Study L-4000 July 10, 1996

First Supplement to Memorandum 96-39

Health Care Decisions: Selected Issues
(Hoffman Comments)

Attached to this supplement is a letter from Paul Gordon Hoffman, a Los Angeles attorney, commenting on several of the issues raised in Memorandum 96-39. We will consider Mr. Hoffman's remarks at the meeting.

Respectfully submitted,

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Assistant Executive Secretary

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July 8, 1996

Paul Gordon Hoffman

Mr. Stan Ulrich
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Re: Study L-4000: Health Care Decisions

Dear Mr. Ulrich:

This letter is written in response to Memorandum 96-39.

As a technical matter, I think the chart contained on page 15 is somewhat misleading. Durable Powers of Attorney must either be signed by two witnesses or by a notary public. Calif. Prob. Code Sections 4121, 4700-4703. The chart seems to indicate that having a signature by either witnesses or a notary public is optional, when in fact it is necessary to have one or the other. On the other hand, as I understand it from the memorandum, the UHCDA provides that while witnesses can sign the document, it is effective despite a lack of witnesses. In my view, that makes correct the notation that witnesses on a UHCDA are optional.

I support the repeal of the NDA, and the incorporation of the substance of its provisions into the Probate Code provisions for DPAHCs.

I also support the adoption of a "statutory surrogacy" to cover situations where a person has not signed a DPAHC. It seems to me that the conceptual framework of the law on health care surrogacy provisions should follow the pattern of appointment of a personal representative at death. In other words, California law provides for a prioritization of people who would serve as administrator of an estate if you die without a Will; but if you follow the proper formalities and leave a Will, then you can appoint whoever you want to serve as executor.

Similarly, California should provide a prioritization of people who can make medical decisions for you; but you should be able to override this by signing a document with appropriate formalities.

Assuming that California adopts a "statutory surrogacy" law, the problems will then revolve around how one can supersede that law and appoint someone other than the statutory surrogate. And, in turn, the real question is what formalities should be required for a DPAHC to be effective.

Problems will arise only in those cases where a person other than the person or persons holding the priority decision making position, seek to make the decisions over the objection of the person or persons whom the legislature has decided should be entitled to make the decisions. I suspect that the default provisions will reflect the wishes of most people. However, there may well be cases (for example, a dispute between the children from a prior marriage and a relatively new spouse; or a dispute between the family of a gay or lesbian individual and that individual's long time companion) where the emotions are high and the general rules may not reflect the wishes of the individual.

I would oppose allowing an oral appointment of a health care surrogate, for the same reasons we do not allow an oral Will. There is too great a potential for misunderstanding or fraudulent claims. You should note that California repealed the concept of nuncupative Wills, at the recommendation of the Law Revision Commission. Even nuncupative Wills (prior to their repeal) required the testimony of two witnesses in order to be valid.

I recognize that refusing to allow oral DPAHCs is at variance with the UHCDA, and in general I support the notion of adopting uniform acts without change in order to facilitate the ability of individuals to move from one state to another without the need for rewriting their estate planning documents. However, I believe that there are certain policy matters where a state may fairly decide to "draw the line" and vary from the uniform law.

The issue of sister state powers of attorney was raised in the Memorandum. I would note, however, that Probate Code Section 4653 provides that a DPAHC or similar instrument <u>executed</u> in another state or jurisdiction in compliance with the laws of that place will be valid. Presumably, the requirement of

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execution would invalidate a claim that an oral instruction, valid in another state, should suffice to make such an instruction valid in California.

I am somewhat less certain about the possibility of allowing a handwritten, but unwitnessed and unnotarized, DPAHC. California law permits a holographic Will to appoint an Executor and dispose of assets. Should there be more onerous provisions for the execution of a DPAHC?

It seems to me that somewhat greater protections should be required of an unwitnessed and unnotarized DPAHC than are required for a holographic Will. A holographic Will is enforced only after there has been a noticed court hearing on its validity. Typically, a DPAHC would be acted on without prior court review. Perhaps a reasonable compromise position would be that a holographic, or unwitnessed and unnotarized, DPAHC would be valid only if a court order is obtained, after appropriate notice to the persons who would be entitled to act as the surrogate in the absence of a DPAHC. In other words, the burden of proof, and the burden of acting to prove the document, should be greater with a document of more questionable reliability (a holograph), than with one of presumably greater reliability (one that is witnessed or notarized.)

Very truly yours,

Paul Gordon Hoffman

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