

#L-703

2/18/83

Memorandum 83-14

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

Attached is a draft of a tentative recommendation that the staff believes would carry out the decisions made by the Commission at the last meeting. The attached tentative recommendation should be reviewed with care prior to the meeting. At the meeting, we propose that the recommendation be approved for printing and submission to the 1983 Legislature after such changes as the Commission concludes are necessary have been made.

Next week (beginning on February 21), the staff plans to make arrangements for the introduction of a bill on this subject. After the March meeting, the bill will be amended, if necessary, to reflect the decisions of the Commission at the March meeting.

We have distributed the attached tentative recommendation to interested persons and organizations for review and comment. We will bring any comments we receive to your attention at the March meeting.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

STATE OF CALIFORNIA
CALIFORNIA LAW
REVISION COMMISSION

TENTATIVE RECOMMENDATION

relating to

DURABLE POWER OF ATTORNEY TO MAKE HEALTH CARE DECISIONS

March 1983

Important Note: This staff draft of a tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be considered when the Commission determines what recommendation, if any, it will make to the California Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you object to the tentative recommendation or that you believe that it needs to be revised. COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE SENT TO THE COMMISSION NOT LATER THAN MARCH 10, 1983. The Commission will consider this tentative recommendation at its March 18 meeting.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

CALIFORNIA LAW REVISION COMMISSION
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LETTER OF TRANSMITTAL

The Law Revision Commission was authorized by Resolution Chapter 19 of the Statutes of 1979 to study the rights and disabilities of minors and incompetent persons. This tentative recommendation relates to one aspect of this topic--use of a durable power of attorney to make health care decisions.

The legislation proposed by the Commission would (1) make clear that a durable power of attorney may authorize the attorney in fact to make health care decisions on behalf of the principal, (2) require additional formalities before a durable power of attorney is effective to authorize health care decisions, and (3) give the health care provider who relies in good faith on a decision of the attorney in fact protection from civil and criminal liability.

TENTATIVE RECOMMENDATION

relating to

DURABLE POWER OF ATTORNEY FOR HEALTH CARE DECISIONS

The Uniform Durable Power of Attorney Act¹ was enacted in California upon recommendation of the Law Revision Commission.² Some lawyers advise the use of a durable power of attorney to delegate the authority to make health care decisions for the person giving the power.³ However, it is unclear under existing law whether a durable power of attorney can be used for this purpose.⁴ For this reason, a health care provider may not be willing to rely on a decision made by the attorney in fact under a durable power of attorney.

1. Civil Code §§ 2400-2407.
2. 1981 Cal. Stats. ch. 511; Recommendation Relating to Uniform Durable Power of Attorney Act, 15 Cal. L. Revision Comm'n Reports 351 (1980). For additional legislative history, see 16 Cal. L. Revision Comm'n Reports 25, 43-46 (1982).
3. See, e.g., Spitler, California's "New" Durable Power of Attorney Act--The Second Time Around, 3 CEB Est. Plan. R. 41, 43-45 (1981).
4. There is no reference to health care decisions in Civil Code Sections 2400-2407, in the Comments to these sections, nor in the Comments to the Uniform Durable Power of Attorney Act. There are explicit and implicit references to property matters. Civil Code Section 2400 provides a warning that the durable power of attorney gives the attorney in fact "broad powers to dispose, sell, convey, and encumber your real and personal property." Civil Code Section 2402 deals with the relation of the attorney in fact to court-appointed fiduciaries by reference to 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 his or her property except specified exclusions." The absence of any reference to a guardian of the person or conservator of the person is recognized in the Comment to Section 2402. No case has been found involving the issue whether the Uniform Durable Power of Attorney Act or the California version of that act would cover health care decisions. One state has provided specifically by statute that a power of attorney may give the attorney in fact authority to authorize medical and surgical procedures. 20 Pa. C.S.A. §§ 5601-5606 (1982).

The Law Revision Commission recommends that the durable power of attorney statute be revised to provide expressly that a durable power of attorney may authorize the attorney in fact to make health care decisions for the principal. Making clear that a durable power of attorney may be used for this purpose will provide a useful and effective alternative to leaving the authority to make health care decisions with the court system for persons unable to give or withhold informed consent.⁵ It will further the interest of the individual in self-determination and personal autonomy.⁶ Instead of leaving health care decisions to a judge, the individual may designate a trusted relative or friend to make the decision on his or her behalf if the need should arise.

The recommended legislation has the following features:

(1) An attorney in fact under a durable power of attorney is not empowered to make health care decisions on behalf of the principal unless the power of attorney specifically grants this authority. The power of attorney may, of course, specify any limitations on the exercise of the power to make health care decisions. This scheme leaves to the individual substantial freedom to fashion a durable power of attorney suited to the individual's particular needs and beliefs.

(2) A durable power of attorney enables the attorney in fact to make health care decisions on behalf of the principal only if the power of attorney is either signed by two witnesses or acknowledged before a notary public in California.

(3) Subject to any limitations in the durable power of attorney, the attorney in fact may make health care decisions for the principal to the same extent as the principal could make health care decisions for himself or herself if he or she had the capacity to do so.

(4) Any printed form of a durable power of attorney sold in California for use by a person who does not have the advice of an attorney is

5. See Prob. Code §§ 2354 (medical treatment of conservatee not adjudicated to lack capacity to give informed consent), 2355 (medical treatment of conservatee adjudicated to lack capacity to give informed consent), 2357 (court-ordered medical treatment), 3200-3211 (court-ordered medical treatment for person without conservator).

6. For a discussion of the need to recognize the power in the individual to provide for health care in the eventuality of incompetence, see Alexander, Premature Probate: A Different Perspective on Guardianship for the Elderly, 31 Stan. L. Rev. 1003 (1979).

required to have a warning advising of the consequences of a delegation of the power to make health care decisions. This is consistent with the warning provided in Civil Code Section 2400 for a printed form of a durable power of attorney as it relates to property matters.

(5) The attorney in fact empowered to make health care decisions has the same right as the principal to receive information relating to proposed health care, to receive and review medical records, and to consent to the disclosure of medical records.

(6) The general procedure for court enforcement of the duties of an attorney in fact provided by Civil Code Sections 2410-2423 is revised to apply to the attorney in fact empowered to make health care decisions.

(7) Health care providers are protected from liability for relying in good faith on a health care decision made by an attorney in fact.

The Commission's recommendation would be effectuated by enactment of the following measure:

An act to amend Sections 2356, 2402, 2410, 2412, 2417, 2419, and 2421 of, to add Section 2412.5 to, and to add Article 5 (commencing with Section 2430) to Chapter 2 of Title 9 of Part 4 of Division 3 of, the Civil Code, relating to durable powers of attorney.

The people of the State of California do enact as follows:

28772

Civil Code § 2356 (technical amendment). Termination of agency; binding effect of transactions

SECTION 1. 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~~ Articles 3 (commencing with Section 2400) and 5 (commencing with Section 2430) of Chapter 2.

(e) With respect to a proxy given by a person to another person relating to the exercise of voting rights, to the extent the provisions of this section conflict with or contravene any other provisions of the statutes of California pertaining to the proxy, the latter provisions shall prevail.

Comment. Subdivision (d) of Section 2356 is amended to add a reference to Article 5 pertaining to powers of attorney for health care decisions.

31193

Civil Code § 2402 (amended). Relation of attorney in fact to court-appointed fiduciary

SEC. 2. Section 2402 of the Civil Code is amended to read:

2402. (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 his or her property except specified exclusions, the attorney in fact is accountable to the fiduciary as well as to the principal. The fiduciary has the same power to revoke or amend the power of attorney that the principal would have had if he or she were not incapacitated; but, if a conservator is appointed by a court of this state, the conservator can revoke or amend the 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 revoke or amend the durable power of attorney and the revocation or amendment is in accord with the order. This subdivision does not apply to a durable power of attorney to the extent that the durable power of attorney authorizes the attorney in fact to make health care decisions (as defined in Section 2430) for the principal.

(b) 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. If the protective proceedings are conservatorship proceedings in this state, the nomination shall have 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 of the Probate Code, whether or not such writing is a durable power of attorney.

Comment. The last sentence is added to subdivision (a) of Section 2402 because special provisions apply to a durable power of attorney to make health care decisions. See Sections 2412.5 and 2421.

27819

Civil Code § 2410 (amendment). Definitions

SEC. 3. Section 2410 of the Civil Code is amended to read:

2410. As used in this article:

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

(b) "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 (as defined in Section 2430) for the principal.

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

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

Comment. Subdivision (b) is added to Section 2410 in recognition that some of the provisions of this article apply only to a durable power of attorney for health care. Where a durable power of attorney

authorizes the attorney in fact to take action both with respect to property matters and health care decisions, this article applies generally to the extent that the power of attorney relates to property matters and the provisions of this article that apply to a durable power of attorney for health care apply to the extent that the power of attorney relates to health care decisions.

27821

Civil Code § 2412 (technical amendment). Petition; purposes

SEC. 4. Section 2412 of the Civil Code is amended to read:

2412. ★ Except as provided in Section 2412.5, a petition may be filed under this article for any one or more of the following purposes:

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

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

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

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

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

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

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

Comment. The introductory clause is added to Section 2412 to recognize that a different provision (Section 2412.5) applies to a petition with respect to a durable power of attorney for health care.

Civil Code § 2412.5 (added). Petition with respect to durable power of attorney for health care

SEC. 5. Section 2412.5 is added to the Civil Code, to read:

2412.5. With respect to a durable power of attorney for health care, a petition may be filed under this article for any one or more of the following purposes.

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

(b) Determining whether the acts or proposed acts of the attorney in fact are in the best interests of the principal, taking into consideration the desires of the principal as expressed in the durable power of attorney or otherwise made known to the court.

(c) Compelling the attorney in fact to report his or her acts as attorney in fact to the principal, the spouse of the principal, the conservator of the person of the principal, or to such other person as the court in its discretion may require, if the attorney in fact has failed to submit such a 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 of both of the following:

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

(2) The termination of the durable power of attorney for health care is in the best interests of the principal in order to carry out the desires of the principal as expressed in the power of attorney.

Comment. Section 2412.5 is a special provision that enumerates the purposes for which a petition may be filed under this article with respect to a durable power of attorney for health care. Under subdivision (b), the desires of the principal as expressed in the durable power of attorney or otherwise made known to the court are required to be taken into consideration by the court in determining the best interests of the principal. Subdivision (d) permits the court to terminate the durable power of attorney for health care where the attorney in fact is not acting in the best interests of the principal in order to carry out the desires of the principal as expressed in the power of attorney. This provision adopts a subjective standard (the principal's desires) in place of an objective standard of what constitutes the best interests of the principal. It permits the durable power of attorney for health care to be terminated if the attorney in fact, for example, is failing to perform his or her duties as expressed in the power of attorney or is acting contrary to the desires of the principal as expressed in the power of attorney. A durable power of attorney for health care may limit the authority to petition under this article. See Section 2421.

Civil Code § 2417 (technical amendment). Hearing on petition

SEC. 6. Section 2417 of the Civil Code is amended to read:

2417. (a) Upon the filing of a petition under this article, the clerk shall set the petition for hearing.

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

- (1) The attorney in fact if not the petitioner.
- (2) The principal if not the petitioner.
- (3) Any other persons the court in its discretion requires.

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

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

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

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

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

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

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

Comment. Subdivision (g)(2) of Section 2417 is revised to permit the court to award attorney's fees to the conservator of the person in a case where the attorney in fact fails without any reasonable cause or justification to submit a report requested under subdivision (c) of Section 2412.5.

27626

Civil Code § 2419 (amended). Appeal

SEC. 7. Section 2419 of the Civil Code is amended to read:

2419. An appeal may be taken from any of the following:

(a) Any final order or decree made pursuant to subdivision (a), (b), or (d) of Section 2412 or subdivision (a), (b), or (d) of Section 2412.5 or from an.

(b) An order dismissing the petition or denying a motion to dismiss under Section 2416.

Comment. The amendment of Section 2419 permits appeal from certain final orders or decrees under Section 2412.5 (petition with respect to durable power of attorney for health care).

27633

Civil Code § 2421 (amended). Restriction in power of attorney of authority to petition

SEC. 8. Section 2421 of the Civil Code is amended to read:

2421. (a) Except as provided in ~~subdivision (b)~~ subdivisions (b) and (c), a power of attorney may expressly eliminate the authority of any person listed in Section 2411 to petition the court under this article for any one or more of the purposes enumerated in Section 2412 or Section 2412.5 if both of the following requirements are met:

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

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

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

(c) Notwithstanding any provision of the power of attorney, in the case of a durable power of attorney for health care, the conservator of the person of the principal may petition the court under this article for any of the purposes enumerated in subdivisions (a), (c), and (d) of Section 2412.5.

Comment. Subdivision (c) is added to Section 2421 to specify the purposes for which a conservator of the person may petition the court under this article with respect to a durable power of attorney for health care. Although a power of attorney may eliminate the authority of any person to petition the court under this article if the requirements of subdivision (a) are met, subdivision (c) provides an exception which permits the conservator of the person to petition for certain purposes. The conservator of the person may obtain a determination whether the durable power of attorney for health care is still effective or has terminated. See Section 2412.5(a). The conservator of the person may obtain a court order requiring the attorney in fact to report his or her 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 2412.5(c). The conservator of the person may obtain a court determination that the durable power of attorney for health care is terminated upon a determination by the court that the attorney in fact is not performing the fiduciary duties under the durable power of attorney for health care in the best interests of the principal in order to carry out the desires of the principal as expressed in the power of attorney. See Section 2412.5(d). For further discussion of this subjective standard, see the Comment to Section 2412.5.

404/081

Civil Code §§ 2430-2435 (added). Durable power of attorney for health care

SEC. 9. Article 5 (commencing with Section 2430) is added to Chapter 2 of Title 9 of Part 4 of Division 3 of the Civil Code, to read:

Article 5. Durable Power of Attorney for Health Care

§ 2430. Health care decision defined

2430. As used in this article, "health care decision" means consent, refusal of consent, or withdrawal of consent to any care, treatment, service, or procedure to maintain, diagnose, or treat a physical or mental condition.

Comment. Section 2430 provides a broad definition of "health care decision" for purposes of this article.

§ 2431. Application of article

2431. (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 power of attorney complies with this article.

(b) This article does not apply where the durable power of attorney was executed before January 1, 1984. Nothing in this article affects the validity of a durable power of attorney executed before January 1, 1984, or the validity of a decision made under such durable power of attorney, regardless of whether the decision is made before or after January 1, 1984. The validity of such a durable power of attorney or of such a decision shall be determined by the law that would apply if this article had not been enacted.

Comment. Subdivision (a) of Section 2431 makes clear that the additional requirements of this article must be satisfied if a durable power of attorney executed after the operative date of this article is intended to authorize health care decisions. See Section 2400 (durable power of attorney). Nothing in this article affects a durable power of attorney executed after the operative date of this article insofar as it relates to matters other than health care decisions. See Section 2430 ("health care decision" defined).

Subdivision (b) makes clear that enactment of this article has no effect on durable powers of attorney executed before its operative date. Moreover, this article has no effect on decisions made under durable powers of attorney executed before its operative date. The validity of a health care decision made before or after the operative date of this article pursuant to a durable power of attorney executed before the operative date is determined by the law that would apply if this article had not been enacted. See California Law Revision Commission, Recommendation Relating to Durable Power of Attorney to Make Health Care Decisions (March 1983).

405/410

§ 2432. Requirements where durable power of attorney authorizes health care decisions

2432. (a) An attorney in fact under a durable power of attorney may not make health care decisions unless both 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 either (A) is signed by at least two witnesses who are present when the durable power of attorney is

signed by the principal or when the principal acknowledges his or her signature or (B) is acknowledged before a notary public at any place within this state.

(b) A printed form of a durable power of attorney sold in this state for use by a person who does not have the advice of legal counsel shall include the following notice in 10-point bold face type, in addition to the warning required by subdivision (b) of Section 2400, if it permits the attorney in fact to make health care decisions: "This document gives the person you designate as your attorney in fact the power to make health care decisions for you, subject to any limitations you include in this document. The power to make health care decisions for you may include consent, refusal of consent, or withdrawal of consent to any care, treatment, service, or procedure to maintain, diagnose, or treat a physical or mental condition. This power of attorney will not be valid for making health care decisions unless it is either (1) signed by two witnesses who are present when you sign or acknowledge your signature or (2) acknowledged before a notary public in California."

Comment. Subdivision (a) of Section 2432 makes clear that a durable power of attorney is not sufficient to enable the attorney in fact to consent to health care or make other health care decisions unless the formalities of this section are satisfied. See also Section 2400 (general requirements for durable power of attorney).

Subdivision (b) provides an additional warning required to be in certain printed forms if the durable power of attorney is designed to authorize health care decisions.

045/212

§ 2433. Authority of attorney in fact to make health care decisions

2433. Subject to any limitations in the durable power of attorney, the attorney in fact may make health care decisions for the principal to the same extent as the principal could make health care decisions for himself or herself if he or she had the capacity to do so.

Comment. Section 2433 gives the broadest possible authority to an attorney in fact authorized to make health care decisions, except as limited by the power of attorney. See also Sections 2410-2423 (court enforcement of duties of attorney in fact).

§ 2434. Availability of medical information to attorney in fact

2434. An attorney in fact authorized to make health care decisions under a durable power of attorney 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 2434 makes clear that the attorney in fact can obtain and disclose information as necessary to exercise the authority given in the durable power of attorney.

043/179

§ 2435. Protection of health care provider from liability

2435. A health care provider is not subject to criminal prosecution, civil liability, or professional disciplinary action where the health care provider relies on a health care decision and both of the following requirements are satisfied:

(a) The decision is made by an attorney in fact who the health care provider believes in good faith is authorized by a durable power of attorney under this article to make the decision.

(b) The health care provider believes in good faith that the decision is in the best interests of the principal in order to carry out the desires of the principal as expressed in the durable power of attorney or otherwise known to the health care provider.

Comment. Section 2435 implements this article by protecting the health care provider who acts in good faith in reliance on a health care decision made by an attorney in fact pursuant to this article.