Study L-3044 January 20, 1994

First Supplement to Memorandum 94-10

Comprehensive Power of Attorney Statute: Definition of Capacity

This supplement presents a brief overview of the law concerning capacity to contract, which is the governing rule as to capacity in the Power of Attorney Law recommendation. At the January meeting, the Commission discussed whether a definition of "capacity" should be included in the recommended statute, how it would be defined, and whether one definition should apply to the capacity of the principal to execute a power, the capacity of the principal that triggers a springing power or terminates a nondurable power of attorney, and the capacity of an attorney-in-fact to exercise authority under the power of attorney. At that time, the Commission declined to include the definition proposed by the State Bar Executive Committee, and decided that the existing standard of capacity to contract should continue to apply, having the benefit of bringing a history of case-law interpretations. The staff was directed to prepare a memorandum giving additional background on capacity to contract and how it would apply in the power of attorney context.

Since the full 200-page recommendation has not been reproduced for this meeting, we have attached the sections relating to capacity as an exhibit to this supplement for reference purposes.

State Bar Committee Proposal

The State Bar Executive Committee proposed the following definition of capacity in its letter commenting on the Tentative Recommendation:

> "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.

The Committee described the concept of capacity as a core feature of the subject matter of powers of attorney and described the proposal as "a good, working definition." The Committee wrote that the definition could be used in all contexts in which capacity arises in the area of durable powers of attorney.

In discussing the proposal at the January meeting, State Bar Executive Committee representatives suggested that lawyers may pretend to know what

"capacity to contract" means, but really don't, and that a statutory definition would help solve this problem. The Committee did not intend to provide a higher or lower standard, but rather to provide a "simple, straitforward, elegant solution" that will work in the four situations where capacity is a determinant under the statute. The Committee hoped that the proposed language would help address the abuses that can occur in the use of powers of attorney.

In the January discussion, the concern was expressed that changing the standard would sever the statute from the case law, resulting in less certainty and clarity in the law, rather than more. In addition, application of a different standard in this area of the law could create a gap between other areas, such as contracts, wills, and conveyancing, where the traditional standard remained applicable. The proposal would also require a separate treatment of minors.

Existing California Law

Civil Code Section 2296 provides: "Any person having capacity to contract may appoint an agent...." Thus, the capacity to employ an agent and become a principal is determined by the law of contracts. See 2 B. Witkin, SUMMARY OF CALIFORNIA LAW *Agency and Employment* § 33, at 47 (9th ed. 1987); 1 B. Witkin, SUMMARY OF CALIFORNIA LAW *Contracts* § 332 *et seq.* (9th ed. 1987).

The general test of capacity to contract is stated in Smalley v. Baker, 262 Cal. App. 2d 824, 832-33, 69 Cal. Rptr. 521 (1968), which involved the attempted rescission of a contract made by a "manic depressive" but otherwise competent person:

> In California, as in many states, a party is entitled to rescission of a contract if, when he entered into the contract, he was not mentally competent to deal with the subject before him with a full understanding of his rights, the test being, in each instance, whether he understood the nature, purpose and effect of what he did. [Citations omitted.] The test is aimed at cognitive capacity and specifically asks the question whether the party understood the transaction which he seeks to avoid. Some contracts require less competence than others, so that the test of understanding varies from one contract to the next. [Citations omitted.]
>
> The traditional test of competence goes to understanding, that is, cognitive capacity, rather than to motivation. [Citations omitted.] Accordingly, cases in other jurisdictions have denied rescission to persons entering into contracts while afflicted by psychoses of the manic-depressive type because this particular illness impairs judgment but not understanding....

The court summarizes the statutory scheme applicable to contracts as follows [*id.* at 834-35]:

> Before proceeding to discuss the law of contractual incompetency applicable in this state to a contract entered into by a manic-depressive psychotic, we note that the Legislature has categorized incompetency due to weakness of mind as follows: (1) Total weakness of mind which leaves a person entirely without understanding and renders such person incapable of making a contract of any kind (Civ. Code, § 38); (2) a lesser weakness of mind which does not leave a person entirely without understanding but destroys the capacity of the person to make a contract, thus rendering the contract subject to rescission (Civ. Code, § 39); and (3) a still lesser weakness which provides sufficient grounds to rescind a contract because of undue influence. (Civ. Code, § 1575; see *Odorizzi v. Bloomfield School Dist., supra,* 246 Cal.App.2d at p. 131.) The last mentioned statute, in subdivision 2 thereof, provides that undue influence consits [sic] "In taking an unfair advantage of another's weakness of mind...." In *Odorizzi* it is noted that the lesser weakness of mind referred to in section 1575 need not be long lasting or wholly incapacitating, but may consist of such factors as lack of full vigor due to age, physical condition, emotional anguish, or a combination of such factors. (P. 131.) It would appear, therefore, that since the manic-depressive psychosis is a mental illness it is clearly a weakness of mind in the context of Civil Code section 1575.

The court in Drum v. Bummer, 77 Cal. App. 2d 453, 460, 175 P.2d 879 (1946), discusses the law as follows:

> Appellants contend that the contract is binding on plaintiff. In support of that contention they argue, in effect, that plaintiff was never adjudged incompetent, was not without understanding, transacted certain business for himself such as making deposits in the bank, and that the contract was fair and equitable. Plaintiff had not been adjudged incompetent and, it appears, he was not entirely without understanding. In such a case the test to be applied is whether the party was mentally competent to deal with the subject before him with a full understanding of his rights—whether he actually understood the nature, purpose and effect of what he did. (*Maxon v. Avery,* 43 Cal.App.2d 155, 157 [110 P.2d 446]; *Carr v. Sacramento C. P. Co.,* 35 Cal.App. 439, 442 [179 P. 446].) It was stated in *Jacks v. Deering,* 150 Cal. 272, 274 [88 P. 909], regarding a mortgagor's mental soundness, that at the time she executed the promissory note and mortgage she was "then a person of unsound

> mind, *but was not entirely without understanding*, nor had her incapacity been judicially determined; that at the time of her execution of the said promissory note and mortgage *she did not have sufficient mental capacity to understand the nature, purpose and effect of the transaction* in which she was engaged, or of the promissory note and mortgage...." The trial court herein found that plaintiff was not mentally capable of understanding the acts or the legal effect of the acts in which he was engaged, and that finding is supported by the evidence. Furthermore, it cannot be said that the contract was fair and equitable. Under its provisions, if the arrangement should become tiresome or no longer beneficial to defendants, they could terminate the agreement regardless of the plaintiff's then age, physical, or financial condition. If, on the other hand, plaintiff should become dissatisfied with the transaction, he would have no choice, but would be required to remain with defendants. He was burdened further with the insecurity of his position in not knowing how long defendants would choose to perform the agreement.

Adopting a different standard than generally applicable in contract and agency law requires that the new standard be clearly preferable to justify a special new rule in the Power of Attorney Law. The staff does not believe the case has been made for departing from the existing scheme. While a clearer, more objective rule might be drafted after appropriate study and circulation of proposals, it should apply to all agencies and contracts and other related areas of the law. There is a danger in altering one segment of agency law, since a gap could result between agencies governed by the new law (powers of attorney) and agencies governed by the general law of agency in the Civil Code. A person's power to make contracts and create agencies generally would not be coextensive with that person's power to create a durable (or nondurable) power of attorney under the new statute.

The concept of capacity to contract is flexible and adaptable. It is woven through a number of areas of law. The capacity to contract is not an elusive standard, although it must be stated in general terms — so, too, are the alternative definitions we have discussed. (The literature contains proposals for more precise, scientific standards, but this is a subject for future study.)

While the staff does not recommend it, the case-law language could be used to develop a statutory rule, such as the following:

> "Capacity" means a person's ability to understand the nature, purpose, and effect of an action or decision and to make and communicate a decision.

This draft is patterned on the State Bar Committee's suggestion, in that it contains the communication feature as icing on the cake. More significantly, however, it makes the standard more abstract by focusing on the person's *ability* to understand, rather than the question of whether the person did *in fact* understand. The case law on capacity to contract, as demonstrated in the language quoted above, considers both abstract capacity as well as whether the person had the requisite understanding of the facts in the case in the particular situation. The courts have not been content simply to determine the abstract question of whether the person had the ability to understand, shorn from the idea of whether they did understand in the case. This seems to the staff to be a better protection against abuse than would result from a literal application of the proposal offered by the State Bar Committee.

Uniform Probate Code Standard

Section 5-103 of the Uniform Probate Code (UPC) contains a definition of "incapacitated person" that may have been the inspiration for the Uniform Health-Care Decisions Act definition:

> (7) "Incapacitated person" means any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or other cause (except minority) to the extent of lacking sufficient understanding or capacity to make or communicate responsible decisions.

It is interesting to note, however, that the Uniform Commissioners limited this definition to the UPC sections concerning guardians and other protective proceedings, specifically excluding the part of Article 5 relating to durable powers of attorney. The prefatory note to the Uniform Durable Power of Attorney Act states that it "permits a principal to create an agency in another that continues in spite of the principal's later loss of *capacity to contract.*" [Emphasis added.]

As a third alternative, the staff suggests consideration of the language of the UPC definition of incapacitated person as the basis for a power of attorney rule:

> "Incapacity" means a person's impairment by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or other cause (except minority) to the extent of lacking sufficient understanding or capacity to make or communicate responsible decisions.

The consequences of defining "incapacity" instead of "capacity" have not been fully analyzed by the staff, but on its face, the definition seems adaptable to the draft.

Control by Instrument

It should be remembered that a well-drafted power of attorney can deal with some of the issues with which the State Bar is concerned. A springing power of attorney can specify a procedure for determining when the power springs, i.e., when the attorney-in-fact is given authority to make decisions. This may depend on determinations made by a doctor alone or with consultation and consent of other persons. Similarly, the instrument can set forth a standard for determining when the attorney-in-fact is deemed to lack capacity for the purpose of suspending or terminating the attorney-in-fact's authority. The instrument could even provide a standard for its own termination, although if the power is not a durable power of attorney, it would have to have a stricter standard to be effective (since incapacity to contract would terminate the power by operation of law if it is not a durable power). The only aspect that is not subject to some control in the instrument is the capacity required to create an instrument.

Drafting Issues

If a definition of capacity is included in the recommendation, a number of conforming revisions will need to be made to link the definition to the various substantive provisions where capacity is relevant. (See the sections set out in the Exhibit.) Any definition that defines capacity or incapacity in a way that does not deal with minors would also require that a rule excluding minors be added to the statute.

Summary of Staff Recommendations

The staff recommendations may be summarized as follows:

(1) The staff recommends against revising the recommendation to include a definition of capacity. This recommendation is based on our conclusions that existing law is adequate, that any shortcomings have not been demonstrated, that the proposed standard drawn from the Uniform Health-Care Decisions Act is not an improvement, and that piecemeal revisions of the capacity standard are undesirable.

(2) If the Commission decides that it would be beneficial to include a definition of capacity in the recommendation, the staff suggests adopting a test

drawn from the cases, as discussed above. While there is always a risk in attempting to codify case law, it seems minimal in this situation. However, the contextual, fact-based determination used in existing cases could be threatened by the statutory focus on the *ability* of the principal to understand. At least codifying the existing standard would not have the other drawbacks associated with adopting a new standard.

(3) As an alternative to codifying the case-law standard, a rule drawn from the Uniform Probate Code could be adopted, as set out above. This alternative shares the drawbacks of the State Bar Executive Committee's proposal, but is preferable because it seems more concrete — notwithstanding the fact that the Uniform Commissioners did not apply the UPC standard to the Uniform Durable Power of Attorney Act.

Respectfully submitted,

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Exhibit

Power of Attorney Law Recommendation:
Sections Relating to Capacity

Staff Note. Sections pertaining to capacity are excerpted from the recommendation relating to the Comprehensive Power of Attorney Law. For ease of use, "capacity" and related words have been set out in bold-face type.

§ 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).

§ 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).

§ 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).

§ 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), 4152(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).

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

4152. (a) Subject to subdivision (b), the authority of an attorney-in-fact under a power of attorney is terminated by any of the following events:

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

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

(3) Revocation of the attorney-in-fact's authority, as provided in Section 4153.

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

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

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

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

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

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

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

Comment. Section 4152 is drawn from the general agency rules provided in Civil Code Sections 2355 and 2356. This section continues the substance of former law as to termination of the authority of an attorney-in-fact under a power of attorney. For a special rule as to termination of nondurable powers of attorney on principal's **incapacity**, see Section 4155.

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

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

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

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

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

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

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

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

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

§ 4200. Qualifications of attorney-in-fact

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

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

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

§ 4202. Multiple attorneys-in-fact

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

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

§ 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.

For provisions concerning the powers of conservators, see, e.g., Sections 2252 (powers of temporary conservator), 2403 (petition for instructions), 2580 (petition for proposed action). 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).

§ 4230. When duties commence

4230. (a) Except as provided in 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.

(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 arises only 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).

§ 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. 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.

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).

§ 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).

§ 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).

§ 4304. Effect of death or incapacity of principal

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

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

Comment. Section 4304 continues former Civil Code Section 2403 without substantive change. This section is the same in substance as the official text of Section 4 of the Uniform Durable Power of Attorney Act (1979), Uniform Probate Code Section 5-504 (1990), except that the reference to the principal's "disability" is omitted. See Section 2(b) (construction of provisions drawn from uniform acts). 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), 4022 ("power of attorney" defined), 4026 ("principal" defined), 4034 ("third person" defined).

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

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

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

Comment. Section 4305 continues former Civil Code Section 2404 without substantive change. A reference to the attorney-in-fact's authority has also been added in subdivision (a) for consistency with other provisions in this part. See, e.g., Section 4152 (termination of attorney-in-fact's authority). This section is the same as the official text of Section 5 of the Uniform Durable Power of Attorney Act (1979), Uniform Probate Code Section 5-505 (1990), except that the reference to the principal's "disability" is omitted. See Section 2(b) (construction of provisions drawn from uniform acts). 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), 4022 ("power of attorney" defined), 4026 ("principal" defined).

§ 4401. Statutory form power of attorney

....

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.

....

§ 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).

§ 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).

§ 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 4900-4948 (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).

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

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

§ 4750. Immunities of health care provider

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

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

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

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

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

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

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

Subdivision (c) provides immunity to the health care provider insofar as there might otherwise be liability for failing to comply with a decision of the attorney-in-fact to withdraw consent previously given to provide health care necessary to keep the principal alive. This subdivision does not deal with providing health care necessary to keep the principal alive. The situations

where such health care can be provided without informed consent (such as an emergency situation) continue to be governed by the law otherwise applicable.

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

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

....

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

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

3. GENERAL STATEMENT OF AUTHORITY GRANTED.

Subject to any limitations in this document, I hereby grant to my agent full power and authority to make health care decisions for me to the same extent that I could make such decisions for myself if I had the **capacity** to do so. In exercising this authority, my agent shall make health care decisions that are consistent with my desires as stated in this document or otherwise made known to my agent, including, but not limited to, my desires concerning obtaining or refusing or withdrawing life-prolonging care, treatment, services, and procedures.

(If you want to limit the authority of your agent to make health care decisions for you, you can state the limitations in paragraph 4 ("Statement of Desires, Special Provisions, and Limitations") below. You can indicate your desires by including a statement of your desires in the same paragraph.)

....

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, these persons to serve in the order listed below:

....

§ 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

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

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

§ 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:

....

(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.

....

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).

§ 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:

....

(d) Declaring that the durable power of attorney for health care is terminated upon a determination by the court that the attorney-in-fact has made a health care decision for the principal that authorized anything illegal or upon a determination by the court of both of the following:

(1) The attorney-in-fact has violated, has failed to perform, or is unfit to perform, the duty under the durable power of attorney for health care to act consistent with the desires of the principal or, where the desires of the principal are unknown or unclear, is acting (by action or inaction) in a manner that is clearly contrary to the best interests of the principal.

(2) At the time of the determination by the court, the principal lacks the **capacity** to execute or to revoke a durable power of attorney for health care.

....

Comment. Section 4942 continues former Civil Code Section 2412.5 without substantive change, 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).

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 of the Probate Code, 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), 4152 (termination of attorney-in-fact's authority), 4155 (termination of authority under nondurable power of attorney).

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)~~ 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), 4152 (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 of the Probate Code, 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").

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);