

Memorandum 83-2

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

At the November 1982 meeting, the Commission considered at some length the question of delegation of the power to make health care decisions. The Commission decided to pursue the approach of working within the framework of the Uniform Durable Power of Attorney Act, and directed the staff to prepare a new draft statute on this basis.

Attached to this memorandum is a staff draft of a tentative recommendation that seeks to carry out the Commission's directive to keep the statute as simple as possible while providing necessary protections. Also attached to this memorandum as Exhibit 1 is a copy of existing law relating to the durable power of attorney (Civil Code §§ 2400-2407) and court enforcement of duties of attorneys in fact (Civil Code §§ 2410-2423) for your reference.

If the draft of the tentative recommendation is approved at the January meeting, the staff (after making any revisions necessary to carry out decisions made at the January meeting) will distribute the revised tentative recommendation to interested persons and organizations for review and comment.

Respectfully submitted,

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Staff Counsel

#L-703

STAFF DRAFT

STATE OF CALIFORNIA

C A L I F O R N I A L A W
R E V I S I O N C O M M I S S I O N

TENTATIVE RECOMMENDATION

relating to

DURABLE POWER OF ATTORNEY TO MAKE HEALTH CARE DECISIONS

December 6, 1982

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94306

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.

STAFF DRAFT

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.

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

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.

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) 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 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.

(4) The attorney in fact empowered to make health care decisions is given access to information relating to proposed health care and medical records to the same extent as the principal.

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).

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

(6) 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, 2417, and 2421 of, 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 ~~Article~~ 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. If, following execution of a durable power of attorney authorizing health care decisions as provided in Article 5 (commencing with Section 2430), a court of the principal's domicile appoints a conservator of the person, guardian of the person, or other fiduciary appointed to exercise protective supervision over the person of the principal, 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.

(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 second sentence is added to subdivision (a) of Section 2402 to provide a rule applicable to an attorney in fact who is authorized to make health care decisions. See Sections 2430-2435. This rule is consistent with the rule provided in the first sentence.

15110

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

SEC. 3. 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 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) of Section 2417 is amended to make clear notice must be given to a conservator of the person where the attorney in fact is accountable to a conservator of the person. See Section 2402.

045/130

Civil Code § 2421 (technical amendment). Authority of conservator to petition

SEC. 4. Section 2421 of the Civil Code is amended to read:

2421. (a) Except as provided in subdivision (b), 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 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, the conservator of the estate or of the person of the principal may petition the court under this article for any one or more of the purposes enumerated in Section 2412.

Comment. Subdivision (b) of Section 2421 is amended to make clear that a conservator of the person to which an attorney in fact is accountable under Section 2402 may petition under this article notwithstanding any provision in the power of attorney.

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

SEC. 5. 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 Decisions

§ 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.

405/358

§ 2431. Application of article

2431. A durable power of attorney 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.

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

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 is signed by at least two witnesses who are present when the durable power of attorney is signed

by the principal or 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 (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 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 arising out of any of the following circumstances:

(a) Where 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 by a durable power of attorney under this article to make the decision.

(2) The health care provider believes in good faith that the decision is in the best interests of the principal.

(b) Where the health care provider refuses to follow a health care decision of an attorney in fact who the health care provider believes in good faith is not capable of giving informed consent.

(c) Where the health care provider refuses to follow a health care decision of an attorney in fact who the health care provider believes in good faith was not authorized by a durable power of attorney under this article to make the decision.

(d) Where the health care provider refuses to follow a health care decision of an attorney in fact whose authority the health care provider believes in good faith has terminated.

(e) Where the health care provider refuses to follow a health care decision the health care provider believes in good faith is not in the best interests of the principal.

Comment. Subdivision (a) of 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. Subdivisions (b)-(e) protect the health care provider in certain situations where the health care provider refuses in good faith to follow the decision of the attorney in fact. For example, under subdivision (c) the health care provider is not liable for refusing to follow the decision of an attorney in fact in a case where the health care provider believes in good faith that the principal was not of sound mind when the power of attorney was executed.

EXHIBIT 1

ARTICLE 3. UNIFORM DURABLE POWER OF ATTORNEY ACT
[NEW]

Sec.

- 2400. Durable power of attorney; forms.
- 2401. Effect of acts by attorney in fact during incapacity of principal.
- 2401. Fiduciary for incapacitated principal.
- 2403. Death or incapacity of principal; knowledge; good faith acts.
- 2404. Affidavit of lack of knowledge of termination of power; recording.
- 2405. Construction and application of article.
- 2406. Citation.
- 2407. Partial invalidity.

UNIFORM DURABLE POWER OF ATTORNEY ACT

Table of Jurisdictions Wherein Act Has Been Adopted

For text of Uniform Act, and variation notes and annotation materials for adopting jurisdictions, see Uniform Laws Annotated, Master Edition, Volume 8.

Jurisdiction	Statutory Citation
California	West's Anno.Civil Code §§ 2400 to 2407.
Kansas	K.S.A. §§ 58-610 to 58-617.
Massachusetts	M.G.L.A. c. 201B, §§ 1 to 7.

Legislative Committee Comment—Senate
1981 Addition

This article, which supersedes former Section 2307.1, is the Uniform Durable Power of Attorney Act as approved and recommended in 1979 by the National Conference of Commissioners on Uniform State Laws. Except as noted in the Law Revision Commission Comments and Legislative Committee Comments, the text of this

article is the same as the text of the Uniform Act.

Although the title of this article refers to durable powers of attorney, two sections of this article apply to powers of attorney whether durable or nondurable. See Sections 2403, 2404.

§ 2400. Durable power of attorney; forms

(a) A durable power of attorney is a power of attorney by which a principal designates another his or her attorney in fact in writing and the writing contains the words "This power of attorney shall not be affected by subsequent incapacity of the principal," or "This power of attorney shall become effective upon the incapacity of the principal," or similar words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding the principal's subsequent incapacity. For the purposes of this article, a durable 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.

(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:

WARNING TO PERSON EXECUTING THIS DOCUMENT

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

1. This document may provide the person you designate as your attorney in fact with broad powers to dispose, sell, convey, and encumber your real and personal property.

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

3. You have the right to revoke or terminate this durable power of attorney at any time.

(c) Nothing in subdivision (b) invalidates any transaction in which a third person relied in good faith upon the authority created by the durable power of attorney. (Added by Stats.1981, c. 511, p. —, § 4.)

Legislative Committee Comment—Senate 1981 Addition

Subdivision (a) of Section 2400 is the same as the official text of Section 1 of the Uniform Durable Power of Attorney Act with two modifications:

(1) The reference in the Uniform Act to the principal's "disability" is omitted. Under Section 2356, it is the principal's incapacity to contract which would otherwise terminate the power of attorney.

(2) The last sentence is added. This sentence merely makes clear that the Uniform Durable Power of Attorney Act does not affect the statutory provisions governing proxies.

Subdivisions (b) and (c) are new. Subdivision (b) requires a warning statement if the durable power of attorney is exe-

cuted on a printed form sold in this state for use by a person who does not have the advice of a lawyer in connection with the durable power of attorney. This requirement is designed to protect the person who purchases a durable power of attorney form at a stationery store or similar place and executes it without consulting a lawyer. The subdivision does not apply to a case where the person has the advice of a lawyer or where the durable power of attorney is produced by typewriting, word processing equipment, or other method than printing. Subdivision (c) protects good faith transactions. Subdivision (c) does not deal with the liability, if any, of a person who sells a form in this state in violation of subdivision (b).

§ 2401. Effect of acts by attorney in fact during incapacity of principal

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 his or her successors in interest as if the principal were competent.

(Added by Stats.1981, c. 511, p. —, § 4.)

Law Revision Commission Comment 1981 Addition

Section 2401 is the same as the official text of Section 2 of the Uniform Durable Power of Attorney Act, except that the reference to the principal's "disability" is

omitted. Under Section 2356, it is the principal's incapacity to contract which would otherwise terminate the power of attorney.

§ 2402. Fiduciary for incapacitated principal

(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.

(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.
(Added by Stats.1981, c. 511, p. —, § 4.)

**Law Revision Commission Comment
1981 Addition**

The first sentence of subdivision (a) of Section 2402 is the same as the first sentence of the official text of subsection (a) of Section 3 of the Uniform Durable Power of Attorney Act except that "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 the Commissioners' Comment to Sec-

tion 3 of the Uniform Durable Power of Attorney Act.

The second sentence of subdivision (a) of Section 2402 is the same as the second sentence of the official text of subsection (a) of Section 3 of the Uniform Durable Power of Attorney Act, except that the requirement of prior court authorization for a California conservator to revoke or amend the power is new and the reference to the principal's "disability" has been deleted. This deletion conforms Section 2402 to the other provisions of this article.

Subdivision (b) of Section 2402 is drawn from subsection (b) of Section 3 of the Uniform Durable Power of Attorney Act, but has been revised to make it consistent

with the general provision for nomination of a conservator in Section 1810 of the Probate Code. The second sentence of subsection (b) of Section 3 of the Uniform Act (most recent nomination in a durable power shall be given effect) is not adopted in California. Thus, the principal may make a later nomination in a writing which

is not a durable power of attorney, and, if at that time the principal has sufficient capacity to form an intelligent preference (Prob.Code § 1810), the later nomination will supersede an earlier nomination made in a durable power. This is consistent with the purpose and effect of Section 1810 of the Probate Code.

§ 2403. Death or incapacity of principal; knowledge; good faith acts

(a) The death of a principal who has executed a written power of attorney, durable or otherwise, does not revoke or terminate the agency as to the attorney in fact or other person who, without actual knowledge of the death of the principal, acts in good faith under the power. Any action so taken, unless otherwise invalid or unenforceable, binds successors in interest of the principal.

(b) The incapacity of a principal who has previously executed a written power of attorney that is not a durable power does not revoke or terminate the agency as to the attorney in fact or other person who, without actual knowledge of the incapacity of the principal, acts in good faith under the power. Any action so taken, unless otherwise invalid or unenforceable, binds the principal and his or her successors in interest.

(Added by Stats.1981, c. 511, p. —, § 4.)

**Law Revision Commission Comment
1981 Addition**

Section 2403 is the same as the official text of Section 4 of the Uniform Durable Power of Attorney Act, except that the reference to the principal's "disability" is

omitted. Under Section 2356, it is the principal's incapacity to contract which would otherwise terminate the power of attorney.

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

As to acts undertaken in good faith reliance thereon, an affidavit executed by the attorney in fact under a power of attorney, durable or otherwise, stating that he or she did not have at the time of the exercise of the power actual knowledge of the termination of the power 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. 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.

(Added by Stats.1981, c. 511, p. —, § 4.)

**Law Revision Commission Comment
1981 Addition**

Section 2404 is the same as the official text of Section 5 of the Uniform Durable Power of Attorney Act, except that the reference to the principal's "disability" is

omitted. Under Section 2356, it is the principal's incapacity to contract which would otherwise terminate the power of attorney.

§ 2405. Construction and application of article

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

(Added by Stats.1981, c. 511, p. —, § 4.)

**Law Revision Commission Comment
1981 Addition**

Section 2405 is the same as the official text of Section 6 of the Uniform Durable Power of Attorney Act.

§ 2406. Citation

This article may be cited as the Uniform Durable Power of Attorney Act.

(Added by Stats.1981, c. 511, p. —, § 4.)

**Law Revision Commission Comment
1981 Addition**

Section 2406 is the same as the official text of Section 7 of the Uniform Durable Power of Attorney Act.

§ 2407. Partial invalidity

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

(Added by Stats.1981, c. 511, p. —, § 4.)

**Law Revision Commission Comment
1981 Addition**

Section 2407 is the same as the official text of Section 8 of the Uniform Durable Power of Attorney Act.

**ARTICLE 4. COURT ENFORCEMENT OF DUTIES
OF ATTORNEY IN FACT [NEW]**

- Sec.**
2410. Definitions.
2411. Petitioners.
2412. Petition; purposes.
2413. Powers of court.
2414. Venue.
2415. Petition; contents.
2416. Dismissal of petition.
2417. Hearing; service of notice; proof of service; laws applicable; attorney fees.
2418. Guardian ad litem.
2419. Appeal.
2420. Cumulative remedies; inapplicability to reciprocal or interinsurance exchanges.
2421. Elimination in power of attorney of authority to petition; exception.
2422. Application of article.
2423. Legislative intent.

§ 2410. Definitions

As used in this article:

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

(b) "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.

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

(Added by Stats.1981, c. 511, p. —, § 4.5.)

**Legislative Committee Comment—Senate
1981 Addition**

Section 2410 defines "power of attorney" so as to limit the use of a proceeding under this article to cases where the attorney in fact either was a resident of this state when the power of attorney was created or is a resident of this state at the time the petition under this article is filed. In other cases, although a proceeding under this article is not authorized, relief may be sought in the appropriate state having jurisdiction over the attorney in

fact. This limitation on the use of a proceeding under this article is consistent with the limitation established by Probate Code Section 1138(a) (proceeding with respect to a trust). The definition of "power of attorney" also limits the use of a proceeding under this article to cases where the principal is a natural person. This article does not limit the use of any other available remedy. See Section 2420. See also Section 2423.

§ 2411. Petitioners

A petition may be filed under this article by any of the following:

- (a) The attorney in fact.
- (b) The principal.

- (c) The spouse or any child of the principal.
 - (d) The conservator of the person or estate of the principal.
 - (e) Any person who would take property of the principal under the laws of intestate succession if the principal died at the time the petition is filed, whether or not the principal has a will.
 - (f) The court investigator, referred to in Section 1454 of the Probate Code, of the county where the power of attorney was executed or where the principal resides.
 - (g) The public guardian of the county where the power of attorney was executed or where the principal resides.
- (Added by Stats.1981, c. 511, p. —, § 4.5.)

**Legislative Committee Comment—Senate
1981 Addition**

Section 2411 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.

§ 2412. Petition; purposes

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.
- (Added by Stats.1981, c. 511, p. —, § 4.5.)

**Legislative Committee Comment—Senate
1981 Addition**

Section 2412 is adapted from portions of Probate Code Section 1138.1 (proceeding with respect to a trust). It should be noted that subdivision (d) requires a court determination that the principal has become incompetent 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.

§ 2413. Powers of court

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

(Added by Stats.1981, c. 511, p. —, § 4.5.)

**Legislative Committee Comment—Senate
1981 Addition**

Section 2413 is the same as Probate Code Section 1138.2 (proceeding with respect to a trust).

§ 2414. Venue

Proceedings under this article shall be commenced in the superior court of the county in which the attorney in fact is resident or, if the attorney in fact is not resident in this state, in any county of this state.
(Added by Stats.1981, c. 511, p. —, § 4.5.)

**Legislative Committee Comment—Senate
1981 Addition**

Section 2414 recognizes that the attorney in fact may not be a resident of this state at the time the petition is filed. See Section 2410(b) (proceeding permitted where attorney in fact is not now a resident of state if he or she was a resident at time power of attorney was created).

§ 2415. Petition; contents

Each proceeding under this article shall be commenced by filing a verified petition in the superior court which shall state facts showing that the petition is authorized by this article and, if known to the petitioner, the terms of the power of attorney.
(Added by Stats.1981, c. 511, p. —, § 4.5.)

**Legislative Committee Comment—Senate
1981 Addition**

Section 2415 is adapted from Probate Code Section 1138.4 (proceeding with respect to a trust).

§ 2416. Dismissal of petition

The court may dismiss a petition when it appears that the proceeding is not necessary for the protection of the interests of the principal or the principal's estate.
(Added by Stats.1981, c. 511, p. —, § 4.5.)

**Legislative Committee Comment—Senate
1981 Addition**

Section 2416 is drawn from Probate Code Section 1138.5 (proceeding with respect to a trust).

§ 2417. Hearing; service of notice; proof of service; laws applicable; attorney fees

(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 within 60 days after written request from the principal or conservator.
(Added by Stats.1981, c. 511, p. —, § 4.5.)

**Legislative Committee Comment—Senate
1981 Addition**

Section 2417 is drawn from Probate Code Section 1138.6 (proceeding with respect to a trust). Subdivision (g) of Section 2417 is a new provision not found in Probate Code Section 1138.6. This new provision is designed to limit the use of this article to cases where its use is justified.

§ 2418. Guardian ad litem

At any stage of a proceeding under this article, 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 article.

(Added by Stats.1981, c. 511, p. —, § 4.5.)

**Legislative Committee Comment—Senate
1981 Addition**

Section 2418 is drawn from Probate Code Section 1138.7 (proceeding with respect to a trust).

§ 2419. Appeal

An appeal may be taken from any final order or decree made pursuant to subdivision (a), (b), or (d) of Section 2412 or from an order dismissing the petition or denying a motion to dismiss under Section 2416.

(Added by Stats.1981, c. 511, p. —, § 4.5.)

**Legislative Committee Comment—Senate
1981 Addition**

Section 2419 is drawn from Probate Code Section 1138.10 (proceeding with respect to a trust).

§ 2420. Cumulative remedies; Inapplicability to reciprocal or interinsurance exchanges

(a) The remedies provided under this article are cumulative and nonexclusive.

(b) This article is not applicable to reciprocal or interinsurance exchanges and their contracts, subscribers, attorneys in fact, agents, and representatives.

(Added by Stats.1981, c. 511, p. —, § 4.5.)

**Legislative Committee Comment—Senate
1981 Addition**

Subdivision (a) of Section 2420 is the same as Probate Code Section 1138.11 (proceeding with respect to a trust). Subdivision (b) is new.

§ 2421. Elimination in power of attorney of authority to petition; exception

(a) Except as provided in subdivision (b), 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 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, 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.

(Added by Stats.1981, c. 511, p. —, § 4.5.)

**Legislative Committee Comment—Senate
1981 Addition**

Section 2421 is drawn from the second sentence of Probate Code Section 1138.13, but the power of attorney may limit the applicability of this article only if it is executed with the advice and approval of the principal's counsel. This limitation is designed to assure that the principal know-

ingly executes a power of attorney that makes this article inapplicable in whole or in part. 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.

§ 2422. Application of article

Subject to Sections 2420 and 2421, this article applies notwithstanding any provision of the power of attorney to the contrary.

(Added by Stats.1981, c. 511, p. —, § 4.5.)

**Legislative Committee Comment—Senate
1981 Addition**

Section 2422 is new.

§ 2423. Legislative intent

It is the intent of the Legislature in enacting this article that a power of attorney be exercisable free of judicial intervention subject to the jurisdiction of the courts of this state as invoked pursuant to this article or otherwise invoked pursuant to law.

(Added by Stats.1981, c. 511, p. —, § 4.5.)

**Legislative Committee Comment—Senate
1981 Addition**

Section 2423 is comparable to Probate Code Section 1138.12 (proceeding with respect to a trust).