

## Memorandum 97-60

### **Health Care Decisions: Revised Staff Draft (Incorporating Uniform Health-Care Decisions Act into Probate Code)**

---

At the June meeting, the Commission considered the first staff draft showing how the Uniform Health-Care Decisions Act and the California Natural Death Act (NDA) could be combined in a reorganized Division 4.5 (Powers of Attorney and Health Care Decisions) of the Probate Code. (See Memorandum 97-41 & attached draft.) The second staff draft, attached to this memorandum, experiments with a different approach: placing the health care decisionmaking rules in a separate division following the Power of Attorney Law (PAL).

At the September meeting, the staff need guidance as to the better approach and we would like the Commission to focus on structural and organizational issues presented in the memorandum. If time permits, there are many policy and drafting issues that can be considered in the attached draft.

#### **Alternative Structures**

As noted in the Memorandum 97-41, there is no ideal way to fit the Uniform Health-Care Decisions Act (UHCDA) into the Probate Code. The staff outlined a number of possible organizational schemes in that memorandum, all of which have their advantages and disadvantages. The first staff draft adopted the approach of integrating the new material from the uniform act and the remains of the NDA into the PAL. This approach reflected an emphasis on health care decisionmaking from the power of attorney perspective and attempted to preserve the application of the PAL general provisions to powers of attorney for health care. This approach puts additional strain on the attempt to make general provisions apply to both property powers and health care powers, since addition of the Uniform Health-Care Decisions Act to the PAL (which must then be renamed to broaden its scope) means that some general provisions apply to "advance directives" (health care powers of attorney and other written directives), some apply to all powers of attorney (and not advance directives other than powers of attorney), some apply to all health care decisions (and not

property powers of attorney). In short, the linear organization of the existing PAL is not very adaptable when new types of instruments are added.

As the staff worked on the draft and as the Commission considered parts of the draft at the June meeting, the organizational conundrums were becoming more apparent. Some will probably prefer the approach of the first draft and suggest ways of dealing with its inherent problems, but the staff concluded that it is worth testing a different approach. Instead of ordering the new draft along the lines of powers of attorney, the second draft focuses on health care decisionmaking and treats advance health care directives together with statutory surrogacy and other health care decisionmaking issues, along the general lines of the Uniform Health-Care Decisions Act, but with major additions from the existing durable power of attorney statute. It should also be noted that drafting a separate division makes it easier to implement an early Commission guideline — that rules from the UHCDA should be preferred unless an existing California rule is clearly superior.

### **Working Group Recommendations**

After the June meeting, James Deeringer, liaison with the State Bar Estate Planning, Trust and Probate Law Section Executive Committee, suggested to the staff that further consideration be given to the organizational issues. A working group was organized and the staff met with them on August 23: Jim Deeringer, Leah Granof, and Faye Blix, of the State Bar, and Professor David English, the Commission's consultant and Reporter for the UHCDA. We spent about four hours discussing the structural and drafting issues in some detail.

The working group reached a general consensus on a number of issues that have provided the basis for this second staff draft statute:

- *The health care decisions law should be in a separate division, next to or near the Power of Attorney Law.* — This reflects the view that health care decisionmaking is a better unifying concept and that powers of attorney for health care have more in common with other advance directives than they do with powers of attorney for property. It also recognizes that a different class of persons and entities are called upon to recognize property powers (e.g., banks, title companies, brokers) than are involved with health care powers (e.g., doctors, hospitals, nursing homes).
- *The health care decisions division should be drafted to provide sufficient space for future development.* — Crafting a statute as in the first staff draft is an intricate process that may work well enough in the short

run, but could become increasingly complex and difficult as amendments and additions are made in the future. Issues involved in conditioning general rules in the PAL that are apparent during a comprehensive revision project are not likely to be apparent to those drafting amendments at a later stage.

- *Relevant rules from the PAL should be restated in appropriate terminology in the health care decision law. — This requires detailed review of every arguably applicable general provision in the PAL. The working group started with the assumption that incorporation by cross-reference to specific sections in the PAL would be the best approach, but as we worked through the general provisions in the PAL, we came to the conclusion that the important rules could be identified and many, if not most, should be tailored to fit the health care context. A beneficial byproduct of this approach is that special qualifications and exceptions scattered throughout the “general” provisions of the PAL can be eliminated, thereby simplifying the law applicable to property powers as well.*
- *The health care law should be less technical than the PAL, and should aim to be “user friendly” for patients and medical professionals. — For example, the detailed rules governing modification and revocation are not likely to be needed for health care advance directives. (On the other hand, we will find that some technical witnessing requirements will be more complicated in the health care area.)*
- *General agency law could be incorporated as a backup, but the PAL should not be incorporated by the health care statute. — The benefit of crafting rules applicable to health care decisionmaking would be undermined if those using the law needed to study and apply the detailed rules of the PAL, essentially recreating the “Russian doll” approach. General agency law is rarely relevant and when it is, it tends to be commonsensical. In any event, in the rare case where a court is involved, it would probably adopt general agency and fiduciary principles as needed.*

The working group was also concerned that, in the time available for preparation and consideration of the second staff draft, the new approach might be rejected before it had a chance to make its case. But in order to move this project forward, the staff felt it was necessary to present an admittedly rough draft at the September meeting. There are some gaps, inconsistencies, and overlaps in the drafting of the attached statute, but we believe it provides a fair basis for judging the benefits and detriments of the separate health care decisionmaking statute even in this rough form.

## Current Coverage of PAL Provisions

The general rule under the Power of Attorney Law is that all sections apply to all powers covered by the act unless specifically provided to the contrary. This results in the theoretical application of rules to health care powers that may not make much sense or are irrelevant in practice. At the same time, important rules are applicable to health care powers by operation of the general statutes, but this may not always be apparent and can be a source of confusion for those who have not studied the PAL in detail.

In addition, there are a significant number of exceptions and additions to the general rules that complicate their easy application to health care powers. Comments to the PAL sections provide a fairly comprehensive lists of exceptions to the general rules, but they do not attempt to resolve conflicts or indicate the extent to which some special rule may apply in relation to a general rule. In sum, we count nine general PAL sections with specific exceptions or limitations relating to health care powers, and over 25 references in Comments.

The challenge posed in separating health care powers from the PAL and placing them in a version of the UHCDA is to preserve desired rules. As noted above, the working group concluded that PAL rules should be reiterated in the health care decisionmaking statute rather than relying on incorporation or some other mechanism. Other approaches are possible: For example, *very* general rules, such as Section 4051 applying general agency rules can apply to all powers and advance directives, and *fairly* general rules, such as Section 4052 concerning choice of law can apply to all powers of attorney, since it is carefully crafted and detailed along those lines — but whether it should apply to other advance directives is problematic. This issue can be raised for many of the sections in Parts 1 and 2 of the PAL. Some *nominally* general rules look to be general, but specifically or logically apply only to non-health care powers, such as Section 4128 (required warning, not applicable to health care powers), Section 4155 (termination of authority under nondurable power), Section 4233 (duty to keep property separate and identified), and Section 4238(a) (duty to return principal's property on termination of attorney-in-fact's authority).

The complications in the structure of existing law are illustrated by the following examples of exceptions to application of general rules. They may be *explicit*, and apply to aggregations of sections (e.g., Section 4260(b) (article)) or only to single sections (e.g., Section 4128(c)), or even to subdivisions within sections (e.g., Section 4203(b)). Exceptions may overlay or supplement general

rules, as in the special witnessing and execution rules, where the statute is explicit about the additional requirements (see Sections 4121-4122, 4700-4701). The overlay may be more subtle, as in the relation between the general rule on inconsistent powers of attorney in Section 4130 and the health care power rule in Section 4727(d). Finally, the statute may provide inconsistent or variant rules, leaving the issue open as to whether the “general” section is supplanted by the “special” rule in toto or only to the extent of the inconsistency. Compare, e.g., Section 4053 (general rule on recognition of foreign powers of attorney) with Section 4653 (health care power version of the rule).

The interlocking scope rules under the PAL are indicated in the following brief summary:

***Part 1. General Provisions (Sections 4000-4054)***

Section 4050 provides that the PAL (Division 4.5 of the Probate Code) “applies to” various types of powers of attorney, including DPAHCs under Part 4, Section 4600 *et seq.*

Section 4051 provides that the general agency rules in the Civil Code apply to “powers of attorney” unless the PAL provides a specific rule.

***Part 2. Powers of Attorney Generally (Sections 4100-4310)***

Section 4100 provides that this part applies to all powers under the division, subject to special rules applicable to DPAHCs. The general rules on creation and effect of powers of attorney are set out in Sections 4120-4130, modification and revocation are governed by Sections 4150-4155, qualifications and duties of attorneys-in-fact are in Sections 4200— these rules apply in general to all types of powers.

This is not apparent to everyone, including those who have studied the law. The Consent Manual of the California Health-Care Association states that the “statute does not say that the attorney-in-fact must be an adult..., and it is not clear that even an emancipated minor would have the capacity to serve” implying that there are no rules governing this issue in the PAL. However, Section 4200, applicable to all powers of attorney, provides that “only a person having the capacity to contract is qualified to act as an attorney-in-fact.”

Several sections have special additional health care rules or exceptions (see Sections 4122(d) (witnesses), 4123(d) (permissible purposes), 4128(c)(2) (warning statement), 4152(a)(4) (exercise of authority after death of principal), 4203(b) (attorney-in-fact’s authority to appoint successor), 4206(c) (relation to court-appointed fiduciary)).

As an exception to the general rule of this part, Section 4260 provides that Article 3 (Sections 4260-4266) of Chapter 4 concerning authority of attorneys-in-fact does not apply to DPAHCs.

***Part 3. Uniform Statutory Form Power of Attorney (Sections 4400-4465)***

This relates only to property matters, and is (thankfully) not directly implicated in our structural discussions, although I can imagine some structural revisions of the PAL general rules that would require technical revisions here.

***Part 4. Durable Powers of Attorney for Health Care (Sections 4600-4806)***

The structural problems within this part are involved in the main drafting initiative. Ideally, this part will be simpler because there will not be so many confusing rules concerning warnings and preprinted forms and the statutory form. However, the advance made on that front may be offset by the complications arising from addressing other advance directives and surrogacy rules. As you are all aware, it is this prospect that puts the great tension on the existing structure of the PAL.

***Part 5. Judicial Proceedings Concerning Powers of Attorney (Sections 4900-4948)***

This part applies to all powers of attorney, although it does not have a general scope statement like that in Parts 1 and 2. In addition, Section 4901 provides that the remedies are cumulative.

Special health care power rules are set out in Sections 4903(b)(3) (limitations in power on right to petition), 4940(h) (who may petition), 4941 (scope of general petition section), 4942 (special health care power petition rule), 4946 (temporary health care order).

Drafting health care decisionmaking rules as a separate statute should eliminate or minimize these exceptions and overlays in the PAL, thereby improving the organization and usability of both the PAL as it relates to property and financial matters and the law relating to health care powers.

Respectfully submitted,

Stan Ulrich  
Assistant Executive Secretary

*Accompanies Memorandum 97-60*

**STAFF DRAFT**

**HEALTH CARE DECISIONS**

☞ **Staff Note.** The following draft represents the second pass at implementing the Uniform Health-Care Decisions Act (1993), along with related provisions from existing California law, in the Probate Code — specifically, as a new Division 4.7 (Health Care Decisions). For an overview of the drafting approach, see Memorandum 97-60.

**Structural Outline**

DIVISION 4.7. HEALTH CARE DECISIONS . . . . . 1  
PART 1. DEFINITIONS AND GENERAL PROVISIONS . . . . . 1  
    CHAPTER 1. SHORT TITLE AND DEFINITIONS . . . . . 1  
    CHAPTER 2. GENERAL PROVISIONS . . . . . 8  
    CHAPTER 3. TRANSITIONAL PROVISIONS . . . . . 12  
PART 2. UNIFORM HEALTH CARE DECISIONS ACT . . . . . 15  
    CHAPTER 1. ADVANCE HEALTH CARE DIRECTIVES . . . . . 15  
        Article 1. General Provisions . . . . . 15  
        Article 2. Powers of Attorney for Health Care . . . . . 20  
        Article 3. Modification and Revocation of Advance Directives . . . . . 26  
    CHAPTER 2. ADVANCE HEALTH CARE DIRECTIVE FORMS . . . . . 29  
    CHAPTER 3. HEALTH CARE SURROGATES . . . . . 41  
    CHAPTER 4. DUTIES OF HEALTH CARE PROVIDERS . . . . . 45  
    CHAPTER 5. IMMUNITIES AND LIABILITIES . . . . . 48  
PART 3. JUDICIAL PROCEEDINGS . . . . . 55  
    CHAPTER 1. GENERAL PROVISIONS . . . . . 55  
    CHAPTER 2. JURISDICTION AND VENUE . . . . . 58  
    CHAPTER 3. PETITIONS, ORDERS, APPEALS . . . . . 59  
PART 4. REQUEST TO FOREGO RESUSCITATIVE MEASURES . . . . . 64  
PART 5. ADVANCE HEALTH CARE DIRECTIVE REGISTRY . . . . . 66

**Detailed Contents**

DIVISION 4.7. HEALTH CARE DECISIONS . . . . . 1  
PART 1. DEFINITIONS AND GENERAL PROVISIONS . . . . . 1  
    CHAPTER 1. SHORT TITLE AND DEFINITIONS . . . . . 1  
        § 4600. Short title . . . . . 1  
        [§ 4601. Uniform Health Care Decisions Act] . . . . . 1  
        § 4603. Application of definitions . . . . . 2  
        § 4605. Advance health care directive . . . . . 2  
        § 4607. Agent . . . . . 3  
        § 4609. Capacity . . . . . 3  
        § 4611. Conservator . . . . . 3

§ 4613. Community care facility	4
§ 4615. Health care	4
§ 4617. Health care decision	4
§ 4619. Health care institution	5
§ 4621. Health care provider	5
§ 4623. Individual instruction	5
§ 4625. Physician	6
§ 4627. Power of attorney for health care	6
§ 4629. Primary physician	7
[§ 4630. Principal]	7
§ 4631. Reasonably available	7
§ 4633. Residential care facility for the elderly	8
§ 4635. Supervising health care provider	8
§ 4637. Surrogate	8
CHAPTER 2. GENERAL PROVISIONS	8
§ 4650. Legislative findings	8
§ 4651. Other authority not affected	9
§ 4652. Unauthorized acts	10
§ 4653. Impermissible acts and constructions	10
§ 4654. Patient's objections	11
§ 4655. Relation to general agency law	11
§ 4656. Use of copies	11
CHAPTER 3. TRANSITIONAL PROVISIONS	12
§ 4660. Application to existing powers of attorney and pending proceedings	12
§ 4661. Application of division to acts and transactions under power of attorney	13
§ 4662. Power of attorney for health care subject to former 7-year limit	13
PART 2. UNIFORM HEALTH CARE DECISIONS ACT	15
CHAPTER 1. ADVANCE HEALTH CARE DIRECTIVES	15
Article 1. General Provisions	15
§ 4670. Individual instruction	15
§ 4671. Power of attorney for health care	15
§ 4672. Presumption of capacity	16
§ 4673. Capacity determinations by primary physician	16
§ 4674. Nomination of conservator in written advance health care directive	17
§ 4675. Witnesses required in skilled nursing facility	17
§ 4676. Validity of written advance health care directive executed in another jurisdiction	19
Article 2. Powers of Attorney for Health Care	20
§ 4680. Formalities for executing a power of attorney	20
§ 4681. Limitations on who may be agent	21
§ 4682. Agent's authority	22
§ 4683. Requirements for power of attorney for health care	22
§ 4684. Lapse of time	23
§ 4685. Priority of provisions of power of attorney	23
§ 4686. Agent's authority to make health care decisions	24
[§ 4687. Permissible purposes]	26
Article 3. Modification and Revocation of Advance Directives	26
§ 4695. Revocation of power of attorney for health care	26
§ 4696. Effect of dissolution or annulment	27
§ 4697. Effect of later advance directive on earlier advance directive	28
CHAPTER 2. ADVANCE HEALTH CARE DIRECTIVE FORMS	29
§ 4700. Authorization for statutory form of advance health care directive	29
§ 4701. Optional form of advance health care directive	29
§ 4702. Requirements for printed form of power of attorney for health care	37



§ 4703. Notice in power of attorney for health care not on printed form . . . . .	39
§ 4704. Language conferring general authority . . . . .	40
§ 4705. Termination of authority . . . . .	40
CHAPTER 3. HEALTH CARE SURROGATES . . . . .	41
§ 4710. Authority of surrogate to make health care decisions . . . . .	41
§ 4711. Designation or determination of surrogate . . . . .	41
§ 4712. Communication of surrogate’s assumption of authority . . . . .	42
§ 4713. Conflicts between surrogates . . . . .	43
§ 4714. Principles governing surrogate’s health care decisions . . . . .	43
§ 4715. Exercise of authority free of judicial approval . . . . .	43
§ 4716. Disqualification of surrogate . . . . .	44
§ 4717. Limitation on who may act as surrogate . . . . .	44
§ 4718. Declaration of surrogate’s authority . . . . .	44
CHAPTER 4. DUTIES OF HEALTH CARE PROVIDERS . . . . .	45
§ 4720. Duty of health care provider to communicate . . . . .	45
§ 4721. Duty of supervising health care provider to record relevant information . . . . .	45
§ 4722. Duty of primary physician to record relevant information . . . . .	45
§ 4723. Obligations of health care provider . . . . .	46
§ 4724. Health care provider’s right to decline . . . . .	46
§ 4725. Obligations of declining health care provider or institution . . . . .	47
§ 4726. Restriction on requiring or prohibiting advance directive . . . . .	47
§ 4727. Right to health-care information . . . . .	48
CHAPTER 5. IMMUNITIES AND LIABILITIES . . . . .	48
§ 4730. Immunities of health care provider or institution . . . . .	48
§ 4731. Immunities of agent and surrogate . . . . .	49
§ 4732. Alteration or forging, or concealment or withholding knowledge of revocation of written advance health care directive . . . . .	49
§ 4733. Restriction on execution of advance directive as condition for admission, treatment, or insurance . . . . .	50
§ 4734. Statutory damages . . . . .	50
§ 4735. Immunities of health care provider . . . . .	51
§ 4736. Convincing evidence of identity of principal . . . . .	51
§ 4737. Identification of agent and principal . . . . .	52
§ 4738. Reliance by third person on general authority . . . . .	53
§ 4739. Protection of third person relying in good faith on power of attorney . . . . .	53
PART 3. JUDICIAL PROCEEDINGS . . . . .	55
CHAPTER 1. GENERAL PROVISIONS . . . . .	55
§ 4750. Advance directive freely exercisable . . . . .	55
§ 4751. Cumulative remedies . . . . .	56
§ 4752. Effect of provision in advance directive attempting to limit right to petition . . . . .	56
§ 4753. Limitations on right to petition . . . . .	56
§ 4754. Jury trial . . . . .	57
§ 4755. Application of general procedural rules . . . . .	58
CHAPTER 2. JURISDICTION AND VENUE . . . . .	58
§ 4760. Jurisdiction and authority of court or judge . . . . .	58
§ 4761. Basis of jurisdiction . . . . .	58
§ 4762. Jurisdiction over agent . . . . .	59
§ 4763. Venue . . . . .	59
CHAPTER 3. PETITIONS, ORDERS, APPEALS . . . . .	59
§ 4765. Petitioners . . . . .	59
§ 4766. Petition as to durable power of attorney for health care . . . . .	60
§ 4767. Commencement of proceeding . . . . .	61
§ 4768. Dismissal of petition . . . . .	62

§ 4769 Notice of hearing . . . . .	62
§ 4770. Temporary health care order . . . . .	62
§ 4771. Award of attorney’s fees . . . . .	63
§ 4772. Appeal . . . . .	63
<b>PART 4. REQUEST TO FOREGO RESUSCITATIVE MEASURES . . . . .</b>	<b>64</b>
§ 4780. “Request to forego resuscitative measures” . . . . .	64
§ 4781. “Health care provider” . . . . .	64
§ 4783. Immunity for honoring request to forego resuscitative measures . . . . .	65
§ 4784. Request to forego resuscitative measures forms . . . . .	65
§ 4785. Presumption of validity . . . . .	65
§ 4786. Application of part . . . . .	65
§ 4787. Relation to other law . . . . .	66
<b>PART 5. ADVANCE HEALTH CARE DIRECTIVE REGISTRY . . . . .</b>	<b>66</b>
§ 4800. Registry system established by Secretary of State . . . . .	66
§ 4801. Identity and fees . . . . .	66
§ 4802. Notice . . . . .	67
§ 4804. Effect of failure to register . . . . .	67
§ 4805. Effect of registration on revocation and validity . . . . .	67
§ 4806. Effect on health care provider . . . . .	67

## STAFF DRAFT

### HEALTH CARE DECISIONS

☞ **Staff Note.** Setting out health care decisionmaking in a separate division will also require the repeal of the existing durable power of attorney for health care statutes (Prob. Code §§ 4600-4806), the amendment or repeal of sections in the other parts of the Power of Attorney Law, and revision of cross-references in other statutes. We would also recommend revision of Commission Comments in the PAL (enacted in 1994) to reflect the reorganization. Preliminary review indicates that nine PAL sections contain explicit exception and exclusions relating to health care powers that will need revision. To make room for the new division, Part 5 (commencing with Section 4900) of the PAL will need to be moved to Section 4500 *et seq.* These technical revisions are not included in this draft.

#### **Part 4 of Division 4.5 (repealed). Durable powers of attorney for health care**

SEC. \_\_\_\_\_. Part 4 (commencing with Section 4600) of Division 4.5 is repealed.

**Comment.** This part is superseded by Division 4.7 (commencing with Section 4600).

#### **Division 4.7 (added). Health care decisions**

SEC. \_\_\_\_\_. Division 4.7 (commencing with Section 4600) is added to the Probate Code, to read:

### DIVISION 4.7. HEALTH CARE DECISIONS

#### PART 1. DEFINITIONS AND GENERAL PROVISIONS

##### CHAPTER 1. SHORT TITLE AND DEFINITIONS

#### **§ 4600. Short title**

4600. This division may be cited as the Health Care Decisions Law.

**Comment.** Section 4600 is new and provides a convenient means of referring to this division. The Health Care Decisions Law is essentially self-contained, but the general agency statutes are applicable as provided in Section 4655. See also Sections 20 *et seq.* (general definitions applicable in Probate Code depending on context), 4755 (application of general procedural rules).

☞ **Staff Note.** This title is suggested as a shorthand for referring to this entire division. As we currently envision the scope of Division 4.7, it is broader than the Uniform Health-Care Decisions Act, although the uniform act is its major component. (Unfortunately, we have not devised a short title that leads naturally to a pronounceable acronym.)

#### **[§ 4601. Uniform Health Care Decisions Act]**

[4601. [Sections \_\_\_\_ ?] [Parts 1, 2, and 3?] may be cited as the [California] Uniform Health Care Decisions Act.]

**[Comment.]** Section 4601 has the same purpose as Section 16 of the Uniform Health-Care Decisions Act (1993). In Comments to sections in this part and elsewhere, a reference to the “Uniform Health Care Decisions Act” means the California version. A reference to the “Uniform

1 Health-Care Decisions Act (1993)” or the “uniform act” (in context) means the official text of the  
2 uniform act approved by the National Conference of Commissioners on Uniform State Laws.

3 Some general provisions included in the Uniform Health-Care Decisions Act (1993) are  
4 generalized elsewhere in this code. See Sections 2(b) (construction of provisions drawn from  
5 uniform acts) (*cf.* UHCDA § 15), 11 (severability) (*cf.* UHCDA § 17).]

6 ☞ **Staff Note.** This section, like existing Section 4001 (Uniform Durable Power of Attorney  
7 Act), could characterize the relevant parts of this division as the UHCDA. This would serve as a  
8 ready reference to sections that are subject to the rule in Section 2(b) that sections drawn from  
9 uniform acts are to be construed to promote uniformity.

10 Providing two short titles here may be confusing, particularly since they are similar. The staff  
11 prefers the more general language and broader scope of draft Section 4600, if only one short title  
12 is used.

13 Using a short title to describe only the part of this division that is drawn from the uniform act  
14 creates other problems. We don’t need to name the division as a whole; we could designate Parts  
15 1-3 as the “California Uniform Health Care Decisions Act,” as suggested in draft Section 4601 —  
16 and the section could be placed at the beginning of Part 2, if that is a more logical location. But  
17 there are a significant number of provisions in Parts 2 and 3 that are from existing California law  
18 and not from the uniform act, so describing them as the uniform act is misleading.

19 In addition, adopting the literal name of a uniform act has always created problems when we  
20 attempt to describe the source of California provisions drawn from the official text of the uniform  
21 act. If they both have the same name (which they generally do), language in Comments can  
22 become wordy and confusing. We are also aware that placing a “hereinafter” type of usage note  
23 in the first Comment works for those reviewing the law as a whole, but will be deficient in  
24 practice where someone is looking only at a particular group of sections relating to an issue.

### 25 § 4603. Application of definitions

26 4603. Unless the provision or context otherwise requires, the definitions in this  
27 chapter govern the construction of this division.

28 **Comment.** Section 4603 serves the same purpose as former Section 4600 and is comparable to  
29 Section 4010 (Power of Attorney Law).

30 Some definitions included in the Uniform Health-Care Decisions Act (1993) are generalized  
31 elsewhere in this code. See Sections 56 (“person” defined) (*cf.* uniform act Section 1(15)), 74  
32 (“state” defined) (*cf.* uniform act Section 1(15)).

33 ☞ **Staff Note.** Consistent with the approach outlined in Memorandum 97-60, this division is  
34 intended to be self-contained to the same extent as the PAL. This approach leads to repetition of  
35 definitions that are in the PAL, or explicit cross-reference where appropriate, rather than reliance  
36 on any general incorporation of PAL definitions or placing this division under any of the general  
37 definitions of the PAL.

### 38 § 4605. Advance health care directive; advance directive

39 4605. “Advance health care directive” or “advance directive” means an  
40 individual instruction or a power of attorney for health care.

41 **Comment.** Section 4605 is new. The first sentence is the same as Section 1(1) of the Uniform  
42 Health-Care Decisions Act (1993), except that the term “advance directive” is included for  
43 convenience and “health care” is not hyphenated. “Advance directive” is commonly used in  
44 practice as a shorthand. Statutory language also may use the shorter term. See, e.g., Section 4800.  
45 A declaration or directive under the repealed Natural Death Act (former Health & Safety Code §  
46 7185 *et seq.*) is a type of advance directive.

47 See also Sections 4623 (“individual instruction” defined), 4627 (“power of attorney for health  
48 care” defined).

1       **Background from Uniform Act.** The term “advance health-care directive” appears in the  
2 federal Patient Self-Determination Act enacted as Sections 4206 and 4751 of the Omnibus Budget  
3 Reconciliation Act of 1990 and has gained widespread usage among health-care professionals.

4       [Adapted from Unif. Health-Care Decisions Act § 1(1) comment (1993).]

5       ☞ **Staff Note.** The State Bar Estate Planning, Trust and Probate Law Section Executive  
6 Committee has cautiously decided that “advance health care directive” should be used as a  
7 “generic” term, but the Executive Committee “felt that it would be confusing if we were to  
8 replace the names of the individual documents currently use[d] in California.” See Memorandum  
9 97-41, Exhibit p. 9.

10       We have also flagged this definition for consideration when transitional issues are addressed,  
11 since it will need to be clear that declarations or directives under the Natural Death Act are  
12 advance directives.

### 13       § 4607. Agent

14       4607. (a) “Agent” means a person designated in a power of attorney for health  
15 care to make a health care decision for the individual granting the power,  
16 regardless of whether the person is known as an agent or attorney-in-fact, or by  
17 some other term.

18       (b) “Agent” includes a successor or alternate agent.

19       **Comment.** Section 4607 is consistent with the definition of attorney-in-fact in the Power of  
20 Attorney Law. See Section 4014. The first part of subdivision (a) is the same as Section 1(2) of  
21 the Uniform Health-Care Decisions Act (1993), except that “person” is used instead of  
22 “individual.” For qualifications of health care agents, see Sections \_\_\_\_.

23       See also Section 4627 (“power of attorney for health care” defined).

24       **Background from Uniform Act.** The definition of “agent” is not limited to a single individual.  
25 The Act permits the appointment of co-agents and alternate agents.

26       [Adapted from Unif. Health-Care Decisions Act § 1(2) comment (1993).]

27       ☞ **Staff Note.** This language is less formal and technical than the existing durable power of  
28 attorney for health care, which consistently uses “principal” when referring to a person who  
29 executes a power of attorney and avoids casual references to “power” since a power of attorney  
30 may grant any number of “powers.” Of course, in context the uniform act language is clear  
31 enough, but the less formal approach does represent a departure from the PAL.

32       The Commission has decided to use “agent” in the health care power provisions. This is  
33 supported by the State Bar Estate Planning, Trust and Probate Law Section Executive Committee.  
34 See Memorandum 97-41, Exhibit p. 9.

### 35       § 4609. Capacity

36       4609. “Capacity” means an individual’s ability to understand the significant  
37 benefits, risks, and alternatives to proposed health care and to make and  
38 communicate a health care decision.

39       **Comment.** Section 4609 is a new provision and is the same as Section 1(3) of the Uniform  
40 Health-Care Decisions Act (1993).

41       See also Sections 4615 (“health care” defined), 4617 (“health care decision” defined).

42       ☞ **Staff Note.** Capacity issues have been reserved for future consideration.

### 43       § 4611. Conservator

44       4611. “Conservator” means a court-appointed conservator having authority to  
45 make a health care decision for a conservatee.

1       **Comment.** Section 4611 is a new provision and serves the same purpose as Section 1(4) of the  
2 Uniform Health-Care Decisions Act (1993) (definition of “guardian”).

3       See also Section 4617 (“health care decision” defined).

4       ☞ **Staff Note.** Is this needed? The Uniform Health-Care Decisions Act defines guardian to  
5 include conservator.

6       **§ 4613. Community care facility**

7       4613. “Community care facility” means a “community care facility” as defined  
8 in Section 1502 of the Health and Safety Code.

9       **Comment.** Section 4613 continues former Section 4603 without substantive change.

10       **§ 4615. Health care**

11       4615. “Health care” means any care, treatment, service, or procedure to  
12 maintain, diagnose, or otherwise affect an individual’s physical or mental  
13 condition.

14       **Comment.** Section 4615 continues the first part of former Section 4609 without substantive  
15 change and is the same as Section 1(5) of the Uniform Health-Care Decisions Act (1993).

16       **Background from Uniform Act.** The definition of “health care” is to be given the broadest  
17 possible construction. It includes the types of care referred to in the definition of “health-care  
18 decision” [Prob. Code § 4617], and to care, including custodial care, provided at a “health-care  
19 institution” [Prob. Code § 4619]. It also includes non-medical remedial treatment.

20       [Adapted from Unif. Health-Care Decisions Act § 1(5) comment (1993).]

21       **§ 4617. Health care decision**

22       4617. “Health care decision” means a decision made by an individual or the  
23 individual’s agent, guardian, conservator, or surrogate, regarding the individual’s  
24 health care, including the following:

25       (a) Selection and discharge of health care providers and institutions.

26       (b) Approval or disapproval of diagnostic tests, surgical procedures, programs of  
27 medication, and orders not to resuscitate.

28       (c) Directions to provide, withhold, or withdraw artificial nutrition and hydration  
29 and all other forms of health care.

30       **Comment.** Section 4617 supersedes former Section 4612 and is the same in substance as  
31 Section 1(6) of the Uniform Health-Care Decisions Act (1993).

32       See also Sections 4607 (“agent” defined), 4611 (“conservator” defined), 4615 (“health care”  
33 defined), 4637 (“surrogate” defined).

34       ☞ **Staff Note.** This section differs from the existing definition:

35       4612. “Health care decision” means consent, refusal of consent, or withdrawal of consent to  
36 health care, or a decision to begin, continue, increase, limit, discontinue, or not to begin any  
37 health care.

38       The Uniform Health-Care Decisions Act definition appears to be broad enough to cover all  
39 aspects of health care decisionmaking described in existing law. Consider, however, whether the  
40 UHCDA language might be provocative in ways that existing law is not.

1 **§ 4619. Health care institution**

2 4619. “Health care institution” means an institution, facility, or agency licensed,  
3 certified, or otherwise authorized or permitted by the law of this state to provide  
4 health care in the ordinary course of business.

5 **Comment.** Section 4619 a new provision and is the same in substance as Section 1(7) of the  
6 Uniform Health-Care Decisions Act (1993).

7 See also Section 4615 (“health care” defined).

8 **Background from Uniform Act.** The term “health-care institution” includes a hospital,  
9 nursing home, residential-care facility, home health agency, or hospice.

10 [Adapted from Unif. Health-Care Decisions Act § 1(7) comment (1993).]

11 **§ 4621. Health care provider**

12 4621. “Health care provider” means an individual who is licensed, certified, or  
13 otherwise authorized or permitted by the law of this state to provide health care in  
14 the ordinary course of business or practice of a profession.

15 See also Section 4615 (“health care” defined).

16 **Comment.** Section 4621 continues former Section 4615 without substantive change and is the  
17 same in substance as Section 1(8) of the Uniform Health-Care Decisions Act (1993). This section  
18 also continues former Health and Safety Code Section 7186(c) (Natural Death Act) without  
19 substantive change.

20 **§ 4623. Individual instruction**

21 4623. “Individual instruction” means a individual’s [written or oral] direction  
22 concerning a health care decision for herself or himself.

23 **Comment.** Section 4623 is a new provision and is the same in substance as Section 1(9) of the  
24 Uniform Health-Care Decisions Act (1993).

25 See also Section 4617 (“health care decision” defined).

26 **Background from Uniform Act.** The term “individual instruction” includes any type of  
27 written or oral direction concerning health-care treatment. The direction may range from a written  
28 document which is intended to be effective at a future time if certain specified conditions arise  
29 and for which a form is provided in Section 4 [Prob. Code §§ 4701], to the written consent  
30 required before surgery is performed, to oral directions concerning care recorded in the health-  
31 care record. The instruction may relate to a particular health-care decision or to health care in  
32 general.

33 [Adapted from Unif. Health-Care Decisions Act § 1(9) comment (1993).]

34 ☞ **Staff Note.** The staff is still not happy with this term. Delaware, Maine, and New Mexico use  
35 it (Maine and New Mexico having enacted the Uniform Health-Care Decisions Act), but other  
36 states use terms such as “health care instruction” (Connecticut, Maryland & Oregon), “instruction  
37 regarding health care” (Minnesota), and “medical treatment instruction” (Hawaii). For purposes  
38 of the present draft, we have used the official text term, but the Commission may want to consider  
39 whether a more expressive term should be used instead, such as “health care instruction.”

40 This section also raises the issue of whether we should continue to use “natural person” as in  
41 existing power of attorney law, or switch to “individual.” As discussed in Memorandum 97-4  
42 (considered at the April meeting), the section has been expanded to include some of the language  
43 from the UHCDA comment (in brackets).



1 § 4625. Physician

2 4625. “Physician” means a physician and surgeon licensed by the Medical Board  
3 of California or the Osteopathic Medical Board of California.

4 **Comment.** Section 4625 continues and generalizes former Health and Safety Code Section  
5 7186(g) (Natural Death Act) and is the same in substance as Section 1(11) of the Uniform Health-  
6 Care Decisions Act (1993).

7 ☞ **Staff Note.** Uniform Health-Care Decisions Act Section 1(11) reads: “‘Physician’ means an  
8 individual authorized to practice medicine [or osteopathy] under [appropriate statute].” As noted,  
9 the draft section is from the Natural Death Act.

10 Currently, the Probate Code does not define “physician.” The DPAHC uses the term without  
11 defining it or uses the phrase “physician and surgeon” which is a term of art meaning a licensed  
12 medical doctor. The staff believes that the term “physician and surgeon” is awkward and impairs  
13 the readability of already complicated statutes. In some contexts, a literal reading can lead a  
14 person to think that two signatures or approvals are required: one from a physician and one from a  
15 surgeon. (See, e.g., Prob. Code § 4753(b) [now fixed in draft Section 4780]: “A ‘request to forego  
16 resuscitative measures’ shall be a written document, signed by the individual, or a legally  
17 recognized surrogate health care decisionmaker and a physician and surgeon, that directs....”)  
18 Consistent and comprehensive use of the defined term “physician” as set out in draft Section 4625  
19 should avoid these problems.

20 § 4627. Power of attorney for health care

21 4627. “Power of attorney for health care” means the designation of an agent to  
22 make health care decisions for the individual granting the power [principal?].

23 **Comment.** Section 4627 supersedes former Section 4606 (defining “durable power of attorney  
24 for health care”) and is the same as Section 1(12) of the Uniform Health-Care Decisions Act  
25 (1993).

26 See also Sections 4507 (“agent” defined), 4617 (“health care decision” defined).

27 ☞ **Staff Note.** In the first staff draft, we used “durable power of attorney for health care” as in  
28 existing law to avoid having to make many amendments just for a taste change. We also felt that  
29 “DPAHC” is fairly well imbedded in California usage, even having acquired a special  
30 pronunciation, “Dee-Pack.” The working group, however, felt that “durable” is surplus in the  
31 statute since it is envisioned that all health care powers will be durable by default. If this is the  
32 common understanding, unlike property powers, health care powers should not have to satisfy the  
33 technical drafting requirements for durability as set forth in Section 4124 (originally part of the  
34 Uniform Durable Power of Attorney Act):

35 4124. A durable power of attorney is a power of attorney by which a principal designates  
36 another person as attorney-in-fact in writing and the power of attorney contains any of the  
37 following statements:

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

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

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

42 Explicit durability requirements are important in property powers because many powers are not  
43 intended to be durable, but health care powers are almost exclusively intended to be active when  
44 the principal is not able to make health care decisions. This approach is also consistent with  
45 recent enactments in other states and with the Uniform Health-Care Decisions Act. Where the  
46 statutory form is used, durability is clear. Mandatory notice (warning) language, if the  
47 Commission continues this approach, can serve the same purpose.



1 **§ 4629. Primary physician**

2 4629. “Primary physician” means a physician designated by an individual or the  
3 individual’s agent, guardian, or surrogate, to have primary responsibility for the  
4 individual’s health care or, in the absence of a designation or if the designated  
5 physician is not reasonably available, a physician who undertakes the  
6 responsibility.

7 **Comment.** Section 4629 continues and generalizes former Health and Safety Code Section  
8 7186(a) (“attending physician” defined) and is the same as Section 1(13) of the Uniform Health-  
9 Care Decisions Act (1993).

10 See also Sections 4607 (agent” defined), 4615 (“health care” defined), 4625 (“physician”  
11 defined), 4631 (“reasonably available” defined), 4637 (“surrogate” defined).

12 **Background from Uniform Act.** The Act employs the term “primary physician” instead of  
13 “attending physician.” The term “attending physician” could be understood to refer to any  
14 physician providing treatment to the individual, and not to the physician whom the individual, or  
15 agent, guardian, or surrogate, has designated or, in the absence of a designation, the physician  
16 who has undertaken primary responsibility for the individual’s health care.

17 [Adapted from Unif. Health-Care Decisions Act § 1(13) comment (1993).]

18 **[§ 4630. Principal]**

19 [4030. “Principal” means a natural person who executes a power of attorney for  
20 health care.]

21 **[Comment.** Section 4030 is the same as Section 4027 in the Power of Attorney Law. See also  
22 Section 4627 (“power of attorney for health care” defined). See also Section 4627 (“power of  
23 attorney for health care” defined).]

24 ☞ **Staff Note.** The Uniform Health Care Decisions Act doesn’t define “principal.” From the  
25 power of attorney perspective, it seems unbalanced to have an agent without a principal. We are  
26 keeping this section in the draft as a reminder to consider this issue of terminology. It also flags  
27 the usage question of whether the statute should attempt to use “natural person” or “individual”  
28 consistently. The staff intends to research this usage in the Probate Code, although our fear is that  
29 neither term is predominant. In this draft, however, we find the term “individual” confusing in  
30 relation to the term “individual instruction.”

31 **§ 4631. Reasonably available**

32 4631. “Reasonably available” means readily able to be contacted without undue  
33 effort and willing and able to act in a timely manner considering the urgency of the  
34 patient’s health care needs.

35 **Comment.** Section 4631 is the same as Section 1(14) of the Uniform Health-Care Decisions  
36 Act (1993).

37 See also Section 4615 (“health care” defined).

38 **Background from Uniform Act.** The term “reasonably available” is used in the Act to  
39 accommodate the reality that individuals will sometimes not be timely available. The term is  
40 incorporated into the definition of “supervising health-care provider” [Prob. Code § 4637]. It  
41 appears in the optional statutory form (Section 4) [Prob. Code §§ \_\_\_\_] to indicate when an  
42 alternate agent may act. In Section 5 [Prob. Code §§ \_\_\_\_] it is used to determine when a  
43 surrogate will be authorized to make health-care decisions for an individual, and if so, which class  
44 of individuals has authority to act.

45 [Adapted from Unif. Health-Care Decisions Act § 1(14) comment (1993).]

1 § 4633. Residential care facility for the elderly

2 4633. “Residential care facility for the elderly” means a “residential care facility  
3 for the elderly” as defined in Section 1569.2 of the Health and Safety Code.

4 **Comment.** Section 4633 continues former Section 4618 without substantive change.

5 § 4635. Supervising health care provider

6 4635. “Supervising health care provider” means the primary physician or, if  
7 there is no primary physician or the primary physician is not reasonably available,  
8 the health care provider who has undertaken primary responsibility for an  
9 individual’s health care.

10 **Comment.** Section 4635 is a new provision and is the same as Section 1(16) of the Uniform  
11 Health-Care Decisions Act (1993).

12 See also Sections 4607 (“agent” defined), 4615 (“health care” defined), 4629 (“primary  
13 physician” defined), 4631 (“reasonably available” defined).

14 **Background from Uniform Act.** The definition of “supervising health-care provider”  
15 accommodates the circumstance that frequently arises where care or supervision by a physician  
16 may not be readily available. The individual’s primary physician is to assume the role, however,  
17 if reasonably available.

18 [Adapted from Unif. Health-Care Decisions Act § 1(16) comment (1993).]

19 § 4637. Surrogate

20 4637. “Surrogate” means a person, other than a patient’s agent or conservator,  
21 authorized under this part to make a health care decision for the patient.

22 **Comment.** Section 4637 is a new provision and is the same in substance as Section 1(17) of the  
23 Uniform Health-Care Decisions Act (1993), except that this section refers to “conservator”  
24 instead of “guardian.”

25 See also Sections 4607 (“agent” defined), 4617 (“health care decision” defined).

26 **Background from Uniform Act.** The definition of “surrogate” refers to the individual having  
27 present authority under Section 5 [Prob. Code § \_\_\_\_ *et seq.*] to make a health-care decision for a  
28 patient. It does not include an individual who might have such authority under a given set of  
29 circumstances which have not occurred.

30 [Adapted from Unif. Health-Care Decisions Act § 1(17) comment (1993).]

31 ☞ **Staff Note.** We may want to refer to both guardians and conservators, but for now, we have  
32 been drafting based on the California usage.

33 CHAPTER 2. GENERAL PROVISIONS

34 § 4650. Legislative findings

35 4650. The Legislature finds the following:

36 (a) An adult person has the fundamental right to control the decisions relating to  
37 the rendering of his or her own medical care, including the decision to have life-  
38 sustaining treatment withheld or withdrawn [in instances of a terminal condition or  
39 permanent unconscious condition].


40 (b) Modern medical technology has made possible the artificial prolongation of  
41 human life beyond natural limits. In the interest of protecting individual autonomy,  
42 such prolongation of the process of dying for a person [with a terminal condition

1 or permanent unconscious condition] for whom continued medical treatment does  
2 not improve the prognosis for recovery may violate patient dignity and cause  
3 unnecessary pain and suffering, while providing nothing medically necessary or  
4 beneficial to the person.

5 (c) In recognition of the dignity and privacy that a person has a right to expect,  
6 the law recognizes that an adult has the right to [make a written declaration  
7 instructing] [instruct] his or her physician to withhold or withdraw life-sustaining  
8 treatment [in the event of a terminal condition or permanent unconscious  
9 condition], in the event that the person is unable to make those decisions for  
10 himself or herself.

11 [(d) This division is in the interest of the public health and welfare.]

12 **Comment.** Section 4650 preserves and continues the substance of the legislative findings set  
13 out in former Health and Safety Code Section 7185.5 (Natural Death Act). These findings, in an  
14 earlier form, have been relied upon by the courts. *Conservatorship of Drabick*, 200 Cal. App. 3d  
15 185, 206, 245 Cal. Rptr. 840, 853 (1988); *Bouvia v. Superior Court*, 179 Cal. App. 3d 1127,  
16 1137, 225 Cal. Rptr. 297, 302 (1986); *Bartling v. Superior Court*, 163 Cal. App. 3d 186, 194-95,  
17 209 Cal. Rptr. 220, 224-25 (1984); *Barber v. Superior Court*, 147 Cal. App. 3d 1006, 1015-16,  
18 195 Cal. Rptr. 484, 489-90 (1983). Parts of former Health and Safety Code Section 7185.5 that  
19 are more appropriately stated as substantive provisions are not continued here. See Sections \_\_\_\_  
20 & 4900 (exercise free of judicial approval), \_\_\_\_.

21  **Staff Note.** The Commission normally avoids statements of intent in statutes, but since the  
22 NDA language has been important in several leading cases, this presents the unusual case where  
23 intent language should be carried forward. However, since the language comes from the NDA  
24 and dates from an earlier era, it is unnecessarily restrictive in its focus on terminal or permanent  
25 unconscious conditions. The statement could be revised for greater consistency with the cases  
26 cited above.

#### 27 § 4651. Other authority not affected

28 4651. (a) Subject to Sections [\_\_\_\_ (limits on agent’s authority) and \_\_\_\_  
29 (temporary health care order)], nothing in this division affects any right a person  
30 may have to make health care decisions on behalf of another if the agent and any  
31 successor agent are unavailable, unwilling, or unable to make health care decisions  
32 on behalf of the [principal].

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

34 (c) This division does not affect the right of an individual to make health care  
35 decisions while having the capacity to do so.

36 **Comment.** Subdivisions (a) and (b) of Section 4651 continue the substance of former Section  
37 4652. Subdivision (c) is the same in substance as Section 11(a) of the Uniform Health-Care  
38 Decisions Act (1993). This section makes clear that the enactment of this division has no effect  
39 on any right a person may have to consent for another or on emergency treatment. Thus, this  
40 division is cumulative to whatever other ways there may be to consent for another individual.

41 See also Sections 4605 (“advance health care directive” defined), 4615 (“health care” defined),  
42 4617 (“health care decision” defined).

43 **Background from Uniform Act.** Section 11 reinforces the principle of patient autonomy by  
44 providing a rebuttable presumption that an individual has capacity for all decisions relating to  
45 health care referred to in the Act.

46 [Adapted from Unif. Health-Care Decisions Act § 11 comment (1993).]

1 ☞ **Staff Note.** This section may need additional revision for consistency with rules adopted from  
2 the Uniform Health Care Decisions Act. (Existing Section 4652 was amended by 1995 Cal. Stat.  
3 ch. 417, § 1.)

4 **§ 4652. Unauthorized acts**

5 4652. This division does not authorize consent to any of the following on behalf  
6 of the patient:

7 (a) Commitment to or placement in a mental health treatment facility.

8 (b) Convulsive treatment (as defined in Section 5325 of the Welfare and  
9 Institutions Code).

10 (c) Psychosurgery (as defined in Section 5325 of the Welfare and Institutions  
11 Code).

12 (d) Sterilization.

13 (e) Abortion.

14 **Comment.** Section 4652 continues former Section 4722 without substantive change and revises  
15 language for consistency with the broader scope of this division.

16 **Original Comment.** Section [4722] continues former Civil Code Section 2435 without  
17 substantive change. The word “durable” has been omitted because the prohibition of this section  
18 applies to all powers of attorney. A power of attorney may not vary the limitations of this section.  
19 See also Section 4723 (unauthorized acts and omissions).

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

22 ☞ **Staff Note**

23 (1) Section 13(e) Uniform Health-Care Decisions Act permits admission to mental health care  
24 institutions if explicitly stated in the advance directive:

25 13(e) This [Act] does not authorize an agent or surrogate to consent to the admission of an  
26 individual to a mental health care institution unless the individual’s written advance health  
27 care directive expressly so provides.

28 Should we consider the limitations in existing Section 4722 for revision?

29 (2) This section will need to be moved from the power of attorney provisions to the general  
30 provisions since it covers advance directives and surrogate decisionmaking.

31 **§ 4653. Impermissible acts and constructions**

32 4653. (a) Nothing in this division shall be construed to condone, authorize, or  
33 approve mercy killing, assisted suicide, or euthanasia, or to permit any affirmative  
34 or deliberate act or omission to end life other than the withholding or withdrawal  
35 of health care pursuant to an advance health care directive or by a surrogate so as  
36 to permit the natural process of dying.

37 (b) In making health care decisions under this division, an attempted suicide by  
38 the patient shall not be construed to indicate a desire of the patient that health care  
39 be restricted or inhibited.

40 **Comment.** Section 4653 continues former Section 4723 without substantive change, and  
41 includes language added for consistency with Section 13(c) of the Uniform Health-Care  
42 Decisions Act (1993) and to conform to the broader scope of this division. This section also  
43 continues the substance of former Health and Safety Code Section 7191.5(g) (Natural Death Act).

1 See also Sections 4605 (“advance health care directive” defined), 4615 (“health care” defined),  
2 4617 (“health-care decision” defined), 4619 (“health care institution” defined), 4637 (“surrogate”  
3 defined),

4 ☞ **Staff Note.** UHCDA Section 13(b) reads: “This [Act] does not authorize mercy killing,  
5 assisted suicide, euthanasia, or the provision, withholding, or withdrawal of health care, to the  
6 extent prohibited by other statutes of this State.” The uniform act provision is essentially a  
7 recognition of other statutes, but in California law, existing Section 4723 is probably one of the  
8 main substantive provisions. Accordingly, the draft section makes some language changes  
9 without altering the purpose of the section.

#### 10 § 4654. Patient’s objections

11 4654. Nothing in this division authorizes consent to health care, or consent to the  
12 withholding or withdrawal of health care necessary to keep the patient alive, if the  
13 patient objects to the health care or to the withholding or withdrawal of the health  
14 care. In this situation, the case is governed by the law that would apply if there  
15 were no advance health care directive or surrogate decisionmaker.

16 **Comment.** Section 4654 continues former Section 4724 without substantive change and is  
17 broadened for consistency with the scope of this division.

18 See also Sections 4605 (“advance health care directive” defined), 4615 (“health care” defined),  
19 4617 (“health-care decision” defined), 4637 (“surrogate” defined),

#### 20 § 4655. Relation to general agency law

21 4655. Where this division provides does not provide a rule, the general law of  
22 agency may be applied.

23 **Comment.** Section 4655 is analogous to Section 4051 in the Power of Attorney Law. Under  
24 this section, reference may be made to general agency law where appropriate.

#### 25 § 4656. Use of copies

26 4656. A copy of a written advance health care directive, revocation of an  
27 advance health care directive, or designation or disqualification of a surrogate has  
28 the same effect as the original.

29 **Comment.** Section 4656 provides a special rule permitting the use of copies under this  
30 division. It is the same as Section 12 of the Uniform Health-Care Decisions Act (1993). The rule  
31 under this section for powers of attorney for health care differs from the rule under the Power of  
32 Attorney Law. See Section 4307 (certified copy of power of attorney).

33 See also Sections 4605 (“advance health care directive” defined), 4637 (“surrogate” defined).

34 **Background from Uniform Act.** The need to rely on an advance health-care directive may  
35 arise at times when the original is inaccessible. For example, an individual may be receiving care  
36 from several health-care providers or may be receiving care at a location distant from that where  
37 the original is kept. To facilitate prompt and informed decision making, this section provides that  
38 a copy of a valid written advance health-care directive, revocation of an advance health-care  
39 directive, or designation or disqualification of a surrogate has the same effect as the original.

40 [Adapted from Unif. Health-Care Decisions Act § 12 comment (1993).]

41 ☞ **Staff Note.** The State Bar Estate Planning, Trust and Probate Law Section Executive  
42 Committee suggests that “copies should be as good as originals with respect to *all* health care  
43 related documents unless the principal provides otherwise in the document or the supervising  
44 health care provider has actual notice of circumstances that would render a copy unreliable.” See  
45 Memorandum 97-41, Exhibit p. 16.



1 A more formal rule applies to powers of attorney under the PAL:

2 4307. (a) A copy of a power of attorney certified under this section has the same force and  
3 effect as the original power of attorney.

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

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

6 (2) A notary public in this state.

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

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

12 (d) Nothing in this section is intended to create an implication that a third person may be  
13 liable for acting on good faith reliance on a copy of a power of attorney that has not been  
14 certified under this section.

15 With the separation of health care decisionmaking from the PAL, Section 4307 will no longer  
16 apply to powers of attorney for health care. This will leave in doubt whether an official can  
17 certify health care powers, not to mention written advance directives other than powers of  
18 attorney, and notaries will not have any authority to certify copies under the health care division.

### 19 CHAPTER 3. TRANSITIONAL PROVISIONS

#### 20 § 4660. Application to existing powers of attorney and pending proceedings

21 ☞ **Staff Note.** Revision of this section is not complete. Further analysis may show that it is not  
22 needed —

23 4660. Except as otherwise provided by statute:

24 (a) On and after January 1, 1999, this division applies to all powers of attorney  
25 regardless of whether they were executed before, on, or after January 1, 1999.

26 (b) This division applies to all proceedings concerning powers of attorney  
27 commenced on or after January 1, 1999.

28 (c) This division applies to all proceedings concerning powers of attorney  
29 commenced before January 1, 1999, unless the court determines that application of  
30 a particular provision of this division would substantially interfere with the  
31 effective conduct of the proceedings or the rights of the parties and other interested  
32 persons, in which case the particular provision of this division does not apply and  
33 prior law applies.

34 (d) Nothing in this division affects the validity of a power of attorney executed  
35 before January 1, 1995, that was valid under prior law.

36 **Original Comment (1994).** Section [4054] is comparable to Section 15001 (application of  
37 Trust Law). Subdivision (a) provides the general rule that this division applies to all powers of  
38 attorney, regardless of when created.

39 Subdivision (b) is a specific application of the general rule in subdivision (a). See Section 4900  
40 *et seq.* (judicial proceedings concerning powers of attorney). Subdivision (c) provides discretion  
41 to the court to resolve problems arising in proceedings commenced before the operative date.

42 For special transitional provisions, see Sections 4102 (durable power of attorney form), 4651  
43 (form of durable power of attorney for health care); see also Section 4129(c) (springing powers).

44 See also Section 4022 (“power of attorney” defined).

1       **Original Comment (1995).** Subdivision (d) is added to Section 4054 to make clear that  
2 enactment of the Power of Attorney Law is not intended to affect the validity of a pre-existing  
3 power of attorney. See Section 4050 (types of powers governed by Power of Attorney Law).  
4 Thus, for example, a durable power of attorney for property matters executed before January 1,  
5 1995, that is neither notarized nor witnessed, is not made invalid by the new execution formalities  
6 provided by Section 4121. Subdivision (d) is declaratory of, and not a change in, the law.

7       ☞ **Staff Note.** Transitional issues arising from revisions in this draft will have to be carefully  
8 considered once the draft takes shape.

9       **§ 4661. Application of division to acts and transactions under power of attorney**

10       ☞ **Staff Note.** Revision of this section is not complete. Further analysis may show that it is not  
11 needed in the health care decisionmaking context—

12       4661. (a) If an advance health care directive provides that the law of this state  
13 governs the advance directive or otherwise indicates the [principal’s] intention that  
14 the law of this state governs the advance directive, this division governs the  
15 advance directive and applies to the agent’s activities in this state or outside this  
16 state where any of the following conditions is satisfied:

17       (1) The [principal] or agent was domiciled in this state when the [principal]  
18 executed the advance directive

19       (2) The authority conferred on the agent relates to activities in this state.

20       (3) The activities of the agent occurred or were intended to occur in this state.

21       (4) The [principal] executed the advance directive in this state.

22       (5) There is otherwise a reasonable relationship between this state and the  
23 subject matter of the advance directive.

24       (b) If subdivision (a) does not apply to the advance health care directive, this  
25 division governs the advance directive and applies to the agent’s activities in this  
26 state where either of the following conditions is satisfied:

27       (1) The [principal] was domiciled in this state when the [principal] executed the  
28 advance directive.

29       (2) The [principal] executed the advance directive in this state.

30       (c) An advance health care directive described in this section remains subject to  
31 this division despite a change in domicile of the [principal] or the agent.

32       **Original Comment.** Section [4052] is drawn from the Missouri Durable Power of Attorney  
33 Law. See Mo. Ann. Stat. § 404.730(1) (Vernon 1990). In part, this section is comparable to a  
34 provision of the Uniform Transfers to Minors Act. See Section 3902 & Comment. The power of  
35 attorney may also specify choice of law. Nothing in this section limits the jurisdiction exercisable  
36 under Code of Civil Procedure Section 410.10.

37       The rules in this section are subject to the general rules concerning the scope of the Power of  
38 Attorney Law set forth in Section 4050. See also Sections 4014 (“attorney-in-fact” defined), 4022  
39 (“power of attorney” defined), 4026 (“principal” defined), 4920-4923 (jurisdiction and venue).

40       **§ 4662. Power of attorney for health care subject to former 7-year limit**


41       4662. (a) This section applies only to a durable power of attorney for health care  
42 that satisfies one of the following requirements:

43       (1) The power of attorney was executed after January 1, 1984, but before  
44 January 1, 1992.

1 (2) The power of attorney was executed on or after January 1, 1992, and contains  
2 a warning statement that refers to a seven-year limit on its duration.

3 (b) Unless a shorter period is provided in the durable power of attorney for  
4 health care, a durable power of attorney for health care described in subdivision (a)  
5 expires seven years after the date of its execution unless at the end of the seven-  
6 year period the [principal] lacks the capacity to make health care decisions for  
7 himself or herself, in which case the durable power of attorney for health care  
8 continues in effect until the time when the [principal] regains the capacity to make  
9 health care decisions for himself or herself.

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

17  **Staff Note.** This is one of several legacy transitional provisions that will need to be carefully  
18 reviewed when the draft statute is completed.



1           PART 2 . UNIFORM HEALTH CARE DECISIONS ACT

2       ☞ **Staff Note.** This part has not been given a short title, although the possibility is discussed in  
3 the staff note following optional Section 4601. For now, we are working on the assumption that  
4 the part heading is a sufficient indicator that this part is largely drawn from the uniform act  
5 without being overly technical in describing its metes and bounds (which are fully indicated in  
6 relevant Comments).

7                           CHAPTER 1. ADVANCE HEALTH CARE DIRECTIVES

8   Article 1. General Provisions

9       **§ 4670. Individual instruction**

10       4670. An adult [or emancipated minor] may give an individual instruction for  
11 health care. The instruction may be oral or written. The instruction may be limited  
12 to take effect only if a specified condition arises.

13       **Comment.** Section 4670 is drawn from Section 2(a) of the Uniform Health-Care Decisions Act  
14 (1993). This section continues the substance of part of former Health and Safety Code Section  
15 7186.5 (Natural Death Act).

16       See also Sections 4615 (“health care” defined), 4623 (“individual instruction” defined).

17       **Background from Uniform Act.** The individual instruction authorized in Section 2(a) may but  
18 need not be limited to take effect in specified circumstances, such as if the individual is dying. An  
19 individual instruction may be either written or oral.

20       [Adapted from Unif. Health-Care Decisions Act § 2(a) comment (1993).]

21       ☞ **Staff Note.** Should the statute refer specifically to emancipated minors or rely on the general  
22 statutes that govern the powers of emancipated minors. See generally Fam. Code §§ 6500 *et seq.*  
23 (minors), 7000 *et seq.* (Emancipation of Minors Law), 7050(e)(1) (consent to medical care),  
24 (e)(2) (delegation of power); Prob. Code §§ 4121, 4700. Note that the NDA is limited to persons  
25 18 or older. Existing power of attorney law is drafted on the basis of a person “having the  
26 capacity to contract,” thus picking up appropriate emancipated minors under general rules  
27 determining when they have the power to contract. See Sections 4022, 4120. We believe that  
28 using “adult” automatically picks up emancipated minors and would eliminate the statutory  
29 references in favor of a statement in the Comment, although the “user friendly” approach might  
30 suggest that an important principle like this should be in the statute where nonlawyers are more  
31 likely to find it.

32       **§ 4671. Power of attorney for health care**

33       4671. An adult or [emancipated minor] may execute a power of attorney for  
34 health care, as provided in Article 2 (commencing with Section 4680). A power of  
35 attorney may authorize the agent to make health care decisions and may also  
36 include individual instructions.

37       **Comment.** Section 4671 is drawn from the first and third sentences of Section 2(b) of the  
38 Uniform Health-Care Decisions Act (1993). This section supersedes Section 4120 (who may  
39 execute power of attorney) to the extent it applied to powers of attorney for health care.

40       See also Sections 4607 (“agent” defined), 4617 (“health care decision” defined), 4623  
41 (“individual instruction” defined), 4627 (“power of attorney for health care” defined).

1       **Background from Uniform Act.** Section 2(b) authorizes a power of attorney for health care to  
2 include instructions regarding the principal’s health care. This provision has been included in  
3 order to validate the practice of designating an agent and giving individual instructions in one  
4 document instead of two. The authority of an agent falls within the discretion of the principal as  
5 expressed in the instrument creating the power and may extend to any health-care decision the  
6 principal could have made while having capacity. [See Prob. Code § \_\_\_\_.]

7       Section 2(b) excludes the oral designation of an agent. Section 5(b) [Prob. Code § 4711]  
8 authorizes an individual to orally designate a surrogate by personally informing the supervising  
9 health-care provider. A power of attorney for health care, however, must be in writing and signed  
10 by the [principal], [although it need not be witnessed or acknowledged].

11       [Adapted from Unif. Health-Care Decisions Act § 2(b) comment (1993).]

12       ☞ **Staff Note**

13       (1) This provision functions to incorporate the relevant parts of the Power of Attorney Law  
14 within the introductory advance directives provisions, following the logic of the Uniform Health  
15 Care Decisions Act. But the clarification that a power of attorney may include individual health  
16 care instructions is new and useful. The uniform act provision reads in full as follows:

17           2(b) An adult or emancipated minor may execute a power of attorney for health care, which  
18 may authorize the agent to make any health care decision the principal could have made while  
19 having capacity. The power must be in writing and signed by the principal. The power  
20 remains in effect notwithstanding the principal’s later incapacity and may include individual  
21 instructions. Unless related to the principal by blood, marriage, or adoption, an agent may not  
22 be an owner, operator, or employee of [a residential long-term health care institution] at  
23 which the principal is receiving care.

24       (2) See the Staff Note following Section 4670 concerning emancipated minors.

25       **§ 4672. Presumption of capacity**

26       4672. An individual is presumed to have capacity to make a health care decision,  
27 to give or revoke an advance health care directive, and to designate or disqualify a  
28 surrogate.

29       **Comment.** Section 4672 is the same in substance as Section 11(b) of the Uniform Health-Care  
30 Decisions Act (1993). The presumption of capacity with regard to revocation continues the  
31 substance of the first sentence of former Section 4727(c).

32       See also Sections 4605 (“advance health care directive” defined), 4609 (“capacity” defined),  
33 4617 (“health care decision” defined), 4637 (“surrogate” defined).

34       **Background from Uniform Act.** Section 11 reinforces the principle of patient autonomy by  
35 providing a rebuttable presumption that an individual has capacity for all decisions relating to  
36 health care referred to in the Act.

37       [Adapted from Unif. Health-Care Decisions Act § 11 comment (1993).]

38       **§ 4673. Capacity determinations by primary physician**

39       4673. Unless otherwise specified in a written advance health care directive, a  
40 determination that an individual lacks or has recovered capacity, or that another  
41 condition exists that affects an individual instruction or the authority of an agent,  
42 shall be made by the primary physician.

43       **Comment.** Section 4673 is drawn from Section 2(d) of the Uniform Health-Care Decisions Act  
44 (1993).

45       See also Sections 4607 (“agent” defined), 4605 (“advance health care directive” defined), 4609  
46 (“capacity” defined), 4623 (“individual instruction” defined), 4629 (“primary physician”  
47 defined).

1       **Background from Uniform Act.** Section 2(d) provides that unless otherwise specified in a  
2 written advance health-care directive, a determination that a principal has lost or recovered  
3 capacity to make health-care decisions must be made by the primary physician. For example, a  
4 principal might specify that the determination of capacity is to be made by the agent in  
5 consultation with the primary physician. Or a [principal], such as a member of the Christian  
6 Science faith who relies on a religious method of healing and who has no primary physician,  
7 might specify that capacity be determined by other means. In the event that multiple decision  
8 makers are specified and they cannot agree, it may be necessary to seek court instruction as  
9 authorized by Section 14 [Prob. Code § 4766].

10       Section 2(d) also provides that unless otherwise specified in a written advance health-care  
11 directive, the existence of other conditions which affect an individual instruction or the authority  
12 of an agent must be determined by the primary physician. For example, an individual might  
13 specify that an agent may withdraw or withhold treatment that keeps the individual alive only if  
14 the individual has an incurable and irreversible condition that will result in the individual's death  
15 within a relatively short time. In that event, unless otherwise specified in the advance health-care  
16 directive, the determination that the individual has that condition must be made by the primary  
17 physician.

18       [Adapted from Unif. Health-Care Decisions Act § 2(d) comment (1993).]

19       **§ 4674. Nomination of conservator in written advance health care directive**

20       4674. (a) A written advance health care directive may include the individual's  
21 nomination of a conservator or guardian of the person for consideration by the  
22 court if protective proceedings for the individual's person or estate are thereafter  
23 commenced.

24       (b) If the protective proceedings are conservatorship proceedings in this state,  
25 the nomination has the effect provided in Section 1810 and the court shall give  
26 effect to the most recent writing executed in accordance with Section 1810,  
27 whether or not the writing is a written advance health care directive.

28       **Comment.** Section 4674 continues Section 4126 without substantive change, insofar as that  
29 section applied to powers of attorney for health care, and expands the scope of the rule to apply to  
30 other written advance health care directives. This section is the same in substance as Section 2(g)  
31 of the Uniform Health-Care Decisions Act (1993).

32       See also Sections 4605 ("advance health care directive" defined), 4611 ("conservator" defined).

33       ☞ **Staff Note.** This section provides an example of how separation of health care  
34 decisionmaking from the PAL simplifies the statutory construction. In the first staff draft attached  
35 to Memorandum 97-41, the nomination of a conservator was covered for durable power of  
36 attorney for health care by the general rule covering all powers of attorney in Section 4126. This  
37 could not apply to written advance health care directives, however, because they are outside the  
38 scope of the PAL general provisions. Hence, a parallel section was included in the health care  
39 decisionmaking title applicable only to written advance directives that are *not* durable powers of  
40 attorney for health care.

41       **§ 4675. Witnesses required in skilled nursing facility**

42       4675. If an individual is a patient in a skilled nursing facility, as defined in  
43 subdivision (c) of Section 1250 of the Health and Safety Code, at the time the  
44 advance health care directive is executed, the following requirements shall be  
45 satisfied:

46       (a) The witnesses shall be adults.

1 (b) Each witness shall witness either the signing of the advance health care  
2 directive by the patient or the patient’s acknowledgment of the signature or the  
3 advance directive.

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

5 (1) The patient’s health care provider or an employee of the patient’s health care  
6 provider.

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

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

9 (d) Each witness shall make the following declaration in substance:

10 “I declare under penalty of perjury under the laws of California that the  
11 individual who signed or acknowledged this document is personally known  
12 to me, or that the identity of the individual was proven to me by convincing  
13 evidence, that the individual signed or acknowledged this advance health care  
14 directive in my presence, that the individual appears to be of sound mind and  
15 under no duress, fraud, or undue influence, that I am not the person appointed  
16 as agent by this document, and that I am not the individual’s health care  
17 provider, an employee of the individual’s health care provider, the operator of  
18 a community care facility, an employee of an operator of a community care  
19 facility, the operator of a residential care facility for the elderly, nor an  
20 employee of an operator of a residential care facility for the elderly.”

21 (e) An advance health care directive is not effective unless a patient advocate or  
22 ombudsman as may be designated by the Department of Aging for this purpose  
23 pursuant to any other applicable provision of law signs the instrument as a witness,  
24 either as one of two witnesses or in addition to notarization pursuant to Section  
25 \_\_\_\_\_. The patient advocate or ombudsman shall declare that he or she is serving as  
26 a witness as required by this subdivision. It is the intent of this subdivision to  
27 recognize that some patients in skilled nursing facilities are insulated from a  
28 voluntary decisionmaking role, by virtue of the custodial nature of their care, so as  
29 to require special assurance that they are capable of willfully and voluntarily  
30 executing an advance directive.

31 **Comment.**

32 **Original Comment.** Section 4701 restates parts of former Civil Code Section 2432 without  
33 substantive change. Subdivision (a) (along with the incorporated rules of Section 4122) continues  
34 former Civil Code Section 2432(d) without substantive change. Subdivision (b) continues the first  
35 declaration in former Civil Code Section 2432(a)(3)(A) without substantive change. Subdivision  
36 (c) continues former Civil Code Section 2432(e) without substantive change. Subdivision (d)  
37 continues the second declaration in former Civil Code Section 2432(a)(3)(A) without substantive  
38 change. Subdivision (e) continues former Civil Code Section 2432(f) without substantive change.  
39 For additional witnessing requirements, see Section 4121.

40 ☞ **Staff Note.** This section preserves the special rules for witnesses in the nursing homes and  
41 applies them to all written advance directives, not just powers of attorney.

42 Similar witnessing rules apply under Health and Safety Code Sections 7186.5(a) (second &  
43 third sentences) and 7187 in the Natural Death Act:

1 § 7186.5(a). ... The declaration shall be signed by the declarant, or another at the  
2 declarant's direction and in the declarant's presence, and witnessed by two individuals at least  
3 one of whom may not be a person who is entitled to any portion of the estate of the qualified  
4 patient upon his or her death under any will or codicil thereto of the qualified patient existing  
5 at the time of execution of the declaration or by operation of law. In addition, a health care  
6 provider, an employee of a health care provider, the operator of a community care facility, an  
7 employee of an operator of a community care facility, In addition, a health care provider, an  
8 employee of a health care provider, the operator of a community care facility, an employee of  
9 an operator of a community care facility, the operator of a residential care facility for the  
10 elderly, or an employee of an operator of a residential care facility for the elderly may not be  
11 a witness.

12 § 7187. A declaration shall have no force or effect if the declarant is a patient in a skilled  
13 nursing facility as defined in subdivision (c) of Section 1250, or a long-term health care  
14 facility as defined in subdivision (a) of Section 1418, at the time the declaration is executed  
15 unless one of the two witnesses to the declaration is a patient advocate or ombudsman as may  
16 be designated by the State Department of Aging for this purpose pursuant to any other  
17 applicable provision of law.

18 **§ 4676. Validity of written advance health care directive executed in another jurisdiction**

19 4675. (a) A written advance health care directive or similar instrument executed  
20 in another state or jurisdiction in compliance with the laws of that state or  
21 jurisdiction or of this state, is valid and enforceable in this state to the same extent  
22 as a written advance health care directive validly executed in this state.

23 (b) In the absence of knowledge to the contrary, a physician or other health care  
24 provider may presume that an advance health care directive or similar instrument,  
25 whether executed in another state or jurisdiction or in this state, is valid.

26 **Comment.** Subdivision (a) of Section 4675 continues former Section 4653 without substantive  
27 change, and extends its principles to apply to all written advance health care directives, which  
28 includes both durable powers of attorney for health care and written individual instructions. This  
29 section is consistent with Section 2(h) of the Uniform Health-Care Decisions Act (1993), as  
30 applied to instruments.

31 Subdivision (b) continues former Section 4752 without substantive change, and broadens the  
32 former rule for consistency with the scope of this division.

33 See also Section 4605 ("advance health care directive" defined), 4621 ("health care provider"  
34 defined), 4625 ("physician" defined). For the rule applicable under the Power of Attorney Law,  
35 see Section 4053.

36 **Background from Uniform Act.** Section 2(h) validates advance health-care directives which  
37 conform to the Act, regardless of when or where executed or communicated. This includes an  
38 advance health-care directive which would be valid under the Act but which was made prior to  
39 the date of its enactment and failed to comply with the execution requirements then in effect. It  
40 also includes an advance health-care directive which was made in another jurisdiction but which  
41 does not comply with that jurisdiction's execution or other requirements.

42 [Adapted from Unif. Health-Care Decisions Act § 2(h) comment (1993).]

43 ☞ **Staff Note.** The uniform act provision is not limited to *written* advance directive:

44 2(h) An advance health care directive is valid for purposes of this [Act] if it complies with  
45 this [Act], regardless of when or where executed or communicated.

46 Should Section 4653 also validate oral instructions communicated under the law of another state?  
47 The purpose seems to be to recognize communication of an oral individual instruction even  
48 though it may have occurred outside California or where it is an interstate communication. The



1 UHCDA language would validate an instruction given by a patient on vacation in Florida to a  
2 doctor in Florida or the patient’s doctor in California, without raising any technical issues of  
3 where the communication took place or what law might otherwise govern its effect.

## 4 Article 2. Powers of Attorney for Health Care

5 ☞ **Staff Note.** Many of the provisions in this article retain the language of existing law. We hope  
6 to be able to simplify these provisions as work on the draft continues.

### 7 § 4680. Formalities for executing a power of attorney

8 4680. A power of attorney for health care is legally sufficient if all of the  
9 following requirements are satisfied:

10 (a) The power of attorney contains the date of its execution.

11 (b) The power of attorney is signed either (1) by the [principal] or (2) in the  
12 [principal’s] name by some other person in the [principal’s] presence and at the  
13 [principal’s] direction.

14 (c) The power of attorney satisfies any applicable witnessing requirements of  
15 Section 4675.

16 **Comment.** Section 4680 restates former Section 4121 without substantive change.

17 See also Sections 4627 (“power of attorney for health care” defined), 4630 (“principal”  
18 defined).

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

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

28 In subdivision (b), the requirement that a power of attorney be signed by the principal or at the  
29 principal’s direction continues a rule implicit in former law. See former Civ. Code §§ 2400,  
30 2410(c). In addition, it generalizes the rule applicable to durable powers of attorney for health  
31 care under former Civil Code Section 2432.

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

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

1 § 4681. Limitations on who may be agent

2 4681. (a) Except as provided in subdivision (b), the following persons may not  
3 make health care decisions under a power of attorney:

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

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

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

8 (b) An employee of the treating health care provider or an employee of an  
9 operator of a community care facility or an employee of a residential care facility  
10 for the elderly may be designated as the agent to make health care decisions under  
11 a power of attorney for health care if both of the following requirements are met:

12 (1) The employee is a relative of the [principal] by blood, marriage, or adoption,  
13 or the employee is employed by the same treating health care provider, community  
14 care facility, or residential care facility for the elderly that employs the [principal].

15 (2) The other requirements of this chapter are satisfied.

16 (c) Except as provided in subdivision (b), if a health care provider becomes the  
17 [principal's] treating health care provider, the health care provider or an employee  
18 of the health care provider may not exercise authority to make health care  
19 decisions under a power of attorney.

20 (d) A conservator may not be designated as the agent to make health care  
21 decisions under a power of attorney for health care executed by a person who is a  
22 conservatee under the Lanterman-Petris-Short Act (Part 1 (commencing with  
23 Section 5000) of Division 5 of the Welfare and Institutions Code), unless all of the  
24 following are satisfied:

25 (1) The power of attorney is otherwise valid.

26 (2) The conservatee is represented by legal counsel.

27 (3) The lawyer representing the conservatee signs a certificate stating in  
28 substance:

29 "I am a lawyer authorized to practice law in the state where this power of  
30 attorney was executed, and the principal was my client at the time this power  
31 of attorney was executed. I have advised my client concerning his or her  
32 rights in connection with this power of attorney and the applicable law and  
33 the consequences of signing or not signing this power of attorney, and my  
34 client, after being so advised, has executed this power of attorney."

35 **Comment.** Section 4681 continues former Section 4702 without substantive change.

36 See also Sections 4613 ("community care facility" defined), 4611 ("conservator" defined),  
37 4617 ("health care decision" defined), 4621 ("health care provider" defined), 4627 ("power of  
38 attorney for health care" defined), 4633 ("residential care facility for the elderly" defined).

39 **Original Comment.** Subdivision (a) of Section 4702 continues former Civil Code Section  
40 2432(b)(1) without substantive change. Subdivision (a), along with Section 4701, which  
41 precludes health care providers in general and their employees and other specified persons from  
42 acting as witnesses to durable powers of attorney for health care, recognizes that Section 4750  
43 provides protections from liability for a health care provider who relies in good faith on a

1 decision of the attorney-in-fact. Subdivision (a) does not preclude a person from appointing, for  
2 example, a friend who is a doctor as the attorney-in-fact under the person’s durable power of  
3 attorney for health care, but if the doctor becomes the person’s “treating health care provider,” the  
4 doctor is precluded from acting as the attorney-in-fact under the durable power of attorney for  
5 health care.

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

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

11 Subdivision (d) continues former Civil Code Section 2432(c) without substantive change. This  
12 subdivision prescribes conditions that must be satisfied if a conservator is to be designated as the  
13 attorney-in-fact for a conservatee under the Lanterman-Petris-Short Act. This subdivision has no  
14 application where a person other than the conservator is to be designated as attorney-in-fact....

15 ☞ **Staff Note.** This section will need additional revision for consistency with the terminology of  
16 the UHCDA. For example, “treating” health care provider does not have a special meaning under  
17 the uniform act.

### 18 § 4682. Agent’s authority

19 4682. Unless otherwise specified in a power of attorney for health care, the  
20 authority of an agent becomes effective only on a determination that the [principal]  
21 lacks capacity, and ceases to be effective on a determination that the [principal]  
22 has recovered capacity.

23 **Comment.** Section 4682 is drawn from Section 2(c) of the Uniform Health-Care Decisions Act  
24 (1993).

25 See also Sections 4607 (“agent” defined), 4609 (“capacity” defined), 4627 (“power of attorney  
26 for health care” defined), 4630 (“principal” defined).

27 **Background from Uniform Act.** Section 2(c) provides that the authority of the agent to make  
28 health-care decisions ordinarily does not become effective until the principal is determined to lack  
29 capacity and ceases to be effective should the principal recover capacity. A principal may  
30 provide, however, that the authority of the agent becomes effective immediately or upon the  
31 happening of some event other than the loss of capacity but may do so only by an express  
32 provision in the power of attorney. For example, a mother who does not want to make her own  
33 health-care decisions but prefers that her daughter make them for her may specify that the  
34 daughter as agent is to have authority to make health-care decisions immediately. The mother in  
35 that circumstance retains the right to later revoke the power of attorney as provided in Section 3  
36 [Prob. Code §§ \_\_\_\_-\_\_\_\_].

37 [Adapted from Unif. Health-Care Decisions Act § 2(c) comment (1993).]

### 38 § 4683. Requirements for power of attorney for health care

39 4683. An agent under a power of attorney may not make health care decisions  
40 unless the power of attorney satisfies all of the following requirements:

41 (a) The power of attorney specifically grants authority to the agent to make  
42 health care decisions.

43 (b) The power of attorney is executed as provided in this article.

44 **Comment.** Section 4683 continues former Section 4700 without substantive change.

45 See also Sections 4607 (“agent” defined), 4609 (“capacity” defined), 4617 (“health care  
46 decision” defined), 4627 (“power of attorney for health care” defined).



1       **Original Comment.** Section 4700 restates the first part of former Civil Code Section 2432(a)  
2 without substantive change. Subdivision (a) continues former Civil Code Section 2432(a)(1)  
3 without substantive change. The dating requirement of former Civil Code Section 2432(a)(2) is  
4 continued in Section 4121(a), which is applicable to all powers of attorney under this division,  
5 and which is incorporated in subdivision (b). The option of using a notary public or two witnesses  
6 under former Civil Code Section 2432(a)(3) is continued through the incorporation of the general  
7 execution requirements in Section 4121(c). As to special rules concerning qualifications of  
8 witnesses under a durable power of attorney for health care, see Section 4701. See also Section  
9 4650 (exception to formalities requirement for powers of attorney executed before operative  
10 date).

11       ☞ **Staff Note.** This section appears to be largely redundant and could be eliminated or, if it  
12 contains some important principle, integrated into some other section.

### 13       **§ 4684. Lapse of time**

14       4684. Unless a power of attorney states a time of termination, the authority of  
15 the agent is exercisable notwithstanding any lapse of time since execution of the  
16 power of attorney.

17       **Comment.** Section 4684 continues Section 4127, insofar as it applied to powers of attorney for  
18 health care, without substantive change.

19       See also Sections 4607 (“agent” defined), 4627 (“power of attorney for health care” defined).

20       **Original Comment.** Section [4127] is the same in substance as the second sentence of the  
21 official text of Section 2 of the Uniform Durable Power of Attorney Act (1987), Uniform Probate  
22 Code Section 5-502 (1991). See Section 2(b) (construction of provisions drawn from uniform  
23 acts). See also Sections 4125 (effect of attorney-in-fact’s acts under durable power of attorney  
24 during principal’s incapacity), 4152 (termination of authority of attorney-in-fact).

### 25       **§ 4685. Priority of provisions of power of attorney**

26       4685. (a) Except as provided in subdivision (b), the [principal] may limit the  
27 application of any provision of this division by an express statement in the power  
28 of attorney or by providing an inconsistent rule in the power of attorney.

29       (b) A power of attorney may not limit either the application of a statute  
30 specifically providing that it is not subject to limitation in the power of attorney or  
31 a statute concerning any of the following:

- 32       (1) Statements required to be included in a power of attorney.
- 33       (2) Operative dates of statutory enactments or amendments.
- 34       (3) Execution formalities.
- 35       (4) Qualifications of witnesses.
- 36       (5) Qualifications of agents.
- 37       (6) Protection of third persons from liability.

38       **Comment.** Section 4685 continues Section 4101, insofar as it applied to powers of attorney for  
39 health care, without substantive change.

40       See also Sections 4607 (“agent” defined), 4627 (“power of attorney for health care” defined),  
41 4630 (“principal” defined).

42       **Original Comment.** Section 4101 is new. This section makes clear that many of the statutory  
43 rules provided in this division are subject to express or implicit limitations in the power of  
44 attorney. If a statutory rule is not subject to control by the power of attorney, this is stated  
45 explicitly, either in a particular section or as to a group of sections. See, e.g., Sections 4130  
46 (inconsistent authority), 4151(a)(2) (revocation of power of attorney by writing), 4153(a)(2)-(3)

1 (revocation of attorney-in-fact’s authority), 4155 (termination of authority under nondurable  
2 power of attorney on principal’s incapacity), 4206 (relation of attorney-in-fact to court-appointed  
3 fiduciary), 4207 (resignation of attorney-in-fact), 4232 (duty of loyalty), 4233 (duty to keep  
4 principal’s property separate and identified), 4234(b) (authority to disobey instructions with court  
5 approval), 4236 (duty to keep records and account; availability of records to other persons), 4902  
6 (effect of provision in power of attorney attempting to limit right to petition), 4903 (limitations on  
7 right to petition)....

8 **§ 4686. Agent’s authority to make health care decisions**

9 4687. (a) Unless the power of attorney provides otherwise, the agent designated  
10 in a power of attorney for health care who is known to the health care provider to  
11 be reasonably available and willing to make health care decisions has priority over  
12 any other person to act for the [principal] in all matters of health care decisions,  
13 but the agent does not have authority to make a particular health care decision if  
14 the [principal] is able to give informed consent with respect to that decision.

15 (b) Subject to any limitations in the power of attorney, the agent designated in a  
16 power of attorney for health care may make health care decisions for the  
17 [principal], effective before or after the death of the [principal], to the same extent  
18 as the [principal] could make health care decisions if the [principal] had the  
19 capacity to do so, including the following:

20 (1) Making a disposition under the Uniform Anatomical Gift Act (Chapter 3.5  
21 (commencing with Section 7150) of Part 1 of Division 7 of the Health and Safety  
22 Code).

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

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

26 (c) In exercising the authority under the power of attorney for health care, the  
27 agent has a duty to act consistent with the desires of the [principal] as expressed in  
28 the power of attorney or otherwise made known to the agent at any time or, if the  
29 [principal’s] desires are unknown, to act in the best interest of the [principal]. The  
30 agent shall consider the [principal’s] personal values to the extent known to the  
31 agent.

32 (d) Nothing in this chapter affects any right the person designated as agent may  
33 have, apart from the power of attorney for health care, to make or participate in the  
34 making of health care decisions on behalf of the [principal].

35 **Comment.** Section 4687 continues former Section 4720 without substantive change.  
36 Subdivision (c) is revised to add the last sentence, drawn from Section 2(e) of the Uniform  
37 Health-Care Decisions Act (1993). Technical amendments are made to conform to the language  
38 of this division.

39 See also Sections 4607 (“agent” defined), 4615 (“health care” defined), 4617 (“health-care  
40 decision” defined), 4627 (“power of attorney for health care” defined), 4631 (“reasonably  
41 available” defined).

42 **Background from Uniform Act.** Section 2(e) requires the agent to follow the principal’s  
43 individual instructions and other expressed wishes to the extent known to the agent. To the extent  
44 such instructions or other wishes are unknown, the agent must act in the principal’s best interest.  
45 In determining the principal’s best interest, the agent is to consider the principal’s personal values

1 to the extent known to the agent. The Act does not prescribe a detailed list of factors for  
2 determining the principal’s best interest but instead grants the agent discretion to ascertain and  
3 weigh the factors likely to be of importance to the principal.

4 [Adapted from Unif. Health-Care Decisions Act § 2(e) comment (1993).]

5 **Original Comment.** Section [4720] continues former Civil Code Section 2434 without  
6 substantive change.

7 Subdivision (a) of Section 4720 gives the attorney-in-fact priority to make health care decisions  
8 if known to the health care provider to be available and willing to act. The power of attorney may  
9 vary this priority. Subdivision (a) also provides that the attorney-in-fact is not authorized to make  
10 health care decisions if the principal is able to give informed consent. The power of attorney may,  
11 however, give the attorney-in-fact authority to make health care decisions for the principal even  
12 though the principal is able to give informed consent, but the power of attorney is always subject  
13 to Section 4724 (if principal objects, attorney-in-fact not authorized to consent to health care or to  
14 the withholding or withdrawal of health care necessary to keep the principal alive).

15 Subdivision (b) authorizes the attorney-in-fact to make health care decisions, except as limited  
16 by the durable power of attorney for health care. As provided in subdivision (c), in exercising his  
17 or her authority, the attorney-in-fact has the duty to act consistent with the principal’s desires if  
18 known or, if the principal’s desires are unknown, to act in the best interests of the principal. This  
19 authority is subject to Section 4722 which precludes consent to certain specified types of  
20 treatment. See also Section 4723 (unauthorized acts and omissions). The principal is free to  
21 provide any limitations on types of treatment in the durable power of attorney that are desired.  
22 See also Sections 4900 *et seq.* (judicial proceedings concerning powers of attorney). The  
23 authority under subdivision (b) is limited by Section 4724 (attorney-in-fact not authorized to  
24 consent to health care, or to the withholding or withdrawal of health care necessary to keep the  
25 principal alive, if principal objects). An attorney-in-fact may, without liability, decline to act  
26 under the power of attorney. For example, the attorney-in-fact may not be willing to follow the  
27 desires of the principal as stated in the power of attorney because of changed circumstances.  
28 Subdivision (d) makes clear that, in such a case, the attorney-in-fact may make or participate in  
29 the making of health care decisions for the principal without being bound by the stated desires of  
30 the principal to the extent that the person designated as the attorney-in-fact has the right under the  
31 applicable law apart from the durable power of attorney.

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

34  **Staff Note**

35 (1) The Uniform Health-Care Decisions Act provision reads as follows:

36 2(e) An agent shall make a health care decision in accordance with the principal’s  
37 individual instructions, if any, and other wishes to the extent known to the agent. Otherwise,  
38 the agent shall make the decision in accordance with the agent’s determination of the  
39 principal’s best interest. In determining the principal’s best interest, the agent shall consider  
40 the principal’s personal values to the extent known to the agent.

41 The staff proposes only to add the “personal value” provision to the existing, more detailed  
42 provision.

43 (2) As discussed in Memorandum 97-4 (April meeting), it is not clear whether the introductory  
44 qualifying language in subdivision (a) applies only to the first clause or also to the final clause.  
45 The Comment makes clear that it applies to both, but the section can be read both ways. The staff  
46 believes the language should be revised for clarity because this is a crucial issue — can a  
47 principal delegate authority to make health care decisions to be exercised when the principal has  
48 capacity. As set out in draft Section 4682, the UHCDA provides: “Unless otherwise specified in a  
49 power of attorney for health care, the authority of an agent becomes effective only on a  
50 determination that the principal lacks capacity, and ceases to be effective on a determination that  
51 the principal has recovered capacity.” Obviously, the overlap and inconsistencies between these  
52 sections remains to be resolved.

1 The State Bar Estate Planning, Trust and Probate Law Section Executive Committee is reported  
2 as being “comfortable with our current law on this point as it is expressed in Probate Code  
3 Section 4720.” See Memorandum 97-41, Exhibit p. 10.  
4

5 **[§ 4687. Permissible purposes]**

6 ☞ **Staff Note.** We have not determined what to do with the permissible purposes section in the  
7 PAL. It recognizes a third category of power of attorney, one for personal care. As things now  
8 stand, personal care powers would have to be executed with the formalities of a property power,  
9 requiring two witnesses or notarization. Personal care authority should probably be permitted in a  
10 health care power as well as (or instead of?) in a property management power.

11 **§ 4123. Permissible purposes**

12 4123. (a) In a power of attorney, a principal may grant authority to an attorney-in-fact to act  
13 on the principal’s]behalf with respect to all lawful subjects and purposes or with respect to  
14 one or more express subjects or purposes. The attorney-in-fact may be granted authority with  
15 regard to the principal’s]property, personal care, health care, or any other matter.

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

21 (c) With regard to personal care, a power of attorney may grant authority to make decisions  
22 relating to the personal care of the [principal], including, but not limited to, determining  
23 where the principal will live, providing meals, hiring household employees, providing  
24 transportation, handling mail, and arranging recreation and entertainment.

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

28 **Article 3. Modification and Revocation of Advance Directives**

29 ☞ **Staff Note.** These provisions have been greatly simplified in the process of severing health  
30 care powers from the general and fairly technical property power rules in the PAL.

31 **§ 4695. Revocation of power of attorney for health care**

32 4695. (a) At any time while the [principal] has capacity, the [principal] may do  
33 any of the following:

34 (1) Revoke the designation of the agent under the power of attorney for health  
35 care by notifying the agent orally or in writing.

36 (2) Revoke the authority granted to the agent to make health care decisions by  
37 notifying the supervising health care provider orally or in writing.

38 (b) If the [principal] notifies the supervising health care provider orally or in  
39 writing that the authority granted to the agent to make health care decisions is  
40 revoked, the supervising health care provider shall make the notification a part of  
41 the [principal’s] medical record and shall make a reasonable effort to notify the  
42 agent of the revocation.

1 **Comment.** Section 4695 continues former Section 4727(a)-(b) without substantive change. See  
2 Section 4672 (presumption of capacity).

3 See also Sections 4607 (“agent” defined), 4609 (“capacity” defined), 4617 (“health care  
4 decision” defined), 4627 (“power of attorney for health care” defined), 4630 (“principal”  
5 defined), 4635 (“supervising health care provider” defined).

6 **Original Comment.** Section [4727] continues former Civil Code Section 2437 without change,  
7 except for some technical, nonsubstantive revisions. This section makes clear that the principal  
8 can revoke the appointment of the attorney-in-fact or the authority granted to the attorney-in-fact  
9 by oral or written notification to the attorney-in-fact or health care provider. The principal may  
10 revoke the appointment or authority only if, at the time of revocation, the principal has sufficient  
11 capacity to give a durable power of attorney for health care. The burden of proof is on the person  
12 who seeks to establish that the principal did not have the capacity to revoke the appointment or  
13 authority. See subdivision (c). Although the authorization to act as attorney-in-fact to make health  
14 care decisions is revoked if the principal notifies the attorney-in-fact orally or in writing that the  
15 appointment of the attorney-in-fact is revoked, a health care provider is protected if the health  
16 care provider without knowledge of the revocation acts in good faith on a health care decision of  
17 the attorney-in-fact. See Section [4750] (immunities of health care provider).

18 Subdivision (b) is intended to preserve a record of a written or oral revocation. It also provides  
19 a means by which notice of an oral or written revocation to a health care provider may come to  
20 the attention of a successor health care provider and imposes a duty to make a reasonable effort to  
21 notify the attorney-in-fact of the revocation....

22 ☞ **Staff Note**

23 (1) The Commission may want to further simplify this section along the lines of the UHCDA:

24 3(a). An individual may revoke the designation of an agent only by a signed writing or by  
25 personally informing the supervising health-care provider.

26 (2) Oral revocation, regardless of the patient’s capacity, is provided in the Natural Death Act  
27 (Health & Safety Code § 7188):

28 7188. (a) A declarant may revoke a declaration at any time and in any manner, without  
29 regard to the declarant’s mental or physical condition. A revocation is effective upon its  
30 communication to the attending physician or other health care provider by the declarant or a  
31 witness to the revocation.

32 (b) The attending physician or other health care provider shall make the revocation a part of  
33 the declarant’s medical record.

34 (3) Marc Hankin believes that “it is illogical to prohibit a health care provider from taking an  
35 action, pursuant to an advance directive, to which a patient objects, because in that situation the  
36 agent is making the decision precisely *because* the principal lacks capacity to make the decision  
37 himself.” See Memorandum 97-41, Exhibit p. 16.

38 **§ 4696. Effect of dissolution or annulment**

39 4696. (a) If after executing a power of attorney for health care the [principal’s]  
40 marriage to the agent is dissolved or annulled, the [principal’s] designation of the  
41 former spouse as an agent to make health care decisions for the [principal] is  
42 revoked.

43 (b) If the agent’s authority is revoked solely by subdivision (a), it is revived by  
44 the [principal’s] remarriage to the agent.

45 **Comment.** Section 4696 continues former Section 4727(e) without substantive change. This  
46 section is comparable to Section 3(d) of the Uniform Health-Care Decisions Act (1993), but does  
47 not revoke the designation of an agent on legal separation. [For special rules applicable to a  
48 federal “absentee” (as defined in Section 1403), see Section 3722.]



1 This section is subject to limitation by the power of attorney. See Section \_\_\_\_ (priority of  
2 provisions of power of attorney). See also Sections 4607 (“agent” defined), 4617 (“health care  
3 decision” defined), 4627 (“power of attorney for health care” defined), 4630 (“principal”  
4 defined).

5 ☞ **Staff Note.** The uniform act also provides an exception for a contrary order in the order of  
6 dissolution or annulment.

7 **§ 4697. Effect of later advance directive on earlier advance directive**

8 4697. (a) Except as otherwise provided in the power of attorney, a valid power  
9 of attorney for health care revokes any prior power of attorney for health care.

10 (b) An individual instruction that conflicts with an earlier individual instruction  
11 revokes the earlier individual instruction to the extent of the conflict.

12 **Comment.** Subdivision (a) of Section 4697 continues former Section 4727(d) without  
13 substantive change .

14 Subdivision (b) is drawn from Section 3(e) of the Uniform Health-Care Decisions Act (1993).  
15 This subdivision is also consistent with former Health and Safety Code Section 7193 (Natural  
16 Death Act).

17 See also Section 4605 (“advance health care directive” defined) 4623 (“individual instruction”  
18 defined),.

19 ☞ **Staff Note.** Section 3(e) of the Uniform Health-Care Decisions Act (1993) provides:

20 3(e) An advance health care directive that conflicts with an earlier advance health care  
21 directive revokes the earlier directive to the extent of the conflict.

22 **UHCDA Comment.** Subsection (e) establishes a rule of construction permitting multiple  
23 advance health-care directives to be construed together in order to determine the individual’s  
24 intent, with the later advance health-care directive superseding the former to the extent of any  
25 inconsistency.

26 The section does not specifically address amendment of an advance health-care directive  
27 because such reference is not necessary. Subsection (b) specifically authorizes partial  
28 revocation, and subsection (e) recognizes that an advance health-care directive may be  
29 modified by a later directive.

30 The existing power of attorney for health care rule in Section 4727 provides a simple, if  
31 draconian, rule. There is only one valid durable power of attorney for health care, and that is the  
32 last one validly executed. Subdivision (a) in the draft section preserves this rule, for now.  
33 However, it does not seem appropriate to apply this rule to individual instructions, and so  
34 subdivision (b) adopts the uniform act rule requiring construction of the instruments. It would not  
35 be appropriate to apply the rule in subdivision (a) to all advance directives, because this could  
36 result in individual instructions invalidating powers of attorney. Existing law presumes the  
37 supremacy of the durable power of attorney for health care. For example, Health and Safety Code  
38 Section 7193 in the NDA provides that a health care power prevails over an NDA declaration  
39 unless the power of attorney provides otherwise.

40 The situation is also complicated by the fact that a power of attorney for health care can include  
41 individual instructions. In this situation, does a later power of attorney supersede the individual  
42 instruction part of the earlier power of attorney? Or is the instruction portion treated separately  
43 and construed under subdivision (b)?

44 Consideration of these problems and other permutations, suggest that it would be best to adopt  
45 the uniform act rule in place of the existing California rule.

1                   CHAPTER 2. ADVANCE HEALTH CARE DIRECTIVE FORMS

2   **§ 4700. Authorization for statutory form of advance health care directive**

3       4700. The form provided in Section 4701 may, but need not, be used to create an  
4   advance health care directive. The other sections of this division govern the effect  
5   of the form or any other writing used to create an advance health care directive. An  
6   individual may complete or modify all or any part of the form in Section 4701.

7       **Comment.** Section 4700 is drawn from the introductory paragraph of Section 4 of the Uniform  
8   Health-Care Decisions Act (1993).

9       See also Section 4605 (“advance health care directive” defined).

10   **§ 4701. Optional form of advance health care directive**

11   4701. The statutory advance health care directive form is as follows:

12                                   ADVANCE HEALTH CARE DIRECTIVE  
13                                   (California Probate Code Section 4701)

14                                   **Explanation**

15    You have the right to give instructions about your own health care. You also  
16    have the right to name someone else to make health care decisions for you. This  
17    form lets you do either or both of these things. It also lets you express your wishes  
18    regarding donation of organs and the designation of your primary physician. If you  
19    use this form, you may complete or modify all or any part of it. You are free to use  
20    a different form.

21    Part 1 of this form is a power of attorney for health care. Part I lets you name  
22    another individual as agent to make health care decisions for you if you become  
23    incapable of making your own decisions or if you want someone else to make  
24    those decisions for you now even though you are still capable. You may also name  
25    an alternate agent to act for you if your first choice is not willing, able, or  
26    reasonably available to make decisions for you. Unless related to you, your agent  
27    may not be an owner, operator, or employee of [a residential long-term health care  
28    institution] at which you are receiving care.

29    Unless the form you sign limits the authority of your agent, your agent may  
30    make all health care decisions for you. This form has a place for you to limit the  
31    authority of your agent. You need not limit the authority of your agent if you wish  
32    to rely on your agent for all health care decisions that may have to be made. If you  
33    choose not to limit the authority of your agent, your agent will have the right to:

- 34           (a) consent or refuse consent to any care, treatment, service, or procedure to  
35           maintain, diagnose, or otherwise affect a physical or mental condition;  
36           (b) select or discharge health care providers and institutions;

- 1 (c) approve or disapprove diagnostic tests, surgical procedures, programs of
- 2 medication, and orders not to resuscitate; and
- 3 (d) direct the provision, withholding, or withdrawal of artificial nutrition
- 4 and hydration and all other forms of health care.

5 Part 2 of this form lets you give specific instructions about any aspect of your  
6 health care. Choices are provided for you to express your wishes regarding the  
7 provision, withholding, or withdrawal of treatment to keep you alive, including the  
8 provision of artificial nutrition and hydration, as well as the provision of pain  
9 relief. Space is also provided for you to add to the choices you have made or for  
10 you to write out any additional wishes.

11 Part 3 of this form lets you express an intention to donate your bodily organs and  
12 tissues following your death.

13 Part 4 of this form lets you designate a physician to have primary responsibility  
14 for your health care.

15 After completing this form, sign and date the form at the end. It is recommended  
16 but not required that you request two other individuals to sign as witnesses. Give a  
17 copy of the signed and completed form to your physician, to any other health care  
18 providers you may have, to any health care institution at which you are receiving  
19 care, and to any health care agents you have named. You should talk to the person  
20 you have named as agent to make sure that he or she understands your wishes and  
21 is willing to take the responsibility.

22 You have the right to revoke this advance health care directive or replace this  
23 form at any time.

24 \* \* \* \* \*

25 PART 1  
26 POWER OF ATTORNEY FOR HEALTH CARE

27 (1) DESIGNATION OF AGENT: I designate the following individual as my agent to  
28 make health care decisions for me:  
29

---

30 (name of individual you choose as agent)  
31

---

32 (address) (city) (state) (zip code)  
33

---

34 (home phone) (work phone)





1 my agent determines to be in my best interest. In determining my best interest, my agent  
2 shall consider my personal values to the extent known to my agent.

3 (5) NOMINATION OF [GUARDIAN]: If a [guardian] of my person needs to be  
4 appointed for me by a court, I nominate the agent designated in this form. If that agent is  
5 not willing, able, or reasonably available to act as [guardian], I nominate the alternate  
6 agents whom I have named, in the order designated.

7 PART 2

8 INSTRUCTIONS FOR HEALTH CARE

9 If you are satisfied to allow your agent to determine what is best for you in making end-  
10 of-life decisions, you need not fill out this part of the form. If you do fill out this part of  
11 the form, you may strike any wording you do not want.

12 (6) END-OF-LIFE DECISIONS: I direct that my health care providers and others  
13 involved in my care provide, withhold, or withdraw treatment in accordance with the  
14 choice I have marked below:

15  (a) Choice Not To Prolong Life

16 I do not want my life to be prolonged if (1) I have an incurable and irreversible  
17 condition that will result in my death within a relatively short time, (2) I become  
18 unconscious and, to a reasonable degree of medical certainty, I will not regain  
19 consciousness, or (3) the likely risks and burdens of treatment would outweigh the  
20 expected benefits, OR

21  (b) Choice To Prolong Life

22 I want my life to be prolonged as long as possible within the limits of generally  
23 accepted health care standards.

24 (7) ARTIFICIAL NUTRITION AND HYDRATION: Artificial nutrition and hydration  
25 must be provided, withheld, or withdrawn in accordance with the choice I have made in  
26 paragraph (6) unless I mark the following box. If I mark this box , artificial nutrition  
27 and hydration must be provided regardless of my condition and regardless of the choice I  
28 have made in paragraph (6).

29 (8) RELIEF FROM PAIN: Except as I state in the following space, I direct that  
30 treatment for alleviation of pain or discomfort be provided at all times, even if it hastens  
31 my death:  
32

---

33

---

1 (Add additional sheets if needed.)

2 (9) OTHER WISHES: (If you do not agree with any of the optional choices above and  
3 wish to write your own, or if you wish to add to the instructions you have given above,  
4 you may do so here.) I direct that:  
5

---

6  
7 (Add additional sheets if needed.)

8 PART 3  
9 DONATION OF ORGANS AT DEATH  
10 (OPTIONAL)

11 (10) Upon my death (mark applicable box):

12  (a) I give any needed organs, tissues, or parts, OR

13  (b) I give the following organs, tissues, or parts only.

14 (c) My gift is for the following purposes (strike any of the following you do not  
15 want):

- 16 (1) Transplant
- 17 (2) Therapy
- 18 (3) Research
- 19 (4) Education

20 PART 4  
21 PRIMARY PHYSICIAN  
22 (OPTIONAL)

23 (11) I designate the following physician as my primary physician:  
24

---

25 (name of physician)  
26

---

27 (address) (city) (state) (zip code)  
28

---

29 (phone)



\_\_\_\_\_  
(date)

\_\_\_\_\_  
(date)

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33

PART 5  
SPECIAL WITNESS REQUIREMENT

(14) The following statement is required only if you are a patient in a skilled nursing facility — a health care facility that provides the following basic services: skilled nursing care and supportive care to patients whose primary need is for availability of skilled nursing care on an extended basis. The patient advocate or ombudsman must sign the following statement:

**Statement of Patient Advocate or Ombudsman**

I declare under penalty of perjury under the laws of California that I am a patient advocate or ombudsman as designated by the State Department of Aging and that I am serving as a witness as required by Section 4675 of the Probate Code.

\_\_\_\_\_  
(date)

\_\_\_\_\_  
(sign your name)

\_\_\_\_\_  
(address)

\_\_\_\_\_  
(print your name)

\_\_\_\_\_  
(city)

\_\_\_\_\_  
(state)

**Comment.** Section 4701 provides the contents of the optional statutory form for the Advance Health Care Directive. Parts 1-4 of this form are drawn from Section 4 of the Uniform Health-Care Decisions Act (1993) and supersede the Statutory Form Durable Power of Attorney for Health Care in former Section 4771. Part 5 continues a portion of the former statutory form applicable to patients in skilled nursing facilities.

**Background from Uniform Act.** The optional form set forth in this section incorporates the [Section 2] requirements applicable to advance health-care directives. There are four parts to the form. An individual may complete all or any parts of the form. Any part of the form left blank is not to be given effect. For example, an individual may complete the instructions for health care part of the form alone. Or an individual may complete the power of attorney for health care part of the form alone. Or an individual may complete both the instructions and power of attorney for health care parts of the form. An individual may also, but need not, complete the parts of the form pertaining to donation of bodily organs and tissue and the designation of a primary physician.

Part 1, the power of attorney for health care, appears first on the form in order to ensure to the extent possible that it will come to the attention of a casual reader. This reflects the reality that the appointment of an agent is a more comprehensive approach to the making of health-care decisions than is the giving of an individual instruction, which cannot possibly anticipate all future circumstances which might arise.

Part 1(1) of the power of attorney for health care form requires only the designation of a single agent, but with opportunity given to designate a single first alternate and a single second alternate,

1 if the individual chooses. No provision is made in the form for the designation of co-agents in  
2 order not to encourage the practice. Designation of co-agents is discouraged because of the  
3 difficulties likely to be encountered if the co-agents are not all readily available or do not agree. If  
4 co-agents are appointed, the instrument should specify that either is authorized to act if the other  
5 is not reasonably available. It should also specify a method for resolving disagreements.

6 Part 1(2) of the power of attorney for health care form grants the agent authority to make all  
7 health-care decisions for the individual subject to any limitations which the individual may state  
8 in the form. Reference is made to artificial nutrition and hydration and other forms of treatment to  
9 keep an individual alive in order to ensure that the individual is aware that those are forms of  
10 health care that the agent would have the authority to withdraw or withhold absent specific  
11 limitation.

12 Part 1(3) of the power of attorney for health care form provides that the agent's authority  
13 becomes effective upon a determination that the individual lacks capacity, but as authorized by  
14 [Section 2(c)] a box is provided for the individual to indicate that the authority of the agent takes  
15 effect immediately.

16 Part 1(4) of the power of attorney for health care form directs the agent to make health-care  
17 decisions in accordance with the power of attorney, any instructions given by the individual in  
18 Part 2 of the form, and the individual's other wishes to the extent known to the agent. To the  
19 extent the individual's wishes in the matter are not known, the agent is to make health-care  
20 decisions based on what the agent determines to be in the individual's best interest. In  
21 determining the individual's best interest, the agent is to consider the individual's personal values  
22 to the extent known to the agent. Section 2(e) imposes this standard, whether or not it is included  
23 in the form, but its inclusion in the form will bring it to the attention of the individual granting the  
24 power, to the agent, to any guardian or surrogate, and to the individual's health-care providers.

25 Part 1(5) of the power of attorney for health care form nominates the agent, if available, able,  
26 and willing to act, otherwise the alternate agents in order of priority stated, as guardians of the  
27 person for the individual. This provision is included in the form for two reasons. First, if an  
28 appointment of a guardian becomes necessary the agent is the one whom the individual would  
29 most likely want to serve in that role. Second, the nomination of the agent as guardian will reduce  
30 the possibility that someone other than the agent will be appointed as guardian who could use the  
31 position to thwart the agent's authority.

32 Because the variety of treatment decisions to which health-care instructions may relate is  
33 virtually unlimited, Part 2 of the form does not attempt to be comprehensive, but is directed at the  
34 types of treatment for which an individual is most likely to have special wishes. Part 2(6) of the  
35 form, entitled "End-of-Life Decisions", provides two alternative choices for the expression of  
36 wishes concerning the provision, withholding, or withdrawal of treatment. Under the first choice,  
37 the individual's life is not to be prolonged if the individual has an incurable and irreversible  
38 condition that will result in death within a relatively short time, if the individual becomes  
39 unconscious and, to a reasonable degree of medical certainty, will not regain consciousness, or if  
40 the likely risks and burdens of treatment would outweigh the expected benefits. Under the second  
41 choice, the individual's life is to be prolonged within the limits of generally accepted health-care  
42 standards. Part 2(7) of the form provides a box for an individual to mark if the individual wishes  
43 to receive artificial nutrition and hydration in all circumstances. Part 2(8) of the form provides  
44 space for an individual to specify any circumstance when the individual would prefer not to  
45 receive pain relief. Because the choices provided in Parts 2(6) to 2(8) do not cover all possible  
46 situations, Part 2(9) of the form provides space for the individual to write out his or her own  
47 instructions or to supplement the instructions given in the previous subparts of the form. Should  
48 the space be insufficient, the individual is free to add additional pages.

49 The health-care instructions given in Part 2 of the form are binding on the agent, any guardian,  
50 any surrogate, and, subject to exceptions specified in [Section 7(e)-(f)], on the individual's health-  
51 care providers. Pursuant to [Section 7(d)], a health-care provider must also comply with a  
52 reasonable interpretation of those instructions made by an authorized agent, guardian, or  
53 surrogate.

1 Part 3 of the form provides the individual an opportunity to express an intention to donate  
2 bodily organs and tissues at death. The options provided are derived from a suggested form in the  
3 Comment to Section 2 of the Uniform Anatomical Gift Act (1987). [See Health & Safety Code §  
4 7150 *et seq.*]

5 Part 4 of the form provides space for the individual to designate a primary physician should the  
6 individual choose to do so. Space is also provided for the designation of an alternate primary  
7 physician should the first designated physician not be available, able, or willing to act.

8 Paragraph (12) of the form conforms with the provisions of [Section 12] by providing that a  
9 copy of the form has the same effect as the original.

10 **[The Act does not require witnessing, but to encourage the practice the form provides**  
11 **space for the signatures of two witnesses.]**

12 The form does not require formal acceptance by an agent. Formal acceptance by an agent has  
13 been omitted not because it is an undesirable practice but because it would add another stage to  
14 executing an advance health-care directive, thereby further reducing the number of individuals  
15 who will follow through and create directives. However, practitioners who wish to adapt this  
16 form for use by their clients are strongly encouraged to add a formal acceptance. Designated  
17 agents have no duty to act until they accept the office either expressly or through their conduct.  
18 Consequently, requiring formal acceptance reduces the risk that a designated agent will decline to  
19 act when the need arises. Formal acceptance also makes it more likely that the agent will become  
20 familiar with the principal’s personal values and views on health care. While the form does not  
21 require formal acceptance, the explanation to the form does encourage principals to talk to the  
22 person they have named as agent to make certain that the designated agent understands their  
23 wishes and is willing to take the responsibility.

24 [Adapted from Unif. Health-Care Decisions Act § 4 comment (1993).]  
25

26 **Part of Comment to existing Section 4771:** Section 4771 is consistent with and subject to the  
27 substantive law applicable to a durable power of attorney for health care. See Sections 4600-4779  
28 (durable power of attorney for health care), 4900-4948 (court review). However, in the statutory  
29 form durable power of attorney for health care, the warning set forth in Section 4771 replaces the  
30 one set forth in Section 4703. See also Section 4772 (warning or lawyer’s certificate). Two  
31 witnesses are required for use of a statutory form durable power of attorney for health care;  
32 acknowledgment before a notary is not permitted. Compare Section 4771 with Section 4700(b)  
33 (incorporating rules in Section 4121 permitting acknowledgment before notary public). The last  
34 sentence of the fifth paragraph of the “warning” recognizes the authority given the court by  
35 Section 4942.

36 As to use of forms complying with former law, see Section 4775. See also Sections 4014  
37 (“attorney-in-fact” defined to include agent), 4026 (“principal” defined), 4603 (“community care  
38 facility” defined), 4606 (“durable power of attorney for health care” defined), 4609 (“health care”  
39 defined), 4612 (“health care decision” defined), 4615 (“health care provider” defined), 4618  
40 (“residential care facility for the elderly” defined).

41 ☞ **Staff Note.** The form will need to be conformed to any substantive changes that are made,  
42 such as with regard to witnessing requirements and special limitations and certifications  
43 concerning particular types of patients.

44  
45 ☞ **Staff Note.** The following sections, drawn from existing law, are retained here for discussion  
46 purposes with minimal revision.

47 **§ 4702. Requirements for printed form of power of attorney for health care**

48 4702. (a) A printed form of a power of attorney for health care that is sold or  
49 otherwise distributed in this state for use by a person who does not have the advice



1 of legal counsel shall provide no other authority than the authority to make health  
2 care decisions on behalf of the [principal] and shall contain, in not less than 10-  
3 point boldface type or a reasonable equivalent thereof, the following statement:

4 **NOTICE TO PERSON EXECUTING THIS DOCUMENT**

5 This is an important legal document. Before executing this document, you  
6 should know these important facts:

7 This document gives the person you designate as your agent the power to make  
8 health care decisions for you. Your agent must act consistently with your desires  
9 as stated in this document or otherwise made known.

10 Except as you otherwise specify in this document, this document gives your  
11 agent the power to consent to your doctor not giving treatment or stopping  
12 treatment necessary to keep you alive.

13 Notwithstanding this document, you have the right to make medical and other  
14 health care decisions for yourself so long as you can give informed consent with  
15 respect to the particular decision. In addition, no treatment may be given to you  
16 over your objection, and health care necessary to keep you alive may not be  
17 stopped or withheld if you object at the time.

18 This document gives your agent authority to consent, to refuse to consent, or to  
19 withdraw consent to any care, treatment, service, or procedure to maintain,  
20 diagnose, or treat a physical or mental condition. This power is subject to any  
21 statement of your desires and any limitations that you include in this document.  
22 You may state in this document any types of treatment that you do not desire. In  
23 addition, a court can take away the power of your agent to make health care  
24 decisions for you if your agent (1) authorizes anything that is illegal, (2) acts  
25 contrary to your known desires, or (3) where your desires are not known, does  
26 anything that is clearly contrary to your best interests.

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

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

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

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

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

40 ~~(b) The printed form described in subdivision (a) shall also include the following~~  
41 ~~notice:~~

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

(c) This section does not apply to the statutory form provided by Section 4701

**Comment.**


**Original Comment (1994).** Subdivisions (a) and (b) of Section 4703 continue former Civil Code Section 2433(a)-(b) without change, except that the statement in former Civil Code Section 2433(b) that the witnesses had to be personally known to the principal has been deleted, since it was not consistent with other substantive requirements. Subdivision (c) makes clear that the statutory form is independent of the requirements of this section.

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

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

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

**Original Comment (1995).** Subdivision (b) of Section 4703 is amended to delete the surplus word “and.” This is a technical, nonsubstantive change.

 **Staff Note.** If retained, this section will need to be revised for consistency with the new form warning language. In view of the decision to eliminate general witnessing requirements, subdivision (b) is shown in ~~strikeout~~.

The State Bar Estate Planning, Trust and Probate Law Section Executive Committee appears to favor simplification of warnings in this statute. See Memorandum 97-41, Exhibit p. 15.

**§ 4703. Notice in power of attorney for health care not on printed form**

4703. (a) A durable power of attorney prepared for execution by a resident of this state that permits an agent to make health care decisions and that is not a printed form shall include one of the following:

(1) The substance of the statements provided in subdivision (a) of Section 4702 in not less than 10-point boldface type or a reasonable equivalent thereof.

(2) A certificate signed by the [principal’s] lawyer stating:

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

1 (b) If a power of attorney includes the certificate provided in paragraph (2) of  
2 subdivision (a) and permits the agent to make health care decisions for the  
3 [principal], the applicable law of which the client is to be advised by the lawyer  
4 signing the certificate includes, but is not limited to, the matters listed in  
5 subdivision (a) of Section 4702.

6 **Comment.**

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

11 ☞ **Staff Note.** Should this section be retained? The staff would omit it. The State Bar Estate  
12 Planning, Trust and Probate Law Section Executive Committee is “not at all wedded to the  
13 existing statutory form warnings.” See Memorandum 97-41, Exhibit p. 15.

14 **§ 4704. Language conferring general authority**

15 4704. In a statutory form power of attorney for health care, the language  
16 conferring general authority with respect to “health care decisions” authorizes the  
17 attorney-in-fact to select and discharge physicians, dentists, nurses, therapists, and  
18 other health care professionals as the attorney-in-fact determines necessary to  
19 carry out the health care decisions the attorney-in-fact is authorized by the power  
20 of attorney to make.

21 **Comment.**

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

25 **§ 4705. Termination of authority; alternate agent**

26 4705. If the authority of the agent under the statutory form power of attorney for  
27 health care is terminated by the court under Part 3 (commencing with Section  
28 4750), an alternate agent designated in the power of attorney is not authorized to  
29 act as the agent unless the court so orders. In the order terminating the authority of  
30 the agent to make health care decisions for the [principal], the court shall authorize  
31 the alternate agent, if any, designated in the power of attorney to act as the agent to  
32 make health care decisions for the [principal] under the power of attorney unless  
33 the court finds that authorizing that alternate agent to make health care decisions  
34 for the [principal] would not be in the best interest of the [principal].

35 **Comment.**

36 **Original Comment.** Section 4778 continues former Civil Code Section 2506 without  
37 substantive change. This section applies only where the authority of the attorney-in-fact in fact is  
38 terminated by the court. This section does not apply where the attorney-in-fact dies or otherwise  
39 is not available or becomes ineligible to act as attorney-in-fact or loses the mental capacity to  
40 make health care decisions for the principal or where the principal revokes the attorney-in-fact’s  
41 appointment or authority. See paragraph 9 (designation of alternate attorneys-in-fact) of statutory  
42 form set forth in Section 4771. Where the court terminates the authority of the attorney-in-fact,  
43 Section 4778 applies and the alternate attorney-in-fact is not authorized to act as attorney-in-fact  
44 unless the court so orders. However, in this case, the court is required to authorize the alternate

1 attorney-in-fact to act unless the court finds that would not be in the best interests of the  
2 principal....  
3

### 4 CHAPTER 3. HEALTH CARE SURROGATES

5 ☞ **Staff Note.** Unlike the other principles covered by the Uniform Health-Care Decisions Act  
6 (powers of attorney and “living wills”), existing California law does not provide general statutory  
7 surrogacy or family consent rules. (But see Health & Safety Code § 1418.8, for rules applicable to  
8 certain nursing homes.) For a discussion of the major issues, see Memorandum 97-63.

9 Pending consideration of other drafting issues, the following sections have not been revised  
10 from the first staff draft attached to Memorandum 97-41. Thus, the Commission’s decision that  
11 oral surrogacy designations should be restricted, has not been implemented in this chapter. (June  
12 1997 Minutes: “Some restrictions should be proposed on the power of a patient to designate a  
13 surrogate orally [see draft Section 4711(a)], particularly in view of the possibility that oral  
14 designations may conflict with preexisting written advance directives. It may be advisable to  
15 restrict the effectiveness of oral designations to the particular period of admission to a hospital or  
16 the course of an illness. Otherwise stale oral designations recorded in the patient’s record could  
17 be given effect.”

#### 18 § 4710. Authority of surrogate to make health care decisions

19 4710. A surrogate may make a health care decision for a patient who is an adult  
20 [or emancipated minor] if (1) the patient has been determined by the primary  
21 physician to lack capacity and (2) no agent or conservator of the person has been  
22 appointed or the agent or conservator is not reasonably available.

23 **Comment.** Section 4710 is drawn from Section 5(a) of the Uniform Health-Care Decisions Act  
24 (1993).

25 See also Sections 4609 (“capacity” defined), 4611 (“conservator” defined), 4617 (“health care  
26 decision” defined), 4629 (“primary physician” defined), 4631 (“reasonably available” defined),  
27 4637 (“surrogate” defined).

28 **Background from Uniform Act.** Section 5(a) authorizes a surrogate to make a health-care  
29 decision for a patient who is an adult or emancipated minor if the patient lacks capacity to make  
30 health-care decisions and if no agent or guardian has been appointed or the agent or guardian is  
31 not reasonably available. Health-care decision making for unemancipated minors is not covered  
32 by this section. The subject of consent for treatment of minors is a complex one which in many  
33 states is covered by a variety of statutes and is therefore left to other state law.

34 [Adapted from Unif. Health-Care Decisions Act § 5(a) comment (1993).]

#### 35 § 4711. Designation or determination of surrogate

36 4711. (a) An adult [or emancipated minor] may designate any [individual] to act  
37 as surrogate to make health care decisions by personally informing the supervising  
38 health care provider.

39 (b) In the absence of a designation, or if the designee is not reasonably available,  
40 any member of the following classes of the patient’s family who is reasonably  
41 available, in descending order of priority, may act as surrogate:

- 42 (1) The spouse, unless legally separated.
- 43 (2) An adult child.
- 44 (3) A parent.

1 (4) An adult brother or sister.

2 (c) If none of the individuals eligible to act as surrogate under subdivision (a) or  
3 (b) is reasonably available, an adult who has exhibited special care and concern for  
4 the patient, who is familiar with the patient’s personal values, and who is  
5 reasonably available may act as surrogate.

6 **Comment.** Section 4711 is drawn from Section 5(b)-(c) of the Uniform Health-Care Decisions  
7 Act (1993).

8 See also Sections 4617 (“health care decision” defined), 4631 (“reasonably available” defined),  
9 4635 (“supervising health care provider” defined), 4637 (“surrogate” defined).

10 **Background from Uniform Act.** While a designation of an agent in a written power of  
11 attorney for health care is preferred, situations may arise where an individual will not be in a  
12 position to execute a power of attorney for health care. In that event, subsection (b) affirms the  
13 principle of patient autonomy by allowing an individual to designate a surrogate by personally  
14 informing the supervising health-care provider. The supervising health-care provider would then,  
15 in accordance with Section 7(b), be obligated to promptly record the designation in the  
16 individual’s health-care record. An oral designation of a surrogate made by a patient directly to  
17 the supervising health-care provider revokes a previous designation of an agent. See Section 3(a).

18 If an individual does not designate a surrogate or if the designee is not reasonably available,  
19 subsection (b) applies a default rule for selecting a family member to act as surrogate. Like all  
20 default rules, it is not tailored to every situation, but incorporates the presumed desires of a  
21 majority of those who find themselves so situated. The relationships specified in subsection (b)  
22 include those of the half-blood and by adoption, in addition to those of the whole blood.

23 Subsection (c) permits a health-care decision to be made by a more distant relative or unrelated  
24 adult with whom the individual enjoys a close relationship but only if all family members  
25 specified in subsection (b) decline to act or are otherwise not reasonably available. Consequently,  
26 those in non-traditional relationships who want to make certain that health-care decisions are  
27 made by their companions should execute powers of attorney for health care designating them as  
28 agents or, if that has not been done, should designate them as surrogates.

29 Subsections (b) and (c) permit any member of a class authorized to serve as surrogate to  
30 assume authority to act even though there are other members in the class.

31 [Adapted from Unif. Health-Care Decisions Act § 5(b)-(c) comments (1993).]

32 ☞ **Staff Note.** Should “individual” in the first clause of subdivision (a) be “adult” for  
33 consistency with other provisions, such as subdivision (b)(2), (b)(4), and (c)?

#### 34 § 4712. Communication of surrogate’s assumption of authority

35 4712. A surrogate shall communicate his or her assumption of authority as  
36 promptly as practicable to the members of the patient’s family specified in Section  
37 4711 who can be readily contacted.

38 **Comment.** Section 4712 is drawn from Section 5(d) of the Uniform Health-Care Decisions Act  
39 (1993).

40 See also Section 4637 (“surrogate” defined)

41 **Background from Uniform Act.** Subsection (d) requires a surrogate who assumes authority to  
42 act to immediately so notify the members of the patient’s family who in given circumstances  
43 would be eligible to act as surrogate. Notice to the specified family members will enable them to  
44 follow health-care developments with respect to their now incapacitated relative. It will also alert  
45 them to take appropriate action, including the appointment of a guardian or the commencement of  
46 judicial proceedings under Section 14, should the need arise.

47 [Adapted from Unif. Health-Care Decisions Act § 5(d) comment (1993).]



1 **§ 4713. Conflicts between surrogates**

2 4713. If more than one member of a class assumes authority to act as surrogate,  
3 and they do not agree on a health care decision and the supervising health care  
4 provider is so informed, the supervising health care provider shall comply with the  
5 decision of a majority of the members of that class who have communicated their  
6 views to the provider. If the class is evenly divided concerning the health care  
7 decision and the supervising health care provider is so informed, that class and all  
8 individuals having lower priority are disqualified from making the decision.

9 **Comment.** Section 4713 is drawn from Section 5(e) of the Uniform Health-Care Decisions Act  
10 (1993).

11 See also Sections 4617 (“health care decision” defined), 4635 (“supervising health care  
12 provider” defined), 4637 (“surrogate” defined).

13 **Background from Uniform Act.** Section 5(e) addresses the situation where more than one  
14 member of the same class has assumed authority to act as surrogate and a disagreement over a  
15 health-care decision arises of which the supervising health-care provider is informed. Should that  
16 occur, the supervising health-care provider must comply with the decision of a majority of the  
17 members of that class who have communicated their views to the provider. If the members of the  
18 class who have communicated their views to the provider are evenly divided concerning the  
19 health-care decision, however, then the entire class is disqualified from making the decision and  
20 no individual having lower priority may act as surrogate. When such a deadlock arises, it may be  
21 necessary to seek court determination of the issue as authorized by [Section 14].

22 [Adapted from Unif. Health-Care Decisions Act § 5(e) comment (1993).]

23 **§ 4714. Principles governing surrogate’s health care decisions**

24 4714. A surrogate shall make a health care decision in accordance with the  
25 patient’s individual instructions, if any, and other wishes to the extent known to  
26 the surrogate. Otherwise, the surrogate shall make the decision in accordance with  
27 the surrogate’s determination of the patient’s best interest. In determining the  
28 patient’s best interest, the surrogate shall consider the patient’s personal values to  
29 the extent known to the surrogate.

30 **Comment.** Section 4714 is drawn from Section 5(f) of the Uniform Health-Care Decisions Act  
31 (1993).

32 See also Sections 4617 (“health care decision” defined), 4623 (“individual instruction”  
33 defined), 4637 (“surrogate” defined).

34 **Background from Uniform Act.** Section 5(f) imposes on surrogates the same standard for  
35 health-care decision making as is prescribed for agents in Section 2(e) [Prob. Code § \_\_\_\_]. The  
36 surrogate must follow the patient’s individual instructions and other expressed wishes to the  
37 extent known to the surrogate. To the extent such instructions or other wishes are unknown, the  
38 surrogate must act in the patient’s best interest. In determining the patient’s best interest, the  
39 surrogate is to consider the patient’s personal values to the extent known to the surrogate.

40 [Adapted from Unif. Health-Care Decisions Act § 5(f) comment (1993).]

41 **§ 4715. Exercise of authority free of judicial approval**

42 4715. A health care decision made by a surrogate for a patient is effective  
43 without judicial approval.

44 **Comment.** Section 4715 is drawn from Section 5(g) of the Uniform Health-Care Decisions Act  
45 (1993). For a related provision concerning advance directives, see Section 4750.

46 See also Sections 4617 (“health care decision” defined), 4637 (“surrogate” defined).

1       **Background from Uniform Act.** Section 5(g) provides that a health-care decision made by a  
2 surrogate is effective without judicial approval. A similar provision applies to health-care  
3 decisions made by agents (Section 2(f)) [Prob. Code § 4750] or guardians (Section 6(c)) [Prob.  
4 Code § \_\_\_\_].

5       [Adapted from Unif. Health-Care Decisions Act § 5(g) comment (1993).]

6       **§ 4716. Disqualification of surrogate**

7       4716. An individual at any time may disqualify another person, including a  
8 member of the individual’s family, from acting as the individual’s surrogate by a  
9 signed writing or by personally informing the supervising health care provider of  
10 the disqualification.

11       **Comment.** Section 4716 is drawn from Section 5(h) of the Uniform Health-Care Decisions Act  
12 (1993).

13       See also Sections 4635 (“supervising health care provider” defined), 4637 (“surrogate”  
14 defined).

15       **Background from Uniform Act.** Section 5(h) permits an individual to disqualify any family  
16 member or other individual from acting as the individual’s surrogate, including disqualification of  
17 a surrogate who was orally designated.

18       [Adapted from Unif. Health-Care Decisions Act § 5(h) comment (1993).]

19       **§ 4717. Limitation on who may act as surrogate**

20       4717. Unless related to the patient by blood, marriage, or adoption, a surrogate  
21 may not be an owner, operator, or employee of [a residential long-term health care  
22 institution] at which the patient is receiving care.

23       **Comment.** Section 4717 is drawn from Section 5(i) of the Uniform Health-Care Decisions Act  
24 (1993).

25       See also Section 4637 (“surrogate” defined).

26       **Background from Uniform Act.** Section 5(i) disqualifies an owner, operator, or employee of a  
27 residential long-term health-care institution at which a patient is receiving care from acting as the  
28 patient’s surrogate unless related to the patient by blood, marriage, or adoption. This  
29 disqualification is similar to that for appointed agents. See Section 2(b) & comment [Prob. Code §  
30 \_\_\_\_].

31       [Adapted from Unif. Health-Care Decisions Act § 5(i) comment (1993).]

32       **§ 4718. Declaration of surrogate’s authority**

33       4718. A supervising health care provider may require an individual claiming the  
34 right to act as surrogate for a patient to provide a written declaration under penalty  
35 of perjury stating facts and circumstances reasonably sufficient to establish the  
36 claimed authority.

37       **Comment.** Section 4718 is drawn from Section 5(j) of the Uniform Health-Care Decisions Act  
38 (1993).

39       See also Sections 4635 (“supervising health care provider” defined), 4637 (“surrogate”  
40 defined).

41       **Background from Uniform Act.** Section 5(j) permits a supervising health-care provider to  
42 require an individual claiming the right to act as surrogate to provide a written declaration under  
43 penalty of perjury stating facts and circumstances reasonably sufficient to establish the claimed  
44 relationship. The authority to request a declaration is included to permit the provider to obtain  
45 evidence of claimed authority. A supervising health-care provider, however, does not have a duty



1 to investigate the qualifications of an individual claiming authority to act as surrogate, and  
2 Section 9(a) protects a health-care provider or institution from liability for complying with the  
3 decision of such an individual, absent knowledge that the individual does not in fact have such  
4 authority.

5 [Adapted from Unif. Health-Care Decisions Act § 5(j) comment (1993).]

## 6 CHAPTER 4. DUTIES OF HEALTH CARE PROVIDERS

### 7 § 4720. Duty of health care provider to communicate

8 4720. Before implementing a health care decision made for a patient, a  
9 supervising health care provider, if possible, shall promptly communicate to the  
10 patient the decision made and the identity of the person making the decision.

11 **Comment.** Section 4780 is drawn from Section 7(a) of the Uniform Health-Care Decisions Act  
12 (1993).

13 See also Sections 4617 (“health care decision” defined), 4635 (“supervising health care  
14 provider” defined).

15 **Background from Uniform Act.** Section 7(a) further reinforces the Act’s respect for patient  
16 autonomy by requiring a supervising health-care provider, if possible, to promptly communicate  
17 to a patient, prior to implementation, a health-care decision made for the patient and the identity  
18 of the person making the decision.

19 [Adapted from Unif. Health-Care Decisions Act § 7(a) comment (1993).]

### 20 § 4721. Duty of supervising health care provider to record relevant information

21 4721. A supervising health care provider who knows of the existence of an  
22 advance health care directive, a revocation of an advance health care directive, or a  
23 designation or disqualification of a surrogate, shall promptly record its existence in  
24 the patient’s health care record and, if it is in writing, shall request a copy and if  
25 one is furnished shall arrange for its maintenance in the health care record.

26 **Comment.** Section 4721 is drawn from Section 7(b) of the Uniform Health-Care Decisions Act  
27 (1993).

28 See also Sections 4605 (“advance health care directive” defined), 4635 (“supervising health  
29 care provider” defined) 4637 (“surrogate” defined).

30 **Background from Uniform Act.** The recording requirement in Section 7(b) reduces the risk  
31 that a health-care provider or institution, or agent, guardian or surrogate, will rely on an outdated  
32 individual instruction or the decision of an individual whose authority has been revoked.

33 [Adapted from Unif. Health-Care Decisions Act § 7(b) comment (1993).]

### 34 § 4722. Duty of primary physician to record relevant information

35 4722. A primary physician who makes or is informed of a determination that a  
36 patient lacks or has recovered capacity, or that another condition exists which  
37 affects an individual instruction or the authority of an agent, conservator of the  
38 person, or surrogate, shall promptly record the determination in the patient’s health  
39 care record and communicate the determination to the patient, if possible, and to  
40 any person then authorized to make health care decisions for the patient.

41 **Comment.** Section 4722 is drawn from Section 7(c) of the Uniform Health-Care Decisions Act  
42 (1993).

1 See also Sections 4607 (“agent” defined), 4609 (“capacity” defined), 4611 (“conservator”  
2 defined), 4617 (“health care decision” defined), 4623 (“individual instruction” defined), 4629  
3 (“primary physician” defined).

4 **Background from Uniform Act.** Section 7(c) imposes recording and communication  
5 requirements relating to determinations that may trigger the authority of an agent, guardian or  
6 surrogate to make health-care decisions on an individual’s behalf. The determinations covered by  
7 these requirements are those specified in Sections 2(c)-(d) and 5(a) [Prob. Code §§ \_\_\_\_ and  
8 \_\_\_\_, respectively].

9 [Adapted from Unif. Health-Care Decisions Act § 7(c) comment (1993).]

10 **§ 4723. Obligations of health care provider**

11 4723. Except as provided in Section 4724, a health care provider or institution  
12 providing care to a patient shall do the following:

13 (a) Comply with an individual instruction of the patient and with a reasonable  
14 interpretation of that instruction made by a person then authorized to make health  
15 care decisions for the patient.

16 (b) Comply with a health care decision for the patient made by a person then  
17 authorized to make health care decisions for the patient to the same extent as if the  
18 decision had been made by the patient while having capacity.

19 **Comment.** Section 4723 is drawn from Section 7(d) of the Uniform Health-Care Decisions Act  
20 (1993).

21 See also Sections 4609 (“capacity” defined), 4617 (“health care decision” defined), 4621  
22 (“health care provider” defined), 4623 (“individual instruction” defined).

23 **Background from Uniform Act.** Section 7(d) requires health-care providers and institutions to  
24 comply with a patient’s individual instruction and with a reasonable interpretation of that  
25 instruction made by a person then authorized to make health-care decisions for the patient. A  
26 health-care provider or institution must also comply with a health-care decision made by a person  
27 then authorized to make health-care decisions for the patient to the same extent as if the decision  
28 had been made by the patient while having capacity. These requirements help to protect the  
29 patient’s rights to autonomy and self-determination and validate and seek to effectuate the  
30 substitute decision making authorized by the Act.

31 [Adapted from Unif. Health-Care Decisions Act § 7(d) comment (1993).]

32 **§ 4724. Health care provider’s right to decline**

33 4724. (a) A health care provider may decline to comply with an individual  
34 instruction or health care decision for reasons of conscience. A health care  
35 institution may decline to comply with an individual instruction or health care  
36 decision if the instruction or decision is contrary to a policy of the institution  
37 which is expressly based on reasons of conscience and if the policy was timely  
38 communicated to the patient or to a person then authorized to make health care  
39 decisions for the patient.

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

44 **Comment.** Section 4724 is drawn from Section 7(e)-(f) of the Uniform Health-Care Decisions  
45 Act (1993).

1 See also Sections 4615 (“health care” defined), 4619 (“health care institution” defined), 4621  
2 (“health care provider” defined), 4623 (“individual instruction” defined),

3 **Background from Uniform Act.** Not all instructions or decisions must be honored, however.  
4 Section 7(e) [Prob. Code § \_\_\_\_ (a)] authorizes a health-care provider to decline to comply with  
5 an individual instruction or health-care decision for reasons of conscience. Section 7(e) also  
6 allows a health-care institution to decline to comply with a health-care instruction or decision if  
7 the instruction or decision is contrary to a policy of the institution which is expressly based on  
8 reasons of conscience and if the policy was timely communicated to the patient or to an  
9 individual then authorized to make health-care decisions for the patient.

10 Section 7(f) [Prob. Code § \_\_\_\_ (b)] further authorizes a health-care provider or institution to  
11 decline to comply with an instruction or decision that requires the provision of care which would  
12 be medically ineffective or contrary to generally accepted health-care standards applicable to the  
13 provider or institution. “Medically ineffective health care”, as used in this section, means  
14 treatment which would not offer the patient any significant benefit.

15 [Adapted from Unif. Health-Care Decisions Act § 7(e)-(f) comment (1993).]

#### 16 § 4725. Obligations of declining health care provider or institution

17 4725. A health care provider or institution that declines to comply with an  
18 individual instruction or health care decision shall do all of the following:

19 (a) Promptly so inform the patient, if possible, and any person then authorized to  
20 make health care decisions for the patient.

21 (b) Provide continuing care to the patient until a transfer can be effected.

22 (c) Unless the patient or person then authorized to make health care decisions for  
23 the patient refuses assistance, immediately make all reasonable efforts to assist in  
24 the transfer of the patient to another health care provider or institution that is  
25 willing to comply with the instruction or decision.

26 **Comment.** Section 4725 is drawn from Section 7(g) of the Uniform Health-Care Decisions Act  
27 (1993).

28 See also Sections 4617 (“health care decision” defined), 4619 (“health care institution”  
29 defined), 4621 (“health care provider” defined), 4623 (“individual instruction” defined).

30 **Background from Uniform Act.** Section 7(g) requires a health-care provider or institution that  
31 declines to comply with an individual instruction or health-care decision to promptly  
32 communicate the refusal to the patient, if possible, and to any person then authorized to make  
33 health-care decisions for the patient. The provider or institution also must provide continuing care  
34 to the patient until a transfer can be effected. In addition, unless the patient or person then  
35 authorized to make health-care decisions for the patient refuses assistance, the health-care  
36 provider or institution must immediately make all reasonable efforts to assist in the transfer of the  
37 patient to another health-care provider or institution that is willing to comply with the instruction  
38 or decision.

39 [Adapted from Unif. Health-Care Decisions Act § 7(g) comment (1993).]

#### 40 § 4726. Restriction on requiring or prohibiting advance directive

41 4726. A health care provider or institution may not require or prohibit the  
42 execution or revocation of an advance health care directive as a condition for  
43 providing health care.

44 **Comment.** Section 4726 is drawn from Section 7(h) of the Uniform Health-Care Decisions Act  
45 (1993).

46 See also Sections 4605 (“advance health care directive” defined), 4615 (“health care” defined),  
47 4619 (“health care institution” defined), 4621 (“health care provider” defined).

1 **Background from Uniform Act.** Section 7(h), forbidding a health-care provider or institution  
2 to condition provision of health care on execution, non-execution, or revocation of an advance  
3 health-care directive, tracks the provisions of the federal Patient Self-Determination Act. 42  
4 U.S.C. §§ 1395cc(f)(1)(C) (Medicare), 1396a(w)(1)(C) (Medicaid).

5 [Adapted from Unif. Health-Care Decisions Act § 7(h) comment (1993).]

6 ☞ **Staff Note.** This section will need to be reconciled with draft Section 4733.

7 **§ 4727. Right to health-care information**

8 4727. Unless otherwise specified in an advance health care directive, a person  
9 then authorized to make health care decisions for a patient has the same rights as  
10 the patient to request, receive, examine, copy, and consent to the disclosure of  
11 medical or any other health care information.

12 **Comment.** Section 4727 is drawn from Section 8 of the Uniform Health-Care Decisions Act  
13 (1993). This section continues former Section 4721 without substantive change, but is broader in  
14 scope since it covers all persons authorized to make health care decisions a patient, not just  
15 agents.

16 See also Sections 4605 (“advance health care directive” defined), 4617 (“health care decision”  
17 defined).

18 **Background from Uniform Act.** An agent, conservator, [guardian,] or surrogate stands in the  
19 shoes of the patient when making health-care decisions. To assure fully informed  
20 decisionmaking, this section provides that a person who is then authorized to make health-care  
21 decisions for a patient has the same right of access to health-care information as does the patient  
22 unless otherwise specified in the patient’s advance health-care directive.

23 [Adapted from Unif. Health-Care Decisions Act § 8 comment (1993).]

24 **Former Section 4721 Comment.** Section 4721 continues former Civil Code Section 2436  
25 without substantive change. Section 4721 makes clear that the attorney-in-fact can obtain and  
26 disclose information in the medical records of the principal. The power of attorney may limit the  
27 right of the attorney-in-fact, for example, by precluding examination of specified medical records  
28 or by providing that the examination of medical records is authorized only if the principal lacks  
29 the capacity to give informed consent. The right of the attorney-in-fact is subject to any  
30 limitations on the right of the patient to reach medical records. See Health & Safety Code §§  
31 1795.14 (denial of right to inspect mental health records), 1795.20 (providing summary of record  
32 rather than allowing access to entire record)....

33 **CHAPTER 5. IMMUNITIES AND LIABILITIES**

34 ☞ **Staff Note.** This chapter is planned to combine the relevant provisions of existing law (mainly  
35 from Sections 4750-4752) and Uniform Health-Care Decisions Act Sections 9 & 10. Many  
36 revisions will need to be made to conform the UHCDA provisions with existing sections that  
37 need to be retained.

38 **§ 4730. Immunities of health care provider or institution**

39 4730. A health care provider or institution acting in good faith and in accordance  
40 with generally accepted health care standards applicable to the health care provider  
41 or institution is not subject to civil or criminal liability or to discipline for  
42 unprofessional conduct for any of the following conduct:

1 (a) Complying with a health care decision of a person apparently having  
2 authority to make a health care decision for a patient, including a decision to  
3 withhold or withdraw health care.

4 (b) Declining to comply with a health care decision of a person based on a belief  
5 that the person then lacked authority.

6 (c) Complying with an advance health care directive and assuming that the  
7 directive was valid when made and has not been revoked or terminated.

8 **Comment.** Section 4730 is drawn from Section 9(a) of the Uniform Health-Care Decisions Act  
9 (1993).

10 See also Sections 4605 (“advance health care directive” defined), 4617 (“health care decision”  
11 defined), 4619 (“health care institution” defined), 4621 (“health care provider” defined).

12 **Background from Uniform Act.** Section 9 [Prob. Code §§ \_\_\_ & \_\_\_] grants broad protection  
13 from liability for actions taken in good faith. Section 9(a) permits a health-care provider or  
14 institution to comply with a health-care decision made by a person appearing to have authority to  
15 make health-care decisions for a patient; to decline to comply with a health-care decision made by  
16 a person believed to be without authority; and to assume the validity of and to comply with an  
17 advance health-care directive. Absent bad faith or actions taken that are not in accord with  
18 generally accepted health-care standards, a health-care provider or institution has no duty to  
19 investigate a claim of authority or the validity of an advance health-care directive.

20 [Adapted from Unif. Health-Care Decisions Act § 9(a) comment (1993).]

21 **§ 4731. Immunities of agent and surrogate**

22 4731. An individual acting as agent or surrogate under this [part] is not subject  
23 to civil or criminal liability or to discipline for unprofessional conduct for health  
24 care decisions made in good faith.

25 **Comment.** Section 4731 is drawn from Section 9(b) of the Uniform Health-Care Decisions Act  
26 (1993).

27 See also Sections 4607 (“agent” defined), 4617 (“health care decision” defined), 4637  
28 (“surrogate” defined).

29 **Background from Uniform Act.** Section 9(b) protects agents and surrogates acting in good  
30 faith from liability for making a health-care decision for a patient. Also protected from liability  
31 are individuals who mistakenly but in good faith believe they have the authority to make a health-  
32 care decision for a patient. For example, an individual who has been designated as agent in a  
33 power of attorney for health care might assume authority unaware that the power has been  
34 revoked. Or a family member might assume authority to act as surrogate unaware that a family  
35 member having a higher priority was reasonably available and authorized to act.

36 [Adapted from Unif. Health-Care Decisions Act § 9(b) comment (1993).]

37 **§ 4732. Alteration or forging, or concealment or withholding knowledge of revocation of**  
38 **written advance health care directive**

39 4732. Any person who, except where justified or excused by law, alters or forges  
40 a written advance health care directive of another, or willfully conceals or  
41 withholds personal knowledge of a revocation of an advance directive, with the  
42 intent to cause a withholding or withdrawal of health care necessary to keep the  
43 [principal] alive contrary to the desires of the [principal], and thereby, because of  
44 that act, directly causes health care necessary to keep the [principal] alive to be  
45 withheld or withdrawn and the death of the [principal] thereby to be hastened, is



1 subject to prosecution for unlawful homicide as provided in Chapter 1  
2 (commencing with Section 187) of Title 4 of Part 1 of the Penal Code.

3 **Comment.** Section 4732 continues former Section 4726 without substantive change.

4 See also Sections 4605 (“advance health care directive” defined), 4615 (“health care” defined).

5 **Original Comment.** Section 4726 continues former Civil Code Section 2442 without change,  
6 except for the revision of a cross-reference to another section. This section is similar to Health  
7 and Safety Code Section 7191(d) (Natural Death Act)....

8 **§ 4733. Restriction on execution of advance directive as condition for admission, treatment,**  
9 **or insurance**

10 4733. No health care provider, health care service plan, insurer issuing disability  
11 insurance, self-insured employee welfare plan, or nonprofit hospital plan or similar  
12 insurance plan, may condition admission to a facility, or the providing of  
13 treatment, or insurance, on the requirement that a patient execute a durable power  
14 of attorney for health care.

15 **Comment.** Section 4733 continues former Section 4725 without substantive change.

16 **Original Comment.** Section 4725 continues former Civil Code Section 2441 without change.  
17 This section is intended to eliminate the possibility that duress might be used by a health care  
18 provider or insurer to cause the patient to execute a durable power of attorney for health care....

19 ☞ **Staff Note.** This section will need to be reconciled with draft Section 4726.

20 **§ 4734. Statutory damages**

21 4734. (a) A health care provider or institution that intentionally violates this  
22 [part] is subject to liability to the aggrieved individual for damages of \$[500] or  
23 actual damages resulting from the violation, whichever is greater, plus reasonable  
24 attorney’s fees.

25 (b) A person who intentionally falsifies, forges, conceals, defaces, or obliterates  
26 an individual’s advance health care directive or a revocation of an advance health  
27 care directive without the individual’s consent, or who coerces or fraudulently  
28 induces an individual to give, revoke, or not to give an advance health care  
29 directive, is subject to liability to that individual for damages of \$[2,500] or actual  
30 damages resulting from the action, whichever is greater, plus reasonable attorney’s  
31 fees.

32 **Comment.** Section 4734 is drawn from Section 10 of the Uniform Health-Care Decisions Act  
33 (1993).

34 See also Sections 4605 (“advance health care directive” defined), 4619 (“health care  
35 institution” defined), 4621 (“health care provider” defined).

36 **Background from Uniform Act.** Conduct which intentionally violates the Act and which  
37 interferes with an individual’s autonomy to make health-care decisions, either personally or  
38 through others as provided under the Act, is subject to civil damages rather than criminal  
39 penalties out of a recognition that prosecutions are unlikely to occur. The legislature of an  
40 enacting state will have to determine the amount of damages which needs to be authorized in  
41 order to encourage the level of potential private enforcement actions necessary to effect  
42 compliance with the obligations and responsibilities imposed by the Act. The damages provided  
43 by this section do not supersede but are in addition to remedies available under other law.

44 [Adapted from Unif. Health-Care Decisions Act § \_\_\_\_ comment (1993).]

1 **§ 4735. Immunities of health care provider**

2 4735. (a) Subject to any limitations stated in the power of attorney for health  
3 care and to subdivision (b) and to Sections \_\_\_\_, a health care provider is not  
4 subject to criminal prosecution, civil liability, or professional disciplinary action  
5 except to the same extent as would be the case if the [principal], having had the  
6 capacity to give informed consent, had made the health care decision on his or her  
7 own behalf under like circumstances, if the health care provider relies on a health  
8 care decision and both of the following requirements are satisfied:

9 (1) The decision is made by an agent who the health care provider believes in  
10 good faith is authorized under this division to make the decision.

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

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

21 (c) Notwithstanding the health care decision of the agent designated by a power  
22 of attorney for health care, the health care provider is not subject to criminal  
23 prosecution, civil liability, or professional disciplinary action for failing to  
24 withdraw health care necessary to keep the [principal] alive.

25 **Comment.**

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

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

37 Subdivision (c) provides immunity to the health care provider insofar as there might otherwise  
38 be liability for failing to comply with a decision of the attorney-in-fact to withdraw consent  
39 previously given to provide health care necessary to keep the principal alive. This subdivision  
40 does not deal with providing health care necessary to keep the principal alive. The situations  
41 where such health care can be provided without informed consent (such as an emergency  
42 situation) continue to be governed by the law otherwise applicable....

43 **§ 4736. Convincing evidence of identity of principal**

44 4736. For the purposes of the declaration of witnesses required by Section 4681,  
45 "convincing evidence" means the absence of any information, evidence, or other



1 circumstances which would lead a reasonable person to believe that the person  
2 signing or acknowledging the power of attorney for health care as [principal] is not  
3 the individual he or she claims to be and any one of the following:

4 (a) Reasonable reliance on the presentation of any one of the following, if the  
5 document is current or has been issued within five years:

6 (1) An identification card or driver's license issued by the California Department  
7 of Motor Vehicles.

8 (2) A passport issued by the Department of State of the United States.

9 (b) Reasonable reliance on the presentation of any one of the following, if the  
10 document is current or has been issued within five years and contains a photograph  
11 and description of the person named on it, is signed by the person, bears a serial or  
12 other identifying number, and, in the event that the document is a passport, has  
13 been stamped by the United States Immigration and Naturalization Service:

14 (1) A passport issued by a foreign government.

15 (2) A driver's license issued by a state other than California or by a Canadian or  
16 Mexican public agency authorized to issue drivers' licenses.

17 (3) An identification card issued by a state other than California.

18 (4) An identification card issued by any branch of the armed forces of the United  
19 States.

20 (c) If the [principal] is a patient in a skilled nursing facility, a witness who is a  
21 patient advocate or ombudsman may, for the purposes of Section 4701 or 4771,  
22 rely upon the representations of the administrators or staff of the skilled nursing  
23 facility, or of family members, as convincing evidence of the identity of the  
24 [principal] if the patient advocate or ombudsman believes that the representations  
25 provide a reasonable basis for determining the identity of the [principal].

26 **Comment.**

27 **Original Comment.** Section 4751 continues former Civil Code Section 2511 without  
28 substantive change. This section is drawn from Civil Code Section 1185 (acknowledgment of  
29 instrument by notary public), but is more restrictive because this section does not include the  
30 substance of Civil Code Section 1185(c)(1).

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

33 **§ 4737. Identification of agent and principal**

34 4737. When requested to engage in transactions with an agent, a third person,  
35 before incurring any duty to comply with the power of attorney, may require the  
36 agent to provide identification, specimens of the signatures of the [principal] and  
37 the agent, and any other information reasonably necessary or appropriate to  
38 identify the [principal] and the agent. A third person may require an agent to  
39 provide the current and permanent residence addresses of the [principal] before  
40 agreeing to engage in a transaction with the attorney-in-fact.

41 **Comment.**

1 **Original Comment.** Section 4302 is drawn in part from the Missouri Durable Power of  
2 Attorney Law. See Mo. Ann. Stat. § 404.719(4) (Vernon 1990). See also former Civ. Code §  
3 2512(a)(1) (presentation by attorney-in-fact named in power of attorney) & Comment.

4 For a special rule applicable to identification of the principal under a durable power of attorney  
5 for health care, see Section 4751. See also Sections 4014 (“attorney-in-fact” defined), 4022  
6 (“power of attorney” defined), 4026 (“principal” defined), 4034 (“third person” defined).

7 ☞ **Staff Note.** It is doubtful that this section is needed, at least in this detail, in this division.

8 **§ 4738. Reliance by third person on general authority**

9 4738. A third person may rely on, contract with, and deal with an attorney-in-  
10 fact with respect to the subjects and purposes encompassed or expressed in the  
11 power of attorney without regard to whether the power of attorney expressly  
12 authorizes the specific act, transaction, or decision by the attorney-in-fact.

13 **Comment.**

14 **Original Comment.** Section 4301 is drawn from the Missouri Durable Power of Attorney  
15 Law. See Mo. Ann. Stat. § 404.710(8) (Vernon 1990). This general rule is subject to specific  
16 limitations provided elsewhere. See, e.g., Sections 4264 (authority that must be specifically  
17 granted), 4722 (limitations on attorney-in-fact’s authority under durable power of attorney for  
18 health care).

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

21 ☞ **Staff Note.** This section may not be needed, particularly in this form, but it is retained here for  
22 further consideration. Note that one consequence of severing health care decisions from the  
23 general PAL is that we need to decide whether to try to preserve anything of value that might be  
24 in these general rules — otherwise, they are lost in the process of separating the two bodies of  
25 law.

26 **§ 4739. Protection of third person relying in good faith on power of attorney**

27 4739. (a) A third person who acts in good faith reliance on a power of attorney is  
28 not liable to the [principal] or to any other person for so acting if all of the  
29 following requirements are satisfied:

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

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

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

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

39 **Comment.**

40 **Original Comment.** Section 4303 continues former Civil Code Section 2512 without  
41 substantive change, with the addition of the witnessing rule in subdivision (a)(3). This section is  
42 intended to ensure that a power of attorney, whether durable or nondurable, will be accepted and  
43 relied on by third persons. The person presenting the power of attorney must actually be the  
44 attorney-in-fact designated in the power of attorney. If the person purporting to be the attorney-in-  
45 fact is an impostor, the immunity does not apply. The third person can rely in good faith on the

1 notary public's certificate of acknowledgment or the signatures of the witnesses that the person  
2 who executed the power of attorney is the principal.

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

8 For other immunity provisions not affected by Section 4303, see, e.g., Sections 4128(b)  
9 (reliance in good faith on durable power of attorney not containing "warning" statement required  
10 by Section 4128), 4301 (reliance by third person on general authority), 4304 (lack of knowledge  
11 of death or incapacity of principal). See also Section 3720 ("Any person who acts in reliance  
12 upon the power of attorney [of an absentee as defined in Section 1403] when accompanied by a  
13 copy of a certificate of missing status is not liable for relying and acting upon the power of  
14 attorney."). Section 4303 does not limit the immunity of health care providers. See Sections 4100  
15 (application of general rules), 4750 (immunities of health care provider); see also Section 4050  
16 Comment (powers subject to this division)....

17 ☞ **Staff Note.** This section, like the two that precede it, is probably not needed, at least in this  
18 form, but it retained for discussion.



1 (c) A health care decision made by a surrogate for a patient is effective without  
2 judicial approval.

3 **Comment.**

4 Subdivisions (b) and (c) of Section 4900 are drawn from Sections 2(f) and 5(g) of the Uniform  
5 Health-Care Decisions Act (1993).

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

9 ☞ **Staff Note.** Is a DNR order under draft Part 4 an “advance directive”?

10 **§ 4751. Cumulative remedies**

11 4751. The remedies provided in this part are cumulative and not exclusive of any  
12 other remedies provided by law.

13 **Comment.**

14 **Original Comment.** Section 4901 continues former Civil Code Section 2420(a) without  
15 substantive change.

16 **§ 4752. Effect of provision in advance directive attempting to limit right to petition**

17 4752. Except as provided in Section 4903, this part is not subject to limitation in  
18 an advance health care directive.

19 **Comment.**

20 **Original Comment.** Section 4902 continues former Civil Code Section 2422 without  
21 substantive change. See also Sections 4022 (“power of attorney” defined), 4101(b) (general rule  
22 on limitations provided in power of attorney).

23 **§ 4753. Limitations on right to petition**

24 4753. (a) Subject to subdivision (b), an advance health care directive may  
25 expressly eliminate the authority of a person listed in Section 4940 to petition the  
26 court for any one or more of the purposes enumerated in Section 4941 if both of  
27 the following requirements are satisfied:

28 (1) The advance directive is executed by an individual having the advice of a  
29 lawyer authorized to practice law in the state where the advance directive is  
30 executed.

31 (2) The individual’s lawyer signs a certificate stating in substance:

32 “I am a lawyer authorized to practice law in the state where this advance  
33 directive was executed, and \_\_\_\_\_ [insert name] was my client at the  
34 time this advance directive was executed. I have advised my client  
35 concerning his or her rights in connection with this advance directive and the  
36 applicable law and the consequences of signing or not signing this advance  
37 directive, and my client, after being so advised, has executed this advance  
38 directive.”

39 (b) An advance directive may not limit the authority of the following persons to  
40 petition under this part:

1 (1) The conservator of the person of the [principal], with respect to a petition  
2 relating to an advance directive for a purpose specified in subdivision (a), (c), or  
3 (d) of Section 4941.

4 (2) The agent, with respect to a petition relating to a power of attorney for health  
5 care for a purpose specified in subdivision (a) or (b) of Section 4941.

6 **Comment.**

7 **Original Comment.** Subdivision (a) of Section 4903 continues former Civil Code Section  
8 2421(a) without substantive change. This subdivision makes clear that a power of attorney may  
9 limit the applicability of this part only if it is executed with the advice and approval of the  
10 principal's counsel. This limitation is designed to ensure that the execution of a power of attorney  
11 that restricts the remedies of this part is accomplished knowingly by the principal. The inclusion  
12 of a provision in the power of attorney making this part inapplicable does not affect the right to  
13 resort to any judicial remedies that may otherwise be available.

14 Subdivision (b) restates former Civil Code Section 2421(b), (c), and (d) without substantive  
15 change, except as explained below.

16 Subdivision (b)(1) continues without substantive change, the provision in former Civil Code  
17 Section 2421(b) concerning a conservator's right to petition under Section 4941 (non-health care  
18 power of attorney), notwithstanding a limitation in the instrument. This authority is extended by  
19 subdivision (b)(1) to the attorney-in-fact, [principal], and public guardian. See Section 4940(a)  
20 (attorney-in-fact), (b) (principal), (e) (conservator), (g) (public guardian).

21 Subdivision (b)(2)-(3) restates former Civil Code Section 2421(c)-(d) without substantive  
22 change. These paragraphs specify the purposes for which a conservator of the person or an  
23 attorney-in-fact may petition the court under this part with respect to a durable power of attorney  
24 for health care. The rights provided in these paragraphs cannot be limited by a provision in the  
25 power of attorney, but the power of attorney may restrict or eliminate the right of any other  
26 persons to petition the court under this part if the principal has the advice of legal counsel and the  
27 other requirements of subdivision (a) are met. See Section 4902 (effect of provision in power of  
28 attorney attempting to limit right to petition).

29 Under subdivision (b)(2), the conservator of the person may obtain a determination of whether  
30 the durable power of attorney for health care is in effect or has terminated, despite a contrary  
31 provision in the power of attorney. See Section 4942(a). The conservator of the person may  
32 obtain a court order requiring the attorney-in-fact to report the attorney-in-fact's acts under the  
33 durable power of attorney for health care if the attorney-in-fact fails to submit such a report  
34 within 10 days after a written request. See Section 4942(c). The conservator of the person may  
35 obtain a court determination that the durable power of attorney for health care is terminated if the  
36 court finds that the attorney-in-fact is acting illegally or is not performing the duty under the  
37 durable power of attorney for health care to act consistently with the desires of the principal or,  
38 where the principal's desires are unknown or unclear, is acting in a manner that is clearly contrary  
39 to the best interests of the principal. See Section 4942(d). See also Section 4942 Comment.

40 Under subdivision (b)(3), the attorney-in-fact may obtain a determination of whether the  
41 durable power of attorney for health care is in effect or has terminated, despite a contrary  
42 provision in the power of attorney. See Section 4942(a). The attorney-in-fact may also obtain a  
43 court order passing on the acts or proposed acts of the attorney-in-fact under the durable power of  
44 attorney for health care. See Section 4942(b).

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

47 **§ 4754. Jury trial**

48 4754. There is no right to a jury trial in proceedings under this division.

49 **Comment.**







1 § 4762. Jurisdiction over agent

2 4762. Without limiting Section 4921, a person who acts as an attorney-in-fact  
3 under a power of attorney governed by this division or an agent or surrogate under  
4 an advance health care directive governed by this division is subject to personal  
5 jurisdiction in this state with respect to matters relating to acts and transactions of  
6 the attorney-in-fact, agent, or surrogate performed in this state or affecting  
7 property or a [principal] or patient in this state.

8 **Comment.**

9 **Original Comment.** Section 4922 is new. It is comparable to Sections 3902(b) (jurisdiction  
10 over custodian under Uniform Transfers to Minors Act) and 17003(a) (jurisdiction over trustee).  
11 This section is intended to facilitate exercise of the court's power under this part when the court's  
12 jurisdiction is properly invoked. As recognized by the introductory clause, constitutional  
13 limitations on assertion of jurisdiction apply to the exercise of jurisdiction under this section.  
14 Consequently, appropriate notice must be given to an attorney-in-fact as a condition of personal  
15 jurisdiction. *Cf.* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950).

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

18 § 4763. Venue

19 4763. The proper county for commencement of a proceeding under this division  
20 shall be determined in the following order of priority:

- 21 (a) The county in which the [principal] or patient resides.
- 22 (b) The county in which the agent or surrogate resides.
- 23 (c) A county in which property subject to the power of attorney is located.
- 24 (d) Any other county that is in the [principal's] or patient's best interest.

25 **Comment.**

26 **Original Comment.** Section 4923 supersedes former Civil Code Section 2414. This section is  
27 drawn from the rules applicable to guardianships and conservatorships. See Sections 2201-2202.  
28 See also Section 4053 (durable powers of attorney under law of another jurisdiction).

29 CHAPTER 3. PETITIONS, ORDERS, APPEALS

30 § 4765. Petitioners

31 4765. Subject to Section 4753, a petition may be filed under this part by any of  
32 the following persons:

- 33 (a) The agent or surrogate.
- 34 (b) The person who executed an advance health care directive.
- 35 (c) The spouse of the person who executed an advance health care directive.
- 36 (d) A relative of the person who executed an advance health care directive.
- 37 (e) The conservator of the person of the person who executed an advance health  
38 care directive.
- 39 (f) The court investigator, described in Section 1454, of the county where the  
40 advance health care directive was executed or where the person who executed an  
41 advance health care directive resides.

1 (g) The public guardian of the county where the advance health care directive  
2 was executed or where the person who executed an advance health care directive  
3 resides.

4 (h) A supervising health care provider, with respect to advance health care  
5 directive.


6 (i) A person who is requested in writing by an agent to take action.

7 (j) Any other interested person or friend of the person executing an advance  
8 health care directive.

9 **Comment.**

10 **Original Comment.** Section 4940 continues former Civil Code Section 2411 without  
11 substantive change, and expands the class of petitioners to include relatives (subdivision (d)),  
12 third persons who are requested to honor the power of attorney (subdivision (k)), and any other  
13 interested persons or friends of the principal (subdivision (l)). These additions are drawn from the  
14 comparable rules governing petitioners for appointment of a conservator under Section 1820. The  
15 purposes for which a person may file a petition under this part are limited by other rules. See  
16 Sections 4902 (effect of provision in power of attorney attempting to limit right to petition), 4903  
17 (limitations on right to petition), 4942 (petition with respect to durable power of attorney for  
18 health care); see also Section 4901 (other remedies not affected).

19 See also Sections 4014 (“attorney-in-fact” defined), 4022 (“power of attorney” defined), 4026  
20 (“principal” defined), 4606 (“durable power of attorney for health care” defined), 4615 (“health  
21 care provider” defined).

22  **Staff Note.** This section needs further analysis to determine the extent to which it should  
23 apply to surrogates making health care decisions and to describe the appropriate coverage with  
24 regard to decisions made pursuant to individual instructions. It should also be considered whether  
25 the list of potential petitioners is overly broad.

26 **§ 4766. Petition as to durable power of attorney for health care**

27 4766. With respect to a power of attorney for health care, a petition may be filed  
28 under this part for any one or more of the following purposes:

29 (a) Determining whether the power of attorney for health care is in effect or has  
30 terminated.

31 (b) Determining whether the acts or proposed acts of the agent are consistent  
32 with the desires of the [principal] as expressed in the power of attorney for health  
33 care or otherwise made known to the court or, where the desires of the [principal]  
34 are unknown or unclear, whether the acts or proposed acts of the agent are in the  
35 best interest of the [principal].

36 (c) Compelling the agent to report agent’s acts o the [principal], the spouse of  
37 the [principal], the conservator of the person of the [principal], or to any other  
38 person required by the court in its discretion, if the agent has failed to submit the  
39 report within 10 days after written request from the person filing the petition.

40 (d) Declaring that the power of attorney for health care is terminated upon a  
41 determination by the court that the agent has made a health care decision for the  
42 [principal] that authorized anything illegal or upon a determination by the court of  
43 both of the following:

44 (1) The agent has violated, has failed to perform, or is unfit to perform, the duty  
45 under the power of attorney for health care to act consistent with the desires of the

1 [principal] or, where the desires of the [principal] are unknown or unclear, is  
2 acting (by action or inaction) in a manner that is clearly contrary to the best  
3 interest of the [principal].

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

6 **Comment.**

7 **Original Comment.** Section 4942 continues former Civil Code Section 2412.5 without  
8 substantive change, except as noted below. This section enumerates the purposes for which a  
9 petition may be filed under this part with respect to a durable power of attorney for health care.  
10 For the provision governing petitions with respect to other powers of attorney, see Section 4941.

11 Under subdivision (b), the desires of the principal as expressed in the durable power of attorney  
12 for health care or otherwise made known to the court provide the standard for judging the acts of  
13 the attorney-in-fact. Subdivision (d) permits the court to terminate the durable power of attorney  
14 for health care where the attorney-in-fact is not complying with the duty to carry out the desires  
15 of the principal. These subdivisions adopt a standard based on the principal's desires in place of a  
16 general standard of what may constitute the best interests of the principal. An attempted suicide  
17 by the principal is not to be construed to indicate the principal's desire that health care be  
18 restricted or inhibited. See Section 4723 (unauthorized acts and omissions).

19 Where it is not possible to use a standard based on the principal's desires because those desires  
20 are not stated in the power of attorney or otherwise known or are unclear, subdivision (b)  
21 provides that the "best interests of the principal" standard be used.

22 Subdivision (d) permits termination of the durable power of attorney for health care not only  
23 where the attorney-in-fact, for example, is acting illegally or failing to perform his or her duties  
24 under the power of attorney or is acting contrary to the known desires of the [principal], but also  
25 where the desires of the principal are unknown or unclear and the attorney-in-fact is acting in a  
26 manner that is clearly contrary to the best interests of the principal. The desires of the principal  
27 may become unclear as a result of the developments in medical treatment techniques that have  
28 occurred since the desires were expressed by the [principal], such developments having changed  
29 the nature or consequences of the treatment.

30 Subdivision (e) is new. See Section 4941(e) Comment. The availability of this procedure is not  
31 intended to imply that an attorney-in-fact must or should petition for judicial acceptance of a  
32 resignation where the attorney-in-fact is not subject to a duty to act.

33 A durable power of attorney for health care may limit the authority to petition under this part.  
34 See Sections 4902 (effect of provision in power of attorney attempting to limit right to petition),  
35 4903 (limitations on right to petition).

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

38 ☞ **Staff Note.** For the time being, we have left this section applicable only to powers of attorney,  
39 and have resisted expanding it to cover individual instructions or decisions made by surrogates.  
40 These matters are better handled in new sections, perhaps drawn from the UHCDA. The  
41 provision for approving the agent's resignation has been omitted since it does not seem relevant  
42 in this context.

43 **§ 4767. Commencement of proceeding**

44 4767. A proceeding under this part is commenced by filing a petition stating  
45 facts showing that the petition is authorized under this part, the grounds of the  
46 petition, and, if known to the petitioner, the terms of the advance health care  
47 directive in question.

48 **Comment.**

1       **Original Comment.** Section 4943 restates parts of former Civil Code Section 2415 without  
2 substantive change. The former reference to filing in the superior court is restated in a different  
3 form in Section 4920. The language concerning the grounds of the petition is new and is drawn  
4 from Section 17201 (commencement of proceeding under Trust Law). A petition is required to be  
5 verified. See Section 1021.

6       See also Section 4022 (“power of attorney” defined).

7       **§ 4768. Dismissal of petition**

8       4768. The court may dismiss a petition if it appears that the proceeding is not  
9 reasonably necessary for the protection of the interests of the patient or the  
10 [principal] or the [principal’s] estate and shall stay or dismiss the proceeding in  
11 whole or in part when required by Section 410.30 of the Code of Civil Procedure.

12       **Comment.**

13       **Original Comment.** Section 4944 restates former Civil Code Section 2416 without substantive  
14 change. The dismissal standard has been revised to permit dismissal when the proceeding is not  
15 “reasonably necessary,” rather than “necessary” as under the former statute. Under this section,  
16 the court has authority to stay or dismiss a proceeding in this state if, in the interest of substantial  
17 justice, the proceeding should be heard in a forum outside this state. See Code Civ. Proc. §  
18 410.30.

19       See also Section 4026 (“principal” defined).

20       **§ 4769 Notice of hearing**

21       4769. (a) Subject to subdivision (b), at least 15 days before the time set for  
22 hearing, the petitioner shall serve notice of the time and place of the hearing,  
23 together with a copy of the petition, on the following:

24       (1) The agent if not the petitioner.

25       (2) The [principal] [or patient] if not the petitioner.

26       (b) In the case of a petition to compel a third person to honor the authority of an  
27 agent, notice of the time and place of the hearing, together with a copy of the  
28 petition, shall be served on the third person in the manner provided in Chapter 4  
29 (commencing with Section 413.10) of Title 5 of Part 2 of the Code of Civil  
30 Procedure.

31       **Comment.**

32       **Original Comment.** Subdivision (a) of Section 4945, pertaining to internal affairs of the power  
33 of attorney, continues former Civil Code Section 2417(b) without substantive change, except that  
34 the notice period is changed to 15 days for consistency with conservatorship proceedings. See  
35 Section 1460.

36       Subdivision (b) provides a special rule applicable to service of notice in proceedings involving  
37 third persons, i.e., not internal affairs of the power of attorney. See Section 4941(f) (petition to  
38 compel third person to honor attorney-in-fact’s authority).

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

40       **§ 4770. Temporary health care order**

41       4770. With respect to an advance health care directive, the court in its discretion,  
42 upon a showing of good cause, may issue a temporary order prescribing the health  
43 care of the patient until the disposition of the petition filed under Section 4766. If a  
44 [durable power of attorney for health care] is in effect and a conservator (including

1 a temporary conservator) of the person is appointed for the [principal], the court  
2 that appoints the conservator in its discretion, upon a showing of good cause, may  
3 issue a temporary order prescribing the health care of the [principal], that order to  
4 continue in effect for such time as is ordered by the court but in no case longer  
5 than the time necessary to permit the filing and determination of a petition filed  
6 under Section 4766.

7 **Comment.**

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

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

14 **§ 4771. Award of attorney's fees**

15 4771. In a proceeding under this part commenced by the filing of a petition by a  
16 person other than the agent, the court may in its discretion award reasonable  
17 attorney's fees to one of the following:

18 (a) The agent, if the court determines that the proceeding was commenced  
19 without any reasonable cause.

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

25 **Comment.**

26 **Original Comment.** Section 4947 continues former Civil Code Section 2417(g) without  
27 substantive change. See Sections 4014 ("attorney-in-fact" defined), 4022 ("power of attorney"  
28 defined), 4026 ("principal" defined).

29 **§ 4772. Appeal**

30 4772. An appeal may be taken from any of the following:

31 (a) Any final order made pursuant to Section 4766, except an order pursuant to  
32 subdivision (c) of Section 4766.

33 (b) An order dismissing the petition or denying a motion to dismiss under  
34 Section 4768.

35 **Comment.**

36 **Original Comment.** Section 4948 continues former Civil Code Section 2419 without  
37 substantive change. The language of the section has been recast to note the exception to the right  
38 to appeal, rather than listing the appealable orders under Sections 4941 and 4942. This has the  
39 effect of continuing the former rule that all orders are appealable except orders requiring the  
40 attorney-in-fact to account. This also remedies an omission that occurred when the authority to  
41 petition to compel a third person to honor the attorney-in-fact's authority under a statutory form  
42 power of attorney was added to former Civil Code Section 2412. See 1992 Cal. Stat. ch. 178, § 3.  
43 The reference to "decree" in former Civil Code Section 2419(a) is omitted as unnecessary.





1 **Comment.** Section 4781 continues former Section 4753(h) without substantive change.

2 ☞ **Staff Note.** The correct incorporation under subdivision (a) will need to be checked.

3 **§ 4783. Immunity for honoring request to forego resuscitative measures**

4 4783. A health care provider who honors a request to forego resuscitative  
5 measures is not subject to criminal prosecution, civil liability, discipline for  
6 unprofessional conduct, administrative sanction, or any other sanction, as a result  
7 of his or her reliance on the request, if the health care provider (1) believes in good  
8 faith that the action or decision is consistent with this section, and (2) has no  
9 knowledge that the action or decision would be inconsistent with a health care  
10 decision that the individual signing the request would have made on his or her own  
11 behalf under like circumstances.

12 **Comment.** Section 4783 continues former Section 4753(a) without substantive change.

13 ☞ **Staff Note.** The terminology of this section will need to be checked for consistency with the  
14 language of Part 1.

15 **§ 4784. Request to forego resuscitative measures forms**

16 4784. (a) Request to forego resuscitative measures forms printed after January 1,  
17 1995, shall contain the following:

18 “By signing this form, the surrogate acknowledges that this request to forego  
19 resuscitative measures is consistent with the known desires of, and with the  
20 best interest of, the individual who is the subject of the form.”

21 (b) A substantially similar printed form is valid and enforceable if all of the  
22 following conditions are met:

23 (1) The form is signed by the individual, or the individual’s legally recognized  
24 surrogate health care decisionmaker, and a physician.

25 (2) The form directs health care providers to forego resuscitative measures.

26 (3) The form contains all other information required by this section.

27 **Comment.** Section 4784 continues former Section 4753(d) without substantive change.

28 **§ 4785. Presumption of validity**

29 4785. In the absence of knowledge to the contrary, a health care provider may  
30 presume that a request to forego resuscitative measures is valid and unrevoked.

31 **Comment.** Section 4785 continues former Section 4753(e) without change.

32 ☞ **Staff Note.** The terminology of this section will need to be checked for consistency with the  
33 language of Part 1.

34 **§ 4786. Application of part**

35 4786. This part applies regardless of whether the individual is within or outside a  
36 hospital or other health care facility.

37 **Comment.** Section 4786 continues former Section 4753(f) without substantive change.

1    **§ 4787. Relation to other law**

2       4787. This part does not repeal or narrow laws relating to health care  
3 decisionmaking, including the provisions governing the use of advance health care  
4 directives.

5       **Comment.** Section 4787 restates former Section 4753(a) without substantive change. The  
6 references to the Durable Power of Attorney for Health Care and the Natural Death Act have been  
7 replaced by the reference to advance health care directives for consistency with other provisions  
8 in this division. The reference to “current” laws had been eliminated as obsolete.

9       ☞ **Staff Note.** The terminology and cross-references in this section will need to be checked for  
10 consistency with the language of this division. We do not believe specific references to laws  
11 replaced by this division will need to be continued.

12    **PART 5 . ADVANCE HEALTH CARE DIRECTIVE REGISTRY**

13    **§ 4800. Registry system established by Secretary of State**

14       4800. The Secretary of State shall establish a registry system by which any  
15 person who has executed a written advance health care directive may register in a  
16 central information center information regarding the advance directive, making  
17 that information available upon request to any health care provider, the public  
18 guardian, or other person authorized by the registrant. Information that may be  
19 received and released is limited to the registrant’s name, social security or driver’s  
20 license or other individual identifying number established by law, if any, address,  
21 date and place of birth, the intended place of deposit or safekeeping of the advance  
22 directive, and the name and telephone number of the agent and any alternative  
23 agent. The Secretary of State, at the request of the registrant, may transmit the  
24 information he or she receives regarding the advance health care directive to the  
25 registry system of another jurisdiction as identified by the registrant. The Secretary  
26 of State may charge a fee to each registrant in an amount such that, when all fees  
27 charged to registrants are aggregated, the aggregated fees do not exceed the actual  
28 cost of establishing and maintaining the registry.

29       **Comment.** Section 4800 continues former Section 4800 without substantive change, and  
30 generalizes it to apply to all written advance health care directives instead of the more limited  
31 class of durable powers of attorney for health care. See Section 4605 (“advance health care  
32 directive” defined).

33       ☞ **Staff Note.** This registry scheme is implemented through a form issued by the Secretary of  
34 State. See Memorandum 97-41, Exhibit pp. 13-14. Informal conversations suggest that very few  
35 forms have been filed (around 80 was one estimate) and that there have been no inquiries directed  
36 to the registry seeking information.

37    **§ 4801. Identity and fees**

38       4801. The Secretary of State shall establish procedures to verify the identities of  
39 health care providers, the public guardian, and other authorized persons requesting  
40 information pursuant to Section 4800. No fee shall be charged to any health care

1 provider, the public guardian, or other authorized person requesting information  
2 pursuant to Section 4800.

3 **Comment.** Section 4801 continues former Section 4801 without change.

4 **§ 4802. Notice**

5 4802. The Secretary of State shall establish procedures to advise each registrant  
6 of the following:

7 (a) A health care provider may not honor a written advance health care directive  
8 until it receives a copy from the registrant.

9 (b) Each registrant must notify the registry upon revocation of the advance  
10 directive.

11 (c) Each registrant must reregister upon execution of a subsequent advance  
12 directive.

13 **Comment.** Section 4802 continues former Section 4802 without substantive change, and  
14 generalizes it to apply to all written advance health care directives instead of the more limited  
15 class of durable powers of attorney for health care. See Section 4605 (“advance health care  
16 directive” defined).

17 **§ 4804. Effect of failure to register**

18 4804. Failure to register with the Secretary of State does not affect the validity of  
19 any advance health care directive.

20 **Comment.** Section 4804 continues former Section 4804 without substantive change, and  
21 generalizes it to apply to all written advance health care directives instead of the more limited  
22 class of durable powers of attorney for health care. See Section 4605 (“advance health care  
23 directive” defined).

24 **§ 4805. Effect of registration on revocation and validity**

25 4805. Registration with the Secretary of State does not affect the ability of the  
26 registrant to revoke the registrant’s advance health care directive or a later  
27 executed advance directive, nor does registration raise any presumption of validity  
28 or superiority among any competing advance directives or revocations.

29 **Comment.** Section 4805 continues former Section 4805 without substantive change, and  
30 generalizes it to apply to all written advance health care directives instead of the more limited  
31 class of durable powers of attorney for health care. See Section 4605 (“advance health care  
32 directive” defined).

33 **§ 4806. Effect on health care provider**

34 4806. Nothing in this chapter shall be construed to require a health care provider  
35 to request from the registry information about whether a patient has executed an  
36 advance health care directive. Nothing in this chapter shall be construed to affect  
37 the duty of a health care provider to provide information to a patient regarding  
38 advance health care directives pursuant to any provision of federal law.

39 **Comment.** Section 4806 continues former Section 4806 without substantive change, and  
40 generalizes it to apply to all written advance health care directives instead of the more limited  
41 class of durable powers of attorney for health care. See Section 4605 (“advance health care  
42 directive” defined).

1 **Part 5 of Division 4.5 (repealed). Judicial proceedings concerning powers of attorney**

2 SEC. \_\_\_\_\_. Part 5 (commencing with Section 4900) of Division 4.5 is repealed.

3 **Comment.** With respect to powers of attorney generally, this part is replaced by a renumbered  
4 Part 5 (commencing with Section 4500) in Division 4.5. With respect to powers of attorney for  
5 health care, this part is replaced by Part 3 (commencing with Section 4750) in Division 4.7.

6

---