

Memorandum 93-43

Subject: L-3044— Comprehensive Power of Attorney Statute (Draft of Tentative Recommendation)

Attached to this memorandum is a draft tentative recommendation on powers of attorney. At the September meeting, we will review the draft and consider any comments from interested persons, with a view toward approval of the tentative recommendation to be distributed for comment. Also attached to this memorandum is correspondence from the Business Law Section of the State Bar concerning a request for information on the provisions relating to proxies and securities voting rights. (See letters from Jeffrey S. Turner and Linda C. Williams, Exhibit pp. 1-5.)

SCHEDULE

In order to have this material ready for introduction in the 1994 legislative session, the Commission will need to approve the tentative recommendation to be distributed for comment, as revised to implement Commission decisions. Before it is distributed, the staff also plans to do additional cite and cross-reference checking. It is essential to provide adequate time for review and comment on the tentative recommendation by interested persons before a final recommendation is approved to print. The staff would like to be able to have a printed recommendation available when the bill is being considered by the Legislature, preferably at or before the time of the first policy committee hearings, likely to be in March or April. This is not essential, but with a project of this sort, experience teaches that understanding of a bill is greatly advanced if a Commission recommendation in printed form is available.

SELECTED REVISIONS SINCE MARCH DRAFT

Implementation of Default Rules Scheme

Many of the statutory rules are subject to control in the power of attorney. The Commission has decided that the general rule now in draft Section

4101(a) should be noted in the comment to each section that may be waived or limited in the power of attorney and that those using the statute would be responsible for learning the fundamental rule in Section 4101. If a section is not subject to control by the power of attorney, then this exception to the general rule is specifically noted in the statute as follows: “This section is not subject to contrary provisions in the power of attorney.” This scheme has been implemented in the draft tentative recommendation and should be carefully reviewed to determine whether the rule tentatively applied to a particular section should be reversed. Some possible problems are discussed in Staff Notes following relevant sections. See, e.g., draft Sections 4150, 4151, 4152.

Witnessing Rules

The Commission has decided to attempt to unify the execution requirements for powers of attorney under the comprehensive statute so that powers of attorney for property matters would be subject to the same basic rules as powers of attorney for health care. This exercise involves making property powers more formally executed and loosening slightly the rules currently applicable to health care powers. The Commission has not attempted to provide complete consistency across the board to all types of powers, including the statutory forms. (Thus, for example, the Uniform Statutory Form Power of Attorney provides for notarization but not signature by two witnesses.)

Some questions remain, however, as to special rules applicable to health care powers. See the Staff Note following Sections 4122 and 4128 and related sections.

Federal Absentee Rules

The special rules concerning revocation of the attorney-in-fact’s authority applicable to missing or imprisoned federal personnel derive from “P.O.W.-M.I.A. Family Relief Act of 1972.” This act was intended to assist families of absentees in dealing with property transactions, and the rules concerning revocation of the authority of a spouse who files for dissolution, nullity, or legal separation would seem to be a relatively small part of the overall package. The Commission expressed the desire to have simpler and general rules concerning the effect of dissolution, etc., on the authority of an attorney-

in-fact. Inasmuch as the rules are a creature of state, not federal, law, the way is open to providing a uniform rule — assuming that there is no problem with revising this aspect of the 1972 act. At the May 1993 meeting, the Commission decided to make the power of attorney rule consistent with the wills rule (Prob. Code § 6122). Draft Section 4153 has been revised to adopt this policy, but the special absentee rule is preserved for further consideration. Perhaps the issue should be noted for comment when the tentative recommendation is circulated.

The staff has tentatively relocated the federal absentee provisions that were in the power of attorney draft to Sections 3721 and 3722.

The following table compares provisions concerning the effect of dissolution, nullity, legal separation, and remarriage.

	Dissolution & Nullity	Legal Separation	Commenced Proceeding	Revival on ...
Civ. Code § 2355(f) Military “absentee” under general agency rules	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	
Civ. Code § 2437(e) DPAHC	<input checked="" type="checkbox"/>			Remarriage
Prob. Code § 78 “Surviving spouse” definition	<input checked="" type="checkbox"/>			Remarriage
Prob. Code § 1811(b) Nomination of conservator	<input checked="" type="checkbox"/>			
Prob. Code § 1813 “Absentee’s” spouse as conservator			<input checked="" type="checkbox"/>	
Prob. Code § 3700(c) “Eligible spouse” for dispo- sition of personal property			<input checked="" type="checkbox"/>	
Prob. Code § 6122(a)-(b) Wills	<input checked="" type="checkbox"/>			Remarriage
Prob. Code § 6227(a)-(b) Statutory wills	<input checked="" type="checkbox"/>			Remarriage

Post-Death Decisions

The durable power of attorney for health care may authorize the attorney-in-fact to make a disposition under the Uniform Anatomical Gift Act, authorize an autopsy, and direct the disposition of remains. See Civ. Code §

2434 (draft Sections 4609, 4720). Treated in the same manner as health care, these authorities then become subject to all of the special rules applicable to the durable power of attorney for health care, including restrictions on who may witness, who may be the attorney-in-fact, and required notices.

The basic provisions in the Health and Safety Code, however, do not appear so restricted:

(1) The Uniform Anatomical Gift Act (Health & Safety Code § 7150 *et seq.*) permits the making of anatomical gifts by an “attorney-in-fact under a valid durable power of attorney that expressly authorizes the attorney-in-fact to make an anatomical gift of all or part of the principal’s body or a pacemaker.” *Id.* § 7151(a)(1). On its face, this is not limited to durable powers of attorney for health care.

(2) The provision on autopsies refers to authorization by the decedent in a “will or other written instrument,” but also permits autopsies pursuant to other written authorization, telegram, verbal authorization by telephone or recording, when made by certain relatives and public officials. See Health & Safety Code § 7113. This section does not refer specifically to powers of attorney and is not limited to durable powers of attorney for health care.

(3) The section concerning disposition of remains and liability for the costs of disposition provides a prioritized right in certain relatives and the public administrator, subject to “other directions ... given by the decedent.” See Health & Safety Code § 7100. The decedent, “prior to his death, may direct the preparation for, type or place of interment of his remains, either by oral or written instructions” and the other persons listed in the section are directed to follow these directions faithfully. Powers of attorney are not mentioned.

There is no recognition of a person’s power to delegate the decision as to autopsies or disposition of remains. It is possible to imagine a conflict between family members having a priority under an applicable statute and an attorney-in-fact exercising discretionary authority under a durable power of attorney. The durable power of attorney for health care statute purportedly decides the issue in Civil Code Section 2434(a) (draft Section) which gives the attorney-in-fact priority in making health care decisions. Someone relying on the Health and Safety Code provisions, however, might argue a different result. The staff does not propose to resolve these issues in this draft, but it does look like an area that could profitably be revised.

Corporations Committee Comments

In response to a request from the Commission, Linda C. Williams, on behalf of the Corporations Committee of the Business Law Section of the State Bar, has reviewed the necessity for the special rules in the power of attorney statute concerning exercise of proxies by attorneys-in-fact. (See Exhibit pp. 3-5.) Based on her analysis, Ms. Williams concludes that the provision in question (September draft Section 4050(b)3)) is “probably unnecessary but innocuous because the current law and proposed statute are otherwise clear that the provisions of the Corporations Code relating to the exercise of proxies and voting agreements would need to be complied with to have a valid proxy.” The staff agrees with Ms. Williams’ analysis, but would retain the language in the draft so that it is not necessary for anyone in the future to go through the exercise of interpreting Civil Code Section 2356 in light of draft Section 4051 to reach the same conclusion. In the current structure of the draft, making this clear requires only 13 words (11, if “attorney-in-fact” is counted as one word). The staff also has a minor concern that Civil Code Section 2356 would need to be revised to make clear that it would apply to all of the new Power of Attorney Law. We prefer to avoid tinkering with the opaque language of Section 2356 to the extent possible.

Explanatory Text

A revised draft of the preliminary part of the tentative recommendation containing the explanatory text will follow in the First Supplement to this memorandum.

Respectfully submitted,

Stan Ulrich
Assistant Executive Secretary

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Mr. Stan Oulrich
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Re: Proposed Power of Attorney Legislation

Dear Mr. Oulrich:

A while back, you requested any input that the Business Law Section of the State Bar of California might have concerning the proposed legislation on powers of attorney that is being considered by the California Law Revision Commission.

We assigned the project to the Corporations Committee of the Business Law Section.

I enclose a letter dated March 25th from Linda C. Williams, of the Corporations Committee, commenting on the legislative proposal.

Mr. Stan Oulrich
March 29, 1993
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I hope these comments are helpful to you. Please do not hesitate to call if you have any further questions.

Cordially,

A handwritten signature in black ink, appearing to read "Jeff Turner". The signature is fluid and cursive, with the first name "Jeff" being more prominent than the last name "Turner".

Jeffrey S. Turner
Chair, Executive Committee

Enclosure

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March 25, 1993

VIA FEDERAL EXPRESS

Jeffrey S. Turner, Esq.
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Dear Mr. Turner:

The Corporations Committee was asked by the State Bar team preparing a comprehensive power of attorney statute to comment on certain sections that deal with powers of attorney as they relate to proxies and other voting rights for securities. We understand that the State Bar team has consulted extensively with the Executive Committee of the State Bar Estate Planning Trust and Probate Law Section in preparing the draft statute. The team is seeking to combine provisions relating to durable and non-durable powers of attorney in a single section of the Civil Code. The primary issue in the voluminous statute is whether durable and non-durable powers should be discussed in the same provisions, or continue to be discussed separately.

We reviewed the January 1993 draft attached to Memorandum 93-12. The Corporations Committee was asked to comment generally on the statute, but specifically, the team has asked us for comments regarding proposed Section 8059(c) (currently set forth in substantial part in Section 2400.5 of the Civil Code) that states that "[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." The team comments that this sub-section is superfluous and that its understanding is that this sub-section was added in response to a particular request from the Corporations Section of the State Bar. It comments that under most durable powers of attorney, an attorney-in-fact would have the power to exercise stock voting rights and it is unnecessary to distinguish between an agent who would vote pursuant to a

Jeffrey S. Turner, Esq.
March 25, 1993
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proxy from any other agent who might be delegated power by an attorney-in-fact. The team believes that the sub-section is unnecessary and should be deleted in its entirety, or at the very least be set forth in a separate section.

As we see it, the primary issue is whether there would be any confusion regarding whether the power of attorney statute would be deemed to supersede the proxy requirements of the Corporations Code. We believe that other sections of the current Civil Code (which are proposed to be included in the new statute) that deal with the issue of powers of attorney and proxies make it clear that they have different functions and are subject to different requirements:

1. Section 8533 of the proposed statute (currently Section 2488 under the Civil Code) states that in a statutory form power of attorney, the language granting power with respect to stock and bond transactions empowers the agent to, among other things, exercise voting rights with respect to securities in person or by proxy, enter into voting trust and consent to limitations on the right to vote. This section makes it clear that a power of attorney is not a proxy per se.

2. In addition, the proposed statute would retain current Civil Code Section 2356, relating to laws of agency. This section provides that with respect to a proxy given by a person to another person relating to the exercise of voting rights, to the extent that there is any conflict with or contravention of any other provisions of California law relating to proxies, the proxy provisions shall prevail. Section 8002 of the proposed new statute states that the general agency law, including Section 2356, applies to the power of attorney provisions.

In conclusion, Section 8059(c) is probably unnecessary but innocuous because the current law and proposed statute are otherwise clear that the provisions of the Corporations Code relating to the exercise of proxies and voting agreements would need to be complied with to have a valid proxy. The power of attorney provisions merely relate to the issue of authority to exercise voting rights generally. The Executive Committee may have further background concerning the history of this section, especially the statement that the Corporations Section of the State Bar requested the addition of Section 8059(c). The Corporations Committee had no information concerning this issue. If the provision is set forth in a separate section, it might be useful to offer a clarification similar to Section 2356 in the agency statute to the effect that proxies and other voting agreements must conform to other provisions of the California law relating to them.

Jeffrey S. Turner, Esq.
March 25, 1993
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Please let me know if I can assist you in any other way or
if you have further questions.

Very truly yours,

Linda C. Williams

Linda C. Williams

cc: Elizabeth Huber, Esq.
Marilyn Fried, Esq.

Memo 93-43

9/16/93

COMPREHENSIVE POWER OF ATTORNEY STATUTE

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SEC. ____ . Division 4.5 (commencing with Section 4000) is added to the Probate Code, to read:

DIVISION 4.5. POWERS OF ATTORNEY

PART 1 . DEFINITIONS AND GENERAL PROVISIONS

CHAPTER 1. SHORT TITLE AND DEFINITIONS

§ 4000. Short title

4000. This division shall be known as the Power of Attorney Law.

Comment. Section 4000 is new and provides a convenient means of referring to this division. The Power of Attorney Law is largely self-contained, but the general agency statutes are applicable as provided in Section 4051. See also Section 20 *et seq.* (general definitions applicable in Probate Code depending on context).

§ 4001. Uniform Durable Power of Attorney Act

4001. Sections 4124, 4125, 4126, 4127, 4206, 4304, and 4305 may be cited as the Uniform Durable Power of Attorney Act.

Comment. Section 4001 restates former Civil Code Section 2406 without substantive change. This section has the same purpose as the official text of Section 7 of the Uniform Durable Power of Attorney Act (1969). See also Sections 2(b) (construction of provisions drawn from uniform acts), 11 (severability).

§ 4010. Application of definitions

4010. Unless the provision or context otherwise requires, the definitions in this chapter govern the construction of this division.

Comment. Section 4010 restates and generalizes the substance of the introductory clause of former Civil Code Section 2410.

§ 4014. Attorney-in-fact

4014. (a) “Attorney-in-fact” means a person granted authority to act for the principal in a power of attorney, regardless of whether the person is known as an attorney-in-fact or agent, or by some other term.

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

Comment. Subdivision (a) of Section 4014 supersedes part of former Civil Code Section 2400 and former Civil Code Section 2410(a), and is comparable to the first sentence of Civil Code Section 2295.

Subdivision (b) is comparable to Section 84 (“trustee” includes successor trustee). See Sections 4202 (multiple attorneys-in-fact), 4203 (successor attorneys-in-fact), 4205 (delegation of attorney-in-fact’s authority), 4771 (alternate attorneys-in-fact under statutory form durable power of attorney for health care). The purpose of subdivision (b) is to make clear that the rules

applicable to attorneys-in-fact under the Power of Attorney Law apply as well to successors and alternates of the original attorney-in-fact, and to other persons who act in place of the attorney-in-fact.

See also Sections 4022 (“power of attorney” defined), 4026 (“principal” defined).

§ 4018. Durable power of attorney

4018. “Durable power of attorney” means a power of attorney that satisfies the requirements for durability provided in Section 4124.

Comment. Section 4018 is a new section included for drafting convenience.

§ 4022. Power of attorney

4022. (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 authority to an attorney-in-fact.

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

Comment. Section 4022 restates the first sentence of former Civil Code Section 2410(c) without substantive change, and supplies additional detail on the scope of a power of attorney. See Sections 4120 (who may execute a power of attorney), 4121 (formalities for executing power of attorney), 4123 (permissible purposes). See also Sections 4014 (“attorney-in-fact” defined), 4018 (“durable power of attorney” defined), 4609 (“health care” defined).

§ 4026. Principal

4026. “Principal” means a natural person who executes a power of attorney.

Comment. Section 4026 restates and generalizes former Civil Code Section 2410(d). See Section 4022 (“power of attorney” defined).

§ 4030. Springing power of attorney

4030. “Springing power of attorney” means a power of attorney that by its terms becomes effective at a specified future time or on the occurrence of a specified event or contingency including, but not limited to, the subsequent incapacity of the principal. A springing power of attorney may be a durable power of attorney or a nondurable power of attorney.

Comment. Section 4030 continues former Civil Code Section 2514(a)(2) without substantive change. See Section 4129 (springing power of attorney). See also Sections 4018 (“durable power of attorney” defined), 4022 (“power of attorney” defined), 4026 (“principal” defined).

§ 4034. Third person

4034. “Third person” means any person other than the principal or attorney-in-fact.

Comment. Section 4034 is a new provision. For the purposes of this statute, a third person is a person who acts on a request from, contracts with, relies on, or otherwise deals with the attorney-in-fact. The Uniform Statutory Form Power of Attorney uses the equivalent term “third party.” See Sections 4401-4402.

See also Section 4014 (“attorney-in-fact” defined), 4026 (“principal” defined).

CHAPTER 2. GENERAL PROVISIONS

§ 4050. Types of powers of attorney governed by this division

4050. (a) This division applies to the following:

- (1) Durable powers of attorney.
- (2) Statutory form powers of attorney under Part 3 (commencing with Section 4400).
- (3) Durable powers of attorney for health care under Part 4 (commencing with Section 4600).
- (4) Any other power of attorney that incorporates or refers to this division or the provisions of this division.

(b) This division does not apply to the following:

- (1) A power of attorney to the extent that the authority of the attorney-in-fact is coupled with an interest in the subject of the power of attorney.
 - (2) Reciprocal or interinsurance exchanges and their contracts, subscribers, attorneys-in-fact, agents, and representatives.
 - (3) A proxy given by an attorney-in-fact to another person to exercise voting rights.
- (c) This division is not intended to affect the validity of any instrument or arrangement that is not described in subdivision (a).

Comment. Section 4050 describes the types of instruments that are subject to the Power of Attorney Law. If a section in this division refers to a “power of attorney,” it generally refers to a durable power of attorney, but may, under certain circumstances, also apply to a nondurable power of attorney. For example, a statutory form power of attorney may be durable or nondurable. See Sections 4401, 4404. A nondurable power may incorporate provisions of this division, thereby becoming subject to its provisions as provided in Section 4050(a)(4).

Subdivision (b) makes clear that certain specialized types of power of attorney are not subject to the Power of Attorney Law. This list is not intended to be exclusive. See subdivision (c). Subdivision (b)(1) recognizes the special rule applicable to a power coupled with an interest in the subject of a power of attorney provided in Civil Code Section 2356(a). Subdivision (b)(2) continues the substance of the limitation in former Civil Code Section 2420(b) and broadens it to apply to the entire Power of Attorney Law. See Ins. Code § 1280 *et seq.* Subdivision (b)(3) restates former Civil Code Section 2400.5 without substantive change and supersedes the second sentence of former Civil Code 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 Civ. Code § 2356(d) (proxy under general agency rules).

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

The general rules in this division are subject to the special rules applicable to statutory form powers of attorney in Part 3 (commencing with Section 4400) and to durable powers of attorney for health care in Part 4 (commencing with Section 4600). See also Section 4770 *et seq.* (statutory form durable power of attorney for health care).

§ 4051. Relation to general agency law

4051. Except where this division provides a specific rule, the general law of agency, including Article 2 (commencing with Section 2019) of Chapter 2 of Title 6 of Division 3 of the Civil Code, and Title 9 (commencing with Section 2295) of Part 4, of Division 3 of the Civil Code, applies to powers of attorney.

Comment. Section 4051 is new. This section makes clear that the general agency statutes and the common law of agency apply to powers of attorney under this division, except where this division provides a specific rule.

§ 4052. Application of division to transactions under power of attorney

4052. Subject to Section 4050:

(a) If a power of attorney does not refer to the Power of Attorney Law of this state, this division applies to the acts and transactions in this state of the attorney-in-fact where either of the following conditions is satisfied:

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

(b) If a power of attorney refers to the Power of Attorney Law of this state, this division applies to acts and transactions of the attorney-in-fact in this state or outside this state where any of the following conditions is satisfied:

- (1) The principal or attorney-in-fact was a domiciliary of this state at the time the power of attorney was executed.
- (2) The authority conferred on the attorney-in-fact relates to property, acts, or transactions in this state.
- (3) The acts and transactions of the attorney-in-fact occurred or were intended to occur in this state.
- (4) The power of attorney was executed in this state.
- (5) There is otherwise a reasonable relationship between this state and the subject matter of the power of attorney.

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

Comment. Section 4052 is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.730(1) (Vernon 1990). This section is comparable to a provision of the Uniform Transfers to Minors Act. See Section 3902 & Comment. The introductory clause makes clear that the rules in this section are subject to the general rules concerning the scope of the Power of Attorney Law set forth in Section 4050. The power of attorney may also specify choice of law. Nothing in this section limits the jurisdiction exercisable under Code of Civil Procedure Section 410.10.

See also Sections 4014 (“attorney-in-fact” defined), 4022 (“power of attorney” defined), 4026 (“principal” defined).

§ 4053. Application to existing powers of attorney and pending proceedings

4053. Except as otherwise provided by statute:

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

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

(c) This division 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 division 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 division does not apply and prior law applies.

Comment. Section 4053 is comparable to Section 15001 (application of Trust Law). Subdivision (a) provides the general rule that this division 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 4900 *et seq.* (court enforcement of duties of attorneys-in-fact). Subdivision (c) provides discretion to the court to resolve problems arising in proceedings commenced before the operative date.

For special transitional provisions, see Sections 4102 (durable power of attorney form), 4651 (form of durable power of attorney for health care); see also Section 4129(c) (springing powers). See also Section 4022 (“power of attorney” defined).

§ 4054. Recognition of durable powers of attorney under law of another state

4054. A durable power of attorney executed under the law of another state may be carried out and enforced as a durable power of attorney in this state.

Comment. Section 4054 is new. This section promotes use and enforceability of durable powers of attorney executed in other states. See also Section 4018 (“durable power of attorney” defined). For a special rule applicable to durable powers of attorney for health care, see Section 4653.

PART 2 . POWERS OF ATTORNEY GENERALLY

CHAPTER 1. GENERAL PROVISIONS

§ 4100. Application of part

4100. This part applies to all powers of attorney under this division, subject to any special rules applicable to a statutory form power of attorney under Part 3 (commencing with Section 4400) or a durable power of attorney for health care under Part 4 (commencing with Section 4600).

Comment. Section 4100 provides the scope of this part and makes clear that these general rules are subject to exceptions and qualifications in the case of certain special types of powers of attorney.

§ 4101. Priority of provisions of power of attorney

4101. (a) Except as provided in subdivision (b), the principal may limit the application of any provision of this division by an express statement in the power of attorney or by providing an inconsistent rule in the power of attorney.

(b) A power of attorney may not limit the application of a statute that specifically provides that it is not subject to limitation by a power of attorney or statutes concerning any of the following matters:

- (1) Requiring a specific warning or notice to be included in a power of attorney.
- (2) Providing operative dates of statutory enactments or amendments.
- (3) Providing execution requirements for powers of attorney.
- (4) Providing qualifications of witnesses.
- (5) Providing qualifications of attorneys-in-fact.
- (6) Protecting third persons from liability.

Comment. Section 4101 is new. This section makes clear that many of the statutory rules provided in this division are subject to express or implicit limitations in the power of attorney. If a statutory rule is not subject to control by the power of attorney, this is stated explicitly, either in a particular section or as to a group of sections. See, e.g., Sections 4206 (duty to keep records and account), 4130 (inconsistent authority), 4154 (termination of authority under nondurable power of attorney on principal's incapacity), 4206 (relation of attorney-in-fact to court-appointed fiduciary), 4207 (resignation of attorney-in-fact), 4232 (duty of loyalty), 4236 (duty to keep records and account; availability of records to other persons).

Staff Note. Subdivision (b) has been added to avoid having to state the obvious in a number of other sections that are already overburdened with detail.

§ 4102. Form of durable power of attorney after January 1, 1995 [operative date]

4102. Notwithstanding Section 4128:

(a) Except as provided in subdivision (b), on and after January 1, 1995, a printed form of a durable power of attorney may be sold or otherwise distributed if it satisfies the requirements of former Section 2510.5 of the Civil Code.

(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 of the Civil Code or with Section 4128 of this code.

(c) A durable power of attorney executed on or after January 1, 1995, using a printed form that complies with subdivision (b) of former Section 2400 of the Civil Code, as originally enacted, or with former Section 2510 of the Civil Code, is as valid as if it had been executed using a printed form that complies with Section 4128 of this code.

Comment. Section 4102 supersedes former Civil Code Section 2510.5. This section permits continued use of printed forms that comply with former law, specifically former Civil Code Section 2400 (as enacted by 1981 Cal. Stat. ch. 511, § 4) and former Civil Code Section 2510 (as enacted by 1985 Cal. Stat. ch. 403, § 12). Subdivision (c) permits use of the earlier forms after January 1, 1995, the operative date of Section 4128. This section, like its predecessor, former Civil Code Section 2510.5, avoids the need to discard existing printed forms on the operative date of this division. However, pursuant to subdivision (b), a form printed on or after January 1, 1995, may be sold or distributed in this state for use by a person who does not have the advice of legal counsel only if the form satisfies the requirements of former Civil Code Section 2510 or of Probate Code Section 4128. Both provisions are acceptable because the wording changes are nonsubstantive. See Section 4128 Comment.

CHAPTER 2. CREATION AND EFFECT OF POWERS OF ATTORNEY

§ 4120. Who may execute a power of attorney

4120. A natural person having the capacity to contract may execute a power of attorney.

Comment. Section 4120 states a requirement of general agency law, consistent with Civil Code Section 2296. See also Section 4022 (“power of attorney” defined).

§ 4121. Formalities for executing a power of attorney

4121. A power of attorney is legally sufficient if all of the following requirements are satisfied:

- (a) The power of attorney contains the date of its execution.
- (b) The power of attorney is signed either (1) by the principal or (2) in the principal’s name by some other person in the principal’s presence and at the principal’s direction.
- (c) The power of attorney is either (1) acknowledged before a notary public or (2) signed by at least two witnesses who satisfy the requirements of Section 4122.

Comment. Section 4121 provides the execution formalities for a power of attorney under this part. A power of attorney that complies with this section is legally sufficient as a grant of authority to an attorney-in-fact. Special rules apply to a statutory form power of attorney. See Section 4402. Additional qualifications apply to witnesses for a durable power of attorney for health care. See Sections 4700, 4701, 4771.

The dating requirement in subdivision (a) generalizes the rule applicable to durable powers of attorney for health care under former Civil Code Section 2432(a)(2). This rule is also consistent with the statutory forms. See Sections 4401 (statutory form power of attorney), 4771 (statutory form durable power of attorney for health care).

In subdivision (b), the requirement that a power of attorney be signed by the principal or at the principal’s direction continues a rule implicit in former law. See former Civ. Code §§ 2400, 2410(c). In addition, it generalizes the rule applicable to durable powers of attorney for health care under former Civil Code Section 2432.

The requirement that the power of attorney be either acknowledged or signed by two witnesses, in subdivision (c) generalizes part of the rule applicable to durable powers of attorney for health care under former Civil Code Section 2432(a)(3). Former general rules did not require either acknowledgment or witnessing. However, the statutory form power of attorney provided for acknowledgment. See former Civil Code Section 2475 (now Probate Code Section 4401). This rule still applies to the statutory form power of attorney; witnessing does not satisfy Section 4402. Subdivision (c) provides the general rule as to witnessing; specific qualifications for witnesses are provided in Section 4122.

Nothing in this section affects the requirements concerning recordable instruments. A power of attorney legally sufficient as a grant of authority under this division must satisfy the general rules concerning recordation in Civil Code Sections 1169-1231. To facilitate recordation of a power of attorney granting authority concerning real property, the power of attorney should be acknowledged before a notary, whether or not it is witnessed.

See also Sections 4014 (“attorney-in-fact” defined), 4022 (“power of attorney” defined), 4026 (“principal” defined).

Staff Note. The staff has removed the phrase “in this state” following “acknowledged before a notary” in what is now subdivision (c). The recording act does not require acknowledgment before a notary in this state, and it seems inconsistent with other provisions of this draft. See

Sections 4052 (application of division), 4054 (recognition of durable powers of attorney under law of another state).

§ 4122. Requirements for witnesses

4122. If the power of attorney is signed by witnesses, as provided in Section 4121, the following requirements shall be satisfied:

- (a) The witnesses shall be adults.
- (b) The attorney-in-fact may not act as a witness.
- (c) Each witness signing the power of attorney shall witness either the signing of the instrument by the principal or the principal's acknowledgment of the signature or the power of attorney.
- (d) At least one of the witnesses shall be a person who is neither (1) a relative of the principal by blood, marriage, or adoption or (2) a person who would be entitled to any portion of the principal's estate at the principal's death under a will existing at the time of execution of the power of attorney or by operation of law then existing.
- (e) At least one of the witnesses shall make the following declaration in substance: "I 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 principal's estate at the principal's death under a will now existing or by operation of law."
- (f) In the case of a durable power of attorney for health care, the additional requirements of Section 4701.

Comment. Section 4122 generalizes witness qualifications from former Civil Code Section 2432 (durable power of attorney for health care). Additional qualifications apply to witnesses for a durable power of attorney for health care. See Sections 4700, 4701, 4771. This section is not subject to contrary provisions in the power of attorney. See Section 4101.

See also Sections 4014 ("attorney-in-fact" defined), 4022 ("power of attorney" defined), 4026 ("principal" defined).

§ 4123. Permissible purposes

4123. (a) In a power of attorney, a principal may grant authority to an attorney-in-fact to act on the principal's behalf with respect to all lawful subjects and purposes or with respect to one or more express subjects or purposes. The attorney-in-fact may be granted authority with regard to the principal's property, personal care, health care, or any other matter.

(b) With regard to property matters, a power of attorney may grant authority to make decisions concerning all or part of the principal's real and personal property, whether owned by the principal at the time of the execution of the power of attorney or thereafter acquired or whether located in this state or elsewhere, without the need for a description of each item or parcel of property.

(c) With regard to personal care, a power of attorney may grant authority to make decisions relating to the personal care of the principal, including, but not limited to, determining where the principal will live, providing meals, hiring

household employees, providing transportation, handling mail, and arranging recreation and entertainment.

(d) With regard to health care, a power of attorney may grant authority to make health care decisions, both before and after the death of the principal, as provided in Part 4 (commencing with Section 4600).

Comment. Subdivision (a) of Section 4123 is new and is consistent with the general agency rules in Sections 2304 and 2305. For provisions concerning the duties and powers of an attorney-in-fact, see Sections 4230-4266. See also Sections 4014 (“attorney-in-fact” defined), 4022 (“power of attorney” defined), 4026 (“principal” defined).

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

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

Subdivision (d) recognizes the monopoly of the durable power of attorney for health care over health care decisions. See Sections 4609 (“health care” defined), 4612 (“health care decisions” defined).

§ 4124. Requirements for durable power of attorney

4124. A durable power of attorney is a power of attorney by which a principal designates another person as attorney-in-fact in writing and the power of attorney contains any of the following statements:

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

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

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

Comment. Section 4124 restates former Civil Code Section 2400 without substantive change. For special rules applicable to statutory form powers of attorney, see Sections 4401, 4484. For special rules applicable to durable powers of attorney for health care, see Sections 4703, 4771 (durable powers of attorney for health care). See also Section 4050 (application of part).

Section 4124 is similar to the official text of Section 1 of the Uniform Durable Power of Attorney Act (1984), Uniform Probate Code Section 5-501 (1991). See Section 4001 (construction of provisions of Uniform Durable Power of Attorney Act). The reference in the Uniform Act to the principal’s “disability” is omitted. Under Section 4152, 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 4124 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 4150(a)(1) (termination of power of attorney at end of stated term).

See also Sections 4014 (“attorney-in-fact” defined), 4018 (“durable power of attorney” defined), 4022 (“power of attorney” defined), 4026 (“principal” defined), 4030 (“springing power of attorney” defined).

§ 4125. Effect of acts under durable power of attorney during principal's incapacity

4125. All acts done by an attorney-in-fact pursuant to a durable power of attorney during any period of incapacity of the principal have the same effect and inure to the benefit of and bind the principal and the principal's successors in interest as if the principal had capacity.

Comment. Section 4125 continues former Civil Code Section 2401 without substantive change. This section is similar to the first sentence of the official text of Section 2 of the Uniform Durable Power of Attorney Act (1987), Uniform Probate Code Section 5-502 (1991). See Section 4001 (construction of provisions drawn from Uniform Durable Power of Attorney Act). This section omits the reference to the principal's "disability" found in the uniform act. Under Section 4152, it is the principal's incapacity to contract which would otherwise terminate the power of attorney.

See also Sections 4014 ("attorney-in-fact" defined), 4026 ("principal" defined).

§ 4126. Nomination of conservator in durable power of attorney

4126. (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 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 4126 continues former Civil Code 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 (1991), but has been revised to make it consistent with the general provision for nomination of a conservator in Section 1810. See Section 4001 (construction of provisions drawn from Uniform Durable Power of Attorney Act). The second sentence of Section 3(b) of the Uniform Durable Power of Attorney Act (most recent nomination in a durable power shall be given effect) is not adopted in California. Thus, the principal may make a later nomination in a writing that is not a durable power of attorney and, if at that time the principal has sufficient capacity to form an intelligent preference (Section 1810), the later nomination will supersede an earlier nomination made in a durable power. This is consistent with the purpose and effect of Section 1810.

See also Section 4018 ("durable power of attorney" defined), 4026 ("principal" defined).

§ 4127. Lapse of time

4127. Unless a power of attorney states a time of termination, the authority of the attorney-in-fact is exercisable notwithstanding any lapse of time since execution of the power of attorney.

Comment. Section 4127 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 (1991). See Section 4001 (construction of provisions drawn from Uniform Durable Power of Attorney Act). See also Sections 4125 (effect of attorney-in-fact's acts under durable power of attorney during principal's incapacity), 4150 (termination of power of attorney).

§ 4128. Warning statement in durable power of attorney

4128. (a) Subject to subdivision (b), a printed form of a durable power of attorney that is sold or otherwise distributed in this state for use by a person who does not have the advice of legal counsel shall contain, in not less than 10-point boldface type or a reasonable equivalent thereof, the following warning statement:

NOTICE TO PERSON EXECUTING DURABLE POWER OF ATTORNEY

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

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

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

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

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

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

This durable power of attorney must be dated and must be acknowledged before a notary public or signed by two witnesses. If it is signed by two witnesses, they must witness either (1) the signing of the power of attorney or (2) the principal's signing or acknowledgment of his or her signature. In addition, at least one of the witnesses must sign a declaration that he or she is not a relative and will not get property from the principal when the principal dies. A durable power of attorney that may affect real property should be acknowledged before a notary public so that it may easily be recorded.

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

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

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

(1) A statutory form power of attorney under Part 3 (commencing with Section 4400).

(2) A durable power of attorney for health care under Part 4 (commencing with Section 4600).

Comment. The warning statement in subdivision (a) of Section 4128 replaces the statement provided in former Civil Code Section 2510(b). Subdivision (b) restates former Civil Code Section 2510(c) without substantive change. Subdivision (c) restates former Civil Code Section 2510(a) without substantive change, but the reference to statutory form powers of attorney under former Civil Code Section 2450 is omitted as obsolete. This section is not subject to contrary provisions in the power of attorney. See Section 4051(b).

Other provisions prescribe the contents of the warning statements for particular types of durable powers of attorney. See Sections 4401, 4409 (statutory form power of attorney), 4703 (durable power of attorney for health care), 4771 (statutory form durable power of attorney for health care). See also Section 4703(a) (introductory clause) (printed form of a durable power of attorney for health care to provide only authority to make health care decisions).

Section 4102 permits a printed form to be used after January 1, 1995, if the form complies with prior law. A form printed after January 1, 1986, may be sold or otherwise distributed in this state only if it complies with the requirements of Section 4128 (or its predecessor, former Civil Code Section 2510). See Section 4102(b).

See also Sections 4014 (“attorney-in-fact” defined), 4018 (“durable power of attorney” defined), 4034 (“third person” defined).

Staff Note. The notice has been revised to deal with the proposed witnessing rules.

§ 4129. Springing power of attorney

4129. (a) In a springing power of attorney, the principal may designate one or more persons who, by a written declaration under penalty of perjury, have the power to determine conclusively that the specified event or contingency has occurred. The principal may designate the attorney-in-fact or another person to perform this function, either alone or jointly with other persons.

(b) A springing power of attorney containing the designation described in subdivision (a) becomes effective when the person or persons designated in the power of attorney execute a written declaration under penalty of perjury that the specified event or contingency has occurred, and any person may act in reliance on the written declaration without liability to the principal or to any other person, regardless of whether the specified event or contingency has actually occurred.

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

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

Comment. Section 4129 continues former Civil Code Section 2514(b)-(e) without substantive change. This section is intended to make springing powers of attorney more effective by

providing a mechanism for conclusively determining that the triggering event or contingency has occurred. See Section 4030 (“springing power of attorney” defined). Subdivision (a) makes clear that the principal may give the agent (or one or more other persons) the power to determine by written declaration under penalty of perjury that the event or contingency specified in the springing power of attorney has occurred so that the power of attorney is effective. This section does not apply to or affect springing powers of attorney containing different procedures for determining whether the triggering event or contingency has occurred. This section applies only where the terms of subdivision (a) are satisfied.

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

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

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

See also Sections 4022 (“power of attorney” defined), 4026 (“principal” defined).

§ 4130. Inconsistent authority

4130. (a) If a principal grants inconsistent authority to one or more attorneys-in-fact in two or more powers of attorney, the authority granted last controls to the extent of the inconsistency.

(b) This section is not subject to contrary provisions in the power of attorney.

Comment. Section 4130 is new. For a special rule applicable to durable powers of attorney for health care, see Section 4727(d).

Staff Note. This implements a decision made at the September 1991 meeting. The rule applicable to durable powers of attorney for health care is that a later power revokes an earlier one, unless the later power provides otherwise. Perhaps this would be the better general rule. The consequence of such a rule, however, is that earlier powers could be inadvertently wiped out.

CHAPTER 3. MODIFICATION AND REVOCATION OF POWERS OF ATTORNEY

Staff Note. The sections in this chapter have been substantially redrafted to implement decisions made at the March and May 1993 meetings.

§ 4150. Modification of power of attorney

4150. A power of attorney may be modified as follows:

(a) In accordance with the terms of the power of attorney.

(b) By an instrument executed in the same manner as a power of attorney may be executed.

(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 when and under what circumstances it is modified.

(d) When a written notice that the power of attorney is modified is filed by the principal or the principal's legal representative for record in the county of the principal's domicile or, if the principal is a nondomiciliary of this state, in the jurisdiction of the attorney-in-fact's domicile last known to the principal, or in the jurisdiction where any property specifically referred to in the power of attorney is located.

Comment. Section 4150 is new. The manner of modifying a power of attorney as provided in subdivision (b) is more formal than the manner of terminating a power of attorney provided by Section 4151(b).

Subdivisions (c) and (d) are drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.717(1) (Vernon 1990). To deal with the situation where the attorney-in-fact cannot be found for the communication, subdivision (d) provides for filing a notice of revocation 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 an attorney-in-fact to keep in contact with the principal. See Section 4234. See also Civ. Code § 1216 (recordation of revocation of recorded instruments).

See also Sections 4014 ("attorney-in-fact" defined), 4022 ("power of attorney" defined), 4026 ("principal" defined).

Staff Note. This section has been revised to implement a Commission decision at the March 1993 meeting. Specifically, the former section covering modification and revocation has been split up, with greater formalities attending modification than revocation.

The Commission should consider whether the special rules in subdivisions (c) and (d) should be retained. They seem useful to the staff, and they seem to meet the sort of formality standards urged by the State Bar.

Sections structured like this one present some conceptual difficulties concerning the degree of control over the statute in the power of attorney. The staff is reluctant to rely completely on the general rule in Section 4101 — in this case, reliance on Section 4101 would suggest deletion of subdivision (a), resulting in a loss of clarity. On the other hand, the approach of stating explicitly that this section is not subject to limitations in the power of attorney does not work too well, since subdivision (a) recognizes control by the instrument. But can the instrument make subdivisions (b)-(d) inapplicable to it? That is not the intent of the section. The best solution may be to exclude this chapter from coverage of the general rule in Section 4101, but the staff is becoming a bit alarmed over the drafting intricacies that are flowing from what appeared to be a simple theoretical principal.

§ 4151. Revocation of attorney-in-fact's authority

4151. As between the principal and attorney-in-fact, the authority of an attorney-in-fact under a power of attorney may be revoked 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 attorney-in-fact's authority is revoked or when and under what circumstances it is revoked.

(c) When the principal's legal representative, with approval of the court, informs the attorney-in-fact in writing that the attorney-in-fact's authority is revoked or when and under what circumstances it is revoked.

(d) When a written notice that the attorney-in-fact's authority is revoked is filed by the principal or the principal's legal representative for record in the county of the principal's domicile or, if the principal is a nondomiciliary of this state, in the jurisdiction of the attorney-in-fact's domicile last known to the principal, or in the jurisdiction where any property specifically referred to in the power of attorney is located.

Comment. Section 4151 is analogous to Section 4150 (modification of powers of attorney). See Section 4150 Comment. The rules concerning revocation of the attorney-in-fact's authority by the principal are not as strict as the rules on modification of the power of attorney. Compare subdivision (b) with Section 4150(b). No writing is required to revoke the attorney-in-fact's authority, and if a writing is used, it need not be witnessed or notarized to be effective between the principal and attorney-in-fact. To deal with the situation where the attorney-in-fact cannot be found, subdivision (d) provides for filing a notice of revocation 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 of attorney. This corresponds with the duty of an attorney-in-fact to keep in contact with the principal. See Section 4234. See also Civ. Code § 1216 (recordation of revocation of recorded instruments).

See also Sections 4014 ("attorney-in-fact" defined), 4022 ("power of attorney" defined), 4026 ("principal" defined).

Staff Note. See the Staff Note to Section 4150. This section has been recast in terms of revocation of authority instead of termination of the power of attorney.

§ 4152. Termination of authority of attorney-in-fact

4152. (a) Subject to subdivision (b), an attorney-in-fact's authority under a power of attorney 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 attorney-in-fact's authority under the power of attorney by the principal.
- (4) Death of the principal, except as to specific authority permitted by statute to be exercised after the principal's death.
- (5) Removal of the attorney-in-fact.
- (6) Resignation of the attorney-in-fact.
- (7) Incapacity of the attorney-in-fact, except that a temporary incapacity suspends the authority of the attorney-in-fact only during the period of the incapacity.
- (8) Dissolution or annulment of the marriage of, or legal separation of, the attorney-in-fact and principal, as provided in Section 4153.
- (9) 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 4300).

Comment. Section 4152 is drawn from the general agency rules provided in Civil Code Sections 2355 and 2356. This section continues the substance of former law as to termination of

the authority of an attorney-in-fact under a power of attorney. For a special rule as to termination of nondurable powers of attorney, see Section 4154.

Subdivision (a)(1) is the same as Section 2355(a). 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). These subdivisions recognize that the authority of an attorney-in-fact necessarily ceases when the underlying power of attorney is terminated.

Subdivision (a)(4) is the same as Section 2356(a)(2), but recognizes that certain tasks may remain to be performed after death. See, e.g., Sections 4238 (attorney-in-fact's duties on termination of authority), 4609 ("health care" defined to include certain post-death decisions), 4720 (authority to make health care decisions, including certain post-death decisions).

Subdivision (a)(5) is generalized from Section 2355(c)-(f). Subdivision (a)(6) is similar to rule in Civil Code Section 2355(d) (renunciation by agent). For the manner of resignation, see Section 4207. Subdivision (a)(7) is similar to of the Civil Code Section 2355(e). Subdivision (a)(8) cross-refers to the rules governing the effect of dissolution and annulment of marriage. Subdivision (a)(9) is the same as Civil Code Section 2355(c).

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

See also Sections 4014 ("attorney-in-fact" defined), 4022 ("power of attorney" defined), 4034 ("third person" defined).

Staff Note. This is another section that does not fit well within the default rule concept of Section 4101. See the Staff Note following draft Section 4150.

§ 4153. Effect of dissolution, annulment, or legal separation

4153. (a) If after executing a power of attorney the principal's marriage to the attorney-in-fact is dissolved or annulled, the principal's designation of the former spouse as an attorney-in-fact is revoked.

(b) If the attorney-in-fact's authority is revoked solely by subdivision (a), it is revived by the principal's remarriage to the attorney-in-fact.

Comment. Section 4153 is generalized from former Civil Code Section 2437(e) (revocation of durable power of attorney for health care on dissolution or annulment) and part of former subdivision (f) of Civil Code Section 2355 (revocation in case federal absentee). This section is also comparable to Section 6122(a)-(b) (revocation of provisions in will after dissolution or annulment). For special rules applicable to a federal "absentee" (as defined in Section 1403), see Section 3722.

This section is subject to limitation by the power of attorney. See Section 4101 (priority of provisions of power of attorney).

See also Sections 4014 ("attorney-in-fact" defined), 4022 ("power of attorney" defined), 4026 ("principal" defined).

Staff Note. The special rule applicable to federal "absentees" is proposed to be continued in the part of the Probate Code dealing with absentees. See Prob. Code § 3700 *et seq.*

§ 4154. Termination of authority under nondurable power of attorney on principal's incapacity

4154. (a) Subject to subdivision (b), the authority of an attorney-in-fact under a nondurable power of attorney is terminated by the incapacity of the principal to contract.

(b) An attorney-in-fact or third person who does not have notice of the incapacity of the principal is protected from liability as provided in Chapter 4 (commencing with Section 4300).

(c) This section is not subject to contrary provisions in the power of attorney.

Comment. Subdivision (a) of Section 4154 restates the general agency rule in Section 2356(a)(3) without substantive change. For other events that terminate a power of attorney, see Section 4150.

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

See also Sections 4014 (“attorney-in-fact” defined), 4018 (“durable power of attorney” defined), 4022 (“power of attorney” defined), 4034 (“third person” defined).

§ 4155. Validity of instrument for other purposes

4155. Termination of a power of attorney or the authority of an attorney-in-fact under this chapter does not affect any validity the instrument may have for purposes not governed by this division.

Comment. Section 4155 is new. This section is intended to make clear that even though the authority of an attorney-in-fact may terminate, the power of attorney instrument may, for example, serve as a valid nomination of a conservator. See Section 1810 (nomination of conservator by a writing signed by proposed conservatee). This section is subject to contrary provisions in the power of attorney. See Section 4101 (priority of provisions of power of attorney).

Staff Note. Is this section too broad? Should it be limited to termination by operation of law under this chapter? As drafted, a revocation of the power of attorney by the principal might still be considered a valid nomination of a conservator. Which should be the default rule?

CHAPTER 4. ATTORNEYS-IN-FACT

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

§ 4200. Qualifications of attorney-in-fact

4200. Only a person having the capacity to contract is qualified to act as an attorney-in-fact.

Comment. Section 4200 supersedes the last part of Section 2296 (“any person may be an agent”) to the extent that it applied to attorneys-in-fact under powers of attorney. For special limitations on attorneys-in-fact under durable powers of attorney for health care, see Sections 4700(b)-(c), 4720.

See also Sections 4014 (“attorney-in-fact” defined), 56 (“person” defined), 4022 (“power of attorney” defined), 4026 (“principal” defined).

§ 4201. Effect of designating unqualified person as attorney-in-fact

4201. Designating an unqualified person as an attorney-in-fact 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 4201 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 4300 *et seq.*

See also Sections 4014 (“attorney-in-fact” defined), 4022 (“power of attorney” defined), 4026 (“principal” defined), 4034 (“third person” defined).

§ 4202. Multiple attorneys-in-fact

4202. (a) A principal may designate more than one attorney-in-fact in one or more powers of attorney.

(b) Authority granted to two or more attorneys-in-fact is exercisable by their unanimous action.

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

(d) If an attorney-in-fact is unavailable because of absence, illness, or other temporary incapacity, the other attorneys-in-fact may exercise the authority under the power of attorney as if they are the only attorneys-in-fact, where necessary to accomplish the purposes of the power of attorney or to avoid irreparable injury to the principal’s interests.

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

Comment. Subdivision (a) of Section 4202 is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.707(1) (Vernon 1990). This section is subject to contrary provisions in the power of attorney. See Section 4101 (priority of provisions of power of attorney). The power of attorney 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

The default rule requiring unanimous action in subdivision (b) is the same in substance as the rule applicable under the statutory form power of attorney. See Civ. Code § 2475.

Subdivisions (b)-(d) are comparable to the rules applicable to multiple trustees under Sections 15620-15622.

Subdivision (e) is comparable to the general rule as to cotrustees in Section 16402(a).

See also Sections 4014 (“attorney-in-fact” defined), 4022 (“power of attorney” defined), 4026 (“principal” defined).

§ 4203. Successor attorneys-in-fact

4203. (a) A principal may designate one or more successor attorneys-in-fact to act if the authority of a predecessor attorney-in-fact terminates.

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

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

Comment. Section 4203 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 4152.

Subdivision (c) is comparable to the general rule as to successor trustees in Section 16403(a).

A successor attorney-in-fact is the same as an original attorney-in-fact under this division. See Section 4014(b) (“attorney-in-fact” includes successor or alternate attorney-in-fact). See also

Sections 4018 (“durable power of attorney” defined), 4022 (“power of attorney” defined), 4026 (“principal” defined).

§ 4204. Compensation of attorney-in-fact

4204. 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 4204 is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.725 (Vernon 1990). This section is comparable to 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. This section is subject to contrary provisions in the power of attorney. See Section 4101 (priority of provisions of power of attorney).

See Section 4231(b) (effect of compensation on standard of care). See also Sections 4014 (“attorney-in-fact” defined), 4022 (“power of attorney” defined), 4026 (“principal” defined).

§ 4205. Delegation of attorney-in-fact’s authority

4205. (a) An attorney-in-fact may revocably delegate authority to perform mechanical acts, or acts that the attorney-in-fact cannot lawfully perform, to one or more persons qualified to exercise the authority delegated.

(b) The attorney-in-fact making a delegation remains responsible to the principal for the exercise or nonexercise of the delegated authority.

Comment. Subdivision (a) of Section 4205 is drawn from Civil Code Section 2349. As provided in subdivision (b), delegation does not relieve the attorney-in-fact of responsibility for the acts of subagents. This section is subject to contrary provisions in the power of attorney. See Section 4101 (priority of provisions of power of attorney).

See also Sections 4014 (“attorney-in-fact” defined), 4018 (“durable power of attorney” defined), 4022 (“power of attorney” defined), 4026 (“principal” defined).

Staff Note. This section has been limited to mechanical delegations, as decided at the May 1993 meeting. Consequently, the provision making this section inapplicable to durable power of attorneys for health care has been deleted.

§ 4206. Relation of attorney-in-fact to court-appointed fiduciary

4206. (a) If, following execution of a durable power of attorney, a court of the principal’s domicile appoints a conservator of the estate, guardian of the estate, or other fiduciary charged with the management of all of the principal’s property or all of the principal’s property except specified exclusions, the attorney-in-fact is accountable to the fiduciary as well as to the principal. Except as provided in subdivision (b), the fiduciary has the same power to revoke or amend the durable

power of attorney that the principal would have had if not incapacitated, subject to any required court approval.

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

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

(d) This section is not subject to contrary provisions in the power of attorney.

Comment. Section 4206 continues former Civil Code 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) (1991), with several clarifying 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 (1991). The reference in the Uniform Act to the principal’s “disability” is omitted to conform with other provisions of this division. The authority of the fiduciary to revoke or amend is the same as in the official text of Section 3(a) of the Uniform Durable Power of Attorney Act, except that the possibility of a requirement of court approval is recognized, as in subdivision (b) which applies to California conservators.

See also Sections 4014 (“attorney-in-fact” defined), 4018 (“durable power of attorney” defined), 4026 (“principal” defined).

§ 4207. Resignation of attorney-in-fact

4207. (a) An attorney-in-fact may resign by any of the following means:

- (1) If the principal is competent, on giving notice to the principal.
- (2) On [written] agreement of a successor to serve as attorney-in-fact.
- (3) Pursuant to a court order.

(b) This section is not subject to contrary provisions in the power of attorney.

Comment. Section 4207 is new. For the effect of resignation, see Section 4152. See also Sections 4014 (“attorney-in-fact” defined), 4026 (“principal” defined).

Staff Note. This section implements a decision made at the May 1993 meeting. Should the agreement of a successor attorney-in-fact be required to be written?

Article 2. Duties of Attorneys-in-Fact

§ 4230. When duties commence

4230. (a) Except as provided in subdivision (c), a person who is designated as an attorney-in-fact has no duty to exercise the authority granted in the power of attorney, regardless of whether the principal has become incapacitated, is missing, or is otherwise unable to act.

(b) Acting for the principal in one or more transactions does not obligate an attorney-in-fact to act for the principal in a subsequent transaction, but the

attorney-in-fact has a duty to complete a transaction that the attorney-in-fact has commenced.

(c) If an attorney-in-fact has expressly agreed in writing to act for the principal, the attorney-in-fact has a duty to act pursuant to the terms of the agreement. The agreement to act on behalf of the principal is enforceable against the attorney-in-fact as a fiduciary regardless of whether there is any consideration to support a contractual obligation.

Comment. Section 4230 is drawn in part from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.705(4) (Vernon 1990). Subdivision (a) makes clear that being named as an attorney-in-fact under a durable or nondurable power of attorney imposes no duty on the named person to act. This is true even if the attorney-in-fact knows of the designation and has received the power of attorney. A duty to act under this part only arises by reason of an express agreement in writing, as provided in subdivision (c). Reliance is not sufficient to impose a legal duty to act, as provided in subdivision (b). However, a particular transaction must be completed.

This section recognizes that many powers of attorney are given and accepted as a gratuitous accommodation by the attorney-in-fact. The principal wants someone to have the ability to act if something needs to be done, but rarely would the principal expect to impose a duty to act on a friend or family member if the attorney-in-fact chooses not to do so. Consequently, unless the attorney-in-fact has agreed to act, accepting a power of attorney designation imposes no duty to act and the named person may even renounce the designation. The person named as attorney-in-fact may also merely wait until the situation arises and then determine whether to act. The person may refuse to act because of personal inconvenience at the time of becoming involved, or for any other reason, and is not required to justify a decision not to act. The person named as attorney-in-fact may believe that there are others in a better position to act for the principal or that the situation really warrants appointment of a court-supervised guardian or conservator. However, once the attorney-in-fact undertakes to act under the power of attorney, the transaction is governed by the duties imposed in the law to act as a fiduciary. See subdivision (c).

See also Sections 4014 (“attorney-in-fact” defined), 4018 (“durable power of attorney” defined), 4026 (“principal” defined).

§ 4231. Duty of care and skill; liability for losses

4231. (a) Except as provided in subdivisions (b) and (c), in dealing with property of the principal, an attorney-in-fact shall observe the standard of care that would be observed by a prudent person dealing with property of another and is not limited by any other statute restricting investments by fiduciaries.

(b) If an attorney-in-fact is not compensated, the attorney-in-fact is not liable for a loss to the principal’s property unless the loss results from the attorney-in-fact’s bad faith, intentional wrongdoing, or gross negligence.

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

Comment. Subdivisions (a) and (b) of Section 4231 are drawn from the standard applicable to custodians under Section 3912(b) (California Uniform Transfers to Minors Act). See also Section 4204 (compensation of attorneys-in-fact). The prudent person standard in subdivision (a) is generally consistent with the standard applicable under general agency law. See Restatement (Second) of Agency § 379 (1957).

Subdivision (c) is consistent with the general rule concerning expert fiduciaries stated in the cases. See the discussions in *Estate of Collins*, 72 Cal. App. 3d 663, 673, 139 Cal. Rptr. 644 (1977); *Coberly v. Superior Court*, 231 Cal. App. 2d 685, 689, 42 Cal. Rptr. 64 (1965); *Estate of Beach*, 15 Cal. 3d 623, 635, 542 P.2d 994, 125 Cal. Rptr. 570 (1975) (bank as executor); see also Section 4237 (attorney-in-fact's duty to use special skills); Section 2401 Comment (standard of care applicable to professional guardian or conservator of estate); Section 3912 Comment (standard of care applicable to professional fiduciary acting as custodian under California Uniform Transfers to Minors Act); Section 16040 Comment (standard of care applicable to expert trustee).

This section is subject to contrary provisions in the power of attorney. See Section 4101 (priority of provisions of power of attorney).

See also Sections 4014 ("attorney-in-fact" defined), 4022 ("power of attorney" defined), 4026 ("principal" defined).

§ 4232. Duty of loyalty

4232. An attorney-in-fact has a duty to act in the interest of the principal and to avoid conflicts of interest. This section is not subject to contrary provisions in the power of attorney.

Comment. The first sentence of Section 4232 restates the substance of part of Civil Code Section 2322(c) in the general agency rules. This section omits the requirement that the attorney-in-fact act "solely" in the principal's interest and the detail concerning avoiding conflicts of interest. The duty of loyalty is also consistent with Civil Code Section 2306 (agent not to defraud principal). Unlike Civil Code Section 2322(c), Section 4232 is stated as an affirmative duty, rather than a prohibition against violation of a duty applicable to trustees under Section 16002. The duty of loyalty of an attorney-in-fact to the principal is subject to the limitations in Section 4230 relating to commencement of the duties of an attorney-in-fact under a power of attorney.

See also Sections 4014 ("attorney-in-fact" defined), 4022 ("power of attorney" defined), 4026 ("principal" defined).

§ 4233. Duty to keep principal's property separate and identified

4233. (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. This subdivision is not subject to contrary provisions in the power of attorney.

(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 4233 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 Civil Code Section 2322(c) which formerly applied to powers of attorney. Unlike Civil Code Section 2322(c), Section 4233 is stated as an affirmative duty, rather than a prohibition against violation of a duty applicable to trustees under Section 16009. This section is subject to contrary provisions in the power of attorney. See Section 4101 (priority of provisions of power of attorney).

See also Sections 4014 ("attorney-in-fact" defined), 4026 ("principal" defined).

§ 4234. Duty to keep principal informed and follow instructions

4234. (a) To the extent reasonably practicable under the circumstances, an attorney-in-fact has a duty to keep in regular contact with the principal, to communicate with the principal, and to follow the instructions of the principal.

(b) With court approval, the attorney-in-fact may disobey instructions of the principal. This subdivision is not subject to contrary provisions in the power of attorney.

Comment. Section 4234 is drawn from general agency rules. The duty to follow the principal's instructions is consistent with the general agency rule in Civil Code Section 2309. See also Section 2019 (agent not to exceed limits of actual authority). The duty to communicate with the principal is consistent with the general agency rule in Civil Code Sections 2020 and 2332.

Subdivision (b) is a limitation on the general agency rule in Civil Code Section 2320 (power to disobey instructions).

See also Sections 4014 ("attorney-in-fact" defined), 4026 ("principal" defined).

§ 4235. Consultation

4235. If the principal becomes wholly or partially incapacitated, or if there is a question concerning the capacity of the principal to give instructions to and supervise the attorney-in-fact, the attorney-in-fact may consult with a person previously designated by the principal for this purpose, and may also consult with and obtain information needed to carry out the attorney-in-fact's duties from the principal's spouse, physician, attorney, accountant, a member of the principal's family, or other person, business entity, or government agency with respect to matters to be undertaken on the principal's behalf and affecting the principal's personal affairs, welfare, family, property, and business interests.

Comment. Section 4235 is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.714(4) (Vernon 1990). This section does not provide anything inconsistent with permissible practice under former law, but is intended to recognize the desirability of consultation in appropriate circumstances and provide assurance to third persons that consultation with the attorney-in-fact is proper and does not contravene privacy rights. As to the right to obtain medical records under the durable power of attorney for health care, see Section 4721. See also Section 4455(f) (receipt of bank statements, etc., under statutory form powers of attorney).

See also Sections 4014 ("attorney-in-fact" defined), 4026 ("principal" defined).

§ 4236. Duty to keep records and account; availability of records to other persons

4236. (a) The attorney-in-fact shall keep records of all transactions entered into by the attorney-in-fact on behalf of the principal.

(b) The attorney-in-fact does not have a duty to make an account of transactions entered into on behalf of the principal, except in 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 made.

(3) On request by the conservator of the estate of the principal while the principal is living.

(4) On request by the principal's personal representative or successor in interest after the death of the principal.

(5) Pursuant to court order.

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

(1) The principal.

(2) The conservator of the estate of the principal while the principal is living.

(3) The principal's personal representative or successor in interest after the death of the principal.

(4) Any other person, pursuant to court order.

(d) This section is not subject to contrary provisions in the power of attorney.

Comment. Section 4236 is drawn in part from Minnesota law. See Minn. Stat. Ann. § 523.21 (West Supp. 1990).

See also Sections 4014 ("attorney-in-fact" defined), 4022 ("power of attorney" defined), 4026 ("principal" defined).

Staff Note. This section has been revised for consistency with other rules, including Section 4206 (duty to account to conservator of estate).

§ 4237. Duty to use special skills

4237. An attorney-in-fact with special skills has a duty to apply the full extent of those skills.

Comment. Section 4237 is comparable to Section 16014(a) applicable to trustees. See also Section 4231(c) (expert standard of care). This section is subject to contrary provisions in the power of attorney. See Section 4101 (priority of provisions of power of attorney).

See also Sections 4014 ("attorney-in-fact" defined), 4022 ("power of attorney" defined), 4026 ("principal" defined).

§ 4238. Attorney-in-fact's duties on termination of authority

4238. (a) On termination of an attorney-in-fact's authority, the attorney-in-fact shall promptly deliver possession or control of the principal's property to the following persons in the following order of priority:

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

(2) To the principal or as directed by the principal, if the principal is not incapacitated.

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

(4) To the principal's conservator of the estate or guardian of the estate.

(5) In the case of the death of the principal, to the principal's personal representative, if any, or the principal's successors.

(b) On termination of an attorney-in-fact's authority, the attorney-in-fact shall deliver copies of any records relating to transactions undertaken on the principal's behalf that are requested by the person to whom possession or control of the property is delivered.

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

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

Comment. Section 4238 is new. The rules concerning duties on termination of the attorney-in-fact's authority are drawn in part from 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 4206.

See also Sections 4014 ("attorney-in-fact" defined), 4018 ("durable power of attorney" defined), 4026 ("principal" defined).

Article 3. Authority of Attorneys-in-Fact

§ 4260. Limitation on article

4260. This article does not apply to the following:

(a) Statutory form powers of attorney under Part 3 (commencing with Section 4400).

(b) Durable powers of attorney for health care under Part 4 (commencing with Section 4600).

Comment. Section 4260 limits the application of this article. Statutory form powers of attorney and durable power of attorney for health care have special rules concerning the authority of attorneys-in-fact.

§ 4261. General power of attorney

4261. If a power of attorney grants general authority to an attorney-in-fact and does not enumerate one or more express actions, subjects, or purposes for which general authority is conferred, the attorney-in-fact has all the authority to act that a person having the capacity to contract may carry out through an attorney-in-fact specifically authorized to take the action.

Comment. Section 4261 is new and provides for the broadest possible authority in a general power of attorney. For specific limitations applicable to this section, see Sections 4264 (authority that must be specifically authorized) and 4265 (actions that may not be taken by an attorney-in-fact).

See also Sections 4014 ("attorney-in-fact" defined), 4022 ("power of attorney" defined), 4026 ("principal" defined).

Staff Note. This section has been redrafted to implement a decision at the July 1993 meeting.

§ 4262. Limited power of attorney

4262. Subject to this article, if a power of attorney grants limited authority to an attorney-in-fact, the attorney-in-fact has the following authority:

(a) The authority granted in the power of attorney, as limited with respect to permissible actions, subjects, or purposes.

(b) The authority granted by statute, except as limited in the power of attorney.

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

Comment. Section 4262 is drawn from 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 4264 (powers that must be enumerated), 4265 (excluded powers), 4266 (exercise of powers subject to duties). Subdivision (a) is consistent with the general agency rule in Civil Code Sections 2315 and 2318. Subdivision (c) is comparable to an agent'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 agents generally in Civil Code Section 2319(1).

See also Sections 4014 ("attorney-in-fact" defined), 4022 ("power of attorney" defined).

Staff Note. This section has been redrafted to implement a decision at the July 1993 meeting.

§ 4263. Incorporation of powers

4263. (a) A power of attorney may grant authority to the attorney-in-fact by incorporating powers by reference to another statute, including, but not limited to, the following:

(1) Powers of attorneys-in-fact provided by the Uniform Statutory Form Power of Attorney Act, Part 3 (commencing with Section 4400).

(2) Powers of guardians and conservators provided by Chapter 5 (commencing with Section 2350) and Chapter 6 (commencing with Section 2400) of Part 4 of Division 4.

(3) Powers of trustees provided by Chapter 2 (commencing with Section 16200) of Part 4 of Division 9.

(b) 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 4263 is new. Subdivision (b) is subject to contrary provisions in the power of attorney. See Section 4101 (priority of provisions of power of attorney). See also Sections 4014 ("attorney-in-fact" defined), 4022 ("power of attorney" defined), 4026 ("principal" defined).

§ 4264. Powers that must be specifically enumerated

4264. A power of attorney may not be construed to grant authority to an attorney-in-fact to perform any of the following acts unless expressly authorized in the power of attorney:

(a) Create, modify, or revoke a trust.

(b) Fund with the principal's property a trust not created by the principal.

(c) Make or revoke a gift of the principal's property in trust or otherwise.

(d) Disclaim a gift or devise of property to or for the benefit of the principal.

(e) Create or change survivorship interests in the principal's property or in property in which the principal may have an interest.

(f) Designate or change the designation of beneficiaries to receive any property, benefit, or contract right on the principal's death.

Comment. Section 4264 is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.710(6) (Vernon 1990). This section is consistent with the general agency rule in Civil Code Section 2304.

See also Sections 4014 ("attorney-in-fact" defined), 4022 ("power of attorney" defined), 4026 ("principal" defined).

§ 4265. Excluded authority

4265. A power of attorney may not authorize an attorney-in-fact to perform any of the following acts:

(a) Make, publish, declare, amend, or revoke the principal's will.

(b) Consent to any action under a durable power of attorney for health care forbidden by Section 4722.

Comment. Section 4265 is consistent with the general agency rule in Civil Code Section 2304. See also Sections 4014 ("attorney-in-fact" defined), 4022 ("power of attorney" defined), 4026 ("principal" defined).

Staff Note. The organization of this section is not ideal. The staff had considered moving the forbidden consents from Section 4722 to this section, but ultimately decided that this location seems out of place and might be of concern to persons with particular interest in the durable power of attorney for health care. Thus, subdivision (b) ends up being a cross-reference.

§ 4266. Exercise of authority subject to duties

4266. The grant of authority to an attorney-in-fact, whether by the power of attorney, by statute, or by the court, does not in itself require or permit the exercise of the power. The exercise of authority by an attorney-in-fact is subject to the attorney-in-fact's fiduciary duties.

Comment. Section 4266 is drawn from Section 16202 (exercise of trustee's powers). See Sections 4230-4238 (duties of attorneys-in-fact). See also 4014 ("attorney-in-fact" defined), 4022 ("power of attorney" defined).

CHAPTER 5. RELATIONS WITH THIRD PERSONS

§ 4300. Third persons required to respect attorney-in-fact's authority

4300. A third person shall accord an attorney-in-fact acting pursuant to the provisions of a power of attorney the same rights and privileges that would be accorded the principal if the principal were personally present and seeking to act.

Comment. Section 4300 is new. This section provides the basic rule concerning the position of an attorney-in-fact: that the attorney-in-fact acts in place of the principal, within the scope of the power of attorney, and is to be treated as if the principal were acting.

See also Sections 4014 ("attorney-in-fact" defined), 4022 ("power of attorney" defined), 4026 ("principal" defined), 4034 ("third person" defined).

§ 4301. Reliance by third person on general authority

4301. A third person may rely on, contract with, and deal with an attorney-in-fact with respect to the subjects and purposes encompassed or expressed in the power of attorney without regard to whether the power of attorney expressly authorizes the specific act, transaction, or decision by the attorney-in-fact.

Comment. Section 4301 is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.710(8) (Vernon 1990).

See also Sections 4014 ("attorney-in-fact" defined), 4022 ("power of attorney" defined), 4034 ("third person" defined).

§ 4302. Identification of attorney-in-fact

4302. When requested to engage in transactions with an attorney-in-fact, a third person, before incurring any duty to comply with the power of attorney, may require the attorney-in-fact to provide identification, specimens of the signatures of the principal and the attorney-in-fact, and any other information reasonably necessary or appropriate to identify the attorney-in-fact and to facilitate the actions of the third person in transacting business with the attorney-in-fact.

Comment. Section 4302 is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.719(4) (Vernon 1990). See also former Civ. Code § 2512(a)(1) (presentation by attorney-in-fact named in power of attorney) & Comment.

See also Sections 4014 (“attorney-in-fact” defined), 4026 (“principal” defined), 4034 (“third person” defined).

§ 4303. Protection of third person relying in good faith on durable power of attorney

4303. (a) A third person who acts in good faith reliance on a power of attorney is not liable to the principal or to any other person for so acting if all of the following requirements are satisfied:

(1) The power of attorney is presented to the third person by the attorney-in-fact designated in the power of attorney.

(2) The power of attorney appears on its face to be valid.

(3) The power of attorney includes a notary public’s certificate of acknowledgment or is signed by two witnesses.

(b) Nothing in this section is intended to create an implication that a third person is liable for acting in reliance on a power of attorney under circumstances where the requirements of subdivision (a) are not satisfied. Nothing in this section affects any immunity that may otherwise exist apart from this section.

Comment. Section 4303 continues former Civil Code Section 2512 without substantive change. This section is intended to ensure that a power of attorney, whether durable or nondurable, will be accepted and relied upon by third persons.

Section 4303 gives a third person immunity from liability only if all of the following requirements are satisfied:

(1) The third person must act in good faith reliance on the power of attorney.

(2) The person presenting the power of attorney must actually be the attorney-in-fact designated in the power of attorney. If the person purporting to be the attorney-in-fact is an impostor, the immunity does not apply.

(3) The power of attorney must appear to be valid on its face and must include a notary public’s certificate of acknowledgment or the signatures of two witnesses. The third person can rely in good faith on the notary public’s certificate of acknowledgment or the signatures of the witnesses that the person who executed the power of attorney is the principal.

Subdivision (b) makes clear that this section merely provides an immunity from liability if the requirements of the section are satisfied. This section has no relevance in determining whether or not a third person who acts in reliance on a power of attorney is liable under the circumstances where, for example, the power of attorney does not include a notary public’s certificate of acknowledgment.

For other immunity provisions not affected by Section 4303, see, e.g., Sections 4128(c) (reliance in good faith upon durable power of attorney not containing “warning” statement required by Section 4128), 4301 (reliance by third person on general powers), 4304 (lack of knowledge of death or incapacity of principal). See also Section 3720 (“Any person who acts in

reliance upon the power of attorney [of an absentee as defined in Section 1403] when accompanied by a copy of a certificate of missing status is not liable for relying or acting upon the power of attorney.”). Section 4303 does not apply to health care providers. See Sections 4050 (application of part), 4750 (immunities of health care provider).

See also Sections 4014 (“attorney-in-fact” defined), 4018 (“durable power of attorney” defined), 4022 (“power of attorney” defined), 4034 (“third person” defined).

§ 4304. Effect of death or incapacity of principal

4304. (a) The death of a principal who has executed a power of attorney, whether durable or nondurable, does not revoke or terminate the agency as to the attorney-in-fact or a third person who, without actual knowledge of the principal’s death, acts in good faith under the power of attorney. Any action so taken, unless otherwise invalid or unenforceable, binds the principal’s successors in interest.

(b) The incapacity of a principal who has previously executed a nondurable power of attorney does not revoke or terminate the agency as to the attorney-in-fact or a third person who, without actual knowledge of the incapacity of the principal, acts in good faith under the power of attorney. Any action so taken, unless otherwise invalid or unenforceable, binds the principal and the principal’s successors in interest.

Comment. Section 4304 continues former Civil Code Section 2403 without substantive change. This section is the same in substance as the official text of Section 4 of the Uniform Durable Power of Attorney Act (1979), Uniform Probate Code Section 5-504 (1990), except that the reference to the principal’s “disability” is omitted. Under Section 4152, it is the principal’s incapacity to contract which would otherwise terminate the power of attorney.

See also Sections 4014 (“attorney-in-fact” defined), 4018 (“durable power of attorney” defined), 4022 (“power of attorney” defined), 4026 (“principal” defined), 4034 (“third person” defined).

§ 4305. Affidavit of lack of knowledge of termination of power

4305. (a) As to acts undertaken in good faith reliance thereon, an affidavit executed by the attorney-in-fact under a power of attorney, whether durable or nondurable, stating that, at the time of the exercise of the power, the attorney-in-fact did not have actual knowledge of the termination of the power of attorney or the attorney-in-fact’s authority by revocation or of the principal’s death or incapacity is conclusive proof of the nonrevocation or nontermination of the power at that time. If the exercise of the power of attorney requires execution and delivery of any instrument that is recordable, the affidavit when authenticated for record is likewise recordable.

(b) This section does not affect any provision in a power of attorney for its termination by expiration of time or occurrence of an event other than express revocation or a change in the principal’s capacity.

Comment. Section 4305 continues former Civil Code Section 2404 without substantive change. A reference to the attorney-in-fact’s authority has also been added in subdivision (a) for consistency with other provisions in this part. See, e.g., Section 4152 (termination of attorney-in-fact’s authority). This section is the same as the official text of Section 5 of the Uniform Durable Power of Attorney Act (1979), Uniform Probate Code Section 5-505 (1990), except that the

reference to the principal's "disability" is omitted. Under Section 4152, it is the principal's incapacity to contract which would otherwise terminate the power of attorney.

See also Sections 4014 ("attorney-in-fact" defined), 4018 ("durable power of attorney" defined), 4022 ("power of attorney" defined), 4026 ("principal" defined).

§ 4306. Reliance on attorney-in-fact's affidavit

4306. (a) If the attorney-in-fact furnishes an affidavit pursuant to Section 4305, whether voluntarily or on demand, a third person dealing with the attorney-in-fact who refuses to accept the exercise of an attorney-in-fact's power covered by the affidavit is liable for attorney's fees incurred in an action or proceeding necessary to confirm the attorney-in-fact's qualifications or powers, unless the court determines that the third person believed in good faith that the attorney-in-fact was not qualified or was attempting to exceed or improperly exercise the attorney-in-fact's powers.

(b) A third person's failure to demand an affidavit pursuant to Section 4305 does not affect the protection provided the third person by this chapter, and no inference as to whether a third person has acted in good faith may be drawn from the failure to demand an affidavit from the attorney-in-fact.

Comment. Section 4306 is analogous to the rule applicable to third persons dealing with trustees. See Section 18100.5(c)-(d) (reliance on trustee's affidavit, liability for attorney's fees). Unless the court determines that the third person refused in good faith to rely on the attorney-in-fact's affidavit, subdivision (a) imposes liability on the third person for attorney's fees in a proceeding needed to confirm exercise of a power. This provision is intended to make powers of attorney more effective and avoid the need to seek judicial confirmation of the existence of a power. The liability under subdivision (a) applies only where the attorney-in-fact executes an affidavit, whether voluntarily or on demand. If the attorney-in-fact has not executed an affidavit, a third person may refuse to recognize the attorney-in-fact's authority even though the third person would be fully protected under this chapter.

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

§ 4307. Certified copy of power of attorney

4307. (a) A copy of a power of attorney certified under this section has the same force and effect as the original power of attorney.

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

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

(2) A notary public in this state.

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

(c) The certification shall state that the certifying person has examined the original power of attorney and the copy and that the copy is a true and correct copy of the original power of attorney.

Comment. Section 4307 is new. 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 4022 (“power of attorney” defined), 4026 (“principal” defined).

§ 4308. When third person charged with employee’s knowledge

4308. A third person who conducts activities through employees is not charged under this chapter with actual knowledge of any fact relating to a power of attorney, nor of a change in the authority of an attorney-in-fact, unless both of the following requirements are satisfied:

(a) The information is received at a home office or a place where there is an employee with responsibility to act on the information.

(b) The employee has a reasonable time in which to act on the information using the procedure and facilities that are available to the third person in the regular course of its operations.

Comment. Section 4308 is a new provision drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.719(3) (Vernon 1990).

See also Sections 4014 (“attorney-in-fact” defined), 4022 (“power of attorney” defined), 4034 (“third person” defined).

PART 3. UNIFORM STATUTORY FORM POWER OF ATTORNEY

CHAPTER 1. GENERAL PROVISIONS

§ 4400. Short title

4400. This part may be cited as the Uniform Statutory Form Power of Attorney Act.

Comment. Section 4400 continues former Civil Code Section 2482 without change. This part is substantially the same as the Uniform Statutory Form Power of Attorney Act (1988). Section 4400 is the same as Section 19 of the Uniform Act. As to the construction of uniform acts, see Section 2. See also Section 11 (severability of provisions).

§ 4401. Statutory form power of attorney

4401. The following statutory form power of attorney is legally sufficient when the requirements of Section 4402 are satisfied:

UNIFORM STATUTORY FORM POWER OF ATTORNEY

(California Probate Code § 4401)

NOTICE: THE POWERS GRANTED BY THIS DOCUMENT ARE BROAD AND SWEEPING. THEY ARE EXPLAINED IN THE UNIFORM STATUTORY FORM POWER OF ATTORNEY ACT (CALIFORNIA PROBATE CODE SECTIONS 4400-4465). IF YOU HAVE ANY QUESTIONS ABOUT THESE POWERS, OBTAIN COMPETENT LEGAL ADVICE. THIS DOCUMENT DOES NOT AUTHORIZE ANYONE TO MAKE MEDICAL AND OTHER HEALTH-CARE DECISIONS FOR YOU. YOU MAY REVOKE THIS POWER OF ATTORNEY IF YOU LATER WISH TO DO SO.

I _____
(your name and address)

appoint _____
(name and address of the person appointed, or of each person
appointed if you want to designate more than one)

as my agent (attorney-in-fact) to act for me in any lawful way with respect to the following initialed subjects:

TO GRANT ALL OF THE FOLLOWING POWERS, INITIAL THE LINE IN FRONT OF (N) AND IGNORE THE LINES IN FRONT OF THE OTHER POWERS.

TO GRANT ONE OR MORE, BUT FEWER THAN ALL, OF THE FOLLOWING POWERS, INITIAL THE LINE IN FRONT OF EACH POWER YOU ARE GRANTING.

TO WITHHOLD A POWER, DO NOT INITIAL THE LINE IN FRONT OF IT. YOU MAY, BUT NEED NOT, CROSS OUT EACH POWER WITHHELD.

INITIAL

- _____ (A) Real property transactions.
- _____ (B) Tangible personal property transactions.
- _____ (C) Stock and bond transactions.
- _____ (D) Commodity and option transactions.
- _____ (E) Banking and other financial institution transactions.
- _____ (F) Business operating transactions.
- _____ (G) Insurance and annuity transactions.
- _____ (H) Estate, trust, and other beneficiary transactions.
- _____ (I) Claims and litigation.
- _____ (J) Personal and family maintenance.
- _____ (K) Benefits from social security, medicare, medicaid, or other governmental programs, or civil or military service.
- _____ (L) Retirement plan transactions.
- _____ (M) Tax matters.
- _____ (N) ALL OF THE POWERS LISTED ABOVE.

YOU NEED NOT INITIAL ANY OTHER LINES IF YOU INITIAL LINE (N).

SPECIAL INSTRUCTIONS:

ON THE FOLLOWING LINES YOU MAY GIVE SPECIAL INSTRUCTIONS LIMITING OR EXTENDING THE POWERS GRANTED TO YOUR AGENT.

UNLESS YOU DIRECT OTHERWISE ABOVE, THIS POWER OF ATTORNEY IS EFFECTIVE IMMEDIATELY AND WILL CONTINUE UNTIL IT IS REVOKED.

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

STRIKE THE PRECEDING SENTENCE IF YOU DO NOT WANT THIS POWER OF ATTORNEY TO CONTINUE IF YOU BECOME INCAPACITATED.

EXERCISE OF POWER OF ATTORNEY WHERE MORE THAN ONE AGENT DESIGNATED

If I have designated more than one agent, the agents are to act _____

IF YOU APPOINTED MORE THAN ONE AGENT AND YOU WANT EACH AGENT TO BE ABLE TO ACT ALONE WITHOUT THE OTHER AGENT JOINING, WRITE THE WORD "SEPARATELY" IN THE BLANK SPACE ABOVE. IF YOU DO NOT INSERT ANY WORD IN THE BLANK SPACE, OR IF YOU INSERT THE WORD "JOINTLY", THEN ALL OF YOUR AGENTS MUST ACT OR SIGN TOGETHER.

I agree that any third party who receives a copy of this document may act under it. Revocation of the power of attorney is not effective as to a third party until the third party has actual knowledge of the revocation. I agree to indemnify the third party for any claims that arise against the third party because of reliance on this power of attorney.

Signed this ____ day of _____, 19__

(your signature)

(your social security number)

State of _____ County of _____

BY ACCEPTING OR ACTING UNDER THE APPOINTMENT, THE AGENT ASSUMES THE FIDUCIARY AND OTHER LEGAL RESPONSIBILITIES OF AN AGENT.

[Include certificate of acknowledgment of notary public in compliance with Section 1189 of the Civil Code or other applicable law.]

Comment. Section 4401 continues former Civil Code Section 2475 [as amended by AB 346, 1993 Cal. Stat. ch. 141, § 2] without change, except for the revision of cross-references to other provisions, the restoration of language erroneously omitted in 1993, and inclusion of a general reference to the law governing the notary's certificate of acknowledgment. Section 4401 is the same in substance as Section 1(a) of the Uniform Statutory Form Power of Attorney Act (1988), with the addition of provisions to permit designation of co-agents.

The provisions added by former Civil Code Section 2475 were drawn from the former Statutory Short Form Power of Attorney statute. See former Civ. Code § 2450 (repealed by 1990 Cal. Stat. ch. 986, § 1). The acknowledgment portion of the form was revised to be consistent with the form used under California law. The word “incapacitated” was substituted for the words “disabled, incapacitated, or incompetent” used in the Uniform Act. This substitution conforms the statutory form to the California version of the Uniform Durable Power of Attorney Act. See Section 4018 requirements for creation of durable power of attorney).

Section 4401 provides the text of the form that is sufficient and necessary to bring this part into operation. The statutory form can be used in whole or part instead of individually drafted forms or forms adapted from a form book.

A form used to create a power of attorney subject to this part should use the language provided in Section 4401. Minor variances in wording will not take it out of the scope of the part. For example, the use of the language of the official text of the Uniform Act in the last paragraph of the text of the statutory form (protection of third party who receives a copy of the statutory form power of attorney and acts in reliance on it) instead of the language provided in Section 4401 does not take the form out of the scope of this part. See Section 4402(a). Nor does the omission of the provisions relating to designation of co-agents take the form out of the scope of this part. See Section 4402(a).

After the introductory phrase, the term “agent” is used throughout the Uniform Act in place of the longer and less familiar “attorney-in-fact.” Special effort is made throughout the Uniform Act to make the language as informal as possible without impairing its effectiveness.

The statutory form contains a list of powers. The powers listed relate to various separate classes of activities, except the last, which includes all the others. Health care matters are not included. See Sections 4609 (“health care” defined), 4612 (“health care decision” defined). For a durable power of attorney form for health care, see Section 4771.

Space is provided in the statutory form for “Special Instructions.” In this space, the principal can add specially drafted provisions limiting or extending the powers granted to the agent. (If the space provided is not sufficient, a reference can be made in this space to an attached sheet or sheets, and the special provisions can be included on the attached sheet or sheets.)

The statutory form contains only a limited list of powers. If it is desired to give the agent the broadest possible powers, language similar to the following can be added under the “Special Instructions” portion of the form:

In addition to all of the powers listed in lines (A) to (M) above, I grant to my agent full power and authority to act for me, in any way which I myself could act if I were personally present and able to act, with respect to all other matters and affairs not listed in lines (A) to (M) above, but this authority does not include authority to make health care decisions.

Neither the form in this section, nor the constructional provisions in Sections 4450-4464, attempt to allow the grant of the power to make a will or to give the agent extensive estate planning authority, although several of the powers, especially lines (G), (H), and (L) of the statutory form, may be useful in planning the disposition of an estate. An individually tailored power of attorney can be used if the principal wants to give the agent extensive estate planning authority, or additional estate planning powers can be granted to the agent by stating those additional powers in the space provided in the form for “Special Instructions.” For example, provisions like the following might be included under the special instructions portion of the statutory form:

In addition to the powers listed in lines (A) to (M) above, the agent is empowered to do all of the following:

(1) Establish a trust with property of the principal for the benefit of the principal and the spouse and descendants of the principal, or any one or more of them, upon such terms as the agent determines are necessary or proper, and transfer any property in which the principal has an interest to the trust.

(2) Exercise in whole or in part, release, or let lapse any power the principal may have under any trust whether or not created by the principal, including any power of appointment, revocation, or withdrawal, but a trust created by the principal may only be modified or revoked by the agent as provided in the trust instrument.

(3) Make a gift, grant, or other transfer without consideration to or for the benefit of the spouse or descendants of the principal or a charitable organization, or more than one or all of them, either outright or in trust, including the forgiveness of indebtedness and the completion of any charitable pledges the principal may have made; consent to the splitting of gifts under Internal Revenue Code Section 2513, or successor Sections if the spouse of the principal makes gifts to any one or more of the descendants of the principal or to a charitable institution; pay any gift tax that may arise by reason of those gifts.

(4) Loan any of the property of the principal to the spouse or descendants of the principal, or their personal representatives or a trustee for their benefit, the loan bearing such interest, and to be secured or unsecured, as the agent determines advisable.

(5) In general, and in addition to all the specific acts enumerated, do any other act which the principal can do through an agent for the welfare of the spouse, children, or dependents of the principal or for the preservation and maintenance of other personal relationships of the principal to parents, relatives, friends, and organizations.

It should be noted that a trust may not be modified or revoked by an agent under a statutory form power of attorney unless it is expressly permitted by the instrument granting the power and by the trust instrument. See Section 15401(b).

Section 4404 and the statutory form itself make the power of attorney a durable power of attorney, remaining in effect after the incapacity of the principal, unless the person executing the form strikes out the language in the form that makes the instrument a durable power of attorney. See also Section 4018 (“durable power of attorney” defined).

The last paragraph of the text of the statutory form protects a third party who receives a copy of the statutory form power of attorney and acts in reliance on it. See also Section 4034 (“third person” defined). The statement in the statutory form — that revocation of the power of attorney is not effective as to a third party until the third party has actual knowledge of the revocation — is consistent with Sections 4403 (good faith reliance on power of attorney without actual knowledge of death or incapacity of principal), 4404 (affidavit of lack of knowledge of termination of power). See also Sections 4400 (third persons required to respect agent’s authority), 4401 (immunities of third person), 4408 (protection of person who acts in good faith reliance upon power of attorney where specified requirements are satisfied). The protection provided by these sections and other immunities that may protect persons who rely on a power of attorney (see Section 4408(b)) apply to a statutory form power of attorney. See Section 4100 (application of division to statutory form power of attorney).

The language of the last portion of the text of the statutory form set out in Section 4401 substitutes the phrase “has actual knowledge of the revocation” for the phrase “learns of the revocation” which is used in the Uniform Act form. This substitution does not preclude use of a form including the Uniform Act language. See Section 4402(a) (third sentence).

Neither this section, nor the part as a whole, attempts to provide an exclusive method for creating a power of attorney. Other forms may be used and other law employed to create powers of attorney. See Section 4408. However, this part should be sufficient for most purposes.

For provisions relating to court enforcement of the duties of the agent, see Sections 4900-4952.

The form provided by Section 4401 supersedes the former statutory short form power of attorney under former Civil Code Sections 2450-2473 (repealed by 1990 Cal. Stat. ch. 986, § 1). But older forms consistent with former Civil Code Sections 2450-2473 are still effective. See Section 4409 & Comment.

See also Sections 4014 (“attorney-in-fact” defined to include agent), 4026 (“principal” defined), 4034 (“third person” defined).

§ 4402. Requirements for statutory form power of attorney

4402. A statutory form power of attorney under this part is legally sufficient if all of the following requirements are satisfied:

(a) The wording of the form complies substantially with Section 4401. A form does not fail to comply substantially with Section 4401 merely because the form does not include the provisions of Section 4401 relating to designation of co-agents. A form does not fail to comply substantially with Section 4401 merely because the form uses the sentence “Revocation of the power of attorney is not effective as to a third party until the third party learns of the revocation” in place of the sentence “Revocation of the power of attorney is not effective as to a third party until the third party has actual knowledge of the revocation,” in which case the form shall be interpreted as if it contained the sentence “Revocation of the power of attorney is not effective as to a third party until the third party has actual knowledge of the revocation.”

(b) The form is properly completed.

(c) The signature of the principal is acknowledged.

Comment. Section 4402 continues former Civil Code Section 2476 without change, except for the revision of cross-references to other provisions and the deletion of language made obsolete by 1993 legislation. See 1993 Cal. Stat. ch. 1414, § 2. Section 4402 is the same in substance as Section 1(b) of the Uniform Statutory Form Power of Attorney Act (1988), with the addition of the second and third sentences of subdivision (a). The added sentences make clear that use of a form that complies with the requirements of the official text of the Uniform Act satisfies the requirements of this section, even though the form used does not include the provisions included in Section 4401 for designation of co-agents and even though the form uses the language “learns of the revocation.”

See also Sections 4014 (“attorney-in-fact” defined to include agent), 4026 (“principal” defined), 4034 (“third person” defined).

§ 4403. Effect of initialing line in front of (N) in statutory form

4403. If the line in front of (N) of the statutory form under Section 4401 is initialed, an initial on the line in front of any other power does not limit the powers granted by line (N).

Comment. Section 4403 continues former Civil Code Section 2479 without change, except for the revision of a cross-reference to another provision. Section 4403 is the same in substance as Section 1(c) of the Uniform Statutory Form Power of Attorney Act (1988).

§ 4404. Durability of statutory form power of attorney

4404. A statutory form power of attorney legally sufficient under this part is durable to the extent that the power of attorney contains language, such as “This power of attorney will continue to be effective even though I become incapacitated,” showing the intent of the principal that the power granted may be exercised notwithstanding later incapacity.

Comment. Section 4404 continues former Civil Code Section 2478 without substantive change. Section 4404 is the same in substance as Section 2 of the Uniform Statutory Form Power of Attorney Act (1988). The phrase “to the extent that durable powers are permitted by other law of this State,” found in the Uniform Act, has been omitted as unnecessary. Durable powers of

attorney are specifically authorized by Section 4124. The words “incapacitated” and “incapacity” are used in Section 4404 for consistency with the form used in Section 4401 and with Section 4124 (California version of the Uniform Durable Power of Attorney Act).

A durable power of attorney under this part continues in effect when the principal becomes incapacitated. The form in Section 4401 includes a provision for continuance under those circumstances. That provision may be used or stricken at the discretion of the principal. The provision is consistent with Section 4124 (Uniform Durable Power of Attorney Act). See also Sections 4125 (effect of acts by agent during incapacity of principal), 4403 (good faith reliance upon power of attorney after death or incapacity of principal). As to the effect of appointment of a conservator of the estate, guardian of the estate, or other fiduciary charged with the management of the principal’s property, see Section 4206.

See also Sections 4018 (“durable power of attorney” defined), 4026 (“principal” defined).

§ 4405. Springing statutory form power of attorney

4405. (a) A statutory form power of attorney under this part that limits the power to take effect upon the occurrence of a specified event or contingency, including but not limited to the incapacity of the principal, may contain a provision designating one or more persons who, by a written declaration under penalty of perjury, have the power to determine conclusively that the specified event or contingency has occurred.

(b) A statutory form power of attorney that contains the provision described in subdivision (a) becomes effective when the person or persons designated in the power of attorney execute a written declaration under penalty of perjury that the specified event or contingency has occurred, and any person may act in reliance on the written declaration without liability to the principal or to any other person, regardless whether the specified event or contingency has actually occurred.

(c) The provision described in subdivision (a) may be included in the “Special Instructions” portion of the form set out in Section 4401.

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

Comment. Section 4405 continues former Civil Code Section 2479 without substantive change. Section 4405 is not found in the Uniform Statutory Form Power of Attorney Act (1988). This section is drawn from Section 5-1602 of the New York General Obligations Law. A provision described in subdivision (a) protects a third person who relies on the declaration under penalty of perjury of the person or persons designated in the power of attorney that the specified event or contingency has occurred. The principal may designate the agent or another person, or several persons, to make this declaration.

Subdivision (d) makes clear that subdivisions (a) and (b) are not the exclusive method for creating a “springing power” (a power of attorney that goes into effect upon the occurrence of a specified event or contingency). The principal is free to set forth in a power of attorney under this part any provision the principal desires to provide for the method of determining whether the specified event or contingency has occurred. For example, the principal may provide that his or her “incapacity” be determined by a court under Part 5 (commencing with Section 4900). See Section 4941(a). If the power of attorney provides only that it shall become effective “upon the incapacity of the principal,” the determination whether the power of attorney is in effect also may be made under Part 5 (commencing with Section 4900).

See also Sections 4026 (“principal” defined), 4030 (“springing power of attorney” defined).

§ 4406. Compelling third person to honor statutory form power of attorney; liability for attorney's fees

4406. (a) If a third person to whom a properly executed statutory form power of attorney under this part is presented refuses to honor the agent's authority under the power of attorney within a reasonable time, the third person may be compelled to honor the agent's authority under the power of attorney, in an action for this purpose brought against the third person, except that the third person may not be compelled to honor the agent's authority if the principal could not compel the third person to act in the same circumstances.

(b) If an action is brought under this section, the court shall award attorney's fees to the agent if the court finds that the third person acted unreasonably in refusing to accept the agent's authority under the statutory form power of attorney.

(c) For the purpose of subdivision (b) and without limiting other grounds that may constitute a reasonable refusal to accept an agent's authority under a statutory form power of attorney, a third person does not act unreasonably in refusing to accept the agent's authority if the refusal is authorized or required by provision of a state or federal statute or regulation.

(d) Notwithstanding subdivision (c), a third person's refusal to accept an agent's authority under a statutory form power of attorney under this part is unreasonable if the only reason for the refusal is that the power of attorney is not on a form prescribed by the third person to whom the power of attorney is presented.

(e) The remedy provided in this section is cumulative and nonexclusive.

Comment. Section 4406 continues former Civil Code Section 2480.5 [1992 Cal. Stat. ch. 178, § 4] without change. Section 4406 is not found in the Uniform Statutory Form Power of Attorney Act (1988). Subdivisions (a) and (b) are drawn in part from Section 13105(b) (compelling payment or delivery under affidavit procedure for collection or transfer of personal property of small estate). See also Section 4404 (affidavit of lack of knowledge of termination of power of attorney).

Subdivision (a) permits an agent to bring an action to compel a third person to honor a statutory form power of attorney only to the extent that the principal, disregarding any legal disability, could bring an action to compel the third person to act. Under this rule, a third person who could not be forced to do business with the principal consequently may not be forced to deal with the agent. However, a third person who holds property of the principal, who owes a debt to the principal, or who is obligated by contract to the principal may be compelled to accept the agent's authority.

In addition, as provided in subdivision (b), if the refusal to deal with the agent is found to be unreasonable, the third person will also be liable for attorney's fees incurred in the action to compel compliance. The determination of reasonableness depends on the particular circumstances of each case. A person to whom the power of attorney is presented may, for example, act reasonably in refusing to accept the agent's authority where it is not clear that the power of attorney grants the agent authority with respect to the particular transaction. Likewise, a third person may reasonably refuse to honor the power of attorney if, for example, the person is not reasonably satisfied as to the identity of the agent or has information that would lead a reasonable person to question the validity of the power of attorney. See also Section 4408 (protection of person relying in good faith).

Subdivision (c) provides some specific guidelines as to the meaning of the reasonableness rule in subdivision (b) as it relates to the liability for attorney's fees. However, subdivision (d) makes clear that an institution's preference for its own power of attorney form is never a reasonable

ground for refusing to accept the authority of an agent under a properly executed and effective statutory form power of attorney.

See also Sections 4014 (“attorney-in-fact” defined to include agent), 4026 (“principal” defined), 4034 (“third person” defined).

§ 4407. General provisions applicable to statutory form power of attorney

4407. Unless there is a conflicting provision in this part, in which case the provision of this part governs, the other provisions of this division apply to a statutory form power of attorney.

Comment. Section 4407 restates the substance of former Civil Code Section 2480. Section 4407 makes clear that the general provisions that apply to powers of attorney generally apply to statutory form powers of attorney under this part. Thus, for example, the following provisions apply to a power of attorney under this part:

Section 4123(b) (application of power of attorney to all or part of principal’s property; unnecessary to describe items or parcels of property).

Section 4124 (requirements for creation of durable power of attorney). The statutory form set out in Section 4401 satisfies the requirements for creation of a durable power of attorney, unless the provision making the power of attorney durable is struck out on the form.

Section 4125 (effect of acts by agent during incapacity of principal).

Section 4206 (effect of appointment of a conservator of the estate or other fiduciary charged with the management of the principal’s property).

Section 4303 (protection against liability of person acting in good faith reliance upon power of attorney).

Section 4304 (good faith reliance on power of attorney after death or incapacity of principal).

Section 4306 (good faith reliance on agent’s affidavit as conclusive proof of the nonrevocation or nontermination of the power).

Sections 4900-4952 (judicial proceedings).

§ 4408. Use of other forms

4408. Nothing in this part affects or limits the use of any other form for a power of attorney. Any form that complies with the requirements of any law other than the provisions of this part may be used in lieu of the form set forth in Section 4401, and none of the provisions of this part apply if such other form is used.

Comment. Section 4408 continues former Civil Code Section 2481 without substantive change. See also Section 4022 (“power of attorney” defined).

§ 4409. Use of statutory form provided by repealed statutes

4409. (a) A statutory short form power of attorney executed before, on, or after the repeal of Chapter 3 (commencing with Section 2450) of Title 9 of Part 4 of the Civil Code by Chapter 986 of the Statutes of 1990, using a form that complied with former Civil Code Section 2450 of the Civil Code, as originally enacted by Chapter 602 of the Statutes of 1984, or as amended by Chapter 403 of the Statutes of 1985, is as valid as if Chapter 3 (commencing with Section 2450) of Title 9 of Part 4 of the Civil Code had not been repealed by, and former Civil Code Section 2511 of the Civil Code amended by, Chapter 986 of the Statutes of 1990.

(b) A statutory form power of attorney executed before, on, or after the repeal of Chapter 3.5 (commencing with Section 2475) of Title 9 of Part 4 of the Civil Code

by the act that enacted this section, using a form that complied with the repealed chapter of the Civil Code is as valid as that chapter had not been repealed.

Comment. Subdivision (a) of Section 4409 restates former Civil Code Section 2450 without substantive change. The “statutory short form power of attorney” provided by former Civil Code Section 2450 was superseded by the Uniform Statutory Form Power of Attorney. See Sections 4400-4465 (continuing former Civ. Code §§ 2475-2499). This section permits use of the earlier forms after January 1, 1991, when the “statutory short form” was repealed. This avoids the need to discard existing printed forms and protects the unwary person who uses a printed form prepared pursuant to the former provisions. However, the new form provided by Sections 4400-4465 (and former Civ. Code §§ 2475-2499) should soon replace the older forms.

CHAPTER 2. CONSTRUCTION OF POWERS

Comment. This chapter (commencing with Section 4450) explains the powers listed in the statutory form in Section 4401. Section 4450 provides general powers that apply to all of the defined classes of authority listed in lines (A) through (M) of the statutory form, subject to any conditions set by the principal.

The language in Sections 4451-4463 makes explicit reference to authority that would be appropriate for each class of transaction. The language in those sections identifies activities that are typical responsibilities for the particular class of transaction.

Any of Sections 4451-4463, together with the general authority in Section 4450, gives the agent complete power for the class of transactions. The recitation of particular powers in each section explains the scope of the individual section and assures the user of this part and the form provided by this part that the matters that are the user’s particular concern are covered by the part. As to use of a power executed outside this state, after-acquired property, use of the power with respect to property located outside this state, and exercise of the power outside this state, see Section 4464.

A general effect of this chapter is that the agent can exercise authority subject to the same conditions and limitations as the principal. In a few instances the limiting conditions are made explicit. For example, in Section 4456 it is stated that partnership powers are subject to the terms of the partnership agreement. But all authority is subject to conditions of fact and law that exist outside the part. For example, a collection agency could not escape regulation by acting under this power of attorney. See also Section 15401 (modifying or revoking trust).

Provisions of this chapter grant the agent authority to enforce rights of the principal “by litigation or otherwise” or to initiate litigation or to bring an action. These grants of authority do not affect the requirement of Code of Civil Procedure Section 367 that an action be prosecuted in the name of the real party in interest.

§ 4450. Construction of powers generally

4450. By executing a statutory form power of attorney with respect to a subject listed in Section 4401, the principal, except as limited or extended by the principal in the power of attorney, empowers the agent, for that subject, to do all of the following:

(a) Demand, receive, and obtain by litigation or otherwise, money or other thing of value to which the principal is, may become, or claims to be entitled, and conserve, invest, disburse, or use anything so received for the purposes intended.

(b) Contract in any manner with any person, on terms agreeable to the agent, to accomplish a purpose of a transaction, and perform, rescind, reform, release, or modify the contract or another contract made by or on behalf of the principal.

(c) Execute, acknowledge, seal, and deliver a deed, revocation, mortgage, lease, notice, check, release, or other instrument the agent considers desirable to accomplish a purpose of a transaction.

(d) Prosecute, defend, submit to arbitration, settle, and propose or accept a compromise with respect to, a claim existing in favor of or against the principal or intervene in litigation relating to the claim.

(e) Seek on the principal's behalf the assistance of a court to carry out an act authorized by the power of attorney.

(f) Engage, compensate, and discharge an attorney, accountant, expert witness, or other assistant.

(g) Keep appropriate records of each transaction, including an accounting of receipts and disbursements.

(h) Prepare, execute, and file a record, report, or other document the agent considers desirable to safeguard or promote the principal's interest under a statute or governmental regulation.

(i) Reimburse the agent for expenditures properly made by the agent in exercising the powers granted by the power of attorney.

(j) In general, do any other lawful act with respect to the subject.

Comment. Section 4450 continues former Civil Code Section 2485 without change, except for the revision of a cross-reference to another provision. Section 4450 is the same in substance as Section 3 of the Uniform Statutory Form Power of Attorney Act (1988). See the Comment to this chapter under the chapter heading. See also Sections 4900-4952 (court enforcement of agent's duties).

See also Sections 4014 ("attorney-in-fact" defined to include agent), 4026 ("principal" defined).

§ 4451. Real property transactions

4451. 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 4451 continues former Civil Code Section 2486 without change. Section 4451 is the same in substance as Section 4 of the Uniform Statutory Form Power of Attorney Act (1988). See the Comment to this chapter under the chapter heading. See also Section 4450 (construction of powers generally).

See also Sections 4014 (“attorney-in-fact” defined to include agent), 4026 (“principal” defined).

§ 4452. Tangible personal property transactions

4452. 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 4452 continues former Civil Code Section 2487 without change. Section 4452 is the same in substance as Section 5 of the Uniform Statutory Form Power of Attorney Act (1988). See the Comment to this chapter under the chapter heading. See also Section 4450 (construction of powers generally).

See also Sections 4014 (“attorney-in-fact” defined to include agent), 4026 (“principal” defined).

§ 4453. Stock and bond transactions

4453. 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 4453 continues former Civil Code Section 2488 without change. Section 4453 is the same in substance as Section 6 of the Uniform Statutory Form Power of Attorney Act (1988). See the Comment to this chapter under the chapter heading. See also Sections 4022(b) (proxies given by agent to exercise voting rights), 4450 (construction of powers generally).

See also Section 4014 (“attorney-in-fact” defined to include agent).

§ 4454. Commodity and option transactions

4454. 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 4454 continues former Civil Code Section 2489 without change. Section 4454 is the same in substance as Section 7 of the Uniform Statutory Form Power of Attorney Act (1988). See the Comment to this chapter under the chapter heading. See also Section 4450 (construction of powers generally).

See also Sections 4014 (“attorney-in-fact” defined to include agent).

§ 4455. Banking and other financial institution transactions

4455. 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 4455 continues former Civil Code Section 2490 without change. Section 4455 is the same in substance as Section 4 of the Uniform Statutory Form Power of Attorney Act (1988). See the Comment to this chapter under the chapter heading. See also Section 4450 (construction of powers generally).

See also Sections 4014 ("attorney-in-fact" defined to include agent), 4026 ("principal" defined).

§ 4456. Business operating transactions

4456. 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 4456 continues former Civil Code Section 2491 without change. Section 4456 is the same in substance as Section 9 of the Uniform Statutory Form Power of Attorney Act (1988). See the Comment to this chapter under the chapter heading. See also Section 4450 (construction of powers generally).

See also Sections 4014 (“attorney-in-fact” defined to include agent), 4026 (“principal” defined).

§ 4457. Insurance and annuity transactions

4457. 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 4457 continues former Civil Code Section 2492 without change. Section 4457 is the same in substance as Section 10 of the Uniform Statutory Form Power of Attorney Act (1988). See the Comment to this chapter under the chapter heading. See also Section 4450 (construction of powers generally). Section 4457 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 4014 (“attorney-in-fact” defined to include agent), 4026 (“principal” defined).

§ 4458. Estate, trust, and other beneficiary transactions

4458. 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 4458 continues former Civil Code Section 2493 without change. Section 4458 is the same in substance as Section 11 of the Uniform Statutory Form Power of Attorney Act (1988). See the Comment to this chapter under the chapter heading. See also Section 4450 (construction of powers generally).

See also Sections 42 (“trust” defined), 4014 (“attorney-in-fact” defined to include agent), 4026 (“principal” defined).

§ 4459. Claims and litigation

4459. 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 4459 continues former Civil Code Section 2494 without change. Section 4459 is the same in substance as Section 12 of the Uniform Statutory Form Power of Attorney Act (1988). Subdivision (f) is clarified by adding a reference to an assignment for the benefit of creditors. See the Comment to this chapter under the chapter heading. See also Section 4450 (construction of powers generally).

See also Sections 4014 ("attorney-in-fact" defined to include agent), 4026 ("principal" defined).

§ 4460. Personal and family maintenance

4460. 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 4460 continues former Civil Code Section 2495 without change. Section 4460 is the same in substance as Section 13 of the Uniform Statutory Form Power of Attorney Act (1988). See the Comment to this chapter under the chapter heading. See also Section 4450 (construction of powers generally).

See also Sections 4014 ("attorney-in-fact" defined to include agent), 4026 ("principal" defined).

§ 4461. Benefits from social security, medicare, medicaid, or other governmental programs, or civil or military service

4461. 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 4460, 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 4461 continues former Civil Code Section 2496 without change, except for the revision of a cross-reference to another provision. Section 4461 is the same in substance as Section 14 of the Uniform Statutory Form Power of Attorney Act (1988). See the Comment to this chapter under the chapter heading. See also Section 4450 (construction of powers generally).

See also Sections 4014 (“attorney-in-fact” defined to include agent), 4026 (“principal” defined).

§ 4462. Retirement plan transactions

4462. 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 4462 continues former Civil Code Section 2497 without change. Section 4462 is the same in substance as Section 15 of the Uniform Statutory Form Power of Attorney Act (1988). See the Comment to this chapter under the chapter heading. See also Section 4450 (construction of powers generally).

See also Sections 4014 (“attorney-in-fact” defined to include agent), 4026 (“principal” defined).

§ 4463. Tax matters

4463. 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 4463 continues former Civil Code Section 2498 without change. Section 4463 is the same in substance as Section 16 of the Uniform Statutory Form Power of Attorney Act (1988). At the end of subdivision (a), reference is made to “a tax year upon which the statute of limitations has not run and to the tax year in which the power of attorney was executed and any subsequent tax year.” This replaces the reference in the Uniform Act to “a tax year upon which the statute of limitations has not run and the following 25 tax years.” This substitution is consistent with the power granted by subdivision (d) which extends to “all tax matters for all periods” and is not limited to particular tax years. See also the Comment to this chapter under the chapter heading and Section 4450 (construction of powers generally).

See also Sections 4014 (“attorney-in-fact” defined to include agent), 4026 (“principal” defined).

§ 4464. After-acquired property; property located outside this state; power exercised outside this state; power of attorney executed outside this state

4464. The powers described in this chapter are exercisable equally with respect to an interest the principal has when the statutory form power of attorney is executed or acquires later, whether or not the property is located in this state, and whether or not the powers are exercised or the power of attorney is executed in this state.

Comment. Section 4464 continues former Civil Code Section 2499 without change. Section 4464 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 4129 (no need to describe each item or parcel of property).

See also Sections 4026 (“principal” defined).

§ 4465. Power to modify or revoke trust

4465. A statutory form power of attorney under this part 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 part 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 4465 continues former Civil Code Section 2499.5 without change. Section 4465 is a new provision not found in the Uniform Statutory Form Power of Attorney Act (1988).

The first sentence of Section 4465 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 4465 recognizes the requirement of Section 15401(b) which precludes modification or revocation of a trust by an agent unless the trust instrument expressly so permits.

See also Sections 42 (“trust” defined), 4014 (“attorney-in-fact” defined to include agent), 4026 (“principal” defined).

PART 4. DURABLE POWERS OF ATTORNEY FOR HEALTH CARE

CHAPTER 1. DEFINITIONS AND GENERAL PROVISIONS

Article 1. Definitions

§ 4600. Application of definitions

4600. Unless the provision or context otherwise requires, the definitions in this article govern the construction of this part.

Comment. Section 4600 restates the substance of the first clauses of former Civil Code Section 2410.

§ 4603. Community care facility

4603. “Community care facility” means a community care facility as defined in Section 1502 of the Health and Safety Code.

Comment. Section 4603 continues former Civil Code Section 2430(f) without change.

§ 4606. Durable power of attorney for health care

4606. “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 4606 continues former Civil Code Section 2430(a) without change and continues the substance of former Civil Code Section 2410(b). For provisions concerning durable powers of attorney for health care, see Sections 4600-4779, 4940, 4942. As to multi-purpose powers of attorney, see the Comment to Section 4018.

See also Sections 4018 (“durable power of attorney” defined), 4612 (“health care decision” defined), 4026 (“principal” defined).

§ 4609. Health care

4609. “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 principal after death, including the following:

(a) 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.

(b) Authorizing an autopsy under Section 7113 of the Health and Safety Code.

(c) Directing the disposition of remains under Section 7100 of the Health and Safety Code.

Comment. The first part of Section 4609 continues former Civil Code Section <2>430(b) without substantive change. The reference to postdeath decisions has been added for consistency with the authority provided in Section 4720 (attorney-in-fact’s authority to make health care decisions).

§ 4612. Health care decision

4612. “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 4612 continues former Civil Code 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 4609 (“health care” defined).

§ 4615. Health care provider

4615. “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 4615 continues former Civil Code 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 4609 (“health care” defined).

§ 4618. Residential care facility for the elderly

4618. “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 4618 continues former Civil Code Section 2430(f) without substantive change.

§ 4621. Statutory form durable power of attorney for health care

4621. “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 4770) of Part 4.

Comment. Section 4621 is new. See also Section 4606 (“durable power of attorney for health care” defined).

Article 2. General Provisions

§ 4650. Application of chapter

4650. (a) A durable power of attorney executed on or after January 1, 1984, 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 4700 or subdivision (c) of Section 4703; 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 5 (commencing with Section 4900).

(c) Nothing in this chapter affects the validity of a decision made under a durable power of attorney before January 1, 1984.

Comment. Section 4650 continues former Civil Code Section 2431 without substantive change. Subdivision (a) of Section 4650 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 4018 (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 4018 (“durable power of attorney” defined), 4612 (“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 4700(a)(3) is not satisfied and even though the requirement of a warning statement or certificate under Section 4703(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 4720 (attorney-in-fact not authorized to act if principal can give informed consent), 4722 (unauthorized types of health care), 4721 (examination and release of medical records), 4727 (revocation), 4750 (protections from liability), 4724 (consent of attorney-in-fact not authorized where principal objects to the health care or objects to the withholding or withdrawal of health care necessary to keep principal alive), 4726 (altering or forging, or concealing or withholding knowledge of revocation, of durable power of attorney for health care), 4723 (unauthorized acts or omissions), 4905 (exceptions to limitations in power of attorney), 4942 (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 4754. 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 4014 (“attorney-in-fact” defined), 4018 (“durable power of attorney” defined), 4026 (“principal” defined), 4612 (“health care decision” defined).

§ 4651. Form of durable power of attorney for health care after January 1, 1995

4651. (a) Notwithstanding Section 4703, 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 Civil Code Section 2433 as amended by Section 5 of Chapter 312 of the Statutes of 1984, or with former Civil Code 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 Civil Code Section 2433 or Section 4703 in effect at the time of printing.

(b) Notwithstanding Section 4720, a printed form of a durable power of attorney for health care may be sold or otherwise distributed if it complies with former Civil Code Section 2432 as originally enacted, with former Civil Code Section 2432 as subsequently amended, or with Section 4700. 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 Civil Code Section 2432 or Section 4700 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 Civil Code 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 Civil Code 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 Civil Code Section 2433 as thereafter amended or with Section 4703.

Comment. Section 4651 continues former Civil Code Section 2444 without substantive change, and applies the principles of the former section to the successor sections in this chapter.

Section 4651 permits a printed form of a durable power of attorney for health care to be used after the amendments to former Civil Code Sections 2432 and 2433 went into effect if the form complies with prior law. Section 4651 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 4700 and 4703.

§ 4652. Other authority not affected

4652. (a) Subject to Section 4720, nothing in this part affects any right a person may have to make health care decisions on behalf of another.

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

Comment. Section 4652 continues former Civil Code Section 2439 without change, except for the revision of a cross-reference to another section and the substitution of a reference to “part” instead of “article.” Section 4652 makes clear that the enactment of this part has no effect on any right a person may have to consent for another or on emergency treatment. Thus, this title is cumulative to whatever other ways there may be to consent for another individual.

See also Sections 4609 (“health care” defined), 4612 (“health care decision” defined).

§ 4653. Validity of durable power of attorney for health care executed in another jurisdiction

4653. 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 4653 continues former Civil Code Section 2445 without change. For the rule applicable to powers of attorney generally, see Section 4054.

§ 4754. Durable power of attorney for health care subject to former 7-year limit

4754. (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 4754 continues former Civil Code Section 2436.5 without change. Section 4754 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 4754 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 4606 (“durable power of attorney for health care” defined), 4612 (“health care decision” defined), 4026 (“principal” defined).

CHAPTER 2. DURABLE POWERS OF ATTORNEY FOR HEALTH CARE

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

§ 4700. Requirements for durable power of attorney for health care

4700. An attorney-in-fact under a durable power of attorney may not make health care decisions unless the durable power of attorney satisfies all of the following requirements:

(a) The power of attorney specifically grants authority to the attorney-in-fact to make health care decisions.

(b) The power of attorney is executed as provided in Section 4121.

(c) The power of attorney satisfies the requirements of this article.

Comment. Section 4700 restates the first part of former Civil Code Section 2432(a) without substantive change. Subdivision (a) continues former Civil Code Section 2432(a)(1) without substantive change. The dating requirement of former Civil Code Section 2432(a)(2) is continued in Section 4121(a)(1), which is applicable to all powers of attorney under this division, and which is incorporated in subdivision (b). The option of using a notary public or two witnesses under former Civil Code Section 2432(a)(3) is continued through the incorporation of the general execution requirements in Section 4121(a)(3). As to special rules concerning qualifications of witnesses under a durable power of attorney for health care, see Section 4701. See also Section 4650 (exception to formalities requirement for powers of attorney executed before operative date).

See also Sections 4014 (“attorney-in-fact” defined), 4606 (“durable power of attorney for health care” defined), 4612 (“health care decision” defined).

§ 4701. Additional requirements for witnesses of durable power of attorney for health care

4701. If the durable power of attorney for health care is signed by witnesses, as provided in Section 4121, in addition to the requirements applicable to witnesses under Section 4122, the following requirements shall be satisfied:

(a) None of the following persons may act as a witness:

(1) The principal's health care provider or an employee of the principal's health care provider.

(2) The operator or an employee of a community care facility.

(3) The operator or an employee of a residential care facility for the elderly.

(b) Each witness shall make 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."

(c) 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 the durable power of attorney for health care is executed, the power of attorney is not effective 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 declare 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 4701 restates parts of former Civil Code Section 2432 without substantive change. Subdivision (a) (along with the incorporated rules of Section 4122) continues former Civil Code Section 2432(d) without substantive change. Subdivision (b) continues the first declaration in former Civil Code Section 2432(a)(3)(A) without substantive change. Subdivision (c) continues former Civil Code Section 2432(f) without substantive change. For additional witnessing requirements, see Section 4121.

See also Sections 4014 ("attorney-in-fact" defined), 4026 ("principal" defined), 4603 ("community care facility" defined), 4606 ("durable power of attorney for health care" defined), 4612 ("health care decision" defined), 4615 ("health care provider" defined), 4618 ("residential care facility for the elderly" defined).

§ 4702. Limitations on who may be attorney-in-fact

4702. (a) Except as provided in subdivision (b), the following persons may not exercise authority to make health care decisions under a durable power of attorney:

(1) The treating health care provider or an employee of the treating health care provider.

(2) An operator or employee of a community care facility.

(3) An operator or employee of a residential care facility for the elderly.

(b) 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 (1) the employee is a relative of the principal by blood, marriage, or adoption, and (2) the other requirements of this chapter are satisfied.

(c) If the principal's health care provider becomes the principal's treating health care provider, the health care provider or an employee of the health care provider may not exercise authority to make health care decisions under a durable power of attorney.

(d) 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 all of the following are satisfied:

(1) The power of attorney is otherwise valid.

(2) The conservatee is represented by legal counsel.

(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."

Comment. Subdivision (a) of Section 4702 continues former Civil Code Section 2432(b)(1) without substantive change. Subdivision (a), along with Section 4701, which precludes health care providers in general and their employees and other specified persons from acting as witnesses to durable powers of attorney for health care, recognize that Section 4750 provides protections from liability for a health care provider who relies in good faith on a decision of the attorney-in-fact. Subdivision (a) does not preclude a person from appointing, for example, a friend who is a doctor to be an attorney-in-fact 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 attorney-in-fact under the durable power of attorney for health care.

Subdivision (b) continues former Civil Code Section 2432.5 without substantive change. Subdivision (b) provides a special exception to subdivision (a). This will, for example, permit a nurse to serve as attorney-in-fact for the nurse's spouse when the spouse is being treated at the hospital where the nurse is employed.

Subdivision (c) continues former Civil Code Section 2432(b)(2) without substantive change.

Subdivision (d) prescribes conditions that must be satisfied if a conservator is to be designated as the attorney-in-fact 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 attorney-in-fact.

See also Sections 4014 (“attorney-in-fact” defined), 4018 (“durable power of attorney” defined), 4026 (“principal” defined), 4603 (“community care facility” defined), 4606 (“durable power of attorney for health care” defined), 4612 (“health care decision” defined), 4615 (“health care provider” defined), 4618 (“residential care facility for the elderly” defined).

§ 4703. Requirements for printed form of durable power of attorney for health care

4703. (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 attorney-in-fact) 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) This section does not apply to the statutory form provided by Section 4771.

Comment. Subdivisions (a) and (b) of Section 4703 continue former Civil Code Section 2433(a)-(b) without change [except that the statement in former Civil Code Section 2433(b) that the witnesses had to be personally known to the principal has been deleted, since it was not in compliance with substantive requirements]. Subdivision (c) makes clear that the statutory form is independent of the requirements of this section.

Section 4703 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 4771 (statutory form durable power of attorney for health care). See Comment to Section 4771.

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 Section 4704 must be included.

See also Sections 4018 (“durable power of attorney” defined), 4606 (“durable power of attorney for health care” defined), 4612 (“health care decision” defined), 4022 (“power of attorney” defined), 4026 (“principal” defined).

Staff Note. There are some anomalies concerning warning statements that we do not propose to try to fix at this point. For example, this warning provision requires a statement that the witnesses have to be personally known to the principal. But this appears nowhere else in the law, and looks like it is backwards. The staff proposes to delete this language.

It is also curious that this warning is in readable, initial capital type, although required to be in bold or its equivalent, whereas the statutory form in Civil Code Section 2500 sets out the notice in all caps, creating a very unreadable text. However, Civil Code Section 2501 permits a statutory form to set out the all-caps text in 10-point boldface type or a reasonable equivalent. But even this much is not required if a lawyer’s certificate of warning is included. The staff believes this structure and presentation could be improved.

§ 4704. Warnings in durable power of attorney for health care not on printed form

4704. (a) A durable power of attorney prepared for execution by a person resident in this state that permits the attorney-in-fact 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 in subdivision (a) of Section 4703 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."

(b) If a durable power of attorney includes the certificate provided for in paragraph (2) of subdivision (a) and permits the attorney-in-fact 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) of Section 4703.

Comment. Section 4704 continues former Civil Code Section 2433(c)-(d) without substantive change. See also Sections 4014 ("attorney-in-fact" defined), 4018 ("durable power of attorney" defined), 4026 ("principal" defined), 4606 ("durable power of attorney for health care" defined), 4612 ("health care decision" defined).

Staff Note. The requirement of capital letters in subdivision (a)(1) is unfortunate. The staff suggests that this be changed to 10-point, bold-face type or its equivalent. It is strange to require all-caps in this section when it is not required in the prior section.

Article 2. Authority of Attorney-in-Fact Under Durable Power of Attorney for Health Care

§ 4720. Attorney-in-fact's authority to make health care decisions

4720. (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 if the principal had the capacity to do so, including the following:

(1) Making a disposition 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.

(2) Authorizing an autopsy under Section 7113 of the Health and Safety Code.

(3) Directing the disposition of remains under Section 7100 of the Health and Safety Code.

(c) 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.

(d) 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 4720 continues former Civil Code Section 2434 without substantive change.

Subdivision (a) of Section 4720 gives the attorney-in-fact 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 attorney-in-fact 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 attorney-in-fact 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 4724 (if principal objects, attorney-in-fact 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 attorney-in-fact to make health care decisions, except as limited by the durable power of attorney for health care. As provided in subdivision (c), in exercising his or her authority, the attorney-in-fact 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 4722 which precludes consent to certain specified types of treatment. See also Section 4723 (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 4900-4952 (court enforcement of duties of attorney-in-fact). The authority under subdivision (b) is limited by Section 4724 (attorney-in-fact 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 attorney-in-fact may, without liability, decline to act under the power of attorney. For example, the attorney-in-fact may not be willing to follow the desires of the principal as stated in the power of attorney because of changed circumstances. Subdivision (d) makes clear that, in such a case, the attorney-in-fact 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 attorney-in-fact has the right under the applicable law apart from the durable power of attorney.

See also Sections 4018 ("durable power of attorney" defined), 4606 ("durable power of attorney for health care" defined), 4612 ("health care decision" defined), 4615 ("health care provider" defined), 4026 ("principal" defined).

§ 4721. Availability of medical information to attorney-in-fact

4721. 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 4721 continues former Civil Code Section 2436 without substantive change. Section 4721 makes clear that the attorney-in-fact can obtain and disclose information in the medical records of the principal. The power of attorney may limit the right of the attorney-in-fact, 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 attorney-in-fact 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 4014 (“attorney-in-fact” defined), 4018 (“durable power of attorney” defined), 4609 (“health care” defined), 4612 (“health care decision” defined), 4026 (“principal” defined).

§ 4722. Limitations on attorney-in-fact’s authority

4722. 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 4722 continues former Civil Code Section 2435 without substantive change. 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 4723 (unauthorized acts and omissions).

See also Sections 4018 (“durable power of attorney” defined), 4026 (“principal” defined).

§ 4723. Unauthorized acts or omissions

4723. 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 4723 continues former Civil Code Section 2443 without change, except for the substitution of a reference to “chapter” instead of “article.” Section 4723 does not prevent the withholding or withdrawal of health care to permit the natural process of dying.

See also Sections 4603 (“community care facility” defined), 4606 (“durable power of attorney for health care” defined), 4612 (“health care decision” defined), 4026 (“principal” defined).

§ 4724. Principal's objections

4724. 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 4724 continues former Civil Code Section 2440 without change, except for a reference to “chapter” instead of “article.”

Section 4724 precludes the attorney-in-fact 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 attorney-in-fact may have apart from the authority under the durable power of attorney for health care. See Section 4720(c).

See also Sections 4014 (“attorney-in-fact” defined), 4606 (“durable power of attorney for health care” defined), 4609 (“health care” defined).

§ 4725. Restriction on execution of durable power of attorney for health care as condition for admission, treatment, or insurance

4725. 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 4725 continues former Civil Code Section 2441 without change. Section 4725 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 4606 (“durable power of attorney for health care” defined), 4615 (“health care provider” defined).

§ 4726. Alteration or forging, or concealment or withholding knowledge of revocation of durable power of attorney for health care

4726. 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 4727, 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 4 of Part 1 of the Penal Code.

Comment. Section 4726 continues former Civil Code 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 4606 (“durable power of attorney for health care” defined), 4609 (“health care” defined), 4026 (“principal” defined).

§ 4727. Revocation of durable power of attorney for health care

4727. (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 4727 continues former Civil Code Section 2437 without change, except for some technical, nonsubstantive revisions. This section makes clear that the principal can revoke the appointment of the attorney-in-fact or the authority granted to the attorney-in-fact by oral or written notification to the attorney-in-fact 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 attorney-in-fact to make health care decisions is revoked if the principal notifies the attorney-in-fact orally or in writing that the appointment of the attorney-in-fact 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 attorney-in-fact. See Section 4750 (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 attorney-in-fact 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 4721.

See also Sections 4014 (“attorney-in-fact” defined), 4606 (“durable power of attorney for health care” defined), 4612 (“health care decision” defined), 4026 (“principal” defined).

Article 3. Protections and Immunities

§ 4750. Immunities of health care provider

4750. (a) Subject to any limitations stated in the durable power of attorney for health care and to subdivision (b) and to Sections 4722, 4723, 4724, 4725, and 4726, 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 4750 continues former Civil Code Section 2438 without change, except for the revision of cross-references to other provisions and other technical, nonsubstantive revisions.

Section 4750 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 4750 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 attorney-in-fact can give informed consent. Nor is a health care provider authorized to do anything illegal. See also Sections 4722 (forms of treatment not authorized by durable power of attorney for health care), 4723 (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 attorney-in-fact 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 4014 (“attorney-in-fact” defined), 4603 (“health care” defined), 4606 (“durable power of attorney for health care” defined), 4612 (“health care decision” defined), 4615 (“health care provider” defined), 4026 (“principal” defined), 4618 (“residential care facility for the elderly” defined).

§ 4751. Convincing evidence of identity of principal

4751. For the purposes of the declaration of witnesses required by Section 4700 or 4771, “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 4700 or 4771, 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 4751 continues former Civil Code 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).

§ 4752. Presumption concerning power executed in other jurisdiction

4752. 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 4752 continues former Civil Code Section 2438.5 without change. See also Section 4606 (“durable power of attorney for health care” defined).

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

§ 4770. Short title

4770. This chapter shall be known and may be cited as the Keene Health Care Agent Act.

Comment. Section 4770 continues former Civil Code Section 2508 without change.

§ 4771. Statutory form durable power of attorney for health care

4771. The use of the following form in the creation of a durable power of attorney for health care under Chapter 1 (commencing with Section 4600) 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 4600), 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 4771)

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 ATTORNEY-IN-FACT) 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 4600 to 4752, 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 4770 to 4779, 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 4700 of the Probate Code.

Signature: _____

Comment. Section 4771 continues former Civil Code Section 2500 without change, except for the revision of cross-references to other provisions, and other technical, nonsubstantive revisions.

Section 4771 is consistent with and subject to the substantive law applicable to a durable power of attorney for health care. See Sections 4600-4779 (durable power of attorney for health care), 4900-4952 (court review). However, in the statutory form durable power of attorney for health care, the warning set out in Section 4771 replaces the one set out in Section 4703. See also Section 4772 (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 4771 with Section 4700(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 4942.

As to use of forms complying with former law, see Section 4775. See also Sections 4603 (“community care facility” defined), 4606 (“durable power of attorney for health care” defined), 4609 (“health care” defined), 4612 (“health care decision” defined), 4615 (“health care provider” defined), 4026 (“principal” defined), 4618 (“residential care facility for the elderly” defined).

§ 4772. Warning or lawyer’s certificate

4772. (a) Notwithstanding Section 4703, 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 4771.

(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 4772 continues former Civil Code 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 4771 must be used in the statutory form instead of the warning set out in Section 4703.

See also Sections 4612 ("health care decision" defined), 4615 ("health care provider" defined), 4022 ("power of attorney" defined), 4618 ("residential care facility for the elderly" defined), 4621 ("statutory form durable power of attorney for health care" defined).

§ 4773. Formal requirements

4773. (a) Notwithstanding paragraph (3) of subdivision (a) of Section 4700, a statutory form durable power of attorney for health care is valid, and the designated attorney-in-fact 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 4771, 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 4771.

(b) Nothing in this section excuses compliance with the special requirements imposed by subdivisions (c) and (f) of Section 4700.

Comment. Section 4773 continues former Civil Code Section 2502 without change, except for the revision of cross-references to other provisions.

Section 4773 is comparable to Section 4700. To be valid a statutory form durable power of attorney for health care must satisfy the requirements of both Section 4772 and 4773. It should be noted that a statutory form durable power of attorney for health care requires two witnesses and, unlike Section 4700, acknowledgment before a notary is not authorized.

See also Sections 4014 ("attorney-in-fact" defined), 4612 ("health care decision" defined), 4026 ("principal" defined), 4621 ("statutory form durable power of attorney for health care" defined).

§ 4774. Requirements for statutory form

4774. (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 4772 and 4773.

(2) It includes the exact wording of the text of paragraphs 1, 2, 3, and 4 of the form set out in Section 4771.

(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 4771.

(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 4771, 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 4771, 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 4774 continues former Civil Code 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 4771, 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 4774 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 attorney-in-fact 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 attorney-in-fact 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 4600). See the introductory clause of Section 4771.

See also Sections 4026 (“principal” defined), 4621 (“statutory form durable power of attorney for health care” defined).

§ 4775. Requirements for forms after January 1, 1993

4775. (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 Civil Code Section 2500 of the Civil Code is as valid as if it had been executed using a form that complies with Section 4771 of this code.

(b) Notwithstanding former Civil Code Section 2501 of the Civil Code or Section 4772 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 Civil Code Section 2500 of the Civil Code instead of the warning using the language set forth in Section 4771 of this code.

(c) For the purposes of subdivision (c) of former Civil Code Section 2503 of the Civil Code and subdivision (c) of Section 4774 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 Civil Code Section 2500 of the Civil Code or the exact wording of the form set out in Section 4771 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 4771 of this code, including the warning and instructions, and nothing else.

Comment. Section 4775 supersedes former Civil Code 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 4775 permits use of a form complying with former Civil Code Section 2500 (applicable from January 1, 1986, until January 1, 1993). Accordingly, after January 1, 1993, either the form set forth in former Civil Code 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 4771, including the warning and instructions, and nothing else.

§ 4776. Language conferring general authority

4776. In a statutory form durable power of attorney for health care, the language conferring general authority with respect to “health care decisions” authorizes the attorney-in-fact to select and discharge physicians, dentists, nurses, therapists, and other health care professionals as the attorney-in-fact determines necessary to carry out the health care decisions the attorney-in-fact is authorized by the power of attorney to make.

Comment. Section 4776 continues former Civil Code Section 2504 without change. See also Sections 4014 (“attorney-in-fact” defined), 4612 (“health care decision” defined), 4621 (“statutory form durable power of attorney for health care” defined).

§ 4777. Effect of documents executed by attorney-in-fact

4777. If a document described in paragraph 5 or 6 of the form set out in Section 4771 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 4771, 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 4777 continues former Civil Code Section 2505 without change, except for the revision of cross-references to other provisions. See also Sections 4014 (“attorney-in-fact” defined), 4026 (“principal” defined), 4621 (“statutory form durable power of attorney for health care” defined).

§ 4778. Termination of authority; alternate attorney-in-fact

4778. 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 5 (commencing with Section 4900), 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 4778 continues former Civil Code Section 2506 without change, except for the revision of a cross-reference to another provision.

This section applies only where the authority of the attorney-in-fact in fact is terminated by the court. This section does not apply where the attorney-in-fact dies or otherwise is not available or becomes ineligible to act as attorney-in-fact or loses the mental capacity to make health care decisions for the principal or where the principal revokes the attorney-in-fact's appointment or authority. See paragraph 9 (designation of alternate attorneys-in-fact) of statutory form set forth in Section 4771. Where the court terminates the authority of the attorney-in-fact, Section 4778 applies and the alternate attorney-in-fact is not authorized to act as attorney-in-fact unless the court so orders. However, in this case, the court is required to authorize the alternate attorney-in-fact to act unless the court finds that would not be in the best interests of the principal.

See also Sections 4014 ("attorney-in-fact" defined), 4612 ("health care decision" defined), 4026 ("principal" defined), 4621 ("statutory form durable power of attorney for health care" defined).

§ 4779. Use of other forms

4779. 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 4600) may be used in lieu of the form provided by Section 4771, and none of the provisions of this chapter apply if such other form is used.

Comment. Section 4779 continues former Civil Code 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 4600-4752 and is subject to the provisions of those sections.

PART 5. JUDICIAL PROCEEDINGS CONCERNING POWERS OF ATTORNEY

CHAPTER 1. GENERAL PROVISIONS

§ 4900. Legislative intent

4900. A power of attorney is exercisable free of judicial intervention, subject to this part.

Comment. Section 4900 continues former Civil Code Section 2423 without substantive change. The language of this section has been recast to provide a rule, rather than an expression of legislative intent. See also Section 4022 (“power of attorney” defined).

§ 4901. Cumulative remedies

4901. The remedies provided in this part are cumulative and not exclusive of any other remedies provided by law.

Comment. Section 4901 continues former Civil Code Section 2420(a) without substantive change.

§ 4902. Effect of provision in power attempting to make part inapplicable

4902. (a) Except as provided in subdivision (b), this part applies notwithstanding any provision of the power of attorney to the contrary.

(b) Subject to Section 4903, a power of attorney may expressly eliminate the authority of any person listed in Section 4940 to petition the court for any one or more of the purposes enumerated in Section 4941 or 4942 if both of the following requirements are met:

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

(2) The principal’s lawyer signs a certificate stating in substance: “I am a lawyer authorized to practice law in the state where this power of attorney was executed, and the principal was my client at the time this power of attorney was executed. I have advised my client concerning his or her rights in connection with this power of attorney and the applicable law and the consequences of signing or not signing this power of attorney, and my client, after being so advised, has executed this power of attorney.”

Comment. Subdivision (a) of Section 4902 continues former Civil Code Section 2422 without substantive change, except that the reference to former Civil Code Section 2420(b) is omitted as surplus. See Section 4050(b) (exclusion of reciprocal or interinsurance exchanges).

Subdivision (b) continues former Civil Code Section 2421(a) without substantive change. This subdivision makes clear that a power of attorney may limit the applicability of this part 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 part is accomplished knowingly by the principal. The inclusion of a provision in the power of attorney

making this part inapplicable does not affect the right to resort to any other judicial remedies that may otherwise be available. See Section 4901 (cumulative remedies).

See also Sections 4022 (“power of attorney” defined), 4026 (“principal” defined).

§ 4903. Right to petition under power of attorney

4903. Notwithstanding any provision of a power of attorney:

(a) The conservator of the estate of the principal may petition the court for any one or more of the purposes enumerated in Section 4941.

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

(1) The conservator of the person of the principal may petition the court for any of the purposes enumerated in subdivisions (a), (c), and (d) of Section 4942.

(2) The attorney-in-fact may petition the court for any of the purposes enumerated in subdivisions (a) and (b) of Section 4942.

Comment. Subdivision (a) of Section 4903 continues former Civil Code Section 2421(b) without substantive change.

Subdivision (b) restates former Civil Code Section 2421(c)-(d) without substantive change. This subdivision specifies the purposes for which a conservator of the person or an attorney-in-fact may petition the court under this part with respect to a durable power of attorney for health care. The rights provided by this subdivision cannot be limited by a provision in the power of attorney, but the power of attorney may restrict or eliminate the right of any other persons to petition the court under this part if the principal has the advice of legal counsel and the other requirements of Section 4903 are met.

Under subdivision (b)(1), the conservator of the person may obtain a determination of whether the durable power of attorney for health care is in effect or has terminated, despite a contrary provision in the power of attorney. See Section 4942(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 4942(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 4942(d). See also the Comment to Section 4942.

Under subdivision (b)(2), the attorney-in-fact may obtain a determination of whether the durable power of attorney for health care is in effect or has terminated, despite a contrary provision in the power of attorney. See Section 4942(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 4942(b).

See also Sections 4014 (“attorney-in-fact” defined), 4022 (“power of attorney” defined), 4026 (“principal” defined), 4606 (“durable power of attorney for health care” defined).

§ 4904. Jury trial

4904. There is no right to a jury trial in proceedings under this division.

Comment. Section 4904 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

§ 4920. Jurisdiction and authority of court or judge

4920. (a) The superior court has jurisdiction in 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 4920 is comparable to Section 7050 governing the jurisdiction and authority of the court in proceedings concerning administration of decedents' estates. See Section 7050 Comment. This section is consistent with prior law. See former Civ. Code §§ 2415 (petition filed in superior court), 2417(e) (proceedings governed by decedents' estates provisions where no specific rule in power of attorney statute).

§ 4921. Basis of jurisdiction

4921. The court may exercise jurisdiction in proceedings under this part on any basis permitted by Section 410.10 of the Code of Civil Procedure.

Comment. Section 4921 is comparable to Section 17004 (jurisdiction under Trust Law). This section recognizes that the court, in proceedings relating to powers of attorney under this part, 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; Section 17004 Comment (basis of jurisdiction under Trust Law).

§ 4922. Jurisdiction over attorney-in-fact

4922. Without limiting Section 4921, a person who acts as an attorney-in-fact under a power of attorney governed by this division 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 or a principal in this state.

Comment. Section 4922 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 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 part 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 4014 ("attorney-in-fact" defined), 4022 ("power of attorney" defined), 4026 ("principal" defined).

§ 4923. Venue

4923. The proper county for commencement of a proceeding under this part is as follows:

- (a) The county in which the principal resides or is temporarily living.
- (b) The county in which the attorney-in-fact resides.

(c) A county in which property subject to the power of attorney is located.

(d) Any other county that is in the principal's best interest.

Comment. Section 4923 supersedes former Civil Code Section 2414. This section is drawn from the rules applicable to guardianships and conservatorships. See Sections 2201-2202. See also Section 4054 (durable powers of attorney under law of another jurisdiction).

Staff Note. This section implements a decision made at the July 1993 meeting. Would it be better if the section stated a priority? — such as, first, as provided in subdivision (a) or (b); second, as in subdivision (c); third, as in subdivision (d).

CHAPTER 3. PETITIONS, ORDERS, APPEALS

§ 4940. Petitioners

4940. A petition may be filed under this part by any of the following:

(a) The attorney-in-fact.

(b) The principal.

(c) The spouse of the principal.

(d) A relative of the principal.

(e) The conservator of the person or estate of the principal.

(f) The court investigator, referred to in Section 1454, 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 person who is requested by an attorney-in-fact to take action.

(j) Any other interested person or friend of the principal.

Comment. Section 4940 continues former Civil Code Section 2411 without substantive change, and expands the class of petitioners to include relatives (subdivision (d)), third persons who are requested to honor the power of attorney (subdivision (i)), and any other interested persons or friends of the principal (subdivision (j)). These additions are drawn from the comparable rules governing petitioners for appointment of a conservator under Section 1820. The purposes for which a person may file a petition under this part are limited by other rules. See Sections 4903 (restriction in power of attorney of right to file petition), 4942 (petition with respect to durable power of attorney for health care); see also Section 4901 (other remedies not affected).

See also Sections 4014 ("attorney-in-fact" defined), 4022 ("power of attorney" defined), 4026 ("principal" defined), 4606 ("durable power of attorney for health care" defined), 4612 ("health care provider" defined).

Staff Note. This section has been revised to implement a decision at the July 1993 meeting. Subdivisions (h) and (i) have been added and "relative" has been substituted for "child" in subdivision (c). The result would be to eliminate a number of restrictions on petitioners in existing law. Civil Code Section 2411 permits petitions by the spouse or a child of the principal and any person who would take by intestate succession and, in the case of a health care power, by a parent.

§ 4941. Petition as to powers of attorney other than durable power of attorney for health care

4941. Except as provided in Section 4942, a petition may be filed under this part for any one or more of the following purposes:

- (a) Determining whether the power of attorney is in effect or has terminated.
- (b) Passing on the acts or proposed acts of the attorney-in-fact.
- (c) Compelling the attorney-in-fact to submit the attorney-in-fact's accounts or report the attorney-in-fact's acts as attorney-in-fact to the principal, the spouse of the principal, the conservator of the person or the estate of the principal, or to any other person required by the court in its discretion, if the attorney-in-fact has failed to submit an accounting or report within 60 days after written request from the person filing the petition.
- (d) Declaring that the authority of the attorney-in-fact is revoked on 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 revocation of the attorney-in-fact's authority is in the best interest of the principal or the principal's estate.
- (e) Compelling a third person to honor the authority of an attorney-in-fact under a statutory form power of attorney pursuant to Section 4406.

Comment. Section 4941 continues former Civil Code Section 2412 without substantive change. Subdivision (d) has been recast in terms of revocation of the authority of the attorney-in-fact.

The introductory clause limits the application of this section to non-health care powers of attorney. This section applies to petitions concerning both durable and nondurable powers of attorney. See Sections 4022 ("power of attorney" defined), 4050 (scope of division). Section 4942 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 4201 (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 4014 ("attorney-in-fact" defined), 4022 ("power of attorney" defined), 4026 ("principal" defined).

§ 4942. Petition as to durable power of attorney for health care

4942. With respect to a durable power of attorney for health care, a petition may be filed under this part 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 4942 continues former Civil Code Section 2412.5 without substantive change. This section enumerates the purposes for which a petition may be filed under this part with respect to a durable power of attorney for health care. Section 4941 applies to petitions with respect to other powers of attorney.

Under subdivision (b), the desires of the principal as expressed in the durable power of attorney for health care or otherwise made known to the court provide the standard for judging the acts of the attorney-in-fact. Subdivision (d) permits the court to terminate the durable power of attorney for health care where the attorney-in-fact is not complying with the duty to carry out the desires of the principal. These subdivisions adopt a standard based on the principal's desires in place of a general standard of what may constitute the best interests of the principal. An attempted suicide by the principal is not to be construed to indicate the principal's desire that health care be restricted or inhibited. See Civ. Code § 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 4903 (limitation by provision in power of attorney).

See also Sections 4014 ("attorney-in-fact" defined), 4606 ("durable power of attorney for health care" defined), 4612 ("health care decision" defined), 4026 ("principal" defined).

§ 4943. Commencement of proceeding

4943. (a) A proceeding under this part is commenced by filing a verified petition stating facts showing that the petition is authorized under this part, 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 part, the clerk shall set the petition for hearing.

Comment. Subdivision (a) of Section 4943 restates parts of former Civil Code Section 2415 without substantive change. The former reference to filing in the superior court is restated in a different form in Section 4920. The language concerning the grounds of the petition is new and is drawn from Section 17201 (commencement of proceeding under Trust Law).

Subdivision (b) restates former Civil Code Section 2417(a) without substantive change.

§ 4944. Dismissal of petition

4944. 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 4944 restates former Civil Code 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 4026 ("principal" defined).

§ 4945. Notice of hearing

4945. At least 15 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 4945 continues former Civil Code Section 2417(b) without substantive change, except that the notice period is changed to 15 days for consistency with conservatorship proceedings. See Section 1460. See also Sections 4014 ("attorney-in-fact" defined), 4026 ("principal" defined).

§ 4946. Service of notice

4946. 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 4946 continues former Civil Code Section 2417(c) without change.

§ 4947. Proof of service

4947. Proof of compliance with Sections 4945 and 4946 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 4947 restates former Civil Code Section 2417(d) without substantive change.

§ 4948. Power of court

4948. (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 part.

Comment. Subdivision (a) of Section 4948 continues former Civil Code Section 2413 without substantive change. The former reference to decrees has been omitted as unnecessary.

Subdivision (b) continues former Civil Code Section 2417(f) without substantive change.

§ 4949. Temporary health care order

4949. 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 4942. 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 4942.

Comment. Section 4949 continues former Civil Code 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 4948 (powers of court).

See also Sections 4606 ("durable power of attorney for health care" defined), 4609 ("health care" defined), 4026 ("principal" defined).

§ 4950. Award of attorney's fees

4950. In a proceeding under this part 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 4950 continues former Civil Code Section 2417(g) without substantive change. See Section 4014 ("attorney-in-fact" defined).

§ 4951. Guardian ad litem

4951. At any stage of a proceeding under this part, 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 part.

Comment. Section 4951 restates former Civil Code Section 2418 without substantive change. See also Section 4026 (“principal” defined).

§ 4952. Appeal

4952. An appeal may be taken from any of the following:

(a) Any final order made pursuant to subdivision (a), (b), or (d) of Section 4941 or subdivision (a), (b), or (d) of Section 4942.

(b) An order dismissing the petition or denying a motion to dismiss under Section 4944.

Comment. Section 4952 continues former Civil Code Section 2419 without substantive change. The reference to “decree” in former Civil Code Section 2419(a) is omitted as unnecessary.

CONFORMING REVISIONS AND REPEALS

CIVIL CODE

Civ. Code § 2355 (amended). Means of termination of agency

SEC. _____. Section 2355 of the Civil Code is amended to read:

2355. An agency is terminated, as to every person having notice thereof, by any of the following:

- (a) The expiration of its term.
- (b) The extinction of its subject.
- (c) The death of the agent.
- (d) The agent's renunciation of the agency.
- (e) The incapacity of the agent to act as such.
- ~~(f) The divorce, dissolution, annulment, or adjudication of the nullity of marriage of, or the judicial or legal separation of, principal and attorney in fact, or commencement by the attorney in fact of an action for such relief, in the case of a power of attorney, if the attorney in fact was the spouse of the principal, and the principal has become an absentee as defined in Section 1403, unless the power of attorney expressly provides otherwise in writing.~~

Comment. Section 2355 is amended to delete subdivision (f) relating to the effect of divorce, dissolution, annulment, or separation of principal and agent under a power of attorney, or commencement of an action for these purposes by the agent, in cases involving "absentees." This provision is restated without substantive change in Probate Code Section 4153(b). Powers of attorney are governed by Part 10 (commencing with Section 4000). See also Sections 4051 (relation to general agency law), 4022 ("power of attorney" defined), 4150 (modification or revocation of power of attorney), 4152 (termination of nondurable power of attorney), 4152 (termination of attorney-in-fact's authority).

Civ. Code § 2356 (amended). Termination of agency not coupled with interest; proxy

SEC. _____. Section 2356 of the Civil Code is amended to read:

2356. (a) Unless the power of an agent is coupled with an interest in the subject of the agency, it is terminated by any of the following:

- (1) Its revocation by the principal.
- (2) The death of the principal.
- (3) The incapacity of the principal to contract.

(b) Notwithstanding subdivision (a), any bona fide transaction entered into with such agent by any person acting without actual knowledge of such revocation, death, or incapacity shall be binding upon the principal, his or her heirs, devisees, legatees, and other successors in interest.

(c) Nothing in this section shall affect the provisions of Section 1216.

~~(d) With respect to a power of attorney, the provisions of this section are subject to the provisions of Articles 3 (commencing with Section 2400) and 5 (commencing with Section 2430) of Chapter 2.~~

(e)

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

Comment. Subdivision (d) of Section 2356, concerning powers of attorney, is deleted. The rules concerning powers of attorney are provided in Probate Code Section 4000 *et seq.* See also Sections 4022 (“power of attorney” defined), 4050(b)(1) (power coupled with an interest), 4051 (relation to general agency law), 4150 (modification or revocation of power of attorney), 4152 (termination of nondurable power of attorney), 4152 (termination of attorney-in-fact’s authority), 4304 (effect of death or incapacity of principal).

Civ. Code § 2357 (amended). Principal who is “absentee”

SEC. _____. Section 2357 of the Civil Code is amended to read:

2357. For the purposes of subdivision (b) of Section 2356 and ~~Sections 2403 and 2404~~, in the case of a principal who is an absentee as defined in Section 1403, a person shall be deemed to be without actual knowledge of:

(a) The principal’s death or incapacity while the absentee continues in missing status and until the person receives notice of the determination of the death of the absentee by the secretary concerned or the head of the department or agency concerned or the delegate of the secretary or head.

(b) Revocation by the principal during the period described in subdivision (a).

Comment. The references to former Sections 2403 and 2404 (durable powers of attorney) are deleted from Section 2357. The rules concerning powers of attorney are provided in Probate Code Section 4000 *et seq.* See also Prob. Code §§ 4051 (relation to general agency law), 4022 (“power of attorney” defined). For a similar provision drawn from Section 2357, see Prob. Code § 3721 (knowledge where principal is “absentee”).

Civ. Code §§ 2400-2407 (repealed). Uniform Durable Power of Attorney Act

SEC. _____. Article 3 (commencing with Section 2400) of Chapter 2 of Title 9 of Part 4 of Division 3 of the Civil Code is repealed.

§ 2400. Durable power of attorney

Comment. Former Section 2400 is restated without substantive change in Probate Code Section 4124 (durable power of attorney). See Prob. Code § 4124 Comment.

§ 2400.5. Proxy given by agent to exercise voting rights

Comment. Former Section 2400.5 is continued without substantive change in Probate Code Section 4022(b) (proxy excluded from definition of power of attorney). See Prob. Code § 4022 Comment.

§ 2401. Effect of principal’s incapacity

Comment. Former Section 2401 is continued without substantive change in Probate Code Section 4125 (effect on attorney-in-fact’s acts under durable power of attorney during principal’s incapacity). See Prob. Code § 4125 Comment.

§ 2402. Relation of agent to court-appointed fiduciary

Comment. Subdivision (a) of former Civil Code Section 2402 is continued without substantive change in Probate Code Section 4206 (relation of agent to court-appointed fiduciary). See Prob. Code § 4206 Comment.

Subdivision (b) is continued without substantive change in Probate Code Section 4126 (nomination of fiduciary in durable power of attorney). See Prob. Code § 4126 Comment.

§ 2403. Death or incapacity of principal

Comment. Former Section 2403 is continued without substantive change in Probate Code Section 4304 (effect of death or incapacity of principal). See Comment to Probate Code Section 4304.

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

Comment. Former Section 2404 is continued without substantive change in Probate Code Section 4305 (affidavit of lack of knowledge of termination of power). See Prob. Code § 4305 Comment.

§ 2405. Construction and application

Comment. Former Section 2405 is generalized in Probate Code Section 2(b). See Prob. Code § 2 Comment.

§ 2406. Short title

Comment. Former Section 2406 is restated without substantive change in Probate Code Section 4001 (Uniform Durable Power of Attorney Act). See Prob. Code § 4001 Comment.

§ 2407. Severability

Comment. Former Section 2407 is generalized in Probate Code Section 11.

Civ. Code § 2400 (added). Powers of attorney under Probate Code

SEC. _____. Article 3 (commencing with Section 2400) is added to Chapter 2 of Title 9 of Part 4 of Division 3 of the Civil Code, to read:

Article 3. Powers of Attorney Under Probate Code

§ 2400. Powers of attorney governed by Power of Attorney Law in Probate Code

2400. Powers of attorney are governed by the Power of Attorney Law, Division 4.5 (commencing with Section 4000) of the Probate Code, to the extent provided in that law.

Comment. Section 2400 provides a cross-reference to the Power of Attorney Law in the Probate Code which supersedes the various power of attorney statutes formerly located at Civil Code Section 2400 *et seq.* See Prob. Code §§ 4022 (“power of attorney” defined), 4050 (types of powers of attorney governed by Power of Attorney Law).

Civ. Code §§ 2410-2423 (repealed). Court enforcement of duties of attorney in fact

SEC. _____. Article 4 (commencing with Section 2410) of Chapter 2 of Title 9 of Part 4 of Division 3 of the Civil Code is repealed.

§ 2410. Definitions

Comment. Subdivision (a) of former Civil Code Section 2410 is superseded by Probate Code Section 4014 (“attorney-in-fact” defined). See Prob. Code § 4014 Comment.

Subdivision (b) is continued without substantive change in Probate Code Section 4606 (“durable power of attorney for health care” defined). See Prob. Code § 4606 Comment.

The first sentence of subdivision (c) is restated without substantive change in Probate Code Section 4022(a) (“power of attorney” defined). The second sentence of subdivision (c) is superseded by Probate Code Section 4022(b) (exclusion from power of attorney). See Comment to Probate Code Section 4022.

Subdivision (d) is restated without substantive change in Probate Code Section 4026 (“principal” defined). See Prob. Code § 4026 Comment.

§ 2411. Petitioners

Comment. Former Section 2411 is continued without substantive change in Probate Code Section 4940 (petitioners). See Prob. Code § 4940 Comment.

§ 2412. Relief available

Comment. Former Section 2412 is continued without substantive change in Probate Code Section 4941 (petition as to non-health care power of attorney). See Prob. Code § 4941 Comment.

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

Comment. Former Section 2412.5 is continued without substantive change in Probate Code Section 4942 (petition as to durable power of attorney for health care). See Prob. Code § 4942 Comment.

§ 2413. Power of court

Comment. Former Section 2413 is continued without substantive change in Probate Code Section 4948 (power of court). See Prob. Code § 4948 Comment.

§ 2414. Venue

Comment. Former Section 2414 is continued without substantive change in Probate Code Section 4923 (venue). See Prob. Code § 4923 Comment.

§ 2415. Verified petition; contents

Comment. Former Section 2415 is restated without substantive change in Sections 1021 (petition to be verified), 4920(a) (jurisdiction in superior court), and 4943 (commencement of proceeding). See Prob. Code § 4943 Comment.

§ 2416. Dismissal of petition

Comment. Former Section 2416 is restated without substantive change in Probate Code Section 4944 (dismissal of petition). See Prob. Code § 4944 Comment.

§ 2417. Hearing

Comment. Subdivision (a) of former Civil Code Section 2417 is restated without substantive change in Probate Code Section 4943(b) (clerk to set matter for hearing).

Subdivision (b) is restated without substantive change in Probate Code Section 4945 (notice of hearing). See Prob. Code § 4945 Comment.

Subdivision (c) is continued without change in Probate Code Section 4946 (service of notice).

Subdivision (d) is restated without substantive change in Probate Code Section 4947 (proof of service).

Subdivision (e) is restated without substantive change in Probate Code Section 4906 (application of decedents' estates provisions). See Comment to Probate Code Section 4906.

Subdivision (f) is restated without substantive change in Probate Code Section 4948(b) (order shortening time).

Subdivision (g) is continued without substantive change in Probate Code Section 4950 (award of attorney's fees). See Prob. Code § 4950 Comment.

Subdivision (h) is continued without substantive change in Probate Code Section 4949 (temporary health care order). See Prob. Code § 4949 Comment.

§ 2418. Guardian ad litem

Comment. Former Section 2418 is restated without substantive change in Probate Code Section 4951 (appointment of guardian ad litem).

§ 2419. Appeal

Comment. Former Section 2419 is continued without substantive change in Probate Code Section 4952 (appeal). See Prob. Code § 4952 Comment.

§ 2420. Cumulative remedies

Comment. Subdivision (a) of former Civil Code Section 2420 is continued without substantive change in Probate Code Section 4901 (cumulative remedies).

Subdivision (b) is continued without substantive change in Probate Code Section 4050(b)(2) (application of division).

§ 2421. Limitation by provision in power of attorney

Comment. Subdivision (a) of former Civil Code Section 2421 is continued without substantive change in Probate Code Section 4903 (limitation of remedies by provision in power of attorney). See Comment to Probate Code Section 4903.

Subdivision (b) is continued without substantive change in Probate Code Section 4903 (right to petition under power of attorney). The cross-reference to subdivision (c) is omitted as unnecessary. See Prob. Code § 4903 Comment.

Subdivisions (c) and (d) are restated without substantive change in Probate Code Section 4905 (right to petition under durable power of attorney for health care). See Prob. Code § 4905 Comment.

§ 2422. Application of article

Comment. Former Section 2422 is restated without substantive change in Probate Code Section 4902 (effect of provision in power attempting to make division inapplicable). See Prob. Code § 4902 Comment.

§ 2423. Legislative intent

Comment. Former Section 2423 is continued without substantive change in Probate Code Section 4900 (legislative intent). See Prob. Code § 4900 Comment.

Civ. Code §§ 2430-2445 (repealed). Durable power of attorney for health care

SEC. _____. Article 5 (commencing with Section 2430) of Chapter 2 of Title 9 of Part 4 of Division 3 of the Civil Code is repealed.

§ 2430. Definitions

Comment. Former Section 2430 is continued without substantive change in Sections 56 (“person” defined), 4603 (“community care facility” defined), 4606 (“durable power of attorney for health care” defined), 4609 (“health care” defined), 4612 (“health care decision” defined), 4615 (“health care provider” defined), and 4618 (“residential care facility for the elderly” defined).

§ 2431. Application of article

Comment. Former Section 2431 is continued in Probate Code Section 4600 without substantive change.

§ 2432. Requirements for durable power of attorney for health care

Comment. Former Section 2432 is continued in Probate Code Section 4700 without substantive change.

§ 2432.5. Employee of health care provider, community care facility, or residential care facility

Comment. Former Section 2432.5 is continued in Probate Code Section 4720 without substantive change.

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

Comment. Former Section 2433 is continued in Probate Code Section 4703 without substantive change.

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

Comment. Former Section 2434 is continued in Probate Code Section 4720 without substantive change.

§ 2435. Limitations on agent’s authority

Comment. Former Section 2435 is continued in Probate Code Section 4722 without substantive change.

§ 2436. Availability of medical information to agent

Comment. Former Section 2436 is continued in Probate Code Section 4721 without substantive change.

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

Comment. Former Section 2436.5 is continued in Probate Code Section 4654 without substantive change.

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

Comment. Former Section 2437 is continued in Probate Code Section 4727 without substantive change.

§ 2438. Immunities of health care provider

Comment. Former Section 2438 is continued in Probate Code Section 4750 without substantive change.

§ 2438.5. Presumption concerning power executed in other jurisdiction

Comment. Former Section 2438.5 is continued in Probate Code Section 4752 without substantive change.

§ 2439. Other authority not affected

Comment. Former Section 2439 is continued in Probate Code Section 4602 without substantive change.

§ 2440. Principal's objections

Comment. Former Section 2440 is continued in Probate Code Section 4724 without substantive change.

§ 2441. Restriction on execution of durable power of attorney for health care as condition for admission, treatment, or insurance

Comment. Former Section 2441 is continued in Probate Code Section 4725 without substantive change.

§ 2442. Alteration or forging, or concealment or withholding knowledge of revocation of durable power of attorney for health care

Comment. Former Section 2442 is continued in Probate Code Section 4726 without substantive change.

§ 2443. Unauthorized acts or omissions

Comment. Former Section 2443 is continued in Probate Code Section 4723 without substantive change.

§ 2444. Form of durable power of attorney for health care

Comment. Former Section 2444 is continued in Probate Code Section 4601 without substantive change.

§ 2445. Validity of durable power of attorney for health care executed in another jurisdiction

Comment. Former Section 2445 is continued in Probate Code Section 4603 without substantive change.

Civ. Code § 2450 (repealed). Use of old statutory forms

SEC. ____. Chapter 3 (commencing with Section 2450) of Title 9 of Part 4 of Division 3 of the Civil Code is repealed.

Comment. Former Section 2450 is continued in Probate Code Section 4409 without substantive change.

Civ. Code §§ 2475-2484 (repealed). Uniform Statutory Form Power of Attorney Act

SEC. _____. Chapter 3.5 (commencing with Section 2475) of Title 9 of Part 4 of Division 3 of the Civil Code is repealed.

§ 2475. Statutory form power of attorney

Comment. Former Section 2475 is continued in Probate Code Section 4401 without substantive change.

§ 2476. Requirements for statutory form power of attorney

Comment. Former Section 2476 is continued in Probate Code Section 4402 without substantive change.

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

Comment. Former Section 2477 is continued in Probate Code Section 4403 without substantive change.

§ 2478. Durability of statutory form power of attorney

Comment. Former Section 2478 is continued in Probate Code Section 4404 without substantive change.

§ 2479. Springing statutory form power of attorney

Comment. Former Section 2479 is continued in Probate Code Section 4405 without substantive change.

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

Comment. Former Section 2480 is continued in Probate Code Section 4407 without substantive change.

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

Comment. Former Section 2480.5 is continued in Probate Code Section 4406 without substantive change.

§ 2481. Use of other forms

Comment. Former Section 2481 is continued in Probate Code Section 4408 without substantive change.

§ 2482. Short title

Comment. Former Section 2482 is continued in Probate Code Section 4400 without substantive change.

§ 2483. Construction

Comment. Former Section 2483 is continued in Probate Code Section 2(b) (uniformity of construction).

§ 2484. Severability

Comment. Former Section 2484 is continued in Probate Code Section 11 (severability).

§ 2485. Construction of powers generally

Comment. Former Section 2485 is continued in Probate Code Section 4450 without substantive change.

§ 2486. Real property transaction

Comment. Former Section 2486 is continued in Probate Code Section 4451 without substantive change.

§ 2487. Tangible personal property transactions

Comment. Former Section 2487 is continued in Probate Code Section 4452 without substantive change.

§ 2488. Stock and bond transactions

Comment. Former Section 2488 is continued in Probate Code Section 4453 without substantive change.

§ 2489. Commodity and option transactions

Comment. Former Section 2489 is continued in Probate Code Section 4454 without substantive change.

§ 2490. Banking and other financial institution transactions

Comment. Former Section 2490 is continued in Probate Code Section 4455 without substantive change.

§ 2491. Business operating transactions

Comment. Former Section 2491 is continued in Probate Code Section 4456 without substantive change.

§ 2492. Insurance and annuity transactions

Comment. Former Section 2492 is continued in Probate Code Section 4457 without substantive change.

§ 2493. Estate, trust, and other beneficiary transactions

Comment. Former Section 2493 is continued in Probate Code Section 4458 without substantive change.

§ 2494. Claims and litigation

Comment. Former Section 2494 is continued in Probate Code Section 4459 without substantive change.

§ 2495. Personal and family maintenance

Comment. Former Section 2495 is continued in Probate Code Section 4460 without substantive change.

§ 2496. Benefits from social security, medicare, medicaid, or other governmental programs, or civil or military service

Comment. Former Section 2496 is continued in Probate Code Section 4461 without substantive change.

§ 2497. Retirement plan transactions

Comment. Former Section 2497 is continued in Probate Code Section 4462 without substantive change.

§ 2498. Tax matters

Comment. Former Section 2498 is continued in Probate Code Section 4463 without substantive change.

§ 2499. After-acquired property

Comment. Former Section 2499 is continued in Probate Code Section 4464 without substantive change.

§ 2499.5. Power to modify or revoke trust

Comment. Former Section 2499.5 is continued in Probate Code Section 4465 without substantive change.

Civ. Code §§ 2500-2508 (repealed). Statutory Form Durable Power of Attorney for Health Care

SEC. _____. Chapter 4 (commencing with Section 2500) of Title 9 of Part 4 of Division 3 of the Civil Code is repealed.

§ 2500. Statutory form of durable power of attorney for health care

Comment. Former Section 2500 is continued in Probate Code Section 4771 without substantive change.

§ 2501. Warning or lawyer's certificate

Comment. Former Section 2501 is continued in Probate Code Section 4772 without substantive change.

§ 2502. Formal requirement

Comment. Former Section 2502 is continued in Probate Code Section 4773 without substantive change.

§ 2503. Requirements for statutory form

Comment. Former Section 2503 is continued in Probate Code Section 4774 without substantive change.

§ 2503.5. Requirements for forms after January 1, 1993

Comment. Former Section 2503.5 is continued in Probate Code Section 4775 without substantive change.

§ 2504. Language conferring general authority

Comment. Former Section 2504 is continued in Probate Code Section 4776 without substantive change.

§ 2505. Effect of documents executed by agent

Comment. Former Section 2505 is continued in Probate Code Section 4777 without substantive change.

§ 2506. Termination of authority; alternate agent

Comment. Former Section 2506 is continued in Probate Code Section 4778 without substantive change.

§ 2507. Use of other forms

Comment. Former Section 2507 is continued in Probate Code Section 4779 without substantive change.

§ 2508. Short title

Comment. Former Section 2508 is continued in Probate Code Section 4770 without substantive change.

Civ. Code §§ 2510-2514 (repealed). Miscellaneous provisions relating to powers of attorney

SEC. _____. Chapter 5 (commencing with Section 2510) of Title 9 of Part 4 of Division 3 of the Civil Code is repealed.

§ 2510. Warning statement in durable power of attorney

Comment. Former Section 2510 is restated without substantive change in Probate Code Section 4128 (warning statement in durable power of attorney). See Prob. Code § 4128 Comment.

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

Comment. Former Section 2510.5 is superseded by Probate Code Section 4102 (form of durable power of attorney after January 1, 1995). See Prob. Code § 4102 Comment.

§ 2511. Convincing evidence of identity of principal

Comment. Former Section 2511 is continued without substantive change in Probate Code Section 4751 (convincing evidence of identity of principal).

§ 2512. Protection of person relying in good faith on durable power of attorney

Comment. Former Section 2512 is continued without substantive change in Probate Code Section 4303 (protection of third person relying in good faith on durable power of attorney). See also Section 2438 (immunities of health care provider).

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

Comment. Former Section 2513 is continued without change in Probate Code Section 4129 (application to principal's property).

§ 2514. Springing power of attorney

Comment. The introductory clause of subdivision (a) of former Civil Code Section 2514 is superseded by Probate Code Section 4010 (application of definitions). Paragraph (1) of subdivision (a) is restated without substantive change in Sections 4014 (“attorney-in-fact” defined), 4022 (“power of attorney” defined), and 4026 (“principal” defined). Paragraph (2) of subdivision (a) is continued without change in Probate Code Section 4030 (“springing power of attorney” defined).

Subdivisions (b)-(d) are continued without substantive change in Probate Code Section 4129 (springing power of attorney). See Prob. Code § 4129 Comment.

FINANCIAL CODE

Fin. Code § 6725 (amended). Power of attorney as to account in savings and loan association

SEC. _____. Section 6725 of the Financial Code is amended to read:

6725. (a) Notwithstanding any other provision of law, an association or federal association may continue to recognize the authority of an attorney-in-fact authorized in writing to manage or to make withdrawals either in whole or in part from the savings account of a holder, whether minor or adult, until it receives written notice or is on actual notice of the revocation of authority, whether the revocation is express or by operation of law.

(b) Except as provided in ~~Sections 2400 through 2407 of the Civil Division 4.5 (commencing with Section 4000) of the Probate Code~~, written notice of the death or adjudication of incompetency of the account holder that is delivered to the office where the account is maintained shall constitute written notice of revocation of the authority of the attorney-in-fact.

(c) No association or federal association shall be liable for damages, penalty, or tax by reason of any payment made pursuant to this section.

Comment. Subdivision (b) of Section 6725 is amended to substitute a reference to the Power of Attorney Law that replaces the former Civil Code sections.

PROBATE CODE

Heading of Chapter 5 (commencing with Section 3700) (amended)

SEC. _____. The heading of Chapter 5 (commencing with Section 3700) of Part 8 of Division 4 of the Probate Code is amended to read:

CHAPTER 5. PERSONAL PROPERTY OF ABSENT FEDERAL PERSONNEL

Comment. The chapter heading is amended since the power of attorney provisions in Article 4 (commencing with Section 3720) are not restricted to personal property.

Prob. Code § 3721 (added). Knowledge where principal is “absentee”

SEC. _____. Section 3721 is added to the Probate Code, to read:

3721. For the purposes of Chapter 5 (commencing with Section 4300) of Part 2 of Division 4.5, in the case of a principal who is an absentee, an attorney-in-fact or third person shall be deemed to be without actual knowledge of the following:

(a) The principal's death or incapacity while the absentee continues in missing status and until the attorney-in-fact or third person receives notice of the determination of the absentee's death by the secretary concerned or the head of the department or agency concerned or the delegate of the secretary or head.

(b) Revocation by the principal during the period described in subdivision (a).

Comment. Section 3721 continues without substantive change the part of Civil Code Section 2357 that related to powers of attorney involving federal absentees. References to "attorney-in-fact or third person" have been substituted for the former references to "person" for clarity and conformity with the language of this division.

See also Sections 1403 ("absentee" defined), 1440 ("secretary concerned" defined), 4014 ("attorney-in-fact" defined), 4026 ("principal" defined), 4034 ("third person" defined);

Prob. Code § 3722 (added). Effect of dissolution, annulment, or legal separation on power of attorney

SEC. _____. Section 3722 is added to the Probate Code, to read:

3722. If after the absentee executes a power of attorney the attorney-in-fact commences a proceeding for dissolution, annulment, or legal separation, or a legal separation is ordered, the attorney-in-fact's authority is revoked. This section is in addition to the provisions of Section 4153.

Comment. Section 3722 continues the part of former subdivision (f) of Civil Code Section 2355, relating to the effect of a legal separation and the filing of a petition for dissolution, nullity, or legal separation in the case of federal absentees. The reference in former law to contrary provisions "in writing" is omitted because it is unnecessary; powers of attorney are required to be in writing and this statute permits variation of default rules in the power of attorney. See Sections 4022 ("power of attorney" defined), 4101 (priority of provisions of power of attorney).

See also Sections 4014 ("attorney-in-fact" defined), 4022 ("power of attorney" defined), 4026 ("principal" defined).

Prob. Code § 5204. Special power of attorney for account transactions

SEC. _____. Section 5204 of the Probate Code is amended to read:

5204. (a) In addition to a power of attorney otherwise authorized by law, a special power of attorney is authorized under this section to apply to one or more accounts at a financial institution. For the purposes of this section, "account" includes checking accounts, savings accounts, certificates of deposit, Savings certificates, and any other depository relationship with the financial institution.

(b) The special power of attorney under this section shall:

(1) Be in writing.

(2) Be signed by the person or persons giving the power of attorney.

(3) Explicitly identify the attorney in fact or attorneys in fact, the financial institution, and the account or accounts subject to the power.

(c) Language in substantially the following form is sufficient to create a power of attorney under this section: "Transactions regarding this account or certificate of deposit may be made by the named agent(s). This agency is governed by

Section 5204 of the California Probate Code. Under Section 5204, (1) the agent has no present or future ownership or right of survivorship in this account, (2) the agent must keep a record of the transactions and disbursements made under the agency, and (3) the agent may make disbursements from this account only to or for the benefit of the account owner unless the account owner has authorized the disbursement in writing.”

(d) The power of attorney granted under this section shall endure as between the grantor and grantee of the power until the earliest of the following occurs:

(1) Revocation by the grantor of the power.

(2) Termination of the account.

(3) Death of the grantor of the power.

(4) Appointment of a guardian or conservator of the estate of the grantor of the power.

(e) A financial institution may rely in good faith upon the validity of the power of attorney granted under this section and is not liable to the principal or any other person for doing so if (1) the power of attorney is on file with the financial institution and the transaction is made by the attorney in fact named in the power of attorney, (2) the power of attorney appears on its face to be valid, and (3) the financial institution has convincing evidence of the identity of the person signing the power of attorney as principal.

(f) For the purposes of subdivision (e), “convincing evidence” requires both of the following:

(1) Reasonable reliance on a document that satisfies the requirement of Section 2511 of the Civil Code 4751.

(2) The absence of any information, evidence, or other circumstances that would lead a reasonable person to believe that the person signing the power of attorney as principal is not the individual he or she claims to be.

(g) The protection provided by subdivision (e) does not extend to payments made after written notice is received by the financial institution as to any of the events of termination of the power under subdivision (d) if the financial institution has had a reasonable time to act on the notice. No other notice or any other information shown to have been available to the financial institution shall affect its right to the protection provided by this subdivision.

(h) The attorney in fact acting under the power of attorney granted under this section shall maintain such books or records as will permit an accounting of the acts of the attorney in fact if an accounting is requested by a legal representative of the grantor of the power.

(i) The attorney in fact acting under a power of attorney granted under this section is liable for any disbursement other than a disbursement to or for the benefit of the grantor of the power, unless the grantor has authorized the disbursement in writing.

(j) Nothing in this section limits the use or effect of any other form of power of attorney for transactions with a financial institution. Nothing in this section creates

an implication that a financial institution is liable for acting in reliance upon a power of attorney under circumstances where the requirements of subdivision (e) are not satisfied. Nothing in this section affects any immunity that may otherwise exist apart from this section.

(k) Nothing in this section prevents the attorney in fact from also being designated as a P.O.D. payee.

Comment. Subdivision (f)(1) of Section 5204 is amended to substitute a reference to the provision of the Power of Attorney Law that replaced the former Civil Code section.