

Memorandum 92-50

Subject: Study L-3044 - Comprehensive Power of Attorney Statute (State Bar Team Commentary)

This memorandum discusses several general issues relevant to the attached draft of a comprehensive power of attorney statute. The Commission has considered this subject three times since the last draft was prepared in the summer of 1991. We have now received extensive and detailed comments from Team 4 of the Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section. (See Exhibits 1 and 2.) The attached draft has not yet been revised to implement all Commission decisions or to consider all of the comments from Team 4 due to other demands on staff time. We will continue our efforts to produce a comprehensive draft in a timely fashion so that this project can continue to move forward. The attached draft is not internally consistent since it is still being developed and many decisions have yet to be made. In the time available at the September meeting, the Commission should review the policy issues discussed in this memorandum and the Staff Notes in the first part of the draft statute.

The staff has several general remarks. Specific drafting and policy issues are discussed in Staff Notes following relevant sections in the attached draft.

Scope of Statute

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

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

(1) The Uniform Durable Power of Attorney Law applies to both durable and nondurable powers. Civil Code Section 2403(a) protects the attorney in fact and other persons who act in good faith without

knowledge of the death of the principal and binds the principal's successors in interest. Subdivision (b) provides protection where the principal has become incapacitated -- a rule that applies only to nondurable powers. Section 2404 provides an affidavit procedure to implement these rules. The Uniform Law Commissioners' Prefatory Note to the Uniform Durable Power of Attorney Act (1979) discusses the scope of the act and the reasons for rejecting a suggestion to omit "Durable" from the title of the Act:

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

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

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

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

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

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

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

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

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

The Team's proposal is intended to separate durable powers, used as estate planning tools, from powers of attorney used in "standard business and commercial transactions." The staff is not clear on what problems the Team sees in a comprehensive power of attorney statute. The attached reports do not explain the perceived problem in detail.

In sum, the staff recommends that the Commission continue its goal of preparing a comprehensive power of attorney statute governing both durable and nondurable powers executed by individuals. If there is a problem in overbreadth of the statute, we should look to limit it to

deal with the problem, not by creating a new set of problems. One answer might be to provide more detail in the definition or scope provisions of the statute.

Health Care Powers

As decided at the May meeting, the scope of the statute has been expanded to cover durable powers of attorney for health care. As development of the draft proceeds, this effort will be refined. At this stage, we intend to point out in Staff Notes any rules that vary between the different types of powers.

Terminology

As decided at the May meeting, "attorney-in-fact" will be used instead of "agent," except in existing statutory forms. (See Minutes, May 1992, at 8.) This change has been made throughout the statute and will not be discussed in Staff Notes.

The State Bar Team commentary contains some interesting discussion of the significance of using "attorney-in-fact." See Exhibit 2, at pp. 1-2. The staff believes that the choice of terms — attorney-in-fact instead of agent — is simply a taste change. We do not accept all of the points urged by the Team. We do not read the significant policies into the mere choice of alternate terms. We disagree that an agent under a power of attorney is any different because we call that person an attorney-in-fact. The only way to determine the powers and duties of an agent or attorney-in-fact is to examine the law and the governing instrument. The Team seems to be urging the creation of a distinct fiduciary position somewhere between trustees and agents under general law.

Control of Statute by Instrument

The State Bar Team suggests addition of a section providing that a provision of a durable power of attorney that "alters, deletes, modified, etc. the Statute will prevail over any contradictory or overlapping statutory provision." (See discussion of proposed Section 2400.050, Exhibit 2, at p. 39.) This raises an important issue, but the staff would not recommend including such a broad provision that

could override any aspect of the governing statute, including procedural rights. If we are to flesh out powers of attorney and give them special status, protect reliance by third persons, establish procedures for judicial review, and the like, we should not sweep it all aside. The staff believes a better approach is to make clear where provisions concerning the content of the power of attorney may be controlled by the instrument, such as the grant of powers or limitation of powers, the imposition of special duties, modification and termination procedures, and procedures for succession. But the issue is important and needs to be kept in mind when considering parts of the statute.

Respectfully submitted,

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COMMENTS OF TEAM 4 OF THE EXECUTIVE COMMITTEE
OF THE ESTATE PLANNING, PROBATE AND TRUST LAW
SECTION OF THE STATE BAR OF CALIFORNIA
COMPREHENSIVE DURABLE POWERS OF ATTORNEY

INTRODUCTION

Team 4 ("Team 4"), a study team of the Executive Committee of the Estate Planning, Probate and Trust Law Section of the State Bar of California ("Executive Committee"), has spent many hours reviewing the proposed Comprehensive Powers of Attorney Statute ("Statute") as set forth and discussed in Memorandum 91-40 dated May 24, 1991 ("Memo 91-40").

These comments reflect Team 4's discussion of § 2400.010 through § 2418.020 of Memo 91-40. For purposes of these Comments, references to Memo 91-40 shall mean only § 2400.010 through § 2418.020 unless otherwise stated. The Executive Committee has discussed and commented upon basic policy questions and several of the more specific issues raised by Memo 91-40.

Part I of Team 4's comments consist of a red-lined version of Memo 91-40. The red-lining denotes additions and deletions in both the Statute and the comments to the Statute. Team 4's proposed additions to the Statute are underlined; deletions are indicated by means of a carat. Team 4 has attempted to propose specific statutory language wherever possible; however, such proposed changes are not necessarily in standard legislative form, and the difficulties which sometimes arise in converting from one computer program to another are apparent. Sections have not been renumbered (to account for deleted and added sections), nor have the comments (except where noted) been modified.

Part II contains Team 4's comments, analysis and suggestions about Memo 91-40. Part II explains the reasons for the proposed language changes set forth in Part I and discusses several new sections and concepts proposed by Team 4. In addition, when a particular statute upon which Team 4 has commented applies to both a durable power of attorney for health care and a durable power of attorney for property, the dual application is noted.

On the other hand, Team 4 did not comment on each section set forth in Memo 91-40. Although many of the sections about which Team 4 has no comment would apply equally to both types of durable powers of attorney, such common provisions were not always noted in Team 4's comments. However, the absence of a comment regarding the

dual applicability of a section should not be misconstrued. Team 4 strongly feels that if a provision applies equally to both types of durable powers, that such provision should appear only once and that one time should be in a part which applies equally to both types of durable powers.

Team 4 hopes that its comments, suggestions and analysis will be of assistance to both the Law Revision Commission and the Staff, and we look forward to discussions and constructive collaboration with both.

PART I

PROPOSED LEGISLATION

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

Civil Code 2400.010-2514.130 (added).

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

TITLE 10. DURABLE POWERS OF ATTORNEY

SUBTITLE 1. GENERAL PROVISIONS AND DEFINITIONS

Chapter 1. General Provisions

2400.010. Short title [4000]

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

Comment. Section 2400.010 is new and provides a convenient means of referring to this title. The Durable Power of Attorney Law is largely self-contained. See also Section 14 (general definitions). The general agency rules in the Civil Code apply to this title. See Section 2400.020. ^

2400.020. Relation to general agency law [4001]

2400.020. The provisions concerning agency in Article 2 (commencing with Section 2019) of Chapter 2 of Title 6 and in Title 9 shall apply to durable powers of attorney governed by this title.

Comment. Section 2400.020 makes clear that the general statutes applicable to agency (Sections 2019-2022 and 2295-2356) are applicable to durable powers of attorney. See Sections 2023, 2360. ^

2400.030. General rule concerning application of title [4002]

2400.030. Except as otherwise provided by statute:

(a) On and after January 1, 199 , this title applies to all durable powers of attorney regardless of whether they were executed before, on, or after January 1, 199 .

(b) This title applies to all proceedings concerning durable powers of attorney commenced on or after January 1, 199_.

(c) This title applies to all proceedings concerning durable powers of attorney commenced before January 1, 199 , unless the court finds that the application of a particular provision of this title would substantially interfere with the conduct of the proceedings or the rights of the parties and other interested persons, in which case the particular provision of this title does not apply and prior law applies.

Comment. Section 2400.030 is comparable to Probate Code Section 15001 (application of Trust Law).

Subdivision (a) provides the general rule that this title applies to all durable powers of attorney, regardless of when created.

Subdivision (b) is a specific application of the general rule in subdivision (a). See Section 2510.010 et seq. (court enforcement of duties of agents under durable powers of attorney).

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

For special transitional provisions, see Sections 2405.030 (form of durable power of attorney), 2444 (form of durable power of attorney for health care); see also Section 2410.070(c) (springing powers).

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

2400.030. Application of California Law [4003]

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

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

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

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

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

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

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

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

(b) A general power of attorney subject to this title under subdivision (b) remains subject to this title despite a subsequent change in domicile of the principal or the attorney-in-fact or the removal from this state of property that was the subject of the durable power of attorney.

Comment. Section 2400.030 is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. 404.730(1) (Vernon 1990). This section is comparable to Probate Code Section 3902(a) (scope and jurisdiction under Uniform Transfers to Minors Act). See Prob. Code 3902 Comment. See also Section 2402.030 ("agent" defined), 2402.210 ("power of attorney" defined), 2402.250 ("principal" defined).

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

First version:

2400.040. (a) An instrument which is a durable power of attorney and which is valid under the laws of the state where it is executed may be carried out and enforced in this state as a durable power of attorney to the extent it is not contrary to the laws of this state.

Second version:

2400.040. (a) An instrument which purports to be a durable power of attorney and which is not valid under the laws of the state where executed, but which would be valid if executed in this state may be carried out and enforced in this state as a durable power of attorney.

Comment. Section 2400.040 is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. 404.730(5) (Vernon 1990). This section is comparable to Section 3902(c) (scope and jurisdiction under Uniform Transfers to Minors Act). This section promotes the use and enforceability of durable powers of attorney by making substantially all durable powers regardless of whether executed in another state

Part One

enforceable in this state. See also Section 2402.070 ("durable power of attorney" defined).

2400.050. Applicability of All Durable Powers

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

Chapter 2. Definitions

2402.010. Application of definitions [4050]

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

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

2402.030. Attorney-in-Fact [4052]

2402.030. (a) "Attorney-in-fact" means a person designated to act for the principal in a durable power of attorney, whether such person is designated as an agent, attorney-in-fact, or by some other term.

(b) "Attorney-in-fact" includes a successor or alternate attorney-in-fact.

Comment. Subdivision (a) of Section 2402.030 supersedes part of former Section 2400 and former Section 2410(a), and is comparable to the first sentence of Section 2295. [See Team 4's comments.] ^

2402.070. Durable power of attorney [4056]

2402.070. (a) "Durable power of attorney" means a power of attorney that (1) is not affected by the principal's subsequent incapacity after the effective date of the durable power of attorney or which becomes effective upon the principal's incapacity; and (2) which complies with the provisions of this title. ^

(b) Depending on the context, "durable power of attorney" may refer to either a durable power of attorney for property or a durable power of attorney for health care, or to both.

Comment. Section 2402.070 is new. Subdivision (a) states the essential element of all durable powers of attorney, whether for property or for health care, and whether executed under California law or the law of a sister state or other jurisdiction. See Sections 2400.030 (durable powers of attorney executed under laws of other jurisdiction), 2410.030 (requirements for durable power of attorney for property), 2432 (requirements for durable power of attorney for health care). See also Sections 2402.090 ("durable power of attorney for health care" defined), 2402.110 ("durable power of attorney for property" defined), 2402.210 ("durable power of attorney" defined), 2402.250 ("principal" defined).

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

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

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

Comment. Section 2402.090 incorporates the definition provided by Section 2430(a) and continues the substance of former Section 2410(b). For provisions concerning durable powers of attorney for health care, see Sections 2430-2445, 2500-2508, 2514.010, 2514.030. A single instrument may be both a durable power of attorney for health care, to the extent it authorizes an agent to make health care decisions, and a durable power of attorney for property, to the extent it authorizes the agent to make decisions concerning property and other matters. See Sections 2402.110 ("durable power of attorney for property" defined). However, a dual-purpose durable power of attorney must comply with the requirements applicable to both types of durable power of attorney. See also Section 2433(a) (printed form of durable power of attorney for health care used by person without legal counsel may not cover other matters). See also Sections 2402.070 ("durable power of attorney" defined), 2402.150 ("health care decision" defined), 2402.250 ("principal" defined).

2402.110. Durable power of attorney for property [4060]

2402.110. "Durable power of attorney for property" is a power of attorney which gives the attorney-in-fact the power and authority to hold, manage or dispose of the principal's property, real, personal or

mixed, or some portion thereof, including but not limited to the powers set forth in section 2485 of the Civil Code.

Comment. Section 2402.110 is new. This section provides a convenient way to identify durable powers of attorney other than durable powers of attorney for health care and recognizes a term used in practice. See, e.g., 1991 California Durable Power of Attorney Handbook 1.1, at 2 (Cal. Cont. Ed. Bar). For provisions concerning durable powers of attorney for property, see Sections 2405.010- 2425.110, 2450-2499.5, 2514.010-2514.130. See also Sections 2402.070 ("durable power of attorney" defined), 2402.090 ("durable power of attorney for health care" defined).

Staff Note. The word "property" may be too limited. There are some types of decisions and authority a principal may want to delegate to an agent that are not health care (as defined) but that do not relate to property except in the loosest sense, such as deciding where the principal will live, providing meals, hiring household employees, providing transportation, picking up mail, and other personal care matters. For now, the draft statute uses "durable power of attorney for property" to mean all authority in a durable power of attorney that is not covered by the special rules concerning health care. We could use the term "durable power of attorney for property and other matters" or some variation on this theme, but then the language becomes so cumbersome that it is annoying to use. Any suggestions for dealing with this dilemma would be appreciated.

2402.120 Durable Power of Attorney for Personal Care

2402.120 "Durable power of attorney for personal care" means a durable power which deals with such aspects of a principal's care and well-being such as: 1) fixing the place of the principal's residence; 2) regulating who will have access to the principal; 3) the principal's recreation and leisure time activities.

2402.130. Health care [4062]

2402.130. "Health care" means 1) any care, treatment, service or procedure to maintain, diagnose, treat or provide for an individual's physical or mental health; 2) 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; 3) authorizing an autopsy under Section 7113 of the Health and Safety Code; and 4) directing the disposition of remains under Section 7100 of the Health and Safety Code].

Comment. The first part of Section 2402.130 incorporates the definition provided by Section 2430(b). See Comment to Section 2430(b).

[The reference to post death decisions has been added for consistency with the authority provided in Section 2434 (agent's authority to make health care decisions).]

Staff Note. There are varying opinions on what is encompassed by the definition of health care and the corresponding scope of the durable power of attorney for health care. The authors of a chapter on the durable power of attorney for health care in the 1991 California Durable Power of Attorney Handbook write as follows:

In the opinion of some attorneys, the definition of health care in CC 2430 is broad enough to encompass all personal care questions, such as location of residence, companionship, recreational, hobby, and leisure time activities, handling mail, and medical and dental treatment. The DPAHC documents drafted by the authors include provisions addressing these concerns, although this broad reading of CC 2430 is a minority view. The prevailing practice is to address these issues in a general durable power of attorney, not a DPAHC. The authors recognize that it is necessary to address these issues in both the DPAHC and the durable power of attorney (DPAP), with the agent under the DPAP contracting for services and the agent under the DPAHC addressing the details of personal care questions (e.g., choice of one skilled nursing facility over another or the decision to accept or refuse treatment). The drafting of the documents should be coordinated so the responsibilities of the agents are clearly delineated and not in conflict with each other.

Ronca & Woolpert, The Durable Power of Attorney for Health Care, 1991 California Durable Power of Attorney Handbook 3.1, at 137 (Cal. Cont.Ed. Bar).

The staff has not attempted to resolve this issue. It is a difficult question of where to draw the line. If additional personal care matters are included in the DPAHC and the exclusivity principle is retained, the DPAP would be unduly restricted. We could explicitly authorize the DPAHC to cover something in the nature of nonproperty personal care decisions, and retain the DPAHC monopoly only over the class of "health care decisions" as defined. Otherwise, we can leave the issue to the ingenuity of counsel, since it appears that a due regard for the issues involved and proper drafting will provide an adequate dual durable power of attorney, as suggested by the CEB authors.

2402.150. Health care decision [4064]

2402.150. "Health care decision" means a consent, or the withdrawal of consent, or a decision to begin, continue, increase, limit, discontinue or not to begin any health care.

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

2402.190. Nondurable power of attorney [4068]

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

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

2402.210. Durable power of attorney [4070]

2402.210. (a) "Durable power of attorney" means a written instrument, however denominated, that is executed by a natural person having the capacity to contract and granting powers to an attorney-in-fact.

(b) A durable power of attorney may grant powers with regard to property, health care or personal care, and may be executed on a statutory or other form that satisfies the requirements of this title.

Comment. Subdivision (a) of Section 2402.210 restates the first sentence of former Section 2410(c) without substantive change. "Agent" has been substituted for "attorney in fact." See Section 2402.030 ("agent" defined). Where a durable power of attorney authorizes the agent to take action both with respect to property matters and health care decisions, the provisions in this title relating to durable powers of attorney for property apply to the extent that the durable power of attorney concerns property and related matters and the provisions in this title that apply to durable powers of attorney for health care apply to the extent that the durable power of attorney relates to health care decisions. For relevant statutory forms, see Sections 2475 et seq. (Uniform Statutory Form Power of Attorney), 2500 et seq. (Statutory Form Durable Power of Attorney for Health Care).

Subdivision (b) continues former Section 2400.5 without substantive change and supersedes the second sentence of former Section 2410(c). For the rules applicable to proxy voting in business corporations, see Corp.

Code § 705. For other statutes dealing with proxies, see Corp.Code § 178, 702, 5069, 5613 7613, 9417, 12405, 13242; Fin. Code §§ 5701, 5702, 5710, 6005. See also Section 2356(d) (proxy under general agency rules). See also Sections 2402.030 ("agent" defined), 2402.070 ("durable power of attorney" defined), 2402.090 ("durable power of attorney for health care" defined), 2402.190 ("nondurable power of attorney" defined).

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2402.250. Principal [4074]

2402.250. "Principal" means a natural person who executes a power of attorney granting persons to an attorney-in-fact.

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

2402.290. Springing durable power of attorney [4078]

2402.290. "Springing durable power of attorney" means a durable power of attorney granting powers to an attorney in fact stating that the power becomes effective at a specified future time or date, or upon the occurrence of a specified event or contingency including, but not limited to, the subsequent incapacity of the principal. ^

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

Staff Note. For the sake of consistency, the definition of "springing durable power of attorney" is included here with the other definitions, even though it is only used in one other section.

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

2402.310. "Statutory form durable power of attorney for health care" means a durable power of attorney for health care that satisfies the requirements of Chapter 3 (commencing with Section 2500) of Subtitle 4.

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

§ 2402.330. Statutory form durable power of attorney [4082]

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

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

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

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

§ 2402.350. Third person or party [4084]

2402.350. "Third person" or "third party" means any person, other than the principal or the attorney-in-fact. Third person or third party includes, without limitation, any such person who acts upon a request from, contacts with, relies on, or otherwise deals with an attorney-in-fact.

Comment. Section 2402.350 is a new provision drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.703(10) (Vernon 1990). The reference to a "third party" is included for consistency with language used elsewhere, such as the statutory form durable power of attorney. See Sections 2475 & 2476.

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

SUBTITLE 2. DURABLE POWERS OF ATTORNEY FOR PROPERTY

Chapter 1. General Provisions

§ 2405.010. Application of subtitle [4100]

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

Comment. Section 2405.010 provides the scope of this subtitle. If a section in this subtitle refers to a "durable power of attorney," it applies to both durable and nondurable powers of attorney for property. If application is limited, the section will refer to either a durable power of attorney or a nondurable power of attorney. See, e.g., Sections 2410.030 (requirements for durable power of attorney for property), 2410.140 (termination of nondurable power of attorney for property). This subtitle applies to statutory form durable powers of attorney since they are a variety of durable powers of attorney for property. However, this subtitle does not apply to statutory form durable powers of attorney to the extent Chapter 2 (commencing with Section 2475) of Subtitle 4 provides a special rule. See Section 2480 (general provisions applicable to statutory form) and the comment.

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

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

2405.020. Uniform Durable Power of Attorney Act [4101]

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

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

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

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

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

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

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

2405.030. Notwithstanding Section 2410.050:

(a) Except as provided in subdivision (b), on and after January 1, 1993, a printed form of a durable power of attorney may be sold or otherwise distributed if it satisfies the requirements of former Section 2510.5.

(b) A printed form of a durable power of attorney printed on or after January 1, 1986, that is sold or otherwise distributed in this state for use by a person who does not have the advice of legal counsel shall comply with former Section 2510 or with Section 2410.050.

(c) A durable power of attorney for property executed on or after January 1, 1994 on 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 on a printed form that complies with Section 2410.050.

Comment. Section 2405.030 supersedes former Section 2510.5. This section permits continued use of printed forms that comply with former law, specifically former Section 2400 (as enacted by 1981 Cal. Stat. ch.511, 4) and former Section 2510 (as enacted by 1985 Cal. Stat. ch.403, 12). Subdivision (c) permits use of the earlier forms after January 1, 1993, the operative date of Section 2410.050. This section, like its predecessor, former Section 2510.5, avoids the need to discard existing printed forms on the operative date of this title. However, pursuant to subdivision (b), a form printed for commercial sale and distribution to the public on or after January 1, 1993, may be sold or distributed in this state only if the form satisfies the requirements of former Section 2510 or Section 2410.050. Either of such provisions may be used, because the changes are in syntax and are nonsubstantive. See Comment to Section 2410.050.

Chapter 2.

Creation, Effect, and Termination of Durable Powers of Attorney for Property

2410.010. Creation of durable power of attorney [4120]

2410.010. A natural person having the capacity to contract may create a durable power of attorney for property by executing a written instrument designating an attorney-in-fact and granting powers to the attorney-in-fact to act on the principal's behalf.

Comment. Section 2410.010 provides the elements essential to creation of a durable power of attorney. The reference to the capacity to contract continues the requirement of general agency law in Section 2296. As a general rule, a durable power of attorney is not required to be acknowledged, but if the agent under the power is expected to handle real property matters, acknowledgment is essential. See also Section 2475 (acknowledgment of Uniform Statutory Form Durable power of attorney).

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

2410.020. Permissible purposes [4121]

2410.020. In a durable power of attorney for property, a principal may grant to an attorney-in-fact powers to act on the principal's behalf with respect to all lawful subjects and purposes, or with respect to one or more express subjects or purposes.

Comment. Section 2410.020 is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. 404.710(1) (Vernon 1990). This section is consistent with the general agency rules in Sections 2304 and 2305.

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

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

2410.030. A durable power of attorney for property is a power of attorney by which a principal designates another person as his or her agent in writing and the durable power of attorney contains any of the following statements:

(a) "This durable power of attorney shall not be affected by subsequent incapacity of the principal."

(b) "This durable power of attorney shall become effective upon the incapacity of the principal."

(c) Similar words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding the principal's subsequent incapacity or upon the occurrence of the principal's incapacity.

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

Section 2410.030 is similar to the official text of Section 1 of the Uniform Durable Power of Attorney Act (1984), Uniform Probate Code Section 5-501 (1990). See Section 2405.020 (construction of provisions drawn from uniform acts). The reference in the Uniform Act to the principal's "disability" is omitted. Under Section 2410.140, it is the principal's incapacity to contract which would otherwise terminate the durable power of attorney. In addition, the phrase "or lapse of time" has not been included in the language set forth in subdivision (a) of Section 2410.030 because it is unnecessary. As a matter of law, unless a durable power of attorney states an earlier termination date, it remains valid regardless of any lapse of time since its creation. See Section 2410.130(a)(1) (termination of durable power of attorney at end of stated term).

The last clause in subdivision (c) concerning the occurrence of the principal's incapacity has been added for consistency with the language in subdivision (b) which relates to springing durable powers of attorney.

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

Staff Note. Since this is the basic provision of the Uniform Durable Power of Attorney Act, the staff has not altered the wording to the extent we normally would. For example, "shall be exercisable" in subdivision (c) would usually be changed to "may be exercised" or "is exercisable." However, one of the drafting compromises made in preparation of this statute is to preserve language of uniform acts where practicable, even though in this case the act has been reorganized. See Section 2405.020 for a list of sections that comprise the Uniform Durable Power of Attorney Act. We imagine that there is some benefit in retaining the flavor of the uniform act, if not its exact wording and structure, in the context of multistate transactions.

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

2410.040. All acts done by an attorney-in-fact pursuant to a durable power of attorney for property 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. A

Comment. Section 2410.040 continues former Section 2401 without substantive change, except for the addition of the last clause which is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann.Stat. 404.705(2) (Vernon 1990). "Agent" has been substituted for "attorney in fact." See Section 2402.030 ("agent" defined). The reference to a "durable power of attorney for property" has been substituted for the former reference to a "durable power of attorney."

Section 2410.040 is similar to the second sentence of the official text of Section 2 of the Uniform Durable Power of Attorney Act (1987), Uniform Probate Code Section 5-502 (1990). See Section 2405.020 (construction of provisions drawn from uniform acts). This section omits the reference to the principal's "disability" found in the Uniform Act. Under Section 2410.140, it is the principal's incapacity to contract which would otherwise terminate the durable power of attorney. See also Sections 2402.030 ("agent" defined), 2402.110 ("durable power of attorney for property" defined), 2402.250 ("principal" defined).

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

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

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

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

(b) A printed form of a durable power of attorney for property that is sold or otherwise distributed in this state for use by a person who does not have the advice of legal counsel shall contain, in not less than 10-point boldface type or a reasonable equivalent thereof, the following warning statement:

Notice to Person Executing Durable Power of Attorney

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

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

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

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

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

You should read this durable power of attorney for property very carefully. Each provision is important to you because it enables your agent to deal with all property that you now have or might acquire in the future. 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.

Comment. Section 2410.050 restates former Section 2510 without substantive change. "Agent" has been substituted for "attorney in fact." See Section 2402.030 ("agent" defined). The exclusion of durable powers of attorney for health care in the former provision is

omitted as unnecessary. See Section 2402.110 ("durable power of attorney for property" defined), 2402.230 ("power of attorney for property" defined). Other provisions prescribe the contents of the warning statements for particular types of durable powers of attorney. See Sections 2475 (Uniform Statutory Form Durable Power of Attorney), 2433 (durable power of attorney for health care), 2500 (statutory form durable power of attorney for health care). See also Section 2433(a) (introductory clause) (printed form of a durable power of attorney for health care to provide only authority to make health care decisions).

Section 2405.030 permits a printed form to be used after January 1, 1993, if the form complies with prior law. A form printed after January 1, 1986, may be sold or otherwise distributed in this state only if it complies with the requirements of Section 2410.050 (or its predecessor, former Section 2510). See Section 2405.030(b).

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

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

2410.060. (a) A principal may nominate, by a durable power of attorney, a conservator of the person or estate or both, or a guardian of the person or estate or both, for consideration by the court if protective proceedings for the principal's person or estate are thereafter commenced.

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

Comment. Section 2410.060 continues former Section 2402(b) without substantive change. This section is drawn from Section 3(b) of the Uniform Durable Power of Attorney Act (1979), Uniform Probate Code Section 5-503 (1990), but has been revised to make it consistent with the general provision for nomination of a conservator in Probate Code Section 1810. See Section 2405.020 (construction of provisions drawn from uniform acts). The second sentence of Section 3(b) of the Uniform Durable Power of Attorney Act (most recent nomination in a durable power shall be given effect) is not adopted in California. Thus, the principal may make a later nomination in a writing which is not a durable power of attorney and, if at that time the principal has sufficient capacity to form an intelligent preference (Prob. Code 2810), the later nomination will supersede an earlier nomination made in a durable power. This is consistent with the purpose and effect of Probate Code Section 1810.

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

Staff Note. Existing law is not clear to what extent this provision applies to durable powers of attorney for health care. Subdivision (a) of Civil Code Section 2402 excludes health care powers, but subdivision (b), from which draft Section 2410.060 comes, is silent. From this one could draw an implication that the nomination provision of subdivision (b) applies to both types of durable powers.

In the case of a conservator, it makes no difference, because this section validates any nomination of a guardian or conservator that complies with Probate Code Section 1810, whether in a durable power or some other writing. The statutory form durable power of attorney for health care provides specifically in paragraph 10 for nomination of a conservator of the person.

May a guardian be nominated in a durable power of attorney for health care? Perhaps this is a trick question. A document drafted as a durable power of attorney for health care may name a guardian and that part of the instrument could be considered a durable power of attorney for property since it would satisfy all applicable requirements. (This would not be true for a printed form, however, which may only cover health care decisions.)

Note that Section 2410.060 does not specifically authorize nomination in a nondurable power of attorney, although as a writing covered by subdivision (b), the nomination of a conservator of the estate would be effective under Section 1810.

We can conclude that draft Section 2410.060 is not an example of ideal drafting. The reason it remains in this form, however, is that it is existing law and is part of the Uniform Durable Power of Attorney Act.

2410.070. Springing power of attorney [4126]

2410.070. (a) In a springing power of attorney, the principal may designate one or more persons who, by a written declaration under penalty of perjury, have the power to determine conclusively that the specified event or contingency has occurred. The principal may designate the attorney-in-fact or another person to perform this function, either alone or jointly with other persons.

(b) A springing power of attorney containing the designation described in subdivision (a) becomes effective when the person or persons designated in the power of attorney execute a written declaration under penalty of perjury that the specified event or contingency has occurred, and any person may act in reliance on the

written declaration without liability to the principal or to any other person, regardless of whether the specified event or contingency has actually occurred.

(c) This section applies to a power of attorney whether executed before, on, or after January 1, 1991, if the power of attorney contains the designation described in subdivision (a).

Comment. Section 2410.070 continues former Section 2514(b)-(d) without substantive change. "Agent" has been substituted for "attorney-in-fact." See Section 2402.030 ("agent" defined).

This section is intended to make springing durable powers of attorney more effective by providing a mechanism for conclusively determining that the triggering event or contingency has occurred. See Section 2402.290 ("springing power of attorney" defined). Subdivision (a) makes clear that the principal may give the agent (or one or more other persons) the power to determine by written declaration under penalty of perjury that the event or contingency specified in the springing power of attorney has occurred so that the power of attorney is effective. This section does not apply to or affect springing durable powers of attorney containing different procedures for determining whether the triggering event or contingency has occurred. This section applies only where the terms of subdivision (a) are satisfied.

Subdivision (b) makes clear that the written declaration of the persons designated in the power of attorney is conclusive, even though it may turn out that the event or contingency did not occur, or that circumstances have returned to normal. The purpose of the conclusive written declaration is to permit other persons to act in reliance on the written declaration without liability.

A springing power of attorney may or may not be a durable power of attorney. A springing power that takes effect on the occurrence of a contingency other than the incapacity of the principal (such as, for example, the principal's failure to return from a vacation or business trip by a certain date) need not be a durable power of attorney. However, a springing power of attorney that takes effect upon the subsequent incapacity of the principal is necessarily a durable power of attorney, and the other rules concerning durable powers of attorney are applicable. See, e.g., Section 2410.030 (durable power of attorney for property).

Subdivision (c) makes clear that this section applies to powers of attorney executed before the operative date of this section if they contain the designation provided in subdivision (a).

See also Sections 2402.190 ("nondurable power of attorney" defined), 2402.210 ("power of attorney" defined), 2402.250 ("principal" defined).

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

2410.080. Lapse of time [4127]

2410.080. Unless a power of attorney for property states a time of termination, the power of attorney is exercisable notwithstanding any lapse of time since the execution of the power of attorney.

Comment. Section 2410.080 is the same in substance as the second sentence of the official text of Section 2 of the Uniform Durable Power of Attorney Act (1987), Uniform Probate Code Section 5-502 (1990). See Section 2405.020 (construction of provisions drawn from uniform acts). See also Section 2402.230 ("power of attorney for property" defined).

2410.090. Application to principal's property [4128]

2410.090. A power of attorney may by its terms apply to all or a portion of the real and personal property of the principal, whether owned by the principal at the time of the execution of the power of attorney or thereafter acquired or whether located in this state or elsewhere, without the need for a description of each item or parcel of property.

Comment. Section 2410.090 continues former Section 2513 without substantive change. This section makes clear that a power of attorney may by its terms apply to all real property of the principal, including after-acquired property, without the need for a specific description of the real property to which the power applies. This section is consistent with Section 2499 (after-acquired property under statutory form power of attorney).

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

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

2410.110. The principal and the person designated as the agent may enter into a written agreement that sets forth their duties and liabilities as between themselves and their successors and that expands

or limits the application of this subtitle, except as provided in Section 2421.070.

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

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

2410.120. Manner of modification by principal [4130]

2410.120. Except as provided by Section 2415.130, as between the principal and agent, a power of attorney for property may be modified by the principal in any one of the following ways:

- (a) In accordance with the terms of the power of attorney.
- (b) When the principal informs the agent, in writing, that the power of attorney is modified or when and under what circumstances it is modified.
- (c) When the principal's legal representative, with approval of the court, informs the agent in writing that the power of attorney is modified or terminated or when and under what circumstances it is modified or terminated.
- (d) When a written notice of modification of the power of attorney is recorded in the office of the recorder of deeds in the city or county of the principal's domicile or, if the principal is a nondomiciliary of this state, in the jurisdiction of the agent's domicile last known to the principal, or in the jurisdiction where any property specifically referred to in the power of attorney is located.

Comment. Section 2410.120 is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. 404.717(1) (Vernon 1990). This section provides that a power of attorney terminates on the date provided in the instrument or on the oral or written advice to the agent that the agent's powers are terminated. An agent can be simply fired as with any other employee or agent or the agent can be told that his or her authority has been changed, and no writing is required. To deal with the situation where the agent cannot be found for the communication, subdivision (d) provides for filing a notice of modification or termination with the recorder. The language is drafted in general terms since it is intended to apply to California recorders as well as similar officials in other jurisdictions. The act of recording imposes constructive knowledge on the agent for all documents recorded by the principal that relate to the power and for knowing whether the principal

is alive. This corresponds with the duty of agents to keep in contact with their principal. See Section 2418.070. For other events that terminate a power of attorney, see Sections 2410.130, 2410.140. For events that terminate the authority of an agent, see Sections 2415.090 and 2415.100.

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

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

2410.130. (a) Except as provided in Section 2415.130 and subject to subdivision (b), a power of attorney for property, whether durable or nondurable, is terminated by any of the following events:

- (1) Expiration of the term of the power of attorney.
- (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.

Comment. Section 2410.130 is drawn from the general agency rules provided in Sections 2355 and 2356. See Section 2360 (Sections 2355 and 2356 inapplicable to durable powers of attorney). This section continues the substance of former law as to termination of durable powers of attorney. For a special rule as to termination of nondurable powers of attorney for property, see Section 2410.140.

The first clause of subdivision (a) recognizes the special rule applicable to a power of attorney coupled with an interest provided in Section 2415.130. Subdivision (a)(1) is the same as Section 2355(a), with the exception of the special case where a principal is missing or held captive in a foreign country as provided in Section 2415.080. Subdivision (a)(2) is the same as Section 2355(b), but the reference to fulfillment of the purpose of the power of attorney is new. Subdivision (a)(3) is the same as Section 2356(a)(1). Subdivision (a)(4) is the same as Section 2356(a)(2). Subdivision (a)(5) is generalized from Section 2355(c)-(f). See Section 2415.090 (termination of agent's authority).

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

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

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

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

2410.140. (a) Except as provided in Section 2415.130 and subject to subdivision (b), a nondurable power of attorney for property is terminated by the incapacity of the principal to contract.

Comment. Subdivision (a) of Section 2410.140 restates the general agency rule in Section 2356(a)(3) without substantive change. The first clause of subdivision (a) recognizes the special rule applicable to a power of attorney coupled with an interest provided in Section 2415.130. For other events that terminate a nondurable power of attorney for property, see Section 2410.130.

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

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

Staff Note. As noted, this section preserves the rule that a nondurable power of attorney terminates upon the incapacity of the principal. This sounds good as a general rule, but can be difficult to apply in cases where the capacity of the principal is in doubt or subject to variation. It also operates harshly, since, in theory anyway, a temporary incapacity of the principal would wipe out any nondurable power of attorney, even though the principal could execute the same power after restoration to capacity. Perhaps it is not worth dealing with, but the Commission may wish to consider an alternative approach, such as the following from the Missouri Durable Power of Attorney Law (Mo. Ann. Stat. 404.714(6) (Vernon 1990)):

6. The authority of an agent, under a power of attorney that is not durable, is suspended during any period that the principal is disabled or incapacitated to the extent that the principal is unable to receive or evaluate information or to communicate decisions with respect to the subject of the power of attorney; and an agent exercising authority under a power of attorney that is not durable shall not act in the principal's behalf during any period that the agent knows the principal is so disabled or incapacitated.

2410.150. Certified copy of power of attorney [4133]

2410.150. (a) A certified copy of a power of attorney for property has the same force and effect as a power of attorney bearing the signature of the principal.

(b) A copy of a power of attorney for property may be certified by an official of a state or of a political subdivision of a state who is authorized to make certifications. The certification shall state that the certifying official has examined an original power of attorney and the copy and that the copy is a true and correct copy of the original power of attorney.

Comment. Section 2410.150 is drawn from Minnesota law. See Minn.Stat. Ann. 523.06 (West Supp. 1990). This section facilitates use of a power of attorney executed in this state as well as durable powers of attorney executed in other states. See also Sections 2402.230 ("power of attorney for property" defined), 2402.250 ("principal" defined).

Chapter 3. Agents Under Durable Powers of Attorney for Property

Article 1. Agents

2415.010. Qualifications of agent [4140]

2415.010. Any person having the capacity to contract may act as an attorney-in-fact under a power of attorney for property.

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

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

Staff Note. Although durable powers of attorney are analogized to conservatorships of the estate, this section would seem to provide a broader class of potential agents than could be appointed conservator of the principal's estate. The staff considered suggesting a rule that any person who is qualified to be appointed as a conservator of the estate of the principal would be qualified to be an agent. But this rule would probably result in undue restrictions on the types of entities that could serve as agents. There is some appeal to the notion that only fiduciary-type artificial persons should serve as agents under durable powers of attorney, this has not apparently been the law in California, and would be overly restrictive in the case of nondurable powers. On the other hand, it is reported that "[p]ractically speaking, the

principal may be unable to find an institution that is willing to serve as an agent" under a durable power of attorney for property. See Montgomery & Wright, Durable Powers of Attorney for Property Management, 1991 California Durable Power of Attorney Handbook 2.46, at 56 (Cal.Cont. Ed. Bar).

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

2415.020. The designation of a person not qualified to act as an agent under a power of attorney for property subjects the person to removal as agent, but does not affect the immunities of third persons nor relieve the unqualified person of any applicable duties to the principal or the principal's successors.

Comment. Section 2415.020 is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. 404.707(4) (Vernon 1990). For provisions governing immunities of third persons, see Section 2425.020 et seq.

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

2415.030. Multiple agents [4142]

2415.030. (a) A principal may designate more than one attorney-in-fact in one or more durable powers of attorney for property and may provide that the authority conferred on two or more agents shall or may be exercised either jointly or severally or in a manner, with the priority and with respect to particular subjects, provided in the power of attorney.

(b) Unless otherwise provided in the power of attorney:

(1) A power vested in two or more attorneys-in-fact over the same property or act may only be exercised unanimously by the attorneys-in-fact.

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

(3) If a co-attorney-in-fact is unavailable to perform the duties of the co-attorney-in-fact because of absence or temporary incapacity, the remaining co-attorney-in-fact or co-attorneys-in-fact may act under the power of attorney, as if they are the only co-attorneys-in-fact.

(c) A co-attorney-in-fact is not liable for the actions of other co-attorneys-in-fact.

Comment. Subdivision (a) of Section 2415.030 is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. 404.707(1) (Vernon 1990). The default rule requiring unanimous action in subdivision (b)(1) is the same in substance as the rule applicable under the statutory form power of attorney. See Section 2475. Subdivision (b) is comparable to the rules applicable to multiple trustees under Probate Code Sections 15620-15622. Subdivision (c) is included for consistency with Section 2415.040(c) (capacity of successor agent). Subdivision (d) is comparable to the general rule as to cotrustees in Probate Code Section 16402(a).

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

Staff Note. As to subdivision (d), the Trust Law provides a lot more detail, making the general rule subject to exceptions where the cotrustee has participated in a breach, improperly delegated administration of the trust, approved, concealed, or acquiesced in the breach, negligently enabled the breach, or neglected to take reasonable steps to remedy the breach. We have chosen just to state the general rule in this section. Should more detail be added?

2415.040. Successor agents [4143]

2415.040. (a) The principal may designate one or more qualified persons as successor attorneys-in-fact and may establish the terms and conditions of such designation.

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

(c) A successor attorney-in-fact is not liable for the actions of the predecessor attorney-in-fact.

Comment. Section 2415.040 is drawn in part from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. 404.723(2)-(3) (Vernon 1990). For events that terminate the authority of an agent, see Section 2415.090. Subdivision (d) is comparable to the general rule as to successor trustees in Probate Code Section 16403(a).

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

Staff Note. As to subdivision (d), the Trust Law provides more detail, making the general rule subject to exceptions where the successor knowingly permits the breach to continue, neglects to take steps to compel delivery from the predecessor, or neglects to take reasonable steps to remedy the breach. We have chosen just to state the general rule in this section as in the previous section. Should more detail be added?

2415.050. Compensation of agent [4144]

2415.050. ▲ An attorney-in-fact is entitled to reasonable compensation for services rendered to the principal and to reimbursement for reasonable expenses incurred as a result of acting at as the principal's attorney-in-fact.

Comment. Section 2415.050 is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. 404.725 (Vernon 1990). This provision is comparable to Probate Code Sections 15681 (trustee's compensation) and 15684(a) (reimbursement for trustee's expenses). In many situations a relative acting as an agent under a durable power of attorney expects to act for the principal as an accommodation. Normally, while the principal is not disabled, such service will be infrequent and will not involve substantial time. However, with the prospect that if the principal becomes disabled or incapacitated, substantial time, effort, and expense may be required of the agent and any successor agents extending over a long period of time, compensation may be important. A definite understanding regarding compensation maybe included in the power of attorney. Reimbursement of expenses would be expected to include the cost of bookkeeping, tax, and legal services incurred by the agent in performing duties on the principal's behalf. It would also include the cost of preparing an accounting and any travel or personal expense incurred by the agent.

See Section 2418.020(b) (effect of compensation on standard of care). See also Sections 2402.030 ("agent" defined), 2402.210 ("power of attorney" defined), 2402.250 ("principal" defined).

Staff Note. This section may be a departure from the expectations of some authorities. For example, the CEB Handbook contains the following:

An agent rarely receives compensation, probably because family members and close family friends are usually appointed. Unless the document specifically authorizes compensation, the agent should never presume to use the principal's assets for compensation, because this could be construed to fall within the self-dealing prohibitions of Prob C 16004. Montgomery & Wright, Durable Powers of Attorney for Property Management, 1991 California Durable Power of Attorney Handbook 2.51, at 58 (Cal.Cont. Ed. Bar).

2415.060. Delegation of agent's authority [4145]

2415.060. (a) Except as otherwise provided in the power of attorney, an attorney-in-fact from time to time may revocably delegate any or all of the powers granted in a power of attorney for property to one or more qualified persons, subject to any directions or limitations of the principal expressed in the power of attorney, but the attorney-in-fact making the delegation remains responsible to the principal for the exercise or nonexercise of the powers delegated.

Comment. Section 2415.060 is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. 404.723(1), (3) (Vernon 1990). This section is consistent with parts of the general agency rules on delegation in Section 2349, but permits a broader delegation than the general agency rules. Delegation under this section may be particularly useful under a durable power of attorney where the principal is incapacitated and the agent needs to delegate authority under the power during a planned absence. However, the delegating agent remains responsible for the acts of subagents. If the principal is available and not incapacitated, the agent is expected to consult about any delegation. See Section 2418.070 (consultation with principal).

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

Staff Note. The Trust Law takes a different approach to the liability of a trustee to beneficiaries for acts of agents employed by the trustee. Probate Code Section 16401 provides in some detail that a trustee is not liable unless the breach has occurred where the trustee has the power to direct the act of the agent, where the trustee made an improper delegation, where reasonable care was not used in selecting the agent, where supervision of the agent was improper, where the trustee concealed the acts of the agent, or where the trustee neglects to take reasonable steps to compel redress of the agent's wrongs. If desired, we could adapt this sort of approach to this law. But we wonder if such formal rules are suited to durable powers of attorney. Perhaps powers of attorney have become more formal and extensive, and need to be treated more like trusts.

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

2415.070. (a) If, following execution of a durable power of attorney for property, a court of the principal's domicile appoints a conservator of the estate, guardian of the estate, or other fiduciary charged with the management of all of the principal's property or all of the principal's property except specified exclusions, the attorney-in-

fact is accountable to the fiduciary as well as to the principal. Except as provided in subdivision (b), the fiduciary has the same power to revoke or amend the durable power of attorney that the principal would have had if he or she were not incapacitated.

(b) If a conservator is appointed by a court of this state, the conservator can revoke or amend the durable power of attorney for property only if the court in which the conservatorship proceeding is pending has first made an order authorizing or requiring the fiduciary to revoke or amend the durable power of attorney and the revocation or amendment is in accord with the order.

Comment. Section 2415.070 continues former Section 2402(a) without substantive change. "Agent" has been substituted for "attorney in fact." See Section 2402.030 ("agent" defined).

Subdivision (a) is substantially the same as the official text of Section 3(a) of the Uniform Durable Power of Attorney Act (1979), Uniform Probate Code Section 5-503(a) (1990), with several changes. "Conservator of the estate" has been substituted for "conservator." This change is consistent with the concept of the Uniform Act that the fiduciary to whom the agent under a durable power is accountable and who may revoke or amend the durable power includes only a fiduciary charged with the management of the principal's estate and does not include a person appointed only to exercise protective supervision over the person of the principal. See Unif. Durable Power of Attorney Act 3 comment (1979); Unif. Prob. Code 5-503 comment (1990). The reference in the Uniform Act to the principal's "disability" is not included. This omission conforms Section 2415.070 to other provisions of this subtitle. The authority of the fiduciary to revoke or amend is the same as that provided by the official text of Section 3(a) of the Uniform Durable Power of Attorney Act, except for the requirement in subdivision (b) of prior court authorization for a California conservator to revoke or amend the power.

The exclusion of durable powers of attorney for health care from the coverage of this provision in former Section 2402(a) is omitted because it is unnecessary. This subtitle applies only to powers of attorney for property. See Section 2405.010 (application of subtitle).

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

2415.090. Termination of agent's authority [4148]

2415.090. Except as provided in Section 2415.130 and subject to subdivision (b), the authority of an attorney-in-fact is suspended.

~~during the incapacity of the attorney-in-fact and terminated by any of the following events:~~

- (1) Termination of the power of attorney.
- (2) Resignation or failure to serve by the attorney-in-fact.
- (3) Removal of the attorney-in-fact.
- (4) Death of the attorney-in-fact.

Comment. Section 2415.090 is drawn in part from the general agency rules provided in Section 2355. See Section 2360 (Section 2355 inapplicable to durable powers of attorney). This section thus continues the substance of former law as to termination of the authority of agents under durable powers of attorney.

The first clause in subdivision (a) recognizes the special rule applicable to a power of attorney coupled with an interest as provided in Section 2415.130. Subdivision (a)(1) provides that the authority of an agent necessarily ceases when the underlying power of attorney is terminated. See Section 2410.130 (termination of power of attorney for property). In a case where the principal is missing or held captive in a foreign country, the agent's authority does not terminate, as provided in Section 2415.080. Subdivision (a)(2) is the same as Section 2355(b), but the reference to fulfillment of the purpose of the power of attorney is new. Subdivision (a)(3) is the same as Section 2355(e). Subdivision (a)(5) is the same as Section 2355(c).

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

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

2415.100. Effect of dissolution or annulment [4149]

2415.100. Unless the power of attorney expressly provides otherwise:

(a) The filing of any action for judicial or legal separation, annulment, adjudication of nullity, or divorce or dissolution of the marriage of the principal and the principal's attorney-in-fact who were married to each other at or subsequent to the time the power of attorney was created terminates all authority of the attorney-in-fact.

(b) In a case where the principal has become an absentee as defined in Section 1403 of the Probate Code, if, after executing a power of attorney for property, the principal's marriage to the attorney-in-fact is dissolved or annulled, or the judicial or legal separation of the principal and attorney-in-fact is declared, or the attorney-in-fact commences an action for such relief, the attorney-in-fact's authority is terminated.

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

Subdivision (b) continues part of former subdivision (f) of Section 2355 relating to the effect of a separation and filing a petition for dissolution or annulment in the case of federal absentees. The reference to contrary provisions "in writing" is omitted because it is unnecessary; durable powers of attorney are always required to be in writing. See Section 2402.210 ("power of attorney" defined).

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

Staff Note. Missouri law follows the federal absentee policy and terminates an agent's authority "unless the power of attorney provides otherwise." See Mo. Ann. Stat. 404.717(a)(6) (Vernon 1990).

It should also be noted that this section applies both to durable and nondurable powers of attorney for property. Strictly speaking, a nondurable power of attorney need not be terminated by operation of law on dissolution, since the principal may terminate the power of attorney by taking appropriate action. Even if the statute provides for termination on dissolution, it would be prudent for the principal to take some action to make sure third persons are aware of the dissolution.

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

2415.120. (a) On termination of the attorney-in-fact's authority, the attorney-in-fact shall promptly deliver possession or control of the principal's property in the following order of priority:

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

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

(3) To the principal's spouse as to community property.

(4) 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 transactions entered into on behalf of the principal.

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

Comment. Section 2415.120 is new. The rules concerning duties on termination of the agent's authority are drawn in part from Probate Code Section 15644 (delivery of property by former trustee upon occurrence of vacancy) and from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. 404.714(9) (Vernon 1990). For other rules concerning the agent's relation with court-appointed fiduciaries under a durable power of attorney, see Section 2415.070.

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

2415.130. Power coupled with an interest [4152]

2415.130. Unless the power of attorney expressly provides otherwise, to the extent that the power of an agent is coupled with an interest in the subject of the power of attorney for property, the agent's authority is not terminated by the incapacity or death of the principal or by the revocation of the power of attorney, attempted removal of the agent, or the dissolution or annulment of the agent's marriage with the principal.

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

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

Article 2. Duties of Agents

2418.010. When duties commence [4160]

2418.010. (a) Except as provided in subdivision (c), a person who is designated as an agent under a power of attorney, whether durable or nondurable, has no duty to exercise the authority conferred in the power of attorney, regardless of whether the principal has become incapacitated, is missing, or is otherwise unable to act.

(b) Acting for the principal in one or more transactions does not obligate an agent to act for the principal in subsequent transactions.

(c) If an agent under a power of attorney has agreed expressly in writing to act for the principal in specified circumstances, the agent has a duty to act when the circumstances occur. The agreement to act on behalf of the principal is enforceable against the agent as a fiduciary without regard to whether there is any consideration to support a contractual obligation to do so.

Comment. Section 2418.010 is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. 404.705(4) (Vernon 1990). Subdivision (a) makes clear that being named as an agent under a durable or nondurable power of attorney imposes no duty on the named person to act. This is true even if the agent knows of the designation and has received the power of attorney. A duty to act under this subtitle only arises by reason of an express agreement in writing, as provided in subdivision (c). Reliance is not sufficient to impose a legal duty to act, as provided in subdivision (b). This section recognizes that many durable powers of attorney are given and accepted as a gratuitous accommodation for the principal by the agent. The principal wants someone to have the ability to act if something needs to be done, but rarely would the principal expect to impose a duty to act on a friend or family member if the agent chooses not to do so. Consequently, unless the agent has agreed to act, accepting a power of attorney designation imposes no duty to act and the named person may even renounce the designation. The person named as agent may also merely wait until the situation arises and then determine whether to act. The person may refuse to act because of personal inconvenience at the time of becoming involved, or for any other reason, and is not required to justify a decision not to act. The person named as agent may believe that there are others in a better position to act for the principal or that the situation really warrants appointment of a court-supervised guardian or conservator. However, once the agent undertakes to act under the power

of attorney, the transaction is governed by the duties imposed in the law to act as a fiduciary.

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

**PART II
TEAM 4 COMMENTS**

TITLE 10. DURABLE POWERS OF ATTORNEY

SUBTITLE 1. GENERAL PROVISIONS AND DEFINITIONS

Chapter 1. General Provisions

§ 2400.010 Short Title

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

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

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

§ 2400.020 Relation to general agency law

1. As explained in the discussion to the comment to § 2400.010, Team 4 believes that general agency law as forth in the Civil Code should and does apply to Title 10. Therefore, § 2400.020 and its comment should be rewritten to reflect the application of the law of agency to durable powers of attorney.

Part Two

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

§ 2400.030 General rule concerning application of title

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

2. Team 4 believes that the language of the Statute should be in the active voice ("reason 1") and that any word which could create confusion should be deleted ("reason 2"). For reason 1, the words "the opinion of the court" were deleted, and the words "the court finds" substituted therefor. For reason 2, the adjective "effective," line 4 of subsection (c), was deleted. Team 4 felt that the standard created by the adjective "effective" would be too vague for the word to be helpful in the context of subsection (c).

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

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

§ 2400.030 Scope of title [second section with number 2400.030]

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

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

3. Team 4 feels that throughout the comprehensive durable powers of attorney statute, the term "attorney-in-fact" should be used in lieu of the word "agent." Except in the instances when the word "agent" is used to refer to an agent under a non-durable power of attorney or to a true agent designated by an attorney-in-fact,

each time the word "agent" appeared in those sections of Memo 91-40 discussed by Team 4, Team 4 substituted the term "attorney-in-fact" for the word "agent." Team 4 urges the Commission to use the term "attorney-in-fact" consistently throughout the Statute. Team 4 believes that the term "attorney-in-fact" is a more useful term than the word "agent" for two reasons. First, the term "attorney-in-fact" connotes an individual actually taking charge of another individual's affairs, and therefore the name reinforces, from a practical perspective, the nature of the duties of the attorney-in-fact. The use of a term other than agent also is useful in distinguishing an individual acting under a durable power of attorney from an agent acting pursuant to a traditional power of attorney under general agency laws. Since many of the responsibilities and powers are different, the distinction is essential. Thus, the term "attorney-in-fact" should assist the public (as well as attorneys) in comprehending and appreciating the differences between an "agent" and an "attorney-in-fact."

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

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

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

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

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

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

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

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

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

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

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

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

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

§ 2400.040 Durable powers of attorney under laws of another jurisdiction

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

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

"(a) An instrument which is a durable power of attorney and which is valid under the laws of the state where it is executed may be carried out and enforced in this state as a durable power of attorney to the extent it is not contrary to the laws of this state."

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

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

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

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

§ 2400.050 Priority of durable power provisions [NEW]

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

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

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

Chapter 2. Definitions

§ 2402.010 Application of definitions.

1. For the convenience of practitioners, it is important to clearly delineate which statutory provisions apply to both durable

powers of attorney for health and property and which apply to only one or the other such durable powers of attorney. The concept that certain provisions (including most definitions) are common to both durable powers of attorney for health and property and that others apply to only one power or the other is integral to the basic organization of the Statute which Team 4 advocates. Team 4 believes that the organizational framework of the conservatorship and guardianship statute would provide a useful model upon which to base the structure of a comprehensive durable power of attorney statute.

2. The conservatorship and guardianship statute is organized so that common provisions are stated only once and provisions that apply solely to conservatorships/guardianships of the person or estate are set forth separately. Likewise, Team 4 suggests that provisions common to both types of durable powers of attorney be contained in the first part and that the common provisions be followed by those provisions specifically dealing with first one type of durable power of attorney (e.g., property) and then the other type of durable power of attorney (e.g., health).

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

§ 2402.030 Agent

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

2. The second half of subsection (b) (as currently written), which refers to an agent delegated authority by an attorney-in-fact, should be deleted. The purported definition simply reiterates the basic characteristic of agency law, i.e., that of the delegation of authority, and adds no further clarification for the practitioner.

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

4. Finally, the Commission has said that the term "agent" is used in this title so that the Statute is consistent with the statutory forms which use the word "agent." The statutory forms purportedly use the term "agent" because the term is both informal and practical. However, this is not a sufficient reason to continue the use of the term "agent," which is susceptible to various meanings within one statute. Since one of the stated purposes of this rewritten Statute is greater clarity, it makes no sense to use a term which is inherently ambiguous in the context used.

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

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

§ 2402.070 Durable power of attorney

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

2. In response to the Staff Note, Team 4 believes that subsection (b) should be retained as part of the section inasmuch as subsection (b) states the general rule that the section will apply to both types of durable powers of attorney unless otherwise stated. If necessary, a specific statute may refer to a particular type of durable power of attorney. However, the general approach will remove the necessity of constantly checking a particular section to see if it applies to one or the other or both types of durable powers of attorney. Moreover, subsection (b) is consistent with the general organization of the Statute advocated by Team 4. (See discussion of § 2402.010.)

§ 2402.090 Durable power of attorney for health care

Consistent with Team 4's position as to the basic structure and organization of the Statute, Team 4 suggests that the full definition of durable power of attorney for health care be set forth only once in the part dealing with durable powers of attorney for health care.

§ 2402.110 Durable power of attorney for property

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

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

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

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

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

§ 2402.120 Durable power of attorney for personal care [NEW]

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

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

3. Team 4 advocates a new type of durable power of attorney specifically for personal care for many reasons. First, the duties, powers and responsibilities which would be gathered together under the durable power of attorney for personal care either are often haphazardly included as part of the existing durable powers of attorney or are ignored altogether. Disputes often and easily arise as to which attorney-in-fact is responsible for or has the ability to undertake personal care responsibilities. Second, as a practical matter, the rights, duties and responsibilities of the proposed durable power of attorney for personal care do not fall neatly within the purview of either of the existing durable powers of attorney. On the other hand, it is the implementation of these personal care powers that might have the most immediate effect upon the daily life of the principal. In light of these considerations, Team 4 suggests that a new durable power of attorney be created which would deal with such personal needs and services. This durable power of attorney for personal care would authorize and empower the attorney-in-fact to take appropriate action to provide for the personal care of the principal.

4. The name of the new durable power of attorney would be Durable Power of Attorney for Personal Care. This Durable Power of Attorney for Personal Care would provide primarily for the personal care of the principal and secondarily would apply to all other matters not encompassed within the durable powers of attorney for property or health. Personal care would include such items as

repairing the principal's place of residence; determining access to the principal; determining leisure time and recreational activities; supervising hobbies; determining and implementing grooming needs; and all other such matters. In addition, Team 4 suggests that this durable power of attorney clearly exclude those powers which are specifically authorized under a durable power of attorney for health or property. Team 4 believes that the Staff comments contain an excellent discussion of the issues and should be encompassed as part of the comments of this newly proposed section.

§ 2402.130 Health care

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

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

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

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

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

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

§ 2402.150 Health care decision

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

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

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

§ 2402.190 Nondurable power of attorney

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

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

§ 2402.210 Power of attorney

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

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

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

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

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

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

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

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

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

§ 2402.230 Power of attorney for property

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

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

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

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

§ 2402.250 Principal

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

"'Principal' means a natural person who executes a durable power of attorney granting powers to an attorney-in-fact."

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

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

§ 2402.290 Springing power of attorney

1. Team 4 suggests that the second sentence of § 2402.290 be deleted inasmuch as the focus of the section should be upon durable powers of attorney. Team 4 believes that it will create great confusion among practitioners if only random sections are specifically said to apply to both durable powers and non-durable powers. Not only will confusion abound, but practitioners will have to refer constantly to the particular section to determine whether the section applies only to durable powers of attorney or to both durable powers and/or non-durable powers of attorney. Such a hodgepodge would create a particularly unwieldy burden for those business and commercial practitioners who deal with durable powers of attorney only in a business setting and only upon relatively infrequent occasions.

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

"'Springing durable power of attorney' means a durable power of attorney granting powers to an attorney-in-fact and stating that the power becomes effective at a specified future time, or date, or upon the occurrence of a specified event or contingency including but not limited to the subsequent incapacity of the principal."

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

§ 2402.350 Third person

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

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

2. Team 4 suggests the above revision inasmuch as the definition of "third party" should be as broad as possible, and the original inclusion of "third party" appeared to be too limiting. As the detailing of actions is set forth purely for example, the list of actions should be retained because of the guidance it will provide to practitioners.

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

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

Subtitle 2.

POWERS OF ATTORNEY FOR PROPERTY

Chapter 1.
General Provisions

§ 2405.010 Application of Subtitle

1. Consistent with the position which Team 4 has expressed throughout its discussion of the Statute, Team 4 strongly suggests that the reference to non-durable powers of attorney be deleted.

2. If a durable power of attorney for personal care is created, then the last sentence of § 2405.010 will have to be expanded in order to reflect that the chapter also does not refer to durable powers of attorney for personal care.

§ 2405.020 Uniform Durable Power of Attorney

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

§ 2405.030 Form of durable power of attorney for property after January 1, 199

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

"However, pursuant to subdivision (b), a form printed for commercial sale and distribution to the public on or after January 1, 199, may be sold or distributed in this state only if the form satisfies the requirements of former Section 2510 or Section 2410.050. Either of such sections may be used, because the changes are in syntax and are non-substantive."

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

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

§ 2410.010 Creation of power of attorney

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

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

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

§ 2410.020 Permissible purposes

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

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

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

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

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

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

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

§ 2410.040 Effect of agents' act under durable power of attorney during principal's incapacity

1. Team 4 suggests that the section be modified by inserting a period after the word "capacity" on line 5 and by deleting the words which appear after the word "capacity," namely "notwithstanding any incapacity of the principal or any uncertainty as to whether the principal is dead or alive." The words which have been deleted add nothing to the meaning of this section, and, in fact, may detract from the power granted to the attorney-in-fact during the period of the principal's incapacity. By definition, a durable power is one that continues to be effective during the principal's incapacity. This essential feature already has been set forth and identified in the Statute. To reiterate the basic characteristic of a durable power (that it is durable) at this juncture adds nothing and most likely will result in practitioner confusion. The effect upon the attorney-in-fact's status if the principal is dead is addressed elsewhere, and the repetition is not useful.

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

S 2410.050 Warning statement and durable power of attorney for property

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

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

"Notice to Person Executing Durable Power of Attorney

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

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

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

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

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

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

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

§ 2410.070 Springing power of attorney

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

§ 2410.090 Application to principal's property

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

§ 2410.110 Variation of duties and liabilities between principal and agent

1. Team 4 strongly feels that this provision should be deleted in its entirety. It is not in the best interest of either the principal or the attorney-in-fact to make secret agreements altering their relations. The potential for the abuse of elderly or infirm principals is immense. The reliability inherent in standardized practices and due process would be jeopardized if such side agreements were permitted. Moreover, on a practical basis, the potential existence of such side agreements would create substantial burdens for title companies and other third parties. If side agreements were authorized, then title companies and other third parties (notwithstanding assurances in the Statute that such inquiries were unnecessary) would think it necessary to ascertain the existence of such side agreements, and then to review the contents thereof in order to insure that the parties' relationship or the powers granted from the principal to the attorney-in-fact had not been altered.

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

§ 2410.120 Manner of modification or termination by principal

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

2. Team 4 extensively discussed whether or not modifications of durable powers of attorney should be permitted at all. Team 4 thought it important that the range of comments concerning the ability to amend a durable power of attorney (or lack thereof) be presented. One Team 4 member thought that modification should not be addressed at all in the Statute. Many members of Team 4 thought that if modifications of durable powers of attorney were permitted, that it would be difficult for third parties to deal with durable powers of attorney because such third parties constantly would (or think they would) have to ascertain whether or not a modification had occurred. Further, the ability to have "silent" modifications would seem to increase the possibility for unscrupulous individuals to take advantage of an aged or infirm principal. The advantage of informal and inexpensive amendments is not outweighed by the dangers inherent in permitting informal modifications nor by the difficulties of third parties in dealing with such modifications.

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

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

5. Team 4 also was concerned about subsection (d) of § 2410.120 for two reasons. One reason was that it would be difficult to enforce the requirement that only a principal or the principal's legal representative could record a notice of termination. The burden of ascertaining who was the responsible filing

party would be substantial, and the possibilities for litigation would be endless. A second concern was that if the original durable power had been recorded, that a termination might not be effective unless it was also recorded. In any event, if the recording requirements are not clear, then the status of a subsequent revocation will be uncertain.

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

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

§ 2410.130 Termination of power of attorney for property

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

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

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

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

4. Team 4 has several general comments respecting §§ 2410.130(b), 2410.140 and 2415.090. In each of these sections, references are made to an agent or a third person who does not have knowledge of certain events, e.g., an event that terminates the power of attorney-in-fact or that triggers the appointment of the attorney-in-fact. Team 4 believes that each of the three sections should be replaced with one section which, in general, would relieve an attorney-in-fact of liability if the attorney-in-fact took action without actual knowledge of the event in question. This section properly should appear in what is now Chapter 4, "Relations with Third Persons." (As stated in the discussion of the Chapter 4 sections, Chapter 4 applies equally to durable powers of attorney for health care and property and therefore should be

contained in the general sections which apply equally to both types of durable powers of attorney.) Probate Code § 9103 which refers to actual knowledge could be used as a guide and in lieu of the notice provisions which are relied upon in the above three sections.

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

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

§ 2410.140 Termination of nondurable power of attorney for property

Team 4 believes that the comprehensive durable power of attorney statute should deal solely with durable powers of attorney. For that reason, Team 4 believes that § 2410.140 should not be included in the comprehensive durable power of attorney statute, because it addresses issues having to do solely with non-durable powers of attorney.

§ 2410.150 Certified copy of power of attorney

1. Team 4 believes that creating a system for certifying durable powers of attorney is desirable. In many instances, certification will facilitate and simplify the use of durable powers of attorney. For example, most third parties would more easily accept and rely upon a certified copy of a durable power of attorney. Team 4 believes that the proposed certification system should be broadened. As written, certification would be difficult to obtain and would place additional and, it is assumed, unwanted burdens upon the "official of a state or of a political subdivision of a state." Undoubtedly some costs--either for the principal or the state--would be attached to such a formal certification process. Neither the formality nor the costs are warranted. In lieu of or in addition to the formal certification process already set forth in the section, Team 4 suggests that the section be rewritten so that a durable power of attorney can be certified by a California-licensed attorney or notary public.

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

CHAPTER 3.
Agents under Power of Attorney for Property

Article 1. Agents

§ 2415.010 Qualifications of agent

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

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

2. One issue that Team 4 suggests be given further consideration is whether a corporation (or an artificial person of any type) which is not qualified to act as a fiduciary under the laws of the State of California should be permitted to act as an attorney-in-fact. Several of Team 4's members expressed concern about the quality of services and professionalism of "professional" conservators. On the other hand, the need for independent attorneys-in-fact (just as for independent conservators) has dramatically increased in recent years. The demand should continue to expand as greater numbers of our citizens enter into the ranks of senior citizens.

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

§ 2415.020 Effect of designating unqualified person as agent

1. Is the Comment to § 2415.020 necessary or appropriate? As written, the language of the Comment does not seem to be particularly helpful in clarifying the language of the section.

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

§ 2415.030 Multiple agents

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

reviewed to ensure that the perspective is that attorneys-in-fact are not required to act unanimously unless they have authority over the same property or act.

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

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

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

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

4. Team 4 believes that subsection (c) of § 2415.030 would create confusion among third parties and could in certain cases enable a dishonest attorney-in-fact to perpetrate an intentional misrepresentation. Team 4 believes that third parties are entitled to know if a principal has appointed co-attorneys-in-fact, and for these reasons believes that subsection (c) should be deleted.

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

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

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

§ 2415.040 Successor agents

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

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

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

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

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

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

§ 2415.050 Compensation of agent

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

2. Team 4 felt that the general presumption should be in favor of compensation with the clear understanding that such presumption can be easily changed by the principal. For example, if the principal and the attorney-in-fact agreed that no compensation were to be paid, then in the durable power of attorney, the principal simply would state that no compensation was to be paid. In the event that the attorney-in-fact did not wish to be paid, the attorney-in-fact could refuse to accept the compensation; the situation would be analogous to an executor's refusal to accept the compensation authorized under the Probate Code.

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

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

"An attorney-in-fact is entitled to reasonable compensation for services rendered to the principal and to

reimbursement for reasonable expenses incurred as a result of acting as the principal's attorney-in-fact."

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

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

§ 2415.060 Delegation of an agent's authority

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

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

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

§ 2415.070 Relation of agent to court-appointed fiduciary

1. Team 4 has several questions with respect to this provision. This provision is derived from the Uniform Durable Powers of Attorney Act as adopted in California. Every effort was made to adopt the Uniform Act in toto while at the same time to allow those variations which were felt to be necessary in order to respond to unique California situations. As a general principle, Team 4 does not favor changes which would deviate from the Uniform Act unless those changes are supported by compelling reasons.

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

§ 2415.080 Agent's authority when principal missing or held captive in foreign country

1. Team 4 suggests that § 2415.080 be deleted in its entirety. The section creates an exception which is directly contrary to the articulated wishes of the principal. Team 4 believes that if a durable power of attorney contains a specific termination date (or refers to a specific terminating event), that the express wishes of the principal, regardless of whether that person is missing, should be honored.

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

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

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

§ 2415.090 Termination of agent's authority

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

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

2. Since the incapacity of the attorney-in-fact is dealt with in the introductory language, incapacity should be removed from the five enumerated events which would cause a termination of the authority of the attorney-in-fact. Team 4 believes that incapacity should not necessarily terminate permanently an attorney-in-fact's authority. The intent is to honor the principal's wishes, and particularly if the incapacity is temporary, the attorney-in-fact should not be barred from acting forever. Team 4 further would delete the specific reference to non-durable powers of attorney.

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

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

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

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

§ 2415.100 Effect of dissolution or annulment

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

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

section should be broadened to include the situation of a married couple living separate and apart. Although definitional difficulties might arise, Team 4 suggests that the section encompass the situation of a married couple living separate and apart inasmuch as this is a most frequently occurring circumstance.

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

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

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

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

§ 2415.110 Succession following termination of agents' authority

1. Team 4 suggests that this section be eliminated in its entirety. Team 4 believes that it is unnecessary to say that a successor attorney-in-fact has all of the powers of the originally designated attorney-in-fact. Once a successor attorney-in-fact is appointed, then by necessity, that attorney-in-fact must have all the rights and powers of an attorney-in-fact. In addition, the concept of a successor attorney-in-fact having all of the powers of an attorney-in-fact is covered by the provisions of § 2415.120 concerning the appointment of successor attorney(s)-in-fact.

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

§ 2415.120 Agent's duties and powers on termination of authority

1. Team 4 suggests that the first clause of subsection (a) of § 2415.120 be deleted. The concept that a durable power of attorney is subject to an order of a court of competent jurisdiction is self-evident and certainly applies to all of the provisions dealing with durable powers of attorney. To insert "subject to the authority of the court" language in this section would result in confusion about the applicable standard in other sections. Therefore, Team 4 suggests that subsection (a) read:

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

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

3. Team 4 also suggests that a new subsection (c) be added which deals with the continuing responsibility of the attorney-in-

fact whose authority as attorney-in-fact has been terminated. Team 4 suggests that new subsection (c) read as follows:

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

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

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

Article 2. Duties of Agents

§ 2418.010 When duties commence

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

2. Although the majority opinion is clear, several members of Team 4 believe that the expectations of the public are exactly the opposite, that is that the public assumes that the attorney-in-fact will act upon the principal's incapacity. For that reason, several suggestions to address this concern have been made; these considerations are set forth at this point. One suggestion is that, as part of the creation of a durable power of attorney, the attorney-in-fact could be required to acknowledge such attorney-in-fact's obligation to act and to perform his or her duties as such attorney-in-fact under the durable power of attorney. A second suggestion is that if such an acceptance is not forthcoming, or if the attorney-in-fact fails to act, the section provide that a named successor attorney-in-fact would automatically become the attorney-in-fact.

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

§ 2418.020 Standard of care and liability for losses

1. Team 4 suggests that the introductory clause "subject to variation in the power of attorney or by agreement between the principal or agent" be deleted, inasmuch as these concepts should be set forth in a general section which will apply to both types of durable powers of attorney.

2. Team 4 agrees with the Staff's position that the standard should be that of a prudent person. Having a clearly articulated standard will be of substantial benefit to both the public and practitioners.

3. Team 4 believes that rules of existing agency law should be continued and that a compensated attorney-in-fact should be held to a higher standard than an attorney-in-fact who is not compensated.

4. Team 4 supports the concept which is being expressed in subsection (c), which is that an attorney-in-fact who possesses more sophisticated or greater skills than an attorney-in-fact who does not have such skills has an obligation to use such skills when acting on behalf of the principal. However, Team 4 suggests that subsection (c) be redrafted as follows:

"An attorney-in-fact who has special skills or expertise or who was designated as an attorney-in-fact based on the attorney-in-fact's representation(s) that such attorney-in-fact possessed special skills or expertise is under a duty to use such skills and expertise when acting as an attorney-in-fact under a durable power of attorney."

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

§ 2418.040 Duty to avoid conflict of interest

[Tom and Don were to do a memorandum]

Some of Team 4's comments were as follows: With respect to the second sentence in subsection (a), most of Team 4 felt that if the attorney-in-fact had a personal interest in a particular transaction involving the principal or the principal's property that such self-interest was not to be considered a per se adverse interest.

With respect to subparagraph (b), Team 4 questions the meaning of the words "any claim." In general, subsection (b) seems somewhat confused and poorly written. For example, does this section not apply to prior loans or to costs advanced?

Subsections (a), (b) and (c) are almost verbatim, taken from Civil Code §2322 dealing with the authority of an agent. Although this may be existing law, many of Team 4's members found the language to be confusing.

Subsection (b) of proposed Section 2418.040 of the California Civil Code presents the tension between the need to protect consumers' rights against the unscrupulous attorneys-in-fact and the desire to allow the consumers to conduct their financial affairs outside the scrutiny of the court. Current law applicable to agency contains a similar provision. Civil Code Section 2322(c) provides that the authority of an agent does not authorize an agent to violate a duty to which a trustee is subject under Probate Code Section 16004(b), inter alia. Proposed Civil Code Section 2418.040(b) is taken virtually verbatim from Probate Code Section 16004(b).

The law applicable to trusts should reinforce the fiduciary relationship, and the law applicable to attorney-in-fact for financial matters and for health care should reinforce the agency relationship. The members of Team 4 agree that subsection (b) should be eliminated and that conflict of interest issues are covered by subsection (a). The collective experience of the members of Team 4 indicate that many consumers of estate planning, probate and trust law services believe that an attorney-in-fact has the power to reimburse himself or herself from the principal's property the amount of the claim of the attorney-in-fact without obtaining a court order. Furthermore, the fact that the claim is purchased or acquired from a third party is irrelevant to the protection of the consumer.

Nevertheless, and most importantly, the members of Team 4 agree that before the law is changed either to reinforce the applicability of Probate Code Section 16004(b) to attorneys-in-fact or to change or eliminate it, experts in the areas of commercial law, real estate law and health care law should have an opportunity to review and comment on this proposed subsection. Clearly, powers of attorney have important impact on these areas as well.

Subsection (c) would seem to go to the burden of proof.

Team 4 also decided that the Law Revision Commission should be informed that other disciplines (e.g., business) would be affected

by the powers of attorney and that their comments should be solicited.

With respect to subsection (c), all of Team 4, except one individual, favored deleting the language "or by the agent's influence with the principal remains." We suggested that such language should be moved to subtitle 5 appearing on page 52. Team 4 reasoned that there was a fundamental difference in a durable power which is more contractual in nature versus a trust where certain duties are imposed as between a trustee and a beneficiary.

§ 2418.050 Duty not to undertake adverse responsibilities

1. This section should make it clear that both the attorney-in-fact and the principal may have a co-existent interest in the same property with property being used in its generic sense. Specifically, Team 4 believes that it would not be a per se violation of an attorney-in-fact's duties if the attorney-in-fact actually began to act as the attorney-in-fact and simultaneously had a co-existent interest in the same property with the principal. However, such a co-interest in such property may in fact represent an actual conflict of interest and thus may preclude the attorney-in-fact from acting at all. The same reasoning should apply if the attorney-in-fact were acting for two principals who as between themselves had actual conflicts of interest.

2. After substantial and extensive discussion, Team 4 agreed that the principles which should be applicable to co-existent interest in property by principal and attorney-in-fact should be as follows: If a principal does not have actual knowledge of an attorney-in-fact's currently existing conflict of interest so that an actual conflict of interest exists, then the attorney-in-fact may be precluded from acting or may be removed. On the other hand, if the principal knows of the currently existing conflict of interest with the other principal or if both principals know of the cross-agency, then the attorney-in-fact can continue to act.

3. Team 4 suggests that the section be reorganized as follows:

2418.050. (a) An attorney-in-fact has a duty not to become an attorney-in-fact where such attorney-in-fact has an interest which is adverse to an interest of the principal.

(b) An attorney-in-fact for one principal has a duty not to knowingly become an agent under a durable power of attorney for another principal, where the interest of one principal is adverse in its nature to the interest of the other.

(c) If the circumstances in sections 2418.050 (a) or (b) exists, the attorney-in-fact has a duty either to eliminate the conflict or to resign upon discovery of such conflict of interest.

(d) Notwithstanding the preceding provisions, an interest of one principal is not necessarily adverse in its nature to the same interest of the other principal, or the interest of the principal is not necessarily adverse to the interest of the attorney-in-fact, [the provisions set forth in paragraph 2 above].

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

§ 2418.070 Duty to keep principal informed and follow instructions

1. Team 4 suggests that the words "and to obtain" be deleted from subsection 2418.070 so that subsection 2418.070 reads as follows:

"2418.070(a). On matters undertaken or to be undertaken on the principal's behalf and to the extent reasonably possible under the circumstances, an attorney-in-fact has the duty to keep in regular contact with the principal, to communicate with the principal and to follow the instructions of the principal given while the principal has capacity."

2. Team 4 suggests that § 2320 of the Civil Code or the substance thereof be set forth as subsection (b) of § 2418.070. Team 4 believes that the attorney-in-fact should be authorized to disobey the instructions of the principal where such disobedience is in the best interest of the principal. If Civil Code § 2320 is incorporated into § 2418.070 as subsection (b) of § 2418.070, then the comment to the section would have to be changed.

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

§ 2418.080 Consultation

1. Team 4 suggests that this section be deleted from this part of the Durable Power of Attorney statute, and instead that the subject of this section be incorporated into the section of the statute dealing with third parties.

2. Team 4 suggests that this section be rewritten so that the attorney-in-fact has a duty to comply with reasonable requests for information by third parties. Although information could be released to third parties, the statute should provide that such release does not waive any privilege which exists as to anyone else.

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

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

§ 2418.090 Duty to keep records

1. Team 4 believes that the section should be retitled so that it reads "Duty to Keep Records and to Account to Principal." Team 4 believes that a new subsection (3) should be added to subsection (d) which would read as follows:

"By order of a court of proper jurisdiction or upon petition by the conservator of the estate of the principal, the principal's personal representative or any other successor-in-interest after the death of the principal."

2. Team 4 requests that a new subsection (b) should be added in order to increase the number of persons who can demand an accounting. These additional individuals would include the personal representative of the principal's estate, any other successor-in-interest after death of the principal and the conservator of the principal's estate.

3. Finally, Team 4 suggests that a new subsection (c) be added which would provide: "such other person as a court of proper jurisdiction may order upon petition and a showing of good cause by any other interested person."

§ 2418.100 Duty to use special skills

Team 4 believes that this section is not useful and that this section should be deleted in its entirety.

§ 2418.110 Duty to reveal capacity

1. Team 4 suggests that the words "clearly indicate" be deleted and that the word "disclose" be substituted therefor. Team 4 believes that an attorney-in-fact has the duty to disclose whether or not he or she is acting as an attorney-in-fact, but that at the same time, such attorney-in-fact does not have to disclose the identity of a principal.

2. Team 4 also would eliminate the word "capacity" and instead say that the attorney-in-fact must disclose the attorney-in-fact's relationship in dealing with third persons.

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

Comprehensive Power of Attorney Statute

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

This draft is currently a work in progress. It largely retains the structure of the May 1991 draft attached to Memorandum 91-40 until decisions can be made that permit further restructuring. For convenience, the source provision from the May 1991 draft is indicated in brackets in the leadline of each section continued in some form from the earlier draft. These numbers will also help finding sections referred to in the commentary from Team 4 of the Estate Planning, Trust and Probate Law Section of the State Bar. (See Exhibits 1 and 2, attached to Memorandum 92-50.)

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-

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

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

PART 9. POWERS OF ATTORNEY

TITLE 1. GENERAL PROVISIONS AND DEFINITIONS

CHAPTER 1. GENERAL PROVISIONS

§ 8000. Short title [2400.010]

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

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

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

8001. (a) Sections 8222, 8223, 8225, 8227, 8306, 8453, and 8454 may be cited as the Uniform Durable Power of Attorney Act.

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

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

Comment. Subdivision (a) of Section 8001 restates former Section 2406 without substantive change. Subdivision (a) has the same purpose as the official text of Section 7 of the Uniform Durable Power of Attorney Act (1969).

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

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

§ 8002. Relation to general agency law [2400.020]

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

Comment. Section 8002 makes clear that the general statutes applicable to agency (Sections 2019-2022 and 2295-2356) are not applicable to powers of attorney. See Sections 2023, 2360.

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

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

8003. Except as otherwise provided by statute:

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

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

(c) This part applies to all proceedings concerning powers of attorney commenced before January 1, 1995, unless the court determines that application of a particular provision of this part would substantially interfere with the effective conduct of the proceedings or the rights of the parties and other interested persons, in which case the particular provision of this part does not apply and prior law applies.

Comment. Section 8003 is comparable to Probate Code Section 15001 (application of Trust Law). Subdivision (a) provides the general rule that this part applies to all powers of attorney, regardless of when created.

Subdivision (b) is a specific application of the general rule in subdivision (a). See Section 8900 *et seq.* (court enforcement of duties of attorneys-in-fact under powers of attorney). Subdivision (c) provides discretion to the court to resolve problems arising in proceedings commenced before the operative date.

For special transitional provisions, see Sections 8202 (form of durable power of attorney), 2444 (form of durable power of attorney for health care); see also Section 8226(c) (springing powers).

See also Section 8059 ("power of attorney" defined).

Staff Note. Tentatively, the operative date is set at January 1, 1995, based on assumptions about a reasonable schedule for this project. The State Bar Team urges that the date be left blank (see Exhibit 2, at p. 36), but the staff prefers to set a date and change it if necessary. Since not all dates are the same in this statute, blank dates can be confusing.

The State Bar Team suggests some wording changes in subdivision (c). See Exhibit 1, at p. 2; Exhibit 2, at p. 36. The staff agrees that the active voice is preferable and has substituted "court determines" for "in the opinion of the court." Using "court finds," as the Team suggests, can be interpreted to require written findings, and that is not the point of this section. The staff would not eliminate the word "effective" because this gives a gloss on the provision and is the standard wording used elsewhere.

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

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

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

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

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

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

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

(3) The acts and transactions of the attorney-in-fact occurred or were intended to occur in this state.

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

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

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

Comment. Section 8004 is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.730(1) (Vernon 1990). This section is comparable to Probate Code Section 3902(a) (scope and jurisdiction under Uniform Transfers to Minors Act). See Prob. Code § 3902 Comment. Nothing in this section limits the jurisdiction exercisable under Code of Civil Procedure Section 410.10.

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

Staff Note. The State Bar Team suggests a revision of this section, but the staff has not accepted the suggestion because it omits the important language concerning where the acts take place. See Exhibit 1, at pp. 2-3; Exhibit 2, at pp. 37-38. However, we have rewritten the section to make the distinction between subdivisions (a) and (b) clearer.

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

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

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

- (a) presence;
- (b) domicile;
- (c) residence;
- (d) nationality or citizenship;
- (e) consent;
- (f) appearance in an action;
- (g) doing business in the state;
- (h) an act done in the state;
- (i) causing an effect in the state by an act done elsewhere;
- (j) ownership, use or possession of a thing in the state;

(k) other relationships to the state which make the exercise of judicial jurisdiction reasonable.

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

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

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

Comment. Section 8005 is new. This section promotes use and enforceability of durable powers of attorney executed in other states.

See also Section 8029 ("durable power of attorney" defined).

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

A power of attorney that purports to have been made under the provisions of the Uniform Durable Power of Attorney Act or a substantially similar law of another state is governed by the law of that state and, if the power of attorney is durable where executed, it is durable and may be carried out and enforced in this state.

The State Bar Team wants to delete the language "if the power of attorney is durable where executed" from the earlier draft. See Exhibit 2, at p. 38. The Team also suggests two alternative rewritings. See Exhibit 1, at pp. 3-4. The rule concerning durability of the power where it is executed is based on choice of law rules, as discussed in the Staff Note following draft Section 8004. If the power is not durable where it is executed, is it sound policy to give the power a greater effect in California? The staff believes the redrafted section may answer the Team's concern.

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

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

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

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

CHAPTER 2. DEFINITIONS

§ 8020. Application of definitions [2402.010]

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

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

§ 8023. Attorney-in-fact [2402.030]

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

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

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

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

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

Staff Note. The State Bar Team suggests deletion of the reference to an agent delegated authority in subdivision (b). See Exhibit 2, at p. 40-41. The purpose of the language is to make clear that the statute applies to an agent delegated authority. This seems a useful notion to the staff and we do not see what harm it causes. Nor is it so clear to the staff, as it is to the Team, that generally agency law answers the question. We do not see any citation in the Team report to Civil Code agency rules. The real issue is the extent to which an attorney-in-fact should be able to delegate authority granted by the principal. This issue will arise later in the draft. If the attorney-in-fact cannot delegate, then this language is surplus, but if delegation is permissible, it seems useful to make clear that this statute sees the agent of the attorney-in-fact in the same light as the attorney-in-fact.

§ 8026. Community care facility

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

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

§ 8029. Durable power of attorney [2402.070]

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

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

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

Comment. Section 8029 is new. Subdivision (a) states the essential element of all durable powers of attorney, whether for property or for health care, and whether executed under California law or the law of a sister state or other jurisdiction. See Sections 8005 (powers of attorney executed under laws of other jurisdiction), 8222 (requirements for durable power of attorney for property), 2432 (requirements for durable power of attorney for health care). See also Sections 8032 ("durable power of attorney for health care" defined), 8038 ("durable power of attorney for property" defined), 8059 ("power of attorney" defined), 8068 ("principal" defined).

A single instrument may be both a durable power of attorney for health care, to the extent it authorizes an attorney-in-fact to make health care decisions, and a durable power of attorney for property, to the extent it authorizes the attorney-in-fact to make decisions concerning property. See Sections 8038 ("durable power of attorney for property" defined). Similarly, the instrument will be a durable power of attorney for personal care to the extent that it authorizes personal care decisions. See Sections 8035 ("durable power of attorney for personal care" defined). However, a multi-purpose power of attorney must comply with the requirements applicable to each type of power of attorney. See also Section 2433(a) (printed form of durable power of attorney for health care used by person without legal counsel may not cover other matters).

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

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

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

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

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

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

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

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

Staff Note. This definition and related definitions of "power of attorney for personal care" and "personal care," have been added to implement a Commission decision. See Minutes, April 1992, at p. 7, May 1992, at p. 8. For a useful background discussion by the State Bar Team, see Exhibit 2, at pp. 43-44.

The draft has not yet been restructured to use this term where appropriate or to provide any needed special rules. Its main purpose is to avoid the oddity of having personal care decisions falling under the term "power of attorney for property." It remains to be seen whether creation of a third category of power creates more problems than it solves. It was convenient to be able to define the scope of the health care power and put everything else into a catch-all power of attorney for property (and other matters). We may now have a new variant of the overlapping powers problem that the personal care power was designed to solve. For example, the Team suggests that repairing the principal's place of residence would be included in the personal care power. This authority is clearly within the scope of a property power. To the extent that the rules governing the instrument are consistent, the name will not matter, but this does illustrate the inescapability of fuzzy boundaries. The practical importance of this power of attorney will be shown in the development of a set of standard statutory powers and duties that may be incorporated by reference.

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

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

Comment. Section 8038 is new. This section provides a convenient way to identify durable powers of attorney other than durable powers of attorney for health care or for personal care and recognizes a term used in practice. See, e.g., 1991 California Durable Power of Attorney Handbook § 1.1, at 2 (Cal. Cont. Ed. Bar). For provisions concerning durable powers of attorney for property, see Sections 8200-8460, 2450-2499.5, 8950-8962. As to multi-purpose powers of attorney, see the Comment to Section 8029. See also Sections 8029 ("durable power of attorney" defined), 8032 ("durable power of attorney for health care" defined), 8035 ("durable power of attorney for personal care" defined), 8065 ("power of attorney for property" defined).

§ 8041. Health care [2402.130]

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

Comment. The first part of Section 8041 incorporates the definition provided by Section 2430(b). See Comment to Section 2430(b). [The reference to postdeath decisions has been added for consistency with the authority provided in Section 2434 (attorney-in-fact's authority to make health care decisions).]

§ 8044. Health care decision [2402.150]

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

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

Staff Note. The language from "decision" to the end of the section has been added at the suggestion of the State Bar Team. See Exhibit 2, at pp. 44-45.

§ 8047. Health care provider

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

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

§ 8050. Nondurable power of attorney [2402.190]

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

Comment. Section 8050 is new. Former law used a variety of terms to describe powers of attorney that were not durable. See, e.g., former Sections 2403, 2410(c), 2512, 2514(a)(2). See also 8032 ("durable power of attorney for health care" defined), 8059 ("power of attorney" defined).

Staff Note. *The State Bar Team would delete this definition, as discussed in Memorandum 92-50. See Exhibit 2, at p. 45. Note that some members of the Team were of the opinion that the entire power of attorney law should be restated because "some practitioners may be confused about which body of law applies in a particular situation, e.g., general agency law or the durable power of attorney law." Id.*

§ 8053. Person

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

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

§ 8056. Personal care [new]

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

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

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

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

§ 8059. Power of attorney [2402.210]

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

(b) A power of attorney may be durable or nondurable, may grant powers with regard to property or health care or personal care, or any or all of these matters, and may be executed on a statutory or other form that satisfies the requirements of this part.

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

exercise the voting rights is subject to all the provisions of law applicable to that proxy and the proxy is not a power of attorney subject to this part.]

Comment. Subdivision (a) of Section 8059 restates the first sentence of former Section 2410(c) without substantive change. Where a power of attorney authorizes the attorney-in-fact to take action both with respect to property matters and health care decisions, the provisions in this part relating to powers of attorney for property apply to the extent that the power of attorney concerns property and related matters and the provisions in this part that apply to durable powers of attorney for health care apply to the extent that the power of attorney relates to health care decisions. For relevant statutory forms, see Sections 2475 *et seq.* (Uniform Statutory Form Power of Attorney), 2500 *et seq.* (Statutory Form Durable Power of Attorney for Health Care).

Subdivision (b) continues former Section 2400.5 without substantive change and supersedes the second sentence of former Section 2410(c). For the rules applicable to proxy voting in business corporations, see Corp. Code § 705. For other statutes dealing with proxies, see Corp. Code §§ 178, 702, 5069, 5613, 7613, 9417, 12405, 13242; Fin. Code §§ 5701, 5702, 5710, 6005. See also Section 2356(d) (proxy under general agency rules).

See also Sections 8023 ("attorney-in-fact" defined), 8029 ("durable power of attorney" defined), 8032 ("durable power of attorney for health care" defined), 8050 ("nondurable power of attorney" defined).

Staff Note. Subdivisions (a) and (b) of this section have been reorganized in part as suggested by the State Bar Team. See Exhibit 2, at pp. 45-46. The Team has also suggested deleting or removing the provision relating to proxies to another location as a separate section. See Exhibit 2, at p. 46. If the provision is obsolete or unneeded, the staff thinks this is a good idea to delete it. At a minimum, we would relocate the provision and we have places brackets around the provision as a reminder to find a better place for it.

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

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

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

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

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

§ 8065. Power of attorney for property [2402.230]

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

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

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

§ 8068. Principal [2402.250]

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

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

Staff Note. The State Bar Team would add "granting powers to an attorney-in-fact" at the end of this section. See Exhibit 2, at p. 47. This would not be incorrect, but the definition of power of attorney already contains this element.

§ 8071. Residential care facility for the elderly

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

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

§ 8074. Springing power of attorney [2402.290]

8074. "Springing power of attorney" means a power of attorney stating that it becomes effective at a specified future time or on the occurrence of a specified event or contingency including, but not limited to, the subsequent incapacity of the principal. A springing power of attorney may be a durable power of attorney or a nondurable power of attorney.

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

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

8077. "Statutory form durable power of attorney for health care" means a durable power of attorney for health care that satisfies the requirements of Chapter 3 (commencing with Section 2500) of Title 4.

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

§ 8080. Statutory form power of attorney [2402.330]

8080. (a) "Statutory form power of attorney" means a power of attorney for property that satisfies the requirements of Chapter 2 (commencing with Section 2475) of Title 4.

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

Comment. Section 8080 is new. See also Section 8065 ("power of attorney for property" defined). Subdivision (b) recognizes a variant name the form may take. See Section 2475 (statutory form power of attorney).

§ 8083. Third person [2402.350]

8083. "Third person" means any person, other than the principal or attorney-in-fact, who acts on a request from, contracts with, relies on, or otherwise deals with an attorney-in-fact, and includes a person described as a third party.

Comment. Section 8083 is a new provision drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.703(10) (Vernon 1990). The reference to a "third party" is included for consistency with language used elsewhere, such as the statutory form power of attorney. See Sections 2475 & 2476.

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

CHAPTER 3. PROVISIONS COMMON TO POWERS OF ATTORNEY

Staff Note. The previous draft treated the property and health care powers separately. The Commission has decided to attempt to unify the law to the extent practicable, such as with regard to execution requirements, capacity, modification and termination, successor attorneys-in-fact, etc. This approach requires substantial restructuring, and the draft will be somewhat disorganized in the interim.

The common provisions are tentatively located in the general provisions title, but if a substantial amount of material can be placed in this chapter, we may want to make it a separate title.

TITLE 2. POWERS OF ATTORNEY FOR PROPERTY

CHAPTER 1. GENERAL PROVISIONS

§ 8200. Application of title [2405.010]

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

Comment. Section 8200 provides the scope of this title. If a section in this title refers to a "power of attorney," it applies to both durable and nondurable powers of attorney for property. If application is limited, the section will refer to either a durable power of attorney or a nondurable power of attorney. See, e.g., Sections 8222 (requirements for durable power of attorney for property), 8232 (termination of nondurable power of attorney for property). This title applies to statutory form powers of attorney since they are a variety of powers of attorney for property. However, this title does not apply to statutory form powers of attorney to the extent Chapter 2 (commencing with Section 2475) of Title 4 provides a special rule. See Section 2480 (general provisions applicable to statutory form) & Comment.

The provisions of this title do not apply to durable powers of attorney for health care, which are governed by Title 3 (commencing with Section 2430). See also Sections 2500-2508 (statutory form durable power of attorney for health care). In this respect, Section 8200 restates the last sentence of former Section 2402(a) without substantive change.

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

Staff Note. *The State Bar Team would eliminate the reference to nondurable powers. See Exhibit 2, at p. 49. This issue is discussed in Memorandum 92-50.*

§ 8202. Form of durable power of attorney after January 1, 1993 [2405.030]

8202. Notwithstanding Section 8224:

(a) Except as provided in subdivision (b), on and after January 1, 1993, a printed form of a durable power of attorney may be sold or otherwise distributed if it satisfies the requirements of former Section 2510.5.

(b) A printed form of a durable power of attorney printed on or after January 1, 1986, that is sold or otherwise distributed in this state for use by a person who does not have the advice of legal counsel shall comply with former Section 2510 or with Section 8224.

(c) A durable power of attorney for property executed on or after January 1, 1993, using a printed form that complies with subdivision (b) of former Section 2400, as originally enacted, or with former Section 2510, is as valid as if it had been executed using a printed form that complies with Section 8224.

Comment. Section 8202 supersedes former Section 2510.5. This section permits continued use of printed forms that comply with former law, specifically former Section 2400 (as enacted by 1981 Cal. Stat. ch. 511, § 4) and former Section 2510 (as enacted by 1985 Cal. Stat. ch. 403, § 12). Subdivision (c) permits use of the earlier forms after January 1, 1993, the operative date of Section 8224. This section, like its predecessor, former Section 2510.5,

avoids the need to discard existing printed forms on the operative date of this part. However, pursuant to subdivision (b), a form printed on or after January 1, 1993, may be sold or distributed in this state for use by a person who does not have the advice of legal counsel only if the form satisfies the requirements of former Section 2510 or Section 8224. Both provisions are acceptable because the wording changes are nonsubstantive. See Comment to Section 8224.

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

§ 8220. Creation of power of attorney [2410.010]

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

Comment. Section 8220 provides the elements essential to creation of a power of attorney. The reference to the capacity to contract continues the requirement of general agency law in Section 2296. As a general rule, a power of attorney is not required to be acknowledged, but if the attorney-in-fact under the power is expected to handle real property matters, acknowledgment is essential. See also Section 2475 (acknowledgment of Uniform Statutory Form Power of Attorney).

For provisions concerning the duties and powers of an attorney-in-fact, see Sections 8350-8407. See also Sections 8023 ("attorney-in-fact" defined), 8065 ("power of attorney for property" defined), 8068 ("principal" defined).

§ 8221. Permissible purposes [2410.020]

8221. In a power of attorney for property, a principal may delegate to an attorney-in-fact general powers to act in a fiduciary capacity on the principal's behalf with respect to all lawful subjects and purposes or with respect to one or more express subjects or purposes.

Comment. Section 8221 is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.710(1) (Vernon 1990). This section is consistent with the general agency rules in Sections 2304 and 2305.

For provisions concerning the duties and powers of an attorney-in-fact, see Sections 8350-8407. See also Sections 8023 ("attorney-in-fact" defined), 8065 ("power of attorney for property" defined), 8068 ("principal" defined).

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

8222. A durable power of attorney for property is a power of attorney by which a principal designates another person as his or her attorney-in-fact in writing and the power of attorney contains any of the following statements:

(a) "This power of attorney shall not be affected by subsequent incapacity of the principal."

(b) "This power of attorney shall become effective upon the incapacity of the principal."

(c) Similar words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding the principal's subsequent incapacity or upon the occurrence of the principal's incapacity.

Comment. Section 8222 restates former Section 2400 without substantive change. This section refers to a durable power of attorney for property, recognizing that this title does not apply to durable powers of attorney for health care. See Sections 8200 (application of title), 8600-8659 (durable powers of attorney for health care).

Section 8222 is similar to the official text of Section 1 of the Uniform Durable Power of Attorney Act (1984), Uniform Probate Code Section 5-501 (1990). See Section 8001 (construction of provisions drawn from uniform acts). The reference in the Uniform Act to the principal's "disability" is omitted. Under Section 8232, it is the principal's incapacity to contract which would otherwise terminate the power of attorney. In addition, the phrase "or lapse of time" has not been included in the language set forth in subdivision (a) of Section 8222 because it is unnecessary. As a matter of law, unless a durable power of attorney states an earlier termination date, it remains valid regardless of any lapse of time since its creation. See Section 8231(a)(1) (termination of power of attorney at end of stated term).

The last clause in subdivision (c) concerning the occurrence of the principal's incapacity has been added for consistency with the language in subdivision (b) which relates to springing powers of attorney.

See also Sections 8023 ("attorney-in-fact" defined), 8029 ("durable power of attorney" defined), 8059 ("power of attorney" defined), 8068 ("principal" defined), 8074 ("springing power of attorney" defined).

Staff Note. Since this is the basic provision of the Uniform Durable Power of Attorney Act, the staff has not altered the wording to the extent we normally would. For example, "shall be exercisable" in subdivision (c) would usually be changed to "may be exercised" or "is exercisable." However, one of the drafting compromises made in preparation of this statute is to preserve language of uniform acts where practicable, even though in this case the act has been reorganized. See Section 8001 for a list of sections that comprise the Uniform Durable Power of Attorney Act. We imagine that there is some benefit in retaining the flavor of the uniform act, if not its exact wording and structure, in the context of multistate transactions.

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

8223. All acts done by an attorney-in-fact pursuant to a durable power of attorney for property during any period of incapacity of the principal have the same effect and inure to the benefit of and bind the principal and the principal's successors in interest as if the principal had capacity, notwithstanding any incapacity of the principal or any uncertainty as to whether the principal is dead or alive.

Comment. Section 8223 continues former Section 2401 without substantive change, except for the addition of the last clause which is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.705(2) (Vernon 1990). The reference to a "durable power of attorney for property" has been substituted for the former reference to a "durable power of attorney."

Section 8223 is similar to the second sentence of the official text of Section 2 of the Uniform Durable Power of Attorney Act (1987), Uniform Probate Code Section 5-502 (1990). See Section 8001 (construction of provisions drawn from uniform acts). This section omits the reference to the principal's "disability" found in the uniform act. Under Section 8232, it is the principal's incapacity to contract which would otherwise terminate the power of attorney.

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

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

8224. (a) This section does not apply to either of the following:

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

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

(b) A printed form of a durable power of attorney for property that is sold or otherwise distributed in this state for use by a person who does not have the advice of legal counsel shall contain, in not less than 10-point boldface type or a reasonable equivalent thereof, the following warning statement:

WARNING TO PERSON EXECUTING THIS DOCUMENT

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

This document may provide the person you designate as your [attorney-in-fact] with broad powers to manage, dispose, sell, and convey your real and personal property and to borrow money using your property as security for the loan.

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

You have the right to revoke or terminate this power of attorney.

If there is anything about this form that you do not understand, you should ask a lawyer to explain it to you.

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

Comment. Section 8224 restates former Section 2510 without substantive change. The exclusion of durable powers of attorney for health care in the former provision is omitted as unnecessary. See Section 8038 ("durable power of attorney for property" defined), 8065 ("power of attorney for property" defined). Other provisions prescribe the contents of the warning statements for particular types of durable powers of attorney. See Sections 2475 (Uniform Statutory Form Power of Attorney), 2433 (durable power of attorney for health care), 2500 (statutory form durable power of attorney for health care). See also Section 2433(a) (introductory clause) (printed form of a durable power of attorney for health care to provide only authority to make health care decisions).

Section 8202 permits a printed form to be used after January 1, 1993, if the form complies with prior law. A form printed after January 1, 1986, may be sold or otherwise distributed in this state only if it complies with the requirements of Section 8224 (or its predecessor, former Section 2510). See Section 8202(b).

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

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

8225. (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 8225 continues former Section 2402(b) without substantive change. This section is drawn from Section 3(b) of the Uniform Durable Power of Attorney Act (1979), Uniform Probate Code Section 5-503 (1990), but has been revised to make it consistent with the general provision for nomination of a conservator in Probate Code Section 1810. See Section 8001 (construction of provisions drawn from uniform acts). The second sentence of Section 3(b) of the Uniform Durable Power of Attorney Act (most recent nomination in a durable power shall be given effect) is not adopted in California. Thus, the principal may make a later nomination in a writing which is not a durable power of attorney and, if at that time the principal has sufficient capacity to form an intelligent preference (Prob. Code § 1810), the later nomination will supersede an earlier nomination made in a durable power. This is consistent with the purpose and effect of Probate Code Section 1810.

See also Section 8029 ("durable power of attorney" defined), 8068 ("principal" defined).

Staff Note. Existing law is not clear to what extent this provision applies to durable powers of attorney for health care. Subdivision (a) of Civil Code Section 2402 excludes health care powers, but subdivision (b), from which draft Section 8225 comes, is silent. From this one could draw an implication that the nomination provision of subdivision (b) applies to both types of durable powers.

In the case of a conservator, it makes no difference, because this section validates any nomination of a guardian or conservator that complies with Probate Code Section 1810, whether in a durable power or some other writing. The statutory form durable power of attorney for health care provides specifically in paragraph 10 for nomination of a conservator of the person.

May a guardian be nominated in a durable power of attorney for health care? Perhaps this is a trick question. A document drafted as a durable power of attorney for health care may name a guardian and that part of the instrument could be considered a durable power of attorney for property since it would satisfy all applicable requirements. (This would not be true for a printed form, however, which may only cover health care decisions.)

Note that Section 8225 does not specifically authorize nomination in a nondurable power of attorney, although as a writing covered by subdivision (b), the nomination of a conservator of the estate would be effective under Section 1810.

We can conclude that draft Section 8225 is not an example of ideal drafting. The reason it remains in this form, however, is that it is existing law and is part of the Uniform Durable Power of Attorney Act.

§ 8226. Springing power of attorney [2410.070]

8226. (a) In a springing power of attorney, the principal may designate one or more persons who, by a written declaration under penalty of perjury, have the power to determine conclusively that the specified event or contingency has occurred. The principal may designate the attorney-in-fact or another person to perform this function, either alone or jointly with other persons.

(b) A springing power of attorney containing the designation described in subdivision (a) becomes effective when the person or persons designated in the

power of attorney execute a written declaration under penalty of perjury that the specified event or contingency has occurred, and any person may act in reliance on the written declaration without liability to the principal or to any other person, regardless of whether the specified event or contingency has actually occurred.

(c) This section applies to a power of attorney whether executed before, on, or after January 1, 1991, if the power of attorney contains the designation described in subdivision (a).

Comment. Section 8226 continues former Section 2514(b)-(d) without substantive change. This section is intended to make springing powers of attorney more effective by providing a mechanism for conclusively determining that the triggering event or contingency has occurred. See Section 8074 ("springing power of attorney" defined). Subdivision (a) makes clear that the principal may give the agent (or one or more other persons) the power to determine by written declaration under penalty of perjury that the event or contingency specified in the springing power of attorney has occurred so that the power of attorney is effective. This section does not apply to or affect springing powers of attorney containing different procedures for determining whether the triggering event or contingency has occurred. This section applies only where the terms of subdivision (a) are satisfied.

Subdivision (b) makes clear that the written declaration of the persons designated in the power of attorney is conclusive, even though it may turn out that the event or contingency did not occur, or that circumstances have returned to normal. The purpose of the conclusive written declaration is to permit other persons to act in reliance on the written declaration without liability.

A springing power of attorney may or may not be a durable power of attorney. A springing power that takes effect on the occurrence of a contingency other than the incapacity of the principal (such as, for example, the principal's failure to return from a vacation or business trip by a certain date) need not be a durable power of attorney. However, a springing power of attorney that takes effect upon the subsequent incapacity of the principal is necessarily a durable power of attorney, and the other rules concerning durable powers of attorney are applicable. See, e.g., Section 8222 (durable power of attorney for property).

Subdivision (c) makes clear that this section applies to powers of attorney executed before the operative date of this section if they contain the designation provided in subdivision (a).

See also Sections 8050 ("nondurable power of attorney" defined), 8059 ("power of attorney" defined), 8068 ("principal" defined).

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

§ 8227. Lapse of time [2410.080]

8227. Unless a power of attorney for property states a time of termination, the power of attorney is exercisable notwithstanding any lapse of time since the execution of the power of attorney.

Comment. Section 8227 is the same in substance as the second sentence of the official text of Section 2 of the Uniform Durable Power of Attorney Act (1987), Uniform Probate Code Section 5-502 (1990). See Section 8001 (construction of provisions drawn from uniform acts). See also Section 8065 ("power of attorney for property" defined).

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

8228. A power of attorney, whether durable or nondurable, may by its terms apply to all or a portion of the real and personal property of the principal, whether

owned by the principal at the time of the execution of the power of attorney or thereafter acquired or whether located in this state or elsewhere, without the need for a description of each item or parcel of property.

Comment. Section 8228 continues former Section 2513 without substantive change. This section makes clear that a power of attorney may by its terms apply to all real property of the principal, including after-acquired property, without the need for a specific description of the real property to which the power applies. This section is consistent with Section 2499 (after-acquired property under statutory form power of attorney).

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

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

8229. The principal and the person designated as the attorney-in-fact may enter into a written agreement that sets forth their duties and liabilities as between themselves and their successors and that expands or limits the application of this title, except as provided in Section 8406.

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

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

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

8230. Except as provided by Section 8312, as between the principal and attorney-in-fact, a power of attorney for property may be modified or terminated by the principal as follows:

- (a) In accordance with the terms of the power of attorney.
- (b) When the principal informs the attorney-in-fact, orally or in writing, that the power of attorney is modified or terminated or when and under what circumstances it is modified or terminated.
- (c) When the principal's legal representative, with approval of the court, informs the attorney-in-fact in writing that the power of attorney is modified or terminated or when and under what circumstances it is modified or terminated.
- (d) When a written notice of modification or termination of the power of attorney is filed by the principal or the principal's legal representative for record in the office of the recorder of deeds in the city or county of the principal's domicile or, if the principal is a nondomiciliary of this state, in the jurisdiction of the attorney-in-fact's domicile last known to the principal, or in the jurisdiction where any property specifically referred to in the power of attorney is located.

Comment. Section 8230 is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.717(1) (Vernon 1990). This section provides that a power of attorney terminates on the date provided in the instrument or on the oral or written advice to the attorney-in-fact that the attorney-in-fact's powers are terminated. An attorney-in-fact can be simply fired as with any other employee or agent or the attorney-in-fact can be told that his or her authority has been changed, and no writing is required. To deal with the situation

where the attorney-in-fact cannot be found for the communication, subdivision (d) provides for filing a notice of modification or termination with the recorder. The language is drafted in general terms since it is intended to apply to California recorders as well as similar officials in other jurisdictions. The act of recording imposes constructive knowledge on the attorney-in-fact for all documents recorded by the principal that relate to the power and for knowing whether the principal is alive. This corresponds with the duty of attorneys-in-fact to keep in contact with their principal. See Section 8356. For other events that terminate a power of attorney, see Sections 8231, 8232. For events that terminate the authority of an attorney-in-fact, see Sections 8308, 8309.

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

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

8231. (a) Except as provided in Section 8312 and subject to subdivision (b), a power of attorney for property, whether durable or nondurable, is terminated by any of the following events:

(1) Expiration of the term of the power of attorney, except as provided in Section 8307.

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

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

(4) Death of the principal.

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

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

Comment. Section 8231 is drawn from the general agency rules provided in Sections 2355 and 2356. See Section 2360 (Sections 2355 & 2356 inapplicable to powers of attorney). This section continues the substance of former law as to termination of powers of attorney. For a special rule as to termination of nondurable powers of attorney for property, see Section 8232.

The first clause of subdivision (a) recognizes the special rule applicable to a power of attorney coupled with an interest provided in Section 8312. Subdivision (a)(1) is the same as Section 2355(a), with the exception of the special case where a principal is missing or held captive in a foreign country as provided in Section 8307. Subdivision (a)(2) is the same as Section 2355(b), but the reference to fulfillment of the purpose of the power of attorney is new. Subdivision (a)(3) is the same as Section 2356(a)(1). Subdivision (a)(4) is the same as Section 2356(a)(2). Subdivision (a)(5) is generalized from Section 2355(c)-(f). See Section 8308 (termination of attorney-in-fact's authority).

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

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

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

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

(b) An attorney-in-fact or third person who does not have notice of the incapacity of the principal in the case of a nondurable power of attorney for property is protected from liability as provided in Chapter 4 (commencing with Section 8450).

Comment. Subdivision (a) of Section 8232 restates the general agency rule in Section 2356(a)(3) without substantive change. The first clause of subdivision (a) recognizes the special rule applicable to a power of attorney coupled with an interest provided in Section 8312. For other events that terminate a nondurable power of attorney for property, see Section 8231.

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

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

Staff Note. As noted, this section preserves the rule that a nondurable power of attorney terminates upon the incapacity of the principal. This sounds good as a general rule, but can be difficult to apply in cases where the capacity of the principal is in doubt or subject to variation. It also operates harshly, since, in theory anyway, a temporary incapacity of the principal would wipe out any nondurable power of attorney, even though the principal could execute the same power after restoration to capacity. Perhaps it is not worth dealing with, but the Commission may wish to consider an alternative approach, such as the following from the Missouri Durable Power of Attorney Law (Mo. Ann. Stat. § 404.714(6) (Vernon 1990)):

6. The authority of an agent, under a power of attorney that is not durable, is suspended during any period that the principal is disabled or incapacitated to the extent that the principal is unable to receive or evaluate information or to communicate decisions with respect to the subject of the power of attorney; and an agent exercising authority under a power of attorney that is not durable shall not act in the principal's behalf during any period that the agent knows the principal is so disabled or incapacitated.

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

8233. (a) A certified copy of a power of attorney for property has the same force and effect as a power of attorney bearing the signature of the principal.

(b) A copy of a power of attorney for property may be certified by an official of a state or of a political subdivision of a state who is authorized to make certifications. The certification shall state that the certifying official has examined an original power of attorney and the copy and that the copy is a true and correct copy of the original power of attorney.

Comment. Section 8233 is drawn from Minnesota law. See Minn. Stat. Ann. § 523.06 (West Supp. 1990). This section facilitates use of a power of attorney executed in this state as well as powers of attorney executed in other states. See also Sections 8065 ("power of attorney for property" defined), 8068 ("principal" defined).

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

Article 1. Attorneys-in-Fact

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

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

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

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

Staff Note. Although durable powers of attorney are analogized to conservatorships of the estate, this section would seem to provide a broader class of potential attorneys-in-fact than could be appointed conservator of the principal's estate. The staff considered suggesting a rule that any person who is qualified to be appointed as a conservator of the estate of the principal would be qualified to be an attorney-in-fact. But this rule would probably result in undue restrictions on the types of entities that could serve as attorneys-in-fact. There is some appeal to the notion that only fiduciary-type artificial persons should serve as attorneys-in-fact under durable powers of attorney, this has not apparently been the law in California, and would be overly restrictive in the case of nondurable powers. On the other hand, it is reported that "[p]ractically speaking, the principal may be unable to find an institution that is willing to serve as an agent" under a durable power of attorney for property. See *Montgomery & Wright, Durable Powers of Attorney for Property Management, 1991 California Durable Power of Attorney Handbook* § 2.46, at 56 (Cal. Cont. Ed. Bar).

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

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

Comment. Section 8301 is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.707(4) (Vernon 1990). For provisions governing immunities of third persons, see Section 8450 *et seq.*

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

§ 8302. Multiple attorneys-in-fact [2415.030]

8302. (a) A principal may designate more than one attorney-in-fact in one or more powers of attorney for property and may provide that the 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) Unless otherwise provided in the power of attorney:

(1) A power vested in two or more attorneys-in-fact may only be exercised by their unanimous action.

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

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

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

(d) A co-attorney-in-fact is not liable for the actions of other co-attorneys-in-fact.

Comment. Subdivision (a) of Section 8302 is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.707(1) (Vernon 1990). The default rule requiring unanimous action in subdivision (b)(1) is the same in substance as the rule applicable under the statutory form power of attorney. See Section 2475. Subdivision (b) is comparable to the rules applicable to multiple trustees under Probate Code Sections 15620-15622. Subdivision (c) is included for consistency with Section 8303(c) (capacity of successor attorney-in-fact). Subdivision (d) is comparable to the general rule as to cotrustees in Probate Code Section 16402(a).

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

Staff Note. As to subdivision (d), the Trust Law provides a lot more detail, making the general rule subject to exceptions where the cotrustee has participated in a breach, improperly delegated administration of the trust, approved, concealed, or acquiesced in the breach, negligently enabled the breach, or neglected to take reasonable steps to remedy the breach. We have chosen just to state the general rule in this section. Should more detail be added?

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

8303. (a) The principal in a power of attorney for property may designate one or more qualified persons as successor attorneys-in-fact to exercise the authority granted in the power of attorney in the order designated in the authority of a prior designated attorney-in-fact terminates.

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

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

(d) A successor attorney-in-fact is not liable for the actions of the predecessor attorney-in-fact.

Comment. Section 8303 is drawn in part from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.723(2)-(3) (Vernon 1990). For events that terminate the

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

A successor attorney-in-fact is the same as an original attorney-in-fact under this part. See Section 8023(b) ("attorney-in-fact" includes successor or alternate attorney-in-fact). See also Sections 8038 ("durable power of attorney for property" defined), 8050 ("nondurable power of attorney" defined), 8065 ("power of attorney for property" defined), 8068 ("principal" defined).

Staff Note. As to subdivision (d), the Trust Law provides more detail, making the general rule subject to exceptions where the successor knowingly permits the breach to continue, neglects to take steps to compel delivery from the predecessor, or neglects to take reasonable steps to remedy the breach. We have chosen just to state the general rule in this section as in the previous section. Should more detail be added?

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

8304. Subject to the power of attorney and any separate agreement, an attorney-in-fact is entitled to reasonable compensation for services rendered to the principal as attorney-in-fact and to reimbursement for reasonable expenses incurred as a result of acting as attorney-in-fact.

Comment. Section 8304 is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.725 (Vernon 1990). This provision is comparable to Probate Code Sections 15681 (trustee's compensation) and 15684(a) (reimbursement for trustee's expenses). In many situations a relative acting as an attorney-in-fact under a durable power of attorney expects to act for the principal as an accommodation. Normally, while the principal is not disabled, such service will be infrequent and will not involve substantial time. However, with the prospect that if the principal becomes disabled or incapacitated, substantial time, effort, and expense may be required of the attorney-in-fact and any successor attorneys-in-fact extending over a long period of time, compensation may be important. A definite understanding regarding compensation may be included in the power of attorney or in a separate agreement. Reimbursement of expenses would be expected to include the cost of bookkeeping, tax, and legal services incurred by the attorney-in-fact in performing duties on the principal's behalf. It would also include the cost of preparing an accounting and any travel or personal expense incurred by the attorney-in-fact.

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

Staff Note. This section may be a departure from the expectations of some authorities. For example, the CEB Handbook contains the following:

An agent rarely receives compensation, probably because family members and close family friends are usually appointed. Unless the document specifically authorizes compensation, the agent should never presume to use the principal's assets for compensation, because this could be construed to fall within the self-dealing prohibitions of Prob C § 16004.

Montgomery & Wright, Durable Powers of Attorney for Property Management, 1991 California Durable Power of Attorney Handbook § 2.51, at 58 (Cal. Cont. Ed. Bar).

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

8305. (a) An attorney-in-fact from time to time may revocably delegate any or all of the powers granted in a power of attorney for property, whether durable or nondurable, to one or more qualified persons, subject to any directions or limitations of the principal expressed in the power of attorney, but the attorney-

in-fact making the delegation remains responsible to the principal for the exercise or nonexercise of the powers delegated.

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

Comment. Section 8305 is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.723(1), (3) (Vernon 1990). This section is consistent with parts of the general agency rules on delegation in Section 2349, but permits a broader delegation than the general agency rules. Delegation under this section may be particularly useful under a durable power of attorney where the principal is incapacitated and the attorney-in-fact needs to delegate authority under the power during a planned absence. However, the delegating attorney-in-fact remains responsible for the acts of subagents. If the principal is available and not incapacitated, the attorney-in-fact is expected to consult about any delegation. See Section 8356 (consultation with principal).

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

Staff Note. *The Trust Law takes a different approach to the liability of a trustee to beneficiaries for acts of attorneys-in-fact employed by the trustee. Probate Code Section 16401 provides in some detail that a trustee is not liable unless the breach has occurred where the trustee has the power to direct the act of the attorney-in-fact, where the trustee made an improper delegation, where reasonable care was not used in selecting the attorney-in-fact, where supervision of the attorney-in-fact was improper, where the trustee concealed the acts of the attorney-in-fact, or where the trustee neglects to take reasonable steps to compel redress of the attorney-in-fact's wrongs. If desired, we could adapt this sort of approach to this law. But we wonder if such formal rules are suited to powers of attorney. Perhaps powers of attorney have become more formal and extensive, and need to be treated more like trusts.*

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

8306. (a) If, following execution of a durable power of attorney for property, a court of the principal's domicile appoints a conservator of the estate, guardian of the estate, or other fiduciary charged with the management of all of the principal's property or all of the principal's property except specified exclusions, the attorney-in-fact is accountable to the fiduciary as well as to the principal. Except as provided in subdivision (b), the fiduciary has the same power to revoke or amend the durable power of attorney that the principal would have had if he or she were not incapacitated.

(b) If a conservator is appointed by a court of this state, the conservator can revoke or amend the durable power of attorney for property only if the court in which the conservatorship proceeding is pending has first made an order authorizing or requiring the fiduciary to revoke or amend the durable power of attorney and the revocation or amendment is in accord with the order.

Comment. Section 8306 continues former Section 2402(a) without substantive change.

Subdivision (a) is substantially the same as the official text of Section 3(a) of the Uniform Durable Power of Attorney Act (1979), Uniform Probate Code Section 5-503(a) (1990), with several changes. "Conservator of the estate" has been substituted for "conservator." This change is consistent with the concept of the Uniform Act that the fiduciary to whom the attorney-in-fact under a durable power is accountable and who may revoke or amend the

durable power includes only a fiduciary charged with the management of the principal's estate and does not include a person appointed only to exercise protective supervision over the person of the principal. See Unif. Durable Power of Attorney Act § 3 comment (1979); Unif. Prob. Code § 5-503 comment (1990). The reference in the Uniform Act to the principal's "disability" is not included. This omission conforms Section 8306 to other provisions of this title. The authority of the fiduciary to revoke or amend is the same as that provided by the official text of Section 3(a) of the Uniform Durable Power of Attorney Act, except for the requirement in subdivision (b) of prior court authorization for a California conservator to revoke or amend the power.

The exclusion of durable powers of attorney for health care from the coverage of this provision in former Section 2402(a) is omitted because it is unnecessary. This title applies only to powers of attorney for property. See Section 8200 (application of title).

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

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

8307. (a) If the principal is not available to communicate in person with the attorney-in-fact either because (1) the principal is missing under such circumstances that it is not known whether the principal is alive or dead or (2) the principal is captured, interned, besieged, or held hostage or prisoner in a foreign country, then the authority of an attorney-in-fact under a power of attorney for property, whether durable or nondurable, continues and is not terminated.

(b) The attorney-in-fact may continue to exercise the authority conferred by the power of attorney as provided in subdivision (a) until the principal returns, is publicly declared dead by a domestic or foreign governmental agency, or is presumed dead pursuant to Section 667 of the Evidence Code or a similar law of the place of the principal's last known domicile.

(c) The attorney-in-fact's authority continues as provided in this section notwithstanding a termination date in the power of attorney.

(d) This section does not apply in the case of a power of attorney executed by an absentee that is governed by Section 3720 of the Probate Code.

Comment. Section 8307 is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.714(3) (Vernon 1990). This section provides for a continuation of the attorney-in-fact's powers when the attorney-in-fact cannot communicate with the principal because the principal's whereabouts is unknown or the principal is being held against his or her will in a foreign country.

As provided in subdivision (c), the attorney-in-fact's authority continues under this section notwithstanding an earlier termination date set out in the power of attorney. Of course, if the purpose of the power of attorney has been fulfilled, this section would not have any effect.

See also Sections 8023 ("attorney-in-fact" defined), 8029 ("durable power of attorney" defined), 8050 ("nondurable power of attorney" defined), 8059 ("power of attorney" defined), 8068 ("principal" defined).

Staff Note. This section could have even broader effect and make springing powers of attorney that are contingent on incapacity come into force when the principal is missing, unless the power provides otherwise.

We have left Probate Code Section 3720 pertaining to powers of attorney executed by federal "absentees" where it is, located with other provisions concerning management of

property of absentees. Section 3720 could be moved to this part of the draft statute. It provides:

3720. If an absentee executed a power of attorney that expires during the period that occasions absentee status, the power of attorney continues in full force and effect until 30 days after the absentee status is terminated. Any person who acts in reliance upon the power of attorney when accompanied by a copy of a certificate of missing status is not liable for relying and acting upon the power of attorney.

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

8308. (a) Except as provided in Section 8312 and subject to subdivision (b), the authority of an attorney-in-fact under a power of attorney for property, whether durable or nondurable, is terminated by any of the following events:

- (1) Termination of the power of attorney.
- (2) Renunciation by the attorney-in-fact.
- (3) Incapacity of the attorney-in-fact.
- (4) Removal of the attorney-in-fact by the principal or by court order.
- (5) Death of the attorney-in-fact.

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

Comment. Section 8308 is drawn in part from the general agency rules provided in Section 2355. See Section 2360 (Section 2355 inapplicable to powers of attorney). This section thus continues the substance of former law as to termination of the authority of attorneys-in-fact under powers of attorney.

The first clause in subdivision (a) recognizes the special rule applicable to a power of attorney coupled with an interest as provided in Section 8312. Subdivision (a)(1) provides that the authority of an attorney-in-fact necessarily ceases when the underlying power of attorney is terminated. See Section 8231 (termination of power of attorney for property). In a case where the principal is missing or held captive in a foreign country, the attorney-in-fact's authority does not terminate, as provided in Section 8307. Subdivision (a)(2) is the same as Section 2355(b), but the reference to fulfillment of the purpose of the power of attorney is new. Subdivision (a)(3) is the same as Section 2355(e). Subdivision (a)(5) is the same as Section 2355(c).

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

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

§ 8309. Effect of dissolution or annulment [2415.100]

8309. Unless the power of attorney expressly provides otherwise:

(a) If, after executing a power of attorney for property, the principal's marriage is dissolved or annulled, the dissolution or annulment revokes any designation of the former spouse as an attorney-in-fact for the principal. If the attorney-in-fact's authority is terminated solely by this subdivision, it is revived by the principal's remarriage to the attorney-in-fact.

(b) In a case where the principal has become an absentee as defined in Section 1403 of the Probate Code, if, after executing a power of attorney for property, the principal's marriage to the attorney-in-fact is dissolved or annulled, or the judicial or legal separation of the principal and attorney-in-fact is declared, or the attorney-in-fact commences an action for such relief, the attorney-in-fact's authority is terminated. If the attorney-in-fact's authority is terminated solely by this subdivision, it is revived by the principal's remarriage to or reconciliation with the attorney-in-fact.

Comment. Subdivision (a) of Section 8309 is generalized from Section 2437(e) (revocation of durable power of attorney for health care on dissolution or annulment) and part of former subdivision (f) of Section 2355 (revocation in case federal absentee). The policy of subdivision (a) is comparable to Probate Code Section 6122 (revocation of provisions in will after dissolution or annulment).

Subdivision (b) continues part of former subdivision (f) of Section 2355 relating to the effect of a separation and filing a petition for dissolution or annulment in the case of federal absentees. The reference to contrary provisions "in writing" is omitted because it is unnecessary; powers of attorney are always required to be in writing. See Section 8059 ("power of attorney" defined).

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

Staff Note. Missouri law follows the federal absentee policy and terminates an attorney-in-fact's authority on "the filing of any action for divorce or dissolution of the marriage of the principal and the principal's attorney-in-fact who were married to each other at or subsequent to the time the power of attorney was created, unless the power of attorney provides otherwise." See Mo. Ann. Stat. § 404.717(a)(6) (Vernon 1990).

It should also be noted that this section applies both to durable and nondurable powers of attorney for property. Strictly speaking, a nondurable power of attorney need not be terminated by operation of law on dissolution, since the principal may terminate the power of attorney by taking appropriate action. Even if the statute provides for termination on dissolution, it would be prudent for the principal to take some action to make sure third persons are aware of the dissolution.

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

8310. Where the authority of an attorney-in-fact under a power of attorney for property is terminated but the power of attorney is not terminated, if the power of attorney designates a successor attorney-in-fact or prescribes a procedure for designating a successor attorney-in-fact, then the authority provided in the power of attorney extends to and vests in the successor attorney-in-fact in place of the attorney-in-fact whose authority was terminated.

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

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

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

8311. (a) Subject to the order of a court having jurisdiction of the attorney-in-fact or the principal's property, on termination of the attorney-in-fact's authority,

the attorney-in-fact shall promptly deliver possession or control of the principal's property as follows:

- (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) In the case of a nondurable power of attorney for property where the principal has become incapacitated, to the principal's conservator of the estate, guardian of the estate, or other fiduciary charged with management of the property in question, or as directed by the fiduciary.
 - (4) In the case of the death of the principal, to the principal's personal representative, if any, or the principal's successors.
- (b) On termination of an 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) The attorney-in-fact has the powers reasonably necessary under the circumstances to perform the duties provided by this section.

Comment. Section 8311 is new. The rules concerning duties on termination of the attorney-in-fact's authority are drawn in part from Probate Code Section 15644 (delivery of property by former trustee upon occurrence of vacancy) and from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.714(9) (Vernon 1990). For other rules concerning the attorney-in-fact's relation with court-appointed fiduciaries under a durable power of attorney, see Section 8306.

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

§ 8312. Power coupled with an interest [2415.130]

8312. To the extent that the power of an attorney-in-fact is coupled with an interest in the subject of the power of attorney for property, the attorney-in-fact's authority is not terminated by the incapacity or death of the principal or by the revocation of the power of attorney, attempted removal of the attorney-in-fact, or the dissolution or annulment of the attorney-in-fact's marriage with the principal.

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

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

Article 2. Duties of Attorneys-in-Fact

§ 8350. When duties commence [2418.010]

8350. (a) Except as provided in subdivision (c), a person who is designated as an attorney-in-fact under a power of attorney, whether durable or nondurable, has no duty to exercise the authority conferred in the power of attorney,

regardless of whether the principal has become incapacitated, is missing, or is otherwise unable to act.

(b) Acting for the principal in one or more transactions does not obligate an attorney-in-fact to act for the principal in subsequent transactions.

(c) If an attorney-in-fact under a power of attorney has agreed expressly in writing to act for the principal in specified circumstances, the attorney-in-fact has a duty to act when the circumstances occur. The agreement to act on behalf of the principal is enforceable against the attorney-in-fact as a fiduciary without regard to whether there is any consideration to support a contractual obligation to do so.

Comment. Section 8350 is drawn 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). This section recognizes that many powers of attorney are given and accepted as a gratuitous accommodation for the principal 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 also Sections 8023 ("attorney-in-fact" defined), 8038 ("durable power of attorney for property" defined), 8050 ("nondurable power of attorney" defined), 8068 ("principal" defined).

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

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

(a) Except as provided in subdivisions (b) and (c), in dealing with property of the principal, the attorney-in-fact shall observe the standard of care that would be observed by a prudent person dealing with property of another and is not limited by any other statute restricting investments by fiduciaries.

(b) If an attorney-in-fact is not compensated, the attorney-in-fact is not liable for losses to the principal's property unless the losses 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 the similar skills or expertise.

Comment. Section 8351 is a new provision. The introductory clause recognizes that the standard of care is subject to variation in the power of attorney or by agreement between the principal and attorney-in-fact. This provision is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.714(1) (Vernon 1990).

Subdivisions (a) and (b) are drawn from the standard applicable to custodians under Probate Code Section 3912(b) in the California Uniform Transfers to Minors Act. See also Section 8304 (compensation of attorneys-in-fact). The prudent person standard in subdivision (a) is generally consistent with the standard applicable under general agency law. See Restatement (Second) of Agency § 379 (1958).

Subdivision (c) is consistent with the general rule concerning expert fiduciaries stated in the cases. See the discussions in *Estate of Collins*, 72 Cal. App. 3d 663, 673, 139 Cal. Rptr. 644 (1977); *Coberly v. Superior Court*, 231 Cal. App. 2d 685, 689, 42 Cal. Rptr. 64 (1965); *Estate of Beach*, 15 Cal. 3d 623, 635, 542 P.2d 994, 125 Cal. Rptr. 570 (1975) (bank as executor); see also Section 8359 (attorney-in-fact's duty to use special skills); Comment to Prob. Code § 2401 (standard of care applicable to professional guardian or conservator of estate); Comment to Prob. Code § 3912 (standard of care applicable to professional fiduciary acting as custodian under California Uniform Transfers to Minors Act); Comment to Prob. Code § 16040 (standard of care applicable to expert trustee).

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

§ 8352. Duty of loyalty [2418.030]

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

Comment. Section 8352 restates the substance of part of Section 2322(c) which formerly applied to powers of attorney. The duty of loyalty is also consistent with Section 2306 (agent not to defraud principal). Unlike Section 2322(c), Section 8352 is stated as an affirmative duty, rather than a prohibition against violation of a duty applicable to trustees under Probate Code Section 16002. The duty of loyalty of an attorney-in-fact to the principal is subject to the limitations in Section 8350 relating to commencement of the duties of an attorney-in-fact under a power of attorney.

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

Staff Note. We believe that this section is unrealistic, but it is continued here for now since it appears to be existing law. At a minimum, the word "solely" should probably be deleted. Missouri law provides that the agent is "under a duty to act in the interest of the principal and to avoid conflicts of interest that impair the ability . . . so to act." See Mo. Ann. Stat. § 404.714(1) (Vernon 1990). Consider the following provision from Illinois law:

An agent who acts with due care for the benefit of the principal shall not be liable or limited merely because the agent also benefits from the act, has individual or conflicting interests in relation to the property, care or affairs of the principal or acts in a different manner with respect to the agency and the agent's individual interests.

Ill. Ann. Stat. ch. 110 ¶ 802-7 (Smith-Hurd Supp. 1990).

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

8353. (a) The attorney-in-fact has a duty not to use or deal with the principal's property for the attorney-in-fact's own profit or for any other purpose

unconnected with the power of attorney for property, nor to take part in any transaction in which the attorney-in-fact has an interest adverse to the principal.

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

(c) A transaction between the attorney-in-fact and the principal that occurs during the existence of the power of attorney or while the attorney-in-fact's influence with the principal remains and by which the attorney-in-fact obtains an advantage from the principal is presumed to be a violation of the attorney-in-fact's fiduciary duties. This presumption is a presumption affecting the burden of proof. This subdivision does not apply to the provisions of an agreement between an attorney-in-fact and a principal relating to the hiring or compensation of the attorney-in-fact.

Comment. Section 8353 restates part of Section 2322(c) which formerly applied to powers of attorney. Unlike Section 2322(c), Section 8353 is stated as an affirmative duty, rather than a prohibition against violation of a duty applicable to trustees under Probate Code Section 16004. The duty to avoid conflicts of interest is consistent with Section 2306.

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

Staff Note. The Comment asserts that this section is consistent with Section 2306. Section 2306 is an odd section which asserts the not very startling rule that an agent does not have authority to defraud the principal. The staff has not felt it necessary to provide such an obvious rule in this draft.

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

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

Comment. Section 8354 restates part of Section 2322(c) which formerly applied to powers of attorney. Unlike Section 2322(c), Section 8354 is stated as an affirmative duty, rather than a prohibition against violation of the duty applicable to trustees under Probate Code Section 16005.

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

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

8355. (a) The attorney-in-fact shall keep the principal's property separate and distinct from other property in a manner adequate to identify the property clearly as belonging to the principal.

(b) An attorney-in-fact holding property for a principal complies with subdivision (a) if the property is held in the name of the principal or in the name of the attorney-in-fact as attorney-in-fact for the principal.

Comment. Section 8355 is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.712 (Vernon 1990). This section is consistent with the general agency rule in Section 2322(c) which formerly applied to powers of attorney. Unlike Section 2322(c), Section 8355 is stated as an affirmative duty, rather than a prohibition against violation of a duty applicable to trustees under Probate Code Section 16009.

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

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

8356. On matters undertaken or to be undertaken on the principal's behalf and to the extent reasonably possible under the circumstances, an attorney-in-fact has a duty to keep in regular contact with the principal, to communicate with the principal, and to obtain and follow the instructions of the principal.

Comment. Section 8356 is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.714(2) (Vernon 1990). The duty to follow the principal's instructions is consistent with the general agency rule in Sections 2019 and 2309. The duty to communicate with the principal is consistent with the general agency rule in Sections 2020 and 2332. Section 8356 supersedes the general agency rule in Section 2320 (power to disobey instructions), to the extent it applied to powers of attorney.

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

§ 8357. Consultation [2418.080]

8357. If, following execution of a power of attorney, the principal is absent or becomes wholly or partially incapacitated, or if there is a question with regard to the ability or capacity of the principal to give instructions to and supervise the acts and transactions of the attorney-in-fact, an attorney-in-fact exercising authority under a power of attorney for property, whether durable or nondurable, may consult with any person previously designated by the principal for this purpose, and may also consult with and obtain information from the principal's spouse, physician, attorney, accountant, any member of the principal's family, or other person, business entity, or government agency with respect to matters to be undertaken on the principal's behalf and affecting the principal's personal affairs, welfare, family, property, and business interests.

Comment. Section 8357 is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.717(4) (Vernon 1990). This section does not provide anything inconsistent with permissible practice under former law, but is intended to recognize the desirability of consultation in appropriate circumstances and provide assurance to third persons that consultation with the attorney-in-fact is proper and does not contravene privacy rights.

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

Staff Note. *The staff is uncertain whether this section is useful. As noted in the comment, it does not provide anything remarkable. It does not establish any rights or provide for enforcement of its provisions. In this respect it is advisory. Should it be retained?*

§ 8358. Duty to keep records [2418.090]

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

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

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

(1) The principal.

(2) The guardian or conservator of the estate of the principal while the principal is living.

(3) The personal representative of the principal's estate after the death of the principal.

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

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

§ 8359. Duty to use special skills [2418.100]

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

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

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

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

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

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

Comment. Section 8360 is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.712(1) (Vernon 1990). This section is consistent with the general agency rule in Section 2322(a). For provisions concerning relations with third persons, see Section 8450 et seq.

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

Article 3. Powers of Attorneys-in-Fact

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

8400. Subject to this article, an attorney-in-fact under a power of attorney for property has the following powers:

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

(b) Except as limited in the power of attorney, the powers conferred by statute, including all of the powers provided an attorney-in-fact under a statutory form power of attorney by Chapter 2 (commencing with Section 2475) of Title 4.

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

Comment. Section 8400 is drawn from Probate Code Section 16200 governing the general powers of a trustee. The introductory clause recognizes that there are specific limitations on the general powers granted by this section. See Sections 8405 (powers that must be enumerated), 8406 (excluded powers), 8407 (exercise of powers subject to duties). Subdivision (a) is consistent with the general agency rule in Sections 2315 and 2318. Subdivision (b) provides for a broad set of powers including all powers provided an attorney-in-fact under a statutory form power of attorney. See Sections 2475, 2485-2499.5. Subdivision (c) is comparable to an attorney-in-fact's authority to do "everything necessary or proper and usual, in the ordinary course of business, for effecting the purpose of his agency" provided as to attorneys-in-fact generally in Section 2319(1).

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

§ 8401. Incorporation of powers [2421.020]

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

(1) Powers of attorneys-in-fact provided by the Uniform Statutory Form Power of Attorney Act, Chapter 2 (commencing with Section 2475) of Title 4.

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

(b) Unless otherwise provided in the power of attorney, incorporation by reference to another statute includes any amendments made to the incorporated provisions after the date of execution of the power of attorney.

Comment. Section 8401 is new. See also Sections 8023 ("attorney-in-fact" defined), 8065 ("power of attorney for property" defined), 8068 ("principal" defined).

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

8402. If a power of attorney for property provides that general powers are granted to the attorney-in-fact and does not enumerate one or more express subjects or purposes for which general powers are conferred, the authority of the attorney-in-fact acting under the power of attorney includes every action or

power that an adult having the capacity to contract may carry out through an attorney-in-fact specifically authorized to take the action, with respect to any and all matters, except as provided in Sections 8405 and 8406.

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

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

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

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

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

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

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

8404. (a) Except as provided in Sections 8405 and 8406, an attorney-in-fact with general powers has, with respect to the subjects or purposes for which the powers are conferred, all rights, power, and authority to act for the principal that the principal would have with respect to the principal's own property as an adult with capacity to contract.

(b) Without limiting the powers provided in subdivision (a), with respect to the subjects or purposes of the power of attorney for property, an attorney-in-fact with general powers has all of the powers provided in the Uniform Statutory Form Power of Attorney Act, Chapter 2 (commencing with Section 2475) of Title 4.

Comment. Section 8404 is drawn in part from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.710(4) (Vernon 1990). This section is consistent with the general agency rules in Sections 2304 (authority conferable) and 2305 (agent's capacity to do what principal may do). Section 8405 lists actions that must be specifically authorized, and thus are not included in general powers. Section 8406 lists actions that may not be accomplished through a power of attorney.

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

Section 3 of the Uniform Statutory Form Power of Attorney Act (1988). See the Comment to this article under the article heading. See also Sections 8900-8962 (court enforcement of agent's duties).

See also Sections 8023 ("agent" defined), 8058 ("principal" defined), 8080 ("statutory form power of attorney" defined).

§ 8531. Real property transactions

8531. In a statutory form power of attorney, the language granting power with respect to real property transactions empowers the agent to do all of the following:

(a) Accept as a gift or as security for a loan, reject, demand, buy, lease, receive, or otherwise acquire, an interest in real property or a right incident to real property.

(b) Sell, exchange, convey with or without covenants, quitclaim, release, surrender, mortgage, encumber, partition, consent to partitioning, subdivide, apply for zoning, rezoning, or other governmental permits, plat or consent to platting, develop, grant options concerning, lease, sublease, or otherwise dispose of, an interest in real property or a right incident to real property.

(c) Release, assign, satisfy, and enforce by litigation or otherwise, a mortgage, deed of trust, encumbrance, lien, or other claim to real property which exists or is asserted.

(d) Do any act of management or of conservation with respect to an interest in real property, or a right incident to real property, owned, or claimed to be owned, by the principal, including all of the following:

(1) Insuring against a casualty, liability, or loss.

(2) Obtaining or regaining possession, or protecting the interest or right, by litigation or otherwise.

(3) Paying, compromising, or contesting taxes or assessments, or applying for and receiving refunds in connection with them.

(4) Purchasing supplies, hiring assistance or labor, and making repairs or alterations in the real property.

(e) Use, develop, alter, replace, remove, erect, or install structures or other improvements upon real property in or incident to which the principal has, or claims to have, an interest or right.

(f) Participate in a reorganization with respect to real property or a legal entity that owns an interest in or right incident to real property and receive and hold shares of stock or obligations received in a plan of reorganization, and act with respect to them, including all of the following:

(1) Selling or otherwise disposing of them.

(2) Exercising or selling an option, conversion, or similar right with respect to them.

(3) Voting them in person or by proxy.

(g) Change the form of title of an interest in or right incident to real property.

(h) Dedicate to public use, with or without consideration, easements or other real property in which the principal has, or claims to have, an interest or right.

Comment. Section 8531 continues former Section 2486 without change. Section 8531 is the same in substance as Section 4 of the Uniform Statutory Form Power of Attorney Act (1988). See the Comment to this article under the article heading. See also Section 8530 (construction of powers generally).

See also Sections 8023 ("agent" defined), 8058 ("principal" defined), 8080 ("statutory form power of attorney" defined).

§ 8532. Tangible personal property transactions

8532. In a statutory form power of attorney, the language granting power with respect to tangible personal property transactions empowers the agent to do all of the following:

(a) Accept as a gift or as security for a loan, reject, demand, buy, receive, or otherwise acquire ownership or possession of tangible personal property or an interest in tangible personal property.

(b) Sell, exchange, convey with or without covenants, release, surrender, mortgage, encumber, pledge, hypothecate, create a security interest in, pawn, grant options concerning, lease, sublease to others, or otherwise dispose of tangible personal property or an interest in tangible personal property.

(c) Release, assign, satisfy, or enforce by litigation or otherwise, a mortgage, security interest, encumbrance, lien, or other claim on behalf of the principal, with respect to tangible personal property or an interest in tangible personal property.

(d) Do an act of management or conservation with respect to tangible personal property or an interest in tangible personal property on behalf of the principal, including all of the following:

(1) Insuring against casualty, liability, or loss.

(2) Obtaining or regaining possession, or protecting the property or interest, by litigation or otherwise.

(3) Paying, compromising, or contesting taxes or assessments or applying for and receiving refunds in connection with taxes or assessments.

(4) Moving from place to place.

(5) Storing for hire or on a gratuitous bailment.

(6) Using, altering, and making repairs or alterations.

Comment. Section 8532 continues former Section 2487 without change. Section 8532 is the same in substance as Section 5 of the Uniform Statutory Form Power of Attorney Act (1988). See the Comment to this article under the article heading. See also Section 8530 (construction of powers generally).

See also Sections 8023 ("agent" defined), 8058 ("principal" defined), 8080 ("statutory form power of attorney" defined).

§ 8533. Stock and bond transactions

8533. In a statutory form power of attorney, the language granting power with respect to stock and bond transactions empowers the agent to do all of the following:

(a) Buy, sell, and exchange stocks, bonds, mutual funds, and all other types of securities and financial instruments except commodity futures contracts and call and put options on stocks and stock indexes.

(b) Receive certificates and other evidences of ownership with respect to securities.

(c) Exercise voting rights with respect to securities in person or by proxy, enter into voting trusts, and consent to limitations on the right to vote.

Comment. Section 8533 continues former Section 2488 without change. Section 8533 is the same in substance as Section 6 of the Uniform Statutory Form Power of Attorney Act (1988). See the Comment to this article under the article heading. See also Sections 8059(b) (proxies given by agent to exercise voting rights), 8530 (construction of powers generally).

See also Sections 70 ("security" defined), 8023 ("agent" defined), 8080 ("statutory form power of attorney" defined).

§ 8534. Commodity and option transactions

8534. In a statutory form power of attorney, the language granting power with respect to commodity and option transactions empowers the agent to do all of the following:

(a) Buy, sell, exchange, assign, settle, and exercise commodity futures contracts and call and put options on stocks and stock indexes traded on a regulated option exchange.

(b) Establish, continue, modify, and terminate option accounts with a broker.

Comment. Section 8534 continues former Section 2489 without change. Section 8534 is the same in substance as Section 7 of the Uniform Statutory Form Power of Attorney Act (1988). See the Comment to this article under the article heading. See also Section 8530 (construction of powers generally).

See also Sections 8023 ("agent" defined), 8080 ("statutory form power of attorney" defined).

§ 8535. Banking and other financial institution transactions

8535. In a statutory form power of attorney, the language granting power with respect to banking and other financial institution transactions empowers the agent to do all of the following:

(a) Continue, modify, and terminate an account or other banking arrangement made by or on behalf of the principal.

(b) Establish, modify, and terminate an account or other banking arrangement with a bank, trust company, savings and loan association, credit union, thrift company, industrial loan company, brokerage firm, or other financial institution selected by the agent.

(c) Hire or close a safe deposit box or space in a vault.

(d) Contract to procure other services available from a financial institution as the agent considers desirable.

(e) Withdraw by check, order, or otherwise money or property of the principal deposited with or left in the custody of a financial institution.

(f) Receive bank statements, vouchers, notices, and similar documents from a financial institution and act with respect to them.

(g) Enter a safe deposit box or vault and withdraw or add to the contents.

(h) Borrow money at an interest rate agreeable to the agent and pledge as security personal property of the principal necessary in order to borrow, pay, renew, or extend the time of payment of a debt of the principal.

(i) Make, assign, draw, endorse, discount, guarantee, and negotiate promissory notes, checks, drafts, and other negotiable or nonnegotiable paper of the principal, or payable to the principal or the principal's order, receive the cash or other proceeds of those transactions, and accept a draft drawn by a person upon the principal and pay it when due.

(j) Receive for the principal and act upon a sight draft, warehouse receipt, or other negotiable or nonnegotiable instrument.

(k) Apply for and receive letters of credit, credit cards, and traveler's checks from a financial institution, and give an indemnity or other agreement in connection with letters of credit.

(l) Consent to an extension of the time of payment with respect to commercial paper or a financial transaction with a financial institution.

Comment. Section 8535 continues former Section 2490 without change. Section 8535 is the same in substance as Section 8 of the Uniform Statutory Form Power of Attorney Act (1988). See the Comment to this article under the article heading. See also Section 8530 (construction of powers generally).

See also Sections 40 ("financial institution" defined), 83 ("trust company" defined), 8023 ("agent" defined), 8058 ("principal" defined), 8080 ("statutory form power of attorney" defined).

§ 8536. Business operating transactions

8536. In a statutory form power of attorney, the language granting power with respect to business operating transactions empowers the agent to do all of the following:

(a) Operate, buy, sell, enlarge, reduce, and terminate a business interest.

(b) To the extent that an agent is permitted by law to act for a principal and subject to the terms of the partnership agreement:

(1) Perform a duty or discharge a liability and exercise a right, power, privilege, or option that the principal has, may have, or claims to have, under a partnership agreement, whether or not the principal is a partner.

(2) Enforce the terms of a partnership agreement by litigation or otherwise.

(3) Defend, submit to arbitration, settle, or compromise litigation to which the principal is a party because of membership in the partnership.

(c) Exercise in person or by proxy, or enforce by litigation or otherwise, a right, power, privilege, or option the principal has or claims to have as the holder of a bond, share, or other instrument of similar character, and defend, submit to arbitration, settle, or compromise litigation to which the principal is a party because of a bond, share, or similar instrument.

(d) With respect to a business owned solely by the principal:

(1) Continue, modify, renegotiate, extend, and terminate a contract made with an individual or a legal entity, firm, association, or corporation by or on behalf of the principal with respect to the business before execution of the power of attorney.

(2) Determine the policy of the business as to (i) the location of its operation, (ii) the nature and extent of its business, (iii) the methods of manufacturing, selling, merchandising, financing, accounting, and advertising employed in its operation, (iv) the amount and types of insurance carried, and (v) the mode of engaging, compensating, and dealing with its accountants, attorneys, and other agents and employees.

(3) Change the name or form of organization under which the business is operated and enter into a partnership agreement with other persons or organize a corporation to take over all or part of the operation of the business.

(4) Demand and receive money due or claimed by the principal or on the principal's behalf in the operation of the business, and control and disburse the money in the operation of the business.

(e) Put additional capital into a business in which the principal has an interest.

(f) Join in a plan of reorganization, consolidation, or merger of the business.

(g) Sell or liquidate a business or part of it at the time and upon the terms the agent considers desirable.

(h) Represent the principal in establishing the value of a business under a buy-out agreement to which the principal is a party.

(i) Prepare, sign, file, and deliver reports, compilations of information, returns, or other papers with respect to a business which are required by a governmental agency or instrumentality or which the agent considers desirable, and make related payments.

(j) Pay, compromise, or contest taxes or assessments and do any other act which the agent considers desirable to protect the principal from illegal or unnecessary taxation, fines, penalties, or assessments with respect to a business, including attempts to recover, in any manner permitted by law, money paid before or after the execution of the power of attorney.

Comment. Section 8536 continues former Section 2491 without change. Section 8536 is the same in substance as Section 9 of the Uniform Statutory Form Power of Attorney Act (1988). See the Comment to this article under the article heading. See also Section 8530 (construction of powers generally).

See also Sections 8023 ("agent" defined), 8058 ("principal" defined), 8080 ("statutory form power of attorney" defined).

§ 8537. Insurance and annuity transactions

8537. In a statutory form power of attorney, the language granting power with respect to insurance and annuity transactions empowers the agent to do all of the following:

(a) Continue, pay the premium or assessment on, modify, rescind, release, or terminate a contract procured by or on behalf of the principal which insures or provides an annuity to either the principal or another person, whether or not the principal is a beneficiary under the contract.

(b) Procure new, different, and additional contracts of insurance and annuities for the principal and the principal's spouse, children, and other dependents, and select the amount, type of insurance or annuity, and mode of payment.

(c) Pay the premium or assessment on, modify, rescind, release, or terminate a contract of insurance or annuity procured by the agent.

(d) Designate the beneficiary of the contract, but the agent may be named a beneficiary of the contract, or an extension, renewal, or substitute for it, only to the extent the agent was named as a beneficiary under a contract procured by the principal before executing the power of attorney.

(e) Apply for and receive a loan on the security of the contract of insurance or annuity.

(f) Surrender and receive the cash surrender value.

(g) Exercise an election.

(h) Change the manner of paying premiums.

(i) Change or convert the type of insurance contract or annuity as to any insurance contract or annuity with respect to which the principal has or claims to have a power described in this section.

(j) Change the beneficiary of a contract of insurance or annuity, but the agent may not be designated a beneficiary except to the extent permitted by subdivision (d).

(k) Apply for and procure government aid to guarantee or pay premiums of a contract of insurance on the life of the principal.

(l) Collect, sell, assign, hypothecate, borrow upon, or pledge the interest of the principal in a contract of insurance or annuity.

(m) Pay from proceeds or otherwise, compromise or contest, and apply for refunds in connection with, a tax or assessment levied by a taxing authority with respect to a contract of insurance or annuity or its proceeds or liability accruing by reason of the tax or assessment.

Comment. Section 8537 continues former Section 2492 without change. Section 8537 is the same in substance as Section 10 of the Uniform Statutory Form Power of Attorney Act (1988). See the Comment to this article under the article heading. See also Section 8530 (construction of powers generally). Section 8537 covers, but is not limited to, life, accident, health, disability, or liability insurance and fire, marine, burglary, compensation, disability, liability, hurricane, earthquake, and casualty insurance.

See also Sections 8023 ("agent" defined), 8058 ("principal" defined), 8080 ("statutory form power of attorney" defined).

§ 8538. Estate, trust, and other beneficiary transactions

8538. In a statutory form power of attorney, the language granting power with respect to estate, trust, and other beneficiary transactions, empowers the agent to

act for the principal in all matters that affect a trust, probate estate, guardianship, conservatorship, escrow, custodianship, or other fund from which the principal is, may become, or claims to be entitled, as a beneficiary, to a share or payment, including the power to do all of the following:

(a) Accept, reject, disclaim, receive, receipt for, sell, assign, release, pledge, exchange, or consent to a reduction in or modification of a share in or payment from the fund.

(b) Demand or obtain by litigation or otherwise money or other thing of value to which the principal is, may become, or claims to be entitled by reason of the fund.

(c) Initiate, participate in, and oppose litigation to ascertain the meaning, validity, or effect of a deed, will, declaration of trust, or other instrument or transaction affecting the interest of the principal.

(d) Initiate, participate in, and oppose litigation to remove, substitute, or surcharge a fiduciary.

(e) Conserve, invest, disburse, and use anything received for an authorized purpose.

(f) Transfer an interest of the principal in real property, stocks, bonds, accounts with financial institutions, insurance, and other property, to the trustee of a revocable trust created by the principal as settlor.

Comment. Section 8538 continues former Section 2493 without change. Section 8538 is the same in substance as Section 11 of the Uniform Statutory Form Power of Attorney Act (1988). See the Comment to this article under the article heading. See also Section 8530 (construction of powers generally).

See also Sections 82 ("trust" defined), 8023 ("agent" defined), 8058 ("principal" defined), 8080 ("statutory form power of attorney" defined).

§ 8539. Claims and litigation

8539. In a statutory form power of attorney, the language with respect to claims and litigation empowers the agent to do all of the following:

(a) Assert and prosecute before a court or administrative agency a claim, claim for relief, cause of action, counterclaim, cross-complaint, or offset, and defend against an individual, a legal entity, or government, including suits to recover property or other thing of value, to recover damages sustained by the principal, to eliminate or modify tax liability, or to seek an injunction, specific performance, or other relief.

(b) Bring an action to determine adverse claims, intervene in litigation, and act as *amicus curiae*.

(c) In connection with litigation:

(1) Procure an attachment, garnishment, libel, order of arrest, or other preliminary, provisional, or intermediate relief and use any available procedure to effect, enforce, or satisfy a judgment, order, or decree.

(2) Perform any lawful act, including acceptance of tender, offer of judgment, admission of facts, submission of a controversy on an agreed statement of facts, consent to examination before trial, and binding the principal in litigation.

(d) Submit to arbitration, settle, and propose or accept a compromise with respect to a claim or litigation.

(e) Waive the issuance and service of process upon the principal, accept service of process, appear for the principal, designate persons upon whom process directed to the principal may be served, execute and file or deliver stipulations on the principal's behalf, verify pleadings, seek appellate review, procure and give surety and indemnity bonds, contract and pay for the preparation and printing of records and briefs, receive and execute and file or deliver a consent, waiver, release, confession of judgment, satisfaction of judgment, notice, agreement, or other instrument in connection with the prosecution, settlement, or defense of a claim or litigation.

(f) Act for the principal with respect to bankruptcy or insolvency proceedings, whether voluntary or involuntary, concerning the principal or some other person, or with respect to a reorganization proceeding, or with respect to an assignment for the benefit of creditors, receivership, or application for the appointment of a receiver or trustee which affects an interest of the principal in property or other thing of value.

(g) Pay a judgment against the principal or a settlement made in connection with litigation and receive and conserve money or other thing of value paid in settlement of or as proceeds of a claim or litigation.

Comment. Section 8539 continues former Section 2494 without change. Section 8539 is the same in substance as Section 12 of the Uniform Statutory Form Power of Attorney Act (1988). Subdivision (f) is clarified by adding a reference to an assignment for the benefit of creditors. See the Comment to this article under the article heading. See also Section 8530 (construction of powers generally).

See also Sections 8023 ("agent" defined), 8058 ("principal" defined), 8080 ("statutory form power of attorney" defined).

§ 8540. Personal and family maintenance

8540. In a statutory form power of attorney, the language granting power with respect to personal and family maintenance empowers the agent to do all of the following:

(a) Do the acts necessary to maintain the customary standard of living of the principal, the principal's spouse, children, and other individuals customarily or legally entitled to be supported by the principal, including providing living quarters by purchase, lease, or other contract, or paying the operating costs, including interest, amortization payments, repairs, and taxes on premises owned by the principal and occupied by those individuals.

(b) Provide for the individuals described in subdivision (a) all of the following:

(1) Normal domestic help.

(2) Usual vacations and travel expenses.

(3) Funds for shelter, clothing, food, appropriate education, and other current living costs.

(c) Pay for the individuals described in subdivision (a) necessary medical, dental, and surgical care, hospitalization, and custodial care.

(d) Continue any provision made by the principal, for the individuals described in subdivision (a), for automobiles or other means of transportation, including registering, licensing, insuring, and replacing them.

(e) Maintain or open charge accounts for the convenience of the individuals described in subdivision (a) and open new accounts the agent considers desirable to accomplish a lawful purpose.

(f) Continue payments incidental to the membership or affiliation of the principal in a church, club, society, order, or other organization and continue contributions to those organizations.

Comment. Section 8540 continues former Section 2495 without change. Section 8540 is the same in substance as Section 13 of the Uniform Statutory Form Power of Attorney Act (1988). See the Comment to this article under the article heading. See also Section 8530 (construction of powers generally).

See also Sections 8023 ("agent" defined), 8058 ("principal" defined), 8080 ("statutory form power of attorney" defined).

§ 8541. Benefits from social security, medicare, medicaid, or other governmental programs, or civil or military service

8541. In a statutory form power of attorney, the language granting power with respect to benefits from social security, medicare, medicaid or other governmental programs, or civil or military service, empowers the agent to do all of the following:

(a) Execute vouchers in the name of the principal for allowances and reimbursements payable by the United States or a foreign government or by a state or subdivision of a state to the principal, including allowances and reimbursements for transportation of the individuals described in subdivision (a) of Section 8540, and for shipment of their household effects.

(b) Take possession and order the removal and shipment of property of the principal from a post, warehouse, depot, dock, or other place of storage or safekeeping, either governmental or private, and execute and deliver a release, voucher, receipt, bill of lading, shipping ticket, certificate, or other instrument for that purpose.

(c) Prepare, file, and prosecute a claim of the principal to a benefit or assistance, financial or otherwise, to which the principal claims to be entitled, under a statute or governmental regulation.

(d) Prosecute, defend, submit to arbitration, settle, and propose or accept a compromise with respect to any benefits the principal may be entitled to receive.

(e) Receive the financial proceeds of a claim of the type described in this section, conserve, invest, disburse, or use anything received for a lawful purpose.

Comment. Section 8541 continues former Section 2496 without change, except for the revision of a cross-reference to another provision. Section 8541 is the same in substance as Section 14 of the Uniform Statutory Form Power of Attorney Act (1988). See the Comment to this article under the article heading. See also Section 8530 (construction of powers generally).

See also Sections 8023 ("agent" defined), 8058 ("principal" defined), 8080 ("statutory form power of attorney" defined).

§ 8542. Retirement plan transactions

8542. In a statutory form power of attorney, the language granting power with respect to retirement plan transactions empowers the agent to do all of the following:

(a) Select payment options under any retirement plan in which the principal participates, including plans for self-employed individuals.

(b) Designate beneficiaries under those plans and change existing designations.

(c) Make voluntary contributions to those plans.

(d) Exercise the investment powers available under any self-directed retirement plan.

(e) Make rollovers of plan benefits into other retirement plans.

(f) If authorized by the plan, borrow from, sell assets to, and purchase assets from the plan.

(g) Waive the right of the principal to be a beneficiary of a joint or survivor annuity if the principal is a spouse who is not employed.

Comment. Section 8542 continues former Section 2497 without change. Section 8542 is the same in substance as Section 15 of the Uniform Statutory Form Power of Attorney Act (1988). See the Comment to this article under the article heading. See also Section 8530 (construction of powers generally).

See also Sections 8023 ("agent" defined), 8058 ("principal" defined), 8080 ("statutory form power of attorney" defined).

§ 8543. Tax matters

8543. In a statutory form power of attorney, the language granting power with respect to tax matters empowers the agent to do all of the following:

(a) Prepare, sign, and file federal, state, local, and foreign income, gift, payroll, Federal Insurance Contributions Act returns, and other tax returns, claims for refunds, requests for extension of time, petitions regarding tax matters, and any other tax-related documents, including receipts, offers, waivers, consents (including consents and agreements under Internal Revenue Code Section 2032A or any successor section), closing agreements, and any power of attorney required by the Internal Revenue Service or other taxing authority with respect to a tax year upon which the statute of limitations has not run and to the tax year in which the power of attorney was executed and any subsequent tax year.

(b) Pay taxes due, collect refunds, post bonds, receive confidential information, and contest deficiencies determined by the Internal Revenue Service or other taxing authority.

(c) Exercise any election available to the principal under federal, state, local, or foreign tax law.

(d) Act for the principal in all tax matters for all periods before the Internal Revenue Service and any other taxing authority.

Comment. Section 8543 continues former Section 2498 without change. Section 8543 is the same in substance as Section 16 of the Uniform Statutory Form Power of Attorney Act (1988). At the end of subdivision (a), reference is made to "a tax year upon which the statute of limitations has not run and to the tax year in which the power of attorney was executed and any subsequent tax year." This replaces the reference in the Uniform Act to "a tax year upon which the statute of limitations has not run and the following 25 tax years." This substitution is consistent with the power granted by subdivision (d) which extends to "all tax matters for all periods" and is not limited to particular tax years. See also the Comment to this article under the article heading and Section 8530 (construction of powers generally).

See also Sections 8023 ("agent" defined), 8058 ("principal" defined), 8080 ("statutory form power of attorney" defined).

§ 8544. After-acquired property; property located outside this state; power exercised outside this state; power of attorney executed outside this state

8544. The powers described in this article are exercisable equally with respect to an interest the principal has when the statutory form power of attorney is executed or acquires later, whether or not the property is located in this state, and whether or not the powers are exercised or the power of attorney is executed in this state.

Comment. Section 8544 continues former Section 2499 without change. Section 8544 makes the power of attorney explicitly effective for property acquired at times and in places that might otherwise be subject to dispute. The section is the same in substance as Section 17 of the Uniform Statutory Form Power of Attorney Act (1988). See also Section 4128 (no need to describe each item or parcel of property).

See also Sections 8058 ("principal" defined), 8080 ("statutory form power of attorney" defined).

§ 8545. Power to modify or revoke trust

8545. A statutory form power of attorney under this chapter does not empower the agent to modify or revoke a trust created by the principal unless that power is expressly granted by the power of attorney. If a statutory form power of attorney under this chapter empowers the agent to modify or revoke a trust created by the principal, the trust may only be modified or revoked by the agent as provided in the trust instrument.

Comment. Section 8545 continues former Section 2499.5 without change. Section 8545 is a new provision not found in the Uniform Statutory Form Power of Attorney Act (1988).

The first sentence of Section 8545 makes clear that the agent has no power to modify or revoke a trust unless a specific provision is added to the statutory form giving the agent that power. The "Special Instructions" portion of the statutory form provides space for such a provision. The first sentence is a clarification that is consistent with the uniform act powers. See Section 11 of the Uniform Statutory Form Power of Attorney Act (1988), which does not give the agent the power to modify or revoke a trust created by the principal.

The second sentence of Section 8545 recognizes the requirement of Probate Code Section 15401(b) which precludes modification or revocation of a trust by an agent unless the trust instrument expressly so permits.

See also Sections 82 ("trust" defined), 8023 ("agent" defined), 8058 ("principal" defined), 8080 ("statutory form power of attorney" defined).

TITLE 3. DURABLE POWERS OF ATTORNEY FOR HEALTH CARE

Staff Note. This material is set out in substantially the same form as existing law for reference purposes. The basic draft is from the staff draft attached to Memorandum 90-122 with the sections renumbered and updated for 1991 and some 1992 legislation.

CHAPTER 1. DURABLE POWERS OF ATTORNEY FOR HEALTH CARE

Article 1. General Provisions

§ 8600. Application of chapter

8600. (a) A durable power of attorney executed after December 31, 1983, is effective to authorize the attorney-in-fact to make health care decisions for the principal only if the durable power of attorney complies with this chapter.

(b) A durable power of attorney executed before January 1, 1984, that specifically authorizes the attorney-in-fact to make decisions relating to the medical or health care of the principal shall be deemed to be valid under this chapter after January 1, 1984, notwithstanding that it fails to comply with the requirement of paragraph (2) of subdivision (a) of Section 8610 or subdivision (c) of Section 8611; but, to the extent that the durable power of attorney authorizes the attorney-in-fact to make health care decisions for the principal, the durable power of attorney is subject to all the provisions of this chapter and to Part 4 (commencing with Section 8900).

(c) Nothing in this chapter affects the validity of a decision made under a durable power of attorney before January 1, 1984.

Comment. Section 8600 continues former Section 2431 without change, except for the substitution of "agent" for "attorney in fact." See Section 8023 ("attorney-in-fact" defined).

Subdivision (a) of Section 8600 makes clear that the requirements of this chapter must be satisfied if a durable power of attorney executed after December 31, 1983, is intended to authorize health care decisions. See also Section 8029 (durable power of attorney). Nothing in this chapter affects a durable power of attorney executed after December 31, 1983, insofar as it relates to matters other than health care decisions. See also Sections 8038 ("durable power of attorney for property" defined), 8044 ("health care decision" defined).

Subdivision (b) validates durable powers of attorney for health care executed before January 1, 1984, even though the witnessing or acknowledgment requirement of Section 8610(a)(2) is not satisfied and even though the requirement of Section 8611(c) is not satisfied. However, after December 31, 1983, any such durable power of attorney is subject to the same provisions as a durable power of attorney executed after that date. See, e.g., Sections 8612 (agent not authorized to act if principal can give informed consent), 8620 (unauthorized types of health care), 8613 (examination and release of medical records), 8615 (revocation), 8630 (protections from liability), 8622 (consent of agent not authorized where principal objects to the health care or objects to the withholding or withdrawal of health care necessary to keep principal alive), 8624 (altering or forging, or concealing or withholding knowledge of revocation, of durable power of attorney for health care), 8621 (unauthorized acts or omissions), 8906 (exceptions to limitations in power of attorney), 8952 (grounds for

petition). However, the limitation of the duration of the durable power of attorney for health care to seven years applies only to a durable power of attorney for health care executed after January 1, 1984. See Section 8616. A durable power of attorney for health care executed prior to that date is of unlimited duration unless the power of attorney otherwise provides.

Subdivision (c) makes clear that this chapter has no effect on decisions made before January 1, 1984, under durable powers of attorney executed before that date. The validity of such health care decisions is determined by the law that would apply if this chapter had not been enacted.

See also Sections 8023 ("attorney-in-fact" defined), 8029 ("durable power of attorney" defined), 8058 ("principal" defined), 8044 ("health care decision" defined).

§ 8601. Form of durable power of attorney for health care after January 1, 1995

8601. (a) Notwithstanding Section 8611, on and after January 1, 1986, a printed form of a durable power of attorney for health care may be sold or otherwise distributed if it complies with former Section 2433 as amended by Section 5 of Chapter 312 of the Statutes of 1984, or with former Section 2433 as in effect at the time of sale or distribution. However, any printed form of a durable power of attorney for health care printed on or after January 1, 1986, that is sold or otherwise distributed in this state for use by a person who does not have the advice of legal counsel shall comply with former Section 2433 or Section 8611 in effect at the time of printing.

(b) Notwithstanding Section 8614, a printed form of a durable power of attorney for health care may be sold or otherwise distributed if it complies with former Section 2432 as originally enacted, with former Section 2432 as subsequently amended, or with Section 8610. However, any printed form of a durable power of attorney for health care printed on or after January 1, 1986, shall comply with the requirements of former Section 2432 or Section 8610 in effect at the time of printing.

(c) A durable power of attorney for health care executed on or after January 1, 1986, is not invalid if it complies with former Section 2432 as originally enacted or as subsequently amended. A durable power of attorney for health care executed on or after January 1, 1986, using a printed form that complied with former Section 2433 as amended by Section 5 of Chapter 312 of the Statutes of 1984, is as valid as if it had been executed using a printed form that complied with former Section 2433 as thereafter amended or with Section 8611.

Comment. Section 8601 continues former Section 2444 without substantive change, and applies the principles of the former section to the include the successor sections in this chapter.

Section 8601 permits a printed form of a durable power of attorney for health care to be used after the amendments to former Sections 2432 and 2433 went into effect if the form complies with prior law. Section 8601 avoids the need to discard the existing supply of printed forms when the amendments go into effect. But a form printed after the amendments go into effect may be sold or otherwise distributed in this state for use by a person who does not have the advice of legal counsel only if the form complies with the requirements of Sections 8610 and 8611.

Staff Note. Further consideration should be given to whether this section can be simplified, such as by validating in general language the use of forms that complied with the statute when they were printed.

As amended in 1991:

2444. (a) Notwithstanding Section 2433, on and after January 1, 1986, a printed form of a durable power of attorney for health care may be sold or otherwise distributed if it complies with Section 2433 as amended by Section 5 of Chapter 312 of the Statutes of 1984, with Section 2433 as amended by Chapter 403 of the Statutes of 1985, or with Section 2433 as in effect at the time of sale or distribution. However, any printed form of a durable power of attorney for health care printed on or after January 1, 1986, that is sold or otherwise distributed in this state for use by a person who does not have the advice of legal counsel shall comply with Section 2433 as in effect at the time of printing.

(b) Notwithstanding Section 2432, a printed form of a durable power of attorney for health care may be sold or otherwise distributed if it complies with Section 2432 as originally enacted, or with Section 2432 as subsequently amended. However, any printed form of a durable power of attorney for health care printed on or after January 1, 1986, shall comply with the requirements of Section 2432 in effect at the time of printing.

(c) A durable power of attorney for health care executed on or after January 1, 1986, is not invalid if it complies with Section 2432 as originally enacted or as subsequently amended. Subject to Section 2436.5, a durable power of attorney for health care executed on or after January 1, 1986, using a printed form that complied with Section 2433 as amended by Section 5 of Chapter 312 of the Statutes of 1984, or with Section 2433 as amended by Chapter 403 of the Statutes of 1985, is as valid as if it had been executed using a printed form that complied with Section 2433 as thereafter amended.

(Amended by 1991 Cal. Stat. ch. 896, § 3.) [AB 793]

§ 8602. Other authority not affected

8602. (a) Subject to Section 8612, nothing in this chapter affects any right a person may have to make health care decisions on behalf of another.

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

Comment. Section 8602 continues former Section 2439 without change, except for the revision of a cross-reference to another section and the substitution of a reference to "chapter" instead of "article." Section 8602 makes clear that the enactment of this chapter has no effect on any right a person may have to consent for another or on emergency treatment. Thus, this chapter is cumulative to whatever other ways there may be to consent for another.

See also Sections 8041 ("health care" defined), 8044 ("health care decision" defined).

§ 8603. Validity of durable power of attorney for health care executed in another jurisdiction

8603. A durable power of attorney for health care or similar instrument executed in another state or jurisdiction in compliance with the laws of that state or jurisdiction or of this state, shall be valid and enforceable in this state to the same extent as a durable power of attorney for health care validly executed in this state.

Comment. Section 8603 continues former Section 2445 [as added by 1992 Cal. Stat. ch. 2697, § 3 (AB 2697), operative Aug. 11, 1992] without change.

Staff Note. This section will be integrated into the draft at a later time.

Article 2. Creation and Effect of Durable Power of Attorney for Health Care

§ 8610. Requirements for durable power of attorney for health care

8610. (a) An attorney in fact under a durable power of attorney may not make health care decisions unless all of the following requirements are satisfied:

(1) The durable power of attorney specifically authorizes the attorney in fact to make health care decisions.

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

(3) The durable power of attorney is witnessed by one of the following methods:

(A) The durable power of attorney is signed by at least two witnesses each of whom witnessed either the signing of the instrument by the principal or the principal's acknowledgment of the signature or of the instrument, each witness making the following declaration in substance: "I declare under penalty of perjury under the laws of California that the person who signed or acknowledged this document is personally known to me to be the principal, or that the identity of the principal was proved to me by convincing evidence, that the principal signed or acknowledged this durable power of attorney in my presence, that the principal appears to be of sound mind and under no duress, fraud, or undue influence, that I am not the person appointed as attorney in fact by this document, and that I am not the principal's health care provider, an employee of the principal's health care provider, the operator of a community care facility, an employee of an operator of a community care 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 [2432.5]:

(1) Neither the treating health care provider nor an employee of the treating health care provider, nor an operator of a community care facility or residential care facility for the elderly nor an employee of an operator of a community care facility or residential care facility for the elderly, may be designated as the attorney in fact to make health care decisions under a durable power of attorney.

(2) A health care provider or employee of a health care provider may not act as an attorney in fact to make health care decisions if the health care provider becomes the principal's treating health care provider.

(c) A conservator may not be designated as the attorney in fact to make health care decisions under a durable power of attorney for health care executed by a person who is a conservatee under the Lanterman-Petris-Short Act, Part 1 (commencing with Section 5000) of Division 5 of the Welfare and Institutions Code, unless (1) the power of attorney is otherwise valid, (2) the conservatee is represented by legal counsel, and (3) the lawyer representing the conservatee signs a certificate stating in substance: "I am a lawyer authorized to practice law in the state where this power of attorney was executed, and the principal was my client at the time this power of attorney was executed. I have advised my client concerning his or her rights in connection with this power of attorney and the applicable law and the consequences of signing or not signing this power of attorney, and my client, after being so advised, has executed this power of attorney."

(d) None of the following may be used as a witness under subdivision (a) :

(1) The principal's health care provider.

(2) An employee of the principal's health care provider.

(3) The attorney in fact.

(4) The operator of a community care facility.

(5) An employee of an operator of a community care facility.

(6) The operator of a residential care facility for the elderly.

(7) An employee of an operator of a residential care facility for the elderly.

(e) At least one of the persons used as a witness under subdivision (a) shall be a person who is not one of the following:

(1) A relative of the principal by blood, marriage, or adoption.

(2) A person who would be entitled to any portion of the estate of the principal upon his or her death under any will or codicil thereto of the principal existing at the time of execution of the durable power of attorney or by operation of law then existing.

(f) A durable power of attorney for health care is not effective if the principal is a patient in a skilled nursing facility as defined in subdivision (c) of Section 1250 of the Health and Safety Code at the time of its execution unless one of the witnesses is a patient advocate or ombudsman as may be designated by the State Department of Aging for this purpose pursuant to any other applicable provision of law. The patient advocate or ombudsman shall include in the declaration required by subdivision (a) a declaration that he or she is serving as a witness as required by this subdivision. It is the intent of this subdivision to recognize that some patients in skilled nursing facilities are insulated from a voluntary decisionmaking role, by virtue of the custodial nature of their care, so as to require special assurance that they are capable of willfully and voluntarily executing a durable power of attorney for health care.

Comment. Section 8610 continues former Section 2432 [as amended by 1992 Cal. Stat. ch. 2697, § 1 (AB 2697), operative Aug. 11, 1992] without change, except for the revision of cross-references to other provisions. See Section 8023 ("attorney-in-fact" defined).

Subdivision (a) makes clear that a durable power of attorney is not sufficient to enable the agent to consent to health care or make other health care decisions unless the durable power of attorney specifically authorizes health care decisions and the formalities of this section are satisfied. Subdivisions (d) and (e) limit the persons who may serve as witnesses. See also Sections 8029 (general requirements for durable power of attorney), 8611 (warning to person executing durable power of attorney for health care). See also Section 8600 (exception to formalities requirement for powers of attorney executed before operative date).

Subdivision (b) precludes the treating health care provider or an employee of the treating health care provider and other specified persons from acting as the agent under a durable power of attorney for health care. Subdivision (d) precludes health care providers in general and their employees and other specified persons from acting as witnesses to such powers of attorney. These limitations are included in recognition that Section 8630 provides protections from liability for a health care provider who relies in good faith on a decision of the agent. Subdivision (b) does not preclude a person from appointing, for example, a friend who is a doctor to be an agent under the durable power of attorney for health care, but if the doctor becomes a "treating health care provider" of the principal, the doctor is precluded from acting as the agent under the durable power of attorney for health care.

Subdivision (c) prescribes conditions that must be satisfied if a conservator is to be designated as the agent for a conservatee under the Lanterman-Petris-Short Act. This subdivision has no application where a person other than the conservator is to be designated as agent.

Subdivision (f) prescribes additional requirements where the principal is a patient in a nursing home.

As to the use of forms printed before January 1, 1986, see Section 8601.

See also Sections 8026 ("community care facility" defined), 8029 ("durable power of attorney" defined), 8032 ("durable power of attorney for health care" defined), 8044 ("health care decision" defined), 8047 ("health care provider" defined), 8058 ("principal" defined), 8071 ("residential care facility for the elderly" defined).

§ 8611. Requirements for printed form of durable power of attorney for health care

8611. (a) A printed form of a durable power of attorney for health care that is sold or otherwise distributed in this state for use by a person who does not have the advice of legal counsel shall provide no other authority than the authority to make health care decisions on behalf of the principal and shall contain, in not less than 10-point boldface type or a reasonable equivalent thereof, the following warning statement:

WARNING TO PERSON EXECUTING THIS DOCUMENT

This is an important legal document. Before executing this document, you should know these important facts:

This document gives the person you designate as your agent the power to make health care decisions for you. Your agent must act consistently with your desires as stated in this document or otherwise made known.

Except as you otherwise specify in this document, this document gives your agent the power to consent to your doctor not giving treatment or stopping treatment necessary to keep you alive.

Notwithstanding this document, you have the right to make medical and other health care decisions for yourself so long as you can give informed consent with respect to the particular decision. In addition, no treatment may be given to you over your objection, and health care necessary to keep you alive may not be stopped or withheld if you object at the time.

This document gives your agent authority to consent, to refuse to consent, or to withdraw consent to any care, treatment, service, or procedure to maintain, diagnose, or treat a physical or mental condition. This power is subject to any statement of your desires and any limitations that you include in this document. You may state in this document any types of treatment that you do not desire. In addition, a court can take away the power of your agent to make health care decisions for you if your agent (1) authorizes anything that is illegal, (2) acts contrary to your known desires, or (3) where your desires are not known, does anything that is clearly contrary to your best interests.

This power will exist for an indefinite period of time unless you limit its duration in this document.

You have the right to revoke the authority of your agent by notifying your agent or your treating doctor, hospital, or other health care provider orally or in writing of the revocation.

Your agent has the right to examine your medical records and to consent to their disclosure unless you limit this right in this document.

Unless you otherwise specify in this document, this document gives your agent the power after you die to (1) authorize an autopsy, (2) donate your body or parts thereof for transplant or therapeutic or educational or scientific purposes, and (3) direct the disposition of your remains.

If there is anything in this document that you do not understand, you should ask a lawyer to explain it to you.

(b) The printed form described in subdivision (a) shall also include the following notice: "This power of attorney will not be valid for making health care decisions unless it is either (1) signed by two qualified adult witnesses who are personally known to you and who are present when you sign or acknowledge your signature or (2) acknowledged before a notary public in California."

(c) A durable power of attorney prepared for execution by a person resident in this state that permits the agent to make health care decisions and that is not a printed form shall include one of the following:

(1) The substance of the statements provided for in subdivision (a) in capital letters.

(2) A certificate signed by the principal's lawyer stating: "I am a lawyer authorized to practice law in the state where this power of attorney was executed, and the principal was my client at the time this power of attorney was executed. I have advised my client concerning his or her rights in connection with this power of attorney and the applicable law and the consequences of signing or not signing this power of attorney, and my client, after being so advised, has executed this power of attorney."

(d) If a durable power of attorney includes the certificate provided for in paragraph (2) of subdivision (c) and permits the agent to make health care decisions for the principal, the applicable law of which the client is to be advised by the lawyer signing the certificate includes, but is not limited to, the matters listed in subdivision (a).

Comment. Section 8611 continues former Section 2433 without change, except for the omission of the reference to "attorney in fact" in the warning statement in subdivision (a) and the substitution elsewhere of "agent" for "attorney in fact." See Section 8023 ("attorney-in-fact" defined).

Section 8611 sets out a warning statement that is required to be in certain printed forms if the durable power of attorney is designed to authorize health care decisions. The warning statement in subdivision (a) is comparable to the warning in Section 8651 (statutory form durable power of attorney for health care). See Comment to Section 8651.

A printed form of a durable power of attorney for health care sold in this state for use by a person who does not have the advice of legal counsel can deal only with the authority to make health care decisions. If a person wants to execute a durable power of attorney to deal with both health care decisions and property matters and the person wants to use a printed form, two different forms are required -- one for health care and another for property matters. However, a person who has the advice of a lawyer may cover both health care and property matters in one durable power of attorney. In this case, the warnings or certificate required by subdivision (c) must be included.

As to the use of forms printed before January 1, 1986, see Section 8615.

See also Sections 8029 ("durable power of attorney" defined), 8032 ("durable power of attorney for health care" defined), 8044 ("health care decision" defined), 8059 ("power of attorney" defined), 8058 ("principal" defined).

§ 8612. Agent's authority to make health care decisions

8612. (a) Unless the durable power of attorney provides otherwise, the attorney-in-fact designated in a durable power of attorney for health care who is known to the health care provider to be available and willing to make health care decisions has priority over any other person to act for the principal in all matters of health care decisions, but the attorney-in-fact does not have authority to make a particular health care decision if the principal is able to give informed consent with respect to that decision.

(b) Subject to any limitations in the durable power of attorney, the attorney-in-fact designated in a durable power of attorney for health care may make health care decisions for the principal, before or after the death of the principal, to the same extent as the principal could make health care decisions for himself or herself if the principal had the capacity to do so, including: (1) making a disposition under the Uniform Anatomical Gift Act, Chapter 3.5 (commencing with Section 7150.5) of Part 1 of Division 7 of the Health and Safety Code, (2) authorizing an autopsy under Section 7113 of the Health and Safety Code, and (3) directing the disposition of remains under Section 7100 of the Health and Safety Code. In exercising the authority under the durable power of attorney for health care, the attorney-in-fact has a duty to act consistent with the desires of the principal as expressed in the durable power of attorney or otherwise made known to the attorney-in-fact at any time or, if the principal's desires are unknown, to act in the best interests of the principal.

(c) Nothing in this chapter affects any right the person designated as attorney-in-fact may have, apart from the durable power of attorney for health care, to make or participate in the making of health care decisions on behalf of the principal.

Comment. Section 8612 continues former Section 2434 without substantive change. "Agent" has been substituted for "attorney in fact." See Section 8023 ("attorney-in-fact" defined).

Subdivision (a) of Section 8612 gives the agent priority to make health care decisions if known to the health care provider to be available and willing to act. The power of attorney may vary this priority. Subdivision (a) also provides that the agent is not authorized to make health care decisions if the principal is able to give informed consent. The power of attorney may, however, give the agent authority to make health care decisions for the principal even though the principal is able to give informed consent, but the power of attorney is always subject to Section 8622 (if principal objects, agent not authorized to consent to health care or to the withholding or withdrawal of health care necessary to keep the principal alive).

Subdivision (b) authorizes the agent to make health care decisions, except as limited by the durable power of attorney for health care. In exercising his or her authority, the agent has the duty to act consistent with the principal's desires if known or, if the principal's desires are unknown, to act in the best interests of the principal. This authority is subject to Section 8620 which precludes consent to certain specified types of treatment. See also Section 8621 (unauthorized acts or omissions). The principal is free to provide any limitations on types of treatment in the durable power of attorney that are desired. See also Sections 8900-8962 (court enforcement of duties of agent). The authority under subdivision (b) is limited by Section 8622 (agent not authorized to consent to health care, or to the withholding or withdrawal of health care necessary to keep the principal alive, if principal objects). An agent

may, without liability, decline to act under the power of attorney. For example, the agent may not be willing to follow the desires of the principal as stated in the power of attorney because of changed circumstances. Subdivision (c) makes clear that, in such a case, the agent may make or participate in the making of health care decisions for the principal without being bound by the stated desires of the principal to the extent that the person designated as the agent has the right under the applicable law apart from the durable power of attorney.

As to the duration of the power of attorney, see Section 8616. See also Sections 8029 ("durable power of attorney" defined), 8032 ("durable power of attorney for health care" defined), 8044 ("health care decision" defined), 8047 ("health care provider" defined), 8058 ("principal" defined).

Staff Note. With the expansion of the definition of health care to include postdeath decisions, drawn from this section, the listing of the three types of postdeath care in subdivision (b) is not really necessary. However, in line with our policy of leaving durable power of attorney for health care provisions alone as much as possible, the language has been retained.

§ 8613. Availability of medical information to agent

8613. Except to the extent the right is limited by the durable power of attorney for health care, an attorney-in-fact designated to make health care decisions under a durable power of attorney for health care has the same right as the principal to receive information regarding the proposed health care, to receive and review medical records, and to consent to the disclosure of medical records.

Comment. Section 8613 continues former Section 2436 without substantive change. "Agent" has been substituted for "attorney in fact." See Section 8023 ("attorney-in-fact" defined).

Section 8613 makes clear that the agent can obtain and disclose information in the medical records of the principal. The power of attorney may limit the right of the agent, for example, by precluding examination of specified medical records or by providing that the examination of medical records is authorized only if the principal lacks the capacity to give informed consent. The right of the agent is subject to any limitations on the right of the patient to reach medical records. See Health & Safety Code §§ 25253 (denial of right to inspect mental health records), 25256 (providing summary of record rather than allowing access to entire record).

See also Sections 8023 ("attorney-in-fact" defined), 8029 ("durable power of attorney" defined), 8041 ("health care" defined), 8044 ("health care decision" defined), 8058 ("principal" defined).

§ 8614. Employee of health care provider, community care facility, or residential care facility

8614. An employee of the treating health care provider or an employee of an operator of a community care facility or an employee of a residential care facility for the elderly may be designated as the attorney-in-fact to make health care decisions under a durable power of attorney for health care if (a) the employee so designated is a relative of the principal by blood, marriage, or adoption, and (b) the other requirements of this chapter are satisfied.

Comment. Section 8614 continues former Section 2432.5 without substantive change. "Agent" has been substituted for "attorney in fact." See Section 8023 ("attorney-in-fact" defined).

Section 8614 provides a special exception to subdivision (b) of Section 8610 which prohibits an employee of the treating health care provider from being designated as agent to

make health care decisions under a durable power of attorney. Under Section 8614, such a person may be so designated if the person is a relative of the principal and the other requirements of this chapter are satisfied. This will, for example, permit a nurse to serve as agent for the nurse's spouse when the spouse is being treated at the hospital where the nurse is employed.

See also Sections 8023 ("attorney-in-fact" defined), 8026 ("community care facility" defined), 8032 ("durable power of attorney for health care" defined), 8044 ("health care decision" defined), 8047 ("health care provider" defined), 8071 ("residential care facility for the elderly" defined).

§ 8615. Revocation of durable power of attorney for health care

8615. (a) At any time while the principal has the capacity to give a durable power of attorney for health care, the principal may do any of the following:

(1) Revoke the appointment of the attorney-in-fact under the durable power of attorney for health care by notifying the attorney-in-fact orally or in writing.

(2) Revoke the authority granted to the attorney-in-fact to make health care decisions by notifying the health care provider orally or in writing.

(b) If the principal notifies the health care provider orally or in writing that the authority granted to the attorney-in-fact to make health care decisions is revoked, the health care provider shall make the notification a part of the principal's medical records and shall make a reasonable effort to notify the attorney-in-fact of the revocation.

(c) It is presumed that the principal has the capacity to revoke a durable power of attorney for health care. This presumption is a presumption affecting the burden of proof.

(d) Unless it provides otherwise, a valid durable power of attorney for health care revokes any prior durable power of attorney for health care.

(e) Unless the durable power of attorney for health care expressly provides otherwise, if after executing a durable power of attorney for health care the principal's marriage is dissolved or annulled, the dissolution or annulment revokes any designation of the former spouse as an attorney-in-fact to make health care decisions for the principal. If any designation is revoked solely by this subdivision, it is revived by the principal's remarriage to the former spouse.

(f) If authority granted by a durable power of attorney for health care is revoked under this section, a person is not subject to criminal prosecution or civil liability for acting in good faith reliance upon the durable power of attorney for health care unless the person has actual knowledge of the revocation.

Comment. Section 8615 continues former Section 2437 without change, except for the substitution of "agent" for "attorney in fact" and some technical, nonsubstantive revisions. See Section 8023 ("attorney-in-fact" defined). This section makes clear that the principal can revoke the appointment of the agent or the authority granted to the agent by oral or written notification to the agent or health care provider. The principal may revoke the appointment or authority only if, at the time of revocation, the principal has sufficient capacity to give a durable power of attorney for health care. The burden of proof is on the person who seeks to establish that the principal did not have the capacity to revoke the appointment or authority. See subdivision (c). Although the authorization to act as agent to make health care decisions

is revoked if the principal notifies the agent orally or in writing that the appointment of the agent is revoked, a health care provider is protected if the health care provider without knowledge of the revocation acts in good faith on a health care decision of the agent. See Section 8630 (immunities of health care provider).

Subdivision (b) is intended to preserve a record of a written or oral revocation. It also provides a means by which notice of an oral or written revocation to a health care provider may come to the attention of a successor health care provider and imposes a duty to make a reasonable effort to notify the agent of the revocation.

Subdivision (f) makes clear that a person is not liable for acting in good faith reliance upon the durable power of attorney unless the person has actual knowledge of its revocation. This subdivision is a specific application of the general agency rule stated in Section 2356(b) and is comparable to a provision found in the Natural Death Act. See Health & Safety Code § 7189(b). Although a person is protected if the person acts in good faith and without actual notice of the revocation, a person who withholds knowledge of the revocation is guilty of unlawful homicide where the death of the principal is hastened as a result of the failure to disclose the revocation. See Section 8613.

See also Sections 8023 ("attorney-in-fact" defined), 8032 ("durable power of attorney for health care" defined), 8044 ("health care decision" defined), 8058 ("principal" defined).

§ 8616. Expiration of durable power of attorney for health care

8616. (a) This section applies only to a durable power of attorney for health care that satisfies one of the following requirements:

(1) The power of attorney was executed after January 1, 1984, but before January 1, 1992.

(2) The power of attorney was executed on or after January 1, 1992, and contains a warning statement that refers to a seven-year limit on its duration.

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

Comment. Section 8616 continues former Section 2436.5 without change. Section 8616 limits the duration of a durable power of attorney for health care. The durable power of attorney may provide for a shorter duration, but the period of duration provided by Section 8616 may not be made longer by a provision in the durable power of attorney. The section does not apply to a durable power of attorney for health care executed before January 1, 1984, there being no limitation on the duration of such a durable power of attorney unless specified in the durable power of attorney.

See also Sections 8032 ("durable power of attorney for health care" defined), 8044 ("health care decision" defined), 8058 ("principal" defined).

Article 3. Limitations and Restrictions

§ 8620. Limitations on agent's authority

8620. A power of attorney may not authorize the attorney-in-fact to consent to any of the following on behalf of the principal:

- (a) Commitment to or placement in a mental health treatment facility.
- (b) Convulsive treatment (as defined in Section 5325 of the Welfare and Institutions Code).
- (c) Psychosurgery (as defined in Section 5325 of the Welfare and Institutions Code).
- (d) Sterilization.
- (e) Abortion.

Comment. Section 8620 continues former Section 2435 without substantive change. "Agent" has been substituted for "attorney in fact." See Section 8023 ("attorney-in-fact" defined). The word "durable" has been omitted because it the prohibition of this section applies to all powers of attorney. A power of attorney may not vary the limitations of this section. See also Section 8621 (unauthorized acts and omissions).

See also Sections 8029 ("durable power of attorney" defined), 8058 ("principal" defined).

§ 8621. Unauthorized acts or omissions

8621. Nothing in this chapter shall be construed to condone, authorize, or approve mercy killing, or to permit any affirmative or deliberate act or omission to end life other than the withholding or withdrawal of health care pursuant to a durable power of attorney for health care so as to permit the natural process of dying. In making health care decisions under a durable power of attorney for health care, an attempted suicide by the principal shall not be construed to indicate a desire of the principal that health care treatment be restricted or inhibited.

Comment. Section 8621 continues former Section 2443 without change, except for the substitution of a reference to "chapter" instead of "article." Section 8621 does not prevent the withholding or withdrawal of health care to permit the natural process of dying.

See also Sections 8026 ("community care facility" defined), 8032 ("durable power of attorney for health care" defined), 8044 ("health care decision" defined), 8058 ("principal" defined).

§ 8622. Principal's objections

8622. Nothing in this chapter authorizes an attorney-in-fact to consent to health care, or to consent to the withholding or withdrawal of health care necessary to keep the principal alive, if the principal objects to the health care or to the withholding or withdrawal of the health care. In such a case, the case is governed by the law that would apply if there were no durable power of attorney for health care.

Comment. Section 8622 continues former Section 2440 without change, except for the substitution of "agent" for "attorney in fact" and of a reference to "chapter" instead of "article." See Section 8023 ("attorney-in-fact" defined).

Section 8622 precludes the agent from consenting to treatment for the principal when the principal does not want the treatment or from consenting to the withholding or withdrawal of treatment necessary to keep the principal alive if the principal objects to withholding or stopping the treatment. This section does not limit any right the agent may have apart from the authority under the durable power of attorney for health care. See Section 8612(c).

See also Sections 8023 ("attorney-in-fact" defined), 8032 ("durable power of attorney for health care" defined), 8041 ("health care" defined).

§ 8623. Restriction on execution of durable power of attorney for health care as condition for admission, treatment, or insurance

8623. No health care provider, health care service plan, insurer issuing disability insurance, self-insured employee welfare plan, or nonprofit hospital plan or similar insurance plan, may condition admission to a facility, or the providing of treatment, or insurance, on the requirement that a patient execute a durable power of attorney for health care.

Comment. Section 8623 continues former Section 2441 without change. Section 8623 is intended to eliminate the possibility that duress might be used by a health care provider or insurer to cause the patient to execute a durable power of attorney for health care.

See also Sections 8032 ("durable power of attorney for health care" defined), 8047 ("health care provider" defined).

§ 8624. Alteration or forging, or concealment or withholding knowledge of revocation of durable power of attorney for health care

8624. Any person who, except where justified or excused by law, alters or forges a durable power of attorney for health care of another, or willfully conceals or withholds personal knowledge of a revocation as provided under Section 8615, with the intent to cause a withholding or withdrawal of health care necessary to keep the principal alive contrary to the desires of the principal, and thereby, because of such act, directly causes health care necessary to keep the principal alive to be withheld or withdrawn and the death of the principal thereby to be hastened, is subject to prosecution for unlawful homicide as provided in Chapter 1 (commencing with Section 187) of Title 8 of Part 1 of the Penal Code.

Comment. Section 8624 continues former Section 2442 without change, except for the revision of a cross-reference to another section. This section is drawn from Section 7194 of the Health and Safety Code (Natural Death Act).

See also Sections 8032 ("durable power of attorney for health care" defined), 8041 ("health care" defined), 8058 ("principal" defined).

Article 4. Protections and Immunities

§ 8630. Immunities of health care provider

8630. (a) Subject to any limitations stated in the durable power of attorney for health care and to subdivision (b) and to Sections 8620, 8621, 8622, 8623, and 8624, a health care provider is not subject to criminal prosecution, civil liability, or professional disciplinary action except to the same extent as would be the case if the principal, having had the capacity to give informed consent, had made the health care decision on his or her own behalf under like circumstances, if the health care provider relies on a health care decision and both of the following requirements are satisfied:

(1) The decision is made by an attorney-in-fact who the health care provider believes in good faith is authorized under this chapter to make the decision.

(2) The health care provider believes in good faith that the decision is not inconsistent with the desires of the principal as expressed in the durable power of attorney for health care or otherwise made known to the health care provider, and, if the decision is to withhold or withdraw health care necessary to keep the principal alive, the health care provider has made a good faith effort to determine the desires of the principal to the extent that the principal is able to convey those desires to the health care provider and the results of the effort are made a part of the principal's medical records.

(b) Nothing in this chapter authorizes a health care provider to do anything illegal.

(c) Notwithstanding the health care decision of the attorney-in-fact designated by a durable power of attorney for health care, the health care provider is not subject to criminal prosecution, civil liability, or professional disciplinary action for failing to withdraw health care necessary to keep the principal alive.

Comment. Section 8630 continues former Section 2438 without change, except for the revision of cross-references to other provisions, the substitution of "agent" for "attorney in fact," and other technical, nonsubstantive revisions. See Section 8023 ("attorney-in-fact" defined). Section 8630 implements this chapter by protecting the health care provider who acts in good faith reliance on a health care decision made by an agent pursuant to this chapter. The protection under Section 8630 is limited. A health care provider is not protected from liability for malpractice. Nor is a health care provider protected if the health care provider fails to provide the agent with the information necessary so that the agent can give informed consent. Nor is a health care provider authorized to do anything illegal. See also Sections 8620 (forms of treatment not authorized by durable power of attorney for health care), 8621 (unauthorized acts and omissions).

Subdivision (c) provides immunity to the health care provider insofar as there might otherwise be liability for failing to comply with a decision of the agent to withdraw consent previously given to provide health care necessary to keep the principal alive. This subdivision does not deal with providing health care necessary to keep the principal alive. The situations where such health care can be provided without informed consent (such as an emergency situation) continue to be governed by the law otherwise applicable.

See also Sections 8023 ("attorney-in-fact" defined), 8026 ("health care" defined), 8032 ("durable power of attorney for health care" defined), 8044 ("health care decision" defined), 8047 ("health care provider" defined), 8058 ("principal" defined), 8071 ("residential care facility for the elderly" defined).

§ 8630.5. Presumption concerning power executed in other jurisdiction

8630.5. In the absence of knowledge to the contrary, a physician and surgeon or other health care provider may presume that a durable power of attorney for health care or similar instrument, whether executed in another state or jurisdiction or in this state, is valid.

Comment. Section 8603 continues former Section 2445 [as added by 1992 Cal. Stat. ch. 2697, § 2 (AB 2697), operative Aug. 11, 1992] without change.

§ 8631. Convincing evidence of identity of principal

8631. For the purposes of the declaration of witnesses required by Section 8610 or 8651, "convincing evidence" means the absence of any information, evidence, or other circumstances which would lead a reasonable person to believe that the person signing or acknowledging the durable power of attorney for health care as principal is not the individual he or she claims to be and any one of the following:

(a) Reasonable reliance on the presentation of any one of the following, if the document is current or has been issued within five years:

(1) An identification card or driver's license issued by the California Department of Motor Vehicles.

(2) A passport issued by the Department of State of the United States.

(b) Reasonable reliance on the presentation of any one of the following, if the document is current or has been issued within five years and contains a photograph and description of the person named on it, is signed by the person, bears a serial or other identifying number, and, in the event that the document is a passport, has been stamped by the United States Immigration and Naturalization Service:

(1) A passport issued by a foreign government.

(2) A driver's license issued by a state other than California or by a Canadian or Mexican public agency authorized to issue drivers' licenses.

(3) An identification card issued by a state other than California.

(4) An identification card issued by any branch of the armed forces of the United States.

(c) If the principal is a patient in a skilled nursing facility, a witness who is a patient advocate or ombudsman may, for the purposes of Section 8610 or 8651, rely upon the representations of the administrators or staff of the skilled nursing facility, or of family members, as convincing evidence of the identity of the principal if the patient advocate or ombudsman believes that the representations provide a reasonable basis for determining the identity of the principal.

Comment. Section 8631 continues former Section 2511 without substantive change. This section is drawn from Civil Code Section 1186 (acknowledgment of instrument by notary public), but is more restrictive because this section does not include the substance of Civil Code Section 1186(c)(1).

**CHAPTER 2. STATUTORY FORM DURABLE POWER OF ATTORNEY FOR
HEALTH CARE**

§ 8650. Short title

8650. This chapter shall be known and may be cited as the Keene Health Care Agent Act.

Comment. Section 8650 continues former Section 2508 without change.

§ 8651. Statutory form durable power of attorney for health care

8651. The use of the following form in the creation of a durable power of attorney for health care under Chapter 1 (commencing with Section 8600) is lawful, and when used, the power of attorney shall be construed in accordance with this chapter and is subject to Chapter 1 (commencing with Section 8600), provided, however, that the use of a form previously authorized by this statute (at the time it was so authorized) remains valid.

STATUTORY FORM DURABLE POWER OF ATTORNEY FOR HEALTH CARE

(California Probate Code Section 8651)

WARNING TO PERSON EXECUTING THIS DOCUMENT

THIS IS AN IMPORTANT LEGAL DOCUMENT WHICH IS AUTHORIZED BY THE KEENE HEALTH CARE AGENT ACT. BEFORE EXECUTING THIS DOCUMENT, YOU SHOULD KNOW THESE IMPORTANT FACTS:

THIS DOCUMENT GIVES THE PERSON YOU DESIGNATE AS YOUR AGENT THE POWER TO MAKE HEALTH CARE DECISIONS FOR YOU. YOUR AGENT MUST ACT CONSISTENTLY WITH YOUR DESIRES AS STATED IN THIS DOCUMENT OR OTHERWISE MADE KNOWN.

EXCEPT AS YOU OTHERWISE SPECIFY IN THIS DOCUMENT, THIS DOCUMENT GIVES YOUR AGENT THE POWER TO CONSENT TO YOUR DOCTOR NOT GIVING TREATMENT OR STOPPING TREATMENT NECESSARY TO KEEP YOU ALIVE.

NOTWITHSTANDING THIS DOCUMENT, YOU HAVE THE RIGHT TO MAKE MEDICAL AND OTHER HEALTH CARE DECISIONS FOR YOURSELF SO LONG AS YOU CAN GIVE INFORMED CONSENT WITH RESPECT TO THE PARTICULAR DECISION. IN ADDITION, NO TREATMENT MAY BE GIVEN TO YOU OVER YOUR OBJECTION AT THE TIME, AND HEALTH CARE NECESSARY TO KEEP YOU ALIVE MAY NOT BE STOPPED OR WITHHELD IF YOU OBJECT AT THE TIME.

THIS DOCUMENT GIVES YOUR AGENT AUTHORITY TO CONSENT, TO REFUSE TO CONSENT, OR TO WITHDRAW CONSENT TO ANY CARE, TREATMENT, SERVICE, OR PROCEDURE TO MAINTAIN, DIAGNOSE, OR TREAT A PHYSICAL OR MENTAL CONDITION. THIS POWER IS SUBJECT TO ANY STATEMENT OF YOUR DESIRES AND ANY LIMITATIONS THAT YOU INCLUDE IN THIS DOCUMENT. YOU MAY STATE IN THIS DOCUMENT ANY TYPES OF TREATMENT THAT YOU DO NOT DESIRE. IN ADDITION, A COURT CAN TAKE AWAY THE POWER OF YOUR AGENT TO MAKE HEALTH CARE DECISIONS FOR YOU IF YOUR AGENT (1) AUTHORIZES ANYTHING THAT IS ILLEGAL, (2) ACTS CONTRARY TO YOUR KNOWN DESIRES, OR (3) WHERE YOUR DESIRES ARE NOT

KNOWN, DOES ANYTHING THAT IS CLEARLY CONTRARY TO YOUR BEST INTERESTS.

THE POWERS GIVEN BY THIS DOCUMENT WILL EXIST FOR AN INDEFINITE PERIOD OF TIME UNLESS YOU LIMIT THEIR DURATION IN THIS DOCUMENT.

YOU HAVE THE RIGHT TO REVOKE THE AUTHORITY OF YOUR AGENT BY NOTIFYING YOUR AGENT OR YOUR TREATING DOCTOR, HOSPITAL, OR OTHER HEALTH CARE PROVIDER ORALLY OR IN WRITING OF THE REVOCATION.

YOUR AGENT HAS THE RIGHT TO EXAMINE YOUR MEDICAL RECORDS AND TO CONSENT TO THEIR DISCLOSURE UNLESS YOU LIMIT THIS RIGHT IN THIS DOCUMENT.

UNLESS YOU OTHERWISE SPECIFY IN THIS DOCUMENT, THIS DOCUMENT GIVES YOUR AGENT THE POWER AFTER YOU DIE TO (1) AUTHORIZE AN AUTOPSY, (2) DONATE YOUR BODY OR PARTS THEREOF FOR TRANSPLANT OR THERAPEUTIC OR EDUCATIONAL OR SCIENTIFIC PURPOSES, AND (3) DIRECT THE DISPOSITION OF YOUR REMAINS.

THIS DOCUMENT REVOKES ANY PRIOR DURABLE POWER OF ATTORNEY FOR HEALTH CARE.

YOU SHOULD CAREFULLY READ AND FOLLOW THE WITNESSING PROCEDURE DESCRIBED AT THE END OF THIS FORM. THIS DOCUMENT WILL NOT BE VALID UNLESS YOU COMPLY WITH THE WITNESSING PROCEDURE.

IF THERE IS ANYTHING IN THIS DOCUMENT THAT YOU DO NOT UNDERSTAND, YOU SHOULD ASK A LAWYER TO EXPLAIN IT TO YOU.

YOUR AGENT MAY NEED THIS DOCUMENT IMMEDIATELY IN CASE OF AN EMERGENCY THAT REQUIRES A DECISION CONCERNING YOUR HEALTH CARE. EITHER KEEP THIS DOCUMENT WHERE IT IS IMMEDIATELY AVAILABLE TO YOUR AGENT AND ALTERNATE AGENTS OR GIVE EACH OF THEM AN EXECUTED COPY OF THIS DOCUMENT. YOU MAY ALSO WANT TO GIVE YOUR DOCTOR AN EXECUTED COPY OF THIS DOCUMENT.

DO NOT USE THIS FORM IF YOU ARE A CONSERVATEE UNDER THE LANTERMAN-PETRIS-SHORT ACT AND YOU WANT TO APPOINT YOUR CONSERVATOR AS YOUR AGENT. YOU CAN DO THAT ONLY IF THE APPOINTMENT DOCUMENT INCLUDES A CERTIFICATE OF YOUR ATTORNEY.

1. DESIGNATION OF HEALTH CARE AGENT.

I,

(Insert your name and address)

do hereby designate and appoint

(Insert name, address, and telephone number of one individual only as your agent to make health care decisions for you. None of the following may be designated as your agent: (1) your treating health care provider, (2) a nonrelative employee of your treating health care provider, (3) an operator of a community care facility, (4) a nonrelative employee of an operator of a community care facility, (5) an operator of a residential care facility for the elderly, or (6) a nonrelative employee of an operator of a residential care facility for the elderly.)

as my agent to make health care decisions for me as authorized in this document. For the purposes of this document, "health care decision" means consent, refusal of consent, or withdrawal of consent to any care, treatment, service, or procedure to maintain, diagnose, or treat an individual's physical or mental condition.

2. CREATION OF DURABLE POWER OF ATTORNEY FOR HEALTH CARE. By this document I intend to create a durable power of attorney for health care under Sections 8600 to 8631, inclusive, of the California Probate Code. This power of attorney is authorized by the Keene Health Care Agent Act and shall be construed in accordance with the provisions of Sections 8650 to 8659, inclusive, of the California Civil Code. This power of attorney shall not be affected by my subsequent incapacity.

3. GENERAL STATEMENT OF AUTHORITY GRANTED. Subject to any limitations in this document, I hereby grant to my agent full power and authority to make health care decisions for me to the same extent that I could make such decisions for myself if I had the capacity to do so. In exercising this authority, my agent shall make health care decisions that are consistent with my desires as stated in this document or otherwise made known to my agent, including, but not limited to, my desires concerning obtaining or refusing or withdrawing life-prolonging care, treatment, services, and procedures.

(If you want to limit the authority of your agent to make health care decisions for you, you can state the limitations in paragraph 4 ("Statement of Desires, Special Provisions, and Limitations") below. You can indicate your desires by including a statement of your desires in the same paragraph.)

4. STATEMENT OF DESIRES, SPECIAL PROVISIONS, AND LIMITATIONS.

(Your agent must make health care decisions that are consistent with your known desires. You can, but are not required to, state your desires in the space provided below. You should consider whether you want to include a statement of your desires concerning life-prolonging care, treatment, services, and procedures. You can also include a statement of your desires concerning other matters relating to your health care. You can also make your desires known to your agent by discussing your desires with your agent or by some other means. If there are any types of treatment that you do not want to be used, you should state them in the space below. If you want to limit in any other way the authority given your agent by this document, you should state the limits in the space below. If you do not state any limits, your agent will have broad powers to make

health care decisions for you, except to the extent that there are limits provided by law.)

In exercising the authority under this durable power of attorney for health care, my agent shall act consistently with my desires as stated below and is subject to the special provisions and limitations stated below:

(a) Statement of desires concerning life-prolonging care, treatment, services, and procedures:

(b) Additional statement of desires, special provisions, and limitations:

(You may attach additional pages if you need more space to complete your statement. If you attach additional pages, you must date and sign EACH of the additional pages at the same time you date and sign this document.)

5. INSPECTION AND DISCLOSURE OF INFORMATION RELATING TO MY PHYSICAL OR MENTAL HEALTH. Subject to any limitations in this document, my agent has the power and authority to do all of the following:

(a) Request, review, and receive any information, verbal or written, regarding my physical or mental health, including, but not limited to, medical and hospital records.

(b) Execute on my behalf any releases or other documents that may be required in order to obtain this information.

(c) Consent to the disclosure of this information.

(If you want to limit the authority of your agent to receive and disclose information relating to your health, you must state the limitations in paragraph 4 ("Statement of Desires, Special Provisions, and Limitations") above.)

6. SIGNING DOCUMENTS, WAIVERS, AND RELEASES. Where necessary to implement the health care decisions that my agent is authorized by this document to make, my agent has the power and authority to execute on my behalf all of the following:

(a) Documents titled or purporting to be a "Refusal to Permit Treatment" and "Leaving Hospital Against Medical Advice."

(b) Any necessary waiver or release from liability required by a hospital or physician.

7. AUTOPSY; ANATOMICAL GIFTS; DISPOSITION OF REMAINS. Subject to any limitations in this document, my agent has the power and authority to do all of the following:

(a) Authorize an autopsy under Section 7113 of the Health and Safety Code.

(b) Make a disposition of a part or parts of my body under the Uniform Anatomical Gift Act (Chapter 3.5 (commencing with Section 7150) of Part 1 of Division 7 of the Health and Safety Code).

(c) Direct the disposition of my remains under Section 7100 of the Health and Safety Code.

(If you want to limit the authority of your agent to consent to an autopsy, make an anatomical gift, or direct the disposition of your remains, you must state the limitations in paragraph 4 ("Statement of Desires, Special Provisions, and Limitations") above.)

8. DURATION.

(Unless you specify otherwise in the space below, this power of attorney will exist for an indefinite period of time.)

This durable power of attorney for health care expires on _____

(Fill in this space ONLY if you want to limit the duration of this power of attorney.)

9. DESIGNATION OF ALTERNATE AGENTS.

(You are not required to designate any alternate agents but you may do so. Any alternate agent you designate will be able to make the same health care decisions as the agent you designated in paragraph 1, above, in the event that agent is unable or ineligible to act as your agent. If the agent you designated is your spouse, he or she becomes ineligible to act as your agent if your marriage is dissolved.)

If the person designated as my agent in paragraph 1 is not available or becomes ineligible to act as my agent to make a health care decision for me or loses the mental capacity to make health care decisions for me, or if I revoke that person's appointment or authority to act as my agent to make health care decisions for me, then I designate and appoint the following persons to serve as my agent to make health care decisions for me as authorized in this document, such persons to serve in the order listed below:

A. First Alternate Agent

(Insert name, address, and telephone number of first alternate agent)

B. Second Alternate Agent

(Insert name, address, and telephone number of second alternate agent)

10. NOMINATION OF CONSERVATOR OF PERSON.

(A conservator of the person may be appointed for you if a court decides that one should be appointed. The conservator is responsible for your physical care, which under some circumstances includes making health care decisions for you. You are not required to nominate a conservator but you may do so. The court will appoint the person you nominate unless that would be contrary to your best interests. You may, but are not required to, nominate as your conservator the same person you named in paragraph 1 as your health care agent. You can nominate an individual as your conservator by completing the space below.)

If a conservator of the person is to be appointed for me, I nominate the following individual to serve as conservator of the person

(Insert name and address of person nominated as
conservator of the person)

11. PRIOR DESIGNATIONS REVOKED. I revoke any prior durable power of attorney for health care.

DATE AND SIGNATURE OF PRINCIPAL

(YOU MUST DATE AND SIGN THIS POWER OF ATTORNEY)

I sign my name to this Statutory Form Durable Power of Attorney for Health Care on _____ at _____
(Date) (City) (State)

(You sign here)

(THIS POWER OF ATTORNEY WILL NOT BE VALID UNLESS IT IS SIGNED BY TWO QUALIFIED WITNESSES WHO ARE PRESENT WHEN YOU SIGN OR ACKNOWLEDGE YOUR SIGNATURE. IF YOU HAVE ATTACHED ANY ADDITIONAL PAGES TO THIS FORM, YOU MUST DATE AND SIGN EACH OF THE ADDITIONAL PAGES AT THE SAME TIME YOU DATE AND SIGN THIS POWER OF ATTORNEY.)

STATEMENT OF WITNESSES

(This document must be witnessed by two qualified adult witnesses. None of the following may be used as a witness: (1) a person you designate as your agent or alternate agent, (2) a health care provider, (3) an employee of a health care provider, (4) the operator of a community care facility, (5) an employee of an operator of a community care facility, (6) the operator of a residential care facility for the elderly, or (7) an employee of an operator of a residential care facility for the elderly. At least one of the witnesses must make the additional declaration set out following the place where the witnesses sign.)

(READ CAREFULLY BEFORE SIGNING. You can sign as a witness only if you personally know the principal or the identity of the principal is proved to you by convincing evidence.)

(To have convincing evidence of the identity of the principal, you must be presented with and reasonably rely on any one or more of the following:

(1) An identification card or driver's license issued by the California Department of Motor Vehicles that is current or has been issued within five years.

(2) A passport issued by the Department of State of the United States that is current or has been issued within five years.

(3) Any of the following documents if the document is current or has been issued within five years and contains a photograph and description of the person named on it, is signed by the person, and bears a serial or other identifying number:

(a) A passport issued by a foreign government that has been stamped by the United States Immigration and Naturalization Service.

(b) A driver's license issued by a state other than California or by a Canadian or Mexican public agency authorized to issue drivers' licenses.

(c) An identification card issued by a state other than California.

(d) An identification card issued by any branch of the armed forces of the United States.

(4) If the principal is a patient in a skilled nursing facility, a witness who is a patient advocate or ombudsman may rely upon the representations of the administrator or staff of the skilled nursing facility, or of family members, as convincing evidence of the identity of the principal if the patient advocate or ombudsman believes that the representations provide a reasonable basis for determining the identity of the principal.)

(Other kinds of proof of identity are not allowed.)

I declare under penalty of perjury under the laws of California that the person who signed or acknowledged this document is personally known to me (or proved to me on the basis of convincing evidence) to be the principal, that the principal signed or acknowledged this durable power of attorney in my presence, that the principal appears to be of sound mind and under no duress, fraud, or undue influence, that I am not the person appointed as agent by this document, and that I am not a health care provider, an employee of a health care provider, the operator of a community care facility, an employee of an operator of a community care facility, the operator of a residential care facility for the elderly, nor an employee of an operator of a residential care facility for the elderly.

Signature: _____ Residence Address:

Print Name:

Date:

Signature: _____ Residence Address:

Print Name:

Date:

(AT LEAST ONE OF THE ABOVE WITNESSES MUST ALSO SIGN THE FOLLOWING DECLARATION.)

I further declare under penalty of perjury under the laws of California that I am not related to the principal by blood, marriage, or adoption, and, to the best of my knowledge, I am not entitled to any part of the estate of the principal upon the death of the principal under a will now existing or by operation of law.

Signature:

Signature:

STATEMENT OF PATIENT ADVOCATE OR OMBUDSMAN

(If you are a patient in a skilled nursing facility, one of the witnesses must be a patient advocate or ombudsman. The following statement is required only if you are a patient in a skilled nursing facility -- a health care facility that provides the following basic services: skilled nursing care and supportive care to patients whose primary need is for availability of skilled nursing care on an extended basis. The patient advocate or ombudsman must sign both parts of the "Statement of Witnesses" above AND must also sign the following statement.)

I further declare under penalty of perjury under the laws of California that I am a patient advocate or ombudsman as designated by the State Department of Aging and that I am serving as a witness as required by subdivision (f) of Section 8610 of the Probate Code.

Signature:

Comment. Section 8651 continues former Section 2500 without change, except for the revision of cross-references to other provisions, the use of "agent" in place of "attorney in fact" in the warning statement, and other technical, nonsubstantive revisions. "Agent" has been substituted for "attorney in fact." See Section 8023 ("attorney-in-fact" defined).

Section 8651 is consistent with and subject to the substantive law applicable to a durable power of attorney for health care. See Sections 8600-8659 (durable power of attorney for health care), 8900-8962 (court review). However, in the statutory form durable power of attorney for health care, the warning set out in Section 8651 replaces the one set out in Section 8611. See also Section 8652 (warning or lawyer's certificate). Two witnesses are required for use of a statutory form durable power of attorney for health care; acknowledgment before a notary is not permitted. Compare Section 8651 with Section 8610(a)(2)(B) (acknowledgment before notary public). The last sentence of the fifth paragraph of the "warning" recognizes the authority given the court by Section 8952.

As to use of forms complying with former law, see Section 8655. See also Sections 8026 ("community care facility" defined), 8032 ("durable power of attorney for health care" defined), 8041 ("health care" defined), 8044 ("health care decision" defined), 8047 ("health care provider" defined), 8058 ("principal" defined), 8071 ("residential care facility for the elderly" defined).

§ 8652. Warning or lawyer's certificate

8652. (a) Notwithstanding Section 8611, except as provided in subdivision (b), a statutory form durable power of attorney for health care, to be valid, shall contain, in not less than 10-point boldface type or a reasonable equivalent

thereof, the warning statement which is printed in capital letters at the beginning of Section 8651.

(b) Subdivision (a) does not apply if the statutory form durable power of attorney for health care contains a certificate signed by the principal's lawyer stating: "I am a lawyer authorized to practice law in the state where this power of attorney was executed, and the principal was my client at the time when this power of attorney was executed. I have advised my client concerning his or her rights in connection with this power of attorney and the applicable law and the consequences of signing or not signing this power of attorney, and my client, after being so advised, has executed this power of attorney."

Comment. Section 8652 continues former Section 2501 without change, except for the revision of cross-references to other provisions. This section makes invalid a statutory form durable power of attorney for health care that does not contain the warning or, in lieu of the warning, a lawyer's certificate. The warning set out in Section 8651 must be used in the statutory form instead of the warning set out in Section 8611.

See also Sections 8044 ("health care decision" defined), 8047 ("health care provider" defined), 8059 ("power of attorney" defined), 8071 ("residential care facility for the elderly" defined), 4080 ("statutory form durable power of attorney for health care" defined).

§ 8653. Formal requirements

8653. (a) Notwithstanding paragraph (3) of subdivision (a) of Section 8610, a statutory form durable power of attorney for health care is valid, and the designated agent may make health care decisions pursuant to such authority, only if it (1) contains the date of its execution, (2) is signed by the principal, and (3) is signed by two qualified witnesses, each of whom executes, under penalty of perjury, the declaration set out in the first paragraph of the "Statement of Witnesses" in the form set out in Section 8651, and one of whom also executes the declaration under penalty of perjury set out in the second paragraph of the "Statement of Witnesses" in the form set out in Section 8651.

(b) Nothing in this section excuses compliance with the special requirements imposed by subdivisions (c) and (f) of Section 8610.

Comment. Section 8653 continues former Section 2502 without change, except for the revision of cross-references to other provisions and the substitution of "agent" for "attorney in fact." See Section 8023 ("attorney-in-fact" defined).

Section 8653 is comparable to Section 8610. To be valid a statutory form durable power of attorney for health care must satisfy the requirements of both Section 8652 and 8653. It should be noted that a statutory form durable power of attorney for health care requires two witnesses and, unlike Section 8610, acknowledgment before a notary is not authorized.

See also Sections 8023 ("attorney-in-fact" defined), 8044 ("health care decision" defined), 8058 ("principal" defined), 4078 ("statutory form durable power of attorney for health care" defined).

§ 8654. Requirements for statutory form

8654. (a) Subject to subdivisions (b), (c), and (d), a power of attorney is a "statutory form durable power of attorney for health care," as this phrase is used in this chapter, if it meets both of the following requirements:

(1) It meets the requirements of Sections 8652 and 8653.

(2) It includes the exact wording of the text of paragraphs 1, 2, 3, and 4 of the form set out in Section 8651.

(b) A statutory form durable power of attorney for health care may include one or more or all of paragraphs 5 to 11, inclusive, of the form set out in Section 8651.

(c) A printed statutory form durable power of attorney for health care sold or otherwise distributed in this state for use by a person who does not have the advice of legal counsel shall contain the exact wording of the form set out in Section 8651, including the warning and instructions, and nothing else. Nothing in this subdivision prohibits selling or otherwise distributing with the printed form (1) material that explains the form and its use if such material is separate from the printed form itself and is not a part of the form executed by the principal or (2) one or more additional pages that are separate from the printed form itself that a person may attach to the printed form as provided in subdivision (d) if the person so chooses.

(d) If one or more additional pages are attached to a statutory form durable power of attorney for health care as a statement, or additional statement, to be a part of subparagraph (a) or (b), or both, of paragraph 4 ("Statement of Desires, Special Provisions, and Limitations") of the form set forth in Section 8651, each of the additional pages shall be dated and signed by the principal at the same time the principal dates and signs the statutory form durable power of attorney for health care.

Comment. Section 8654 continues former Section 2503 without change, except for the revision of cross-references to other provisions. This section permits use of a statutory form durable power of attorney for health care that omits portions of the form set out in Section 8651, such as, for example, the paragraph on "Duration." However, if the form is sold or distributed for use by a person who does not have a lawyer, the form must be exactly as set out in the statute with nothing omitted. Section 8654 also permits use of a printed statutory form that includes separate attached printed statements of desires, special provisions, and limitations, if the person using the form so desires, such as, for example, a statement that the health care agent is to confer with specified members of the principal's family who are reasonably available before making specified health care decisions or a statement that the health care agent is authorized and directed to arrange for health care of the principal by spiritual means through prayer in accordance with the tenets and practices of a recognized church or religious denomination by an accredited practitioner thereof. A separately printed statement of the principal's desires concerning life-prolonging care, treatment, services, and procedures may also be used. The statements of desires, special provisions, and limitations--whether or not printed--are, of course, subject to the provisions of Chapter 1 (commencing with Section 8600). See the introductory clause of Section 8651.

See also Sections 8058 ("principal" defined), 4080 ("statutory form durable power of attorney for health care" defined).

§ 8655. Requirements for forms after January 1, 1993

8655. (a) A statutory form durable power of attorney for health care executed on or after January 1, 1993, using a form that complies with former Section 2500 of the Civil Code is as valid as if it had been executed using a form that complies with Section 8651 of this code.

(b) Notwithstanding former Section 2501 of the Civil Code or Section 8652 of this code, a statutory form durable power of attorney for health care executed on or after January 1, 1993, is not invalid if it contains the warning using the language set forth in former Section 2500 of the Civil Code instead of the warning using the language set forth in Section 8651 of this code.

(c) For the purposes of subdivision (c) of former Section 2503 of the Civil Code and subdivision (c) of Section 8654 of this code, on and after January 1, 1993, a printed statutory form durable power of attorney for health care may be sold or otherwise distributed if it contains the exact wording of the form set out in former Section 2500 of the Civil Code or the exact wording of the form set out in Section 8651 of this code, including the warning and instructions, and nothing else; but any printed statutory form durable power of attorney for health care printed on or after January 1, 1993, that is sold or otherwise distributed in this state for use by a person who does not have the advice of legal counsel shall contain the exact wording of the form set out in Section 8651 of this code, including the warning and instructions, and nothing else.

Comment. Section 8655 supersedes former Section 2503.5, but like the former section, this section permits continued use of the form prescribed under former law until existing supplies are exhausted. Section 8655 permits use of a form complying with former Section 2500 (applicable from January 1, 1986, until January 1, 1993). Accordingly, after January 1, 1993, either the form set forth in former Section 2500 or the form set forth in this section may be used. This avoids the need to discard existing printed forms on January 1, 1993. However, forms printed on or after January 1, 1993, must contain the exact wording of the form set out in Section 8651, including the warning and instructions, and nothing else.

Staff Note. *Further consideration should be given to whether this section can be simplified, such as by validating in general language the use of forms that complied with the statute when they were printed.*

As amended in 1991:

2503.5. (a) Subject to Section 2436.5, a statutory form durable power of attorney for health care executed on or after January 1, 1986, using a form that complied with Section 2500 as originally enacted, or as amended by Chapter 403 of the Statutes of 1985, or as amended by Chapter 1543 of the Statutes of 1988, or as amended by Chapter 331 of the Statutes of 1990, is as valid as if it had been executed using a form that complied with the requirements of Section 2500 as in effect at the time of execution.

(b) Notwithstanding Section 2501, a statutory form durable power of attorney for health care executed on or after January 1, 1986, is not invalid if it contains the warning using the language set forth in Section 2500 as originally enacted, or as amended by Chapter 403 of the Statutes of 1985, or as amended by Chapter 1543 of the Statutes of 1988, or as amended by Chapter 331 of the Statutes of 1990, instead of the warning using the language set forth in that section as in effect at the time of execution.

(c) For the purposes of subdivision (c) of Section 2503, on and after January 1, 1986, a printed statutory form durable power of attorney for health care may be sold or otherwise distributed if it contains the exact wording of the form set out in Section 2500 as originally enacted, or the exact

wording of the form set out in Section 2500 as amended by Chapter 403 of the Statutes of 1985, or as amended by Chapter 1543 of the Statutes of 1988, or as amended by Chapter 331 of the Statutes of 1990, including the warning and instructions, and nothing else; but any printed statutory form durable power of attorney for health care printed on or after January 1, 1986, that is sold or otherwise distributed in this state for use by a person who does not have the advice of legal counsel shall contain the exact wording of the form set out in Section 2500, including the warning and instructions, and nothing else.

(Amended by 1991 Cal. Stat. ch. 896, § 5.) [AB 793]

§ 8656. Language conferring general authority

8656. In a statutory form durable power of attorney for health care, the language conferring general authority with respect to "health care decisions" authorizes the agent to select and discharge physicians, dentists, nurses, therapists, and other health care professionals as the agent determines necessary to carry out the health care decisions the agent is authorized by the power of attorney to make.

Comment. Section 8656 continues former Section 2504 without change, except for the substitution of "agent" for "attorney in fact." See Section 8023 ("attorney-in-fact" defined). See also Sections 8044 ("health care decision" defined), 4078 ("statutory form durable power of attorney for health care" defined).

§ 8657. Effect of documents executed by agent

8657. If a document described in paragraph 5 or 6 of the form set out in Section 8651 is executed on behalf of the principal by the attorney-in-fact in the exercise of authority granted to the attorney-in-fact by paragraph 5 or 6 of the form set out in Section 8651, the document has the same effect as if the principal had executed the document at the same time and under the same circumstances and had the capacity to execute the document at that time.

Comment. Section 8657 continues former Section 2505 without change, except for the revision of cross-references to other provisions and the substitution of "agent" for "attorney in fact." See Section 8023 ("attorney-in-fact" defined). See also Sections 8058 ("principal" defined), 4078 ("statutory form durable power of attorney for health care" defined).

§ 8658. Termination of authority; alternate agent

8658. If the authority of the attorney-in-fact under the statutory form durable power of attorney for health care is terminated by the court under Part 4 (commencing with Section 8900), an alternate attorney-in-fact designated in the statutory form durable power of attorney for health care is not authorized to act as the attorney-in-fact unless the court so orders. In the order terminating the authority of the attorney-in-fact to make health care decisions for the principal, the court shall authorize the alternate attorney-in-fact, if any, designated in the statutory form durable power of attorney for health care to act as the attorney-in-fact to make health care decisions for the principal under the durable power of attorney for health care unless the court finds that authorizing that alternate attorney-in-fact to make health care decisions for the principal would not be in the best interests of the principal.

Comment. Section 8658 continues former Section 2506 without change, except for the revision of a cross-reference to another provision and the substitution of "agent" for "attorney in fact." See Section 8023 ("attorney-in-fact" defined).

This section applies only where the authority of the agent in fact is terminated by the court. This section does not apply where the agent dies or otherwise is not available or becomes ineligible to act as agent or loses the mental capacity to make health care decisions for the principal or where the principal revokes the agent's appointment or authority. See paragraph 9 (designation of alternate agents) of statutory form set forth in Section 8651. Where the court terminates the authority of the agent, Section 8658 applies and the alternate agent is not authorized to act as agent unless the court so orders. However, in this case, the court is required to authorize the alternate agent to act unless the court finds that would not be in the best interests of the principal.

See also Sections 8023 ("attorney-in-fact" defined), 8044 ("health care decision" defined), 8058 ("principal" defined), 4078 ("statutory form durable power of attorney for health care" defined).

§ 8659. Use of other forms

8659. Nothing in this chapter affects or limits the use of any other form for a durable power of attorney for health care. Any form complying with the requirements of Chapter 1 (commencing with Section 8600) may be used in lieu of the form provided by Section 8651, and none of the provisions of this chapter apply if such other form is used.

Comment. Section 8659 continues former Section 2507 without change, except for the revision of cross-references to other provisions. This section makes clear that a person may use a durable power of attorney for health care that is not a statutory form durable power of attorney for health care under this chapter. The other durable power of attorney for health care -- whether a printed form or a specially drafted document -- must, of course, comply with the requirements of Sections 8600-4331 and is subject to the provisions of those sections.

TITLE 5. JUDICIAL PROCEEDINGS CONCERNING POWERS OF ATTORNEY

CHAPTER 1. GENERAL PROVISIONS

§ 8900. Legislative intent [2510.010]

8900. It is the intent of the Legislature in enacting this title 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 title or otherwise invoked pursuant to law.

Comment. Section 8900 continues former Section 2423 without substantive change. See also Section 8059 ("power of attorney" defined).

§ 8901. Application of title [2510.020]

8901. (a) Except as otherwise provided, this title applies to all powers of attorney, including the following:

- (1) Durable powers of attorney for property.
- (2) Durable powers of attorney for health care.
- (3) Statutory form powers of attorney.
- (4) Statutory form durable powers of attorney for health care.
- (5) Nondurable powers of attorney.

(b) This title does not apply to reciprocal or interinsurance exchanges and their contracts, subscribers, attorneys in fact, attorneys-in-fact, and representatives.

Comment. Section 8901 provides the scope of this title. See also Sections 8032 ("durable power of attorney for health care" defined), 8038 ("durable power of attorney for property" defined), 8050 ("nondurable power of attorney" defined), 8080 ("statutory form power of attorney" defined), 8077 ("statutory form durable power of attorney for health care" defined).

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

§ 8902. Cumulative remedies [2510.030]

8902. The remedies provided under this title are cumulative and nonexclusive.

Comment. Section 8902 continues former Section 2420(a) without substantive change.

§ 8903. Effect of provision in power attempting to make title inapplicable [2510.040]

8903. Subject to Section 8904, this title applies notwithstanding any provision of the power of attorney to the contrary.

Comment. Section 8903 continues former Section 2422 without substantive change, except that the reference to former Section 2420 is omitted as surplus. See Section 8901(b) (exclusion of reciprocal or interinsurance exchanges). See also Section 8059 ("power of attorney" defined).

§ 8904. Limitation of remedies by provision in power of attorney [2510.050]

8904. Except as provided in Sections 8905 and 8906, a power of attorney may expressly eliminate the authority of any person listed in Section 8950 to petition the court under this title for any one or more of the purposes enumerated in Section 8901 or 8952 if both of the following requirements are met:

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

(b) The principal's lawyer signs a certificate stating in substance: "I am a lawyer authorized to practice law in the state where this power of attorney was executed, and the principal was my client at the time this power of attorney was executed. I have advised my client concerning his or her rights in connection with this power of attorney and the applicable law and the consequences of signing or not signing this power of attorney, and my client, after being so advised, has executed this power of attorney."

Comment. Section 8904 continues former Section 2421(a) without substantive change.

This section makes clear that a power of attorney may limit the applicability of this title only if it is executed with the advice and approval of the principal's counsel. This limitation is designed to ensure that the execution of a power of attorney that restricts the remedies of this title is accomplished knowingly by the principal. The inclusion of a provision in the power of attorney making this article inapplicable does not affect the right to resort to any other judicial remedies that may otherwise be available. See Section 8902 (cumulative remedies).

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

§ 8905. Right to petition under power of attorney for property [2510.060]

8905. Notwithstanding any provision of a power of attorney for property, the conservator of the estate of the principal may petition the court under this title for any one or more of the purposes enumerated in Section 8901.

Comment. Section 8905 continues former Section 2421(b) without substantive change. See also Sections 8059 ("power of attorney" defined), 8068 ("principal" defined).

§ 8906. Right to petition under durable power of attorney for health care [2510.070]

8906. Notwithstanding any provision of a durable power of attorney for health care:

(a) The conservator of the person of the principal may petition the court under this title for any of the purposes enumerated in subdivisions (a), (c), and (d) of Section 8952.

(b) The attorney-in-fact may petition the court under this title for any of the purposes enumerated in subdivisions (a) and (b) of Section 8952.

Comment. Section 8906 restates former Section 2421(c)-(d) without substantive change.

This section specifies the purposes for which a conservator of the person or an attorney-in-fact may petition the court under this title with respect to a durable power of attorney for health care. The rights provided by this section cannot be limited by a provision in the power of attorney, but the power of attorney may restrict or eliminate the right of any other persons to petition the court under this title if the principal has the advice of legal counsel and the other requirements of Section 8904 are met.

Under subdivision (a), the conservator of the person may obtain a determination of whether the durable power of attorney for health care is in effect or has terminated, despite a contrary provision in the power of attorney. See Section 8952(a). The conservator of the person may obtain a court order requiring the attorney-in-fact to report the attorney-in-fact's acts under the durable power of attorney for health care if the attorney-in-fact fails to submit such a report within 10 days after a written request. See Section 8952(c). The conservator of the person may obtain a court determination that the durable power of attorney for health care is terminated if the court finds that the attorney-in-fact is acting illegally or is not performing the duty under the durable power of attorney for health care to act consistently with the desires of the principal or, where the principal's desires are unknown or unclear, is acting in a manner that is clearly contrary to the best interests of the principal. See Section 8952(d). See also the Comment to Section 8952.

Under subdivision (b), the attorney-in-fact may obtain a determination of whether the durable power of attorney for health care is in effect or has terminated, despite a contrary provision in the power of attorney. See Section 8952(a). The attorney-in-fact may also obtain a court order passing on the acts or proposed acts of the attorney-in-fact under the durable power of attorney for health care. See Section 8952(b).

See also Sections 8023 ("attorney-in-fact" defined), 8032 ("durable power of attorney for health care" defined), 8068 ("principal" defined).

§ 8907. Application of decedents' estates provisions [2510.080]

8907. Proceedings under this title are governed, whenever possible, by the provisions of this title, but where the provisions of this title do not appear applicable, the provisions of Part 1 (commencing with Section 7000) of Division 7 of the Probate Code apply.

Comment. Section 8907 continues former Section 2417(e) without substantive change, except that the reference to the provisions governing administration of decedents' estates is limited to the general provisions in Part 1 (commencing with Section 7000) of Division 7 of the Probate Code rather than the entire division.

Staff Note. *Should this provision be continued? It may not do any harm, but we are not certain what provisions it picks up. If we are able to identify any important provisions, it might be best to include them in this part rather than leaving the matter to guesswork.*

§ 8908. Jury trial [2510.090]

8908. There is no right to a jury trial in proceedings under this part.

Comment. Section 8908 is a new provision. This section is consistent with the rule applicable to other fiduciaries. See Prob. Code §§ 1452 (guardianships and conservatorships), 7200 (decedents' estates), 17006 (trusts).

CHAPTER 2. JURISDICTION AND VENUE

§ 8930. Jurisdiction and authority of court or judge [2512.010]

8930. (a) The superior court has jurisdiction of proceedings under this part.

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

Comment. Section 8930 is comparable to Probate Code Section 7050 governing the jurisdiction and authority of the court in proceedings concerning administration of decedents' estates. See Comment to Prob. Code § 7050. This section is consistent with prior law. See former Sections 2415 (petition filed in superior court), 2417(e) (proceedings governed by decedents' estates provisions where no specific rule in power of attorney statute).

Staff Note. Civil Code Section 2413 was amended in 1991 to add subdivision (a):

(a) The superior court exercising its general jurisdiction and the superior court exercising its jurisdiction under Section 7050 of the Probate Code shall have concurrent jurisdiction over all petitions filed pursuant to this article.

This needs to be incorporated here.

§ 8931. Jurisdiction over attorney-in-fact [2512.020]

8931. Subject to Section 8932, a person who acts as an attorney-in-fact under a power of attorney governed by this part is subject to personal jurisdiction in this state with respect to matters relating to acts and transactions of the attorney-in-fact performed in this state, performed for a domiciliary of this state, or affecting property in this state.

Comment. Section 8931 is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.730(2) (Vernon 1990). This section is also comparable to Probate Code Sections 3902(b) (jurisdiction over custodian under Uniform Transfers to Minors Act) and 17003(a) (jurisdiction over trustee). This section is intended to facilitate exercise of the court's power under this title when the court's jurisdiction is properly invoked. As recognized by the introductory clause, constitutional limitations on assertion of jurisdiction apply to the exercise of jurisdiction under this section. Consequently, appropriate notice must be given to an attorney-in-fact as a condition of personal jurisdiction. Cf. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

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

§ 8932. Basis of jurisdiction [2512.030]

8932. The court may exercise jurisdiction in proceedings under this title on any basis permitted by Section 410.10 of the Code of Civil Procedure.

Comment. Section 8932 is comparable to Probate Code Section 17004 (jurisdiction under Trust Law). This section recognizes that the court, in proceedings relating to powers of attorney under this title, may exercise jurisdiction on any basis that is not inconsistent with the California or United States Constitutions, as provided in Code of Civil Procedure Section 410.10. See generally Judicial Council Comment to Code Civ. Proc. § 410.10; Comment to Prob. Code § 17004 (basis of jurisdiction under Trust Law).

§ 8933. Venue [2512.040]

8933. Proceedings under this title shall be commenced in the superior court of the county in which the attorney-in-fact is resident or, if the attorney-in-fact is not resident in this state, in any county of this state.

Comment. Section 8933 continues former Section 2414 without substantive change. This section recognizes that the attorney-in-fact may not be a resident of this state at the time the petition is filed. See Sections 8004 (durable powers of attorney under law of another jurisdiction), 8029(a) ("durable power of attorney" defined to include foreign durable powers).

CHAPTER 3. PETITIONS, ORDERS, APPEALS

§ 8950. Petitioners [2514.010]

8950. A petition may be filed under this title by any of the following:

- (a) The attorney-in-fact.
- (b) The principal.
- (c) The spouse or any child of the principal.
- (d) The conservator of the person or estate of the principal.
- (e) Any person who would take property of the principal under the laws of intestate succession if the principal died at the time the petition is filed, whether or not the principal has a will.
- (f) The court investigator, referred to in Section 1454 of the Probate Code, of the county where the power of attorney was executed or where the principal resides.
- (g) The public guardian of the county where the power of attorney was executed or where the principal resides.
- (h) A treating health care provider with respect to a durable power of attorney for health care.
- (i) A parent of the principal with respect to a durable power of attorney for health care.

Comment. Section 8950 continues former Section 2411 without substantive change.

This section limits the persons who may file a petition under this article to the attorney-in-fact, the conservator of the principal, those having a present interest or an expectancy in the property of the principal, and a court investigator or public guardian. The attorney-in-fact is permitted to file a petition so that he or she may, for example, obtain a court review of a particular transaction. See also Sections 8902 (other remedies not affected), 8904 (restriction in power of attorney of right to file petition), 8901 (petition as to power of attorney for property), 8952 (petition with respect to durable power of attorney for health care).

See also Sections 8023 ("attorney-in-fact" defined), 8032 ("durable power of attorney for health care" defined), 8044 ("health care provider" defined), 8059 ("power of attorney" defined), 8068 ("principal" defined).

Staff Note. *Is the class of petitioners too limited? Is there a reason why the principal's grandchildren cannot petition (unless they qualify under subdivision (e))? In cases where the principal is incapacitated, or where the capacity of the principal is an issue, the Missouri statute permits a petition by the principal, the agent, an adult member of the principal's family, or "any person interested in the welfare of the principal." See Mo. Ann. Stat. §§ 404.727(1), (4)-(5) (Vernon 1990). Is the Commission interested in expanding the class of permissible petitioners in any respect?*

§ 8901. Petition as to power of attorney for property [2510.020]

8901. With respect to a power of attorney for property, a petition may be filed under this title for any one or more of the following purposes:

- (a) Determining whether the power of attorney for property is in effect or has terminated.
- (b) Passing on the acts or proposed acts of the attorney-in-fact.

(c) Compelling the attorney-in-fact to submit the attorney-in-fact's accounts or report the attorney-in-fact's acts as attorney-in-fact to the principal, the spouse of the principal, the conservator of the person or the estate of the principal, or to any other person required by the court in its discretion, if the attorney-in-fact has failed to submit an accounting or report within 60 days after written request from the person filing the petition.

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

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

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

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

(e) Compelling a third person to honor the authority of an agent under a statutory form power of attorney pursuant to Section [8507.5].

Comment. Section 8901 continues former Section 2412 [as amended by 1992 Cal. Stat. ch. 178, § 3] without substantive change.

The introductory clause limits the application of this section to powers of attorney for property. This section applies to petitions concerning both durable and nondurable powers of attorney for property. See Section 8065 ("power of attorney for property" defined). Section 8952 applies to petitions with respect to durable powers of attorney for health care.

Subdivision (a) makes clear that a petition may be filed to determine whether the power of attorney was ever effective, thus permitting, for example, a determination that the power of attorney was invalid when executed because its execution was induced by fraud. See also Section 8301 (unqualified attorney-in-fact).

Subdivision (d) requires a court determination that the principal has become incapacitated before the court is authorized to declare the power of attorney terminated because the attorney-in-fact has violated or is unfit to perform the fiduciary duties under the power of attorney.

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

§ 8952. Petition as to durable power of attorney for health care [2514.030]

8952. With respect to a durable power of attorney for health care, a petition may be filed under this title for any one or more of the following purposes:

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

(b) Determining whether the acts or proposed acts of the attorney-in-fact are consistent with the desires of the principal as expressed in the durable power of attorney for health care or otherwise made known to the court or, where the desires of the principal are unknown or unclear, whether the acts or proposed acts of the attorney-in-fact are in the best interests of the principal.

(c) Compelling the attorney-in-fact to report the attorney-in-fact's acts as attorney-in-fact to the principal, the spouse of the principal, the conservator of the person of the principal, or to any other person required by the court in its

discretion, if the attorney-in-fact has failed to submit the report within 10 days after written request from the person filing the petition.

(d) Declaring that the durable power of attorney for health care is terminated upon a determination by the court that the attorney-in-fact has made a health care decision for the principal that authorized anything illegal or upon a determination by the court of both of the following:

(1) The attorney-in-fact has violated, has failed to perform, or is unfit to perform, the duty under the durable power of attorney for health care to act consistent with the desires of the principal or, where the desires of the principal are unknown or unclear, is acting (by action or inaction) in a manner that is clearly contrary to the best interests of the principal.

(2) At the time of the determination by the court, the principal lacks the capacity to execute or to revoke a durable power of attorney for health care.

Comment. Section 8952 continues former Section 2412.5 without substantive change. This section enumerates the purposes for which a petition may be filed under this title with respect to a durable power of attorney for health care. Section 8901 applies to petitions with respect to powers of attorney for property.

Under subdivision (b), the desires of the principal as expressed in the durable power of attorney for health care or otherwise made known to the court provide the standard for judging the acts of the attorney-in-fact. Subdivision (d) permits the court to terminate the durable power of attorney for health care where the attorney-in-fact is not complying with the duty to carry out the desires of the principal. These subdivisions adopt a standard based on the principal's desires in place of a general standard of what may constitute the best interests of the principal. An attempted suicide by the principal is not to be construed to indicate the principal's desire that health care be restricted or inhibited. See Section 2443 (unauthorized acts and omissions).

Where it is not possible to use a standard based on the principal's desires because those desires are not stated in the power of attorney or otherwise known or are unclear, subdivision (b) provides that the "best interests of the principal" standard be used.

Subdivision (d) permits termination of the durable power of attorney for health care not only where the attorney-in-fact, for example, is acting illegally or failing to perform his or her duties under the power of attorney or is acting contrary to the known desires of the principal but also where the desires of the principal are unknown or unclear and the attorney-in-fact is acting in a manner that is clearly contrary to the best interests of the principal. The desires of the principal may become unclear as a result of the developments in medical treatment techniques that have occurred since the desires were expressed by the principal, such developments having changed the nature or consequences of the treatment.

A durable power of attorney for health care may limit the authority to petition under this article. See Section 8904 (limitation by provision in power of attorney).

See also Sections 8023 ("attorney-in-fact" defined), 8032 ("durable power of attorney for health care" defined), 8044 ("health care decision" defined), 8068 ("principal" defined).

§ 8953. Commencement of proceeding [2514.040]

8953. (a) A proceeding under this title is commenced by filing a verified petition stating facts showing that the petition is authorized under this title, the grounds of the petition, and, if known to the petitioner, the terms of the power of attorney.

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

Comment. Subdivision (a) of Section 8953 restates parts of former Section 2415 without substantive change. The former reference to filing in the superior court is restated in a different form in Section 8930. The language concerning the grounds of the petition is new and is drawn from Probate Code Section 17201 (commencement of proceeding under Trust Law).

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

§ 8954. Dismissal of petition [2514.050]

8954. The court may dismiss a petition if it appears that the proceeding is not reasonably necessary for the protection of the interests of the principal or the principal's estate and shall stay or dismiss the proceeding in whole or in part when required by Section 410.30 of the Code of Civil Procedure.

Comment. Section 8954 restates former Section 2416 without substantive change. The dismissal standard has been revised to permit dismissal when the proceeding is not "reasonably necessary," rather than "necessary" as under the former statute. Under this section, the court has authority to stay or dismiss a proceeding in this state if, in the interest of substantial justice, the proceeding should be heard in a forum outside this state. See Code Civ. Proc. § 410.30. See also Section 8068 ("principal" defined).

§ 8955. Notice of hearing [2514.060]

8955. At least 30 days before the time set for hearing, the petitioner shall serve notice of time and place of the hearing, together with a copy of the petition, on all of the following:

- (a) The attorney-in-fact if not the petitioner.
- (b) The principal if not the petitioner.
- (c) Any other persons the court in its discretion requires.

Comment. Section 8955 continues former Section 2417(b) without substantive change. See also 8068 ("principal" defined).

§ 8956. Service of notice [2514.070]

8956. Service shall be made by mailing to the last known address of the person required to be served unless the court in its discretion requires that notice be served in some other manner. Personal delivery is the equivalent of mailing.

Comment. Section 8956 continues former Section 2417(c) without change.

§ 8957. Proof of service [2514.080]

8957. Proof of compliance with Sections 8955 and 8956 shall be made at or before the hearing. If it appears to the satisfaction of the court that the notice has been given as required, the court shall so find in its order, and the order, when it becomes final, is conclusive on all persons.

Comment. Section 8957 restates former Section 2417(d) without substantive change.

§ 8958. Power of court [2514.090]

8958. (a) The court may make all orders and take all other action necessary or proper to dispose of the matters presented by the petition.

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

Comment. Subdivision (a) of Section 8958 continues former Section 2413 without substantive change. The former reference to decrees has been omitted as unnecessary.

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

§ 8959. Temporary health care order [2514.100]

8959. With respect to a durable power of attorney for health care, the court in its discretion, upon a showing of good cause, may issue a temporary order prescribing the health care of the principal until the disposition of the petition filed under Section 8952. If a durable power of attorney for health care is in effect and a conservator (including a temporary conservator) of the person is appointed for the principal, the court that appoints the conservator in its discretion, upon a showing of good cause, may issue a temporary order prescribing the health care of the principal, that order to continue in effect for such time as is ordered by the court but in no case longer than the time necessary to permit the filing and determination of a petition filed under Section 8952.

Comment. Section 8959 continues former Section 2417(h) without substantive change. This section is intended to make clear that the court has authority to provide, for example, for the continuance of treatment necessary to keep the principal alive pending the court's action on the petition. See also Section 8958 (powers of court).

See also Sections 8032 ("durable power of attorney for health care" defined), 8041 ("health care" defined), 8068 ("principal" defined).

§ 8960. Award of attorney's fees [2514.110]

8960. In a proceeding under this title commenced by the filing of a petition by a person other than the attorney-in-fact, the court may in its discretion award reasonable attorney's fees to one of the following:

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

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

Comment. Section 8960 continues former Section 2417(g) without substantive change. See Section 8023 ("attorney-in-fact" defined).

§ 8961. Guardian ad litem [2514.120]

8961. At any stage of a proceeding under this title, the court may appoint a guardian ad litem to represent the interests of a missing or incapacitated principal.

Sections 373 and 373.5 of the Code of Civil Procedure do not apply to the appointment of a guardian ad litem under the provisions of this title.

Comment. Section 8961 restates former Section 2418 without substantive change. See also Section 8068 ("principal" defined).

§ 8962. Appeal [2514.130]

8962. An appeal may be taken from any of the following:

(a) Any final order made pursuant to subdivision (a), (b), or (d) of Section 8901 or subdivision (a), (b), or (d) of Section 8952.

(b) An order dismissing the petition or denying a motion to dismiss under Section 8954.

Comment. Section 8962 continues former Section 2419 without substantive change. The reference to "decree" in former Section 2419(a) is omitted as unnecessary.