

## Memorandum 97-75

### Health Care Decisions: Staff Draft Statute

---

At the September meeting, the Commission considered the second staff draft statute on health care decisionmaking. Attached to this memorandum is the third staff draft, implementing the Commission's decisions and filling quite a few gaps existing in the second draft. The Commission will recall that the second draft presented a distinct structural approach from what was presented in the first draft, but the tentative approach was not fully implemented.

As work has progressed, the staff has included more language from the Uniform Health Care Decisions Act (UHCDA), in accordance with the Commission's general drafting directions dating back to the January 1996 meeting. This process is essentially completed. A cross-reference table showing the disposition of the UHCDA in the third staff draft statute is set out at page 4 of the Exhibit attached to this memorandum.

For browsing convenience, the Exhibit also includes a copy of the statutory language only (omitting commentary, sections recommended for deletion, transitional provisions, form language, and extraneous sections). See Exhibit pp. 5-20. This version should help give an overview of the statute and show that it is not quite as convoluted as may appear in the full draft statute with commentary and notes.

#### Priority Matters for November

At the November meeting, we need to concentrate the discussion on (1) new policy implementations, (2) areas that have not yet been fully considered, and (3) issues remaining in other parts of the draft. Many staff notes discuss problems and raise questions that the Commission needs to resolve before we can prepare a draft tentative recommendation.

New policies are implemented in the following areas:

- Health care surrogates — §§ 4710-4717, pp. 44-49  
This chapter implements the Commission's decision to adopt a default priority scheme for statutory surrogates subject to variation based on standards. The draft is based on the West Virginia statute,

a copy of which is attached as Exhibit pp. 1-3. (Note: this statute was amended earlier this year and is different from what was included in Memorandum 97-63 considered at the September meeting, but the essentials are the same.)

- Decisions for patients without surrogates — §§ 4725-4726, pp. 49-50  
This chapter is based on the Epple bill approach to making decisions for the “friendless” patient, as discussed at the September meeting.

Major areas not yet considered include the following:

- Duties of health care providers — §§ 4730-4736, at pp. 51-54  
This chapter draws heavily on the UHCDA.
- Immunities and liabilities — §§ 4740-4747, at pp. 54-58  
In this chapter, the staff is recommending adopting the UHCDA approach as easier to understand than the existing statute which was crafted at a time when durable powers of attorney for health care were a new concept.
- Judicial proceedings — §§ 4750-4772, at pp. 59-67  
Much of this is technical in nature, but this part illustrates the tension between the short and very general UHCDA provisions and the technical and detailed provisions applicable to powers of attorney under existing law.

Other issues are noted in the 75 Staff Notes appended to sections throughout the draft. We will raise the more important issues as time permits.

### **What’s Next?**

If we make sufficient progress, the staff anticipates that a draft tentative recommendation, including a textual explanation of the proposed legislation, conforming revisions, and Comments to repealed sections, can be prepared for consideration early next year. It may not be possible to deal with all the issues involved in approving a tentative recommendation in one meeting, but we believe that it should be possible to have a tentative recommendation ready to be circulated for comment by April or May of 1998.

Respectfully submitted,

Stan Ulrich  
Assistant Executive Secretary

Exhibit

**WEST VIRGINIA CODE 1966**  
**CHAPTER 16. PUBLIC HEALTH.**  
**ARTICLE 30B. HEALTH CARE SURROGATE ACT.**  
Current through End of 1997 1st Ex. Sess.

**§ 16-30B-7 Selection of a surrogate**

1 (a) When a person is or becomes incapacitated, the attending physician or the advanced  
2 practice nurse in consultation with the attending physician shall select, in writing, a  
3 surrogate with the assistance of other health care providers as necessary. The attending  
4 physician shall reasonably attempt to determine whether the incapacitated person has  
5 appointed a representative under a medical power of attorney in accordance with the  
6 provisions of article thirty-a [§ 16-30A-1 et seq.] of this chapter, or if the incapacitated  
7 person has a guardian in accordance with the provisions of article one [§ 44A-1-1 et seq.],  
8 chapter forty-four-a of this code. If no representative or guardian is authorized or capable  
9 and willing to serve, the attending physician or advance practice nurse must make a  
10 reasonable inquiry as to the availability of a surrogate from the following persons:

- 11 (1) The person's spouse;
- 12 (2) The person's adult children;
- 13 (3) The person's parents;
- 14 (4) The person's adult siblings;
- 15 (5) The person's adult grandchildren;
- 16 (6) The person's close friends;
- 17 (7) Any other person or entity, including, but not limited to, public agencies, public  
18 guardians, public officials, public and private corporations and other persons or entities  
19 which the department of health and human resources may from time to time designate in  
20 rules promulgated pursuant to chapter twenty-nine-a [§ 29A-1-1 et seq.] of this code.

21 (b) After inquiring about the existence and availability of a medical power of attorney  
22 representative or a guardian as required by subsection (a) of this section, and determining  
23 that such persons either do not exist or are unavailable or unwilling to serve as a  
24 surrogate, the primary care provider shall select and rely upon a surrogate in the order of  
25 priority set forth in subsection (a) of this section, subject to the following conditions:

- 26 (1) Where there are multiple possible surrogate decisionmakers at the same priority  
27 level, the attending physician or the advanced practice nurse in consultation with the  
28 attending physician shall, after reasonable inquiry, choose as the surrogate the person  
29 who reasonably appears to be best qualified. The following criteria shall be considered in  
30 the determination of the person or entity best qualified to serve as the surrogate:

1 (A) Whether the proposed surrogate reasonably appears to be better able to make  
2 decisions either in accordance with the known wishes of the person or in accordance with  
3 the person's best interests;

4 (B) The proposed surrogate's regular contact with the person prior to and during the  
5 incapacitating illness;

6 (C) The proposed surrogate's demonstrated care and concern;

7 (D) The proposed surrogate's availability to visit the incapacitated person during his or  
8 her illness; and

9 (E) The proposed surrogate's availability to engage in face-to-face contact with health  
10 care providers for the purpose of fully participating in the decision-making process;

11 (2) The attending physician or the advanced practice nurse in consultation with the  
12 attending physician may select a proposed surrogate who is ranked lower in priority if, in  
13 his or her judgment, that individual is best qualified, as described in this section, to serve  
14 as the incapacitated person's surrogate. The attending physician or the advanced practice  
15 nurse shall document in the incapacitated person's medical records his or her reasons for  
16 selecting a surrogate in exception to the priority order provided in subsection (a) of this  
17 section.

18 (c) The surrogate is authorized to make health care decisions on behalf of the  
19 incapacitated person without a court order or judicial involvement.

20 (d) A health care provider or health care facility may rely upon the decisions of the  
21 selected surrogate if the provider believes, after reasonable inquiry, that:

22 (1) A guardian or representative under a valid, applicable medical power of attorney is  
23 unavailable, incapable or is unwilling to serve;

24 (2) There is no other applicable advance directive;

25 (3) There is no reason to believe that such health care decisions are contrary to the  
26 incapacitated person's religious beliefs; and

27 (4) The attending physician or advanced practice nurse has not received actual notice of  
28 opposition to any health care decisions made pursuant to the provisions of this section.

29 (e) If a person who is ranked as a possible surrogate pursuant to subsection (a) of this  
30 section wishes to challenge the selection of a surrogate or the health care decision of the  
31 selected surrogate, he or she may seek injunctive relief or may file a petition for review of  
32 the selection of, or decision of, the selected surrogate with the circuit court of the county  
33 in which the incapacitated person resides or the supreme court of appeals. There shall be  
34 a rebuttable presumption that the selection of the surrogate was valid, and the person who  
35 is challenging the selection shall have the burden of proving the invalidity of that  
36 selection. The challenging party shall be responsible for all court costs and other costs  
37 related to the proceeding, except attorneys' fees, unless the court finds that the attending  
38 physician or advanced practice nurse acted in bad faith, in which case the person so  
39 acting shall be responsible for all costs. Each party shall be responsible for his or her own  
40 attorneys' fees.

41 (f) If the attending physician or advanced practice nurse is advised that a person who is  
42 ranked as a possible surrogate pursuant to the provisions of subsection (a) of this section  
43 has an objection to a health care decision to withhold or withdraw a life-prolonging

1 intervention which has been made by the selected surrogate, the attending physician or  
2 advanced practice nurse shall document the objection in the medical records of the  
3 patient. Once notice of an objection or challenge is documented, the attending physician  
4 or advanced practice nurse shall notify the challenging party that the decision shall be  
5 implemented in seventy-two hours unless the attending physician receives a court order  
6 prohibiting or enjoining the implementation of the decision as provided in subsection (e)  
7 of this section. In the event that the incapacitated person has been determined to have  
8 undergone brain death and the selected surrogate has authorized organ or tissue donation,  
9 the decision shall be implemented in twenty-four hours unless the attending physician  
10 receives a court order prohibiting or enjoining the implementation of the decision as  
11 provided in subsection (e) of this section.

12 (g) If the surrogate becomes unavailable for any reason, the surrogate may be replaced  
13 by applying the provisions of this section.

14 (h) If a person who ranks higher in priority relative to a selected surrogate becomes  
15 available and willing to be the surrogate, the person with higher priority may be  
16 substituted for the identified surrogate unless the attending physician determines that the  
17 lower ranked person is best qualified to serve as the surrogate.

(1993, c. 62; 1997, c. 103.)

*Cross Reference Table*

**Disposition of Uniform Health Care Decisions Act in Third Staff Draft**

<b>UHCDA</b>	<b>3d Staff Draft</b>	<b>UHCDA</b>	<b>3d Staff Draft</b>
1(1) .....	4605	5(g) .....	4750(c)
1(2) .....	4607(a)	5(h) .....	4715
1(3) .....	4609	5(i) .....	4717
1(4) .....	4611	5(j) .....	4713(j)
1(5) .....	4615		
1(6) .....	4617	6(a) .....	
1(7) .....	4619	6(b) .....	4686
1(8) .....	4621	6(c) .....	<i>Drabick</i>
1(9) .....	4623		
1(10) .....	56	7(a) .....	4730
1(11) .....	4625	7(b) .....	4731
1(12) .....	4627	7(c) .....	4732
1(13) .....	4629	7(d) .....	4733
1(14) .....	4631	7(e) .....	4734(a)
1(15) .....	74	7(f) .....	4734(b)
1(16) .....	4637	7(g) .....	4735
1(17) .....	4639	7(h) .....	4743
2(a) .....	4670	8 .....	4736
2(b) snt. 1 .....	4671, 4684(a)	9(a) .....	4740
2(b) snt. 2 .....	4627, 4680(b)	9(b) .....	4741
2(b) snt. 3 .....	4671		
2(b) snt. 4 .....	see 4682	10(a) .....	4744(a)
2(c) .....	4683	10(b) .....	4744(b)
2(d) .....	4673		
2(e) .....	4685	11(a) .....	4651(a)
2(f) .....	4750(b)	11(b) .....	4672
2(g) .....	4674		
2(h) .....	4676	12 .....	4658
3(a) .....	see 4695(a)	13(a) .....	4655(a)
3(b) .....	see 4695(a)	13(b) .....	4656
3(c) .....	see 4695(b)	13(c) .....	4653
3(d) .....	4696	13(d) .....	4654
3(e) .....	4697(b)	13(e) .....	see 4652(a)
		13(f) .....	no
4 intro ¶ .....	4700		
4 form .....	4701	14 .....	see 4750 <i>ff</i>
5(a) .....	4710	15 .....	2(b)
5(b) .....	4711	16 .....	4601
5(c) .....	see 4712	17 .....	11
5(d) .....	4713(a)	18 .....	3, 4660 <i>ff</i>
5(e) .....	no		
5(f) .....	4714		

## HEALTH CARE DECISIONS

☞ **Staff Note.** This contains the complete *statutory* text of Parts 1-3 of the full third staff draft, except that items recommended for omission are deleted, and the transitional provisions and statutory form is not included.

This version is intended to give a quick overview of the core provisions of the third staff draft without having to wade through all of the Comments and staff notes in the full draft.

### 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.

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

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

**§ 4603. Application of definitions**

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

**§ 4605. Advance health care directive; advance directive**

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

**§ 4607. Agent**

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

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

**§ 4609. Capacity**

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

**§ 4611. Conservator**

4611. “Conservator” means a court-appointed conservator or guardian having authority to make a health care decision for an individual.

**§ 4613. Community care facility**

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

**§ 4615. Health care**

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

**§ 4617. Health care decision**

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

- (a) Selection and discharge of health care providers and institutions.
- (b) Approval or disapproval of diagnostic tests, surgical procedures, programs of medication, and orders not to resuscitate.
- (c) Directions to provide, withhold, or withdraw artificial nutrition and hydration and all other forms of health care.

**§ 4619. Health care institution**

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

**§ 4621. Health care provider**

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

**§ 4623. Individual health care instruction; individual instruction**

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

**§ 4624. Patient**

4624. “Patient” means the individual whose health care is under consideration, and includes a principal under a power of attorney for health care, an individual, and an individual who has given an individual health care instruction or designated a surrogate.

**§ 4625. Physician**

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

**§ 4627. Power of attorney for health care**

4627. “Power of attorney for health care” means a written instrument designating an agent to make health care decisions for the principal.

**§ 4629. Primary physician**

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

**§ 4630. Principal**

4030. “Principal” means an individual who executes a power of attorney for health care.

**§ 4631. Reasonably available**

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

**§ 4633. Residential care facility for the elderly**

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

**§ 4635. Skilled nursing facility**

4635. “Skilled nursing facility” means a “skilled nursing facility” as defined in Section 1250 of the Health and Safety Code.

**§ 4637. Supervising health care provider**

4637. “Supervising health care provider” means the primary physician or, if there is no primary physician or the primary physician is not reasonably available, the health care provider who has undertaken primary responsibility for an individual’s health care.

**§ 4639. Surrogate**

4639. “Surrogate” means an adult, other than a patient’s agent or conservator, authorized under this part to make a health care decision for the patient.

**CHAPTER 2. GENERAL PROVISIONS**

**§ 4650. Legislative findings**

4650. The Legislature finds the following:

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

(b) Modern medical technology has made possible the artificial prolongation of human life beyond natural limits. In the interest of protecting individual autonomy, this prolongation of the process of dying for a person [with a terminal condition or permanent unconscious condition] for whom continued health care does not improve the prognosis for recovery may violate patient dignity and cause unnecessary pain and suffering, while providing nothing medically necessary or beneficial to the person.

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

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

**§ 4651. Other authority not affected**

4651. (a) This division does not affect the right of an individual to make health care decisions for himself or herself while having the capacity to do so.

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

**§ 4652. Unauthorized acts**

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

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

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

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

(d) Sterilization.

(e) Abortion.

**§ 4653. Mercy killing, assisted suicide, euthanasia not approved**

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

**§ 4654. Compliance with generally accepted health care standards**

4654. This division does not authorize or require a health care provider or health care institution to provide health care contrary to generally accepted health care standards applicable to the health care provider or institution.

**§ 4655. Impermissible constructions**

4655. (a) This division does not create a presumption concerning the intention of an individual who has not made or who has revoked an advance health care directive.

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

**§ 4656. Affect on death benefits**

4656. Death resulting from withholding or withdrawing health care in accordance with this division does not for any purpose constitute a suicide or homicide or legally impair or invalidate a policy of insurance or an annuity providing a death benefit, notwithstanding any term of the policy or annuity to the contrary.

**§ 4657. Patient's objections**

4657. Nothing in this division authorizes consent to health care, or consent to the withholding or withdrawal of health care necessary to keep the patient alive, if the patient having capacity objects to the health care or to the withholding or withdrawal of the health care. In this situation, the case is governed by the law that would apply if there were no advance health care directive or surrogate decisionmaker.

**§ 4658. Use of copies**

4658. A copy of a written advance health care directive, revocation of an advance health care directive, or designation or disqualification of a surrogate has the same effect as the original.

**§ 4659. Relation to general agency law**

4659. Where this division does not provide a rule, the general law of agency may be applied.

CHAPTER 3. TRANSITIONAL PROVISIONS

 **Staff Note.** Omitted from this document.

PART 2 . UNIFORM HEALTH CARE DECISIONS ACT

CHAPTER 1. ADVANCE HEALTH CARE DIRECTIVES

Article 1. General Provisions

**§ 4670. Individual health care instruction**

4670. An adult may give an individual health care instruction for health care. The instruction may be oral or written. The instruction may be limited to take effect only if a specified condition arises.

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

4671. An adult may execute a power of attorney for health care, as provided in Article 2 (commencing with Section 4680). A power of attorney may authorize the agent to make health care decisions and may also include individual health care instructions. A power of attorney may grant authority to make decisions relating to the personal care of the principal, including, but not limited to, determining where the principal will live, providing meals, hiring household employees, providing transportation, handling mail, and arranging recreation and entertainment.

**§ 4672. Presumption of capacity**

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

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

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

**§ 4674. Nomination of conservator in written advance directive**

4674. (a) A written advance health care directive may include the individual's nomination of a conservator or guardian of the person.

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

**§ 4675. Witnessing required in skilled nursing facility**

4675. (a) If an individual is a patient in a skilled nursing facility when the advance health care directive is executed, the advance directive shall be acknowledged before a notary public or signed by at least two witnesses as provided in this section.

(b) If the advance health care directive is signed by witnesses, the following requirements shall be satisfied:

(1) The witnesses shall be adults.

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

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

(A) The agent, with regard to a power of attorney for health care.

(B) The patient's health care provider or an employee of the patient's health care provider.

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

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

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

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

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

(f) For the purposes of the declaration of witnesses, "convincing evidence" means the absence of any information, evidence, or other circumstances that would lead a reasonable person to believe the individual executing the advance health care directive,

whether by signing or acknowledging his or her signature, is not the individual he or she claims to be, and any one of the following:

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

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

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

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

(A) A passport issued by a foreign government.

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

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

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

(g) A witness who is a patient advocate or ombudsman may rely on the representations of the administrators or staff of the skilled nursing facility, or of family members, as convincing evidence of the identity of the patient if the patient advocate or ombudsman believes that the representations provide a reasonable basis for determining the identity of the patient.

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

4676. (a) A written advance health care directive or similar instrument executed in another state or jurisdiction in compliance with the laws of that state or jurisdiction or of this state, is valid and enforceable in this state to the same extent as a written advance health care directive validly executed in this state.

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

**Article 2. Powers of Attorney for Health Care**

**§ 4680. Formalities for executing a power of attorney**

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

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

(b) The power of attorney is signed either (1) by the principal or (2) in the principal's name by some other person in the principal's presence and at the principal's direction.

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

**§ 4681. Limitations expressed in power of attorney**

4681. (a) Except as provided in subdivision (b), the principal may limit the application of any provision of this division by an express statement in the power of attorney or by providing an inconsistent rule in the power of attorney.

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

(1) Statements required to be included in a power of attorney.

(2) Operative dates of statutory enactments or amendments.

(3) Execution formalities.

(4) Qualifications of witnesses.

- (5) Qualifications of agents.
- (6) Protection of third persons from liability.

**§ 4682. Limitations on who may act as agent**

4682. (a) Except as provided in subdivision (b), the following persons may not make health care decisions under a power of attorney for health care:

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

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

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

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

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

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

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

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

(1) The power of attorney is otherwise valid.

(2) The conservatee is represented by legal counsel.

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

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

**§ 4683. When agent's authority effective**

4683. Unless otherwise provided in a power of attorney for health care, the authority of an agent becomes effective only on a determination that the principal lacks capacity, and ceases to be effective on a determination that the principal has recovered capacity.

**§ 4684. Scope of agent's authority**

4684. Subject to any limitations in the power of attorney for health care:

(a) An agent designated in the power of attorney may make health care decisions for the principal to the same extent the principal could make health care decisions if the principal had the capacity to do so.

(b) The agent may also make decisions that may be effective after the principal's death, including the following:

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

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

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

**§ 4685. Standard governing agent's health care decisions**

4685. An agent shall make a health care decision in accordance with the principal's individual health care instructions, if any, and other wishes to the extent known to the agent. Otherwise, the agent shall make the decision in accordance with the agent's determination of the principal's best interest. In determining the principal's best interest, the agent shall consider the principal's personal values to the extent known to the agent.

**§ 4686. Agent's priority**

4686. Unless the power of attorney for health care provides otherwise, the agent designated in the power of attorney who is known to the health care provider to be reasonably available and willing to make health care decisions has priority over any other person in making health care decisions for the principal.

**§ 4687. Duration**

4687. Unless the power of attorney for health care provides a time of termination, the authority of the agent is exercisable notwithstanding any lapse of time since execution of the power of attorney.

**§ 4688. Other authority of person named as agent not affected**

4688. Nothing in this division affects any right the person designated as an agent under a power of attorney for health care may have, apart from the power of attorney, to make or participate in making health care decisions for the principal.

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

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

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

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

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

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

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

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

(b) If the agent's authority is revoked solely by subdivision (a), it is revived by the principal's remarriage to the agent.

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

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

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

**CHAPTER 2. ADVANCE HEALTH CARE DIRECTIVE FORMS**

☞ **Staff Note.** Omitted from this document.

### CHAPTER 3. HEALTH CARE SURROGATES

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

4710. A surrogate may make a health care decision for a patient who is an adult if all of the following conditions are satisfied:

- (a) The patient has been determined by the primary physician to lack capacity.
- (b) No agent has been designated under a power of attorney for health care and no conservator of the person has been appointed with authority to make health care decisions, or the agent or conservator is not reasonably available.

#### **§ 4711. Patient's designation of surrogate**

4711. An adult may designate any individual to act as surrogate to make health care decisions by personally informing the supervising health care provider. An oral designation of a surrogate is effective only during the course of treatment or illness or during a hospital stay during which the designation is made.

#### **§ 4712. Determination of statutory surrogate**

4712. (a) In the absence of a surrogate designation under Section 4711, or if the designated surrogate is not reasonably available, the primary physician shall make a reasonable inquiry as to the availability of a surrogate from among the following persons:

- (1) The patient's spouse, unless legally separated.
- (2) An individual in a long-term relationship of indefinite duration with the patient in which the individual has demonstrated an actual commitment to the patient similar to the commitment of a spouse and in which the individual and the patient consider themselves to be responsible for each other's well-being.
- (3) The patient's adult children.
- (4) The patient's parents.
- (5) The patient's adult brothers and sisters.
- (6) The patient's adult grandchildren.
- (7) The patient's close friends and companions.

(b) After inquiring about the existence and availability of an agent or conservator and determining that these persons either do not exist or are not reasonably available, the primary physician shall select a surrogate, with the assistance of other health care providers as desired, in the order of priority set forth in subdivision (a), subject to the following conditions:

(1) Where there are multiple possible surrogates at the same priority level, the primary physician, after reasonable inquiry, shall choose as surrogate the person who reasonably appears to be best qualified.

(2) The primary physician may select as surrogate an individual who is ranked lower in priority if, in the primary physician's judgment, the individual is best qualified, as provided in this section, to serve as the patient's surrogate. The primary physician shall document in the incapacitated person's medical records his or her reasons for selecting a surrogate in exception to the priority order provided in subsection (a) of this section.

(c) The following factors shall be considered in determining the individual best qualified to serve as the surrogate under this section:

- (1) Whether the proposed surrogate reasonably appears to be better able to make decisions either in accordance with the known wishes of the patient or in accordance with the patient best interest.
- (2) The proposed surrogate's regular contact with the person before and during the patient's illness.
- (3) The proposed surrogate's demonstrated care and concern for the patient.
- (4) The proposed surrogate's familiarity with the patient's personal values.
- (5) The proposed surrogate's availability to visit the patient.

(6) The proposed surrogate's availability to engage in face-to-face contact with health care providers for the purpose of fully participating in the health care decisionmaking process.

**§ 4713. Surrogate's assumption of authority**

4713. (a) A prospective surrogate may seek to assume authority by notifying the supervising health care provider and shall communicate the assumption of authority as promptly as practicable to the members of the patient's family specified in Section 4712 who can be readily contacted.

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

**§ 4714. Standard governing surrogate's health care decisions**

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

**§ 4715. Disqualification of surrogate**

4715. An individual at any time may disqualify another person, including a member of the individual's family, from acting as the individual's surrogate by a signed writing or by personally informing the supervising health care provider of the disqualification.

**§ 4716. Reassessment of surrogate determination**

4716. (a) If the surrogate becomes unavailable for any reason, the surrogate may be replaced by applying the provisions of this chapter.

(b) If a person who ranks higher in priority relative to a selected surrogate becomes reasonably available, the person with higher priority may be substituted for the identified surrogate unless the primary physician determines that the lower ranked person is best qualified to serve as the surrogate.

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

4717. Notwithstanding any other provision of this chapter, unless related to the patient by blood, marriage, or adoption, a surrogate may not be an owner, operator, or employee of [a residential long-term health care institution] at which the patient is receiving care.

**CHAPTER 4. HEALTH CARE DECISIONS FOR  
PATIENTS WITHOUT SURROGATES**

**§ 4725. Application of chapter**

4725. (a) Except as provided in subdivision (b), this chapter applies to health care decisions where (1) a health care decision needs to be made for an adult and (2) the selection of a surrogate under Chapter 3 (commencing with Section 4710) is appropriate but no surrogate can be selected after diligent and good faith efforts.

(b) This chapter does not apply to medical interventions relating to a resident in a skilled nursing facility or intermediate care facility governed by Section 1418.8 of the Health and Safety Code.

**§ 4726. Referral to interdisciplinary team**

4726. (a) The primary physician may approval for a proposed a health care decision by referring the matter to an interdisciplinary team before the health care decision is

implemented. The interdisciplinary team shall oversee the patient's health care utilizing a team approach to assessment and health care planning.

(b) The interdisciplinary team shall include the patient's primary physician, a registered professional nurse with responsibility for the patient, other appropriate staff in disciplines as determined by the patient's needs, and, where practicable, a patient representative, in accordance with applicable federal and state requirements. A patient representative may include a family member or friend of the patient who is unable to take full responsibility for the patient's health care decisions, but has agreed to serve on the interdisciplinary team, or other person authorized by state or federal law.

(c) The review by the interdisciplinary team shall include all of the following:

(1) A review of the primary physician's assessment of the patient's condition.

(2) The reason for the proposed health care decision.

(3) A discussion of the desires of the patient, where known. To determine the desires of the patient, the interdisciplinary team shall interview the patient, review the patient's medical records, and consult with family members or friends, if any have been identified.

(4) The type of health care to be used in the patient's care, including its probable frequency and duration.

(5) The probable impact on the patient's condition, with and without the use of the proposed health care decision.

(6) Reasonable alternative health care decisions considered or utilized, and reasons for their discontinuance or inappropriateness.

(d) The interdisciplinary team shall periodically evaluate the use of the prescribed medical intervention at least quarterly or upon a significant change in the resident's medical condition.

## CHAPTER 5. DUTIES OF HEALTH CARE PROVIDERS

### **§ 4730. Duty of supervising health care provider to communicate**

4730. Before implementing a health care decision made for a patient, a supervising health care provider, if possible, shall promptly communicate to the patient the decision made and the identity of the person making the decision.

### **§ 4731. Duty of supervising health care provider to record relevant information**

4731. A supervising health care provider who knows of the existence of an advance health care directive, a revocation of an advance health care directive, or a designation or disqualification of a surrogate, shall promptly record its existence in the patient's health care record and, if it is in writing, shall request a copy. If a copy is furnished, the supervising health care provider shall arrange for its maintenance in the patient's health care record.

### **§ 4732. Duty of primary physician to record relevant information**

4732. A primary physician who makes or is informed of a determination that a patient lacks or has recovered capacity, or that another condition exists affecting an individual health care instruction or the authority of an agent, conservator of the person, or surrogate, shall promptly record the determination in the patient's health care record and communicate the determination to the patient, if possible, and to any person then authorized to make health care decisions for the patient.

### **§ 4733. Obligations of health care provider or institution**

4733. Except as provided in Section 4734, a health care provider or health care institution providing care to a patient shall do the following:

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

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

**§ 4734. Health care provider's or institution's right to decline**

4734. (a) A health care provider may decline to comply with an individual health care instruction or health care decision for reasons of conscience. A health care institution may decline to comply with an individual instruction or health care decision if the instruction or decision is contrary to a policy of the institution that is expressly based on reasons of conscience and if the policy was timely communicated to the patient or to a person then authorized to make health care decisions for the patient.

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

**§ 4735. Obligations of declining health care provider or institution**

4735. A health care provider or health care institution that declines to comply with an individual health care instruction or health care decision shall do all of the following:

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

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

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

**§ 4736. Right to health care information**

4736. Unless otherwise specified in an advance health care directive, a person then authorized to make health care decisions for a patient has the same rights as the patient to request, receive, examine, copy, and consent to the disclosure of medical or any other health care information.

**CHAPTER 6. IMMUNITIES AND LIABILITIES**

**§ 4740. Immunities of health care provider and institution**

4740. A health care provider or health care institution acting in good faith and in accordance with generally accepted health care standards applicable to the health care provider or institution is not subject to civil or criminal liability or to discipline for unprofessional conduct for any of the following conduct:

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

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

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

**§ 4741. Immunities of agent and surrogate**

4741. An individual acting as agent or surrogate under this [part] is not subject to civil or criminal liability or to discipline for unprofessional conduct for health care decisions made in good faith.

**§ 4742. Altering, forging, concealing, or withholding knowledge of revocation of written advance directive**

4742. Any person who, except where justified or excused by law, alters or forges a written advance health care directive of another, or willfully conceals or withholds personal knowledge of a revocation of an advance directive, with the intent to cause a withholding or withdrawal of health care necessary to keep the patient alive contrary to the desires of the patient, and thereby, because of that act, directly causes health care necessary to keep the patient alive to be withheld or withdrawn and the death of the patient thereby to be hastened, is subject to prosecution for unlawful homicide as provided in Chapter 1 (commencing with Section 187) of Title 4 of Part 1 of the Penal Code.

**§ 4743. Restriction on requiring or prohibiting advance directive**

4743. A health care provider, health care institution, disability insurer, self-insured employee welfare plan, or nonprofit hospital plan or similar insurance plan may not require or prohibit the execution or revocation of an advance health care directive as a condition for providing health care, admission to a facility, or furnishing insurance.

**§ 4744. Statutory damages**

4744. (a) A health care provider or health care institution that intentionally violates this part is subject to liability to the aggrieved individual for damages of \$[500] or actual damages resulting from the violation, whichever is greater, plus reasonable attorney's fees.

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

## PART 3 . JUDICIAL PROCEEDINGS

### CHAPTER 1. GENERAL PROVISIONS

**§ 4750. Judicial intervention disfavored**

4750. Subject to this division:

(a) An advance health care directive is exercisable free of judicial intervention.

(b) A health care decision made by an agent for a principal is effective without judicial approval.

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

(d) A health care decision made pursuant to Chapter 4 (commencing with Section 4725) is effective without judicial approval.

**§ 4751. Cumulative remedies**

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

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

4752. Except as provided in Section 4753, this part is not subject to limitation in an advance health care directive.

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

4753. (a) Subject to subdivision (b), an advance health care directive may expressly eliminate the authority of a person listed in Section 4765 to petition the court for any one

or more of the purposes enumerated in Section 4766, if both of the following requirements are satisfied:

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

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

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

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

(1) The conservator of the person, with respect to a petition relating to an advance directive for a purpose specified in subdivision (a), (c), or (d) of Section 4766.

(2) The agent, with respect to a petition relating to a power of attorney for health care for a purpose specified in subdivision (a) or (b) of Section 4766.

**§ 4754. Jury trial**

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

**§ 4755. Application of general procedural rules**

4755. Except as otherwise provided in this division, the general provisions in Division 3 (commencing with Section 1000) apply to proceedings under this division.

**CHAPTER 2. JURISDICTION AND VENUE**

**§ 4760. Jurisdiction and authority of court or judge**

4760. (a) The superior court has jurisdiction in proceedings under this division.

(b) The court in proceedings under this division is a court of general jurisdiction and the court, or a judge of the court, has the same power and authority with respect to the proceedings as otherwise provided by law for a superior court, or a judge of the superior court, including, but not limited to, the matters authorized by Section 128 of the Code of Civil Procedure.

**§ 4761. Basis of jurisdiction**

4761. The court may exercise jurisdiction in proceedings under this division on any basis permitted by Section 410.10 of the Code of Civil Procedure.

**§ 4762. Jurisdiction over agent or surrogate**

4762. Without limiting Section 4761, a person who acts as an agent under a power of attorney for health care or as a surrogate under an advance health care directive governed by this division is subject to personal jurisdiction in this state with respect to matters relating to acts and transactions of the agent or surrogate performed in this state or affecting a patient in this state.

**§ 4763. Venue**

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

(a) The county in which the patient resides.

(b) The county in which the agent or surrogate resides.

(c) Any other county that is in the patient's best interest.

### CHAPTER 3. PETITIONS, ORDERS, APPEALS

#### **§ 4765. Petitioners**

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

- (a) The agent or surrogate.
- (b) The person who executed an advance health care directive.
- (c) The spouse of the person who executed an advance health care directive.
- (d) A relative of the person who executed an advance health care directive.
- (e) The conservator of the person of the person who executed an advance health care directive.
- (f) The court investigator, described in Section 1454, of the county where the advance health care directive was executed or where the person who executed an advance directive resides.
- (g) The public guardian of the county where the advance health care directive was executed or where the person who executed an advance directive resides.
- (h) A supervising health care provider, with respect to advance health care directive.
- (i) A person who is requested in writing by an agent to take action.
- (j) Any other interested person or friend of the individual executing an advance health care directive.

#### **§ 4766. Petition as to advance directive**

4766. With respect to an advance health care directive, a petition may be filed under this part for any one or more of the following purposes:

- (a) Determining whether the advance health care directive is in effect or has terminated.
- (b) Determining whether the acts or proposed acts of an agent or surrogate are consistent with the patient's desires as expressed in the advance health care directive or otherwise made known to the court or, where the patient's desires are unknown or unclear, whether the acts or proposed acts of the agent or surrogate are in the patient's best interest.
- (c) Compelling the agent or surrogate to report to the patient, the patient's spouse, the patient's conservator, or to any other person required by the court in its discretion, if the agent or surrogate has failed to submit the report within 10 days after written request from the petitioner.
- (d) Declaring that the advance health care directive is terminated, upon a determination by the court that the agent or surrogate has made a health care decision for the patient that authorized anything illegal or upon a determination by the court of both of the following:
  - (1) The agent or surrogate has violated, has failed to perform, or is unfit to perform, the duty under the advance health care directive to act consistent with the patient's desires or, where the patient's desires are unknown or unclear, is acting (by action or inaction) in a manner that is clearly contrary to the patient's best interest.
  - (2) At the time of the determination by the court, the patient lacks the capacity to execute or to revoke an advance health care directive.

#### **§ 4767. Commencement of proceeding**

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

#### **§ 4768. Dismissal of petition**

4768. The court may dismiss a petition if it appears that the proceeding is not reasonably necessary for the protection of the interests of the patient and shall stay or dismiss the proceeding in whole or in part when required by Section 410.30 of the Code of Civil Procedure.

**§ 4769. Notice of hearing**

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

- (1) The agent, if not the petitioner.
- (2) The patient, if not the petitioner.

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

**§ 4770. Temporary health care order**

4770. The court in its discretion, upon a showing of good cause, may issue a temporary order prescribing the health care of the patient until the disposition of the petition filed under Section 4766. If a power of attorney for health care is in effect and a conservator (including a temporary conservator) of the person is appointed for the principal, the court that appoints the conservator in its discretion, upon a showing of good cause, may issue a temporary order prescribing the health care of the principal, the order to continue in effect for the period ordered by the court but in no case longer than the period necessary to permit the filing and determination of a petition filed under Section 4766.

**§ 4771. Award of attorney's fees**

4771. In a proceeding under this part commenced by the filing of a petition by a person other than the agent or surrogate, the court may in its discretion award reasonable attorney's fees to one of the following:

- (a) The agent or surrogate, if the court determines that the proceeding was commenced without any reasonable cause.
- (b) The person commencing the proceeding, if the court determines that the agent or surrogate has clearly violated the duties under the advance health care directive or has failed without any reasonable cause or justification to report to the principal or conservator of the person, as the case may be, after written request from the principal or conservator.

**§ 4772. Appeal**

4772. An appeal may be taken from any of the following:

- (a) Any final order made pursuant to Section 4766, except an order pursuant to subdivision (c) of Section 4766.
- (b) An order dismissing the petition or denying a motion to dismiss under Section 4768.

Accompanies Memorandum 97-75

## STAFF DRAFT

### HEALTH CARE DECISIONS

☞ **Staff Note.** The following draft represents the third 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). This drafting approach was approved at the September meeting.

### 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	11
CHAPTER 3. TRANSITIONAL PROVISIONS	16
PART 2. UNIFORM HEALTH CARE DECISIONS ACT	19
CHAPTER 1. ADVANCE HEALTH CARE DIRECTIVES	19
Article 1. General Provisions	19
Article 2. Powers of Attorney for Health Care	24
Article 3. Modification and Revocation of Advance Directives	30
CHAPTER 2. ADVANCE HEALTH CARE DIRECTIVE FORMS	32
CHAPTER 3. HEALTH CARE SURROGATES	44
CHAPTER 4. HEALTH CARE DECISIONS FOR PATIENTS WITHOUT SURROGATES	49
CHAPTER 5. DUTIES OF HEALTH CARE PROVIDERS	51
CHAPTER 6. IMMUNITIES AND LIABILITIES	54
PART 3. JUDICIAL PROCEEDINGS	59
CHAPTER 1. GENERAL PROVISIONS	59
CHAPTER 2. JURISDICTION AND VENUE	62
CHAPTER 3. PETITIONS, ORDERS, APPEALS	63
PART 4. REQUEST TO FOREGO RESUSCITATIVE MEASURES	68
PART 5. ADVANCE HEALTH CARE DIRECTIVE REGISTRY	70

### 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 . . . . .	4
§ 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 health care instruction . . . . .	6
§ 4624. Patient . . . . .	7
§ 4625. Physician . . . . .	7
§ 4627. Power of attorney for health care . . . . .	7
§ 4629. Primary physician . . . . .	8
§ 4630. Principal . . . . .	9
§ 4631. Reasonably available . . . . .	9
§ 4633. Residential care facility for the elderly . . . . .	9
§ 4635. Skilled nursing facility . . . . .	10
§ 4637. Supervising health care provider . . . . .	10
§ 4639. Surrogate . . . . .	10
CHAPTER 2. GENERAL PROVISIONS . . . . .	11
§ 4650. Legislative findings . . . . .	11
§ 4651. Other authority not affected . . . . .	12
§ 4652. Unauthorized acts . . . . .	12
§ 4653. Mercy killing, assisted suicide, euthanasia not approved . . . . .	13
§ 4654. Compliance with generally accepted health care standards . . . . .	14
§ 4655. Impermissible constructions . . . . .	14
§ 4656. Affect on death benefits . . . . .	14
§ 4657. Patient's objections . . . . .	14
§ 4658. Use of copies . . . . .	15
§ 4659. Relation to general agency law . . . . .	16
CHAPTER 3. TRANSITIONAL PROVISIONS . . . . .	16
§ 4660. Application to existing advance directives and pending proceedings . . . . .	16
§ 4661. Application to acts and transactions under power of attorney . . . . .	17
§ 4662. Power of attorney for health care subject to former seven-year limit . . . . .	17
PART 2. UNIFORM HEALTH CARE DECISIONS ACT . . . . .	19
CHAPTER 1. ADVANCE HEALTH CARE DIRECTIVES . . . . .	19
Article 1. General Provisions . . . . .	19
§ 4670. Individual health care instruction . . . . .	19
§ 4671. Power of attorney for health care . . . . .	19
§ 4672. Presumption of capacity . . . . .	20
§ 4673. Capacity determinations by primary physician . . . . .	21
§ 4674. Nomination of conservator in written advance directive . . . . .	21
§ 4675. Witnessing required in skilled nursing facility . . . . .	22
§ 4676. Validity of written advance directive executed in another jurisdiction . . . . .	24
Article 2. Powers of Attorney for Health Care . . . . .	24
§ 4680. Formalities for executing a power of attorney . . . . .	24
§ 4681. Limitations expressed in power of attorney . . . . .	25
§ 4682. Limitations on who may act as agent . . . . .	25
§ 4683. When agent's authority effective . . . . .	27
§ 4684. Scope of agent's authority . . . . .	27
§ 4685. Standard governing agent's health care decisions . . . . .	28
§ 4686. Agent's priority . . . . .	29
§ 4687. Duration . . . . .	29
§ 4688. Other authority of person named as agent not affected . . . . .	29

Article 3. Modification and Revocation of Advance Directives . . . . .	30
§ 4695. Revocation of power of attorney for health care . . . . .	30
§ 4696. Effect of dissolution or annulment . . . . .	31
§ 4697. Effect of later advance directive on earlier advance directive . . . . .	31
CHAPTER 2. ADVANCE HEALTH CARE DIRECTIVE FORMS . . . . .	32
§ 4700. Authorization for statutory form of advance directive . . . . .	32
§ 4701. Optional form of advance directive . . . . .	33
§ 4702. Requirements for printed form of power of attorney for health care [OMIT?] . . . . .	41
§ 4703. Notice in power of attorney for health care not on printed form [OMIT] . . . . .	43
§ 4704. Language conferring general authority [OMIT] . . . . .	43
§ 4705. Termination of authority . . . . .	44
CHAPTER 3. HEALTH CARE SURROGATES . . . . .	44
§ 4710. Authority of surrogate to make health care decisions . . . . .	44
§ 4711. Patient's designation of surrogate . . . . .	45
§ 4712. Determination of statutory surrogate . . . . .	45
§ 4713. Surrogate's assumption of authority . . . . .	47
§ 4714. Standard governing surrogate's health care decisions . . . . .	48
§ 4715. Disqualification of surrogate . . . . .	48
§ 4716. Reassessment of surrogate determination . . . . .	49
§ 4717. Limitation on who may act as surrogate . . . . .	49
CHAPTER 4. HEALTH CARE DECISIONS FOR PATIENTS WITHOUT SURROGATES . . . . .	49
§ 4725. Application of chapter . . . . .	49
§ 4726. Referral to interdisciplinary team . . . . .	50
CHAPTER 5. DUTIES OF HEALTH CARE PROVIDERS . . . . .	51
§ 4730. Duty of supervising health care provider to communicate . . . . .	51
§ 4731. Duty of supervising health care provider to record relevant information . . . . .	51
§ 4732. Duty of primary physician to record relevant information . . . . .	51
§ 4733. Obligations of health care provider or institution . . . . .	52
§ 4734. Health care provider's or institution's right to decline . . . . .	52
§ 4735. Obligations of declining health care provider or institution . . . . .	53
§ 4736. Right to health care information . . . . .	53
CHAPTER 6. IMMUNITIES AND LIABILITIES . . . . .	54
§ 4740. Immunities of health care provider and institution . . . . .	54
§ 4741. Immunities of agent and surrogate . . . . .	56
§ 4742. Altering, forging, concealing, or withholding knowledge of revocation of written advance directive . . . . .	56
§ 4743. Restriction on requiring or prohibiting advance directive . . . . .	56
§ 4744. Statutory damages . . . . .	57
§ 4745. Identification of agent and principal [OMIT] . . . . .	57
§ 4746. Reliance by third person on general authority [OMIT] . . . . .	58
§ 4747. Protection of third person relying in good faith on power of attorney [OMIT] . . . . .	58
PART 3. JUDICIAL PROCEEDINGS . . . . .	59
CHAPTER 1. GENERAL PROVISIONS . . . . .	59
§ 4750. Judicial intervention disfavored . . . . .	59
§ 4751. Cumulative remedies . . . . .	60
§ 4752. Effect of provision in advance directive attempting to limit right to petition . . . . .	60
§ 4753. Limitations on right to petition . . . . .	60
§ 4754. Jury trial . . . . .	61
§ 4755. Application of general procedural rules . . . . .	62
CHAPTER 2. JURISDICTION AND VENUE . . . . .	62
§ 4760. Jurisdiction and authority of court or judge . . . . .	62
§ 4761. Basis of jurisdiction . . . . .	62

§ 4762. Jurisdiction over agent or surrogate . . . . .	62
§ 4763. Venue . . . . .	63
CHAPTER 3. PETITIONS, ORDERS, APPEALS . . . . .	63
§ 4765. Petitioners . . . . .	63
§ 4766. Petition as to advance directive . . . . .	64
§ 4767. Commencement of proceeding . . . . .	65
§ 4768. Dismissal of petition . . . . .	65
§ 4769. Notice of hearing . . . . .	66
§ 4770. Temporary health care order . . . . .	66
§ 4771. Award of attorney’s fees . . . . .	66
§ 4772. Appeal . . . . .	67
PART 4. REQUEST TO FOREGO RESUSCITATIVE MEASURES . . . . .	68
§ 4780. “Request to forego resuscitative measures” . . . . .	68
§ 4781. “Health care provider” . . . . .	68
§ 4782. Immunity for honoring request to forego resuscitative measures . . . . .	69
§ 4783. Forms for requests to forego resuscitative measures . . . . .	69
§ 4784. Presumption of validity . . . . .	69
§ 4785. Application of part . . . . .	70
§ 4786. Relation to other law . . . . .	70
PART 5. ADVANCE HEALTH CARE DIRECTIVE REGISTRY . . . . .	70
§ 4800. Registry system established by Secretary of State . . . . .	70
§ 4801. Identity and fees . . . . .	71
§ 4802. Notice . . . . .	71
§ 4803. Effect of failure to register . . . . .	71
§ 4804. Effect of registration on revocation and validity . . . . .	71
§ 4805. Effect on health care provider . . . . .	72

## STAFF DRAFT

### HEALTH CARE DECISIONS

☞ **Staff Note.** Setting out health care decisionmaking in a separate division requires the repeal of the existing durable power of attorney for health care statutes (Prob. Code §§ 4600-4805), 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 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 4659. 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

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

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

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

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

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

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

#### 26 § 4603. Application of definitions

---

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

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

31 Some definitions included in the Uniform Health-Care Decisions Act (1993) are generalized  
32 elsewhere in this code. See Sections 56 (“person” defined) (*cf.* uniform act Section 1(10)), 74  
33 (“state” defined) (*cf.* uniform act Section 1(15)).

#### 34 § 4605. Advance health care directive; advance directive

---

35 4605. “Advance health care directive” or “advance directive” means an  
36 individual health care instruction or a power of attorney for health care.

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

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

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

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

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

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

9 **§ 4607. Agent**

---

10 4607. (a) “Agent” means an individual designated in a power of attorney for  
11 health care to make a health care decision for the principal, regardless of whether  
12 the person is known as an agent or attorney-in-fact, or by some other term.

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

14 **Comment.** Section 4607 is consistent with the definition of attorney-in-fact in the Power of  
15 Attorney Law. See Section 4014. The first part of subdivision (a) is the same as Section 1(2) of  
16 the Uniform Health-Care Decisions Act (1993). For qualifications of health care agents, see  
17 Sections 4682.

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

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

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

23 **§ 4609. Capacity**

---

24 4609. “Capacity” means an individual’s ability to understand the significant  
25 benefits, risks, and alternatives to proposed health care and to make and  
26 communicate a health care decision.

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

29 For provisions in this division relating to capacity, see Sections 4651 (authority of person  
30 having capacity not affected), 4657 (patient’s objections), [4662 (power of attorney for health  
31 care subject to former 7-year limit)], 4672 (presumption of capacity), 4673 (capacity  
32 determinations by primary physician), 4683 (when agent’s authority effective), 4684 (scope of  
33 agent’s authority), 4695 (revocation of power of attorney for health care), 4710 (authority of  
34 surrogate to make health care decisions), 4732 (duty of primary physician to record relevant  
35 information), 4733 (obligations of health care provider), 4740 (immunities of health care  
36 provider), 4666 (petition as to durable power of attorney for health care).

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

38 ☞ **Staff Note.** Health and Safety Code Section 1418.8(b) (the Epple bill), describes capacity in  
39 the following terms:

40 [A] resident lacks capacity to make a decision regarding his or her health care if the resident  
41 is unable to understand the nature and consequences of the proposed medical intervention,  
42 including its risks and benefits, or is unable to express a preference regarding the  
43 intervention....

1 **§ 4611. Conservator**

---

2 4611. “Conservator” means a court-appointed conservator or guardian having  
3 authority to make a health care decision for an individual.

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

6 For provisions in this division concerning conservators, see Sections 4617 (“health care  
7 decision” defined), 4629 (“primary physician” defined), 4639 (“surrogate” defined), 4674  
8 (nomination of conservator in written advance health care directive), 4682 (limitations on who  
9 may act as agent), 4710 (authority of surrogate to make health care decisions), 4712  
10 (determination of statutory surrogate), 4732 (duty of primary physician to record relevant  
11 information), 4753 (limitations on right to petition), 4765 (petitioners), 4766 (petition as to power  
12 of attorney for health care), 4770 (temporary health care order), 4771 (award of attorney’s fees).

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

14 ☞ **Staff Note.** The Uniform Health-Care Decisions Act defines guardian to include conservator,  
15 Harley Spitler suggests substituting the UHCDA language. (Letter of Oct. 10, 1997, p. 2.) Since  
16 the California scheme uses “conservator” with regard to adults, we prefer to define conservator to  
17 include guardians appointed under the law of other states. Probate Code Section 1490 provides:  
18 “When used in any statute of this state with reference to an adult or to the person of a married  
19 minor, ‘guardian’ means the conservator of that adult or the conservator of the person in case of  
20 the married minor.”

21 **§ 4613. Community care facility**

---

22 4613. “Community care facility” means a “community care facility” as defined  
23 in Section 1502 of the Health and Safety Code.

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

25 For provisions in this division using this term, see Sections 4675 (witnessing requirements in  
26 skilled nursing facility), 4682 (limitations on who may act as agent).

27 **§ 4615. Health care**

---

28 4615. “Health care” means any care, treatment, service, or procedure to  
29 maintain, diagnose, or otherwise affect an individual’s physical or mental  
30 condition.

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

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

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

38 **§ 4617. Health care decision**

---

39 4617. “Health care decision” means a decision made by an individual or the  
40 individual’s agent, conservator, or surrogate, regarding the individual’s health  
41 care, including the following:

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

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

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

3 **Comment.** Section 4617 supersedes former Section 4612 and is the same in substance as  
4 Section 1(6) of the Uniform Health-Care Decisions Act (1993). Adoption of the uniform act  
5 formulation is not intended to limit the scope applicable under former. Thus, like former law, this  
6 section encompasses consent, refusal of consent, or withdrawal of consent to health care, or a  
7 decision to begin, continue, increase, limit, discontinue, or not to begin any health care.

8 See also Sections 4607 (“agent” defined), 4611 (“conservator” defined), 4615 (“health care”  
9 defined), 4639 (“surrogate” defined).

10 ☞ **Staff Note.** The third sentence of the Comment uses the language of existing Section 4612  
11 and is intended to provide continuity with the superseded law. Harley Spitler considers this  
12 section to be too long and favors Section 4612. (Letter of Oct. 10, 1997, p. 2.)

### 13 § 4619. Health care institution

---

14 4619. “Health care institution” means an institution, facility, or agency licensed,  
15 certified, or otherwise authorized or permitted by law to provide health care in the  
16 ordinary course of business.

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

19 For provisions in this division using this term, see Sections 4654 (compliance with generally  
20 accepted health care standards), 4701 (optional form of advance health care directive), [4717  
21 (limitation on who may act as surrogate)], 4733 (obligations of health care institution), 4734  
22 (health care institution’s right to decline), 4735 (obligations of declining health care institution),  
23 4740 (immunities of health care provider or institution), 4743 (restriction on requiring or  
24 prohibiting advance directive), 4744 (statutory damages).

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

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

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

29 ☞ **Staff Note.** This section has been revised in line with drafting suggestions submitted by  
30 Harley Spitler. (Letter of Oct. 10, 1997, pp. 2, 9.) He also suggests substituting “administer” for  
31 “provide” in the second line of draft Section 4619. The language as proposed is the same as the  
32 Uniform Health Care Decisions Act.

### 33 § 4621. Health care provider

---

34 4621. “Health care provider” means an individual licensed, certified, or  
35 otherwise authorized or permitted by the law of this state to provide health care in  
36 the ordinary course of business or practice of a profession.

37 **Comment.** Section 4621 continues former Section 4615 without substantive change and is the  
38 same as Section 1(8) of the Uniform Health-Care Decisions Act (1993). This section also  
39 continues former Health and Safety Code Section 7186(c) (Natural Death Act) without  
40 substantive change. The reference in the former section to the law “of this state” is omitted as  
41 surplus. This is a technical, nonsubstantive change.

42 For provisions in this division using this term, see Sections 4617 (“health care decision”  
43 defined), 4654 (compliance with generally accepted health care standards), 4675 (witnessing  
44 requirements in skilled nursing facility), 4682 (limitations on who may act as agent), 4686  
45 (agent’s priority), 4701 (optional form of advance health care directive), 4712 (determination of  
46 statutory surrogate), 4733 (obligations of health care provider), 4734 (health care provider’s right  
47 to decline), 4735 (obligations of declining health care provider), 4740 (immunities of health care

1 provider), 4743 (restriction on requiring or prohibiting advance directive), 4744 (statutory  
2 damages), 4740 (immunities of health care provider).

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

4 ☞ **Staff Note.** This section has been revised in line with drafting suggestions submitted by  
5 Harley Spitler. (Letter of Oct. 10, 1997, pp. 2, 9.) He also suggests substituting “administer” for  
6 “provide” in the second line of draft Section 4621. The language as proposed is the same as the  
7 Uniform Health Care Decisions Act.

## 8 **§ 4623. Individual health care instruction; individual instruction**

---

9 4623. “Individual health care instruction” or “individual instruction” means an  
10 individual’s [written or oral] direction concerning a health care decision for herself  
11 or himself.

12 **Comment.** Section 4623 is a new provision and is the same in substance as Section 1(9) of the  
13 Uniform Health-Care Decisions Act (1993), except that the term “individual health care  
14 instruction” is included to provide more clarity.

15 For provisions in this division using this term, see Sections 4605 (“advance health care  
16 directive” defined), 4624 (“patient” defined), 4670 (individual health care instruction recognized),  
17 4671 (power of attorney for health care may include individual instruction), 4673 (capacity  
18 determinations by primary physician), 4685 (standard governing agent’s health care decisions),  
19 4697 (effect of later advance directive on earlier advance directive), 4714 (standard governing  
20 surrogate’s health care decisions), 4732 (duty of primary physician to record relevant  
21 information), 4733 (obligations of health care provider or institution), 4734 (health care  
22 provider’s or institution’s right to decline), 4735 (obligations of declining health care provider or  
23 institution).

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

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

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

### 33 ☞ **Staff Note**

34 (1) In an attempt to deal with the vagueness of “individual instruction,” the staff has included a  
35 longer term — individual health care instruction. This term will be used first in a section, with  
36 later references to the shorter “individual instruction,” just as we are using “advance health care  
37 directive” first and then using “advance directive” in later references in a section. The  
38 Commission should consider whether it would be better to drop the word “individual” entirely.  
39 We have kept it for now for greater similarity to the Uniform Act language.

40 Delaware, Maine, and New Mexico use “individual instruction” (Maine and New Mexico  
41 having enacted the Uniform Health-Care Decisions Act), but other states use terms such as  
42 “health care instruction” (Connecticut, Maryland & Oregon), “instruction regarding health care”  
43 (Minnesota), and “medical treatment instruction” (Hawaii).

44 Harley Spitler recommends the UHCDA language, but approves use of “health care  
45 instruction.” (Letter of Oct. 10, 1997, p. 2.) He also prefers “individual” over “natural person.”

46 (2) In earlier drafts, we raised the issue of whether to use “natural person” or “individual” in  
47 connection with this section. The statutes use both terms, with “individual” being far more  
48 common, although “natural person” appears in many modern statutes. Frequently, “natural  
49 person” is used to draw a distinction from artificial persons in a broad definition of “person.” See,

1 e.g., Corp. Code § 18; Evid. Code § 175; Fam. Code § 105. The Probate Code uses both terms,  
2 but defines “person” using “individual.” Code of Civil Procedure Section 116.130 defines  
3 “individual” to mean “natural person.” On balance, it does not appear to matter which term we  
4 use, but “individual” seems to be simpler.

#### 5 **§ 4624. Patient**

---

6 4624. “Patient” means the individual whose health care is under consideration,  
7 and includes a principal under a power of attorney for health care, an individual,  
8 and an individual who has given an individual health care instruction or designated  
9 a surrogate.

10 **Comment.** Section 4624 is a new provision added for drafting convenience.

11 See also Sections 4615 (“health care” defined), 4623 (“individual health care instruction”  
12 defined), 4630 (“principal” defined), 4639 (“surrogate” defined).

13 ☞ **Staff Note.** This section is suggested as a way to simplify drafting in some general provisions.  
14 See, e.g., Section 4750 *et seq.* (judicial proceedings). It may seem to state the obvious, but in the  
15 drafting process, the staff repeatedly felt compelled to explain in a Comment that “individual” or  
16 “patient” included a principal under a power of attorney, and in other cases, sections were drafted  
17 by pairing “principal and patient” which also did not seem ideal.

#### 18 **§ 4625. Physician**

---

19 4625. “Physician” means a physician and surgeon licensed by the Medical Board  
20 of California or the Osteopathic Medical Board of California.

21 **Comment.** Section 4625 continues and generalizes former Health and Safety Code Section  
22 7186(g) (Natural Death Act) and is the same in substance as Section 1(11) of the Uniform Health-  
23 Care Decisions Act (1993).

24 ☞ **Staff Note.** Uniform Health-Care Decisions Act Section 1(11) reads: “‘Physician’ means an  
25 individual authorized to practice medicine [or osteopathy] under [appropriate statute].” As noted,  
26 the draft section is from the Natural Death Act and serves the same purpose. Harley Spittler  
27 approves using a definition to avoid use of “physician and surgeon,” but recommends using the  
28 UHCDA language and avoiding any mention of “physician and surgeon” even in this section.

#### 29 **§ 4627. Power of attorney for health care**

---

30 4627. “Power of attorney for health care” means a written instrument  
31 designating an agent to make health care decisions for the principal.

32 **Comment.** Section 4627 supersedes former Section 4606 (defining “durable power of attorney  
33 for health care”) and is the same in substance as Section 1(12) of the Uniform Health-Care  
34 Decisions Act (1993). The writing requirement continues part of Section 4022 (defining “power  
35 of attorney” generally) as it applied to powers of attorney for health care under former law, and is  
36 consistent with part of the second sentence of Section 2(b) of the Uniform Health-Care Decisions  
37 Act (1993).

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

#### 39 ☞ **Staff Note**

40 (1) In the second draft, we used the language from the UHCDA defining power of attorney for  
41 health care as “the designation of an agent to make health care decisions for the individual  
42 granting the power.” The suggestion was made to substitute “principal” for “individual granting  
43 the power.” The staff is now proposing, throughout this third draft, that we use “principal” were  
44 appropriate, and this is one of those places. Further review of the UHCDA language, particularly

1 in light of the concerns that were expressed during the development of the Power of Attorney  
2 Law, led the staff to including a reference to a “written instrument.” This preserves a consistency  
3 with Section 4022 defining “power of attorney” which is incorporated by the existing definition  
4 of “durable power of attorney for health care” in Section 4606. However, the general definitions  
5 of the PAL are *not* incorporated in this new scheme, so important rules must be specifically  
6 imported where needed.

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

15 4124. A durable power of attorney is a power of attorney by which a principal designates  
16 another person as attorney-in-fact in writing and the power of attorney contains any of the  
17 following statements:

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

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

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

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

## 28 § 4629. Primary physician

---

29 4629. “Primary physician” means a physician designated by an individual or the  
30 individual’s agent, conservator, or surrogate, to have primary responsibility for the  
31 individual’s health care or, in the absence of a designation or if the designated  
32 physician is not reasonably available, a physician who undertakes the  
33 responsibility.

34 **Comment.** Section 4629 supersedes former Health and Safety Code Section 7186(a)  
35 (“attending physician” defined) and is the same in substance as Section 1(13) of the Uniform  
36 Health-Care Decisions Act (1993), except that this section refers to “conservator” instead of  
37 “guardian.”

38 For provisions in this division using this term, see Sections 4637 (“supervising health care  
39 provider” defined), 4673 (capacity determinations by primary physician), 4701 (optional form of  
40 advance health care directive), 4710 (authority of surrogate to make health care decisions), 4712  
41 (determination of statutory surrogate), 4716 (reassessment of surrogate determination), 4726  
42 (referral to interdisciplinary team), 4732 (duty of primary physician to record relevant  
43 information).

44 See also Sections 4607 (agent” defined), 4611 (“conservator” defined), 4615 (“health care”  
45 defined), 4625 (“physician” defined), 4631 (“reasonably available” defined), 4639 (“surrogate”  
46 defined).

47 **Background from Uniform Act.** The Act employs the term “primary physician” instead of  
48 “attending physician.” The term “attending physician” could be understood to refer to any  
49 physician providing treatment to the individual, and not to the physician whom the individual, or

1 agent, guardian, or surrogate, has designated or, in the absence of a designation, the physician  
2 who has undertaken primary responsibility for the individual’s health care.

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

4 **§ 4630. Principal**

---

5 4030. “Principal” means an individual who executes a power of attorney for  
6 health care.

7 **Comment.** Section 4030 is the same as Section 4027 in the Power of Attorney Law. See also  
8 Section 4627 (“power of attorney for health care” defined). See also Section 4627 (“power of  
9 attorney for health care” defined).

10 ☞ **Staff Note.** The Uniform Health Care Decisions Act doesn’t define “principal.” From the  
11 power of attorney perspective, it seems unbalanced to have an agent without a principal. Harley  
12 Spittler states that this section is unnecessary. (Letter of Oct. 10, 1997, p. 2.) But it is convenient.

13 **§ 4631. Reasonably available**

---

14 4631. “Reasonably available” means readily able to be contacted without undue  
15 effort and willing and able to act in a timely manner considering the urgency of the  
16 patient’s health care needs.

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

19 For provisions in this division the use this term, see Sections 4629 (“primary physician”  
20 defined), 4637 (“supervising health care provider” defined), 4686 (agent’s priority), 4701  
21 (optional form of advance health care directive), 4710 (authority of surrogate to make health care  
22 decisions), 4712 (determination of statutory surrogate), 4716 (reassessment of surrogate  
23 determination).

24 See also Section 4615 (“health care” defined), 4624 (“patient” defined).

25 **Background from Uniform Act.** The term “reasonably available” is used in the Act to  
26 accommodate the reality that individuals will sometimes not be timely available. The term is  
27 incorporated into the definition of “supervising health-care provider” [Prob. Code § 4637]. It  
28 appears in the optional statutory form (Section 4) [Prob. Code § 4701] to indicate when an  
29 alternate agent may act. In Section 5 [Prob. Code § 4712] it is used to determine when a surrogate  
30 will be authorized to make health-care decisions for an individual, and if so, which class of  
31 individuals has authority to act.

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

33 ☞ **Staff Note.** This provision plays an important substantive role. The sections where it is used  
34 depend on

35 **§ 4633. Residential care facility for the elderly**

---

36 4633. “Residential care facility for the elderly” means a “residential care facility  
37 for the elderly” as defined in Section 1569.2 of the Health and Safety Code.

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

39 For provisions in this division using this term, see Sections 4675 (witnessing requirements in  
40 skilled nursing facility), 4682 (limitations on who may act as agent), 4701 (optional form of  
41 advance health care directive).

1 **§ 4635. Skilled nursing facility**

---

2 4635. “Skilled nursing facility” means a “skilled nursing facility” as defined in  
3 Section 1250 of the Health and Safety Code.

4 **Comment.** Section 4635 is a new provision that incorporates the relevant definition from the  
5 Health and Safety Code.

6 For provisions in this division using this term, see Sections 4675 (witnessing requirements in  
7 skilled nursing facility), 4701 (optional form of advance health care directive), 4725 (application  
8 of rules on patients without surrogates), 4745 (convincing evidence of identity of principal).

9 **§ 4637. Supervising health care provider**

---

10 4637. “Supervising health care provider” means the primary physician or, if  
11 there is no primary physician or the primary physician is not reasonably available,  
12 the health care provider who has undertaken primary responsibility for an  
13 individual’s health care.

14 **Comment.** Section 4637 is a new provision and is the same as Section 1(16) of the Uniform  
15 Health-Care Decisions Act (1993).

16 For provisions in this division using this term, see Sections 4695 (revocation of power of  
17 attorney for health care), 4711 (patient’s designation of surrogate), 4713 (surrogate’s assumption  
18 of authority), 4715 (disqualification of surrogate), 4730 (duty of health care provider to  
19 communicate), 4731 (duty of supervising health care provider to record relevant information ),  
20 4765 (petitioners).

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

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

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

28 **§ 4639. Surrogate**

---

29 4639. “Surrogate” means an adult, other than a patient’s agent or conservator,  
30 authorized under this part to make a health care decision for the patient.

31 **Comment.** Section 4639 is a new provision and is the same in substance as Section 1(17) of the  
32 Uniform Health-Care Decisions Act (1993), except that this section refers to “conservator”  
33 instead of “guardian” and to “adult” instead of “individual.” “Adult” includes an emancipated  
34 minor. See Fam. Code §§ 7002 (emancipation), 7050 (emancipated minor considered as adult for  
35 consent to medical, dental, or psychiatric care). For provisions governing surrogates, see Section  
36 4710 *et seq.*

37 For provisions in this division using this term, see Sections 4617 (health care decision), 4624  
38 (patient), 4629. (primary physician). 4653 (mercy killing, assisted suicide, euthanasia not  
39 approved), 4657 (patient’s objections), 4658 (use of copies). 4672 (presumption of capacity),  
40 4710-4717 (health care surrogates), 4725 (application of rules on patients without surrogates),  
41 4731 (duty of supervising health care provider to record relevant information), 4732 (duty of  
42 primary physician to record relevant information), 4741 (immunities of agent and surrogate),  
43 4750 (judicial intervention disfavored), 4762 (jurisdiction over agent or surrogate), 4763 (venue),  
44 4765 (petitioners), 4769 (notice of hearing), 4771 (award of attorney’s fees), 4780 “(request to  
45 forego resuscitative measures)”, 4783 (forms for requests to forego resuscitative measures).

46 See also Sections 4607 (“agent” defined), 4617 (“health care decision” defined), 4624  
47 (“patient” defined).



1 ☞ **Staff Note**

2 (1) The Commission normally avoids statements of intent in statutes, but since the NDA  
3 language has been important in several leading cases, this presents the unusual case where intent  
4 language should be carried forward. However, since the language comes from the NDA and dates  
5 from an earlier era, it is unnecessarily restrictive in its focus on terminal or permanent  
6 unconscious conditions. The statement could be revised for greater consistency with the cases  
7 cited above.

8 (2) Harley Spitler writes, “I strongly believe that your comment should include the three U.S.  
9 Supreme Court physician-aid-in-dying cases which override the California cases.” (Letter of Oct.  
10 10, 1997, p. 2.) The staff does not believe this would be particularly useful. The California cases  
11 are cited in the Comment only because they cite the statutory language that is preserved in this  
12 section. We are attempting to provide continuity and preserve the unity of the statutory and case  
13 law as expressed in these cases. The US Supreme Court cases do not involve this language and  
14 are not directly relevant to the purpose of the Comment. However, we recognize that Mr. Spitler  
15 is correct in his point that the US Supreme Court cases bear on the issues in a broader sense.

16 **§ 4651. Other authority not affected**

---

17 4651. (a) This division does not affect the right of an individual to make health  
18 care decisions for himself or herself while having the capacity to do so.

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

20 **Comment.** Subdivision (a) of Section 4651 is the same in substance as Section 11(a) of the  
21 Uniform Health-Care Decisions Act (1993).

22 Subdivision (b) continues the substance of former Section 4652(b).

23 See also Sections 4605 (“advance health care directive” defined), 4615 (“health care” defined),  
24 4617 (“health care decision” defined), 4688 (other authority of person named as agent not  
25 affected).

26 ☞ **Staff Note.** Harley Spitler prefers the UHCDA section. (Letter of Oct. 10, 1997, p. 2.) He  
27 considers subdivision (b) to be superfluous, but subdivision (a) is “ok and a good addition.” He  
28 also recommends the presumption of capacity provided in UHCDA Section 11(b). This provision  
29 is set out in draft Section 4672.

30 The second staff draft continued language from existing Section 4652(a) in the following terms:

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

35 Further consideration of this language leads us to the conclusion that it is superfluous, as Mr.  
36 Spitler states. It is also confusing. In the context of the existing durable power of attorney for  
37 health care statute, it may have an important function (although that is questionable now that  
38 health care powers are understood and accepted), but in a broader statute covering many aspects  
39 of health care decisionmaking for incapacitated adults, it is difficult to try to state the substantive  
40 rules in the form of a disclaimer. It is better to rely on the affirmative rules provided in this  
41 division. As written, the provision is too limited, because the division *does* attempt to govern  
42 when a person may make health care decisions on behalf of another in the absence of an agent.  
43 We do not need to make clear what should already be clear: that powers of attorney are not the  
44 exclusive manner of making surrogate health care decisions.

45 **§ 4652. Unauthorized acts**

---

46 4652. This division does not authorize consent to any of the following on behalf  
47 of a patient:

- 1 (a) Commitment to or placement in a mental health treatment facility.
- 2 (b) Convulsive treatment (as defined in Section 5325 of the Welfare and
- 3 Institutions Code).
- 4 (c) Psychosurgery (as defined in Section 5325 of the Welfare and Institutions
- 5 Code).
- 6 (d) Sterilization.
- 7 (e) Abortion.

8 **Comment.** Section 4652 continues former Section 4722 without substantive change and revises  
9 language for consistency with the broader scope of this division. A power of attorney may not  
10 vary the limitations of this section. See also Section 4653 (mercy killing, assisted suicide,  
11 euthanasia not approved).

12 ☞ **Staff Note.** Section 13(e) Uniform Health-Care Decisions Act permits admission to mental  
13 health care institutions if explicitly stated in the advance directive:

14 13(e) This [Act] does not authorize an agent or surrogate to consent to the admission of an  
15 individual to a mental health care institution unless the individual's written advance health  
16 care directive expressly so provides.

17 Should we consider the limitations in existing Section 4732 for revision? Harley Spitler strongly  
18 prefers the UHCDA provision, and reports that he has “never liked” this provision. He argues that  
19 “there is a California appellate decision that invalidates one of the subsections.”

20 **§ 4653. Mercy killing, assisted suicide, euthanasia not approved**

---

21 4653. Nothing in this division shall be construed to condone, authorize, or  
22 approve mercy killing, assisted suicide, or euthanasia, or to permit any [affirmative  
23 or deliberate] act or omission to end life other than the withholding or withdrawal  
24 of health care pursuant to an advance health care directive or by a surrogate [so as  
25 to permit the natural process of dying].

26 **Comment.** Section 4653 continues the first sentence of former Section 4723 without  
27 substantive change, and is consistent with Section 13(c) of the Uniform Health-Care Decisions  
28 Act (1993). This section also continues the substance of former Health and Safety Code Section  
29 7191.5(g) (Natural Death Act). Language has been revised to conform to the broader scope of this  
30 division.

31 See also Sections 4605 (“advance health care directive” defined), 4615 (“health care” defined),  
32 4639 (“surrogate” defined).

33 ☞ **Staff Note.** UHCDA Section 13(c) reads: “This [Act] does not authorize mercy killing,  
34 assisted suicide, euthanasia, or the provision, withholding, or withdrawal of health care, to the  
35 extent prohibited by other statutes of this State.” The uniform act provision is essentially a  
36 recognition of other statutes, but in California law, existing Section 4733 is probably one of the  
37 main substantive provisions. Accordingly, the draft section makes some language changes  
38 without altering the purpose of the section.

39 Harley Spitler would omit the bracketed language in subdivision (a). (Letter of Oct. 10, 1997,  
40 p. 3.) For the phrase “so as to permit the natural process of dying,” we could substitute “as  
41 authorized by this division.” This approach would incorporate applicable standards without the  
42 need to summarize or repeat them in this section — or risk setting out a conflicting standard.

1 **§ 4654. Compliance with generally accepted health care standards**

---

2 4654. This division does not authorize or require a health care provider or health  
3 care institution to provide health care contrary to generally accepted health care  
4 standards applicable to the health care provider or institution.

5 **Comment.** Section 4654 is the same as Section 13(d) of the Uniform Health-Care Decisions  
6 Act (1993).

7 See also Sections 4615 (“health care” defined), 4621 (“health care provider” defined), 4619  
8 (“health care institution” defined).

9 **§ 4655. Impermissible constructions**

---

10 4655. (a) This division does not create a presumption concerning the intention of  
11 an individual who has not made or who has revoked an advance health care  
12 directive.

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

16 **Comment.** Subdivision (a) of Section 4655 is the same as Section 13(a) of the Uniform Health-  
17 Care Decisions Act (1993).

18 Subdivision (b) continues the second sentence of former Section 4723 without substantive  
19 change and with wording changes to reflect the broader scope of this division.

20 See also Sections 4605 (“advance health care directive” defined), 4615 (“health care” defined),  
21 4617 (“health-care decision” defined), 4624 (“patient” defined).

22 **§ 4656. Affect on death benefits**

---

23 4656. Death resulting from withholding or withdrawing health care in  
24 accordance with this division does not for any purpose constitute a suicide or  
25 homicide or legally impair or invalidate a policy of insurance or an annuity  
26 providing a death benefit, notwithstanding any term of the policy or annuity to the  
27 contrary.

28 **Comment.** Section 4656 continues and generalizes former Health and Safety Code Section  
29 7191.5(a) (Natural Death Act), and is the same in substance as Section 13(b) of the Uniform  
30 Health-Care Decisions Act (1993).

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

32 **§ 4657. Patient’s objections**

---

33 4657. Nothing in this division authorizes consent to health care, or consent to the  
34 withholding or withdrawal of health care necessary to keep the patient alive, if the  
35 patient having capacity objects to the health care or to the withholding or  
36 withdrawal of the health care. In this situation, the case is governed by the law that  
37 would apply if there were no advance health care directive or surrogate  
38 decisionmaker.

39 **Comment.** Section 4657 is drawn from former Section 4724 which applied only to durable  
40 powers of attorney for health care. The scope of this section is much broader, since it applies to  
41 powers of attorney for health care, other written advance health care directives, oral advance

1 directives, and statutory surrogates. The reference to the patient’s capacity has been added for  
2 consistency with the statutory scheme. See Section 4672 (presumption of capacity) & Comment.

3 See also Sections 4605 (“advance health care directive” defined), 4609 (“capacity” defined),  
4 4615 (“health care” defined), 4617 (“health-care decision” defined), 4624 (“patient” defined),  
5 4639 (“surrogate” defined).

6 ☞ **Staff Note.** It is not clear whether the existing section assumes that an incapacitated patient’s  
7 objections should be ignored or whether it is intended to adopt the rule in the Natural Death Act  
8 that an objection is valid regardless of capacity. See the Staff Note following draft Section 4695.  
9 For consistency with the approach taken elsewhere, the staff proposes to make clear that capacity  
10 is required for an effective objection.

## 11 § 4658. Use of copies

---

12 4658. A copy of a written advance health care directive, revocation of an  
13 advance health care directive, or designation or disqualification of a surrogate has  
14 the same effect as the original.

15 **Comment.** Section 4658 provides a special rule permitting the use of copies under this  
16 division. It is the same as Section 12 of the Uniform Health-Care Decisions Act (1993). The rule  
17 under this section for powers of attorney for health care differs from the rule under the Power of  
18 Attorney Law. See Section 4307 (certified copy of power of attorney).

19 See also Sections 4605 (“advance health care directive” defined), 4639 (“surrogate” defined).

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

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

27 ☞ **Staff Note.** The State Bar Estate Planning, Trust and Probate Law Section Executive  
28 Committee suggests that “copies should be as good as originals with respect to *all* health care  
29 related documents unless the principal provides otherwise in the document or the supervising  
30 health care provider has actual notice of circumstances that would render a copy unreliable.” See  
31 Memorandum 97-41, Exhibit p. 16. Harley Spitler says this section is OK. (Letter of Oct. 10,  
32 1997, p. 3.)

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

34 4307. (a) A copy of a power of attorney certified under this section has the same force and  
35 effect as the original power of attorney.

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

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

38 (2) A notary public in this state.

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

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

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

47 With the separation of health care decisionmaking from the PAL, Section 4307 will no longer  
48 apply to powers of attorney for health care. This will leave in doubt whether an official can

1 certify health care powers, not to mention written advance directives other than powers of  
2 attorney, and notaries will not have any authority to certify copies under the health care division.

3 **§ 4659. Relation to general agency law**

---

4 4659. Where this division does not provide a rule, the general law of agency may  
5 be applied.

6 **Comment.** Section 4659 is analogous to Section 4051 in the Power of Attorney Law. Under  
7 this section, reference may be made to general agency law where appropriate.

8 ☞ **Staff Note.** Harley Spittler recommends using the language of Section 4051 from the PAL.  
9 (Letter of Oct. 10, 1997, p. 3.) That section reads:

10 4051. Except where this division provides a specific rule, the general law of agency,  
11 including Article 2 (commencing with Section 2019) of Chapter 2 of Title 6 of, and Title 9  
12 (commencing with Section 2295) of, Part 4 of Division 3 of the Civil Code, applies to powers  
13 of attorney.

14 We would prefer to keep the more general reference. Alternatively, we could omit this section  
15 without loss.

16 CHAPTER 3. TRANSITIONAL PROVISIONS

17 **§ 4660. Application to existing advance directives and pending proceedings**

---

18 4660. Except as otherwise provided by statute:

19 (a) On and after January 1, 1999, this division applies to all written advance  
20 health care directives, including but not limited to durable powers of attorney for  
21 health care and declarations under the Natural Death Act, regardless of whether  
22 they were executed before, on, or after January 1, 1999.

23 (b) This division applies to all proceedings concerning written advance health  
24 care directives commenced on or after January 1, 1999.

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

31 (d) Nothing in this division affects the validity of a written advance health care  
32 directive executed before January 1, 1999, that was valid under prior law.

33 **Comment.** Section 4660 serves the same purpose as Section 4054 in the Power of Attorney  
34 Law. Subdivision (a) provides the general rule that this division applies to all powers of attorney,  
35 regardless of when created.

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

39 For special transitional provisions, see Sections \_\_\_\_.

40 See also Sections 4605 (“advance health care directive” defined), 4627 (“power of attorney for  
41 health care” defined).

1 ☞ **Staff Note.** Transitional issues arising from revisions in this draft will have to be carefully  
2 considered once the draft takes shape. It is desirable to retroactively validate writings executed  
3 before the operative date that we call “individual health care instructions” in this draft statute,  
4 even though they are not statutorily recognized under existing law.

5 **§ 4661. Application to acts and transactions under power of attorney**

---

6 4661. (a) If a power of attorney for health care provides that the law of this state  
7 governs the power of attorney or otherwise indicates that the law of this state  
8 governs the power of attorney, this division governs the power of attorney and  
9 applies to an agent’s activities in this state or outside this state where any of the  
10 following conditions is satisfied:

11 (1) The principal or agent was domiciled in this state when the principal  
12 executed the power of attorney for health care.

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

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

15 (4) The principal executed the power of attorney for health care in this state.

16 (5) There is otherwise a reasonable relationship between this state and the  
17 subject matter of the power of attorney for health care.

18 (b) If subdivision (a) does not apply to the power of attorney for health care, this  
19 division governs the power of attorney and applies to the agent’s activities in this  
20 state where either of the following conditions is satisfied:

21 (1) The principal was domiciled in this state when the principal executed the  
22 power of attorney for health care.

23 (2) The principal executed the power of attorney for health care in this state.

24 (c) A power of attorney for health care described in this section remains subject  
25 to this division despite a change in domicile of the principal or the agent.

26 **Comment.** Section 4661 is drawn from Section 4054 in the Power of Attorney Law. Nothing in  
27 this section limits the jurisdiction exercisable under Code of Civil Procedure Section 410.10.

28 See also Sections 4607 (“agent” defined), 4627 (“power of attorney for health care” defined),  
29 4630 (“principal” defined).

30 ☞ **Staff Note.** In the second staff draft, this section had been proposed to cover all written  
31 advance directives. However, it really doesn’t work where there is not an agent. Without an agent,  
32 it may not be feasible to extend the reach of California law into other jurisdictions.

33 **§ 4662. Power of attorney for health care subject to former seven-year limit**

---

34 4662. (a) This section applies only to a durable power of attorney for health care  
35 executed under the law this state that satisfies one of the following requirements:

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

38 (2) The power of attorney was executed on or after January 1, 1992, and contains  
39 a warning statement, as distinguished from an affirmative provision, that refers to  
40 a seven-year limit on its duration.

41 (b) Unless a shorter period is provided in the durable power of attorney for  
42 health care, a durable power of attorney for health care described in subdivision (a)

1 expires seven years after the date of its execution unless at the end of the seven-  
2 year period the principal lacks the capacity to make health care decisions for  
3 himself or herself, in which case the durable power of attorney for health care  
4 continues in effect until [six months after] the time when the principal regains the  
5 capacity to make health care decisions for himself or herself.

6 **Comment.** Section 4662 continues former Section 4654 without substantive change, except  
7 that (1) warning statements are distinguished from provisions of the instrument in subdivision  
8 (a)(2) to clarify the section's intent, and (2) a six-month grace period has been provided in  
9 subdivision (b).

10 ☞ **Staff Note.** This is a legacy transitional provision that has decreasing relevance, but is still  
11 needed in theory. The Commission has discussed this thorny, albeit minor, issue but a final  
12 conclusion has not been reached.

13 There are several alternative approaches:

14 (1) We could override seven-year limitations arising from pre-1992 law or forms prepared  
15 under that law, subject to a two-year grace period so that anyone who really desires to retain the  
16 limitation would need to execute a new power of attorney. By 1999, when it is anticipated this  
17 statute could become operative, seven years will have expired. Thus, any power subject to  
18 subdivision (a)(1) where the principal is not incapacitated, will expire. Where the principal has  
19 capacity, only those who executed form powers that were validated by transitional provisions in  
20 prior statutes would have the limitation invalidated.

21 (2) A simpler approach would be to explicitly wipe away the seven-year limitations deriving  
22 from the statute as it existed from 1984-1991. This should presumably not resurrect powers that  
23 had expired, but it would override the limitations on old validated form powers.

24 (3) From a drafting perspective, the simplest approach would be to delete this section and not  
25 address the issue at all on the assumptions that a problem is unlikely to arise and that if it does,  
26 the parties involved will probably work something out without finding the statute.

27 Harley Spitler suggests modifying subdivision (b) to provide that the power continues in effect  
28 until six months after the principal regains capacity (see bracketed language), apparently to  
29 provide a grace period. (Letter of Oct. 10, 1997, pp. 3, 9.) This seems like a good idea and the  
30 staff would make this change if we retain this form of the provision.

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 health care instruction**

---

10       4670. An adult may give an individual health care instruction for health care.  
11 The instruction may be oral or written. The instruction may be limited to take  
12 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). “Adult” includes an emancipated minor. See Fam. Code §§ 7002  
16 (emancipation), 7050 (emancipated minor considered as adult for consent to medical, dental, or  
17 psychiatric care).

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

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

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

24       ☞ **Staff Note.** In earlier drafts, this note considered whether to refer specifically to emancipated  
25 minors, as in the Uniform Health Care Decisions Act, or rely on the Emancipation of Minors Law  
26 (Fam. Code § 7000 *et seq.*), which is our usual practice. The staff recommends omitting specific  
27 reference to emancipated minors, and making clear in the Comment that they are covered.

28       Harley Spitler suggests removing the brackets from “emancipated minors,” i.e., retaining the  
29 reference to “emancipated minor.” (Letter of Oct. 10, 1997, p. 3.)

30       **§ 4671. Power of attorney for health care**

---

31       4671. An adult may execute a power of attorney for health care, as provided in  
32 Article 2 (commencing with Section 4680). A power of attorney may authorize the  
33 agent to make health care decisions and may also include individual health care  
34 instructions. A power of attorney may grant authority to make decisions relating to  
35 the personal care of the principal, including, but not limited to, determining where  
36 the principal will live, providing meals, hiring household employees, providing  
37 transportation, handling mail, and arranging recreation and entertainment.

38       **Comment.** The first two sentences of Section 4671 are drawn from the first and third sentences  
39 of Section 2(b) of the Uniform Health-Care Decisions Act (1993). The first sentence supersedes  
40 Section 4120 (who may execute power of attorney) to the extent it applied to powers of attorney

1 for health care. “Adult” includes an emancipated minor. See Fam. Code §§ 7002 (emancipation),  
2 7050 (emancipated minor considered as adult for consent to medical, dental, or psychiatric care).

3 The third sentence, relating to personal care authority, is parallel to Section 4123(c) (personal  
4 care authority permissible in non-health care power of attorney).

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

7 **Background from Uniform Act.** Section 2(b) authorizes a power of attorney for health care to  
8 include instructions regarding the principal’s health care. This provision has been included in  
9 order to validate the practice of designating an agent and giving individual instructions in one  
10 document instead of two. The authority of an agent falls within the discretion of the principal as  
11 expressed in the instrument creating the power and may extend to any health-care decision the  
12 principal could have made while having capacity.

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

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

19  **Staff Note**

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

24 2(b) An adult or emancipated minor may execute a power of attorney for health care, which  
25 may authorize the agent to make any health care decision the principal could have made while  
26 having capacity. The power must be in writing and signed by the principal. The power  
27 remains in effect notwithstanding the principal’s later incapacity and may include individual  
28 instructions. Unless related to the principal by blood, marriage, or adoption, an agent may not  
29 be an owner, operator, or employee of [a residential long-term health care institution] at  
30 which the principal is receiving care.

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

32 (3) The personal care authority implements a staff note under draft Section 4687 in the second  
33 draft. Harley Spittler supports the approach of enabling personal care authority in both property  
34 and health care powers. (Letter of Oct. 10, 1997, p. 4.)

35 **§ 4672. Presumption of capacity**

---

36 4672. An individual is presumed to have capacity to make a health care decision,  
37 to give or revoke an advance health care directive, and to designate or disqualify a  
38 surrogate.

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

42 See also Sections 4605 (“advance health care directive” defined), 4609 (“capacity” defined),  
43 4617 (“health care decision” defined), 4639 (“surrogate” defined).

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

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

1 **§ 4673. Capacity determinations by primary physician**

---

2 4673. Unless otherwise specified in a written advance health care directive, a  
3 determination that an individual lacks or has recovered capacity, or that another  
4 condition exists that affects an individual health care instruction or the authority of  
5 an agent, shall be made by the primary physician.

6 **Comment.** Section 4673 is drawn from Section 2(d) of the Uniform Health-Care Decisions Act  
7 (1993).

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

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

20 Section 2(d) also provides that unless otherwise specified in a written advance health-care  
21 directive, the existence of other conditions which affect an individual instruction or the authority  
22 of an agent must be determined by the primary physician. For example, an individual might  
23 specify that an agent may withdraw or withhold treatment that keeps the individual alive only if  
24 the individual has an incurable and irreversible condition that will result in the individual’s death  
25 within a relatively short time. In that event, unless otherwise specified in the advance health-care  
26 directive, the determination that the individual has that condition must be made by the primary  
27 physician.

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

29  **Staff Note.** This section overstates the rule if read out of context. Obviously, where a court is  
30 called upon to determine capacity, such as in conservatorship proceedings, the Due Process in  
31 Capacity Determinations Act (Prob. Code §§ 810-813) will apply.

32 Under Health and Safety Code Section 1418.8(b) (the Epple bill), the following duties are  
33 imposed:

34 To make the determination regarding capacity, the physician shall interview the patient,  
35 review the patient’s medical records, and consult with skilled nursing or intermediate care  
36 facility staff, as appropriate, and family members and friends of the resident, if any have been  
37 identified.

38 **§ 4674. Nomination of conservator in written advance directive**

---

39 4674. (a) A written advance health care directive may include the individual’s  
40 nomination of a conservator or guardian of the person.

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

45 **Comment.** Section 4674 continues Section 4126 without substantive change, insofar as that  
46 section applied to powers of attorney for health care, and expands the scope of the rule to apply to  
47 other written advance health care directives. The phrase “for consideration by the court if  
48 protective proceedings for the principal’s person or estate are thereafter commenced” is omitted

1 as surplus. Subdivision (a) is the same in substance as Section 2(g) of the Uniform Health-Care  
2 Decisions Act (1993).

3 See also Sections 4605 (“advance health care directive” defined), 4611 (“conservator” defined).

4 ☞ **Staff Note.** Harley Spitler says subdivision (a) is “ok” and suggests deleting “in this state” in  
5 subdivision (b). (Letter of Oct. 10, 1997, p. 3.)

6 This section does not add much to the general authority in Section 1810 for nomination of a  
7 conservator. In fact, it might be read to limit the ability of a parent to nominate a guardian for his  
8 or her children under Sections 1500 and 1502.

9 **§ 4675. Witnessing required in skilled nursing facility**

---

10 4675. (a) If an individual is a patient in a skilled nursing facility when the  
11 advance health care directive is executed, the advance directive shall be  
12 acknowledged before a notary public or signed by at least two witnesses as  
13 provided in this section.

14 (b) If the advance health care directive is signed by witnesses, the following  
15 requirements shall be satisfied:

16 (1) The witnesses shall be adults.

17 (2) Each witness shall witness either the signing of the advance health care  
18 directive by the patient or the patient’s acknowledgment of the signature or the  
19 advance directive.

20 (3) None of the following persons may act as a witness:

21 (A) The agent, with regard to a power of attorney for health care.

22 (B) The patient’s health care provider or an employee of the patient’s health care  
23 provider.

24 (C) The operator or an employee of a community care facility.

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

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

27 “I declare under penalty of perjury under the laws of California that the  
28 individual who signed or acknowledged this document is personally known  
29 to me, or that the identity of the individual was proven to me by convincing  
30 evidence, that the individual signed or acknowledged this advance health care  
31 directive in my presence, that the individual appears to be of sound mind and  
32 under no duress, fraud, or undue influence, that I am not the person appointed  
33 as agent by this document, and that I am not the individual’s health care  
34 provider, an employee of the individual’s health care provider, the operator of  
35 a community care facility, an employee of an operator of a community care  
36 facility, the operator of a residential care facility for the elderly, nor an  
37 employee of an operator of a residential care facility for the elderly.”

38 (e) An advance health care directive is not effective unless a patient advocate or  
39 ombudsman, as may be designated by the Department of Aging for this purpose  
40 pursuant to any other applicable provision of law, signs the advance directive as a  
41 witness, either as one of two witnesses or in addition to notarization. The patient  
42 advocate or ombudsman shall declare that he or she is serving as a witness as

1 required by this subdivision. It is the intent of this subdivision to recognize that  
2 some patients in skilled nursing facilities are insulated from a voluntary  
3 decisionmaking role, by virtue of the custodial nature of their care, so as to require  
4 special assurance that they are capable of willfully and voluntarily executing an  
5 advance directive.

6 (f) For the purposes of the declaration of witnesses, “convincing evidence”  
7 means the absence of any information, evidence, or other circumstances that  
8 would lead a reasonable person to believe the individual executing the advance  
9 health care directive, whether by signing or acknowledging his or her signature, is  
10 not the individual he or she claims to be, and any one of the following:

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

13 (A) An identification card or driver’s license issued by the California  
14 Department of Motor Vehicles.

15 (B) A passport issued by the Department of State of the United States.

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

21 (A) A passport issued by a foreign government.

22 (B) A driver’s license issued by a state other than California or by a Canadian or  
23 Mexican public agency authorized to issue drivers’ licenses.

24 (C) An identification card issued by a state other than California.

25 (D) An identification card issued by any branch of the armed forces of the  
26 United States.

27 (g) A witness who is a patient advocate or ombudsman may rely on the  
28 representations of the administrators or staff of the skilled nursing facility, or of  
29 family members, as convincing evidence of the identity of the patient if the patient  
30 advocate or ombudsman believes that the representations provide a reasonable  
31 basis for determining the identity of the patient.

32 **Comment.** Section 4675 continues Section 4121 and 4122 without substantive change, to the  
33 extent they applied to powers of attorney for health care, and continues former Section 4701  
34 without substantive change. This section expands the witnessing and notarization rules under  
35 former law to cover all written advance directives executed in nursing homes, not just powers of  
36 attorney. Subdivisions (f) and (g) continue the substance of relevant parts of former Section 4751  
37 (convincing evidence of identity of principal) and apply to all written advance directives, not just  
38 powers of attorney for health care.

39 See also Sections 4605 (“advance health care directive” defined), 4621 (“health care provider”  
40 defined), 4624 (“patient” defined), 4633 (“residential care facility for the elderly” defined), 4635  
41 (“skilled nursing facility” defined).

42 ☞ **Staff Note.** The staff wonders whether the detailed provisions in subdivisions (f) and (g) are  
43 really needed.

1 **§ 4676. Validity of written advance directive executed in another jurisdiction**

---

2 4676. (a) A written advance health care directive or similar instrument executed  
3 in another state or jurisdiction in compliance with the laws of that state or  
4 jurisdiction or of this state, is valid and enforceable in this state to the same extent  
5 as a written advance health care directive validly executed in this state.

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

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

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

16 See also Section 4605 (“advance health care directive” defined), 4621 (“health care provider”  
17 defined), 4625 (“physician” defined). For the rule applicable under the Power of Attorney Law,  
18 see Section 4053.

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

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

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

27 2(h) An advance health care directive is valid for purposes of this [Act] if it complies with  
28 this [Act], regardless of when or where executed or communicated.

29 Should Section 4653 also validate oral instructions communicated under the law of another state?  
30 The purpose seems to be to recognize communication of an oral individual instruction even  
31 though it may have occurred outside California or where it is an interstate communication. The  
32 UHCDA language would validate an instruction given by a patient on vacation in Florida to a  
33 doctor in Florida or the patient’s doctor in California, without raising any technical issues of  
34 where the communication took place or what law might otherwise govern its effect.

35 Harley Spitler agrees that this is a “concern,” but his personal view is to validate oral  
36 instructions communicated under the law of another state. (Letter of Oct. 10, 1997, p. 3.)

37 **Article 2. Powers of Attorney for Health Care**

38 **§ 4680. Formalities for executing a power of attorney**

---

39 4680. A power of attorney for health care is legally sufficient if all of the  
40 following requirements are satisfied:

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

42 (b) The power of attorney is signed either (1) by the principal or (2) in the  
43 principal’s name by some other person in the principal’s presence and at the  
44 principal’s direction.

1 (c) The power of attorney satisfies any applicable witnessing requirements of  
2 Section 4675.

3 **Comment.** Section 4680 restates former Section 4121 without substantive change, except that  
4 the witnessing requirements are restricted to special circumstances provided in Section 4675. A  
5 power of attorney must be in writing. See Section 4627 (“power of attorney for health care”  
6 defined). This section provides the general execution formalities for a power of attorney under  
7 this division. A power of attorney that complies with this section is legally sufficient as a grant of  
8 authority to an agent. The dating requirement in subdivision (a) generalizes the rule applicable to  
9 durable powers of attorney for health care under former Civil Code Section 2432(a)(2). This rule  
10 is also consistent with the statutory forms. See Sections 4401 (statutory form power of attorney),  
11 4771 (statutory form durable power of attorney for health care).

12 In subdivision (b), the requirement that a power of attorney be signed by the principal or at the  
13 principal’s direction continues a rule implicit in former law. See former Civ. Code §§ 2400,  
14 2410(c). In addition, it generalizes the rule applicable to durable powers of attorney for health  
15 care under former Civil Code Section 2432.

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

#### 18 **§ 4681. Limitations expressed in power of attorney**

---

19 4681. (a) Except as provided in subdivision (b), the principal may limit the  
20 application of any provision of this division by an express statement in the power  
21 of attorney or by providing an inconsistent rule in the power of attorney.

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

- 25 (1) Statements required to be included in a power of attorney.
- 26 (2) Operative dates of statutory enactments or amendments.
- 27 (3) Execution formalities.
- 28 (4) Qualifications of witnesses.
- 29 (5) Qualifications of agents.
- 30 (6) Protection of third persons from liability.

31 **Comment.** Section 4681 continues Section 4101, insofar as it applied to powers of attorney for  
32 health care, without substantive change. This section makes clear that many of the statutory rules  
33 provided in this division are subject to express or implicit limitations in the power of attorney. If a  
34 statutory rule is not subject to control by the power of attorney, this is stated explicitly, either in a  
35 particular section or as to a group of sections.

36 See also Sections 4607 (“agent” defined), 4627 (“power of attorney for health care” defined),  
37 4630 (“principal” defined).

38 ☞ **Staff Note.** Harley Spitler approves subdivision (a) if “a” is substituted for “an express” in the  
39 second line. “The word ‘express’ is always a troublesome term.” (Letter of Oct. 10, 1997, p. 4.)  
40 We are sympathetic, but would prefer to keep the language of this section the same as Section  
41 4101 in the PAL.

#### 42 **§ 4682. Limitations on who may act as agent**

---

43 4682. (a) Except as provided in subdivision (b), the following persons may not  
44 make health care decisions under a power of attorney for health care:

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

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

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

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

9 (1) The employee is a relative of the principal by blood, marriage, or adoption,  
10 or the employee is employed by the same treating health care provider, community  
11 care facility, or residential care facility for the elderly that employs the principal.

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

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

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

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

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

24 (3) The lawyer representing the conservatee signs a certificate stating in  
25 substance:

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

32 **Comment.** Section 4682 continues former Section 4702 without substantive change.  
33 Subdivision (a), along with Section 4675, which precludes health care providers in general and  
34 their employees and other specified persons from acting as witnesses to powers of attorney for  
35 health care, recognizes that Section 4740 provides protections from liability for a health care  
36 provider who relies in good faith on a decision of the agent. Subdivision (a) does not preclude a  
37 person from appointing, for example, a friend who is a doctor as the agent under the person's  
38 power of attorney for health care, but if the doctor becomes the person's "treating health care  
39 provider," the doctor is precluded from acting as the agent under the power of attorney.

40 Subdivision (b) provides a special exception to subdivisions (a) and (c). This will, for example,  
41 permit a nurse to serve as agent for the nurse's spouse when the spouse is being treated at the  
42 hospital where the nurse is employed.

1 Subdivision (d) prescribes conditions that must be satisfied if a conservator is to be designated  
2 as the agent for a conservatee under the Lanterman-Petris-Short Act. This subdivision has no  
3 application where a person other than the conservator is to be designated as agent.

4 See also Sections 4613 (“community care facility” defined), 4611 (“conservator” defined),  
5 4617 (“health care decision” defined), 4621 (“health care provider” defined), 4627 (“power of  
6 attorney for health care” defined), 4633 (“residential care facility for the elderly” defined).

7 ☞ **Staff Note.** In the second draft, the staff noted that this section needed additional revision for  
8 consistency with the terminology of the UHCDA — for example, “treating” health care provider  
9 does not have a special meaning under the uniform act. Harley Spitler concurs that “treating”  
10 does not fit with the UHCDA terminology and finds subdivision (c) “very confused and  
11 ambiguous.” (Letter of Oct. 10, 1997, p. 3.) He would like to omit it if it isn’t necessary. The staff  
12 believes that rule will need to be retained. It was not in any of the Commission’s  
13 recommendations to the Legislature.

#### 14 § 4683. When agent’s authority effective

---

15 4683. Unless otherwise provided in a power of attorney for health care, the  
16 authority of an agent becomes effective only on a determination that the principal  
17 lacks capacity, and ceases to be effective on a determination that the principal has  
18 recovered capacity.

19 **Comment.** Section 4683 is drawn from Section 2(c) of the Uniform Health-Care Decisions Act  
20 (1993) and continues the substance of the last part of former Section 4720(a). See Sections 4672  
21 (presumption of capacity), 4673 (capacity determinations). As under former law, the agent is not  
22 authorized to make health care decisions if the principal has the capacity to make health care  
23 decisions. The power of attorney may, however, give the agent authority to make health care  
24 decisions for the principal even though the principal does have capacity, but the power of attorney  
25 is always subject to Section 4657 (if principal objects, agent not authorized to consent to health  
26 care or to the withholding or withdrawal of health care necessary to keep the principal alive).

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

29 **Background from Uniform Act.** Section 2(c) provides that the authority of the agent to make  
30 health-care decisions ordinarily does not become effective until the principal is determined to lack  
31 capacity and ceases to be effective should the principal recover capacity. A principal may  
32 provide, however, that the authority of the agent becomes effective immediately or upon the  
33 happening of some event other than the loss of capacity but may do so only by an express  
34 provision in the power of attorney. For example, a mother who does not want to make her own  
35 health-care decisions but prefers that her daughter make them for her may specify that the  
36 daughter as agent is to have authority to make health-care decisions immediately. The mother in  
37 that circumstance retains the right to later revoke the power of attorney as provided in Section 3  
38 [Prob. Code § 4695].

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

#### 40 § 4684. Scope of agent’s authority

---

41 4684. Subject to any limitations in the power of attorney for health care:

42 (a) An agent designated in the power of attorney may make health care decisions  
43 for the principal to the same extent the principal could make health care decisions  
44 if the principal had the capacity to do so.

45 (b) The agent may also make decisions that may be effective after the principal’s  
46 death, including the following:

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

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

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

7 **Comment.** Section 4684 continues former Section 4720(b) without substantive change.  
8 Subdivision (a) is consistent with the last part of the first sentence of Section 2(b) of the Uniform  
9 Health-Care Decisions Act (1993). Technical revisions have made to conform to the language of  
10 this division. See Section 4673 (capacity determinations by primary physician). The agent's  
11 authority is subject to Section 4652 which precludes consent to certain specified types of  
12 treatment. See also Section 4653 (impermissible acts and constructions). The principal is free to  
13 provide any limitations on types of treatment in the durable power of attorney that are desired.  
14 See also Section 4750 *et seq.* (judicial proceedings concerning powers of attorney).

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

17 See also Sections 4607 ("agent" defined), 4609 ("capacity" defined), 4615 ("health care"  
18 defined), 4617 ("health-care decision" defined), 4627 ("power of attorney for health care"  
19 defined), 4631 ("reasonably available" defined).

20 ☞ **Staff Note.** Harley Spitler notes that the UHCDA does not refer to autopsies. (Letter of Oct.  
21 10, 1997, p. 4.) He would delete any treatment of post-death decisions. "The Act you are drafting  
22 should not be encumbered with this problem which has nothing, at all, to do with health or  
23 healthcare." But the staff thinks that the authorities listed in subdivision (b) provide useful  
24 clarification. The language has been modified in this draft, from what appeared in earlier drafts  
25 and in existing law, so that the post-death authorities are not labeled as "health care."

#### 26 **§ 4685. Standard governing agent's health care decisions**

---

27 4685. An agent shall make a health care decision in accordance with the  
28 principal's individual health care instructions, if any, and other wishes to the  
29 extent known to the agent. Otherwise, the agent shall make the decision in  
30 accordance with the agent's determination of the principal's best interest. In  
31 determining the principal's best interest, the agent shall consider the principal's  
32 personal values to the extent known to the agent.

33 **Comment.** Section 4685 continues the substance of former Section 4720(c) and is the same as  
34 Section 2(e) of the Uniform Health-Care Decisions Act (1993). Although the new wording of this  
35 fundamental rule is different, this section continues the principle of former law that, in exercising  
36 his or her authority, the agent has the duty to act consistent with the principal's desires if known  
37 or, if the principal's desires are unknown, to act in the best interest of the principal. The agent's  
38 authority is subject to Section 4652 which precludes consent to certain specified types of  
39 treatment. See also Section 4653 (mercy killing, assisted suicide, euthanasia not approved)). The  
40 principal is free to provide any limitations on types of treatment in the durable power of attorney  
41 that are desired. See also Section 4750 *et seq.* (judicial proceedings concerning powers of  
42 attorney).

43 See also Sections 4607 ("agent" defined), 4623 ("individual health care instruction" defined),  
44 4630 ("principal" defined).

45 **Background from Uniform Act.** Section 2(e) requires the agent to follow the principal's  
46 individual instructions and other expressed wishes to the extent known to the agent. To the extent  
47 such instructions or other wishes are unknown, the agent must act in the principal's best interest.  
48 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 ☞ **Staff Note.** Harley Spitler “strongly prefers” UHCDA Section 2(e). (Letter of Oct. 10, 1997,  
6 p. 4.)

### 7 **§ 4686. Agent’s priority**

---

8 4686. Unless the power of attorney for health care provides otherwise, the agent  
9 designated in the power of attorney who is known to the health care provider to be  
10 reasonably available and willing to make health care decisions has priority over  
11 any other person in making health care decisions for the principal.

12 **Comment.** Section 4686 continues the first part of former Section 4720(a) without substantive  
13 change. This section gives the agent priority over others, including a conservator or statutory  
14 surrogate, to make health care decisions if the agent is known to the health care provider to be  
15 available and willing to act. The power of attorney may vary this priority, as recognized in the  
16 introductory clause, and the rule of this section is subject to a contrary court order. See Section  
17 4766. In part, this section serves the same purpose as Section 6(b) of the Uniform Health-Care  
18 Decisions Act (1993).

19 See also Sections 4607 (“agent” defined), 4617 (“health care decision” defined), 4621 (“health  
20 care provider” defined), 4627 (“power of attorney for health care” defined), 4630 (“principal”  
21 defined), 4631 (“reasonably available” defined).

### 22 **§ 4687. Duration**

---

23 4687. Unless the power of attorney for health care provides a time of  
24 termination, the authority of the agent is exercisable notwithstanding any lapse of  
25 time since execution of the power of attorney.

26 **Comment.** Section 4687 continues Section 4127, insofar as it applied to powers of attorney for  
27 health care, without substantive change. This rule is the same in substance as the second sentence  
28 of the official text of Section 2 of the Uniform Durable Power of Attorney Act (1987), Uniform  
29 Probate Code Section 5-502 (1991). See Section 2(b) (construction of provisions drawn from  
30 uniform acts).

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

### 32 **§ 4688. Other authority of person named as agent not affected**

---

33 4688. Nothing in this division affects any right the person designated as an agent  
34 under a power of attorney for health care may have, apart from the power of  
35 attorney, to make or participate in making health care decisions for the principal.

36 **Comment.** Section 4688 continues former Section 4720(d) without substantive change. An  
37 agent may, without liability, decline to act under the power of attorney. For example, the agent  
38 may not be willing to follow the desires of the principal as stated in the power of attorney because  
39 of changed circumstances. This section makes clear that, in such a case, the person may make or  
40 participate in making health care decisions for the principal without being bound by the stated  
41 desires of the principal to the extent that the person designated as the agent has the right under the  
42 applicable law apart from the power of attorney.

43 See also Sections 4607 (“agent” defined), 4617 (“health care decision” defined), 4627 (“power  
44 of attorney for health care” defined), 4630 (“principal” defined).

1 Article 3. Modification and Revocation of Advance Directives

2 **§ 4695. Revocation of power of attorney for health care**

---

3 4695. (a) At any time while the principal has capacity, the principal may do any  
4 of the following:

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

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

9 (b) If the principal notifies the supervising health care provider orally or in  
10 writing that the authority granted to the agent to make health care decisions is  
11 revoked, the supervising health care provider shall make the notification a part of  
12 the principal's medical record and shall make a reasonable effort to notify the  
13 agent of the revocation.

14 **Comment.** Section 4695 continues former Section 4727(a)-(b) without substantive change, but  
15 terminology has been adjusted for consistency with this division. "Agent" replaces "attorney-in-  
16 fact" and "supervising health care provider" replaces "health care provider." The principal may  
17 revoke the designation or authority only if, at the time of revocation, the principal has sufficient  
18 capacity to make a power of attorney for health care. The burden of proof is on the person who  
19 seeks to establish that the principal did not have capacity to revoke the designation or authority.  
20 See Section 4672 (presumption of capacity).

21 Although the authorization to act as attorney-in-fact to make health care decisions is revoked if  
22 the principal notifies the agent orally or in writing that the appointment of the agent is revoked, a  
23 health care provider is protected if the health care provider without knowledge of the revocation  
24 acts in good faith on a health care decision of the agent. See Section 4740 (immunities of health  
25 care provider).

26 Subdivision (b) is intended to preserve a record of a written or oral revocation. It also provides  
27 a means by which notice of an oral or written revocation to a health care provider may come to  
28 the attention of a successor health care provider and imposes a duty to make a reasonable effort to  
29 notify the agent of the revocation.

30 See Section 4672 (presumption of capacity). See also Sections 4607 ("agent" defined), 4609  
31 ("capacity" defined), 4617 ("health care decision" defined), 4627 ("power of attorney for health  
32 care" defined), 4630 ("principal" defined), 4637 ("supervising health care provider" defined).

33  **Staff Note**

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

35 3(a). An individual may revoke the designation of an agent only by a signed writing or by  
36 personally informing the supervising health-care provider.

37 The Uniform Act provision is not as concrete as the existing California rule. When is a "signed  
38 writing" effective to revoke the agent's designation? When it is signed? What if it is not  
39 communicated?

40 On the other hand, the California rule might be criticized as overly technical since it provides  
41 separate rules for revocation of the agency, which requires communication to the agent, as  
42 distinguished from revocation of the agent's authority, which is communicated to the supervising  
43 health care provider. The former is seen as a more drastic action, although in practice, there may  
44 not be much difference between the two actions in the health care area.

45 Harley Spitler writes "I very strongly prefer the simplicity and clarity of" the UHCDA  
46 provision. (Letter of Oct. 10, 1997, p. 4.)

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

3 7188. (a) A declarant may revoke a declaration at any time and in any manner, without  
4 regard to the declarant's mental or physical condition. A revocation is effective upon its  
5 communication to the attending physician or other health care provider by the declarant or a  
6 witness to the revocation.

7 (b) The attending physician or other health care provider shall make the revocation a part of  
8 the declarant's medical record.

9 Marc Hankin believes that "it is illogical to prohibit a health care provider from taking an action,  
10 pursuant to an advance directive, to which a patient objects, because in that situation the agent is  
11 making the decision precisely *because* the principal lacks capacity to make the decision himself."  
12 See Memorandum 97-41, Exhibit p. 16. The staff is not recommending that this aspect of the  
13 NDA be included in the new statute.

#### 14 **§ 4696. Effect of dissolution or annulment**

---

15 4696. (a) If after executing a power of attorney for health care the principal's  
16 marriage to the agent is dissolved or annulled, the principal's designation of the  
17 former spouse as an agent to make health care decisions for the principal is  
18 revoked.

19 (b) If the agent's authority is revoked solely by subdivision (a), it is revived by  
20 the principal's remarriage to the agent.

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

25 This section is subject to limitation by the power of attorney. See Section 4681 (priority of  
26 provisions of power of attorney). See also Sections 4607 ("agent" defined), 4617 ("health care  
27 decision" defined), 4627 ("power of attorney for health care" defined), 4630 ("principal"  
28 defined).

29 ☞ **Staff Note.** The uniform act also provides an exception for a contrary order in the order of  
30 dissolution or annulment. Harley Spittler proposes language closer to the UHCDA: "Unless  
31 otherwise specified in a power of attorney for health care, a decree of annulment, divorce,  
32 termination of marriage, or legal separation revokes a previous designation of the spouse as  
33 agent." (Letter of Oct. 10, 1997, pp. 4, 9.)

#### 34 **§ 4697. Effect of later advance directive on earlier advance directive**

---

35 4697. (a) Except as otherwise provided in the power of attorney, a valid power  
36 of attorney for health care revokes any prior power of attorney for health care.

37 (b) An individual health care instruction that conflicts with an earlier individual  
38 instruction revokes the earlier individual instruction to the extent of the conflict.

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

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

44 See also Section 4605 ("advance health care directive" defined), 4623 ("individual health care  
45 instruction" defined).

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

1       3(e) An advance health care directive that conflicts with an earlier advance health care  
2 directive revokes the earlier directive to the extent of the conflict.

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

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

11 The existing power of attorney for health care rule in Section 4737 provides a simple, if  
12 draconian, rule. There is only one valid durable power of attorney for health care, and that is the  
13 last one validly executed. Subdivision (a) in the draft section preserves this rule, for now.  
14 However, it does not seem appropriate to apply this rule to individual instructions, and so  
15 subdivision (b) adopts the uniform act rule requiring construction of the instruments. It would not  
16 be appropriate to apply the rule in subdivision (a) to all advance directives, because this could  
17 result in individual instructions invalidating powers of attorney. Existing law presumes the  
18 supremacy of the durable power of attorney for health care. For example, Health and Safety Code  
19 Section 7193 in the NDA provides that a health care power prevails over an NDA declaration  
20 unless the power of attorney provides otherwise.

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

25       Consideration of these problems and other permutations, suggest that it would be best to adopt  
26 the uniform act rule in place of the existing California rule. Harley Spitler writes that this section  
27 is “Ok but I prefer the simplicity” of the UHCDA rule. (Letter of Oct. 10, 1997, p. 4.)

## 28                   CHAPTER 2. ADVANCE HEALTH CARE DIRECTIVE FORMS

### 29       **§ 4700. Authorization for statutory form of advance directive**

---

30       4700. The form provided in Section 4701 may, but need not, be used to create an  
31 advance health care directive. The other sections of this division govern the effect  
32 of the form or any other writing used to create an advance health care directive. An  
33 individual may complete or modify all or any part of the form in Section 4701.

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

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

1 **§ 4701. Optional form of advance directive**

---

2 4701. The statutory advance health care directive form is as follows:

3 **ADVANCE HEALTH CARE DIRECTIVE**  
4 (California Probate Code Section 4701)

5 **Explanation**

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

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

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

- 25 (a) consent or refuse consent to any care, treatment, service, or procedure to  
26 maintain, diagnose, or otherwise affect a physical or mental condition;  
27 (b) select or discharge health care providers and institutions;  
28 (c) approve or disapprove diagnostic tests, surgical procedures, programs of  
29 medication, and orders not to resuscitate; and  
30 (d) direct the provision, withholding, or withdrawal of artificial nutrition  
31 and hydration and all other forms of health care.

32 Part 2 of this form lets you give specific instructions about any aspect of your  
33 health care. Choices are provided for you to express your wishes regarding the  
34 provision, withholding, or withdrawal of treatment to keep you alive, including the  
35 provision of artificial nutrition and hydration, as well as the provision of pain

1 relief. Space is also provided for you to add to the choices you have made or for  
2 you to write out any additional wishes.

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

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

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

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

16 \* \* \* \* \*

17 PART 1

18 POWER OF ATTORNEY FOR HEALTH CARE

19 (1) DESIGNATION OF AGENT: I designate the following individual as my agent to  
20 make health care decisions for me:  
21

---

22 (name of individual you choose as agent)  
23

---

24 (address) (city) (state) (zip code)  
25

---

26 (home phone) (work phone)

27 OPTIONAL: If I revoke my agent's authority or if my agent is not willing, able, or  
28 reasonably available to make a health care decision for me, I designate as my first  
29 alternate agent:

1

2

---

(name of individual you choose as first alternate agent)

3

4

---

(address)

(city)

(state)

(zip code)

5

6

---

(home phone)

(work phone)

7

OPTIONAL: If I revoke the authority of my agent and first alternate agent or if neither is willing, able, or reasonably available to make a health care decision for me, I designate as my second alternate agent:

8

9

10

11

---

(name of individual you choose as second alternate agent)

12

13

---

(address)

(city)

(state)

(zip code)

14

15

---

(home phone)

(work phone)

16

(2) AGENT'S AUTHORITY: My agent is authorized to make all health care decisions for me, including decisions to provide, withhold, or withdraw artificial nutrition and hydration and all other forms of health care to keep me alive, except as I state here:

17

18

19

20

21

22

---

(Add additional sheets if needed.)

23

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

24

25

26

27

(4) AGENT'S OBLIGATION: My agent shall make health care decisions for me in accordance with this power of attorney for health care, any instructions I give in Part 2 of this form, and my other wishes to the extent known to my agent. To the extent my wishes are unknown, my agent shall make health care decisions for me in accordance with what my agent determines to be in my best interest. In determining my best interest, my agent shall consider my personal values to the extent known to my agent.

28

29

30

31

32

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

5 PART 2

6 INSTRUCTIONS FOR HEALTH CARE

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

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

13  (a) Choice Not To Prolong Life

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

19  (b) Choice To Prolong Life

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

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

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

---

31

---

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

28  

---

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

31 **§ 4702. Requirements for printed form of power of attorney for health care [OMIT?]**

32 4702. (a) A printed form of a power of attorney for health care that is sold or  
33 otherwise distributed in this state for use by a person who does not have the advice  
34 of legal counsel shall provide no other authority than the authority to make health  
35 care decisions on behalf of the principal and shall contain, in not less than 10-point  
36 boldface type or a reasonable equivalent thereof, the following statement:

37 **NOTICE TO PERSON EXECUTING THIS DOCUMENT**

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

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

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

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

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

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

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

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

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

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

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

32 **Comment.** Section 4702 continues former Section 4703(a) and (c). Subdivision (b) makes clear  
33 that the statutory form is independent of the requirements of this section.

34 Section 4702 sets out a warning statement that is required to be in certain printed forms if the  
35 power of attorney is designed to authorize health care decisions. The warning statement in  
36 subdivision (a) is comparable to the warning in Section 4701 (statutory form power of attorney  
37 for health care). See Section 4701 Comment.

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

1 ☞ **Staff Note.** This is a troublesome section. We would like do omit it. The Uniform Health Care  
2 Decisions Act does not contain such a provision. However, it was a major issue when the first  
3 durable power of attorney for health care statute was passed and was also given quite a bit of  
4 attention when the PAL was enacted in 1994, at which time the language was substantially  
5 rewritten. In light of the user-friendly and encouraging orientation of the UHCDA form set out in  
6 Section 4701, this type of adversarial WARNING seems out of step. On the other hand, shouldn't  
7 there be some type of information required to be given in printed forms?

8 If retained, this section will need to be revised for consistency with the new form language in  
9 Section 4701.

10 The State Bar Estate Planning, Trust and Probate Law Section Executive Committee appears to  
11 favor simplification of warnings in this statute. See Memorandum 97-41, Exhibit p. 15. It is not  
12 known whether the Executive Committee would abandon this form statement completely.

13 **§ 4703. Notice in power of attorney for health care not on printed form [OMIT]**

---

14 4703. (a) A durable power of attorney prepared for execution by a resident of  
15 this state that permits an agent to make health care decisions and that is not a  
16 printed form shall include one of the following:

17 (1) The substance of the statements provided in subdivision (a) of Section  
18 4702 in not less than 10-point boldface type or a reasonable equivalent thereof.

19 (2) A certificate signed by the principal's lawyer stating:

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

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

31 **Comment.** Section 4703 continues former Section 4704 without substantive change.

32 ☞ **Staff Note.** Should this section be retained? The staff would omit it. In effect, it seems to  
33 reaffirm that lawyers should inform their clients of the nature of documents they are executing.  
34 The State Bar Estate Planning, Trust and Probate Law Section Executive Committee is "not at all  
35 wedded to the existing statutory form warnings." See Memorandum 97-41, Exhibit p. 15. Harley  
36 Spitler would omit it. (Letter of Oct. 10, 1997, p. 4.)

37 **§ 4704. Language conferring general authority [OMIT]**

---

38 4704. In a statutory form power of attorney for health care, the language  
39 conferring general authority with respect to "health care decisions" authorizes the  
40 attorney-in-fact to select and discharge physicians, dentists, nurses, therapists, and  
41 other health care professionals as the attorney-in-fact determines necessary to  
42 carry out the health care decisions the attorney-in-fact is authorized by the power  
43 of attorney to make.

1 **Comment.** Section 4704 continues former Section 4776 without substantive change.

2 ☞ **Staff Note.** The staff would omit this section. It is not really necessary in light of other  
3 provisions governing the scope of authority of agents. See, Section 4684.

4 **§ 4705. Termination of authority; alternate agent [OMIT]**

---

5 4705. If the authority of the agent under the statutory form power of attorney for  
6 health care is terminated by the court under Part 3 (commencing with Section  
7 4750), an alternate agent designated in the power of attorney is not authorized to  
8 act as the agent unless the court so orders. In the order terminating the authority of  
9 the agent to make health care decisions for the principal, the court shall authorize  
10 the alternate agent, if any, designated in the power of attorney to act as the agent to  
11 make health care decisions for the principal under the power of attorney unless the  
12 court finds that authorizing that alternate agent to make health care decisions for  
13 the principal would not be in the best interest of the principal.

14 **Comment.** Section 4705 continues former Section 4778 without substantive change. This  
15 section applies only where the authority of the attorney-in-fact in fact is terminated by the court.  
16 This section does not apply where the attorney-in-fact dies or otherwise is not available or  
17 becomes ineligible to act as attorney-in-fact or loses the mental capacity to make health care  
18 decisions for the principal or where the principal revokes the attorney-in-fact's appointment or  
19 authority. Where the court terminates the authority of the attorney-in-fact, Section 4778 applies  
20 and the alternate attorney-in-fact is not authorized to act as attorney-in-fact unless the court so  
21 orders. However, in this case, the court is required to authorize the alternate attorney-in-fact to act  
22 unless the court finds that would not be in the best interests of the principal.

23 ☞ **Staff Note.** The staff would omit this section. It seems unlikely to be useful and is overly  
24 detailed. It assumes the need for a protection for which there is no clear need. The parties and the  
25 court, should the situation ever arise, are fully capable of arriving at an appropriate disposition of  
26 the matter without this rule. This is another section that may have been thought important when  
27 durable powers of attorney for health care were a new concept, but do not seem to serve a useful  
28 function now.

29 **CHAPTER 3. HEALTH CARE SURROGATES**

30 **§ 4710. Authority of surrogate to make health care decisions**

---

31 4710. A surrogate may make a health care decision for a patient who is an adult  
32 if all of the following conditions are satisfied:

33 (a) The patient has been determined by the primary physician to lack capacity.

34 (b) No agent has been designated under a power of attorney for health care and  
35 no conservator of the person has been appointed with authority to make health care  
36 decisions, or the agent or conservator is not reasonably available.

37 **Comment.** Section 4710 is drawn from Section 5(a) of the Uniform Health-Care Decisions Act  
38 (1993). "Adult" includes an emancipated minor. See Fam. Code §§ 7002 (emancipation), 7050  
39 (emancipated minor considered as adult for consent to medical, dental, or psychiatric care).

40 See also Sections 4609 ("capacity" defined), 4611 ("conservator" defined), 4615 ("health care"  
41 defined), 4617 ("health care decision" defined), 4624 ("patient" defined), 4627 ("power of  
42 attorney for health care" defined), 4629 ("primary physician" defined), 4631 ("reasonably  
43 available" defined), 4639 ("surrogate" defined).

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

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

#### 8       **§ 4711. Patient’s designation of surrogate**

---

9       4711. An adult may designate any individual to act as surrogate to make health  
10 care decisions by personally informing the supervising health care provider. An  
11 oral designation of a surrogate is effective only during the course of treatment or  
12 illness or during a hospital stay during which the designation is made.

13       **Comment.** The first sentence of Section 4711 is drawn from Section 5(b) of the Uniform  
14 Health-Care Decisions Act (1993). An “adult” who may designate a surrogate health care  
15 decisionmaker, includes an emancipated minor. See Fam. Code §§ 7002 (emancipation), 7050  
16 (emancipated minor considered as adult for consent to medical, dental, or psychiatric care). The  
17 surrogate must also be an adult. See Section 4639 (“surrogate” defined). The second sentence is  
18 intended to guard against the possibility of giving effect to obsolete oral statements entered in the  
19 patient’s record.

20       See also Sections 4617 (“health care decision” defined), 4624 (“patient” defined), 4631  
21 (“reasonably available” defined), 4637 (“supervising health care provider” defined), 4639  
22 (“surrogate” defined).

23       **Background from Uniform Act.** While a designation of an agent in a written power of  
24 attorney for health care is preferred, situations may arise where an individual will not be in a  
25 position to execute a power of attorney for health care. In that event, subsection (b) affirms the  
26 principle of patient autonomy by allowing an individual to designate a surrogate by personally  
27 informing the supervising health-care provider. The supervising health-care provider would then,  
28 in accordance with Section 7(b), be obligated to promptly record the designation in the  
29 individual’s health-care record. An oral designation of a surrogate made by a patient directly to  
30 the supervising health-care provider revokes a previous designation of an agent. See Section 3(a).  
31 [See Prob. Code § 4695.]

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

#### 33       ☞ **Staff Note**

34       (1) The second sentence is added to implement a Commission decision. See discussion in  
35 Memorandum 97-63, pp. 25-26. Although in clinical practice, this rule may not present any  
36 practical problems, there may be cases where we would want the patient’s oral statements from  
37 an earlier time to be given effect rather than substituting the physician’s judgment under Section  
38 4712.

39       (2) Should “individual” in the first clause be “adult” for consistency with other provisions, such  
40 as Section 4712(a)(2)?

#### 41       **§ 4712. Determination of statutory surrogate**

---

42       4712. (a) In the absence of a surrogate designation under Section 4711, or if the  
43 designated surrogate is not reasonably available, the primary physician shall make  
44 a reasonable inquiry as to the availability of a surrogate from among the following  
45 persons:

46       (1) The patient’s spouse, unless legally separated.

1 (2) An individual in a long-term relationship of indefinite duration with the  
2 patient in which the individual has demonstrated an actual commitment to the  
3 patient similar to the commitment of a spouse and in which the individual and the  
4 patient consider themselves to be responsible for each other's well-being.

5 (3) The patient's adult children.

6 (4) The patient's parents.

7 (5) The patient's adult brothers and sisters.

8 (6) The patient's adult grandchildren.

9 (7) The patient's close friends and companions.

10 (b) After inquiring about the existence and availability of an agent or conservator  
11 and determining that these persons either do not exist or are not reasonably  
12 available, the primary physician shall select a surrogate, with the assistance of  
13 other health care providers as desired, in the order of priority set forth in  
14 subdivision (a), subject to the following conditions:

15 (1) Where there are multiple possible surrogates at the same priority level, the  
16 primary physician, after reasonable inquiry, shall choose as surrogate the person  
17 who reasonably appears to be best qualified.

18 (2) The primary physician may select as surrogate an individual who is ranked  
19 lower in priority if, in the primary physician's judgment, the individual is best  
20 qualified, as provided in this section, to serve as the patient's surrogate. The  
21 primary physician shall document in the incapacitated person's medical records his  
22 or her reasons for selecting a surrogate in exception to the priority order provided  
23 in subsection (a) of this section.

24 (c) The following factors shall be considered in determining the individual best  
25 qualified to serve as the surrogate under this section:

26 (1) Whether the proposed surrogate reasonably appears to be better able to make  
27 decisions either in accordance with the known wishes of the patient or in  
28 accordance with the patient best interest.

29 (2) The proposed surrogate's regular contact with the person before and during  
30 the patient's illness.

31 (3) The proposed surrogate's demonstrated care and concern for the patient.

32 (4) The proposed surrogate's familiarity with the patient's personal values.

33 (5) The proposed surrogate's availability to visit the patient.

34 (6) The proposed surrogate's availability to engage in face-to-face contact with  
35 health care providers for the purpose of fully participating in the health care  
36 decisionmaking process.

37 **Comment.** Section 4712 is a new provision, drawn from West Virginia law and the Uniform  
38 Health-Care Decisions Act (1993). See W.Va. Code § 16-30B-7 (1997); Unif. Health-Care  
39 Decisions Act § 5(b)-(c) (1993). Subdivision (a)(2) is drawn from New Mexico law. See N.M.  
40 Stat. Ann. § 24-7A-5 (Michie 19\_\_). "Adult" includes an emancipated minor. See Fam. Code §§  
41 7002 (emancipation), 7050 (emancipated minor considered as adult for consent to medical,  
42 dental, or psychiatric care).

1 See also Sections 4617 (“health care decision” defined), 4624 (“patient” defined), 4631  
2 (“reasonably available” defined), 4637 (“supervising health care provider” defined), 4639  
3 (“surrogate” defined).

4 **Background from Uniform Act.** ... If an individual does not designate a surrogate or if the  
5 designee is not reasonably available, [subdivision (a)] applies a default rule for selecting a family  
6 member [or other person] to act as surrogate. Like all default rules, it is not tailored to every  
7 situation, but incorporates the presumed desires of a majority of those who find themselves so  
8 situated. The relationships specified in [subdivision (a)] include those of the half-blood and by  
9 adoption, in addition to those of the whole blood.

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

11  **Staff Note**

12 (1) The West Virginia statute provides a category that we have not included:

13 Any other person or entity, including, but not limited to, public agencies, public guardians,  
14 public officials, public and private corporations and other persons or entities which the  
15 department of health and human resources may from time to time designate in rules  
16 promulgated pursuant [authority].

17 W. Va. Code § 16-30B-7(a)(7) (Westlaw 1997).

18 (2) Consistent with the West Virginia statute, this section adopts a reasonable inquiry standard,  
19 not a good faith standard. This is an important issue and we expect that CMA and others may  
20 argue for one or the other standard (or some third standard). The important protection may be  
21 placed in the rules governing liabilities and immunities. Those provisions generally adopt a good  
22 faith standard. See Section 4740.

23 **§ 4713. Surrogate’s assumption of authority**

---

24 4713. (a) A prospective surrogate may seek to assume authority by notifying the  
25 supervising health care provider and shall communicate the assumption of  
26 authority as promptly as practicable to the members of the patient’s family  
27 specified in Section 4712 who can be readily contacted.

28 (b) A supervising health care provider may require an individual claiming the  
29 right to act as surrogate for a patient to provide a written declaration under penalty  
30 of perjury stating facts and circumstances reasonably sufficient to establish the  
31 claimed authority.

32 **Comment.** Subdivision (a) of Section 4713 is drawn from Section 5(d) of the Uniform Health-  
33 Care Decisions Act (1993). A prospective surrogate may also seek judicial relief as provided in  
34 Sections 4765-4766.

35 Subdivision (b) is drawn from Section 5(j) of the Uniform Health-Care Decisions Act (1993).

36 See also Section 4624 (“patient” defined), 4637 (“supervising health care provider” defined),  
37 4639 (“surrogate” defined).

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

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

1 of an individual claiming authority to act as surrogate, and Section 9(a) protects a health-care  
2 provider or institution from liability for complying with the decision of such an individual, absent  
3 knowledge that the individual does not in fact have such authority.[Adapted from Unif. Health-  
4 Care Decisions Act § 5(d) & (j) comments (1993).]

5 ☞ **Staff Note.** The UHCDA described who may act and then adopts an assumption of authority  
6 model. Draft Section 4712 implements a system based on physician determinations. These two  
7 systems are not mutually exclusive, and there may be some value to providing a statutory means  
8 for surrogates to come forward and make themselves known. Accordingly, this section is retained  
9 for discussion purposes. However, on balance, the staff believes that in practical terms, a  
10 physician-based selection system is superior to a surrogate-assumption-of-authority system.

#### 11 **§ 4714. Standard governing surrogate’s health care decisions**

---

12 4714. A surrogate shall make a health care decision in accordance with the  
13 patient’s individual health care instructions, if any, and other wishes to the extent  
14 known to the surrogate. Otherwise, the surrogate shall make the decision in  
15 accordance with the surrogate’s determination of the patient’s best interest. In  
16 determining the patient’s best interest, the surrogate shall consider the patient’s  
17 personal values to the extent known to the surrogate.

18 **Comment.** Section 4714 is drawn from Section 5(f) of the Uniform Health-Care Decisions Act  
19 (1993). This standard is consistent with the health care decisionmaking standard applicable to  
20 agents. See Section 4685.

21 See also Sections 4617 (“health care decision” defined), 4623 (“individual health care  
22 instruction” defined), 4624 (“patient” defined), 4639 (“surrogate” defined).

23 **Background from Uniform Act.** Section 5(f) imposes on surrogates the same standard for  
24 health-care decision making as is prescribed for agents in Section 2(e) [Prob. Code § 4685]. The  
25 surrogate must follow the patient’s individual instructions and other expressed wishes to the  
26 extent known to the surrogate. To the extent such instructions or other wishes are unknown, the  
27 surrogate must act in the patient’s best interest. In determining the patient’s best interest, the  
28 surrogate is to consider the patient’s personal values to the extent known to the surrogate.

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

#### 30 **§ 4715. Disqualification of surrogate**

---

31 4715. An individual at any time may disqualify another person, including a  
32 member of the individual’s family, from acting as the individual’s surrogate by a  
33 signed writing or by personally informing the supervising health care provider of  
34 the disqualification.

35 **Comment.** Section 4715 is drawn from Section 5(h) of the Uniform Health-Care Decisions Act  
36 (1993).

37 See also Sections 4637 (“supervising health care provider” defined), 4639 (“surrogate”  
38 defined).

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

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

1 **§ 4716. Reassessment of surrogate determination**

---

2 4716. (a) If the surrogate becomes unavailable for any reason, the surrogate may  
3 be replaced by applying the provisions of this chapter.

4 (b) If a person who ranks higher in priority relative to a selected surrogate  
5 becomes reasonably available, the person with higher priority may be substituted  
6 for the identified surrogate unless the primary physician determines that the lower  
7 ranked person is best qualified to serve as the surrogate.

8 **Comment.** Section 4716 is drawn from West Virginia law. See W. Va. Code § 16-30B-7  
9 (1997).

10 See also Sections 4629 (“primary physician” defined), 4639 (“surrogate” defined).

11 **§ 4717. Limitation on who may act as surrogate**

---

12 4717. Notwithstanding any other provision of this chapter, unless related to the  
13 patient by blood, marriage, or adoption, a surrogate may not be an owner, operator,  
14 or employee of [a residential long-term health care institution] at which the patient  
15 is receiving care.

16 **Comment.** Section 4717 is drawn from Section 5(i) of the Uniform Health-Care Decisions Act  
17 (1993) and is consistent with the rule governing who may be an agent under a power of attorney  
18 for health care. See Section 4682.

19 See also Section 4624 (“patient” defined), 4639 (“surrogate” defined).

20 **Background from Uniform Act.** Section 5(i) disqualifies an owner, operator, or employee of a  
21 residential long-term health-care institution at which a patient is receiving care from acting as the  
22 patient’s surrogate unless related to the patient by blood, marriage, or adoption. This  
23 disqualification is similar to that for appointed agents. See Section 2(b) & comment [Prob. Code §  
24 4682].

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

26 **CHAPTER 4. HEALTH CARE DECISIONS FOR**  
27 **PATIENTS WITHOUT SURROGATES**

28 ☞ **Staff Note.** This chapter implements the Commission decision to provide a procedure for  
29 health care decisionmaking for the “friendless” patient, i.e., an incompetent adult for whom a  
30 surrogate cannot be found under the rules in the preceding chapter.

31 **§ 4725. Application of chapter**

---

32 4725. (a) Except as provided in subdivision (b), this chapter applies to health  
33 care decisions where (1) a health care decision needs to be made for an adult and  
34 (2) the selection of a surrogate under Chapter 3 (commencing with Section 4710)  
35 is appropriate but no surrogate can be selected after diligent and good faith efforts.

36 (b) This chapter does not apply to medical interventions relating to a resident in  
37 a skilled nursing facility or intermediate care facility governed by Section 1418.8  
38 of the Health and Safety Code.

39 **Comment.** Section 4725 is new. The procedure in this chapter does not apply to emergency  
40 health care. See Section 4651(b). In subdivision (a), “adult” includes an emancipated minor. See  
41 Fam. Code §§ 7002 (emancipation), 7050 (emancipated minor considered as adult for consent to  
42 medical, dental, or psychiatric care).

1 See also Sections 4607 (“agent” defined).

2 ☞ **Staff Note.** For now, subdivision (b) leaves the “Epple bill” procedure untouched. Ideally, the  
3 relevant parts of that procedure should be merged with this chapter. Section 1418.8 is in the part  
4 of the Health and Safety Code dealing with licensing and inspection of long-term health facilities.

5 The term “proposed health care decision” is not ideal. The Epple bill refers to a case where the  
6 physician “prescribes or orders a medical intervention that requires informed consent.”

7 **§ 4726. Referral to interdisciplinary team**

---

8 4726. (a) The primary physician may approval for a proposed a health care  
9 decision by referring the matter to an interdisciplinary team before the health care  
10 decision is implemented. The interdisciplinary team shall oversee the patient’s  
11 health care utilizing a team approach to assessment and health care planning.

12 (b) The interdisciplinary team shall include the patient’s primary physician, a  
13 registered professional nurse with responsibility for the patient, other appropriate  
14 staff in disciplines as determined by the patient’s needs, and, where practicable, a  
15 patient representative, in accordance with applicable federal and state  
16 requirements. A patient representative may include a family member or friend of  
17 the patient who is unable to take full responsibility for the patient’s health care  
18 decisions, but has agreed to serve on the interdisciplinary team, or other person  
19 authorized by state or federal law.

20 (c) The review by the interdisciplinary team shall include all of the following:

21 (1) A review of the primary physician’s assessment of the patient’s condition.

22 (2) The reason for the proposed health care decision.

23 (3) A discussion of the desires of the patient, where known. To determine the  
24 desires of the patient, the interdisciplinary team shall interview the patient, review  
25 the patient’s medical records, and consult with family members or friends, if any  
26 have been identified.

27 (4) The type of health care to be used in the patient’s care, including its probable  
28 frequency and duration.

29 (5) The probable impact on the patient’s condition, with and without the use of  
30 the proposed health care decision.

31 (6) Reasonable alternative health care decisions considered or utilized, and  
32 reasons for their discontinuance or inappropriateness.

33 (d) The interdisciplinary team shall periodically evaluate the use of the  
34 prescribed medical intervention at least quarterly or upon a significant change in  
35 the resident’s medical condition.

36 **Comment.** Section 4726 is new and is patterned after provisions of Health and Safety Code  
37 Section 1418.8(d)-(g) (medical interventions for resident of long-term care facility).

38 ☞ **Staff Note.** This section shows its source in the Epple bill relating to long-term care  
39 institutions with the built-in bureaucracies needed to construct the interdisciplinary team. This is  
40 not necessarily inappropriate.



1     **Background from Uniform Act.** Section 7(c) imposes recording and communication  
2 requirements relating to determinations that may trigger the authority of an agent, guardian or  
3 surrogate to make health-care decisions on an individual’s behalf. The determinations covered by  
4 these requirements are those specified in Sections 2(c)-(d) and 5(a) [Prob. Code §§ 4683 & 4710  
5 respectively].

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

7     **§ 4733. Obligations of health care provider or institution**

---

8     4733. Except as provided in Section 4734, a health care provider or health care  
9 institution providing care to a patient shall do the following:

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

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

16     **Comment.** Section 4733 is drawn from Section 7(d) of the Uniform Health-Care Decisions Act  
17 (1993).

18     See also Sections 4609 (“capacity” defined), 4617 (“health care decision” defined), 4621  
19 (“health care provider” defined), 4623 (“individual health care instruction” defined), 4624  
20 (“patient” defined).

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

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

30     **§ 4734. Health care provider’s or institution’s right to decline**

---

31     4734. (a) A health care provider may decline to comply with an individual health  
32 care instruction or health care decision for reasons of conscience. A health care  
33 institution may decline to comply with an individual instruction or health care  
34 decision if the instruction or decision is contrary to a policy of the institution that  
35 is expressly based on reasons of conscience and if the policy was timely  
36 communicated to the patient or to a person then authorized to make health care  
37 decisions for the patient.

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

42     **Comment.** Section 4734 is drawn from Section 7(e)-(f) of the Uniform Health-Care Decisions  
43 Act (1993).

1 See also Sections 4615 (“health care” defined), 4619 (“health care institution” defined), 4621  
2 (“health care provider” defined), 4623 (“individual health care instruction” defined), 4624  
3 (“patient” defined).

4 **Background from Uniform Act.** Not all instructions or decisions must be honored, however.  
5 Section 7(e) [Prob. Code § 4734(a)] authorizes a health-care provider to decline to comply with  
6 an individual instruction or health-care decision for reasons of conscience. Section 7(e) also  
7 allows a health-care institution to decline to comply with a health-care instruction or decision if  
8 the instruction or decision is contrary to a policy of the institution which is expressly based on  
9 reasons of conscience and if the policy was timely communicated to the patient or to an  
10 individual then authorized to make health-care decisions for the patient.

11 Section 7(f) [Prob. Code § 4734(b)] further authorizes a health-care provider or institution to  
12 decline to comply with an instruction or decision that requires the provision of care which would  
13 be medically ineffective or contrary to generally accepted health-care standards applicable to the  
14 provider or institution. “Medically ineffective health care”, as used in this section, means  
15 treatment which would not offer the patient any significant benefit.

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

### 17 **§ 4735. Obligations of declining health care provider or institution**

---

18 4735. A health care provider or health care institution that declines to comply  
19 with an individual health care instruction or health care decision shall do all of the  
20 following:

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

23 (b) Provide continuing care to the patient until a transfer can be accomplished.

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

28 **Comment.** Section 4735 is drawn from Section 7(g) of the Uniform Health-Care Decisions Act  
29 (1993).

30 See also Sections 4617 (“health care decision” defined), 4619 (“health care institution”  
31 defined), 4621 (“health care provider” defined), 4623 (“individual health care instruction”  
32 defined), 4624 (“patient” defined).

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

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

### 43 **§ 4736. Right to health care information**

---

44 4736. Unless otherwise specified in an advance health care directive, a person  
45 then authorized to make health care decisions for a patient has the same rights as

1 the patient to request, receive, examine, copy, and consent to the disclosure of  
2 medical or any other health care information.

3 **Comment.** Section 4736 is drawn from Section 8 of the Uniform Health-Care Decisions Act  
4 (1993). This section continues former Section 4721 without substantive change, but is broader in  
5 scope since it covers all persons authorized to make health care decisions a patient, not just  
6 agents. A power of attorney may limit the right of the agent, for example, by precluding  
7 examination of specified medical records or by providing that the examination of medical records  
8 is authorized only if the principal lacks the capacity to give informed consent. The right of the  
9 agent is subject to any limitations on the right of the patient to reach medical records. See Health  
10 & Safety Code §§ 1795.14 (denial of right to inspect mental health records), 1795.20 (providing  
11 summary of record rather than allowing access to entire record).

12 See also Sections 4605 (“advance health care directive” defined), 4617 (“health care decision”  
13 defined), 4624 (“patient” defined).

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

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

## 20 CHAPTER 6. IMMUNITIES AND LIABILITIES

### 21 § 4740. Immunities of health care provider and institution

---

22 4740. A health care provider or health care institution acting in good faith and in  
23 accordance with generally accepted health care standards applicable to the health  
24 care provider or institution is not subject to civil or criminal liability or to  
25 discipline for unprofessional conduct for any of the following conduct:

26 (a) Complying with a health care decision of a person apparently having  
27 authority to make a health care decision for a patient, including a decision to  
28 withhold or withdraw health care.

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

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

33 **Comment.** Section 4740 is drawn from Section 9(a) of the Uniform Health-Care Decisions Act  
34 (1993) and supersedes former Section 4750. The good faith standard of former law is continued  
35 in this section. Like former law, this section protects the health care provider who acts in good  
36 faith reliance on a health care decision made by an agent pursuant to this division. The reference  
37 to acting in accordance with generally accepted health care standards makes clear that a health  
38 care provider is not protected from liability for malpractice. The specific qualifications built into  
39 the rules provided in former Section 4750(a) are superseded by the good faith rule in this section  
40 and by the affirmative requirements of other provisions. See, e. g., Sections 4684(a) (scope of  
41 agent’s authority) (compare to second part of introductory language of former Section 4750(a)),  
42 4685 (standard governing agent’s health care decisions) (compare to former Section 4750(a)(1)-  
43 (2)). Subdivision (b) is comparable to former Section 4750(c). See also Section 4733 (obligations  
44 of health care provider or institution), 4734 (health care provider’s or institution’s right to  
45 decline), 4735 (obligations of declining health care provider or institution).

1 See also Sections 4605 (“advance health care directive” defined), 4617 (“health care decision”  
2 defined), 4619 (“health care institution” defined), 4621 (“health care provider” defined), 4624  
3 (“patient” defined).

4 **Background from Uniform Act.** Section 9 [Prob. Code §§ 4740-4741] grants broad protection  
5 from liability for actions taken in good faith. Section 9(a) permits a health-care provider or  
6 institution to comply with a health-care decision made by a person appearing to have authority to  
7 make health-care decisions for a patient; to decline to comply with a health-care decision made by  
8 a person believed to be without authority; and to assume the validity of and to comply with an  
9 advance health-care directive. Absent bad faith or actions taken that are not in accord with  
10 generally accepted health-care standards, a health-care provider or institution has no duty to  
11 investigate a claim of authority or the validity of an advance health-care directive.

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

13  **Staff Note**

14 (1) There are important differences between the existing California rule in Probate Code  
15 Section 4750 and the proposed section, but on balance the UHCDA version is simpler and easier  
16 to understand. Existing law provides as follows:

17 4750. (a) Subject to any limitations stated in the durable power of attorney for health care  
18 and to subdivision (b) and to [limitations on authority, execution requirements, forgeries], a  
19 health care provider is not subject to criminal prosecution, civil liability, or professional  
20 disciplinary action ❶ except to the same extent as would be the case if the principal, having  
21 had the capacity to give informed consent, had made the health care decision on his or her  
22 own behalf under like circumstances, if the health care provider relies on a health care  
23 decision and both of the following requirements are satisfied:

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

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

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

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

38 The special standards and exceptions provided in existing law are much more detailed and  
39 specific than the UHCDA rule. Three special rules are noted with the circled numbers above. The  
40 “except” clause at point ❶ seems to be a restatement of the general principle in Section 4684(a)  
41 that the agent can make health care decisions that the principal could make if the principal had  
42 capacity. The good faith belief requirement at point ❷ does not really appear in this form in the  
43 draft statute. Is it needed, or is it sufficient to rely on a general good faith standard as set out in  
44 the introductory language of this section? The good faith effort standard at point ❸ varies even  
45 more from the UHCDA standards. Should this rule be implemented as an affirmative duty  
46 elsewhere in the statute? Something of this general type is included in the “surrogate-less” rules  
47 in draft Section 4726.

48 (2) Harley Spitler would delete existing Section 4750(b). (Letter of Oct. 10, 1997, p. 5.) The  
49 staff agrees and this language has not be included in this draft.

1 **§ 4741. Immunities of agent and surrogate**

---

2 4741. An individual acting as agent or surrogate under this [part] is not subject  
3 to civil or criminal liability or to discipline for unprofessional conduct for health  
4 care decisions made in good faith.

5 **Comment.** Section 4741 is drawn from Section 9(b) of the Uniform Health-Care Decisions Act  
6 (1993).

7 See also Sections 4607 (“agent” defined), 4617 (“health care decision” defined), 4639  
8 (“surrogate” defined).

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

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

17 **§ 4742. Altering, forging, concealing, or withholding knowledge of revocation of written**  
18 **advance directive**

---

19 4742. Any person who, except where justified or excused by law, alters or forges  
20 a written advance health care directive of another, or willfully conceals or  
21 withholds personal knowledge of a revocation of an advance directive, with the  
22 intent to cause a withholding or withdrawal of health care necessary to keep the  
23 patient alive contrary to the desires of the patient, and thereby, because of that act,  
24 directly causes health care necessary to keep the patient alive to be withheld or  
25 withdrawn and the death of the patient thereby to be hastened, is subject to  
26 prosecution for unlawful homicide as provided in Chapter 1 (commencing with  
27 Section 187) of Title 4 of Part 1 of the Penal Code.

28 **Comment.** Section 4742 continues former Section 4726 without substantive change, and  
29 supersedes former Health and Safety Code Section 7191(d) (Natural Death Act). References to  
30 “principal” have been changed to “patient” to reflect the broader scope of this division.

31 See also Sections 4605 (“advance health care directive” defined), 4615 (“health care” defined),  
32 4624 (“patient” defined).

33 ☞ **Staff Note.** The “except” clause in the first line of this section is mystifying.

34 **§ 4743. Restriction on requiring or prohibiting advance directive**

---

35 4743. A health care provider, health care institution, disability insurer, self-  
36 insured employee welfare plan, or nonprofit hospital plan or similar insurance plan  
37 may not require or prohibit the execution or revocation of an advance health care  
38 directive as a condition for providing health care, admission to a facility, or  
39 furnishing insurance.

40 **Comment.** Section 4743 continues and generalizes former Section 4725, and contains the  
41 substance of Section 7(h) of the Uniform Health-Care Decisions Act (1993). The former  
42 provision applied only to powers of attorney for health care. This section is intended to eliminate  
43 the possibility that duress might be used by a health care provider, insurer, or other entity to cause  
44 the patient to execute or revoke an advance directive.

1 See also Sections 4605 (“advance health care directive” defined), 4615 (“health care” defined),  
2 4619 (“health care institution” defined), 4621 (“health care provider” defined).

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

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

#### 8 **§ 4744. Statutory damages**

---

9 4744. (a) A health care provider or health care institution that intentionally  
10 violates this part is subject to liability to the aggrieved individual for damages of  
11 \$[500] or actual damages resulting from the violation, whichever is greater, plus  
12 reasonable attorney’s fees.

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

20 **Comment.** Section 4744 is drawn from Section 10 of the Uniform Health-Care Decisions Act  
21 (1993).

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

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

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

#### 33 **§ 4745. Identification of agent and principal [OMIT]**

---

34 4745. 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 the  
37 agent, and any other information reasonably necessary or appropriate to identify  
38 the principal and the agent. A third person may require an agent to provide the  
39 current and permanent residence addresses of the principal before agreeing to  
40 engage in a transaction with the attorney-in-fact.

41 **Comment.** Section 4745 continues former Section 4302 without substantive change.

42 ☞ **Staff Note.** It is doubtful that this section is needed, at least in this detail, in this division.  
43 Harley Spitler agrees that the provision should be deleted. (Letter of Oct. 10, 1997, p. 5.)

1 **§ 4746. Reliance by third person on general authority [OMIT]**

2 4746. A third person may rely on, contract with, and deal with an agent with  
3 respect to the subjects and purposes encompassed or expressed in the power of  
4 attorney for health care without regard to whether the power of attorney expressly  
5 authorizes the specific act, transaction, or decision by the agent.

6 **Comment.** Section 4746 continues Section 4301 without substantive change, insofar as it  
7 applied to powers of attorney for health care. This general rule is subject to specific limitations  
8 provided elsewhere. See, e.g., Sections 4652 (limitations on agent’s authority under power of  
9 attorney for health care).

10 See also Sections 4607 (“agent” defined),

11 ☞ **Staff Note.** This section is probably not needed, particularly in this form, and overlaps with  
12 other sections delineating the duty of health care providers to implement decisions of agents and  
13 surrogates. Note that one consequence of severing health care decisions from the general PAL is  
14 that we need to decide whether to try to preserve anything of value that might be in these general  
15 rules — otherwise, they are lost in the process of separating the two bodies of law and will *not*  
16 apply. They are not incorporated.

17 Harley Spitler agrees that the provision should be deleted. (Letter of Oct. 10, 1997, p. 5.)

18 **§ 4747. Protection of third person relying in good faith on power of attorney [OMIT]**

19 4747. (a) A third person who acts in good faith reliance on a power of attorney is  
20 not liable to the principal or to any other person for so acting if all of the following  
21 requirements are satisfied:

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

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

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

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

31 **Comment.** Section 4747 continues former Section 4303 without substantive change, insofar as  
32 it applied to powers of attorney for health care. This section is intended to ensure that a power of  
33 attorney, whether durable or nondurable, will be accepted and relied on by third persons. The  
34 person presenting the power of attorney must actually be the agent designated in the power of  
35 attorney. If the person purporting to be the agent is an impostor, the immunity does not apply.

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

41 ☞ **Staff Note.** This section, like the two that precede it, is probably not needed, at least in this  
42 form, but it is retained for discussion. It does not work very well in a regime where witnessing or  
43 notarization are not required. There are more general protections for health care providers and  
44 institutions that act pursuant to advance health care directives.

45 Harley Spitler agrees that the provision should be deleted. (Letter of Oct. 10, 1997, p. 5.)



1 (b) A health care decision made by an agent for a principal is effective without  
2 judicial approval.

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

5 (d) A health care decision made pursuant to Chapter 4 (commencing with  
6 Section 4725) is effective without judicial approval.

7 **Comment.** Subdivision (a) of Section 4750 continues former Section 4900 to the extent it  
8 applied to powers of attorney for health care.

9 Subdivision (b) is drawn from Section 2(f) of the Uniform Health-Care Decisions Act (1993).

10 Subdivision (c) is drawn from Sections 2(f) and 5(g) of the Uniform Health-Care Decisions Act  
11 (1993).

12 Subdivision (d) is patterned after subdivisions (b) and (c) and is analogous to Health and Safety  
13 Code Section 1418.8(i) (medical interventions for resident of long-term care facility).

14 See also Sections 4605 (“advance health care directive” defined), 4607 (“agent” defined), 4617  
15 (“health care decision” defined), 4624 (“patient” defined), 4630 (“principal” defined), 4639  
16 (“surrogate” defined).

#### 17 **§ 4751. Cumulative remedies**

---

18 4751. The remedies provided in this part are cumulative and not exclusive of any  
19 other remedies provided by law.

20 **Comment.** Section 4751 continues former Section 4901 to the extent it applied to powers of  
21 attorney for health care.

#### 22 **§ 4752. Effect of provision in advance directive attempting to limit right to petition**

---

23 4752. Except as provided in Section 4753, this part is not subject to limitation in  
24 an advance health care directive.

25 **Comment.** Section 4752 continues former Section 4902 to the extent it applied to powers of  
26 attorney for health care.

27 See also Sections 4605 (“advance health care directive” defined), 4681 (general rule on  
28 limitations provided in power of attorney).

#### 29 **§ 4753. Limitations on right to petition**

---

30 4753. (a) Subject to subdivision (b), an advance health care directive may  
31 expressly eliminate the authority of a person listed in Section 4765 to petition the  
32 court for any one or more of the purposes enumerated in Section 4766, if both of  
33 the following requirements are satisfied:

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

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

38 “I am a lawyer authorized to practice law in the state where this advance  
39 health care directive was executed, and \_\_\_\_\_ [insert name] was my  
40 client at the time this advance directive was executed. I have advised my  
41 client concerning his or her rights in connection with this advance directive  
42 and the applicable law and the consequences of signing or not signing this

1 advance directive, and my client, after being so advised, has executed this  
2 advance directive.”

3 (b) An advance health care directive may not limit the authority of the following  
4 persons to petition under this part:

5 (1) The conservator of the person, with respect to a petition relating to an  
6 advance directive for a purpose specified in subdivision (a), (c), or (d) of Section  
7 4766.

8 (2) The agent, with respect to a petition relating to a power of attorney for health  
9 care for a purpose specified in subdivision (a) or (b) of Section 4766.

10 **Comment.** Section 4753 continues former Section 4903 to the extent it applied to powers of  
11 attorney for health care. Subdivision (a) makes clear that a power of attorney may limit the  
12 applicability of this part only if it is executed with the advice and approval of the principal’s  
13 counsel. This limitation is designed to ensure that the execution of a power of attorney that  
14 restricts the remedies of this part is accomplished knowingly by the principal. The inclusion of a  
15 provision in the power of attorney making this part inapplicable does not affect the right to resort  
16 to any judicial remedies that may otherwise be available.

17 Subdivision (b) specifies the purposes for which a conservator of the person or an agent may  
18 petition the court under this part with respect to a power of attorney for health care. The rights  
19 provided in these paragraphs cannot be limited by a provision in an advance directive, but the  
20 advance directive may restrict or eliminate the right of any other persons to petition the court  
21 under this part if the individual executing the advance directive has the advice of legal counsel  
22 and the other requirements of subdivision (a) are met. See Section 4681 (effect of provision in  
23 power of attorney attempting to limit right to petition).

24 Under subdivision (b)(1), the conservator of the person may obtain a determination of whether  
25 an advance directive is in effect or has terminated, despite a contrary provision in the advance  
26 directive. See Section 4766(a). The conservator of the person may obtain a court order requiring  
27 an agent to report the agent’s acts under a power of attorney for health care if the agent fails to  
28 submit such a report within 10 days after a written request. See Section 4766(c). The conservator  
29 of the person may obtain a court determination that a power of attorney for health care is  
30 terminated if the court finds that the agent is acting illegally or is not performing the duty to act  
31 consistently with the desires of the principal or, where the principal’s desires are unknown or  
32 unclear, is acting in a manner that is clearly contrary to the best interest of the principal. See  
33 Section 4766(d). See also Section 4766 Comment.

34 Under subdivision (b)(2), the agent may obtain a determination of whether the power of  
35 attorney for health care is in effect or has terminated, despite a contrary provision in the power of  
36 attorney. See Section 4766(a). The agent may also obtain a court order passing on the acts or  
37 proposed acts of the agent under the power of attorney. See Section 4766(b).

38 See also Sections 4607 (“agent” defined), 4605 (“advance health care directive” defined), 4611  
39 (“conservator” defined), 4627 (“power of attorney for health care” defined).

#### 40 § 4754. Jury trial

---

41 4754. There is no right to a jury trial in proceedings under this division.

42 **Comment.** Section 4754 continues former Section 4904 to the extent it applied to powers of  
43 attorney for health care. This section is consistent with the rule applicable to other fiduciaries. See  
44 Sections 1452 (guardianships and conservatorships), 4504 (powers of attorney generally), 7200  
45 (decedents’ estates), 17006 (trusts).

1 **§ 4755. Application of general procedural rules**

---

2 4755. Except as otherwise provided in this division, the general provisions in  
3 Division 3 (commencing with Section 1000) apply to proceedings under this  
4 division.

5 **Comment.** Section 4755 continues former Section 4905 to the extent it applied to powers of  
6 attorney for health care. Like Section 4505, this section provides a cross-reference to the general  
7 procedural rules that apply to this division. See, e.g., Sections 1003 (guardian ad litem), 1021  
8 (verification required), 1041 (clerk to set matters for hearing), 1046 (hearing and orders), 1203  
9 (order shortening time for notice), 1215-1216 (service), 1260 (proof of service).

10 **CHAPTER 2. JURISDICTION AND VENUE**

11 **§ 4760. Jurisdiction and authority of court or judge**

---

12 4760. (a) The superior court has jurisdiction in proceedings under this division.

13 (b) The court in proceedings under this division is a court of general jurisdiction  
14 and the court, or a judge of the court, has the same power and authority with  
15 respect to the proceedings as otherwise provided by law for a superior court, or a  
16 judge of the superior court, including, but not limited to, the matters authorized by  
17 Section 128 of the Code of Civil Procedure.

18 **Comment.** Section 4760 continues former Section 4920 to the extent it applied to powers of  
19 attorney for health care. Like Section 4520, this section is comparable to Section 7050 governing  
20 the jurisdiction and authority of the court in proceedings concerning administration of decedents'  
21 estates. See Section 7050 Comment.

22 **§ 4761. Basis of jurisdiction**

---

23 4761. The court may exercise jurisdiction in proceedings under this division on  
24 any basis permitted by Section 410.10 of the Code of Civil Procedure.

25 **Comment.** Section 4761 continues former Section 4921 to the extent it applied to powers of  
26 attorney for health care. Like Section 4521, this section is comparable to Section 17004  
27 (jurisdiction under Trust Law). This section recognizes that the court, in proceedings relating to  
28 powers of attorney under this division, may exercise jurisdiction on any basis that is not  
29 inconsistent with the California or United States Constitutions, as provided in Code of Civil  
30 Procedure Section 410.10. See generally Judicial Council Comment to Code Civ. Proc. § 410.10;  
31 Prob. Code § 17004 Comment (basis of jurisdiction under Trust Law).

32 **§ 4762. Jurisdiction over agent or surrogate**

---

33 4762. Without limiting Section 4761, a person who acts as an agent under a  
34 power of attorney for health care or as a surrogate under an advance health care  
35 directive governed by this division is subject to personal jurisdiction in this state  
36 with respect to matters relating to acts and transactions of the agent or surrogate  
37 performed in this state or affecting a patient in this state.

38 **Comment.** Section 4762 continues former Section 4922 to the extent it applied to powers of  
39 attorney for health care. Like Section 4522, this section is comparable to Sections 3902(b)  
40 (jurisdiction over custodian under Uniform Transfers to Minors Act) and 17003(a) (jurisdiction  
41 over trustee). This section is intended to facilitate exercise of the court's power under this part  
42 when the court's jurisdiction is properly invoked. As recognized by the introductory clause,

1 constitutional limitations on assertion of jurisdiction apply to the exercise of jurisdiction under  
2 this section. Consequently, appropriate notice must be given to an agent or surrogate as a  
3 condition of personal jurisdiction. *Cf.* Mullane v. Central Hanover Bank & Trust Co., 339 U.S.  
4 306 (1950).

5 See also Sections 4605 (“advance health care directive” defined), 4607 (“agent” defined), 4624  
6 (“patient” defined), 4627 (“power of attorney for health care” defined), 4630 (“principal”  
7 defined), 4639 (“surrogate” defined).

### 8 **§ 4763. Venue**

---

9 4763. The proper county for commencement of a proceeding under this division  
10 shall be determined in the following order of priority:

- 11 (a) The county in which the patient resides.
- 12 (b) The county in which the agent or surrogate resides.
- 13 (c) Any other county that is in the patient’s best interest.

14 **Comment.** Section 4733 continues former Section 4923 to the extent it applied to powers of  
15 attorney for health care.

16 See also Sections 4607 (“agent” defined), 4624 (“patient” defined), 4630 (“principal” defined),  
17 4639 (“surrogate” defined).

18 ☞ **Staff Note.** Harley Spitler suggests removing the reference to “patient.” (Letter of Oct. 10,  
19 1997, p. 6.) But that would limit the scope of the provision to powers of attorney.

## 20 CHAPTER 3. PETITIONS, ORDERS, APPEALS

### 21 **§ 4765. Petitioners**

---

22 4765. Subject to Section 4753, a petition may be filed under this part by any of  
23 the following persons:

- 24 (a) The agent or surrogate.
- 25 (b) The person who executed an advance health care directive.
- 26 (c) The spouse of the person who executed an advance health care directive.
- 27 (d) A relative of the person who executed an advance health care directive.
- 28 (e) The conservator of the person of the person who executed an advance health  
29 care directive.
- 30 (f) The court investigator, described in Section 1454, of the county where the  
31 advance health care directive was executed or where the person who executed an  
32 advance directive resides.
- 33 (g) The public guardian of the county where the advance health care directive  
34 was executed or where the person who executed an advance directive resides.
- 35 (h) A supervising health care provider, with respect to advance health care  
36 directive.
- 37 (i) A person who is requested in writing by an agent to take action.
- 38 (j) Any other interested person or friend of the individual executing an advance  
39 health care directive.

40 **Comment.** Section 4765 continues former Section 4940 to the extent it applied to powers of  
41 attorney for health care. The purposes for which a person may file a petition under this part are  
42 limited by other rules. See Sections 4752 (effect of provision in advance directive attempting to

1 limit right to petition), 4753 (limitations on right to petition), 4766 (petition with respect to  
2 advance directive); see also Section 4751 (other remedies not affected).

3 See also Sections 4605 (“advance health care directive” defined), 4607 (“agent” defined), 4611  
4 (“conservator” defined), 4635 (“supervising health care provider” defined).

5 **Original Comment.** Section 4940 continues former Civil Code Section 2411 without  
6 substantive change, and expands the class of petitioners to include relatives (subdivision (d)),  
7 third persons who are requested to honor the power of attorney (subdivision (k)), and any other  
8 interested persons or friends of the principal (subdivision (l)). These additions are drawn from the  
9 comparable rules governing petitioners for appointment of a conservator under Section 1820.

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

13 ☞ **Staff Note.** This section needs further analysis to determine the extent to which it should  
14 apply to surrogates making health care decisions and to describe the appropriate coverage with  
15 regard to decisions made pursuant to individual instructions. It should also be considered whether  
16 the list of potential petitioners is overly broad. Some commentators argue it is best to restrict the  
17 class of potential petitioners to avoid endless and expensive second-guessing.

#### 18 § 4766. Petition as to advance directive

---

19 4766. With respect to an advance health care directive, a petition may be filed  
20 under this part for any one or more of the following purposes:

21 (a) Determining whether the advance health care directive is in effect or has  
22 terminated.

23 (b) Determining whether the acts or proposed acts of an agent or surrogate are  
24 consistent with the patient’s desires as expressed in the advance health care  
25 directive or otherwise made known to the court or, where the patient’s desires are  
26 unknown or unclear, whether the acts or proposed acts of the agent or surrogate  
27 are in the patient’s best interest.

28 (c) Compelling the agent or surrogate to report to the patient, the patient’s  
29 spouse, the patient’s conservator, or to any other person required by the court in its  
30 discretion, if the agent or surrogate has failed to submit the report within 10 days  
31 after written request from the petitioner.

32 (d) Declaring that the advance health care directive is terminated, upon a  
33 determination by the court that the agent or surrogate has made a health care  
34 decision for the patient that authorized anything illegal or upon a determination by  
35 the court of both of the following:

36 (1) The agent or surrogate has violated, has failed to perform, or is unfit to  
37 perform, the duty under the advance health care directive to act consistent with the  
38 patient’s desires or, where the patient’s desires are unknown or unclear, is acting  
39 (by action or inaction) in a manner that is clearly contrary to the patient’s best  
40 interest.

41 (2) At the time of the determination by the court, the patient lacks the capacity to  
42 execute or to revoke an advance health care directive.

43 **Comment.** Section 4766 continues former Section 4942 to the extent it applied to powers of  
44 attorney for health care. Under subdivision (b), the patient’s desires as expressed in the power of

1 attorney for health care, individual health care instructions, or otherwise made known to the court  
2 provide the standard for judging the acts of the agent or surrogate.

3 Subdivision (d) permits the court to terminate an advance health care directive where the agent  
4 or surrogate is not complying with the duty to carry out the patient's desires. These subdivisions  
5 adopt a standard based on the principal's desires in place of a general standard of what may  
6 constitute the patient's best interest. An attempted suicide by the principal is not to be construed  
7 to indicate the principal's desire that health care be restricted or inhibited. See Section 4655(b).

8 Where it is not possible to use a standard based on the patient's desires because they are not  
9 stated in the advance directive or otherwise known or are unclear, subdivision (b) provides that  
10 the "patient's best interest" standard be used.

11 Subdivision (d) permits termination of the advance health care directive not only where an  
12 agent, for example, is acting illegally or failing to perform his or her duties under a power of  
13 attorney or is acting contrary to the known desires of the principal, but also where the desires of  
14 the principal are unknown or unclear and the agent is acting in a manner that is clearly contrary to  
15 the patient's best interest. The patient's desires may become unclear as a result of developments  
16 in medical treatment techniques that have occurred since the patient's desires were expressed,  
17 such developments having changed the nature or consequences of the treatment.

18 An advance health care directive may limit the authority to petition under this part. See  
19 Sections 4752 (effect of provision in power of attorney attempting to limit right to petition), 4753  
20 (limitations on right to petition).

21 See also Sections 4605 ("advance health care directive" defined), 4607 ("agent" defined), 4609  
22 ("capacity" defined), 4611 ("conservator" defined), 4627 ("power of attorney for health care"  
23 defined), 4630 ("principal" defined), 4639 ("surrogate" defined).

24 ☞ **Staff Note.** On a trial basis, this section has been expended it to cover individual instructions  
25 and decisions made by surrogates. Further review may suggest that these matters are better  
26 handled in separate sections, perhaps drawn from the UHCDA. The existing provision for  
27 approving the agent's resignation has been omitted since it does not seem relevant in this context.

## 28 § 4767. Commencement of proceeding

---

29 4767. A proceeding under this part is commenced by filing a petition stating  
30 facts showing that the petition is authorized under this part, the grounds of the  
31 petition, and, if known to the petitioner, the terms of the advance health care  
32 directive in question.

33 **Comment.** Section 4767 continues former Section 4943 to the extent it applied to powers of  
34 attorney for health care.

35 See also Section 4605 ("advance health care directive" defined).

## 36 § 4768. Dismissal of petition

---

37 4768. The court may dismiss a petition if it appears that the proceeding is not  
38 reasonably necessary for the protection of the interests of the patient and shall stay  
39 or dismiss the proceeding in whole or in part when required by Section 410.30 of  
40 the Code of Civil Procedure.

41 **Comment.** Section 4768 is similar to Section 4944 in the Power of Attorney Law. Under this  
42 section, the court has authority to stay or dismiss a proceeding in this state if, in the interest of  
43 substantial justice, the proceeding should be heard in a forum outside this state. See Code Civ.  
44 Proc. § 410.30.

45 See also Section 4624 ("patient" defined), 4630 ("principal" defined).

46 ☞ **Staff Note.** Harley Spitler would not refer to the "patient." (Letter of Oct. 10, 1997, p. 6.)

1 **§ 4769. Notice of hearing**

---

2 4769. (a) Subject to subdivision (b), at least 15 days before the time set for  
3 hearing, the petitioner shall serve notice of the time and place of the hearing,  
4 together with a copy of the petition, on the following:

- 5 (1) The agent, if not the petitioner.
- 6 (2) The patient, if not the petitioner.

7 (b) In the case of a petition to compel a third person to honor the authority of an  
8 agent or surrogate, notice of the time and place of the hearing, together with a  
9 copy of the petition, shall be served on the third person in the manner provided in  
10 Chapter 4 (commencing with Section 413.10) of Title 5 of Part 2 of the Code of  
11 Civil Procedure.

12 **Comment.** Section 4769 continues former Section 4945 to the extent it applied to powers of  
13 attorney for health care. Subdivision (b) is generalized from former Section 4945(b) applicable to  
14 property powers of attorney.

15 See also Sections 4607 (“agent” defined), 4624 (“patient” defined), 4630 (“principal” defined),  
16 4639 (“surrogate” defined).

17 ☞ **Staff Note.** Harley Spitler would not refer to the “patient.” (Letter of Oct. 10, 1997, p. 6.)

18 **§ 4770. Temporary health care order**

---

19 4770. The court in its discretion, upon a showing of good cause, may issue a  
20 temporary order prescribing the health care of the patient until the disposition of  
21 the petition filed under Section 4766. If a power of attorney for health care is in  
22 effect and a conservator (including a temporary conservator) of the person is  
23 appointed for the principal, the court that appoints the conservator in its discretion,  
24 upon a showing of good cause, may issue a temporary order prescribing the health  
25 care of the principal, the order to continue in effect for the period ordered by the  
26 court but in no case longer than the period necessary to permit the filing and  
27 determination of a petition filed under Section 4766.

28 **Comment.** Section 4770 continues former Section 4946 to the extent it applied to powers of  
29 attorney for health care. This section is intended to make clear that the court has authority to  
30 provide, for example, for the continuance of treatment necessary to keep the patient alive pending  
31 the court’s action on the petition. See also Section 1046 (court authority to make appropriate  
32 orders).

33 See also Sections 4605 (“advance health care directive” defined), 4611 (“conservator” defined),  
34 4615 (“health care” defined), 4624 (“patient” defined), 4630 (“principal” defined).

35 **§ 4771. Award of attorney’s fees**

---

36 4771. In a proceeding under this part commenced by the filing of a petition by a  
37 person other than the agent or surrogate, the court may in its discretion award  
38 reasonable attorney’s fees to one of the following:

39 (a) The agent or surrogate, if the court determines that the proceeding was  
40 commenced without any reasonable cause.

41 (b) The person commencing the proceeding, if the court determines that the  
42 agent or surrogate has clearly violated the duties under the advance health care

1 directive or has failed without any reasonable cause or justification to report to the  
2 principal or conservator of the person, as the case may be, after written request  
3 from the principal or conservator.

4 **Comment.** Section 4771 continues former Section 4947 to the extent it applied to powers of  
5 attorney for health care.

6 See also Sections 4605 (“advance health care directive” defined), 4607 (“agent” defined), 4630  
7 (“principal” defined), 4639 (“surrogate” defined).

8 **§ 4772. Appeal**

---

9 4772. An appeal may be taken from any of the following:

10 (a) Any final order made pursuant to Section 4766, except an order pursuant to  
11 subdivision (c) of Section 4766.

12 (b) An order dismissing the petition or denying a motion to dismiss under  
13 Section 4768.

14 **Comment.** Section 4772 continues former Section 4948 to the extent it applied to powers of  
15 attorney for health care.



1 1797.171, 1797.172, 1797.182, and 1797.183 of the Health and Safety Code to  
2 respond to medical emergencies in the course of performing their volunteer or  
3 employee duties with the organization.

4 **Comment.** Section 4781 continues former Section 4753(g) without substantive change.

5 ☞ **Staff Note.** The correct incorporation under subdivision (a) will need to be checked.

6 **§ 4782. Immunity for honoring request to forego resuscitative measures**

---

7 4782. A health care provider who honors a request to forego resuscitative  
8 measures is not subject to criminal prosecution, civil liability, discipline for  
9 unprofessional conduct, administrative sanction, or any other sanction, as a result  
10 of his or her reliance on the request, if the health care provider (1) believes in good  
11 faith that the action or decision is consistent with this section, and (2) has no  
12 knowledge that the action or decision would be inconsistent with a health care  
13 decision that the individual signing the request would have made on his or her own  
14 behalf under like circumstances.

15 **Comment.** Section 4782 continues former Section 4753(a) without substantive change.

16 ☞ **Staff Note.** The terminology of this section will need to be checked for consistency with the  
17 language of Part 1.

18 **§ 4783. Forms for requests to forego resuscitative measures**

---

19 4783. (a) Forms for requests to forego resuscitative measures printed after  
20 January 1, 1995, shall contain the following:

21 “By signing this form, the surrogate acknowledges that this request to forego  
22 resuscitative measures is consistent with the known desires of, and with the  
23 best interest of, the individual who is the subject of the form.”

24 (b) A substantially similar printed form is valid and enforceable if all of the  
25 following conditions are met:

26 (1) The form is signed by the individual, or the individual’s legally recognized  
27 surrogate health care decisionmaker, and a physician.

28 (2) The form directs health care providers to forego resuscitative measures.

29 (3) The form contains all other information required by this section.

30 **Comment.** Section 4783 continues former Section 4753(c)-(d) without substantive change.

31 **§ 4784. Presumption of validity**

---

32 4784. In the absence of knowledge to the contrary, a health care provider may  
33 presume that a request to forego resuscitative measures is valid and unrevoked.

34 **Comment.** Section 4784 continues former Section 4753(e) without change.

35 ☞ **Staff Note.** The terminology of this section will need to be checked for consistency with the  
36 language of Part 1.

1 **§ 4785. Application of part**

---

2 4785. This part applies regardless of whether the individual executing a request  
3 to forego resuscitative measures is within or outside a hospital or other health care  
4 facility.

5 **Comment.** Section 4785 continues former Section 4753(f) without substantive change.

6 **§ 4786. Relation to other law**

---

7 4786. This part does not repeal or narrow laws relating to health care  
8 decisionmaking, including the provisions governing the use of advance health care  
9 directives.

10 **Comment.** Section 4786 restates former Section 4753(h) without substantive change. The  
11 references to the Durable Power of Attorney for Health Care and the Natural Death Act have been  
12 replaced by the reference to advance health care directives for consistency with other provisions  
13 in this division. The reference to “current” laws had been eliminated as obsolete.

14 ☞ **Staff Note.** The terminology and cross-references in this section will need to be checked for  
15 consistency with the language of this division. We do not believe specific references to laws  
16 replaced by this division will need to be continued.

17 **PART 5. ADVANCE HEALTH CARE DIRECTIVE REGISTRY**

18 **§ 4800. Registry system established by Secretary of State**

---

19 4800. The Secretary of State shall establish a registry system by which any  
20 person who has executed a written advance health care directive may register in a  
21 central information center information regarding the advance directive, making  
22 that information available upon request to any health care provider, the public  
23 guardian, or other person authorized by the registrant. Information that may be  
24 received and released is limited to the registrant’s name, social security or driver’s  
25 license or other individual identifying number established by law, if any, address,  
26 date and place of birth, the intended place of deposit or safekeeping of the advance  
27 directive, and the name and telephone number of the agent and any alternative  
28 agent. The Secretary of State, at the request of the registrant, may transmit the  
29 information he or she receives regarding the advance health care directive to the  
30 registry system of another jurisdiction as identified by the registrant. The Secretary  
31 of State may charge a fee to each registrant in an amount such that, when all fees  
32 charged to registrants are aggregated, the aggregated fees do not exceed the actual  
33 cost of establishing and maintaining the registry.

34 **Comment.** Section 4800 continues former Section 4800 without substantive change as applied  
35 to powers of attorney for health care, and generalizes it to apply to all written advance health care  
36 directives instead of the more limited class of durable powers of attorney for health care.

37 See Section 4605 (“advance health care directive” defined), 4621 (“health care provider”  
38 defined).

39 ☞ **Staff Note.** This registry scheme is implemented through a form issued by the Secretary of  
40 State. See Memorandum 97-41, Exhibit pp. 13-14. Informal conversations suggest that very few

1 forms have been filed (around 80 was one estimate) and that there have been no inquiries directed  
2 to the registry seeking information.

3 **§ 4801. Identity and fees**

---

4 4801. The Secretary of State shall establish procedures to verify the identities of  
5 health care providers, the public guardian, and other authorized persons requesting  
6 information pursuant to Section 4800. No fee shall be charged to any health care  
7 provider, the public guardian, or other authorized person requesting information  
8 pursuant to Section 4800.

9 **Comment.** Section 4801 continues former Section 4801 without change.

10 See also Section 4621 (“health care provider” defined).

11 **§ 4802. Notice**

---

12 4802. The Secretary of State shall establish procedures to advise each registrant  
13 of the following:

14 (a) A health care provider may not honor a written advance health care directive  
15 until it receives a copy from the registrant.

16 (b) Each registrant must notify the registry upon revocation of the advance  
17 directive.

18 (c) Each registrant must reregister upon execution of a subsequent advance  
19 directive.

20 **Comment.** Section 4802 continues former Section 4802 without substantive change as applied  
21 to powers of attorney for health care, and generalizes it to apply to all written advance health care  
22 directives instead of the more limited class of durable powers of attorney for health care.

23 See Section 4605 (“advance health care directive” defined), 4621 (“health care provider”  
24 defined).

25 **§ 4803. Effect of failure to register**

---

26 4803. Failure to register with the Secretary of State does not affect the validity of  
27 any advance health care directive.

28 **Comment.** Section 4803 continues former Section 4804 without substantive change as applied  
29 to powers of attorney for health care, and generalizes it to apply to all written advance health care  
30 directives instead of the more limited class of durable powers of attorney for health care.

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

32 **§ 4804. Effect of registration on revocation and validity**

---

33 4804. Registration with the Secretary of State does not affect the ability of the  
34 registrant to revoke the registrant’s advance health care directive or a later  
35 executed advance directive, nor does registration raise any presumption of validity  
36 or superiority among any competing advance directives or revocations.

37 **Comment.** Section 4804 continues former Section 4805 without substantive change as applied  
38 to powers of attorney for health care, and generalizes it to apply to all written advance health care  
39 directives instead of the more limited class of durable powers of attorney for health care.

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

1 **§ 4805. Effect on health care provider**

---

2 4805. Nothing in this chapter shall be construed to require a health care provider  
3 to request from the registry information about whether a patient has executed an  
4 advance health care directive. Nothing in this chapter shall be construed to affect  
5 the duty of a health care provider to provide information to a patient regarding  
6 advance health care directives pursuant to any provision of federal law.

7 **Comment.** Section 4805 continues former Section 4806 without substantive change as applied  
8 to powers of attorney for health care, and generalizes it to apply to all written advance health care  
9 directives instead of the more limited class of durable powers of attorney for health care.

10 See Section 4605 (“advance health care directive” defined), 4621 (“health care provider”  
11 defined), 4624 (“patient” defined).

12 **Part 5 of Division 4.5 (repealed). Judicial proceedings concerning powers of attorney**

---

13 SEC. \_\_\_\_\_. Part 5 (commencing with Section 4900) of Division 4.5 is repealed.

14 **Comment.** With respect to powers of attorney generally, this part is replaced by a renumbered  
15 Part 5 (commencing with Section 4500) in Division 4.5. With respect to powers of attorney for  
16 health care, this part is replaced by Part 3 (commencing with Section 4750) in Division 4.7.

17

---