

Memorandum 93-12

Subject: L-3044 — Comprehensive Power of Attorney Statute

Attached to this memorandum is the working edition of the draft comprehensive power of attorney statute. As described in the head note in the draft, these materials integrate the extensive comments submitted by Team 4 of the Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section. For convenience of reference, all of the Team's comments, which were received in three installments during 1992, are set forth verbatim following the relevant sections in the draft.

Also attached to this memorandum as Exhibit 1 is a letter from Janice Fogg on behalf of the Legislative Committee of the Beverly Hills Bar Association Probate and Trust Section. These comments are noted and discussed where relevant in the draft statute.

Two additional items are attached as exhibits: Exhibit 2 is an article by Harley Spitler referred to in the State Bar Team comments on Section 8308; Exhibit 3 is a memorandum prepared by Harley Spitler on the commonality between durable powers of attorney for health care and durable powers of attorney for property. This issue runs throughout the draft.

This memorandum discusses several general issues relevant to the attached draft of a comprehensive power of attorney statute. At the meeting, we plan to proceed through the draft, considering issues as they arise in the notes.

Scope of Statute

The Team would restrict the coverage of the "comprehensive" power of attorney statute to durable powers. From the start, this project has applied to both durable and nondurable powers of attorney used by individuals. The staff believes that it is inadvisable to restrict the statute to durable powers and further Balkanize the law.

There are a number of reasons for retaining the broader scope:

(1) The Uniform Durable Power of Attorney Law applies to both durable and nondurable powers. Civil Code Section 2403(a) protects the attorney in fact and

other persons who act in good faith without knowledge of the death of the principal and binds the principal's successors in interest. Subdivision (b) provides protection where the principal has become incapacitated — a rule that applies only to nondurable powers. Section 2404 provides an affidavit procedure to implement these rules. The Uniform Law Commissioners' Prefatory Note to the Uniform Durable Power of Attorney Act (1979) discusses the scope of the act and the reasons for rejecting a suggestion to omit "Durable" from the title of the Act:

While it is true that the act describes 'durable' and 'non-durable' powers of attorney, this is merely the result of use of language to accomplish a purpose of making both categories of power more reliable for use than formerly.... The general purpose of the act is to alter common law rules that created traps for the unwary by voiding powers on the principal's incompetency or death. The act does not purport to deal with other aspects of powers of attorney, and a label that would result from dropping 'durable' would be misleading to the extent that it suggested otherwise.

The draft comprehensive power of attorney statute does purport to deal with other aspects of powers of attorney, and in that sense completes what the Uniform Durable Power of Attorney Act started. It would be a great leap backward to attempt to sever nondurable powers from durable powers.

(2) The existing provisions relating to court enforcement of the duties of attorneys in fact apply to both types of powers. Civil Code Section 2410(c) defines power of attorney to mean a "written power of attorney, durable or otherwise, which designates for a natural person an attorney in fact." This procedure was part of the legislative package recommended by the Commission in 1981 that enacted the Uniform Durable Power of Attorney Act.

(3) The recently enacted Uniform Statutory Form Power of Attorney Act provides for both types of powers. This legislation was enacted on Commission recommendation in 1990. The statutory form contains the following provision:

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

STRIKE THE PRECEDING SENTENCE IF YOU DO NOT WANT THIS POWER OF ATTORNEY TO CONTINUE UNTIL IT IS REVOKED.

Civil Code Section 2478 provides the substantive rule concerning the requirements for making a power of attorney durable.

(4) Splitting durable from nondurable powers would leave nondurable powers in limbo. What law would govern nondurable powers if this project were to be limited to durable powers? Apparently, the new comprehensive statute fleshing out the relations between principal and agent and third persons, governing creation, duration, modification, and termination, stating presumptions concerning duties and powers, providing judicial enforcement procedures — all of this would specifically not apply to nondurable powers. Nondurable powers of attorney would be left to the mercies of the Field Code which is (with apologies to David Dudley Field) a woefully inadequate statement even of the law it purports to codify. Consider two statutory form powers of attorney, identical in all respects except that one provides for durability. Under the Team's proposed approach, these two powers of attorney would be subject to completely different sets of statutory rules and procedures. The same would be true for two hand-drawn powers identical except for the durability provision. The durability status of a power of attorney does not necessarily have any connection with the other aspects of the power.

It is interesting to note that the State Bar Team rests its fundamental argument on the fact that durable powers of attorney are “essentially estate planning tools.” (See Exhibit 2, at p. 1.) Perhaps the staff will be forgiven a wistful reminder of the lengthy debate on the proper location of the comprehensive power of attorney statute, in which the staff proposed placing it in the Probate Code for exactly the same fundamental principle that the Team now recognizes.

The Team's proposal is intended to separate durable powers, used as estate planning tools, from powers of attorney used in “standard business and commercial transactions.” The staff is not clear on what problems the Team sees in a comprehensive power of attorney statute.

In sum, the staff recommends that the Commission continue its goal of preparing a comprehensive power of attorney statute governing both durable and nondurable powers executed by individuals. If there is a problem in overbreadth of the statute, we should look to limit it to deal with the problem, not by creating a new set of problems. One answer might be to provide more detail in the definition or scope provisions of the statute.

At the last meeting, the State Bar representatives expressed the concern that a more detailed statute, such as that under consideration, might have unintended

consequences when applied to powers of attorney used in business. They also suggested that there might be a problem if judicial proceedings concerning nondurable powers were to be brought in the probate courts. The issue has been put on hold until the views of other segments of the bar — in addition to the estate planning bar — can be obtained. However, as the Commission proceeds through the draft statute, the issue should be kept in mind to see if there are provisions of the statute that might present special problems if applied to nondurable powers of attorney or, specifically, nondurable powers used in a business or commercial setting rather than a personal or consumer setting.

Respectfully submitted,

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November 19, 1992

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Re: Comprehensive Power of Attorney Statute

Dear Mr. Ulrich:

The Legislative Committee of the Beverly Hills Bar Association Probate and Trust Section has the following comments regarding the September 1992 draft of the Comprehensive Power of Attorney statute:

1. With regard to the addition of a power of attorney for personal care, as set forth in proposed Civil Code Sections 8035, 8056 and 8062, the Committee believes that this third type of power of attorney is unnecessary. Rather, we feel that issues of personal care are more appropriately addressed in the power of attorney for property. All personal care decisions, including, without limitation, the place of residence, hiring household employees, handling mail, and arranging for food, transportation, recreation, and entertainment, involve the expenditure of funds on the principal's behalf or are within the power of the attorney-in-fact under a power of attorney for property. If there were a power of attorney for personal care, there would in any event have to be coordination between the agents under the two powers, and we believe that the splitting of these powers has the potential for increasing rather than resolving conflict.

The Committee recommends that the power of attorney for personal care be omitted from the statute. Instead, we suggest that a provision be added permitting the principal to direct the attorney-in-fact under the power of attorney for property to consult with a specific person (or with named successors) with respect to personal care considerations on behalf of the principal, and that the attorney-in-fact be relieved of any liability for acting in accordance with the written instructions of such named consultant.

2. The Committee does not believe that the broad power of delegation set forth in Section 8306 coincides with the reasonable expectation of a principal executing a power of attorney. The Committee suggests that the presumption be reversed; i.e., no delegation should be permitted unless expressly permitted by the principal. If delegation of authority is permitted, authority should first be delegated to the named successors to the attorney-in-fact; if no successors are named, the principal could direct that the attorney-in-fact be permitted to delegate to a person of his or her choosing or petition the court to name a successor.

3. The Committee believes that the word "solely" should be omitted from Section 8352 regarding the duty of loyalty of the attorney-in-fact. The relationship of the attorney-in-fact is primarily an agency relationship, rather than a fiduciary relationship, and it should be clear that an activity such as investing in the same fund for the benefit of the principal as for the attorney-in-fact's own benefit should not be considered a breach of the duty of loyalty.

4. With regard to proposed Section 8357 concerning consultation with the principal's spouse, physician, attorney, accountant, etc., the Committee is curious as to whether this section is intended to protect the doctor, attorney, etc., in releasing information to the attorney-in-fact and whether this provision constitutes a waiver of the attorney-client or doctor-patient privilege. If it is nothing more than advisory, the section should probably be omitted.

5. Finally, although no question was raised by the Staff regarding Section 8620, the Committee questions the continuing necessity for the absolute ban on consent by an attorney-in-fact on behalf of the principal to placement in a mental health treatment facility, convulsive treatment, psychosurgery, sterilization and abortion. All of these treatments can, under the appropriate circumstances, be vital to the principal's well-being, and we recommend that the Staff consider revising this section to prohibit such actions by the attorney-in-fact, unless specifically permitted by the principal (and perhaps specially initialled to prevent such permission from becoming part of the boilerplate of the form). I have personal knowledge of a case where the only effective treatment for a person with a manic-depressive disorder was electro-shock therapy; despite the fact that the patient had given consent for the treatment when she had the capacity to do so, her doctors insisted on renewed consent at the time of treatment, at which time she was virtually incapacitated and unable to give informed consent. Since the agent under her durable power of attorney for health care was

Stan Ulrich
November 19, 1992
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also prohibited from giving that consent, there was a serious delay in needed treatment.

Thank you for your consideration of these matters.

Sincerely,



Janice Fogg

/jf

Exhibit 2

Spitler, *A Trap for the Wary!*, Estate Plan. Tr. & Prob. News 19 (Fall 1991)

A Trap for the Wary!

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There is a "trap," in California Civil Code 2355, that can terminate many durable powers—both for health care and for property.

Civil Code Section 2355 provides, in relevant part:

"An agency is terminated as to every person having notice thereof, by any of the following:

- (c) The death of the agent.
- (d) The agent's renunciation of the agency.
- (e) The incapacity of the agent to act as such."

Because a durable power is an agency, the durable power will terminate, unless the instrument otherwise provides, upon the occurrence of any one of the following events:

1. Death of the agent.
2. *Agent's* renunciation of the agency.
3. Incapacity of the *agent* to act as such.

The drafting attorney can draft around these events—none of which presents a public policy issue. For example, a clause in the durable power instrument might provide something along these lines:

"None of the following events shall terminate this durable power of attorney:

1. Death of the agent.
2. The agent's renunciation of the agency.
3. The agent's incapacity to act as agent.
4. A vacancy in the office of the agent.

If any of those events occurs, the authority of the agent is merely suspended until a new, or successor, agent is in office and is acting as agent under this instrument."

This "trap" is most damaging when one of the Civil Code 2355 events occurs at a time when the *principal* is incapacitated. Due to his then incapacity, the principal cannot execute a new durable power instrument; and, as a consequence, it may be necessary to have a conservator appointed to handle his medical care, and other personal and property matters—the very subjects the durable power was designed to avoid!

The "trap" is also present in both of California's statutory forms being:

- a. The Durable Power of Attorney for Health Care. Civil Code 2500 *et seq.*
- b. Uniform Statutory Form Power of Attorney. Civil Code 2475 *et seq.*

The "trap," of course, is also present in the California Medical Association form "Durable Power of Attorney for Health Care Decisions" which is probably the most widely used form in the nation.

There is a partial amelioration of this "trap," as to durable powers of attorney for health care, in Civil Code 2436.5:

"§2436.5 (Expiration date; Exception)

Unless a shorter period is provided in the durable power of attorney for health care, a durable power of attorney for health care executed after January 1, 1984, expires seven years after the date of its execution unless at the end of the seven-year period the principal lacks the capacity to make health care decisions for himself or herself, in which case the durable power of attorney for health care continues in effect until the time when the principal regains the capacity to make health care decision for himself or herself."

That section would, on its face, apply only when a durable power of attorney for health care expires by lapse of time. It does not cover a termination of the health care durable power due to (i) the *agent's* death, (ii) the *agent's* incapacity or (iii) the *agent's* renunciation of the agency. ■

MEMORANDUM

TO: California Law Revising Commission
FROM: Harley J. Spitler
DATE: August 27, 1992
RE: Memo 91-40: Commonality Between DPAHC and DPAP
FILE NO: 703\003\135.M7

I. INTRODUCTORY.

This memorandum is intended to give Team 4's views regarding areas of commonality between a durable power of attorney for health care ("DPAHC") and a durable power of attorney for property ("DPAP"). As evidenced by Team 4's prior comments, Team 4 believes that substantial commonality exists between DPAHC and DPAP. The instant analysis provides additional support for Team 4's contention because of the number of common provisions. The specific areas of commonality are:

II. The Areas of Commonality Between A DPAHC and a DPAP.**A. Civil Code 2295-2537.**

All provisions of Civil Code sections 2295 through 2357 are common. As the DPA is an agency concept, these general provisions apply to both a DPAHC and a DPAP.

B. Uniform Durable Power of Attorney Act.

The Uniform Durable Power of Attorney Act, being Civil Code sections 2400-2407, has many common provisions:

1. C.C. 2400: The key definition is common to both types of durable powers.
2. C.C. 2401: Deal with the binding effect of a DPA on successor in interest of the principal. That is common to both types of durable powers.
3. C.C. 2402(a): A confusing section on which Team 4 has commented in an effort to eliminate the confusion. Due to the section's ambiguity, it is difficult to comment on the common provisions. However, as currently written, the entire clause after the semicolon in the second sentence seems to say that a court-appointed conservator can revoke or amend any DPA--whether a DPAHC or a DPAP.
4. C.C. 2402(b): The principal's nomination of a conservator of the person or estate or both can be made in any DPA.
5. C.C. 2403(a): By its terms, it applies to "a written power of attorney, durable or otherwise."
6. C.C. 2404: By its terms, it applies to "the attorney in fact under a power of attorney, durable or otherwise."

7. C.C. 2405-

2407:

C. Court Enforcement of Duties of Attorney in Fact.

C.C. sections 2410-2423, dealing with Court Enforcement of Duties of Attorney in Fact, has a number of common provisions:

1. C.C. 2410(a): The definition of "attorney in fact" is common.
2. C.C. 2410(c): The definition of "Power of Attorney" is common.
3. C.C. 2410(d): The definition of "Principal" is common.
4. C.C. 24011(a),
(b), (c),
(d), (e): All are common re who can file a petition under C.C. 2411.
5. C.C. 2412: All are common purposes of the petition under C.C. 2411.
6. C.C. 2413: Common Court jurisdiction provisions.
7. C.C. 2413: Common venue provisions.
8. C.C. 2415: Common place of commencing action.
9. C.C. 2416: Common Dismissal provisions.
10. C.C. 2417: Common service provisions.
11. C.C. 2418: Common guardian ad litem provision.
12. C.C. 2419: Common Appeals provisions.
13. C.C. 2420: Common cumulative remedies provisions.

14. C.C. 2421

(a), (b): Common provisions limiting court petitions.

15. C.C. 2422: Common "notwithstanding" clause.

16. C.C. 2423: Common freedom from judicial intervention clause.

D. Uniform Statutory Form Power of Attorney Act

Although the Uniform Statutory Form Power of Attorney Act in C.C. 2475 through 2499.5 deals primarily with property matters, C.C. 2495 contains the same common provisions:

1. C.C. 2495(a): Deals with the "standard of living of the principal, the principal's spouse, children, and "certain other individuals." This provision could be either a DPAHC or a DPAP.
2. C.C. 2495(b): Contains a number of provisions which seem to deal primarily with the principal's health.
3. C.C. 2495(c): Is clearly common in authorizing payment for the individuals described in C.C. 2495(a) of "necessary medical, dental, and surgical care, hospitalization, and custodial care."
4. C.C. 2495
(d) & (f): are personal expense provisions.

E. Miscellaneous Provisions Relating to Power of Attorney.

The Miscellaneous Provisions Relating to Power of Attorney contained in C.C. 2510 through 2514 contain some common provisions:

1. C.C. 2511: The convincing evidence rule and other provisions of C.C. 2511 are common.
2. C.C. 2512: These "non-liability of persons acting in good faith" provisions are common.
3. C.C. 2511: These new springing power of attorney provisions are common.

COMPREHENSIVE POWER OF ATTORNEY STATUTE

Staff Note. This draft statute is based on the draft attached to Memorandum 92-50. The major difference is that the comments submitted by Team 4 of the Executive Committee of the Estate Planning, Trust and Probate Law Section of the State Bar have been integrated into the draft for easier consideration. This will make the Team comments easier to consider, particularly since they are directed to the draft before its most recent renumbering. We have not reproduced the Team's statutory redraft (152 pages in the aggregate of its three parts) because most of it is the same as the draft attached to Memorandum 91-40 and, in addition, most of the draft language is included in the Team comments, which are reproduced following relevant sections in this draft. (The Commission received the first of the three installments of the Team's statutory redraft as Exhibit 1 to Memorandum 92-50. If any Commissioner would like a copy of the complete redraft, as submitted by Team 4, let the staff know.) In some cases, technical points have been adopted in this draft and this disposition is noted in brackets in the quoted Team commentary without further discussion.

Also noted, but not reproduced in full, are comments from the Legislative Committee of the Beverly Hills Bar Association Probate and Trust Section. For the full text of this material, see the letter from Janice Fogg attached as Exhibit 1 to Memorandum 93-12.

The draft statute has been renumbered to fit at the end of the Civil Code, within Division 4 (General Provisions). The staff considered placing the statute as a new division, but the division structure of the Civil Code has remained constant since its beginning. A power of attorney division would not be on the same level as the current structure of four divisions: Persons, Property, Obligations, and General Provisions. Until the Civil Code is given a long-overdue comprehensive reorganization, the staff concludes that it is best to make the statute a part within the general provisions division.

This draft is a work in progress. It retains the structure of the May 1991 draft attached to Memorandum 91-40 until decisions can be made that permit further restructuring. For convenience, the source provisions from the May 1991 draft are indicated in brackets in the headline of each section continued in some form from the earlier draft. These numbers will also help finding sections referred to in the commentary from the State Bar Team. Some earlier Commission decisions have not yet been implemented in this draft but will be in the next draft. The next draft should also be shorter because we intend to remove most of the staff notes and the Team comments and bring this chapter of the comprehensive power of attorney project to an end.

Commissioners and other interested persons should retain this draft for future reference. It will take some time to consider and resolve all of the issues raised by the State Bar Team. Even as a new draft is prepared, it may be necessary to refer back to this draft.

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Civ. Code §§ 8000-8962 (added). Powers of attorney

SEC. _____. Part 9 (commencing with Section 8000) is added to Division 4 of the Civil Code, to read:

PART 9. POWERS OF ATTORNEY

TITLE 1. GENERAL PROVISIONS AND DEFINITIONS

CHAPTER 1. GENERAL PROVISIONS

§ 8000. Short title [2400.010]

8000. This part shall be known as the Power of Attorney Law.

Comment. Section 8000 is new and provides a convenient means of referring to this part. The Power of Attorney Law is largely self-contained. See also Section 14 (general definitions). The general agency rules in the Civil Code apply as provided in Section 8002.

Staff Note. The issue of the scope of the statute — whether it should be limited to **durable** powers of attorney or apply to all personal powers of attorney — was considered in Memorandum 92-50 at the October 1992 meeting. Our focus is normally on durable powers, but powers of attorney that are essentially the same except for the durability language should be treated in the same fashion, as in existing law. This approach is evident in the Uniform Durable Power of Attorney Act itself, which applies to both (notwithstanding its title), in the statutes for court enforcement, and in the Uniform Statutory Form Power of Attorney Act.

State Bar Team 4 comments:

1. For reasons advanced throughout its discussion of Memo 91-40, Team 4 strongly believes that Title 10 should only deal with durable powers of attorney. Durable powers of attorney for health and property are distinguishable from those powers of attorney which are used in standard business and commercial transactions. Although durable powers of attorney, like regular powers of attorney, are founded upon the basic laws of agency, many of the provisions set forth in Title 10 are unique to durable powers of attorney. These unique provisions need to be carefully distinguished and physically set apart from the more standard powers of attorney which are used extensively in business and commerce.

2. The durable powers of attorney for health care and property are essentially estate planning

tools, and as such, should be given special consideration from that particular perspective. Although non-durable powers of attorney are most often used in commerce, as opposed to durable powers of attorney which are more often used in estate planning, one similarity between durable powers of attorney and regular powers of attorney is that they both are founded upon the law of agency. That is, agency law, with its gloss of judicial and administrative decisions, provides the general framework for both. In view of these observations, Team 4 strongly suggests that the Comment to § 2400.010 be changed so as to state that general agency law as set forth in the Civil Code should and does apply to Title 10.

3. This new section applies equally to durable powers of attorney for health and property.

§ 8001. Uniform Durable Power of Attorney Act [2405.020]

8001. (a) Sections 8222, 8223, 8225, 8227, 8306, 8453, and 8454 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 8001 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 (c) continues former Section 2407 without substantive change.

State Bar Team 4 comments:

This new section applies equally to durable powers of attorney for health and property.

§ 8002. Relation to general agency law [2400.020]

8002. Except where this part provides a specific rule, the general law of agency provided in Article 2 (commencing with Section 2019) of Chapter 2 of Title 6 and in Title 9 (commencing with Section 2295) of Division 3 apply to powers of attorney.

Comment. Section 8002 is new.

Staff Note. This section reversed the rule in the prior draft, as decided at the May 1992 meeting. See May 1992 Minutes, at 8. The general agency statutes will be reviewed after the contents of this draft statute are substantially determined to see if any general rules need to be specifically excluded.

State Bar Team 4 comments:

- | | |
|--|--|
| 1. As explained in the discussion to the comment to § 2400.010, Team 4 believes that general agency law as forth in the Civil Code should and does apply to Title 10. Therefore, § 2400.020 and its comment should be rewritten to | reflect the application of the law of agency to durable powers of attorney. |
| | 2. This new section applies equally to durable powers of attorney for health and property. |

§ 8003. General rule concerning application of part [2400.030 #1]

8003. Except as otherwise provided by statute:

(a) On and after January 1, 1995, this part applies to all powers of attorney regardless of whether they were executed before, on, or after January 1, 1993.

(b) This part applies to all proceedings concerning powers of attorney commenced on or after January 1, 1995.

(c) This part applies to all proceedings concerning powers of attorney commenced before January 1, 1995, unless the court determines that application of a particular provision of this part 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 part does not apply and prior law applies.

Comment. Section 8003 is comparable to Probate Code Section 15001 (application of Trust Law). Subdivision (a) provides the general rule that this part 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 8900 *et seq.* (court enforcement of duties of attorneys-in-fact 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 8202 (form of durable power of attorney), 8601 (form of durable power of attorney for health care); see also Section 8226(c) (springing powers).

See also Section 8059 (“power of attorney” defined).

Staff Note. Tentatively, the operative date is set at January 1, 1995, based on assumptions about a reasonable schedule for this project: passage of a bill in the 1994 legislative session with a normal operative date of January 1 the following year. The State Bar Team urges that the date be left blank, but the staff prefers to set a date and change it if necessary. Since not all dates are the same in this statute, blank dates can be confusing.

The State Bar Team suggests some wording changes in subdivision (c). The staff agrees that the active voice is preferable and has substituted “court determines” for “in the opinion of the court.” Using “court finds,” as the Team suggests, can be interpreted to require written findings, and that is not the point of this section. The staff would not eliminate the word “effective” because this gives a gloss on the provision and is the standard wording used elsewhere.

State Bar Team 4 comments:

1. In view of the Staff’s intent to extensively redraft Memo 91-40, the effective date of the Statute should be left blank until the redrafting has been completed and the Statute disseminated for comment. Therefore, for accuracy and efficiency, the dates throughout § 2400.030 have been changed to 199_.

2. Team 4 believes that the language of the Statute should be in the active voice (“reason 1”) and that any word which could create confusion should be deleted (“reason 2”). For reason 1, the words “the opinion of the court” were deleted, and

the words “the court finds” substituted therefor. For reason 2, the adjective “effective,” line 4 of subsection (c), was deleted. Team 4 felt that the standard created by the adjective “effective” would be too vague for the word to be helpful in the context of subsection (c).

3. For purposes of convenience, to avoid needless repetition and unless otherwise stated, it should be assumed that wherever the words “powers of attorney” appear in Memo 91-40, Team 4 wants the word “durable” inserted before the word “powers.”

§ 8004. Application of Power of Attorney Law [2400.030 #2]

8004. (a) If the instrument creating a power of attorney does not refer to the power of attorney law of this state, this part applies to the acts and transactions in this state of the attorney-in-fact under the power of attorney where either of the following conditions is satisfied:

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

(2) The power of attorney was executed by a person domiciled in this state.

(b) If the instrument creating a power of attorney refers to the power of attorney law of this state, this part applies to acts and transactions of the attorney-in-fact in this state or outside this state under the power of attorney where any of the following conditions is satisfied:

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

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

(3) The acts and transactions of the attorney-in-fact 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 part under subdivision (b) remains subject to this part despite a subsequent change in domicile of the principal or the attorney-in-fact, or the removal from this state of property that was the subject of the power of attorney.

Comment. Section 8004 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. Nothing in this section limits the jurisdiction exercisable under Code of Civil Procedure Section 410.10.

See also Sections 8023 (“attorney-in-fact” defined), 8059 (“power of attorney” defined), 8068 (“principal” defined).

Staff Note 1. As decided at the May 1992 meeting, “attorney-in-fact” is used in this draft instead of “agent,” except in existing statutory forms. (See May 1992 Minutes, at 8.) This change has been made throughout the statute and will not be further discussed in Staff Notes. However, the staff does not concur with the State Bar Team’s assessment of the significance of using “attorney-in-fact.” The staff believes that the choice of terms — attorney-in-fact instead of agent — is simply a matter of taste. We do not read the significant policies into the mere choice of alternate terms. We disagree that an agent under a power of attorney is any different because we call that person an attorney-in-fact. The only way to determine the powers and duties of an agent or attorney-in-fact is to examine the law and the governing instrument. The Team seems to be urging the creation of a distinct fiduciary position somewhere between trustees and agents under general law. This will result, if at all, from the substance of the statute, not from the choice of terms.

Staff Note 2. The State Bar Team suggests a substantial revision of this section, but the staff has not accepted the suggestion because it omits the important language concerning where the acts take place. However, we have rewritten the section to make the distinction between subdivisions (a) and (b) clearer.

The Team also raises the issue of the relation of this section to the California “long arm” statute. Actually, Code of Civil Procedure Section 410.10 is broader than traditional long arm statutes; draft Section 8004 resembles earlier long arm statutes in providing detail that is missing from the general section, which simply provides: “A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.” Section 410.10 establishes the outside permissible bounds of jurisdiction. Draft Section 8004 is intended to provide guidance to parties within the broad outlines of Code of Civil Procedure Section 410.10, but not limited to the exercise of judicial power. A statement has been added to the Comment to make clear that this section is not a limitation on the general rule. However, the draft section is really a conflict of laws section that asserts a broad application of the California statute, regardless of what court may have assumed jurisdiction of an issue arising under the power of attorney. Where there is a conflict, say with Missouri

law from which this section is drawn, then appropriate choice of laws rules would be applied to determine the applicable law.

Consider the following from the Restatement (2d) of Conflict of Laws:

A state has power to exercise judicial jurisdiction over an individual on one or more of the following bases:

- (a) presence;
- (b) domicil;
- (c) residence;
- (d) nationality or citizenship;
- (e) consent;
- (f) appearance in an action;
- (g) doing business in the state;
- (h) an act done in the state;
- (i) causing an effect in the state by an act done elsewhere;
- (j) ownership, use or possession of a thing in the state;
- (k) other relationships to the state which make the exercise of judicial jurisdiction reasonable.

These grounds for exercising judicial power seem fully consistent with the details provided in the draft section, and the staff does not see that anything would be gained by removing the detail and substituting the broad generality of Code of Civil Procedure Section 410.10.

State Bar Team 4 comments:

1. A technical problem exists because the number of this section repeats the number of the section immediately before this section. For purposes of its redrafting, Team 4 has not changed the numbering. *[corrected]*

2. Team 4 believes that the name of this section is inaccurate because this section really deals with the application of California law. For that reason, Team 4 would delete the current title, and substitute therefor: "Application of California law." *[revised]*

3. Team 4 feels that throughout the comprehensive durable powers of attorney statute, the term "attorney-in-fact" should be used in lieu of the word "agent." Except in the instances when the word "agent" is used to refer to an agent under a non-durable power of attorney or to a true agent designated by an attorney-in-fact, each time the word "agent" appeared in those sections of Memo 91-40 discussed by Team 4, Team 4 substituted the term "attorney-in-fact" for the word "agent." Team 4 urges the Commission to use the term "attorney-in-fact" consistently throughout the Statute. Team 4 believes that the term "attorney-in-fact" is a more useful term than the word "agent" for two reasons. First, the term "attorney-in-fact" connotes an individual actually taking charge of another individual's affairs, and therefore the name reinforces, from a practical perspective, the nature of the duties of the attorney-in-fact. The use of a term other than agent also is useful in

distinguishing an individual acting under a durable power of attorney from an agent acting pursuant to a traditional power of attorney under general agency laws. Since many of the responsibilities and powers are different, the distinction is essential. Thus, the term "attorney-in-fact" should assist the public (as well as attorneys) in comprehending and appreciating the differences between an "agent" and an "attorney-in-fact."

4. An issue which needs to be resolved and then reflected in the Statute is the nature of the relationship between the attorney-in-fact and an agent under general agency law. Team 4 believes that the relationship between the attorney-in-fact and a [traditional] agent should be governed by general agency law.

5. The language of subsection (5) (original Statute) should be redrafted so as to incorporate the language of California's long-arm statute. The language of California's long-arm statute and the language of subsection (5) should be as parallel as possible, and the incorporation of California's long-arm statute should be specifically discussed in the comment to the section.

6. Team 4 believes that this section should be revised substantially in order to avoid repetition and to make the language internally consistent. Team 4's suggested preliminary language changes for § 2400.030 are:

2400.030. (a) This title applies to the acts and transactions of an attorney-in-fact under a durable power of attorney:

(1) Executed in this state or by a person domiciled in this state; or

(2) That expressly refers to the California durable power of attorney law if any of the following conditions is satisfied:

(i) The principal or attorney-in-fact was a domiciliary of this state at the time the durable power of attorney was executed.

(ii) The authority conferred on the attorney-in-fact by the durable power of attorney relates to property, acts or transactions in this state.

(iii) The acts and transactions of the attorney-in-fact occur or are intended to occur in this state.

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

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

7. The issues presented by §§ 2400.030 and 2400.040 are complex and interrelated and warrant further consideration by the Commission and the Staff.

8. This new section applies equally to durable powers of attorney for health and property.

§ 8005. Recognition of durable powers of attorney under law of another state [2400.040]

8005. A durable power of attorney under the law of another state may be carried out and enforced as a durable power of attorney in this state.

Comment. Section 8005 is new. This section promotes use and enforceability of durable powers of attorney executed in other states. See also Section 8029 (“durable power of attorney” defined).

Staff Note. This section has been redrafted to simplify it, consistent with an earlier Commission decision. See September 1991 Minutes, at 13. The earlier version drawn from Missouri law read:

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.

The State Bar Team wants to delete the language “if the power of attorney is durable where executed” from the earlier draft. The Team also suggests two alternative rewritings. The rule concerning durability of the power where it is executed is based on choice of law rules, as discussed in the Staff Note following draft Section 8004. If the power is not durable where it is executed, is it sound policy to give the power a greater effect in California? The staff believes the redrafted section may answer the Team’s concern.

However, the staff wonders whether the section has much value in this simplified form. The earlier draft was intended to recognize the Uniform Durable Power of Attorney Act and provide a choice of law rule. It tracked the language of Probate Code Section 3902(c) concerning recognition of transfers under the Uniform Transfers to Minors Act or the Uniform Gifts to Minors Act of another state.

In this connection, perhaps the Commission should consider including a general provision based on Civil Code Sections 2438.5 and 2445 (added by 1992 Cal. Stat. ch. 470, § 2, [AB 2697] operative Aug. 11, 1992):

2438.5. In the absence of knowledge to the contrary, a physician and surgeon or other health care provider may presume that a durable power of attorney for health care or similar instrument, whether executed in another state or jurisdiction or in this state, is valid.

2445. A durable power of attorney for health care or similar instrument executed in another state or jurisdiction in compliance with the laws of that state or jurisdiction or of this state, shall be valid and enforceable in this state to the same extent as a durable power of attorney for health care validly executed in this state.

State Bar Team 4 comments:

1. Team 4 would delete the following phrase (lines 4 and 5) of § 2400.040: “if the power of attorney is durable where executed.” Team 4 suggests that the quoted words be deleted because it is important that durable powers of attorney be interpreted as broadly as possible and with a view to upholding their validity where feasible. For a California practitioner to have to ensure that a durable power was durable where executed would entail needless client expense, delay, attorney exposure and ultimately serve no purpose.

2. Although Team 4 believes that this section should be revised substantially, Team 4 was evenly divided as to the exact manner in which the section should be amended or redrafted. For the convenience of the Commission and in fairness to the advocates of each viewpoint, both versions are presented. The first version provides:

“(a) An instrument which is a durable power of attorney and which is valid under the laws of the state where it is executed may be carried out and enforced in this state as a

durable power of attorney to the extent it is not contrary to the laws of this state.”

3. The second version of a rewritten § 2400.040 would read as follows:

“(a) An instrument which purports to be a durable power of attorney and which is not valid under the laws of the state where executed, but which would be valid if executed in this state may be carried out and enforced in this state as a durable power of attorney.”

4. Team 4 generally supports the basic concept embodied in section 2400.040 as written. However, based upon both of the above-proposed alternatives, it should be clear that Team 4 believes that the language of § 2400.040 can be improved. Subject to the resolution of the issues raised by the above-quoted provisions, both alternatives are set forth in the annotated text of § 2400.040.

5. This new section applies equally to durable powers of attorney for health and property.

[§ 8006. Priority of durable power provisions — State Bar Team proposal]

Staff Note. The State Bar Team proposes a section providing that the terms of a durable power of attorney will prevail over any contradictory or overlapping statutory provision. This raises an important issue, but the staff would not recommend including such a broad provision that could override any aspect of the governing statute, including procedural rights. If we are to flesh out powers of attorney and give them special status, protect reliance by third persons, establish procedures for judicial review, and the like, we should not sweep it all aside. The staff believes a better approach is to make clear where provisions concerning the content of the power of attorney may be controlled by the instrument, such as the grant of powers or limitation of powers, the imposition of special duties, modification and termination procedures, and procedures for succession. But the issue is important and needs to be kept in mind when considering parts of the statute.

State Bar Team 4 comments:

1. Team 4 believes that it is extremely important that practitioners and the public know and understand that a provision of a durable power of attorney which alters, deletes, modifies, etc. the Statute will prevail over any contradictory or overlapping statutory provision. Therefore, Team 4 suggests a new § 2400.050 which would read as follows:

“Except as expressly provided otherwise in a durable power of attorney, each of the provisions of this Title shall apply to all durable powers of attorney.”

2. This new section applies equally to durable powers of attorney for health and property.

CHAPTER 2. DEFINITIONS

§ 8020. Application of definitions [2402.010]

8020. Unless the provision or context otherwise requires, the definitions in this chapter govern the construction of this part.

Comment. Section 8020 restates the substance of the first clauses of former Section 2410.

Staff Note. The State Bar Team suggests a number of general guidelines for organizing the statute. The staff has no particular problems with these guidelines in the abstract. The test will come when the staff attempts to draft additional general provisions. There is always a risk that removing detail from the part of the statute dealing with property powers and the part of the statute dealing with health care powers may result in a net loss of intelligibility. For example, if the part of the rules concerning execution are generalized, someone using the health care power will have to consult sections in two separated parts of the statute, whereas now the two bodies of statutory law are largely self-contained.

As to the organization of the definitions, the Commission faces a recurring problem. From one perspective, it is best if all definitions are collected in one place so that definitions can be found easily. On the other hand, it may seem more convenient to locate specialized definitions in or near the provisions where they are used. Thus, for example, the definition of “community care facility” might best be placed with the health care power. But then should all health care power definitions be located there? And would all of the property power definitions be taken out of the general definitions? It can become difficult to decide where to locate a definition, and then users must consult several locations. Would “durable power of attorney” and “power of attorney” be defined generally, but “durable power of attorney for health care” and “power of attorney for property” be defined in their respective titles?

We tend to keep definitions applicable only in one section in that section. This principle may be expanded to apply to an article or chapter, or beyond.

There is no final answer to this problem. In the Family Code, to take a current example, definitions relating to custody were initially placed in the general definition division at the front of the code. But practitioners complained about this structure, and the bill was amended to move the custody definitions to the custody division. The adoption definitions were kept in the adoption division. Few general definitions remain.

State Bar Team 4 comments:

1. For the convenience of practitioners, it is important to clearly delineate which statutory provisions apply to both durable powers of attorney for health and property and which apply to only one or the other such durable powers of attorney. The concept that certain provisions (including most definitions) are common to both durable powers of attorney for health and property and that others apply to only one power or the other is integral to the basic organization of the Statute which Team 4 advocates. Team 4 believes that the organizational framework of the conservatorship and guardianship statute would provide a useful model upon which to base the structure of a comprehensive durable power of attorney statute.
2. The conservatorship and guardianship statute is organized so that common provisions are stated only once and provisions that apply solely to conservatorships/guardianships of the person or estate are set forth separately. Likewise, Team 4 suggests that provisions common to both types of durable powers of attorney be contained in the first part and that the common provisions be followed by those provisions specifically dealing with first one type of durable power of attorney (e.g., property) and then the other type of durable power of attorney (e.g., health).
3. This new section applies equally to durable powers of attorney for health and property.

§ 8023. Attorney-in-fact [2402.030]

8023. (a) “Attorney-in-fact” means a person designated to act for the principal in a power of attorney, regardless of whether the person is known as an attorney-in-act or agent, or by some other term.

(b) “Attorney-in-fact” includes a successor or alternate attorney-in-fact and an agent delegated authority by an attorney-in-fact.

Comment. Subdivision (a) of Section 8023 supersedes part of former Section 2400 and former Section 2410(a), and is comparable to the first sentence of Section 2295.

Subdivision (b) is comparable to Probate Code Section 84 (“trustee” includes successor trustee). See Sections 8302 (multiple attorneys-in-fact), 8303 (successor attorneys-in-fact), 8305 (delegation of attorney-in-fact’s authority), 2500 (alternate attorneys-in-fact under statutory form durable power of attorney for health care).

See also Sections 8059 (“power of attorney” defined), 8068 (“principal” defined).

Staff Note. The State Bar Team suggests deletion of the reference to an agent delegated authority in subdivision (b). The purpose of the language is to make clear that the statute applies to an agent delegated authority. This seems a useful notion and we do not see what harm it causes. Nor is it so clear to the staff, as it is to the Team, that general agency law answers the question. We do not see any citation in the Team report to Civil Code agency rules. The real issue is the extent to which an attorney-in-fact should be able to delegate authority granted by the principal. This issue will arise later in the draft. If the attorney-in-fact cannot delegate, then this language is surplus, but if delegation is permissible, it seems useful to make clear that this statute sees the agent of the attorney-in-fact in the same light as the attorney-in-fact for such purposes as determining duties and in relation with third persons. Ultimately, however, the Commission may sensibly conclude that the reference creates more confusion than clarity and that it should be omitted. The concern of the Team may be alleviated simply by replacing “agent” with “person” — the principle at stake is whether a person delegated powers by the attorney-in-fact is subject to the same rules, regardless of what that person is called.

State Bar Team 4 comments:

1. Section 2402.030, and particularly subsection (b), reinforces Team 4’s position that the term “attorney-in-fact” should be used in lieu of the word “agent” in the Statute. An “attorney-in-fact” must be distinguished from an agent who otherwise might be appointed by the attorney-in-fact. From the perspective of both practitioners and the public, subsection (b) seems to embrace (ambiguously at best) two different concepts, one being represented by the term “attorney-in-fact,” and the other being reflected by the word “agent,” as that word is used under the general agency law. Thus, for purposes of clarity, Team 4 suggests that the term “attorney-in-fact” be used in lieu of the word “agent” when reference is made to the individual appointed by the principal under a durable power of attorney. *[done]*

2. The second half of subsection (b) (as currently written), which refers to an agent delegated authority by an attorney-in-fact, should

be deleted. The purported definition simply reiterates the basic characteristic of agency law, i.e., that of the delegation of authority, and adds no further clarification for the practitioner.

3. The use of the term “agent” in this section appears to contradict the position set forth in Memo 91-40 that the general agency law of the State of California does not apply to durable powers of attorney. If the general agency law does not apply, then the term “agent” should not be employed inasmuch as the only possible result will be confusion among practitioners and the public. If the general agency law does apply, then again, substantial confusion will be the result if the word “agent” is used to refer to both the attorney-in-fact as well as an agent appointed under California’s general law of agency.

4. Finally, the Commission has said that the term “agent” is used in this title so that the Statute is consistent with the statutory forms

which use the word “agent.” The statutory forms purportedly use the term “agent” because the term is both informal and practical. However, this is not a sufficient reason to continue the use of the term “agent,” which is susceptible to various meanings within one statute. Since one of the stated purposes of this rewritten Statute is greater clarity, it makes no sense to use a term which is inherently ambiguous in the context used.

5. In the event that Team 4’s suggestion is accepted, then the comment will have to be rewritten in order to clearly distinguish the term “attorney-in-fact” from the term “agent” as used under general California agency law.

6. This new section applies equally to durable powers of attorney for health and property.

§ 8026. Community care facility

8026. “Community care facility” means a community care facility as defined in Section 1502 of the Health and Safety Code.

Comment. Section 8026 continues former Section 2430(f) without change.

§ 8029. Durable power of attorney [2402.070]

8029. (a) “Durable power of attorney” means a power of attorney (1) that is not affected by the principal’s subsequent incapacity or that becomes effective upon the principal’s incapacity and (2) that complies with the provisions of this part relating to durable powers of attorney.

(b) Depending on the context, “durable power of attorney” may refer to any of the following:

- (1) A durable power of attorney for property.
- (2) A durable power of attorney for health care.
- (3) A durable power of attorney for personal care.

Comment. Section 8029 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 8005 (powers of attorney executed under laws of other jurisdiction), 8222 (requirements for durable power of attorney for property), 8610 (requirements for durable power of attorney for health care). See also Sections 8032 (“durable power of attorney for health care” defined), 8038 (“durable power of attorney for property” defined), 8059 (“power of attorney” defined), 8068 (“principal” defined).

A single instrument may be both a durable power of attorney for health care, to the extent it authorizes an attorney-in-fact to make health care decisions, and a durable power of attorney for property, to the extent it authorizes the attorney-in-fact to make decisions concerning property. See Sections 8038 (“durable power of attorney for property” defined). Similarly, the instrument will be a durable power of attorney for personal care to the extent that it authorizes personal care decisions. See Sections 8035 (“durable power of attorney for personal care” defined). However, a multi-purpose power of attorney must comply with the requirements applicable to each type of power of attorney. See also Section 8611(a) (printed form of durable power of attorney for health care used by person without legal counsel may not cover other matters).

Staff Note. The word “subsequent” has been added in subdivision (a) at the suggestion of the State Bar Team. Subdivision (b) has been reorganized and tentatively includes a reference to the proposed durable power of attorney for personal care.

As to the desirability of the concept of a power of attorney for personal care, see the Staff Note following draft Section 8035.

State Bar Team 4 comments:

1. Team 4 suggests that the word “subsequent” be added before the word “incapacity” in line 1 of § 2402.070. The fact that the power survives incapacity is the essence of a durable power of attorney.

2. In response to the Staff Note, Team 4 believes that subsection (b) should be retained as part of the section inasmuch as subsection (b) states the general rule that the section will apply to both types of durable powers of attorney unless

otherwise stated. If necessary, a specific statute may refer to a particular type of durable power of attorney. However, the general approach will remove the necessity of constantly checking a particular section to see if it applies to one or the other or both types of durable powers of attorney. Moreover, subsection (b) is consistent with the general organization of the Statute advocated by Team 4. (See discussion of § 2402.010.)

§ 8032. Durable power of attorney for health care [2402.090]

8032. “Durable power of attorney for health care” means a durable power of attorney to the extent that it authorizes an attorney-in-fact to make health care decisions for the principal.

Comment. Section 8032 continues former Section 2430(a) without change and continues the substance of former Section 2410(b). For provisions concerning durable powers of attorney for health care, see Sections 8600-8659, 8950, 8952. As to multi-purpose powers of attorney, see the Comment to Section 8029.

See also Sections 8029 (“durable power of attorney” defined), 8044 (“health care decision” defined), 8068 (“principal” defined).

Staff Note. As to the issue of the location of definitions, see the Staff Note following Section 8020.

State Bar Team 4 comments:

Consistent with Team 4’s position as to the basic structure and organization of the Statute, Team 4 suggests that the full definition of durable

power of attorney for health care be set forth only once in the part dealing with durable powers of attorney for health care.

§ 8035. Durable power of attorney for personal care [new]

8035. “Durable power of attorney for personal care” means a power of attorney for personal care that satisfies the requirements for durability.

Comment. Section 8035 is new. See Sections 8029 (“durable power of attorney” defined), 8056 (“personal care” defined), 8062 (“power of attorney for personal care” defined).

Staff Note. This definition and related definitions of “power of attorney for personal care” and “personal care,” have been added to implement a Commission decision. See April 1992 Minutes, at p. 7; May 1992 Minutes, at p. 8.

The draft has not yet been restructured to use this term where appropriate or to provide any needed special rules. Its main purpose is to avoid the oddity of having personal care decisions falling under the term “power of attorney for property.” It remains to be seen whether creation of a third category of power creates more problems than it solves. It was convenient to be able to define the scope of the health care power and put everything else into a catch-all power of attorney for property (and other matters).

We may now have a new variant of the overlapping powers problem that the personal care power was designed to solve. For example, the Team suggests that repairing the principal’s place of residence would be included in the personal care power. This authority is clearly within the scope of a property power. To the extent that the rules governing the instrument are consistent, the name will not matter, but this does illustrate the inescapability of fuzzy

boundaries. The practical importance of this power of attorney may only become evident in the development of a set of standard statutory powers and duties that may be incorporated by reference. Whether this can and should be done in the general statute, as opposed to statutory forms or drafting guides, should be carefully considered.

Beverly Hills Bar Legislative Committee comments: The BHBLC is opposed to adding this new category of power. (See Exhibit 1, p.1.) The BHBLC finds it unnecessary and concludes that personal care powers are more appropriately addressed in the power of attorney for property. The BHBLC cites the possible confusion arising from splitting the powers and having additional agents under the two powers. To deal with the issue of expertise and liability, the BHBLC suggests making clear that the attorney-in-fact can be directed to consult with a specific person (including successor attorneys-in-fact) and be relieved of liability for acting in accordance with written instructions from a named consultant.

State Bar Team 4 comments:

1. Team 4 wishes to begin its discussion of this newly proposed durable power of attorney by complimenting the Staff on its excellent analysis of the difficulties of encompassing the various personal needs of the principal into either of the existing durable powers of attorney. (See Staff Note to § 2402.110.) [Memo 91-40]

2. The Staff Note emphasizes the difficulty of including certain types of services within the definition of either a durable power of attorney for property or a durable power of attorney for health care. The personal types of needs/responsibilities which are not encompassed realistically by either of the existing durable powers of attorney include such powers as providing grooming, choosing the location of the principal's residence, providing companionship, determining recreational and leisure-time activities, selecting appropriate hobbies, and arranging for medical and dental treatment. In analyzing such powers and in evaluating proposed solutions, Team 4 believes that it would be useful to review many of the conservatorship statutes dealing with the conservatorship of a person.

3. Team 4 advocates a new type of durable power of attorney specifically for personal care for many reasons. First, the duties, powers and responsibilities which would be gathered together under the durable power of attorney for personal care either are often haphazardly included as part of the existing durable powers of attorney or are ignored altogether. Disputes often and easily arise as to which attorney-in-fact is responsible for or has the ability to undertake personal care responsibilities. Second, as a practical matter, the

rights, duties and responsibilities of the proposed durable power of attorney for personal care do not fall neatly within the purview of either of the existing durable powers of attorney. On the other hand, it is the implementation of these personal care powers that might have the most immediate effect upon the daily life of the principal. In light of these considerations, Team 4 suggests that a new durable power of attorney be created which would deal with such personal needs and services. This durable power of attorney for personal care would authorize and empower the attorney-in-fact to take appropriate action to provide for the personal care of the principal.

4. The name of the new durable power of attorney would be Durable Power of Attorney for Personal Care. This Durable Power of Attorney for Personal Care would provide primarily for the personal care of the principal and secondarily would apply to all other matters not encompassed within the durable powers of attorney for property or health. Personal care would include such items as repairing the principal's place of residence; determining access to the principal; determining leisure time and recreational activities; supervising hobbies; determining and implementing grooming needs; and all other such matters. In addition, Team 4 suggests that this durable power of attorney clearly exclude those powers which are specifically authorized under a durable power of attorney for health or property. Team 4 believes that the Staff comments contain an excellent discussion of the issues and should be encompassed as part of the comments of this newly proposed section.

§ 8038. Durable power of attorney for property [2402.110]

8038. “Durable power of attorney for property” means a power of attorney for property that satisfies the requirements for durability.

Comment. Section 8038 is new. This section provides a convenient way to identify durable powers of attorney other than durable powers of attorney for health care or for personal 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 8200-8460, 2450-2499.5, 8950-8962. As to multi-purpose powers of attorney, see the Comment to Section 8029. See also Sections 8029 (“durable power of attorney” defined), 8032 (“durable power of attorney for health care” defined), 8035 (“durable power of attorney for personal care” defined), 8065 (“power of attorney for property” defined).

Staff Note. The State Bar Team notes that this definition does not contain much substance. The major definitional substance is in the definition of “power of attorney” in Section 8065. The statute could be drafted differently, as we suspect the Team might prefer, by telescoping more of these related terms into one or two omnibus definition that, say, defines power of attorney and then provides that a power of attorney is durable if it satisfies durability requirements and is a health care power if it does one thing, and a property power if it does something else, and is a personal care power if it does a third type of thing. However, the purpose of these definitions is not to provide the major substantive rules, but simply to define the terms in brief. Since review of a draft statute usually starts at the beginning, there is a tendency to expect the definitions to do more than they are intended to do. The substantive rules governing creation of powers, making them durable, and permissible purposes, etc., generally should be kept out of the definitions.

State Bar Team 4 comments:

1. The definitional technique of section 2402.110 is that the term being defined is deemed to encompass all of a thing except as otherwise specifically stated. The current definition of a durable power of attorney for property does not provide adequate guidance to either practitioners or the public. On the other hand, it appears to Team 4 that a full and complete definition of a durable power of attorney for property should be included and that such an approach would not preclude, in addition, the use of a definition by exclusion. *[This comment relates to an earlier version that defined a durable power of attorney for property as a power “other than a durable power of attorney for health care.”]*

2. Team 4’s comments about the placement of the definition of the durable power of attorney for health care applies equally to the placement of the definition of the durable power of attorney for property, that is that the definition should appear in the part dealing with durable powers of attorney for property.

3. Team 4 suggests that § 2402.110 be amended as follows:

“‘A durable power of attorney for property’ is a power of attorney which gives the attorney-in-fact the power and authority to hold, manage or dispose of the principal’s property, real, personal or mixed, or any portion thereof, and includes but is not limited to the powers set forth in section 2485 of the Civil Code.”

4. The issue raised by the Staff Note would be resolved by Team 4’s suggested creation of a third durable power of attorney, that is a durable power of attorney for personal care. (See new proposed § 2402.120.) Further, the Staff’s apparent struggle in writing a definition of a durable power of attorney for property again highlights the difficulty of attempting to deal with only one of the durable powers (i.e., property) to the exclusion of the other(s). Team 4 firmly believes that the efficient, effective and economical use of Staff and attorney time and resources favors a one-time consideration of durable powers of attorney of health, property and personal care. *[See draft Sections 8056, 8062.]*

§ 8041. Health care [2402.130]

8041. "Health care" means any care, treatment, service, or procedure to maintain, diagnose, or treat an individual's physical or mental condition [and includes decisions affecting the individual after death, including (1) making a disposition under the Uniform Anatomical Gift Act, Chapter 3.5 (commencing with Section 7150.5) of Part 1 of Division 7 of the Health and Safety Code, (2) authorizing an autopsy under Section 7113 of the Health and Safety Code, and (3) directing the disposition of remains under Section 7100 of the Health and Safety Code].

Comment. The first part of Section 8041 continues former Section 2430(b) without substantive change. The reference to postdeath decisions has been added for consistency with the authority provided in Section 8612 (attorney-in-fact's authority to make health care decisions).

Staff Note.

State Bar Team 4 comments:

1. Team 4 strongly suggests that instead of a reference to a code section, the words of the definition (set forth in the Code section to which reference is made) actually be inserted as the definition at this point. The definition is particularly important since by implication health care implies that services are being rendered for a living individual when in fact some of the duties may continue to exist after the principal's death. *[done as to the first clause]*

2. Team 4 suggests that the following definition of health care be used in lieu of the definition currently set forth:

"'Health care' means: any care, treatment, service or procedure to maintain, diagnose, treat or otherwise provide for the principal's physical or mental health."

3. The Staff's difficulty in attempting to define a durable power of attorney for health care without considering the durable power of attorney for property reinforces Team 4's position that all types of durable powers should be considered at this time and that the public would be best served by the adoption of one comprehensive, well-written durable power of attorney statute. *[tentatively this is the approach adopted by the Commission]*

4. Team 4's comments with respect to the placement of health care-related definitions applies equally to § 2402.130.

5. Team 4 believes that the Staff's analysis is very good and should be included as part of the comment.

§ 8044. Health care decision [2402.150]

8044. "Health care decision" means consent, refusal of consent, or withdrawal of consent to health care, or a decision to begin, continue, increase, limit, discontinue, or not to begin any health care.

Comment. The first part of Section 8044 continues former Section 2430(c) (consent, refusal, or withdrawal). The remainder of this section is new and provides additional detail concerning health care decisions. This is not intended as a substantive change. See also Section 8041 ("health care" defined).

Staff Note. The language from "decision" to the end of the section has been added at the suggestion of the State Bar Team.

State Bar Team 4 comments:

1. For the reasons stated previously, Team 4 believes that the definition set forth is inadequate. Therefore, Team 4 suggests that the definition of "health care decision" read:

"'Health care decision' means a consent, or the withdrawal of consent, or a decision to begin,

continue, increase, limit, discontinue or not to begin any health care."

2. Team 4 believes that this definition should be included in that part of the Statute dealing with durable powers of attorney for health care.

§ 8047. Health care provider

8047. "Health care provider" means a person who is licensed, certified, or otherwise authorized or permitted by the law of this state to administer health care in the ordinary course of business or practice of a profession.

Comment. Section 8047 continues former Section 2430(d) without change. The definition of "health care provider" in this section is the same in substance as the definition in Section 1 of the Uniform Law Commissioner's Model Health-Care Consent Act (1982). See also Section 8041 ("health care" defined).

§ 8050. Nondurable power of attorney [2402.190]

8050. "Nondurable power of attorney" means a power of attorney that is not a durable power of attorney.

Comment. Section 8050 is new. Former 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 8032 ("durable power of attorney for health care" defined), 8059 ("power of attorney" defined).

Staff Note. The State Bar Team would delete this definition. Note that some members of the Team were of the opinion that the entire power of attorney law should be restated because "some practitioners may be confused about which body of law applies in a particular situation, e.g., general agency law or the durable power of attorney law." *Id.*

State Bar Team 4 comments:

1. In light of Team 4's previous recommendations regarding the scope of the comprehensive durable powers of attorney statute, Team 4 recommends that § 2402.190 be deleted in its entirety, and that § 2400 be amended to exclude any non-durable powers of attorney.

2. Some members of Team 4 believe that the best approach would be a restatement of the entire

power of attorney law with the durable powers of attorney provisions being presented in a different part. The Team 4 members advocating this position are concerned that some practitioners may be confused about which body of law applies in a particular situation, e.g., general agency law or the durable power of attorney law.

§ 8053. Person [new]

8053. "Person" includes an individual, corporation, partnership, association, the state, a city, county, city and county, or other public entity or governmental subdivision or agency, or any other legal entity.

Comment. Section 8053 continues former Section 2430(e) without change and generalizes it to apply to the entire part.

Staff Note. This implements a decision made at the September 1991 meeting. See September 1991 Minutes, at 14.

§ 8056. Personal care [new]

8056. “Personal care,” when used in connection with a power of attorney, means decisions relating to the personal care of the principal, other than health care, and includes, but is not limited to, determining where the principal will live, providing meals, hiring household employees, providing transportation, handling mail, and arranging recreation and entertainment

Comment. Section 8053 is new. The exclusion of health care decisions recognizes the monopoly of the durable power of attorney for health care. See Section 8041 (“health care” defined). See also Sections 8035 (“durable power of attorney for personal care” defined), 8062 (“power of attorney or personal care” defined).

Staff Note. This definition is offered as a parallel definition to the definition of “health care” in draft Section 8041. Whether it is useful as a separate definition, or should be folded into the definition of “power of attorney for personal care” (or “durable power of attorney for personal care”) remains to be seen.

Additional examples of personal care can be added as the Commission thinks appropriate.

Beverly Hills Bar Legislative Committee comments: See the notes following Section 8035.

State Bar Team 4 comments: See the notes following Section 8035.

§ 8059. Power of attorney [2402.210]

8059. (a) “Power of attorney” means a written instrument, however denominated, that is executed by a natural person having the capacity to contract and that grants powers to an attorney-in-fact.

(b) A power of attorney may be durable or nondurable, may grant powers with regard to property or health care or personal care, or any or all of these matters.

[(c) If a durable power of attorney gives an attorney-in-fact the power to exercise voting rights, a proxy given by the attorney-in-fact 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 part.]

Comment. Subdivision (a) of Section 8059 restates the first sentence of former Section 2410(c) without substantive change. Where a power of attorney authorizes the attorney-in-fact to take action both with respect to property matters and health care decisions, the provisions in this part 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 part 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 8023 (“attorney-in-fact” defined), 8029 (“durable power of attorney” defined), 8032 (“durable power of attorney for health care” defined), 8050 (“nondurable power of attorney” defined).

Staff Note. Subdivisions (a) and (b) of this section have been reorganized in part as suggested by the State Bar Team. See points 1-3 below. These revisions go beyond what was decided at the September 1991 meeting. See September 1991 Minutes, at 14.

In this section or elsewhere, in connection with the scope of this statute, it needs to be made clear that the power of attorney statute does not apply to other types of agencies governed by special statutes, such as real estate agents. See September 1991 Minutes, at 14.

The Team has also suggested deleting or removing the provision relating to proxies to another location as a separate section. See points 4-5 below. If the provision is obsolete or unneeded, the staff thinks this is a good idea to delete it. At a minimum, we would relocate the provision and we have places brackets around the provision as a reminder to find a better place for it. We will also draw the attention of the Corporations Committee of the Business Law Section this question.

State Bar Team 4 comments:

1. As previously stated, Team 4 believes that the general law of agency applies to durable powers of attorney, and that the definition of a power of attorney as set forth in § 2402.210 supports Team 4's position (i.e., the general law of agency applies) as opposed to that of the Commission (i.e., the general law of agency does not apply). Team 4 would alter the definition of the first sentence of § 2402.210, subsection (a), as follows:

“(a) ‘Durable power of attorney’ means a written instrument, however denominated, that is executed by a natural person having the capacity to contract and granting powers to an attorney-in-fact.”

2. Team 4 further suggests that the second sentence of subsection (a) be set forth as subsection (b) and that: (1) the word “durable” be inserted as the second word of the sentence before the word “power”; and the words “may be durable or nondurable” be deleted.

3. Team 4 would delete the words “written agency agreement” (line 1 of subsection (a)), not only because of the conflict with general agency law, but, as well, because the definition suggests that a more formal document than is actually necessary may be required.

4. It is Team 4's understanding that subsection (b) was added in response to a

particular request from the Corporations Section of the State Bar. However, under most durable powers of attorney for property, an attorney-in-fact would have the power to exercise stock voting rights. Team 4 believes that it is unnecessary to distinguish between an agent who would vote pursuant to a proxy from any other agent who might be delegated power by an attorney-in-fact. Moreover, some of the confusion which may have generated the Corporations Section's original concern may be dissipated by the use of the term “attorney-in-fact.” Finally, there is no reason to presume that an agent acting under a proxy is not subject to the law applicable to that proxy. For the above reasons, the subsection is unnecessary, and Team 4 suggests that the subsection be deleted in its entirety.

5. On the other hand, if the Staff feels that a provision dealing with proxies is necessary, then Team 4 suggests that current § 2402.210(b) be set forth as a separate section. In essence, the new section should provide:

“(1) A durable power of attorney for property is not a proxy.

“(2) A proxy exercisable by an attorney-in-fact is not a durable power of attorney.”

6. Team 4 suggests that the Comment to § 2402.210 contain a definition of the phrase “capacity to contract.”

§ 8062. Power of attorney for personal care [new]

8062. “Power of attorney for personal care” means a power of attorney, whether durable or nondurable, that grants powers to an attorney-in-fact concerning the personal care of the principal.

Comment. Section 8062 is new. As to multi-purpose powers of attorney, see the Comment to Section 8029. See Section 8035 & Comment (“durable power of attorney for personal care” defined).

Staff Note. The staff assumes that the State Bar Team would not favor this section, since the Team has suggested restricting this statute to durable powers. But what would happen if a principal executes a power of attorney for personal care and omits the statement of durability as defined in draft Section 8029? Is the power void? Is there really a problem with permitting nondurable powers for personal care? An alternative would be to provide that all personal care powers are durable unless the instrument states otherwise. Early in this project, the Commission considered and rejected the possibility of adopting the Illinois scheme where all powers of attorney are durable unless they provide otherwise.

California has a mixed system now, since powers of attorney for health care are all durable. There are some who disagree, but the staff does not believe that a nondurable power of attorney for health care (as “health care” is defined) is possible in California. Or if it is possible, it is unlikely to be accepted. Perhaps this merits further study, but so far we have not attempted to change this aspect of the health care power statutes. The personal care power could be modeled on the health care power in this respect.

Beverly Hills Bar Legislative Committee comments: See the notes following Section 8035.

State Bar Team 4 comments: See the notes following Section 8035.

§ 8065. Power of attorney for property [2402.230]

8065. “Power of attorney for property” means a power of attorney, whether durable or nondurable, that grants powers to an attorney-in-fact concerning the principal’s property.

Comment. Section 8065 is new. This section provides a convenient way to identify durable and nondurable powers of attorney. A power of attorney for property is exclusive of powers of attorney for personal care and durable powers of attorney for health care. See also Section 8038 & Comment (“durable power of attorney for property” defined); Sections 8032 (“durable power of attorney for health care” defined), 8035 (“durable power of attorney for personal care” defined), 8050 (“nondurable power of attorney” defined), 8059 (“power of attorney” defined).

Staff Note. As to the issue of the location of definitions, see the Staff Note following Section 8020.

State Bar Team 4 comments:

1. As with the other definitions which have appeared in this part, Team 4 suggests that the definition of a power of attorney for property contain the characteristics of the durable power of attorney for property. Practitioners need concrete guidance, and not just reference to a code section. Further, to the extent that uncertainty exists about the meaning of the other durable powers of attorney, a complete definition of a durable power of attorney for property is necessary. Insofar as Team 4 has suggested that a definition of a durable power of attorney for health care be set forth and a durable power of attorney for personal care be

created, the task of defining a durable power of attorney for property should be eased.

2. Team 4’s comments about the placement of definitions having to do with particular types of durable powers applies to the § 2402.230 definition; this definition should be set forth in the part concerning durable powers of attorney for property.

3. Team 4 is concerned about what appears to be a repetition of definitions; for whatever reason, the repetitions are likely to cause confusion among practitioners.

Staff Note. This section has been revised to reflect the inclusion of the durable power of attorney for personal care.

§ 8068. Principal [2402.250]

8068. “Principal” means a natural person who executes a power of attorney.

Comment. Section 8068 restates and generalizes former Section 2410(d). See Section 8059 (“power of attorney” defined).

Staff Note. The State Bar Team would add “granting powers to an attorney-in-fact” at the end of this section. This would not be incorrect, but the definition of power of attorney already contains this element.

State Bar Team 4 comments:

1. Team 4 suggests that the definition of principal be restated as follows:

“‘Principal’ means a natural person who executes a durable power of attorney granting powers to an attorney-in-fact.”

2. Team 4 believes that the essence of a durable power of attorney is the granting of powers from the principal to his or her attorney-in-fact. For this reason, the essential characteristic should be included within the definition.

3. This new section applies equally to durable powers of attorney for health and property.

§ 8071. Residential care facility for the elderly

8071. “Residential care facility for the elderly” means a residential care facility for the elderly as defined in Section 1569.2 of the Health and Safety Code.

Comment. Section 8071 continues former Section 2430(f) without substantive change.

§ 8074. Springing power of attorney [2402.290]

8074. “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 8074 continues former Section 2514(a)(2) without change. See Section 8227 (springing power of attorney). See also Sections 8029 (“durable power of attorney” defined), 8050 (“nondurable power of attorney” defined), 8059 (“power of attorney” defined), 8068 (“principal” defined).

Staff Note. The general issue of whether the statute should apply only to durable powers is addressed elsewhere. If it is so limited, then the second sentence of this section should be deleted.

The staff does not agree that this section applies equally to property and health care powers in its present form, because we do not yet accept the idea that health care powers can be nondurable under the existing scheme.

State Bar Team 4 comments:

1. Team 4 suggests that the second sentence of § 2402.290 be deleted inasmuch as the focus of the section should be upon durable powers of attorney. Team 4 believes that it will create great confusion among practitioners if only random sections are specifically said to apply to both durable powers and non-durable powers. Not only will confusion abound, but practitioners will have to refer constantly to the particular section to

determine whether the section applies only to durable powers of attorney or to both durable powers and/or non-durable powers of attorney. Such a hodgepodge would create a particularly unwieldy burden for those business and commercial practitioners who deal with durable powers of attorney only in a business setting and only upon relatively infrequent occasions.

2. Further, Team 4 recommends that the definition of “springing power of attorney” be revised as follows:

“‘Springing durable power of attorney’ means a durable power of attorney granting powers to an attorney-in-fact and stating that the power

becomes effective at a specified future time, or date, or upon the occurrence of a specified event or contingency including but not limited to the subsequent incapacity of the principal.”

3. This new section applies equally to durable powers of attorney for health and property.

§ 8077. Statutory form durable power of attorney for health care [2402.310]

8077. “Statutory form durable power of attorney for health care” means a durable power of attorney for health care that satisfies the requirements of Chapter 2 (commencing with Section 8650) of Title 3.

Comment. Section 8077 is new. See also Section 8032 (“durable power of attorney for health care” defined).

§ 8080. Statutory form power of attorney [2402.330]

8080. (a) “Statutory form power of attorney” means a power of attorney for property that satisfies the requirements of Chapter 5 (commencing with Section 8500) of Title 2.

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

Comment. Section 8080 is new. See also Section 8065 (“power of attorney for property” defined). Subdivision (b) recognizes a variant name the form may take. See Section 8501 (statutory form power of attorney).

§ 8083. Third person [2402.350]

8083. “Third person” means any person, other than the principal or attorney-in-fact.

Comment. Section 8083 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 8501-8502.

See also Section 8023 (“attorney-in-fact” defined), 8068 (“principal” defined).

Staff Note. This section has been revised to implement a Commission decision. See September 1991 Minutes, at 14. The following language was stricken: “...who acts on a request from, contracts with, relies on, or otherwise deals with an attorney-in-fact, and includes a person described as a third party.”

State Bar Team 4 comments:

1. Team 4 suggests that the definition of “third person” be rewritten as follows:

“‘Third person’ or ‘third party’ means any person, other than the principal or the attorney-in-fact. Third person or third party includes, without limitation, any such person who acts upon a request from, contracts with, relies on, or otherwise deals with an attorney-in-fact.”

2. Team 4 suggests the above revision inasmuch as the definition of “third party” should

be as broad as possible, and the original inclusion of “third party” appeared to be too limiting. As the detailing of actions is set forth purely for example, the list of actions should be retained because of the guidance it will provide to practitioners.

3. The specific enumeration of actions (e.g., “acts,” “contracts”) should be clearly identified as being for purposes of example only. Obviously the range of possible interactions is endless.

4. This new section applies equally to durable powers of attorney for health and property.

CHAPTER 3. PROVISIONS COMMON TO POWERS OF ATTORNEY

Staff Note. The draft attached to Memorandum 91-40 treated the property and health care powers separately. The Commission has decided to attempt to unify the law to the extent practicable, such as with regard to execution requirements, capacity, modification and termination, successor attorneys-in-fact, etc. This approach requires substantial restructuring, and the draft will be somewhat disorganized in the interim. If a substantial amount of material can be placed in this chapter, it may be best to make it a separate title.

TITLE 2. POWERS OF ATTORNEY FOR PROPERTY

CHAPTER 1. GENERAL PROVISIONS

§ 8200. Application of title [2405.010]

8200. Except as otherwise provided by statute, this title applies to powers of attorney for property, whether durable or nondurable, including statutory form powers of attorney. This title does not apply to durable powers of attorney for health care or to powers of attorney for personal care.

Comment. Section 8200 provides the scope of this title. If a section in this title 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 8222 (requirements for durable power of attorney for property), 8232 (termination of nondurable power of attorney for property). This title applies to statutory form powers of attorney since they are a variety of powers of attorney for property. However, this title does not apply to statutory form powers of attorney to the extent Chapter 2 (commencing with Section 2475) of Title 4 provides a special rule. See Section 2480 (general provisions applicable to statutory form) & Comment.

The provisions of this title do not apply to durable powers of attorney for health care, which are governed by Title 3 (commencing with Section 8600). See also Sections 8650-8659 (statutory form durable power of attorney for health care). In this respect, Section 8200 restates the last sentence of former Section 2402(a) without substantive change.

See also Sections 8038 (“durable power of attorney for property” defined), 8032 (“durable power of attorney for health care” defined), 8050 (“nondurable power of attorney” defined).

Staff Note. The State Bar Team would eliminate the reference to nondurable powers. This issue is discussed elsewhere. See, e.g., Staff Note to Section 8000.

State Bar Team 4 comments:

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| 1. Consistent with the position which Team 4 has expressed throughout its discussion of the Statute, Team 4 strongly suggests that the reference to non-durable powers of attorney be deleted. | 2. If a durable power of attorney for personal care is created, then the last sentence of § 2405.010 will have to be expanded in order to reflect that the chapter also does not refer to durable powers of attorney for personal care. |
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§ 8202. Form of durable power of attorney after January 1, 1993 [2405.030]

8202. Notwithstanding Section 8224:

(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 8224.

(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 8224.

Comment. Section 8202 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 8224. This section, like its predecessor, former Section 2510.5, avoids the need to discard existing printed forms on the operative date of this part. 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 8224. Both provisions are acceptable because the wording changes are nonsubstantive. See Section 8224 Comment.

Staff Note. The State Bar Team suggests that the Comment make clear that this section does not “necessarily” apply to powers of attorney prepared by attorneys. The staff has no problem with this suggestion, except that it might be better to include language in the section itself to the effect that a printed form does not include a power of attorney prepared by an attorney. The Comment could then make clear that this language excludes forms printed by an attorney for a client using computer equipment.

State Bar Team 4 comments:

1. Team 4 suggests that the comment to § 2405.030 begin with an explanation that this section applies particularly to commercially printed forms and not necessarily to durable powers of attorney prepared by attorneys. Team 4 also suggests that for purposes of clarity, the last two substantive sections of the Comment be redrafted as follows:

“However, pursuant to subdivision (b), a form printed for commercial sale and distribution to

the public on or after January 1, 199_, may be sold or distributed in this state only if the form satisfies the requirements of former Section 2510 or Section 2410.050. Either of such sections may be used, because the changes are in syntax and are non-substantive.”

2. This new section applies equally to durable powers of attorney for health and property.

CHAPTER 2. CREATION, EFFECT, AND TERMINATION OF POWERS OF ATTORNEY FOR PROPERTY

§ 8220. Creation of power of attorney [2410.010]

8220. A natural person having the capacity to contract may create a power of attorney for property by signing a written instrument designating an attorney-in-fact and granting powers to the attorney-in-fact to act on the principal’s behalf.

Comment. Section 8220 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 attorney-in-fact 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 attorney-in-fact, see Sections 8350-8407. See also Sections 8023 (“attorney-in-fact” defined), 8065 (“power of attorney for property” defined), 8068 (“principal” defined).

Staff Note. This section has been revised to adopt the State Bar Team's suggestion. However, the staff does not read into the choice of "delegating" or "granting" the significance urged by the Team. It seems a matter of taste and not legal significance.

State Bar Team 4 comments:

1. Team 4 suggests that § 2410.010 be rewritten as follows:

"A natural person having the capacity to contract may create a durable power of attorney for property by executing a written instrument designating an attorney-in-fact and granting powers to the attorney-in-fact to act on the principal's behalf."

2. Team 4 urges the Commission to use the word "grant" when referring to the powers which

the principal gives to the attorney-in-fact. The word "grant" implies a complete and total transfer of powers to the attorney-in-fact. The word "delegate," on the other hand, implies a more temporary transfer with the transferor retaining certain non-delegated powers. When the durable power of attorney is in effect, Team 4 believes that it is essential that the attorney-in-fact's powers, to the extent conveyed by the principal, be deemed to be as comprehensive as possible.

§ 8221. Permissible purposes [2410.020]

8221. In a power of attorney for property, a principal may grant to an attorney-in-fact powers to act 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 8221 is new and is consistent with the general agency rules in Sections 2304 and 2305. For provisions concerning the duties and powers of an attorney-in-fact, see Sections 8350-8407. See also Sections 8023 ("attorney-in-fact" defined), 8065 ("power of attorney for property" defined), 8068 ("principal" defined).

Staff Note. This section has been revised to adopt the State Bar Team's suggestion. See September 1991 Minutes, at 15. See also the Staff Note for Section 8220.

State Bar Team 4 comments:

1. Team 4 suggests that Section 2410.020 be rewritten as follows:

"In a durable power of attorney, a principal may grant to an attorney-in-fact powers to act on the principal's behalf with respect to all lawful subjects and purposes, or with respect to one or more expressed subjects or purposes."

2. Although the suggested modifications are changes in wording only, Team 4 believes that they have substantive aspects as well. The reasons for the suggested modifications are as follows:

a. The word "delegate" was deleted, and the word "grant" was used instead; the word "delegation" implies a more temporary and restrictive transfer of powers. (See discussion of § 2410.010.) In a durable power of attorney, the purpose is to allow the attorney-in-fact to act fully in the principal's stead to the extent of the powers granted.

b. The word "general" was deleted. Since the word "general" modifies powers, the public and

practitioners could infer from the use of the word "general" that other powers exist which are not general — that is, they may be of a special nature. This is not the case, and the ambiguity should be deleted. (See subsequent discussion of general powers; Team 4 suggests that the "generally granted" versus "specifically granted" framework be deleted.)

c. Finally, the words "in a fiduciary capacity" were deleted. The precise and exact nature of the relationship between a principal and an attorney-in-fact is open to discussion. However, by using the word "fiduciary," the implication certainly arises that fiduciary concepts and principles (specifically as those apply to a trustee or perhaps to a conservator or guardian) are to be imported to the durable powers of attorney statute. Such a wholesale import should be considered carefully, and in any event is not the case in Team 4's proposed revision of the Statute.

3. This new section applies equally to durable powers of attorney for health and property.

§ 8222. Requirements for durable power of attorney for property [2410.030]

8222. A durable power of attorney for property is a power of attorney by which a principal designates another person as his or her attorney-in-fact 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 8222 restates former Section 2400 without substantive change. This section refers to a durable power of attorney for property, recognizing that this title does not apply to durable powers of attorney for health care. See Sections 8200 (application of title), 8600-8659 (durable powers of attorney for health care).

Section 8222 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 8001 (construction of provisions drawn from uniform acts). The reference in the Uniform Act to the principal’s “disability” is omitted. Under Section 8232, 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 8222 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 8231(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 8023 (“attorney-in-fact” defined), 8029 (“durable power of attorney” defined), 8059 (“power of attorney” defined), 8068 (“principal” defined), 8074 (“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 proposed altering 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 8001 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.

§ 8223. Effect of attorney-in-fact’s acts under durable power of attorney during principal’s incapacity [2410.040]

8223. All acts done by an attorney-in-fact 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 8223 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). The reference to a “durable power of attorney for property” has been substituted for the former reference to a “durable power of attorney.”

Section 8223 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 8001 (construction of provisions drawn from uniform acts). This section omits the reference to the principal’s “disability” found in the uniform act. Under Section 8232, it is the principal’s incapacity to contract which would otherwise terminate the power of attorney.

See also Sections 8023 (“attorney-in-fact” defined), 8038 (“durable power of attorney for property” defined), 8068 (“principal” defined).

Staff Note. The State Bar Team would delete the language in brackets. As to incapacity, the Team is correct in suggesting that the language really adds nothing new to the section, although the staff does not believe it causes any confusion. The reference to uncertainty as to whether the principal is dead or alive, the language does answer a question that otherwise might arise. It can be argued that the “as if the principal had capacity” language does not cover the question of whether the principal is alive. A third person might be in doubt about whether the principal is alive, not whether a living principal has capacity. In other words, incapacity does not normally include death, although we would all agree that a dead person does not have legal capacity. This language complements the rule of Section 8453 (effect of death or incapacity of principal). The Team’s comments on whether the bracketed language is surplus could apply to the entire section. The Commission has considered the bracketed language before but did not decide on its disposition. See September 1991 Minutes, at 15.

State Bar Team 4 comments:

1. Team 4 suggests that the section be modified by inserting a period after the word “capacity” on line 5 and by deleting the words which appear after the word “capacity,” namely “notwithstanding any incapacity of the principal or any uncertainty as to whether the principal is dead or alive.” The words which have been deleted add nothing to the meaning of this section, and, in fact, may detract from the power granted to the attorney-in-fact during the period of the principal’s incapacity. By definition, a durable power is one that continues to be effective during the

principal’s incapacity. This essential feature already has been set forth and identified in the Statute. To reiterate the basic characteristic of a durable power (that it is durable) at this juncture adds nothing and most likely will result in practitioner confusion. The effect upon the attorney-in-fact’s status if the principal is dead is addressed elsewhere, and the repetition is not useful.

2. This new section applies equally to durable powers of attorney for health and property.

§ 8224. Warning statement in durable power of attorney for property [2410.050]

8224. (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 Title 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:

NOTICE TO PERSON EXECUTING DURABLE POWER OF ATTORNEY

A durable power of attorney for property is an important legal document. By signing the durable power of attorney, you are authorizing another person to act for you. Before you sign this durable power of attorney, you should know these important facts:

Your agent (attorney-in-fact) has no duty to act unless you and your agent agree otherwise in writing.

This document gives your agent the powers to manage, dispose of, sell, and convey your real and personal property, and to use your property as security if your agent borrows money on your behalf.

Your agent will have the right to receive reasonable payment for services provided under this durable power of attorney unless you provide otherwise in the power of attorney.

The powers you give your agent will continue to exist for your entire lifetime, unless you state that the durable power of attorney will last for a shorter period of time or unless you otherwise terminate the durable power of attorney. The powers you give your agent in this durable power of attorney will continue to exist even if you can no longer make your own decisions respecting the management of your property.

You can amend or change this durable power of attorney only by executing a new durable power of attorney. You have the right to revoke or terminate this durable power of attorney at any time, so long as you are competent.

This durable power of attorney must be dated and must be acknowledged before a notary public.

You should read this durable power of attorney for property carefully. When effective, this durable power of attorney will give your agent the right to deal with all property that you now have or might acquire in the future. The durable power of attorney is important to you. If you do not understand the durable power of attorney, or any provision of it, then you should obtain the assistance of an attorney or other qualified person.

(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. Subdivisions (a) and (c) of Section 8224 restate former Section 2510(a) and (c) without substantive change. The warning statement in subdivision (b) replaces the statement provided in former Section 2510(b). The exclusion of durable powers of attorney for health care in the former provision is omitted as unnecessary. See Section 8038 (“durable power of attorney for property” defined), 8065 (“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 8501 (Uniform Statutory Form Power of Attorney), 8611 (durable power of attorney for health care), 8651 (statutory form durable power of attorney for health care). See also Section 8611(a) (introductory clause) (printed form of a durable power of attorney for health care to provide only authority to make health care decisions).

Section 8202 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 8224 (or its predecessor, former Section 2510). See Section 8202(b).

See also Sections 8023 (“attorney-in-fact” defined), 8038 (“durable power of attorney for property” defined), 8080 (“statutory form power of attorney” defined), 8083 (“third person” defined).

Staff Note. The State Bar Team suggests a redrafting of the warning. The staff has adopted most of these suggestions in the redrafted warning statement in subdivision (b), with only a few minor changes. The staff has revised the statement as to the right to compensation to refer to the power of attorney, rather than an agreement in writing between the agent and principal.

The reference to dating and acknowledgment requirements and to the competency requirement for revocation have been added. See September 1991 Minutes, at 15.

The statement will have to be monitored to make sure it conforms to the substantive provisions as they are finalized.

It is also worth noting that the Team has chosen to use “agent” instead of “attorney-in-fact” in this warning. The staff has included a parenthetical reference to “attorney-in-fact” to provide some contact between the clear, consumer language of the warning and the arcane terminology of the statute. This is the same approach taken in the Statutory Form Durable Power of Attorney for Health Care and in the Uniform Statutory Form Power of Attorney.

State Bar Team 4 comments:

1. Team 4 believes that this warning is of critical importance to the public who will be dealing with durable powers of attorney. The goal is to create a notice which communicates in plain English and clearly identifies the major issues which should be considered by an individual prior to executing a durable power of attorney. In addition, the Commission should be aware that Team 4 has amended the notice to reflect Team 4’s position that an attorney-in-fact should be compensated unless otherwise provided in the durable power of attorney. When the payment of compensation and other issues are finally determined, then the notice may require additional revision.

2. At this point, Team 4 suggests that the “Warning To Person Executing This Document” should be rewritten as follows:

“Notice to Person Executing Durable Power of Attorney

“A durable power of attorney for property is an important legal document. By signing the durable power of attorney, you are authorizing another person to act for you if you cannot act. Before you sign this durable power of attorney, you should know these important facts:

“Your agent has no duty to act unless you and your agent agree otherwise in writing.

“This document gives your agent the powers to manage, dispose, sell and convey your real and personal property, and to use your property as security if your agent borrows money on your behalf.

“Your agent will have the right to receive reasonable payment for services provided under this durable power of attorney unless you and your agent agree otherwise in writing.

“The powers which you give your agent will continue to exist for your entire lifetime, unless you state that the durable power of attorney will last for a shorter period of time or unless you otherwise terminate the durable power of attorney. The powers which you give to your agent in this durable power of attorney will continue to exist even if you can no longer make your own decisions respecting the management of your property.

“You can amend or change this durable power of attorney only by executing a new durable power of attorney. You have the right to revoke or terminate this durable power of attorney at any time.

“You should read this durable power of attorney for property carefully. When effective, this durable power of attorney will give your agent the right to deal with all property that you now have or might acquire in the future.

The durable power of attorney is important to you. If you do not understand the durable power of attorney, or any provision of it, then you should obtain the assistance of an attorney or other qualified person.”

§ 8225. Nomination of conservator in durable power of attorney [2410.060]

8225. (a) A principal may nominate, by a durable power of attorney for property, 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 8225 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 8001 (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 that 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 8029 (“durable power of attorney” defined), 8068 (“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 8225 comes, is silent. From this, one could draw an implication that the nomination provision of subdivision (b) applies to both types of durable powers. It was decided at the September 1991 meeting to inset “for property” in subdivision (a). See September 1991 Minutes, at 15.

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 8225 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 8225 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.

§ 8226. Springing power of attorney [2410.070]

8226. (a) In a springing power of attorney for property, 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 attorney-in-fact 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 8226 continues former Section 2514(b)-(d) without substantive change. 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 8074 (“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 8222 (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 8050 (“nondurable power of attorney” defined), 8059 (“power of attorney” defined), 8068 (“principal” defined).

Staff Note. As drafted, this section does not apply to durable powers of attorney for health care. See September 1991 Minutes, at 15.

State Bar Team 4 comments:

This new section applies equally to durable powers of attorney for health and property.

§ 8227. Lapse of time [2410.080]

8227. 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 8227 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 8001 (construction of provisions drawn from uniform acts). See also Section 8065 (“power of attorney for property” defined). See also Sections 8223 (effect of attorney-in-fact’s acts under durable power of attorney during principal’s incapacity), 8231 (termination of power of attorney for property).

§ 8228. Application to principal’s property [2410.090]

8228. 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 8228 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 8038 (“durable power of attorney for property” defined), 8050 (“nondurable power of attorney” defined), 8065 (“power of attorney for property” defined), 8068 (“principal” defined).

Staff Note. The State Bar Team would eliminate the reference to nondurable powers. This issue is discussed elsewhere. See, e.g., Staff Note to Section 8000.

State Bar Team 4 comments:

The distinction between durable and non-durable powers of attorney should be deleted.

§ 8229. Variation of duties and liabilities between principal and attorney-in-fact [2410.110]

8229. The principal and the person designated as the attorney-in-fact 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 title, except as provided in Section 8406.

Comment. Section 8229 is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.717(4) (Vernon 1990). Section 8406 provides certain absolute limits on actions that may be taken by an attorney-in-fact under a power of attorney.

See also Sections 8023 (“attorney-in-fact” defined), 8068 (“principal” defined).

Staff Note. At the September 1991 meeting, this provision was discussed but not approved, pending receipt of additional views from bar commentators.

The State Bar Team would eliminate this provision. As indicated in their draft of the warning statement, the Team would permit changes in the power of attorney only by

executing a new power of attorney. While the staff sees the problems suggested by the Team, we also think this section provides a useful flexibility that is appropriate in the supposedly less formal realm of powers of attorney. The staff would resist such a section in the Trust Law, but powers of attorney are not trusts. The only serious drawback we see is that “side agreements” may blunt the effectiveness of the power by confusing third persons. But this is a problem inherent in a flexible statute and the harm, if any, is not to the statute or to third persons, but to the principal who engages in the practice authorized by this section. In sum, it seems a useful provision that avoids the need to pay the lawyer another fee just to print the whole power of attorney out on his or her laser printer just to clarify some minor point. As for title companies, they can be just as protected against side agreements as they are against death or revocation. This does not seem to be a new issue.

State Bar Team 4 comments:

1. Team 4 strongly feels that this provision should be deleted in its entirety. It is not in the best interest of either the principal or the attorney-in-fact to make secret agreements altering their relations. The potential for the abuse of elderly or infirm principals is immense. The reliability inherent in standardized practices and due process would be jeopardized if such side agreements were permitted. Moreover, on a practical basis, the potential existence of such side agreements would create substantial burdens for title companies and other third parties. If side agreements were

authorized, then title companies and other third parties (notwithstanding assurances in the Statute that such inquiries were unnecessary) would think it necessary to ascertain the existence of such side agreements, and then to review the contents thereof in order to insure that the parties’ relationship or the powers granted from the principal to the attorney-in-fact had not been altered.

2. This new section applies equally to durable powers of attorney for health and property.

§ 8230. Manner of modification or termination by principal [2410.120]

8230. Except as provided by Section 8312, as between the principal and attorney-in-fact, 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 attorney-in-fact 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 attorney-in-fact 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 attorney-in-fact’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 8230 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 attorney-in-fact that the attorney-in-fact’s powers are terminated. An attorney-in-fact can be simply fired as with any other employee or agent or the attorney-in-fact can be told that his or her authority has been changed, and no writing is required. To deal with the situation

where the attorney-in-fact 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 attorney-in-fact 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 attorneys-in-fact to keep in contact with their principal. See Section 8356. For other events that terminate a power of attorney, see Sections 8231, 8232. For events that terminate the authority of an attorney-in-fact, see Sections 8308, 8309.

See also Sections 8023 (“attorney-in-fact” defined), 8065 (“power of attorney for property” defined), 8068 (“principal” defined).

Staff Note. The authority to make an oral modification or termination has been deleted from subdivision (b). See September 1991 Minutes, at 16.

The State Bar Team would delete this section. Some of the Team’s comments focus on the issue of how a modification might affect third persons. But the section applies to relations between the principal and the agent and does not affect third persons. The Team is also concerned about unscrupulous individuals taking advantage of principals by making side deals or modifications. But at the same time, the ability to modify or terminate is essential for the principal to have control. There will always be this tension between the policy of giving individuals freedom and the possibility or likelihood that a number of them may abuse it to their own detriment. To over-formalize powers of attorney may in the end not be seen as a protection of consumers but as paternalism and overreaching restrictions on freedom of contract. This brief note does not attempt to summarize all of the Team’s points which should be read in full.

State Bar Team 4 comments:

1. Team 4 has a number of comments with respect to this section. Team 4 believes that this section should be deleted for the reasons set forth in this discussion. Team 4 suggests that all of the termination provisions be set forth in one section, namely § 2410.130, and that § 2410.130 should be entitled “Termination of durable power of attorney.”

2. Team 4 extensively discussed whether or not modifications of durable powers of attorney should be permitted at all. Team 4 thought it important that the range of comments concerning the ability to amend a durable power of attorney (or lack thereof) be presented. One Team 4 member thought that modification should not be addressed at all in the Statute. Many members of Team 4 thought that if modifications of durable powers of attorney were permitted, that it would be difficult for third parties to deal with durable powers of attorney because such third parties constantly would (or think they would) have to ascertain whether or not a modification had occurred. Further, the ability to have “silent” modifications would seem to increase the possibility for unscrupulous individuals to take advantage of an aged or infirm principal. The advantage of informal and inexpensive

amendments is not outweighed by the dangers inherent in permitting informal modifications nor by the difficulties of third parties in dealing with such modifications.

3. Five members of Team 4 thought that no modification or amendment of a durable power of attorney should be permitted. These members thought that it was safer from all perspectives and more reliable for third parties if modification were accomplished through a complete termination and restatement of the durable power of attorney. These members further thought that such terminations should be required to be in writing.

4. With respect to subsection (b) of § 2410.120, Team 4 thought that the phrase “orally or in writing” was too limiting. Two of Team 4’s members thought that a revocation should only be in writing. Four other members of Team 4 thought that the section should permit a revocation to be effected in any way or by any method whereby the principal communicated to the attorney-in-fact (or to a third party) that the durable power of attorney was to be revoked. Such communications should include any type of hand signal or nonverbal communication.

5. Team 4 also was concerned about subsection (d) of § 2410.120 for two reasons. One

reason was that it would be difficult to enforce the requirement that only a principal or the principal's legal representative could record a notice of termination. The burden of ascertaining who was the responsible filing party would be substantial, and the possibilities for litigation would be endless. A second concern was that if the original durable power had been recorded, that a termination might not be effective unless it was also recorded. In any event, if the recording requirements are not clear, then the status of a subsequent revocation will be uncertain.

6. In summary, Team 4 feels that a durable power of attorney should not be amended or modified because of the confusion and disruption which such amendments or modifications could cause. Rather Team 4 believes that if a principal wants to change a durable power of attorney that the original document should be retracted in total, and an entirely new document executed.

7. This new section applies equally to durable powers of attorney for health and property.

§ 8231. Termination of power of attorney for property [2410.130]

8231. (a) Except as provided in Section 8312 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 8307.

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

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

(4) Death of the principal.

(5) Death, incapacity, resignation, refusal to act, or other disqualification of all attorneys-in-fact designated in the power of attorney.

(b) An attorney-in-fact or third person who does not have notice of an event that terminates the power of attorney or the authority of an attorney-in-fact is protected from liability as provided in Chapter 4 (commencing with Section 8450).

Comment. Section 8231 is drawn from the general agency rules provided in Sections 2355 and 2356. 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 8232.

The first clause of subdivision (a) recognizes the special rule applicable to a power of attorney coupled with an interest provided in Section 8312. 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 8307. 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 8308 (termination of attorney-in-fact'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 8023 ("attorney-in-fact" defined), 8038 ("durable power of attorney for property" defined), 8050 ("nondurable power of attorney" defined), 8065 ("power of attorney for property" defined), 8083 ("third person" defined).

Staff Note. The references to resignation and refusal to act have been added in subdivision (a)(5) to replace renunciation. See September 1991 Minutes, at 16.

A question arose at the September 1991 meeting concerning the meaning of "extinction of the subject" of the power of attorney. This language is from the general agency rules, Section 2355. Cases annotated after this section use "subject" to mean the property involved in the agency. E.g., *McColgan v. Bank of Cal. Nat'l Ass'n*, 208 Cal. 329, 334-35, 281 P. 381 (1929) (agency to sell land in satisfaction of debt terminated when land sold in foreclosure sale to another); *Boehm v. Spreckels*, 65 Cal. App. 127, 128, 223 P. 84 (1924) (contracts for newspaper delivery route created agencies which were extinguished when the newspaper was sold by the principal).

The State Bar Team would eliminate the reference to nondurable powers. This issue is discussed elsewhere. See, e.g., Staff Note to Section 8000. The Team has a number of technical drafting suggestions that the staff would consider once the Commission decides the general policies on modification and termination.

State Bar Team 4 comments:

Team 4 has a number of comments about § 2410.130 which are as follows:

1. This section should be renamed "Termination of durable power of attorney."

2. If subsection (d) of § 2410.120 is retained, Team 4 suggests that the subsection be moved from § 2410.120 to § 2410.130 and be renumbered as § 2410.130(b). [The current subsection (b) should be deleted; see comment below.]

3. Team 4 believes that subsection (a)(1) should be modified by deleting the words "except as provided in § 2415.080." Thus subsection (a)(1) should read "Expiration of the term of the durable power of attorney."

4. Team 4 has several general comments respecting §§ 2410.130(b), 2410.140 and 2415.090.

In each of these sections, references are made to an agent or a third person who does not have knowledge of certain events, e.g., an event that terminates the power of attorney-in-fact or that triggers the appointment of the attorney-in-fact. Team 4 believes that each of the three sections

should be replaced with one section which, in general, would relieve an attorney-in-fact of liability if the attorney-in-fact took action without actual knowledge of the event in question. This section properly should appear in what is now Chapter 4, "Relations with Third Persons." (As stated in the discussion of the Chapter 4 sections, Chapter 4 applies equally to durable powers of attorney for health care and property and therefore should be contained in the general sections which apply equally to both types of durable powers of attorney.) Probate Code § 9103 which refers to actual knowledge could be used as a guide and in lieu of the notice provisions which are relied upon in the above three sections.

5. Team 4 suggests that subparagraph (5) of § 2410.130 be deleted in its entirety. Team 4 believes that the issue of the incapacity of an agent, temporary or permanent, is a most serious issue, and should be dealt with in a separate section.

6. This new section applies equally to durable powers of attorney for health and property.

§ 8232. Termination of nondurable power of attorney for property [2410.140]

8232. (a) Except as provided in Section 8312 and subject to subdivision (b), a nondurable power of attorney for property is terminated by the incapacity of the principal to contract.

(b) An attorney-in-fact 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 8450).

Comment. Subdivision (a) of Section 8232 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 8312. For other events that terminate a nondurable power of attorney for property, see Section 8231.

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 8023 ("attorney-in-fact" defined), 8038 ("durable power of attorney for property" defined), 8050 ("nondurable power of attorney" defined), 8065 ("power of attorney for property" defined), 8083 ("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.

The State Bar Team would eliminate the reference to nondurable powers. This issue is discussed elsewhere. See, e.g., Staff Note to Section 8000.

State Bar Team 4 comments:

Team 4 believes that the comprehensive durable power of attorney statute should deal solely with durable powers of attorney. For that reason, Team 4 believes that § 2410.140 should

not be included in the comprehensive durable power of attorney statute, because it addresses issues having to do solely with non-durable powers of attorney.

§ 8233. Certified copy of power of attorney [2410.150]

8233. (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 8233 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 8065 ("power of attorney for property" defined), 8068 ("principal" defined).

Staff Note. The Commission has decided that the feasibility of empowering court clerks and city clerks to certify copies of powers of attorney should be investigated.

State Bar Team 4 comments:

1. Team 4 believes that creating a system for certifying durable powers of attorney is desirable. In many instances, certification will facilitate and simplify the use of durable powers of attorney. For example, most third parties would more easily accept and rely upon a certified copy of a durable

power of attorney. Team 4 believes that the proposed certification system should be broadened. As written, certification would be difficult to obtain and would place additional and, it is assumed, unwanted burdens upon the "official of a state or of a political subdivision of a state." Undoubtedly some costs — either for the principal

or the state — would be attached to such a formal certification process. Neither the formality nor the costs are warranted. In lieu of or in addition to the formal certification process already set forth in the section, Team 4 suggests that the section be rewritten so that a durable power of attorney can

be certified by a California-licensed attorney or notary public.

2. This new section applies equally to durable powers of attorney for health and property.

CHAPTER 3. ATTORNEYS-IN-FACT UNDER POWERS OF ATTORNEY FOR PROPERTY

Article 1. Attorneys-in-Fact

§ 8300. Qualifications of attorney-in-fact [2415.010]

8300. Any person having the capacity to contract may act as an attorney-in-fact under a power of attorney for property.

Comment. Section 8300 supersedes the last part of Section 2296 (“any person may be an agent”) to the extent that it applied to attorneys-in-fact under powers of attorney.

See also Sections 8023 (“attorney-in-fact” defined), 8065 (“power of attorney for property” defined), 8068 (“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 attorneys-in-fact 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 attorney-in-fact. But this rule would probably result in undue restrictions on the types of entities that could serve as attorneys-in-fact. There is some appeal to the notion that only fiduciary-type artificial persons should serve as attorneys-in-fact 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). The State Bar Team expresses concern about nonfiduciary artificial persons acting as attorneys-in-fact.

The section has been revised to replace “be designated” with “act” as suggested by the State Bar Team. This avoids the possibility that a power could be invalid because, for example, the agent was a minor when the power was executed, even though not at the time the agent seeks to exercise a power.

State Bar Team 4 comments:

1. Team 4 suggests that the word “designated” be eliminated from the section and that § 2415.010 be rewritten as follows:

“Any person having the capacity to contract may act as an attorney-in-fact under a durable power of attorney for property.”

2. One issue that Team 4 suggests be given further consideration is whether a corporation (or an artificial person of any type) which is not qualified to act as a fiduciary under the laws of the State of California should be permitted to act as

an attorney-in-fact. Several of Team 4’s members expressed concern about the quality of services and professionalism of “professional” conservators. On the other hand, the need for independent attorneys-in-fact (just as for independent conservators) has dramatically increased in recent years. The demand should continue to expand as greater numbers of our citizens enter into the ranks of senior citizens.

3. This new section applies equally to durable powers of attorney for health and property.

§ 8301. Effect of designating unqualified person as attorney-in-fact [2415.020]

8301. If a person is not qualified to act as an attorney-in-fact under a power of attorney for property, the person may be removed as attorney-in-fact, but the removal does not affect the immunities of third persons nor relieve the unqualified person of any duties to the principal or the principal's successors.

Comment. Section 8301 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 8450 *et seq.*

See also Sections 8023 ("attorney-in-fact" defined), 8065 ("power of attorney for property" defined), 8068 ("principal" defined), 8083 ("third person" defined).

Staff Note. This section has been revised to eliminate the word "designation" for consistency with the revision of Section 8300. The staff does not understand the State Bar Team comment.

State Bar Team 4 comments:

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| 1. Is the Comment to § 2415.020 necessary or appropriate? As written, the language of the Comment does not seem to be particularly helpful in clarifying the language of the section. | 2. This new section applies equally to durable powers of attorney for health and property. |
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§ 8302. Multiple attorneys-in-fact [2415.030]

8302. (a) A principal may designate more than one attorney-in-fact in one or more powers of attorney for property and may provide that the powers conferred on two or more attorneys-in-fact 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 attorneys-in-fact over the same property or subject may only be exercised by their unanimous action.

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

(3) If a co-attorney-in-fact is unavailable to perform the duties of the co-attorney-in-fact because of absence, illness, or other temporary incapacity, the remaining co-attorney-in-fact or co-attorneys-in-fact may act under the power of attorney, as if they are the only attorneys-in-fact, where necessary to accomplish the purposes of the power of attorney or to avoid irreparable injury to the principal's property.

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

(d) A co-attorney-in-fact is not liable for the actions of other co-attorneys-in-fact, unless the co-attorney-in-fact participates in, knowingly acquiesces in, or conceals a breach of fiduciary duty committed by another co-attorney-in-fact.

Comment. Subdivision (a) of Section 8302 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 8303(c) (capacity of successor attorney-in-fact). Subdivision (d) is comparable to the general rule as to cotrustees in Probate Code Section 16402(a).

See also Sections 8023 ("attorney-in-fact" defined), 8065 ("power of attorney for property" defined), 8068 ("principal" defined).

Staff Note. Subdivisions (b)(1) has been revised in light of the State Bar Team's suggestion in point 2.

The staff has not taken the Team's suggested revision of subdivision (b)(3) (see point 3) because the reference to absence and illness seem useful, particularly since it is imagined that nonlawyers may have occasion to read the statute. We are not sure of the reason for the Team's suggested change. The language in the draft is the same as Probate Code Section 15622 applicable to trusts.

The Team would delete subdivision (c), arguing that it would "enable" a dishonest agent to perpetrate an "intentional misrepresentation" (point 4). The staff does not think the inclusion of this provision is a major issue, but we also do not think that its omission would have any effect on the schemes of dishonest agents. The point of the provision is to attempt to make powers of attorney more effective in dealing with third persons. As noted, however, the provision may not be very important because a third person may want to see the power of attorney in which case the status of the co-agent would be obvious anyway.

As to subdivision (d), the Trust Law provides a 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. The provision has been revised to provide additional detail. See September 1991 Minutes, at 17. The Team is divided on whether this subdivision should be retained. (See points 5 and 6).

The awkwardness of the term "co-attorneys-in-fact" (as compared with "co-agents" probably needs no comment.

State Bar Team 4 comments:

1. Team 4 believes that if more than one attorney-in-fact is designated, that as long as those attorneys-in-fact have independent and separately identifiable duties, that the attorneys-in-fact should not be required to act together. Stated another way, attorneys-in-fact should not be required to act unanimously unless their authority specifically overlaps. The entire section needs to be reviewed to ensure that the perspective is that attorneys-in-fact are not required to act unanimously unless they have authority over the same property or act.

2. With respect to subsection (1)(b), Team 4 suggests that subsection (1) be reworded as follows:

"A power vested in two or more attorneys-in-fact over the same property or act must be exercised unanimously by the attorneys-in-fact."

3. Team 4 suggests that subsection (3) of subsection (b) be modified by deleting the words "illness" and "other" in the second line and all words following the word "agents" in the fourth line. If modified as suggested above, subsection (3) would read as follows:

"If two or more attorneys-in-fact have the same power to take any action or to perform any act, and one of the attorneys-in-fact fails or is unable to act as such attorney-in-fact, the remaining attorney(s)-in-fact may act under the durable power of attorney, as if such attorney(s)-in-fact were the only attorney(s)-in-fact."

4. Team 4 believes that subsection (c) of § 2415.030 would create confusion among third parties and could in certain cases enable a dishonest attorney-in-fact to perpetrate an intentional misrepresentation. Team 4 believes

that third parties are entitled to know if a principal has appointed co-attorneys-in-fact, and for these reasons believes that subsection (c) should be deleted.

5. Team 4 had several concerns about subsection (d) of § 2415.030. Some members of Team 4 felt that at least a reasonable argument could be made that the section should be deleted inasmuch as a textbook on breaches of trust was not being written. In addition, the liability of successor and co-attorneys-in-fact represent a major concern and deserve treatment in their own section.

6. Team 4 felt that if subsection (d) were included in the section, then the subsection should be expanded in order to address certain additional issues. For example, if co-attorneys-in-fact were acting together, should one co-attorney-in-fact have the responsibility to "make up" a deficiency of another co-attorney-in-fact? In response to the Staff Note about whether more details should be added, Team 4's response is that greater detail should be included in the Statute. *[some detail added]*

7. This new section applies equally to durable powers of attorney for health and property.

§ 8303. Successor attorneys-in-fact [2415.040]

8303. (a) The principal in a power of attorney for property may designate one or more successor attorneys-in-fact to act if the authority of a predecessor attorney-in-fact terminates.

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

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

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

Comment. Section 8303 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 attorney-in-fact, see Section 8308. Subdivision (d) is comparable to the general rule as to successor trustees in Probate Code Section 16403(a).

A successor attorney-in-fact is the same as an original attorney-in-fact under this part. See Section 8023(b) ("attorney-in-fact" includes successor or alternate attorney-in-fact). See also Sections 8038 ("durable power of attorney for property" defined), 8050 ("nondurable power of attorney" defined), 8065 ("power of attorney for property" defined), 8068 ("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. The provision has been revised to provide additional detail. See September 1991 Minutes, at 17.

The State Bar Team finds this section too complex and therefore an inhibition on designating successors. In response to this point, the staff has simplified the drafting.

State Bar Team 4 comments:

1. Team 4 suggested that subsection (a) of § 2415.040 be reworded as follows:

"The principal may designate one or more qualified persons as successor attorney(s)-in-fact and may establish the terms and conditions

under which such attorney(s)-in-fact should act.”

2. The provision in the current draft is too complex, and the complexity thereby limits the principal’s ability to designate successor attorneys-in-fact. The provisions dealing with the designation of successor attorneys-in-fact should be as broad as possible and should allow the principal as much of an opportunity as is reasonable to appoint successor attorneys-in-fact.

3. Team 4 believes that the current subparagraph (b) should be deleted in its entirety and should be replaced with language that reflects the following concepts. Civil Code § 2304 gives the attorney-in-fact the power to take any action or perform any act which the principal could perform or undertake. This concept has been incorporated into § 2400.020 in the rewriting suggested by Team 4. (The rewritten § 2400.020 specifically incorporates the general law of agency into the law dealing with durable powers of attorney.) The difficulty with the current subsection (b) is that

there may be certain (difficult to define) limitations on the principal’s power to delegate or the attorney-in-fact’s power to act or perform.

4. As written, subsection (d) is ambiguous particularly concerning an attorney-in-fact’s duty to take action with respect to a continuing breach. Team 4 believes that a successor attorney-in-fact should be liable for his or her failure to attempt to cure a continuing breach by a predecessor attorney-in-fact. In the event of the occurrence of any of the events enumerated in the Staff Note (e.g., the successor knowingly permits the breach to continue, etc.), then the successor-in-fact should have an affirmative duty to act. Therefore, in response to the Staff’s question, Team 4 believes that more detail should be added. Team 4 also wants to commend the Staff’s efforts in drawing attention to these difficult issues and the Staff’s discussion of the same.

5. This new section applies equally to durable powers of attorney for health and property.

§ 8304. Compensation of attorney-in-fact [2415.050]

8304. An attorney-in-fact is entitled to reasonable compensation for services rendered to the principal as attorney-in-fact and to reimbursement for reasonable expenses incurred as a result of acting as attorney-in-fact.

Comment. Section 8304 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 attorney-in-fact 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 attorney-in-fact and any successor attorneys-in-fact 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 attorney-in-fact 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 attorney-in-fact.

See Section 8351(b) (effect of compensation on standard of care). See also Sections 8023 (“attorney-in-fact” defined), 8059 (“power of attorney” defined), 8068 (“principal” defined).

Staff Note. This section provides the default rule that the agent is entitled to compensation. Thus, it is consistent with the position taken by the State Bar Team. The introductory clause (“Subject to the power of attorney and any separate agreement...”) has been eliminated at the urging of the Team. The draft will have to be checked at some point to make sure that it is clear which provisions can be controlled by the principal.

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).

State Bar Team 4 comments:

1. Team 4 extensively discussed whether or not an attorney-in-fact should be compensated, and what, if any, were the expectations of the public with respect to the issue of compensation. Several members of Team 4 believed that if a family member were serving as an attorney-in-fact, that neither the principal nor the attorney-in-fact would anticipate or expect that the attorney-in-fact would be compensated. On the other hand, the majority of Team 4 believes a provision favoring compensation is fairer to the majority of attorneys-in-fact. Acting as an attorney-in-fact entails numerous responsibilities and often significant time commitments. The consequences of acting as an attorney-in-fact often means time missed from work. The attorney-in-fact's own affairs or family may suffer. Finally, the principal and attorney-in-fact can always agree that no compensation should or will be paid. Therefore, Team 4 suggests that at the minimum, the section be rewritten to provide that an attorney-in-fact is entitled to receive reasonable compensation for services rendered to the principal.

2. Team 4 felt that the general presumption should be in favor of compensation with the clear understanding that such presumption can be easily changed by the principal. For example, if the principal and the attorney-in-fact agreed that no compensation were to be paid, then in the durable power of attorney, the principal simply would state that no compensation was to be paid. In the

event that the attorney-in-fact did not wish to be paid, the attorney-in-fact could refuse to accept the compensation; the situation would be analogous to an executor's refusal to accept the compensation authorized under the Probate Code.

3. It should not be necessary to have an introductory clause which provides for an exception set forth in the durable power itself. As previously discussed, the concept of the principal's ability to deviate from the statutory provisions should be included as a separate section in the general introductory provisions of the Statute.

4. Specifically, Team 4 suggests that § 2415.050 be rewritten as follows:

"An attorney-in-fact is entitled to reasonable compensation for services rendered to the principal and to reimbursement for reasonable expenses incurred as a result of acting as the principal's attorney-in-fact."

5. Finally, Team 4 firmly believes, as previously stated, that separate side agreements between the principal and the attorney-in-fact should not be permitted. Particularly, in the area of compensation substantial abuse is likely to be the result of the use of a side agreement. For that reason, Team 4 would delete the reference to a separate side agreement which currently appears in the draft of § 2415.050.

6. This new section applies equally to durable powers of attorney for health and property.

§ 8305. Delegation of attorney-in-fact's authority [2415.060]

8305. (a) An attorney-in-fact 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 persons qualified to exercise the powers delegated, subject to any directions or limitations of the principal expressed in the power of attorney, but the attorney-in-fact making the delegation remains responsible to the principal for the exercise or nonexercise of the powers delegated.

(b) A delegated attorney-in-fact need not indicate the attorney-in-fact's capacity as a delegated attorney-in-fact.

Comment. Section 8305 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 attorney-in-fact needs to delegate authority under the power during a planned absence. However, the delegating attorney-in-fact remains responsible for the acts of subagents. If the principal is available and not incapacitated, the attorney-in-fact is expected to consult about any delegation. See Section 8356 (consultation with principal).

See also Sections 8023 ("attorney-in-fact" defined), 8038 ("durable power of attorney for property" defined), 8050 ("nondurable power of attorney" defined), 8065 ("power of attorney for property" defined), 8068 ("principal" defined).

Staff Note. The Trust Law takes a different approach to the liability of a trustee to beneficiaries for acts of attorneys-in-fact 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 attorney-in-fact, where the trustee made an improper delegation, where reasonable care was not used in selecting the attorney-in-fact, where supervision of the attorney-in-fact was improper, where the trustee concealed the acts of the attorney-in-fact, or where the trustee neglects to take reasonable steps to compel redress of the attorney-in-fact'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.

The State Bar Team disfavors broad delegation and suggests implementing a distinction between "mechanical" powers and "discretionary" powers as in the general agency statute. The Team's position might be combined with the Beverly Hills Bar position (see below) to permit "mechanical" power delegations unless forbidden in the power of attorney, and preclude "discretionary" power delegations unless authorized in the power of attorney.

As to the disclosure issue raised by the Team, see the Staff Note to Section 8302.

Beverly Hills Bar Legislative Committee comments: The BHBLC would reverse the presumption and permit delegation only if it is expressly permitted by the principal. (See Exhibit 1, p.2, ¶ 2.) The BHBLC would give a priority to co-agents or successors named in the power of attorney.

State Bar Team 4 comments:

1. Team 4 is uncomfortable with § 2415.060 as it is currently written. Team 4 believes that an attorney-in-fact should not be allowed to delegate all powers, both discretionary and mandatory. Team 4 suggests that the delegation standard for an attorney-in-fact be that as set forth in Civil Code § 2349 which authorizes the delegation of mechanical powers as opposed to discretionary powers.

2. Subsection (b) presents the same issue as is presented in § 2415.030 — specifically, whether or not an attorney-in-fact's capacity, if the attorney-in-fact is not the sole attorney-in-fact, must be disclosed to third parties. Consistent with its previously stated position, Team 4 believes that such capacity, in this case as to a delegated power, should be disclosed to third parties.

3. This new section applies equally to durable powers of attorney for health and property.

§ 8306. Relation of attorney-in-fact to court-appointed fiduciary [2415.070]

8306. (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 attorney-in-fact 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 of the estate 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 8306 continues former Section 2402(a) without substantive change.

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 attorney-in-fact 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 8306 to other provisions of this title. 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 title applies only to powers of attorney for property. See Section 8200 (application of title).

See also Sections 8023 ("attorney-in-fact" defined), 8038 ("durable power of attorney for property" defined), 8068 ("principal" defined).

Staff Note. The State Bar Team questions changes that were made in existing law to the Uniform Durable Power of Attorney Act. The points are addressed in the Comment.

State Bar Team 4 comments:

1. Team 4 has several questions with respect to this provision. This provision is derived from the Uniform Durable Powers of Attorney Act as adopted in California. Every effort was made to adopt the Uniform Act in toto while at the same time to allow those variations which were felt to be necessary in order to respond to unique

California situations. As a general principle, Team 4 does not favor changes which would deviate from the Uniform Act unless those changes are supported by compelling reasons.

2. This new section applies equally to durable powers of attorney for health and property.

§ 8307. Attorney-in-fact's authority when principal missing or held captive in foreign country [2415.080]

8307. (a) If the principal is not available to communicate in person with the attorney-in-fact 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 attorney-in-fact under a power of attorney for property, whether durable or nondurable, continues and is not terminated.

(b) The attorney-in-fact 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 attorney-in-fact'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 8307 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 attorney-in-fact's powers when the attorney-in-fact 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 attorney-in-fact'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 8023 ("attorney-in-fact" defined), 8029 ("durable power of attorney" defined), 8050 ("nondurable power of attorney" defined), 8059 ("power of attorney" defined), 8068 ("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.

State Bar Team would delete this section, arguing that a power with a termination date should terminate even under these circumstances. The Team also believes the section is unnecessary, citing the absent federal personnel statute in the Probate Code. However, the federal statute only applies to federal personnel, not everyone. Probate Code Section 3700(a) incorporates the definition in Probate Code Section 1403 which defines absentee as a member of a "uniformed service" or a federal employee who has been determined to be in missing status by the appropriate authority. And Section 3720 and draft Section 8307 are not "overlapping" — they are mutually exclusive.

In any event, the Team suggests that a springing power should spring under the statutory circumstances (as suggested earlier in this note), but an existing power should not hold over. The staff finds this to be an inconsistent position. If the section is to be retained, we would suggest adding to it the springing power feature.

As to the point of whether this section should be applied to both health care and property powers, the staff has difficulty imagining how it could usefully apply to making health care decisions where the principal is missing or being held captive.

State Bar Team 4 comments:

1. Team 4 suggests that § 2415.080 be deleted in its entirety. The section creates an exception which is directly contrary to the articulated wishes of the principal. Team 4 believes that if a durable

power of attorney contains a specific termination date (or refers to a specific terminating event), that the express wishes of the principal, regardless of whether that person is missing, should be honored.

2. Further, this section is unnecessary. A specific statute in the Probate Code, namely Probate Code § 3700 et seq., deals with absent federal personnel. The Probate Code section addresses most of the issues raised in § 2415.080. The result of having two overlapping sections will simply be to create practitioner confusion.

3. Team 4 supports the following concepts. If a durable power of attorney is in existence, if a person is missing as defined in the Statute, and/or if the circumstances listed in § 2415.080(a) exist, then a springing power, which otherwise would come into effect only upon the principal's incapacity, may be triggered. Consideration should be given to moving this section to the section dealing with springing powers.

4. This new section applies equally to durable powers of attorney for health and property.

§ 8308. Termination of attorney-in-fact's authority [2415.090]

8308. (a) Except as provided in Section 8312 and subject to subdivision (b), the authority of an attorney-in-fact 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) Resignation of the attorney-in-fact.
- (3) Incapacity of the attorney-in-fact.
- (4) Dissolution, annulment, or legal separation of the attorney-in-fact and principal as provided in Section 8309.
- (5) Removal of the attorney-in-fact.
- (6) Death of the attorney-in-fact.

(b) An attorney-in-fact or third person who does not have notice of an event that terminates the power of attorney or the authority of an attorney-in-fact is protected from liability as provided in Chapter 4 (commencing with Section 8450).

Comment. Section 8308 is drawn in part from the general agency rules provided in Section 2355. This section continues the substance of former law as to termination of the authority of attorneys-in-fact 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 8312. Subdivision (a)(1) provides that the authority of an attorney-in-fact necessarily ceases when the underlying power of attorney is terminated. See Section 8231 (termination of power of attorney for property). In a case where the principal is missing or held captive in a foreign country, the attorney-in-fact's authority does not terminate, as provided in Section 8307. Subdivision (a)(2) is similar to rule in Section 2355(d) (renunciation by agent). Subdivision (a)(3) is similar to Section 2355(e). Subdivision (a)(6) 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 8023 ("attorney-in-fact" defined), 8038 ("durable power of attorney for property" defined), 8050 ("nondurable power of attorney" defined), 8065 ("power of attorney for property" defined), 8083 ("third person" defined).

Staff Note. The language concerning termination of the attorney-in-fact's authority on dissolution has been added to implement a Commission decision. See May 1992 Minutes, at 9.

The State Bar Team would revise the incapacity rule (in Section 8308(3)) to provide that the authority of the attorney-in-fact is suspended during incapacity, not terminated (see points 1-2 below). This would appear to be consistent with case law. See *Clay v. Saute*, 140 Cal. App. 2d 681, 295 P.2d 914 (1956) (construing Section 2355 to refer to capacity at time of action and not as permanent termination); 2 B. Witkin, *Summary of California Law Agency and Employment* § 155, at 148-49 (9th ed. 1987). If the Commission approves codification of this principle, the staff will prepare a redraft of the section, perhaps using the approach suggested by the Team. The article by Harley Spitler, noted in the Team comments, is attached to Memorandum 92-12 as Exhibit 2.

The Team suggests using "resignation," "refusal," or "failure to act" instead of renunciation. The staff has replaced "renunciation" in subdivision (a)(2) with "resignation." Refusal or failure to act seem too indefinite to use as standards in this section.

State Bar Team 4 comments:

1. One issue which is not addressed in this section is the incapacity of the attorney-in-fact. Such incapacity would have most serious consequences for the principal, particularly if the principal also were incapacitated. Harley Spitler, a member of Team 4, has written an article entitled "A Trap for the Wary," which discusses the issue of the incapacity of the attorney-in-fact; a copy of the article is attached for the Staff's convenience. In accordance with its concern about the incapacity of the attorney-in-fact, Team 4 would modify § 2415.090(a) as follows:

"Except as provided in § 2415.130 and subject to subdivision (b), the authority of an attorney-in-fact is suspended during the incapacity of the attorney-in-fact and terminated by any of the following events"

2. Since the incapacity of the attorney-in-fact is dealt with in the introductory language, incapacity should be removed from the five enumerated events which would cause a termination of the authority of the attorney-in-fact. Team 4 believes that incapacity should not necessarily terminate permanently an attorney-in-fact's authority. The intent is to honor the

principal's wishes, and particularly if the incapacity is temporary, the attorney-in-fact should not be barred from acting forever. Team 4 further would delete the specific reference to non-durable powers of attorney.

3. In addition, under subsection 4, "removal of the agent," Team 4 would delete the words "by the principal or by court order" inasmuch as such list may not be exhaustive. Therefore, sub-item (4) should read: "removal of the agent." [done]

4. Finally, all of the events (1 through 5) of subsection (a) should be treated equally; that is, each event should identify who takes the action (e.g., "termination of the durable power of attorney by the principal") or none should.

5. Under subsection 2 (that is, event two), the current version states that the durable power of attorney is terminated as the result of the renunciation of the agent. Team 4 suggests that more concrete words such as "resignation," "refusal," or "failure to act" would be more helpful to practitioners.

6. This new section applies equally to durable powers of attorney for health and property.

§ 8309. Effect of dissolution, annulment, or legal separation [2415.100]

8309. Unless the power of attorney expressly provides otherwise:

(a) If, after executing a power of attorney for property, the principal's marriage to the attorney-in-fact is dissolved or annulled, or the spouses obtain a legal separation, the principal's designation of the spouse as an attorney-in-fact terminates.

(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 attorney-in-fact is dissolved or annulled, or the judicial or legal separation of the principal and attorney-in-fact is declared, or the

attorney-in-fact commences an action for such relief, the attorney-in-fact's authority is terminated. If the attorney-in-fact's authority is terminated solely by this subdivision, it is revived by the principal's remarriage to or reconciliation with the attorney-in-fact.

Comment. Subdivision (a) of Section 8309 is generalized from former 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). This section has been expanded to apply to legal separation. In the case of dissolution or annulment, it is the termination of the marital status of the parties that triggers the operation of the rule in subdivision (a), not the date of the division of property.

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 8059 ("power of attorney" defined).

See also Sections 8023 ("attorney-in-fact" defined), 8065 ("power of attorney for property" defined), 8068 ("principal" defined).

Staff Note. Missouri law follows the federal absentee policy and terminates an attorney-in-fact's authority on "the filing of any action for divorce or dissolution of the marriage of the principal and the principal's attorney-in-fact 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.

Subdivision (a) has been revised to implement Commission decisions. See May 1992 Minutes, at 9-10. The staff will continue to work on harmonizing subdivision (a) and (b) (if possible under federal law). The Team would delete subdivision (b). This appeals to the staff, assuming that it is not mandated by federal law.

In addition, the issue whether there should be any revival effect on the parties' remarriage or reconciliation requires further work. Initially, it would seem desirable to have one general rule applicable to powers of attorney for property and health care, to wills, and to federal absentees, but additional analysis of the issues may lead us to different conclusions.

The State Bar Team would adopt the Missouri and federal absentee rule and terminate the spouse-agent's authority on the filing of a petition for dissolution, nullity, or legal separation. The Team is also concerned about the effect of living separate and apart and the jurisdictional issues involved in rehabilitation of the attorney-in-fact on remarriage or reconciliation.

State Bar Team 4 comments:

1. Team 4 agrees with the Staff Note which quotes Missouri law, which follows the federal absentee policy. Team 4 believes that a durable power of attorney should be terminated upon the filing of an action for divorce or dissolution. Team 4 would leave the word "divorce" in the section, inasmuch as this section may be applied in other jurisdictions.

2. An issue which Team 4 has not resolved is whether or not a durable power of attorney should be terminated in the event that a husband and wife are living separate and apart. Team 4 is most concerned about the period prior to the termination of a marriage, that is while the parties are legally separated or living separate and apart. This is an extremely dangerous period, particularly when one

spouse is to be given, or has, the sweeping powers normally accorded to an attorney-in-fact. The issue is whether the section should be broadened to include the situation of a married couple living separate and apart. Although definitional difficulties might arise, Team 4 suggests that the section encompass the situation of a married couple living separate and apart inasmuch as this is a most frequently occurring circumstance.

3. Still another unresolved issue is whether a court should be given the power to revive a durable power of attorney notwithstanding the filing of an action for dissolution, etc. If it is determined that such revival should be permitted, then a subissue which must be addressed is whether the probate court or the court having jurisdiction over the dissolution, etc., should be given the power to revive the durable power of attorney. Team 4 believes that the second sentence of § 2415.100(a) should be deleted. A durable power of attorney should not automatically revive upon the remarriage of the principal and the attorney-in-fact. This is particularly true in view of the trauma which usually accompanies the legal separation of a married couple or the dissolution of their marriage. In 1991, one court declared that a will was not revived as a result of the remarriage of the individuals. Team 4 believes that the same policy should apply to the revival of durable

powers of attorney. The main issue underlying this debate is whether or not an automatic revival is consistent with or opposite to public expectations. Team 4 believes that it is not consistent with public expectations that there be an automatic revival of a durable power of attorney in the event of the remarriage of the parties.

4. Team 4 would delete subsection (b) of § 2415.100 because subsection (a) has been broadened to include all of the instances currently set forth in subsection (b). Team 4 believes that after the changes have been made in subsection (a), subsection (b) will be unnecessary.

5. However, Team 4 requests the input of the Staff with respect to the suggestion presented in item 4 above. If the Staff believes that subsection (b) should remain, then Team 4 suggests that subsection (b) be rewritten. As set forth above, Team 4 does not believe that the attorney-in-fact's authority should be reinstated as a result of the remarriage of parties. If the remarriage standard is retained, then Team 4 strongly suggests that the word "reconciliation" be defined. Without such definition, substantial litigation about the nature of the events constituting reconciliation is likely to ensue.

6. This new section applies equally to durable powers of attorney for health and property.

§ 8310. Succession following termination of attorney-in-fact's authority [2415.110]

8310. Where the authority of an attorney-in-fact 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 attorney-in-fact or prescribes a procedure for designating a successor attorney-in-fact, then the authority provided in the power of attorney extends to and vests in the successor attorney-in-fact in place of the attorney-in-fact whose authority was terminated.

Comment. Section 8310 is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.717(2) (Vernon 1990). See Section 8303 (successor attorneys-in-fact).

See also Sections 8023 ("attorney-in-fact" defined), 8065 ("power of attorney for property" defined).

Staff Note. The State Bar Team would delete this section as unnecessary. The staff tends to agree that it is embroidery on the inherent meaning of "successor." The question is whether it would provide any useful guidance to those less sophisticated in these matters.

State Bar Team 4 comments:

1. Team 4 suggests that this section be eliminated in its entirety. Team 4 believes that it is unnecessary to say that a successor attorney-in-fact has all of the powers of the originally designated

attorney-in-fact. Once a successor attorney-in-fact is appointed, then by necessity, that attorney-in-fact must have all the rights and powers of an attorney-in-fact. In addition, the concept of a

successor attorney-in-fact having all of the powers of an attorney-in-fact is covered by the provisions of § 2415.120 concerning the appointment of successor attorney(s)-in-fact.

2. This new section applies equally to durable powers of attorney for health and property.

§ 8311. Attorney-in-fact's duties and powers on termination of authority [2415.120]

8311. (a) On termination of the attorney-in-fact's authority, the attorney-in-fact shall promptly deliver possession or control of the principal's property in the following order of priority:

(1) To a qualified successor attorney-in-fact, if any.

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

[(3) To the principal's spouse, as to any community property.]

(4) 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 or guardian of the estate.

(5) 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 attorney-in-fact's authority, the attorney-in-fact 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) Termination of an attorney-in-fact's authority does not relieve the attorney-in-fact of any duty to render an account actions taken as attorney-in-fact.

(d) The attorney-in-fact has the powers reasonably necessary under the circumstances to perform the duties provided by this section.

Comment. Section 8311 is new. The rules concerning duties on termination of the attorney-in-fact'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 attorney-in-fact's relation with court-appointed fiduciaries under a durable power of attorney, see Section 8306.

See also Sections 8023 ("attorney-in-fact" defined), 8038 ("durable power of attorney for property" defined), 8050 ("nondurable power of attorney" defined), 8068 ("principal" defined).

Staff Note. This section has been revised in light of the State Bar Team comments. However, the staff does not see that this section has much of an application to durable powers of attorney for health care, as stated by the Team.

State Bar Team 4 comments:

1. Team 4 suggests that the first clause of subsection (a) of § 2415.120 be deleted. The concept that a durable power of attorney is subject to an order of a court of competent jurisdiction is self-evident and certainly applies to all of the provisions dealing with durable powers of attorney. To insert "subject to the authority of the

court" language in this section would result in confusion about the applicable standard in other sections. Therefore, Team 4 suggests that subsection (a) read:

"On termination of the attorney-in-fact's authority, the attorney-in-fact shall promptly

deliver possession or control of the principal's property in the following order of priority:"

2. The most important aspect of this section is establishing the order of priority of those individuals or institutions who or which are entitled to receive the principal's property upon termination of the durable power of attorney. Team 4 suggests that subsections (1) and (2) of subsection (a) remain as written. Team 4 then suggests that a new subsection (3) be added as follows: "To the spouse as to any community property." In addition, Team 4 suggests that subsection (3) (under the new numbering scheme subsection (4)) be rewritten to delete the first clause so that the section reads: "To the principal's conservator of the estate or guardian of the estate." Team 4 believes that the last clause of subsection (3) as written is confusing and lacks a

satisfactory reference under California law, and for those reasons, the clause should be deleted.

3. Team 4 also suggests that a new subsection (c) be added which deals with the continuing responsibility of the attorney-in-fact whose authority as attorney-in-fact has been terminated. Team 4 suggests that new subsection (c) read as follows:

"Termination of an attorney-in-fact's authority does not relieve the attorney-in-fact of any duty to render an account of his/her transactions entered into on behalf of the principal."

4. As a result of the addition of the new subsection (c), the old subsection (c) would become subsection (d).

5. This new section applies equally to durable powers of attorney for health and property.

§ 8312. Power coupled with an interest [2415.130]

8312. To the extent that the power of an attorney-in-fact is coupled with an interest in the subject of the power of attorney for property, the attorney-in-fact'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 attorney-in-fact, or the dissolution or annulment of the attorney-in-fact's marriage with the principal.

Comment. Section 8312 continues the special rule concerning powers coupled with interests provided in Section 2356(a). This section provides an exception to Sections 8231 (termination of power of attorney for property), 8308 (termination of authority of attorney-in-fact), and 8309 (effect of dissolution or annulment).

See also 8023 ("attorney-in-fact" defined), 8065 ("power of attorney for property" defined), 8068 ("principal" defined).

Article 2. Duties of Attorneys-in-Fact

§ 8350. When duties commence [2418.010]

8350. (a) Except as provided in subdivision (c), a person who is designated as an attorney-in-fact 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 attorney-in-fact to act for the principal in subsequent transactions, but the attorney-in-fact has a duty to complete a transaction that has been commenced.

(c) If an attorney-in-fact under a power of attorney has agreed expressly in writing to act for the principal in specified circumstances, the attorney-in-fact has a duty to act when the circumstances occur. The agreement to act on behalf of the principal is enforceable against the attorney-in-fact as a fiduciary without

regard to whether there is any consideration to support a contractual obligation to do so.

Comment. Section 8350 is drawn in part 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 attorney-in-fact under a durable or nondurable power of attorney imposes no duty on the named person to act. This is true even if the attorney-in-fact knows of the designation and has received the power of attorney. A duty to act under this title 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). However, a particular transaction must be completed.

This section recognizes that many powers of attorney are given and accepted as a gratuitous accommodation by the attorney-in-fact. 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 attorney-in-fact chooses not to do so. Consequently, unless the attorney-in-fact 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 attorney-in-fact 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 attorney-in-fact 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 attorney-in-fact 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 subdivision (b).

See also Sections 8023 ("attorney-in-fact" defined), 8038 ("durable power of attorney for property" defined), 8050 ("nondurable power of attorney" defined), 8068 ("principal" defined).

Staff Note. The "but" clause in subdivision (b) has been added to implement a Commission decision. See May 1992 Minutes, at 10.

In point 2, below, the State Bar Team suggests some new ideas for Commission consideration bearing on the duty to act. Requiring the prospective attorney-in-fact to acknowledge an obligation (by signing under penalty of perjury?) seems a bit extreme, particularly since the power may not become exercisable for many years. The law does not impose such a requirement on other "contingent" fiduciaries. The suggestion that a refusal to accept the duties would result in an automatic shift to a successor attorney-in-fact seems more workable, but also seems largely covered by the existing draft. The first-named attorney-in-fact need only resign and the succession follows. See Sections 8308, 8310.

State Bar Team 4 comments:

1. The issues raised by this section have been discussed extensively, and therefore Team 4 believes reiterating and summarizing each and every argument is unnecessary. The consensus of the Executive Committee, as well as Team 4, is that an attorney-in-fact does not have an automatic duty to act as an attorney-in-fact either upon the incapacity of the principal or if designated as attorney-in-fact immediately upon the execution of the durable power of attorney.

2. Although the majority opinion is clear, several members of Team 4 believe that the expectations of the public are exactly the

opposite, that is that the public assumes that the attorney-in-fact will act upon the principal's incapacity. For that reason, several suggestions to address this concern have been made; these considerations are set forth at this point. One suggestion is that, as part of the creation of a durable power of attorney, the attorney-in-fact could be required to acknowledge such attorney-in-fact's obligation to act and to perform his or her duties as such attorney-in-fact under the durable power of attorney. A second suggestion is that if such an acceptance is not forthcoming, or if the attorney-in-fact fails to act, the section provide

that a named successor attorney-in-fact would automatically become the attorney-in-fact.

3. This new section applies equally to durable powers of attorney for health and property.

§ 8351. Standard of care and liability for losses [2418.020]

8351. Subject to a provision in the power of attorney or in a separate agreement between the principal and attorney-in-fact:

(a) Except as provided in subdivisions (b) and (c), in dealing with property of the principal, the attorney-in-fact 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 attorney-in-fact is not compensated, the attorney-in-fact is not liable for a loss to the principal's property unless the loss result from the attorney-in-fact's bad faith, intentional wrongdoing, or gross negligence.

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

Comment. Section 8351 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 attorney-in-fact. 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 8304 (compensation of attorneys-in-fact). 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 8359 (attorney-in-fact'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 8023 ("attorney-in-fact" defined), 8065 ("power of attorney for property" defined), 8068 ("principal" defined).

Staff Note. The State Bar Team agrees with the policies in this section, but suggests some variant language. The suggested language would require the attorney-in-fact to use special skills, whereas the draft holds the attorney-in-fact to the standard of persons with such skills. The question of using special skills is addressed in Section 8359. Perhaps the two sections should be harmonized.

State Bar Team 4 comments:

1. Team 4 agrees with the standard set forth in subsection (b) of § 2418.020, that is that an attorney-in-fact who is compensated should be held to a higher standard than an attorney-in-fact who is not compensated. Since many of the

persons who will be acting as attorneys-in-fact will be well-meaning but inexperienced family members, the different standards seem appropriate; presumably, the principal is aware of what may be the less sophisticated abilities of a family

member, but nevertheless designates the family member because of other considerations such as loyalty, familiarity, etc. In most "family" situations, neither the principal nor the attorney-in-fact expect that the attorney-in-fact will be compensated. Further, the different standards which apply to compensated and non-compensated attorneys-in-fact are a continuation of existing law.

2. Team 4 agrees with and supports the Staff's position that a prudent person standard should be adopted as the standard of care with respect to an attorney-in-fact's liability for losses.

3. Team 4 agrees with the substance of § 2418.020(c) that an attorney-in-fact who possesses special skills or who is appointed on the basis of possessing those special skills should have a duty

to use those special skills. However, Team 4 suggests that subsection 2418.020(c) be redrafted as follows:

"An attorney-in-fact who possess special skills or expertise or who represents that such attorney-in-fact possesses special skills or expertise and who is appointed in reliance on such representations shall make use of such skills or expertise when acting under a durable power of attorney."

4. In redrafting § 2418.020(c), Team 4 relied upon § 379 of the Restatement of Agency with respect to the standard to which a compensated agent should be held.

5. This section applies equally to durable powers of attorney for health and property.

§ 8352. Duty of loyalty [2418.030]

8352. When acting under a power of attorney for property, the attorney-in-fact has a duty to act in the interest of the principal.

Comment. Section 8352 restates the substance of part of Section 2322(c) which formerly applied to powers of attorney, but omits the requirement that the attorney-in-fact act "solely" in the principal's interest. The duty of loyalty is also consistent with Section 2306 (agent not to defraud principal). Unlike Section 2322(c), Section 8352 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 attorney-in-fact to the principal is subject to the limitations in Section 8350 relating to commencement of the duties of an attorney-in-fact under a power of attorney.

See also Sections 8023 ("attorney-in-fact" defined), 8065 ("power of attorney for property" defined), 8068 ("principal" defined).

Staff Note. The word "solely" has been deleted from the previous draft. Both the Beverly Hills Bar Legislative Committee and the State Bar Team support this change.

By way of comparison, 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). Also 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 ¶ 802-7 (Smith-Hurd Supp. 1990). The State Bar Team would add a new provision like that in Illinois.

Beverly Hills Bar Legislative Committee comments: As noted, the BHBLC would loosen the strict standard literally applied by existing law. See Exhibit 1, p. 2.

State Bar Team 4 comments:

1. Team 4 supports the suggestion of the Staff that the word "solely" as currently set forth in § 2418.030 be deleted. Team 4 further suggests

that § 2418.030 be reorganized by making the current section into subpart (a) and adding as subpart (b) a modified provision from Illinois Law

(set forth in the Staff's draft of the Statute dated May, 1991, p. 34). Thus, § 2418.030 would read:

"(a) When acting under a durable power of attorney for property, the attorney-in-fact has a duty to act in the interest of the principal.

"(b) An attorney-in-fact who acts for a principal shall not be liable or limited in so acting merely because the attorney-in-fact also benefits from the act, has individual or conflicting interests in relation to the property, care or affairs of the principal, or acts in an inconsistent manner regarding the respective interests of the principal and the attorney-in-fact."

2. The issue of actual or potential conflicts of interest between the attorney-in-fact and the principal is a common thread throughout proposed §§ 2418.030, 2418.040 and 2418.050. Practitioners and the public need to clearly understand that § 2418.030's conflict-of-interest concept applies to each of the designated sections. Team 4 suggests that the conflict-of-interest concept as set forth in § 2418.030 be referred to in the comments of other relevant sections. The area of conflicts of interests is one of theoretical complexity and of great practical significance to both practitioners and the public. The more guidance that can be given the better.

3. This section applies equally to durable powers of attorney for health and property.

§ 8353. Duty to avoid conflict of interest [2418.040]

8353. (a) The attorney-in-fact has a duty not to use or deal with the principal's property for the attorney-in-fact'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 attorney-in-fact has an interest adverse to the principal.

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

(c) A transaction between the attorney-in-fact and the principal that occurs during the existence of the power of attorney or while the attorney-in-fact's influence with the principal remains and by which the attorney-in-fact obtains an advantage from the principal is presumed to be a violation of the attorney-in-fact'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 attorney-in-fact and a principal relating to the hiring or compensation of the attorney-in-fact.

Comment. Section 8353 restates part of Section 2322(c) which formerly applied to powers of attorney. Unlike Section 2322(c), Section 8353 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 8023 ("attorney-in-fact" defined), 8065 ("power of attorney for property" defined), 8068 ("principal" defined).

Staff Note. The Comment asserts that this section is consistent with Section 2306. Section 2306 is an odd section which states 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.

State Bar Team 4 comments:

[See Team 4 comments following Section 2418.050.]

§ 8354. Duty not to undertake adverse responsibilities [2418.050]

8354. The attorney-in-fact under a power of attorney for one principal has a duty not to knowingly become an attorney-in-fact 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 attorney-in-fact has a duty to eliminate the conflict or resign as attorney-in-fact when the conflict is discovered.

Comment. Section 8354 restates part of Section 2322(c) which formerly applied to powers of attorney. Unlike Section 2322(c), Section 8354 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 8023 ("attorney-in-fact" defined), 8065 ("power of attorney for property" defined), 8068 ("principal" defined).

Staff Note. The State Bar Team suggests a substantial reorganization of the conflict of interest rules, in part because the Team believes that a vaguer fiduciary standard applies to attorneys-in-fact and that it should be articulated in the statute.

State Bar Team 4 comments:

1. Team 4 believes that both § 2418.040 and § 2418.050 encompass similar substantive areas, and for that reason, Team 4 has combined its discussion of each section. Team 4 suggests that § 2418.050 be deleted in its entirety and that § 2418.040 be restated and reorganized in its entirety as set forth in the following discussion.

2. Team 4 believes that the conflict of interest issues that might arise between an attorney-in-fact and a single principal are adequately addressed in § 2418.030(b). (For purposes of organizing the Statute, the Staff may want to move Team 4's proposed § 2418.030(b) to § 2418.040 as subpart (a).)

3. The newly proposed § 2418.040 would set forth provisions dealing with conflicts of interest between one attorney-in-fact and multiple principals who have designated the one attorney-in-fact to act on each of their respective behalves.

4. Team 4 suggests that § 2418.040 not limit the manner in which an attorney-in-fact could deal with a conflict of interest. In other words, subject to the standards established by the section, the attorney-in-fact would be free to resolve conflicts of interest by, for instance, obtaining knowing waivers of the conflict of interest, declining to act in the area of conflict, etc. The section is clear, however, that if a conflict of interest does arise under proposed § 2418.040 (see subparagraph 7 of this discussion of §§ 2418.040 and 2418.050), then the attorney-in-fact either would have to eliminate the conflict of interest or resign as

attorney-in-fact when the attorney-in-fact discovered the conflict.

5. As presented in item 7 of this discussion of § 2418.040 and § 2418.050, Team 4 has suggested a substantial revamping of § 2418.040. Team 4 has suggested the changes because Team 4 does not believe that the fiduciary standards expressed in trust law apply to §§ 2418.040 and 2418.050; rather, the standard is a vaguer fiduciary standard which requires articulation and definition. Team 4 believes that a different, but clearly delineated standard must be created because an attorney-in-fact is not a trustee.

6. The specific reasons that Team 4 suggests that § 2418.040(a) be deleted in its entirety are: 1) the section is too broad; 2) the concept set forth in the subsection is already discussed by the new conflict of interest section; 3) although the subsection attempts to be all-encompassing, situations are more than likely to arise which will not have been addressed by the section. The resulting omissions will simply confuse the public and practitioners.

7. Team 4 suggests that the concept embodied in § 2418.040(c) be retained, but that the subsection be transferred to a new subsection (b) of § 2418.055. Team 4 further suggests that the following language set forth in § 2418.055(b), "or while the agent's influence with the principal remains," be deleted.

8. Team 4 suggests that § 2418.040 be restated as follows:

"2418.040. Subject to the provisions of § 2418.030, an attorney-in-fact has a duty not to take part in any transaction where such action

adversely affects another principal for whom the attorney-in-fact is also acting.

9. This section applies equally to durable powers of attorney for health and property.

§ 8355. Duty to keep principal's property separate and identified [2418.060]

8355. (a) The attorney-in-fact 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 attorney-in-fact 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 attorney-in-fact as attorney-in-fact for the principal.

Comment. Section 8355 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 8355 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 8023 ("attorney-in-fact" defined), 8068 ("principal" defined).

§ 8356. Duty to keep principal informed and follow instructions [2418.070]

8356. On matters undertaken or to be undertaken on the principal's behalf and to the extent reasonably possible under the circumstances, an attorney-in-fact 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 8356 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 8356 supersedes the general agency rule in Section 2320 (power to disobey instructions), to the extent it applied to powers of attorney.

See also Sections 8023 ("attorney-in-fact" defined), 8068 ("principal" defined).

Staff Note. The State Bar Team would omit "obtain" from this section. In addition, the Team would reverse the rejection of the general agency rule in Section 2320 that permits the agent to disobey instructions. Should the attorney-in-fact be required to follow the instructions of the principal or should the attorney-in-fact have the following authority:

2320. An agent has power to disobey instructions in dealing with the subject of the agency, in cases where it is clearly for the interest of his principal that he should do so, and there is not time to communicate with the principal.

State Bar Team 4 comments:

1. Team 4 suggests that the words "and to obtain" be deleted from subsection 2418.070, and that compliance with prior instructions be subject to the test of "the best interest of the principal." The revised subsection 2418.070 would provide:

"2418.070(a). On matters undertaken or to be undertaken on the principal's behalf and to the extent reasonably practical under the circumstances, an attorney-in-fact has the duty

to maintain regular contact with the principal, to communicate with the principal and to follow the instructions of the principal given while the principal had capacity, providing that the exercise of such instructions is in the best interest of the principal as of the date that the attorney-in-fact implements the instructions."

2. Team 4 suggests that § 2320 of the Civil Code (or the substance thereof) be set forth as

subsection (b) of § 2418.070. Team 4 believes that an attorney-in-fact should be authorized to disobey the instructions of the principal where such disobedience is in the best interest of the principal. If Civil Code § 2320 is incorporated into § 2418.070 as subsection (b) of § 2418.070,

then the comment to the section would have to be changed, and the "providing language" of subsection (a) could be eliminated.

3. This section applies equally to durable powers of attorney for health and property.

§ 8357. Consultation [2418.080]

8357. 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 attorney-in-fact, an attorney-in-fact 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 8357 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 attorney-in-fact is proper and does not contravene privacy rights.

See also Sections 8038 ("durable power of attorney for property" defined), 8050 ("nondurable power of attorney" defined), 8068 ("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? It appears that both the Beverly Hills Bar and the State Bar are unenthusiastic about it.

Beverly Hills Bar Legislative Committee comments: The BHBLC would omit this section if it is nothing more than advisory. See Exhibit 1, p. 2.

State Bar Team 4 comments:

1. Team 4 suggests that § 2418.080 be deleted from this part of the Statute, and instead that the subject of this section be incorporated into that part of the Statute dealing with third parties.

2. Team 4 suggests that after moving § 2418.080, § 2418.080 be rewritten so that the attorney-in-fact has a duty to comply with reasonable requests for information made by third parties. Although a revised § 2418.080 would permit the release of information to third parties,

the section should provide that such release does not waive any privilege which exists as to any other person or institution.

3. When a durable power of attorney is executed, the attorney/client privilege is waived with respect to the attorney-in-fact. Team 4 would adapt the Staff Note and agrees that this section should be eliminated.

4. This section applies equally to durable powers of attorney for health and property.

§ 8358. Duty to keep records and account to principal [2418.090]

8358. (a) The attorney-in-fact shall keep complete records of all transactions entered into by the attorney-in-fact on behalf of the principal.

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

(1) At any time requested by the principal.

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

(3) On petition by the conservator of the estate of the principal, the principal's personal representative or any other successor in interest after the death of the principal.

(c) The following persons are entitled to examine and copy the records of the attorney-in-fact:

(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 8358 is drawn from Minnesota law. See Minn. Stat. Ann. § 523.21 (West Supp. 1990).

See also Sections 8023 ("attorney-in-fact" defined), 8065 ("power of attorney for property" defined), 8068 ("principal" defined).

Staff Note. The staff has made some wording changes in light of the State Bar Team comments. The suggestion to include "on court order" has not been added consistent with the Team's comments elsewhere that court authority need not be specified. A remaining question is the extent to which the class of petitioners for an accounting should be specified in this statute. (See point 4 below.)

State Bar Team 4 comments:

1. Team 4 believes that § 2418.090 should be retitled so that it reads "Duty to Keep Records and to Account to Principal." [done]

2. Team 4 suggests that the word "any" be added following the words "except in _____ of subsection (b)"; to subsection (c) [misabeled in the draft as the subsection (b) of § 2418.090] [corrected]. Therefore, subsection (b) would read,

"An attorney-in-fact has no duty to render an account of transactions entered into on behalf of the principal, except in any of the following circumstances:"

3. Team 4 suggests that a new subsection (3) be added to subsection (b) of § 2418.090 which would read as follows:

"(3) Upon court order, or upon petition by the conservator of the estate of the principal, the principal's personal representative or any other successor-in-interest after the death of the principal."

4. Team 4 suggests that a new subsection (4) be added in order to increase the number of persons who could demand to examine and copy the records of the principal. An attorney-in-fact has a fundamental duty to accurately maintain the books and records of the principal, and the availability of such records is essential to the principal's other representatives (e.g., conservator) and successors-in-interest. These additional individuals would include the personal representative of the principal's estate, any other successor-in-interest after death of the principal and the conservator of

the principal's estate. Accordingly, Team 4 suggests that a new subsection (4) of subsection (c) be added to §2418.090 which would provide:

"such other person as a court may order for good cause shown."

5. This section applies equally to durable powers of attorney for health and property.

§ 8359. Duty to use special skills [2418.100]

8359. (a) An attorney-in-fact under a power of attorney for property has a duty to apply the full extent of the attorney-in-fact's skills.

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

Comment. Section 8359 is comparable to Probate Code Section 16014 applicable to trustees. See also Section 8351(c) (expert standard of care).

See also Sections 8023 ("attorney-in-fact" defined), 8065 ("power of attorney for property" defined), 8068 ("principal" defined).

Staff Note. The State Bar Team would delete this section. The staff would keep it, although it could be revised it in connection with Section 8351 to make sure they do not overlap unnecessarily. However, the duty to use skills, the duty to use special skills, the standard of care based on skills either represented or possessed, and the standard of care applicable to expert fiduciaries are all distinct, though related, concepts. The staff does not doubt that the drafting can be improved, but we would not want to throw out useful rules.

State Bar Team 4 comments:

Team 4 believes that this section is not useful and that this section should be deleted in its entirety inasmuch as it repeats the concepts set forth in § 2418.020.

§ 8360. Duty to reveal capacity as attorney-in-fact [2418.110]

8360. An attorney-in-fact acting for the principal under a power of attorney for property shall disclose the attorney-in-fact's capacity in dealing with third persons.

Comment. Section 8360 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 8450 et seq.

See also Sections 8023 ("attorney-in-fact" defined), 8065 ("power of attorney for property" defined), 8068 ("principal" defined), 8083 ("third person" defined).

Staff Note. The State Bar Team suggests providing that the attorney-in-fact should not have to disclose the identity of the principal. The staff has not accepted this suggestion.

State Bar Team 4 comments:

1. Team 4 suggests that the words "clearly indicate" (line 2 of § 2418.100) be deleted and that the word "disclose" be substituted therefor. Team 4 believes that an attorney-in-fact has a duty to disclose that he/she is acting as an attorney-in-fact under a durable power of attorney. At the same time, however, an attorney-in-fact does not have to disclose the identity of his or her principal. The

body of the section should reflect this distinction. [done]

2. Team 4 would eliminate the word "capacity" (line 2 of § 2418.100). Instead, § 2418.110 should require that the attorney-in-fact must disclose the attorney-in-fact's relationship in dealing with third persons.

3. Incorporating the above suggestions, the revised § 2418.110 would read:

“(a) Except as provided in subsection (b), in dealing with third persons, an attorney-in-fact acting for the principal under a durable power of attorney shall disclose the attorney-in-fact’s relationship with the principal, providing that the attorney-in-fact shall not be compelled to disclose the identity of the principal.

“(b) An attorney-in-fact shall not act in the attorney-in-fact’s own name, unless it is the

usual course of business for the attorney-in-fact to so act.”

4. Proposed new subsection (b) of § 2418.110 is taken from Civil Code § 2322(a); thus the new section reflects current law and recognizes common and regular courses of conduct.

5. This section applies equally to durable powers of attorney for health and property.

Article 3. Powers of Attorneys-in-Fact

§ 8400. General powers of attorney-in-fact subject to limitations in power of attorney [2421.010]

8400. Subject to this article, an attorney-in-fact 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 attorney-in-fact under a statutory form power of attorney by Chapter 2 (commencing with Section 2475) of Title 4.

(c) Except as limited in the power of attorney, the power to perform any act that an attorney-in-fact under a power of attorney would perform for the purposes of the power of attorney under the standard of care provided in Section 8351.

Comment. Section 8400 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 8405 (powers that must be enumerated), 8406 (excluded powers), 8407 (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 attorney-in-fact under a statutory form power of attorney. See Sections 2475, 2485-2499.5. Subdivision (c) is comparable to an attorney-in-fact’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 attorneys-in-fact generally in Section 2319(1).

See also Sections 8023 (“attorney-in-fact” defined), 8065 (“power of attorney for property” defined).

Staff Note. The State Bar Team disagrees with the approach approved in the past of incorporating the statutory form powers, unless the power of attorney provides otherwise. The Team’s approach would provide less guidance to attorneys-in-fact under simple powers of attorney. The staff does not agree that this section would apply to health care powers.

State Bar Team 4 comments:

1. Team 4 suggests that § 2421.010 as written be deleted in its entirety and that the section be restated as follows:

“The attorney-in-fact has the following powers:

(a) the powers conferred in the durable power of attorney authorizing the attorney-in-fact to act on behalf of the principal; and (b) the powers

incidental, necessary or convenient to carry out the conferred powers.”

2. One reason that Team 4 believes it is important to restate this section is that if a specific power is given, then the laundry list which is set forth in subsection (b) as currently written would not and should not apply. In addition, the powers set forth in subsection (b) are

too broad to be incorporated automatically into every durable power of attorney. Finally, nothing would be lost by so excluding the powers currently set forth in § 2421.010(b).

3. This section applies equally to durable powers of attorney for health and property.

§ 8401. Incorporation of powers [2421.020]

8401. (a) Subject to any limitations expressed in the power of attorney, a power of attorney for property may grant powers to the attorney-in-fact by incorporating powers by reference to another statute, including, but not limited to, the following:

(1) Powers of attorneys-in-fact provided by the Uniform Statutory Form Power of Attorney Act, Chapter 2 (commencing with Section 2475) of Title 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 8401 is new. See also Sections 8023 ("attorney-in-fact" defined), 8065 ("power of attorney for property" defined), 8068 ("principal" defined).

State Bar Team 4 comments:

For the reasons set forth in the discussion to § 2421.010, Team 4 suggests that § 2421.020 be eliminated in its entirety.

§ 8402. Grant of general powers without limitation [2421.030]

8402. If a power of attorney for property provides that general powers are granted to the attorney-in-fact and does not enumerate one or more express subjects or purposes for which general powers are conferred, the authority of the attorney-in-fact acting under the power of attorney includes every action or power that an adult having the capacity to contract may carry out through an attorney-in-fact specifically authorized to take the action, with respect to any and all matters, except as provided in Sections 8405 and 8406.

Comment. Section 8402 is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.710(2) (Vernon 1990). Section 8405 lists actions that must be specifically authorized, and thus are not included in general powers. Section 8406 lists actions that may not be accomplished through a power of attorney.

See also Sections 8023 ("attorney-in-fact" defined), 8065 ("power of attorney for property" defined), 8068 ("principal" defined).

State Bar Team 4 comments:

For the reasons set forth in the discussion to § 2421.010, Team 4 suggests that § 2421.030 be eliminated in its entirety.

§ 8403. Grant of general powers for express purposes [2421.040]

8403. If a power of attorney for property states that general powers are granted to an attorney-in-fact with respect to one or more express subjects or purposes for which general powers are conferred, the authority of the attorney-in-fact 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 attorney-in-fact specifically authorized to take the action, with respect to any and all matters, except as provided in Sections 8405 and 8406.

Comment. Section 8403 is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.710(3) (Vernon 1990). Section 8405 lists actions that must be specifically authorized, and thus are not included in general powers. Section 8406 lists actions that may not be accomplished through a power of attorney.

See also Sections 8023 (“attorney-in-fact” defined), 8065 (“power of attorney for property” defined).

State Bar Team 4 comments:

For the reasons set forth in the discussion to § 2421.010, Team 4 suggests that § 2421.040 be eliminated in its entirety.

§ 8404. Effect of grant of general powers [2421.050]

8404. (a) Except as provided in Sections 8405 and 8406, an attorney-in-fact 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 attorney-in-fact 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 Title 4.

Comment. Section 8404 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 8405 lists actions that must be specifically authorized, and thus are not included in general powers. Section 8406 lists actions that may not be accomplished through a power of attorney.

See also Sections 8023 (“attorney-in-fact” defined), 8065 (“power of attorney for property” defined), 8068 (“principal” defined).

State Bar Team 4 comments:

For the reasons set forth in the discussion to § 2421.010, Team 4 suggests that § 2421.050 be eliminated in its entirety.

§ 8405. Powers that must be specifically enumerated [2421.060]

8405. 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 attorney-in-fact 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.

Comment. Section 8405 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 8041 ("health care" defined), 8044 ("health care decision" defined), 8406(b) (health care decisions excluded), 8610 (requirements for durable power of attorney for health care).

See also Sections 8023 ("attorney-in-fact" defined), 8065 ("power of attorney for property" defined), 8068 ("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 Civ. Code §§ 2434(b) (authority to make health care decisions) [draft Section 8612], 2500 ¶ 7 (statutory form durable power of attorney for health care). The definition of "health care" in draft Section 8041 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.

The State Bar Team suggests some redrafting of this section although the Team agrees with the general concept. The staff has deleted the limitation on nomination of a guardian or conservator at the Team's suggestion.

As to point 5 of the Team's comments, if the instrument is both a power of attorney for property and a power of attorney for health care, then it is the power of attorney for health care module that authorizes health care decisions, and it is not the power of attorney for property that does so. This conclusion follows as a matter of definition. It confuses the discussion to suggest that a power of attorney for health care and a power of attorney for property (and a power of attorney for personal care?) can all authorize the making of health care decisions.

State Bar Team 4 comments:

1. In general, Team 4 approves of the general concept of § 2421.060 as set forth.

2. Team 4 would restate § 2421.060 as follows:

"For an attorney-in-fact to have any of the following powers, each power must be expressly granted to the attorney-in-fact in the durable power of attorney:"

3. Team 4 believes that all of the powers set forth on page 41 of the May, 1991 draft of the Statute should be specifically authorized in the durable power of appointment under the agent is designated; however, Team 4 would delete subsection (g), “nominate a guardian or conservator of the principal.” *[done]*

4. Subsection (g) should be deleted inasmuch as guardians and conservators are subject to court jurisdiction, and in fact cannot act absent appointment by a court. Therefore, less risk is associated with the nomination of a conservator or guardian by the principal than with some of the other acts listed in § 2421.060. Such minimal risk does not warrant the specific cure through enumeration of the other acts set forth in § 2421.060.

5. Team 4 strongly disagrees with the statement in the comment to § 2421.060 that a power of attorney for property may not effectively authorize the making of any health care decisions. Team 4 believes that a single document may function as both a durable power of attorney for property and a durable power of attorney for health care. If a durable power of attorney for property contains any provision authorizing the making of health care decisions, then the durable power of attorney for property should be construed as a durable power of attorney for health care to that extent.

6. This section applies equally to durable powers of attorney for health and property.

§ 8406. Excluded powers [2421.070]

8406. No power of attorney for property, whether durable or nondurable and whether or not it delegates general powers, may grant power to an attorney-in-fact 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 8406 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 title may not authorize health care decisions. See Sections 8600-8659 (durable powers of attorney for health care).

See also Sections 8023 (“attorney-in-fact” defined), 8044 (“health care decision” defined), 8065 (“power of attorney for property” defined), 8068 (“principal” defined).

Staff Note. As to the State Bar Team comments, see the Staff Note to Section 8405.

State Bar Team 4 comments:

1. Team 4 suggests that § 2421.070 be deleted in its entirety, particularly the express and rigid restrictions of subparagraphs (c) and (d). At times it may be necessary for the attorney-in-fact to insist that the principal take action in order to save his or her life or to preserve his or her estate. In many instances, certain instructions may become obsolete because of the passage of time or changed circumstances.

2. As previously stated, Team 4 believes that one document can contain powers granted under a

durable power of attorney for property and a durable power of attorney for health.

3. With respect to subparagraph (a), Team 4 believes that an attorney-in-fact should have the power to execute a will on the principal’s behalf. Practically, little, if any, difference exists between a will and a revocable inter vivos trust which is used as a will substitute. However, Team 4 realizes that this is a matter which deserves thorough consideration; further, as of the date of the submission of this draft, the issue has not been discussed by the Executive Committee as a

whole. Further, if the Statute is changed so that a principal could grant such power to his/her principal, then a corresponding change in the statute of wills probably also would be required. If the Statute is changed so that a principal can grant such a power to an attorney-in-fact, then Team 4

suggests that subsection (a) of § 2421.070 be included as one of the powers that must be expressly granted under § 2421.060.

4. This section applies equally to durable powers of attorney for health and property.

§ 8407. Exercise of powers subject to duties [2421.080]

8407. The grant of a power to an attorney-in-fact, 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 attorney-in-fact is subject to the attorney-in-fact's fiduciary duties.

Comment. Section 8407 is drawn from Probate Code Section 16202 (exercise of trustee's powers). See Sections 8350-8360 (duties of attorneys-in-fact). See also 8023 ("attorney-in-fact" defined), 8059 ("power of attorney" defined).

State Bar Team 4 comments:

1. Team 4 believes that § 2421.080 as written should be deleted. On the other hand, Team 4 believes that in an appropriate section it is important to state the basic nature of the relationship that exists between the attorney-in-fact and the principal. Team 4 found that § 13 of the Restatement of Agency contained an excellent description of an attorney-in-fact, and the relationship between the attorney-in-fact and the principal. Specifically, § 13 of the Restatement of Agency provides: "An attorney-in-fact is a fiduciary with respect to matters within the scope of the power of attorney." Team 4 suggests that the concept contained in § 13 of the Restatement of Agency be incorporated into the Statute.

2. Team 4 was concerned about the definition of "fiduciary." The comment to § 13 of the Restatement of Agency provides a reasonable definition. Team 4 believes the Restatement of Agency comment should be set forth in the comments. The comment to § 13, Restatement of Agency, provides:

"A fiduciary is a person having a duty created by his undertaking to act primarily for the benefit of another in the matters connected with his undertaking."

Team 4 further suggests that the comment to § 2421.080 (or any other section in which this concept is set forth) delineate and explain, to the extent possible, the nature of the principal/attorney-in-fact relationship.

3. Although certain provisions and concepts obviously overlap, Team 4 does not believe that the definition of "fiduciary" as set forth in trust law can be incorporated verbatim into the Statute. Rather, only relevant and carefully considered provisions should be incorporated.

4. Team 4 suggests that this part of the definition of attorney-in-fact be set forth in the general definitional part of the Statute.

5. This section applies equally to durable powers of attorney for health and property.

CHAPTER 4. RELATIONS WITH THIRD PERSONS

§ 8450. Third persons required to respect attorney-in-fact's authority [2425.010]

8450. An attorney-in-fact 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 8450 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 attorney-in-fact: that the attorney-in-fact 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 8023 (“attorney-in-fact” defined), 8038 (“durable power of attorney for property” defined), 8050 (“nondurable power of attorney” defined), 8065 (“power of attorney for property” defined), 8068 (“principal” defined), 8083 (“third person” defined).

State Bar Team 4 comments:

1. Team 4 believes that the last sentence of § 2425.010, “Any provision of law and any purported waiver, consent or agreement executed or granted by the principal to the contrary is void or unenforceable,” should be deleted. The statement is unduly broad, and therefore could result in practitioner confusion. Further, the sentence would seem to encourage side agreements which is contrary to Team 4’s position that side agreements should not be permitted.

2. Team 4 believes that § 2425.010 should be restated so that the section contains a stronger and more affirmative statement of the duty of third persons to honor a durable power of attorney.

3. Therefore, Team 4 suggests that the current language of § 2425.010 be deleted, and the section be amended to read:

“Third persons shall accord an attorney-in-fact acting pursuant to the provisions of a durable power of attorney the same rights and

privileges as if the principal were personally present and acting or seeking to act.”

4. Team 4 believes that it is unnecessary to bifurcate durable power of attorney provisions which grant general powers and those which enumerate express subjects or purposes. Team 4 would delete the specific references to personal welfare, property and business interests for the reason that such specific terms are superfluous because they are encompassed within the existing Statute or would be encompassed in the proposed durable power relating to personal care.

5. In the Staff Note to § 2425.010, the Staff states that § 2425.010 also raises the issue of the scope of the durable power of attorney for property because of its reference to personal welfare. Team 4 already has responded to the Staff’s concern by suggesting the recognition of personal care powers, regardless of whether those powers are set forth in a separate durable power of attorney.

6. This section applies equally to durable powers of attorney for health and property.

§ 8451. Immunities of third person [2425.020]

8451. 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 attorney-in-fact.

(c) In the absence of actual knowledge, as provided in Section 8456, 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 attorney-in-fact.

(2) The validity of the designation of the attorney-in-fact.

(3) Whether the attorney-in-fact is qualified to act as an attorney-in-fact for the principal.

(4) The propriety of any act of the attorney-in-fact 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 attorney-in-fact any instructions or the content of any instructions, or whether the attorney-in-fact 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 attorney-in-fact 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 attorney-in-fact 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 attorney-in-fact or successor with regard to the ability or capacity of the principal, the authority of the attorney-in-fact under the power of attorney, the happening of any event vesting authority in any successor or alternate attorney-in-fact, the identity or authority of a person designated in the power of attorney to designate a successor or alternate attorney-in-fact, or that the principal is alive.

Comment. Section 8451 is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.719(1) (Vernon 1990).

See also Sections 8023 ("attorney-in-fact" defined), 8065 ("power of attorney for property" defined), 8068 ("principal" defined), 8083 ("third person" defined).

Staff Note. The State Bar Team would delete this section in favor of Section 8458. Perhaps the two sections should be combined and thus preserve some of the useful detail in this section. This section is an attempt, in Missouri, to make the power of attorney more acceptable to third persons — a similar effort has been made by the Commission as to powers of attorney and trusts.

State Bar Team 4 comments:

1. Team 4 suggests that § 2425.020 as set forth be deleted in its entirety and that § 2425.090 be inserted in the place formerly occupied by § 2425.020. Section 2425.090 contains reasonably detailed and easily undertaken criteria and sets forth simple to follow directions for third parties who must deal with attorneys-in-fact. Such brevity and clearness should facilitate the broad purposes of the Statute. Lay persons, practicing attorneys and third persons should feel reasonably secure in

relying upon an attorney-in-fact acting under a durable power of attorney; concern for the third person's liability should not inhibit or detract from the use of or reliance upon the Statute. Section 2425.090 would provide a standard method for verifying durable powers of attorney and therefore would promote their use.

2. This section applies equally to durable powers of attorney for health and property.

§ 8452. Reliance by third person on general powers [2425.030]

8452. A third person may freely rely on, contract with, and deal with an attorney-in-fact 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 attorney-in-fact.

Comment. Section 8452 is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.710(8) (Vernon 1990).

See also Sections 8023 ("attorney-in-fact" defined), 8038 ("durable power of attorney for property" defined), 8050 ("nondurable power of attorney" defined), 8065 ("power of attorney for property" defined), 8083 ("third person" defined).

State Bar Team 4 comments:

1. Team 4 would modify the language of § 2425.030 as follows:

"A third person may rely on, contract with and deal with an attorney-in-fact with respect to the subjects and purposes encompassed or expressed in the durable power of attorney, without regard to whether the durable power of

attorney expressly authorizes the specific act, transaction or decision by the attorney-in-fact."

2. Team 4 believes that the above language furthers the goal of encouraging reliance upon durable powers of attorney.

3. This section applies equally to durable powers of attorney for health and property.

§ 8453. Effect of death or incapacity of principal [2425.040]

8453. (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 attorney-in-fact 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 attorney-in-fact 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 8453 continues former Section 2403 without substantive change. 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 8232, it is the principal's incapacity to contract which would otherwise terminate the power of attorney.

See also Sections 8023 ("attorney-in-fact" defined), 8038 ("durable power of attorney for property" defined), 8050 ("nondurable power of attorney" defined), 8065 ("power of attorney for property" defined), 8068 ("principal" defined), 8083 ("third person" defined).

Staff Note. This section uses the word "agency" which is not defined. See also draft Section 8059 ("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 attorney-in-fact or to the power of attorney. Draft Sections 8231 and 8308 distinguish between these concepts.

§ 8454. Affidavit of lack of knowledge of termination of power [2425.050]

8454. (a) As to acts undertaken in good faith reliance thereon, an affidavit executed by the attorney-in-fact under a power of attorney for property, whether durable or nondurable, stating that, at the time of the exercise of the power, the attorney-in-fact did not have actual knowledge of the termination of the power of attorney or the attorney-in-fact'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 attorney-in-fact furnishes an affidavit pursuant to subdivision (a), whether voluntarily or on demand, a third person dealing with the attorney-in-fact who refuses to accept the exercise of an attorney-in-fact's power covered by the affidavit is liable for attorney's fees incurred in an action or proceeding necessary to confirm the attorney-in-fact's qualifications or powers, unless the court determines that the third person believed in good faith that the attorney-in-fact was not qualified or was attempting to exceed or improperly exercise the attorney-in-fact'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 attorney-in-fact.

(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 8454 continue former Section 2404 without substantive change. A reference to the attorney-in-fact's authority has also been added in

subdivision (a) for consistency with other provisions in this title. See, e.g., Section 8308 (termination of attorney-in-fact'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 8232, 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 attorney-in-fact'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 attorney-in-fact gives an affidavit, whether voluntarily or on demand. If the attorney-in-fact has not executed an affidavit, a third person may refuse to recognize the attorney-in-fact's power even though the third person would be fully protected under Section 18100.

Subdivision (c) makes clear that the failure to require the attorney-in-fact 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 attorney-in-fact. 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 8023 ("attorney-in-fact" defined), 8038 ("durable power of attorney for property" defined), 8050 ("nondurable power of attorney" defined), 8065 ("power of attorney for property" defined), 8068 ("principal" defined).

Staff Note. Draft Section 8454 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 attorney-in-fact.

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 ¶ 802-8 (Smith-Hurd Supp. 1990).

Senate Bill 1496, noted in the State Bar Team's comments, was, of course, enacted on recommendation of the Commission. It may be possible to generalize the provisions of Civil Code Section 2480.5, but it would probably happen only over the opposition of the California Bankers Association who opposed SB 1496, even though the rule was limited to statutory form powers. An persuasive argument in favor of the bill was that the statutory form was easily identifiable and short so that bank personnel would not have the burden of examining a lengthy document and interpreting its provisions. On the other hand, CBA may oppose any legislation that would make powers of attorney more effective if it looks like it would subject banks to a greater liability risk.

State Bar Team 4 comments:

1. A major problem confronting the public and practitioners alike in dealing with durable powers of attorney is the fact that third persons and institutions often refuse to honor the durable powers of attorney. Team 4 strongly believes that the language of the Statute should contain appropriate directions and remedies to both encourage and ensure compliance with the provisions of the durable power of attorney.

2. § 2480.5 was added to the Civil Code by Senate Bill No. 1496. Team 4 suggests that the concepts and much of the statutory language of Civil Code § 2480.5 could and should be encompassed into the Statute. Newly enacted Civil Code § 2480.5 provides as follows:

“SEC. 4. Section 2480.5 is added to the Civil Code, to read:

“2480.5 (a) If a third person to whom a properly executed statutory form power of attorney under this chapter is presented refuses to honor the agent’s authority under the power of attorney within a reasonable time, the third person may be compelled to honor the agent’s authority under the power of attorney, in an action for this purpose brought against the third person, except that the third person may not be compelled to honor the agent’s authority if the principal could not compel the third person to act in the same circumstances.

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

“(c) For the purpose of subdivision (b) and without limiting other grounds that may constitute a reasonable refusal to accept an agent’s authority under a statutory form power of attorney, a third person does not act unreasonably in refusing to accept the agent’s authority if the refusal is authorized or required by a provision of a state or federal statute or regulation.

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

“(e) The remedy provided in this section is cumulative and nonexclusive.”

3. This section applies equally to durable powers of attorney for health and property.

§ 8455. Identification of attorney-in-fact [2425.060]

8455. A third person, when requested to engage in transactions with an attorney-in-fact on behalf of the principal, may require the attorney-in-fact to provide specimens of the attorney-in-fact’s signature and any other information reasonably necessary or appropriate to facilitate the actions of the third person in transacting business with the attorney-in-fact.

Comment. Section 8455 is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.719(4) (Vernon 1990).

See also Sections 8023 (“attorney-in-fact” defined), 8068 (“principal” defined), 8083 (“third person” defined).

State Bar Team 4 comments:

1. Although Team 4 agrees with the concepts set forth in this § 2425.060, Team 4 believes that the section could be more clearly written. For that reason, Team 4 would delete § 2425.060 as written, and restate § 2425.060 as follows:

“When requested to engage in a transaction with an attorney-in-fact on behalf of the principal, a third party, before incurring any duty to comply with the attorney-in-fact’s

instructions, may require the attorney-in-fact to provide specimens of the attorney-in-fact’s signature and any other information reasonably necessary or appropriate to identify the attorney-in-fact and to facilitate the actions of the third person in transacting business with the attorney-in-fact.

2. This section applies equally to durable powers of attorney for health and property.

§ 8456. When knowledge of employees charged to third person [2425.070]

8456. 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 attorney-in-fact, 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 8456 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 8023 (“attorney-in-fact” defined), 8065 (“power of attorney for property” defined), 8083 (“third person” defined).

Staff Note.

State Bar Team 4 comments:

1. Team 4 would delete § 2425.070 because Team 4 believes that § 2425.070 is unnecessary. In addition, the test articulated in the section to determine whether or not the third person has actual knowledge would be extremely difficult to

implement. The essential terms of § 2425.070 are not defined. Finally,

Team 4 believes that the section would not be applicable in many situations in which it was designed to apply.

§ 8457. Knowledge where principal is “absentee” [2425.080]

8457. 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 attorney-in-fact 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 attorney-in-fact 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 8457 continues without substantive change the part of Section 2357 that related to powers of attorney involving federal absentees. References to “attorney-in-fact or third person” have been substituted for the former references to “person” for clarity and conformity with the language of this part.

See also Sections 8023 (“attorney-in-fact” defined), 8068 (“principal” defined), 8083 (“third person” defined); Prob. Code §§ 1403 (“absentee” defined), 1440 (“secretary concerned” defined).

§ 8458. Protection of third person relying in good faith on durable power of attorney for property [2425.090]

8458. (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 attorney-in-fact 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 8458 continues former Section 2512, insofar as it applied to powers of attorney for property, without substantive change. 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 8458 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 attorney-in-fact designated in the power of attorney. If the person purporting to be the attorney-in-fact is an impostor, 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 8458, see, e.g., Sections 8224(c) (reliance in good faith upon durable power of attorney not containing "warning" statement required by Section 8224), 8451 (immunities of third person), 8452 (reliance by third person on general powers), 8453 (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 8458 does not apply to health care providers. See Sections 8200 (application of title), 8630 (immunities of health care provider).

See also Sections 8023 ("attorney-in-fact" defined), 8038 ("durable power of attorney for property" defined), 8050 ("nondurable power of attorney" defined), 8065 ("power of attorney for property" defined), 8083 ("third person" defined).

§ 8459. Effect of contractual provision for notice [2425.100]

8459. (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 attorney-in-fact in order to give a valid notice to the third person of any modification or termination of the designation of an attorney-in-fact 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 attorney-in-fact 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 8459 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 8023 ("attorney-in-fact" defined), 8065 ("power of attorney for property" defined), 8068 ("principal" defined), 8083 ("third person" defined).

State Bar Team 4 comments:

1. Team 4 would delete § 2425.100 in its entirety because it is unnecessary. Any third person can enter into any transaction or make any contract with a third person that the third person wants; such an action is not against public policy. This means that a third party and the principal can enter into any contract that he or she wishes. This

section is unnecessary. Finally, Team 4 has repeatedly emphasized that durable powers of attorney should not be subject to separate contracts. Thus, no modification discussed in the Statute would be precluded.

2. This section applies equally to durable powers of attorney for health and property.

§ 8460. Liability between principal and third person [2425.110]

8460. (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 attorney-in-fact 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 attorney-in-fact designated in a durable power of attorney.

Comment. Section 8460 is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.721 (Vernon 1990).

See also Sections 8023 ("attorney-in-fact" defined), 8065 ("power of attorney for property" defined), 8068 ("principal" defined), 8083 ("third person" defined).

CHAPTER 5. UNIFORM STATUTORY FORM POWER OF ATTORNEY

Staff Note. This chapter continues Civil Code Sections 2450 and 2475-2499.5 which were enacted on Commission recommendation in the 1990 legislative session. See 1990 Cal. Stat. ch. 986 [SB 1777]. This chapter also includes the newly enacted provision for recognition of

an agent's authority, enacted on Commission recommendation. Some reorganization has been done, as explained in the Comments.

Article 1. General Provisions

§ 8500. Short title

8500. This chapter may be cited as the Uniform Statutory Form Power of Attorney Act.

Comment. Section 8500 continues former Section 2482 without change. This chapter is substantially the same as the Uniform Statutory Form Power of Attorney Act (1988). Section 8500 is the same as Section 19 of the Uniform Act. As to the construction of uniform acts, see Section 2. See also Section 11 (severability of provisions).

§ 8501. Statutory form power of attorney

8501. The following statutory form power of attorney is legally sufficient when the requirements of Section 8502 are satisfied:

UNIFORM STATUTORY FORM POWER OF ATTORNEY

(California Probate Code § 8501)

NOTICE: THE POWERS GRANTED BY THIS DOCUMENT ARE BROAD AND SWEEPING. THEY ARE EXPLAINED IN THE UNIFORM STATUTORY FORM POWER OF ATTORNEY ACT (CALIFORNIA PROBATE CODE SECTIONS 8500-8545). IF YOU HAVE ANY QUESTIONS ABOUT THESE POWERS, OBTAIN COMPETENT LEGAL ADVICE. THIS DOCUMENT DOES NOT AUTHORIZE ANYONE TO MAKE MEDICAL AND OTHER HEALTH-CARE DECISIONS FOR YOU. YOU MAY REVOKE THIS POWER OF ATTORNEY IF YOU LATER WISH TO DO SO.

I _____
(your name and address)

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

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

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

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

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

INITIAL

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

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

SPECIAL INSTRUCTIONS:

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

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

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

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

EXERCISE OF POWER OF ATTORNEY WHERE MORE THAN ONE AGENT
DESIGNATED

If I have designated more than one agent, the agents are to act _____

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

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

Signed this ____ day of _____, 19__

(your signature)

(your social security number)

State of _____

County of _____

CERTIFICATE OF ACKNOWLEDGMENT OF NOTARY PUBLIC

State of California)

) ss.

County of _____)

On this ____ day of _____, 19__

before me, _____,
(name of notary public)

personally appeared _____,
(name of principal)

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

NOTARY SEAL

(signature of notary public)

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

Comment. Section 8501 continues former Section 2475 without change, except for the revision of cross-references to other provisions. Section 8501 is the same in substance as Section 1(a) of the Uniform Statutory Form Power of Attorney Act (1988), with the addition of provisions to permit designation of co-agents.

The provisions added by former Section 2475 were drawn from the former Statutory Short Form Power of Attorney statute. See former § 2450 (repealed by 1990 Cal. Stat. ch. 986, § 1). The acknowledgment portion of the form was revised to be consistent with the form used under California law. The word “incapacitated” was substituted for the words “disabled, incapacitated, or incompetent” used in the Uniform Act. This substitution conforms the statutory form to the California version of the Uniform Durable Power of Attorney Act. See Section 8029 requirements for creation of durable power of attorney).

Section 8501 provides the text of the form that is sufficient and necessary to bring this chapter into operation. The statutory form can be used in whole or part instead of individually drafted forms or forms adapted from a form book.

A form used to create a power of attorney subject to this chapter should use the language provided in Section 8501. Minor variances in wording will not take it out of the scope of the chapter. For example, the use of the language of the official text of the Uniform Act in the last paragraph of the text of the statutory form (protection of third party who receives a copy of the statutory form power of attorney and acts in reliance on it) instead of the language provided in Section 8501 does not take the form out of the scope of this chapter. See Section 8502(a). Nor does the omission of the provisions relating to designation of co-agents take the form out of the scope of this chapter. See Section 8502(a).

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

The statutory form contains a list of powers. The powers listed relate to various separate classes of activities, except the last, which includes all the others. Health care matters are not included. See Sections 8041 (“health care” defined), 8044 (“health care decision” defined), 4100 (scope of this part). For a durable power of attorney form for health care matters, see Sections 8651.

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

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

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

Neither the form in this section, nor the constructional provisions in Sections 8530-8544, attempt to allow the grant of the power to make a will or to give the agent extensive estate planning authority, although several of the powers, especially lines (G), (H), and (L) of the statutory form, may be useful in planning the disposition of an estate. An individually tailored power of attorney can be used if the principal wants to give the agent extensive estate planning authority, or additional estate planning powers can be granted to the agent by stating those additional powers in the space provided in the form for “Special Instructions.” For example, provisions like the following might be included under the special instructions portion of the statutory form:

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

- (1) Establish a trust with property of the principal for the benefit of the principal and the spouse and descendants of the principal, or any one or more of them, upon such terms as the agent determines are necessary or proper, and transfer any property in which the principal has an interest to the trust.
- (2) Exercise in whole or in part, release, or let lapse any power the principal may have under any trust whether or not created by the principal, including any power of appointment, revocation, or withdrawal, but a trust created by the principal may only be modified or revoked by the agent as provided in the trust instrument.
- (3) Make a gift, grant, or other transfer without consideration to or for the benefit of the spouse or descendants of the principal or a charitable organization, or more than one or all of them, either outright or in trust, including the forgiveness of indebtedness and the completion of any charitable pledges the principal may have made; consent to the splitting of gifts under Internal Revenue Code Section 2513, or successor sections, if the spouse of the principal makes gifts to any one or more of the descendants of the principal or to a charitable institution; pay any gift tax that may arise by reason of those gifts.
- (4) Loan any of the property of the principal to the spouse or descendants of the principal, or their personal representatives or a trustee for their benefit, the loan bearing such interest, and to be secured or unsecured, as the agent determines advisable.
- (5) In general, and in addition to all the specific acts enumerated, do any other act which the principal can do through an agent for the welfare of the spouse, children, or dependents of the principal or for the preservation and maintenance of other personal relationships of the principal to parents, relatives, friends, and organizations.

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

Section 8504 and the statutory form itself make the power of attorney a durable power of attorney, remaining in effect after the incapacity of the principal, unless the person executing the form strikes out the language in the form that makes the instrument a durable power of attorney. See also Sections 8038 (“durable power of attorney for property” defined), 4068 (“nondurable power of attorney” defined).

The last paragraph of the text of the statutory form protects a third party who receives a copy of the statutory form power of attorney and acts in reliance on it. See also Section 8083 (“third person” defined). The statement in the statutory form — that revocation of the power of attorney is not effective as to a third party until the third party has actual knowledge of the revocation — is consistent with Sections 8503 (good faith reliance on power of attorney without actual knowledge of death or incapacity of principal), 8504 (affidavit of lack of knowledge of termination of power). See also Sections 8500 (third persons required to respect agent’s authority), 8501 (immunities of third person), 8508 (protection of person who acts in good faith reliance upon power of attorney where specified requirements are satisfied). The protection provided by these sections and other immunities that may protect persons who rely on a power of attorney (see Section 8508(b)) apply to a statutory form power of attorney. See Section 4100 (application of part to statutory form power of attorney).

The language of the last portion of the text of the statutory form set out in Section 8501 substitutes the phrase “has actual knowledge of the revocation” for the phrase “learns of the revocation” which is used in the Uniform Act form. This substitution does not preclude use of a form including the Uniform Act language. See Section 8502(a) (third sentence).

Neither this section, nor the chapter as a whole, attempts to provide an exclusive method for creating a power of attorney. Other forms may be used and other law employed to create powers of attorney. See Section 8508. However, this chapter should be sufficient for most purposes.

For provisions relating to court enforcement of the duties of the agent, see Sections 8900-8962.

The form provided by Section 8501 supersedes the former statutory short form power of attorney under former Sections 2450-2473 (repealed by 1990 Cal. Stat. ch. 986, § 1). But older forms consistent with former Sections 2450-2473 are still effective. See Section 8509 & Comment.

See also Sections 8023 (“agent” defined), 8058 (“principal” defined), 8080 (“statutory form power of attorney” defined), 8083 (“third person” defined).

§ 8502. Requirements for statutory form power of attorney

8502. A statutory form power of attorney under this chapter is legally sufficient if all of the following requirements are satisfied:

(a) The wording of the form complies substantially with Section 8501. A form does not fail to comply substantially with Section 8501 merely because the form does not include the provisions of Section 8501 relating to designation of co-agents. A form does not fail to comply substantially with Section 8501 merely because the form uses the sentence “Revocation of the power of attorney is not effective as to a third party until the third party learns of the revocation” in place of the sentence “Revocation of the power of attorney is not effective as to a third party until the third party has actual knowledge of the revocation,” in which case the form shall be interpreted as if it contained the sentence “Revocation of the power of attorney is not effective as to a third party until the third party has actual knowledge of the revocation.”

(b) The form is properly completed.

(c) The signature of the principal is acknowledged. Notwithstanding Section 1188 and 1189, the certificate of acknowledgment of a notary public required by Section 8501 is sufficient if it is in substantially the form set out in either Section 8501 or Section 1189.

Comment. Section 8502 continues former Section 2476 [as amended by 1992 Cal. Stat. ch. 178, § 3.5] without change, except for the revision of cross-references to other provisions. Section 8502 is the same in substance as Section 1(b) of the Uniform Statutory Form Power of Attorney Act (1988) with the addition of the second and third sentences of subdivision (a). The added sentences make clear that use of a form that complies with the requirements of the official text of the Uniform Act satisfies the requirements of this section, even though the form used does not include the provisions included in Section 8501 for designation of co-agents and even though the form uses the language “learns of the revocation.”

See also Sections 8023 (“agent” defined), 8058 (“principal” defined), 8083 (“third person” defined).

§ 8503. Effect of initialing line in front of (N) in statutory form

8503. If the line in front of (N) of the statutory form under Section 8501 is initialed, an initial on the line in front of any other power does not limit the powers granted by line (N).

Comment. Section 8503 continues former Section 2479 without change, except for the revision of a cross-reference to another provision. Section 8503 is the same in substance as subsection (c) of Section 1 of the Uniform Statutory Form Power of Attorney Act (1988).

§ 8504. Durability of statutory form power of attorney

8504. A statutory form power of attorney legally sufficient under this chapter is durable to the extent that the power of attorney contains language, such as “This power of attorney will continue to be effective even though I become incapacitated,” showing the intent of the principal that the power granted may be exercised notwithstanding later incapacity.

Comment. Section 8504 continues former Section 2478 without substantive change. Section 8504 is the same in substance as Section 2 of the Uniform Statutory Form Power of Attorney Act (1988). The phrase “to the extent that durable powers are permitted by other law of this State,” found in the Uniform Act, has been omitted as unnecessary. Durable powers of attorney are specifically authorized by Part 2 (commencing with Section 4100). The words “incapacitated” and “incapacity” are used in Section 8504 to conform to the form used in Section 8501 and to Section 8029 (California version of the Uniform Durable Power of Attorney Act).

A durable power of attorney under this chapter continues in effect when the principal becomes incapacitated. The form in Section 8501 includes a provision for continuance under those circumstances. That provision may be used or stricken at the discretion of the principal. The provision is consistent with Section 8029 (Uniform Durable Power of Attorney Act). See also Sections 8223 (effect of acts by agent during incapacity of principal), 8503 (good faith reliance upon power of attorney after death or incapacity of principal). As to the effect of appointment of a conservator of the estate, guardian of the estate, or other fiduciary charged with the management of the principal’s property, see Section 8306.

See also Sections 8038 (“durable power of attorney for property” defined), 8058 (“principal” defined), 8080 (“statutory form power of attorney” defined).

§ 8505. Springing statutory form power of attorney

8505. (a) A statutory form power of attorney under this chapter that limits the power to take effect upon the occurrence of a specified event or contingency, including but not limited to the incapacity of the principal, may contain a provision designating one or more persons who, by a written declaration under penalty of perjury, have the power to determine conclusively that the specified event or contingency has occurred.

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

(c) The provision described in subdivision (a) may be included in the “Special Instructions” portion of the form set out in Section 8501.

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

Comment. Section 8505 continues former Section 2479 without substantive change. Section 8505 is not found in the Uniform Statutory Form Power of Attorney Act (1988). This section is drawn from Section 5-1602 of the New York General Obligations Law. A

provision described in subdivision (a) protects a third person who relies on the declaration under penalty of perjury of the person or persons designated in the power of attorney that the specified event or contingency has occurred. The principal may designate the agent or another person, or several persons, to make this declaration.

Subdivision (d) makes clear that subdivisions (a) and (b) are not the exclusive method for creating a “springing power” (a power of attorney that goes into effect upon the occurrence of a specified event or contingency). The principal is free to set forth in a power of attorney under this chapter any provision the principal desires to provide for the method of determining whether the specified event or contingency has occurred. For example, the principal may provide that his or her “incapacity” be determined by a court under Part 4 (commencing with Section 8900). See Section 8941(a). If the power of attorney provides only that it shall become effective “upon the incapacity of the principal,” the determination whether the power of attorney is in effect also may be made under Part 4 (commencing with Section 8900).

See also Sections 8058 (“principal” defined), 4078 (“springing power of attorney” defined), 8080 (“statutory form power of attorney” defined).

§ 8506. Compelling third person to honor statutory form power of attorney; liability for attorney’s fees

8506. (a) If a third person to whom a properly executed statutory form power of attorney under this chapter is presented refuses to honor the agent’s authority under the power of attorney within a reasonable time, the third person may be compelled to honor the agent’s authority under the power of attorney, in an action for this purpose brought against the third person, except that the third person may not be compelled to honor the agent’s authority if the principal could not compel the third person to act in the same circumstances.

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

(c) For the purpose of subdivision (b) and without limiting other grounds that may constitute a reasonable refusal to accept an agent’s authority under a statutory form power of attorney, a third person does not act unreasonably in refusing to accept the agent’s authority if the refusal is authorized or required by provision of a state or federal statute or regulation.

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

(e) The remedy provided in this section is cumulative and nonexclusive.

Comment. Section 8506 continues former Section 2480.5 [1992 Cal. Stat. ch. 178, § 4] without change. Section 8506 is not found in the Uniform Statutory Form Power of Attorney Act (1988). Subdivisions (a) and (b) are drawn in part from Section 13105(b) (compelling payment or delivery under affidavit procedure for collection or transfer of personal property of small estate). See also Section 8504 (affidavit of lack of knowledge of termination of power of attorney).

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

In addition, as provided in subdivision (b), if the refusal to deal with the agent is found to be unreasonable, the third person will also be liable for attorney's fees incurred in the action to compel compliance. The determination of reasonableness depends on the particular circumstances of each case. A person to whom the power of attorney is presented may, for example, act reasonably in refusing to accept the agent's authority where it is not clear that the power of attorney grants the agent authority with respect to the particular transaction. Likewise, a third person may reasonably refuse to honor the power of attorney if, for example, the person is not reasonably satisfied as to the identity of the agent or has information that would lead a reasonable person to question the validity of the power of attorney. See also Section 8508 (protection of person relying in good faith).

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

See also Sections 8023 ("agent" defined), 8058 ("principal" defined), 8080 ("statutory form power of attorney" defined), 8083 ("third person" defined).

§ 8507. General provisions applicable to statutory form power of attorney

8507. Unless there is a conflicting provision in this chapter, in which case the provision of this chapter governs, the other provisions of this division applicable to powers of attorney for property apply to a statutory form power of attorney.

Comment. Section 8507 restates the substance of former Section 2480. Section 8507 makes clear that the general provisions that apply to powers of attorney for property generally apply to statutory form powers of attorney under this chapter. Accordingly, the following provisions apply to a power of attorney under this chapter:

Section 8059(b) (proxies given by agent to exercise voting rights).

Section 8029 (requirements to create durable power of attorney). The statutory form set out in Section 8501 satisfies the requirements to create a durable power of attorney unless the provision making the power of attorney durable is struck out on the form.

Section 8223 (effect of acts by agent during incapacity of principal).

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

Section 8306 (effect of appointment of a conservator of the estate or other fiduciary charged with the management of the principal's property).

Section 8503 (good faith reliance on power of attorney after death or incapacity of principal).

Section 8504 (good faith reliance on agent's affidavit as conclusive proof of the nonrevocation or nontermination of the power).

Section 8508 (protection against liability of person acting in good faith reliance upon power of attorney).

Sections 8900-8962 (court enforcement of agent's duties).

See also Sections 4072 ("power of attorney for property" defined), 8080 ("statutory form power of attorney" defined).

§ 8507.5. Compelling third person to honor statutory form power of attorney; liability for attorney's fees

8507.5. (a) If a third person to whom a properly executed statutory form power of attorney under this chapter is presented refuses to honor the agent's authority under the power of attorney within a reasonable time, the third person may be compelled to honor the agent's authority under the power of attorney, in an action for this purpose brought against the third person, except that the third person may not be compelled to honor the agent's authority if the principal could not compel the third person to act in the same circumstances.

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

(c) For the purpose of subdivision (b) and without limiting other grounds that may constitute a reasonable refusal to accept an agent's authority under a statutory form power of attorney, a third person does not act unreasonably in refusing to accept the agent's authority if the refusal is authorized or required by provision of a state or federal statute or regulation.

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

(e) The remedy provided in this section is cumulative and nonexclusive.

Comment. Section 8507.5 continues former Section 2480.5 [as added by 1992 Cal. Stat. ch. 178, § 4] without change.

§ 8508. Use of other forms

8508. Nothing in this chapter affects or limits the use of any other form for a power of attorney for property. Any form that complies with the requirements of any law other than the provisions of this chapter may be used in lieu of the form set forth in Section 8501, and none of the provisions of this chapter apply if such other form is used.

Comment. Section 8508 continues former Section 2481 without substantive change. See also Section 4072 ("power of attorney for property" defined).

§ 8509. Use of statutory form provided by repealed statutes

8509. (a) A statutory short form power of attorney executed before, on, or after the repeal of Chapter 3 (commencing with Section 2450) of Title 9 of Part 4 of the Civil Code by Chapter 986 of the Statutes of 1990, using a form that complied with former Section 2450 of the Civil Code, as originally enacted by Chapter 602 of the Statutes of 1984, or as amended by Chapter 403 of the Statutes of 1985, is as valid as if Chapter 3 (commencing with Section 2450) of

Title 9 of Part 4 of the Civil Code had not been repealed by, and former Section 2511 of the Civil Code amended by, Chapter 986 of the Statutes of 1990.

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

Comment. Subdivision (a) of Section 8509 restates former Section 2450 without substantive change. The "statutory short form power of attorney" provided by former Section 2450 was superseded by the Uniform Statutory Form Power of Attorney. See Prob. Code §§ 8500-8545 (continuing former §§ 2475-2499). This section permits use of the earlier forms after January 1, 1991, when the "statutory short form" was repealed. This avoids the need to discard existing printed forms and protects the unwary person who uses a printed form prepared pursuant to the former provisions. However, the new form provided by Sections 8500-8545 (and former §§ 2475-2499) should soon replace the older forms.

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

Article 2. Construction of Powers

Comment. This article (commencing with Section 8530) explains the powers listed in the statutory form in Section 8501. Section 8530 provides general powers that apply to all of the defined classes of authority listed in lines (A) through (M) of the statutory form, subject to any conditions set by the principal.

The language in Sections 8531-8543 makes explicit reference to authority that would be appropriate for each class of transaction. The language in those sections identifies activities that are typical responsibilities for the particular class of transaction.

Any of Sections 8531-8543, together with the general authority in Section 8530, gives the agent complete power for the class of transactions. The recitation of particular powers in each section explains the scope of the individual section and assures the user of this chapter and the form provided by this chapter that the matters that are the user's particular concern are covered by the chapter. As to use of a power executed outside this state, after-acquired property, use of the power with respect to property located outside this state, and exercise of the power outside this state, see Section 8544.

A general effect of this article is that the agent can exercise authority subject to the same conditions and limitations as the principal. In a few instances the limiting conditions are made explicit. For example, in Section 8536 it is stated that partnership powers are subject to the terms of the partnership agreement. But all authority is subject to conditions of fact and law that exist outside the chapter. For example, a collection agency could not escape regulation by acting under this power of attorney. See also Section 15401 (modifying or revoking trust).

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

§ 8530. Construction of powers generally

8530. By executing a statutory form power of attorney with respect to a subject listed in Section 8501, the principal, except as limited or extended by the

principal in the power of attorney, empowers the agent, for that subject, to do all of the following:

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

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

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

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

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

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

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

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

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

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

Comment. Section 8530 continues former Section 2485 without change, except for the revision of a cross-reference to another provision. Section 8530 is the same in substance as Section 3 of the Uniform Statutory Form Power of Attorney Act (1988). See the Comment to this article under the article heading. See also Sections 8900-8962 (court enforcement of agent's duties).

See also Sections 8023 ("agent" defined), 8058 ("principal" defined), 8080 ("statutory form power of attorney" defined).

§ 8531. Real property transactions

8531. In a statutory form power of attorney, the language granting power with respect to real property transactions empowers the agent to do all of the following:

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

(b) Sell, exchange, convey with or without covenants, quitclaim, release, surrender, mortgage, encumber, partition, consent to partitioning, subdivide, apply for zoning, rezoning, or other governmental permits, plat or consent to platting,

develop, grant options concerning, lease, sublease, or otherwise dispose of, an interest in real property or a right incident to real property.

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

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

(1) Insuring against a casualty, liability, or loss.

(2) Obtaining or regaining possession, or protecting the interest or right, by litigation or otherwise.

(3) Paying, compromising, or contesting taxes or assessments, or applying for and receiving refunds in connection with them.

(4) Purchasing supplies, hiring assistance or labor, and making repairs or alterations in the real property.

(e) Use, develop, alter, replace, remove, erect, or install structures or other improvements upon real property in or incident to which the principal has, or claims to have, an interest or right.

(f) Participate in a reorganization with respect to real property or a legal entity that owns an interest in or right incident to real property and receive and hold shares of stock or obligations received in a plan of reorganization, and act with respect to them, including all of the following:

(1) Selling or otherwise disposing of them.

(2) Exercising or selling an option, conversion, or similar right with respect to them.

(3) Voting them in person or by proxy.

(g) Change the form of title of an interest in or right incident to real property.

(h) Dedicate to public use, with or without consideration, easements or other real property in which the principal has, or claims to have, an interest or right.

Comment. Section 8531 continues former Section 2486 without change. Section 8531 is the same in substance as Section 4 of the Uniform Statutory Form Power of Attorney Act (1988). See the Comment to this article under the article heading. See also Section 8530 (construction of powers generally).

See also Sections 8023 ("agent" defined), 8058 ("principal" defined), 8080 ("statutory form power of attorney" defined).

§ 8532. Tangible personal property transactions

8532. In a statutory form power of attorney, the language granting power with respect to tangible personal property transactions empowers the agent to do all of the following:

(a) Accept as a gift or as security for a loan, reject, demand, buy, receive, or otherwise acquire ownership or possession of tangible personal property or an interest in tangible personal property.

(b) Sell, exchange, convey with or without covenants, release, surrender, mortgage, encumber, pledge, hypothecate, create a security interest in, pawn, grant options concerning, lease, sublease to others, or otherwise dispose of tangible personal property or an interest in tangible personal property.

(c) Release, assign, satisfy, or enforce by litigation or otherwise, a mortgage, security interest, encumbrance, lien, or other claim on behalf of the principal, with respect to tangible personal property or an interest in tangible personal property.

(d) Do an act of management or conservation with respect to tangible personal property or an interest in tangible personal property on behalf of the principal, including all of the following:

(1) Insuring against casualty, liability, or loss.

(2) Obtaining or regaining possession, or protecting the property or interest, by litigation or otherwise.

(3) Paying, compromising, or contesting taxes or assessments or applying for and receiving refunds in connection with taxes or assessments.

(4) Moving from place to place.

(5) Storing for hire or on a gratuitous bailment.

(6) Using, altering, and making repairs or alterations.

Comment. Section 8532 continues former Section 2487 without change. Section 8532 is the same in substance as Section 5 of the Uniform Statutory Form Power of Attorney Act (1988). See the Comment to this article under the article heading. See also Section 8530 (construction of powers generally).

See also Sections 8023 ("agent" defined), 8058 ("principal" defined), 8080 ("statutory form power of attorney" defined).

§ 8533. Stock and bond transactions

8533. In a statutory form power of attorney, the language granting power with respect to stock and bond transactions empowers the agent to do all of the following:

(a) Buy, sell, and exchange stocks, bonds, mutual funds, and all other types of securities and financial instruments except commodity futures contracts and call and put options on stocks and stock indexes.

(b) Receive certificates and other evidences of ownership with respect to securities.

(c) Exercise voting rights with respect to securities in person or by proxy, enter into voting trusts, and consent to limitations on the right to vote.

Comment. Section 8533 continues former Section 2488 without change. Section 8533 is the same in substance as Section 6 of the Uniform Statutory Form Power of Attorney Act (1988). See the Comment to this article under the article heading. See also Sections 8059(b) (proxies given by agent to exercise voting rights), 8530 (construction of powers generally).

See also Sections 70 ("security" defined), 8023 ("agent" defined), 8080 ("statutory form power of attorney" defined).

§ 8534. Commodity and option transactions

8534. In a statutory form power of attorney, the language granting power with respect to commodity and option transactions empowers the agent to do all of the following:

(a) Buy, sell, exchange, assign, settle, and exercise commodity futures contracts and call and put options on stocks and stock indexes traded on a regulated option exchange.

(b) Establish, continue, modify, and terminate option accounts with a broker.

Comment. Section 8534 continues former Section 2489 without change. Section 8534 is the same in substance as Section 7 of the Uniform Statutory Form Power of Attorney Act (1988). See the Comment to this article under the article heading. See also Section 8530 (construction of powers generally).

See also Sections 8023 ("agent" defined), 8080 ("statutory form power of attorney" defined).

§ 8535. Banking and other financial institution transactions

8535. In a statutory form power of attorney, the language granting power with respect to banking and other financial institution transactions empowers the agent to do all of the following:

(a) Continue, modify, and terminate an account or other banking arrangement made by or on behalf of the principal.

(b) Establish, modify, and terminate an account or other banking arrangement with a bank, trust company, savings and loan association, credit union, thrift company, industrial loan company, brokerage firm, or other financial institution selected by the agent.

(c) Hire or close a safe deposit box or space in a vault.

(d) Contract to procure other services available from a financial institution as the agent considers desirable.

(e) Withdraw by check, order, or otherwise money or property of the principal deposited with or left in the custody of a financial institution.

(f) Receive bank statements, vouchers, notices, and similar documents from a financial institution and act with respect to them.

(g) Enter a safe deposit box or vault and withdraw or add to the contents.

(h) Borrow money at an interest rate agreeable to the agent and pledge as security personal property of the principal necessary in order to borrow, pay, renew, or extend the time of payment of a debt of the principal.

(i) Make, assign, draw, endorse, discount, guarantee, and negotiate promissory notes, checks, drafts, and other negotiable or nonnegotiable paper of the principal, or payable to the principal or the principal's order, receive the cash or other proceeds of those transactions, and accept a draft drawn by a person upon the principal and pay it when due.

(j) Receive for the principal and act upon a sight draft, warehouse receipt, or other negotiable or nonnegotiable instrument.

(k) Apply for and receive letters of credit, credit cards, and traveler's checks from a financial institution, and give an indemnity or other agreement in connection with letters of credit.

(l) Consent to an extension of the time of payment with respect to commercial paper or a financial transaction with a financial institution.

Comment. Section 8535 continues former Section 2490 without change. Section 8535 is the same in substance as Section 8 of the Uniform Statutory Form Power of Attorney Act (1988). See the Comment to this article under the article heading. See also Section 8530 (construction of powers generally).

See also Sections 40 ("financial institution" defined), 83 ("trust company" defined), 8023 ("agent" defined), 8058 ("principal" defined), 8080 ("statutory form power of attorney" defined).

§ 8536. Business operating transactions

8536. In a statutory form power of attorney, the language granting power with respect to business operating transactions empowers the agent to do all of the following:

(a) Operate, buy, sell, enlarge, reduce, and terminate a business interest.

(b) To the extent that an agent is permitted by law to act for a principal and subject to the terms of the partnership agreement:

(1) Perform a duty or discharge a liability and exercise a right, power, privilege, or option that the principal has, may have, or claims to have, under a partnership agreement, whether or not the principal is a partner.

(2) Enforce the terms of a partnership agreement by litigation or otherwise.

(3) Defend, submit to arbitration, settle, or compromise litigation to which the principal is a party because of membership in the partnership.

(c) Exercise in person or by proxy, or enforce by litigation or otherwise, a right, power, privilege, or option the principal has or claims to have as the holder of a bond, share, or other instrument of similar character, and defend, submit to arbitration, settle, or compromise litigation to which the principal is a party because of a bond, share, or similar instrument.

(d) With respect to a business owned solely by the principal:

(1) Continue, modify, renegotiate, extend, and terminate a contract made with an individual or a legal entity, firm, association, or corporation by or on behalf of the principal with respect to the business before execution of the power of attorney.

(2) Determine the policy of the business as to (i) the location of its operation, (ii) the nature and extent of its business, (iii) the methods of manufacturing, selling, merchandising, financing, accounting, and advertising employed in its operation, (iv) the amount and types of insurance carried, and (v) the mode of engaging, compensating, and dealing with its accountants, attorneys, and other agents and employees.

(3) Change the name or form of organization under which the business is operated and enter into a partnership agreement with other persons or organize a corporation to take over all or part of the operation of the business.

(4) Demand and receive money due or claimed by the principal or on the principal's behalf in the operation of the business, and control and disburse the money in the operation of the business.

(e) Put additional capital into a business in which the principal has an interest.

(f) Join in a plan of reorganization, consolidation, or merger of the business.

(g) Sell or liquidate a business or part of it at the time and upon the terms the agent considers desirable.

(h) Represent the principal in establishing the value of a business under a buy-out agreement to which the principal is a party.

(i) Prepare, sign, file, and deliver reports, compilations of information, returns, or other papers with respect to a business which are required by a governmental agency or instrumentality or which the agent considers desirable, and make related payments.

(j) Pay, compromise, or contest taxes or assessments and do any other act which the agent considers desirable to protect the principal from illegal or unnecessary taxation, fines, penalties, or assessments with respect to a business, including attempts to recover, in any manner permitted by law, money paid before or after the execution of the power of attorney.

Comment. Section 8536 continues former Section 2491 without change. Section 8536 is the same in substance as Section 9 of the Uniform Statutory Form Power of Attorney Act (1988). See the Comment to this article under the article heading. See also Section 8530 (construction of powers generally).

See also Sections 8023 ("agent" defined), 8058 ("principal" defined), 8080 ("statutory form power of attorney" defined).

§ 8537. Insurance and annuity transactions

8537. In a statutory form power of attorney, the language granting power with respect to insurance and annuity transactions empowers the agent to do all of the following:

(a) Continue, pay the premium or assessment on, modify, rescind, release, or terminate a contract procured by or on behalf of the principal which insures or provides an annuity to either the principal or another person, whether or not the principal is a beneficiary under the contract.

(b) Procure new, different, and additional contracts of insurance and annuities for the principal and the principal's spouse, children, and other dependents, and select the amount, type of insurance or annuity, and mode of payment.

(c) Pay the premium or assessment on, modify, rescind, release, or terminate a contract of insurance or annuity procured by the agent.

(d) Designate the beneficiary of the contract, but the agent may be named a beneficiary of the contract, or an extension, renewal, or substitute for it, only to

the extent the agent was named as a beneficiary under a contract procured by the principal before executing the power of attorney.

(e) Apply for and receive a loan on the security of the contract of insurance or annuity.

(f) Surrender and receive the cash surrender value.

(g) Exercise an election.

(h) Change the manner of paying premiums.

(i) Change or convert the type of insurance contract or annuity as to any insurance contract or annuity with respect to which the principal has or claims to have a power described in this section.

(j) Change the beneficiary of a contract of insurance or annuity, but the agent may not be designated a beneficiary except to the extent permitted by subdivision (d).

(k) Apply for and procure government aid to guarantee or pay premiums of a contract of insurance on the life of the principal.

(l) Collect, sell, assign, hypothecate, borrow upon, or pledge the interest of the principal in a contract of insurance or annuity.

(m) Pay from proceeds or otherwise, compromise or contest, and apply for refunds in connection with, a tax or assessment levied by a taxing authority with respect to a contract of insurance or annuity or its proceeds or liability accruing by reason of the tax or assessment.

Comment. Section 8537 continues former Section 2492 without change. Section 8537 is the same in substance as Section 10 of the Uniform Statutory Form Power of Attorney Act (1988). See the Comment to this article under the article heading. See also Section 8530 (construction of powers generally). Section 8537 covers, but is not limited to, life, accident, health, disability, or liability insurance and fire, marine, burglary, compensation, disability, liability, hurricane, earthquake, and casualty insurance.

See also Sections 8023 ("agent" defined), 8058 ("principal" defined), 8080 ("statutory form power of attorney" defined).

§ 8538. Estate, trust, and other beneficiary transactions

8538. In a statutory form power of attorney, the language granting power with respect to estate, trust, and other beneficiary transactions, empowers the agent to act for the principal in all matters that affect a trust, probate estate, guardianship, conservatorship, escrow, custodianship, or other fund from which the principal is, may become, or claims to be entitled, as a beneficiary, to a share or payment, including the power to do all of the following:

(a) Accept, reject, disclaim, receive, receipt for, sell, assign, release, pledge, exchange, or consent to a reduction in or modification of a share in or payment from the fund.

(b) Demand or obtain by litigation or otherwise money or other thing of value to which the principal is, may become, or claims to be entitled by reason of the fund.

(c) Initiate, participate in, and oppose litigation to ascertain the meaning, validity, or effect of a deed, will, declaration of trust, or other instrument or transaction affecting the interest of the principal.

(d) Initiate, participate in, and oppose litigation to remove, substitute, or surcharge a fiduciary.

(e) Conserve, invest, disburse, and use anything received for an authorized purpose.

(f) Transfer an interest of the principal in real property, stocks, bonds, accounts with financial institutions, insurance, and other property, to the trustee of a revocable trust created by the principal as settlor.

Comment. Section 8538 continues former Section 2493 without change. Section 8538 is the same in substance as Section 11 of the Uniform Statutory Form Power of Attorney Act (1988). See the Comment to this article under the article heading. See also Section 8530 (construction of powers generally).

See also Sections 82 ("trust" defined), 8023 ("agent" defined), 8058 ("principal" defined), 8080 ("statutory form power of attorney" defined).

§ 8539. Claims and litigation

8539. In a statutory form power of attorney, the language with respect to claims and litigation empowers the agent to do all of the following:

(a) Assert and prosecute before a court or administrative agency a claim, claim for relief, cause of action, counterclaim, cross-complaint, or offset, and defend against an individual, a legal entity, or government, including suits to recover property or other thing of value, to recover damages sustained by the principal, to eliminate or modify tax liability, or to seek an injunction, specific performance, or other relief.

(b) Bring an action to determine adverse claims, intervene in litigation, and act as *amicus curiae*.

(c) In connection with litigation:

(1) Procure an attachment, garnishment, libel, order of arrest, or other preliminary, provisional, or intermediate relief and use any available procedure to effect, enforce, or satisfy a judgment, order, or decree.

(2) Perform any lawful act, including acceptance of tender, offer of judgment, admission of facts, submission of a controversy on an agreed statement of facts, consent to examination before trial, and binding the principal in litigation.

(d) Submit to arbitration, settle, and propose or accept a compromise with respect to a claim or litigation.

(e) Waive the issuance and service of process upon the principal, accept service of process, appear for the principal, designate persons upon whom process directed to the principal may be served, execute and file or deliver stipulations on the principal's behalf, verify pleadings, seek appellate review, procure and give surety and indemnity bonds, contract and pay for the preparation and printing of records and briefs, receive and execute and file or deliver a consent, waiver, release, confession of judgment, satisfaction of judgment, notice, agreement, or

other instrument in connection with the prosecution, settlement, or defense of a claim or litigation.

(f) Act for the principal with respect to bankruptcy or insolvency proceedings, whether voluntary or involuntary, concerning the principal or some other person, or with respect to a reorganization proceeding, or with respect to an assignment for the benefit of creditors, receivership, or application for the appointment of a receiver or trustee which affects an interest of the principal in property or other thing of value.

(g) Pay a judgment against the principal or a settlement made in connection with litigation and receive and conserve money or other thing of value paid in settlement of or as proceeds of a claim or litigation.

Comment. Section 8539 continues former Section 2494 without change. Section 8539 is the same in substance as Section 12 of the Uniform Statutory Form Power of Attorney Act (1988). Subdivision (f) is clarified by adding a reference to an assignment for the benefit of creditors. See the Comment to this article under the article heading. See also Section 8530 (construction of powers generally).

See also Sections 8023 ("agent" defined), 8058 ("principal" defined), 8080 ("statutory form power of attorney" defined).

§ 8540. Personal and family maintenance

8540. In a statutory form power of attorney, the language granting power with respect to personal and family maintenance empowers the agent to do all of the following:

(a) Do the acts necessary to maintain the customary standard of living of the principal, the principal's spouse, children, and other individuals customarily or legally entitled to be supported by the principal, including providing living quarters by purchase, lease, or other contract, or paying the operating costs, including interest, amortization payments, repairs, and taxes on premises owned by the principal and occupied by those individuals.

(b) Provide for the individuals described in subdivision (a) all of the following:

(1) Normal domestic help.

(2) Usual vacations and travel expenses.

(3) Funds for shelter, clothing, food, appropriate education, and other current living costs.

(c) Pay for the individuals described in subdivision (a) necessary medical, dental, and surgical care, hospitalization, and custodial care.

(d) Continue any provision made by the principal, for the individuals described in subdivision (a), for automobiles or other means of transportation, including registering, licensing, insuring, and replacing them.

(e) Maintain or open charge accounts for the convenience of the individuals described in subdivision (a) and open new accounts the agent considers desirable to accomplish a lawful purpose.

(f) Continue payments incidental to the membership or affiliation of the principal in a church, club, society, order, or other organization and continue contributions to those organizations.

Comment. Section 8540 continues former Section 2495 without change. Section 8540 is the same in substance as Section 13 of the Uniform Statutory Form Power of Attorney Act (1988). See the Comment to this article under the article heading. See also Section 8530 (construction of powers generally).

See also Sections 8023 ("agent" defined), 8058 ("principal" defined), 8080 ("statutory form power of attorney" defined).

§ 8541. Benefits from social security, medicare, medicaid, or other governmental programs, or civil or military service

8541. In a statutory form power of attorney, the language granting power with respect to benefits from social security, medicare, medicaid or other governmental programs, or civil or military service, empowers the agent to do all of the following:

(a) Execute vouchers in the name of the principal for allowances and reimbursements payable by the United States or a foreign government or by a state or subdivision of a state to the principal, including allowances and reimbursements for transportation of the individuals described in subdivision (a) of Section 8540, and for shipment of their household effects.

(b) Take possession and order the removal and shipment of property of the principal from a post, warehouse, depot, dock, or other place of storage or safekeeping, either governmental or private, and execute and deliver a release, voucher, receipt, bill of lading, shipping ticket, certificate, or other instrument for that purpose.

(c) Prepare, file, and prosecute a claim of the principal to a benefit or assistance, financial or otherwise, to which the principal claims to be entitled, under a statute or governmental regulation.

(d) Prosecute, defend, submit to arbitration, settle, and propose or accept a compromise with respect to any benefits the principal may be entitled to receive.

(e) Receive the financial proceeds of a claim of the type described in this section, conserve, invest, disburse, or use anything received for a lawful purpose.

Comment. Section 8541 continues former Section 2496 without change, except for the revision of a cross-reference to another provision. Section 8541 is the same in substance as Section 14 of the Uniform Statutory Form Power of Attorney Act (1988). See the Comment to this article under the article heading. See also Section 8530 (construction of powers generally).

See also Sections 8023 ("agent" defined), 8058 ("principal" defined), 8080 ("statutory form power of attorney" defined).

§ 8542. Retirement plan transactions

8542. In a statutory form power of attorney, the language granting power with respect to retirement plan transactions empowers the agent to do all of the following:

- (a) Select payment options under any retirement plan in which the principal participates, including plans for self-employed individuals.
- (b) Designate beneficiaries under those plans and change existing designations.
- (c) Make voluntary contributions to those plans.
- (d) Exercise the investment powers available under any self-directed retirement plan.
- (e) Make rollovers of plan benefits into other retirement plans.
- (f) If authorized by the plan, borrow from, sell assets to, and purchase assets from the plan.
- (g) Waive the right of the principal to be a beneficiary of a joint or survivor annuity if the principal is a spouse who is not employed.

Comment. Section 8542 continues former Section 2497 without change. Section 8542 is the same in substance as Section 15 of the Uniform Statutory Form Power of Attorney Act (1988). See the Comment to this article under the article heading. See also Section 8530 (construction of powers generally).

See also Sections 8023 ("agent" defined), 8058 ("principal" defined), 8080 ("statutory form power of attorney" defined).

§ 8543. Tax matters

8543. In a statutory form power of attorney, the language granting power with respect to tax matters empowers the agent to do all of the following:

- (a) Prepare, sign, and file federal, state, local, and foreign income, gift, payroll, Federal Insurance Contributions Act returns, and other tax returns, claims for refunds, requests for extension of time, petitions regarding tax matters, and any other tax-related documents, including receipts, offers, waivers, consents (including consents and agreements under Internal Revenue Code Section 2032A or any successor section), closing agreements, and any power of attorney required by the Internal Revenue Service or other taxing authority with respect to a tax year upon which the statute of limitations has not run and to the tax year in which the power of attorney was executed and any subsequent tax year.
- (b) Pay taxes due, collect refunds, post bonds, receive confidential information, and contest deficiencies determined by the Internal Revenue Service or other taxing authority.
- (c) Exercise any election available to the principal under federal, state, local, or foreign tax law.
- (d) Act for the principal in all tax matters for all periods before the Internal Revenue Service and any other taxing authority.

Comment. Section 8543 continues former Section 2498 without change. Section 8543 is the same in substance as Section 16 of the Uniform Statutory Form Power of Attorney Act (1988). At the end of subdivision (a), reference is made to "a tax year upon which the statute of limitations has not run and to the tax year in which the power of attorney was executed and any subsequent tax year." This replaces the reference in the Uniform Act to "a tax year upon which the statute of limitations has not run and the following 25 tax years." This substitution is consistent with the power granted by subdivision (d) which extends to "all tax

matters for all periods” and is not limited to particular tax years. See also the Comment to this article under the article heading and Section 8530 (construction of powers generally).

See also Sections 8023 (“agent” defined), 8058 (“principal” defined), 8080 (“statutory form power of attorney” defined).

§ 8544. After-acquired property; property located outside this state; power exercised outside this state; power of attorney executed outside this state

8544. The powers described in this article are exercisable equally with respect to an interest the principal has when the statutory form power of attorney is executed or acquires later, whether or not the property is located in this state, and whether or not the powers are exercised or the power of attorney is executed in this state.

Comment. Section 8544 continues former Section 2499 without change. Section 8544 makes the power of attorney explicitly effective for property acquired at times and in places that might otherwise be subject to dispute. The section is the same in substance as Section 17 of the Uniform Statutory Form Power of Attorney Act (1988). See also Section 4128 (no need to describe each item or parcel of property).

See also Sections 8058 (“principal” defined), 8080 (“statutory form power of attorney” defined).

§ 8545. Power to modify or revoke trust

8545. A statutory form power of attorney under this chapter does not empower the agent to modify or revoke a trust created by the principal unless that power is expressly granted by the power of attorney. If a statutory form power of attorney under this chapter empowers the agent to modify or revoke a trust created by the principal, the trust may only be modified or revoked by the agent as provided in the trust instrument.

Comment. Section 8545 continues former Section 2499.5 without change. Section 8545 is a new provision not found in the Uniform Statutory Form Power of Attorney Act (1988).

The first sentence of Section 8545 makes clear that the agent has no power to modify or revoke a trust unless a specific provision is added to the statutory form giving the agent that power. The “Special Instructions” portion of the statutory form provides space for such a provision. The first sentence is a clarification that is consistent with the uniform act powers. See Section 11 of the Uniform Statutory Form Power of Attorney Act (1988), which does not give the agent the power to modify or revoke a trust created by the principal.

The second sentence of Section 8545 recognizes the requirement of Probate Code Section 15401(b) which precludes modification or revocation of a trust by an agent unless the trust instrument expressly so permits.

See also Sections 82 (“trust” defined), 8023 (“agent” defined), 8058 (“principal” defined), 8080 (“statutory form power of attorney” defined).

TITLE 3. DURABLE POWERS OF ATTORNEY FOR HEALTH CARE

Staff Note. This material is set out in substantially the same form as existing law for reference purposes. The basic draft is from the staff draft attached to Memorandum 90-122 with the sections renumbered and updated for 1991 and some 1992 legislation.

CHAPTER 1. DURABLE POWERS OF ATTORNEY FOR HEALTH CARE

Article 1. General Provisions

§ 8600. Application of chapter

8600. (a) A durable power of attorney executed after December 31, 1983, is effective to authorize the attorney-in-fact to make health care decisions for the principal only if the durable power of attorney complies with this chapter.

(b) A durable power of attorney executed before January 1, 1984, that specifically authorizes the attorney-in-fact to make decisions relating to the medical or health care of the principal shall be deemed to be valid under this chapter after January 1, 1984, notwithstanding that it fails to comply with the requirement of paragraph (2) of subdivision (a) of Section 8610 or subdivision (c) of Section 8611; but, to the extent that the durable power of attorney authorizes the attorney-in-fact to make health care decisions for the principal, the durable power of attorney is subject to all the provisions of this chapter and to Part 4 (commencing with Section 8900).

(c) Nothing in this chapter affects the validity of a decision made under a durable power of attorney before January 1, 1984.

Comment. Section 8600 continues former Section 2431 without change, except for the substitution of “agent” for “attorney in fact.” See Section 8023 (“attorney-in-fact” defined).

Subdivision (a) of Section 8600 makes clear that the requirements of this chapter must be satisfied if a durable power of attorney executed after December 31, 1983, is intended to authorize health care decisions. See also Section 8029 (durable power of attorney). Nothing in this chapter affects a durable power of attorney executed after December 31, 1983, insofar as it relates to matters other than health care decisions. See also Sections 8038 (“durable power of attorney for property” defined), 8044 (“health care decision” defined).

Subdivision (b) validates durable powers of attorney for health care executed before January 1, 1984, even though the witnessing or acknowledgment requirement of Section 8610(a)(2) is not satisfied and even though the requirement of Section 8611(c) is not satisfied. However, after December 31, 1983, any such durable power of attorney is subject to the same provisions as a durable power of attorney executed after that date. See, e.g., Sections 8612 (agent not authorized to act if principal can give informed consent), 8620 (unauthorized types of health care), 8613 (examination and release of medical records), 8615 (revocation), 8630 (protections from liability), 8622 (consent of agent not authorized where principal objects to the health care or objects to the withholding or withdrawal of health care necessary to keep principal alive), 8624 (altering or forging, or concealing or withholding knowledge of revocation, of durable power of attorney for health care), 8621 (unauthorized acts or omissions), 8906 (exceptions to limitations in power of attorney), 8952 (grounds for

petition). However, the limitation of the duration of the durable power of attorney for health care to seven years applies only to a durable power of attorney for health care executed after January 1, 1984. See Section 8616. A durable power of attorney for health care executed prior to that date is of unlimited duration unless the power of attorney otherwise provides.

Subdivision (c) makes clear that this chapter has no effect on decisions made before January 1, 1984, under durable powers of attorney executed before that date. The validity of such health care decisions is determined by the law that would apply if this chapter had not been enacted.

See also Sections 8023 (“attorney-in-fact” defined), 8029 (“durable power of attorney” defined), 8058 (“principal” defined), 8044 (“health care decision” defined).

§ 8601. Form of durable power of attorney for health care after January 1, 1995

8601. (a) Notwithstanding Section 8611, on and after January 1, 1986, a printed form of a durable power of attorney for health care may be sold or otherwise distributed if it complies with former Section 2433 as amended by Section 5 of Chapter 312 of the Statutes of 1984, or with former Section 2433 as in effect at the time of sale or distribution. However, any printed form of a durable power of attorney for health care printed on or after January 1, 1986, that is sold or otherwise distributed in this state for use by a person who does not have the advice of legal counsel shall comply with former Section 2433 or Section 8611 in effect at the time of printing.

(b) Notwithstanding Section 8614, a printed form of a durable power of attorney for health care may be sold or otherwise distributed if it complies with former Section 2432 as originally enacted, with former Section 2432 as subsequently amended, or with Section 8610. However, any printed form of a durable power of attorney for health care printed on or after January 1, 1986, shall comply with the requirements of former Section 2432 or Section 8610 in effect at the time of printing.

(c) A durable power of attorney for health care executed on or after January 1, 1986, is not invalid if it complies with former Section 2432 as originally enacted or as subsequently amended. A durable power of attorney for health care executed on or after January 1, 1986, using a printed form that complied with former Section 2433 as amended by Section 5 of Chapter 312 of the Statutes of 1984, is as valid as if it had been executed using a printed form that complied with former Section 2433 as thereafter amended or with Section 8611.

Comment. Section 8601 continues former Section 2444 without substantive change, and applies the principles of the former section to the include the successor sections in this chapter.

Section 8601 permits a printed form of a durable power of attorney for health care to be used after the amendments to former Sections 2432 and 2433 went into effect if the form complies with prior law. Section 8601 avoids the need to discard the existing supply of printed forms when the amendments go into effect. But a form printed after the amendments go into effect may be sold or otherwise distributed in this state for use by a person who does not have the advice of legal counsel only if the form complies with the requirements of Sections 8610 and 8611.

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

As amended in 1991:

2444. (a) Notwithstanding Section 2433, on and after January 1, 1986, a printed form of a durable power of attorney for health care may be sold or otherwise distributed if it complies with Section 2433 as amended by Section 5 of Chapter 312 of the Statutes of 1984, with Section 2433 as amended by Chapter 403 of the Statutes of 1985, or with Section 2433 as in effect at the time of sale or distribution. However, any printed form of a durable power of attorney for health care printed on or after January 1, 1986, that is sold or otherwise distributed in this state for use by a person who does not have the advice of legal counsel shall comply with Section 2433 as in effect at the time of printing.

(b) Notwithstanding Section 2432, a printed form of a durable power of attorney for health care may be sold or otherwise distributed if it complies with Section 2432 as originally enacted, or with Section 2432 as subsequently amended. However, any printed form of a durable power of attorney for health care printed on or after January 1, 1986, shall comply with the requirements of Section 2432 in effect at the time of printing.

(c) A durable power of attorney for health care executed on or after January 1, 1986, is not invalid if it complies with Section 2432 as originally enacted or as subsequently amended. Subject to Section 2436.5, a durable power of attorney for health care executed on or after January 1, 1986, using a printed form that complied with Section 2433 as amended by Section 5 of Chapter 312 of the Statutes of 1984, or with Section 2433 as amended by Chapter 403 of the Statutes of 1985, is as valid as if it had been executed using a printed form that complied with Section 2433 as thereafter amended.

(Amended by 1991 Cal. Stat. ch. 896, § 3.) [AB 793]

§ 8602. Other authority not affected

8602. (a) Subject to Section 8612, nothing in this chapter affects any right a person may have to make health care decisions on behalf of another.

(b) This chapter does not affect the law governing health care treatment in an emergency.

Comment. Section 8602 continues former Section 2439 without change, except for the revision of a cross-reference to another section and the substitution of a reference to “chapter” instead of “article.” Section 8602 makes clear that the enactment of this chapter has no effect on any right a person may have to consent for another or on emergency treatment. Thus, this chapter is cumulative to whatever other ways there may be to consent for another.

See also Sections 8041 (“health care” defined), 8044 (“health care decision” defined).

§ 8603. Validity of durable power of attorney for health care executed in another jurisdiction

8603. A durable power of attorney for health care or similar instrument executed in another state or jurisdiction in compliance with the laws of that state or jurisdiction or of this state, shall be valid and enforceable in this state to the same extent as a durable power of attorney for health care validly executed in this state.

Comment. Section 8603 continues former Section 2445 [as added by 1992 Cal. Stat. ch. 470, § 3 (AB 2697), operative Aug. 11, 1992] without change.

Staff Note. This section will be integrated into the draft at a later time.

Article 2. Creation and Effect of Durable Power of Attorney for Health Care

§ 8610. Requirements for durable power of attorney for health care

8610. (a) An attorney in fact under a durable power of attorney may not make health care decisions unless all of the following requirements are satisfied:

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

(2) The durable power of attorney contains the date of its execution.

(3) The durable power of attorney is witnessed by one of the following methods:

(A) The durable power of attorney is signed by at least two witnesses each of whom witnessed either the signing of the instrument by the principal or the principal's acknowledgment of the signature or of the instrument, each witness making the following declaration in substance: "I declare under penalty of perjury under the laws of California that the person who signed or acknowledged this document is personally known to me to be the principal, or that the identity of the principal was proved to me by convincing evidence, that the principal signed or acknowledged this durable power of attorney in my presence, that the principal appears to be of sound mind and under no duress, fraud, or undue influence, that I am not the person appointed as attorney in fact by this document, and that I am not the principal's health care provider, an employee of the principal's health care provider, the operator of a community care facility, an employee of an operator of a community care 6 facility, the operator of a residential care facility for the elderly, nor an employee of an operator of a residential care facility for the elderly." At least one of the witnesses must also have signed the following declaration: "I further declare under penalty of perjury under the laws of California that I am not related to the principal by blood, marriage, or adoption, and, to the best of my knowledge, I am not entitled to any part of the estate of the principal upon the death of the principal under a will now existing or by operation of law."

(B) The durable power of attorney is acknowledged before a notary public at any place within this state, the notary public certifying to the substance of the following:

State of California)
) ss.
County of _____)

On this _____ day of _____, in the year _____,
before me, _____,

(Insert name of notary public)

personally appeared _____,
(Insert name of principal)

personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to this instrument, and acknowledged that he or she executed it. I declare under penalty of perjury that the person whose name is subscribed to this instrument appears to be of sound mind and under no duress, fraud, or undue influence.

NOTARY SEAL

(Signature of Notary Public)

(b) Except as provided in Section 8614:

(1) Neither the treating health care provider nor an employee of the treating health care provider, nor an operator of a community care facility or residential care facility for the elderly nor an employee of an operator of a community care facility or residential care facility for the elderly, may be designated as the attorney in fact to make health care decisions under a durable power of attorney.

(2) A health care provider or employee of a health care provider may not act as an attorney in fact to make health care decisions if the health care provider becomes the principal's treating health care provider.

(c) A conservator may not be designated as the attorney in fact to make health care decisions under a durable power of attorney for health care executed by a person who is a conservatee under the Lanterman-Petris-Short Act, Part 1 (commencing with Section 5000) of Division 5 of the Welfare and Institutions Code, unless (1) the power of attorney is otherwise valid, (2) the conservatee is represented by legal counsel, and (3) the lawyer representing the conservatee signs a certificate stating in substance: "I am a lawyer authorized to practice law in the state where this power of attorney was executed, and the principal was my client at the time this power of attorney was executed. I have advised my client concerning his or her rights in connection with this power of attorney and the applicable law and the consequences of signing or not signing this power of attorney, and my client, after being so advised, has executed this power of attorney."

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

- (1) The principal's health care provider.
- (2) An employee of the principal's health care provider.
- (3) The attorney in fact.
- (4) The operator of a community care facility.
- (5) An employee of an operator of a community care facility.
- (6) The operator of a residential care facility for the elderly.
- (7) An employee of an operator of a residential care facility for the elderly.

(e) At least one of the persons used as a witness under subdivision (a) shall be a person who is not one of the following:

(1) A relative of the principal by blood, marriage, or adoption.

(2) A person who would be entitled to any portion of the estate of the principal upon his or her death under any will or codicil thereto of the principal existing at the time of execution of the durable power of attorney or by operation of law then existing.

(f) A durable power of attorney for health care is not effective if the principal is a patient in a skilled nursing facility as defined in subdivision (c) of Section 1250 of the Health and Safety Code at the time of its execution unless one of the witnesses is a patient advocate or ombudsman as may be designated by the State Department of Aging for this purpose pursuant to any other applicable provision of law. The patient advocate or ombudsman shall include in the declaration required by subdivision (a) a declaration that he or she is serving as a witness as required by this subdivision. It is the intent of this subdivision to recognize that some patients in skilled nursing facilities are insulated from a voluntary decisionmaking role, by virtue of the custodial nature of their care, so as to require special assurance that they are capable of willfully and voluntarily executing a durable power of attorney for health care.

Comment. Section 8610 continues former Section 2432 [as amended by 1992 Cal. Stat. ch. 470, § 1 (AB 2697), operative Aug. 11, 1992] without change, except for the revision of cross-references to other provisions. See Section 8023 (“attorney-in-fact” defined).

Subdivision (a) makes clear that a durable power of attorney is not sufficient to enable the agent to consent to health care or make other health care decisions unless the durable power of attorney specifically authorizes health care decisions and the formalities of this section are satisfied. Subdivisions (d) and (e) limit the persons who may serve as witnesses. See also Sections 8029 (general requirements for durable power of attorney), 8611 (warning to person executing durable power of attorney for health care). See also Section 8600 (exception to formalities requirement for powers of attorney executed before operative date).

Subdivision (b) precludes the treating health care provider or an employee of the treating health care provider and other specified persons from acting as the agent under a durable power of attorney for health care. Subdivision (d) precludes health care providers in general and their employees and other specified persons from acting as witnesses to such powers of attorney. These limitations are included in recognition that Section 8630 provides protections from liability for a health care provider who relies in good faith on a decision of the agent. Subdivision (b) does not preclude a person from appointing, for example, a friend who is a doctor to be an agent under the durable power of attorney for health care, but if the doctor becomes a “treating health care provider” of the principal, the doctor is precluded from acting as the agent under the durable power of attorney for health care.

Subdivision (c) prescribes conditions that must be satisfied if a conservator is to be designated as the agent for a conservatee under the Lanterman-Petris-Short Act. This subdivision has no application where a person other than the conservator is to be designated as agent.

Subdivision (f) prescribes additional requirements where the principal is a patient in a nursing home.

As to the use of forms printed before January 1, 1986, see Section 8601.

See also Sections 8026 (“community care facility” defined), 8029 (“durable power of attorney” defined), 8032 (“durable power of attorney for health care” defined), 8044

(“health care decision” defined), 8047 (“health care provider” defined), 8058 (“principal” defined), 8071 (“residential care facility for the elderly” defined).

§ 8611. Requirements for printed form of durable power of attorney for health care

8611. (a) A printed form of a durable power of attorney for health care that is sold or otherwise distributed in this state for use by a person who does not have the advice of legal counsel shall provide no other authority than the authority to make health care decisions on behalf of the principal and shall contain, in not less than 10-point boldface type or a reasonable equivalent thereof, the following warning statement:

WARNING TO PERSON EXECUTING THIS DOCUMENT

This is an important legal document. Before executing this document, you should know these important facts:

This document gives the person you designate as your agent the power to make health care decisions for you. Your agent must act consistently with your desires as stated in this document or otherwise made known.

Except as you otherwise specify in this document, this document gives your agent the power to consent to your doctor not giving treatment or stopping treatment necessary to keep you alive.

Notwithstanding this document, you have the right to make medical and other health care decisions for yourself so long as you can give informed consent with respect to the particular decision. In addition, no treatment may be given to you over your objection, and health care necessary to keep you alive may not be stopped or withheld if you object at the time.

This document gives your agent authority to consent, to refuse to consent, or to withdraw consent to any care, treatment, service, or procedure to maintain, diagnose, or treat a physical or mental condition. This power is subject to any statement of your desires and any limitations that you include in this document. You may state in this document any types of treatment that you do not desire. In addition, a court can take away the power of your agent to make health care decisions for you if your agent (1) authorizes anything that is illegal, (2) acts contrary to your known desires, or (3) where your desires are not known, does anything that is clearly contrary to your best interests.

This power will exist for an indefinite period of time unless you limit its duration in this document.

You have the right to revoke the authority of your agent by notifying your agent or your treating doctor, hospital, or other health care provider orally or in writing of the revocation.

Your agent has the right to examine your medical records and to consent to their disclosure unless you limit this right in this document.

Unless you otherwise specify in this document, this document gives your agent the power after you die to (1) authorize an autopsy, (2) donate your body or parts

thereof for transplant or therapeutic or educational or scientific purposes, and (3) direct the disposition of your remains.

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

(b) The printed form described in subdivision (a) shall also include the following notice: “This power of attorney will not be valid for making health care decisions unless it is either (1) signed by two qualified adult witnesses who are personally known to you and who are present when you sign or acknowledge your signature or (2) acknowledged before a notary public in California.”

(c) A durable power of attorney prepared for execution by a person resident in this state that permits the agent to make health care decisions and that is not a printed form shall include one of the following:

(1) The substance of the statements provided for in subdivision (a) in capital letters.

(2) A certificate signed by the principal’s lawyer stating: “I am a lawyer authorized to practice law in the state where this power of attorney was executed, and the principal was my client at the time this power of attorney was executed. I have advised my client concerning his or her rights in connection with this power of attorney and the applicable law and the consequences of signing or not signing this power of attorney, and my client, after being so advised, has executed this power of attorney.”

(d) If a durable power of attorney includes the certificate provided for in paragraph (2) of subdivision (c) and permits the agent to make health care decisions for the principal, the applicable law of which the client is to be advised by the lawyer signing the certificate includes, but is not limited to, the matters listed in subdivision (a).

Comment. Section 8611 continues former Section 2433 without change, except for the omission of the reference to “attorney in fact” in the warning statement in subdivision (a) and the substitution elsewhere of “agent” for “attorney in fact.” See Section 8023 (“attorney-in-fact” defined).

Section 8611 sets out a warning statement that is required to be in certain printed forms if the durable power of attorney is designed to authorize health care decisions. The warning statement in subdivision (a) is comparable to the warning in Section 8651 (statutory form durable power of attorney for health care). See Comment to Section 8651.

A printed form of a durable power of attorney for health care sold in this state for use by a person who does not have the advice of legal counsel can deal only with the authority to make health care decisions. If a person wants to execute a durable power of attorney to deal with both health care decisions and property matters and the person wants to use a printed form, two different forms are required — one for health care and another for property matters. However, a person who has the advice of a lawyer may cover both health care and property matters in one durable power of attorney. In this case, the warnings or certificate required by subdivision (c) must be included.

As to the use of forms printed before January 1, 1986, see Section 8615.

See also Sections 8029 (“durable power of attorney” defined), 8032 (“durable power of attorney for health care” defined), 8044 (“health care decision” defined), 8059 (“power of attorney” defined), 8058 (“principal” defined).

§ 8612. Attorney-in-fact's authority to make health care decisions

8612. (a) Unless the durable power of attorney provides otherwise, the attorney-in-fact designated in a durable power of attorney for health care who is known to the health care provider to be available and willing to make health care decisions has priority over any other person to act for the principal in all matters of health care decisions, but the attorney-in-fact does not have authority to make a particular health care decision if the principal is able to give informed consent with respect to that decision.

(b) Subject to any limitations in the durable power of attorney, the attorney-in-fact designated in a durable power of attorney for health care may make health care decisions for the principal, before or after the death of the principal, to the same extent as the principal could make health care decisions for himself or herself if the principal had the capacity to do so, including: (1) making a disposition under the Uniform Anatomical Gift Act, Chapter 3.5 (commencing with Section 7150.5) of Part 1 of Division 7 of the Health and Safety Code, (2) authorizing an autopsy under Section 7113 of the Health and Safety Code, and (3) directing the disposition of remains under Section 7100 of the Health and Safety Code. In exercising the authority under the durable power of attorney for health care, the attorney-in-fact has a duty to act consistent with the desires of the principal as expressed in the durable power of attorney or otherwise made known to the attorney-in-fact at any time or, if the principal's desires are unknown, to act in the best interests of the principal.

(c) Nothing in this chapter affects any right the person designated as attorney-in-fact may have, apart from the durable power of attorney for health care, to make or participate in the making of health care decisions on behalf of the principal.

Comment. Section 8612 continues former Section 2434 without substantive change. "Agent" has been substituted for "attorney in fact." See Section 8023 ("attorney-in-fact" defined).

Subdivision (a) of Section 8612 gives the agent priority to make health care decisions if known to the health care provider to be available and willing to act. The power of attorney may vary this priority. Subdivision (a) also provides that the agent is not authorized to make health care decisions if the principal is able to give informed consent. The power of attorney may, however, give the agent authority to make health care decisions for the principal even though the principal is able to give informed consent, but the power of attorney is always subject to Section 8622 (if principal objects, agent not authorized to consent to health care or to the withholding or withdrawal of health care necessary to keep the principal alive).

Subdivision (b) authorizes the agent to make health care decisions, except as limited by the durable power of attorney for health care. In exercising his or her authority, the agent has the duty to act consistent with the principal's desires if known or, if the principal's desires are unknown, to act in the best interests of the principal. This authority is subject to Section 8620 which precludes consent to certain specified types of treatment. See also Section 8621 (unauthorized acts or omissions). The principal is free to provide any limitations on types of treatment in the durable power of attorney that are desired. See also Sections 8900-8962 (court enforcement of duties of agent). The authority under subdivision (b) is limited by Section 8622 (agent not authorized to consent to health care, or to the withholding or

withdrawal of health care necessary to keep the principal alive, if principal objects). An agent may, without liability, decline to act under the power of attorney. For example, the agent may not be willing to follow the desires of the principal as stated in the power of attorney because of changed circumstances. Subdivision (c) makes clear that, in such a case, the agent may make or participate in the making of health care decisions for the principal without being bound by the stated desires of the principal to the extent that the person designated as the agent has the right under the applicable law apart from the durable power of attorney.

As to the duration of the power of attorney, see Section 8616. See also Sections 8029 (“durable power of attorney” defined), 8032 (“durable power of attorney for health care” defined), 8044 (“health care decision” defined), 8047 (“health care provider” defined), 8058 (“principal” defined).

Staff Note. With the expansion of the definition of health care to include postdeath decisions, drawn from this section, the listing of the three types of postdeath care in subdivision (b) is not really necessary. However, in line with our policy of leaving durable power of attorney for health care provisions alone as much as possible, the language has been retained.

§ 8613. Availability of medical information to attorney-in-fact

8613. Except to the extent the right is limited by the durable power of attorney for health care, an attorney-in-fact designated to make health care decisions under a durable power of attorney for health care has the same right as the principal to receive information regarding the proposed health care, to receive and review medical records, and to consent to the disclosure of medical records.

Comment. Section 8613 continues former Section 2436 without substantive change. “Agent” has been substituted for “attorney in fact.” See Section 8023 (“attorney-in-fact” defined).

Section 8613 makes clear that the agent can obtain and disclose information in the medical records of the principal. The power of attorney may limit the right of the agent, for example, by precluding examination of specified medical records or by providing that the examination of medical records is authorized only if the principal lacks the capacity to give informed consent. The right of the agent is subject to any limitations on the right of the patient to reach medical records. See Health & Safety Code §§ 25253 (denial of right to inspect mental health records), 25256 (providing summary of record rather than allowing access to entire record).

See also Sections 8023 (“attorney-in-fact” defined), 8029 (“durable power of attorney” defined), 8041 (“health care” defined), 8044 (“health care decision” defined), 8058 (“principal” defined).

§ 8614. Employee of health care provider, community care facility, or residential care facility

8614. An employee of the treating health care provider or an employee of an operator of a community care facility or an employee of a residential care facility for the elderly may be designated as the attorney-in-fact to make health care decisions under a durable power of attorney for health care if (a) the employee so designated is a relative of the principal by blood, marriage, or adoption, and (b) the other requirements of this chapter are satisfied.

Comment. Section 8614 continues former Section 2432.5 without substantive change. “Agent” has been substituted for “attorney in fact.” See Section 8023 (“attorney-in-fact” defined).

Section 8614 provides a special exception to subdivision (b) of Section 8610 which prohibits an employee of the treating health care provider from being designated as agent to make health care decisions under a durable power of attorney. Under Section 8614, such a person may be so designated if the person is a relative of the principal and the other requirements of this chapter are satisfied. This will, for example, permit a nurse to serve as agent for the nurse's spouse when the spouse is being treated at the hospital where the nurse is employed.

See also Sections 8023 ("attorney-in-fact" defined), 8026 ("community care facility" defined), 8032 ("durable power of attorney for health care" defined), 8044 ("health care decision" defined), 8047 ("health care provider" defined), 8071 ("residential care facility for the elderly" defined).

§ 8615. Revocation of durable power of attorney for health care

8615. (a) At any time while the principal has the capacity to give a durable power of attorney for health care, the principal may do any of the following:

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

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

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

(c) It is presumed that the principal has the capacity to revoke a durable power of attorney for health care. This presumption is a presumption affecting the burden of proof.

(d) Unless it provides otherwise, a valid durable power of attorney for health care revokes any prior durable power of attorney for health care.

(e) Unless the durable power of attorney for health care expressly provides otherwise, if after executing a durable power of attorney for health care the principal's marriage is dissolved or annulled, the dissolution or annulment revokes any designation of the former spouse as an attorney-in-fact to make health care decisions for the principal. If any designation is revoked solely by this subdivision, it is revived by the principal's remarriage to the former spouse.

(f) If authority granted by a durable power of attorney for health care is revoked under this section, a person is not subject to criminal prosecution or civil liability for acting in good faith reliance upon the durable power of attorney for health care unless the person has actual knowledge of the revocation.

Comment. Section 8615 continues former Section 2437 without change, except for the substitution of "agent" for "attorney in fact" and some technical, nonsubstantive revisions. See Section 8023 ("attorney-in-fact" defined). This section makes clear that the principal can revoke the appointment of the agent or the authority granted to the agent by oral or written notification to the agent or health care provider. The principal may revoke the appointment or authority only if, at the time of revocation, the principal has sufficient capacity to give a durable power of attorney for health care. The burden of proof is on the

person who seeks to establish that the principal did not have the capacity to revoke the appointment or authority. See subdivision (c). Although the authorization to act as agent to make health care decisions is revoked if the principal notifies the agent orally or in writing that the appointment of the agent is revoked, a health care provider is protected if the health care provider without knowledge of the revocation acts in good faith on a health care decision of the agent. See Section 8630 (immunities of health care provider).

Subdivision (b) is intended to preserve a record of a written or oral revocation. It also provides a means by which notice of an oral or written revocation to a health care provider may come to the attention of a successor health care provider and imposes a duty to make a reasonable effort to notify the agent of the revocation.

Subdivision (f) makes clear that a person is not liable for acting in good faith reliance upon the durable power of attorney unless the person has actual knowledge of its revocation. This subdivision is a specific application of the general agency rule stated in Section 2356(b) and is comparable to a provision found in the Natural Death Act. See Health & Safety Code § 7189(b). Although a person is protected if the person acts in good faith and without actual notice of the revocation, a person who withholds knowledge of the revocation is guilty of unlawful homicide where the death of the principal is hastened as a result of the failure to disclose the revocation. See Section 8613.

See also Sections 8023 (“attorney-in-fact” defined), 8032 (“durable power of attorney for health care” defined), 8044 (“health care decision” defined), 8058 (“principal” defined).

§ 8616. Expiration of durable power of attorney for health care

8616. (a) This section applies only to a durable power of attorney for health care that satisfies one of the following requirements:

(1) The power of attorney was executed after January 1, 1984, but before January 1, 1992.

(2) The power of attorney was executed on or after January 1, 1992, and contains a warning statement that refers to a seven-year limit on its duration.

(b) Unless a shorter period is provided in the durable power of attorney for health care, a durable power of attorney for health care executed after January 1, 1984, expires seven years after the date of its execution unless at the end of the seven-year period the principal lacks the capacity to make health care decisions for himself or herself, in which case the durable power of attorney for health care continues in effect until the time when the principal regains the capacity to make health care decisions for himself or herself.

Comment. Section 8616 continues former Section 2436.5 without change. Section 8616 limits the duration of a durable power of attorney for health care. The durable power of attorney may provide for a shorter duration, but the period of duration provided by Section 8616 may not be made longer by a provision in the durable power of attorney. The section does not apply to a durable power of attorney for health care executed before January 1, 1984, there being no limitation on the duration of such a durable power of attorney unless specified in the durable power of attorney.

See also Sections 8032 (“durable power of attorney for health care” defined), 8044 (“health care decision” defined), 8058 (“principal” defined).

Article 3. Limitations and Restrictions

§ 8620. Limitations on attorney-in-fact's authority

8620. A power of attorney may not authorize the attorney-in-fact to consent to any of the following on behalf of the principal:

- (a) Commitment to or placement in a mental health treatment facility.
- (b) Convulsive treatment (as defined in Section 5325 of the Welfare and Institutions Code).
- (c) Psychosurgery (as defined in Section 5325 of the Welfare and Institutions Code).
- (d) Sterilization.
- (e) Abortion.

Comment. Section 8620 continues former Section 2435 without substantive change. “Agent” has been substituted for “attorney in fact.” See Section 8023 (“attorney-in-fact” defined). The word “durable” has been omitted because it the prohibition of this section applies to all powers of attorney. A power of attorney may not vary the limitations of this section. See also Section 8621 (unauthorized acts and omissions).

See also Sections 8029 (“durable power of attorney” defined), 8058 (“principal” defined).

Beverly Hills Bar Legislative Committee comments: The BHBLC questions the absolute ban on consent by an attorney-in-fact to the treatments and procedures listed in this section. (See Exhibit 1, pp. 2-3.) The letter notes that these treatments can, under the appropriate circumstances, be vital to the principal’s well-being, and proposes that the section be revised to prohibit these treatments unless the power of attorney contains a specific, initialized grant of authority.

§ 8621. Unauthorized acts or omissions

8621. Nothing in this chapter shall be construed to condone, authorize, or approve mercy killing, or to permit any affirmative or deliberate act or omission to end life other than the withholding or withdrawal of health care pursuant to a durable power of attorney for health care so as to permit the natural process of dying. In making health care decisions under a durable power of attorney for health care, an attempted suicide by the principal shall not be construed to indicate a desire of the principal that health care treatment be restricted or inhibited.

Comment. Section 8621 continues former Section 2443 without change, except for the substitution of a reference to “chapter” instead of “article.” Section 8621 does not prevent the withholding or withdrawal of health care to permit the natural process of dying.

See also Sections 8026 (“community care facility” defined), 8032 (“durable power of attorney for health care” defined), 8044 (“health care decision” defined), 8058 (“principal” defined).

§ 8622. Principal's objections

8622. Nothing in this chapter authorizes an attorney-in-fact to consent to health care, or to consent to the withholding or withdrawal of health care necessary to keep the principal alive, if the principal objects to the health care or

to the withholding or withdrawal of the health care. In such a case, the case is governed by the law that would apply if there were no durable power of attorney for health care.

Comment. Section 8622 continues former Section 2440 without change, except for the substitution of “agent” for “attorney in fact” and of a reference to “chapter” instead of “article.” See Section 8023 (“attorney-in-fact” defined).

Section 8622 precludes the agent from consenting to treatment for the principal when the principal does not want the treatment or from consenting to the withholding or withdrawal of treatment necessary to keep the principal alive if the principal objects to withholding or stopping the treatment. This section does not limit any right the agent may have apart from the authority under the durable power of attorney for health care. See Section 8612(c).

See also Sections 8023 (“attorney-in-fact” defined), 8032 (“durable power of attorney for health care” defined), 8041 (“health care” defined).

§ 8623. Restriction on execution of durable power of attorney for health care as condition for admission, treatment, or insurance

8623. No health care provider, health care service plan, insurer issuing disability insurance, self-insured employee welfare plan, or nonprofit hospital plan or similar insurance plan, may condition admission to a facility, or the providing of treatment, or insurance, on the requirement that a patient execute a durable power of attorney for health care.

Comment. Section 8623 continues former Section 2441 without change. Section 8623 is intended to eliminate the possibility that duress might be used by a health care provider or insurer to cause the patient to execute a durable power of attorney for health care.

See also Sections 8032 (“durable power of attorney for health care” defined), 8047 (“health care provider” defined).

§ 8624. Alteration or forging, or concealment or withholding knowledge of revocation of durable power of attorney for health care

8624. Any person who, except where justified or excused by law, alters or forges a durable power of attorney for health care of another, or willfully conceals or withholds personal knowledge of a revocation as provided under Section 8615, with the intent to cause a withholding or withdrawal of health care necessary to keep the principal alive contrary to the desires of the principal, and thereby, because of such act, directly causes health care necessary to keep the principal alive to be withheld or withdrawn and the death of the principal thereby to be hastened, is subject to prosecution for unlawful homicide as provided in Chapter 1 (commencing with Section 187) of Title 8 of Part 1 of the Penal Code.

Comment. Section 8624 continues former Section 2442 without change, except for the revision of a cross-reference to another section. This section is drawn from Section 7194 of the Health and Safety Code (Natural Death Act).

See also Sections 8032 (“durable power of attorney for health care” defined), 8041 (“health care” defined), 8058 (“principal” defined).

Article 4. Protections and Immunities

§ 8630. Immunities of health care provider

8630. (a) Subject to any limitations stated in the durable power of attorney for health care and to subdivision (b) and to Sections 8620, 8621, 8622, 8623, and 8624, a health care provider is not subject to criminal prosecution, civil liability, or professional disciplinary action except to the same extent as would be the case if the principal, having had the capacity to give informed consent, had made the health care decision on his or her own behalf under like circumstances, if the health care provider relies on a health care decision and both of the following requirements are satisfied:

(1) The decision is made by an attorney-in-fact who the health care provider believes in good faith is authorized under this chapter to make the decision.

(2) The health care provider believes in good faith that the decision is not inconsistent with the desires of the principal as expressed in the durable power of attorney for health care or otherwise made known to the health care provider, and, if the decision is to withhold or withdraw health care necessary to keep the principal alive, the health care provider has made a good faith effort to determine the desires of the principal to the extent that the principal is able to convey those desires to the health care provider and the results of the effort are made a part of the principal's medical records.

(b) Nothing in this chapter authorizes a health care provider to do anything illegal.

(c) Notwithstanding the health care decision of the attorney-in-fact designated by a durable power of attorney for health care, the health care provider is not subject to criminal prosecution, civil liability, or professional disciplinary action for failing to withdraw health care necessary to keep the principal alive.

Comment. Section 8630 continues former Section 2438 without change, except for the revision of cross-references to other provisions, the substitution of "agent" for "attorney in fact," and other technical, nonsubstantive revisions. See Section 8023 ("attorney-in-fact" defined). Section 8630 implements this chapter by protecting the health care provider who acts in good faith reliance on a health care decision made by an agent pursuant to this chapter. The protection under Section 8630 is limited. A health care provider is not protected from liability for malpractice. Nor is a health care provider protected if the health care provider fails to provide the agent with the information necessary so that the agent can give informed consent. Nor is a health care provider authorized to do anything illegal. See also Sections 8620 (forms of treatment not authorized by durable power of attorney for health care), 8621 (unauthorized acts and omissions).

Subdivision (c) provides immunity to the health care provider insofar as there might otherwise be liability for failing to comply with a decision of the agent to withdraw consent previously given to provide health care necessary to keep the principal alive. This subdivision does not deal with providing health care necessary to keep the principal alive. The situations where such health care can be provided without informed consent (such as an emergency situation) continue to be governed by the law otherwise applicable.

See also Sections 8023 ("attorney-in-fact" defined), 8026 ("health care" defined), 8032 ("durable power of attorney for health care" defined), 8044 ("health care decision"

defined), 8047 (“health care provider” defined), 8058 (“principal” defined), 8071 (“residential care facility for the elderly” defined).

§ 8630.5. Presumption concerning power executed in other jurisdiction

8630.5. In the absence of knowledge to the contrary, a physician and surgeon or other health care provider may presume that a durable power of attorney for health care or similar instrument, whether executed in another state or jurisdiction or in this state, is valid.

Comment. Section 8603 continues former Section 2438.5 [as added by 1992 Cal. Stat. ch. 470, § 2 (AB 2697), operative Aug. 11, 1992] without change.

§ 8631. Convincing evidence of identity of principal

8631. For the purposes of the declaration of witnesses required by Section 8610 or 8651, “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 8610 or 8651, 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 8631 continues former Section 2511 without substantive change. This section is drawn from Civil Code Section 1186 (acknowledgment of instrument by notary

public), but is more restrictive because this section does not include the substance of Civil Code Section 1186(c)(1).

CHAPTER 2. STATUTORY FORM DURABLE POWER OF ATTORNEY FOR HEALTH CARE

§ 8650. Short title

8650. This chapter shall be known and may be cited as the Keene Health Care Agent Act.

Comment. Section 8650 continues former Section 2508 without change.

§ 8651. Statutory form durable power of attorney for health care

8651. The use of the following form in the creation of a durable power of attorney for health care under Chapter 1 (commencing with Section 8600) is lawful, and when used, the power of attorney shall be construed in accordance with this chapter and is subject to Chapter 1 (commencing with Section 8600), provided, however, that the use of a form previously authorized by this statute (at the time it was so authorized) remains valid.

STATUTORY FORM DURABLE POWER OF ATTORNEY FOR HEALTH CARE

(California Probate Code Section 8651)

WARNING TO PERSON EXECUTING THIS DOCUMENT

THIS IS AN IMPORTANT LEGAL DOCUMENT WHICH IS AUTHORIZED BY THE KEENE HEALTH CARE AGENT ACT. BEFORE EXECUTING THIS DOCUMENT, YOU SHOULD KNOW THESE IMPORTANT FACTS:

THIS DOCUMENT GIVES THE PERSON YOU DESIGNATE AS YOUR AGENT THE POWER TO MAKE HEALTH CARE DECISIONS FOR YOU. YOUR AGENT MUST ACT CONSISTENTLY WITH YOUR DESIRES AS STATED IN THIS DOCUMENT OR OTHERWISE MADE KNOWN.

EXCEPT AS YOU OTHERWISE SPECIFY IN THIS DOCUMENT, THIS DOCUMENT GIVES YOUR AGENT THE POWER TO CONSENT TO YOUR DOCTOR NOT GIVING TREATMENT OR STOPPING TREATMENT NECESSARY TO KEEP YOU ALIVE.

NOTWITHSTANDING THIS DOCUMENT, YOU HAVE THE RIGHT TO MAKE MEDICAL AND OTHER HEALTH CARE DECISIONS FOR YOURSELF SO LONG AS YOU CAN GIVE INFORMED CONSENT WITH RESPECT TO THE PARTICULAR DECISION. IN ADDITION, NO TREATMENT MAY BE GIVEN TO YOU OVER YOUR OBJECTION AT THE TIME, AND HEALTH CARE NECESSARY TO KEEP YOU ALIVE MAY NOT BE STOPPED OR WITHHELD IF YOU OBJECT AT THE TIME.

THIS DOCUMENT GIVES YOUR AGENT AUTHORITY TO CONSENT, TO REFUSE TO CONSENT, OR TO WITHDRAW CONSENT TO ANY CARE, TREATMENT, SERVICE, OR PROCEDURE TO MAINTAIN, DIAGNOSE, OR TREAT A PHYSICAL OR MENTAL CONDITION. THIS POWER IS SUBJECT TO ANY STATEMENT OF YOUR DESIRES AND ANY LIMITATIONS THAT YOU INCLUDE IN THIS DOCUMENT. YOU MAY STATE IN THIS DOCUMENT ANY TYPES OF TREATMENT THAT YOU DO NOT DESIRE. IN ADDITION, A COURT CAN TAKE AWAY THE POWER OF YOUR AGENT TO MAKE HEALTH CARE DECISIONS FOR YOU IF YOUR AGENT (1) AUTHORIZES ANYTHING THAT IS ILLEGAL, (2) ACTS CONTRARY TO YOUR KNOWN DESIRES, OR (3) WHERE YOUR DESIRES ARE NOT KNOWN, DOES ANYTHING THAT IS CLEARLY CONTRARY TO YOUR BEST INTERESTS.

THE POWERS GIVEN BY THIS DOCUMENT WILL EXIST FOR AN INDEFINITE PERIOD OF TIME UNLESS YOU LIMIT THEIR DURATION IN THIS DOCUMENT.

YOU HAVE THE RIGHT TO REVOKE THE AUTHORITY OF YOUR AGENT BY NOTIFYING YOUR AGENT OR YOUR TREATING DOCTOR, HOSPITAL, OR OTHER HEALTH CARE PROVIDER ORALLY OR IN WRITING OF THE REVOCATION.

YOUR AGENT HAS THE RIGHT TO EXAMINE YOUR MEDICAL RECORDS AND TO CONSENT TO THEIR DISCLOSURE UNLESS YOU LIMIT THIS RIGHT IN THIS DOCUMENT.

UNLESS YOU OTHERWISE SPECIFY IN THIS DOCUMENT, THIS DOCUMENT GIVES YOUR AGENT THE POWER AFTER YOU DIE TO (1) AUTHORIZE AN AUTOPSY, (2) DONATE YOUR BODY OR PARTS THEREOF FOR TRANSPLANT OR THERAPEUTIC OR EDUCATIONAL OR SCIENTIFIC PURPOSES, AND (3) DIRECT THE DISPOSITION OF YOUR REMAINS.

THIS DOCUMENT REVOKES ANY PRIOR DURABLE POWER OF ATTORNEY FOR HEALTH CARE.

YOU SHOULD CAREFULLY READ AND FOLLOW THE WITNESSING PROCEDURE DESCRIBED AT THE END OF THIS FORM. THIS DOCUMENT WILL NOT BE VALID UNLESS YOU COMPLY WITH THE WITNESSING PROCEDURE.

IF THERE IS ANYTHING IN THIS DOCUMENT THAT YOU DO NOT UNDERSTAND, YOU SHOULD ASK A LAWYER TO EXPLAIN IT TO YOU.

YOUR AGENT MAY NEED THIS DOCUMENT IMMEDIATELY IN CASE OF AN EMERGENCY THAT REQUIRES A DECISION CONCERNING YOUR HEALTH CARE. EITHER KEEP THIS DOCUMENT WHERE IT IS IMMEDIATELY AVAILABLE TO YOUR AGENT AND ALTERNATE AGENTS OR GIVE EACH OF THEM AN EXECUTED COPY OF THIS DOCUMENT. YOU MAY ALSO WANT TO GIVE YOUR DOCTOR AN EXECUTED COPY OF THIS DOCUMENT.

DO NOT USE THIS FORM IF YOU ARE A CONSERVATEE UNDER THE LANTERMAN-PETRIS-SHORTACT AND YOU WANT TO APPOINT YOUR CONSERVATOR AS YOUR AGENT. YOU CAN DO THAT ONLY IF THE APPOINTMENT DOCUMENT INCLUDES A CERTIFICATE OF YOUR ATTORNEY.

1. DESIGNATION OF HEALTH CARE AGENT.

I, _____
(Insert your name and address)

do hereby designate and appoint _____

(Insert name, address, and telephone number of one individual only as your agent to make health care decisions for you. None of the following may be designated as your agent: (1) your treating health care provider, (2) a nonrelative employee of your treating health care provider, (3) an operator of a community care facility, (4) a nonrelative employee of an operator of a community care facility, (5) an operator of a residential care facility for the elderly, or (6) a nonrelative employee of an operator of a residential care facility for the elderly.)

as my agent to make health care decisions for me as authorized in this document. For the purposes of this document, "health care decision" means consent, refusal of consent, or withdrawal of consent to any care, treatment, service, or procedure to maintain, diagnose, or treat an individual's physical or mental condition.

2. CREATION OF DURABLE POWER OF ATTORNEY FOR HEALTH CARE.

By this document I intend to create a durable power of attorney for health care under Sections 8600 to 8631, inclusive, of the California Probate Code. This power of attorney is authorized by the Keene Health Care Agent Act and shall be construed in accordance with the provisions of Sections 8650 to 8659, inclusive, of the California Civil Code. This power of attorney shall not be affected by my subsequent incapacity.

3. GENERAL STATEMENT OF AUTHORITY GRANTED. Subject to any limitations in this document, I hereby grant to my agent full power and authority to make health care decisions for me to the same extent that I could make such decisions for myself if I had the capacity to do so. In exercising this authority, my agent shall make health care decisions that are consistent with my desires as stated in this document or otherwise made known to my agent, including, but not limited to, my desires concerning obtaining or refusing or withdrawing life-prolonging care, treatment, services, and procedures.

(If you want to limit the authority of your agent to make health care decisions for you, you can state the limitations in paragraph 4 ("Statement of Desires, Special Provisions, and Limitations") below. You can indicate your desires by including a statement of your desires in the same paragraph.)

4. STATEMENT OF DESIRES, SPECIAL PROVISIONS, AND LIMITATIONS.

(Your agent must make health care decisions that are consistent with your known desires. You can, but are not required to, state your desires in the space provided below. You should consider whether you want to include a statement

of your desires concerning life-prolonging care, treatment, services, and procedures. You can also include a statement of your desires concerning other matters relating to your health care. You can also make your desires known to your agent by discussing your desires with your agent or by some other means. If there are any types of treatment that you do not want to be used, you should state them in the space below. If you want to limit in any other way the authority given your agent by this document, you should state the limits in the space below. If you do not state any limits, your agent will have broad powers to make health care decisions for you, except to the extent that there are limits provided by law.)

In exercising the authority under this durable power of attorney for health care, my agent shall act consistently with my desires as stated below and is subject to the special provisions and limitations stated below:

(a) Statement of desires concerning life-prolonging care, treatment, services, and procedures:

(b) Additional statement of desires, special provisions, and limitations:

(You may attach additional pages if you need more space to complete your statement. If you attach additional pages, you must date and sign EACH of the additional pages at the same time you date and sign this document.)

5. INSPECTION AND DISCLOSURE OF INFORMATION RELATING TO MY PHYSICAL OR MENTAL HEALTH. Subject to any limitations in this document, my agent has the power and authority to do all of the following:

(a) Request, review, and receive any information, verbal or written, regarding my physical or mental health, including, but not limited to, medical and hospital records.

(b) Execute on my behalf any releases or other documents that may be required in order to obtain this information.

(c) Consent to the disclosure of this information.

(If you want to limit the authority of your agent to receive and disclose information relating to your health, you must state the limitations in paragraph 4 (“Statement of Desires, Special Provisions, and Limitations”) above.)

6. SIGNING DOCUMENTS, WAIVERS, AND RELEASES. Where necessary to implement the health care decisions that my agent is authorized by this document to make, my agent has the power and authority to execute on my behalf all of the following:

(a) Documents titled or purporting to be a “Refusal to Permit Treatment” and “Leaving Hospital Against Medical Advice.”

(b) Any necessary waiver or release from liability required by a hospital or physician.

7. AUTOPSY; ANATOMICAL GIFTS; DISPOSITION OF REMAINS. Subject to any limitations in this document, my agent has the power and authority to do all of the following:

(a) Authorize an autopsy under Section 7113 of the Health and Safety Code.

(b) Make a disposition of a part or parts of my body under the Uniform Anatomical Gift Act (Chapter 3.5 (commencing with Section 7150) of Part 1 of Division 7 of the Health and Safety Code).

(c) Direct the disposition of my remains under Section 7100 of the Health and Safety Code.

(If you want to limit the authority of your agent to consent to an autopsy, make an anatomical gift, or direct the disposition of your remains, you must state the limitations in paragraph 4 (“Statement of Desires, Special Provisions, and Limitations”) above.)

8. DURATION.

(Unless you specify otherwise in the space below, this power of attorney will exist for an indefinite period of time.)

This durable power of attorney for health care expires on _____

(Fill in this space ONLY if you want to limit the duration of this power of attorney.)

9. DESIGNATION OF ALTERNATE AGENTS.

(You are not required to designate any alternate agents but you may do so. Any alternate agent you designate will be able to make the same health care decisions as the agent you designated in paragraph 1, above, in the event that agent is unable or ineligible to act as your agent. If the agent you designated is your spouse, he or she becomes ineligible to act as your agent if your marriage is dissolved.)

If the person designated as my agent in paragraph 1 is not available or becomes ineligible to act as my agent to make a health care decision for me or loses the mental capacity to make health care decisions for me, or if I revoke that person’s

appointment or authority to act as my agent to make health care decisions for me, then I designate and appoint the following persons to serve as my agent to make health care decisions for me as authorized in this document, such persons to serve in the order listed below:

A. First Alternate Agent _____

(Insert name, address, and telephone number of first alternate agent)

B. Second Alternate Agent _____

(Insert name, address, and telephone number of second alternate agent)

10. NOMINATION OF CONSERVATOR OF PERSON.

(A conservator of the person may be appointed for you if a court decides that one should be appointed. The conservator is responsible for your physical care, which under some circumstances includes making health care decisions for you. You are not required to nominate a conservator but you may do so. The court will appoint the person you nominate unless that would be contrary to your best interests. You may, but are not required to, nominate as your conservator the same person you named in paragraph 1 as your health care agent. You can nominate an individual as your conservator by completing the space below.)

If a conservator of the person is to be appointed for me, I nominate the following individual to serve as conservator of the person _____

(Insert name and address of person nominated as
conservator of the person)

11. PRIOR DESIGNATIONS REVOKED. I revoke any prior durable power of attorney for health care.

DATE AND SIGNATURE OF PRINCIPAL

(YOU MUST DATE AND SIGN THIS POWER OF ATTORNEY)

I sign my name to this Statutory Form Durable Power of Attorney for Health Care on _____ at _____, _____
(Date) (City) (State)

(You sign here)

(THIS POWER OF ATTORNEY WILL NOT BE VALID UNLESS IT IS SIGNED BY TWO QUALIFIED WITNESSES WHO ARE PRESENT WHEN YOU SIGN OR ACKNOWLEDGE YOUR SIGNATURE. IF YOU HAVE ATTACHED ANY ADDITIONAL PAGES TO THIS FORM, YOU MUST DATE AND SIGN EACH OF THE ADDITIONAL PAGES AT THE SAME TIME YOU DATE AND SIGN THIS POWER OF ATTORNEY.)

STATEMENT OF WITNESSES

(This document must be witnessed by two qualified adult witnesses. None of the following may be used as a witness: (1) a person you designate as your agent or alternate agent, (2) a health care provider, (3) an employee of a health care provider, (4) the operator of a community care facility, (5) an employee of an operator of a community care facility, (6) the operator of a residential care facility for the elderly, or (7) an employee of an operator of a residential care facility for the elderly. At least one of the witnesses must make the additional declaration set out following the place where the witnesses sign.)

(READ CAREFULLY BEFORE SIGNING. You can sign as a witness only if you personally know the principal or the identity of the principal is proved to you by convincing evidence.)

(To have convincing evidence of the identity of the principal, you must be presented with and reasonably rely on any one or more of the following:

(1) An identification card or driver's license issued by the California Department of Motor Vehicles that is current or has been issued within five years.

(2) A passport issued by the Department of State of the United States that is current or has been issued within five years.

(3) Any of the following documents if the document is current or has been issued within five years and contains a photograph and description of the person named on it, is signed by the person, and bears a serial or other identifying number:

(a) A passport issued by a foreign government that has been stamped by the United States Immigration and Naturalization Service.

(b) A driver's license issued by a state other than California or by a Canadian or Mexican public agency authorized to issue drivers' licenses.

(c) An identification card issued by a state other than California.

(d) An identification card issued by any branch of the armed forces of the United States.

(4) If the principal is a patient in a skilled nursing facility, a witness who is a patient advocate or ombudsman may rely upon the representations of the administrator or staff of the skilled nursing facility, or of family members, as convincing evidence of the identity of the principal if the patient advocate or ombudsman believes that the representations provide a reasonable basis for determining the identity of the principal.)

(Other kinds of proof of identity are not allowed.)

I declare under penalty of perjury under the laws of California that the person who signed or acknowledged this document is personally known to me (or proved to me on the basis of convincing evidence) to be the principal, that the principal signed or acknowledged this durable power of attorney in my presence, that the principal appears to be of sound mind and under no duress, fraud, or undue influence, that I am not the person appointed as agent by this document, and that I am not a health care provider, an employee of a health care provider,

the operator of a community care facility, an employee of an operator of a community care facility, the operator of a residential care facility for the elderly, nor an employee of an operator of a residential care facility for the elderly.

Signature: _____ Residence Address: _____
Print Name: _____
Date: _____

Signature: _____ Residence Address: _____
Print Name: _____
Date: _____

(AT LEAST ONE OF THE ABOVE WITNESSES MUST ALSO SIGN THE FOLLOWING DECLARATION.)

I further declare under penalty of perjury under the laws of California that I am not related to the principal by blood, marriage, or adoption, and, to the best of my knowledge, I am not entitled to any part of the estate of the principal upon the death of the principal under a will now existing or by operation of law.

Signature: _____
Signature: _____

STATEMENT OF PATIENT ADVOCATE OR OMBUDSMAN

(If you are a patient in a skilled nursing facility, one of the witnesses must be a patient advocate or ombudsman. The following statement is required only if you are a patient in a skilled nursing facility — a health care facility that provides the following basic services: skilled nursing care and supportive care to patients whose primary need is for availability of skilled nursing care on an extended basis. The patient advocate or ombudsman must sign both parts of the “Statement of Witnesses” above AND must also sign the following statement.)

I further declare under penalty of perjury under the laws of California that I am a patient advocate or ombudsman as designated by the State Department of Aging and that I am serving as a witness as required by subdivision (f) of Section 8610 of the Probate Code.

Signature: _____

Comment. Section 8651 continues former Section 2500 without change, except for the revision of cross-references to other provisions, the use of “agent” in place of “attorney in fact” in the warning statement, and other technical, nonsubstantive revisions. “Agent” has been substituted for “attorney in fact.” See Section 8023 (“attorney-in-fact” defined).

Section 8651 is consistent with and subject to the substantive law applicable to a durable power of attorney for health care. See Sections 8600-8659 (durable power of attorney for health care), 8900-8962 (court review). However, in the statutory form durable power of attorney for health care, the warning set out in Section 8651 replaces the one set out in Section 8611. See also Section 8652 (warning or lawyer’s certificate). Two witnesses are required for use of a statutory form durable power of attorney for health care; acknowledgment before a notary is not permitted. Compare Section 8651 with Section

8610(a)(2)(B) (acknowledgment before notary public). The last sentence of the fifth paragraph of the “warning” recognizes the authority given the court by Section 8952.

As to use of forms complying with former law, see Section 8655. See also Sections 8026 (“community care facility” defined), 8032 (“durable power of attorney for health care” defined), 8041 (“health care” defined), 8044 (“health care decision” defined), 8047 (“health care provider” defined), 8058 (“principal” defined), 8071 (“residential care facility for the elderly” defined).

§ 8652. Warning or lawyer’s certificate

8652. (a) Notwithstanding Section 8611, except as provided in subdivision (b), a statutory form durable power of attorney for health care, to be valid, shall contain, in not less than 10-point boldface type or a reasonable equivalent thereof, the warning statement which is printed in capital letters at the beginning of Section 8651.

(b) Subdivision (a) does not apply if the statutory form durable power of attorney for health care contains a certificate signed by the principal’s lawyer stating: “I am a lawyer authorized to practice law in the state where this power of attorney was executed, and the principal was my client at the time when this power of attorney was executed. I have advised my client concerning his or her rights in connection with this power of attorney and the applicable law and the consequences of signing or not signing this power of attorney, and my client, after being so advised, has executed this power of attorney.”

Comment. Section 8652 continues former Section 2501 without change, except for the revision of cross-references to other provisions. This section makes invalid a statutory form durable power of attorney for health care that does not contain the warning or, in lieu of the warning, a lawyer’s certificate. The warning set out in Section 8651 must be used in the statutory form instead of the warning set out in Section 8611.

See also Sections 8044 (“health care decision” defined), 8047 (“health care provider” defined), 8059 (“power of attorney” defined), 8071 (“residential care facility for the elderly” defined), 8077 (“statutory form durable power of attorney for health care” defined).

§ 8653. Formal requirements

8653. (a) Notwithstanding paragraph (3) of subdivision (a) of Section 8610, a statutory form durable power of attorney for health care is valid, and the designated agent may make health care decisions pursuant to such authority, only if it (1) contains the date of its execution, (2) is signed by the principal, and (3) is signed by two qualified witnesses, each of whom executes, under penalty of perjury, the declaration set out in the first paragraph of the “Statement of Witnesses” in the form set out in Section 8651, and one of whom also executes the declaration under penalty of perjury set out in the second paragraph of the “Statement of Witnesses” in the form set out in Section 8651.

(b) Nothing in this section excuses compliance with the special requirements imposed by subdivisions (c) and (f) of Section 8610.

Comment. Section 8653 continues former Section 2502 without change, except for the revision of cross-references to other provisions and the substitution of “agent” for “attorney in fact.” See Section 8023 (“attorney-in-fact” defined).

Section 8653 is comparable to Section 8610. To be valid a statutory form durable power of attorney for health care must satisfy the requirements of both Section 8652 and 8653. It should be noted that a statutory form durable power of attorney for health care requires two witnesses and, unlike Section 8610, acknowledgment before a notary is not authorized.

See also Sections 8023 (“attorney-in-fact” defined), 8044 (“health care decision” defined), 8058 (“principal” defined), 8077 (“statutory form durable power of attorney for health care” defined).

§ 8654. Requirements for statutory form

8654. (a) Subject to subdivisions (b), (c), and (d), a power of attorney is a “statutory form durable power of attorney for health care,” as this phrase is used in this chapter, if it meets both of the following requirements:

(1) It meets the requirements of Sections 8652 and 8653.

(2) It includes the exact wording of the text of paragraphs 1, 2, 3, and 4 of the form set out in Section 8651.

(b) A statutory form durable power of attorney for health care may include one or more or all of paragraphs 5 to 11, inclusive, of the form set out in Section 8651.

(c) A printed statutory form durable power of attorney for health care sold or otherwise distributed in this state for use by a person who does not have the advice of legal counsel shall contain the exact wording of the form set out in Section 8651, including the warning and instructions, and nothing else. Nothing in this subdivision prohibits selling or otherwise distributing with the printed form (1) material that explains the form and its use if such material is separate from the printed form itself and is not a part of the form executed by the principal or (2) one or more additional pages that are separate from the printed form itself that a person may attach to the printed form as provided in subdivision (d) if the person so chooses.

(d) If one or more additional pages are attached to a statutory form durable power of attorney for health care as a statement, or additional statement, to be a part of subparagraph (a) or (b), or both, of paragraph 4 (“Statement of Desires, Special Provisions, and Limitations”) of the form set forth in Section 8651, each of the additional pages shall be dated and signed by the principal at the same time the principal dates and signs the statutory form durable power of attorney for health care.

Comment. Section 8654 continues former Section 2503 without change, except for the revision of cross-references to other provisions. This section permits use of a statutory form durable power of attorney for health care that omits portions of the form set out in Section 8651, such as, for example, the paragraph on “Duration.” However, if the form is sold or distributed for use by a person who does not have a lawyer, the form must be exactly as set out in the statute with nothing omitted. Section 8654 also permits use of a printed statutory form that includes separate attached printed statements of desires, special provisions, and limitations, if the person using the form so desires, such as, for example, a statement that the health care agent is to confer with specified members of the principal’s family who are

reasonably available before making specified health care decisions or a statement that the health care agent is authorized and directed to arrange for health care of the principal by spiritual means through prayer in accordance with the tenets and practices of a recognized church or religious denomination by an accredited practitioner thereof. A separately printed statement of the principal's desires concerning life-prolonging care, treatment, services, and procedures may also be used. The statements of desires, special provisions, and limitations—whether or not printed—are, of course, subject to the provisions of Chapter 1 (commencing with Section 8600). See the introductory clause of Section 8651.

See also Sections 8058 (“principal” defined), 8077 (“statutory form durable power of attorney for health care” defined).

§ 8655. Requirements for forms after January 1, 1993

8655. (a) A statutory form durable power of attorney for health care executed on or after January 1, 1993, using a form that complies with former Section 2500 of the Civil Code is as valid as if it had been executed using a form that complies with Section 8651 of this code.

(b) Notwithstanding former Section 2501 of the Civil Code or Section 8652 of this code, a statutory form durable power of attorney for health care executed on or after January 1, 1993, is not invalid if it contains the warning using the language set forth in former Section 2500 of the Civil Code instead of the warning using the language set forth in Section 8651 of this code.

(c) For the purposes of subdivision (c) of former Section 2503 of the Civil Code and subdivision (c) of Section 8654 of this code, on and after January 1, 1993, a printed statutory form durable power of attorney for health care may be sold or otherwise distributed if it contains the exact wording of the form set out in former Section 2500 of the Civil Code or the exact wording of the form set out in Section 8651 of this code, including the warning and instructions, and nothing else; but any printed statutory form durable power of attorney for health care printed on or after January 1, 1993, that is sold or otherwise distributed in this state for use by a person who does not have the advice of legal counsel shall contain the exact wording of the form set out in Section 8651 of this code, including the warning and instructions, and nothing else.

Comment. Section 8655 supersedes former Section 2503.5, but like the former section, this section permits continued use of the form prescribed under former law until existing supplies are exhausted. Section 8655 permits use of a form complying with former Section 2500 (applicable from January 1, 1986, until January 1, 1993). Accordingly, after January 1, 1993, either the form set forth in former Section 2500 or the form set forth in this section may be used. This avoids the need to discard existing printed forms on January 1, 1993. However, forms printed on or after January 1, 1993, must contain the exact wording of the form set out in Section 8651, including the warning and instructions, and nothing else.

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

As amended in 1991:

2503.5. (a) Subject to Section 2436.5, a statutory form durable power of attorney for health care executed on or after January 1, 1986, using a form that complied with Section 2500 as originally enacted, or as amended by Chapter 403 of the Statutes of 1985, or as amended by

Chapter 1543 of the Statutes of 1988, or as amended by Chapter 331 of the Statutes of 1990, is as valid as if it had been executed using a form that complied with the requirements of Section 2500 as in effect at the time of execution.

(b) Notwithstanding Section 2501, a statutory form durable power of attorney for health care executed on or after January 1, 1986, is not invalid if it contains the warning using the language set forth in Section 2500 as originally enacted, or as amended by Chapter 403 of the Statutes of 1985, or as amended by Chapter 1543 of the Statutes of 1988, or as amended by Chapter 331 of the Statutes of 1990, instead of the warning using the language set forth in that section as in effect at the time of execution.

(c) For the purposes of subdivision (c) of Section 2503, on and after January 1, 1986, a printed statutory form durable power of attorney for health care may be sold or otherwise distributed if it contains the exact wording of the form set out in Section 2500 as originally enacted, or the exact wording of the form set out in Section 2500 as amended by Chapter 403 of the Statutes of 1985, or as amended by Chapter 1543 of the Statutes of 1988, or as amended by Chapter 331 of the Statutes of 1990, including the warning and instructions, and nothing else; but any printed statutory form durable power of attorney for health care printed on or after January 1, 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 contain the exact wording of the form set out in Section 2500 , including the warning and instructions, and nothing else.

(Amended by 1991 Cal. Stat. ch. 896, § 5.) [AB 793]

§ 8656. Language conferring general authority

8656. In a statutory form durable power of attorney for health care, the language conferring general authority with respect to “health care decisions” authorizes the agent to select and discharge physicians, dentists, nurses, therapists, and other health care professionals as the agent determines necessary to carry out the health care decisions the agent is authorized by the power of attorney to make.

Comment. Section 8656 continues former Section 2504 without change, except for the substitution of “agent” for “attorney in fact.” See Section 8023 (“attorney-in-fact” defined). See also Sections 8044 (“health care decision” defined), 8077 (“statutory form durable power of attorney for health care” defined).

§ 8657. Effect of documents executed by attorney-in-fact

8657. If a document described in paragraph 5 or 6 of the form set out in Section 8651 is executed on behalf of the principal by the attorney-in-fact in the exercise of authority granted to the attorney-in-fact by paragraph 5 or 6 of the form set out in Section 8651, the document has the same effect as if the principal had executed the document at the same time and under the same circumstances and had the capacity to execute the document at that time.

Comment. Section 8657 continues former Section 2505 without change, except for the revision of cross-references to other provisions and the substitution of “agent” for “attorney in fact.” See Section 8023 (“attorney-in-fact” defined). See also Sections 8058 (“principal” defined), 8077 (“statutory form durable power of attorney for health care” defined).

§ 8658. Termination of authority; alternate attorney-in-fact

8658. If the authority of the attorney-in-fact under the statutory form durable power of attorney for health care is terminated by the court under Part 4 (commencing with Section 8900), an alternate attorney-in-fact designated in the statutory form durable power of attorney for health care is not authorized to act as the attorney-in-fact unless the court so orders. In the order terminating the authority of the attorney-in-fact to make health care decisions for the principal, the court shall authorize the alternate attorney-in-fact, if any, designated in the statutory form durable power of attorney for health care to act as the attorney-in-fact to make health care decisions for the principal under the durable power of attorney for health care unless the court finds that authorizing that alternate attorney-in-fact to make health care decisions for the principal would not be in the best interests of the principal.

Comment. Section 8658 continues former Section 2506 without change, except for the revision of a cross-reference to another provision and the substitution of “agent” for “attorney in fact.” See Section 8023 (“attorney-in-fact” defined).

This section applies only where the authority of the agent in fact is terminated by the court. This section does not apply where the agent dies or otherwise is not available or becomes ineligible to act as agent or loses the mental capacity to make health care decisions for the principal or where the principal revokes the agent’s appointment or authority. See paragraph 9 (designation of alternate agents) of statutory form set forth in Section 8651. Where the court terminates the authority of the agent, Section 8658 applies and the alternate agent is not authorized to act as agent unless the court so orders. However, in this case, the court is required to authorize the alternate agent to act unless the court finds that would not be in the best interests of the principal.

See also Sections 8023 (“attorney-in-fact” defined), 8044 (“health care decision” defined), 8058 (“principal” defined), 8077 (“statutory form durable power of attorney for health care” defined).

§ 8659. Use of other forms

8659. Nothing in this chapter affects or limits the use of any other form for a durable power of attorney for health care. Any form complying with the requirements of Chapter 1 (commencing with Section 8600) may be used in lieu of the form provided by Section 8651, and none of the provisions of this chapter apply if such other form is used.

Comment. Section 8659 continues former Section 2507 without change, except for the revision of cross-references to other provisions. This section makes clear that a person may use a durable power of attorney for health care that is not a statutory form durable power of attorney for health care under this chapter. The other durable power of attorney for health care — whether a printed form or a specially drafted document — must, of course, comply with the requirements of Sections 8600-8631 and is subject to the provisions of those sections.

TITLE 4. JUDICIAL PROCEEDINGS CONCERNING POWERS OF ATTORNEY

CHAPTER 1. GENERAL PROVISIONS

§ 8900. Legislative intent [2510.010]

8900. 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 title or otherwise invoked pursuant to law.

Comment. Section 8900 continues former Section 2423 without substantive change. The language of this section has been recast to provide a rule, rather than an expression of legislative intent. See also Section 8059 (“power of attorney” defined).

Staff Note. This section has been revised to incorporate suggestions made by the State Bar Team.

State Bar Team 4 comments:

1. Team 4 believes that § 2510.010 should be transferred to that part of the Statute which will contain general comments.

2. Probate Code § 17209, “Administration of trusts; judicial intervention intermittent,” provides:

“The administration of trusts is intended to proceed expeditiously and free of judicial intervention, subject to the jurisdiction of the court.”

Team 4 suggests that the concepts embodied in Probate Code §17209 be encompassed in § 2510.010.

3. Team 4 suggests that the current § 2510.010 be restated as follows:

“(a) A durable power of attorney shall be exercisable expeditiously and free of judicial intervention, but subject to the jurisdiction of the courts of this state as invoked under the provisions of this article or as otherwise required by law.”

4. If the wording of § 2510.010 is changed, then the title of the section also should be changed.

5. Team 4 suggests that either § 2510.010 or another appropriate section provide that a petition may be filed to compel third parties to honor the instructions of the attorney-in-fact.

6. This section applies equally to durable powers of attorney for health and property.

§ 8901. Application of title [2510.020]

8901. (a) Except as otherwise provided, this title 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 title does not apply to reciprocal or interinsurance exchanges and their contracts, subscribers, attorneys in fact, attorneys-in-fact, and representatives.

Comment. Section 8901 provides the scope of this title. See also Sections 8032 (“durable power of attorney for health care” defined), 8038 (“durable power of attorney for property” defined), 8050 (“nondurable power of attorney” defined), 8080 (“statutory form

power of attorney” defined), 8077 (“statutory form durable power of attorney for health care” defined).

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

State Bar Team 4 comments:

1. In § 2510.020, the clause “except as otherwise provided” provides little guidance to the practitioner; on the other hand, it does generate many questions as to the scope and meaning of the clause. Therefore, Team 4 recommends that the clause “except as otherwise provided” be deleted and that the clause “except as provided in subsection (b)” be substituted therefor. (If subsection (b) of § 2510.020 is not retained (see comment 2), then the clause should be deleted altogether.)

2. Team 4 is uncertain as to the reason that subsection (b) of § 2510.020 was included in § 2510.020. Team 4 believes that this subsection may have been drafted in response to a particular problem which no longer exists. In any event, Team 4 requests that the Staff closely review the necessity for subsection (b) of § 2510.020.

3. This section applies equally to durable powers of attorney for health and property.

§ 8902. Cumulative remedies [2510.030]

8902. The remedies provided under this title are cumulative and nonexclusive.

Comment. Section 8902 continues former Section 2420(a) without substantive change.

State Bar Team 4 comments:

This section applies equally to durable powers of attorney for health and property.

§ 8903. Effect of provision in power attempting to make title inapplicable [2510.040]

8903. Subject to Section 8904, this title applies notwithstanding any provision of the power of attorney to the contrary.

Comment. Section 8903 continues former Section 2422 without substantive change, except that the reference to former Section 2420 is omitted as surplus. See Section 8901(b) (exclusion of reciprocal or interinsurance exchanges). See also Section 8059 (“power of attorney” defined).

State Bar Team 4 comments:

This section applies equally to durable powers of attorney for health and property.

§ 8904. Limitation of remedies by provision in power of attorney [2510.050]

8904. Except as provided in Sections 8905 and 8906, a power of attorney may expressly eliminate the authority of any person listed in Section 8950 to petition the court under this title for any one or more of the purposes enumerated in Section 8901 or 8952 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 8904 continues former Section 2421(a) without substantive change.

This section makes clear that a power of attorney may limit the applicability of this title 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 title 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 8902 (cumulative remedies).

See also Sections 8059 (“power of attorney” defined), 8068 (“principal” defined).

State Bar Team 4 comments:

This section applies equally to durable powers of attorney for health and property.

§ 8905. Right to petition under power of attorney for property [2510.060]

8905. Notwithstanding any provision of a power of attorney for property, the conservator of the estate of the principal may petition the court under this title for any one or more of the purposes enumerated in Section 8901.

Comment. Section 8905 continues former Section 2421(b) without substantive change. See also Sections 8059 (“power of attorney” defined), 8068 (“principal” defined).

§ 8906. Right to petition under durable power of attorney for health care [2510.070]

8906. 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 title for any of the purposes enumerated in subdivisions (a), (c), and (d) of Section 8952.

(b) The attorney-in-fact may petition the court under this title for any of the purposes enumerated in subdivisions (a) and (b) of Section 8952.

Comment. Section 8906 restates former Section 2421(c)-(d) without substantive change.

This section specifies the purposes for which a conservator of the person or an attorney-in-fact may petition the court under this title 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 title if the principal has the advice of legal counsel and the other requirements of Section 8904 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 8952(a). The conservator of the person may obtain a court order requiring the attorney-in-fact to report the attorney-in-fact’s acts under the durable power of attorney for health care if the attorney-in-fact fails to submit such a report within 10 days after a written request. See Section 8952(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 attorney-in-fact 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 8952(d). See also the Comment to Section 8952.

Under subdivision (b), the attorney-in-fact 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 8952(a). The attorney-in-fact may also obtain a court order passing on the acts or proposed acts of the attorney-in-fact under the durable power of attorney for health care. See Section 8952(b).

See also Sections 8023 (“attorney-in-fact” defined), 8032 (“durable power of attorney for health care” defined), 8068 (“principal” defined).

§ 8907. Application of decedents’ estates provisions [2510.080]

8907. Proceedings under this title are governed, whenever possible, by the provisions of this title, but where the provisions of this title do not appear applicable, the provisions of Part 1 (commencing with Section 7000) of Division 7 of the Probate Code apply.

Comment. Section 8907 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 part rather than leaving the matter to guesswork.

State Bar Team 4 comments:

- | | |
|---|--|
| 1. Team 4 agrees with the Staff that this provision should be deleted. In the event that certain other specific provisions are intended to be | encompassed within § 2510.080, then the references should be specific. |
| | 2. This section applies equally to durable powers of attorney for health and property. |

§ 8908. Jury trial [2510.090]

8908. There is no right to a jury trial in proceedings under this part.

Comment. Section 8908 is a new provision. This section is consistent with the rule applicable to other fiduciaries. See Prob. Code §§ 1452 (guardianships and conservatorships), 17200 (decedents’ estates), 17006 (trusts).

State Bar Team 4 comments:

This section applies equally to durable powers of attorney for health and property.

CHAPTER 2. JURISDICTION AND VENUE

§ 8930. Jurisdiction and authority of court or judge [2512.010]

8930. (a) The superior court has jurisdiction of proceedings under this part.

(b) The court in proceedings under this part 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 8930 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).

Staff Note. Civil Code Section 2413 was amended in 1991 to add subdivision (a):

(a) The superior court exercising its general jurisdiction and the superior court exercising its jurisdiction under Section 7050 of the Probate Code shall have concurrent jurisdiction over all petitions filed pursuant to this article.

This needs to be incorporated here.

§ 8931. Jurisdiction over attorney-in-fact [2512.020]

8931. Subject to Section 8932, a person who acts as an attorney-in-fact under a power of attorney governed by this part is subject to personal jurisdiction in this state with respect to matters relating to acts and transactions of the attorney-in-fact performed in this state, performed for a domiciliary of this state, or affecting property in this state.

Comment. Section 8931 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 title 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 attorney-in-fact as a condition of personal jurisdiction. *Cf.* *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

See also Sections 8023 ("attorney-in-fact" defined), 8059 ("power of attorney" defined), 8068 ("principal" defined).

§ 8932. Basis of jurisdiction [2512.030]

8932. The court may exercise jurisdiction in proceedings under this title on any basis permitted by Section 410.10 of the Code of Civil Procedure.

Comment. Section 8932 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 title, 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).

§ 8933. Venue [2512.040]

8933. Proceedings under this title shall be commenced in the superior court of the county in which the attorney-in-fact is resident or, if the attorney-in-fact is not resident in this state, in any county of this state.

Comment. Section 8933 continues former Section 2414 without substantive change. This section recognizes that the attorney-in-fact may not be a resident of this state at the time the petition is filed. See Sections 8004 (durable powers of attorney under law of another

jurisdiction), 8029(a) (“durable power of attorney” defined to include foreign durable powers).

State Bar Team 4 comments:

1. Team 4 believes that it would be helpful to expand and amplify the venue provisions of § 2512.040. Theoretically, Team 4 believes that the venue provisions governing judicial proceedings which involve durable powers of attorney should be the same as the venue requirements applicable to guardianship and conservatorship proceedings.

2. Team 4 believes that if a judicial proceeding for a durable power of attorney is commenced, then the venue preferences for determining the proper location of the proceedings should be as follows: 1) the county of the principal’s residence; 2) the county of the attorney-in-fact’s residence; 3) the county where any property of the principal is located; or 4) any

other county which is in the principal’s best interest.

3. Team 4 felt that the following unresolved issues warranted the Staff’s attention: 1) should the principal be given the right to initiate litigation against the attorney-in-fact in a county other than the county where the principal resides; and 2) if the principal is also a conservatee, should the principal have the right to initiate an action under a durable power of attorney in a county other than a county which has jurisdiction over the conservatorship. Depending upon the resolution of these issues, § 2512.040 may have to be redrafted.

4. This section applies equally to durable powers of attorney for health and property.

CHAPTER 3. PETITIONS, ORDERS, APPEALS

§ 8950. Petitioners [2514.010]

8950. A petition may be filed under this title by any of the following:

(a) The attorney-in-fact.

(b) The principal.

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

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

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

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

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

(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 8950 continues former Section 2411 without substantive change.

This section limits the persons who may file a petition under this article to the attorney-in-fact, 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 attorney-in-fact is permitted a file to petition so that he or she may, for example, obtain a court review of a particular transaction. See also Sections 8902 (other remedies not affected), 8904 (restriction

in power of attorney of right to file petition), 8901 (petition as to power of attorney for property), 8952 (petition with respect to durable power of attorney for health care).

See also Sections 8023 (“attorney-in-fact” defined), 8032 (“durable power of attorney for health care” defined), 8044 (“health care provider” defined), 8059 (“power of attorney” defined), 8068 (“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?

State Bar Team 4 comments:

1. In identifying those individuals who should be eligible to petition the court under a durable power of attorney, Team 4 favored the approach set forth in Probate Code § 1820, which identifies who can be a petitioner in a conservatorship proceeding. Probate Code § 1820 provides:

“(a) A petition for the appointment of a conservator may be filed by any of the following:

- (1) The proposed conservatee.
- (2) The spouse of the proposed conservatee.
- (3) A relative of the proposed conservatee.
- (4) Any interested state or local entity or agency of this state or any interested public

officer or employee of this state or of a local public entity of this state.

(5) Any other interested person or friend of the proposed conservatee.”

In particular, Team 4 suggests that the following individuals should be entitled to petition the court:

1) the principal; 2) the attorney-in-fact; 3) any family member of the principal; or 4) any other interested person.

2. One unresolved issue is whether a creditor of the principal should be entitled to initiate a petition against a principal, specifically whether a creditor should be defined as an interested person.

3. This section applies equally to durable powers of attorney for health and property.

§ 8901. Petition as to power of attorney for property [2510.020]

8901. With respect to a power of attorney for property, a petition may be filed under this title 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 attorney-in-fact.

(c) Compelling the attorney-in-fact to submit the attorney-in-fact’s accounts or report the attorney-in-fact’s acts as attorney-in-fact to the principal, the spouse of the principal, the conservator of the person or the estate of the principal, or to any other person required by the court in its discretion, if the attorney-in-fact 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 attorney-in-fact has violated or is unfit to perform the fiduciary duties under the power of attorney.

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

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

(e) Compelling a third person to honor the authority of an agent under a statutory form power of attorney pursuant to Section [8507.5].

Comment. Section 8901 continues former Section 2412 [as amended by 1992 Cal. Stat. ch. 178, § 3] without substantive change.

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 8065 ("power of attorney for property" defined). Section 8952 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 8301 (unqualified attorney-in-fact).

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 attorney-in-fact has violated or is unfit to perform the fiduciary duties under the power of attorney.

See also Sections 8023 ("attorney-in-fact" defined), 8065 ("power of attorney for property" defined), 8068 ("principal" defined).

§ 8952. Petition as to durable power of attorney for health care [2514.030]

8952. With respect to a durable power of attorney for health care, a petition may be filed under this title 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 attorney-in-fact 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 attorney-in-fact are in the best interests of the principal.

(c) Compelling the attorney-in-fact to report the attorney-in-fact's acts as attorney-in-fact 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 attorney-in-fact 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 attorney-in-fact 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 attorney-in-fact 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 8952 continues former Section 2412.5 without substantive change. This section enumerates the purposes for which a petition may be filed under this title with respect to a durable power of attorney for health care. Section 8901 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 attorney-in-fact. Subdivision (d) permits the court to terminate the durable power of attorney for health care where the attorney-in-fact 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 attorney-in-fact, 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 attorney-in-fact 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 8904 limitation by provision in power of attorney).

See also Sections 8023 ("attorney-in-fact" defined), 8032 ("durable power of attorney for health care" defined), 8044 ("health care decision" defined), 8068 ("principal" defined).

§ 8953. Commencement of proceeding [2514.040]

8953. (a) A proceeding under this title is commenced by filing a verified petition stating facts showing that the petition is authorized under this title, 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 title, the clerk shall set the petition for hearing.

Comment. Subdivision (a) of Section 8953 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 8930. 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.

§ 8954. Dismissal of petition [2514.050]

8954. 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 8954 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 8068 ("principal" defined).

§ 8955. Notice of hearing [2514.060]

8955. 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 attorney-in-fact if not the petitioner.
- (b) The principal if not the petitioner.
- (c) Any other persons the court in its discretion requires.

Comment. Section 8955 continues former Section 2417(b) without substantive change. See also 8068 ("principal" defined).

State Bar Team 4 comments:

1. An unresolved issue is whether notice must be given to the principal's spouse, adult children and possibly others unless the petitioner is able to show good cause for not giving these persons notice.

2. Team 4 is uncertain whether § 2514.060 should parallel the conservatorship notice provisions in the event the principal lacks capacity. For example, if a petition is filed to

compel a third party to honor the power of attorney, should that party as well as the principal be given notice of the proceedings.

3. Although § 2514.060 would appear to apply equally to durable powers of attorney for health and property, this is one of the rare situations where a provision may not apply equally to both types of durable power of attorney.

§ 8956. Service of notice [2514.070]

8956. 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 8956 continues former Section 2417(c) without change.

State Bar Team 4 comments:

This section applies equally to durable powers of attorney for health and property.

§ 8957. Proof of service [2514.080]

8957. Proof of compliance with Sections 8955 and 8956 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 8957 restates former Section 2417(d) without substantive change.

State Bar Team 4 comments:

This section applies equally to durable powers of attorney for health and property.

§ 8958. Power of court [2514.090]

8958. (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 title.

Comment. Subdivision (a) of Section 8958 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.

State Bar Team 4 comments:

This section applies equally to durable powers of attorney for health and property.

§ 8959. Temporary health care order [2514.100]

8959. 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 8952. 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 8952.

Comment. Section 8959 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 8958 (powers of court).

See also Sections 8032 ("durable power of attorney for health care" defined), 8041 ("health care" defined), 8068 ("principal" defined).

State Bar Team 4 comments:

This section applies equally to durable powers of attorney for health and property.

§ 8960. Award of attorney's fees [2514.110]

8960. In a proceeding under this title commenced by the filing of a petition by a person other than the attorney-in-fact, the court may in its discretion award reasonable attorney's fees to one of the following:

(a) The attorney-in-fact, 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 attorney-in-fact has clearly violated the fiduciary duties under the power of attorney or has failed without any reasonable cause or justification to submit

accounts or report acts to the principal or conservator of the estate or of the person, as the case may be, after written request from the principal or conservator.

Comment. Section 8960 continues former Section 2417(g) without substantive change. See Section 8023 (“attorney-in-fact” defined).

State Bar Team 4 comments:

This section applies equally to durable powers of attorney for health and property.

§ 8961. Guardian ad litem [2514.120]

8961. At any stage of a proceeding under this title, 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 title.

Comment. Section 8961 restates former Section 2418 without substantive change. See also Section 8068 (“principal” defined).

Staff Note.

State Bar Team 4 comments:

1. Team 4 felt that the standards which should be applied by the guardian ad litem in determining what action should be undertaken on behalf of a principal merited further consideration. One specific issue is if a guardian ad litem is appointed to represent a missing or incapacitated principal,

should the guardian consider “general family benefit” as that concept which is embodied in the last sentence of Probate Code § 15405?

2. This section applies equally to durable powers of attorney for health and property.

§ 8962. Appeal [2514.130]

8962. An appeal may be taken from any of the following:

(a) Any final order made pursuant to subdivision (a), (b), or (d) of Section 8901 or subdivision (a), (b), or (d) of Section 8952.

(b) An order dismissing the petition or denying a motion to dismiss under Section 8954.

Comment. Section 8962 continues former Section 2419 without substantive change. The reference to “decree” in former Section 2419(a) is omitted as unnecessary.

CONFORMING REVISIONS AND REPEALS

Civ. 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 8309(b). Powers of attorney are governed by Part 10 (commencing with Section 8000). See also Sections 8002 (relation to general agency law), 8059 ("power of attorney" defined), 8231 (termination of power of attorney for property), 8232 (termination of nondurable power of attorney for property), 8308 (termination of attorney-in-fact's authority).

Civ. 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. The rules concerning powers of attorney are provided in Section 8000 *et seq.* See also Sections 8002 (relation to general agency law), 8059 (“power of attorney” defined), 8231 (termination of power of attorney for property), 8232 (termination of nondurable power of attorney for property), 8308 (termination of attorney-in-fact’s authority), 8312 (power coupled with an interest), 8453 (effect of death or incapacity of principal).

Civ. 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. The rules concerning powers of attorney are provided in Section 8000 *et seq.* See also Sections 8002 (relation to general agency law), 8059 (“power of attorney” defined). For a similar provision drawn from Section 2357, see Section 8457 (knowledge where principal is “absentee”).

Civ. 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 8222 (durable power of attorney for property). See Comment to Section 8222.

§ 2400.5. Proxy given by agent to exercise voting rights

Comment. Former Section 2400.5 is continued without substantive change in Section 8059(b) (proxy excluded from definition of power of attorney). See Comment to Section 8059.

§ 2401. Effect of principal’s incapacity

Comment. Former Section 2401 is continued without substantive change in Section 8223 (effect on attorney-in-fact’s acts under durable power of attorney during principal’s incapacity). See Comment to Section 8223.

§ 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 8306 (relation of agent to court-appointed fiduciary). See Comment to Section 8306. The substance of the last sentence of subdivision (a) is restated in Section 8200 (title containing Section 8306 not applicable to durable powers of attorney for health care).

Subdivision (b) is continued without substantive change in Section 8225 (nomination of fiduciary in durable power of attorney for property). See Comment to Section 8225.

§ 2403. Death or incapacity of principal

Comment. Former Section 2403 is continued without substantive change in Section 8453 (effect of death or incapacity of principal). See Comment to Section 8453.

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

Comment. Former Section 2404 is continued without substantive change in Section 8454 (affidavit of lack of knowledge of termination of power). See Comment to Section 8454.

§ 2405. Construction and application

Comment. Former Section 2405 is restated without substantive change in Section 8001(b).

§ 2406. Short title

Comment. Former Section 2406 is restated without substantive change in Section 8001 (Uniform Durable Power of Attorney Act). See Comment to Section 8001.

§ 2407. Severability

Comment. Former Section 2407 is restated without substantive change in Section 8001(c).

Civ. 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 8023 (“attorney-in-fact” defined). See Comment to Section 8023.

Subdivision (b) is continued without substantive change in Section 8032 (“durable power of attorney for health care” defined). See Comment to Section 8032.

The first sentence of subdivision (c) is restated without substantive change in Section 8059(a) (“power of attorney” defined). The second sentence of subdivision (c) is superseded by Section 8059(b) (exclusion from power of attorney). See Comment to Section 8059.

Subdivision (d) is restated without substantive change in Section 8068 (“principal” defined). See Comment to Section 8068.

§ 2411. Petitioners

Comment. Former Section 2411 is continued without substantive change in Section 8950 (petitioners). See Comment to Section 8950.

§ 2412. Relief available

Comment. Former Section 2412 is continued without substantive change in Section 8901 (petition as to power of attorney for property). See Comment to Section 8901.

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

Comment. Former Section 2412.5 is continued without substantive change in Section 8952 (petition as to durable power of attorney for health care). See Comment to Section 8952.

§ 2413. Power of court

Comment. Former Section 2413 is continued without substantive change in Section 8958 (power of court). See Comment to Section 8958.

§ 2414. Venue

Comment. Former Section 2414 is continued without substantive change in Section 8933 (venue). See Comment to Section 8933.

§ 2415. Verified petition; contents

Comment. Former Section 2415 is restated without substantive change in Sections 1021 (petition to be verified), 8930(a) (jurisdiction in superior court), and 8953 (commencement of proceeding). See Comment to Section 8953.

§ 2416. Dismissal of petition

Comment. Former Section 2416 is restated without substantive change in Section 8954 (dismissal of petition). See Comment to Section 8954.

§ 2417. Hearing

Comment. Subdivision (a) of former Section 2417 is restated without substantive change in Section 8953(b) (clerk to set matter for hearing).

Subdivision (b) is restated without substantive change in Section 8955 (notice of hearing). See Comment to Section 8955

Subdivision (c) is continued without change in Section 8956 (service of notice).

Subdivision (d) is restated without substantive change in Section 8957 (proof of service).

Subdivision (e) is restated without substantive change in Section 8907 (application of decedents' estates provisions). See Comment to Section 8907.

Subdivision (f) is restated without substantive change in Section 8958(b) (order shortening time).

Subdivision (g) is continued without substantive change in Section 8960 (award of attorney's fees). See Comment to Section 8960.

Subdivision (h) is continued without substantive change in Section 8959 (temporary health care order). See Comment to Section 8959.

§ 2418. Guardian ad litem

Comment. Former Section 2418 is restated without substantive change in Section 8961 (appointment of guardian ad litem).

§ 2419. Appeal

Comment. Former Section 2419 is continued without substantive change in Section 8962 (appeal). See Comment to Section 8962.

§ 2420. Cumulative remedies

Comment. Subdivision (a) of former Section 2420 is continued without substantive change in Section 8902 (cumulative remedies).

Subdivision (b) is continued without substantive change in Section 8901(b) (application of part).

§ 2421. Limitation by provision in power of attorney

Comment. Subdivision (a) of former Section 2421 is continued without substantive change in Section 8904 (limitation of remedies by provision in power of attorney). See Comment to Section 8904.

Subdivision (b) is continued without substantive change in Section 8905 (right to petition under power of attorney for property). The cross-reference to subdivision (c) is omitted as unnecessary. See Comment to Section 8905.

Subdivisions (c) and (d) are restated without substantive change in Section 8906 (right to petition under durable power of attorney for health care). See Comment to Section 8906.

§ 2422. Application of article

Comment. Former Section 2422 is restated without substantive change in Section 8903 (effect of provision in power attempting to make part inapplicable). See Comment to Section 8903.

§ 2423. Legislative intent

Comment. Former Section 2423 is continued without substantive change in Section 8900 (legislative intent). See Comment to Section 8900.

Civ. Code §§ 2430-2445 (repealed). Durable power of attorney for health care

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

§ 2430. Definitions

Comment. Former Section 2430 is continued without substantive change in Sections 8026 (“community care facility” defined), 8032 (“durable power of attorney for health care” defined), 8041 (“health care” defined), 8044 (“health care decision” defined), 8047 (“health care provider” defined), 8053 (“person” defined), and 8071 (“residential care facility for the elderly” defined).

§ 2431. Application of article

Comment. Former Section 2431 is continued in Section 8600 without substantive change.

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

Comment. Former Section 2432 is continued in Section 8610 without substantive change.

§ 2432.5. Employee of health care provider, community care facility, or residential care facility

Comment. Former Section 2432.5 is continued in Section 8614 without substantive change.

§ 2433. Requirements for printed form of durable power of attorney for health care

Comment. Former Section 2433 is continued in Section 8611 without substantive change.

§ 2434. Agent's authority to make health care decisions

Comment. Former Section 2434 is continued in Section 8612 without substantive change.

§ 2435. Limitations on agent's authority

Comment. Former Section 2435 is continued in Section 8620 without substantive change.

§ 2436. Availability of medical information to agent

Comment. Former Section 2436 is continued in Section 8613 without substantive change.

§ 2436.5. Expiration of durable power of attorney for health care

Comment. Former Section 2436.5 is continued in Section 8616 without substantive change.

§ 2437. Revocation of durable power of attorney for health care

Comment. Former Section 2437 is continued in Section 8615 without substantive change.

§ 2438. Immunities of health care provider

Comment. Former Section 2438 is continued in Section 8630 without substantive change.

§ 2438.5. Presumption concerning power executed in other jurisdiction

Comment. Former Section 2438.5 is continued in Section 8630.5 without substantive change.

§ 2439. Other authority not affected

Comment. Former Section 2439 is continued in Section 8602 without substantive change.

§ 2440. Principal's objections

Comment. Former Section 2440 is continued in Section 8622 without substantive change.

§ 2441. Restriction on execution of durable power of attorney for health care as condition for admission, treatment, or insurance

Comment. Former Section 2441 is continued in Section 8623 without substantive change.

§ 2442. Alteration or forging, or concealment or withholding knowledge of revocation of durable power of attorney for health care

Comment. Former Section 2442 is continued in Section 8624 without substantive change.

§ 2443. Unauthorized acts or omissions

Comment. Former Section 2443 is continued in Section 8621 without substantive change.

§ 2444. Form of durable power of attorney for health care

Comment. Former Section 2444 is continued in Section 8601 without substantive change.

§ 2445. Validity of durable power of attorney for health care executed in another jurisdiction

Comment. Former Section 2445 is continued in Section 8603 without substantive change.

Civ. Code § 2450 (repealed). Use of old statutory forms

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

Comment. Former Section 2450 is continued in Section 8509 without substantive change.

Civ. Code §§ 2475-2484 (repealed). Uniform Statutory Form Power of Attorney Act

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

§ 2475. Statutory form power of attorney

Comment. Former Section 2475 is continued in Section 8501 without substantive change.

§ 2476. Requirements for statutory form power of attorney

Comment. Former Section 2476 is continued in Section 8502 without substantive change.

§ 2477. Effect of initialing line in front of (N) in statutory form

Comment. Former Section 2477 is continued in Section 8503 without substantive change.

§ 2478. Durability of statutory form power of attorney

Comment. Former Section 2478 is continued in Section 8504 without substantive change.

§ 2479. Springing statutory form power of attorney

Comment. Former Section 2479 is continued in Section 8505 without substantive change.

§ 2480. General provisions applicable to statutory form power of attorney

Comment. Former Section 2480 is continued in Section 8507 without substantive change.

§ 2480.5. Compelling third person to honor statutory form power of attorney

Comment. Former Section 2480.5 is continued in Section 8506 without substantive change.

Staff Note. The repetition of this provision in Section 8507 is an error.

§ 2481. Use of other forms

Comment. Former Section 2481 is continued in Section 8508 without substantive change.

§ 2482. Short title

Comment. Former Section 2482 is continued in Section 8500 without substantive change.

§ 2483. Construction

Staff Note. This section needs to be preserved in the new statute.

§ 2484. Severability

Staff Note. This section needs to be preserved in the new statute.

§ 2485. Construction of powers generally

Comment. Former Section 2485 is continued in Section 8530 without substantive change.

§ 2486. Real property transaction

Comment. Former Section 2486 is continued in Section 8531 without substantive change.

§ 2487. Tangible personal property transactions

Comment. Former Section 2487 is continued in Section 8532 without substantive change.

§ 2488. Stock and bond transactions

Comment. Former Section 2488 is continued in Section 8533 without substantive change.

§ 2489. Commodity and option transactions

Comment. Former Section 2489 is continued in Section 8534 without substantive change.

§ 2490. Banking and other financial institution transactions

Comment. Former Section 2490 is continued in Section 8535 without substantive change.

§ 2491. Business operating transactions

Comment. Former Section 2491 is continued in Section 8536 without substantive change.

§ 2492. Insurance and annuity transactions

Comment. Former Section 2492 is continued in Section 8537 without substantive change.

§ 2493. Estate, trust, and other beneficiary transactions

Comment. Former Section 2493 is continued in Section 8538 without substantive change.

§ 2494. Claims and litigation

Comment. Former Section 2494 is continued in Section 8539 without substantive change.

§ 2495. Personal and family maintenance

Comment. Former Section 2495 is continued in Section 8540 without substantive change.

§ 2496. Benefits from social security, medicare, medicaid, or other governmental programs, or civil or military service

Comment. Former Section 2496 is continued in Section 8541 without substantive change.

§ 2497. Retirement plan transactions

Comment. Former Section 2497 is continued in Section 8542 without substantive change.

§ 2498. Tax matters

Comment. Former Section 2498 is continued in Section 8543 without substantive change.

§ 2499. After-acquired property

Comment. Former Section 2499 is continued in Section 8544 without substantive change.

§ 2499.5. Power to modify or revoke trust

Comment. Former Section 2499.5 is continued in Section 8545 without substantive change.

Civ. Code §§ 2500-2508 (repealed). Statutory Form Durable Power of Attorney for Health Care

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

§ 2500. Statutory form of durable power of attorney for health care

Comment. Former Section 2500 is continued in Section 8651 without substantive change.

§ 2501. Warning or lawyer's certificate

Comment. Former Section 2501 is continued in Section 8652 without substantive change.

§ 2502. Formal requirement

Comment. Former Section 2502 is continued in Section 8653 without substantive change.

§ 2503. Requirements for statutory form

Comment. Former Section 2503 is continued in Section 8654 without substantive change.

§ 2503.5. Requirements for forms after January 1, 1993

Comment. Former Section 2503.5 is continued in Section 8655 without substantive change.

§ 2504. Language conferring general authority

Comment. Former Section 2504 is continued in Section 8656 without substantive change.

§ 2505. Effect of documents executed by agent

Comment. Former Section 2505 is continued in Section 8657 without substantive change.

§ 2506. Termination of authority; alternate agent

Comment. Former Section 2506 is continued in Section 8658 without substantive change.

§ 2507. Use of other forms

Comment. Former Section 2507 is continued in Section 8659 without substantive change.

§ 2508. Short title

Comment. Former Section 2508 is continued in Section 8650 without substantive change.

Civ. 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 8224 (warning statement in durable power of attorney for property). See Comment to Section 8224.

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

Comment. Former Section 2510.5 is superseded by Section 8202 (form of durable power of attorney after January 1, 1993). See Comment to Section 8202.

§ 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 8458 (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 8458.

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

Comment. Former Section 2513 is continued without change in Section 8228 (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 8020 (application of definitions). Paragraph (1) of subdivision (a) is restated without substantive change in Sections 8023 ("attorney-in-fact" defined), 8059 ("power of attorney" defined), and 8068 ("principal" defined). See Comment to Section 8023

(“agent” replaces “attorney in fact”). Paragraph (2) of subdivision (a) is continued without change in Section 8074 (“springing power of attorney” defined).

Subdivisions (b)-(d) are continued without substantive change in Section 8226 (springing power of attorney). See Comment to Section 8226.