
Memorandum 94-2**Comprehensive Power of Attorney Statute:
Comments on Tentative Recommendation**

This memorandum considers comments on the Tentative Recommendation relating to the Comprehensive Power of Attorney Law. We have received three letters, which are attached as an exhibit:

	<i>Exhibit pp.</i>
(1) Paul Gordon Hoffman	1-2
(2) Harley J. Spitler	3-24
(3) Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section	25-32

Although we have not received comments from many people, the comments we did receive are quite detailed and carefully considered. The staff has implemented some technical suggestions; these are flagged in a staff note following the section. Substantive issues are discussed in a staff note following the affected section. General issues and more important policy questions are discussed below.

At the January 6-7 meeting, the Commission will need to consider the substantive and general policy issues and resolve them if a bill is to be presented to the 1994 Legislature. Pursuant to a decision made at the December meeting, the staff has sent the current draft (with technical changes) to Legislative Counsel so that the process of preparing a bill can get under way. The bill draft will then be corrected to include any revisions adopted by the Commission at the January meeting before it is printed.

Status of Study

Several commentaries made by Mr. Spitler and by the Executive Committee of the State Bar Estate Planning, Trust and Probate Law Section present major substantive issues. The staff had hoped that such issues would have been put to rest by this stage of the project, but we recognize the seriousness of the concerns expressed by the commentators — if only their resolution were simple. The question is whether this recommendation is ready to be approved to print and introduction in the 1994 legislative session.

The power of attorney study has been an off and on affair, with other studies occupying most of the Commission's meeting time in recent years. Some significant issues remain unresolved and some new issues are now presented in what should be the last step of the 3¹/₂-year process leading to finalization of the Commission's recommendation. The alternatives are (1) to once again postpone proposing legislation until the issues can be resolved, (2) to forge ahead with the recommendation largely in its present form, postponing larger issues for later study, or (3) to make quick revisions as urged by the commentators without the normal consideration given to Commission-recommended legislation. These considerations should be kept in mind as Commissioners ponder the issues discussed in this memorandum, in the attached letters, and in the staff notes in the draft recommendation.

Capacity of Principal

The State Bar urges a new definition of "capacity" to replace the concept of capacity to contract as the factor determining when non-durable powers terminate and when springing powers come into force. (See Exhibit pp. 25-26.) The State Bar Team representatives had alluded to the possibility of development of such a proposal in the past, but this is the first time we have seen it.

The staff believes that the suggested language is a useful suggestion. It appears to be drawn from the new Uniform Health Care Decisions Act, with references to "health" removed. This language would certainly be a strong contender, it would seem, if the staff had done the work of analyzing the question for the Commission and presenting a number of alternatives. In other words, while the suggested language seems useful, more informative than "capacity to contract," and otherwise unobjectionable, the staff is concerned that alternatives, such as standards used in other states, have not been studied. With that caution noted, the staff is not strongly opposed to including the language in the recommendation.

The staff can anticipate objections to the proposed language, however. The phrasing is reactive. It assumes that something is being "proposed" to the principal. It assumes that the decision should be based on an assessment of "risks" and "alternatives." Does this sound like a decision concerning disposition of property? Does it describe a situation where the issue is whether the principal has the competence to pay bills on time? Is this the best or most appropriate standard we can develop?

The proposed language is set out in context as Section 4016 in the attached draft recommendation. (See p. 26.)

The State Bar also suggests adding a commentary on cognitive psychology to the Comment. Without first studying this matter, the staff would not want to include statements such as these in the Comment to the definition section.

Execution Requirements — Witnessing

The State Bar argues that there should be no restrictions on who can witness a power of attorney, except as to the durable power of attorney for health care. Alternatively, the State Bar suggests that the disqualification standard should be broadened to include any benefit that would accrue to the witness from the principal's death. (See Exhibit pp. 26-27.)

There is tension here between the desire to adopt uniform rules applicable to both property and health care powers, on the one hand, and crafting particular standards that seem most appropriate to each type of power, on the other. In response to the State Bar's arguments in the past, the Commission has adopted the policy of trying to make execution requirements uniform to the extent practicable. This means that existing protections applicable to health care powers have been extended to property powers in the interest of adopting uniform rules. Another way to achieve uniformity would be to eliminate the protections across the board, of course, but this would ignore the political realities concerning the durable power of attorney for health care. While it is not a foregone conclusion that the health care power cannot be significantly revised, the study has not been done, and a broad range of interested persons have not been involved in the process.

The State Bar's first suggestion reduces the degree of uniformity in the draft statute. The State Bar's alternative suggestion (broadening the witness standard to cover non-probate dispositions) would preserve the same degree of uniformity, but also change the health care power statute. This is a policy question the Commission must determine.

A third alternative would be to abandon the (unattainable) goal of uniformity by eliminating the execution formality of witnessing or notarization completely for property powers, while continuing the existing law as to health care powers.

Fundamental Liberties and Reform of Health Care Powers Statutes

Harley Spitler and the State Bar Executive Committee argue that statutory limitations on the principal's power to delegate health care decision-making authority to an attorney-in-fact contravene the principal's liberty interest under the 14th Amendment as interpreted in *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990). (See Exhibit pp. 5, 11, 16, 30.) These comments raise serious and important issues, but ones that the Commission has not yet considered and does not need to consider at this point.

From its inception, this study has been primarily concerned with coordinating and filling in the gaps in the statutes governing property powers (i.e., powers of attorney other than the durable power of attorney for health care). In the effort to prepare a comprehensive structure, the health care power statutes have usually been included in the draft. We have attempted to make the drafting consistent by making some changes in the language of the health care power statutes. In response to the strong position taken by the State Bar, the Commission has attempted to generalize certain provisions, particularly pertaining to execution requirements. However, the Commission has been consistent in resisting the temptation to make fundamental revisions in the durable power of attorney for health care statutes — not because reform is not called for, but because staff and Commission resources have not permitted the detailed study that is required to do the job.

The staff continues to believe that complete review of powers of attorney must be a two-stage process. The first stage is to do the basic reorganization and improvement of the statutes concerning property powers. Once this structure is in place, the second stage of considering the health care powers and related matters can take place. There are a host of issues that must be considered in connection with health care decision making that have nothing to do with other powers of attorney. It would also have made little sense to proceed with revision of the California health care statutes before the approval of the Uniform Health-Care Decisions Act, which has only just occurred. The Commission's recommendation as to the first stage should not inhibit any future reform of the health care power, since it should be readily apparent that the Commission has not attempted do that job in this stage of the project.

Were it not for the Commission's overfull plate of priority studies, the staff would recommend that commencement of the second stage of the power of attorney study, revision of the health care power. This would involve considera-

tion of the development of the law in the decade since enactment of the Commission's durable power of attorney for health care, along with the Uniform Health-Care Decisions Act, and other relevant materials, with a view toward recommending legislation in this area on a priority basis.

Reliance on General Probate Code Procedural Rules

One advantage of locating the Power of Attorney Law in the Probate Code is that procedural many rules have been drafted to apply to the entire code. The draft recommendation still contains some duplicative provisions. See Sections 4946 (service of notice), 4947 (proof of service), 4948 (power of court), 4951 (guardian ad litem). Similar provisions in the guardianship-conservatorship statute and in the Trust Law were removed in favor of the general provisions when the Commission completed its overall revision of the Probate Code in 1990. However, the attached draft has not yet been revised to delete provisions that are covered by general rules. When the draft statute was directed to the Civil Code, it was necessary to provide a complete scheme. This scheme has hung on since the statute was redrafted to be in the Probate Code. While an argument could be made that the Power of Attorney Law should be a self-contained statute regardless of where it is located, this is not consistent with the approach taken by the Commission on procedural issues.

The State Bar suggests deletion of subdivision (c) of Section 4945 because it is duplicative of Section 1202. (See Exhibit p. 32.) The staff recommends removing all duplicative provisions and relying on the general rules in the interest of consistency with the approach taken in other parts of the Probate Code. A forthcoming supplement to this memorandum will set out a draft of the procedural provisions as revised to be consistent with the general rules, and also to implement the State Bar suggestion for restructuring the petition sections (Sections 4941-4942).

Respectfully submitted,

Stan Ulrich
Assistant Executive Secretary

HOFFMAN
SABBAN &
WATENMAKER

LAWYERS

10880 Wilshire
Boulevard
Suite 2200
Los Angeles
California 90024
(310) 470-6010
FAX (310) 470-6735

Law Revision Commission

NOV 15 1993

File: _____
Rev. _____

November 9, 1993

Paul Gordon Hoffman

California Law Revision Commission
Suite D-2
4000 Middlefield Road
Palo Alto, CA 94303-4739

Re: Tentative Recommendation: Comprehensive
Power of Attorney Law (L-3044)

Ladies & Gentlemen:

The proposed Tentative Recommendation is useful, but I have a suggestion. Section 4054 provides that 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. The implication of this provision is that recognition of such a power of attorney is optional (perhaps on the part of the agent or perhaps on the part of third parties.)

It is essential that people have enforceable documents, where those documents comply with the law of the place where they are executed or where the signer lives. I note, by comparison, that Section 4653, dealing with Health Care Powers, states that an out of state power shall be valid and enforceable in this state, if it complies with the laws of the place of execution. Further, by comparison, Section 6113(c), dealing with the validity of Wills, looks to the place of domicile of the testator.

To facilitate recognition of Powers of Attorney generally, I suggest that:

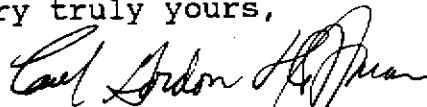
1. Section 4054 be amended to provide that out of state powers of attorney shall be valid and enforceable in California.
2. Both Sections 4054 and 4653 be amended to provide that an out of state power of attorney will be recognized if

California Law Revision Commission
November 9, 1993
Page 2

it is valid under the laws of the state of the principal's domicile. (Occasionally, I will prepare documents and send them for signing to a California client who happens to be out of the state on an extended business or vacation trip. The place of signing should not control in these cases.)

3. Any person dealing with an attorney-in-fact should be able to rely on a representation made by that attorney that the Power of Attorney under which he or she purports to act is in fact in compliance with the laws of the state in which it was executed or the laws of the state in which the principal was domiciled on the date executed. Section 4752 allows a health care provider to assume the validity of a health care power executed outside of California, but this may be insufficient. However, something comparable should be incorporated into the laws regarding general Durable Powers of Attorney. Section 4303 is clearly insufficient, since a document which is not valid under California law may not be easily ascertained to be "valid on its face."
4. It should be expressly stated that any limits imposed on California Powers of Attorney by Sections 4265 and 4722 through 4724 shall apply to an out of state power of attorney, since these represent the major public policy limitations contained in the law.

Very truly yours,



Paul Gordon Hoffman

PGH:gk

ATTORNEYS AT LAW Palo Alto, CA
415 843-5000
One Maritime Plaza Menlo Park, CA
20th Floor 415 843-5000
San Francisco, CA San Diego, CA
94111-3580 619 550-6000
MAIN 415 693-2000 Boulder, CO
FAX 415 951-3699 303 546-4000

HARLEY J. SPITLER
Direct: (415) 693-2060

November 23, 1993

California Law Revision Commission
4000 Middlefield Road, D-2
Palo Alto, CA 94303-4739

Law Revision Commission
RECEIVED

NOV 23 1993

Attention: Mr. Stan Ulrich
Assistant Executive Secretary

File: _____
Rev: _____

Re: Comprehensive Power of Attorney Law -- Tentative Recommendation

Dear Commissioners:

My personal comments on your September 1993 tentative recommendation on Comprehensive Power of Attorney Law .

My overall evaluation is:

A. To a large extent, your massive revision deals only with durable powers of attorney for property ("DPAP") excepting only where there are provisions common to both the DPAP and the durable power of attorney for health-care ("DPAHC").

B. From the inception of your current study, I have been advocating, without much success, to anyone who would listen: the California statute on durable powers should be all inclusive. That is, one statute that would include everything that conceivably can be done under a durable power: DPAP, DPAHC; personal matters handled by a conservatorship. For reasons never clearly stated, you have opted to focus on the DPAP -- at the very moment in history when millions of our citizens, since *Cruzan v. Missouri*, eagerly want knowledge regarding DPAHC. And also at the very moment in history when the N.C.C.U.S.L. has approved the Uniform Health-Care Decisions Act which will be the prototype of all future statutes on health-care decision making.

C. California, largely through your work, led the field in health-care decision making with the 1983 enactment of the DPAHC and the 1984 enactment of the statutory form DPAHC. Unfortunately during the intervening years, other states and N.C.C.U.S.L. have made significant advances while California has stood still!

Mr. Stan Ulrich
November 23, 1993
Page 2

My following comments, among other topics, will try to point up those areas where California is the caboose. My comments are by section number.

Section 4030: Insert "future" before word "event" in third line.

Section 4052(a): There is ambiguity between (a)(1) and (a)(2) arising principally out of the term "executed".

Ex: All of my durable powers contain a written acceptance by the attorney-in-fact ("AF"). Normally, both principal ("P") and AF execute the instrument in California. On occasion, however, the AF executes the instrument in another state, such as Nevada.

Query: Does your (a)(1) purport to validate the AF's acts and transactions *in California* when, in law, the agency was contracted in Nevada?

Query: Same general question under (a)(2). Does your (a)(2) purport to validate the AF's acts and transactions *in Nevada* solely by reason of the fact that P was "a person domiciled in this state"?

I can assure you that the above is not a "made up" question for a law school exam. It arises frequently in practice.

Section 4052(b): This is the choice of law statute. I do not like the phrase "refers to the Power of Attorney Law of this state". Suggest that phrase be changed to read:

" . . . provides that the Power of Attorney Law of this state shall govern this instrument, then . . ."

The "refers to" clause is ambiguous.

In (b)(3), change "and" to "or".

In (b)(4), same ambiguity regarding term "executed" as noted above under (a)(1) and (a)(2).

Mr. Stan Ulrich
November 23, 1993
Page 3

Section 4054: Unless "may" means "must" or "shall" the section is meaningless! Please note that your Section 4653 says "shall". I do not understand your comment reference to Section 4018 which has nothing to do with the subject matter of 4054.

Section 4101(b): I believe this section is unconstitutional in so far as it pertains to a person's health-care decisions. For example, I believe that the purported limitations contained in Civil Code 2435, contravene the P's "liberty interest" under the 14th Amendment as interpreted by the U.S. Supreme Court in *Cruzan v. Missouri* (1990) 497 U.S. 261.

I suggest you consider restricting "(b)" to DPAP. That could be done by substituting the following for the first four words in "(b)":

"(b) A power of attorney for property"

Section 4121(c): Please consider deleting "(c)". There is no reason whatsoever that either acknowledgement or witnessing should be a mandatory requirement.

The new Uniform Health-Care Decisions Act ("UHCD Act") does *not* require either acknowledgement or witnessing.

Section 4122: As I disfavor any witnessing requirements, I would favor deleting 4122.

However, as C.L.R.C. seems very strongly to favor witnesses, here are my suggestions looking toward relaxing the very technical witnessing requirements:

1. Delete 4122(b);
2. Delete 4122(d). If you fear fraud or undue influence, consider following the UHCD Act which, in Section 2(b) disqualifies certain persons from acting as agent:

"Unless related to the principal by blood, marriage, or adoption, an agent may not be an owner, operator, or employee of [a residential long-term health-care institution] at which the principal is receiving care."

That would be much more effective than your technical witnessing requirements which few people even read -- or reading, understand!

Mr. Stan Ulrich
November 23, 1993
Page 4

3. Delete 4122(e):

4. 4122(f): I'll comment on Section 4701 when I reach it later in these section comments.

Section 4123:

(a): Delete "or with respect to one or more express subjects or purposes" in first sentence. Those words are surplusage.

(b): I'll comment on Section 4600 when I reach it later in these section comments.

Though I am, as everyone knows, a strong advocate of the DPAHC, I do not like the word "monopoly" in the last paragraph of the Comment. Suggest you consider substituting "priority" for "monopoly".

Section 4130(b): Do not understand; and, accordingly, suggest deletion of "(b)".

Sections 4150 and 4151: You must "fix" 4150 and 4151. There are several problems:

1. 4150(a)(2): the same execution problems, I discussed above under section 4052;

2. Perhaps you intend 4150 to apply only to a DPAP. If so, you should say so in "(a)";

3. If you intend 4150 to apply to a durable power (a)(2) certainly is not acceptable. You certainly do not mean that if a P is on the operating table, awaiting surgery to remove his leg that he cannot *modify* his DPAHC any way he wishes to stop the surgery.

4. 4151 needs the same major "fix". Here again, if you intend 4151 to apply to a durable power (a)(2) is preposterous. Again, use my above example: do you really mean P must find someone to help him *write* a revocation if he wants to revoke the DPAHC.

Mr. Stan Ulrich
November 23, 1993
Page 5

Please carefully study the following black letter and relevant comment of the UHCD Act, and consider following them in the California statute:

"SECTION 3. REVOCATION OF ADVANCE HEALTH-CARE DIRECTIVE.

(a) An individual may revoke the designation of an agent only by a signed writing or by personally informing the supervising health-care provider.

(b) An individual may revoke all or part of an advance health-care directive, other than the designation of an agent, at any time and in any manner that communicates an intent to revoke.

(c) A health-care provider, agent, guardian, or surrogate who is informed of a revocation shall promptly communicate the fact of the revocation to the supervising health-care provider and to any health-care institution at which the patient is receiving care."

"Comment

Subsection (c) provides that an individual may revoke any portion of an advance health-care directive at any time and in any manner that communicates an intent to revoke. However, a more restrictive standard applies to the revocation of the portion of a power of attorney for health care relating to the designation of an agent. Subsection (a) provides that an individual may revoke the designation of an agent only by a signed writing or by personally informing the supervising health-care provider. This higher standard is justified by the risk of a false revocation of an agent's designation or of a misinterpretation or miscommunication of a principal's statement communicated through a third party. For example, without this higher standard, an individual motivated by a desire to gain control over a patient might be able to assume authority to act as agent by falsely informing a health-care provider that the principal no longer wishes the previously designated agent to act but instead wishes to appoint the individual."

Section 4152(a)(2): Do not understand last sentence; and, accordingly suggest its deletion.

Section 4152(a)(3): Do not understand last sentence; and, accordingly suggest its deletion.

Mr. Stan Ulrich
November 23, 1993
Page 6

Section 4153(a)(8): Change second "of" to "between" so it reads ". . . marriage *between* the attorney-in-fact . . ."

Section 4154(a): Consider expanding, and changing 4154(a) to be similar to the black letter of the UHCD Act:

"A decree of annulment, divorce, dissolution of marriage, or legal separation revokes a previous designation of a spouse as agent *unless otherwise specified in the decree or in a power of attorney for health care.*" (Section 3(d).)

Section 4154(b): Delete. California law is quite scrambled on this subject:

1. Prob. C. 6122 is quite similar to 4154(a) re revival by remarriage, in so far as *wills* are concerned;
2. There does not appear to be any provision on the subject in so far as *trusts* are concerned;
3. There does not appear to be any provision on the subject in so far as life insurance beneficiary clauses are concerned.

This "revival by remarriage" was thrashed out by the drafting committee of the U.H.C.D. Act - and rejected. If P is beholden to this woman the "second time around", he should sign a new durable power!

Section 4155(a): Sounds like the demise of durable powers in California. Your comment that "Section 4155 restates the general agency rule in Civil Code Section 2356(a)(3) without substantive change" is inaccurate.

Stan, please focus on what you say in 4155(a):

"the authority of an attorney-in-fact under a nondurable power of attorney is terminated by the incapacity of the principal to contract."

That is totally contrary to the "durable" feature of every durable power!

The authority of the "attorney-in-fact" always survives the incapacity of the principal!

Mr. Stan Ulrich
November 23, 1993
Page 7

That's what its all about! Otherwise, the instrument is an ordinary, non durable power.

I believe 4155 should be deleted in its entirety.

Section 4200: A troublesome section. Are you, in effect, requiring a court hearing to determine whether or not the AF has "capacity to contract" -- whatever that means?

I favor deleting 4200; and relying on your definition of "AF" in 4014. If you must put in something re qualification to act, I would put in a presumption of capacity.

"4200. It is presumed that an attorney-in-fact has capacity to act."

See Section 11(b) presumption in U.H.C.D. Act

Section 4201: This is a mighty strange provision. Following (but not accepting) your 4200 how can an AF *lacking capacity* carry out *any* "duties" to the P or the P's successors? *Totally inconsistent! If P lacks capacity, he can't understand his duties.*

Section 4202(d): delete "other" in first line.

Section 4202(e): comma after "conceals".

Section 4203(c): delete "improperly". Seems to assume there is such a concept as a "*proper*" breach of fiduciary duty.

Section 4205(a): Suggest deletion of words "or acts that the attorney-in-fact cannot lawfully perform." Do not understand how AF can delegate acts that are unlawful if performed by the AF himself! Civil C 2349(2) is likewise wrong in my view. If you can conceive of a particular case, please tell me.

Section 4206(a): delete the following:

1. "following the execution of a durable power of attorney" in first line;
2. "as well as to the principal" in fifth line.
3. Delete entire second sentence.

Mr. Stan Ulrich
November 23, 1993
Page 8

Section 4207(3): Is ambiguous and should be deleted. *The successor AF is the AF under the instrument; and accordingly follows the procedures set forth in (a)(1), (a)(2) and (a)(4).*

Section 4230: This section is the heart of one of the raging battles re durable powers, *i.e.*, does the AF ever have a duty to act unless he has agreed to do so in writing?

One view: No -- never!

My view: Yes -- whenever he is first made aware of his appointment and fails to renounce the office or tell the P he will *not* act as AF. A couple of examples will explain my position.

Ex. No. 1: Attorney prepares DP appointing X as AF. X is never told anything about his appointment. P is in an automobile accident; in a coma. Attorney shows X the durable power for the first time after P is in hospital.

Ex. No. 2: Same facts except P tells X about the latter's appointment shortly after the instrument is prepared.

Questions: When does X have duty to act?

Answers:

In Ex. No. 1, he doesn't have any duty unless he chooses to act after P is in hospital. Until then, X never had any knowledge of his appointment.

In Ex. No. 2, his duty to act begins when P tells X about the latter's appointment *unless* X then tells P he will not act as AF!

This latter example is the one followed in the U.H.C.D. Act:

"Give a copy of the signed and completed form to your physician, to *any* health-care providers you *may* have, to any health-care institution at which you are receiving care, and to any health-care agents you have named. *You should talk to the person you have named as agent to make sure that he or she understands your wishes and is willing to take the responsibility.*" (Section 4)

Mr. Stan Ulrich
November 23, 1993
Page 9

I, of course, also disagree with most of your comment. It is very clear, from my practice, that the P does expect the AF to act if P becomes incapacitated.

You should rethink this section. It is a classic example of where California, again, is the caboose! The same comment re Missouri!

Section 4232: Delete second sentence. The principal should be permitted to permit conflicts of interest.

Section 4235: A harmless and not needed section. It should be obvious that any AF can "consult" with any one he chooses on any subject at anytime!

Section 4238(a)(2)(B): Needs language to protect P when P and AF are married but have separated. See my comment under Section 4154(a).

Section 4261: Consider substituting "is not limited to" in place of "does not enumerate."

Section 4265(b): Unconstitutional under *Cruzan v. Missouri* (1990) 497 U.S. 26. See my discussions of Section 4101(b) above. You have a serious "liberty interest" deprivation if you leave 4265(b) in the statute.

Section 4266: Delete "or permit." Of course, the grant of power is always enough to "permit" the AF to exercise that power; it is not enough to "require" its exercise.

Section 4306(a): would be much clearer if you substituted "referred to in" in place of "covered by" in third line.

PART 3 UNIFORM STATUTORY FORM POWER OF ATTORNEY

Sections 4400 thru 4465: As my primary interest is in health-care decision making and the DPAHC, I am making only selective comments on these sections.

Section 4401: This section presents the second of the never ending raging battles re durable powers, *i.e.*, the springing power vs. the immediate power and *i.e.*, should a printed form give a preference to the springing power or to the immediate power?

Mr. Stan Ulrich
November 23, 1993
Page 10

Your form gives a statutory preference to the *immediate* power:

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

That is directly contrary to Section 4 of the U.H.C.D. Act which gives a statutory preference to the *springing* power:

"(3) WHEN AGENT'S AUTHORITY BECOMES OPERATIVE: My agent's authority becomes effective when my primary physician determines that I am unable to make my own health-care decisions unless I mark the following box. If I mark this box [], my agent's authority to make health-care decisions for me takes effect immediately."

This subject was argued, reargued, revisited, etc. *ad nauseam* at several drafting committee meetings. The main argument for the springing power -- my argument always -- is that the P never wants his AF to have authority to act so long as the P has capacity. The counter arguments by those who favor the immediate power are:

1. Its hard to define incapacity.
2. You can use a "gimmick" to prevent the AF from getting access to the instrument so long as the P has capacity. Such gimmicks include:
 - (a) Keeping the instrument in P's safe deposit box, and away from AF.
 - (b) Keeping the instrument in the office of P's attorney or P's physician.
 - (c) Hiding the instrument somewhere else -- usually where no one will ever find it!

(N.B. The drafting committee of the UHCD Act is quite aware that the N.C.C.U.S.L. Uniform Form Power of Attorney Act gives a statutory preference to the *immediate* power: Despite that the drafting committee opted for the *springing power preference*. I believe that you should do likewise.)

Mr. Stan Ulrich
November 23, 1993
Page 11

Another problem, not quite so serious, is the attempt to combine in one statutory form *both* durable powers and non-durable powers.

"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."

The result is a confusing "hodge podge". Basically, the form is an ordinary, *non durable power of attorney*. By striking one short sentence, it becomes a durable power of attorney. Just like the sorcerer's apprentice, the instrument is transmuted by striking 14 words! Many of my future comments are directed to problems you create, in the instrument, by this magical transmutation.

Section 4404: The legal effect of 4404 is unclear. Standing alone, it is accurate. But it seems to conflict with the above-quoted sentence in 4401:

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

Does 4404 mean that sentence must appear *twice* -- once in 4401 and again in the "special instructions" part?

I would delete 4404 as surplusage.

PART 4. DURABLE POWERS OF ATTORNEY FOR HEALTH CARE

As C.L.R.C. knows, I strongly disagree with its treatment, in this tentative recommendation, of the DPAHC. In its overview, C.L.R.C. states:

"DURABLE POWERS OF ATTORNEY FOR HEALTH CARE

The provisions concerning durable powers of attorney for health care are continued in the proposed law with only a few minor changes. The changes involve technical references necessary because of the relocation and renumbering of the sections and to conform to general rules applicable to all non-form powers of attorney. In addition, the general provisions governing durable powers of attorney for health care have been

Mr. Stan Ulrich
November 23, 1993
Page 12

reordered in a more logical sequence. This permits grouping of like provisions, such as those concerning limitations on the use health care powers, in a separate article for the convenience of persons using the statute." (Overview, p. 15)

That is the wrong treatment of the D.P.A.H.C., from my perspective, for these reasons:

A. After devoting a massive amount of time, extending over several years, to revamping California's statutory systems on durable powers, you fail to include the most important subject -- health care decision making!

B. *And*, that failure comes at the very time millions of Californians have become, and are, increasingly aware of dying without any D.P.A.H.C., or similar instrument.

C. *And*, that failure comes at the very time the N.C.C.U.S.L. has produced its U.H.C.D. Act as a modern, current prototype.

D. *And*, C.L.R.C. has not even provided for a statutory surrogate -- the most grievous omission from the California statutory system of health-care decision making.

Even President Clinton has a living will and says everyone should consider having one. On the November 6 "Meet The Press," he so stated. The President was *not* talking about a DPAP -- he was talking about a DPAHC. The C.L.R.C. should, also, be placing its emphasis upon advance health-care directives.

Section 4609: I prefer the U.H.C.D. Act definition in Section 1(5):

"(5) 'Health Care' means any care, treatment, service, or procedure to maintain, diagnose, or otherwise affect an individual's physical or mental condition"

That is a much broader definition which will cover non-medical remedial treatment such as practiced by Christian Science.

Mr. Stan Ulrich
November 23, 1993
Page 13

Section 4612: Again, I prefer the U.H.C.D. Act definition in Section 1(6):

"(6) "Health-care decision" means a decision made by an individual, or the individual's agent, guardian, or surrogate, regarding the individual's health care, including:

- (i) selection and discharge of health-care providers and institutions;
- (ii) approval or disapproval of diagnostic tests, surgical procedures, programs of medication, and orders not to resuscitate; and
- (iii) directions to provide, withhold, or withdraw artificial nutrition and hydration and all other forms of health care."

The 4612 definition is simply outdated, old stuff! O.K. for 1988 but outmoded for 1994!

In 4612, the most grievous omission is the substance of 1(6)(iii) of the above U.H.C.D. Act definition.

Section 4650(b). There is a typo, or typos, in 4650(b). There is no 4700(a)(2); I believe your reference should be Section 4121(c).

Also, I believe the reference to Section 4703(c) is wrong; believe it should refer to 4703(a).

Section 4652(a): Delete "subject to Section 4720" so as to make 4652(a) consistent with Section 4720(d).

Section 4700: My tentative comments now drift into tautology -- simply because that is the way you have drafted your recommendation. There is too much needless repetition in the recommendation.

Sections 4700(a), (b) and (c) would be clarified, and made more comprehensible to everyone, if you added the word "durable" before the word "power".

Suggest deletion of word "*specifically*" in 4700(a). That is a term that invites litigation. It is sufficient to simply have the statutory requirement that the DPAHC "grants authority ---- to make health care decisions"

Mr. Stan Ulrich
November 23, 1993
Page 14

You do not have any "*specifically*" language in the DPAP -- why pick on the DPAHC!

Section 4701: Please refer to my comments on Section 4122.

I favor deletion of section 4701; and rely upon Section 4702. Too much duplication and overkill! So long as you have 4702, you do not need 4701.

Section 4703(b): Delete for reasons noted about re Section 4122.

Section 4704(a): To clarify change "person" to "principal" in first line. This is consistent with your usage of "principal's" in (a)(2).

Section 4720(a): Extremely troublesome section as is Civil Code 2434(a) on which 4720(a) is based.

The problems are in the last phrase: "... 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 that decision"

The Problems:

1. You do not define "informed consent" which is a tort doctrine created by physicians as a defense to malpractice actions.
2. "*Informed Consent*" is *not* the same as "incapacity" which triggers DPAHC.

Compare California's good Samaritan statute in Business and Professions Code 2397(a) and (b). These sections indicate that "informed consent" is a defense to an action for civil damages. It does not belong in a durable power statute!

Section 4722: Unconstitutional! See my discussion re Section 4101(b).

I believe that the purported limitations contained in Civil Code 2435, contravene the P's "liberty interest" under the 14th Amendment as interpreted by the U.S. Supreme Court in *Cruzan v. Missouri* (1990) 497 U.S. 261.

I believe that the P can authorize his AF to make any health care decision that the P can make because those health care decisions are a component of P's constitutionally protected

Mr. Stan Ulrich
November 23, 1993
Page 15

"liberty interest". 4722 "(a)", "(b)", "(c)" and "(d)" are clearly a part of P's *personal* health care. 4722(e) is somewhat different because it deals with the death of a third person -- *i.e.*, the unborn Fetus.

I favor deletion of "(a)", "(b)", "(c)" and "(d)".

Section 4723: Delete "so as to permit the natural process of dying"; and substitute:

" _____ or other type of advance health-care directive"

Place those same words after the second usage of the word "care" in the last sentence, or, as a simpler statement of intention, consider Section 13(a) of the U.H.C.D. Act:

"(a) This [Act] does not create a presumption concerning the intention of an individual who has not made or who has revoked an advance health-care directive"

Section 4724: *Good!* This takes care of that "informed consent" stuff in 4722. The verb "*objects*" is correct and sufficient.

Section 4725: My problems with 4725 are there:

1. It doesn't take into account the Patient Self Determination Act (42 U.S.C. 1395 cc (f)(1)(C)). Section 7(a) of the U.H.C.D. Act is very simple:

"(h) a health-care provider or institution may not require or prohibit the execution or revocation of an advance health-care directive as a condition for providing health care"

2. Your recommendation omits a "*conscience objection*" which is recognized in the Patient Self Determination Act. Section 7 of the U.H.C.D. Act provides, in relevant part:

"(e) a health-care provider may decline to comply with an individual instruction or health-care decision for reasons of conscience. A health-care institution may decline to comply with an individual instruction or health-care decision if the instruction or decision is contrary to a policy of the institution which is expressly based on reasons of conscience and if the policy was timely communicated to the patient or to a person then authorized to make health-care decisions for the patient.

Mr. Stan Ulrich
November 23, 1993
Page 16

(f) A health-care provider or institution may decline to comply with an individual instruction or health-care decision that requires medically ineffective health care or health care contrary to generally accepted health-care standards applicable to the health-care provider or institution.

(g) A health-care provider or institution that declines to comply with an individual instruction or health-care decision shall:

(1) promptly so inform the patient, if possible, and any person then authorized to make health-care decisions for the patient;

(2) provide continuing care to the patient until a transfer can be effected;
and

(3) unless the patient or person then authorized to make health-care decisions for the patient refuses assistance, immediately make all reasonable efforts to assist in the transfer of the patient to another health-care provider or institution that is willing to comply with the instruction or decision."

Section 4726: Delete from Civil code and place entire section in *Penal Code*. *Homicide provisions do not belong in Civil Code*.

Section 4727(a): Please refer supra to my comments re sections 4150 and 4151. Same comments re 4727(a)

Section 4727(c): First sentence in fine. The California Act should also have a presumption that the P has capacity to execute a DPAHC. The statutory presumption should work both ways, *i.e., to make a DPAHC and to revoke a DPAHC*.

Section 4727(d): I favor the U.H.C.D. Act provision which is the same as the effect of a codicil upon an earlier will:

"An advance health-care directive that conflicts with an earlier advance health-care directive revokes the earlier directive to the extent of the conflict."
[Section 3(e)]

Section 4727(e): See my comment *supra* re Section 4154(e). Same comment re 4727(e).

Mr. Stan Ulrich
November 23, 1993
Page 17

Section 4727(f): Delete "criminal prosecution or". Place all criminal provisions in Penal Code -- not in Civil Code.

Section 4750. Needs to be restructured and shortened.

First, I favor deleting "criminal prosecution" from "(a)" and "(c)"; and placing that criminal defense in the Penal Code.

Second, consider restructuring "(a)" along these lines from the U.H.C.D. Act:

"SECTION 9. IMMUNITIES.

(a) A health-care provider or institution acting in good faith and in accordance with generally accepted health-care standards applicable to the health-care provider or institution is not subject to civil or criminal liability or to discipline for unprofessional conduct for:

(1) complying with a health-care decision of a person apparently having authority to make a health-care decision for a patient, including a decision to withhold or withdraw health care;

(2) declining to comply with a health-care decision of a person based on a belief that the person then lacked authority; or

(3) complying with an advance health-care directive and assuming that the directive was valid when made and has not been revoked or terminated.

(b) An individual acting as agent or surrogate under this [Act] is not subject to civil or criminal liability or to discipline for unprofessional conduct for health-care decisions made in good faith."

Section 4751: Typo: "4700" should, I believe, be 4701. For clarification, and easier reading, I would rephrase "convincing evidence" in the *positive* -- not the negative. Thus: "convincing evidence" means *any information* -- principal is the individual ..."

Section 4771: For clarification insert "durable" before "power" in third line.

Mr. Stan Ulrich
November 23, 1993
Page 18

My comments again are tautologous -- simply because your recommendation is the same.

4771, par. 1: I would revise the definition of "health care decision" as I suggested in my above comments re section 4612.

4771, par 2: For clarification insert "durable" before "power" in third line.

4771, par 2: The last sentence contains C.L.R.C.'s preference for an *immediate durable power*. My preference, and the preference of the N.C.C.U.S.L.'s new, modern U.H.C.D. Act is to give statutory preference to the *springing* DPAHC. See above comments re section 4401.

You don't even mention in your comment that the principal can convert the form to a springing power if he wishes. A very grievous omission from your comment!

4771, par 3: These eight words exemplify the ambiguity in the form:

"... if I had the capacity to do so ..."

Please explain to me how you reconcile those words with the last sentence of paragraph 2:

"This power of attorney shall not be affected by my *subsequent incapacity*"

Those two sentences are squarely inconsistent:

1. The sentence in paragraph 1 is the language of an *immediate power*!
2. The language in paragraph 3 is language of a *springing power*!

For clarity, and adopting your preference (*which is not my preference*) you should end the first sentence of paragraph 3 after the word "myself".

4771, Witnesses: Please refer supra for my comments on witnesses. See comments re sections 4121(c) and 4122.

Mr. Stan Ulrich
November 23, 1993
Page 19

4771, Acceptance: Please consider placing an acceptance clause immediately following the principal's signature. Something like this:

"Accepted

(Date)

Agent

You don't even comment that without an acceptance, the instrument may be useless. See my comment under Section 4230. The C.L.R.C. can anticipate receiving nationwide criticism if it fails to deal with this very glaring omission.

Section 4773(a): There ain't no "paragraph (3) of subdivision (a) of Section 4700"!

Section 4773(a)(3): See my adverse comments on witnesses in Sections 4121(c) and 4122.

Section 4773(b): There ain't no "subdivision (f) of Section 4700"!

Section 4774(a)(2): Substitute "*substantial*" for "*exact*". Very foolish, and a trap, to require "*exact wording*" of any statutory form! Especially so in your form due to the internal inconsistency in the form itself! See my above comments re 4771!

Section 4774(c): "*Exact wording*" is o.k. here because this section contemplates a printed form available at a legal forms store.

Section 4778: I wholly oppose the concept of 4778. The P *not the Court* should always be the primary person appointing an alternate AF. That alternate AF, so appointed by the P should always have the power to act as AF unless for some reason his authority is terminated by the court under Part 5.

Ex: The AF violates his fiduciary duties, *e.g.*, improperly has the P sterilized. AF's authority is revoked by Court under 4941(d)(1). In DPAHC, P appointed his minister of long standing as the alternate AF.

Mr. Stan Ulrich
November 23, 1993
Page 20

In that example, the minister automatically, *without any Court involvement* becomes the sole AF! It is preposterous to have the Court "second guessing" or vetoing the P's selection of his *alternate agent*.

Section 4779: Revise second sentence which is wholly inconsistent with the first sentence. How can you possibly say that any other form for a DPAHC may be used (in first sentence); and in second sentence require that the other DPAHC form comply with Chapter 1?

Part 5 Judicial Proceedings

Judicial 4941: The title is not consistent with the section. I suggest you delete "except as provided in Section 4942" and substitute:

"With respect to powers of attorney other than durable powers of attorney for health care
..."

Section 4942(b): Substitute "Attorney-in-fact" for "court". And insert "to the Attorney-in-fact" after word "unclear"

Section 4942(d)(1): Insert "known to the attorney-in-fact" after first usage of term "principal" in third line. And, insert "to the Attorney-in-fact" after word "unclear"

Conforming Revisions and Repeals.

Civ. Code 2355: I have long, and strongly, opposed C. Code 2355 "(c)", "(d)" and "(e)". The death, renunciation and/or incapacity of the *agent* should never terminate the entire agency. *Those events should only terminate the authority of the dead agent, or the renouncing agent or the incapacitated agent.*

Consider revamping Civ. Code 2355 along these lines:

"Civ. Code § 2355 (amended). Means of termination of agency and Authority of Agent

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

Mr. Stan Ulrich
November 23, 1993
Page 21

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.

The authority of an agent is terminated by any of the following:

- (i) the death of the agent.
- (ii) The agent's renunciation of the agency.
- (iii) The incapacity of the agent to act as such."

The Durable power, as an agency, is not affected by (i), (ii) or (iii); the successor Agent assumes the office and continues the DPAHC.

A very glaring substantive omission from C.L.R.C.'s health-care decision-making sections is the *statutory surrogate*. Please consider "Section 5. Decisions By Surrogate" of U.H.C.D. Act, not reproduced here due to its length. That provision will be a prototype for all legislatures hereafter considering health-care decision-making. C.L.R.C. should do likewise.

Best wishes,



Harley J. Spitler

HJS:wp

cc: Michael V. Vollmer
Robert Foster
Valerie J. Merritt
Thomas J. Stikker

20662148

ESTATE PLANNING, TRUST AND
PROBATE LAW SECTION
THE STATE BAR OF CALIFORNIA



555 FRANKLIN STREET
SAN FRANCISCO, CA 94102
(415) 561-8206

November 29, 1993

CALIFORNIA LAW REVISION COMMISSION
JANUARY 1993

1993

Chair
MICHAEL V. VOLLMER, Newport Beach

Vice-Chair
ROBERT L. SULLIVAN, JR., Fresno

Executive Committee
JAMES R. BIRNBERG, Los Angeles
EDWARD V. BRENNAN, La Jolla
FRAYDA L. BRULTON, Sacramento
JAMES R. CODY, Burlingame
JAMES B. ELLIS, Walnut Creek
ROBERT FOSTER, Morgan Hill
MARY P. GILICK, San Diego
ANTONIA GRAPHOS, Palm Springs
MARC B. HANKIN, Los Angeles
DIANA HASTINGS TEMPLE, San Francisco
SUSAN T. HOUSE, Pasadena
JONNIE H. JOHNSON-PARKER, Inglewood
NANCY L. POWERS, San Francisco
JULEE ROBINSON, Orange
WARREN A. SINSHEIMER, III, San Luis Obispo
ROBERT L. SULLIVAN, JR., Fresno
MICHAEL V. VOLLMER, Newport Beach

Advisors
ARTHUR R. FREUDENBERG, Burlingame
CLARK E. BYAM, Pasadena
SANDRA J. CHAN, Los Angeles
MONICA DELL'OSO, Oakland
MICHAEL G. DESMARAIS, Palo Alto
ROBERT J. DURHAM, JR., La Jolla
MELITTA FLECK, La Jolla
ANDREW S. GARE, Los Angeles
DON E. GREEN, Sacramento
JOHN T. HARRIS, Gridley
VALERIE J. MERRITT, Glendale
BRUCE S. ROSE, Beverly Hills
WILLIAM V. SCHMIDT, Newport Beach
THOMAS J. STICKER, San Francisco
ROBERT Z. TEMMERMAN, JR., Campbell

Reporter
LEONARD W. POLLARD II, San Diego

Section Administrator
SUSAN M. ORLOFF, San Francisco

REPLY TO:

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303-4739
Attention: Mr. Stan Ulrich

Michael V. Vollmer, Esq.
4340 Campus Drive, Suite 100
Newport Beach, CA 92660
(714) 852-0833

Re: Tentative Recommendation on Comprehensive Power of
Attorney Law of September 1993 (Your Study No. L-3044)

Dear Commissioners:

This letter, written on behalf of the Executive Committee of the Estate Planning, Trust and Probate Law Section of The State Bar of California, comments on your Tentative Recommendation for Comprehensive Power of Attorney Law dated September, 1993.

1. Proposed New Section 4035: Definition of Capacity. We believe the issue of the capacity of a principal is a core feature of the subject matter of powers of attorney. This issue arises in several contexts. First, it comes up when determining whether or not the principal has the ability ("capacity") to execute a power of attorney (whether for property or health care matters). Second, if the power of attorney is a non-durable power, the principal's lack of capacity terminates the agent's authority to act under the instrument. Similarly, many durable powers of attorney are drafted as "springing powers," designed to become effective only when the principal lacks the capacity to deal with his or her affairs.

Accordingly, we believe that a good, working definition of "capacity" should be included in the definitional provisions of Division 4.5, Part 1, Chapter 1 (new section 4035, perhaps). We suggest the following definition:

"Capacity" means an individual's ability to understand the significant risks, benefits and alternatives of a proposed

act or decision, and to make and communicate a choice or decision.

This definition can be used in all of the contexts in which capacity arises in the area of durable powers of attorney. Adopting this definitional approach will require conforming changes throughout the proposed legislation (for example, by deleting the phrase "to contract" in Sections 4022(a) and 4120 which set forth who may execute a power of attorney, and using the phrase "lacks capacity" instead of "incapacity" throughout the statute).

In the Commission comment to this proposed new section, we believe it is appropriate to recognize that the term "understand" may have a more limited, technical meaning in the field of cognitive psychology and that the use of this term in the statute is meant to encompass a severe mood disorder or psychotic disorder which prevents a person from being able to understand risks, benefits and alternatives within the meaning of this section.

2. Section 4101: Priority of Provisions of Power of Attorney. It is critical that it be understood that there are two areas of statutory exclusion from the terms of the power of attorney: (i) those sections expressly providing that the power of attorney cannot limit their application; and (ii) the list of matters specified in subsection (b). Accordingly, we recommend adding in the first clause of subsection (b) the word "either" after "application of".

3. Section 4120: Who May Execute a Power of Attorney. This section is duplicative of section 4022(a) and should be deleted. If the Commission decides to retain this section, then we believe the section should state that only a natural person (rather than a corporation or partnership, for example) may execute a power of attorney governed by this division.

4. Section 4122: Requirements for Witnesses. To facilitate the execution of powers of attorney and avoid invalidating documents, we believe that there should be no restrictions on who can witness the power of attorney, except as provided in section 4701 dealing with durable powers of attorney for health care. Thus, we would delete subsections (d) and (e). If the Commission decides to retain these witness restrictions, we believe that the approach of excluding only individuals who would take the estate under the principal's will or by operation of law is underinclusive and does not cover the myriad of non-probate transfers that would result in the witness receiving substantial assets (including transfers under a revocable trust, life insurance contract, pay-on-death account, retirement plan beneficiary designation and the like). As an alternative in this regard, we suggest that the Commission consider language that

excludes a person having any financial interest or expectancy by reason of the death of the principal.

5. Sections 4130 and 4727: Inconsistent Authority. We favor deleting subsection 4727(d) in its entirety. This change is consistent with the general rule in section 4130 and in the construction of wills and codicils and other instruments which modify existing documents. It also comports with the approach adopted by the National Conference of Commissioners on Uniform State Laws in its Uniform Health-Care Decisions Act.

If the Commission does not delete subsection 4727(d), we believe that the clause, "Except as provided in section 4727(d) for durable powers of attorney for health care," should be added at the beginning of subsection (a).

6. Section 4151: Manner of Revocation of Power of Attorney. We believe the comment should include the following affirmative statement: "This section provides for revocation of the power of attorney in its entirety, as distinct from revocation or termination of the authority of the attorney-in-fact pursuant to sections 4152 and 4153. This section recognizes that a power of attorney may, for example, contain expressions of wishes or nominations of conservators or successors; these provisions may exist independent from the provisions granting authority to the designated attorney-in-fact. Revocation under this section revokes all provisions stated in the instrument, rather than modifying or terminating the authority of the individual attorney-in-fact."

7. Sections 4152 and 4153: Revocation and Termination. We suggest reversing the order of these sections because 4152 is a subset of the alternatives for termination set forth in 4153.

8. Section 4154: Effect of Dissolution or Annulment. We would broaden this section to include legal separation and suggest that subsection (a) be re-written as follows:

"A decree of annulment, divorce, dissolution of marriage, or legal separation revokes a prior designation of the spouse as attorney-in-fact unless otherwise specified in the decree or in the power of attorney."

The provision allowing the court to order otherwise for good cause would allow the spouse to continue acting as attorney-in-fact under circumstances where there was no loss of love or confidence between the spouses but a dissolution was desirable for other reasons.

We strongly favor deleting subparagraph (b) of this section in its entirety. Once a married couple has gone through the trauma of

having a decree entered which results in the revocation of the spouse's authority to act under a power of attorney, there should be no automatic revival of that authority upon remarriage of the parties. If the principal wishes to redesignate the spouse as attorney-in-fact after remarriage, a new document should be executed. We believe this position is consistent with public expectations (even though revival by remarriage is recognized in the law of wills).

9. Section 4202: Multiple Attorneys-in-Fact. We would add in subsection (b) the word "only" to make it clear that authority granted to two or more attorneys-in-fact can only be exercised by their unanimous action. We also would delete the word "other" in the first clause of subsection (d) before the phrase "temporary incapacity."

10. Section 4203: Successor Attorneys-in-Fact. Subsection (c) makes a successor attorney-in-fact liable for "improperly" allowing the predecessor attorney-in-fact's breach of fiduciary duty to continue. This concept is troubling in light of the philosophical decision to impose no independent duty to act on an attorney-in-fact. Accordingly, we would delete the last clause of subsection (c).

11. Section 4206: Relation of Attorney-In-Fact to Court-Appointed Fiduciary. In subsection (a), we would delete the words "following execution of a durable power of attorney" as a superfluous clause. We also would delete the words "as well as to the principal" in subsection (a) because they invite confusion and conflict as to controlling authority. Finally, we would delete the entire second sentence of subsection (a) because it unreasonably gives non-California fiduciaries more power than is granted to California fiduciaries and creates substantial confusion with subsection (b).

12. Section 4230: When Duties Commence. We recommend adding a new subsection (d) to state that the other duties provided in Article 2 apply only when the attorney-in-fact is acting or has a duty to act under the power of attorney. The other duty sections in Article 2 (such as sections 4232 and 4234) may be read to impose affirmative duties on an attorney-in-fact who is not obligated to act for the principal.

13. Section 4232: Duty of Loyalty. This section must be reconsidered. The duty to avoid conflicts of interest must be couched in terms of reasonable exceptions (such as when trusted family members or partners have an interest in the same transaction as the principal). In addition, the principal should be permitted to vary or limit the provisions of this section in the power of attorney.

We suggest that this section be re-drafted as follows:

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

(b) Notwithstanding subdivision (a), an attorney-in-fact who acts for the principal shall not be liable or limited in so acting solely because the attorney-in-fact also benefits from the act, has individual or conflicting interests in relation to the property, care or affairs of the principal, or acts in an inconsistent manner regarding the respective interests of the principal and the attorney-in-fact."

14. Section 4233: Duty to Keep Principal's Property Separate and Identified. We believe this section should be subject to limitation in the power of attorney. A principal should be allowed to permit the attorney-in-fact to commingle assets if he or she desires that for some reason.

15. Section 4234: Duty to Keep Principal Informed and Follow Instructions. In subsection (a), the duty should be expressed in terms of keeping the principal informed as to the actions of the attorney-in-fact under the power of attorney, not as a nebulous duty to "keep in regular contact" or "communicate". In addition, we believe the principal should be allowed to limit the application of subsection (b) in the power of attorney.

16. Section 4235: Consultation. To compel the disclosure of information necessary for the attorney-in-fact to act, we would add a provision in section 4941 specifically authorizing a court petition to compel disclosure by the principal's spouse, physician, attorney, accountant, etc. of the necessary information referred to in section 4235. We also favor the addition of a subsection (b) affirmatively stating that disclosure of privileged information to the attorney-in-fact under subsection (a) does not constitute a waiver of any privilege.

17. Section 4236: Duty to Keep Records and Account. The section is disturbing in its implication that the books and records of the attorney-in-fact do not belong to the principal, and that the principal must pay the cost of copying the books and records if he or she wants access to them. The books and records kept by the attorney-in-fact should belong to the principal or his or her legal representatives, but the attorney-in-fact should be allowed to make and keep copies at the principal's expense.

18. Section 4264: Powers that Must Be Specifically Enumerated. Subsection (b) should be revised to read as follows: "Fund with the principal's property a trust not created by the principal or a person authorized to create a trust on behalf of the principal." This change will provide certainty that the agent has the authority not only to create a trust for the principal if specifically authorized, but also to fund it. It will also allow the attorney-in-fact to fund a trust created by the principal's conservator under the substituted judgment provisions of the Probate Code.

19. Section 4701: Witness Requirements for Health Care Powers. We believe that the execution formalities for both health care and property powers of attorney should be the same, with one exception (discussed below). In particular, we do not believe that there should be special restrictions on who can act as a witness for a health care power. (This was the approach adopted by the National Conference of Commissioners on Uniform State Laws in its Uniform Health-Care Decisions Act.) Accordingly, we would delete subparagraph (a) of Section 4701 in its entirety. We would make conforming changes to subparagraph (b) of the section, and also delete any statement under penalty of perjury that the principal appears to be of sound mind and under no duress, fraud or undue influence. With respect to patients in a skilled nursing facility, we would retain the requirement that an ombudsman be one of the witnesses if the document is witnessed (as opposed to acknowledged before a notary public). We believe this additional execution formality is appropriate in this context to avoid the possible abuses inherent in this situation.

20. Section 4722: Limitations on Attorney-in-Fact's Authority. We favor deleting the prohibitions against an agent consenting to the matters set forth in this section. The constitutional liberty interest recognized by the U.S. Supreme Court in Cruzan v. Missouri, 497 U.S. 261 (1990) and by the California Supreme Court in its decision in In re Valerie N., 40 Cal.3d 143, must be carefully analyzed if these prohibitions remain. (We believe that a correct reading of these cases may make unconstitutional the state's attempts to prohibit a principal from granting authority to an agent to make these decisions.) We believe the better approach would be to allow the agent to consent to these items if and only if they are specifically authorized in the durable power of attorney for health care. The agent may be prohibited from consenting to these matters if they are not specifically authorized in the governing instrument.

21. Section 4720: Attorney-in-Fact's Authority to Make Health Care Decisions. This section precludes an attorney-in-fact from acting under a durable power of attorney for health care if the principal is able to give informed consent with respect to a health care decision. The National Conference of Commissioners on Uniform

State Laws, in its Uniform Health-Care Decisions Act, does not impose such a restriction, and allows an agent to act for a principal whenever the durable power of attorney so provides. We recognize that there may be certain situations in which the principal has the capacity to give informed consent to medical treatment, but for some reason wishes to allow the agent to act on his or her behalf (when, for example, the principal does not wish to hear all the informed consent information required to be conveyed in order to make a decision). We do not believe that there is any public policy reason to forbid such a principal from granting health-care decision making authority to an agent under such circumstances.

Accordingly, we would propose that this section be modified to permit an agent to make medical decisions for a principal who continues to have the capacity to give informed consent if and only (i) the principal advises the health care provider that the designated agent is to make the decision; (ii) the principal is advised of the agent's ultimate decision and does not object; and (iii) the agent is given all relevant information to make the decision. Such a modification to the statute will allow an individual to delegate the health-care decision making responsibility to an agent, but remain in the loop so that there is no abuse of the process.

22. Section 4904: Jury Trial. The Commission has received comments favoring the right to a jury trial in judicial proceedings concerning powers of attorney. We strongly support the approach taken by the Commission in denying the right to a jury trial for powers of attorney, following the rule articulated in the decedent's estate and conservatorship areas. Controversies involving an attorney-in-fact acting on behalf of a living principal should be resolved as quickly and as expeditiously as possible. Granting a right to a jury trial in this area will result in extensive delay in getting the matter resolved and will be much more expensive for all interested parties. Moreover, there is no discernible reason to treat a dispute involving a durable power of attorney any differently from a dispute involving other fiduciary relationships. If a judge sitting without a jury can adjudicate cases involving conservators, guardians and personal representatives, he or she can most certainly adjudicate cases involving attorneys-in-fact.

23. Section 4940: Petitioners. We would add to the class of persons entitled to bring a petition under this part the duly appointed and acting personal representative of the estate of the deceased principal or a successor in interest to the principal. Although the personal representative and successors in interest probably fall within the class of "any other interested person," we believe it is advisable to specifically state that the personal representative and successors in interest have this right. This will

allow a personal representative to, for example, file a petition to compel reports and accounts of the attorney-in-fact and pass on the acts of the attorney-in-fact while the principal was living. This addition also will make it clear that petitions can be filed after the principal's death.

24. Section 4941: Petitions as to Powers of Attorney. This section should be divided into two sections, one dealing with internal matters between the principal and the attorney-in-fact, and the other dealing with third party interests. The notice provisions then should be coordinated with these two sections. This approach will allow clarity as to the notice requirements without the burdensome and ambiguous requirement for routine orders fixing notice whenever third parties are involved. Splitting sections will assist in the definition of who is entitled to notice and what kind of notice should be given.

The substance of subsection (f) is a recent statutory addition to existing Civil Code section 2412. There should be distinct and clear notice provisions for this subsection.

25. Section 4945: Notice of Hearing. Current subsection (c) should be deleted as duplicative of section 1202. New subsections should be added to include any conservator of the principal and any third party whose interest would be directly affected by the petition and coordinated with the changes in section 4941.

We plan to be available at Commission meetings to answer any questions you may have with respect to the foregoing comments. Thank you for your consideration of these matters.

Sincerely,


Michael V. Vollmer
Chair

COMPREHENSIVE POWER OF ATTORNEY LAW

BACKGROUND

The statutes governing powers of attorney are in need of reorganization and revision.¹ Since 1979, several bills have been enacted recognizing general durable powers of attorney and durable powers of attorney for health care, providing statutory forms, specifying a procedure for enforcement of the duties of attorneys-in-fact, and making a number of other changes in the law.² From the beginning of

1. Power of attorney statutes consist of the following: Civ. Code §§ 2400-2407 (Uniform Durable Power of Attorney Act), 2410-2423 (court enforcement of duties of attorney-in-fact), 2430-2444 (durable power of attorney for health care), 2450 (statutory short form power of attorney), 2475-2499.5 (Uniform Statutory Form Power of Attorney Act), 2500-2508 (statutory form durable power of attorney for health care), 2510-2513 (miscellaneous provisions relating to powers of attorney). See also Civ. Code §§ 2019-2022, 2295-2357 (general rules relating to agency); Prob. Code § 3720 (federal absentee's power of attorney).

2. Almost all of the legislation in this area was enacted on recommendation of the Law Revision Commission:

Recommendation Relating to Uniform Durable Power of Attorney Act, 15 Cal. L. Revision Comm'n Reports 351 (1980) (enacted as 1981 Cal. Stat. ch. 511). For legislative history, see 16 Cal. L. Revision Comm'n Reports 25 (1982); *Report of Senate Committee on Judiciary on Assembly Bill 329*, 16 Cal. L. Revision Comm'n Reports 43 (1982).

Recommendation Relating to Durable Power of Attorney for Health Care Decisions, 17 Cal. L. Revision Comm'n Reports 101 (1984) (enacted as 1983 Cal. Stat. ch. 1204). For legislative history, see 17 Cal. L. Revision Comm'n Reports 822 (1984); *Report of Assembly Committee on Judiciary on Senate Bill 762*, 17 Cal. L. Revision Comm'n Reports 889 (1984).

Recommendation Relating to Statutory Forms for Durable Powers of Attorney, 17 Cal. L. Revision Comm'n Reports 701 (1984) (enacted as 1984 Cal. Stat. chs. 312 & 602). For legislative history, see 18 Cal. L. Revision Comm'n Reports 18 (1986); *Report of Assembly Committee on Judiciary on Senate Bill 1365*, 18 Cal. L. Revision Comm'n Reports 45 (1986).

Recommendation Relating to Durable Powers of Attorney, 18 Cal. L. Revision Comm'n Reports 305 (1986) (enacted as 1985 Cal. Stat. ch. 403). For legislative history, see 18 Cal. L. Revision Comm'n Reports 216 (1986); *Communication from California Law Revision Commission Concerning Senate Bill 1270*, 18 Cal. L. Revision Comm'n Reports 379 (1986).

Recommendation Relating to Springing Powers of Attorney, 20 Cal. L. Revision Comm'n Reports 405 (1990) (enacted as part of 1990 Cal. Stat. ch. 986). For legislative history, see 20 Cal. L. Revision Comm'n Reports 2220 (1990).

Recommendation Relating to Uniform Statutory Form Power of Attorney Act, 20 Cal. L. Revision Comm'n Reports 415 (1990) (enacted as part of 1990 Cal. Stat. ch. 986). For legislative history, see 20 Cal. L. Revision Comm'n Reports 2220 (1990); *Report of the California Law Revision Commission on Chapter 986 of the Statutes of 1990 (Senate Bill 1777)*, 20 Cal. L. Revision Comm'n Reports 2291 (1990).

Recommendation Relating to Elimination of Seven-Year Limit for Durable Power of Attorney for Health Care, 20 Cal. L. Revision Comm'n Reports 2605 (1990) (enacted as 1991 Cal. Stat. ch. 896). For legislative history, see 21 Cal. L. Revision Comm'n Reports 22 (1991).

The initial authorization in 1979 for a durable power provided only for a power lasting for one year after the principal's disability. See 1979 Cal. Stat. ch. 234 (enacting Civ. Code § 2307.1, repealed by 1981 Cal. Stat. ch. 511, § 1). Civil Code Section 2307.1 was superseded by enactment of the California version of the Uniform Durable Power of Attorney Act (1979) in 1981. See *Recommendation Relating to Uniform Durable Power of Attorney Act*, 15 Cal. L. Revision Comm'n Reports 351, 359-60 (1980).

these reforms, the power of attorney statutes have been added to the part of the Civil Code relating to agency. A shortage of space and available section numbers in this part of the Civil Code, in league with the piecemeal nature of the revisions over the past 12 years, has resulted in a disorganized set of statutes. In some cases it is difficult to determine whether a particular provision applies to all powers of attorney, to durable powers generally, or only to health care powers. The degree to which the different varieties of powers of attorney are subject to the general agency rules is unclear. In addition, the general agency statutes are obscure and incomplete.³ They provide little practical guidance to individuals attempting to resolve issues that may arise in connection with powers of attorney relating to their private affairs.⁴

Durable powers of attorney are an increasingly important tool in ordering private affairs, resulting in special legislative attention in several other jurisdictions, as in California.⁵ A few states have enacted new comprehensive statutes that the Commission considered in the preparation of this proposed law. Of particular interest are the new statutes in Illinois (1987), Minnesota (1984), Missouri (1989), and Nebraska (1988).⁶

3. See Civ. Code §§ 2019-2022, 2295-2357. Of the 51 agency sections appearing in the Civil Code of 1872, only four have been revised in 120 years. Drawn from the Field Civil Code proposed in New York (but never enacted), the 1872 Code was prepared by revisers who "felt themselves under 'lash and spur'" to prepare a bill before the 1872 legislative session and who reported that they felt "embarrassment" in this revision. Revision Commission, *Final Note*, [Proposed] Revised Laws of the State of California in Four Codes: Civil Code 609 (1871). The Civil Code of 1872 was the subject of an unrelenting attack by Professor Pomeroy who argued in 1884 that the Revision Commission had created a great source of doubt, uncertainty, and error by the "constant, but wholly unnecessary practice, of abandoning well-known legal terms and phrases ... and of adopting instead thereof an unknown and hitherto unused language and terminology." Quoted in Van Alstyne, *The California Civil Code*, in 6 West's Ann. Cal. Codes: Civil Code 1, 30 (1954). Pomeroy concluded that there was "hardly a definition, or a statement of doctrine in the whole work, the full meaning, force and effect of which can be apprehended or understood without a previous accurate knowledge of the common law doctrines and rules on the same subject matter." *Id.*

4. Many of the general agency statutes are concerned with ratification and ostensible authority, matters that are either irrelevant or handled differently in the power of attorney statutes. The general agency statutes overlap and seem at cross-purposes in some instances, such as Civil Code Sections 2019 (agent cannot exceed authority), 2315 (agent has authority conferred), 2319 (agent's necessary authority), 2320 (agent's power to disobey), and 2322 (limits on general authority). The language of many of these rules is so general and abstract as to provide almost no guidance at all. See Civ. Code §§ 2298-2300, 2315-2320.

5. Twenty-seven jurisdictions have adopted the Uniform Durable Power of Attorney Act in whole or substantial part. See 8A Unif. L. Ann. at 82 (West Supp. 1990). Forty-seven states have adopted either the free-standing Uniform Durable Power of Attorney Act or version provided in the Uniform Probate Code. See tables in Nat'l Conf. Comm. Unif. State Laws, 1993-94 Reference Book. Durable powers of attorney in some form are available in all fifty states and the District of Columbia. See generally Collin, Lombard, Moses, & Spittler, *Drafting the Durable Power of Attorney: A Systems Approach* 14 (2d ed. 1987).

A different approach has been taken in Illinois and Oregon where all powers of attorney are durable. See Ill. Ann. Stat. ch. 110 ¶ 802-5 (Smith-Hurd Supp. 1990); Or. Rev. Stat. Ann. § 127.005(1) (Supp. 1990), as amended 1993 Or. Laws ch. 767, § 25. For an overview of legislation nationally, see Collin, *Planning and Drafting Durable Powers of Attorney*, 15 Prob. Notes 27 (Am. C. Prob. Couns. 1989); Vignery, *Legislative Trends in Nonjudicial Surrogate Health Care Decision Making*, 23 Clearinghouse Rev. 422 (1989).

6. See Ill. Ann. Stat. ch. 110 ¶¶ 802-1 to 802-11 (Smith-Hurd Supp. 1990); Minn. Stat. Ann. §§ 523.01-523.25 (West Supp. 1993); Mo. Ann. Stat. §§ 404.700-404.735 (Vernon 1992); Neb. Rev. Stat. §§ 49-1501 to 49-1561 (1988); see also Burns, *New Power of Attorney Statute*, 41 Bench & Bar of Minn., Dec. 1984, at

OVERVIEW OF PROPOSED LAW

Location of Proposed Law

The proposed comprehensive Power of Attorney Law restructures the power of attorney statutes and relocates them as a new Division 4.5 in the Probate Code, commencing at Section 4000.⁷ Relocating the power of attorney statutes in the Probate Code reinforces the estate planning nature of the durable power of attorney, and assists in distinguishing them from powers of attorney used in business transactions. A durable power of attorney may serve as an alternative to a conservatorship, hence placing the new statutes following the guardianship-conservatorship law is appropriate. Under existing law, the power of attorney statutes are already related to probate law inasmuch as the judicial review provisions apply Probate Code procedures.⁸

Relation to General Agency Law

Under this proposal, the power of attorney statutes are not completely severed from the general agency rules. Useful rules from the general agency provisions have been worked into the fabric of the proposed law, in the interest of providing a relatively complete statute.⁹ However, powers of attorney are a type of agency and would remain subject to the general law of agency, except to the extent that the Power of Attorney Law provides its own rules. The general rules concerning agency in the Civil Code remain largely untouched, with only a few conforming revisions required to remove material relevant exclusively to powers of attorney.¹⁰

Scope of Revision

The great majority of changes that would be made by the proposed law concern the law relating to powers of attorney for property — i.e., powers other than durable powers of attorney for health care — because these statutes are incomplete

9; Eickhoff, *New Durable Power Law and Custodial Trust Act Amendments*, 45 J. Mo. B. 329 (1989); Missouri Bar Ass'n, *Missouri Probate and Trust Update* — 1989, at 123-70; Zartman, *Illinois Power of Attorney Act*, 13 S. Ill. U.L.J. 1 (1988).

7. Relocation to the Probate Code would continue a process that began in 1931 when the Probate Code was first created, mainly from pieces of the Civil Code. See Turrentine, *Introduction to the California Probate Code*, 52 West's Annotated California Codes: Probate Code 1, 27-30 (1954). This process has continued in recent years. Enactment of the Trust Law in 1986 removed several parts of the Civil Code to the Probate Code. See 1986 Cal. Stat. ch. 820; *Selected 1986 Trust and Probate Legislation*, 18 Cal. L. Revision Comm'n Reports 1201 (1986). Most recently, the power of appointment statute was relocated from the Civil Code to the Probate Code. See 1992 Cal. Stat. ch. 30; *Relocation of Powers of Appointment Statute*, 21 Cal. L. Revision Comm'n Reports 91 (1991). Many other pieces of the Civil Code have been removed in the process of spawning other codes, such as the Commercial Code, Corporations Code, Family Code, Financial Code, Insurance Code, Labor Code, and Water Code.

8. See Civ. Code §§ 2413, 2417(e).

9. See, e.g., proposed Prob. Code §§ 4120 (continuing Civ. Code § 2296 requirement that principal have capacity to contract), 4153 (drawn from termination rules in Civ. Code §§ 2355-2356), 4205 (consistent with delegation rules in Civ. Code § 2349), *infra*.

10. See proposed amendments to Civ. Code §§ 2355-2357, *infra*.

1 and disorganized.¹¹ Much of the proposed legislation is directed toward supplying
2 more detailed rules and filling gaps in existing coverage, rather than making any
3 major substantive revisions.

4 The scope of the proposed law is broad, but not unlimited. It applies to durable
5 powers of attorney (including durable powers of attorney for health care), statutory
6 form powers of attorney, and any other power of attorney that incorporates or
7 refers to the Power of Attorney Law. A power of attorney is defined as a written
8 agency agreement executed by a natural person that grants powers to an attorney-
9 in-fact, and a durable power is one that survives the incapacity of the principal.
10 The effect of these provisions is to avoid unintentional application of the Power of
11 Attorney Law to powers of attorney executed in business affairs.

12 The proposed law also generalizes certain rules to apply to all powers of attorney
13 covered by the statute, whether for property, health care, or personal care. Rules
14 concerning execution, termination, revocation of authority, and the like would
15 apply to all powers covered by the statute, thereby achieving a greater consistency
16 in the law. The statutes relating to durable powers of attorney for health care¹² and
17 powers under the Uniform Statutory Form Power of Attorney Act¹³ would remain
18 largely self-contained, with only minor technical changes to conform to the
19 restructured statute.

20 GENERAL RULES

21 **Default Rules Subject to Limitations in Power of Attorney**

22 The proposed law makes clear that many statutory rules are default rules subject
23 to limitations in the power of attorney. Thus, where the statute does not provide
24 otherwise, the principal may limit or nullify a default rule by a specific provision
25 in the instrument or by providing an inconsistent provision. For example, the
26 principal may impose greater or lesser duties on the attorney-in-fact, may provide
27 special rules concerning modification or termination of the power of attorney or
28 the authority of the attorney-in-fact, or may determine the rate of compensation of
29 the attorney-in-fact or provide for no compensation. On the other hand, the
30 proposed law does not permit certain rules to be limited by the principal. Thus, the
31 power of attorney cannot waive statutory qualifications for the attorney-in-fact or
32 witnesses, alter operative date rules or required contents of forms or warnings, or
33 change the rules protecting third persons from liability.

11. "Power of attorney for property" is used in this discussion to refer to all powers of attorney other than durable powers of attorney for health care, even though the power may include personal care authority.

12. See Civ. Code §§ 2430-2445 (durable power of attorney for health care), 2500-2508 (statutory form durable power of attorney for health care); see also Civ. Code §§ 2410-2423 (court enforcement of duties of attorney-in-fact), 2511 (identity of principal).

13. Civ. Code §§ 2475-2499.5.

Creation of Power of Attorney

The proposed law provides general rules governing creation of a power of attorney. As under existing law, a power of attorney must be in writing and signed by the principal or at the principal's direction.¹⁴ There is no requirement that the attorney-in-fact sign the instrument. The proposed law generalizes the requirement that a power of attorney be dated, which applies under existing law only to the durable power of attorney for health care and the statutory form power.¹⁵ Including the date of execution is essential to determining whether the principal had capacity to execute the power and also aids in determining which is the later of two conflicting powers of attorney.

In addition, the proposed law requires as a general rule that powers of attorney be either acknowledged before a notary public or signed by two witnesses.¹⁶ This requirement is drawn from the execution requirements applicable to non-form durable powers of attorney for health care.¹⁷ The witnessing or acknowledgment requirement is intended to provide a protective level of formality for durable powers of attorney. Where witnesses are used, at least one witness must be a person who would not take property from the principal by will or intestate succession at the time the power of attorney is executed. This rule is generalized from the durable power of attorney for health care.¹⁸ Acknowledgment before a notary public is needed to facilitate recording a power of attorney in transactions affecting real property.¹⁹

Qualifications of Attorney-in-Fact

Existing law imposes no particular qualifications on who may be an attorney-in-fact under a power of attorney for property,²⁰ although special restrictions apply in

14. Civ. Code §§ 2400; Montgomery & Wright, in *Durable Powers of Attorney for Property Management*, 1991 California Durable Power of Attorney Handbook § 2.47, at 56 (Cal. Cont. Ed. Bar). There is no explicit general requirement in the statutes that a power of attorney be signed. The statutory forms require the principal's signature. See Civ. Code § 2475 (Uniform Statutory Form Power of Attorney); see also Civ. Code § 2500 (statutory form durable power of attorney for health care).

15. See Civ. Code §§ 2475 (uniform statutory form), 2432(a)(2) (durable power of attorney for health care), 2500, 2502 (statutory form durable power of attorney for health care), 2503 (printed form durable power of attorney for health care).

16. Witnessing would not be an option under the Uniform Statutory Form Power of Attorney, in the interest of consistency with the uniform form used in other states.

17. See Civ. Code §§ 2432(a)(3) (durable power of attorney for health care). The requirement that the statutory form durable power of attorney for health care be signed by two witnesses, rather than notarized, is retained in the proposed law. See Civ. Code §§ 2500, 2502 (statutory form durable power of attorney for health care), 2503 (printed form durable power of attorney for health care).

18. See Civ. Code § 2432.

19. See Civ. Code §§ 1213, 1216.

20. Civil Code Section 2400 provides that a durable power of attorney designates "another" as attorney-in-fact for the principal. The general agency rules provide that "any person may be an agent." Civ. Code § 2296.

the case of a durable power of attorney for health care.²¹ At a minimum, the attorney-in-fact should be a person with the capacity to contract.²² The proposed law provides that any person (including both natural persons and artificial entities)²³ having the capacity to make a contract may be an attorney-in-fact. The proposed law also makes clear that designation of an unqualified person as an attorney-in-fact does not affect the immunities of third persons nor the duties owed to the principal.

Duty to Act

The existing statutes are silent as to what obligation, if any, a person designated as an attorney-in-fact has to accept the position or what obligation there is to continue acting as attorney-in-fact. In the absence of an agreement, it appears under general agency principles that an attorney-in-fact is free to act or not to act, may refuse to act in future transactions after having acted in some matters, and can resign at will.²⁴ This is consistent with the idea that a power of attorney in a private relationship typically is an accommodation between friends or relatives. Many practitioners reportedly have the attorney-in-fact sign the power as a routine matter "to establish the attorney-in-fact's acceptance of the authority granted by the principal and the concurrent responsibilities as an agent."²⁵ The Uniform Statutory Form Power of Attorney provides that "by accepting or acting under the appointment, the agent assumes the fiduciary and other legal responsibilities of an agent."²⁶

The situation is more formal with regard to trustees. Under the Trust Law, if a trustee accepts the trust, the trustee becomes subject to all applicable duties to administer the trust, cannot later refuse to act, and may resign only by following the procedures prescribed in the statute or the trust instrument. A trustee accepts by signing the trust instrument or knowingly exercising powers under the trust, except in emergency situations.²⁷ Once the trustee has accepted the trust, the

21. See Civ. Code §§ 2432(b)-(c), 2432.5, 2500 (¶ 1 of statutory form durable power of attorney for health care).

22. Some commentators conclude that "a principal can appoint any mentally competent natural adult person who has not been deprived of his or her civil rights and can also appoint institutions." Montgomery & Wright, in *Durable Powers of Attorney for Property Management*, 1991 California Durable Power of Attorney Handbook § 2.46, at 55-56 (Cal. Cont. Ed. Bar).

23. See Prob. Code § 56 ("person" defined).

24. See generally 2 B. Witkin, *Summary of California Law Agency and Employment* §§ 36-37, at 49-51, § 62, at 68 (9th ed. 1987).

25. Montgomery & Wright, *Durable Powers of Attorney for Property Management*, in 1991 California Durable Power of Attorney Handbook § 2.47, at 56 (Cal. Cont. Ed. Bar).

26. Civ. Code § 2475. The full implication of this statement is unknown. This language from the Uniform Statutory Form Power of Attorney Act was inadvertently stricken from the statute in the course of making a conforming revision in the form of the notary's certification. See 1993 Cal. Stat. ch. 141, § 2 [AB 346]. This language is restored in the proposed law.

27. Prob. Code § 15600. Provision is also made for rejecting a trust or modification of a trust. See Prob. Code § 15601.

1 trustee has a duty to administer the trust that does not end until the trustee is
2 removed or allowed to resign.²⁸

3 The tendency of modern statutes is to relieve the attorney-in-fact under a power
4 of attorney from a duty to exercise the authority granted.²⁹ The proposed law
5 adopts this approach, making clear that no duty to exercise the authority conferred
6 in the power of attorney arises merely from being designated as an attorney-in-
7 fact.³⁰ This rule applies whether or not the principal has become incapacitated, is
8 missing, or is otherwise unable to act, unless the attorney-in-fact has agreed
9 expressly in writing to act for the principal in certain circumstances. The attorney-
10 in-fact's agreement is enforceable regardless of whether there consideration is
11 given. In addition, the proposed law provides, contrary to the trust rule, that acting
12 for the principal in one or more transactions does not obligate the attorney-in-fact
13 to act for the principal in later transactions, but the attorney-in-fact has a duty to
14 complete a transaction that has been commenced.

15 These rules are intended to facilitate use of powers of attorney.³¹ It is believed
16 that in the usual case, the principal wants someone to have the ability to act if
17 something needs to be done, but rarely would expect to impose a duty to act on a
18 family member or friend where the person chooses not to act. If a potential
19 attorney-in-fact believes that there is a legal duty to act, he or she may be reluctant
20 to accept the designation in the first instance. Under the proposed rule, the
21 attorney-in-fact may also merely wait until the situation arises and then determine
22 whether to act. The attorney-in-fact may refuse to act because of the personal
23 inconvenience at the time of becoming involved, or for any other reason and is not
24 required to justify a decision not to act. The attorney-in-fact may believe that there
25 are others in a better position to act for the principal or that the situation really
26 warrants appointment of a court supervised guardian or conservator. However,
27 once the attorney-in-fact undertakes to act under the power of attorney, the
28 transaction is governed by the fiduciary duties imposed in the law. But even where
29 the attorney-in-fact has agreed in writing to act for the principal, the proposed law
30 permits the attorney-in-fact to resign by giving notice to the principal (if the
31 principal is competent), when a successor attorney-in-fact agrees in writing to
32 serve in place of the resigning attorney-in-fact, or pursuant to a court order.

28. See Prob. Code §§ 15640-15645 (resignation and removal), 16000 (duty to administer trust).

29. For example, the Illinois statute provides that the agent has no duty to exercise powers granted or to assume control of or responsibility for the principal's property, care, or affairs, regardless of the principal's physical or mental condition. Ill. Ann. Stat. ch. 110 ¶¶ 802-7 (Smith-Hurd Supp. 1990). See also Mo. Ann. Stat. § 404.705(4) (Vernon 1990).

30. This provision is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.705(4) (Vernon 1990).

31. The following discussion draws on the Missouri Bar Association Comment to the new Missouri section. See Missouri Bar Ass'n, Missouri Probate and Trust Update — 1989, at 123-70.

1 Authority of Attorneys-in-Fact

2 The general agency statutes contain a number of statements concerning the
3 power and authority of attorneys-in-fact,³² but these statements are expressed in
4 broad terms and in an artificial, legalistic language that is unlikely to be of much
5 assistance to an attorney-in-fact under a power of attorney. By way of contrast, the
6 Uniform Statutory Form Power of Attorney Act provides for grants of general
7 powers that are amplified in highly detailed statutory language.³³ But if a principal
8 sets out to draft his or her own power of attorney, the statute provides no real
9 guidance on the extent of the attorney-in-fact's authority. An attorney-drafted
10 power of attorney should provide the necessary powers, but this will not always be
11 the case. By way of comparison, the settlor of a trust may rely on the general
12 powers provided in the Trust Law.³⁴

13 The proposed law does not attempt to provide another statement of available
14 powers. Instead, it fleshes out the meaning of a grant of general authority or
15 limited authority to an attorney-in-fact. It also makes clear that an attorney-in-fact
16 granted limited authority has the authority incidental, necessary, or proper to carry
17 out the limited authority.³⁵ The proposed law also authorizes the incorporation of
18 authority by reference to other provisions, such as the Uniform Statutory Form
19 Power of Attorney Act, the guardianship-conservatorship law, or the Trust Law.

20 Some authority may be exercised by an attorney-in-fact only if the authority is
21 expressly granted in the power of attorney, such as the power to create, fund, or
22 revoke a trust, to make, revoke, or disclaim a gift, to change beneficiary
23 designations, or to nominate a conservator for the principal.³⁶ There is also a set of
24 powers that can never be exercised by an attorney-in-fact under a power of
25 attorney: making, amending, or revoking a will, or consenting to certain health

32. See, e.g., Civ. Code §§ 2318 (agent has "actually such authority" as provided by title on agency unless "specifically deprived thereof" by the principal), 2307 (authority may be conferred by "a precedent authorization or a subsequent ratification"), 2315 ("agent has such authority as the principal, actually or ostensibly, confers upon him"), 2316 (actual authority is that intentionally conferred on the agent or that the principal "intentionally, or by want of ordinary care, allows the agent to believe himself to possess"), 2317 (ostensible authority is what the principal "intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess"), 2319 (agent has authority to do "everything necessary or proper and usual, in the ordinary course of business, for effecting the purpose of his agency"), 2320 (agent has power to disobey instructions where "clearly for the interest of his principal that he should do so, and there is not time to communicate with the principal), 2321 ("When an authority is given partly in general and partly in specific terms, the general authority gives no higher powers than those specifically mentioned."), 2322 (general authority does not authorize the agent to act in his own name, unless it is in the usual course of business, to "define the scope of the agency," or to violate basic fiduciary principles concerning loyalty, conflict of interest, or commingling).

33. See Civ. Code §§ 2475 (statutory form), 2485-2499.5 (construction of powers).

34. Prob. Code §§ 16200-16249.

35. This is comparable to the general agency rule in Civil Code Section 2319(1).

36. This provision is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.710(6) (Vernon 1990). It is not clear whether an agent may nominate a conservator under existing law. See Montgomery & Wright, *Durable Powers of Attorney for Property Management*, in 1991 California Durable Power of Attorney Handbook § 2.66, at 70 (Cal. Cont. Ed. Bar).

care procedures, such as convulsive treatment, psychosurgery, sterilization, and abortion.³⁷

Delegation of Attorney-in-Fact's Authority

Existing law is unclear on the extent to which an attorney-in-fact may delegate authority under a power of attorney for property. The power of attorney statutes are silent on the matter, but the general agency statutes permit delegation (1) if the act is "purely mechanical," (2) if the act cannot be performed by the attorney-in-fact but can be by the subagent, (3) if it is the "usage of the place" to delegate the authority, or (4) if the delegation is authorized by the principal.³⁸ Under these general rules, a subagent is not responsible to the principal, nor is the original attorney-in-fact responsible to third persons for the acts of a "lawfully appointed" subagent.³⁹ The language of these sections seems more appropriate to business agencies than to the type of power of attorney prepared by an individual to manage private affairs.

As the default rule, the proposed law permits delegation of mechanical acts or acts the attorney-in-fact cannot lawfully perform. However, unlike the general agency rule, the original attorney-in-fact remains responsible to the principal for the exercise of the authority delegated.

General Duties of Attorneys-in-Fact

The power of attorney statutes do not provide any set of duties for the guidance of attorneys-in-fact, even though an attorney-in-fact will normally be a nonprofessional. The general agency statutes provide insufficient guidance. A few duties are scattered amongst the general agency statutes, such as the obligations not to exceed actual authority, to keep the principal informed, and not to commit fraud on the principal.⁴⁰ The agency statute also forbids violation of a number of duties applicable to trustees.⁴¹ Agents' duties have been fleshed out by commentators and the courts by reference to the Restatement on Agency and the duties of trustees.⁴² But these sources will not be of much assistance to a friend or relative undertaking responsibilities under a durable power of attorney.

37. These limitations are generally consistent with the agency rule in Civil Code Section 2304 (actions to which principal is bound to give personal attention) and the limitations on guardians and conservators under Probate Code Sections 2356 (health care) and 2400 *et seq.* (estate matters).

38. Civ. Code § 2349.

39. Civ. Code §§ 2022, 2350, 2351; see also Civ. Code § 2400.5 (proxy given by agent to exercise stock voting rights).

40. Civ. Code §§ 2019, 2020, 2306.

41. See Civ. Code § 2322(c), forbidding violation of duties of trustee under Prob. Code §§ 16002 (duty of loyalty), 16004 (duty to avoid conflict of interest), 16005 (duty not to undertake adverse trust), 16009 (duty to keep trust property separate and identified).

42. See, e.g., 2 B. Witkin, *Summary of California Law Agency and Employment* §§ 41, 43, 48 (9th ed. 1987); Montgomery & Wright, *Durable Powers of Attorney for Property Management*, in 1991 California Durable Power of Attorney Handbook §§ 2.64-2.67, at 67-71 (Cal. Cont. Ed. Bar).

Other fiduciary laws typically provide a list of basic duties, such as the statutes applicable to guardians and conservators,⁴³ custodians under the Uniform Transfers to Minors Act,⁴⁴ personal representatives,⁴⁵ and trustees.⁴⁶ The Commission believes that it is appropriate to set out in the statute the basic duties of an attorney-in-fact under a power of attorney. The duties in the proposed law have been drawn from existing agency law, from the Trust Law, and from the relevant laws in other states. The proposed law provides the following duties: a duty of care and skill, a duty of loyalty, a duty to keep the principal's property separate and identified, a duty to keep the principal informed and follow instructions, a duty to consult with other persons designated by the principal, a duty to keep records of transactions on behalf of the principal, a duty to use special skills, and a duty to deliver property to appropriate persons on termination of the attorney-in-fact's authority.

Standard of Care

The existing agency rules do not provide a positive statement of a standard of care. The courts, however, have read the statutes to impose a fiduciary standard on attorneys-in-fact, typically the standard applicable to trustees.⁴⁷ The standard of care for trustees has undergone revision from time to time since the general principle analogizing attorneys-in-fact to trustees was laid down.⁴⁸ Much of trust law is influenced by the skilled property management and investment services professional trustees are expected to provide.

The situation of a typical attorney-in-fact under a power of attorney for property is more analogous to a custodian under the Uniform Transfers to Minors Act⁴⁹ than to a trustee. Accordingly, the proposed law provides a nonprofessional fiduciary standard of care as a general rule. This standard requires the attorney-in-fact to observe the standard of care that would be observed by a prudent person dealing with property of another. If the attorney-in-fact is not compensated, the attorney-in-fact is not liable for losses to the principal's property unless the losses result from the attorney-in-fact's bad faith, intentional wrongdoing, or gross negligence. However, if the attorney-in-fact has special skills or was designated as an attorney-in-fact on the basis of representations of special skills, the attorney-in-

43. See generally Prob. Code §§ 2350-2595

44. Prob. Code § 3912.

45. Prob. Code § 9600 *et seq.*

46. Prob. Code § 16000 *et seq.*

47. See cases cited in 2 B. Witkin, *Summary of California Law Agency and Employment* §§ 41 (9th ed. 1987).

48. For background, see *Selected 1986 Trust and Probate Legislation*, 18 Cal. L. Revision Comm'n Reports 1201, 1238-42 (1986).

49. See Prob. Code § 3912(b).

fact is required to observe the standard of care that would be observed by those with similar skills.⁵⁰

Compensation of Attorneys-in-Fact

Existing statutes provide no rules on compensation of attorneys-in-fact, except to say that consideration is not necessary to make an attorney-in-fact's authority binding on the principal.⁵¹ An attorney-in-fact under a power of attorney is generally not expected to receive compensation, since the attorney-in-fact is usually a friend or member of the principal's family who accepts the designation as an accommodation.⁵² The proposed law provides that the attorney-in-fact is entitled to reasonable compensation and to reimbursement of expenses.⁵³ This authority is comparable to the law applicable to compensation and reimbursement of trustees⁵⁴ and custodians under the Uniform Transfers to Minors Act.⁵⁵ The default right to compensation and reimbursement is subject to control in the power of attorney. It is expected that most attorneys-in-fact will serve without expecting compensation, but if the principal becomes incompetent and the attorney-in-fact is expected to incur substantial expenditures of time and money, compensation is entirely appropriate. In fact, omitting a right to compensation might result in the failure of a durable power of attorney to carry out its purpose, since the attorney-in-fact may be unwilling to continue without compensation and reimbursement.

Multiple and Successor Attorneys-in-Fact

The proposed law provides authority for designating multiple attorneys-in-fact and, if the power of attorney does not provide otherwise, specifies that the multiple attorneys-in-fact must act unanimously.⁵⁶ This is consistent with the default rule applicable under the statutory form power of attorney and with the law governing

50. This rule 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 Comment to Prob. Code § 2401 (standard of care applicable to professional guardian or conservator of estate); Comment to Prob. Code § 3912 (standard of care applicable to professional fiduciary acting as custodian under California Uniform Transfers to Minors Act); Prob. Code § 16040 & Comment (standard of care applicable to expert trustee).

51. Civ. Code § 2308. The statutory form power of attorney provides authority for the agent to reimburse expenditures properly made. Civ. Code § 2485(i).

52. See *Montgomery & Wright, Durable Powers of Attorney for Property Management*, in 1991 California Durable Power of Attorney Handbook § 2.51, at 58 (Cal. Cont. Ed. Bar); Missouri Bar Ass'n Comment to Mo. Ann. Stat. § 404.725 (Vernon 1990), Missouri Bar Ass'n, Missouri Probate and Trust Update — 1989, at 156.

53. This provision is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.725 (Vernon 1990).

54. See Prob. Code §§ 15681, 15684(a).

55. See Prob. Code § 3915.

56. The statutory form power of attorney under existing law provides a place for designating multiple attorneys-in-fact and for providing that they may act separately or jointly. Civ. Code § 2475. The statutory form does not provide the option of action by a majority of the designated agents.

1 trustees.⁵⁷ The proposed law also adopts the trust rules permitting action by the
2 remaining co-attorneys-in-fact when one of the co-attorneys-in-fact cannot act due
3 to absence, illness, or other temporary incapacity or when a co-attorney-in-fact's
4 position has become vacant, such as through death or other termination of
5 authority.⁵⁸

6 In addition to multiple attorneys-in-fact who have the same authority, the
7 proposed law recognizes that the principal may designate different attorneys-in-
8 fact to perform separate functions, and may make the designations in one or more
9 powers of attorney.⁵⁹ This recognizes that different attorneys-in-fact may have
10 expertise in different areas.⁶⁰ The proposed law recognizes that the power of
11 attorney may designate successor attorneys-in-fact and provide the manner of their
12 succession. As in the case of trustees, the proposed law makes clear that co-
13 attorneys-in-fact and successor attorneys-in-fact are not liable for the acts of other
14 attorneys-in-fact.⁶¹

15 **Termination of Power of Attorney and Authority of Agent**

16 The general agency statute lists several events that act to terminate an agency.
17 An "agency" is terminated "as to every person having notice thereof" by (1)
18 expiration of its term, (2) extinction of its subject, (3) death of the agent, (4) the
19 agent's renunciation of the agency, (5) the incapacity of the agent to act as such,
20 (6) divorce, annulment, legal separation, between agent and principal, or the filing
21 of an action to do so, in the case of a federal "absentee."⁶² Where the power of the
22 agent is not coupled with an interest, an agency is also terminated by (7)
23 revocation by the principal, (8) the principal's death, (9) or the principal's
24 incapacity to contract (subject to durable power exception).⁶³ A good faith
25 transaction of the agent without actual knowledge of items (7)-(9) is binding on
26 the principal.⁶⁴ The existing power of attorney statute focuses on what does not
27 terminate a durable or nondurable power, providing that the death of the principal
28 does not terminate the agency as to anyone acting in good faith without actual
29 knowledge of the principal's death.⁶⁵

30 The proposed law reorganizes and combines these rules, but preserves most of
31 their substance. As a default rule, the proposed law requires modifications to be

57. Prob. Code § 15620.

58. See Prob. Code §§ 15621-15622.

59. This provision is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.707(1) (Vernon 1990).

60. See Montgomery & Wright, *Durable Powers of Attorney for Property Management*, in 1991 California Durable Power of Attorney Handbook § 2.21, at 42 (Cal. Cont. Ed. Bar).

61. See Prob. Code §§ 16402(a), 16403(a).

62. Civ. Code § 2355.

63. Civ. Code § 2356.

64. Civ. Code § 2356(b).

65. Civ. Code § 2403.

1 executed with the same formality as a power of attorney is created. This rule is
2 intended to provide some certainty to persons dealing with the attorney-in-fact as
3 to the effective contents of the power of attorney. If the principal were allowed to
4 readily modify the terms of the power of attorney, third persons might not be
5 willing to rely on its contents, notwithstanding statutory protections.

6 Revocation of the attorney-in-fact's authority is simpler, however, in order to
7 protect the interests of the principal. Thus, the authority of the attorney-in-fact may
8 be revoked orally, as between the principal and attorney-in-fact and as to any third
9 person who has notice of the revocation. In addition, the proposed law provides
10 that the principal may revoke the power of attorney by a writing.

11 Under the proposed law, events that terminate the attorney-in-fact's authority
12 under a power of attorney, whether durable or nondurable, include (1) expiration
13 of its term or other terminating event as provided in the power of attorney, (2)
14 extinction of its subject or fulfillment of its purpose, (3) revocation by the
15 principal, (4) death of the principal (except for specific statutory authority that
16 continues after death),⁶⁶ and (5) removal of the attorney-in-fact by the principal or
17 a court, (6) resignation of the attorney-in-fact, (7) incapacity of the attorney-in-
18 fact, (8) dissolution or annulment of marriage between the principal and attorney-
19 in-fact, and (9) death of the attorney-in-fact.

20 In the case of a principal and attorney-in-fact who are married, the proposed law
21 generalizes the rule applicable to durable powers of attorney for health care.⁶⁷
22 Thus, as a default rule, dissolution or annulment revokes the authority of the
23 spouse designated as attorney-in-fact. Again, subject to a contrary rule in the
24 power of attorney, the spouse's authority is revived by a remarriage of the parties.
25 This general rule is limited to cases where the marriage between the principal and
26 attorney-in-fact is dissolved or annulled and does not apply when a petition for
27 dissolution, annulment, or separation is filed, as is the case with federal
28 "absentees."⁶⁸ Termination on dissolution or annulment is appropriate in
29 consideration of the broad powers that may be granted in a power of attorney for
30 property. The general rule is also consistent with the rule applicable to wills that,
31 upon the dissolution or annulment of the marriage of the testator, revokes a power
32 of appointment conferred on the former spouse or appointment of the former
33 spouse as executor, trustee, conservator, or guardian.⁶⁹

66. This authority includes winding up affairs under the power of attorney and delivering property and records to the person entitled to them and, where specifically authorized, the authority to make anatomical gifts, authorize an autopsy, or direct disposition of remains.

67. See Civ. Code § 2437(e).

68. See Civ. Code § 2355(f), enacted as part of the P.O.W.-M.I.A. Family Relief Act of 1972 (1972 Cal. Stat. ch. 988, § 1). The special rule applicable to federal absentees under Civil Code Section 2355(f) — that filing a petition for dissolution, annulment, or legal separation revokes the authority — would be relocated to the Probate Code with other absentee provisions. See Prob. Code § 3720.

69. See Prob. Code §§ 6122(a)(2)-(3), 6226(a).

As under existing law, an attorney-in-fact or third person who does not have knowledge of a terminating event is protected from liability.⁷⁰

Relations with Third Persons

Existing law provides a number of rules concerning the relation between attorneys-in-fact and third persons, both in the general agency statutes⁷¹ and in the power of attorney statutes.⁷² These rules protect attorneys-in-fact and third persons without knowledge of some event that would terminate the power of attorney or the authority of the attorney-in-fact. An attorney-in-fact's lack of knowledge of revocation or termination by death or incapacity may be formalized by the giving of an affidavit and the affidavit is deemed conclusive proof of the facts at the time it is given.⁷³ A third person may be compelled to accept the authority of an attorney-in-fact under a statutory form power of attorney to the same extent as the principal could compel the third person to act.⁷⁴

The proposed law continues these principles of existing law, but adds several additional rules intended to make powers of attorney more effective. The proposed law sets forth a general duty on the part of third persons to accord the same rights and privileges with respect to the interests of the principal as if the principal were personally present and acting.⁷⁵ This duty may not be restricted by contract. In order to facilitate compliance with this duty, the proposed law protects a third person acting in good faith and protects the third person in relying on the representations of the attorney-in-fact.

The attorney-in-fact's affidavit is broadened and made more effective in the proposed law. The affidavit may be given voluntarily or in response to the request of a third person. A third person who is given an affidavit and refuses to accept the exercise of the attorney-in-fact's authority covered by the affidavit will be liable for attorney's fees in any judicial proceedings necessary to confirm the attorney-in-fact's authority.

The proposed law also adds new provisions recognizing the right of third persons to require appropriate identification from the attorney-in-fact⁷⁶ and

70. See discussion under "Relations with Third Persons" *infra*.

71. See, e.g., Civ. Code §§ 2342 (warrant of authority), 2343 (agent's responsibility to third persons), 2355(a) (effect of notice on termination), 2356(b) (effect of lack of knowledge of termination of authority on bona fide transactions).

72. Civ. Code §§ 2403 (effect of death or incapacity of principal), 2404 (affidavit of lack of knowledge of termination of power), 2510(c) (good faith reliance in absence of required warning statement), 2512 (protection of person relying in good faith on durable power of attorney).

73. See Civ. Code § 2404.

74. Civ. Code § 2480.5. See *Recognition of Agent's Authority Under Statutory Form Power of Attorney*, 22 Cal. L. Revision Comm'n Reports 965 (1992).

75. This provision is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.710(9) (Vernon 1990).

76. This provision is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.719(4) (Vernon 1990).

1 specifying when a third person who conducts activities through employees is
2 charged with knowledge that would deprive the third person of statutory
3 protections from liability.⁷⁷

4 In order to facilitate use of powers of attorney, the proposed law provides that a
5 copy has the same force and effect as the original if it is certified by a California
6 notary public or attorney or by an official of any state who is authorized to make
7 certifications.

8 UNIFORM STATUTORY FORM POWERS OF ATTORNEY

9 The Uniform Statutory Form Power of Attorney Act⁷⁸ is left largely unchanged
10 because it is a recently enacted uniform act. Several statutory cross-references are
11 revised in the proposed law to reflect relocation of the statute to the Probate Code.

12 DURABLE POWERS OF ATTORNEY FOR HEALTH CARE

13 The provisions concerning durable powers of attorney for health care⁷⁹ are
14 continued in the proposed law with only a few minor changes. The changes
15 involve technical references necessary because of the relocation and renumbering
16 of the sections and to conform to general rules applicable to all non-form powers
17 of attorney. In addition, the general provisions governing durable powers of
18 attorney for health care have been reordered in a more logical sequence. This
19 permits grouping of like provisions, such as those concerning limitations on the
20 use of health care powers, in a separate article for the convenience of persons
21 using the statute.⁸⁰

22 JUDICIAL PROCEEDINGS

23 The procedure for obtaining judicial interpretation and enforcement of duties of
24 attorneys-in-fact under powers of attorney⁸¹ are reorganized in the proposed law,
25 but remain substantively the same. This procedure applies to durable and
26 nondurable powers of attorney for property, to durable powers of attorney for
27 health care, and to statutory forms of both types of powers.

77. The information must be received at a home office or place where there is an employee who is responsible for acting on the information and the employee has a reasonable time within which to act in light of the procedure and facilities available to the third person in the regular course of its operations. This provision is drawn from the Missouri Durable Power of Attorney Law. See Mo. Ann. Stat. § 404.719(3) (Vernon 1990).

78. Civ. Code §§ 2475-2499.5. See *Recommendation Relating to Uniform Statutory Form Power of Attorney Act*, 20 Cal. L. Revision Comm'n Reports 415 (1990).

79. Civ. Code §§ 2430-2444 (general provisions concerning durable power of attorney for health care), 2500-2508 (statutory form durable power of attorney for health care).

80. See Civ. Code §§ 2435, 2440-2443.

81. See Civ. Code §§ 2410-2423.

1 The proposed law also adds some new provisions clarifying the general
2 jurisdiction and power of the superior court in dealing with powers of attorney,⁸²
3 making the personal jurisdiction over attorneys-in-fact more concrete,⁸³ providing
4 new venue rules,⁸⁴ and making clear that there is no right to a jury trial, consistent
5 with the general rule concerning fiduciary relationships.⁸⁵

82. For comparable provisions, see Prob. Code §§ 7050 (decedents' estates), 17000-17001, 17004 (trusts).

83. For comparable provisions, see Prob. Code §§ 3902(b) (custodian under Uniform Transfers to Minors Act), 17003(a) (trustees).

84. For comparable provisions, see Prob. Code §§ 1820-1821 (venue under guardianship-conservatorship law).

85. This is comparable to the rule applicable elsewhere under the Probate Code. See Prob. Code §§ 1452 (guardianships and conservatorships), 7200 (decedents' estates), 17006 (trusts).

SUMMARY CONTENTS

PROBATE CODE: DIVISION 4.5. POWERS OF ATTORNEY [§§ 4000-4952]

PART 1. DEFINITIONS AND GENERAL PROVISIONS [§§ 4000-4054]

CHAPTER 1. SHORT TITLE AND DEFINITIONS [§§ 4000-4034]

CHAPTER 2. GENERAL PROVISIONS [§§ 4050-4054]

PART 2. POWERS OF ATTORNEY GENERALLY [§§ 4100-4309]

CHAPTER 1. GENERAL PROVISIONS [§§ 4100-4102]

CHAPTER 2. CREATION AND EFFECT OF POWERS OF ATTORNEY [§§ 4120-4130]

CHAPTER 3. MODIFICATION AND REVOCATION OF POWERS OF ATTORNEY [§§ 4150-4155]

CHAPTER 4. ATTORNEYS-IN-FACT [§§ 4200-4266]

Article 1. Qualifications and Authority of Attorneys-in-Fact [§§ 4200-4207]

Article 2. Duties of Attorneys-in-Fact [§§ 4230-4238]

Article 3. Authority of Attorneys-in-Fact [§§ 4260-4266]

CHAPTER 5. RELATIONS WITH THIRD PERSONS [§§ 4300-4308]

PART 3. UNIFORM STATUTORY FORM POWER OF ATTORNEY [§§ 4400-4465]

CHAPTER 1. GENERAL PROVISIONS [§§ 4400-4409]

CHAPTER 2. CONSTRUCTION OF POWERS [§§ 4450-4465]

PART 4. DURABLE POWERS OF ATTORNEY FOR HEALTH CARE [§§ 4600-4779]

CHAPTER 1. DEFINITIONS AND GENERAL PROVISIONS [§§ 4600-4653]

Article 1. Definitions [§§ 4600-4621]

Article 2. General Provisions [§§ 4650-4654]

CHAPTER 2. DURABLE POWERS OF ATTORNEY FOR HEALTH CARE [§§ 4700-4752]

Article 1. Creation and Effect of Durable Power of Attorney for Health Care [§§ 4700-4704]

Article 2. Authority of Attorney-in-Fact Under Durable Power of Attorney for Health Care [§§ 4720-4727]

Article 3. Protections and Immunities [§§ 4750-4752]

CHAPTER 3. STATUTORY FORM DURABLE POWER OF ATTORNEY FOR HEALTH CARE [§§ 4770-4779]

PART 5. JUDICIAL PROCEEDINGS CONCERNING POWERS OF ATTORNEY [§§ 4900-4952]

CHAPTER 1. GENERAL PROVISIONS [§§ 4900-4904]

CHAPTER 2. JURISDICTION AND VENUE [§§ 4920-4923]

CHAPTER 3. PETITIONS, ORDERS, APPEALS [§§ 4940-4952]

CONFORMING REVISIONS AND REPEALS

DETAILED CONTENTS

Staff Note. Comments submitted on the Tentative Recommendation are discussed in Staff Notes following the relevant sections. To assist persons reviewing these materials, sections for which there is a Staff Note are indicated in boldface type in the following table of contents.

DIVISION 4.5. POWERS OF ATTORNEY	25
PART 1. DEFINITIONS AND GENERAL PROVISIONS	25
CHAPTER 1. SHORT TITLE AND DEFINITIONS	25
§ 4000. Short title	25
§ 4001. Uniform Durable Power of Attorney Act	25
§ 4010. Application of definitions	25
§ 4014. Attorney-in-fact	25
§ 4016. Capacity	26
§ 4018. Durable power of attorney	26
§ 4022. Power of attorney	26
§ 4026. Principal	26
§ 4030. Springing power of attorney	26
§ 4034. Third person	27
CHAPTER 2. GENERAL PROVISIONS	27
§ 4050. Types of powers of attorney governed by this division	27
§ 4051. Relation to general agency law	28
§ 4052. Application of division to transactions under power of attorney	28
§ 4053. Application to existing powers of attorney and pending proceedings	29
§ 4054. Recognition of durable powers of attorney under law of another state	30
PART 2. POWERS OF ATTORNEY GENERALLY	30
CHAPTER 1. GENERAL PROVISIONS	30
§ 4100. Application of part	30
§ 4101. Priority of provisions of power of attorney	31
§ 4102. Form of durable power of attorney after January 1, 1995	31
CHAPTER 2. CREATION AND EFFECT OF POWERS OF ATTORNEY	32
§ 4120. Who may execute a power of attorney	32
§ 4121. Formalities for executing a power of attorney	32
§ 4122. Requirements for witnesses	33
§ 4123. Permissible purposes	34
§ 4124. Requirements for durable power of attorney	35
§ 4125. Effect of acts under durable power of attorney during principal's incapacity	35
§ 4126. Nomination of conservator in durable power of attorney	36
§ 4127. Lapse of time	36
§ 4128. Warning statement in durable power of attorney	36
§ 4129. Springing power of attorney	38
§ 4130. Inconsistent authority	39
CHAPTER 3. MODIFICATION AND REVOCATION OF POWERS OF ATTORNEY	39
§ 4150. Manner of modification of power of attorney	39
§ 4151. Manner of revocation of power of attorney	40
§ 4152. Manner of revocation of attorney-in-fact's authority	40
§ 4153. Termination of attorney-in-fact's authority	41
§ 4154. Effect of dissolution or annulment	42
§ 4155. Termination of authority under nondurable power of attorney on principal's incapacity	43

CHAPTER 4. ATTORNEYS-IN-FACT	43
Article 1. Qualifications and Authority of Attorneys-in-Fact	43
§ 4200. Qualifications of attorney-in-fact	43
§ 4201. Effect of designating unqualified person as attorney-in-fact	44
§ 4202. Multiple attorneys-in-fact	44
§ 4203. Successor attorneys-in-fact	45
§ 4204. Compensation of attorney-in-fact	45
§ 4205. Delegation of attorney-in-fact's authority	46
§ 4206. Relation of attorney-in-fact to court-appointed fiduciary	46
§ 4207. Resignation of attorney-in-fact	48
Article 2. Duties of Attorneys-in-Fact	48
§ 4230. When duties commence	48
§ 4231. Duty of care and skill	49
§ 4232. Duty of loyalty	50
§ 4233. Duty to keep principal's property separate and identified	50
§ 4234. Duty to keep principal informed and follow instructions	51
§ 4235. Consultation	51
§ 4236. Duty to keep records and account	52
§ 4237. Duty to use special skills	53
§ 4238. Attorney-in-fact's duties on termination of authority	53
Article 3. Authority of Attorneys-in-Fact	54
§ 4260. Limitation on article	54
§ 4261. General power of attorney	54
§ 4262. Limited power of attorney	54
§ 4263. Incorporation of authority	55
§ 4264. Authority that must be specifically granted	55
§ 4265. Excluded authority	56
§ 4266. Exercise of authority subject to duties	56
CHAPTER 5. RELATIONS WITH THIRD PERSONS	56
§ 4300. Third persons required to respect attorney-in-fact's authority	56
§ 4301. Reliance by third person on general authority	56
§ 4302. Identification of attorney-in-fact	57
§ 4303. Protection of third person relying in good faith on durable power of attorney	57
§ 4304. Effect of death or incapacity of principal	58
§ 4305. Affidavit of lack of knowledge of termination of power	58
§ 4306. Reliance on attorney-in-fact's affidavit	59
§ 4307. Certified copy of power of attorney	59
§ 4308. When third person charged with employee's knowledge	60
PART 3. UNIFORM STATUTORY FORM POWER OF ATTORNEY	61
CHAPTER 1. GENERAL PROVISIONS	61
§ 4400. Short title	61
§ 4401. Statutory form power of attorney	61
§ 4402. Requirements for statutory form power of attorney	66
§ 4403. Effect of initialing line in front of (N) in statutory form	66
§ 4404. Durability of statutory form power of attorney	67
§ 4405. Springing statutory form power of attorney	67
§ 4406. Compelling third person to honor statutory form power of attorney	68
§ 4407. General provisions applicable to statutory form power of attorney	69
§ 4408. Use of other forms	69
§ 4409. Use of statutory form provided by repealed statutes	70
CHAPTER 2. CONSTRUCTION OF POWERS	70
§ 4450. Construction of powers generally	71
§ 4451. Real property transactions	71

§ 4452. Tangible personal property transactions	72
§ 4453. Stock and bond transactions	73
§ 4454. Commodity and option transactions	74
§ 4455. Banking and other financial institution transactions	74
§ 4456. Business operating transactions	75
§ 4457. Insurance and annuity transactions	76
§ 4458. Estate, trust, and other beneficiary transactions	77
§ 4459. Claims and litigation	78
§ 4460. Personal and family maintenance	79
§ 4461. Benefits from social security, medicare, medicaid, or other governmental programs, or civil or military service	80
§ 4462. Retirement plan transactions	81
§ 4463. Tax matters	81
§ 4464. After-acquired property	82
§ 4465. Power to modify or revoke trust	82
PART 4. DURABLE POWERS OF ATTORNEY FOR HEALTH CARE	83
CHAPTER 1. DEFINITIONS AND GENERAL PROVISIONS	83
Article 1. Definitions	83
§ 4600. Application of definitions	83
§ 4603. Community care facility	83
§ 4606. Durable power of attorney for health care	83
§ 4609. Health care	83
§ 4612. Health care decision	84
§ 4615. Health care provider	84
§ 4618. Residential care facility for the elderly	84
§ 4621. Statutory form durable power of attorney for health care	84
Article 2. General Provisions	84
§ 4650. Application of chapter	84
§ 4651. Form of durable power of attorney for health care after January 1, 1995	85
§ 4652. Other authority not affected	86
§ 4653. Validity of durable power of attorney for health care executed in another jurisdiction	86
§ 4654. Durable power of attorney for health care subject to former 7-year limit	86
CHAPTER 2. DURABLE POWERS OF ATTORNEY FOR HEALTH CARE	87
Article 1. Creation and Effect of Durable Power of Attorney for Health Care	87
§ 4700. Requirements for durable power of attorney for health care	87
§ 4701. Additional requirements for witnesses of durable power of attorney for health care	88
§ 4702. Limitations on who may be attorney-in-fact	89
§ 4703. Requirements for printed form of durable power of attorney for health care	90
§ 4704. Warnings in durable power of attorney for health care not on printed form	92
Article 2. Authority of Attorney-in-Fact Under Durable Power of Attorney for Health Care	92
§ 4720. Attorney-in-fact's authority to make health care decisions	92
§ 4721. Availability of medical information to attorney-in-fact	94
§ 4722. Limitations on attorney-in-fact's authority	94
§ 4723. Unauthorized acts or omissions	94
§ 4724. Principal's objections	95
§ 4725. Restriction on execution of durable power of attorney for health care as condition for admission, treatment, or insurance	95
§ 4726. Alteration or forging, or concealment or withholding knowledge of revocation of durable power of attorney for health care	95
§ 4727. Revocation of durable power of attorney for health care	96
Article 3. Protections and Immunities	97
§ 4750. Immunities of health care provider	97

§ 4751. Convincing evidence of identity of principal	98
§ 4752. Presumption concerning power executed in other jurisdiction	99
CHAPTER 3. STATUTORY FORM DURABLE POWER OF ATTORNEY FOR HEALTH CARE	99
§ 4770. Short title	99
§ 4771. Statutory form durable power of attorney for health care	99
§ 4772. Warning or lawyer's certificate	108
§ 4773. Formal requirements	108
§ 4774. Requirements for statutory form	109
§ 4775. Use of forms valid under prior law	110
§ 4776. Language conferring general authority	111
§ 4777. Effect of documents executed by attorney-in-fact	111
§ 4778. Termination of authority	111
§ 4779. Use of other forms	112
PART 5. JUDICIAL PROCEEDINGS CONCERNING POWERS OF ATTORNEY	113
CHAPTER 1. GENERAL PROVISIONS	113
§ 4900. Power of attorney freely exercisable	113
§ 4901. Cumulative remedies	113
§ 4902. Effect of provision in power of attorney attempting to limit this part	113
§ 4903. Right to petition under power of attorney	114
§ 4904. Jury trial	114
CHAPTER 2. JURISDICTION AND VENUE	115
§ 4920. Jurisdiction and authority of court or judge	115
§ 4921. Basis of jurisdiction	115
§ 4922. Jurisdiction over attorney-in-fact	115
§ 4923. Venue	115
CHAPTER 3. PETITIONS, ORDERS, APPEALS	116
§ 4940. Petitioners	116
§ 4941. Petition as to powers of attorney other than durable power of attorney for health care	116
§ 4942. Petition as to durable power of attorney for health care	118
§ 4943. Commencement of proceeding	119
§ 4944. Dismissal of petition	120
§ 4945. Notice of hearing	120
§ 4946. Service of notice	120
§ 4947. Proof of service	120
§ 4948. Power of court	121
§ 4949. Temporary health care order	121
§ 4950. Award of attorney's fees	121
§ 4951. Guardian ad litem	122
§ 4952. Appeal	122
CONFORMING REVISIONS AND REPEALS	123
CIVIL CODE 123	
§ 2355 (amended). Means of termination of agency	123
§ 2356 (amended). Termination of agency not coupled with interest	123
§ 2357 (amended). Principal who is "absentee"	124
§§ 2400-2407 (repealed). Uniform Durable Power of Attorney Act	124
§ 2400. Durable power of attorney	124
§ 2400.5. Proxy given by agent to exercise voting rights	124
§ 2401. Effect of principal's incapacity	125
§ 2402. Relation of agent to court-appointed fiduciary	125
§ 2403. Death or incapacity of principal	125
§ 2404. Affidavit of lack of knowledge of termination of power	125

§ 2405. Construction and application	125
§ 2406. Short title	125
§ 2407. Severability	125
§ 2400 (added). Powers of attorney under Probate Code	125
§ 2400. Powers of attorney governed by Power of Attorney Law in Probate Code	125
§§ 2410-2423 (repealed). Court enforcement of duties of attorney in fact	126
§ 2410. Definitions	126
§ 2411. Petitioners	126
§ 2412. Relief available	126
§ 2412.5. Petition as to durable power of attorney for health care	126
§ 2413. Power of court	126
§ 2414. Venue	126
§ 2415. Verified petition	126
§ 2416. Dismissal of petition	126
§ 2417. Hearing	127
§ 2418. Guardian ad litem	127
§ 2419. Appeal	127
§ 2420. Cumulative remedies	127
§ 2421. Limitation by provision in power of attorney	127
§ 2422. Application of article	127
§ 2423. Legislative intent	128
§§ 2430-2445 (repealed). Durable power of attorney for health care	128
§ 2430. Definitions	128
§ 2431. Application of article	128
§ 2432. Requirements for durable power of attorney for health care	128
§ 2432.5. Employee of health care provider, community care facility, or residential care facility	128
§ 2433. Requirements for printed form of durable power of attorney for health care	128
§ 2434. Agent's authority to make health care decisions	128
§ 2435. Limitations on agent's authority	129
§ 2436. Availability of medical information to agent	129
§ 2436.5. Expiration of durable power of attorney for health care	129
§ 2437. Revocation of durable power of attorney for health care	129
§ 2438. Immunities of health care provider	129
§ 2438.5. Presumption concerning power executed in other jurisdiction	129
§ 2439. Other authority not affected	129
§ 2440. Principal's objections	129
§ 2441. Restriction on execution of durable power of attorney for health care as condition for admission, treatment, or insurance	129
§ 2442. Alteration or forging, or concealment or withholding knowledge of revocation of durable power of attorney for health care	129
§ 2443. Unauthorized acts or omissions	129
§ 2444. Form of durable power of attorney for health care	130
§ 2445. Validity of durable power of attorney for health care executed in another jurisdiction	130
§ 2450 (repealed). Use of old statutory forms	130
§§ 2475-2484 (repealed). Uniform Statutory Form Power of Attorney Act	130
§ 2475. Statutory form power of attorney	130
§ 2476. Requirements for statutory form power of attorney	130
§ 2477. Effect of initialing line in front of (N) in statutory form	130
§ 2478. Durability of statutory form power of attorney	130
§ 2479. Springing statutory form power of attorney	130
§ 2480. General provisions applicable to statutory form power of attorney	130
§ 2480.5. Compelling third person to honor statutory form power of attorney	131

§ 2481. Use of other forms	131
§ 2482. Short title	131
§ 2483. Construction	131
§ 2484. Severability	131
§ 2485. Construction of powers generally	131
§ 2486. Real property transaction	131
§ 2487. Tangible personal property transactions	131
§ 2488. Stock and bond transactions	131
§ 2489. Commodity and option transactions	131
§ 2490. Banking and other financial institution transactions	131
§ 2491. Business operating transactions	132
§ 2492. Insurance and annuity transactions	132
§ 2493. Estate, trust, and other beneficiary transactions	132
§ 2494. Claims and litigation	132
§ 2495. Personal and family maintenance	132
§ 2496. Benefits from social security, medicare, medicaid, or other governmental programs, or civil or military service	132
§ 2497. Retirement plan transactions	132
§ 2498. Tax matters	132
§ 2499. After-acquired property	132
§ 2499.5. Power to modify or revoke trust	132
§§ 2500-2508 (repealed). Statutory Form Durable Power of Attorney for Health Care	132
§ 2500. Statutory form of durable power of attorney for health care	133
§ 2501. Warning or lawyer's certificate	133
§ 2502. Formal requirement	133
§ 2503. Requirements for statutory form	133
§ 2503.5. Use of forms valid under prior law	133
§ 2504. Language conferring general authority	133
§ 2505. Effect of documents executed by agent	133
§ 2506. Termination of authority	133
§ 2507. Use of other forms	133
§ 2508. Short title	133
§§ 2510-2514 (repealed). Miscellaneous provisions relating to powers of attorney	133
§ 2510. Warning statement in durable power of attorney	134
§ 2510.5. Form of durable power of attorney after January 1, 1986	134
§ 2511. Convincing evidence of identity of principal	134
§ 2512. Protection of person relying in good faith on durable power of attorney	134
§ 2513. Application to principal's property	134
§ 2514. Springing power of attorney	134
FINANCIAL CODE	134
§ 6725 (amended). Power of attorney as to account in savings and loan association	134
PROBATE CODE	135
Heading of Chapter 5 (commencing with Section 3700) (amended)	135
CHAPTER 5. PERSONAL PROPERTY OF ABSENT FEDERAL PERSONNEL	135
§ 3721 (added). Knowledge where principal is "absentee"	135
§ 3722 (added). Effect of dissolution, annulment, or legal separation on power of attorney	135

Prob. Code §§ 4000-4952 (added). Powers of attorney

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).

§ 4016. Capacity

4016. "Capacity" means an individual's ability to understand the significant risks, benefits, and alternatives of a proposed act or decision, and to make and communicate a choice or decision.

Comment. Section 4016 is new. This definition of "capacity" is drawn from Section 1(3) of the Uniform Health-Care Decisions Act (1993).

Staff Note. This definition is proposed by the State Bar. See the discussion in Memorandum 94-2.

§ 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. "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. A power of attorney may be durable or nondurable.

Comment. Section 4022 restates the first sentence of former Civil Code Section 2410(c) without substantive change. 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 future 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).

Staff Note. The word “future” has been added preceding “event” at the suggestion of Harley Spitler. See Exhibit p. 4.

§ 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 Sections 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(e) (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).

See also Sections 4014 ("attorney-in-fact" defined), 4018 ("durable power of attorney" defined), 4022 ("power of attorney" defined), 4606 ("durable power of attorney for health care" defined).

§ 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. See also Section 4022 ("power of attorney" defined).

§ 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 or 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), 4920-4923 (jurisdiction and venue).

Staff Note. Harley Spitler raises a number of issues concerning this section (see Exhibit p. 4):

(1) He finds the term "executed" to be ambiguous, and reads it to include the signing of a power of attorney by the attorney-in-fact. The staff, on the other hand, considers execution of a power of attorney to be exclusively the act of the principal. This seems clear from the language of the provisions on execution. See, e.g., Sections 4120, 4121. The problem seen by Mr. Spitler could be avoided if subdivisions (a)(1) and (a)(2) read:

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

(2) The principal was domiciled in this state when the principal executed the power of attorney.

The same language would be needed in subdivisions (b)(1) and (b)(5).

(2) Mr. Spitler questions whether subdivision (a)(1) would "validate the AF's acts and transactions in California when, in law, the agency was contracted in Nevada?" If the principal executed the power in California, then under subdivision (a), this states law would apply to the attorney-in-fact's acts and transactions. Where the "agency was contracted" is not a meaningful concept separate from the principal's act of executing the power of attorney. The same answer applies where the attorney-in-fact's actions are in Nevada, barring a different consequence arising from conflicts of laws principles.

(3) Mr. Spitler suggests changing the "refers to" language in subdivision (b) to "provides that the Power of Attorney Law of this state shall govern this instrument." He finds the "refers to" language ambiguous. The staff finds Mr. Spitler's language too specific, since it could be read to require a specific provision in the instrument that the California law applies. The purpose should be to achieve the principal's intent. The assumption in the draft is that a reference to California power of attorney law indicates that intent. The "refers to" language is also used in Section 3902 of the California Uniform Transfers to Minors Act. However, it should be noted that CUTMA is more limited in scope and that the reference is tied to statutory references set forth in Section 3909. The Commission should decide whether "refers to" is too ambiguous. A more formal but not overly restrictive standard might be fashioned from Mr. Spitler's suggestion: "If a power of attorney provides that the Power of Attorney Law of this state governs the power of attorney or otherwise indicates the principal's intention that the Power of Attorney Law of this state governs,...."

§ 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 executed in another jurisdiction, see Section 4653.

Staff Note. Two commentators suggest that enforceability under this section be made more consistent with the rule in Section 4653 applicable to durable powers of attorney for health care. (See Exhibit pp. 1-2, 5.) Paul Gordon Hoffman also suggests that Section 4653 be revised to refer to the domicile of the principal, instead of place of execution. In consideration of these suggestions, Section 4054 could be drafted as follows:

4054. A durable power of attorney executed in another state or jurisdiction in compliance with the law of that state or jurisdiction is valid and enforceable to the same extent as a durable power of attorney executed in compliance with this division.

This language is consistent with 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 statutory form powers of attorney under Part 3 (commencing with Section 4400) or durable powers 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. See also Sections 4022 ("power of attorney" defined), 4606 ("durable power of attorney for health care" defined).

§ 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 either the application of a statute specifically providing that it is not subject to limitation in the power of attorney or a statute concerning any of the following:

- (1) Warnings or notices required to be included in a power of attorney.
- (2) Operative dates of statutory enactments or amendments.
- (3) Execution formalities.
- (4) Qualifications of witnesses.
- (5) Qualifications of attorneys-in-fact.
- (6) Protection of 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 4130 (inconsistent authority), 4151(a)(2) (revocation of power of attorney by writing), 4152(a)(2)-(3) (revocation of attorney-in-fact's authority), 4155 (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), 4233 (duty to keep principal's property separate and identified), 4234(b) (authority to disobey instructions with court approval), 4236 (duty to keep records and account; availability of records to other persons), 4902 (effect of provision in power of attorney attempting to limit judicial proceedings), 4903 (right of conservator and attorney-in-fact to petition for certain purposes).

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

§ 4102. Form of durable power of attorney after January 1, 1995

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 enacted by Chapter 511 of the Statutes of 1981, 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, 1986, 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. See also Section 4018 ("durable power of attorney" defined).

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).

Staff Note. The State Bar states that this section duplicates Section 4022(a) defining power of attorney and suggests deleting this section. (See Exhibit p. 26.) The staff disagrees. A definition should not attempt to provide a substantive rule. If anything should be eliminated, it is excess language in the definition. However, the detail in the definition is there because of earlier State Bar Team suggestions. If this section is retained, the State Bar suggests adding "only" to say that "only a natural person ... may execute a power of attorney" so that it is clear that corporations and partnerships are excluded. This possibility is excluded by the definition in Section 4022.

§ 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 general execution formalities for a power of attorney under this division. 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 Civ. Code § 2475 (now Prob. Code § 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 4022 ("power of attorney" defined), 4026 ("principal" defined).

Staff Note. Harley Spitler would delete subdivision (c): "There is no reason whatsoever that either acknowledgment or witnessing should be a mandatory requirement." (See Exhibit p. 5.) He notes that the Uniform Health-Care Decisions Act does not require either acknowledgment or witnessing. The Commission has decided that acknowledgment is significant because it makes the power readily recordable for purposes of real property transactions. The witnessing option was added for two reasons: it allows a general rule applicable to both property and health care powers that preserves existing health care power law and it gives a principal an alternative when executing a property power. The State Bar Team members have expressed the opinion that some formalities are appropriate and help inhibit the possibility of fraud. As noted in the Comment, the existing general statutes and the Uniform Durable Power of Attorney Act do not require either acknowledgment or witnessing, although the Uniform Statutory Form Power of Attorney Act requires acknowledgment. Does the Commission wish to reconsider this issue?

§ 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 nor (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, as recognized in subdivision (f). See also Section 4771 (statutory form durable power of attorney for health care). This section is not subject to limitation in the power of attorney. See Section 4101.

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).

Staff Note. Harley Spitler would delete this section, consistent with his view that there should be no witnessing provision. (See Exhibit p. 5.) The State Bar concurs in eliminating restrictions on non-health-care powers of attorney. (See Exhibit p. 26.) If the witness provision is retained, Mr. Spitler suggests deleting subdivision (b), (d), and (e). If subdivision (d) is retained, he proposes adoption of language from the Uniform Health-Care Decisions Act. He believes that if the rule in subdivision (d) is read, it will be understood by few.

This last point would be mitigated by taking the alternative language suggested by the State Bar. (See Exhibit pp. 26-27.) The State Bar would not restrict the rule in the second clause of subdivision (d) to taking under a will or by operation of law, but simply state that the witness has no financial interest or expectancy by reason of the principal's death. The staff would adopt the intent of this suggestion and revise subdivisions (d) and (e) as follows:

(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 nor (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, or by a nonprobate transfer under an instrument 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 property at the principal's death ~~under a will now existing or by operation of law.~~"

§ 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 Civil Code 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 4464 (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 special rules concerning health care decisions made by an attorney-in-fact under a power of attorney. See Sections 4609 ("health care" defined), 4612 ("health care decision" defined).

Staff Note. The last paragraph of the Comment has been revised in response to an objection from Harley Spitler. (See Exhibit p. 6.)

§ 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, 4402. For special rules applicable to durable powers of attorney for health care, see Sections 4703, 4771. See also Section 4050 (powers subject to this division).

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 2(b) (construction of provisions drawn from uniform acts). The reference in the Uniform Act to the principal's "disability" is omitted. Under Section 4155, 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, e.g., Sections 4127 (lapse of time), 4153(a)(1) (termination of attorney-in-fact's authority pursuant to terms 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).

§ 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 2(b) (construction of provisions drawn from uniform acts). This section omits the reference to the principal's "disability" found in the uniform act. Under Section 4155, 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), 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 2(b) (construction of provisions drawn from uniform acts). The second sentence of Section 3(b) of the Uniform Durable Power of Attorney Act (most recent nomination in a durable power shall be given effect) is not adopted in California. Thus, the principal may make a later nomination in a writing 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 2(b) (construction of provisions drawn from uniform acts). See also Sections 4125 (effect of attorney-in-fact's acts under durable power of attorney during principal's incapacity), 4153 (termination of authority of attorney-in-fact).

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

§ 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, the principal. 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 this 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 or by executing an amendment through the same formalities as an original. 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 you when you die. 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 limitation in the power of attorney. See Section 4101(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 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), 4026 ("principal" defined), 4034 ("third person" defined).

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

Staff Note. Harley Spitler suggests deleting subdivision (b), saying that he does not understand it. (See Exhibit p. 6; he makes the same point elsewhere in connection with this language wherever it appears.) Perhaps better phrasing can be found, but Mr. Spitler may also be objecting to the policy of restricting the principal's ability to act free of any statutory limitations.

The State Bar would add a cross-reference to the special rule applicable to health care powers under Section 4727(d) (durable power of attorney for health care revokes all earlier durable powers of attorney for health care unless otherwise provided), although the Bar's first suggestion is to eliminate the special rule. Technically, the exception need not be noted because of the rule in Section 4100 that makes the general rules subject to any special rules in stated in Part 3 or 4. However, the staff has no serious objection to including the exception language, noting that there may also be other places where an exception would need to be noted to preserve a consistent drafting style.

CHAPTER 3. MODIFICATION AND REVOCATION OF POWERS OF ATTORNEY

§ 4150. Manner of modification of power of attorney

4150. (a) A principal may modify a power of attorney as follows:

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

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

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

Comment. Section 4150 is new. The manner of modifying a power of attorney as provided in subdivision (a)(2) is more formal than the manner of revoking the attorney-in-fact's authority provided by Section 4152(a). Subdivision (a)(2) is subject to limitation 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), 4034 ("third person" defined).

Staff Note. Harley Spitler makes the same point about "executed" in subdivision (a)(2) that he made in connection with Section 4052. (See Exhibit p. 6; Staff Note following Section 4052.) He also suggests that this section may not be intended to apply to durable powers of attorney for health care, but the staff does not see why that would be, recognizing that other rules also apply to health care powers, as provided in Section 4100. It is really not an issue, since Section 4150 is subsumed by Section 4727.

The principal's right to stop removal of his leg (to use Mr. Spitler's example), is preserved in Section 4727.

§ 4151. Manner of revocation of power of attorney

4151. (a) A principal may revoke a power of attorney as follows:

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

(2) By a writing. This paragraph is not subject to limitation in the power of attorney.

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

Comment. Section 4151 is new. This section provides for termination of the power of attorney, as distinct from revocation of the authority of the attorney-in-fact pursuant to Section 4152. The rule in subdivision (a)(2) permitting revocation of a power of attorney by a writing executed by the principal acts as an escape hatch and is not subject to limitation in the power of attorney. See Section 4101(b) (exception to priority of provisions of power of attorney).

See also Sections 4014 ("attorney-in-fact" defined), 4022 ("power of attorney" defined), 4026 ("principal" defined), 4034 ("third person" defined); Civ. Code § 1216 (recordation of revocation of recorded instruments).

Staff Note. Harley Spitler makes similar points to his comments on Section 4150. (See Exhibit pp. 6-7.) He also suggests adoption of the rule from the Uniform Health-Care Decisions Act. The staff believes this suggestion merits study, but as discussed in Memorandum 94-2, this is not the appropriate stage of this project to do so.

The State Bar suggests adding language to the Comment to Section 4151. (See Exhibit p. 27.) The staff recommends this addition.

§ 4152. Manner of revocation of attorney-in-fact's authority

4152. (a) The authority of an attorney-in-fact under a power of attorney may be revoked as follows:

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

(2) Where 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. This paragraph is not subject to limitation in the power of attorney.

(3) Where 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

1 revoked or when and under what circumstances it is revoked. This paragraph is not
2 subject to limitation in the power of attorney.

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

6 **Comment.** Section 4152 is new. The rules concerning revocation of the attorney-in-fact's
7 authority by the principal are not as strict as the rules on modification of the power of attorney.
8 Compare subdivision (a)(2) with Section 4150(a)(2). No writing is required to revoke the
9 attorney-in-fact's authority, and if a writing is used, it need not be witnessed or notarized to be
10 effective between the principal and attorney-in-fact. Subdivisions (a)(2) and (a)(3)

11 See also Sections 4014 ("attorney-in-fact" defined), 4022 ("power of attorney" defined), 4026
12 ("principal" defined), 4034 ("third person" defined); Civ. Code § 1216 (recordation of revocation
13 of recorded instruments).

14 **Staff Note.** The State Bar suggest switching the order of this section and Section 4153. (See
15 Exhibit p. 27.) This is a question of taste, but the staff has no objection.

16 **§ 4153. Termination of attorney-in-fact's authority**

17 4153. (a) Subject to subdivision (b), the authority of an attorney-in-fact under a
18 power of attorney is terminated by any of the following events:

19 (1) In accordance with the terms of the power of attorney.

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

22 (3) Revocation of the attorney-in-fact's authority, as provided in Section 4152.

23 (4) Death of the principal, except as to specific authority permitted by statute to
24 be exercised after the principal's death.

25 (5) Removal of the attorney-in-fact.

26 (6) Resignation of the attorney-in-fact.

27 (7) Incapacity of the attorney-in-fact, except that a temporary incapacity
28 suspends the attorney-in-fact's authority only during the period of the incapacity.

29 (8) Dissolution or annulment of the marriage of the attorney-in-fact and
30 principal, as provided in Section 4154.

31 (9) Death of the attorney-in-fact.

32 (b) An attorney-in-fact or third person who does not have notice of an event that
33 terminates the power of attorney or the authority of an attorney-in-fact is protected
34 from liability as provided in Chapter 4 (commencing with Section 4300).

35 **Comment.** Section 4153 is drawn from the general agency rules provided in Civil Code
36 Sections 2355 and 2356. This section continues the substance of former law as to termination of
37 the authority of an attorney-in-fact under a power of attorney. For a special rule as to termination
38 of nondurable powers of attorney on principal's incapacity, see Section 4155.

39 Subdivision (a)(1) is the same as Civil Code Section 2355(a). Subdivision (a)(2) is the same as
40 Civil Code Section 2355(b), but the reference to fulfillment of the purpose of the power of
41 attorney is new. Subdivision (a)(3) is the same as Civil Code Section 2356(a)(1). These
42 subdivisions recognize that the authority of an attorney-in-fact necessarily ceases when the
43 underlying power of attorney is terminated.

44 Subdivision (a)(4) is the same as Civil Code Section 2356(a)(2), but recognizes that certain
45 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 post-death decisions), 4720 (authority to make health care decisions, including certain post-death decisions).

Subdivision (a)(5) is generalized from Civil Code Section 2355(c)-(f). Subdivision (a)(6) is similar to Civil Code Section 2355(d) (renunciation by agent). For the manner of resignation, see Section 4207. Subdivision (a)(7) is similar to 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 Section 2355 and Civil Code Section 2356(b), which protect persons without notice of events that terminate an agency.

See also Sections 4014 ("attorney-in-fact" defined), 4022 ("power of attorney" defined), 4026 ("principal" defined), 4034 ("third person" defined); Civ. Code § 1216 (recordation of revocation of recorded instruments).

§ 4154. Effect of dissolution or annulment

4154. (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 4154 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); Civ. Code § 1216 (recordation of revocation of recorded instruments).

Staff Note. Harley Spitler suggests adoption of language from the Uniform Health-Care Decisions Act. (See Exhibit p. 8.) In effect, this would be the same as Section 4154 as qualified by Section 4101, except that the uniform act also terminates authority on legal separation. Earlier drafts presented a number of different proposals, and the possibility of terminating authority on legal separation was fully discussed. The present scheme was decided upon in the interest of simplicity and consistency with the wills provision. It is recognized that the law is not thoroughly consistent, but adopting the rule of the unenacted Uniform Health-Care Decisions Act would not advance the consistency of California law.

The State Bar also suggests adding legal separation to the list of terminating events, but would permit the court to order otherwise in the order for dissolution, annulment, or legal separation. (See Exhibit p. 27.) This proposal has been made and considered before. Does the Commission wish to reconsider this section?

Both Mr. Spitler and the State Bar question the rule that revives a power of attorney upon remarriage of the principal and named attorney-in-fact. (See Exhibit pp. 8, 27.) While the staff does not consider this a major issue, in light of what we assume to be the infrequency of such remarriages, it is consistent with the existing health care rule and wills rule. The revival on remarriage rule is simply intended to avoid unnecessary invalidation. The commentators state that the principal can execute a new document following a remarriage. This reasoning applies equally to wills and health care powers under existing law, and it may also be said with equal force that the principal can revoke a power following remarriage. It looks like a toss-up, with consistency and continuity persuading the staff. Does the Commission wish to reopen the matter?

1 **§ 4155. Termination of authority under nondurable power of attorney on principal's**
2 **incapacity**

3 4155. (a) Subject to subdivision (b), the authority of an attorney-in-fact under a
4 nondurable power of attorney is terminated by the incapacity of the principal to
5 contract.

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

9 (c) This section is not subject to limitation in the power of attorney.

10 **Comment.** Subdivision (a) of Section 4155 restates the general agency rule in Civil Code
11 Section 2356(a)(3) without substantive change.

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

15 See also Sections 4014 ("attorney-in-fact" defined), 4018 ("durable power of attorney"
16 defined), 4022 ("power of attorney" defined), 4026 ("principal" defined), 4034 ("third person"
17 defined); Civ. Code § 1216 (recording of revocation of recorded instruments).

18 **Staff Note.** Harley Spitler suggests deleting this section, but this is based on a misreading of
19 the statutory language. (See Exhibit pp. 8-9.)

20 **CHAPTER 4. ATTORNEYS-IN-FACT**

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

22 **§ 4200. Qualifications of attorney-in-fact**

23 4200. Only a person having the capacity to contract is qualified to act as an
24 attorney-in-fact.

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

29 See also Sections 56 ("person" defined), 4014 ("attorney-in-fact" defined).

30 **Staff Note.** Harley Spitler finds this section troublesome and suggests that it might require a
31 court hearing to determine whether the attorney-in-fact has capacity. (See Exhibit p. 9.) This is
32 not the intent of the section, and we do not believe it can properly be read this way. It seems to
33 the staff that the section states the obvious. It could be deleted without losing anything. The only
34 reason it was included in an earlier draft was that the general agency rule in Civil Code Section
35 2296 (any person may be an agent) seems too broad.

36 **§ 4201. Effect of designating unqualified person as attorney-in-fact**

37 4201. Designating an unqualified person as an attorney-in-fact does not affect
38 the immunities of third persons nor relieve the unqualified person of any
39 applicable duties to the principal or the principal's successors.

40 **Comment.** Section 4201 is drawn from the Missouri Durable Power of Attorney Law. See Mo.
41 Ann. Stat. § 404.707(4) (Vernon 1990). For provisions governing immunities of third persons, see
42 Section 4300 *et seq.*

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

Staff Note. Harley Spitler finds this to be a "mighty strange provision" since he does not see how an attorney-in-fact lacking capacity could carry out or understand his or her duties. (See Exhibit p. 9.) The section would apply to minors who do not have the capacity to contract, although they may be able to understand their duties. It would also apply where an attorney-in-fact has become incompetent so that it is clear to whomever is in charge of that person's affairs that, for example, property and books and records must be turned over to the principal or the principal's successors, or a successor attorney-in-fact.

§ 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 only 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 limitation 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 Section 4401.

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).

Staff Note. The word "only" has been added in subdivision (b) at the suggestion of the State Bar. (See Exhibit p. 28.) Additional editorial suggestions made by Harley Spitler have not been implemented because the language as it stands is consistent with the Trust Law. (See Exhibit p. 9.)

§ 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 4153.

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).

Staff Note. The State Bar suggests deleting the last clause of subdivision (c) "in light of the philosophical decision to impose no independent duty to act on an attorney-in-fact." (See Exhibit p. 28.) But this overstates the situation. The attorney-in-fact may have a duty to act if a transaction has been commenced or if the attorney-in-fact has agreed to accept the duties under the power of attorney. See Section 4230(b)-(c).

Harley Spittler suggests deleting "improperly" in subdivision (c) based on the argument that there is no such thing as a "proper" breach of fiduciary duty. However, the meaning of the provision is that the successor attorney-in-fact is liable where he or she has a *duty* and yet permits the breach to continue, as in a case where the successor does not take steps to compel the predecessor to turn property or records over. The draft is generalized from the Trust Law rules, and attempts to summarize the detail in the Trust Law. An earlier draft presented the detailed language of Section 16403(b), but it seemed out of place in the less formal context of powers of attorney.

The Commission should consider whether to continue subdivision (c). Without the detail of the Trust Law, it does not provide much guidance. The staff does not believe much would be lost by its deletion. We would not simply strike "improperly" however, since that would seem to impose absolute liability on the successor. Nor would we delete only the last clause, since that goes too far in shielding the successor.

§ 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 limitation 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), 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 limitation 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).

Staff Note. Harley Spitler suggests deleting the clause "or acts that the attorney-in-fact cannot lawfully perform." He recognizes that this is drawn from the general agency statute, but believes it is wrong there, too. (See Exhibit p. 9.) This authority would cover acts such as those that may be performed only by a licensed person, such as a broker or attorney. The clause could probably be omitted without serious loss.

§ 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 limitation 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 2(b) (construction of provisions drawn from uniform acts), 4014 ("attorney-in-fact" defined), 4018 ("durable power of attorney" defined), 4026 ("principal" defined).

Staff Note. Both Harley Spitler and the State Bar make three suggestions with regard to this section (see Exhibit pp. 9, 28); the staff would not recommend any of these revisions:

(1) Both suggest deleting "following execution of a durable power of attorney" in the first line of subdivision (a). The State Bar says this is superfluous.

This language is identical to the official text of Section 3(a) of the Uniform Durable Power of Attorney Act (1979), Uniform Probate Code Section 5-503(a) (1991). The State Bar Team that worked closely with the Commission on this draft argued strenuously for preserving language of the Uniform Durable Power of Attorney Act. The staff does not know why the language appears in the uniform act, and were we in a drafting session of the National Conference of Commissioners on Uniform State Laws, we would move to delete it as surplus. Its only apparent purpose is to distinguish situations where the durable power of attorney is executed *after* a conservator is appointed to manage the principal's property. This does not seem very likely, but if it did occur, why wouldn't the rule be the same? Why shouldn't the attorney-in-fact be just as accountable to the conservator in that case?

(2) Both suggest deleting the provision that the attorney-in-fact is accountable to the principal. The State Bar says this would "invite confusion and conflict as to controlling authority."

Once again, this language is identical to the official Uniform Durable Power of Attorney Act. The staff does not understand what confusion and conflict is created in practical terms. The uniform act was revised in 1979 to *insert* accountability to the principal, presumably for consistency with the policy that the durable power of attorney is an alternative to a court-appointed fiduciary. Since the appointment of a conservator does not automatically revoke the power of attorney, it should not displace the accountability to the principal.

(3) Both suggest deleting the second sentence of subdivision (a) pertaining to the fiduciary's power to revoke or amend the durable power of attorney. The State Bar says that it "unreasonably gives non-California fiduciaries more power than is granted to California fiduciaries and creates substantial confusion with subsection (b)."

As might be expected, the core of this provision is from the Uniform Durable Power of Attorney Act. The exception for California conservators was added when the uniform act was enacted on Commission recommendation in 1981. The policy decision was made to require prior court authorization for revocation of a durable power of attorney by a conservator. This furthers the policy of self-determination by giving priority to the attorney-in-fact who was selected by the principal. However the uniform act rule was retained for non-California durable powers of attorney in the interest of uniformity. In addition, it is probably also consistent with conflict of laws principles. The last clause was added when the Commission considered this section in May 1993. Its purpose is to avoid giving a foreign conservator more power than provided by the governing law of the foreign jurisdiction.

§ 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, by giving notice to the principal.

(2) If a conservator has been appointed, by giving notice to the conservator.

(3) On written agreement of a successor who is designated in the power of attorney or pursuant to the terms of the power of attorney to serve as attorney-in-fact.

(4) Pursuant to a court order.

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

Comment. Section 4207 is new. For judicial procedures for approving the attorney-in-fact's resignation, see Sections 4941(e) (petition as to power of attorney other than durable power of attorney for health care), 4942(e) (petition as to durable power of attorney for health care).

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

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), 4022 ("power of attorney" defined), 4026 ("principal" defined).

Staff Note. Harley Spitler disagrees with the policy of this section and would impose a duty on the attorney-in-fact who is made aware of the appointment and fails to renounce the office or tell the principal that he will not act as attorney-in-fact. (See Exhibit pp. 10-11.) It should be noted, however, that the language from the Uniform Health-Care Decisions Act quoted by Mr. Spitler does not impose a duty; it is hortatory language that implies that the principal may get an understanding that the attorney-in-fact is willing to take responsibility. However, that is not the end of the question, since a person may be willing to take responsibility today, but come to a different conclusion a year or five or 10 later. Circumstances may have changed for the person named as attorney-in-fact; he or she may have moved, may be financially unable to commit the time and resources, or not be in physical or emotional condition to do what was once promised. These issues are addressed in the draft.

As a technical revision, the State Bar recommends adding a subdivision (d) to the effect that the other duties provided in Article 2 apply only when the attorney-in-fact is acting or has a duty to act under the power of attorney. The staff would revise subdivision (a) to meet the State Bar's concern:

(a) Except as provided in subdivision subdivisions (b) and (c), a person who is designated as an attorney-in-fact has no duty to exercise the authority granted in the power of attorney and is not subject to the other duties of an attorney-in-fact, regardless of whether the principal has become incapacitated, is missing, or is otherwise unable to act.

§ 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 limitation 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).

§ 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 limitation 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).

Staff Note. Both Harley Spitler and the State Bar suggest deleting the second sentence, thereby enabling the principal to permit conflicts of interest in the power of attorney. (See Exhibit pp. 11, 28.) The staff is somewhat reluctant, but can accept this change. At some theoretical point, however, a power of attorney would cease to be a fiduciary relationship if the attorney-in-fact were fully excused from the duty to act in the principal's interest, since that is the fundamental aspect of a fiduciary relationship.

The State Bar proposes revising this section to read as follows (the staff has made some minor editorial revisions):

4232. (a) An attorney-in-fact has a duty to act in the interest of the principal and to avoid conflicts of interest.

(b) Notwithstanding subdivision (a), an attorney-in-fact is not liable solely because the attorney-in-fact also benefits from acting for the principal, has conflicting interests in relation to the property, care, or affairs of the principal, or acts in an inconsistent manner regarding the respective interests of the principal and the attorney-in-fact.

The staff is not clear on the meaning of the last clause concerning acting in an "inconsistent manner." Perhaps the State Bar representatives can provide further explanation at the meeting. The Commission should consider whether this accommodation to the informal and familial nature of a typical durable power of attorney should be made.

§ 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 limitation 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.

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

Staff Note. The State Bar suggests deleting the second sentence of subdivision (a), making the duty to keep property separate and identified subject to limitation in the power of attorney. (See Exhibit p. 29.) The staff thinks this change is acceptable.

§ 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 limitation 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 Civ. Code § 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). For provisions relating to judicial proceedings, see Section 4900 *et seq.*

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

Staff Note. The State Bar would replace the duty to keep in regular contact and communicate (which they describe as "nebulous") with a duty to keep the principal informed as to the actions of the attorney-in-fact under the power of attorney. (See Exhibit p. 29.) The staff thinks the draft statute is more useful for laypersons, but does not feel strongly about it. The general tenor of the State Bar's commentary on this part of the draft statute has been to make the statute more formal, more like the Trust Law, and arguably less informative for laypersons. Whether this is the best approach in this statute, is up to the Commission.

The State Bar also suggests that the rule in subdivision (b) should be subject to limitation in the power of attorney. The staff agrees with this point. If the principal specifically forbids it, the attorney-in-fact should not be able to disobey the principal's instructions even with a court order.

§ 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).

Staff Note. Harley Spitler says this section is "harmless and not needed" since any attorney-in-fact can consult anytime. (See Exhibit p. 11.) The State Bar wants to make the section more forceful by providing that a court can enforce disclosure and that disclosure of privileged information to the attorney-in-fact does not constitute a waiver of any privilege. (See Exhibit p. 29.)

The State Bar's suggestion could be implemented in part by adding the following to this section:

A person from whom information is requested shall disclose relevant information to the attorney-in-fact. Disclosure under this section is not a waiver of any privilege that may apply to the information disclosed.

The judicial remedy would be covered by revisions in Section 4941.

§ 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 limitation in the power of attorney.

Comment. Section 4236 is drawn in part from Minnesota law. See Minn. Stat. Ann. § 523.21 (West Supp. 1990). For provisions relating to judicial proceedings, see Section 4900 *et seq.*

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

Staff Note. The State Bar finds a "disturbing implication" in this section that the books and records kept by the attorney-in-fact "do not belong" to the principal and that the principal would have to pay to have copies made. (See Exhibit p. 29.) The State Bar seems to propose that the statute be revised to provide that the records belong to the principal or his or her legal representatives, and that the attorney-in-fact would be allowed to make and keep copies at the principal's expense.

It seems to the staff that either way the principal is stuck with the cost, and that the ownership issue does not even arise under the present draft. If it would help, the introductory clause of subdivision (c) could be revised to read: "The following persons are entitled to examine and copy the records of kept by the attorney-in-fact...."

§ 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 limitation in the power of attorney. See Section 4101 (priority of provisions of power of attorney).

See also Section 4014 ("attorney-in-fact" 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 as follows:

(1) If the principal is not incapacitated, to the principal or as directed by the principal.

(2) If the principal is incapacitated, to the following persons with the following priority:

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

(B) As to any community property, to the principal's spouse.

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

(3) 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). This section is subject to limitation in the power of attorney. See Section 4101 (priority of provisions of power of attorney). 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), 4026 ("principal" defined).

Staff Note. Harley Spitler says that this section needs language to protect the principal when the principal and attorney-in-fact are married but have separated. (See Exhibit p. 11.) This ties in with the suggestion that a legal separation should terminate a power of attorney unless otherwise provided in the power. See Section 4154 and the Staff Note following it.

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 is not limited to 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), 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).

Staff Note. This section includes an editorial suggestion made by Harley Spitler. (See Exhibit p. 11.)

§ 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 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 specifically enumerated), 4265 (excluded authority), 4266 (exercise of authority subject to duties). Subdivision (a) is consistent with the general agency rule in Civil Code Sections 2315 and 2318. Subdivision (b) 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).

§ 4263. Incorporation of authority

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 limitation 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).

§ 4264. Authority that must be specifically granted

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 or a person authorized to create a trust on behalf of 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).

Staff Note. The second clause of subdivision (b) has been added at the suggestion of the State Bar. (See Exhibit p. 30.) The purpose is to permit an attorney-in-fact to fund a trust created by a conservator under the substituted judgment provisions.

§ 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), 4606 ("durable power of attorney for health care" defined).

§ 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).

Staff Note. Harley Spitler argues that "permit" should be deleted, saying that the grant of a power is always enough to permit exercise of the power. (See Exhibit p. 11.) The staff disagrees. The authority to sell the home of the principal does not permit the attorney-in-fact to do so if the fiduciary duty of the attorney-in-fact to the principal demands otherwise.

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), 4022 ("power of attorney" 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 on by third persons. 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. 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 provides an immunity from liability where 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 authority), 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 (powers subject to this division), 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), 4026 ("principal" 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-

1 fact or a third person who, without actual knowledge of the incapacity of the
2 principal, acts in good faith under the power of attorney. Any action so taken,
3 unless otherwise invalid or unenforceable, binds the principal and the principal's
4 successors in interest.

5 **Comment.** Section 4304 continues former Civil Code Section 2403 without substantive
6 change. This section is the same in substance as the official text of Section 4 of the Uniform
7 Durable Power of Attorney Act (1979), Uniform Probate Code Section 5-504 (1990), except that
8 the reference to the principal's "disability" is omitted. See Section 2(b) (construction of
9 provisions drawn from uniform acts). Under Section 4155, it is the principal's incapacity to
10 contract which would otherwise terminate the power of attorney.

11 See also Sections 4014 ("attorney-in-fact" defined), 4018 ("durable power of attorney"
12 defined), 4022 ("power of attorney" defined), 4026 ("principal" defined), 4034 ("third person"
13 defined).

14 **§ 4305. Affidavit of lack of knowledge of termination of power**

15 4305. (a) As to acts undertaken in good faith reliance thereon, an affidavit
16 executed by the attorney-in-fact under a power of attorney, whether durable or
17 nondurable, stating that, at the time of the exercise of the power, the attorney-in-
18 fact did not have actual knowledge of the termination of the power of attorney or
19 the attorney-in-fact's authority by revocation or of the principal's death or
20 incapacity is conclusive proof of the nonrevocation or nontermination of the power
21 at that time. If the exercise of the power of attorney requires execution and
22 delivery of any instrument that is recordable, the affidavit when authenticated for
23 record is likewise recordable.

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

27 **Comment.** Section 4305 continues former Civil Code Section 2404 without substantive
28 change. A reference to the attorney-in-fact's authority has also been added in subdivision (a) for
29 consistency with other provisions in this part. See, e.g., Section 4153 (termination of attorney-in-
30 fact's authority). This section is the same as the official text of Section 5 of the Uniform Durable
31 Power of Attorney Act (1979), Uniform Probate Code Section 5-505 (1990), except that the
32 reference to the principal's "disability" is omitted. See Section 2(b) (construction of provisions
33 drawn from uniform acts). Under Section 4155, it is the principal's incapacity to contract which
34 would otherwise terminate the power of attorney.

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

37 **§ 4306. Reliance on attorney-in-fact's affidavit**

38 4306. (a) If the attorney-in-fact furnishes an affidavit pursuant to Section 4305,
39 whether voluntarily or on demand, a third person dealing with the attorney-in-fact
40 who refuses to accept the exercise of an attorney-in-fact's authority referred to in
41 the affidavit is liable for attorney's fees incurred in an action or proceeding
42 necessary to confirm the attorney-in-fact's qualifications or authority, unless the
43 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 authority.

(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 to the third person 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.

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

Staff Note. This section includes an editorial suggestion made by Harley Spitler. (See Exhibit p. 11.)

§ 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 Section 4022 ("power of attorney" 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:

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

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

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

8 See also Sections 4014 ("attorney-in-fact" defined), 4022 ("power of attorney" defined), 4034
9 ("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. See Section 2(b) (construction of provisions drawn from uniform acts). 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.

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

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

6 INITIAL

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

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

23 SPECIAL INSTRUCTIONS:

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

26 _____
27 _____
28 _____
29 _____
30 _____
31 _____
32 _____
33 _____
34 _____
35 _____

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

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

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

9 EXERCISE OF POWER OF ATTORNEY WHERE MORE THAN ONE
10 AGENT DESIGNATED

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

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

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

23 Signed this ____ day of _____, 19__

24 _____
25 (your signature)

26 _____
27 (your social security number)

28 State of _____ County of _____

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

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

34 **Comment.** Section 4401 continues former Civil Code Section 2475 [as amended by AB 346,
35 1993 Cal. Stat. ch. 141, § 2] without change, except for the revision of cross-references to other
36 provisions, the restoration of language erroneously omitted in 1993, and inclusion of a general
37 reference to the law governing the notary's certificate of acknowledgment. Section 4401 is the
38 same in substance as Section 1(a) of the Uniform Statutory Form Power of Attorney Act (1988),

1 with the addition of provisions to permit designation of co-agents. See Section 2(b) (construction
2 of provisions drawn from uniform acts).

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

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

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

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

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

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

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

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

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

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

50 (1) Establish a trust with property of the principal for the benefit of the principal and the spouse
51 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 4304 (good faith reliance on power of attorney without actual knowledge of death or incapacity of principal), 4305 (affidavit of lack of knowledge of termination of power). See also Sections 4300 (third persons required to respect agent's authority), 4301 (immunities of third person), 4303 (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 4303(b)) apply to a statutory form power of attorney. See Sections 4100 (application of division to statutory form power of attorney), 4407 (general provisions applicable to statutory form power of attorney).

The language of the last portion of the text of the statutory form set forth 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).

Staff Note. Harley Spitler makes some comments about this uniform form. (See Exhibit pp. 11-13.) The staff does not believe we should tinker any further with the Uniform Statutory Form Power of Attorney Act.

§ 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). See Section 2(b) (construction of provisions drawn from uniform acts). 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 2477 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). See Section 2(b) (construction of provisions drawn from uniform acts).

§ 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). See Section 2(b) (construction of provisions drawn from uniform acts). 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), 4303 (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 forth 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 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 4305 (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 4303 (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 durable power of attorney). The statutory form set forth 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 attorney-in-fact during incapacity of principal).

Section 4206 (relation of attorney-in-fact to court-appointed fiduciary).

Section 4303 (protection of person relying in good faith on power of attorney).

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

Section 4306 (good faith reliance on attorney-in-fact'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. A form that complies with the requirements of any law other than the provisions of this part may be used instead 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 if 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 Section 2(b) (construction of provisions drawn from uniform acts). 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), 4022 ("power of attorney" defined), 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 Section 2(b) (construction of provisions drawn from uniform acts). 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 Section 2(b) (construction of provisions drawn from uniform acts). 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 Section 2(b) (construction of provisions drawn from uniform acts). See the Comment to this chapter under the chapter heading. See also Sections 4050(b)(3) (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 Section 2(b) (construction of provisions drawn from uniform acts). 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 Section 2(b) (construction of provisions drawn from uniform acts). 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 (A) the location of its operation, (B) the nature and extent of its business, (C) the methods of manufacturing, selling, merchandising, financing, accounting, and advertising employed in its operation, (D) the amount and types of insurance carried, and (E) 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 Section 2(b) (construction of provisions drawn from uniform acts). 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 Section 2(b) (construction of provisions drawn from uniform acts). 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 Section 2(b) (construction of provisions drawn from uniform acts). See the Comment to this chapter under the chapter heading. See also Section 4450 (construction of powers generally).

See also Sections 82 ("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). See Section 2(b) (construction of provisions drawn from uniform acts). 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 Section 2(b) (construction of provisions drawn from uniform acts). 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 Section 2(b) (construction of provisions drawn from uniform acts). 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 Section 2(b) (construction of provisions drawn from uniform acts). 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). See Section 2(b) (construction of provisions drawn from uniform acts). 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 Section 2(b) (construction of provisions drawn from uniform acts). See also Section 4123(b) (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 82 ("trust" defined), 4014 ("attorney-in-fact" defined to include agent), 4026 ("principal" defined).

PART 4. DURABLE POWERS OF ATTORNEY FOR HEALTH CARE

Staff Note. Harley Spitler raises a number of fundamental issues concerning the durable power of attorney for health care. (See Exhibit pp. 13-22.) The staff thinks these comments are valuable and provocative, but as discussed in Memorandum 94-2, we recommend against making substantive revisions in the durable power of attorney for health care statute at this stage of the study. The same may be said as to fundamental issues raised by the State Bar. (See Exhibit pp. 30-31.) Technical issues raised by Mr. Spitler and the State Bar as to sections in this part are considered in Staff Notes below.

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 clause 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).

See also Sections 4014 ("attorney-in-fact" defined), 4018 ("durable power of attorney" defined), 4026 ("principal" defined), 4612 ("health care decision" 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.

Comment. The first part of Section 4609 continues former Civil Code Section 2430(b) without substantive change. As to certain decisions after the principal's death, see Section 4720(b). See also Section 4026 ("principal" defined).

§ 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(g) 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).

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 subdivision (c) of Section 4121 or subdivision (a) of Section 4704; 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. 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 applicable under Sections 4121(c) and 4700(b) is not satisfied and even though the requirement of a warning statement or certificate under Section 4704 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), 4721 (availability of medical information to attorney-in-fact), 4722 (limitations on attorney-in-fact's authority), 4723 (unauthorized acts or omissions), 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), 4727 (revocation), 4750 (immunities of health care provider), 4903 (exceptions to limitations in power of attorney), 4942 (grounds for petition).

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 of this code 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 of this code. 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 of this code 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 of this code.

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.

See also Section 4606 ("durable power of attorney for health care" defined).

§ 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.

See also Section 4606 ("durable power of attorney for health care" defined).

§ 4654. Durable power of attorney for health care subject to former 7-year limit

4654. (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 4654 continues former Civil Code Section 2436.5 without change. This section restricts the former seven-year limit for a durable power of attorney for health care (1) to powers executed between January 1, 1984 and December 31, 1991, and (2) to powers containing a warning statement that refers to a seven-year limit on duration. For a durable power of attorney for health care executed on or after January 1, 1992, that does not contain a warning statement that refers to a seven-year limit on its duration, there is no statutory limit, but only the limit, if any, provided in the durable power itself.

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), 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(c). 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).

Staff Note. Harley Spitler would delete "specifically" in subdivision (a). (See Exhibit p. 16.) The staff agrees that this language could be eliminated as surplus and a litigation invitation, but it may have been included in the original 1983 recommendation in response to a particular objection. We do not know whether that concern is still viable.

§ 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), 4615 ("health care provider" defined), 4618 ("residential care facility for the elderly" defined).

Staff Note. The State Bar would delete subdivision (a) on the grounds that there should not be special restrictions on witnesses other than to require one of the witnesses to be an ombudsman

with respect to patients in a skilled nursing facility. (See Exhibit p. 30.) The State Bar would also eliminate the requirement that the witness declare as to duress, fraud, or undue influence. Harley Spitler would eliminate this section as well. (See Exhibit p. 16.) The staff would not tinker with this section at this stage of the study.

§ 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, recognizes 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) continues former Civil Code Section 2432(c) without substantive change. This subdivision 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

1 decisions for you if your agent (1) authorizes anything that is illegal, (2) acts
2 contrary to your known desires, or (3) where your desires are not known, does
3 anything that is clearly contrary to your best interests.

4 This power will exist for an indefinite period of time unless you limit its duration
5 in this document.

6 You have the right to revoke the authority of your agent by notifying your agent
7 or your treating doctor, hospital, or other health care provider orally or in writing
8 of the revocation.

9 Your agent has the right to examine your medical records and to consent to their
10 disclosure unless you limit this right in this document.

11 Unless you otherwise specify in this document, this document gives your agent
12 the power after you die to (1) authorize an autopsy, (2) donate your body or parts
13 thereof for transplant or therapeutic or educational or scientific purposes, and (3)
14 direct the disposition of your remains.

15 If there is anything in this document that you do not understand, you should ask
16 a lawyer to explain it to you.

17 (b) The printed form described in subdivision (a) shall also include the following
18 notice:

19 "This power of attorney will not be valid for making health care decisions unless it
20 is either (1) signed by two qualified adult witnesses and who are present when you
21 sign or acknowledge your signature or (2) acknowledged before a notary public in
22 California."

23 (c) This section does not apply to the statutory form provided by Section 4771.

24 **Comment.** Subdivisions (a) and (b) of Section 4703 continue former Civil Code Section
25 2433(a)-(b) without change, except that the statement in former Civil Code Section 2433(b) that
26 the witnesses had to be personally known to the principal has been deleted, since it was not
27 consistent with other substantive requirements. Subdivision (c) makes clear that the statutory
28 form is independent of the requirements of this section.

29 Section 4703 sets out a warning statement that is required to be in certain printed forms if the
30 durable power of attorney is designed to authorize health care decisions. The warning statement
31 in subdivision (a) is comparable to the warning in Section 4771 (statutory form durable power of
32 attorney for health care). See Section 4771 Comment.

33 A printed form of a durable power of attorney for health care sold in this state for use by a
34 person who does not have the advice of legal counsel can deal only with the authority to make
35 health care decisions. If a person wants to execute a durable power of attorney to deal with both
36 health care decisions and property matters and the person wants to use a printed form, two
37 different forms are required — one for health care and another for property matters. However, a
38 person who has the advice of a lawyer may cover both health care and property matters in one
39 durable power of attorney. In this case, the warnings or certificate required by Section 4704 must
40 be included.

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

§ 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).

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.

The description of certain post-death decisions in subdivision (b) is not intended to limit the authority to make such decisions under the governing statutes in the Health and Safety Code.

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), 4615 ("health care provider" 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), 4026 ("principal" defined), 4606 ("durable power of attorney for health care" defined), 4609 ("health care" defined), 4612 ("health care decision" 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 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 4014 ("attorney-in-fact" defined), 4022 ("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 4026 ("principal" defined), 4606 ("durable power of attorney for health care" defined), 4609 ("health care" defined), 4612 ("health care decision" 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), 4026 ("principal" 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 4026 ("principal" defined), 4606 ("durable power of attorney for health care" defined), 4609 ("health care" 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 Civil Code Section 2356(b) and is comparable to a provision found in the Natural Death Act. See Health & Safety Code § 7188. 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

1 unlawful homicide where the death of the principal is hastened as a result of the failure to disclose
2 the revocation. See Section 4726.

3 See also Sections 4014 ("attorney-in-fact" defined), 4026 ("principal" defined), 4606 ("durable
4 power of attorney for health care" defined), 4612 ("health care decision" defined), 4615 ("health
5 care provider" defined).

6 **Staff Note.** The State Bar would delete the rule in subdivision (d) and rely on the general rule
7 in Section 4130 which overrides earlier powers only to the extent of the inconsistency, unless the
8 power of attorney provides otherwise. (See Exhibit p. 27; Staff Note following Section 4130.)

9 Article 3. Protections and Immunities

10 **§ 4750. Immunities of health care provider**

11 4750. (a) Subject to any limitations stated in the durable power of attorney for
12 health care and to subdivision (b) and to Sections 4722, 4723, 4724, 4725, and
13 4726, a health care provider is not subject to criminal prosecution, civil liability, or
14 professional disciplinary action except to the same extent as would be the case if
15 the principal, having had the capacity to give informed consent, had made the
16 health care decision on his or her own behalf under like circumstances, if the
17 health care provider relies on a health care decision and both of the following
18 requirements are satisfied:

19 (1) The decision is made by an attorney-in-fact who the health care provider
20 believes in good faith is authorized under this chapter to make the decision.

21 (2) The health care provider believes in good faith that the decision is not
22 inconsistent with the desires of the principal as expressed in the durable power of
23 attorney for health care or otherwise made known to the health care provider, and,
24 if the decision is to withhold or withdraw health care necessary to keep the
25 principal alive, the health care provider has made a good faith effort to determine
26 the desires of the principal to the extent that the principal is able to convey those
27 desires to the health care provider and the results of the effort are made a part of
28 the principal's medical records.

29 (b) Nothing in this chapter authorizes a health care provider to do anything
30 illegal.

31 (c) Notwithstanding the health care decision of the attorney-in-fact designated by
32 a durable power of attorney for health care, the health care provider is not subject
33 to criminal prosecution, civil liability, or professional disciplinary action for
34 failing to withdraw health care necessary to keep the principal alive.

35 **Comment.** Section 4750 continues former Civil Code Section 2438 without change, except for
36 the revision of cross-references to other provisions and other technical, nonsubstantive revisions.

37 Section 4750 implements this chapter by protecting the health care provider who acts in good
38 faith reliance on a health care decision made by an agent pursuant to this chapter. The protection
39 under Section 4750 is limited. A health care provider is not protected from liability for
40 malpractice. Nor is a health care provider protected if the health care provider fails to provide the
41 agent with the information necessary so that the attorney-in-fact can give informed consent. Nor
42 is a health care provider authorized to do anything illegal. See also Sections 4722 (forms of
43 treatment not authorized by durable power of attorney for health care), 4723 (unauthorized acts
44 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), 4026 ("principal" defined), 4603 ("health care" 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).

§ 4751. Convincing evidence of identity of principal

4751. For the purposes of the declaration of witnesses required by Section 4701 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 4701 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 1185 (acknowledgment of instrument by notary public), but is more restrictive because this section does not include the substance of Civil Code Section 1185(c)(1).

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

§ 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 Sections 4606 ("durable power of attorney for health care" defined), 4615 ("health care provider" 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.

1 NOTWITHSTANDING THIS DOCUMENT, YOU HAVE THE RIGHT TO
2 MAKE MEDICAL AND OTHER HEALTH CARE DECISIONS FOR
3 YOURSELF SO LONG AS YOU CAN GIVE INFORMED CONSENT WITH
4 RESPECT TO THE PARTICULAR DECISION. IN ADDITION, NO
5 TREATMENT MAY BE GIVEN TO YOU OVER YOUR OBJECTION AT THE
6 TIME, AND HEALTH CARE NECESSARY TO KEEP YOU ALIVE MAY NOT
7 BE STOPPED OR WITHHELD IF YOU OBJECT AT THE TIME.

8 THIS DOCUMENT GIVES YOUR AGENT AUTHORITY TO CONSENT, TO
9 REFUSE TO CONSENT, OR TO WITHDRAW CONSENT TO ANY CARE,
10 TREATMENT, SERVICE, OR PROCEDURE TO MAINTAIN, DIAGNOSE, OR
11 TREAT A PHYSICAL OR MENTAL CONDITION. THIS POWER IS
12 SUBJECT TO ANY STATEMENT OF YOUR DESIRES AND ANY
13 LIMITATIONS THAT YOU INCLUDE IN THIS DOCUMENT. YOU MAY
14 STATE IN THIS DOCUMENT ANY TYPES OF TREATMENT THAT YOU
15 DO NOT DESIRE. IN ADDITION, A COURT CAN TAKE AWAY THE
16 POWER OF YOUR AGENT TO MAKE HEALTH CARE DECISIONS FOR
17 YOU IF YOUR AGENT (1) AUTHORIZES ANYTHING THAT IS ILLEGAL,
18 (2) ACTS CONTRARY TO YOUR KNOWN DESIRES, OR (3) WHERE YOUR
19 DESIRES ARE NOT KNOWN, DOES ANYTHING THAT IS CLEARLY
20 CONTRARY TO YOUR BEST INTERESTS.

21 THE POWERS GIVEN BY THIS DOCUMENT WILL EXIST FOR AN
22 INDEFINITE PERIOD OF TIME UNLESS YOU LIMIT THEIR DURATION IN
23 THIS DOCUMENT.

24 YOU HAVE THE RIGHT TO REVOKE THE AUTHORITY OF YOUR
25 AGENT BY NOTIFYING YOUR AGENT OR YOUR TREATING DOCTOR,
26 HOSPITAL, OR OTHER HEALTH CARE PROVIDER ORALLY OR IN
27 WRITING OF THE REVOCATION.

28 YOUR AGENT HAS THE RIGHT TO EXAMINE YOUR MEDICAL
29 RECORDS AND TO CONSENT TO THEIR DISCLOSURE UNLESS YOU
30 LIMIT THIS RIGHT IN THIS DOCUMENT.

31 UNLESS YOU OTHERWISE SPECIFY IN THIS DOCUMENT, THIS
32 DOCUMENT GIVES YOUR AGENT THE POWER AFTER YOU DIE TO (1)
33 AUTHORIZE AN AUTOPSY, (2) DONATE YOUR BODY OR PARTS
34 THEREOF FOR TRANSPLANT OR THERAPEUTIC OR EDUCATIONAL OR
35 SCIENTIFIC PURPOSES, AND (3) DIRECT THE DISPOSITION OF YOUR
36 REMAINS.

37 THIS DOCUMENT REVOKES ANY PRIOR DURABLE POWER OF
38 ATTORNEY FOR HEALTH CARE.

39 YOU SHOULD CAREFULLY READ AND FOLLOW THE WITNESSING
40 PROCEDURE DESCRIBED AT THE END OF THIS FORM. THIS
41 DOCUMENT WILL NOT BE VALID UNLESS YOU COMPLY WITH THE
42 WITNESSING PROCEDURE.

1 IF THERE IS ANYTHING IN THIS DOCUMENT THAT YOU DO NOT
2 UNDERSTAND, YOU SHOULD ASK A LAWYER TO EXPLAIN IT TO YOU.

3 YOUR AGENT MAY NEED THIS DOCUMENT IMMEDIATELY IN CASE
4 OF AN EMERGENCY THAT REQUIRES A DECISION CONCERNING
5 YOUR HEALTH CARE. EITHER KEEP THIS DOCUMENT WHERE IT IS
6 IMMEDIATELY AVAILABLE TO YOUR AGENT AND ALTERNATE
7 AGENTS OR GIVE EACH OF THEM AN EXECUTED COPY OF THIS
8 DOCUMENT. YOU MAY ALSO WANT TO GIVE YOUR DOCTOR AN
9 EXECUTED COPY OF THIS DOCUMENT.

10 DO NOT USE THIS FORM IF YOU ARE A CONSERVATEE UNDER THE
11 LANTERMAN-PETRIS-SHORT ACT AND YOU WANT TO APPOINT YOUR
12 CONSERVATOR AS YOUR AGENT. YOU CAN DO THAT ONLY IF THE
13 APPOINTMENT DOCUMENT INCLUDES A CERTIFICATE OF YOUR
14 ATTORNEY.

15 1. DESIGNATION OF HEALTH CARE AGENT.

16 I, _____

17 (Insert your name and address)

18 do hereby designate and appoint _____

19
20 (Insert name, address, and telephone number of one individual only as your agent to make
21 health care decisions for you. None of the following may be designated as your agent: (1)
22 your treating health care provider, (2) a nonrelative employee of your treating health care
23 provider, (3) an operator of a community care facility, (4) a nonrelative employee of an
24 operator of a community care facility, (5) an operator of a residential care facility for the
25 elderly, or (6) a nonrelative employee of an operator of a residential care facility for the
26 elderly.)

27 as my agent to make health care decisions for me as authorized in this document.
28 For the purposes of this document, "health care decision" means consent, refusal
29 of consent, or withdrawal of consent to any care, treatment, service, or procedure
30 to maintain, diagnose, or treat an individual's physical or mental condition.

31 2. CREATION OF DURABLE POWER OF ATTORNEY FOR HEALTH CARE.

32 By this document I intend to create a durable power of attorney for health care
33 under Sections 4600 to 4752, inclusive, of the California Probate Code. This
34 power of attorney is authorized by the Keene Health Care Agent Act and shall be
35 construed in accordance with the provisions of Sections 4770 to 4779, inclusive,
36 of the California Probate Code. This power of attorney shall not be affected by my
37 subsequent incapacity.

38 3. GENERAL STATEMENT OF AUTHORITY GRANTED.

39 Subject to any limitations in this document, I hereby grant to my agent full
40 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 (c) of Section 4701 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 forth in Section 4771 replaces the one set forth 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(b) (incorporating rules in Section 4171 permitting 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 4014 ("attorney-in-fact" defined to include agent), 4026 ("principal" 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), 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 that is set forth 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 the following:

"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 substantive change. This section invalidates a statutory form durable power of attorney for health care that does not contain the statutory warning or, in lieu of the warning, a lawyer's certificate. The warning set forth in Section 4771 must be used in the statutory form instead of the warning set forth in Section 4703.

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

§ 4773. Formal requirements

4773. (a) Notwithstanding subdivision (c) of Section 4121, 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 forth in the first paragraph of the "Statement of Witnesses" in the form set forth in Section 4771, and one of whom also executes the declaration under penalty of perjury set forth in the second paragraph of the "Statement of Witnesses" in the form set forth in Section 4771.

(b) Nothing in this section excuses compliance with the special requirements imposed by subdivision (c) of Section 4701 and subdivision (d) of Section 4702.

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 Sections 4772 and 4773. It should be noted that a statutory form durable power of attorney for health care requires two witnesses and, unlike the general rule under Section 4700(b) (incorporating execution rules of Section 4121), 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 forth 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 forth 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 forth 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 substantive change. This section permits use of a statutory form durable power of attorney for health care that omits portions of the form set forth 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 forth 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 attorney-in-fact is authorized and directed to arrange for 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 4022 ("power of attorney" defined), 4026 ("principal" defined), 4621 ("statutory form durable power of attorney for health care" defined).

§ 4775. Use of forms valid under prior law

4775. (a) A statutory form durable power of attorney for health care executed on or after January 1, 1992, 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, 1992, 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 and subdivision (c) of Section 4774 of this code, on and after January 1, 1992, 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 forth in former Civil Code Section 2500 or the exact wording of the form set forth 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, 1992, 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 forth in former Civil Code Section 2500 or the exact wording of the form set forth 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, 1992). Accordingly, after January 1, 1992, either the form set forth in former Civil Code Section 2500 or the form set forth in Section 4771 may be used. This avoids the need to discard existing printed forms on January 1, 1992. However, forms printed on or after January 1, 1992, must contain the exact wording of the form set forth in Section 4771 or former Civil Code Section 2500, including the warning and instructions, and nothing else.

See also Section 4621 ("statutory form durable power of attorney for health care" defined).

§ 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 forth 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

1 set forth in Section 4771, the document has the same effect as if the principal had
2 executed the document at the same time and under the same circumstances and
3 had the capacity to execute the document at that time.

4 **Comment.** Section 4777 continues former Civil Code Section 2505 without substantive
5 change. See also Sections 4014 ("attorney-in-fact" defined), 4026 ("principal" defined).

6 **§ 4778. Termination of authority; alternate attorney-in-fact**

7 4778. If the authority of the attorney-in-fact under the statutory form durable
8 power of attorney for health care is terminated by the court under Part 5
9 (commencing with Section 4900), an alternate attorney-in-fact designated in the
10 statutory form durable power of attorney for health care is not authorized to act as
11 the attorney-in-fact unless the court so orders. In the order terminating the
12 authority of the attorney-in-fact to make health care decisions for the principal, the
13 court shall authorize the alternate attorney-in-fact, if any, designated in the
14 statutory form durable power of attorney for health care to act as the attorney-in-
15 fact to make health care decisions for the principal under the durable power of
16 attorney for health care unless the court finds that authorizing that alternate
17 attorney-in-fact to make health care decisions for the principal would not be in the
18 best interests of the principal.

19 **Comment.** Section 4778 continues former Civil Code Section 2506 without substantive
20 change. This section applies only where the authority of the attorney-in-fact in fact is terminated
21 by the court. This section does not apply where the attorney-in-fact dies or otherwise is not
22 available or becomes ineligible to act as attorney-in-fact or loses the mental capacity to make
23 health care decisions for the principal or where the principal revokes the attorney-in-fact's
24 appointment or authority. See paragraph 9 (designation of alternate attorneys-in-fact) of statutory
25 form set forth in Section 4771. Where the court terminates the authority of the attorney-in-fact,
26 Section 4778 applies and the alternate attorney-in-fact is not authorized to act as attorney-in-fact
27 unless the court so orders. However, in this case, the court is required to authorize the alternate
28 attorney-in-fact to act unless the court finds that would not be in the best interests of the principal.

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

32 **§ 4779. Use of other forms**

33 4779. Nothing in this chapter affects or limits the use of any other form for a
34 durable power of attorney for health care. Any form complying with the
35 requirements of Chapter 1 (commencing with Section 4600) may be used in lieu of
36 the form provided by Section 4771, and none of the provisions of this chapter
37 apply if such other form is used.

38 **Comment.** Section 4779 continues former Civil Code Section 2507 without substantive
39 change. This section makes clear that a person may use a durable power of attorney for health
40 care that is not a statutory form durable power of attorney for health care under this chapter. The
41 other durable power of attorney for health care — whether a printed form or a specially drafted
42 document — must, of course, comply with the requirements of Sections 4600-4752 and is subject
43 to the provisions of those sections.

PART 5. JUDICIAL PROCEEDINGS CONCERNING
POWERS OF ATTORNEY

CHAPTER 1. GENERAL PROVISIONS

§ 4900. Power of attorney freely exercisable

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 of attorney attempting to limit this part

4902. (a) Except as provided in subdivision (b), this part is not subject to limitation in the power of attorney.

(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 satisfied:

(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)(2) (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 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 limitation in the power of attorney:

(a) The conservator of the estate of the principal may petition the court for any one or more of the purposes 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 in subdivisions (a), (c), and (d) of Section 4942.

(2) The attorney-in-fact may petition the court for any of the purposes 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 4902 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 Section 4942 Comment.

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 division.

(b) The court in proceedings under this division 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 division 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 division, 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 or affecting property or a principal in this state.

Comment. Section 4922 is new. It is 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 division shall be determined in the following order of priority:

(a) The county in which the principal resides.

(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).

CHAPTER 3. PETITIONS, ORDERS, APPEALS

§ 4940. Petitioners

4940. Subject to Sections 4902 and 4903, 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, described 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 in writing 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 4902 (limitation in power of attorney on right to petition), 4903 (exceptions to limitation in power of attorney of right to 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. The State Bar recommends adding a specific reference to the personal representative acting for the estate of the principal. (See Exhibit pp. 31-32.) The staff thinks this is a useful addition, and would add it following subdivision (i).

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

4941. With respect to a power of attorney other than 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 power of attorney is in effect or has terminated.

(b) Passing on the acts or proposed acts of the attorney-in-fact, including approval of authority to disobey the principal's instructions pursuant to subdivision (b) of Section 4234.

(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) Approving the resignation of the attorney-in-fact:

(1) If the attorney-in-fact is subject to a duty to act under Section 4230, the court may approve the resignation, subject to any orders the court determines are necessary to protect the principal's interests.

(2) If the attorney-in-fact is not subject to a duty to act under Section 4230, the court shall approve the resignation, subject to the court's discretion to require the attorney-in-fact to give notice to other interested persons.

(f) Compelling a third person to honor the authority of an attorney-in-fact.

Comment. Section 4941 continues former Civil Code Section 2412 without substantive change, except as noted below.

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).

The authority to petition to disobey the principal's instructions in subdivision (b) is new. This is a limitation on the general agency rule in Civil Code Section 2320. See Section 4234 & Comment.

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.

Subdivision (e) is a new procedure for accepting the attorney-in-fact's resignation. The court's discretion in this type of case depends on whether the attorney-in-fact is subject to any duty to act under Section 4230, as in the situation where the attorney-in-fact has agreed in writing to act or is involved in an ongoing transaction. Under subdivision (e)(1) the court may make any necessary protective order. Under subdivision (e)(2), the court's discretion is limited to requiring that notice be given to others who may be expected to look out for the principal's interests, such as a public

guardian or a relative. In addition, the attorney-in-fact is required to comply with the statutory duties on termination of authority. See Section 4238.

The former limitation of the provision in subdivision (f) to statutory form powers of attorney has been eliminated. See Sections 4300-4308 (relations with third persons).

A power of attorney may limit the authority to petition under this part. See Sections 4902 (limitation in power of attorney on who may petition), 4903 (exception to limitation in power of attorney).

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

Staff Note. The introductory clause has been revised as suggested by Harley Spitler. (See Exhibit p. 22.)

The State Bar suggests restructuring this section to separate internal affairs from proceedings involving third persons. (See Exhibit p. 32.) This is a good suggestion. As discussed in Memorandum 94-2, the staff will prepare a revised draft of the procedural sections for Commission consideration. The State Bar has also suggested addition of a provision permitting a petition to compel a third person to disclose information consistent with Section 4235. See the Staff Note following that section.

§ 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.

(e) Approving the resignation of the attorney-in-fact:

(1) If the attorney-in-fact is subject to a duty to act under Section 4230, the court may approve the resignation, subject to any orders the court determines are necessary to protect the principal's interests.

(2) If the attorney-in-fact is not subject to a duty to act under Section 4230, the court shall approve the resignation, subject to the court's discretion to require the attorney-in-fact to give notice to other interested persons.

Comment. Section 4942 continues former Civil Code Section 2412.5 without substantive change, except as noted below. 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.

Subdivision (e) is new. See Section 4941(e) Comment.

A durable power of attorney for health care may limit the authority to petition under this part. See Sections 4902 (limitation in power of attorney on who may petition) 4903 (exception to limitation 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).

Staff Note. Harley Spitler suggests several substantive changes in this section that relate to the rules concerning communication of the principal's desires to an attorney-in-fact under a durable power of attorney for health care. (See Exhibit p. 22.) In subdivision (b), For example, Mr. Spitler would change "otherwise made known to the court" to "otherwise made known to the attorney-in-fact." This may be a beneficial change, but the staff is reluctant to recommend it because it should be part of an overall review of the health care power.

§ 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) On 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.

See also Section 4022 ("power of attorney" defined).

§ 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).

Staff Note. The State Bar suggests deleting subdivision (c) as duplicative of the general provision in Section 1202. (See Exhibit p. 32.) The staff agrees with the State Bar that the power of attorney procedure should not duplicate the general procedural rules of the Probate Code. As discussed in Memorandum 94-2, the staff will prepare a revised draft that coordinates these procedural sections with the general rules in Section 1000 *et seq.*

§ 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

1 been given as required, the court shall so find in its order, and the order, when it
2 becomes final, is conclusive on all persons.

3 **Comment.** Section 4947 restates former Civil Code Section 2417(d) without substantive
4 change.

5 **§ 4948. Power of court**

6 4948. (a) The court may make all orders and take all other action necessary or
7 proper to dispose of the matters presented by the petition.

8 (b) The court for good cause may shorten the time required for the performance
9 of any act required by this part.

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

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

13 **§ 4949. Temporary health care order**

14 4949. With respect to a durable power of attorney for health care, the court in its
15 discretion, upon a showing of good cause, may issue a temporary order prescribing
16 the health care of the principal until the disposition of the petition filed under
17 Section 4942. If a durable power of attorney for health care is in effect and a
18 conservator (including a temporary conservator) of the person is appointed for the
19 principal, the court that appoints the conservator in its discretion, upon a showing
20 of good cause, may issue a temporary order prescribing the health care of the
21 principal, that order to continue in effect for such time as is ordered by the court
22 but in no case longer than the time necessary to permit the filing and determination
23 of a petition filed under Section 4942.

24 **Comment.** Section 4949 continues former Civil Code Section 2417(h) without substantive
25 change. This section is intended to make clear that the court has authority to provide, for example,
26 for the continuance of treatment necessary to keep the principal alive pending the court's action
27 on the petition. See also Section 4948 (powers of court).

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

30 **§ 4950. Award of attorney's fees**

31 4950. In a proceeding under this part commenced by the filing of a petition by a
32 person other than the attorney-in-fact, the court may in its discretion award
33 reasonable attorney's fees to one of the following:

34 (a) The attorney-in-fact, if the court determines that the proceeding was
35 commenced without any reasonable cause.

36 (b) The person commencing the proceeding, if the court determines that the
37 attorney-in-fact has clearly violated the fiduciary duties under the power of
38 attorney or has failed without any reasonable cause or justification to submit
39 accounts or report acts to the principal or conservator of the estate or of the person,
40 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 Sections 4014 (“attorney-in-fact” defined), 4022 (“power of attorney” defined), 4026 (“principal” 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 Section 4941, except an order pursuant to subdivision (c) of Section 4941.

(b) Any final order made pursuant to Section 4942, except an order pursuant to subdivision (c) of Section 4942.

(c) 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 language of the section has been recast to note the exception to the right to appeal, rather than listing the appealable orders under Sections 4941 and 4942. This has the effect of continuing the former rule that all orders are appealable except orders requiring the attorney-in-fact to account. This also remedies an omission that occurred when the authority to petition to compel a third person to honor the attorney-in-facts authority under a statutory form power of attorney was added to former Civil Code Section 2412. See 1992 Cal. Stat. ch. 178, § 3. 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 in Probate Code Sections 3722 (effect of legal separation or petition for dissolution, nullity, or legal separation in case of federal absentee) and 4154 (effect of dissolution or nullity). The rules concerning powers of attorney are provided in Probate Code Section 4000 *et seq.* See also Sections 4022 ("power of attorney" defined), 4050 (types of powers of attorney governed by Probate Code), 4051 (relation to general agency law), 4153 (termination of attorney-in-fact's authority), 4155 (termination of authority under nondurable power of attorney).

Staff Note. Harley Spitler proposes improvements in the language of this section in an effort to make sense of it. (See Exhibit pp. 22-23.) The staff is sympathetic to any attempt to make these Field Code provisions coherent, but the Commission has restricted its activity in this study to powers of attorney, as distinguished from the general rules of agency.

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 Prob. Code §§ 4022 ("power of attorney" defined), 4050(b)(1) (power coupled with an interest), 4051 (relation to general agency law), 4153 (termination of attorney-in-fact's authority), 4155 (termination of authority under nondurable power of attorney), 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 §§ 4022 ("power of attorney" defined), 4051 (relation to general agency law). 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 (requirements for 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 4050(b)(3) (proxy excluded from definition of power of attorney). See Prob. Code § 4050 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 actions 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 conservator 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 Prob. Code § 4304 Comment.

§ 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) (exclusions from "power of attorney"). See Prob. Code § 4022 Comment.

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 superseded by Probate Code Section 4923 (venue). See Prob. Code § 4923 Comment.

§ 2415. Verified petition; contents

Comment. Former Section 2415 is restated without substantive change in Probate Code 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 omitted as unnecessary. See Prob. Code § 1000 (general rules of practice under Probate Code).

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 4902(b) (effect of provision in power of attorney attempting to limit remedies). See Prob. Code § 4902 Comment.

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 4903 (right to petition under durable power of attorney for health care). See Prob. Code § 4903 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 (power of attorney freely exercisable). 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 4650 without substantive change.

§ 2432. Requirements for durable power of attorney for health care

Comment. The introductory clause and paragraph (1) of subdivision (a) of former Section 2432 are continued without substantive change in Probate Code Section 4700(a). The dating requirement of subdivision (a)(2) is continued without substantive change in Probate Code Section 4121(a). The witnessing requirements of subdivision (a)(3) are continued without substantive change and generalized in Probate Code Sections 4121(c) and 4122. See also Prob. Code § 4700(b) (general execution requirements made explicitly applicable).

Subdivision (b) is continued without substantive change in Probate Code Section 4702(a) and (c).

Subdivision (c) is continued without substantive change in Probate Code Section 4702(d).

Subdivision (d) is continued without substantive change in Probate Code Section 4701(a).

Subdivision (e) is continued without substantive change in Probate Code Section 4122(d).

Subdivision (f) is continued without substantive change in Probate Code Section 4701(c).

§ 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 4702(b) without substantive change.

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

Comment. Subdivisions (a)-(b) of former Section 2433 are continued in Probate Code Section 4703 without substantive change. Subdivisions (c)-(d) are continued in Probate Code Section 4704 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 4652 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 4651 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 4653 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. Use of forms valid under prior law

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 Prob. Code § 4750 (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 4123(b) (application to principal's property).

§ 2514. Springing power of attorney

Comment. The introductory clause of subdivision (a) of former Section 2514 is superseded by Probate Code Section 4010 (application of definitions). Paragraph (1) of subdivision (a) is restated without substantive change in Probate Code 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)-(e) 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 which replaced 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 the Power of Attorney Law.

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 4154.

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 the Power of Attorney Law 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 1403 ("absentee" defined), 4014 ("attorney-in-fact" defined), 4022 ("power of attorney" 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.

1 (g) The protection provided by subdivision (e) does not extend to payments
2 made after written notice is received by the financial institution as to any of the
3 events of termination of the power under subdivision (d) if the financial institution
4 has had a reasonable time to act on the notice. No other notice or any other
5 information shown to have been available to the financial institution shall affect its
6 right to the protection provided by this subdivision.

7 (h) The attorney in fact acting under the power of attorney granted under this
8 section shall maintain such books or records as will permit an accounting of the
9 acts of the attorney in fact if an accounting is requested by a legal representative of
10 the grantor of the power.

11 (i) The attorney in fact acting under a power of attorney granted under this
12 section is liable for any disbursement other than a disbursement to or for the
13 benefit of the grantor of the power, unless the grantor has authorized the
14 disbursement in writing.

15 (j) Nothing in this section limits the use or effect of any other form of power of
16 attorney for transactions with a financial institution. Nothing in this section creates
17 an implication that a financial institution is liable for acting in reliance upon a
18 power of attorney under circumstances where the requirements of subdivision
19 (e) are not satisfied. Nothing in this section affects any immunity that may
20 otherwise exist apart from this section.

21 (k) Nothing in this section prevents the attorney in fact from also being
22 designated as a P.O.D. payee.

23 **Comment.** Subdivision (f)(1) of Section 5204 is amended to substitute a reference to the
24 provision of the Power of Attorney Law that replaced the former Civil Code section.

REVISED COMMENTS

Prob. Code § 2. Continuation of existing law; construction of provisions drawn from uniform acts

Comment. Section 2 continues Section 2 of the repealed Probate Code without change. See also Gov't Code §§ 9604 (reference made in statute, charter, or ordinance to provisions of one statute carried into another statute under circumstances in which they are required to be construed as restatements and continuations and not as new enactments), 9605 (construction of amended statutory provision).

Some of the provisions of this code are the same as or similar to provisions of uniform acts. Subdivision (b) provides a rule for interpretation of these provisions. Many of the provisions of this code are drawn from the Uniform Probate Code (1987). Some provisions are drawn from other uniform acts:

- Sections 220-224 — Uniform Simultaneous Death Act (1953)
- Sections 260-288 — Uniform Disclaimer of Transfers by Will, Intestacy or Appointment Act (1978)
- Sections 260-288 — Uniform Disclaimer of Transfers Under Nontestamentary Instrument Act (1978)
- Sections 3900-3925 — Uniform Transfers to Minors Act (1983)
- Sections 4001, 4124-4127, 4206, 4304-4305 — Uniform Durable Power of Attorney Act
- Sections 4400-4465 — Uniform Statutory Form Power of Attorney Act
- Sections 6300-6303 — Uniform Testamentary Additions to Trusts Act (1960)
- Sections 6380-6390 — Uniform International Wills Act (1977). See also Section 6387 (need for uniform interpretation of Uniform International Wills Act)
- Sections 16200-16249 — Uniform Trustees' Powers Act (1964)
- Sections 16300-16313 — Revised Uniform Principal and Income Act (1962)

A number of terms and phrases are used in the Comments to the sections of the new Probate Code (including the "Background" portion of each Comment) to indicate the sources of the new provisions and to describe how they compare with prior law. The portion of the Comment giving the background on each section of the repealed code may also use terms and phrases to indicate the source or sources of the repealed section and to describe how the repealed section compared with the prior law.

The following discussion is intended to provide guidance in interpreting the terminology most commonly used in the Comments.

(1) *Continues without change.* A new provision "continues" a former provision "without change" if the two provisions are identical or nearly so. In some cases, there may be insignificant technical differences, such as where punctuation is changed without a change in meaning. Some Comments may describe the relationship by simply stating that a new provision "continues" or is "the same as" a former provision of the repealed Probate Code, or is "the same as" a provision of the Uniform Probate Code or another uniform act.

(2) *Continues without substantive change.* A new provision "continues" a former provision "without substantive change" if the substantive law remains the same but the language differs to an insignificant degree.

(3) *Restates without substantive change.* A new provision "restates" a former provision "without substantive change" if the substantive law remains the same but the language differs to a significant degree. Some Comments may describe the new provision as being the "same in substance."

1 (4) *Exceptions, additions, omissions.* If part of a former provision is “continued” or “restated,”
2 the Comment may say that the former provision is continued or restated but also note the specific
3 differences as “exceptions to,” “additions to,” or “omissions from” the former provision.

4 (5) *Generalizes, broadens, restates in general terms.* A new provision may be described as
5 “generalizing,” “broadening,” or “restating in general terms” a provision of prior law. This
6 description means that a limited rule has been expanded to cover a broader class of cases.

7 (6) *Supersedes, replaces.* A provision “supersedes” or “replaces” a former provision if the new
8 provision deals with the same subject as the former provision but treats it in a significantly
9 different manner.

10 (7) *New.* A provision is described as “new” where it has no direct source in prior statutes.

11 (8) *Drawn from, similar to, consistent with.* A variety of terms is used to indicate a source for a
12 new provision, typically a source other than California statutes. For example, a provision may be
13 “drawn from” a uniform act, model code, Restatement, or the statutes of another state. In such
14 cases, it may be useful to consult any available commentary or interpretation of the source from
15 which the new provision is drawn for background information.

16 (9) *Codifies.* A Comment may state that a new provision “codifies” a case-law rule that has not
17 previously been enacted into statutory law. A provision may also be described as codifying a
18 Restatement rule, which may or may not represent previously existing common law in California.

19 (10) *Makes clear, clarifies.* A new provision may be described as “making clear” a particular
20 rule or “clarifying” a rule as a way of emphasizing the rule, particularly if the situation under
21 prior law was doubtful or contradictory.

22 (11) *Statement in Comment that section is “comparable” to another section.* A Comment may
23 state that a provision is “comparable” to another provision. If the Comment to a section notes that
24 another section is “comparable” that does not mean that the other section is the same or
25 substantially the same. The statement is included in the Comment so that the statute user is alerted
26 to the other section and can review the cases under that section for possible use in interpreting the
27 section containing the statement in the Comment.

28 **Staff Note.** This comment is proposed for revision to correct the list of uniform acts.