately preceding Section 2475 of the Civil Code, to read:

Chapter 2. Uniform Statutory Form Power of Attorney

Heading of Chapter 4 (commencing with Section 2500) (repealed)

SEC. . The heading of Chapter 4 (commencing with Section 2500) of Title 9 of Part 4 of Division 3 of the Civil Code is repealed:

~~Chapter 4. Statutory Form Durable Power of Attorney for Health Care~~

Heading of Chapter 3 (commencing with Section 2500) (added)

SEC. . A chapter heading is added immediately preceding Section 2500 of the Civil Code, to read:

Chapter 3. Statutory Form Durable Power of Attorney for Health Care

Civil Code § 2500 (technical amendment). Statutory form of durable power of attorney for health care

Comment. The first paragraph of Section 2500 is amended to correct cross-references. These are technical, nonsubstantive changes.

Civil Code § 2506 (technical amendment). Termination of authority; alternate agent

Comment. Section 2506 is amended to correct a cross-reference. This is a technical, nonsubstantive change.

Civil Code § 2507 (technical amendment). Use of other forms

Comment. Section 2507 is amended to correct cross-references. These are technical, nonsubstantive changes.

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 Section 2410.050 (warning statement in durable power of attorney for property). See Comment to Section 2410.050.

§ 2510.5. Form of durable power of attorney after January 1, 1986

Comment. Former Section 2510.5 is superseded by Section 2405.030 (form of durable power of attorney after January 1, 1993). See Comment to Section 2405.030.

§ 2511. Convincing evidence of identity of principal

Comment. Former Section 2511 is continued without substantive change in Section 2445 (convincing evidence of identity of principal).

§ 2512. Protection of person relying in good faith on durable power of attorney

Comment. Former Section 2512 is continued without substantive change in Section 2425.090 (protection of third person relying in good faith on durable power of attorney for property). See also Section 2438 (immunities of health care provider). See Comment to Section 2425.090.

§ 2513. Application to principal's property; description of items

Comment. Former Section 2513 is continued without change in Section 2410.090 (application to principal's property).

§ 2514. Springing power of attorney

Comment. The introductory clause of subdivision (a) of former Section 2514 is superseded by Section 2402.010 (application of definitions). Paragraph (1) of subdivision (a) is restated without substantive change in Sections 2402.030 ("agent" defined), 2402.210

("power of attorney" defined), and 2402.250 ("principal" defined). See Comment to Section 2402.030 ("agent" replaces "attorney in fact"). Paragraph (2) of subdivision (a) is continued without change in Section 2402.290 ("springing power of attorney" defined).

Subdivisions (b)-(d) are continued without substantive change in Section 2410.070 (springing power of attorney). See Comment to Section 2410.070.