

First Supplement to Memorandum 94-2

**Comprehensive Power of Attorney: Comments on Tentative
Recommendation (General Procedural Provisions)**

Attached to this supplement is a draft showing revisions needed to remove provisions that are covered by general rules in the Probate Code. The State Bar suggested that this be done in connection with draft Section 4945 (see Draft Recommendation at p. 120).

Respectfully submitted,

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Assistant Executive Secretary

Exhibit

Draft Power of Attorney Procedural Provisions

Staff Note. The following draft sections are proposed to replace and supplement the corresponding material in the draft recommendation attached to Memorandum 94-2.

1 **§ 4905. Application of general procedural rules [new]**

2 4905. Except as otherwise provided in this division, the general provisions in
3 Division 3 (commencing with Section 1000) apply to proceedings under this
4 division.

5 **Comment.** Section 4905 provides a cross reference to the general procedural rules that apply to
6 this division. See, e.g., Sections 1003 (guardian ad litem) (superseding former Civil Code Section
7 2418), 1021 (verification required) (superseding part of former Civil Code Section 2415), 1041
8 (clerk to set matters for hearing) (superseding former Civil Code Section 2417(a)), 1046 (hearing
9 and orders) (superseding former Civil Code Section 2413), 1203 (order shortening time for
10 notice) (superseding former Civil Code Section 2417(f)), 1215-1216 (service) (superseding
11 former Civil Code Section 2417(c)), 1260 (proof of service) (superseding former Civil Code
12 Section 2417(d)).

13 **Staff Note.** Strictly speaking, this section is not needed, since the general provisions of the
14 Probate Code apply without the need for assistance.

15 **§ 4943. Commencement of proceeding**

16 4943. (a) A proceeding under this part is commenced by filing a verified petition
17 stating facts showing that the petition is authorized under this part, the grounds of
18 the petition, and, if known to the petitioner, the terms of the power of attorney.

19 ~~(b) On the filing of a petition under this part, the clerk shall set the petition for~~
20 ~~hearing.~~

21 **Comment.** ~~Subdivision (a) of Section 4943 restates parts of former Civil Code Section 2415~~
22 without substantive change. The former reference to filing in the superior court is restated in a
23 different form in Section 4920. The language concerning the grounds of the petition is new and is
24 drawn from Section 17201 (commencement of proceeding under Trust Law). A petition is
25 required to be verified. See Section 1021.

26 ~~Subdivision (b) restates former Civil Code Section 2417(a) without substantive change.~~
27 See also Section 4022 ("power of attorney" defined).

28 **§ 4944. Dismissal of petition**

29 4944. The court may dismiss a petition if it appears that the proceeding is not
30 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 Subject to Sections 1202 and 1203, 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. The explicit cross-reference is consistent with Section 1460 applicable to guardianships and conservatorships.

§ 4946. Service of notice

~~4946. Service shall be made by mailing to the last known address of the person required to be served unless the court in its discretion requires that notice be served in some other manner. Personal delivery is the equivalent of mailing.~~

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

§ 4947. Proof of service

~~4947. Proof of compliance with Sections 4945 and 4946 shall be made at or before the hearing. If it appears to the satisfaction of the court that the notice has been given as required, the court shall so find in its order, and the order, when it becomes final, is conclusive on all persons.~~

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

§ 4948. Power of court

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

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

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

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

§ 4949, 4946. Temporary health care order

4949. 4946. With respect to a durable power of attorney for health care, the court in its discretion, upon a showing of good cause, may issue a temporary order prescribing the health care of the principal until the disposition of the petition filed under Section 4942. If a durable power of attorney for health care is in effect and a conservator (including a temporary conservator) of the person is appointed for the principal, the court that appoints the conservator in its discretion, upon a showing of good cause, may issue a temporary order prescribing the health care of the principal, that order to continue in effect for such time as is ordered by the court but in no case longer than the time necessary to permit the filing and determination of a petition filed under Section 4942.

Comment. Section 4949 4946 continues former Civil Code Section 2417(h) without substantive change. This section is intended to make clear that the court has authority to provide, for example, for the continuance of treatment necessary to keep the principal alive pending the court's action on the petition. See also Section 4948 1046 (powers of court authority to make appropriate orders).

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

§ 4950, 4947. Award of attorney's fees

4950. 4947. In a proceeding under this part commenced by the filing of a petition by a person other than the attorney-in-fact, the court may in its discretion award reasonable attorney's fees to one of the following:

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

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

Comment. Section 4950 4947 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).

1 **§ 4952. 4948. Appeal**

2 4952. 4948. An appeal may be taken from any of the following:

3 (a) Any final order made pursuant to Section 4941, except an order pursuant to
4 subdivision (c) of Section 4941.

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

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

9 **Comment.** Section 4952 4948 continues former Civil Code Section 2419 without substantive
10 change. The language of the section has been recast to note the exception to the right to appeal,
11 rather than listing the appealable orders under Sections 4941 and 4942. This has the effect of
12 continuing the former rule that all orders are appealable except orders requiring the attorney-in-
13 fact to account. This also remedies an omission that occurred when the authority to petition to
14 compel a third person to honor the attorney-in-facts authority under a statutory form power of
15 attorney was added to former Civil Code Section 2412. See 1992 Cal. Stat. ch. 178, § 3. The
16 reference to “decree” in former Civil Code Section 2419(a) is omitted as unnecessary.