

Memorandum 98-16

Health Care Decisions: Staff Draft Tentative Recommendation

Attached to this memorandum is the statutory portion of the staff draft tentative recommendation on *Health Care Decisions*. The draft statute carries forward from the third staff draft considered at the November 1997 meeting. The preliminary part is still in preparation, and will be distributed attached to the First Supplement. A Second Supplement, setting out conforming revisions and comments to repealed sections, will follow shortly.

This revised statutory material is being distributed now to facilitate review by the Commission and interested persons, rather than holding it for completion of the other parts of the complete draft tentative recommendation.

Schedule

If the Commission can complete its review of the draft tentative recommendation materials at the March meeting, we anticipate that revisions could be made and a complete tentative recommendation could be approved at the following meeting in April, subject to meeting schedule changes. The tentative recommendation would then be distributed for comment over the late spring and summer months and the Commission would be able to consider comments at one or two meetings in the fall. Ideally, we could have a final recommendation prepared in plenty of time for introduction in the 1999 legislative session. There is some flexibility in this schedule. Additional meeting time may be necessary to prepare the tentative recommendation, and after the comments are in, we may need to consider comments at additional meetings in the fall.

Priority Matters for March

At the March meeting, we need to concentrate the discussion on new policy implementations and some issues in other parts of the draft raised in staff notes. The following list catalogues the staff notes and briefly describes the issues:

Capacity — §§ 4609, 4658, 4766, at pp. 2-3, 12-13, 55

We think the draft strikes the appropriate balance between the existing Power of Attorney Law and the detailed approach of the Due Process in Capacity Determinations Act. The Commission should look at the three sections together to confirm the approach. The specific mention of determinations of capacity in the judicial proceedings section (§ 4766) is new to the draft.

Unauthorized acts — § 4652, at p. 10

The extent to which advance health care directives can address placement in a mental health treatment facility, convulsive treatment, psychosurgery, sterilization, and abortion should be reviewed. The existing limitations are continued in the draft. Should one or more of these restrictions be made subject to a contrary provision in the patient's advance directive?

Use of copies — § 4661, at pp. 14-15

Splitting health care powers from the Power of Attorney Law, and adding a new type of advance directive (individual instructions), raises some problems with the rules concerning use of copies of powers of attorney that had been imported into the draft. The use of copies has been liberalized, in recognition of the fact that notarization is important for real property transactions, but not inherently useful in the health care context. But what if someone wants to get copies of their advance directive notarized? Should we provide for this?

Relation to general agency law — § 4662, at p. 15

Should we keep a reference to general agency law? What form should it take?

Validity of foreign advance directive — § 4674, at pp. 20-21

Should nonwritten advance directives (in other words, oral individual instructions) be recognized on the same basis as written advance directives?

Formalities for executing a power of attorney — § 4680, at pp. 21-22

Should a person executing instrument at direction of principal also be an adult?

Revocation — §§ 4695-4698, at pp. 26-28

These rules need to be carefully reviewed. They are a mixture of a simplified set of rules drawn from the existing Power of Attorney Law and the Uniform

Health-Care Decisions Act. One additional rule should be included in this article or in the duties chapter, drawn from Section 3(c) of the uniform act:

A health-care provider, agent, guardian, or surrogate who is informed of a revocation shall promptly communicate the fact of the revocation to the supervising health-care provider and to any health-care institution at which the patient is receiving care.

Comment. ... Subsection (c) requires any health-care provider, agent, guardian or surrogate who is informed of a revocation to promptly communicate that fact to the supervising health-care provider and to any health-care institution at which the patient is receiving care. The communication triggers the Section 7(b) [draft § 4731] obligation of the supervising health-care provider to record the revocation in the patient's health-care record and reduces the risk that a health-care provider or agent, guardian or surrogate will rely on a health-care directive that is no longer valid.

Health care surrogates — §§ 4710-4715, at pp. 37-41

These sections have been rewritten to implement decisions made at the November 1997 meeting. There are also some new technical issues raised concerning the nature of surrogate designations under Section 4711.

In connection with the statutory surrogacy rules and the following chapter on health care decisions by a surrogate committee acting on behalf of the “unbefriended” patient, see the email comment we received recently from Andrew Landay. (Exhibit p. 2.) Mr. Landay is concerned that some of the possible approaches outlined in earlier memorandums would erode important protections such as those applicable in the LPS procedure. The Commission has sought to preserve protections and find a proper balance in filling gaps in California law. We will invite Mr. Landay to review the staff draft and comment on the current resolution of these issues, or wait until distribution of the tentative recommendation.

Decisions for the “unbefriended” patient— §§ 4720-4725, at pp. 41-43

This procedure has been substantially redrafted following the November 1997 meeting, and needs to be thoroughly reviewed.

Statutory damages — § 4742, at pp. 48-50

The Staff Note considers the issue whether other remedies are adequate and other issues with regard to this section. Serious consideration should be given to

the suggestion of Professors Larson and Eaton (1) that the patient (and the patient's estate) should not have to pay for health care *provided* in knowing violation or reckless disregard of an advance directive, and (2) that the patient (and the patient's estate) should be able to recover more than nominal damages where a health care provider *fails to provide* treatment in knowing violation or reckless disregard of an advance directive.

Petitioners — § 4765, at pp. 54-55

The Commission needs to be sure that the class of permissible petitioners is correctly described and not overly inclusive.

Request to forego resuscitative measures — §§ 4780-4786, at pp. 58-60

The draft statutes have carried this procedure forward without much change. The DNR statute was enacted fairly recently and is self-contained.

Secretary of State's registry system — §§ 4800-4805, at pp. 60-62

This procedure has not been discussed at any prior meeting. We will attempt to get commentary from the Secretary of State's office once a tentative recommendation is approved.

Uniform Act Cross-Reference Table

A cross-reference table showing the disposition of the UHCDA in the latest draft statute is set out at page 1 of the Exhibit attached to this memorandum.

Respectfully submitted,

Stan Ulrich
Assistant Executive Secretary

UHCDA 3d Staff Draft

1(1)4605
 1(2)4607(a)
 1(3)4609
 1(4)4613
 1(5)4615
 1(6)4617
 1(7)4619
 1(8)4621
 1(9)4623
 1(10)56
 1(11)4625
 1(12)4627
 1(13)4629
 1(14)4631
 1(15)74
 1(16)4637
 1(17)4639

2(a)4670
 2(b) snt. 14671, 4684(a)
 2(b) snt. 24627, 4680(b)
 2(b) snt. 34671
 2(b) snt. 4see 4660
 2(c)4683
 2(d)4658
 2(e)4685
 2(f).....4750(b)
 2(g)4672
 2(h)4674

3(a)see 4696
 3(b)see 4695-4696
 3(c)see Memo 98-16
 3(d)4697
 3(e)4698(b)

4 intro ¶4700
 4 form.....4701

5(a)4710
 5(b)4711
 5(c)see 4712(a)-(c)
 5(d)see 4712(d)
 5(e)see 4712(b)(1)
 5(f).....4713

UHCDA 3d Staff Draft

5(g)4750(c)
 5(h)4714
 5(i).....see 4660
 5(j).....see 4712(d)

6(a)
 6(b)4686
 6(c) *Drabick*

7(a)4730
 7(b)4731
 7(c)4732
 7(d)4733
 7(e)4734
 7(f).....4735
 7(g)4736
 7(h)4675

8.....4737

9(a)4740
 9(b)4741

10(a)4742(a)
 10(b)4742(b)

11(a)4651(a)
 11(b)4657

12.....4661

13(a)4655(a)
 13(b)4656
 13(c)4653
 13(d)4654
 13(e)see 4652(a)
 13(f).....no

14.....see 4750 *ff*

15.....2(b)
 16.....4601
 17.....11
 18.....3, 4665 *ff*

X-Sender: alanday@mail.wgn.net (Unverified)
Mime-Version: 1.0
Date: Sun, 11 Jan 1998 17:08:45 -0800
To: ulrich@clrc.ca.gov
From: alanday@westworld.com (Andrew Landay)
Subject: health care decisions - dangers
X-Rcpt-To: ulrich@clrc.ca.gov

Subject: Uniform Health Care Decisions Act (UHCDA)

Gentlemen:

The glare of the UHCDA appears to have distracted the Commission from the dangers lurking in some of its provisions.

Two provisions especially pose dangers to incapacitated patients and would repeal protections now found in the LPS Act and in other conservatorship provisions.

§16-30-B-7 allows the attending physician or advanced practice nurse (presumably an NP) to select a surrogate for incapacitated patients. §1616-30B-5, health care providers may rely on such surrogates decisions without resort to the courts or legal process.

We are all becoming elderly. I object strongly to the repeal of the hard-won protections we now enjoy under LPS and the conservatorship law generally. These sections of the UHCDA would lead to tremendous abuses by families, HMO's, and insurance companies eager to get rid of the costly care of the elderly or dying.

Please have the staff review these problems and avoid anything that might erode protection of incapacitated elderly patients.

Very truly yours,

Andrew Landay, J.D.

AL: mac

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Accompanies Memorandum 98-16

STAFF DRAFT
HEALTH CARE DECISIONS

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STAFF DRAFT

HEALTH CARE DECISIONS

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 4662. See also Sections 20 *et seq.* (general definitions applicable in Probate Code depending on context), 4755 (application of general procedural rules).

Many provisions in Parts 1, 2, and 3 are the same as or drawn from the Uniform Health-Care Decisions Act (1993). Some general provisions included in the Uniform Health-Care Decisions Act (1993) are generalized elsewhere in this code. See Sections 2(b) (construction of provisions drawn from uniform acts) (*cf.* UHCDA § 15), 11 (severability) (*cf.* UHCDA § 17). In Comments to sections in this title, a reference to the “Uniform Health-Care Decisions Act (1993)” or the “uniform act” (in context) means the official text of the uniform act approved by the National Conference of Commissioners on Uniform State Laws.

§ 4603. Application of definitions

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

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

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

§ 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.

Comment. Section 4605 is new. The first sentence is the same as Section 1(1) of the Uniform Health-Care Decisions Act (1993), except that the term “advance directive” is defined for convenience. “Advance directive” is commonly used in practice as a shorthand. Statutory language also may use the shorter term. See, e.g., Section 4800. A declaration or directive under

1 the repealed Natural Death Act (former Health & Safety Code § 7185 *et seq.*) is a type of advance
2 directive.

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

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

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

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)
16 of the Uniform Health-Care Decisions Act (1993). For qualifications of health care agents, see
17 Sections 4660.

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 a patient’s ability to understand the nature and
25 consequences of proposed health care, including its significant benefits, risks, and
26 alternatives, and to make and communicate a health care decision.

27 **Comment.** Section 4609 is a new provision drawn from former Health and Safety Code
28 Section 1418.8 and Section 1(3) of the Uniform 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 (presumption of capacity), 4658 (capacity determinations by
31 primary physician), 4659 (patient’s objections), 4683 (when agent’s authority effective), 4684
32 (scope of agent’s authority), 4696 (revocation of power of attorney for health care), 4710
33 (authority of surrogate to make health care decisions), 4720 (health care decisions for patient
34 without surrogates), 4732 (duty of primary physician to record relevant information), 4733
35 (obligations of health care provider), 4740 (immunities of health care provider), 4766 (petition as
36 to durable power of attorney for health care).

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

38 ☞ **Staff Note.** This section has been fine-tuned. Earlier drafts used the Uniform Health Care
39 Decisions Act definition verbatim:

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

42 Note that the syntax is not correct — benefits and risks *of* proposed health care, alternatives *to*
43 proposed health care. A definition drawn from existing California law relating to “medical
44 interventions” in long-term care facilities avoids this problem and has the benefit of carrying
45 some recent language forward. Health and Safety Code Section 1418.8(b) (the Epple bill),
46 relating to long-term care, describes capacity in the following terms:

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

5 The Due Process in Competency Determinations Act (Prob. Code § 813) includes a more detailed
6 set of standards:

7 (a) For purposes of a judicial determination, a person has the capacity to give informed
8 consent to a proposed medical treatment if the person is able to do all of the following:

9 (1) Respond knowingly and intelligently to queries about that medical treatment.

10 (2) Participate in that treatment decision by means of a rational thought process.

11 (3) Understand all of the following items of minimum basic medical treatment information
12 with respect to that treatment:

13 (A) The nature and seriousness of the illness, disorder, or defect that the person has.

14 (B) The nature of the medical treatment that is being recommended by the person's health
15 care providers.

16 (C) The probable degree and duration of any benefits and risks of any medical intervention
17 that is being recommended by the person's health care providers, and the consequences of
18 lack of treatment.

19 (D) The nature, risks, and benefits of any reasonable alternatives.

20 **However**, these rules are explicitly not intended to extend outside the judicial context. Section
21 811(e) provides:

22 (e) This part applies only to the evidence that is presented to, and the findings that are made
23 by, a court determining the capacity of a person to do a certain act or make a decision,
24 including, but not limited to, making medical decisions. Nothing in this part shall affect the
25 decisionmaking process set forth in Section 1418.8 of the Health and Safety Code, nor
26 increase or decrease the burdens of documentation on, or potential liability of, physicians and
27 surgeons who, outside the judicial context, determine the capacity of patients to make a
28 medical decision.

29 The question that needs to be resolved in the Commission's recommendation is whether any
30 additional detail, standards, or procedure should be added to the simple rule in draft Section 4609.
31 The staff does not believe additional detail is needed.

32 § 4611. Community care facility

33 4611. "Community care facility" means a "community care facility" as defined
34 in Section 1502 of the Health and Safety Code.

35 **Comment.** Section 4611 continues former Section 4603 without substantive change.

36 For provisions in this division using this term, see Sections 4660 (limitations on who may act
37 as agent), 4673 (witnessing requirements in skilled nursing facility).

38 § 4613. Conservator

39 4613. "Conservator" means a court-appointed conservator or guardian having
40 authority to make a health care decision for a patient.

41 **Comment.** Section 4613 is a new provision and serves the same purpose as Section 1(4) of the
42 Uniform Health-Care Decisions Act (1993) (definition of "guardian"). See also Section 1490
43 ("guardian" means conservator of adult or married minor).

44 For provisions in this division concerning conservators, see Sections 4617 ("health care
45 decision" defined), 4629 ("primary physician" defined), 4639 ("surrogate" defined), 4660
46 (limitations on who may act as agent), 4672 (nomination of conservator in written advance health

1 care directive), 4710 (authority of surrogate to make health care decisions), 4712 (determination
2 of statutory surrogate), 4732 (duty of primary physician to record relevant information), 4753
3 (limitations on right to petition), 4765 (petitioners), 4766 (petition as to power of attorney for
4 health care), 4770 (temporary health care order), 4771 (award of attorney’s fees).

5 See also Section 4617 (“health care decision” defined), 4624 (“patient” defined).

6 **§ 4615. Health care**

7 4615. “Health care” means any care, treatment, service, or procedure to
8 maintain, diagnose, or otherwise affect a patient’s physical or mental condition.

9 **Comment.** Section 4615 continues the first part of former Section 4609 without substantive
10 change and is the same in substance as Section 1(5) of the Uniform Health-Care Decisions Act
11 (1993).

12 See also Section 4624 (“patient” defined).

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

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

18 **§ 4617. Health care decision**

19 4617. “Health care decision” means a decision made by a patient or the patient’s
20 agent, conservator, or surrogate, regarding the patient’s health care, including the
21 following:

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

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

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

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

32 See also Sections 4607 (“agent” defined), 4613 (“conservator” defined), 4615 (“health care”
33 defined), 4624 (“patient” defined), 4639 (“surrogate” defined).

34 **§ 4619. Health care institution**

35 4619. “Health care institution” means an institution, facility, or agency licensed,
36 certified, or otherwise authorized or permitted by law to provide health care in the
37 ordinary course of business.

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

40 For provisions in this division using this term, see Sections 4654 (compliance with generally
41 accepted health care standards), 4660 (limitation on who may act as agent or surrogate), 4701
42 (optional form of advance health care directive), 4733 (obligations of health care institution),
43 4735 (health care institution’s right to decline ineffective care), 4736 (obligations of declining
44 health care institution), 4740 (immunities of health care provider or institution), 4675 (restriction
45 on requiring or prohibiting advance directive), 4742 (statutory damages).

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

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

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

5 **§ 4621. Health care provider**

6 4621. “Health care provider” means an individual licensed, certified, or
7 otherwise authorized or permitted by the law of this state to provide health care in
8 the ordinary course of business or practice of a profession.

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

14 For provisions in this division using this term, see Sections 4617 (“health care decision”
15 defined), 4654 (compliance with generally accepted health care standards), 4660 (limitations on
16 who may act as agent), 4673 (witnessing requirements in skilled nursing facility), 4686 (agent’s
17 priority), 4701 (optional form of advance health care directive), 4712 (determination of statutory
18 surrogate), 4733 (obligations of health care provider), 4734 (health care provider’s right to
19 decline for reasons of conscience), 4735 (health care provider’s right to decline ineffective care),
20 4736 (obligations of declining health care provider), 4740 (immunities of health care provider),
21 4675 (restriction on requiring or prohibiting advance directive), 4742 (statutory damages), 4740
22 (immunities of health care provider).

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

24 **§ 4623. Individual health care instruction; individual instruction**

25 4623. “Individual health care instruction” or “individual instruction” means a
26 patient’s written or oral direction concerning a health care decision for herself or
27 himself.

28 **Comment.** Section 4623 is a new provision and is the same in substance as Section 1(9) of the
29 Uniform Health-Care Decisions Act (1993). The term “individual health care instruction” is
30 included to provide more clarity.

31 For provisions in this division using this term, see Sections 4605 (“advance health care
32 directive” defined), 4624 (“patient” defined), 4658 (capacity determinations by primary
33 physician), 4670 (individual health care instruction recognized), 4671 (power of attorney for
34 health care may include individual instruction), 4685 (standard governing agent’s health care
35 decisions), 4698 (effect of later advance directive on earlier advance directive), 4713 (standard
36 governing surrogate’s health care decisions), 4732 (duty of primary physician to record relevant
37 information), 4733 (obligations of health care provider or institution), 4734 (health care
38 provider’s or institution’s right to decline), 4736 (obligations of declining health care provider or
39 institution).

40 See also Section 4617 (“health care decision” defined), 4624 (“patient” defined).

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

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

1 **§ 4624. Patient**

2 4624. “Patient” means an adult whose health care is under consideration, and
3 includes a principal under a power of attorney for health care and an adult who has
4 given an individual health care instruction or designated a surrogate.

5 **Comment.** Section 4624 is a new provision added for drafting convenience. “Adult” includes
6 an emancipated minor. See Fam. Code §§ 7002 (emancipation), 7050 (emancipated minor
7 considered as adult for consent to medical, dental, or psychiatric care). For provisions governing
8 surrogates, see Section 4710 *et seq.*

9 See also Sections 4615 (“health care” defined), 4623 (“individual health care instruction”
10 defined), 4627 (“power of attorney for health care” defined), 4630 (“principal” defined), 4639
11 (“surrogate” defined).

12 **§ 4625. Physician**

13 4625. “Physician” means a physician and surgeon licensed by the Medical Board
14 of California or the Osteopathic Medical Board of California.

15 **Comment.** Section 4625 continues and generalizes former Health and Safety Code Section
16 7186(g) (Natural Death Act) and is the same in substance as Section 1(11) of the Uniform Health-
17 Care Decisions Act (1993).

18 **§ 4627. Power of attorney for health care**

19 4627. “Power of attorney for health care” means a written instrument
20 designating an agent to make health care decisions for the principal.

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

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

28 **§ 4629. Primary physician**

29 4629. “Primary physician” means a physician designated by a patient or the
30 patient’s agent, conservator, or surrogate, to have primary responsibility for the
31 patient’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).

37 For provisions in this division using this term, see Sections 4637 (“supervising health care
38 provider” defined), 4658 (capacity determinations by primary physician), 4701 (optional form of
39 advance health care directive), 4710 (authority of surrogate to make health care decisions), 4712
40 (determination of statutory surrogate), 4715 (reassessment of surrogate determination), 4721
41 (referral to interdisciplinary team), 4732 (duty of primary physician to record relevant
42 information).

1 See also Sections 4607 (agent” defined), 4613 (“conservator” defined), 4615 (“health care”
2 defined), 4625 (“physician” defined), 4631 (“reasonably available” defined), 4639 (“surrogate”
3 defined).

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

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

10 § 4630. Principal

11 4030. “Principal” means an adult who executes a power of attorney for health
12 care.

13 **Comment.** Section 4030 is the same in substance as Section 4027 in the Power of Attorney
14 Law. “Adult” includes an emancipated minor. See Fam. Code §§ 7002 (emancipation), 7050
15 (emancipated minor considered as adult for consent to medical, dental, or psychiatric care).

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

17 § 4631. Reasonably available

18 4631. “Reasonably available” means readily able to be contacted without undue
19 effort and willing and able to act in a timely manner considering the urgency of the
20 patient’s health care needs.

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

23 For provisions in this division the use this term, see Sections 4629 (“primary physician”
24 defined), 4637 (“supervising health care provider” defined), 4686 (agent’s priority), 4701
25 (optional form of advance health care directive), 4710 (authority of surrogate to make health care
26 decisions), 4712 (determination of statutory surrogate), 4715 (reassessment of surrogate
27 determination).

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

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

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

37 § 4633. Residential care facility for the elderly

38 4633. “Residential care facility for the elderly” means a “residential care facility
39 for the elderly” as defined in Section 1569.2 of the Health and Safety Code.

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

41 For provisions in this division using this term, see Sections 4660 (limitations on who may act
42 as agent), 4673 (witnessing requirements in skilled nursing facility).

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 4673 (witnessing requirements in
7 skilled nursing facility), 4701 (optional form of advance health care directive), 4720 (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 a patient’s
13 health care.

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

16 For provisions in this division using this term, see Sections 4696 (revocation of power of
17 attorney for health care), 4711 (patient’s designation of surrogate), 4714 (disqualification of
18 surrogate), 4730 (duty of health care provider to communicate), 4731 (duty of supervising health
19 care provider to record relevant information), 4765 (petitioners).

20 See also Sections 4607 (“agent” defined), 4615 (“health care” defined), 4624 (“patient”
21 defined), 4629 (“primary physician” defined), 4631 (“reasonably available” defined).

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

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

27 **§ 4639. Surrogate**

28 4639. “Surrogate” means an adult, other than a patient’s agent or conservator,
29 authorized under this part to make a health care decision for the patient.

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

35 For provisions in this division using this term, see Sections 4617 (health care decision), 4624
36 (patient), 4629 (primary physician), 4653 (mercy killing, assisted suicide, euthanasia not
37 approved), 4657 (presumption of capacity), 4658 (capacity determinations), 4659 (patient’s
38 objections), 4660 (limitation on who may act as agent or surrogate), 4661 (use of copies), 4710-
39 4715 (health care surrogates), 4720 (application of rules on patients without surrogates), 4725
40 (general surrogate rules applicable to surrogate committee), 4731 (duty of supervising health care
41 provider to record relevant information), 4732 (duty of primary physician to record relevant
42 information), 4741 (immunities of agent and surrogate), 4750 (judicial intervention disfavored),
43 4762 (jurisdiction over agent or surrogate), 4763 (venue), 4765 (petitioners), 4766 (purposes of
44 petition), 4769 (notice of hearing), 4771 (award of attorney’s fees), 4780 “(request to forego
45 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 **Comment.** Subdivision (a) of Section 4651 is the same in substance as Section 11(a) of the
2 Uniform Health-Care Decisions Act (1993).

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

4 Subdivision (c) is new. This division applies to emancipated minors to the same extent as
5 adults. See Fam. Code §§ 7002 (emancipation), 7050 (emancipated minor considered as adult for
6 consent to medical, dental, or psychiatric care).

7 See also Sections 4605 (“advance health care directive” defined), 4615 (“health care” defined),
8 4617 (“health care decision” defined), 4688 (other authority of person named as agent not
9 affected).

10 **§ 4652. Unauthorized acts**

11 4652. This division does not authorize consent to any of the following on behalf
12 of a patient:

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


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

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

18 (d) Sterilization.

19 (e) Abortion.

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

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

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

29 Should these limitations in existing Section 4732 be reconsidered? Harley Spitler strongly prefers
30 the UHCDA provision, and reports that he has “never liked” this provision. He argues that “there
31 is a California appellate decision that invalidates one of the subsections.”

32 **§ 4653. Mercy killing, assisted suicide, euthanasia not approved**

33 4653. This division does not condone, authorize, or approve mercy killing,
34 assisted suicide, or euthanasia, nor does it permit any affirmative or deliberate act
35 or omission to end life other than the withholding or withdrawal of health care
36 pursuant to an advance health care directive or by a surrogate so as to permit the
37 natural process of dying.

38 **Comment.** Section 4653 continues the first sentence of former Section 4723 without
39 substantive change, and is consistent with Section 13(c) of the Uniform Health-Care Decisions
40 Act (1993). This section also continues the substance of former Health and Safety Code Section
41 7191.5(g) (Natural Death Act). Language has been revised to conform to the broader scope of this
42 division.

43 See also Sections 4605 (“advance health care directive” defined), 4615 (“health care” defined),
44 4639 (“surrogate” defined).

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). For a special application of this general rule, see Section 4735 (right to decline to
7 provide ineffective care).

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

10 **§ 4655. Impermissible constructions**

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

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

16 **Comment.** Subdivision (a) of Section 4655 is the same in substance as Section 13(a) of the
17 Uniform Health-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. Effect 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. Presumption of capacity**

33 4657. A patient is presumed to have capacity to make a health care decision, to
34 give or revoke an advance health care directive, and to designate or disqualify a
35 surrogate.

36 **Comment.** Section 4657 is the same in substance as Section 11(b) of the Uniform Health-Care
37 Decisions Act (1993). The presumption of capacity with regard to revocation continues the
38 substance of the first sentence of former Section 4727(c). See also Section 4766(a) (petition to
39 review capacity determinations).

40 See also Sections 4605 (“advance health care directive” defined), 4609 (“capacity” defined),
41 4617 (“health care decision” defined), 4624 (“patient” defined), 4639 (“surrogate” defined).

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

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

5 **§ 4658. Capacity determinations**

6 4658. Unless otherwise specified in a written advance health care directive, for
7 the purposes of this division, a determination that a patient lacks or has recovered
8 capacity, or that another condition exists that affects an individual health care
9 instruction or the authority of an agent or surrogate, shall be made by the primary
10 physician.

11 **Comment.** Section 4658 is drawn from Section 2(d) and part of Section 5(a) of the Uniform
12 Health-Care Decisions Act (1993). This section makes clear that capacity determinations need not
13 be made by the courts. For provisions governing judicial determinations of capacity, see Sections
14 810-813 (Due Process in Capacity Determinations Act). See also Section 4766 (petitions
15 concerning advance directives). For the primary physician’s duty to record capacity
16 determinations, see Section 4732. See also Section 4766(a) (petition to review capacity
17 determinations).

18 See also Sections 4605 (“advance health care directive” defined), 4607 (“agent” defined), 4609
19 (“capacity” defined), 4623 (“individual health care instruction” defined), 4624 (“patient”
20 defined), 4629 (“primary physician” defined), 4639 (“surrogate” defined).

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

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

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

39 ☞ **Staff Note.** This section was in the general provisions relating only to advance directives in
40 the prior draft. However, the rules concerning capacity determinations apply to situations where
41 there is no advance directive, i.e., where a surrogate may have authority to make health care
42 decisions as provided in Section 4710.

43 The UHCDA does not provide any special procedure for making capacity determinations, nor
44 does this draft. Under Health and Safety Code Section 1418.8(b) (the Epple bill), the following
45 duties are imposed:

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

1 Should additional detail be provided in Section 4658? It should be noted that the provisions
2 concerning judicial proceedings in this draft statute now explicitly provide for capacity
3 determinations. See Section 4766. It was implicit in earlier drafts that determining whether an
4 advance directive is effective or has terminated under Section 4766(a) could involve the patient’s
5 capacity. See the Staff Note following Section 4766.

6 **§ 4659. Patient’s objections**

7 4659. Nothing in this division authorizes consent to health care, or consent to the
8 withholding or withdrawal of health care necessary to keep the patient alive, if the
9 patient having capacity objects to the health care or to the withholding or
10 withdrawal of the health care. In this situation, the case is governed by the law that
11 would apply if there were no advance health care directive or surrogate
12 decisionmaker.

13 **Comment.** Section 4659 is drawn from former Section 4724, which applied only to powers of
14 attorney for health care. The scope of this section is broader, since it applies to powers of attorney
15 for health care, other written advance health care directives, oral advance directives, and statutory
16 surrogates. The reference to the patient’s capacity has been added for consistency with the
17 statutory scheme. See Section 4657 (presumption of capacity) & Comment.

18 See also Sections 4605 (“advance health care directive” defined), 4609 (“capacity” defined),
19 4615 (“health care” defined), 4617 (“health-care decision” defined), 4624 (“patient” defined),
20 4639 (“surrogate” defined).

21 **§ 4660. Limitations on who may act as agent or surrogate**

22 4660. (a) Except as provided in subdivision (b), none of the following persons
23 may make health care decisions as an agent under a power of attorney for health
24 care or a surrogate under this division:

25 (1) The supervising health care provider or an employee of the health care
26 institution where the patient is receiving care.

27 (2) An operator or employee of a community care facility or residential care
28 facility where the patient is receiving care.

29 (b) The prohibition in subdivision (a) does not apply to the following persons:

30 (1) An employee who is related to the patient by blood, marriage, or adoption.

31 (2) An employee who is employed by the same health care institution,
32 community care facility, or residential care facility for the elderly as the patient.

33 (c) A conservator under the Lanterman-Petris-Short Act (Part 1 (commencing
34 with Section 5000) of Division 5 of the Welfare and Institutions Code) may not be
35 designated as an agent or surrogate to make health care decisions by the
36 conservatee, unless all of the following are satisfied:

37 (1) The [advance directive] is otherwise valid.

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

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

41 “I am a lawyer authorized to practice law in the state where this [advance
42 health care directive] was executed, and the principal or patient was my client
43 at the time this advance directive was executed. I have advised my client

1 concerning his or her rights in connection with this advance directive and the
2 applicable law and the consequences of signing or not signing this advance
3 directive, and my client, after being so advised, has executed this advance
4 directive.”

5 (d) This section does not apply to participation in a surrogate committee
6 pursuant to Chapter 4 (commencing with Section 4720) of Part 2.

7 **Comment.** Subdivisions (a)-(c) of Section 4660 restate former Section 4702 without
8 substantive change, and extend its principles to cover surrogates. The terms “supervising health
9 care provider” and “health care institution” have been substituted for “treating health care
10 provider” as appropriate, for consistency with the terms used in this division. See Section 4637
11 (“supervising health care provider” defined).

12 Subdivisions (a) and (b) serve the same purpose as Section 2(b) (fourth sentence) and Section
13 5(i) of the Uniform Health-Care Decisions Act (1993). Subdivision (a) does not preclude a person
14 from appointing, for example, a friend who is a physician as the agent under the person’s power
15 of attorney for health care, but if the physician becomes the person’s “supervising health care
16 provider,” the physician is precluded from acting as the agent under the power of attorney. See
17 also Section 4673 (witnessing requirements in skilled nursing facilities).

18 Subdivision (b) provides a special exception to subdivision (a). This will, for example, permit a
19 nurse to serve as agent for the nurse’s spouse when the spouse is being treated at the hospital
20 where the nurse is employed.

21 Subdivision (c) prescribes conditions that must be satisfied if a conservator is to be designated
22 as the agent or surrogate for a conservatee under the Lanterman-Petris-Short Act. This
23 subdivision has no application where a person other than the conservator is so designated.

24 Subdivision (d) makes clear that the rules governing surrogate committees under Sections
25 4720-4725 prevail over this section.

26 See also Sections 4605 (“advance health care directive” defined), 4607 (“agent” defined), 4611
27 (“community care facility” defined), 4613 (“conservator” defined), 4617 (“health care decision”
28 defined), 4619 (“health care institution” defined), 4624 (“patient” defined), 4627 (“power of
29 attorney for health care” defined), 4633 (“residential care facility for the elderly” defined), 4637
30 (“supervising health care provider” defined), 4639 (“surrogate” defined).

31 ☞ **Staff Note.** We are still working on the issue of whether “advance directive” can or should
32 include a written surrogate designation. If not, then paragraphs (1) and (3) of subdivision (c) will
33 need to be revised to refer to “power of attorney or surrogate designation.”

34 § 4661. Use of copies

35 4661. A copy of a written advance health care directive, revocation of an
36 advance directive, or designation or disqualification of a surrogate has the same
37 effect as the original.

38 **Comment.** Section 4661 provides a special rule permitting the use of copies under this
39 division. It is the same as Section 12 of the Uniform Health-Care Decisions Act (1993). The rule
40 under this section for powers of attorney for health care differs from the rule under the Power of
41 Attorney Law. See Section 4307 (certified copy of power of attorney).

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

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

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

2 ☞ **Staff Note.** The State Bar Estate Planning, Trust and Probate Law Section Executive
3 Committee suggests that “copies should be as good as originals with respect to *all* health care
4 related documents unless the principal provides otherwise in the document or the supervising
5 health care provider has actual notice of circumstances that would render a copy unreliable.” See
6 Memorandum 97-41, Exhibit p. 16. Harley Spitler says this section is OK. (Letter of Oct. 10,
7 1997, p. 3.)

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

9 4307. (a) A copy of a power of attorney certified under this section has the same force and
10 effect as the original power of attorney.

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

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

13 (2) A notary public in this state.

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

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

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

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

26 Government Code Section 8205(a)(4) provides authority for notaries to certify copies of
27 powers of attorney under Probate Code Section 4307, and Government Code Section 8211(h)
28 provides the fee.

29 **§ 4662. Relation to general agency law**

30 4662. Where this division does not provide a rule, the general law of agency may
31 be applied.

32 **Comment.** Section 4662 is analogous to Section 4051 in the Power of Attorney Law. Under
33 this section, reference may be made to general agency law where appropriate.

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

36 4051. Except where this division provides a specific rule, the general law of agency,
37 including Article 2 (commencing with Section 2019) of Chapter 2 of Title 6 of, and Title 9
38 (commencing with Section 2295) of, Part 4 of Division 3 of the Civil Code, applies to powers
39 of attorney.

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

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CHAPTER 3. TRANSITIONAL PROVISIONS

§ 4665. Application to existing advance directives and pending proceedings

4665. Except as otherwise provided by statute:
(a) On and after January 1, 2000, this division applies to all written advance health care directives, including but not limited to durable powers of attorney for health care and declarations under the Natural Death Act, regardless of whether they were executed before, on, or after January 1, 2000.

(b) This division applies to all proceedings concerning written advance health care directives commenced on or after January 1, 2000.

(c) This division applies to all proceedings concerning written advance health care directives commenced before January 1, 2000, unless the court determines that application of a particular provision of this division would substantially interfere with the effective conduct of the proceedings or the rights of the parties and other interested persons, in which case the particular provision of this division does not apply and prior law applies.

(d) Nothing in this division affects the validity of a written advance health care directive executed before January 1, 2000, that was valid under prior law.

Comment. Section 4665 serves the same purpose as Section 4054 in the Power of Attorney Law. Subdivision (a) provides the general rule that this division applies to all powers of attorney, regardless of when created.

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

[For special transitional provisions, see Sections ____.]
See also Sections 4605 (“advance health care directive” defined), 4627 (“power of attorney for health care” defined).

1 PART 2 . UNIFORM HEALTH CARE DECISIONS ACT

2 CHAPTER 1. ADVANCE HEALTH CARE DIRECTIVES

3 Article 1. General Provisions

4 **§ 4670. Individual health care instruction**

5 4670. An adult may give an individual health care instruction. The individual
6 instruction may be oral or written. The individual instruction may be limited to
7 take effect only if a specified condition arises.

8 **Comment.** Section 4670 is drawn from Section 2(a) of the Uniform Health-Care Decisions Act
9 (1993). This section continues the substance of part of former Health and Safety Code Section
10 7186.5 (Natural Death Act). “Adult” includes an emancipated minor. See Fam. Code §§ 7002
11 (emancipation), 7050 (emancipated minor considered as adult for consent to medical, dental, or
12 psychiatric care).

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

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

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

19 **§ 4671. Power of attorney for health care**

20 4671. An adult may execute a power of attorney for health care, as provided in
21 Article 2 (commencing with Section 4680). A power of attorney may authorize the
22 agent to make health care decisions and may also include individual health care
23 instructions. A power of attorney may grant authority to make decisions relating to
24 the personal care of the principal, including, but not limited to, determining where
25 the principal will live, providing meals, hiring household employees, providing
26 transportation, handling mail, and arranging recreation and entertainment.

27 **Comment.** The first two sentences of Section 4671 are drawn from the first and third sentences
28 of Section 2(b) of the Uniform Health-Care Decisions Act (1993). The first sentence supersedes
29 Section 4120 (who may execute power of attorney) to the extent it applied to powers of attorney
30 for health care. “Adult” includes an emancipated minor. See Fam. Code §§ 7002 (emancipation),
31 7050 (emancipated minor considered as adult for consent to medical, dental, or psychiatric care).

32 The third sentence, relating to personal care authority, is parallel to Section 4123(c) (personal
33 care authority permissible in non-health care power of attorney). For powers of attorney
34 generally, see the Power of Attorney Law, Section 4000 *et seq.*

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

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

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

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

7 **§ 4672. Nomination of conservator in written advance directive**

8 4672. (a) A written advance health care directive may include the individual's
9 nomination of a conservator of the person or estate or both, or a guardian of the
10 person or estate or both, for consideration by the court if protective proceedings
11 for the individual's person or estate are thereafter commenced.

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

16 **Comment.** Section 4672 continues Section 4126 without substantive change, insofar as that
17 section applied to powers of attorney for health care, and expands the scope of the rule to apply to
18 other written advance health care directives. Subdivision (a) is the same in substance as Section
19 2(g) of the Uniform Health-Care Decisions Act (1993).

20 See also Sections 4605 ("advance health care directive" defined), 4613 ("conservator" defined).

21 **§ 4673. Witnessing required in skilled nursing facility**

22 4673. (a) If an individual is a patient in a skilled nursing facility when the
23 advance health care directive is executed, the advance directive shall be
24 acknowledged before a notary public or signed by at least two witnesses as
25 provided in this section.

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

28 (1) The witnesses shall be adults.

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

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

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

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

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

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

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

39 "I declare under penalty of perjury under the laws of California that the
40 individual who signed or acknowledged this document is personally known
41 to me, or that the identity of the individual was proven to me by convincing
42 evidence, that the individual signed or acknowledged this advance health care

1 directive in my presence, that the individual appears to be of sound mind and
2 under no duress, fraud, or undue influence, that I am not the person appointed
3 as agent by this document, and that I am not the individual's health care
4 provider, an employee of the individual's health care provider, the operator of
5 a community care facility, an employee of an operator of a community care
6 facility, the operator of a residential care facility for the elderly, nor an
7 employee of an operator of a residential care facility for the elderly.”

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

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

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

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

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

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

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

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

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

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

39 (e) A witness who is a patient advocate or ombudsman may rely on the
40 representations of the administrators or staff of the skilled nursing facility, or of
41 family members, as convincing evidence of the identity of the patient if the patient

1 advocate or ombudsman believes that the representations provide a reasonable
2 basis for determining the identity of the patient.

3 **Comment.** Section 4673 continues Section 4121 and 4122 without substantive change, to the
4 extent they applied to powers of attorney for health care, and continues former Section 4701
5 without substantive change. This section expands the witnessing and notarization rules under
6 former law to cover all written advance directives executed in nursing homes, not just powers of
7 attorney.

8 Subdivisions (d) and (e) continue the substance of relevant parts of former Section 4751
9 (convincing evidence of identity of principal) and apply to all written advance directives, not just
10 powers of attorney for health care as under former law.

11 See also Sections 4605 (“advance health care directive” defined), 4611 (“community care
12 facility” defined), 4621 (“health care provider” defined), 4624 (“patient” defined), 4633
13 (“residential care facility for the elderly” defined), 4635 (“skilled nursing facility” defined).

14 § 4674. Validity of written advance directive executed in another jurisdiction

15 4674. (a) A written advance health care directive or similar instrument executed
16 in another state or jurisdiction in compliance with the laws of that state or
17 jurisdiction or of this state, is valid and enforceable in this state to the same extent
18 as a written advance directive validly executed in this state.

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

23 **Comment.** Subdivision (a) of Section 4673 continues former Section 4653 without substantive
24 change, and extends its principles to apply to all written advance health care directives, which
25 include both powers of attorney for health care and written individual instructions. This section is
26 consistent with Section 2(h) of the Uniform Health-Care Decisions Act (1993), as applied to
27 instruments.

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

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

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

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

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

41 2(h) An advance health care directive is valid for purposes of this [Act] if it complies with
42 this [Act], regardless of when or where executed or communicated.

43 Should Section 4674 also validate oral instructions communicated under the law of another state?
44 The purpose seems to be to recognize communication of an oral individual instruction even
45 though it may have occurred outside California or where it is an interstate communication. The
46 UHCDA language would validate an instruction given by a patient on vacation in Florida to a
47 doctor in Florida or the patient’s doctor in California, without raising any technical issues of
48 where the communication took place or what law might otherwise govern its effect. The UHCDA

1 is not clear, however, on the full scope of this rule. Surrogate designations do not appear to fall
2 within the definition of advance directives or individual instructions. Hence, an oral instruction as
3 to treatment communicated in another state would appear to be covered by the UHCDA rule, but
4 a designation of a surrogate would not be. Under the California rule continued here, a written
5 surrogate designation (if there can be such a thing) executed in another state would be entitled to
6 respect in this state.

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

10 **§ 4675. Restriction on requiring or prohibiting advance directive**

11 4675. A health care provider, health care institution, disability insurer, self-
12 insured employee welfare plan, or nonprofit hospital plan or similar insurance plan
13 may not require or prohibit the execution or revocation of an advance health care
14 directive as a condition for providing health care, admission to a facility, or
15 furnishing insurance.

16 **Comment.** Section 4675 continues and generalizes former Section 4725, and contains the
17 substance of Section 7(h) of the Uniform Health-Care Decisions Act (1993). The former
18 provision applied only to powers of attorney for health care. This section is intended to eliminate
19 the possibility that duress might be used by a health care provider, insurer, or other entity to cause
20 the patient to execute or revoke an advance directive.

21 See also Sections 4605 (“advance health care directive” defined), 4615 (“health care” defined),
22 4619 (“health care institution” defined), 4621 (“health care provider” defined).

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

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

28 Article 2. Powers of Attorney for Health Care

29 **§ 4680. Formalities for executing a power of attorney**

30 4680. A power of attorney for health care is legally sufficient if all of the
31 following requirements are satisfied:

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

33 (b) The power of attorney is signed either (1) by the principal or (2) in the
34 principal’s name by an adult in the principal’s presence and at the principal’s
35 direction.

36 (c) The power of attorney satisfies applicable witnessing requirements of Section
37 4673.

38 **Comment.** Section 4680 continues former Section 4121, insofar as it applied to powers of
39 attorney for health care, without substantive change, except that (1) “adult” has been substituted
40 for “person” in subdivision (b) and (2) the witnessing requirements in subdivision (c) are
41 restricted to the special circumstances provided in Section 4673. “Adult” includes an emancipated
42 minor. See Fam. Code §§ 7002 (emancipation), 7050 (emancipated minor considered as adult for
43 consent to medical, dental, or psychiatric care).

44 A power of attorney must be in writing. See Section 4627 (“power of attorney for health care”
45 defined). This section provides the general execution formalities for a power of attorney under

1 this division. A power of attorney that complies with this section is legally sufficient as a grant of
2 authority to an agent. The dating requirement in subdivision (a) generalizes the rule applicable to
3 durable powers of attorney for health care under former Civil Code Section 2432(a)(2). This rule
4 is also consistent with the statutory forms. See Sections 4401 (statutory form power of attorney),
5 4771 (statutory form durable power of attorney for health care).

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

8 ☞ **Staff Note.** The Commission has decided that special care should be taken in the use of terms
9 like adult, individual, patient, principal, and person. Accordingly, the staff suggests using “adult”
10 in subdivision (b). Is this overly restrictive? Should an unemancipated minor be able to sign a
11 power of attorney at the direction of the principal?

12 If this change is made, we will need to make the same change in Section 4121 which applies to
13 powers of attorney generally.

14 § 4681. Limitations expressed in power of attorney

15 4681. (a) Except as provided in subdivision (b), the principal may limit the
16 application of any provision of this division by an express statement in the power
17 of attorney for health care or by providing an inconsistent rule in the power of
18 attorney.

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

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

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

33 See also Sections 4607 (“agent” defined), 4627 (“power of attorney for health care” defined),
34 4630 (“principal” defined).

35 § 4683. When agent’s authority effective

36 4683. Unless otherwise provided in a power of attorney for health care, the
37 authority of an agent becomes effective only on a determination that the principal
38 lacks capacity, and ceases to be effective on a determination that the principal has
39 recovered capacity.

40 **Comment.** Section 4683 is drawn from Section 2(c) of the Uniform Health-Care Decisions Act
41 (1993) and continues the substance of the last part of former Section 4720(a). See Sections 4657
42 (presumption of capacity), 4658 (capacity determinations) & Comment. As under former law, the
43 default rule is that the agent is not authorized to make health care decisions if the principal has the
44 capacity to make health care decisions. The power of attorney may, however, give the agent
45 authority to make health care decisions for the principal even though the principal does have

1 capacity, but the power of attorney is always subject to Section 4659 (if principal objects, agent
2 not authorized to consent to health care or to the withholding or withdrawal of health care
3 necessary to keep the principal alive).

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

6 **Background from Uniform Act.** Section 2(c) provides that the authority of the agent to make
7 health-care decisions ordinarily does not become effective until the principal is determined to lack
8 capacity and ceases to be effective should the principal recover capacity. A principal may
9 provide, however, that the authority of the agent becomes effective immediately or upon the
10 happening of some event other than the loss of capacity but may do so only by an express
11 provision in the power of attorney. For example, a mother who does not want to make her own
12 health-care decisions but prefers that her daughter make them for her may specify that the
13 daughter as agent is to have authority to make health-care decisions immediately. The mother in
14 that circumstance retains the right to later revoke the power of attorney as provided in Section 3
15 [Prob. Code § 4696].

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

17 **§ 4684. Scope of agent’s authority**

18 4684. Subject to any limitations in the power of attorney for health care:

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

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

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

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

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

30 **Comment.** Section 4684 continues former Section 4720(b) without substantive change.
31 Subdivision (a) is consistent with the last part of the first sentence of Section 2(b) of the Uniform
32 Health-Care Decisions Act (1993). Technical revisions have made to conform to the language of
33 this division. See Section 4658 (capacity determinations by primary physician). The agent’s
34 authority is subject to Section 4652 which precludes consent to certain specified types of
35 treatment. See also Section 4653 (impermissible acts and constructions). The principal is free to
36 provide any limitations on types of treatment in the durable power of attorney that are desired.
37 See also Section 4750 *et seq.* (judicial proceedings concerning powers of attorney).

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

40 See also Sections 4607 (“agent” defined), 4609 (“capacity” defined), 4615 (“health care”
41 defined), 4617 (“health-care decision” defined), 4627 (“power of attorney for health care”
42 defined), 4631 (“reasonably available” defined).

43 **§ 4685. Standard governing agent’s health care decisions**

44 4685. An agent shall make a health care decision in accordance with the
45 principal’s individual health care instructions, if any, and other wishes to the
46 extent known to the agent. Otherwise, the agent shall make the decision in

1 accordance with the agent’s determination of the principal’s best interest. In
2 determining the principal’s best interest, the agent shall consider the principal’s
3 personal values to the extent known to the agent.

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

14 See also Sections 4607 (“agent” defined), 4623 (“individual health care instruction” defined),
15 4630 (“principal” defined).

16 **Background from Uniform Act.** Section 2(e) requires the agent to follow the principal’s
17 individual instructions and other expressed wishes to the extent known to the agent. To the extent
18 such instructions or other wishes are unknown, the agent must act in the principal’s best interest.
19 In determining the principal’s best interest, the agent is to consider the principal’s personal values
20 to the extent known to the agent. The Act does not prescribe a detailed list of factors for
21 determining the principal’s best interest but instead grants the agent discretion to ascertain and
22 weigh the factors likely to be of importance to the principal.

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

24 § 4686. Agent’s priority

25 4686. Unless the power of attorney for health care provides otherwise, the agent
26 designated in the power of attorney who is known to the health care provider to be
27 reasonably available and willing to make health care decisions has priority over
28 any other person in making health care decisions for the principal.

29 **Comment.** Section 4686 continues the first part of former Section 4720(a) without substantive
30 change. This section gives the agent priority over others, including a conservator or statutory
31 surrogate, to make health care decisions if the agent is known to the health care provider to be
32 available and willing to act. See Section 4710 (statutory surrogate’s authority dependent on
33 appointment and availability of agent). The power of attorney may vary this priority, as
34 recognized in the introductory clause, and the rule of this section is subject to a contrary court
35 order. See Section 4766. In part, this section serves the same purpose as Section 6(b) of the
36 Uniform Health-Care Decisions Act (1993).

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

40 § 4687. Duration

41 4687. Unless the power of attorney for health care provides a time of
42 termination, the authority of the agent is exercisable notwithstanding any lapse of
43 time since execution of the power of attorney.

44 **Comment.** Section 4687 continues Section 4127, insofar as it applied to powers of attorney for
45 health care, without substantive change. This rule is the same in substance as the second sentence
46 of the official text of Section 2 of the Uniform Durable Power of Attorney Act (1987), Uniform

1 Probate Code Section 5-502 (1991). See Section 2(b) (construction of provisions drawn from
2 uniform acts).

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

4 **§ 4688. Other authority of person named as agent not affected**

5 4688. Nothing in this division affects any right the person designated as an agent
6 under a power of attorney for health care may have, apart from the power of
7 attorney, to make or participate in making health care decisions for the principal.

8 **Comment.** Section 4688 continues former Section 4720(d) without substantive change. An
9 agent may, without liability, decline to act under the power of attorney. For example, the agent
10 may not be willing to follow the desires of the principal as stated in the power of attorney because
11 of changed circumstances. This section makes clear that, in such a case, the person may make or
12 participate in making health care decisions for the principal without being bound by the stated
13 desires of the principal to the extent that the person designated as the agent has the right under the
14 applicable law apart from the power of attorney. See Section 4722(a)(4) (patient representative on
15 surrogate committee).

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

18 **§ 4689. Application to acts and transactions under power of attorney**

19 4689. (a) If a power of attorney for health care provides that the law of this state
20 governs the power of attorney or otherwise indicates that the law of this state
21 governs the power of attorney, this division governs the power of attorney and
22 applies to an agent’s activities in this state or outside this state where any of the
23 following conditions is satisfied:

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

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

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

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

29 (5) There is otherwise a reasonable relationship between this state and the
30 principal’s health care.

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

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

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

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

39 **Comment.** Section 4689 is drawn from Section 4052 in the Power of Attorney Law. Nothing in
40 this section limits the jurisdiction exercisable under Code of Civil Procedure Section 410.10.

41 See also Sections 4607 (“agent” defined), 4627 (“power of attorney for health care” defined),
42 4630 (“principal” defined).

1 Article 3. Modification and Revocation of Advance Directives

2 **§ 4695. Revocation of advance directive**

3 4695. A patient may modify or revoke an advance health care directive as
4 follows:

5 (a) In accordance with the terms of the advance directive.

6 (b) By a writing. This subdivision is not subject to limitation in the advance
7 directive.

8 **Comment.** Section 4695 is supersedes Sections 4150 and 4151 in the Power of Attorney Law
9 to the extent they applied to powers of attorney for health care, and applies the rule to all advance
10 health care directives.

11 See also Sections 4605 (“advance health care directive” defined), 4624 (“patient” defined),
12 4627 (“power of attorney for health care” defined),

13 ☞ **Staff Note.** This section could be simplified along the lines of the UHCDA:

14 3(b). An individual may revoke all or part of an advance health-care directive, other than
15 the designation of an agent, at any time and in any manner that communicates an intent to
16 revoke.

17 The draft section may still retain too much of the flavor of the PAL rules designed to deal with
18 property matters. We have not imported many of the technical refinements from the PAL, as can
19 be seen by comparing draft Section 4695-4696 to existing Sections 4150-4153 and 4727.

20 **§ 4696. Revocation of designation of agent under power of attorney for health care**

21 4696. At any time while the principal has capacity, the principal may do any of
22 the following:

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

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

27 **Comment.** Section 4696 continues former Section 4727(a) without substantive change, but
28 terminology has been adjusted for consistency with this division. “Agent” replaces “attorney-in-
29 fact” and “supervising health care provider” replaces “health care provider.” The principal may
30 revoke the designation or authority only if, at the time of revocation, the principal has sufficient
31 capacity to make a power of attorney for health care. The burden of proof is on the person who
32 seeks to establish that the principal did not have capacity to revoke the designation or authority.
33 See Section 4657 (presumption of capacity).

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

39 See Section 4657 (presumption of capacity). See also Sections 4607 (“agent” defined), 4609
40 (“capacity” defined), 4617 (“health care decision” defined), 4627 (“power of attorney for health
41 care” defined), 4630 (“principal” defined), 4637 (“supervising health care provider” defined).

42 ☞ **Staff Note**

43 (1) This section could be simplified along the lines of the UHCDA:

44 3(a). An individual may revoke the designation of an agent only by a signed writing or by
45 personally informing the supervising health-care provider.

1 However, the Uniform Act provision is not as concrete as the existing California rule. When is a
2 “signed writing” effective to revoke the agent’s designation? When is it signed? What if it is not
3 communicated?

4 On the other hand, the California rule might be criticized as overly technical since it provides
5 separate rules for revocation of the *agency itself*, which requires notice to the agent, as
6 distinguished from revocation of the agent’s *authority*, which is accomplished by notice to the
7 supervising health care provider. The former is a more drastic action, although in practice, there
8 may not be much difference between the two actions in the health care area.

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

11 (2) Since the Third Draft was considered in November, we have moved the part of this section
12 requiring the health care provider to make a record of the revocation and attempt to notify the
13 agent to Chapter 5 where the duties of health care providers are collected. See draft Sections
14 4731-4732.

15 (3) Oral revocation, *regardless of the patient’s capacity*, is provided in the Natural Death Act
16 (Health & Safety Code § 7188):

17 7188. (a) A declarant may revoke a declaration at any time and in any manner, without
18 regard to the declarant’s mental or physical condition. A revocation is effective upon its
19 communication to the attending physician or other health care provider by the declarant or a
20 witness to the revocation.

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

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

28 § 4697. Effect of dissolution or annulment

29 4697. (a) If after executing a power of attorney for health care the principal’s
30 marriage to the agent is dissolved or annulled, the principal’s designation of the
31 former spouse as an agent to make health care decisions for the principal is
32 revoked.

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

35 **Comment.** Section 4697 continues former Section 4727(e) without substantive change.
36 Subdivision (a) is comparable to Section 3(d) of the Uniform Health-Care Decisions Act (1993),
37 but does not revoke the designation of an agent on legal separation. For special rules applicable to
38 a federal “absentee” (as defined in Section 1403), see Section 3722.

39 This section is subject to limitation by the power of attorney. See Section 4681 (priority of
40 provisions of power of attorney). See also Sections 4607 (“agent” defined), 4617 (“health care
41 decision” defined), 4627 (“power of attorney for health care” defined), 4630 (“principal”
42 defined).

43 § 4698. Effect of later advance directive on earlier advance directive

44 4698. (a) Except as otherwise provided in the power of attorney, a valid power
45 of attorney for health care revokes any prior power of attorney for health care.

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

3 **Comment.** Subdivision (a) of Section 4698 continues former Section 4727(d) without
4 substantive change.

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

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

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

11 3(e) An advance health care directive that conflicts with an earlier advance health care
12 directive revokes the earlier directive to the extent of the conflict.

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

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

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

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

34 Additional complications arise when we consider the effect of a surrogate designation. The
35 UHCDA does not make clear whether a patient’s designation of a surrogate is an advance health
36 care directive. The staff concludes that it is not, even if a surrogate is designated in writing. (Of
37 course, it might be argued that a written designation of a surrogate is actually a power of attorney
38 for health care.) The comment to UHCDA Section 5 says that an “oral designation of a surrogate
39 made by a patient directly to the supervising health-care provider revokes a previous designation
40 of an agent.” But the governing section does not say this.

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

1 CHAPTER 2. ADVANCE HEALTH CARE DIRECTIVE FORMS

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

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

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

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

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

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

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

14 **Explanation**

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

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

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

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

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

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

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

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

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

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

24 * * * * *

25 PART 1
 26 POWER OF ATTORNEY FOR HEALTH CARE

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

30 _____
 31 (name of individual you choose as agent)

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

34 _____
 (home phone) (work phone)

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

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

7 PART 2

8 INSTRUCTIONS FOR HEALTH CARE

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

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

15 (a) Choice Not To Prolong Life

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

21 (b) Choice To Prolong Life

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

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

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

33
34 (Add additional sheets if needed.)

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

5
6 (Add additional sheets if needed.)

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

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

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

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

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

15 (1) Transplant

16 (2) Therapy

17 (3) Research

18 (4) Education

19 PART 4
20 PRIMARY PHYSICIAN
21 (OPTIONAL)

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

24 _____
25 (name of physician)

26 _____
27 (address)

(city)

(state)

(zip code)

28 _____
(phone)

1 OPTIONAL: If the physician I have designated above is not willing, able, or
2 reasonably available to act as my primary physician, I designate the following physician
3 as my primary physician:
4

5 _____
6 (name of physician)

7 _____
8 (address) (city) (state) (zip code)

9 _____
(phone)

10 * * * * *

11 (12) EFFECT OF COPY: A copy of this form has the same effect as the original.

12 (13) SIGNATURES: Sign and date the form here:

13 _____
(date)

(sign your name)

(address)

(print your name)

(city)

(state)

14
15 (Optional) SIGNATURES OF WITNESSES:

16 First witness

Second witness

(print name)

(print name)

(address)

(address)

(city)

(state)

(city)

(state)

(signature of witness)

(signature of witness)

(date)

(date)

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 4673 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 [Prob. Code § 4670 *et seq.*] 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, if the individual chooses. No provision is made in the form for the designation of co-agents in order not to encourage the practice. Designation of co-agents is discouraged because of the difficulties likely to be encountered if the co-agents are not all readily available or do not agree. If

1 co-agents are appointed, the instrument should specify that either is authorized to act if the other
2 is not reasonably available. It should also specify a method for resolving disagreements.

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

9 Part 1(3) of the power of attorney for health care form provides that the agent's authority
10 becomes effective upon a determination that the individual lacks capacity, but as authorized by
11 Section 2(c) [Prob. Code § 4683] a box is provided for the individual to indicate that the authority
12 of the agent takes effect immediately.

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

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

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

46 The health-care instructions given in Part 2 of the form are binding on the agent, any guardian,
47 any surrogate, and, subject to exceptions specified in Section 7(e)-(f) [Prob. Code § 4734-4735],
48 on the individual's health-care providers. Pursuant to Section 7(d) [Prob. Code § 4733], a health-
49 care provider must also comply with a reasonable interpretation of those instructions made by an
50 authorized agent, guardian, or surrogate.

51 Part 3 of the form provides the individual an opportunity to express an intention to donate
52 bodily organs and tissues at death. The options provided are derived from a suggested form in the
53 Comment to Section 2 of the Uniform Anatomical Gift Act (1987). [See Health & Safety Code §
54 7150 *et seq.*]

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

4 Paragraph (12) of the form conforms with the provisions of Section 12 [Prob. Code § 4661] by
5 providing that a copy of the form has the same effect as the original.

6 The Act does not require witnessing, [but see Prob. Code § 4673] but to encourage the practice
7 the form provides space for the signatures of two witnesses.

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

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

21 CHAPTER 3. HEALTH CARE SURROGATES

22 § 4710. Authority of surrogate to make health care decisions

23 4710. A surrogate who is designated or determined under this chapter may make
24 health care decisions for a patient if all of the following conditions are satisfied:

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

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

29 **Comment.** Section 4710 is drawn from Section 5(a) of the Uniform Health-Care Decisions Act
30 (1993). Section 4658 provides for capacity determinations by the primary physician under this
31 division. Both the patient and the surrogate must be adults. See Sections 4624 (“patient” defined),
32 4639 (“surrogate” defined). “Adult” includes an emancipated minor. See Fam. Code §§ 7002
33 (emancipation), 7050 (emancipated minor considered as adult for consent to medical, dental, or
34 psychiatric care).

35 See also Sections 4609 (“capacity” defined), 4613 (“conservator” defined), 4615 (“health care”
36 defined), 4617 (“health care decision” defined), 4624 (“patient” defined), 4627 (“power of
37 attorney for health care” defined), 4629 (“primary physician” defined), 4631 (“reasonably
38 available” defined), 4639 (“surrogate” defined).

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

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

1 **§ 4711. Patient’s designation of surrogate**

2 4711. A patient may designate an individual as a surrogate to make health care
3 decisions by [personally informing] the supervising health care provider. An oral
4 designation of a surrogate is effective only during the course of treatment or illness
5 or during the stay in the health care institution when the designation is made.

6 **Comment.** The first sentence of Section 4711 is drawn from Section 5(b) of the Uniform
7 Health-Care Decisions Act (1993). Both the patient and the surrogate must be adults. See
8 Sections 4624 (“patient” defined), 4639 (“surrogate” defined). The second sentence is intended to
9 guard against the possibility of giving effect to obsolete oral statements entered in the patient’s
10 record.

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

14 **Background from Uniform Act.** While a designation of an agent in a written power of
15 attorney for health care is preferred, situations may arise where an individual will not be in a
16 position to execute a power of attorney for health care. In that event, subsection (b) affirms the
17 principle of patient autonomy by allowing an individual to designate a surrogate by personally
18 informing the supervising health-care provider. The supervising health-care provider would then,
19 in accordance with Section 7(b), be obligated to promptly record the designation in the
20 individual’s health-care record. An oral designation of a surrogate made by a patient directly to
21 the supervising health-care provider revokes a previous designation of an agent. See Section 3(a).
22 [See Prob. Code § 4696.]

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

24 ☞ **Staff Note.** This section should make clear whether a surrogate can be designated in writing.
25 The UHCDA is not clear on the point, but the assumption in the uniform act and in writings about
26 it seems to be that these surrogate designations are oral. But what if the patient writes a note?
27 What if the patient can’t speak? Should a written surrogacy designation be treated as a power of
28 attorney? A simple note would not be sufficient as a power of attorney, unless it satisfies
29 applicable execution requirements. At a minimum, it would have to be signed and dated as
30 provided in Section 4680. We can see no reason to disregard a writing when an oral
31 communication is sufficient. This is a troublesome technicality that involves a handful of other
32 rules drawn from the UHCDA.

33 **§ 4712. Selection of statutory surrogate**

34 4712. (a) Subject to Section 4710, if no surrogate has been designated under
35 Section 4711 or if the designated surrogate is not reasonably available, the primary
36 physician may select a surrogate to make health care decisions for the patient from
37 among the following adults with a relationship to the patient:

- 38 (1) The spouse, unless legally separated.
- 39 (2) Children.
- 40 (3) Parents.
- 41 (4) Brothers and sisters.
- 42 (5) Grandchildren.

43 (6) An individual in a long-term relationship of indefinite duration with the
44 patient in which the individual has demonstrated an actual commitment to the
45 patient similar to the commitment of a spouse and in which the individual and the

1 patient consider themselves to be responsible for each other's well-being. This
2 individual may be known as a domestic partner.

3 (7) Close friends.

4 (b) The primary physician shall select the surrogate, with the assistance of other
5 health care providers or institutional committees as desired, in the order of priority
6 set forth in subdivision (a), subject to the following conditions:

7 (1) Where there are multiple possible surrogates at the same priority level, the
8 primary physician shall select the individual who reasonably appears after a good
9 faith inquiry to be best qualified.

10 (2) The primary physician may select as the surrogate an individual who is
11 ranked lower in priority if, in the primary physician's judgment, the individual is
12 best qualified to serve as the patient's surrogate.

13 (c) In determining the individual best qualified to serve as the surrogate under
14 this section, the following factors shall be considered:

15 (1) Whether the proposed surrogate reasonably appears to be best able to make
16 decisions in accordance with Section 4713.

17 (2) The degree of regular contact with the patient before and during the patient's
18 illness.

19 (3) Demonstrated care and concern for the patient.

20 (4) Familiarity with the patient's personal values.

21 (5) Availability to visit the patient.

22 (6) Availability to engage in face-to-face contact with health care providers for
23 the purpose of fully participating in the health care decisionmaking process.

24 (d) The primary physician may require a surrogate or proposed surrogate to
25 provide information to assist in making the determinations under this section and
26 to provide information to family members and other persons concerning the
27 selection of the surrogate and to communicate with them concerning health care
28 decisions for the patient.

29 (e) The primary physician shall document in the patient's health care record the
30 reasons for selecting a surrogate.

31 **Comment.** Section 4712 is a new provision, drawn from West Virginia law and the Uniform
32 Health-Care Decisions Act (1993). See W.Va. Code § 16-30B-7 (1997); Unif. Health-Care
33 Decisions Act § 5(b)-(d) (1993). Subdivision (a)(6) is drawn from New Mexico law. See N.M.
34 Stat. Ann. § 24-7A-5 (Michie 19__). "Adult" includes an emancipated minor. See Fam. Code §§
35 7002 (emancipation). A prospective surrogate and other persons may also seek judicial relief as
36 provided in Sections 4765-4766.

37 See also Sections 4617 ("health care decision" defined), 4624 ("patient" defined), 4631
38 ("reasonably available" defined), 4637 ("supervising health care provider" defined), 4639
39 ("surrogate" defined).

40 **Background from Uniform Act.** Subsection (d) requires a surrogate who assumes authority to
41 act to immediately so notify the members of the patient's family who in given circumstances
42 would be eligible to act as surrogate. Notice to the specified family members will enable them to
43 follow health-care developments with respect to their now incapacitated relative. It will also alert
44 them to take appropriate action, including the appointment of a guardian or the commencement of
45 judicial proceedings under Section 14, should the need arise. [Adapted from Unif. Health-Care
46 Decisions Act § 5(d) comment (1993).]

1 ☞ **Staff Note.** Uniform Health Care Decisions Act Section 5(d) requires the surrogate to
2 “communicate his or her assumption of authority as promptly as practicable to members of the
3 patient’s family ... who can readily be contacted” and Section 5(j) permits the supervising health
4 care provider to require a person who claims the right to act as surrogate to provide a declaration
5 “under penalty of perjury stating facts and circumstances reasonably sufficient to establish the
6 claimed authority.” We have not continued the detail and stricter duties in these provisions, since
7 the draft does not use the assumption of authority model and rigid priorities provided in the
8 uniform act.

9 Is this the correct balance? The duty to notify could be made stronger or could be omitted and
10 left to nonstatutory custom and practice.

11 § 4713. Standard governing surrogate’s health care decisions

12 4713. 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 4713 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 § 4714. Disqualification of surrogate

31 4714. A patient at any time may disqualify another person, including a member
32 of the patient’s family, from acting as the patient’s surrogate by a signed writing or
33 by personally informing the supervising health care provider of the
34 disqualification.

35 **Comment.** Section 4714 is drawn from Section 5(h) of the Uniform Health-Care Decisions Act
36 (1993). See Section 4731 (duty to record surrogate’s disqualification).

37 See also Sections 4624 (“patient” defined), 4637 (“supervising health care provider” defined),
38 4639 (“surrogate” 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).]

43 § 4715. Reassessment of surrogate selection

44 4715. (a) If a surrogate is not reasonably available, the surrogate may be
45 replaced.

1 (b) If an individual who ranks higher in priority under subdivision (a) of Section
2 4712 relative to a selected surrogate becomes reasonably available, the individual
3 with higher priority may be substituted for the identified surrogate unless the
4 primary physician determines that the lower ranked individual is best qualified to
5 serve as the surrogate.

6 **Comment.** Section 4715 is drawn from West Virginia law. See W. Va. Code § 16-30B-7
7 (1997). A surrogate may be replaced in the circumstances described in this section by applying
8 the rules in Section 4712. The determination of whether a surrogate has become unavailable or
9 whether a higher priority potential surrogate has become reasonably available is made by the
10 primary physician under Section 4712 and this section. Accordingly, person who believes it is
11 appropriate to reassess the surrogate selection would need to communicate with the primary
12 physician.

13 See also Sections 4629 (“primary physician” defined), 4631 (“reasonably available” defined),
14 4639 (“surrogate” defined).

15 CHAPTER 4. HEALTH CARE DECISIONS FOR 16 PATIENTS WITHOUT SURROGATES

17 ☞ **Staff Note.** The prior draft left the procedure relating to “medical intervention” in long-term
18 health facilities untouched. However, the general consensus at the November meeting was that it
19 would be better to have one procedure instead of two, and that this statute should try to replace
20 the “Epple bill” rules in Health and Safety Code Section 1418.8. This draft of Chapter 4 provides
21 much additional detail consistent with the general discussion at the November meeting.

22 § 4720. Application of chapter

23 4720. This chapter applies to health care decisions where a health care decision
24 needs to be made for a patient and all of the following conditions are satisfied:

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

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

29 (c) No surrogate can be selected under Chapter 3 (commencing with Section
30 4710) or the surrogate is not reasonably available.

31 (d) No relevant individual health care instruction is in the patient’s record.

32 **Comment.** Section 4720 is new. The procedure in this chapter is in part drawn from and
33 supersedes former Health and Safety Code Section 1418.8 applicable to medical interventions in
34 long-term care facilities. This chapter does not apply to emergency health care. See Section
35 4651(b).

36 See also Sections 4607 (“agent” defined), 4609 (“capacity” defined), 4613 (“conservator”
37 defined), 4617 (“health care decision” defined), 4623 (“individual health care instruction”
38 defined), 4624 (“patient” defined), 4629 (“primary physician” defined), 4631 (“reasonably
39 available” defined), 4639 (“surrogate” defined),.

40 § 4721. Referral to surrogate committee

41 4721. A patient’s primary physician may obtain approval for a proposed health
42 care decision by referring the matter to a surrogate committee before the health
43 care decision is implemented.

1 **Comment.** Section 4721 is new. It supersedes former Health and Safety Code Section
2 1418.8(d) applicable to medical interventions in long-term care facilities.

3 See also Sections 4617 (“health care decision” defined), 4624 (“patient” defined), 4629
4 (“primary physician” defined), 4631 (“reasonably available” defined), 4639 (“surrogate” defined).

5 **§ 4722. Composition of surrogate committee**

6 4722. (a) The surrogate committee shall include the following individuals:

7 (1) The patient’s primary physician.

8 (2) A registered professional nurse with responsibility for the patient.

9 (3) Other appropriate health care institution staff in disciplines as determined by
10 the patient’s needs.

11 (4) One or more patient representatives, who may be a family member or friend
12 of the patient who is unable to take full responsibility for the patient’s health care
13 decisions, but has agreed to serve on the surrogacy committee.

14 (5) In cases involving major health care decisions, a member of the community
15 who is not employed by or regularly associated with the primary physician, the
16 health care institution, or employees of the health care institution.

17 (6) In cases involving major health care decisions, a member of the health care
18 institution’s ethics committee or an outside ethics consultant.

19 (b) This section is intended to provide general guidelines for the composition of
20 the surrogate committee and is not intended to restrict participation by other
21 appropriate persons or unnecessarily interfere in administration of health care.

22 **Comment.** Section 4722 is new. Subdivision (a) is drawn in part from provisions of former
23 Health and Safety Code Section 1418.8(e)-(f) applicable to medical interventions in long-term
24 care facilities. Subdivision (a)(4) makes clear that a person who may be qualified to serve as a
25 surrogate under Chapter 4 (commencing with Section 4710) may still participate in health care
26 decisionmaking as a patient representative.

27 See also Sections 4615 (“health care” defined), 4617 (“health care decision” defined), 4619
28 (“health care institution” defined), 4624 (“patient” defined), 4629 (“primary physician” defined),
29 4722 (composition of surrogate committee).

30 **§ 4723. Standards of review by surrogate committee**

31 4723. (a) The surrogate committee’s review of proposed health care shall include
32 all of the following:

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

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

35 (3) A discussion of the desires of the patient, if known. To determine the desires
36 of the patient, the surrogate committee shall interview the patient, review the
37 patient’s medical records, and consult with family members or friends, if any have
38 been identified.

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

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

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

3 (b) The surrogate committee shall periodically evaluate the results of the
4 approved health care decision at least quarterly or upon a significant change in the
5 patient's medical condition.

6 **Comment.** Section 4723 is new and is patterned after provisions of former Health and Safety
7 Code Section 1418.8(e) applicable to medical interventions in long-term care facilities.

8 See also Sections 4617 ("health care decision" defined), 4624 ("patient" defined), 4629
9 ("primary physician" defined), 4722 (composition of surrogate committee).

10 **§ 4724. Decisionmaking by surrogate committee**

11 4724. The surrogate committee shall attempt to find consensus on proposed
12 health care decisions, but may approve proposed health care decisions by majority
13 vote. However, proposed health care decisions relating to refusal or withdrawal of
14 life-sustaining treatment may not be approved if any member of the surrogate
15 committee is opposed.

16 **Comment.** Section 4724 is new. The principle of decisionmaking by a majority is consistent
17 with the rule applicable to statutory surrogates under Section 5(e) of the Uniform Health-Care
18 Decisions Act (1993). With respect to medical interventions in long-term care facilities, this
19 section supersedes part of the second sentence of former Health and Safety Code Section
20 1418.8(e) relating to "a team approach to assessment and care planning."

21 See also Sections 4617 ("health care decision" defined), 4722 (composition of surrogate
22 committee).

23 **§ 4725. General surrogate rules applicable to surrogate committee**

24 4725. Provisions applicable to health care decisionmaking, duties, and
25 immunities of surrogates apply to a surrogate committee and its members.

26 **Comment.** Section 4725 is new. For provisions applicable to health care surrogates generally,
27 see Chapter 3 (commencing with Section 4710), Section 4741 (immunities of surrogate). See also
28 Section 4653 (mercy killing, assisted suicide, euthanasia not approved). For a list of sections
29 applicable to surrogates, see Section 4639 Comment.

30 See also Sections 4617 ("health care decision" defined), 4639 ("surrogate" defined), 4722
31 (composition of surrogate committee).

32 **CHAPTER 5. DUTIES OF HEALTH CARE PROVIDERS**

33 **§ 4730. Duty of supervising health care provider to communicate**

34 4730. Before implementing a health care decision made for a patient, a
35 supervising health care provider, if possible, shall promptly communicate to the
36 patient the decision made and the identity of the person making the decision.

37 **Comment.** Section 4730 is drawn from Section 7(a) of the Uniform Health-Care Decisions Act
38 (1993). The duty to communicate the identity of the decisionmaker also applies to a surrogate
39 committee. See Section 4725 (general surrogate rules applicable to surrogate committee).

40 See also Sections 4617 ("health care decision" defined), 4624 ("patient" defined), 4637
41 ("supervising health care provider" defined).

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

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

6 **§ 4731. Duty of supervising health care provider to record relevant information**

7 4731. (a) A supervising health care provider who knows of the existence of an
8 advance health care directive, a revocation of an advance health care directive, or a
9 designation or disqualification of a surrogate, shall promptly record its existence in
10 the patient’s health care record and, if it is in writing, shall request a copy. If a
11 copy is furnished, the supervising health care provider shall arrange for its
12 maintenance in the patient’s health care record.

13 (b) A supervising health care provider who knows of a revocation of a power of
14 attorney for health care or a disqualification of a surrogate shall make a reasonable
15 effort to notify the agent or surrogate of the revocation or disqualification.

16 **Comment.** Subdivision (a) of Section 4731 is drawn from Section 7(b) of the Uniform Health-
17 Care Decisions Act (1993). With respect to recording notice of revocation of a power of attorney
18 for health care, this section continues the substance of part of former Section 4727(b).

19 Subdivision (b) continues the substance of part of former Section 4727(b) and applies the same
20 duty to surrogate disqualification.

21 See also Sections 4605 (“advance health care directive” defined), 4624 (“patient” defined),
22 4627 (“power of attorney for health care” defined), 4637 (“supervising health care provider”
23 defined), 4639 (“surrogate” defined).

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

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

28 **§ 4732. Duty of primary physician to record relevant information**

29 4732. A primary physician who makes or is informed of a determination that a
30 patient lacks or has recovered capacity, or that another condition exists affecting
31 an individual health care instruction or the authority of an agent, conservator of the
32 person, or surrogate, shall promptly record the determination in the patient’s health
33 care record and communicate the determination to the patient, if possible, and to a
34 person then authorized to make health care decisions for the patient.

35 **Comment.** Section 4732 is drawn from Section 7(c) of the Uniform Health-Care Decisions Act
36 (1993). This duty also applies to a surrogate committee. See Section 4725 (general surrogate rules
37 applicable to surrogate committee).

38 See also Sections 4607 (“agent” defined), 4609 (“capacity” defined), 4613 (“conservator”
39 defined), 4617 (“health care decision” defined), 4623 (“individual health care instruction”
40 defined), 4624 (“patient” defined), 4629 (“primary physician” defined).

41 **Background from Uniform Act.** Section 7(c) imposes recording and communication
42 requirements relating to determinations that may trigger the authority of an agent, guardian or
43 surrogate to make health-care decisions on an individual’s behalf. The determinations covered by
44 these requirements are those specified in Sections 2(c)-(d) and 5(a) [Prob. Code §§ 4683 & 4710
45 respectively].

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

1 **§ 4733. Obligation of health care provider or institution to comply with health care**
2 **instructions and decisions**

3 4733. Except as provided in Sections 4734 and 4735, a health care provider or
4 health care institution providing care to a patient shall do the following:

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

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

11 **Comment.** Section 4733 is drawn from Section 7(d) of the Uniform Health-Care Decisions Act
12 (1993).

13 See also Sections 4609 (“capacity” defined), 4617 (“health care decision” defined), 4621
14 (“health care provider” defined), 4623 (“individual health care instruction” defined), 4624
15 (“patient” defined).

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

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

25 **§ 4734. Right to decline for reasons of conscience or institutional policy**

26 4734. (a) A health care provider may decline to comply with an individual health
27 care instruction or health care decision for reasons of conscience.

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

33 **Comment.** Section 4734 is drawn from Section 7(e) of the Uniform Health-Care Decisions Act
34 (1993).

35 See also Sections 4615 (“health care” defined), 4619 (“health care institution” defined), 4621
36 (“health care provider” defined), 4623 (“individual health care instruction” defined), 4624
37 (“patient” defined).

38 **Background from Uniform Act.** Not all instructions or decisions must be honored, however.
39 Section 7(e) [Prob. Code § 4734(a)] authorizes a health-care provider to decline to comply with
40 an individual instruction or health-care decision for reasons of conscience. Section 7(e) also
41 allows a health-care institution to decline to comply with a health-care instruction or decision if
42 the instruction or decision is contrary to a policy of the institution which is expressly based on
43 reasons of conscience and if the policy was timely communicated to the patient or to an
44 individual then authorized to make health-care decisions for the patient.

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

1 **§ 4735. Right to decline to provide ineffective care**

2 4735. A health care provider or health care institution may decline to comply
3 with an individual health care instruction or health care decision that requires
4 medically ineffective health care or health care contrary to generally accepted
5 health care standards applicable to the health care provider or institution.

6 **Comment.** Section 4734 is drawn from Section 7(f) of the Uniform Health-Care Decisions Act
7 (1993). This section is a special application of the general rule in Section 4654.

8 See also Sections 4615 (“health care” defined), 4619 (“health care institution” defined), 4621
9 (“health care provider” defined), 4623 (“individual health care instruction” defined), 4624
10 (“patient” defined).

11 **Background from Uniform Act.** Section 7(f) [Prob. Code § 4734(b)] further authorizes a
12 health-care provider or institution to decline to comply with an instruction or decision that
13 requires the provision of care which would be medically ineffective or contrary to generally
14 accepted health-care standards applicable to the provider or institution. “Medically ineffective
15 health care”, as used in this section, means treatment which would not offer the patient any
16 significant benefit.

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

18 **§ 4736. Obligation of declining health care provider or institution**

19 4736. A health care provider or health care institution that declines to comply
20 with an individual health care instruction or health care decision shall do all of the
21 following:

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

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

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

29 **Comment.** Section 4736 is drawn from Section 7(g) of the Uniform Health-Care Decisions Act
30 (1993). Nothing in this section requires administration of ineffective care. See Sections 4654,
31 4735.

32 See also Sections 4617 (“health care decision” defined), 4619 (“health care institution”
33 defined), 4621 (“health care provider” defined), 4623 (“individual health care instruction”
34 defined), 4624 (“patient” defined).

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

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

1 **§ 4737. Right to health care information**

2 4737. Unless otherwise specified in an advance health care directive, a person
3 then authorized to make health care decisions for a patient has the same rights as
4 the patient to request, receive, examine, copy, and consent to the disclosure of
5 medical or any other health care information.

6 **Comment.** Section 4737 is drawn from Section 8 of the Uniform Health-Care Decisions Act
7 (1993). This section continues former Section 4721 without substantive change, but is broader in
8 scope since it covers all persons authorized to make health care decisions a patient, not just
9 agents. A power of attorney may limit the right of the agent, for example, by precluding
10 examination of specified medical records or by providing that the examination of medical records
11 is authorized only if the principal lacks the capacity to give informed consent. The right of the
12 agent is subject to any limitations on the right of the patient to reach medical records. See Health
13 & Safety Code §§ 1795.14 (denial of right to inspect mental health records), 1795.20 (providing
14 summary of record rather than allowing access to entire record).

15 See also Sections 4605 (“advance health care directive” defined), 4617 (“health care decision”
16 defined), 4624 (“patient” defined).

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

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

23 **CHAPTER 6. IMMUNITIES AND LIABILITIES**

24 **§ 4740. Immunities of health care provider and institution**

25 4740. A health care provider or health care institution acting in good faith and in
26 accordance with generally accepted health care standards applicable to the health
27 care provider or institution is not subject to civil or criminal liability or to
28 discipline for unprofessional conduct for any actions in compliance with this
29 division, including any of the following conduct:

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

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

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

37 **Comment.** Section 4740 is drawn from Section 9(a) of the Uniform Health-Care Decisions Act
38 (1993) and supersedes former Section 4750. The major categories of actions listed in subdivisions
39 (a)-(c) are given as examples and not by way of limitation on the general rule stated in the
40 introductory paragraph. Hence, the protections of this section apply to selection of a surrogate
41 under Section 4712. This immunity also applies where health care decisions are approved by a
42 surrogate committee. See Section 4725 (general surrogate rules applicable to surrogate
43 committee).

44 The good faith standard of former law is continued in this section. Like former law, this section
45 protects the health care provider who acts in good faith reliance on a health care decision made by

1 an agent pursuant to this division. The reference to acting in accordance with generally accepted
2 health care standards makes clear that a health care provider is not protected from liability for
3 malpractice. The specific qualifications built into the rules provided in former Section 4750(a) are
4 superseded by the good faith rule in this section and by the affirmative requirements of other
5 provisions. See, e. g., Sections 4684(a) (scope of agent’s authority) (compare to second part of
6 introductory language of former Section 4750(a)), 4685 (standard governing agent’s health care
7 decisions) (compare to former Section 4750(a)(1)-(2)). Subdivision (b) is comparable to former
8 Section 4750(c). See also Section 4733 (obligations of health care provider or institution), 4734
9 (health care provider’s or institution’s right to decline), 4736 (obligations of declining health care
10 provider or institution).

11 See also Sections 4605 (“advance health care directive” defined), 4617 (“health care decision”
12 defined), 4619 (“health care institution” defined), 4621 (“health care provider” defined), 4624
13 (“patient” defined).

14 **Background from Uniform Act.** Section 9 [Prob. Code §§ 4740-4741] grants broad protection
15 from liability for actions taken in good faith. Section 9(a) permits a health-care provider or
16 institution to comply with a health-care decision made by a person appearing to have authority to
17 make health-care decisions for a patient; to decline to comply with a health-care decision made by
18 a person believed to be without authority; and to assume the validity of and to comply with an
19 advance health-care directive. Absent bad faith or actions taken that are not in accord with
20 generally accepted health-care standards, a health-care provider or institution has no duty to
21 investigate a claim of authority or the validity of an advance health-care directive.

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

23 **§ 4741. Immunities of agent and surrogate**

24 4741. A person acting as agent or surrogate under this part is not subject to civil
25 or criminal liability or to discipline for unprofessional conduct for health care
26 decisions made in good faith.

27 **Comment.** Section 4741 is drawn from Section 9(b) of the Uniform Health-Care Decisions Act
28 (1993). This immunity also applies where health care decisions are approved by a surrogate
29 committee. See Section 4725 (general surrogate rules applicable to surrogate committee).

30 See also Sections 4607 (“agent” defined), 4617 (“health care decision” defined), 4639
31 (“surrogate” defined).

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

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

40 **§ 4742. Statutory damages**

41 4742. (a) A health care provider or health care institution that intentionally
42 violates this part is subject to liability to the aggrieved individual for damages of
43 \$[500] or actual damages resulting from the violation, whichever is greater, plus
44 reasonable attorney’s fees.

45 (b) A person who intentionally falsifies, forges, conceals, defaces, or obliterates
46 an individual’s advance health care directive or a revocation of an advance health
47 care directive without the individual’s consent, or who coerces or fraudulently

1 induces an individual to give, revoke, or not to give an advance health care
2 directive, is subject to liability to that individual for damages of \$[2,500] or actual
3 damages resulting from the action, whichever is greater, plus reasonable attorney's
4 fees.

5 **Comment.** Section 4742 is drawn from Section 10 of the Uniform Health-Care Decisions Act
6 (1993).

7 See also Sections 4605 ("advance health care directive" defined), 4619 ("health care
8 institution" defined), 4621 ("health care provider" defined).

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

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

18 ☞ **Staff Note.** At the November 1997 meeting, the Commission requested further research into
19 the need for a statutory damages rule. The Commission thought liability for minimum statutory
20 damages and attorney's fees under this section should be eliminated if there are adequate
21 remedies elsewhere under California law. It was suggested that the statutory minimum damages
22 would provide a more useful remedy where actual damages are difficult or expensive to prove,
23 but that to be effective deterrents, the amounts would have to be substantially increased from the
24 \$500 and \$2500 levels drawn from the Uniform Health Care Decisions Act.

25 If this section were entirely deleted from the draft, a cause of action for violating the statutory
26 duties, as distinct from tort remedies and professional discipline, would have to be based on
27 negligence per se. Violation of a statutory duty establishes negligence per se, and if the statutory
28 violation proximately caused injury and no excuse or justification is shown, responsibility may be
29 fixed on the violator without other proof of failure to exercise due care. 6 B. Witkin, Summary of
30 California Law *Torts*, § 818, at 170 (9th ed. 1988); see also Evid. Code § 669 (codifying doctrine
31 of negligence per se); *Derrick v. Ontario Community Hosp.*, 47 Cal. App. 3d 145, 151, 120 Cal.
32 Rptr. 566 (1975) (requiring report of infectious disease to local health officer).

33 Compensatory damages in tort are to restore plaintiff as nearly as possible to his or her former
34 position, or to give some pecuniary equivalent. 6 B. Witkin, *supra*, § 1319, at 776. Punitive
35 damages may be awarded where the defendant's conduct has been "outrageous." *Id.* § 1327, at
36 785; see Civ. Code § 3294. Not every intentional tort will result in punitive damages.

37 There are analogous statutes. For example, no person may be subjected to a medical experiment
38 without his or her informed consent. Health & Safety Code § 24175(a). A person who negligently
39 allows a medical experiment to be conducted without informed consent is liable to the subject in a
40 minimum sum of \$50 and a maximum of \$1,000. *Id.* § 24178(a). A person who willfully fails to
41 obtain informed consent is liable to the subject in a maximum sum of \$5,000. *Id.* § 24176(b). The
42 statute also provides criminal sanctions. See *id.* § 24176(c). See generally 5 B. Witkin, Summary
43 of California Law *Torts* §§ 363-366, at 450-53 (9th ed. 1988).

44 It seems clear the compensatory damages language should be kept in Section 4742 to avoid any
45 argument about the applicability of the doctrine of negligence per se. The statutory minimum
46 penalty in Section 4742 appears justified by the analogous medical experiment provisions. The
47 answer to the question whether "there are adequate remedies elsewhere under California law,"
48 justifying deletion of the statutory minimum penalty, depends on the likely difficulty of proving
49 actual damages resulting from a violation of the Health Care Decisions Law. Seen in this light,
50 the statutory minimum penalty seems desirable.

1 The UHCDA rule on statutory damages has been applauded and criticized by Professors Larson
2 and Eaton in *The Limits of Advance Directives: A History and Assessment of the Patient Self-*
3 *Determination Act*, 32 Wake Forest L. Rev. 249, 290-92 (1997) [footnotes omitted]:

4 The UHCDA sets an important precedent by providing civil damages for health care
5 providers who intentionally disregard advance directives. The drafters recognized that
6 criminal prosecutions are unlikely to be brought against physicians in such a situation; thus,
7 civil penalties offer the only realistic enforcement mechanism. The amount suggested by the
8 UHCDA is nominal, however: “\$500 or actual damages resulting from the violation,
9 whichever is greater, plus reasonable attorney’s fees.” In enacting the UHCDA, New Mexico
10 raised this figure to \$2500, but it still could be paid out of the petty cash fund of the typical
11 health care provider, and is unlikely to influence compliance. We recommend that the
12 minimum statutory damages figure in the UHCDA be raised significantly and that the Act’s
13 penalty provisions also include the following two components designed to counter potential
14 financial reasons for disregarding advance directives.

15 First, where a health care provider provides treatment in knowing violation or reckless
16 disregard of an advance directive, the patient-or the patient’s estate-should not be liable for
17 payment of that treatment. This recognized legal principle should be expressly incorporated
18 into advance directive statutes with exemptions for the cost of comfort care, appropriate pain
19 medication, and any treatment provided for reasons of conscience in accordance with section
20 7(e) of the UHCDA. This could minimize the financial incentive to provide excess treatment
21 under a fee-for-service payment method.

22 Second, where a health care provider fails to provide treatment in knowing violation or
23 reckless disregard of an advance directive, the patient-or the patient’s estate-should be able to
24 recover more than nominal damages. Many state advance directive statutes, including the
25 UHCDA, give individuals the option of directing that artificial nutrition and hydration not be
26 discontinued. The advance directive in the UHCDA also extends to individuals the “Choice to
27 Prolong Life” in addition to the “Choice Not to Prolong Life.” Ignoring these requests should
28 not go uncompensated simply because it is difficult to measure the actual damages from
29 speeding up of the passing of a dying patient. Further, minimum statutory damages may be
30 insufficient to discourage violations. Concern about under-treatment has been raised in the
31 context of managed care organizations and Medicare DRG-prospective payment methods,
32 which create financial incentives to minimize treatment. Just as the financial incentive for
33 over-treating fee-for- service patients can be reduced by eliminating the duty to pay for the
34 excess treatment, the financial incentive for under-treating managed-care patients can be
35 reduced by awarding damages in an amount at least equal to the cost of the unprovided
36 services. Advance directive statutes should expressly recognize this principle as an alternative
37 minimum measure of damages.

38 The staff recommends raising the limits to at least \$2500 and \$10,000, respectively, and serious
39 consideration of the additional remedies proposed as a way to provide disincentives for
40 overtreatment and undertreatment in disregard of advance health care directives.

41 **§ 4743. Criminal penalties**

42 4743. Any person who alters or forges a written advance health care directive of
43 another, or willfully conceals or withholds personal knowledge of a revocation of
44 an advance directive, with the intent to cause a withholding or withdrawal of
45 health care necessary to keep the patient alive contrary to the desires of the patient,
46 and thereby directly causes health care necessary to keep the patient alive to be
47 withheld or withdrawn and the death of the patient thereby to be hastened, is
48 subject to prosecution for unlawful homicide as provided in Chapter 1
49 (commencing with Section 187) of Title 4 of Part 1 of the Penal Code.

1 **Comment.** Section 4743 continues former Section 4726 without substantive change and
2 supersedes former Health and Safety Code Section 7191(d) (Natural Death Act). References to
3 “principal” have been changed to “patient” to reflect the broader scope of this division, and some
4 surplus language has been omitted.

5 See also Sections 4605 (“advance health care directive” defined), 4615 (“health care” defined),
6 4624 (“patient” defined).

7 PART 3 . JUDICIAL PROCEEDINGS

8 ☞ **Staff Note.** This part mirrors the existing rules in Probate Code Sections 4900-4948. In order
9 to adjust to the new Division 4.7, existing Sections 4900-4948 will have to be revised in a few
10 technical respects and renumbered to fit within the streamlined PAL, probably starting at Section
11 4500.

12 CHAPTER 1. GENERAL PROVISIONS

13 § 4750. Judicial intervention disfavored

14 4750. Subject to this division:

15 (a) An advance health care directive is effective and exercisable free of judicial
16 intervention.

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

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

21 (d) A health care decision made pursuant to Chapter 4 (commencing with
22 Section 4720) is effective without judicial approval.

23 **Comment.** Subdivision (a) of Section 4750 continues former Section 4900 to the extent it
24 applied to powers of attorney for health care.

25 Subdivision (b) is drawn from Section 2(f) of the Uniform Health-Care Decisions Act (1993).

26 Subdivision (c) is drawn from Sections 2(f) and 5(g) of the Uniform Health-Care Decisions Act
27 (1993).

28 Subdivision (d) is patterned after subdivisions (b) and (c) and is analogous to Health and Safety
29 Code Section 1418.8(i) (medical interventions for resident of long-term care facility).

30 See also Sections 4605 (“advance health care directive” defined), 4607 (“agent” defined), 4617
31 (“health care decision” defined), 4624 (“patient” defined), 4630 (“principal” defined), 4639
32 (“surrogate” defined).

33 § 4751. Cumulative remedies

34 4751. The remedies provided in this part are cumulative and not exclusive of any
35 other remedies provided by law.

36 **Comment.** Section 4751 continues former Section 4901 to the extent it applied to powers of
37 attorney for health care.

38 § 4752. Effect of provision in advance directive attempting to limit right to petition

39 4752. Except as provided in Section 4753, this part is not subject to limitation in
40 an advance health care directive.

1 **Comment.** Section 4752 continues former Section 4902 to the extent it applied to powers of
2 attorney for health care.

3 See also Sections 4605 (“advance health care directive” defined), 4681 (general rule on
4 limitations provided in power of attorney).

5 **§ 4753. Limitations on right to petition**

6 4753. (a) Subject to subdivision (b), an advance health care directive may
7 expressly eliminate the authority of a person listed in Section 4765 to petition the
8 court for any one or more of the purposes enumerated in Section 4766, if both of
9 the following requirements are satisfied:

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

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

14 “I am a lawyer authorized to practice law in the state where this advance
15 health care directive was executed, and _____ [insert name] was my
16 client at the time this advance directive was executed. I have advised my
17 client concerning his or her rights in connection with this advance directive
18 and the applicable law and the consequences of signing or not signing this
19 advance directive, and my client, after being so advised, has executed this
20 advance directive.”

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

23 (1) The conservator of the person, with respect to a petition relating to an
24 advance directive, for a purpose specified in subdivision (b) or (d) of Section
25 4766.

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

28 **Comment.** Section 4753 continues former Section 4903 to the extent it applied to powers of
29 attorney for health care. Subdivision (a) makes clear that a power of attorney may limit the
30 applicability of this part only if it is executed with the advice and approval of the principal’s
31 counsel. This limitation is designed to ensure that the execution of a power of attorney that
32 restricts the remedies of this part is accomplished knowingly by the principal. The inclusion of a
33 provision in the power of attorney making this part inapplicable does not affect the right to resort
34 to any judicial remedies that may otherwise be available.

35 Subdivision (b) specifies the purposes for which a conservator of the person or an agent may
36 petition the court under this part with respect to a power of attorney for health care. The rights
37 provided in these paragraphs cannot be limited by a provision in an advance directive, but the
38 advance directive may restrict or eliminate the right of any other persons to petition the court
39 under this part if the individual executing the advance directive has the advice of legal counsel
40 and the other requirements of subdivision (a) are met. See Section 4681 (effect of provision in
41 power of attorney attempting to limit right to petition).

42 Under subdivision (b)(1), despite a contrary provision in the advance directive, the conservator
43 of the person may obtain a determination of whether an advance directive is in effect or has
44 terminated (Section 4766(b) or whether the authority of an agent or surrogate is terminated
45 (Section 4766(d)). See also Section 4766 Comment.

1 Under subdivision (b)(2), despite a contrary provision in the power of attorney, the agent may
2 obtain a determination of whether the power of attorney for health care is in effect or has
3 terminated (Section 4766(a)), or an order passing on the acts or proposed acts of the agent under
4 the power of attorney (Section 4766(b)).

5 See also Sections 4607 (“agent” defined), 4605 (“advance health care directive” defined), 4613
6 (“conservator” defined), 4627 (“power of attorney for health care” defined).

7 **§ 4754. Jury trial**

8 4754. There is no right to a jury trial in proceedings under this division.

9 **Comment.** Section 4754 continues former Section 4904 to the extent it applied to powers of
10 attorney for health care. This section is consistent with the rule applicable to other fiduciaries. See
11 Sections 1452 (guardianships and conservatorships), 4504 (powers of attorney generally), 7200
12 (decedents’ estates), 17006 (trusts).

13 **§ 4755. Application of general procedural rules**

14 4755. Except as otherwise provided in this division, the general provisions in
15 Division 3 (commencing with Section 1000) apply to proceedings under this
16 division.

17 **Comment.** Section 4755 continues former Section 4905 to the extent it applied to powers of
18 attorney for health care. Like Section 4505, this section provides a cross-reference to the general
19 procedural rules that apply to this division. See, e.g., Sections 1003 (guardian ad litem), 1021
20 (verification required), 1041 (clerk to set matters for hearing), 1046 (hearing and orders), 1203
21 (order shortening time for notice), 1215-1216 (service), 1260 (proof of service).

22 CHAPTER 2. JURISDICTION AND VENUE

23 **§ 4760. Jurisdiction and authority of court or judge**

24 4760. (a) The superior court has jurisdiction in proceedings under this division.

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

30 **Comment.** Section 4760 continues former Section 4920 to the extent it applied to powers of
31 attorney for health care. Like Section 4520, this section is comparable to Section 7050 governing
32 the jurisdiction and authority of the court in proceedings concerning administration of decedents’
33 estates. See Section 7050 Comment.

34 **§ 4761. Basis of jurisdiction**

35 4761. The court may exercise jurisdiction in proceedings under this division on
36 any basis permitted by Section 410.10 of the Code of Civil Procedure.

37 **Comment.** Section 4761 continues former Section 4921 to the extent it applied to powers of
38 attorney for health care. Like Section 4521, this section is comparable to Section 17004
39 (jurisdiction under Trust Law). This section recognizes that the court, in proceedings relating to
40 powers of attorney under this division, may exercise jurisdiction on any basis that is not
41 inconsistent with the California or United States Constitutions, as provided in Code of Civil

1 Procedure Section 410.10. See generally Judicial Council Comment to Code Civ. Proc. § 410.10;
2 Prob. Code § 17004 Comment (basis of jurisdiction under Trust Law).

3 **§ 4762. Jurisdiction over agent or surrogate**

4 4762. Without limiting Section 4761, a person who acts as an agent under a
5 power of attorney for health care or as a surrogate under this division is subject to
6 personal jurisdiction in this state with respect to matters relating to acts and
7 transactions of the agent or surrogate performed in this state or affecting a patient
8 in this state.

9 **Comment.** Section 4762 continues former Section 4922 to the extent it applied to powers of
10 attorney for health care, and extends its principles to cover surrogates. Like Section 4522, this
11 section is comparable to Sections 3902(b) (jurisdiction over custodian under Uniform Transfers to
12 Minors Act) and 17003(a) (jurisdiction over trustee). This section is intended to facilitate exercise
13 of the court’s power under this part when the court’s jurisdiction is properly invoked. As
14 recognized by the introductory clause, constitutional limitations on assertion of jurisdiction apply
15 to the exercise of jurisdiction under this section. Consequently, appropriate notice must be given
16 to an agent or surrogate as a condition of personal jurisdiction. *Cf.* Mullane v. Central Hanover
17 Bank & Trust Co., 339 U.S. 306 (1950).

18 See also Sections 4607 (“agent” defined), 4624 (“patient” defined), 4627 (“power of attorney
19 for health care” defined), 4639 (“surrogate” defined).

20 **§ 4763. Venue**

21 4763. The proper county for commencement of a proceeding under this division
22 shall be determined in the following order of priority:

- 23 (a) The county in which the patient resides.
24 (b) The county in which the agent or surrogate resides.
25 (c) Any other county that is in the patient’s best interest.

26 **Comment.** Section 4763 continues former Section 4923 to the extent it applied to powers of
27 attorney for health care.

28 See also Sections 4607 (“agent” defined), 4624 (“patient” defined), 4639 (“surrogate” defined).

29 **CHAPTER 3. PETITIONS, ORDERS, APPEALS**

30 **§ 4765. Petitioners**

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


- 33 (a) The patient.
34 (b) The patient’s spouse, unless legally separated.
35 (c) A relative of the patient.
36 (d) The agent or surrogate.
37 (e) The conservator of the person of the patient.
38 (f) The court investigator, described in Section 1454, of the county where the
39 patient resides.
40 (g) The public guardian of the county where the patient resides.

1 (h) The supervising health care provider or health care institution involved with
2 the patient’s care.

3 (i) Any other interested person or friend of the patient.

4 **Comment.** Section 4765 continues former Section 4940 to the extent it applied to powers of
5 attorney for health care, with some omissions and clarifications appropriate for the scope of this
6 division. The purposes for which a person may file a petition under this part are limited by other
7 rules. See Sections 4752 (effect of provision in advance directive attempting to limit right to
8 petition), 4753 (limitations on right to petition), 4766 (petition with respect to advance directive);
9 see also Section 4751 (other remedies not affected).

10 See also Sections 4607 (“agent” defined), 4613 (“conservator” defined), 4624 (“patient”
11 defined), 4635 (“supervising health care provider” defined), 4639 (“surrogate” defined).

12  **Staff Note.** The Commission should consider whether the list of potential petitioners is overly
13 broad. Some commentators argue it is best to restrict the class of potential petitioners to avoid
14 endless and expensive second-guessing. The approach in this section is based on the approach of
15 current law. We are not aware of any special problems that have arisen as a result of the existing
16 rules. It may be argued that officious intermeddlers have intervened in some cases, but our
17 general understanding is that this would occur anyway through a petition to be appointed as a
18 guardian ad litem or conservator. However, since the scope of this division is broader than the
19 existing procedure in the Power of Attorney Law, the issue needs to be carefully considered.

20 Section 14 of the UHCDA provides for the following petitioners:

21 On petition of a patient, the patient’s agent, guardian, or surrogate, a health-care provider or
22 institution involved with the patient’s care, or an individual described in Section 5(b) or (c),
23 the [appropriate] court may enjoin or direct a health-care decision or order other equitable
24 relief. A proceeding under this section is governed by [here insert appropriate reference to the
25 rules of procedure or statutory provisions governing expedited proceedings and proceedings
26 affecting incapacitated persons].

27 The individuals incorporated by the reference to Section 5(b)-(c) are the statutory surrogates —
28 spouse, child, parent, siblings, and adults who have exhibited special care and concern.

29 **§ 4766. Purposes of petition**

30 4766. A petition may be filed under this part for any one or more of the
31 following purposes:

32 (a) Determining whether the patient has capacity to make health care decisions.

33 (b) Determining whether an advance health care directive is in effect or has
34 terminated.

35 (c) Determining whether the acts or proposed acts of an agent or surrogate are
36 consistent with the patient’s desires as expressed in an advance health care
37 directive or otherwise made known to the court or, where the patient’s desires are
38 unknown or unclear, whether the acts or proposed acts of the agent or surrogate
39 are in the patient’s best interest.

40 (d) Declaring that the authority of an agent or surrogate is terminated, upon a
41 determination by the court that the agent or surrogate has made a health care
42 decision for the patient that authorized anything illegal or upon a determination by
43 the court of both of the following:

44 (1) The agent or surrogate has violated, has failed to perform, or is unfit to
45 perform, the duty under an advance health care directive to act consistent with the
46 patient’s desires or, where the patient’s desires are unknown or unclear, is acting

1 (by action or inaction) in a manner that is clearly contrary to the patient’s best
2 interest.

3 (2) At the time of the determination by the court, the patient lacks the capacity to
4 execute or to revoke an advance health care directive or disqualify a surrogate.

5 **Comment.** Section 4766 continues the substance of former Section 4942 to the extent it applied
6 to powers of attorney for health care, and adds language relating to advance directives and
7 surrogates for consistency with the scope of this division.

8 Under subdivision (c), the patient’s desires as expressed in the power of attorney for health
9 care, individual health care instructions, or otherwise made known to the court provide the
10 standard for judging the acts of the agent or surrogate. Subdivision (d) permits the court to
11 terminate health care decisionmaking authority where an agent or surrogate is not complying with
12 the duty to carry out the patient’s desires or act in the patient’s best interest.

13 An attempted suicide by the principal is not to be construed to indicate the principal’s desire
14 that health care be restricted or inhibited. See Section 4655(b).

15 Where it is not possible to use a standard based on the patient’s desires because they are not
16 stated in an advance directive or otherwise known or are unclear, subdivision (b) provides that the
17 “patient’s best interest” standard be used.

18 Subdivision (d) permits termination of authority under an advance health care directive not only
19 where an agent, for example, is acting illegally or failing to perform his or her duties under a
20 power of attorney or is acting contrary to the known desires of the principal, but also where the
21 desires of the principal are unknown or unclear and the agent is acting in a manner that is clearly
22 contrary to the patient’s best interest. The patient’s desires may become unclear as a result of
23 developments in medical treatment techniques that have occurred since the patient’s desires were
24 expressed, such developments having changed the nature or consequences of the treatment.

25 An advance health care directive may limit the authority to petition under this part. See
26 Sections 4752 (effect of provision in power of attorney attempting to limit right to petition), 4753
27 (limitations on right to petition).

28 See also Sections 4605 (“advance health care directive” defined), 4607 (“agent” defined), 4609
29 (“capacity” defined), 4613 (“conservator” defined), 4627 (“power of attorney for health care”
30 defined), 4630 (“principal” defined), 4639 (“surrogate” defined).

31 **§ 4767. Commencement of proceeding**

32 4767. A proceeding under this part is commenced by filing a petition stating
33 facts showing that the petition is authorized under this part, the grounds of the
34 petition, and, if known to the petitioner, the terms of any advance health care
35 directive in question.

36 **Comment.** Section 4767 continues former Section 4943 to the extent it applied to powers of
37 attorney for health care.

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

39 **§ 4768. Dismissal of petition**

40 4768. The court may dismiss a petition if it appears that the proceeding is not
41 reasonably necessary for the protection of the interests of the patient and shall stay
42 or dismiss the proceeding in whole or in part when required by Section 410.30 of
43 the Code of Civil Procedure.

44 **Comment.** Section 4768 is similar to Section 4944 in the Power of Attorney Law. Under this
45 section, the court has authority to stay or dismiss a proceeding in this state if, in the interest of
46 substantial justice, the proceeding should be heard in a forum outside this state. See Code Civ.
47 Proc. § 410.30.

1 See also Section 4624 (“patient” defined).

2 **§ 4769. Notice of hearing**

3 4769. (a) Subject to subdivision (b), at least 15 days before the time set for
4 hearing, the petitioner shall serve notice of the time and place of the hearing,
5 together with a copy of the petition, on the following:

6 (1) The agent or surrogate, if not the petitioner.

7 (2) The patient, if not the petitioner.

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

13 **Comment.** Section 4769 continues former Section 4945 to the extent it applied to powers of
14 attorney for health care and extends its principles to apply to surrogates. Subdivision (b) is
15 generalized from former Section 4945(b) applicable to property powers of attorney.

16 See also Sections 4607 (“agent” defined), 4624 (“patient” defined), 4630 (“principal” defined),
17 4639 (“surrogate” defined).

18 **§ 4770. Temporary health care order**

19 4770. The court in its discretion, on 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 on 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), 4613 (“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.

1 (b) The person commencing the proceeding, if the court determines that the
2 agent or surrogate has clearly violated the duties under the advance health care
3 directive.

4 **Comment.** Section 4771 continues part of former Section 4947 to the extent it applied to
5 powers of 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.

11 (b) An order dismissing the petition or denying a motion to dismiss under
12 Section 4768.

13 **Comment.** Section 4772 continues part of former Section 4948 to the extent it applied to
14 powers of attorney for health care.

15 PART 4 . REQUEST TO FOREGO
16 RESUSCITATIVE MEASURES

17  **Staff Note.** Should DNRs be treated as advance directives (written individual health care
18 instructions) in some fashion? Or excluded from the other rules? This draft preserves the
19 substance of the existing statute, making only a few changes for consistency with the rest of the
20 division.

21 Harley Spitler finds these provisions to be a “mish-mash of ambiguity.” (Letter of Oct. 10,
22 1997, p. 7.)

23 **§ 4780. Request to forego resuscitative measures**

24 4780. (a) As used in this part:

25 (1) “Request to forego resuscitative measures” means a written document,
26 signed by (A) an individual, or a legally recognized surrogate health care
27 decisionmaker, and (B) a physician, that directs a health care provider to forego
28 resuscitative measures for the individual.

29 (2) “Request to forego resuscitative measures” includes a prehospital “do not
30 resuscitate” form as developed by the Emergency Medical Services Authority or
31 other substantially similar form.

32 (b) A request to forego resuscitative measures may also be evidenced by a
33 medallion engraved with the words “do not resuscitate” or the letters “DNR,” a
34 patient identification number, and a 24-hour toll-free telephone number, issued by
35 a person pursuant to an agreement with the Emergency Medical Services
36 Authority.

37 **Comment.** Section 4780 continues former Section 4753(b) without substantive change. The
38 phrase “for the individual” has been added at the end of subdivision (a) for clarity. The former
39 reference to “physician and surgeon” has been changed to “physician” for clarity. See Section
40 4623 (“physician” defined). For rules governing “legally recognized surrogate health care

1 decisionmakers,” see Part 2 (commencing with Section 4670) (Uniform Health Care Decisions
2 Act).

3 See also Section 4781 (“health care provider” defined), 4624 (“patient” defined).

4 **§ 4781. Health care provider**

5 4781. As used in this part, “health care provider” includes, but is not limited to,
6 the following:

7 (a) Persons described in Section 4621.

8 (b) Emergency response employees, including, but not limited to, firefighters,
9 law enforcement officers, emergency medical technicians I and II, paramedics, and
10 employees and volunteer members of legally organized and recognized volunteer
11 organizations, who are trained in accordance with standards adopted as regulations
12 by the Emergency Medical Services Authority pursuant to Sections 1797.170,
13 1797.171, 1797.172, 1797.182, and 1797.183 of the Health and Safety Code to
14 respond to medical emergencies in the course of performing their volunteer or
15 employee duties with the organization.

16 **Comment.** Section 4781 continues former Section 4753(g) without substantive change.

17 **§ 4782. Immunity for honoring request to forego resuscitative measures**

18 4782. A health care provider who honors a request to forego resuscitative
19 measures is not subject to criminal prosecution, civil liability, discipline for
20 unprofessional conduct, administrative sanction, or any other sanction, as a result
21 of his or her reliance on the request, if the health care provider (1) believes in good
22 faith that the action or decision is consistent with this part, and (2) has no
23 knowledge that the action or decision would be inconsistent with a health care
24 decision that the individual signing the request would have made on his or her own
25 behalf under like circumstances.

26 **Comment.** Section 4782 continues former Section 4753(a) without substantive change.

27 See also Sections 4617 (“health care decision” defined), 4781 (“health care provider” defined),
28 4780 (“request to forego resuscitative measures” defined),

29 **§ 4783. Forms for requests to forego resuscitative measures**

30 4783. (a) Forms for requests to forego resuscitative measures printed after
31 January 1, 1995, shall contain the following:

32 “By signing this form, the surrogate acknowledges that this request to forego
33 resuscitative measures is consistent with the known desires of, and with the
34 best interest of, the individual who is the subject of the form.”

35 (b) A substantially similar printed form is valid and enforceable if all of the
36 following conditions are met:

37 (1) The form is signed by the individual, or the individual’s legally recognized
38 surrogate health care decisionmaker, and a physician.

39 (2) The form directs health care providers to forego resuscitative measures.

40 (3) The form contains all other information required by this section.

1 **Comment.** Section 4783 continues former Section 4753(c)-(d) without substantive change. For
2 rules governing “legally recognized surrogate health care decisionmakers,” see Part 2
3 (commencing with Section 4670) (Uniform Health Care Decisions Act).

4 See also Sections 4625 (“physician” defined), 4780 (“request to forego resuscitative measures”
5 defined), 4781 (“health care provider” defined).

6 **§ 4784. Presumption of validity**

7 4784. In the absence of knowledge to the contrary, a health care provider may
8 presume that a request to forego resuscitative measures is valid and unrevoked.

9 **Comment.** Section 4784 continues former Section 4753(e) without change.

10 See also Sections 4780 (“request to forego resuscitative measures” defined), 4781 (“health care
11 provider” defined).

12 **§ 4785. Application of part**

13 4785. This part applies regardless of whether the individual executing a request
14 to forego resuscitative measures is within or outside a hospital or other health care
15 institution.

16 **Comment.** Section 4785 continues former Section 4753(f) without substantive change.

17 See also Section 4619 (“health care institution” defined), 4780 (“request to forego resuscitative
18 measures” defined).

19 **§ 4786. Relation to other law**

20 4786. This part does not repeal or narrow laws relating to health care
21 decisionmaking.

22 **Comment.** Section 4786 restates former Section 4753(h) without substantive change. The
23 references to the Durable Power of Attorney for Health Care and the Natural Death Act have been
24 omitted as unnecessary. The reference to “current” laws had been eliminated as obsolete.

25 PART 5 . ADVANCE HEALTH CARE DIRECTIVE REGISTRY

26 ☞ **Staff Note.** This registry scheme is implemented through a form issued by the Secretary of
27 State. See Memorandum 97-41, Exhibit pp. 13-14. Informal conversations suggest that very few
28 forms have been filed (around 80 was one estimate) and that there have been no inquiries directed
29 to the registry seeking information.

30 **§ 4800. Registry system established by Secretary of State**

31 4800. (a) The Secretary of State shall establish a registry system through which a
32 person who has executed a written advance health care directive may register in a
33 central information center information regarding the advance directive, making
34 that information available upon request to any health care provider, the public
35 guardian, or other person authorized by the registrant.

36 (b) Information that may be received and released is limited to the registrant’s
37 name, social security or driver’s license or other individual identifying number
38 established by law, if any, address, date and place of birth, the intended place of

1 deposit or safekeeping of the written advance health care directive, and the name
2 and telephone number of the agent and any alternative agent.

3 (c) The Secretary of State, at the request of the registrant, may transmit the
4 information received regarding the written advance health care directive to the
5 registry system of another jurisdiction as identified by the registrant.

6 (d) The Secretary of State may charge a fee to each registrant in an amount such
7 that, when all fees charged to registrants are aggregated, the aggregated fees do not
8 exceed the actual cost of establishing and maintaining the registry.

9 **Comment.** Section 4800 continues former Section 4800 without substantive change as applied
10 to powers of attorney for health care, and generalizes the former provision to apply to all written
11 advance health care directives. Hence, in addition to powers of attorney for health care, this
12 section as revised permits registration of individual health care instructions.

13 See Section 4605 (“advance health care directive” defined), 4607 (“agent” defined), 4621
14 (“health care provider” defined).

15 **§ 4801. Identity and fees**

16 4801. The Secretary of State shall establish procedures to verify the identities of
17 health care providers, the public guardian, and other authorized persons requesting
18 information pursuant to Section 4800. No fee shall be charged to any health care
19 provider, the public guardian, or other authorized person requesting information
20 pursuant to Section 4800.

21 **Comment.** Section 4801 continues former Section 4801 without change.

22 See also Section 4621 (“health care provider” defined).

23 **§ 4802. Notice**

24 4802. The Secretary of State shall establish procedures to advise each registrant
25 of the following:

26 (a) A health care provider may not honor a written advance health care directive
27 until it receives a copy from the registrant.

28 (b) Each registrant must notify the registry upon revocation of the advance
29 directive.

30 (c) Each registrant must reregister upon execution of a subsequent advance
31 directive.

32 **Comment.** Section 4802 continues former Section 4802 without substantive change as applied
33 to powers of attorney for health care, and generalizes it to apply to all written advance health care
34 directives. Hence, in addition to powers of attorney for health care, this section as revised permits
35 registration of individual health care instructions.

36 See also Section 4605 (“advance health care directive” defined), 4621 (“health care provider”
37 defined).

38 **§ 4803. Effect of failure to register**

39 4803. Failure to register with the Secretary of State does not affect the validity of
40 any advance health care directive.

1 **Comment.** Section 4803 continues former Section 4804 without substantive change as applied
2 to powers of attorney for health care, and generalizes it to apply to all written advance health care
3 directives instead of the more limited class of durable powers of attorney for health care.

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

5 **§ 4804. Effect of registration on revocation and validity**

6 4804. Registration with the Secretary of State does not affect the ability of the
7 registrant to revoke the registrant’s advance health care directive or a later
8 executed advance directive, nor does registration raise any presumption of validity
9 or superiority among any competing advance directives or revocations.

10 **Comment.** Section 4804 continues former Section 4805 without substantive change as applied
11 to powers of attorney for health care, and generalizes it to apply to all written advance health care
12 directives. Hence, in addition to powers of attorney for health care, this section as revised permits
13 registration of individual health care instructions.

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

15 **§ 4805. Effect on health care provider**

16 4805. Nothing in this chapter shall be construed to require a health care provider
17 to request from the registry information about whether a patient has executed an
18 advance health care directive. Nothing in this chapter shall be construed to affect
19 the duty of a health care provider to provide information to a patient regarding
20 advance health care directives pursuant to any provision of federal law.

21 **Comment.** Section 4805 continues former Section 4806 without substantive change as applied
22 to powers of attorney for health care, and generalizes it to apply to all written advance health care
23 directives. Hence, in addition to powers of attorney for health care, this section as revised permits
24 registration of individual health care instructions.

25 See also Section 4605 (“advance health care directive” defined), 4621 (“health care provider”
26 defined), 4624 (“patient” defined).

27
