

Memorandum 93-20

Subject: L-3044 — Comprehensive Power of Attorney Statute

Attached to this memorandum is a revised and simplified draft of the power of attorney statute. The extensive staff notes and State Bar Team commentary included in the draft attached to Memorandum 93-12 have been discarded. The draft statute is still tentatively placed at Civil Code Section 8000 *et seq.*, but the sections have been substantially renumbered. For those wishing to review earlier commentary and relate it to the successor provision in the current draft, a cross-reference table is attached to this memorandum as Exhibit 1.

Meeting with State Bar Team 4 Members

In an effort to iron out technical issues raised by Team 4 of the Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section (set forth in detail in the draft attached to Memorandum 93-12), the staff met with three Team members for two full days of intensive and productive discussion. This enabled the staff and the bar to work through a number of technical issues and to refine our collective thinking about some basic policy issues. The draft attached to this memorandum reflects the staff's understanding of how these issues should best be resolved based on our discussions.

The revised draft statute raises a number of new issues and some as yet unresolved matters are discussed below and in staff notes following the relevant sections.

Schedule of Power of Attorney Study

The staff believes that the Commission should now be in a position to make significant progress on the draft so that a tentative recommendation can be distributed for comment this summer. If a substantial number of issues can be resolved at the March meeting, a revised draft and explanatory text can be reviewed at the May meeting. If all major issues are resolved at these two meetings, a tentative recommendation can be approved at the July meeting. Comments on the tentative recommendation would then be reviewed and

revisions made in the fall so that a final recommendation can be submitted to the Legislature in the 1994 session.

Scope of “Comprehensive” Power of Attorney Statute

A major problem from the start has been the scope of the comprehensive power of attorney statute. Most recently, the State Bar Team has urged the Commission to limit the statute to **durable** powers of attorney. (This issue was fully considered in Memorandum 93-12 on the January agenda.) In this draft, the issue is discussed in connection with Section 8050, but in summary, focuses on durable powers of attorney, but in certain circumstances applies to nondurable powers. The draft applies to durable powers, the statutory form powers (which include both durable and nondurable powers), and any power that incorporates the statute. This approach leaves some loose ends. For example, the Uniform Durable Power of Attorney protects the reliance interest of third persons regardless of whether the power is durable.

Scope of Definitions and General Provisions

The definitions have been simplified and reorganized. The special health care definitions have been returned to the title concerning the durable power of attorney for health care. The definitions based on permutations of the terms “durable,” “power of attorney,” “property,” etc., have been abandoned in favor of broader terms. This may result in a lack of technical precision, but should hopefully be less confusing to those using the statute. Having fewer definitions enables drafting less wordy statutes, in many cases.

The original approach had been to try to make clear which rules applied to which types of powers and to do this it was felt necessary to define the powers with precision. Thus, the draft used the term “power of attorney for property” to draw a distinction from the durable power of attorney for health care. The risk in abandoning this effort is that the statute will not be clear in its application to those who do not already understand its intent. As those of us working on the project delve deeper into these subjects, we may come to a general understanding that will not be clear to those encountering the statute for the first time.

The general set of definitions is thus reduced from 21 to seven. The disadvantage to this approach is that there is not one place to look for definitions under the new draft. On the other hand, specialized definitions like “community

care facility” appear near where they are used instead of cluttering up the general definitions. The best location for the definition of “durable power of attorney for health care” is debatable. For the time being, it is with the rest of the health care definitions.

Terminology

The draft has been revised to eliminate references to powers of attorney “for property.” In addition, the provisions concerning the powers of the attorney-in-fact have been revised to refer to “authority” instead of “power” to avoid any confusion that might arise between the instrument (the power of attorney) and the power (authority) of the attorney-in-fact. We do not think it is any more than a question of taste. The Trust Law used “power” almost exclusively, but the general agency statutes use “authority.” The Uniform Durable Power of Attorney Act uses both terms but the Uniform Statutory Form Power of Attorney Act uses “power.”

Location of Statute

An issue that has been before the Commission off and on from the start of this project in the summer of 1990 is the best location of the power of attorney statute. The question cannot be answered in the abstract. If we can judge from the recent discussions between the staff and the Team representatives, if the focus of the statute is to be on durable powers, then the Probate Code is the best location. This is true even if the statute has some application on nondurable powers of attorney drawn by individuals, by which we mean to refer to powers that are covered by the Uniform Durable Power of Attorney Act, the Uniform Statutory Form Power of Attorney, and the judicial review procedures in existing law even though they are not durable. In fact, it has become clear that moving the statute to the Probate Code would have the beneficial effect of helping define the focus and purpose of the statute — to cover powers of attorney that are mainly intended as substitutes for conservatorships and trusts. It would help distinguish by usage these types of powers from the power of attorney used in the commercial world. As discussed in earlier memorandums, location in the Probate Code has some other advantages, such as usable general provisions and definitions, and the judicial review sections already apply Probate Code procedures by reference from the Civil Code.

Perhaps the State Bar's major objection to relocating the power of attorney statutes stemmed from the desire to keep powers of attorney linked to agency law. Now that the Commission has approved including a section in the power of attorney statute saying that it is subject to the general agency statutes, this particular objection would seem to have been satisfied. It should also be remembered that the choice is not between leaving the statute where it is with just a bit of tinkering. The statutory revisions under discussion will make a dramatic change in the appearance of the statute. We have earlier investigated the approach of trying to revise the statute in situ (as in the draft attached to Memorandum 91-40), but the results are not pleasing and certainly not up to the Commission's usual standards. The new statute will involve relocating the law, the only remaining question being whether it should be relocated somewhere else in the Civil Code (as in the draft attached to this memorandum) or in the Probate Code (as in the draft attached to Memorandum 90-122).

Respectfully submitted,

Stan Ulrich
Assistant Executive Secretary

3/15/93

STAFF DRAFT POWER OF ATTORNEY CONVERSION TABLE

Staff Note. This table provides cross references among the last three staff drafts of a comprehensive power of attorney statute. The table is provided to permit correlation of State Bar Team comments to the current working draft. This enables us to simplify the current working draft without losing all of the earlier commentary from the State Bar and the Beverly Hills Bar. The table also provides an easy way to see what earlier sections have not been continued in the current draft.

The table is structured as follows:

- The first column of numbers shows the section numbers and headings from the January 1993 draft which was attached to Memorandum 93-12. (These numbers are substantially the same as the September 1992 draft which was attached to Memorandum 92-50.)
- The second column of numbers shows the section numbers from the May 1991 draft, which was attached to Memorandum 91-40. The State Bar Team comments were keyed to this draft.
- The third column of numbers shows the section numbers from the current (March 1993) working draft, attached to Memorandum 93-20.

Jan. 1993	May 1991	Current
§ 8000 Short title	§ 2400.010	§ 8000
§ 8001 Uniform Durable Power of Attorney Act	§ 2405.020	§ 8001
§ 8002 Relation to general agency law	§ 2400.020	§ 8051
§ 8003 General rule concerning application of part	§ 2400.030 #1	§ 8053
§ 8004 Application of Power of Attorney Law	§ 2400.030 #2	§ 8052
§ 8005 Recognition of durable powers of attorney under law of another state	§ 2400.040	§ 8054
§ 8020 Application of definitions	§ 2402.010	§ 8010
§ 8023 Attorney-in-fact	§ 2402.030	§ 8013
§ 8026 Community care facility		§ 8603
§ 8029 Durable power of attorney	§ 2402.070	§ 8016
§ 8032 Durable power of attorney for health care	§ 2402.090	§ 8606
§ 8035 Durable power of attorney for personal care		
§ 8041 Health care	§ 2402.130	§ 8609
§ 8044 Health care decision	§ 2402.150	§ 8612
§ 8047 Health care provider		§ 8615
§ 8050 Nondurable power of attorney	§ 2402.190	
§ 8053 Person		§ 8019
§ 8056 Personal care		[§ 8122]
§ 8059 Power of attorney	§ 2402.210	§ 8022
§ 8062 Power of attorney for personal care		
§ 8068 Principal	§ 2402.250	§ 8025
§ 8071 Residential care facility for the elderly		§ 8618
§ 8074 Springing power of attorney	§ 2402.290	§ 8028
§ 8077 Statutory form durable power of attorney for health care	§ 2402.310	§ 8621
§ 8080 Statutory form power of attorney	§ 2402.330	
§ 8083 Third person	§ 2402.350	§ 8031
§ 8200 Application of title	§ 2405.010	§ 8100
§ 8202 Form of durable power of attorney after January 1, 1995	§ 2405.030	§ 8102
§ 8220 Creation of power of attorney	§ 2410.010	§ 8120
§ 8221 Permissible purposes	§ 2410.020	§ 8122

Jan. 1993	May 1991	Current
§ 8222 Requirements for durable power of attorney for property	§ 2410.030	§ 8123
§ 8223 Effect of acts under durable power of attorney during principal's incapacity	§ 2410.040	§ 8124
§ 8224 Warning statement in durable power of attorney for property	§ 2410.050	§ 8127
§ 8225 Nomination of conservator in durable power of attorney	§ 2410.060	§ 8125
§ 8226 Springing power of attorney	§ 2410.070	§ 8128
§ 8227 Lapse of time	§ 2410.080	§ 8126
§ 8228 Application to principal's property	§ 2410.090	[§8221]
§ 8229 Variation of duties and liabilities between principal and attorney-in-fact . . .	§ 2410.110	§ 8150
§ 8230 Manner of modification or termination by principal	§ 2410.120	§ 8151
§ 8231 Termination of power of attorney for property	§ 2410.130	§ 8152
§ 8232 Termination of nondurable power of attorney for property	§ 2410.140	§ 8153
§ 8233 Certified copy of power of attorney	§ 2410.150	§ 8306
§ 8300 Qualifications of attorney-in-fact	§ 2415.010	§ 8200
§ 8301 Effect of designating unqualified person as attorney-in-fact	§ 2415.020	§ 8201
§ 8302 Multiple attorneys-in-fact	§ 2415.030	§ 8202
§ 8303 Successor attorneys-in-fact	§ 2415.040	§ 8203
§ 8304 Compensation of attorney-in-fact	§ 2415.050	§ 8204
§ 8305 Delegation of attorney-in-fact's authority	§ 2415.060	§ 8205
§ 8306 Relation of attorney-in-fact to court-appointed fiduciary	§ 2415.070	§ 8206
§ 8307 Authority when principal missing or held captive in foreign country	§ 2415.080	§ 8207
§ 8308 Termination of attorney-in-fact's authority	§ 2415.090	[§ 8153]
§ 8309 Effect of dissolution, annulment, or legal separation	§ 2415.100	§ 8154
§ 8310 Succession following termination of attorney-in-fact's authority	§ 2415.110	
§ 8311 Attorney-in-fact's duties and powers on termination of authority	§ 2415.120	§ 8239
§ 8312 Power coupled with an interest	§ 2415.130	[§ 8050]
§ 8350 When duties commence	§ 2418.010	§ 8230
§ 8351 Standard of care and liability for losses	§ 2418.020	§ 8231
§ 8352 Duty of loyalty	§ 2418.030	§ 8232
§ 8353 Duty to avoid conflict of interest	§ 2418.040	[§ 8232]
§ 8354 Duty not to undertake adverse responsibilities	§ 2418.050	[§ 8232]
§ 8355 Duty to keep principal's property separate and identified	§ 2418.060	§ 8233
§ 8356 Duty to keep principal informed and follow instructions	§ 2418.070	§ 8234
§ 8357 Consultation	§ 2418.080	§ 8235
§ 8358 Duty to keep records and account to principal	§ 2418.090	§ 8236
§ 8359 Duty to use special skills	§ 2418.100	§ 8237
§ 8360 Duty to reveal capacity as attorney-in-fact	§ 2418.110	§ 8238
§ 8400 General powers subject to limitations in power of attorney	§ 2421.010	§ 8261
§ 8401 Incorporation of powers	§ 2421.020	§ 8262
§ 8402 Grant of general powers without limitation	§ 2421.030	§ 8263
§ 8403 Grant of general powers for express purposes	§ 2421.040	§ 8264
§ 8404 Effect of grant of general powers	§ 2421.050	
§ 8405 Powers that must be specifically enumerated	§ 2421.060	§ 8265
§ 8406 Excluded powers	§ 2421.070	§ 8266
§ 8407 Exercise of powers subject to duties	§ 2421.080	§ 8267
§ 8450 Third persons required to respect attorney-in-fact's authority	§ 2425.010	§ 8300
§ 8451 Immunities of third person	§ 2425.020	
§ 8452 Reliance by third person on general powers	§ 2425.030	§ 8301
§ 8453 Effect of death or incapacity of principal	§ 2425.040	§ 8302
§ 8454 Affidavit of lack of knowledge of termination of power	§ 2425.050	§ 8303, 8304

Jan. 1993		May 1991	Current
§ 8455	Identification of attorney-in-fact	\$ 2425.060	\$ 8305
§ 8456	When knowledge of employees charged to third person	\$ 2425.070	\$ 8307
§ 8457	Knowledge where principal is "absentee"	\$ 2425.080	\$ 8308
§ 8458	Protection of third person relying in good faith	\$ 2425.090	\$ 8309
§ 8459	Effect of contractual provision for notice	\$ 2425.100	
§ 8460	Liability between principal and third person	\$ 2425.110	
§ 8500	Uniform Statutory Form short title		\$ 8400
§ 8501	Statutory form power of attorney		\$ 8401
§ 8502	Requirements for statutory form power of attorney		\$ 8402
§ 8503	Effect of initialing line in front of (N) in statutory form		\$ 8403
§ 8504	Durability of statutory form power of attorney		\$ 8404
§ 8505	Springing statutory form power of attorney		\$ 8405
§ 8506	Compelling third person to honor statutory form power of attorney		\$ 8406
§ 8507	General provisions applicable to statutory form power of attorney		\$ 8407
§ 8507.5	Compelling third person to honor statutory form power of attorney		
§ 8508	Use of other forms		\$ 8408
§ 8509	Use of statutory form provided by repealed statutes		\$ 8409
§ 8530	Construction of powers generally		\$ 8450
§ 8531	Real property transactions		\$ 8451
§ 8532	Tangible personal property transactions		\$ 8452
§ 8533	Stock and bond transactions		\$ 8453
§ 8534	Commodity and option transactions		\$ 8454
§ 8535	Banking and other financial institution transactions		\$ 8455
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§ 8537	Insurance and annuity transactions		\$ 8457
§ 8538	Estate, trust, and other beneficiary transactions		\$ 8458
§ 8539	Claims and litigation		\$ 8459
§ 8540	Personal and family maintenance		\$ 8460
§ 8541	Benefits from social security, medicare, medicaid, or other governmental programs		\$ 8461
§ 8542	Retirement plan transactions		\$ 8462
§ 8543	Tax matters		\$ 8463
§ 8544	After-acquired property		\$ 8464
§ 8545	Power to modify or revoke trust		\$ 8465
§ 8600	Application of chapter (DPAHC)		\$ 8600
§ 8601	Form of durable power of attorney for health care after January 1, 1995		\$ 8651
§ 8602	Other authority not affected		\$ 8652
§ 8603	Validity of durable power of attorney for health care executed in other jurisdiction		\$ 8653
§ 8610	Requirements for durable power of attorney for health care		\$ 8700
§ 8611	Requirements for printed form of durable power of attorney for health care		\$ 8701
§ 8612	Attorney-in-fact's authority to make health care decisions		\$ 8702
§ 8613	Availability of medical information to attorney-in-fact		\$ 8703
§ 8614	Employee of health care provider, community or residential care facility		\$ 8704
§ 8615	Revocation of durable power of attorney for health care		\$ 8705
§ 8616	Expiration of durable power of attorney for health care		\$ 8706
§ 8620	Limitations on attorney-in-fact's authority		\$ 8730
§ 8621	Unauthorized acts or omissions		\$ 8731
§ 8622	Principal's objections		\$ 8732
§ 8623	Restriction on DPAHC as condition for admission, treatment, or insurance		\$ 8733
§ 8624	Alteration, forging, or concealment, etc. of revocation of DPAHC		\$ 8734

Jan. 1993		May 1991	Current
§ 8630	Immunities of health care provider		§ 8750
§ 8630.5	Presumption concerning power executed in other jurisdiction		§ 8752
§ 8631	Convincing evidence of identity of principal		§ 8751
§ 8650	Short title		§ 8770
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§ 8659	Use of other forms		§ 8779
§ 8900	Legislative intent	§ 2510.010	§ 8900
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§ 8902	Cumulative remedies	§ 2510.030	§ 8901
§ 8903	Effect of provision in power attempting to make title inapplicable	§ 2510.040	§ 8902
§ 8904	Limitation of remedies by provision in power of attorney	§ 2510.050	§ 8902
§ 8905	Right to petition under power of attorney for property	§ 2510.060	§ 8903
§ 8906	Right to petition under durable power of attorney for health care	§ 2510.070	§ 8903
§ 8907	Application of decedents' estates provisions	§ 2510.080	
§ 8908	Jury trial	§ 2510.090	§ 8904
§ 8930	Jurisdiction and authority of court or judge	§ 2512.010	§ 8920
§ 8931	Jurisdiction over attorney-in-fact	§ 2512.020	§ 8921
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COMPREHENSIVE POWER OF ATTORNEY STATUTE

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Civ. Code §§ 8000-8952 (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. DEFINITIONS AND GENERAL PROVISIONS

CHAPTER 1. SHORT TITLE AND DEFINITIONS

§ 8000. Short title

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, but the general agency statutes also apply as provided in Section 8051. See also Section 14 (general definitions).

§ 8001. Uniform Durable Power of Attorney Act

8001. (a) Sections 8123, 8124, 8125, 8126, 8206, 8302, and 8303 may be cited as the Uniform Durable Power of Attorney Act.

(b) The Uniform Durable Power of Attorney Act shall be applied and construed to effectuate its general purpose to make uniform the law with respect to durable powers of attorney among states enacting the act.

(c) If any provision of the Uniform Durable Power of Attorney Act or its application to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of the act that 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.

Staff Note. Subdivisions (b) and (c) will not be needed if the Power of Attorney Law is located in the Probate Code. See Prob. Code §§ 2, 11.

§ 8010. Application of definitions

8010. Unless the provision or context otherwise requires, the definitions in this chapter govern the construction of this part.

Comment. Section 8010 restates and generalizes the substance of the introductory clause of former Section 2410.

§ 8013. Attorney-in-fact

8013. (a) “Attorney-in-fact” means a person delegated authority 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 a person delegated authority by an attorney-in-fact.

Comment. Subdivision (a) of Section 8013 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 8202 (multiple attorneys-in-fact), 8203 (successor attorneys-in-fact), 8205 (delegation of attorney-in-fact’s authority), 8771 (alternate attorneys-in-fact under statutory form durable power of attorney for health care). The purpose of subdivision (b) is to make clear that the rules applicable to attorneys-in-fact under the Power of Attorney Law apply as well to successors and alternates of the original attorney-in-fact, and to other persons who act in place of the attorney-in-fact.

See also Sections 8022 (“power of attorney” defined), 8025 (“principal” defined).

§ 8016. Durable power of attorney

8016. “Durable power of attorney” means a power of attorney that satisfies the requirements for durability provided in Section 8123.

Comment. Section 8016 is a new section included for drafting convenience.

Staff Note. The prior draft restricted the Uniform Durable Power of Attorney section to powers of attorney for property. Now that the approach is to generalize and write exceptions, instead of defining strict, mutually exclusive types of powers, the definition in Section 8016 is reduced to a cross-reference. It could be eliminated, but it is useful to have a definition where it might be expected. The staff considered the alternative of putting the substance of Section 8123 in this section, but that would have involved rewriting the section substantially and since it is the fundamental section of UDPA, we did not do so. Unlike many uniform acts, UDPA is not an integrated structure and could be tinkered with profitably. But the State Bar Team feels strongly that language changes in UDPA should be kept to a minimum. Accordingly, the staff has adopted this cross-reference approach.

§ 8019. Person

8019. “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 8019 continues former Section 2430(e) without change and generalizes it to apply to the entire part.

Staff Note. This section would not be eliminated if the Power of Attorney Law is located in the Probate Code. See Prob. Code § 56.

§ 8022. Power of attorney

8022. (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.

Comment. Subdivision (a) of Section 8022 restates the first sentence of former Section 2410(c) without substantive change.

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 8013 (“attorney-in-fact” defined), 8016 (“durable power of attorney” defined), 8606 (“durable power of attorney for health care” defined).

§ 8025. Principal

8025. “Principal” means a natural person who executes a power of attorney.

Comment. Section 8025 restates and generalizes former Section 2410(d). See Section 8022 (“power of attorney” defined).

§ 8028. Springing power of attorney

8028. “Springing power of attorney” means a power of attorney that by its terms 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 8028 continues former Section 2514(a)(2) without substantive change. See Section 8128 (springing power of attorney). See also Sections 8016 (“durable power of attorney” defined), 8022 (“power of attorney” defined), 8025 (“principal” defined).

Staff Note. This definition is used only in draft Section 8128, although the concept is used in draft Section 8405 (statutory form springing power). The staff was tempted to put this definition back into Section 8128, but we have kept it here for now since it could be more generally applicable. Note also that the second sentence of Section 8028 provides that a springing power may be durable or nondurable. This is existing law, enacted on recommendation of the Commission in 1990. Technically, it is surplus and would be surplus under the scope rules provided in draft Section 8050.

§ 8031. Third person

8031. “Third person” means any person other than the principal or attorney-in-fact.

Comment. Section 8031 is a new provision. For the purposes of this statute, a third person is a person who acts on a request from, contracts with, relies on, or otherwise deals with the attorney-in-fact. The Uniform Statutory Form Power of Attorney uses the equivalent term “third party.” See Sections 8401-8402.

See also Section 8013 (“attorney-in-fact” defined), 8025 (“principal” defined).

CHAPTER 2. GENERAL PROVISIONS

§ 8050. Types of powers of attorney governed by this part

8050. (a) This part applies to the following types of powers of attorney:

- (1) Durable powers of attorney.
- (2) Statutory form powers of attorney under Title 3 (commencing with Section 8400).
- (3) Durable powers of attorney for health care under Title 4 (commencing with Section 8600).
- (4) Any other powers of attorney that incorporate or refer to the provisions of this part.
 - (b) This part does not apply to the following:
 - (1) A power of attorney to the extent that the authority of the attorney-in-fact is coupled with an interest in the subject of the power of attorney.
 - (2) Reciprocal or interinsurance exchanges and their contracts, subscribers, attorneys-in-fact, agents, and representatives.
 - (3) A proxy given by an attorney-in-fact to another person to exercise voting rights.
 - (c) This part is not intended to affect the validity of any instrument or arrangement that is not described in subdivision (a).
 - (d) Nothing in this part is intended to prevent the application of all or part of the principles or procedures of this part to a power of attorney that is not described in subdivision (a) where these principles or procedures are applied pursuant to statutory or common law principles, by court order or rule, or by contract.

Comment. Section 8050 describes the types of instruments that are subject to the Power of Attorney Law. If a section in this part refers to a “power of attorney,” it generally refers to a durable power of attorney, but may, under certain circumstances, also apply to a nondurable power of attorney. For example, a statutory form power of attorney may be durable or nondurable. See Sections 8401, 8404. A nondurable power may incorporate provisions of this part, thereby becoming subject to its provisions as provided in Section 8050(a)(4).

Subdivision (b) makes clear that certain specialized types of power of attorney are not subject to the Power of Attorney Law. Subdivision (b)(1) continues former Section 2420(b) and broadens it to apply to the entire Power of Attorney Law. See Ins. Code § 1280 *et seq.* Subdivision (b)(2) continues the substance of the limitation in former Section 2400.5. This list is not intended to be exclusive. See subdivision (c).

Subdivision (c) makes clear that this part does not affect the validity of other agencies and powers of attorney. The Power of Attorney Law thus does not apply to other specialized agencies, such as real estate agents under Section 2373 *et seq.* As a corollary, an instrument denominated a power of attorney that does not satisfy the execution requirements for a power of attorney under this part may be valid under general agency law or other principles.

Subdivision (d) is analogous to the rule applicable to the Trust Law. See Prob. Code § 15003(c),

The general rules in this part are subject to the special rules applicable to statutory form powers of attorney in Title 3 (commencing with Section 8400) and to durable powers of attorney for health care in Title 4 (commencing with Section 8600). See also Sections 8770-8779 (statutory form durable power of attorney for health care).

Staff Note 1. The reference in subdivision (b)(1) to a power coupled with an interest is a new attempt to avoid the distracting references to this rule that has appeared in earlier drafts. If this works, it will improve the readability of several other sections. The intent here is to throw powers coupled with an interest back into general agency law where they can fend for

themselves. They are really not a major concern in this statute. However, the staff will double-check this disposition to see if it works and would appreciate comments from practitioners on this disposition.

The former draft language was as follows:

[8212] To the extent that the power of an attorney-in-fact is coupled with an interest in the subject of the power of attorney, 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 [8212] continues the special rule concerning powers coupled with interests provided in Section 2356(a). This section provides an exception to Sections 8151 (termination of power of attorney), 8153 (termination of authority of attorney-in-fact), and 8154 (effect of dissolution or annulment).

The staff would prefer to eliminate subdivision (b)(2)-(3), but these provisions are preserved here since it is existing law.

Staff Note 2. Subdivision (c) is new to the draft and is offered in an effort to provide some flexibility as to instruments not covered by subdivision (a) in appropriate circumstances.

§ 8051. Relation to general agency law

8051. Except where this part provides a specific rule, the general law of agency, including Article 2 (commencing with Section 2019) of Chapter 2 of Title 6, and Title 9 (commencing with Section 2295) of Part 4, of Division 3, applies to powers of attorney.

Comment. Section 8051 is new. This section makes clear that the general agency statutes and the common law of agency apply to powers of attorney under this part, except where this part provides a specific rule.

Staff Note. This rule may be a bit overbroad. There are some very general and vague rules in the general agency statutes that may not be appropriate for written durable powers of attorney. Perhaps the rule should be modified by some type of standard, such as "where application of a particular rule is appropriate taking into consideration the purposes of the power of attorney...."

§ 8052. Application of part to transactions under power of attorney

8052. Subject to Section 8050:

(a) If 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 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 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 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 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 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 8052 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. The introductory clause makes clear that the rules in this section are subject to the general rules concerning the scope of the Power of Attorney Law set forth in Section 8050. Nothing in this section limits the jurisdiction exercisable under Code of Civil Procedure Section 410.10.

See also Sections 8013 (“attorney-in-fact” defined), 8022 (“power of attorney” defined), 8025 (“principal” defined).

§ 8053. Retroactivity

8053. 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, 1995.

(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 8053 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). Subdivision (c) provides discretion to the court to resolve problems arising in proceedings commenced before the operative date.

For special transitional provisions, see Sections 8102 (durable power of attorney form), 8651 (form of durable power of attorney for health care); see also Section 8128(c) (springing powers). See also Section 8022 (“power of attorney” defined).

§ 8054. Recognition of durable powers of attorney under law of another state

8054. 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 8054 is new. This section promotes use and enforceability of durable powers of attorney executed in other states. See also Section 8016 (“durable power of attorney” defined). For a special rule applicable to durable powers of attorney for health care, see Section 8653.

TITLE 2. POWERS OF ATTORNEY GENERALLY

CHAPTER 1. GENERAL PROVISIONS

§ 8100. Application of title

8100. This title applies to all powers of attorney under this part, subject to any special rules applicable to a statutory form power of attorney under Title 3 (commencing with Section 8400) or a durable power of attorney for health care under Title 4 (commencing with Section 8600).

Comment. Section 8100 provides the scope of this title and makes clear that these general rules are subject to exceptions and qualifications in the case of certain special types of powers of attorney.

§ 8101. Priority of provisions of power of attorney

8101. Except as otherwise provided in this part, the principal may limit the application of this part to a power of attorney by an express provision in the power of attorney.

Comment. Section 8101 is new.

Staff Note. This provision is new to the draft and would implement a suggestion made by the State Bar Team. See comments to Section 8006 of the draft attached to Memorandum 93-12. The draft statute has not been thoroughly examined to determine which provisions should not be subject to control in the instrument.

§ 8102. Form of durable power of attorney after January 1, 1995 [operative date]

8102. Notwithstanding Section 8127:

(a) Except as provided in subdivision (b), on and after January 1, 1995, 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 8127.

(c) A durable power of attorney executed on or after January 1, 1995, 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 8127.

Comment. Section 8102 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, 1995, the

operative date of Section 8127. 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, 1995, 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 8127. Both provisions are acceptable because the wording changes are nonsubstantive. See Section 8127 Comment.

CHAPTER 2. CREATION AND EFFECT OF POWERS OF ATTORNEY

§ 8120. Who may execute a power of attorney

8120. A natural person having the capacity to contract may execute a power of attorney.

Comment. Section 8120 continues the requirement of general agency law in Section 2296.

§ 8121. Formalities for executing a power of attorney

8121. A power of attorney is legally sufficient if all of the following requirements are satisfied:

(a) The power of attorney contains the date of its execution.

(b) The power of attorney is signed either (1) by the principal or (2) in the principal's name by some other person in the principal's presence and by the principal's direction.

(c) The signature of the principal is either (1) acknowledged before a notary public in this state or (2) signed by two witnesses, each of whom witnessed either the signing of the power of attorney or the principal's acknowledgment of the signature or the power of attorney.

Comment. Section 8121 provides the execution formalities for a power of attorney under this title. Special rules apply to the statutory form power of attorney. See Section 8402. Additional qualifications apply to witnesses for a durable power of attorney for health care. See Sections 8700, 8771.

The dating requirement in subdivision (a) generalizes the rule applicable to durable powers of attorney for health care under former Section 2432(a)(2). This rule is also consistent with the statutory forms. See Sections 8401 (statutory form power of attorney), 8771 (statutory form durable power of attorney for health care).

The signature requirement in subdivision (b) continues an implicit rule in former law. See former Sections 2400, 2410(c). In addition, it generalizes the rule applicable to durable powers of attorney for health care under former Section 2432.

The requirement that the power of attorney be either acknowledged or signed by two witnesses generalizes a rule applicable to durable powers of attorney for health care under former Section 2432(a)(3). Former general rules did not require either acknowledgment or witnessing. However, the statutory form power of attorney provided for acknowledgment. See former Section 2475 (now Section 8401). This rule still applies to the statutory form power of attorney; witnessing does not satisfy Section 8402.

Staff Note 1. The option of signing at the principal's direction in subdivision (b)(2) is new to the general rules in the draft. The language is drawn from the wills statute. Prob. Code § 6110(b). The staff has not been tempted to import the requirement that each witness sign in the others presence. See Prob. Code § 6110(c). This is consistent with the durable power of

attorney for health care rule in Section 2432(a)(3), which we intend to supersede by this simpler general rule.

Staff Note 2. A major goal of this revised draft is to provide general rules applicable to all powers of attorney. We have retreated from the approach of defining special types of powers and then making explicit which statutory rules apply to which type of power. It has been the hope that one set of rules concerning execution of powers (other than statutory forms) could be established so that the statute would be easier to use and we would not have variant but overlapping rules applicable to health care powers on one hand, and property and personal care powers on the other.

As a consequence, the draft now requires acknowledgment or witnessing. The witnessing option needs to be retained for health care powers, and so it must be generalized to apply to all powers (other than the Uniform Statutory Form Power of Attorney). However, this raises additional issues. The health care power has detailed limitations on who can be a witness. (See draft Section 8700 for all of the details.) The staff does not believe that it is acceptable to eliminate those restrictions in the health care power statutes, but it does not seem appropriate to generalize these rules to all powers of attorney. Of course, most property powers would presumably be acknowledged so that they can be recorded, but it would be silly to provide as a general rule that, for example, an employee of the principal's health care provider cannot be a witness of the principal's power of attorney for property matters.

The current draft permits non-health care powers to be witnessed as an alternative to notarization. A power of attorney should be valid if the formalities of its execution approximate the formalities for a will. But it might be a more logical approach to drop the witnessing alternative for powers generally and provide instead that any power of attorney that satisfies the execution requirements for a durable power of attorney for health care is valid even though it is not acknowledged. In other words, the general rule in Section 8121 would require acknowledgment, subject to the exception where the formalities of the durable power of attorney for health care are satisfied. Would this be a better approach?

Staff Note 3. Other states do not necessarily require acknowledgment or witnessing. Perhaps some state does not require a power of attorney to be dated. The draft assumes that the execution formalities in this section are subject to the rule concerning foreign powers of attorney in draft Section 8054,

§ 8122. Permissible purposes

8122. (a) In a power of attorney, a principal may authorize an attorney-in-fact 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. The attorney-in-fact may be granted authority with regard to the principal's property, personal care, or health care.

(b) With regard to property matters, a power of attorney may apply to all or part of the principal's real and personal property, 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.

(c) With regard to personal care, a power of attorney may grant authority to make decisions relating to the personal care of the principal, including, but not limited to, determining where the principal will live, providing meals, hiring household employees, providing transportation, handling mail, and arranging recreation and entertainment.

(d) With regard to health care, a power of attorney may grant the authority to make health care decisions as provided in Title 4 (commencing with Section 8600).

Comment. Subdivision (a) of Section 8122 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 8230-8267. See also Sections 8013 (“attorney-in-fact” defined), 8022 (“power of attorney” defined), 8025 (“principal” defined).

Subdivision (b) continues former Section 2513 without substantive change. This subdivision 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).

Subdivision (c) is new and acknowledges the existing practice of providing authority to make personal care decisions in durable powers of attorney.

Subdivision (d) recognizes the monopoly of the durable power of attorney for health care over health care decisions. See Section 8609 (“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. The reference to personal care in subdivision (c) is the current disposition of the suggestion that the statute define powers of attorney for personal care. Several difficulties with implementing this concept were discussed in the draft attached to Memorandum 93-12. In addition, the Beverly Hills Bar Legislative Committee opposed inventing a new type of power. The staff believes that the statutory recognition is the main point in the State Bar Team’s suggestion, and that is accomplished in this draft section. The approach here is to recognize categories of powers of attorney without actually defining them and drafting statutes based on rigid categories. This section could be split up, but it seems useful as an overview in this form.

§ 8123. Requirements for durable power of attorney

8123. A durable power of attorney is a power of attorney by which a principal designates another person as 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.

Comment. Section 8123 restates former Section 2400 without substantive change. For special rules applicable to statutory form powers of attorney, see Sections 8401, 8484. For special rules applicable to durable powers of attorney for health care, see Sections 8701, 8771 (durable powers of attorney for health care). See also Section 8050 (application of title).

Section 8123 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 of Uniform Durable Power of Attorney Act). The reference in the Uniform Act to the principal’s “disability” is omitted. Under Section 8152, 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 8123 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 8151(a)(1) (termination of power of attorney at end of stated term).

See also Sections 8013 (“attorney-in-fact” defined), 8016 (“durable power of attorney” defined), 8022 (“power of attorney” defined), 8025 (“principal” defined), 8028 (“springing power of attorney” defined).

§ 8124. Effect of acts under durable power of attorney during principal’s incapacity

8124. All acts done by an attorney-in-fact pursuant to a durable power of attorney 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.

Comment. Section 8124 continues former Section 2401 without substantive change. This section is similar to the first 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 Durable Power of Attorney Act). This section omits the reference to the principal’s “disability” found in the uniform act. Under Section 8152, it is the principal’s incapacity to contract which would otherwise terminate the power of attorney.

See also Sections 8013 (“attorney-in-fact” defined), 8025 (“principal” defined).

§ 8125. Nomination of conservator in durable power of attorney

8125. (a) A principal may nominate, by a durable power of attorney, a conservator of the person or estate or both, or a guardian of the person or estate or both, for consideration by the court if protective proceedings for the principal’s person or estate are thereafter commenced.

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

Comment. Section 8125 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 Durable Power of Attorney Act). 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 8016 (“durable power of attorney” defined), 8025 (“principal” defined).

§ 8126. Lapse of time

8126. Unless a power of attorney states a time of termination, the authority of the attorney-in-fact is exercisable notwithstanding any lapse of time since execution of the power of attorney.

Comment. Section 8126 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 Durable Power of Attorney Act). See also Sections 8124 (effect of attorney-in-fact's acts under durable power of attorney during principal's incapacity), 8151 (termination of power of attorney).

§ 8127. Warning statement in durable power of attorney

8127. (a) Subject to subdivision (b), a printed form of a durable power of attorney 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 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 [or signed by two witnesses].

You should read this durable power of attorney carefully. When effective, this durable power of attorney will give your agent the right to deal with 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.

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

(c) This section does not apply to the following:

(1) A statutory form power of attorney under Title 3 (commencing with Section 8400).

(2) A durable power of attorney for health care under Title 4 (commencing with Section 8600).

Comment. The warning statement in subdivision (a) of Section 8127 replaces the statement provided in former Section 2510(b). Subdivisions (b) and (c) restate former Section 2510(a) and (c) without substantive change. Other provisions prescribe the contents of the warning statements for particular types of durable powers of attorney. See Sections 8401, 8409 (statutory form power of attorney), 8701 (durable power of attorney for health care), 8771 (statutory form durable power of attorney for health care). See also Section 8701(a) (introductory clause) (printed form of a durable power of attorney for health care to provide only authority to make health care decisions).

Section 8102 permits a printed form to be used after January 1, 1995, 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 8127 (or its predecessor, former Section 2510). See Section 8102(b).

See also Sections 8013 (“attorney-in-fact” defined), 8016 (“durable power of attorney” defined), 8031 (“third person” defined).

§ 8128. Springing power of attorney

8128. (a) In a springing power of attorney, the principal may designate one or more persons who, by a written declaration under penalty of perjury, have the power to determine conclusively that the specified event or contingency has occurred. The principal may designate the 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).

(d) This section does not provide the exclusive method by which a power of attorney may be limited to take effect on the occurrence of a specified event or contingency.

Comment. Section 8128 continues former Section 2514(b)-(e) 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 8028 (“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 incapacity of the principal is necessarily a durable power of attorney, and the other rules concerning durable powers of attorney are applicable.

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 8022 (“power of attorney” defined), 8025 (“principal” defined).

CHAPTER 3. MODIFICATION AND REVOCATION OF POWERS OF ATTORNEY

Staff Note. An important policy issue concerns the treatment of modification of powers of attorney. The State Bar Team has fairly consistently urged that powers of attorney not be modifiable, that what you see is what you get, that there should be no “side agreements” between the principal and attorney-in-fact, and that the principal who wishes to revise a power of attorney should terminate it and execute a new instrument. See, e.g., State Bar Team comments to Sections 8229-8230 of the draft attached to Memorandum 93-12.

The staff believes that principals will try to modify powers of attorney, to clarify provisions or to add or delete authority, regardless of whether this is the best practice or one that would be advised by a skilled lawyer. It is also more efficient to permit minor adjustments than to require termination and reexecution. We do not require such a procedure for wills or trusts.

The staff surmises that the State Bar Team was primarily concerned with two issues: acceptance of powers of attorney by third persons and the possibility of oral modifications. The provision concerning oral modifications has been eliminated from the draft (although the general agency rules requiring the agent to follow the directions of the principal still apply) and the issue of protecting the reliance interest of third persons, and thereby promoting acceptance of powers of attorney, is dealt with directly (and can be improved where needed).

Finally, the draft has been revised to pull more of the related rules together. We had hoped to provide separate rules for modification and termination, but this effort proved more cumbersome than clarifying. This approach of the draft is like that in the Trust Law, where it

was recognized that the power to modify is equivalent to the power to revoke, resulting in the rules being drafted together.

§ 8150. Variation of duties and liabilities as between principal and attorney-in-fact

8150. The principal and the attorney-in-fact may enter into a written agreement that sets forth their duties and liabilities as between themselves and their successors.

Comment. Section 8150 is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.717(4) (Vernon 1990). Section 8266 provides certain absolute limits on actions that may be taken by an attorney-in-fact under a power of attorney that may not be varied by this section. Nothing in this section affects the rules protecting and encouraging reliance on powers of attorney by third persons.

See also Sections 8013 (“attorney-in-fact” defined), 8025 (“principal” defined).

§ 8151. Modification or revocation by principal

8151. As between the principal and attorney-in-fact, a power of attorney may be modified or revoked 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 revoked or when and under what circumstances it is modified or revoked.

(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 revoked or when and under what circumstances it is modified or revoked.

(d) When a written notice that the power of attorney is modified or revoked is filed by the principal or the principal’s legal representative for record in the 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 8151 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 8234. For other events that terminate a power of attorney, see Sections 8151, 8152. For events that terminate the authority of an attorney-in-fact, see Sections 8153, 8154.

See also Sections 8013 (“attorney-in-fact” defined), 8022 (“power of attorney” defined), 8025 (“principal” defined).

§ 8152. Termination of power of attorney

8152. (a) Subject to subdivision (b), a power of attorney is terminated by any of the following events:

(1) Expiration of the term of the power of attorney, except as provided in Section 8207.

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

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

(4) Death of the principal.

(5) Death, 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 8300).

Comment. Section 8152 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, see Section 8155.

The first clause of subdivision (a) recognizes the special rule applicable to a power of attorney coupled with an interest provided in Section 8212. 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 8207. 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 8153 (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 8013 ("attorney-in-fact" defined), 8022 ("power of attorney" defined), 8031 ("third person" defined).

§ 8153. Termination of attorney-in-fact's authority

8153. (a) Subject to subdivision (b), the authority of an attorney-in-fact under a power of attorney 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 or annulment of the marriage of, or legal separation of, the attorney-in-fact and principal, as provided in Section 8154.

(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 8300).

Comment. Section 8153 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 an attorney-in-fact under a power 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 8212. Subdivision (a)(1) provides that the authority of an attorney-in-fact necessarily ceases when the underlying power of attorney is terminated. See Section 8151 (termination of power of attorney). 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 8207. 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 8013 ("attorney-in-fact" defined), 8016 ("durable power of attorney" defined), 8022 ("power of attorney" defined), 8031 ("third person" defined).

§ 8154. Effect of dissolution, annulment, or legal separation

8154. Unless the power of attorney expressly provides otherwise:

(a) If, after executing a power of attorney, 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, 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 8154 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 8022 ("power of attorney" defined).

See also Sections 8013 ("attorney-in-fact" defined), 8022 ("power of attorney" defined), 8025 ("principal" defined).

Staff Note. The duplicative rules in the durable power of attorney for health care would be superseded by this general rule. In addition, the staff intends to do further research on whether the federal absentee rules can be harmonized with the general rule proposed in subdivision (a). On the face of it, we see no justification for the special rules in subdivision (b).

§ 8155. Termination of nondurable power of attorney on principal's incapacity

8155. (a) Subject to subdivision (b), a nondurable power of attorney 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 is protected from liability as provided in Chapter 4 (commencing with Section 8300).

Comment. Subdivision (a) of Section 8155 restates the general agency rule in Section 2356(a)(3) without substantive change. For other events that terminate a power of attorney, see Section 8151.

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

See also Sections 8013 (“attorney-in-fact” defined), 8016 (“durable power of attorney” defined), 8022 (“power of attorney” defined), 8031 (“third person” defined).

CHAPTER 4. ATTORNEYS-IN-FACT

Article 1. Qualifications and Authority of Attorneys-in-Fact

§ 8200. Qualifications of attorney-in-fact

8200. A person having the capacity to contract is qualified to act as an attorney-in-fact.

Comment. Section 8200 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. For special limitations on attorneys-in-fact under durable powers of attorney for health care, see Sections 8700(b)-(c), 8704.

See also Sections 8013 (“attorney-in-fact” defined), 8019 (“person” defined), 8022 (“power of attorney” defined), 8025 (“principal” defined).

§ 8201. Effect of designating unqualified person as attorney-in-fact

8201. If a person is not qualified to act as an attorney-in-fact, the person's authority may be revoked, 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 8201 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 8300 *et seq.*

See also Sections 8013 (“attorney-in-fact” defined), 8022 (“power of attorney” defined), 8025 (“principal” defined), 8031 (“third person” defined).

Staff Note. The State Bar Team would delete this section. The staff does not feel strongly about it, but we have preserved it so that the Commission can determine whether to keep it in this or a modified form. The Team suggested in discussions with the staff that the section could perhaps be relocated to the sections dealing with third persons. However, the section is broader than protection of third persons' reliance interests, since it touches on revocation of authority and the duties to the unqualified person,

§ 8202. Multiple attorneys-in-fact

8202. (a) A principal may designate more than one attorney-in-fact in one or more powers of attorney and may provide that the authority 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) Authority vested in two or more attorneys-in-fact may only be exercised by their unanimous action.

(c) If a vacancy occurs, the remaining attorneys-in-fact may exercise the authority conferred as if they are the only attorneys-in-fact.

(d) If an attorney-in-fact is unavailable because of absence, illness, or other temporary incapacity, the other attorneys-in-fact may exercise the authority 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 interests.

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

Comment. Subdivision (a) of Section 8202 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 comparable to the general rule as to cotrustees in Probate Code Section 16402(a).

See also Sections 8013 (“attorney-in-fact” defined), 8022 (“power of attorney” defined), 8025 (“principal” defined).

Staff Note. In discussions with the State Bar Team, the staff agreed to consider relocating subdivision (c) of this section and of the next section, concerning liability for acts of other attorneys-in-fact. However, we have not found a better location, and removing these provisions from their respective contexts seemed counterproductive. If the State Bar Team has a suggestion for a better location, the staff would be happy to consider it.

Subdivisions (b)-(d) were appended to a clause providing “Unless otherwise provided in the power of attorney...” in the prior draft. However, this language has been deleted as surplus in light of the general rule in draft Section 8101.

This section has also been redrafted to avoid the awkward term “co-attorney-in-fact” and to apply beyond the bounds of property matters.

§ 8203. Successor attorneys-in-fact

8203. (a) A principal may designate one or more successor attorneys-in-fact to act if the authority of a predecessor attorney-in-fact terminates.

(b) The principal may grant authority 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 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 8203 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 8153.

Subdivision (c) 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 8013(b) ("attorney-in-fact" includes successor or alternate attorney-in-fact). See also Sections 8016 ("durable power of attorney" defined), 8022 ("power of attorney" defined), 8025 ("principal" defined).

Staff Note. See the Staff Note following Section 8202.

§ 8204. Compensation of attorney-in-fact

8204. 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 8204 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 8231(b) (effect of compensation on standard of care). See also Sections 8013 ("attorney-in-fact" defined), 8022 ("power of attorney" defined), 8025 ("principal" defined).

§ 8205. Delegation of attorney-in-fact's authority

8205. (a) An attorney-in-fact from time to time may revocably delegate any or all of the authority granted in a power of attorney to one or more persons qualified to exercise the authority 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 delegated authority.

(b) This section does not apply to a durable power of attorney for health care.

Comment. Subdivision (a) of Section 8205 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 8234 (consultation with principal).

See also Sections 8013 (“attorney-in-fact” defined), 8016 (“durable power of attorney” defined), 8022 (“power of attorney” defined), 8025 (“principal” defined).

Staff Note. This section is preserved for purposes of discussion. The State Bar Team is “uncomfortable” with the provision and has suggested that the standard should be that set forth in Civil Code Section 2349 (delegation of mechanical as opposed to discretionary powers). The Beverly Hills Bar Legislative Committee would forbid delegation unless the power of attorney expressly permits it.

§ 8206. Relation of attorney-in-fact to court-appointed fiduciary

8206. (a) If, following execution of a durable power of attorney, 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 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 only if the court in which the conservatorship proceeding is pending has first made an order authorizing or requiring the fiduciary to modify or revoke the durable power of attorney and the modification or revocation is in accord with the order.

(c) This section does not apply to a durable power of attorney for health care.

Comment. Section 8206 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 8206 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.

See also Sections 8013 (“attorney-in-fact” defined), 8016 (“durable power of attorney” defined), 8025 (“principal” defined).

§ 8207. Attorney-in-fact’s authority when principal missing in foreign country

8207. (a) If a principal is not available to communicate in person with an 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 being held in a foreign country, the authority of the attorney-in-fact continues and is not terminated, notwithstanding a termination date in the power of attorney and notwithstanding whether the power of attorney is durable.

(b) The attorney-in-fact may continue to exercise the authority granted by the power of attorney 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) 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 8207 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 authority when the attorney-in-fact cannot communicate with the principal because the principal's whereabouts is unknown or the principal is being held in a foreign country. As provided in subdivision (a), the attorney-in-fact's authority continues 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 8013 ("attorney-in-fact" defined), 8016 ("durable power of attorney" defined), 8022 ("power of attorney" defined), 8025 ("principal" defined).

Staff Note. The State Bar Team has suggested that this section be eliminated. The staff thinks it provides some useful guidance, although the Commission should review its scope. For example, the Commission may want to eliminate the rule overriding a stated termination date in a power of attorney. All would not be lost if the section were eliminated.

Article 2. Duties of Attorneys-in-Fact

§ 8230. When duties commence

8230. (a) Except as provided in subdivision (c), a person who is designated as an attorney-in-fact has no duty to exercise the authority granted 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 a subsequent transaction, but the attorney-in-fact has a duty to complete a transaction that the attorney-in-fact has commenced.

(c) If an attorney-in-fact has expressly agreed in writing to act for the principal, the attorney-in-fact has a duty to act pursuant to the terms of the agreement. 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.

Comment. Section 8230 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 8013 (“attorney-in-fact” defined), 8016 (“durable power of attorney” defined), 8025 (“principal” defined).

Staff Note. This section has been revised in light of State Bar Team comments and our discussions. The new draft is more broadly worded than the earlier draft of subdivision (c), which was limited to specific circumstances:

(c) If an attorney-in-fact 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.

Note that this is a situation where some of those opposing “side agreements” between the principal and attorney-in-fact find themselves advocating binding agreements outside the power of attorney itself.

There is an additional issue that should be considered. Should the attorney-in-fact be able to escape the signed agreement to act without liability, particularly if it was signed without consideration? Would it make any difference whether the principal had become incompetent? Should this question be covered by the statute? The staff and the State Bar Team representatives discussed a rule that would permit renunciation even though the attorney-in-fact had executed a written acceptance of the duties, provided that the renunciation is made in writing and that the principal or the principal’s successor or legal representative is notified within a reasonable time. This would let an attorney-in-fact off the hook and provide some protective procedures for dealing with the interests of the principal. This may be the best alternative since the attorney-in-fact may have underestimated the burden, or it may be many years after the agreement was signed and the attorney-in-fact may have moved away or be incapable of fulfilling the agreement.

§ 8231. Duty of care and skill; liability for losses

8231. (a) Except as provided in subdivisions (b) and (c), in dealing with property of the principal, an 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. Subdivisions (a) and (b) of Section 8231 are drawn from the standard applicable to custodians under Probate Code Section 3912(b) (California Uniform Transfers to Minors Act). See also Section 8204 (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 (1957).

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 8237 (attorney-in-fact's duty to use special skills); Prob. Code § 2401 Comment (standard of care applicable to professional guardian or conservator of estate); Prob. Code § 3912 Comment (standard of care applicable to professional fiduciary acting as custodian under California Uniform Transfers to Minors Act); Prob. Code § 16040 Comment (standard of care applicable to expert trustee).

See also Sections 8013 ("attorney-in-fact" defined), 8022 ("power of attorney" defined), 8025 ("principal" defined).

§ 8232. Duty of loyalty

8232. An attorney-in-fact has a duty to act in the interest of the principal and to avoid conflicts of interest.

Comment. Section 8232 restates the substance of part of Section 2322(c) in the general agency rules. This section omits the requirement that the attorney-in-fact act "solely" in the principal's interest and the detail concerning avoiding conflicts of interest. The duty of loyalty is also consistent with Section 2306 (agent not to defraud principal). Unlike Section 2322(c), Section 8232 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 8230 relating to commencement of the duties of an attorney-in-fact under a power of attorney.

See also Sections 8013 ("attorney-in-fact" defined), 8022 ("power of attorney" defined), 8025 ("principal" defined).

Staff Note. In discussing these provisions with the State Bar Team representatives, we came to a consensus that simpler statements and less strict rules are appropriate in the context of powers of attorney subject to this statute. Accordingly, the simple reference to avoiding conflicts of interest has been inserted in draft Section 8232. The following provisions from the prior draft have been deleted:

§ [8353]. Duty to avoid conflict of interest

[8353]. (a) An 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, 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.

§ [8354]. Duty not to undertake adverse responsibilities

[8234]. 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.

The trade-off is that the draft now provides less specific guidance.

§ 8233. Duty to keep principal's property separate and identified

8233. (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 8233 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 8233 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 8013 ("attorney-in-fact" defined), 8025 ("principal" defined).

§ 8234. Duty to keep principal informed and follow instructions

8234. To the extent reasonably practical 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 follow the instructions of the principal.

Comment. Section 8234 is drawn from general agency rules. The duty to follow the principal's instructions is consistent with the general agency rule in Section 2309. See also Section 2019 (agent not to exceed limits of actual authority). The duty to communicate with the principal is consistent with the general agency rule in Sections 2020 and 2332. Section 8234 supersedes the general agency rule in Section 2320 (power to disobey instructions), to the extent it applied to powers of attorney.

See also Sections 8013 ("attorney-in-fact" defined), 8025 ("principal" defined).

Staff Note. At the urging of the State Bar Team, the staff has dropped the duty to “obtain” the instructions of the principal and changed “reasonably possible” to “reasonably practical.”

§ 8235. Consultation

8235. If 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 and supervise a attorney-in-fact, the attorney-in-fact may consult with a 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, a 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 8235 is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.714(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. As to the right to obtain medical records under the durable power of attorney for health care, see Section 8703. See also Section 8455(f) (receipt of bank statements, etc., under statutory form powers of attorney),

See also Sections 8016 (“durable power of attorney” defined), 8025 (“principal” defined).

Staff Note. The State Bar Team has suggested that this section be deleted, and the Beverly Hills Bar Legislative Committee suggests that it be omitted if nothing more than advisory. (See comments following Section 8357 in draft attached to Memorandum 93-12.) The staff believes it could provide useful guidance. It also raises questions about what privileges may apply to an attorney-in-fact. Should the section be retained?

§ 8236. Duty to keep records and account

8236. (a) The attorney-in-fact shall keep 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 principal's personal representative or successor in interest after the death of the principal.

(4) Other persons pursuant to court order.

Comment. Section 8236 is drawn from Minnesota law. See Minn. Stat. Ann. § 523.21 (West Supp. 1990). See also Sections 8013 ("attorney-in-fact" defined), 8022 ("power of attorney" defined), 8025 ("principal" defined).

§ 8237. Duty to use special skills

8237. An attorney-in-fact with special skills has a duty to apply the full extent of those skills.

Comment. Section 8237 is comparable to Probate Code Section 16014(a) applicable to trustees. See also Section 8231(c) (expert standard of care).

See also Sections 8013 ("attorney-in-fact" defined), 8022 ("power of attorney" defined), 8025 ("principal" defined).

§ 8238. Duty to reveal capacity as attorney-in-fact

8238. An attorney-in-fact acting for the principal shall disclose the attorney-in-fact's capacity in dealing with third persons.

Comment. Section 8238 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 8300 et seq.

See also Sections 8013 ("attorney-in-fact" defined), 8022 ("power of attorney" defined), 8025 ("principal" defined), 8031 ("third person" defined).

Staff Note. The State Bar Team has proposed restating the rule from Section 2322 under which an attorney-in-fact may act in the name of the attorney-in-fact if it is the usual course of business so to act. An alternative would be to omit this section and rely on the general rule by silence. See draft Section 8051 (relation to general agency law). The staff is uncertain how important the rule or its exception really are in the context of durable powers of attorney.

§ 8239. Attorney-in-fact's duties on termination of authority

8239. (a) On termination of an 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) If the principal is incapacitated, to the principal's spouse, as to any community property.

(4) In the case of a nondurable power of attorney 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 of 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 8239 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 8206.

See also Sections 8013 ("attorney-in-fact" defined), 8016 ("durable power of attorney" defined), 8025 ("principal" defined).

Article 3. Authority of Attorneys-in-Fact

§ 8260. Limitation on article

8260. This article does not apply to the following:

(a) Statutory form powers of attorney under Title 3 (commencing with Section 8400).

(b) Durable powers of attorney for health care under Title 4 (commencing with Section 8600).

Comment. Section 8260 limits the application of this article. Statutory form powers of attorney and durable power of attorney for health care have special rules concerning the authority of attorneys-on-fact.

§ 8261. General authority of attorney-in-fact subject to limitations in power of attorney

8261. Subject to this article, an attorney-in-fact has the following authority:

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

(b) Subject to limitations in the power of attorney, the authority conferred by statute.

(c) The authority incidental, necessary, or proper to carry out the conferred authority.

Comment. Section 8261 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 8265 (powers that must be enumerated), 8266 (excluded powers), 8267 (exercise of powers subject to duties). Subdivision (a) is consistent with the general agency rule in Sections 2315 and 2318. 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 8013 (“attorney-in-fact” defined), 8022 (“power of attorney” defined).

Staff Note. This section has been substantially revised. The provision conferring automatic powers based on the attorney-in-fact’s powers under a Uniform Statutory Form Power of Attorney has been eliminated to implement a Commission decision at the January 1993 meeting. Based on the staff’s discussions with the State Bar Team representatives, the section has been further simplified by eliminating the following provision which had been drawn from the transfers to minors act: “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 [8231].”

§ 8262. Incorporation of powers

8262. (a) A power of attorney may grant authority 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 5.

(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 8262 is new. See also Sections 8013 (“attorney-in-fact” defined), 8022 (“power of attorney” defined), 8025 (“principal” defined).

Staff Note. The State Bar Team has proposed elimination of this section, but the staff thinks it is useful, particularly in light of the rule in subdivision (b). We suspect that the Team may be reacting negatively to the mention of the Uniform Statutory Form Power of Attorney in subdivision (a)(1).

§ 8263. Grant of general authority without limitation

8263. If a power of attorney grants general authority to an attorney-in-fact and does not enumerate one or more express subjects or purposes for which general authority is conferred, the attorney-in-fact has all the authority to act that a person having the capacity to contract may carry out through an attorney-in-fact specifically authorized to take the action, with respect to all matters, except as provided in Sections 8265 and 8266.

Comment. Section 8263 is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.710(2) (Vernon 1990). Section 8265 lists actions that must be specifically authorized, and thus are not included in general powers. Section 8266 lists actions that may not be accomplished through a power of attorney.

See also Sections 8013 (“attorney-in-fact” defined), 8022 (“power of attorney” defined), 8025 (“principal” defined).

§ 8264. Grant of general authority for express purposes

8264. If a power of attorney grants general authority to an attorney-in-fact with respect to one or more express subjects or purposes, the attorney-in-fact has all the authority to act with respect to the express subjects or purposes that a

person having the capacity to contract may carry out through an attorney-in-fact specifically authorized to take the action, with respect to all matters, except as provided in Sections 8265 and 8266.

Comment. Section 8264 is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.710(3) (Vernon 1990). Section 8265 lists actions that must be specifically authorized, and thus are not included in general powers. Section 8266 lists actions that may not be accomplished through a power of attorney.

See also Sections 8013 (“attorney-in-fact” defined), 8022 (“power of attorney” defined).

§ 8265. Powers that must be specifically enumerated

8265. A power of attorney may not be construed to grant authority to an attorney-in-fact to perform any of the following acts unless 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 8265 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.

See also Sections 8013 (“attorney-in-fact” defined), 8022 (“power of attorney” defined), 8025 (“principal” defined).

§ 8266. Excluded authority

8266. A power of attorney may not authorize an attorney-in-fact to make, publish, declare, amend, or revoke the principal’s will.

Comment. Section 8266 is consistent with the general agency rule in Section 2304. See also Sections 8013 (“attorney-in-fact” defined), 8022 (“power of attorney” defined), 8025 (“principal” defined).

Staff Note. This section has been substantially revised in light of State Bar Team comments and discussions with Team representatives. The staff has continued the restriction on making a will because it is existing law, but the Team suggests deleting the rule and permitting attorneys-in-fact to make wills. Since an attorney-in-fact can do about anything else to or with the principal’s property, perhaps the limitation on wills should be given further consideration.

§ 8267. Exercise of authority subject to duties

8267. The grant of authority 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 authority by an attorney-in-fact is subject to the attorney-in-fact’s fiduciary duties.

Comment. Section 8267 is drawn from Probate Code Section 16202 (exercise of trustee's powers). See Sections 8230-8238 (duties of attorneys-in-fact). See also 8013 ("attorney-in-fact" defined), 8022 ("power of attorney" defined).

CHAPTER 5. RELATIONS WITH THIRD PERSONS

§ 8300. Third persons required to respect attorney-in-fact's authority

8300. A third person shall accord an attorney-in-fact acting pursuant to the provisions of a power of attorney the same rights and privileges that would be accorded the principal if the principal were personally present and seeking to act.

Comment. Section 8300 is new. 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 the principal were acting.

See also Sections 8013 ("attorney-in-fact" defined), 8022 ("power of attorney" defined), 8025 ("principal" defined), 8031 ("third person" defined).

Staff Note. This section has been substantially revised to adopt a proposal of the State Bar Team.

§ 8301. Reliance by third person on general authority

8301. A third person may freely rely on, contract with, and deal with an attorney-in-fact with respect to the subjects and purposes encompassed or expressed in the power of attorney without regard to whether the power of attorney expressly authorizes the specific act, transaction, or decision by the attorney-in-fact.

Comment. Section 8301 is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.710(8) (Vernon 1990).

See also Sections 8013 ("attorney-in-fact" defined), 8022 ("power of attorney" defined), 8031 ("third person" defined).

Staff Note. This section has been revised in light of State Bar Team comments. The section is now more general. In this form, the staff wonders whether it has any value. In its present form, it does not compel a third person to do anything. The original section was intended to make clear that general powers of attorney were not suspect because they did not list specific property or transactions. See Section 8452 in the draft attached to Memorandum 93-12.

§ 8302. Effect of death or incapacity of principal

8302. (a) The death of a principal who has executed a power of attorney, 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 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 8302 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 8152, it is the principal's incapacity to contract which would otherwise terminate the power of attorney.

See also Sections 8013 ("attorney-in-fact" defined), 8016 ("durable power of attorney" defined), 8022 ("power of attorney" defined), 8025 ("principal" defined), 8031 ("third person" defined).

§ 8303. Affidavit of lack of knowledge of termination of power

8303. (a) As to acts undertaken in good faith reliance thereon, an affidavit executed by the attorney-in-fact under a power of attorney, 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) 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. Section 8303 continues 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 8153 (termination of attorney-in-fact's authority). This section is 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 8152, it is the principal's incapacity to contract which would otherwise terminate the power of attorney.

See also Sections 8013 ("attorney-in-fact" defined), 8016 ("durable power of attorney" defined), 8022 ("power of attorney" defined), 8025 ("principal" defined).

§ 8304. Reliance on attorney-in-fact's affidavit

8304. (a) If the attorney-in-fact furnishes an affidavit pursuant to Section 8303, 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.

(b) A third person's failure to demand an affidavit pursuant to Section 8303 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.

Comment. Section 8304 is 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). Unless the court determines that the third person refused in good faith to rely on the attorney-in-fact's affidavit, subdivision (a) 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 powers of attorney more effective and avoid the need to seek judicial confirmation of the existence of a power. The liability under subdivision (a) applies only where the attorney-in-fact executes 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 authority even though the third person would be fully protected under this chapter.

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

Staff Note. This section is drawn from the trustee's affidavit enacted on Commission recommendation in the 1992 legislative session. (See Prob. Code § 18100.5; 1992 Cal. Stat. ch. 178, § 43.8; *Recognition of Trustees' Powers*, 20 Cal. L. Revision Comm'n Reports 2849 (1990).) We note that a bill has been introduced to completely rewrite Probate Code Section 18100.5, replacing the affidavit with a "certification of trust" and making other changes. The staff will monitor the progress of AB 1249 and consider offering revisions of draft Section 8304 if the bill is enacted.

§ 8305. Identification of attorney-in-fact

8305. When requested to engage in transactions with an attorney-in-fact, a third person, before incurring any duty to comply with the power of attorney, may require the attorney-in-fact to provide identification, specimens of the signatures of the principal and the attorney-in-fact, 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.

Comment. Section 8305 is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.719(4) (Vernon 1990).

See also Sections 8013 ("attorney-in-fact" defined), 8025 ("principal" defined), 8031 ("third person" defined).

§ 8306. Certified copy of power of attorney

8306. (a) A copy of a power of attorney certified under this section has the same force and effect as the original power of attorney.

(b) A copy of a power of attorney may be certified by any of the following:

(1) An attorney authorized to practice law in this state.

(2) A notary public in this state.

(3) An official of a state or of a political subdivision who is authorized to make certifications.

(c) The certification shall state that the certifying person has examined the 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 8306 is new and is drawn in part 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 8022 (“power of attorney” defined), 8025 (“principal” defined).

Staff Note. This section has been expanded to implement Commission decisions and also in response to comments of the State Bar Team. In light of the broad authority for certification by notaries and attorneys, the staff has not further investigated trying to provide an effective procedure for certification by county clerks and city clerks.

§ 8307. When third person charged with employee’s knowledge

8307. 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, 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 8307 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 8013 (“attorney-in-fact” defined), 8022 (“power of attorney” defined), 8031 (“third person” defined).

§ 8308. Knowledge where principal is “absentee”

8308. 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 8308 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 8013 (“attorney-in-fact” defined), 8025 (“principal” defined), 8031 (“third person” defined); Prob. Code §§ 1403 (“absentee” defined), 1440 (“secretary concerned” defined).

§ 8309. Protection of third person relying in good faith on durable power of attorney

8309. (a) A third person who acts in good faith reliance on a power of attorney 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 or is signed by two witnesses.

(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 8309 continues former Section 2512 without substantive change. This section is intended to ensure that a power of attorney, whether durable or nondurable, will be accepted and relied upon by third persons.

Section 8309 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 8309, see, e.g., Sections 8127(c) (reliance in good faith upon durable power of attorney not containing "warning" statement required by Section 8127), 8301 (immunities of third person), 8301 (reliance by third person on general powers), 8302 (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 8309 does not apply to health care providers. See Sections 8050 (application of title), 8750 (immunities of health care provider).

See also Sections 8013 ("attorney-in-fact" defined), 8016 ("durable power of attorney" defined), 8022 ("power of attorney" defined), 8031 ("third person" defined).

TITLE 3. UNIFORM STATUTORY FORM POWER OF ATTORNEY

CHAPTER 1. GENERAL PROVISIONS

§ 8400. Short title

8400. This title may be cited as the Uniform Statutory Form Power of Attorney Act.

Comment. Section 8400 continues former Section 2482 without change. This title is substantially the same as the Uniform Statutory Form Power of Attorney Act (1988). Section 8400 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).

§ 8401. Statutory form power of attorney

8401. The following statutory form power of attorney is legally sufficient when the requirements of Section 8402 are satisfied:

UNIFORM STATUTORY FORM POWER OF ATTORNEY

(California Civil Code § 8401)

NOTICE: THE POWERS GRANTED BY THIS DOCUMENT ARE BROAD AND SWEEPING. THEY ARE EXPLAINED IN THE UNIFORM STATUTORY FORM POWER OF ATTORNEY ACT (CALIFORNIA CIVIL CODE SECTIONS 8400-8465). 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 8401 continues former Section 2475 without change, except for the revision of cross-references to other provisions. Section 8401 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 8016 requirements for creation of durable power of attorney).

Section 8401 provides the text of the form that is sufficient and necessary to bring this title 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 title should use the language provided in Section 8401. Minor variances in wording will not take it out of the scope of the title. 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 8401 does not take the form out of the scope of this title. See Section 8402(a). Nor does the omission of the provisions relating to designation of co-agents take the form out of the scope of this title. See Section 8402(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 8609 (“health care” defined), 8612 (“health care decision” defined), 4100 (scope of this part). For a durable power of attorney form for health care matters, see Sections 8771.

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 8450-8464, 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 8404 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 8016 (“durable power of attorney” 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 8031 (“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 8403 (good faith reliance on power of attorney without actual knowledge of death or incapacity of principal), 8404 (affidavit of lack of knowledge of termination of power). See also Sections 8400 (third persons required to respect agent’s authority), 8401 (immunities of third person), 8408 (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 8408(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 8401 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 8402(a) (third sentence).

Neither this section, nor the title 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 8408. However, this title should be sufficient for most purposes.

For provisions relating to court enforcement of the duties of the agent, see Sections 8900-8952.

The form provided by Section 8401 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 8409 & Comment.

See also Sections 8013 (“attorney-in-fact” defined to include agent), 8025 (“principal” defined), 8031 (“third person” defined).

§ 8402. Requirements for statutory form power of attorney

8402. A statutory form power of attorney under this title is legally sufficient if all of the following requirements are satisfied:

(a) The wording of the form complies substantially with Section 8401. A form does not fail to comply substantially with Section 8401 merely because the form does not include the provisions of Section 8401 relating to designation of co-agents. A form does not fail to comply substantially with Section 8401 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 8401 is sufficient if it is in substantially the form set out in either Section 8401 or Section 1189.

Comment. Section 8402 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 8402 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 8401 for designation of co-agents and even though the form uses the language “learns of the revocation.”

See also Sections 8013 (“attorney-in-fact” defined to include agent), 8025 (“principal” defined), 8031 (“third person” defined).

§ 8403. Effect of initialing line in front of (N) in statutory form

8403. If the line in front of (N) of the statutory form under Section 8401 is initialed, an initial on the line in front of any other power does not limit the powers granted by line (N).

Comment. Section 8403 continues former Section 2479 without change, except for the revision of a cross-reference to another provision. Section 8403 is the same in substance as subsection (c) of Section 1 of the Uniform Statutory Form Power of Attorney Act (1988).

§ 8404. Durability of statutory form power of attorney

8404. A statutory form power of attorney legally sufficient under this title 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 8404 continues former Section 2478 without substantive change. Section 8404 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 Section 8123. The words “incapacitated” and “incapacity” are used in Section 8404 to conform to the form used in Section 8401 and to Section 8016 (California version of the Uniform Durable Power of Attorney Act).

A durable power of attorney under this title continues in effect when the principal becomes incapacitated. The form in Section 8401 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 8016 (Uniform Durable Power of Attorney Act). See also Sections 8124 (effect of acts by agent during incapacity of principal), 8403 (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 8206.

See also Sections 8016 (“durable power of attorney” defined), 8025 (“principal” defined).

§ 8405. Springing statutory form power of attorney

8405. (a) A statutory form power of attorney under this title 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 8401.

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

Comment. Section 8405 continues former Section 2479 without substantive change. Section 8405 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 title 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 8025 (“principal” defined), 8028 (“springing power of attorney” defined).

§ 8406. Compelling third person to honor statutory form power of attorney; liability for attorney’s fees

8406. (a) If a third person to whom a properly executed statutory form power of attorney under this title 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 title 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 8406 continues former Section 2480.5 [1992 Cal. Stat. ch. 178, § 4] without change. Section 8406 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 8404 (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 8408 (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 8013 ("attorney-in-fact" defined to include agent), 8025 ("principal" defined), 8031 ("third person" defined).

§ 8407. General provisions applicable to statutory form power of attorney

8407. Unless there is a conflicting provision in this title, in which case the provision of this title governs, the other provisions of this part apply to a statutory form power of attorney.

Comment. Section 8407 restates the substance of former Section 2480. Section 8407 makes clear that the general provisions that apply to powers of attorney generally apply to statutory form powers of attorney under this title. Accordingly, the following provisions apply to a power of attorney under this title:

Section 8016 (requirements to create durable power of attorney). The statutory form set out in Section 8401 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 8022(b) (proxies given by agent to exercise voting rights).

Section 8122(b) (application of power of attorney to all or part of principal's property; unnecessary to describe items or parcels of property).

Section 8124 (effect of acts by agent during incapacity of principal).

Section 8206 (effect of appointment of a conservator of the estate or other fiduciary charged with the management of the principal's property).

Section 8403 (good faith reliance on power of attorney after death or incapacity of principal).

Section 8404 (good faith reliance on agent's affidavit as conclusive proof of the nonrevocation or nontermination of the power).

Section 8408 (protection against liability of person acting in good faith reliance upon power of attorney).

Sections 8900-8952 (court enforcement of agent's duties).

§ 8408. Use of other forms

8408. Nothing in this title affects or limits the use of any other form for a power of attorney. Any form that complies with the requirements of any law other than the provisions of this title may be used in lieu of the form set forth in Section 8401, and none of the provisions of this title apply if such other form is used.

Comment. Section 8408 continues former Section 2481 without substantive change. See also Section 8022 (“power of attorney” defined).

§ 8409. Use of statutory form provided by repealed statutes

8409. (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 8409 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 Sections 8400-8465 (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 8400-8465 (and former §§ 2475-2499) should soon replace the older forms.

CHAPTER 2. CONSTRUCTION OF POWERS

Comment. This chapter (commencing with Section 8450) explains the powers listed in the statutory form in Section 8401. Section 8450 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 8451-8463 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 8451-8463, together with the general authority in Section 8450, 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 title and the form provided by this title that the matters that are the user’s particular concern are covered by the title. 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 8464.

A general effect of this chapter 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 8456 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 title. 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 chapter 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.

§ 8450. Construction of powers generally

8450. By executing a statutory form power of attorney with respect to a subject listed in Section 8401, 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 8450 continues former Section 2485 without change, except for the revision of a cross-reference to another provision. Section 8450 is the same in substance as Section 3 of the Uniform Statutory Form Power of Attorney Act (1988). See the Comment to this chapter under the chapter heading. See also Sections 8900-8952 (court enforcement of agent’s duties).

See also Sections 8013 (“attorney-in-fact” defined to include agent), 8025 (“principal” defined).

§ 8451. Real property transactions

8451. 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 8451 continues former Section 2486 without change. Section 8451 is the same in substance as Section 4 of the Uniform Statutory Form Power of Attorney Act

(1988). See the Comment to this chapter under the chapter heading. See also Section 8450 (construction of powers generally).

See also Sections 8013 (“attorney-in-fact” defined to include agent), 8025 (“principal” defined).

§ 8452. Tangible personal property transactions

8452. 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 8452 continues former Section 2487 without change. Section 8452 is the same in substance as Section 5 of the Uniform Statutory Form Power of Attorney Act (1988). See the Comment to this chapter under the chapter heading. See also Section 8450 (construction of powers generally).

See also Sections 8013 (“attorney-in-fact” defined to include agent), 8025 (“principal” defined).

§ 8453. Stock and bond transactions

8453. 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 8453 continues former Section 2488 without change. Section 8453 is the same in substance as Section 6 of the Uniform Statutory Form Power of Attorney Act (1988). See the Comment to this chapter under the chapter heading. See also Sections 8022(b) (proxies given by agent to exercise voting rights), 8450 (construction of powers generally).

See also Section 8013 (“attorney-in-fact” defined to include agent).

§ 8454. Commodity and option transactions

8454. 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 8454 continues former Section 2489 without change. Section 8454 is the same in substance as Section 7 of the Uniform Statutory Form Power of Attorney Act (1988). See the Comment to this chapter under the chapter heading. See also Section 8450 (construction of powers generally).

See also Sections 8013 (“attorney-in-fact” defined to include agent).

§ 8455. Banking and other financial institution transactions

8455. 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 8455 continues former Section 2490 without change. Section 8455 is the same in substance as Section 8 of the Uniform Statutory Form Power of Attorney Act (1988). See the Comment to this chapter under the chapter heading. See also Section 8450 (construction of powers generally).

See also Sections 8013 ("attorney-in-fact" defined to include agent), 8025 ("principal" defined).

§ 8456. Business operating transactions

8456. 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 8456 continues former Section 2491 without change. Section 8456 is the same in substance as Section 9 of the Uniform Statutory Form Power of Attorney Act (1988). See the Comment to this chapter under the chapter heading. See also Section 8450 (construction of powers generally).

See also Sections 8013 ("attorney-in-fact" defined to include agent), 8025 ("principal" defined).

§ 8457. Insurance and annuity transactions

8457. 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 8457 continues former Section 2492 without change. Section 8457 is the same in substance as Section 10 of the Uniform Statutory Form Power of Attorney Act (1988). See the Comment to this chapter under the chapter heading. See also Section 8450 (construction of powers generally). Section 8457 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 8013 ("attorney-in-fact" defined to include agent), 8025 ("principal" defined).

§ 8458. Estate, trust, and other beneficiary transactions

8458. 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 8458 continues former Section 2493 without change. Section 8458 is the same in substance as Section 11 of the Uniform Statutory Form Power of Attorney Act (1988). See the Comment to this chapter under the chapter heading. See also Section 8450 (construction of powers generally).

See also Sections 82 (“trust” defined), 8013 (“attorney-in-fact” defined to include agent), 8025 (“principal” defined).

§ 8459. Claims and litigation

8459. 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 8459 continues former Section 2494 without change. Section 8459 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 chapter under the chapter heading. See also Section 8450 (construction of powers generally).

See also Sections 8013 ("attorney-in-fact" defined to include agent), 8025 ("principal" defined).

§ 8460. Personal and family maintenance

8460. 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 8460 continues former Section 2495 without change. Section 8460 is the same in substance as Section 13 of the Uniform Statutory Form Power of Attorney Act (1988). See the Comment to this chapter under the chapter heading. See also Section 8450 (construction of powers generally).

See also Sections 8013 (“attorney-in-fact” defined to include agent), 8025 (“principal” defined).

§ 8461. Benefits from social security, medicare, medicaid, or other governmental programs, or civil or military service

8461. 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 8460, 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 8461 continues former Section 2496 without change, except for the revision of a cross-reference to another provision. Section 8461 is the same in substance as Section 14 of the Uniform Statutory Form Power of Attorney Act (1988). See the Comment to this chapter under the chapter heading. See also Section 8450 (construction of powers generally).

See also Sections 8013 (“attorney-in-fact” defined to include agent), 8025 (“principal” defined).

§ 8462. Retirement plan transactions

8462. 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 8462 continues former Section 2497 without change. Section 8462 is the same in substance as Section 15 of the Uniform Statutory Form Power of Attorney Act (1988). See the Comment to this chapter under the chapter heading. See also Section 8450 (construction of powers generally).

See also Sections 8013 (“attorney-in-fact” defined to include agent), 8025 (“principal” defined).

§ 8463. Tax matters

8463. 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 8463 continues former Section 2498 without change. Section 8463 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 chapter under the chapter heading and Section 8450 (construction of powers generally).

See also Sections 8013 (“attorney-in-fact” defined to include agent), 8025 (“principal” defined).

§ 8464. After-acquired property; property located outside this state; power exercised outside this state; power of attorney executed outside this state

8464. The powers described in this chapter 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 8464 continues former Section 2499 without change. Section 8464 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 8025 (“principal” defined).

§ 8465. Power to modify or revoke trust

8465. A statutory form power of attorney under this title 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 title 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 8465 continues former Section 2499.5 without change. Section 8465 is a new provision not found in the Uniform Statutory Form Power of Attorney Act (1988).

The first sentence of Section 8465 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 8465 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), 8013 (“attorney-in-fact” defined to include agent), 8025 (“principal” defined).

TITLE 4. DURABLE POWERS OF ATTORNEY FOR HEALTH CARE

Staff Note. The staff has not yet revised the durable power of attorney for health care statutes in light of the new structure of the general provisions in Title 2 of this draft. Consistent with recent Commission decision, we will, where possible, delete provisions in this title that are superseded by general rules.

CHAPTER 1. DEFINITIONS AND GENERAL PROVISIONS

Article 1. Definitions

§ 8600. Application of definitions

8600. Unless the provision or context otherwise requires, the definitions in this chapter govern the construction of this part.

Comment. Section 8600 restates the substance of the first clauses of former Section 2410.

§ 8603. Community care facility

8603. “Community care facility” means a community care facility as defined in Section 1502 of the Health and Safety Code.

Comment. Section 8603 continues former Section 2430(f) without change.

§ 8606. Durable power of attorney for health care

8606. “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 8606 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 8600-8779, 8940, 8942. As to multi-purpose powers of attorney, see the Comment to Section 8016.

See also Sections 8016 (“durable power of attorney” defined), 8612 (“health care decision” defined), 8025 (“principal” defined).

§ 8609. Health care

8609. “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 8609 continues former Section 2430(b) without substantive change. The reference to postdeath decisions has been added for consistency with the authority provided in Section 8702 (attorney-in-fact's authority to make health care decisions).

§ 8612. Health care decision

8612. "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 8612 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 8609 ("health care" defined).

§ 8615. Health care provider

8615. "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 8615 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 8609 ("health care" defined).

§ 8618. Residential care facility for the elderly

8618. "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 8618 continues former Section 2430(f) without substantive change.

§ 8621. Statutory form durable power of attorney for health care

8621. "Statutory form durable power of attorney for health care" means a durable power of attorney for health care that satisfies the requirements of Chapter 3 (commencing with Section 8770) of Title 4.

Comment. Section 8621 is new. See also Section 8606 ("durable power of attorney for health care" defined).

Article 2. General Provisions

§ 8650. Application of chapter

8650. (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 8700 or subdivision (c) of Section 8701; 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 8650 continues former Section 2431 without substantive change. See Section 8013 (“attorney-in-fact” defined).

Subdivision (a) of Section 8650 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 8016 (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 8016 (“durable power of attorney” defined), 8612 (“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 8700(a)(2) is not satisfied and even though the requirement of Section 8701(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 8702 (agent not authorized to act if principal can give informed consent), 8730 (unauthorized types of health care), 8703 (examination and release of medical records), 8705 (revocation), 8750 (protections from liability), 8732 (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), 8734 (altering or forging, or concealing or withholding knowledge of revocation, of durable power of attorney for health care), 8731 (unauthorized acts or omissions), 8905 (exceptions to limitations in power of attorney), 8942 (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 8706. 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 8013 (“attorney-in-fact” defined), 8016 (“durable power of attorney” defined), 8025 (“principal” defined), 8612 (“health care decision” defined).

§ 8651. Form of durable power of attorney for health care after January 1, 1995

8651. (a) Notwithstanding Section 8701, 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 8701 in effect at the time of printing.

(b) Notwithstanding Section 8704, 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 8700. 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 8700 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 8701.

Comment. Section 8651 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 8651 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 8651 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 8700 and 8701.

§ 8652. Other authority not affected

8652. (a) Subject to Section 8702, nothing in this title affects any right a person may have to make health care decisions on behalf of another.

(b) This title does not affect the law governing health care treatment in an emergency.

Comment. Section 8652 continues former Section 2439 without change, except for the revision of a cross-reference to another section and the substitution of a reference to “title” instead of “article.” Section 8652 makes clear that the enactment of this title has no effect on any right a person may have to consent for another or on emergency treatment. Thus, this title is cumulative to whatever other ways there may be to consent for another.

See also Sections 8609 (“health care” defined), 8612 (“health care decision” defined).

§ 8653. Validity of durable power of attorney for health care executed in another jurisdiction

8653. 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 8653 continues former Section 2445 [as added by 1992 Cal. Stat. ch. 470, § 3 (AB 2697), operative Aug. 11, 1992] without change.

CHAPTER 2. DURABLE POWERS OF ATTORNEY FOR HEALTH CARE

Article 1. Creation and Effect of Durable Power of Attorney for Health Care

§ 8700. Requirements for durable power of attorney for health care

8700. (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 8704:

(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 8700 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 8013 (“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 8016 (general requirements for durable power of attorney), 8701 (warning to person executing durable power of attorney for health care). See also Section 8650 (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 8750 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 8651.

See also Sections 8603 (“community care facility” defined), 8016 (“durable power of attorney” defined), 8606 (“durable power of attorney for health care” defined), 8612

(“health care decision” defined), 8615 (“health care provider” defined), 8025 (“principal” defined), 8618 (“residential care facility for the elderly” defined).

§ 8701. Requirements for printed form of durable power of attorney for health care

8701. (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 8701 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 8013 (“attorney-in-fact” defined).

Section 8701 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 8771 (statutory form durable power of attorney for health care). See Comment to Section 8771.

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 8705.

See also Sections 8016 (“durable power of attorney” defined), 8606 (“durable power of attorney for health care” defined), 8612 (“health care decision” defined), 8022 (“power of attorney” defined), 8025 (“principal” defined).

§ 8702. Attorney-in-fact's authority to make health care decisions

8702. (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 8702 continues former Section 2434 without substantive change. "Agent" has been substituted for "attorney in fact." See Section 8013 ("attorney-in-fact" defined).

Subdivision (a) of Section 8702 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 8732 (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 8730 which precludes consent to certain specified types of treatment. See also Section 8731 (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 8900-8952 (court enforcement of duties of agent). The authority under subdivision (b) is limited by Section 8732 (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 8706. See also Sections 8016 (“durable power of attorney” defined), 8606 (“durable power of attorney for health care” defined), 8612 (“health care decision” defined), 8615 (“health care provider” defined), 8025 (“principal” defined).

§ 8703. Availability of medical information to attorney-in-fact

8703. 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 8703 continues former Section 2436 without substantive change. “Agent” has been substituted for “attorney in fact.” See Section 8013 (“attorney-in-fact” defined).

Section 8703 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 8013 (“attorney-in-fact” defined), 8016 (“durable power of attorney” defined), 8609 (“health care” defined), 8612 (“health care decision” defined), 8025 (“principal” defined).

§ 8704. Employee of health care provider, community care facility, or residential care facility

8704. 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 8704 continues former Section 2432.5 without substantive change. “Agent” has been substituted for “attorney in fact.” See Section 8013 (“attorney-in-fact” defined).

Section 8704 provides a special exception to subdivision (b) of Section 8700 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 8704, 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 8013 ("attorney-in-fact" defined), 8603 ("community care facility" defined), 8606 ("durable power of attorney for health care" defined), 8612 ("health care decision" defined), 8615 ("health care provider" defined), 8618 ("residential care facility for the elderly" defined).

§ 8705. Revocation of durable power of attorney for health care

8705. (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 8705 continues former Section 2437 without change, except for the substitution of "agent" for "attorney in fact" and some technical, nonsubstantive revisions. See Section 8013 ("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 8750 (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 8703.

See also Sections 8013 (“attorney-in-fact” defined), 8606 (“durable power of attorney for health care” defined), 8612 (“health care decision” defined), 8025 (“principal” defined).

§ 8706. Expiration of durable power of attorney for health care

8706. (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 8706 continues former Section 2436.5 without change. Section 8706 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 8706 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 8606 (“durable power of attorney for health care” defined), 8612 (“health care decision” defined), 8025 (“principal” defined).

Article 2. Limitations and Restrictions

§ 8730. Limitations on attorney-in-fact’s authority

8730. 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 8730 continues former Section 2435 without substantive change. “Agent” has been substituted for “attorney in fact.” See Section 8013 (“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 8731 (unauthorized acts and omissions).

See also Sections 8016 (“durable power of attorney” defined), 8025 (“principal” defined).

§ 8731. Unauthorized acts or omissions

8731. 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 8731 continues former Section 2443 without change, except for the substitution of a reference to “chapter” instead of “article.” Section 8731 does not prevent the withholding or withdrawal of health care to permit the natural process of dying.

See also Sections 8603 (“community care facility” defined), 8606 (“durable power of attorney for health care” defined), 8612 (“health care decision” defined), 8025 (“principal” defined).

§ 8732. Principal’s objections

8732. 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 8732 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 8013 (“attorney-in-fact” defined).

Section 8732 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 8702(c).

See also Sections 8013 (“attorney-in-fact” defined), 8606 (“durable power of attorney for health care” defined), 8609 (“health care” defined).

§ 8733. Restriction on execution of durable power of attorney for health care as condition for admission, treatment, or insurance

8733. 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 8733 continues former Section 2441 without change. Section 8733 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 8606 (“durable power of attorney for health care” defined), 8615 (“health care provider” defined).

§ 8734. Alteration or forging, or concealment or withholding knowledge of revocation of durable power of attorney for health care

8734. 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 8705, 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 8734 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 8606 (“durable power of attorney for health care” defined), 8609 (“health care” defined), 8025 (“principal” defined).

Article 3. Protections and Immunities

§ 8750. Immunities of health care provider

8750. (a) Subject to any limitations stated in the durable power of attorney for health care and to subdivision (b) and to Sections 8730, 8731, 8732, 8733, and 8734, 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 8750 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 8013 ("attorney-in-fact" defined). Section 8750 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 8750 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 8730 (forms of treatment not authorized by durable power of attorney for health care), 8731 (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 8013 ("attorney-in-fact" defined), 8603 ("health care" defined), 8606 ("durable power of attorney for health care" defined), 8612 ("health care decision" defined), 8615 ("health care provider" defined), 8025 ("principal" defined), 8618 ("residential care facility for the elderly" defined).

§ 8751. Convincing evidence of identity of principal

8751. For the purposes of the declaration of witnesses required by Section 8700 or 8771, "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 8700 or 8771, 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 8751 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).

§ 8752. Presumption concerning power executed in other jurisdiction

8752. 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 8752 continues former Section 2438.5 [as added by 1992 Cal. Stat. ch. 470, § 2 (AB 2697), operative Aug. 11, 1992] without change.

CHAPTER 3. STATUTORY FORM DURABLE POWER OF ATTORNEY FOR HEALTH CARE

§ 8770. Short title

8770. This chapter shall be known and may be cited as the Keene Health Care Agent Act.

Comment. Section 8770 continues former Section 2508 without change.

§ 8771. Statutory form durable power of attorney for health care

8771. 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 8771)

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 8752, 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 8770 to 8779, 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 8700 of the Probate Code.

Signature: _____

Comment. Section 8771 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 8013 (“attorney-in-fact” defined to include agent).

Section 8771 is consistent with and subject to the substantive law applicable to a durable power of attorney for health care. See Sections 8600-8779 (durable power of attorney for health care), 8900-8952 (court review). However, in the statutory form durable power of attorney for health care, the warning set out in Section 8771 replaces the one set out in Section 8701. See also Section 8772 (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 8771 with Section 8700(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 8942.

As to use of forms complying with former law, see Section 8775. See also Sections 8603 (“community care facility” defined), 8606 (“durable power of attorney for health care” defined), 8609 (“health care” defined), 8612 (“health care decision” defined), 8615 (“health care provider” defined), 8025 (“principal” defined), 8618 (“residential care facility for the elderly” defined).

§ 8772. Warning or lawyer's certificate

8772. (a) Notwithstanding Section 8701, 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 8771.

(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 8772 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 8771 must be used in the statutory form instead of the warning set out in Section 8701.

See also Sections 8612 ("health care decision" defined), 8615 ("health care provider" defined), 8022 ("power of attorney" defined), 8618 ("residential care facility for the elderly" defined), 8621 ("statutory form durable power of attorney for health care" defined).

§ 8773. Formal requirements

8773. (a) Notwithstanding paragraph (3) of subdivision (a) of Section 8700, 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 8771, 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 8771.

(b) Nothing in this section excuses compliance with the special requirements imposed by subdivisions (c) and (f) of Section 8700.

Comment. Section 8773 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 8013 ("attorney-in-fact" defined).

Section 8773 is comparable to Section 8700. To be valid a statutory form durable power of attorney for health care must satisfy the requirements of both Section 8772 and 8773. It should be noted that a statutory form durable power of attorney for health care requires two witnesses and, unlike Section 8700, acknowledgment before a notary is not authorized.

See also Sections 8013 ("attorney-in-fact" defined), 8612 ("health care decision" defined), 8025 ("principal" defined), 8621 ("statutory form durable power of attorney for health care" defined).

§ 8774. Requirements for statutory form

8774. (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 8772 and 8773.

(2) It includes the exact wording of the text of paragraphs 1, 2, 3, and 4 of the form set out in Section 8771.

(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 8771.

(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 8771, 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 8771, 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 8774 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 8771, 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 8774 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 8771.

See also Sections 8025 (“principal” defined), 8621 (“statutory form durable power of attorney for health care” defined).

§ 8775. Requirements for forms after January 1, 1993

8775. (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 8771 of this code.

(b) Notwithstanding former Section 2501 of the Civil Code or Section 8772 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 8771 of this code.

(c) For the purposes of subdivision (c) of former Section 2503 of the Civil Code and subdivision (c) of Section 8774 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 8771 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 8771 of this code, including the warning and instructions, and nothing else.

Comment. Section 8775 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 8775 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 8771, including the warning and instructions, and nothing else.

§ 8776. Language conferring general authority

8776. 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 8776 continues former Section 2504 without change, except for the substitution of “agent” for “attorney in fact.” See Section 8013 (“attorney-in-fact” defined). See also Sections 8612 (“health care decision” defined), 8621 (“statutory form durable power of attorney for health care” defined).

§ 8777. Effect of documents executed by attorney-in-fact

8777. If a document described in paragraph 5 or 6 of the form set out in Section 8771 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 8771, 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 8777 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 8013 (“attorney-in-fact” defined). See also Sections 8025 (“principal” defined), 8621 (“statutory form durable power of attorney for health care” defined).

§ 8778. Termination of authority; alternate attorney-in-fact

8778. 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 8778 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 8013 (“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 8771. Where the court terminates the authority of the agent, Section 8778 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 8013 (“attorney-in-fact” defined), 8612 (“health care decision” defined), 8025 (“principal” defined), 8621 (“statutory form durable power of attorney for health care” defined).

§ 8779. Use of other forms

8779. 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 8771, and none of the provisions of this chapter apply if such other form is used.

Comment. Section 8779 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 8600-8752 and is subject to the provisions of those sections.

TITLE 5. JUDICIAL PROCEEDINGS CONCERNING POWERS OF ATTORNEY

CHAPTER 1. GENERAL PROVISIONS

§ 8900. Legislative intent

8900. A power of attorney is exercisable free of judicial intervention, subject to the jurisdiction of the courts of this state 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 8022 (“power of attorney” defined).

Staff Note. This section had been slated for deletion, following discussions with the State Bar Team representatives. Section 2423 was enacted on recommendation of the Commission when the judicial review provisions were added to the law along with the enactment of the Uniform Durable Power of Attorney Act in 1981. Although the section may seem innocuous now, it does no harm and should perhaps be retained. The staff has not discovered any legislative history that would indicate the section was added to meet a particular objection to the judicial review procedures, but it is logical to assume that that was its purpose. Should it be retained in this or some other form, or deleted?

§ 8901. Cumulative remedies

8901. The remedies provided in this title are cumulative and nonexclusive.

Comment. Section 8901 continues former Section 2420(a) without substantive change.

§ 8902. Effect of provision in power attempting to make title inapplicable

8902. (a) Except as provided in subdivision (b), this title applies notwithstanding any provision of the power of attorney to the contrary.

(b) Subject to Section 8903, a power of attorney may expressly eliminate the authority of any person listed in Section 8940 to petition the court for any one or more of the purposes enumerated in Section 8941 or 8942 if both of the following requirements are met:

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

(2) 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. Subdivision (a) of Section 8902 continues former Section 2422 without substantive change, except that the reference to former Section 2420(b) is omitted as surplus. See Section 8050(b) (exclusion of reciprocal or interinsurance exchanges).

Subdivision (b) continues former Section 2421(a) without substantive change. This subdivision 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 8901 (cumulative remedies).

See also Sections 8022 ("power of attorney" defined), 8025 ("principal" defined).

§ 8903. Right to petition under power of attorney

8903. Notwithstanding any provision of a power of attorney:

(a) The conservator of the estate of the principal may petition the court for any one or more of the purposes enumerated in Section 8941.

(b) With regard to a durable power of attorney for health care:

(1) The conservator of the person of the principal may petition the court for any of the purposes enumerated in subdivisions (a), (c), and (d) of Section 8942.

(2) The attorney-in-fact may petition the court for any of the purposes enumerated in subdivisions (a) and (b) of Section 8942.

Comment. Subdivision (a) of Section 8903 continues former Section 2421(b) without substantive change.

Subdivision (b) restates former Section 2421(c)-(d) without substantive change. This subdivision 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 subdivision 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 8903 are met.

Under subdivision (b)(1), 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 8942(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 8942(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 8942(d). See also the Comment to Section 8942.

Under subdivision (b)(2), 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 8942(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 8942(b).

See also Sections 8013 ("attorney-in-fact" defined), 8022 ("power of attorney" defined), 8025 ("principal" defined), 8606 ("durable power of attorney for health care" defined).

§ 8904. Jury trial

8904. There is no right to a jury trial in proceedings under this part.

Comment. Section 8904 is a new provision. This section is consistent with the rule applicable to other fiduciaries. See Prob. Code §§ 1452 (guardianships and conservatorships), 1700 (decedents' estates), 17006 (trusts).

CHAPTER 2. JURISDICTION AND VENUE

§ 8920. Jurisdiction and authority of court or judge

8920. (a) The superior court has jurisdiction in proceedings under this title.

(b) The court in proceedings under this title is a court of general jurisdiction and the court, or a judge of the court, has the same power and authority with respect to the proceedings as otherwise provided by law for a superior court, or a judge of the superior court, including, but not limited to, the matters authorized by Section 128 of the Code of Civil Procedure.

Comment. Section 8920 is comparable to Probate Code Section 7050 governing the jurisdiction and authority of the court in proceedings concerning administration of decedents' estates. See Prob. Code § 7050 Comment. 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).

§ 8921. Jurisdiction over attorney-in-fact

8921. Subject to Section 8922, 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 8921 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 8013 ("attorney-in-fact" defined), 8022 ("power of attorney" defined), 8025 ("principal" defined).

§ 8922. Basis of jurisdiction

8922. 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 8922 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).

§ 8923. Venue

8923. 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 in this state.

Comment. Section 8923 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 Section 8054 (durable powers of attorney under law of another jurisdiction).

Staff Note. The venue rules are still undergoing review in light of suggestions from the State Bar Team.

CHAPTER 3. PETITIONS, ORDERS, APPEALS

Staff Note. The staff has not completed revision of this chapter to reflect the discussions with the State Bar Team representatives.

§ 8940. Petitioners

8940. 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 a 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 8940 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 8901 (other remedies not affected), 8903 (restriction in power of attorney of right to file petition), 8942 (petition with respect to durable power of attorney for health care).

See also Sections 8013 (“attorney-in-fact” defined), 8606 (“durable power of attorney for health care” defined), 8612 (“health care provider” defined), 8022 (“power of attorney” defined), 8025 (“principal” defined).

§ 8941. Petition as to powers of attorney other than durable power of attorney for health care

8941. Except as provided in Section 8942, a petition may be filed under this title for any one or more of the following purposes:

- (a) Determining whether the power of attorney 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 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 8406.

Comment. Section 8941 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 non-health care powers of attorney. This section applies to petitions concerning both durable and nondurable powers of attorney. See Sections 8022 (“power of attorney” defined), 8050 (scope of part). Section 8942 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 8201 (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 8013 (“attorney-in-fact” defined), 8022 (“power of attorney” defined), 8025 (“principal” defined).

§ 8942. Petition as to durable power of attorney for health care

8942. 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 8942 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 8941 applies to petitions with respect to other powers of attorney.

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 8903 limitation by provision in power of attorney).

See also Sections 8013 (“attorney-in-fact” defined), 8606 (“durable power of attorney for health care” defined), 8612 (“health care decision” defined), 8025 (“principal” defined).

§ 8943. Commencement of proceeding

8943. (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 8943 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 8920. 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.

§ 8944. Dismissal of petition

8944. 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 8944 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 8025 (“principal” defined).

§ 8945. Notice of hearing

8945. 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 8945 continues former Section 2417(b) without substantive change. See also 8025 (“principal” defined).

§ 8946. Service of notice

8946. 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 8946 continues former Section 2417(c) without change.

§ 8947. Proof of service

8947. Proof of compliance with Sections 8945 and 8946 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 8947 restates former Section 2417(d) without substantive change.

§ 8948. Power of court

8948. (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 8948 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.

§ 8949. Temporary health care order

8949. 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 8942. 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 8942.

Comment. Section 8949 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 8948 (powers of court).

See also Sections 8606 ("durable power of attorney for health care" defined), 8609 ("health care" defined), 8025 ("principal" defined).

§ 8950. Award of attorney's fees

8950. 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 8950 continues former Section 2417(g) without substantive change. See Section 8013 (“attorney-in-fact” defined).

§ 8951. Guardian ad litem

8951. 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 8951 restates former Section 2418 without substantive change. See also Section 8025 (“principal” defined).

§ 8952. Appeal

8952. An appeal may be taken from any of the following:

(a) Any final order made pursuant to subdivision (a), (b), or (d) of Section 8941 or subdivision (a), (b), or (d) of Section 8942.

(b) An order dismissing the petition or denying a motion to dismiss under Section 8944.

Comment. Section 8952 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 8154(b). Powers of attorney are governed by Part 10 (commencing with Section 8000). See also Sections 8051 (relation to general agency law), 8022 ("power of attorney" defined), 8151 (modification or revocation of power of attorney), 8152 (termination of nondurable power of attorney), 8153 (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 8022 (“power of attorney” defined), 8051 (relation to general agency law), 8151 (modification or revocation of power of attorney), 8152 (termination of nondurable power of attorney), 8153 (termination of attorney-in-fact’s authority), 8212 (power coupled with an interest), 8302 (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 8051 (relation to general agency law), 8022 (“power of attorney” defined). For a similar provision drawn from Section 2357, see Section 8308 (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 8123 (durable power of attorney). See Section 8123 Comment.

§ 2400.5. Proxy given by agent to exercise voting rights

Comment. Former Section 2400.5 is continued without substantive change in Section 8022(b) (proxy excluded from definition of power of attorney). See Section 8022 Comment.

§ 2401. Effect of principal’s incapacity

Comment. Former Section 2401 is continued without substantive change in Section 8124 (effect on attorney-in-fact’s acts under durable power of attorney during principal’s incapacity). See Section 8124 Comment.

§ 2402. Relation of agent to court-appointed fiduciary

Comment. Subdivision (a) of former Section 2402 is continued without substantive change in Section 8206 (relation of agent to court-appointed fiduciary). See Section 8206 Comment.

Subdivision (b) is continued without substantive change in Section 8125 (nomination of fiduciary in durable power of attorney). See Section 8125 Comment.

§ 2403. Death or incapacity of principal

Comment. Former Section 2403 is continued without substantive change in Section 8302 (effect of death or incapacity of principal). See Comment to Section 8302.

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

Comment. Former Section 2404 is continued without substantive change in Section 8303 (affidavit of lack of knowledge of termination of power). See Comment to Section 8303.

§ 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 8013 (“attorney-in-fact” defined). See Comment to Section 8013.

Subdivision (b) is continued without substantive change in Section 8606 (“durable power of attorney for health care” defined). See Comment to Section 8606.

The first sentence of subdivision (c) is restated without substantive change in Section 8022(a) (“power of attorney” defined). The second sentence of subdivision (c) is superseded by Section 8022(b) (exclusion from power of attorney). See Comment to Section 8022.

Subdivision (d) is restated without substantive change in Section 8025 (“principal” defined). See Comment to Section 8025.

§ 2411. Petitioners

Comment. Former Section 2411 is continued without substantive change in Section 8940 (petitioners). See Comment to Section 8940.

§ 2412. Relief available

Comment. Former Section 2412 is continued without substantive change in Section 8941 (petition as to non-health care power of attorney). See Section 8941 Comment.

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

Comment. Former Section 2412.5 is continued without substantive change in Section 8942 (petition as to durable power of attorney for health care). See Section 8942 Comment.

§ 2413. Power of court

Comment. Former Section 2413 is continued without substantive change in Section 8948 (power of court). See Section 8948 Comment.

§ 2414. Venue

Comment. Former Section 2414 is continued without substantive change in Section 8923 (venue). See Section 8923 Comment.

§ 2415. Verified petition; contents

Comment. Former Section 2415 is restated without substantive change in Sections 1021 (petition to be verified), 8920(a) (jurisdiction in superior court), and 8943 (commencement of proceeding). See Section 8943 Comment.

§ 2416. Dismissal of petition

Comment. Former Section 2416 is restated without substantive change in Section 8944 (dismissal of petition). See Section 8944 Comment.

§ 2417. Hearing

Comment. Subdivision (a) of former Section 2417 is restated without substantive change in Section 8943(b) (clerk to set matter for hearing).

Subdivision (b) is restated without substantive change in Section 8945 (notice of hearing). See Comment to Section 8945

Subdivision (c) is continued without change in Section 8946 (service of notice).

Subdivision (d) is restated without substantive change in Section 8947 (proof of service).

Subdivision (e) is restated without substantive change in Section 8906 (application of decedents' estates provisions). See Comment to Section 8906.

Subdivision (f) is restated without substantive change in Section 8948(b) (order shortening time).

Subdivision (g) is continued without substantive change in Section 8950 (award of attorney's fees). See Section 8950 Comment.

Subdivision (h) is continued without substantive change in Section 8949 (temporary health care order). See Section 8949 Comment.

§ 2418. Guardian ad litem

Comment. Former Section 2418 is restated without substantive change in Section 8951 (appointment of guardian ad litem).

§ 2419. Appeal

Comment. Former Section 2419 is continued without substantive change in Section 8952 (appeal). See Section 8952 Comment.

§ 2420. Cumulative remedies

Comment. Subdivision (a) of former Section 2420 is continued without substantive change in Section 8901 (cumulative remedies).

Subdivision (b) is continued without substantive change in Section 8050(b)(2) (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 8903 (limitation of remedies by provision in power of attorney). See Comment to Section 8903.

Subdivision (b) is continued without substantive change in Section 8903 (right to petition under power of attorney). The cross-reference to subdivision (c) is omitted as unnecessary. See Section 8903 Comment.

Subdivisions (c) and (d) are restated without substantive change in Section 8905 (right to petition under durable power of attorney for health care). See Section 8905 Comment.

§ 2422. Application of article

Comment. Former Section 2422 is restated without substantive change in Section 8902 (effect of provision in power attempting to make part inapplicable). See Section 8902 Comment.

§ 2423. Legislative intent

Comment. Former Section 2423 is continued without substantive change in Section 8900 (legislative intent). See Section 8900 Comment.

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 8603 (“community care facility” defined), 8606 (“durable power of attorney for health care” defined), 8609 (“health care” defined), 8612 (“health care decision” defined), 8615 (“health care provider” defined), 8019 (“person” defined), and 8618 (“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 8700 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 8704 without substantive change.

§ 2433. Requirements for printed form of durable power of attorney for health care

Comment. Former Section 2433 is continued in Section 8701 without substantive change.

§ 2434. Agent's authority to make health care decisions

Comment. Former Section 2434 is continued in Section 8702 without substantive change.

§ 2435. Limitations on agent's authority

Comment. Former Section 2435 is continued in Section 8730 without substantive change.

§ 2436. Availability of medical information to agent

Comment. Former Section 2436 is continued in Section 8703 without substantive change.

§ 2436.5. Expiration of durable power of attorney for health care

Comment. Former Section 2436.5 is continued in Section 8706 without substantive change.

§ 2437. Revocation of durable power of attorney for health care

Comment. Former Section 2437 is continued in Section 8705 without substantive change.

§ 2438. Immunities of health care provider

Comment. Former Section 2438 is continued in Section 8750 without substantive change.

§ 2438.5. Presumption concerning power executed in other jurisdiction

Comment. Former Section 2438.5 is continued in Section 8752 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 8732 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 8733 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 8734 without substantive change.

§ 2443. Unauthorized acts or omissions

Comment. Former Section 2443 is continued in Section 8731 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 8409 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 8401 without substantive change.

§ 2476. Requirements for statutory form power of attorney

Comment. Former Section 2476 is continued in Section 8402 without substantive change.

§ 2477. Effect of initialing line in front of (N) in statutory form

Comment. Former Section 2477 is continued in Section 8403 without substantive change.

§ 2478. Durability of statutory form power of attorney

Comment. Former Section 2478 is continued in Section 8404 without substantive change.

§ 2479. Springing statutory form power of attorney

Comment. Former Section 2479 is continued in Section 8405 without substantive change.

§ 2480. General provisions applicable to statutory form power of attorney

Comment. Former Section 2480 is continued in Section 8407 without substantive change.

§ 2480.5. Compelling third person to honor statutory form power of attorney

Comment. Former Section 2480.5 is continued in Section 8406 without substantive change.

§ 2481. Use of other forms

Comment. Former Section 2481 is continued in Section 8408 without substantive change.

§ 2482. Short title

Comment. Former Section 2482 is continued in Section 8400 without substantive change.

§ 2483. Construction

Staff Note. This section needs to be preserved, perhaps as combined with Section 8001(b). It will not be necessary if the Power of Attorney Law is located in the Probate Code.

§ 2484. Severability

Staff Note. This section needs to be preserved, perhaps as combined with Section 8001(c). It will not be necessary if the Power of Attorney Law is located in the Probate Code.

§ 2485. Construction of powers generally

Comment. Former Section 2485 is continued in Section 8450 without substantive change.

§ 2486. Real property transaction

Comment. Former Section 2486 is continued in Section 8451 without substantive change.

§ 2487. Tangible personal property transactions

Comment. Former Section 2487 is continued in Section 8452 without substantive change.

§ 2488. Stock and bond transactions

Comment. Former Section 2488 is continued in Section 8453 without substantive change.

§ 2489. Commodity and option transactions

Comment. Former Section 2489 is continued in Section 8454 without substantive change.

§ 2490. Banking and other financial institution transactions

Comment. Former Section 2490 is continued in Section 8455 without substantive change.

§ 2491. Business operating transactions

Comment. Former Section 2491 is continued in Section 8456 without substantive change.

§ 2492. Insurance and annuity transactions

Comment. Former Section 2492 is continued in Section 8457 without substantive change.

§ 2493. Estate, trust, and other beneficiary transactions

Comment. Former Section 2493 is continued in Section 8458 without substantive change.

§ 2494. Claims and litigation

Comment. Former Section 2494 is continued in Section 8459 without substantive change.

§ 2495. Personal and family maintenance

Comment. Former Section 2495 is continued in Section 8460 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 8461 without substantive change.

§ 2497. Retirement plan transactions

Comment. Former Section 2497 is continued in Section 8462 without substantive change.

§ 2498. Tax matters

Comment. Former Section 2498 is continued in Section 8463 without substantive change.

§ 2499. After-acquired property

Comment. Former Section 2499 is continued in Section 8464 without substantive change.

§ 2499.5. Power to modify or revoke trust

Comment. Former Section 2499.5 is continued in Section 8465 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 8771 without substantive change.

§ 2501. Warning or lawyer's certificate

Comment. Former Section 2501 is continued in Section 8772 without substantive change.

§ 2502. Formal requirement

Comment. Former Section 2502 is continued in Section 8773 without substantive change.

§ 2503. Requirements for statutory form

Comment. Former Section 2503 is continued in Section 8774 without substantive change.

§ 2503.5. Requirements for forms after January 1, 1993

Comment. Former Section 2503.5 is continued in Section 8775 without substantive change.

§ 2504. Language conferring general authority

Comment. Former Section 2504 is continued in Section 8776 without substantive change.

§ 2505. Effect of documents executed by agent

Comment. Former Section 2505 is continued in Section 8777 without substantive change.

§ 2506. Termination of authority; alternate agent

Comment. Former Section 2506 is continued in Section 8778 without substantive change.

§ 2507. Use of other forms

Comment. Former Section 2507 is continued in Section 8779 without substantive change.

§ 2508. Short title

Comment. Former Section 2508 is continued in Section 8770 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 8127 (warning statement in durable power of attorney). See Section 8127 Comment.

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

Comment. Former Section 2510.5 is superseded by Section 8102 (form of durable power of attorney after January 1, 1995). See Section 8102 Comment.

§ 2511. Convincing evidence of identity of principal

Comment. Former Section 2511 is continued without substantive change in Section 8751 (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 8309 (protection of third person relying in good faith on durable power of attorney). See also Section 2438 (immunities of health care provider). See Section 8309 Comment.

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

Comment. Former Section 2513 is continued without change in Section 8128 (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 8010 (application of definitions). Paragraph (1) of subdivision (a) is restated without substantive change in Sections 8013 (“attorney-in-fact” defined), 8022 (“power of attorney” defined), and 8025 (“principal” defined). See Section 8013 Comment (“agent” replaces “attorney in fact”). Paragraph (2) of subdivision (a) is continued without change in Section 8028 (“springing power of attorney” defined).

Subdivisions (b)-(d) are continued without substantive change in Section 8128 (springing power of attorney). See Section 8128 Comment.