

Second Supplement to Memorandum 98-16

Health Care Decisions: Staff Draft Tentative Recommendation (Conforming Revisions)

Attached to this memorandum is the conforming revisions portion of the staff draft tentative recommendation on *Health Care Decisions*. Included here are conforming amendments in the Power of Attorney Law and other parts of the Probate Code, Comments showing the disposition of repealed sections in the Health and Safety Code and the Probate Code, and revisions needed in existing Comments in the Power of Attorney Law.

The Commission has not seen most of this material before, although the Comments to the draft statute contain many references to the prior law. Comments to repealers generally duplicate information in source Comments, so much of the information is not new. Several earlier memorandums considered issues involving parts of these conforming revisions, e.g., the Natural Death Act (Health & Safety Code § 7185 *et seq.*), which was attached to Memorandum 97-41, the first staff draft.

At the meeting, the staff does not intend to go through this material in detail, but there are some issues raised in staff notes following two sections:

Replacement of medical intervention procedure — Health & Safety Code
§ 1418.8, at pp. 3-4

Criminal penalties under Natural Death Act — Health & Safety Code §
7197, at p. 9

If anyone has concerns with any other parts of this material, you should raise it at the meeting.

Respectfully submitted,

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Assistant Executive Secretary

Accompanies the Second Supplement to Memorandum 98-16

CONFORMING REVISIONS AND REPEALS

☞ **Staff Note.** For convenience of reference, the text of some repealed sections has been included in this document. To improve readability, repealed sections reproduced below are not shown in ~~strikeout~~. Note, however, that when a tentative recommendation is prepared for distribution, we usually do not include the text of repealed sections. Bills include the text of sections that are repealed on an individual basis, but not where larger chunks of statutory material are repealed, such as articles, chapters, parts, or divisions.

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1 CONFORMING REVISIONS AND REPEALS

2 HEALTH AND SAFETY CODE

3 **Health & Safety Code § 1418.8 (repealed). Consent for incapacitated patient in skilled**
4 **nursing facility or intermediate care facility**

5 SEC. _____. Section 1418.8 of the Health and Safety Code is repealed.

6 1418.8. (a) If the attending physician and surgeon of a resident in a skilled nursing
7 facility or intermediate care facility prescribes or orders a medical intervention that
8 requires informed consent be obtained prior to administration of the medical intervention,
9 but is unable to obtain informed consent because the physician and surgeon determines
10 that the resident lacks capacity to make decisions concerning his or her health care and
11 that there is no person with legal authority to make those decisions on behalf of the
12 resident, the physician and surgeon shall inform the skilled nursing facility or
13 intermediate care facility.

14 (b) For purposes of subdivision (a), a resident lacks capacity to make a decision
15 regarding his or her health care if the resident is unable to understand the nature and
16 consequences of the proposed medical intervention, including its risks and benefits, or is
17 unable to express a preference regarding the intervention. To make the determination
18 regarding capacity, the physician shall interview the patient, review the patient's medical
19 records, and consult with skilled nursing or intermediate care facility staff, as appropriate,
20 and family members and friends of the resident, if any have been identified.

21 (c) For purposes of subdivision (a), a person with legal authority to make medical
22 treatment decisions on behalf of a patient is a person designated under a valid Durable
23 Power of Attorney for Health Care, a guardian, a conservator, or next of kin. To
24 determine the existence of a person with legal authority, the physician shall interview the
25 patient, review the medical records of the patient and consult with skilled nursing or
26 intermediate care facility staff, as appropriate, and family members and friends of the
27 resident, if any have been identified.

28 (d) The attending physician and the skilled nursing facility or intermediate care facility
29 may initiate a medical intervention that requires informed consent pursuant to subdivision
30 (e) in accordance with acceptable standards of practice.

31 (e) Where a resident of a skilled nursing facility or intermediate care facility has been
32 prescribed a medical intervention by a physician and surgeon that requires informed
33 consent and the physician has determined that the resident lacks capacity to make health
34 care decisions and there is no person with legal authority to make those decisions on
35 behalf of the resident, the facility shall, except as provided in subdivision (h), conduct an
36 interdisciplinary team review of the prescribed medical intervention prior to the
37 administration of the medical intervention. The interdisciplinary team shall oversee the
38 care of the resident utilizing a team approach to assessment and care planning and shall
39 include the resident's attending physician, a registered professional nurse with
40 responsibility for the resident, other appropriate staff in disciplines as determined by the
41 resident's needs, and, where practicable, a patient representative, in accordance with
42 applicable federal and state requirements. The review shall include all of the following:

43 (1) A review of the physician's assessment of the resident's condition.

44 (2) The reason for the proposed use of the medical intervention.

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

4 (4) The type of medical intervention to be used in the resident's care, including its
5 probable frequency and duration.

6 (5) The probable impact on the resident's condition, with and without the use of the
7 medical intervention.

8 (6) Reasonable alternative medical interventions considered or utilized and reasons for
9 their discontinuance or inappropriateness.

10 (f) A patient representative may include a family member or friend of the resident who
11 is unable to take full responsibility for the health care decisions of the resident, but has
12 agreed to serve on the interdisciplinary team, or other person authorized by state or
13 federal law.

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

17 (h) In case of an emergency, after obtaining a physician and surgeon's order as
18 necessary, a skilled nursing or intermediate care facility may administer a medical
19 intervention which requires informed consent prior to the facility convening an
20 interdisciplinary team review. If the emergency results in the application of physical or
21 chemical restraints, the interdisciplinary team shall meet within one week of the
22 emergency for an evaluation of the medical intervention.

23 (i) Physician and surgeons and skilled nursing facilities and intermediate care facilities
24 shall not be required to obtain a court order pursuant to Section 3201 of the Probate Code
25 prior to administering a medical intervention which requires informed consent if the
26 requirements of this section are met.

27 (j) Nothing in this section shall in any way affect the right of a resident of a skilled
28 nursing facility or intermediate care facility for whom medical intervention has been
29 prescribed, ordered, or administered pursuant to this section to seek appropriate judicial
30 relief to review the decision to provide the medical intervention.

31 (k) No physician or other health care provider, whose action under this section is in
32 accordance with reasonable medical standards, is subject to administrative sanction if the
33 physician or health care provider believes in good faith that the action is consistent with
34 this section and the desires of the resident, or if unknown, the best interests of the
35 resident.

36 (l) The determinations required to be made pursuant to subdivisions (a), (e), and (g),
37 and the basis for those determinations shall be documented in the patient's medical record
38 and shall be made available to the patient's representative for review.

39 **Comment.** Former Section 1418.8 is superseded by the procedure for making health care
40 decisions for patients without surrogates provided by Probate Code Sections 4720-4725. The new
41 procedure is not limited to incapacitated persons in skilled nursing facilities or intermediate care
42 facilities. Parts of the new procedure were drawn from this section. See Prob. Code §§ 4720-4725
43 Comments. The terminology varies, however. For example, the term "medical intervention" is
44 superseded by "health care decision" as defined in Probate Code Section 4617.

45 The conditions for using the procedure in subdivision (a) are continued in substance by Probate
46 Code Section 4720. Provisions relating to capacity and capacity determinations in subdivision (b)
47 are superseded by Probate Code Sections 4609 ("capacity" defined), 4657 (presumption of
48 capacity), and 4658 (determination of capacity and other medical conditions).

1 The first sentence of subdivision (c) is superseded by Probate Code Section 4720[a] (conditions
2 for application of chapter). [The second sentence is generalized in Probate Code Section 4720(b).]
3 See also Prob. Code § 4712 (selection of statutory surrogate).

4 Subdivision (d) is superseded by Probate Code Section 4721 (referral to surrogate committee
5 by primary physician). See also Prob. Code § 4654 (compliance with generally accepted health
6 care standards).

7 The first sentence of subdivision (e) is superseded by Probate Code Sections 4720 (conditions
8 for application of chapter) and 4721 (referral to surrogate committee). The interdisciplinary team
9 is superseded by a surrogate committee. As to emergency care, see Prob. Code § 4651(b). The
10 second sentence is superseded by Probate Code Sections 4722 (composition of surrogate
11 committee) and 4724 (decisionmaking by surrogate committee). The standards of review in the
12 third sentence are continued and generalized in Probate Code Section 4723(a).

13 The part of subdivision (f) relating to family and friends is continued and generalized in
14 Probate Code Section 4722(a)(4). The reference to persons authorized by state or federal law is
15 omitted as surplus, but such persons would be permissible under Probate Code Section 4722,
16 which provides some flexibility in composition of the surrogate committee.

17 Subdivision (g) is continued and generalized in Probate Code Section 4723(b) (periodic
18 review).

19 Subdivision (h) is superseded by Prob. Code § 4651(b) (emergency care). [... is continued and
20 generalized in Probate Code Section [4723.5] — see Staff Note.]

21 Subdivision (i) is superseded by Probate Code Section 4750(d) (judicial intervention
22 disfavored), which continues the same policy.

23 Subdivision (j) is superseded by Probate Code Section 4765 (permissible petitioners).

24 The first part of subdivision (k) is superseded by Probate Code Section 4740 (immunities of
25 health care provider and institution). The last part is superseded by Probate Code Sections 4713
26 (standard governing surrogate's health care decisions), 4723(a)(3) (standards of review by
27 surrogate committee), and 4725 (general surrogate rules applicable to surrogate committee).

28 Subdivision (l) is superseded by Probate Code Sections 4732 (duty of primary physician to
29 record relevant information) and 4737 (right to health care information).

30 **Staff Note**

31 (1) Further review suggests the need to continue the substance of Section 1418.8(h) in the
32 surrogate committee chapter. We would add a section following 4723 reading substantially as
33 follows:

34 [4723.5]. In case where emergency care is administered without approval by a surrogate
35 committee, if the emergency results in the application of physical or chemical restraints, the
36 surrogate committee shall meet within one week of the emergency for an evaluation of the
37 health care decision.

38 (2) The staff is uncertain about what to do with the uncodified legislative findings and
39 intentions that accompanied Health and Safety Code Section 1418.8 when it was enacted.

40 **1992 Cal. Stat. ch. 1303 provides:**

41 SECTION 1. The Legislature finds and declares as follows:

42 (a) When a skilled nursing facility or intermediate care facility resident loses capacity to
43 make health care decisions, there is a need to identify a surrogate decisionmaker to make
44 health care treatment decisions on his or her behalf. However, in many cases, the skilled
45 nursing facility or intermediate care facility resident may have no family member who is
46 available and willing to make health care decisions, no conservator of the person, and no
47 other health care agent, such as an agent appointed pursuant to a valid Durable Power of
48 Attorney for Health Care. In California, this has been identified by health care providers and
49 others as a significant dilemma.

50 (b) The current system is not adequate to deal with the legal, ethical, and practical issues
51 that are involved in making health care decisions for incapacitated skilled nursing facility or

1 intermediate care facility residents who lack surrogate decisionmakers. Existing Probate Code
2 procedures, including public conservatorship, are inconsistently interpreted and applied,
3 cumbersome, and sometimes unavailable for use in situations in which day-to-day medical
4 treatment decisions must be made on an on-going basis.

5 (c) Therefore, it is the intent of the Legislature to identify a procedure to secure, to the
6 greatest extent possible, health care decisionmakers for skilled nursing facility or intermediate
7 care facility residents who lack the capacity to make these decisions and who also lack a
8 surrogate health care decisionmaker. It is also the intent of the Legislature to ensure that the
9 medical needs of nursing facility residents are met even in the absence of a surrogate health
10 care decisionmaker and to ensure that health care providers are not subject to inappropriate
11 civil, criminal, or administrative liability when delivering appropriate medical care to these
12 residents.

13 **Health & Safety Code §§ 7185-7194.5 (repealed). Natural Death Act**

14 SEC. _____. Chapter 3.9 (commencing with Section 7185) of Part 1 of Division 7 of the
15 Health and Safety Code is repealed.

16 **§ 7185 (repealed). Short title**

17 7185. This act shall be known and may be cited as the Natural Death Act.

18 **Comment.** Former Section 7185 is not continued. The Natural Death Act is superseded by the
19 provisions of Division 4.7 (commencing with Section 4600) of the Probate Code relating to
20 advance health care directives. The new law is not limited to decisions concerning life-sustaining
21 treatment of persons in a terminal or permanent unconscious condition.

22 **§ 7185.5 (repealed). Legislative findings and declarations**

23 7185.5. (a) The Legislature finds that an adult person has the fundamental right to
24 control the decisions relating to the rendering of his or her own medical care, including
25 the decision to have life-sustaining treatment withheld or withdrawn in instances of a
26 terminal condition or permanent unconscious condition.

27 (b) The Legislature further finds that modern medical technology has made possible the
28 artificial prolongation of human life beyond natural limits.

29 (c) The Legislature further finds that, in the interest of protecting individual autonomy,
30 such prolongation of the process of dying for a person with a terminal condition or
31 permanent unconscious condition for whom continued medical treatment does not
32 improve the prognosis for recovery may violate patient dignity and cause unnecessary
33 pain and suffering, while providing nothing medically necessary or beneficial to the
34 person.

35 (d) In recognition of the dignity and privacy that a person has a right to expect, the
36 Legislature hereby declares that the laws of the State of California shall recognize the
37 right of an adult person to make a written declaration instructing his or her physician to
38 withhold or withdraw life-sustaining treatment in the event of a terminal condition or
39 permanent unconscious condition, in the event that the person is unable to make those
40 decisions for himself or herself.

41 (e) The Legislature further declares that, in the absence of controversy, a court
42 normally is not the proper forum in which to make decisions regarding life-sustaining
43 treatment.

44 (f) To avoid treatment that is not desired by a person in a terminal condition or
45 permanent unconscious condition, the Legislature declares that this chapter is in the
46 interest of the public health and welfare.

1 **Comment.** The substance of subdivisions (a)-(d) of former Section 7185 is continued in
2 Probate Code Section 4650 (legislative findings), except that the references to “terminal condition
3 or permanent unconscious decision” have been omitted to reflect relevant case law and the scope
4 of the Uniform Health Care Decisions Act (Prob. Code § 4670 *et seq.*).

5 The substance of subdivision (e) is continued in Probate Code Section 4750 (judicial
6 intervention disfavored). Subdivision (f) is omitted as surplus. See former Section 7185
7 Comment.

8 **§ 7186 (repealed). Definitions**

9 7186. As used in this chapter, unless the context otherwise requires:

10 (a) “Attending physician” means the physician who has primary responsibility for the
11 treatment and care of the patient.

12 (b) “Declaration” means a writing executed in accordance with the requirements of
13 subdivision (a) of Section 7186.5.

14 (c) “Health care provider” means a person who is licensed, certified, or otherwise
15 authorized by the law of this state to administer health care in the ordinary course of
16 business or practice of a profession.

17 (d) “Life-sustaining treatment” means any medical procedure or intervention that, when
18 administered to a qualified patient, will serve only to prolong the process of dying or an
19 irreversible coma or persistent vegetative state.

20 (e) “Permanent unconscious condition” means an incurable and irreversible condition
21 that, within reasonable medical judgment, renders the patient in an irreversible coma or
22 persistent vegetative state.

23 (f) “Person” means an individual, corporation, business trust, estate, trust, partnership,
24 limited liability company, association, joint venture, government, governmental
25 subdivision or agency, or any other legal or commercial entity.

26 (g) “Physician” means a physician and surgeon licensed by the Medical Board of
27 California or the Osteopathic Medical Board of California.

28 (h) “Qualified patient” means a patient 18 or more years of age who has executed a
29 declaration and who has been diagnosed and certified in writing by the attending
30 physician and a second physician who has personally examined the patient to be in a
31 terminal condition or permanent unconscious condition.

32 (i) “State” means a state of the United States, the District of Columbia, the
33 Commonwealth of Puerto Rico, or a territory or insular possession subject to the
34 jurisdiction of the United States.

35 (j) “Terminal condition” means an incurable and irreversible condition that, without the
36 administration of life-sustaining treatment, will, within reasonable medical judgment,
37 result in death within a relatively short time.

38 **Comment.** Subdivision (a) of former Section 7186 is continued in Probate Code Section 4629
39 (“primary physician” defined) without substantive change. Subdivision (b) is superseded by
40 Probate Code Section 4605 (“advance health care directive” defined). Subdivision (c) is
41 continued in Probate Code Section 4621 without substantive change. Subdivisions (d) and (e) are
42 not continued. See former Section 7185 Comment.

43 Subdivision (f) is unnecessary in view of Probate Code Section 56 (“person” defined).
44 Subdivision (g) is continued in Probate Code Section 4625 without change. Subdivision (h) is
45 superseded by Probate Code Sections 4670 (who may give individual instruction). Subdivision (i)
46 is unnecessary in view of Probate Code Section 74 (“state” defined). Subdivision (j) is not
47 continued. See former Section 7185 Comment.

1 **§ 7186.5 (repealed). Declaration governing life-sustaining treatment**

2 7186.5. (a) An individual of sound mind and 18 or more years of age may execute at
3 any time a declaration governing the withholding or withdrawal of life-sustaining
4 treatment. The declaration shall be signed by the declarant, or another at the declarant's
5 direction and in the declarant's presence, and witnessed by two individuals at least one of
6 whom may not be a person who is entitled to any portion of the estate of the qualified
7 patient upon his or her death under any will or codicil thereto of the qualified patient
8 existing at the time of execution of the declaration or by operation of law. In addition, a
9 health care provider, an employee of a health care provider, the operator of a community
10 care facility, an employee of an operator of a community care facility, the operator of a
11 residential care facility for the elderly, or an employee of an operator of a residential care
12 facility for the elderly may not be a witness.

13 (b) A declaration shall substantially contain the following provisions:

14 **DECLARATION**

15 If I should have an incurable and irreversible condition that has been diagnosed by two
16 physicians and that will result in my death within a relatively short time without the
17 administration of life-sustaining treatment or has produced an irreversible coma or
18 persistent vegetative state, and I am no longer able to make decisions regarding my
19 medical treatment, I direct my attending physician, pursuant to the Natural Death Act of
20 California, to withhold or withdraw treatment, including artificially administered
21 nutrition and hydration, that only prolongs the process of dying or the irreversible coma
22 or persistent vegetative state and is not necessary for my comfort or to alleviate pain.

23 If I have been diagnosed as pregnant, and that diagnosis is known to my physician, this
24 declaration shall have no force or effect during my pregnancy.

25 Signed this ____ day of _____, ____

26 Signature _____

27 Address _____

28 The declarant voluntarily signed this writing in my presence. I am not a health care
29 provider, an employee of a health care provider, the operator of a community care
30 facility, an employee of an operator of a community care facility, the operator of a
31 residential care facility for the elderly, or an employee of an operator of a residential care
32 facility for the elderly.

33 Witness _____

34 Address _____

35 The declarant voluntarily signed this writing in my presence. I am not entitled to any
36 portion of the estate of the declarant upon his or her death under any will or codicil
37 thereto of the declarant now existing or by operation of law. I am not a health care
38 provider, an employee of a health care provider, the operator of a community care
39 facility, an employee of an operator of a community care facility, the operator of a
40 residential care facility for the elderly, or an employee of an operator of a residential care
41 facility for the elderly.

42 Witness _____

43 Address _____

1 (c) A physician or other health care provider who is furnished a copy of the declaration
2 shall make it a part of the declarant’s medical record and, if unwilling to comply with the
3 declaration, promptly so advise the declarant.

4 **Comment.** The first sentence of former Section 7186.5(a) is superseded by Probate Code
5 Section 4670 (who may give individual instruction). The second sentence concerning general
6 witnessing requirements is not continued; an individual health care instruction is not generally
7 required to be witnessed. The third sentence concerning special witnessing requirements in skilled
8 nursing facilities is continued in Probate Code Section 4673 without substantive change.

9 The declaration form in subdivision (b) is superseded by the optional form of an advance health
10 care directive in Probate Code Section 4701 and related substantive rules. For transitional
11 provisions relating to declarations executed under the repealed Natural Death Act, see Prob. Code
12 § 4665(a).

13 The substance of the record-keeping duty in subdivision (c) is continued in Probate Code
14 Section 4731. The language concerning a health care provider who is unwilling to comply is
15 superseded by Probate Code Sections 4734 (right to decline for reasons of conscience or
16 institutional policy) and 4736 (obligation of declining health care provider or institution).

17 **§ 7187 (repealed). Skilled nursing facility or long-term health care facility**

18 7187. A declaration shall have no force or effect if the declarant is a patient in a skilled
19 nursing facility as defined in subdivision (c) of Section 1250, or a long-term health care
20 facility as defined in subdivision (a) of Section 1418, at the time the declaration is
21 executed unless one of the two witnesses to the declaration is a patient advocate or
22 ombudsman as may be designated by the State Department of Aging for this purpose
23 pursuant to any other applicable provision of law.

24 **Comment.** Former Section 7187 is continued in Probate Code Section 4673(c) without
25 substantive change. See also Prob. Code Section 4635 (“skilled nursing facility” defined).

26 **§ 7187.5 (repealed). When declaration becomes operative**

27 7187.5. A declaration becomes operative when (a) it is communicated to the attending
28 physician and (b) the declarant is diagnosed and certified in writing by the attending
29 physician and a second physician who has personally examined the declarant to be in a
30 terminal condition or permanent unconscious condition and no longer able to make
31 decisions regarding administration of life-sustaining treatment. When the declaration
32 becomes operative, the attending physician and other health care providers shall act in
33 accordance with its provisions or comply with the transfer requirements of Section 7190.

34 **Comment.** The first sentence of former Section 7187.5 is not continued. See former Section
35 7185 Comment. As to the determination of preconditions to operation of the declaration (advance
36 health care directive), see Probate Code Sections 4651(a) (authority of individual with capacity
37 not affected), 4657 (presumption of capacity), 4658 (determination of capacity and other
38 conditions).

39 The duty to comply with the declaration in the second sentence is superseded by Probate Code
40 Section 4733(a). The duty to transfer is superseded by Probate Code Section 4736.

41 **§ 7188 (repealed). Revocation**

42 7188. (a) A declarant may revoke a declaration at any time and in any manner, without
43 regard to the declarant’s mental or physical condition. A revocation is effective upon its
44 communication to the attending physician or other health care provider by the declarant
45 or a witness to the revocation.

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

3 **Comment.** Subdivision (a) of former Section 7188 is superseded by Probate Code Sections
4 4659 (patient's objections) and 4695-4696 (revocation of advance directive).

5 The duty to record in subdivision (b) is continued in Probate Code Section 4731(a) without
6 substantive change.

7 **§ 7189 (repealed). Determination of terminal or permanent unconscious condition**

8 7189. Upon determining that the declarant is in a terminal condition or permanent
9 unconscious condition, the attending physician who knows of a declaration shall record
10 the determination and the terms of the declaration in the declarant's medical record and
11 file a copy of the declaration in the record.

12 **Comment.** Former Section 7189 is superseded by Probate Code Sections 4658 (authority to
13 determine capacity and other conditions) and 4732 (duty to record relevant information).

14 **§ 7189.5 (repealed). Patient's right to make decisions concerning life-sustaining treatment**

15 7189.5. (a) A qualified patient may make decisions regarding life-sustaining treatment
16 as long as the patient is able to do so.

17 (b) This chapter does not affect the responsibility of the attending physician or other
18 health care provider to provide treatment for a patient's comfort care or alleviation of
19 pain.

20 (c) The declaration of a qualified patient known to the attending physician to be
21 pregnant shall not be given effect as long as the patient is pregnant.

22 **Comment.** Subdivision (a) of former Section 7189.5 is superseded by Probate Code Section
23 4651(a). See also Prob. Code §§ 4657 (presumption of capacity), 4659 (patient's objections).

24 Subdivision (b) is replaced by the general rules in Probate Code Sections 4654 (compliance
25 with generally accepted health care standards), 4733 (obligation to comply with reasonable
26 interpretation of health care instructions and decisions). See also 4736(b) (continuing care until
27 transfer can be accomplished).

28 Subdivision (c) is not continued.

29 **§ 7190 (repealed). Duties of health care provider unwilling to comply with chapter**

30 7190. An attending physician or other health care provider who is unwilling to comply
31 with this chapter shall take all reasonable steps as promptly as practicable to transfer care
32 of the declarant to another physician or health care provider who is willing to do so.

33 **Comment.** Former Section 7190 is continued in Probate Code Section 4736 without
34 substantive change.

35 **§ 7190.5 (repealed). Liability and professional discipline**

36 7190.5. (a) A physician or other health care provider is not subject to civil or criminal
37 liability, or discipline for unprofessional conduct, for giving effect to a declaration in the
38 absence of knowledge of the revocation of a declaration.

39 (b) A physician or other health care provider, whose action under this chapter is in
40 accord with reasonable medical standards, is not subject to criminal prosecution, civil
41 liability, discipline for unprofessional conduct, administrative sanction, or any other
42 sanction if the physician or health care provider believes in good faith that the action is
43 consistent with this chapter and the desires of the declarant expressed in the declaration.

44 **Comment.** Former Section 7190.5 is superseded by Probate Code Section 4740.

1 **§ 7191 (repealed). Specified conduct as misdemeanor; prosecution of specified conduct as**
2 **unlawful homicide**

3 7191. (a) A physician or other health care provider who willfully fails to transfer the
4 care of a patient in accordance with Section 7190 is guilty of a misdemeanor.

5 (b) A physician who willfully fails to record a determination of terminal condition or
6 permanent unconscious condition or the terms of a declaration in accordance with Section
7 7189 is guilty of a misdemeanor.

8 (c) An individual who willfully conceals, cancels, defaces, or obliterates the declaration
9 of another individual without the declarant's consent or who falsifies or forges a
10 revocation of the declaration of another individual is guilty of a misdemeanor.

11 (d) An individual who falsifies or forges the declaration of another individual, or
12 willfully conceals or withholds personal knowledge of a revocation under Section 7188,
13 with the intent to cause a withholding or withdrawal of life-sustaining treatment contrary
14 to the wishes of the declarant, and thereby, because of that act, directly causes life-
15 sustaining treatment to be withheld or withdrawn and death to thereby be hastened, shall
16 be subject to prosecution for unlawful homicide as provided in Chapter 1 (commencing
17 with Section 187) of Title 8 of Part 1 of the Penal Code.

18 (e) A person who requires or prohibits the execution of a declaration as a condition for
19 being insured for, or receiving, health care services is guilty of a misdemeanor.

20 (f) A person who coerces or fraudulently induces an individual to execute a declaration
21 is guilty of a misdemeanor.

22 (g) The sanctions provided in this section do not displace any sanction applicable under
23 other law.

24 **Comment.** Subdivisions (a) and (b) of former Section 7191 are superseded by Probate Code
25 Section 4742, which provides statutory damages instead of criminal penalties.

26 Subdivisions (c) and (d) are replaced by Probate Code Section 4743.

27 Subdivisions (e) and (f) are superseded by the prohibition in Probate Code Section 4675.

28 The substance of subdivision (g) is continued in Probate Code Section 4742(____) [see staff note
29 following draft Section 4742, attached to Memorandum 98-16].

30 ☞ **Staff Note.** This section raises the issue of whether these criminal penalties should be
31 continued in some form. The staff does not believe these types of penalties are effective and
32 prefers the approach of the Uniform Health-Care Decisions Act in the statutory penalties sections
33 cited.

34 **§ 7191.5 (repealed). Effect of death on life insurance or annuity; declaration as condition for**
35 **insurance or receipt of health care services; effect of chapter on patient's right to decide**

36 7191.5. (a) Death resulting from the withholding or withdrawal of a life-sustaining
37 treatment in accordance with this chapter does not constitute, for any purpose, a suicide
38 or homicide.

39 (b) The making of a declaration pursuant to Section 7186.5 does not affect in any
40 manner the sale, procurement, or issuance of any policy of life insurance or annuity, nor
41 does it affect, impair, or modify the terms of an existing policy of life insurance or
42 annuity. A policy of life insurance or annuity is not legally impaired or invalidated by the
43 withholding or withdrawal of life-sustaining treatment from an insured, notwithstanding
44 any term to the contrary.

45 (c) A person may not prohibit or require the execution of a declaration as a condition
46 for being insured for, or receiving, health care services.

47 (d) This chapter creates no presumption concerning the intention of an individual who
48 has revoked or has not executed a declaration with respect to the use, withholding, or

1 withdrawal of life-sustaining treatment in the event of a terminal condition or permanent
2 unconscious condition.

3 (e) This chapter does not affect the right of a patient to make decisions regarding use of
4 life-sustaining treatment, so long as the patient is able to do so, or impair or supersede a
5 right or responsibility that a person has to effect the withholding or withdrawal of
6 medical care.

7 (f) This chapter does not require any physician or other health care provider to take any
8 action contrary to reasonable medical standards.

9 (g) This chapter does not condone, authorize, or approve mercy killing or assisted
10 suicide or permit any affirmative or deliberate act or omission to end life other than to
11 permit the natural process of dying.

12 (h) The rights granted by this chapter are in addition to, and not in derogation of, rights
13 under any other statutory or case law.

14 **Comment.** Subdivision (a) of former Section 7191.5 is generalized in Probate Code Section
15 4656. Subdivision (b) is replaced by Probate Code Section 4656.

16 Subdivision (c) is continued in Probate Code Section 4675 without substantive change.

17 Subdivision (d) is continued and generalized in Probate Code Section 4655(a).

18 Subdivision (e) is superseded by Probate Code Section 4651(a) (authority not affected). See
19 also Prob. Code § 4657 (presumption of capacity)

20 Subdivision (f) is continued in Probate Code Section 4654 without substantive change.

21 Subdivision (g) is continued in Probate Code Section 4653 without substantive change.

22 Subdivision (h) is superseded by Probate Code Sections 4651 (other authority not affected) and
23 4741 (cumulative remedies).

24 **§ 7192 (repealed). Presumption of validity of declaration**

25 7192. In the absence of knowledge to the contrary, a physician or other health care
26 provider may presume that a declaration complies with this chapter and is valid.

27 **Comment.** Former Section 7192 is continued and generalized in Probate Code Section
28 4674(b).

29 **§ 7192.5 (repealed). Validity of declarations executed in another state**

30 7192.5. An instrument governing the withholding or withdrawal of life-sustaining
31 treatment executed in another state in compliance with the law of that state or of this state
32 is valid for purposes of this chapter.

33 **Comment.** Former Section 7192.5 is continued in Probate Code Section 4674 without
34 substantive change.

35 **§ 7193 (repealed). Effect of Durable Power of Attorney for Health Care**

36 7193. A Durable Power of Attorney for Health Care shall prevail over a declaration
37 executed pursuant to this chapter unless expressly provided otherwise in the Durable
38 Power of Attorney for Health Care.

39 **Comment.** Former Section 7193 is superseded by Probate Code Section 4698 (effect of later
40 advance directive on earlier advance directive).

41 **§ 7193.5 (repealed). Instruments to be given effect**

42 7193.5. The following instruments shall be given effect pursuant to the provisions of
43 this chapter:

1 (a) An instrument executed before January 1, 1992, that substantially complies with
2 subdivision (a) of Section 7186.5.

3 (b) An instrument governing the withholding or withdrawal of life-sustaining treatment
4 executed in another state that does not comply with the law of that state but substantially
5 complies with the law of this state.

6 **Comment.** Former Section 7193.5 is superseded by Probate Code Sections 4665 (application to
7 existing advance directives), 4674 (validity of written advance directive executed in another
8 jurisdiction). See also Prob. Code § 4605 (“advance health care directive” defined).

9 **§ 7194 (repealed). Severability clause**

10 7194. If any provision of this chapter or its application to any person or circumstance is
11 held invalid, the invalidity shall not affect other provisions or applications of this chapter
12 which can be given effect without the invalid provision or application, and to this end the
13 provisions of this chapter are severable.

14 **Comment.** Former Section 7194 is superseded by Probate Code Section 11.

15 **§ 7194.5 (repealed). Conformity with Uniform Rights of the Terminally Ill Act**

16 7194.5. To the extent that a provision of this chapter conforms to the Uniform Rights of
17 the Terminally Ill Act, that provision shall be applied and construed to effectuate its
18 general purpose to make uniform the law with respect to the subject of this chapter
19 among states enacting it.

20 **Comment.** Former Section 7194.5 is superseded by Probate Code Section 2(b) (construction of
21 provisions drawn from uniform acts).

22 **PROBATE CODE**

23 **Staff Note.** Revisions in older Commission Comments set out below are shown in ~~strikeout~~ and
24 underscore. Following our usual practice, however, we do not intend to show revisions in either
25 the tentative or final recommendation.

26 **Prob. Code § 3722 (technical amendment). Effect of dissolution, annulment, or legal**
27 **separation on power of attorney involving federal absentees**

28 SEC. _____. Section 3722 of the Probate Code is amended to read:

29 3722. If after the absentee executes a power of attorney, the principal’s spouse who is
30 the attorney-in-fact commences a proceeding for dissolution, annulment, or legal
31 separation, or a legal separation is ordered, the attorney-in-fact’s authority is revoked.
32 This section is in addition to the provisions of ~~Section~~ Sections 4154 and 4697.

33 **Comment.** Section 3722 is amended to refer to a corresponding section concerning advance
34 health care directives.

35 See also Sections 1403 (“absentee” defined), 4014 (“attorney-in-fact” defined), 4022 (“power
36 of attorney” defined).

37 **Prob. Code § 4050 (amended). Types of powers of attorney governed by this division**

38 SEC. _____. Section 4050 of the Probate Code is amended to read:

39 4050. (a) This division applies to the following:

40 (1) Durable powers of attorney, other than powers of attorney for health care governed
41 by Division 4.7 (commencing with Section 4600).

42 (2) Statutory form powers of attorney under Part 3 (commencing with Section 4400).

1 (3) ~~Durable powers of attorney for health care under Part 4 (commencing with Section~~
2 ~~4600).~~

3 (4) Any other power of attorney that incorporates or refers to this division or the
4 provisions of this division.

5 (b) This division does not apply to the following:

6 (1) A power of attorney to the extent that the authority of the attorney-in-fact is coupled
7 with an interest in the subject of the power of attorney.

8 (2) Reciprocal or interinsurance exchanges and their contracts, subscribers, attorneys-
9 in-fact, agents, and representatives.

10 (3) A proxy given by an attorney-in-fact to another person to exercise voting rights.

11 (c) This division is not intended to affect the validity of any instrument or arrangement
12 that is not described in subdivision (a).

13 **Comment.** Section 4050 is amended to reflect the revision of the law relating to powers of
14 attorney for health care. See Section 4600 *et seq.* (Health Care Decisions Law). Division 4.5 no
15 longer governs powers of attorney for health care.

16 **Comment (1994 Revised).** Section 4050 describes the types of instruments that are subject to
17 the Power of Attorney Law. If a section in this division refers to a “power of attorney,” it
18 generally refers to a durable power of attorney, but may, under certain circumstances, also apply
19 to a nondurable power of attorney. For example, a statutory form power of attorney may be
20 durable or nondurable. See Sections 4401, 4404. A nondurable power may incorporate provisions
21 of this division, thereby becoming subject to its provisions as provided in Section 4050(a)(4).

22 Subdivision (b) makes clear that certain specialized types of power of attorney are not subject
23 to the Power of Attorney Law. This list is not intended to be exclusive. See subdivision (c).
24 Subdivision (b)(1) recognizes the special rule applicable to a power coupled with an interest in
25 the subject of a power of attorney provided in Civil Code Section 2356(a). Subdivision (b)(2)
26 continues the substance of the limitation in former Civil Code Section 2420(b) and broadens it to
27 apply to the entire Power of Attorney Law. See Ins. Code § 1280 *et seq.* Subdivision ~~(b)(3)~~
28 ~~restates former Civil Code Section 2400.5 without substantive change and supersedes the second~~
29 ~~sentence of former Civil Code Section 2410(e).~~ For the rules applicable to proxy voting in
30 business corporations, see Corp. Code § 705. For other statutes dealing with proxies, see Corp.
31 Code §§ 178, 702, 5069, 5613, 7613, 9417, 12405, 13242; Fin. Code §§ 5701, 5702, 5710, 6005.
32 See also Civ. Code § 2356(e) (proxy under general agency rules).

33 Subdivision (c) makes clear that this division does not affect the validity of other agencies and
34 powers of attorney. The Power of Attorney Law thus does not apply to other specialized agencies,
35 such as real estate agents under Civil Code Sections 2373-2382. As a corollary, an instrument
36 denominated a power of attorney that does not satisfy the execution requirements for a power of
37 attorney under this division may be valid under general agency law or other principles.

38 ~~The general rules in this division are subject to the special rules applicable to statutory form~~
39 ~~powers of attorney in Part 3 (commencing with Section 4400) and to durable powers of attorney~~
40 ~~for health care in Part 4 (commencing with Section 4600). See also Section 4770 *et seq.* (statutory~~
41 ~~form durable power of attorney for health care).~~

42 See also Sections 4014 (“attorney-in-fact” defined), 4018 (“durable power of attorney”
43 defined), 4022 (“power of attorney” defined), ~~4606 (“durable power of attorney for health care”~~
44 ~~defined).~~

45 **Prob. Code § 4100 (amended). Application of part**

46 SEC. _____. Section 4100 of the Probate Code is amended to read:

47 4100. This part applies to all powers of attorney under this division, subject to any
48 special rules applicable to statutory form powers of attorney under Part 3 (commencing
49 with Section 4400) ~~or durable powers of attorney for health care under Part 4~~
50 ~~(commencing with Section 4600).~~

1 **Comment.** Section 4100 is amended to delete a reference to powers of attorney for health care,
2 which are governed by Division 4.7 (commencing with Section 4600) (Health Care Decisions
3 Law). See also Section 4050 (types of powers of attorney governed by this division).

4 **Prob. Code § 4122 (amended). Requirements for witnesses**

5 SEC. _____. Section 4122 of the Probate Code is amended to read:
6 4122. If the power of attorney is signed by witnesses, as provided in Section 4121, the
7 following requirements shall be satisfied:

- 8 (a) The witnesses shall be adults.
9 (b) The attorney-in-fact may not act as a witness.
10 (c) Each witness signing the power of attorney shall witness either the signing of the
11 instrument by the principal or the principal's acknowledgment of the signature or the
12 power of attorney.
13 (d) ~~In the case of a durable power of attorney for health care, the additional~~
14 ~~requirements of Section 4701.~~

15 **Comment.** Section 4122 is amended to delete a reference to powers of attorney for health care,
16 which are governed by Division 4.7 (commencing with Section 4600) (Health Care Decisions
17 Law).

18 This section is not subject to limitation in the power of attorney. See Section 4101. See also
19 Sections 4014 ("attorney-in-fact" defined), 4022 ("power of attorney" defined), 4026 ("principal"
20 defined).

21 **Prob. Code § 4123 (amended). Permissible purposes**

22 SEC. _____. Section 4123 of the Probate Code is amended to read:
23 4123. (a) In a power of attorney, a principal may grant authority to an attorney-in-fact
24 to act on the principal's behalf with respect to all lawful subjects and purposes or with
25 respect to one or more express subjects or purposes. The attorney-in-fact may be granted
26 authority with regard to the principal's property, personal care, health care, or any other
27 matter.

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

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

37 (d) ~~With regard to health care, a power of attorney may grant authority to make health~~
38 ~~care decisions, both before and after the death of the principal, as provided in Part 4~~
39 ~~(commencing with Section 4600).~~

40 **Comment.** Section 4123 is amended to delete a reference to powers of attorney for health care,
41 which are governed by Division 4.7 (commencing with Section 4600) (Health Care Decisions
42 Law). See Section 4050 (types of powers of attorney governed by this division).

43 **Comment (1994 Revised).** Subdivision (a) of Section 4123 is new and is consistent with the
44 general agency rules in Civil Code Sections 2304 and 2305. For provisions concerning the duties
45 and powers of an attorney-in-fact, see Sections 4230-4266. See also Sections 4014 ("attorney-in-
46 fact" defined), 4022 ("power of attorney" defined), 4026 ("principal" defined).

1 Subdivision (b) continues former Civil Code Section 2513 without substantive change. This
2 subdivision makes clear that a power of attorney may by its terms apply to all real property of the
3 principal, including after-acquired property, without the need for a specific description of the real
4 property to which the power applies. This section is consistent with Section 4464 (after-acquired
5 property under statutory form power of attorney).

6 Subdivision (c) is new and acknowledges the existing practice of providing authority to make
7 personal care decisions in durable powers of attorney. For a comparable provision in the Health
8 Care Decisions Law, see Section 4671.

9 ~~Subdivision (d) recognizes the special rules concerning health care decisions made by an
10 attorney-in-fact under a power of attorney. See Sections 4609 (“health care” defined), 4612
11 (“health care decision” defined).~~

12 **Prob. Code § 4128 (amended). Warning statement in durable power of attorney**

13 SEC. _____. Section 4128 of the Probate Code is amended to read:

14 4128. (a) Subject to subdivision (b), a printed form of a durable power of attorney that
15 is sold or otherwise distributed in this state for use by a person who does not have the
16 advice of legal counsel shall contain, in not less than 10-point boldface type or a
17 reasonable equivalent thereof, the following warning statement:

18 NOTICE TO PERSON EXECUTING DURABLE
19 POWER OF ATTORNEY

20 A durable power of attorney is an important legal document. By signing the durable
21 power of attorney, you are authorizing another person to act for you, the principal. Before
22 you sign this durable power of attorney, you should know these important facts:

23 Your agent (attorney-in-fact) has no duty to act unless you and your agent agree
24 otherwise in writing.

25 This document gives your agent the powers to manage, dispose of, sell, and convey
26 your real and personal property, and to use your property as security if your agent
27 borrows money on your behalf.

28 Your agent will have the right to receive reasonable payment for services provided
29 under this durable power of attorney unless you provide otherwise in this power of
30 attorney.

31 The powers you give your agent will continue to exist for your entire lifetime, unless
32 you state that the durable power of attorney will last for a shorter period of time or unless
33 you otherwise terminate the durable power of attorney. The powers you give your agent
34 in this durable power of attorney will continue to exist even if you can no longer make
35 your own decisions respecting the management of your property.

36 You can amend or change this durable power of attorney only by executing a new
37 durable power of attorney or by executing an amendment through the same formalities as
38 an original. You have the right to revoke or terminate this durable power of attorney at
39 any time, so long as you are competent.

40 This durable power of attorney must be dated and must be acknowledged before a
41 notary public or signed by two witnesses. If it is signed by two witnesses, they must
42 witness either (1) the signing of the power of attorney or (2) the principal’s signing or
43 acknowledgment of his or her signature. A durable power of attorney that may affect real
44 property should be acknowledged before a notary public so that it may easily be recorded.

45 You should read this durable power of attorney carefully. When effective, this durable
46 power of attorney will give your agent the right to deal with property that you now have
47 or might acquire in the future. The durable power of attorney is important to you. If you

1 do not understand the durable power of attorney, or any provision of it, then you should
2 obtain the assistance of an attorney or other qualified person.

3 (b) Nothing in subdivision (a) invalidates any transaction in which a third person relied
4 in good faith on the authority created by the durable power of attorney.

5 (c) This section does not apply to the following:

6 (1) A a statutory form power of attorney under Part 3 (commencing with Section 4400).

7 (2) A durable power of attorney for health care under Part 4 (commencing with Section
8 4600).

9 **Comment.** Subdivision (c) of Section is amended to delete a reference to powers of attorney
10 for health care, which are governed by Division 4.7 (commencing with Section 4600) (Health
11 Care Decisions Law). This is a technical, nonsubstantive change.

12 **Comment (1994 Revised).** The warning statement in subdivision (a) of Section 4128 replaces
13 the statement provided in former Civil Code Section 2510(b). Subdivision (b) restates former
14 Civil Code Section 2510(c) without substantive change. Subdivision (c) restates former Civil
15 Code Section 2510(a) without substantive change, but the reference to statutory short form
16 powers of attorney under former Civil Code Section 2450 is omitted as obsolete. This section is
17 not subject to limitation in the power of attorney. See Section 4101(b).

18 Other provisions prescribe the contents of the warning statements for particular types of durable
19 powers of attorney. See Section 4401 (statutory form power of attorney), ~~4703 (durable power of~~
20 ~~attorney for health care), 4771 (statutory form durable power of attorney for health care).~~ See also
21 Section ~~4703(a) (introductory clause) (printed form of durable power of attorney for health care~~
22 ~~to provide only authority to make health care decisions).~~

23 Section 4102 permits a printed form to be used after January 1, 1995, if the form complies with
24 prior law. A form printed after January 1, 1986, may be sold or otherwise distributed in this state
25 only if it complies with the requirements of Section 4128 (or its predecessor, former Civil Code
26 Section 2510). See Section 4102(b).

27 See also Sections 4014 (“attorney-in-fact” defined), 4018 (“durable power of attorney”
28 defined), 4026 (“principal” defined), 4034 (“third person” defined).

29 **Prob. Code § 4203 (amended). Successor attorneys-in-fact**

30 SEC. _____. Section 4203 of the Probate Code is amended to read:

31 4203. (a) A principal may designate one or more successor attorneys-in-fact to act if the
32 authority of a predecessor attorney-in-fact terminates.

33 (b) The principal may grant authority to another person, designated by name, by office,
34 or by function, including the initial and any successor attorneys-in-fact, to designate at
35 any time one or more successor attorneys-in-fact. ~~This subdivision does not apply to a~~
36 ~~durable power of attorney for health care under Part 4 (commencing with Section 4600).~~

37 (c) A successor attorney-in-fact is not liable for the actions of the predecessor attorney-
38 in-fact.

39 **Comment.** Section 4203 is amended to delete a reference to powers of attorney for health care,
40 which are governed by Division 4.7 (commencing with Section 4600) (Health Care Decisions
41 Law). This is a technical, nonsubstantive change.

42 **Prob. Code § 4206 (amended). Relation of attorney-in-fact to court-appointed fiduciary**

43 SEC. _____. Section 4206 of the Probate Code is amended to read:

44 4206. (a) If, following execution of a durable power of attorney, a court of the
45 principal’s domicile appoints a conservator of the estate, guardian of the estate, or other
46 fiduciary charged with the management of all of the principal’s property or all of the
47 principal’s property except specified exclusions, the attorney-in-fact is accountable to the
48 fiduciary as well as to the principal. Except as provided in subdivision (b), the fiduciary

1 has the same power to revoke or amend the durable power of attorney that the principal
2 would have had if not incapacitated, subject to any required court approval.

3 (b) If a conservator of the estate is appointed by a court of this state, the conservator
4 can revoke or amend the durable power of attorney only if the court in which the
5 conservatorship proceeding is pending has first made an order authorizing or requiring
6 the fiduciary to modify or revoke the durable power of attorney and the modification or
7 revocation is in accord with the order.

8 (c) ~~This section does not apply to a durable power of attorney for health care.~~

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

10 **Comment.** Section 4206 is amended to delete a reference to powers of attorney for health care,
11 which are governed by Division 4.7 (commencing with Section 4600) (Health Care Decisions
12 Law). This is a technical, nonsubstantive change.

13 **Prob. Code § 4260 (amended). Limitation on article**

14 SEC. _____. Section 4260 of the Probate Code is amended to read:

15 4260. This article does not apply to the following:

16 (a) ~~Statutory~~ statutory form powers of attorney under Part 3 (commencing with Section
17 4400).

18 (b) ~~Durable powers of attorney for health care under Part 4 (commencing with Section~~
19 ~~4600).~~

20 **Comment.** Section 4260 is amended to delete a reference to powers of attorney for health care,
21 which are governed by Division 4.7 (commencing with Section 4600) (Health Care Decisions
22 Law). This is a technical, nonsubstantive change.

23 **Prob. Code § 4265 (amended). Excluded authority**

24 SEC. _____. Section 4265 of the Probate Code is amended to read:

25 4265. A power of attorney may not authorize an attorney-in-fact to ~~perform any of the~~
26 ~~following acts:~~

27 (a) ~~Make~~ make, publish, declare, amend, or revoke the principal's will.

28 (b) ~~Consent to any action under a durable power of attorney for health care forbidden~~
29 ~~by Section 4722.~~

30 **Comment.** Section 4265 is amended to delete a reference to powers of attorney for health care,
31 which are governed by Division 4.7 (commencing with Section 4600) (Health Care Decisions
32 Law). See Section 4050 (scope of division).

33 Section 4265 is consistent with the general agency rule in Civil Code Section 2304. See also
34 Sections 4014 ("attorney-in-fact" defined), 4022 ("power of attorney" defined), 4026 ("principal"
35 defined).

1 **Prob. Code §§ 4500-4546 (added). Judicial proceedings concerning powers of attorney**

2 SEC. _____. Part 4 (commencing with Section 4500) is added to Division 4.5 of the
3 Probate Code, to read:

4 PART 4. JUDICIAL PROCEEDINGS CONCERNING
5 POWERS OF ATTORNEY

6 CHAPTER 1. GENERAL PROVISIONS

7 **§ 4500. Power of attorney freely exercisable**

8 4500. A power of attorney is exercisable free of judicial intervention, subject to this
9 part.

10 **Comment.** Section 4500 continues former Section 4900 without change. See also Section 4022
11 (“power of attorney” defined).

12 **§ 4501. Cumulative remedies**

13 4501. The remedies provided in this part are cumulative and not exclusive of any other
14 remedies provided by law.

15 **Comment.** Section 4501 continues former Section 4901 without change.

16 **§ 4502. Effect of provision in power of attorney attempting to limit right to petition**

17 4502. Except as provided in Section 4503, this part is not subject to limitation in the
18 power of attorney.

19 **Comment.** Section 4502 continues former Section 4502 without change. See also Sections
20 4022 (“power of attorney” defined), 4101(b) (general rule on limitations provided in power of
21 attorney).

22 **§ 4503. Limitations on right to petition**

23 4503. (a) Subject to subdivision (b), a power of attorney may expressly eliminate the
24 authority of a person listed in Section 4540 to petition the court for any one or more of
25 the purposes enumerated in Section 4541 if both of the following requirements are
26 satisfied:

27 (1) The power of attorney is executed by the principal at a time when the principal has
28 the advice of a lawyer authorized to practice law in the state where the power of attorney
29 is executed.

30 (2) The principal’s lawyer signs a certificate stating in substance:

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

36 (b) A power of attorney may not limit the authority of the following persons to petition
37 under this part:

1 (1) The attorney-in-fact, the principal, the conservator of the estate of the principal, or
2 the public guardian, with respect to a petition for a purpose specified in Section 4541.

3 (2) The conservator of the person of the principal, with respect to a petition relating to a
4 durable power of attorney for health care for a purpose specified in subdivision (a), (c), or
5 (d) of Section 4542.

6 (3) The attorney-in-fact, with respect to a petition relating to a durable power of
7 attorney for health care for a purpose specified in subdivision (a) or (b) of Section 4542.

8 **Comment.** Subdivision (a) of Section 4503 continues former Section 4903(a) without change,
9 except that the reference to the section governing petitions relating to powers of attorney for
10 health care (former Section 4942) is omitted. Powers of attorney for health care are governed by
11 Division 4.7 (commencing with Section 4600).

12 Subdivision (a) makes clear that a power of attorney may limit the applicability of this part only
13 if it is executed with the advice and approval of the principal's counsel. This limitation is
14 designed to ensure that the execution of a power of attorney that restricts the remedies of this part
15 is accomplished knowingly by the principal. The inclusion of a provision in the power of attorney
16 making this part inapplicable does not affect the right to resort to any judicial remedies that may
17 otherwise be available. See Section 4501.

18 Subdivision (b) continues the part of former Section 4903(b) relating to non-health care powers
19 of attorney without substantive change.

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

22 § 4504. Jury trial

23 4504. There is no right to a jury trial in proceedings under this division.

24 **Comment.** Section 4504 continues former Section 4904 without change. This section is
25 consistent with the rule applicable to other fiduciaries. See Prob. Code §§ 1452 (guardianships
26 and conservatorships), 7200 (decedents' estates), 17006 (trusts).

27 § 4505. Application of general procedural rules

28 4505. Except as otherwise provided in this division, the general provisions in Division
29 3 (commencing with Section 1000) apply to proceedings under this division.

30 **Comment.** Section 4505 continues former Section 4905 without change, and provides a cross
31 reference to the general procedural rules that apply to this division. See, e.g., Sections 1003
32 (guardian ad litem), 1021 (verification required), 1041 (clerk to set matters for hearing), 1046
33 (hearing and orders), 1203 (order shortening time for notice), 1215-1216 (service), 1260 (proof of
34 service).

35 CHAPTER 2. JURISDICTION AND VENUE

36 § 4520. Jurisdiction and authority of court or judge

37 4520. (a) The superior court has jurisdiction in proceedings under this division.

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

43 **Comment.** Section 4520 continues former Section 4920 without change, and is comparable to
44 Section 7050 governing the jurisdiction and authority of the court in proceedings concerning
45 administration of decedents' estates. See Section 7050 Comment.

1 **§ 4521. Basis of jurisdiction**

2 4521. The court may exercise jurisdiction in proceedings under this division on any
3 basis permitted by Section 410.10 of the Code of Civil Procedure.

4 **Comment.** Section 4521 continues former Section 4921 without change, and is comparable to
5 Section 17004 (jurisdiction under Trust Law). This section recognizes that the court, in
6 proceedings relating to powers of attorney under this division, may exercise jurisdiction on any
7 basis that is not inconsistent with the California or United States Constitutions, as provided in
8 Code of Civil Procedure Section 410.10. See generally Judicial Council Comment to Code Civ.
9 Proc. § 410.10; Prob. Code § 17004 Comment (basis of jurisdiction under Trust Law).

10 **§ 4522. Jurisdiction over attorney-in-fact**

11 4522. Without limiting Section 4521, a person who acts as an attorney-in-fact under a
12 power of attorney governed by this division is subject to personal jurisdiction in this state
13 with respect to matters relating to acts and transactions of the attorney-in-fact performed
14 in this state or affecting property or a principal in this state.

15 **Comment.** Section 4522 continues former Section 4922 without change, and is comparable to
16 Sections 3902(b) (jurisdiction over custodian under Uniform Transfers to Minors Act) and
17 17003(a) (jurisdiction over trustee). This section is intended to facilitate exercise of the court's
18 power under this part when the court's jurisdiction is properly invoked. As recognized by the
19 introductory clause, constitutional limitations on assertion of jurisdiction apply to the exercise of
20 jurisdiction under this section. Consequently, appropriate notice must be given to an attorney-in-
21 fact as a condition of personal jurisdiction. *Cf.* *Mullane v. Central Hanover Bank & Trust Co.*,
22 339 U.S. 306 (1950).

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

25 **§ 4523. Venue**

26 4523. The proper county for commencement of a proceeding under this division shall
27 be determined in the following order of priority:

- 28 (a) The county in which the principal resides.
- 29 (b) The county in which the attorney-in-fact resides.
- 30 (c) A county in which property subject to the power of attorney is located.
- 31 (d) Any other county that is in the principal's best interest.

32 **Comment.** Section 4523 continues former Section 4923 without change. This section is drawn
33 from the rules applicable to guardianships and conservatorships. See Sections 2201-2202. See
34 also Section 4053 (durable powers of attorney under law of another jurisdiction).

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

36 **§ 4540. Petitioners**

37 4540. Subject to Section 4503, a petition may be filed under this part by any of the
38 following persons:

- 39 (a) The attorney-in-fact.
- 40 (b) The principal.
- 41 (c) The spouse of the principal.
- 42 (d) A relative of the principal.
- 43 (e) The conservator of the person or estate of the principal.

1 (f) The court investigator, described in Section 1454, of the county where the power of
2 attorney was executed or where the principal resides.

3 (g) The public guardian of the county where the power of attorney was executed or
4 where the principal resides.

5 (h) The personal representative or trustee of the principal's estate.

6 (i) The principal's successor in interest.

7 (j) A person who is requested in writing by an attorney-in-fact to take action.

8 (k) Any other interested person or friend of the principal.

9 **Comment.** Section 4540 continues former Section 4940 without change, except that the
10 reference to the treating health care provider in former subdivision (h) is omitted. Powers of
11 attorney for health care are governed by Division 4.7 (commencing with Section 4600). The
12 purposes for which a person may file a petition under this part are limited by other rules. See
13 Sections 4502 (effect of provision in power of attorney attempting to limit right to petition), 4503
14 (limitations on right to petition),; see also Section 4501 (other remedies not affected). See also the
15 comparable rules governing petitioners for appointment of a conservator under Section 1820.

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

18 § 4541. Petition as to powers of attorney

19 4541. A petition may be filed under this part for any one or more of the following
20 purposes:

21 (a) Determining whether the power of attorney is in effect or has terminated.

22 (b) Passing on the acts or proposed acts of the attorney-in-fact, including approval of
23 authority to disobey the principal's instructions pursuant to subdivision (b) of Section
24 4234.

25 (c) Compelling the attorney-in-fact to submit the attorney-in-fact's accounts or report
26 the attorney-in-fact's acts as attorney-in-fact to the principal, the spouse of the principal,
27 the conservator of the person or the estate of the principal, or to any other person required
28 by the court in its discretion, if the attorney-in-fact has failed to submit an accounting or
29 report within 60 days after written request from the person filing the petition.

30 (d) Declaring that the authority of the attorney-in-fact is revoked on a determination by
31 the court of all of the following:

32 (1) The attorney-in-fact has violated or is unfit to perform the fiduciary duties under the
33 power of attorney.

34 (2) At the time of the determination by the court, the principal lacks the capacity to give
35 or to revoke a power of attorney.

36 (3) The revocation of the attorney-in-fact's authority is in the best interest of the
37 principal or the principal's estate.

38 (e) Approving the resignation of the attorney-in-fact:

39 (1) If the attorney-in-fact is subject to a duty to act under Section 4230, the court may
40 approve the resignation, subject to any orders the court determines are necessary to
41 protect the principal's interests.

42 (2) If the attorney-in-fact is not subject to a duty to act under Section 4230, the court
43 shall approve the resignation, subject to the court's discretion to require the attorney-in-
44 fact to give notice to other interested persons.

45 (f) Compelling a third person to honor the authority of an attorney-in-fact.

46 **Comment.** Section 4541 continues former Section 4941 without change, except that the
47 reference to powers of attorney for health care in the introductory paragraph of former law is
48 omitted. Powers of attorney for health care are governed by Division 4.7 (commencing with

1 Section 4600). This section applies to petitions concerning both durable and nondurable powers
2 of attorney. See Sections 4022 (“power of attorney” defined), 4050 (scope of division).

3 Subdivision (a) makes clear that a petition may be filed to determine whether the power of
4 attorney was ever effective, thus permitting, for example, a determination that the power of
5 attorney was invalid when executed because its execution was induced by fraud. See also Section
6 4201 (unqualified attorney-in-fact).

7 The authority to petition to disobey the principal’s instructions in subdivision (b) is new. This is
8 a limitation on the general agency rule in Civil Code Section 2320. See Section 4234 (duty to
9 follow instructions) & Comment.

10 Subdivision (d) requires a court determination that the principal has become incapacitated
11 before the court is authorized to declare the power of attorney terminated because the attorney-in-
12 fact has violated or is unfit to perform the fiduciary duties under the power of attorney.

13 Subdivision (e) is a new procedure for accepting the attorney-in-fact’s resignation. The court’s
14 discretion in this type of case depends on whether the attorney-in-fact is subject to any duty to act
15 under Section 4230, as in the situation where the attorney-in-fact has agreed in writing to act or is
16 involved in an ongoing transaction. Under subdivision (e)(1) the court may make any necessary
17 protective order. Under subdivision (e)(2), the court’s discretion is limited to requiring that notice
18 be given to others who may be expected to look out for the principal’s interests, such as a public
19 guardian or a relative. In addition, the attorney-in-fact is required to comply with the statutory
20 duties on termination of authority. See Section 4238. The availability of this procedure is not
21 intended to imply that an attorney-in-fact must or should petition for judicial acceptance of a
22 resignation where the attorney-in-fact is not subject to a duty to act.

23 Subdivision (f) provides a remedy to achieve compliance with the power of attorney through
24 recognition of the attorney-in-fact’s authority. This remedy is also available to compel disclosure
25 of information under Section 4235 (consultation and disclosure). The former limitation of the
26 provision in subdivision (f) to statutory form powers of attorney has been eliminated. See Section
27 4300 *et seq.* (relations with third persons).

28 A power of attorney may limit the authority to petition under this part. See Sections 4502
29 (effect of provision in power of attorney attempting to limit right to petition), 4503 (limitations on
30 right to petition).

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

33 § 4542. Commencement of proceeding

34 4542. A proceeding under this part is commenced by filing a petition stating facts
35 showing that the petition is authorized under this part, the grounds of the petition, and, if
36 known to the petitioner, the terms of the power of attorney.

37 **Comment.** Section 4542 continues former Section 4943 without change. The former reference
38 to filing in the superior court is restated in a different form in Section 4520. For a comparable
39 provision, see Section 17201 (commencement of proceeding under Trust Law). A petition is
40 required to be verified. See Section 1021.

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

42 § 4543. Dismissal of petition

43 4543. The court may dismiss a petition if it appears that the proceeding is not
44 reasonably necessary for the protection of the interests of the principal or the principal’s
45 estate and shall stay or dismiss the proceeding in whole or in part when required by
46 Section 410.30 of the Code of Civil Procedure.

47 **Comment.** Section 4543 continues former Section 4944 without change. Under former Section
48 4944, the dismissal standard was revised to permit dismissal when the proceeding is not
49 “reasonably necessary,” rather than “necessary” as under the prior section (Civil Code Section

1 2416). Under this section, the court has authority to stay or dismiss a proceeding in this state if, in
2 the interest of substantial justice, the proceeding should be heard in a forum outside this state. See
3 Code Civ. Proc. § 410.30.

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

5 **§ 4544. Notice of hearing**

6 4544. (a) Subject to subdivision (b), at least 15 days before the time set for hearing, the
7 petitioner shall serve notice of the time and place of the hearing, together with a copy of
8 the petition, on the following:

9 (1) The attorney-in-fact if not the petitioner.

10 (2) The principal if not the petitioner.

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

15 **Comment.** Subdivision (a) of Section 4544, pertaining to internal affairs of the power of
16 attorney, continues former Section 4945(a) without change

17 Subdivision (b) continues former Section 4945(b) without change, and provides a special rule
18 applicable to service of notice in proceedings involving third persons, i.e., not internal affairs of
19 the power of attorney. See Section 4541(f) (petition to compel third person to honor attorney-in-
20 fact’s authority).

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

22 **§ 4545. Award of attorney’s fees**

23 4545. In a proceeding under this part commenced by the filing of a petition by a person
24 other than the attorney-in-fact, the court may in its discretion award reasonable attorney’s
25 fees to one of the following:

26 (a) The attorney-in-fact, if the court determines that the proceeding was commenced
27 without any reasonable cause.

28 (b) The person commencing the proceeding, if the court determines that the attorney-in-
29 fact has clearly violated the fiduciary duties under the power of attorney or has failed
30 without any reasonable cause or justification to submit accounts or report acts to the
31 principal or conservator of the estate or of the person, as the case may be, after written
32 request from the principal or conservator.

33 **Comment.** Section 4545 continues former Section 4947 without change.

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

36 **§ 4546. Appeal**

37 4546. An appeal may be taken from any of the following:

38 (a) Any final order made pursuant to Section 4541, except an order pursuant to
39 subdivision (c) of Section 4541.

40 (b) An order dismissing the petition or denying a motion to dismiss under Section 4543.

41 **Comment.** Section 4546 continues former Section 4948(a) and (c) without change. Subdivision
42 (b) in the former section is omitted because it related to petitions concerning powers of attorney
43 for health care. Powers of attorney for health care are governed by Division 4.7 (commencing
44 with Section 4600).

1 **Prob. Code §§ 4600-4806 (repealed). Durable powers of attorney for health care**

2 SEC. _____. Part 4 (commencing with Section 4600) of Division 4.5 of the Probate
3 Code is repealed.

4 **Comment.** Former Sections 4600-4806 are superseded by relevant parts of the Health Care
5 Decisions Law, Division 4.7 (commencing with Section 4600). See former Section 4600-4806
6 Comments.

7 **§ 4600 (repealed). Application of definitions**

8 **Comment.** Former Section 4600 is continued in Section 4603 without substantive change.

9 **§ 4603 (repealed). Community care facility**

10 **Comment.** Former Section 4603 is continued in Section 4611 without substantive change.

11 **§ 4606 (repealed). Durable power of attorney for health care**

12 **Comment.** Former Section 4606 is superseded by Section 4627 (“power of attorney for health
13 care” defined). See Section 4627 Comment. The durability of powers of attorney for health care is
14 implicit, so the term has been shortened in the new law to “power of attorney for health care.”

15 **§ 4609 (repealed). Health care**

16 **Comment.** The first part of former Section 4609 is continued in Section 4615 without
17 substantive change. The language relating to decisions affecting the principal after death is not
18 continued in the definition, but the authority is continued in Section 4684(b) without substantive
19 change.

20 **§ 4612 (repealed). Health care decision**

21 **Comment.** Former Section 4612 is superseded by Section 4617. See Section 4617 Comment.

22 **§ 4615 (repealed). Health care provider**

23 **Comment.** Former Section 4615 is continued in Section 4621 without substantive change.

24 **§ 4618 (repealed). Residential care facility for the elderly**

25 **Comment.** Former Section 4618 is continued in Section 4633 without substantive change.

26 **§ 4621 (repealed). Statutory form durable power of attorney for health care**

27 **Comment.** Former Section 4621 is not continued. For the replacement statutory form, see
28 Section 4701 (optional form of advance health care directive).

29 **§ 4650 (repealed). Application of chapter**

30 **Comment.** Former Section 4650 is superseded by Section 4671 and related authority in the
31 Health Care Decisions Law. For the application of the new law to existing advance health care
32 directives, see Section 4665 & Comment.

33 **§ 4651 (repealed). Form of durable power of attorney for health care after January 1, 1995**

34 **Comment.** Former Section 4651 is not continued. See Section 4701 (optional form of advance
35 health care directive).

1 **§ 4652 (repealed). Other authority not affected**

2 **Comment.** Subdivision (a) of former Section 4652 is superseded by Sections 4686 (agent's
3 priority) and 4688 (other authority of person named as agent not affected).

4 Subdivision (b) is continued in Section 4651(b) (emergency treatment) without substantive
5 change.

6 **§ 4653 (repealed). Validity of durable power of attorney for health care executed in another**
7 **jurisdiction**

8 **Comment.** Former Section 4653 is continued in Section 4674(a) without substantive change.

9 **§ 4654 (repealed). Durable power of attorney for health care subject to former 7-year limit**

10 **Comment.** Former Section 4654 is not continued. See Section 4665 (application of Health Care
11 Decisions Law to existing advance directives).

12 **§ 4700 (repealed). Requirements for durable power of attorney for health care**

13 **Comment.** Former Section 4700 is superseded by Section 4671 and related provisions. See
14 Section 4671 Comment.

15 **§ 4701 (repealed). Additional requirements for witnesses of durable power of attorney for**
16 **health care**

17 **Comment.** Former Section 4701 is continued in Section 4673(a)-(c) without substantive
18 change, but the witnessing rules apply only to patients in skilled nursing facilities.

19 **§ 4702 (repealed). Limitations on who may be attorney-in-fact**

20 **Comment.** Former Section 4702 is continued in Section 4660(a)-(c) without substantive
21 change. See Section 4660 Comment.

22 **§ 4703 (repealed). Requirements for printed form of durable power of attorney for health**
23 **care**

24 **Comment.** Former Section 4703 is not continued. See Section 4701 (optional form of advance
25 health care directive).

26 **§ 4704 (repealed). Warnings in durable power of attorney for health care not on printed**
27 **form**

28 **Comment.** Former Section 4704 is not continued. See Section 4701 (optional form of advance
29 health care directive).

30 **§ 4720 (repealed). Attorney-in-fact's authority to make health care decisions**

31 **Comment.** Subdivision (a) of former Section 4720 is continued in Sections 4683 (when agent's
32 authority effective) and 4686 (agent's priority) without substantive change.

33 Subdivision (b) is continued in Section 4684 without substantive change.

34 Subdivision (c) is continued in Section 4685 without substantive change.

35 Subdivision (d) is continued in Section 4688 without substantive change.

36 **§ 4721 (repealed). Availability of medical information to attorney-in-fact**

37 **Comment.** Former Section 4721 is continued in Section 4737 without substantive change.

1 **§ 4722 (repealed). Limitations on attorney-in-fact’s authority**

2 **Comment.** Former Section 4722 is continued in Section 4652 without substantive change.

3 **§ 4723 (repealed). Unauthorized acts and omissions**

4 **Comment.** Former Section 4723 is continued in Section 4653 without substantive change.

5 **§ 4724 (repealed). Principal’s objections**

6 **Comment.** Former Section 4724 is continued in Section 4659 without substantive change.

7 **§ 4725 (repealed). Restriction on execution of durable power of attorney for health care as**
8 **condition for admission, treatment, or insurance**

9 **Comment.** Former Section 4725 is continued in Section 4675 without substantive change.

10 **§ 4726 (repealed). Alteration or forging, or concealment or withholding knowledge of**
11 **revocation of durable power of attorney for health care**

12 **Comment.** Former Section 4726 is continued in Section 4743 without substantive change.

13 **§ 4727 (repealed). Revocation of durable power of attorney for health care**

14 **Comment.** Subdivision (a) of former Section 4727 is continued in Section 4696 (revocation of
15 designation of agent under power of attorney for health care) without substantive change. See
16 Section 4696 Comment.

17 Subdivision (b) is continued in Section 4731 (duty of supervising health care provider to record
18 relevant information) without substantive change.

19 The first sentence of subdivision (c) is continued in Section 4657 (presumption of capacity)
20 without substantive change. [The second sentence is not continued.]

21 Subdivision (d) is [continued] in Section 4698(a) (effect of later advance directive on earlier
22 advance directive) without substantive change.

23 Subdivision (e) is continued in Section 4697 (effect of dissolution or annulment) without
24 substantive change.

25 Subdivision (f) is superseded by Section 4740 (immunities of health care provider and
26 institution). See Section 4740 Comment.

27 **§ 4750 (repealed). Immunities of health care provider**

28 **Comment.** Former Section 4750 is superseded by Section 4740. See Section 4740 Comment.

29 **§ 4751 (repealed). Convincing evidence of identity of principal**

30 **Comment.** Former Section 4751 is continued in Section 4673(d)-(e) without substantive
31 change. The scope of the new provision is different, however. See Section 4673 Comment.

32 **§ 4752 (repealed). Presumption concerning power executed in other jurisdiction**

33 **Comment.** Former Section 4752 is continued in Section 4674(b) without substantive change.

34 **§ 4753 (repealed). Request to forego resuscitative measures**

35 **Comment.** Former Section 4753 is continued in Part 4 (commencing with Section 4780) of
36 Division 4.7 without substantive change. Subdivision (a) is continued in Section 4782 without
37 substantive change. Subdivision (b) is continued in Section 4780 without substantive change.
38 Subdivisions (c) and (d) are continued in Section 4783 without substantive change. Subdivision
39 (e) is continued in Section 4784 without change. Subdivision (f) is continued in Section 4785

1 without substantive change. Subdivision (g) is continued in Section 4781 without substantive
2 change. Subdivision (h) is continued in Section 4786 without substantive change.

3 **§ 4770 (repealed). Short title**

4 **Comment.** Former Section 4770 is not continued. The statutory form durable power of attorney
5 for health care is replaced by the optional form of an advance health care directive in Section
6 4701.

7 **§ 4771 (repealed). Statutory form durable power of attorney for health care**

8 **Comment.** The statutory form set out in former Section 4771 is superseded by the optional
9 advance health care directive form provided by Section 4701. See Section 4701 Comment. See
10 also Section 4665 (application of Health Care Decisions Law to existing advance directives).

11 **§ 4772 (repealed). Warning or lawyer’s certificate**

12 **Comment.** Former Section 4772 is not continued. See Section 4701 (optional advance directive
13 form) & Comment.

14 **§ 4773 (repealed). Formal requirements**

15 **Comment.** Former Section 4773 is not continued. For execution requirements, see Section
16 4680. See also Sections 4700 (substantive rules applicable to form), 4701 (optional advance
17 directive form) & Comment.

18 **§ 4774 (repealed). Requirements for statutory form**

19 **Comment.** Former Section 4774 is not continued. For execution requirements, see Section
20 4680. See also Sections 4700 (substantive rules applicable to form), 4701 (optional advance
21 directive form) & Comment.

22 **§ 4775 (repealed). Use of forms valid under prior law**

23 **Comment.** Former Section 4775 is not continued. See Section 4665 (application of Health Care
24 Decisions Law to existing advance directives).

25 **§ 4776 (repealed). Language conferring general authority**

26 **Comment.** Former Section 4776 is not continued. See Section 4701 (optional advance directive
27 form) & Comment.

28 **§ 4777 (repealed). Effect of documents executed by attorney-in-fact**

29 **Comment.** Former Section 4777 is not continued. See Sections 4684 (scope of agent’s
30 authority), 4701 (optional advance directive form) & Comment.

31 **§ 4778 (repealed). Termination of authority; alternate attorney-in-fact**

32 **Comment.** Former Section 4778 is not continued. See Section 4701 (optional advance directive
33 form) & Comment.

34 **§ 4779 (repealed). Use of other forms**

35 **Comment.** Former Section 4779 is superseded by Section 4700.

1 **§ 4800 (repealed). Registry system established by Secretary of State**

2 **Comment.** Former Section 4800 is continued in new Section 4800 without substantive change.
3 However, the registry provisions in Sections 4800-4806 of former law are revised to permit
4 registration of individual health care instructions, as well as powers of attorney for health care in
5 new Sections 4800-4805. See new Section 4800 Comment.

6 **§ 4801 (repealed). Identity and fees**

7 **Comment.** Former Section 4801 is continued in new Section 4801 without change.

8 **§ 4802 (repealed). Notice**

9 **Comment.** Former Section 4802 is continued in new Section 4802 without substantive change.
10 See Section 4800 Comment.

11 **§ 4804 (repealed). Effect of failure to register**

12 **Comment.** Former Section 4804 is continued in Section 4803 without substantive change. See
13 Section 4800 Comment.

14 **§ 4805 (repealed). Effect of registration on revocation and validity**

15 **Comment.** Former Section 4805 is continued in Section 4804 without substantive change. See
16 Section 4800 Comment.

17 **§ 4806 (repealed). Effect on health care provider**

18 **Comment.** Former Section 4806 is continued in Section 4805 without substantive change. See
19 Section 4800 Comment.

20 **Prob. Code §§ 4900-4948 (repealed). Judicial proceedings concerning powers of attorney**

21 SEC. _____. Part 5 (commencing with Section 4900) of Division 4.5 of the Probate
22 Code is repealed.

23 **Comment.** Sections 4900-4948 have been moved to a new Part 4 (commencing with Section
24 4500) as part of the reorganization related to enactment of the Health Care Decisions Law,
25 Division 4.7 (commencing with Section 4600). With respect to powers of attorney for health care,
26 this part is replaced by Part 3 (commencing with Section 4750) in Division 4.7.

27 **§ 4900 (repealed). Power of attorney freely exercisable**

28 **Comment.** Former Section 4900 is continued in Sections 4500 (property powers) and 4750
29 (health care powers) without substantive change.

30 **§ 4901 (repealed). Cumulative remedies**

31 **Comment.** Former Section 4901 is continued in Sections 4501 (property powers) and 4751
32 (health care powers) without substantive change.

33 **§ 4902 (repealed). Effect of provision in power of attorney attempting to limit right to**
34 **petition**

35 **Comment.** Former Section 4902 is continued in Sections 4502 (property powers) and 4752
36 (health care powers) without substantive change.

1 **§ 4903 (repealed). Limitations on right to petition**

2 **Comment.** Former Section 4903 is continued in Sections 4503 (property powers) and 4753
3 (health care powers) without substantive change.

4 **§ 4904 (repealed). Jury trial**

5 **Comment.** Former Section 4904 is continued in Sections 4504 (property powers) and 4754
6 (health care powers) without substantive change.

7 **§ 4905 (repealed). Application of general procedural rules**

8 **Comment.** Former Section 4905 is continued in Sections 4505 (property powers) and 4755
9 (health care powers) without substantive change.

10 **§ 4920 (repealed). Jurisdiction and authority of court or judge**

11 **Comment.** Former Section 4920 is continued in Sections 4520 (property powers) and 4760
12 (health care powers) without substantive change.

13 **§ 4921 (repealed). Basis of jurisdiction**

14 **Comment.** Former Section 4921 is continued in Sections 4521 (property powers) and 4761
15 (health care powers) without substantive change.

16 **§ 4922 (repealed). Jurisdiction over attorney-in-fact**

17 **Comment.** Former Section 4922 is continued in Sections 4522 (property powers) and 4762
18 (health care powers) without substantive change.

19 **§ 4923 (repealed). Venue**

20 **Comment.** Former Section 4923 is continued in Sections 4523 (property powers) and 4763
21 (health care powers) without substantive change.

22 **§ 4940 (repealed). Petitioners**

23 **Comment.** Former Section 4940 is continued in Section 4540 without change, except that the
24 reference to the treating health care provider in subdivision (h) is omitted. Powers of attorney for
25 health care are governed by Division 4.7 (commencing with Section 4600).

26 **§ 4941 (repealed). Petition as to powers of attorney other than durable power of attorney**
27 **for health care**

28 **Comment.** As to property powers, former Section 4941 is continued in Section 4541 without
29 change, except that the reference to powers of attorney for health care in the introductory
30 paragraph is omitted. As to health care powers, the former section is continued in Section 4765,
31 with several changes. See Section 4765 Comment.

32 **§ 4942 (repealed). Petition as to durable power of attorney for health care**

33 **Comment.** Former Section 4942 is continued in Section 4766 with several changes. See
34 Section 4766 & Comment.

35 **§ 4943 (repealed). Commencement of proceeding**

36 **Comment.** Former Section 4943 is continued in Sections 4542 (property powers) and 4767
37 (health care powers) without substantive change.

1 **§ 4944 (repealed). Dismissal of petition**

2 **Comment.** Former Section 4944 is continued in Sections 4543 (property powers) and 4768
3 (health care powers) without substantive change.

4 **§ 4945 (repealed). Notice of hearing**

5 **Comment.** Former Section 4945 is continued in Sections 4544 (property powers) and 4769
6 (health care powers) without substantive change.

7 **§ 4946 (repealed). Temporary health care order**

8 **Comment.** Former Section 4946 is continued in Section 4770 without several changes. See
9 Section 4770 Comment.

10 **§ 4947 (repealed). Award of attorney's fees**

11 **Comment.** Former Section 4947 is continued in Sections 4545 (property powers) and 4771
12 (health care powers) without substantive change.

13 **§ 4948 (repealed). Appeal**

14 **Comment.** Former Section 4948 is continued in Sections 4546 (property powers) and 4772
15 (health care powers) without substantive change.
16

17 **REVISED COMMENTS**

18 **Prob. Code § 2 (revised comment). Continuation of existing law; construction of provisions**
19 **drawn from uniform acts**

20 **Revised Comment.** Section 2 continues Section 2 of the repealed Probate Code without
21 change. See also Gov't Code §§ 9604 (reference made in statute, charter, or ordinance to
22 provisions of one statute carried into another statute under circumstances in which they are
23 required to be construed as restatements and continuations and not as new enactments), 9605
24 (construction of amended statutory provision).

25 Some of the provisions of this code are the same as or similar to provisions of uniform acts.
26 Subdivision (b) provides a rule for interpretation of these provisions. Many of the provisions of
27 this code are drawn from the Uniform Probate Code (1987). Some provisions are drawn from
28 other uniform acts:

- 29 Sections 220-224 — Uniform Simultaneous Death Act (1953)
- 30 Sections 260-288 — Uniform Disclaimer of Transfers by Will, Intestacy or
31 Appointment Act (1978)
- 32 Sections 260-288 — Uniform Disclaimer of Transfers Under Nontestamentary
33 Instrument Act (1978)
- 34 Sections 3900-3925 — Uniform Transfers to Minors Act (1983)
- 35 Sections 4001, 4124-4127, 4206, 4304-4305 — Uniform Durable Power of Attorney Act
- 36 Sections 4400-4465 — Uniform Statutory Form Power of Attorney Act
- 37 Sections 4670-4772 — Uniform Health-Care Decisions Act
- 38 Sections 6300-6303 — Uniform Testamentary Additions to Trusts Act (1960)
- 39 Sections 6380-6390 — Uniform International Wills Act (1977). See also Section 6387
40 (need for uniform interpretation of Uniform International Wills Act)
- 41 Sections 16002(a), 16003, 16045-16054 — Uniform Prudent Investor Act (1994)
- 42 Sections 16200-16249 — Uniform Trustees' Powers Act (1964)
- 43 Sections 16300-16313 — Revised Uniform Principal and Income Act (1962)

1 A number of terms and phrases are used in the Comments to the sections of the new Probate
2 Code (including the “Background” portion of each Comment) to indicate the sources of the new
3 provisions and to describe how they compare with prior law. The portion of the Comment giving
4 the background on each section of the repealed code may also use terms and phrases to indicate
5 the source or sources of the repealed section and to describe how the repealed section compared
6 with the prior law.

7 The following discussion is intended to provide guidance in interpreting the terminology most
8 commonly used in the Comments.

9 (1) *Continues without change.* A new provision “continues” a former provision “without
10 change” if the two provisions are identical or nearly so. In some cases, there may be insignificant
11 technical differences, such as where punctuation is changed without a change in meaning. Some
12 Comments may describe the relationship by simply stating that a new provision “continues” or is
13 “the same as” a former provision of the repealed Probate Code, or is “the same as” a provision of
14 the Uniform Probate Code or another uniform act.

15 (2) *Continues without substantive change.* A new provision “continues” a former provision
16 “without substantive change” if the substantive law remains the same but the language differs to
17 an insignificant degree.

18 (3) *Restates without substantive change.* A new provision “restates” a former provision
19 “without substantive change” if the substantive law remains the same but the language differs to a
20 significant degree. Some Comments may describe the new provision as being the “same in
21 substance.”

22 (4) *Exceptions, additions, omissions.* If part of a former provision is “continued” or “restated,”
23 the Comment may say that the former provision is continued or restated but also note the specific
24 differences as “exceptions to,” “additions to,” or “omissions from” the former provision.

25 (5) *Generalizes, broadens, restates in general terms.* A new provision may be described as
26 “generalizing,” “broadening,” or “restating in general terms” a provision of prior law. This
27 description means that a limited rule has been expanded to cover a broader class of cases.

28 (6) *Supersedes, replaces.* A provision “supersedes” or “replaces” a former provision if the new
29 provision deals with the same subject as the former provision but treats it in a significantly
30 different manner.

31 (7) *New.* A provision is described as “new” where it has no direct source in prior statutes.

32 (8) *Drawn from, similar to, consistent with.* A variety of terms is used to indicate a source for a
33 new provision, typically a source other than California statutes. For example, a provision may be
34 “drawn from” a uniform act, model code, Restatement, or the statutes of another state. In such
35 cases, it may be useful to consult any available commentary or interpretation of the source from
36 which the new provision is drawn for background information.

37 (9) *Codifies.* A Comment may state that a new provision “codifies” a case-law rule that has not
38 previously been enacted into statutory law. A provision may also be described as codifying a
39 Restatement rule, which may or may not represent previously existing common law in California.

40 (10) *Makes clear, clarifies.* A new provision may be described as “making clear” a particular
41 rule or “clarifying” a rule as a way of emphasizing the rule, particularly if the situation under
42 prior law was doubtful or contradictory.

43 (11) *Statement in Comment that section is “comparable” to another section.* A Comment may
44 state that a provision is “comparable” to another provision. If the Comment to a section notes that
45 another section is “comparable” that does not mean that the other section is the same or
46 substantially the same. The statement is included in the Comment so that the statute user is alerted
47 to the other section and can review the cases under that section for possible use in interpreting the
48 section containing the statement in the Comment.

49 **Prob. Code § 4014 (revised comment). Attorney-in-fact**

50 **Revised Comment.** Subdivision (a) of Section 4014 supersedes part of former Civil Code
51 Section 2400 and former Civil Code Section 2410(a), and is comparable to the first sentence of
52 Civil Code Section 2295.

1 Subdivision (b) is comparable to Section 84 (“trustee” includes successor trustee). See Sections
2 4202 (multiple attorneys-in-fact), 4203 (successor attorneys-in-fact), 4205 (delegation of
3 attorney-in-fact’s authority), ~~4771 (alternate attorneys-in-fact under statutory form durable power~~
4 ~~of attorney for health care)~~. The purpose of subdivision (b) is to make clear that the rules
5 applicable to attorneys-in-fact under the Power of Attorney Law apply as well to successors and
6 alternates of the original attorney-in-fact, and to other persons who act in place of the attorney-in-
7 fact.

8 See also Sections 4022 (“power of attorney” defined), 4026 (“principal” defined).

9 **Prob. Code § 4053 (revised comment). Recognition of durable powers of attorney executed**
10 **under law of another state**

11 **Revised Comment.** Section 4053 is new. This section promotes use and enforceability of
12 durable powers of attorney executed in other states. See also Section 4018 (“durable power of
13 attorney” defined). ~~For a special rule applicable to durable powers of attorney for health care~~
14 ~~executed in another jurisdiction, see Section 4653.~~

15 **Prob. Code § 4054 (revised comment). Application to existing powers of attorney and**
16 **pending proceedings**

17 **Revised Comment (1994).** Section 4054 is comparable to Section 15001 (application of Trust
18 Law). Subdivision (a) provides the general rule that this division applies to all powers of attorney,
19 regardless of when created.

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

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

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

26 **Prob. Code § 4101 (revised comment). Priority of provisions of power of attorney**

27 **Revised Comment.** Section 4101 is new. This section makes clear that many of the statutory
28 rules provided in this division are subject to express or implicit limitations in the power of
29 attorney. If a statutory rule is not subject to control by the power of attorney, this is stated
30 explicitly, either in a particular section or as to a group of sections. See, e.g., Sections 4130
31 (inconsistent authority), 4151(a)(2) (revocation of power of attorney by writing), 4153(a)(2)-(3)
32 (revocation of attorney-in-fact’s authority), 4155 (termination of authority under nondurable
33 power of attorney on principal’s incapacity), 4206 (relation of attorney-in-fact to court-appointed
34 fiduciary), 4207 (resignation of attorney-in-fact), 4232 (duty of loyalty), 4233 (duty to keep
35 principal’s property separate and identified), 4234(b) (authority to disobey instructions with court
36 approval), 4236 (duty to keep records and account; availability of records to other persons), ~~4902~~
37 ~~4502~~ (effect of provision in power of attorney attempting to limit right to petition), ~~4903~~ ~~4503~~
38 (limitations on right to petition).

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

41 **Prob. Code § 4121 (revised comment). Formalities for executing a power of attorney**

42 **Revised Comment.** Section 4121 provides the general execution formalities for a power of
43 attorney under this division. A power of attorney that complies with this section is legally
44 sufficient as a grant of authority to an attorney-in-fact. Special rules apply to a statutory form
45 power of attorney. See Section 4402. ~~Additional qualifications apply to witnesses for a durable~~
46 ~~power of attorney for health care.~~ See Sections 4700, 4701, 4771.

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

5 In subdivision (b), the requirement that a power of attorney be signed by the principal or at the
6 principal's direction continues a rule implicit in former law. See former Civ. Code §§ 2400,
7 2410(c). In addition, it generalizes the rule applicable to durable powers of attorney for health
8 care under former Civil Code Section 2432.

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

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

22 See also Sections 4022 ("power of attorney" defined), 4026 ("principal" defined).

23 **Prob. Code § 4124 (revised comment). Requirements for durable power of attorney**

24 **Revised Comment.** Section 4124 restates former Civil Code Section 2400 without substantive
25 change. For special rules applicable to statutory form powers of attorney, see Sections 4401,
26 4402. ~~For special rules applicable to durable powers of attorney for health care, see Sections~~
27 ~~4703, 4771.~~ See also Section 4050 (powers subject to this division).

28 Section 4124 is similar to the official text of Section 1 of the Uniform Durable Power of
29 Attorney Act (1984), Uniform Probate Code Section 5-501 (1991). See Section 2(b)
30 (construction of provisions drawn from uniform acts). The reference in the uniform act to the
31 principal's "disability" is omitted. Under Section 4155, it is the principal's incapacity to contract
32 which would otherwise terminate the power of attorney. In addition, the phrase "or lapse of time"
33 has not been included in the language set forth in subdivision (a) of Section 4124 because it is
34 unnecessary. As a matter of law, unless a durable power of attorney states an earlier termination
35 date, it remains valid regardless of any lapse of time since its creation. See, e.g., Sections 4127
36 (lapse of time), 4152(a)(1) (termination of attorney-in-fact's authority pursuant to terms of power
37 of attorney).

38 See also Sections 4014 ("attorney-in-fact" defined), 4018 ("durable power of attorney"
39 defined), 4022 ("power of attorney" defined), 4026 ("principal" defined).

40 **Prob. Code § 4130 (revised comment). Inconsistent authority**

41 **Revised Comment.** Section 4130 is new. ~~For a special rule applicable to durable powers of~~
42 ~~attorney for health care, see Section 4727(d).~~ See also Sections 4014 ("attorney-in-fact" defined),
43 4022 ("power of attorney" defined), 4026 ("principal" defined).

44 **Prob. Code § 4152 (revised comment). Termination of attorney-in-fact's authority**

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

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

6 Subdivision (a)(4) is the same as Civil Code Section 2356(a)(2), but recognizes that certain
7 tasks may remain to be performed after death. See, e.g., Sections 4238 (attorney-in-fact’s duties
8 on termination of authority), ~~4609 (“health care” defined to include post-death decisions)~~, 4720
9 (~~authority to make health care decisions, including certain post-death decisions~~).

10 Subdivision (a)(5) is generalized from Civil Code Section 2355(c)-(f). Subdivision (a)(6) is
11 similar to Civil Code Section 2355(d) (renunciation by agent). For the manner of resignation, see
12 Section 4207. Subdivision (a)(7) is similar to Civil Code Section 2355(e). Subdivision (a)(8)
13 cross-refers to the rules governing the effect of dissolution and annulment of marriage.
14 Subdivision (a)(9) is the same as Civil Code Section 2355(c).

15 Subdivision (b) preserves the substance of the introductory clause of Civil Code Section 2355
16 and Civil Code Section 2356(b), which protect persons without notice of events that terminate an
17 agency.

18 See also Sections 4014 (“attorney-in-fact” defined), 4022 (“power of attorney” defined), 4026
19 (“principal” defined), 4034 (“third person” defined); Civ. Code § 1216 (recordation of revocation
20 of recorded instruments).

21 **Prob. Code § 4200 (revised comment). Qualifications of attorney-in-fact**

22 **Revised Comment.** Section 4200 supersedes the last part of Civil Code Section 2296 (“any
23 person may be an agent”) to the extent that it applied to attorneys-in-fact under powers of
24 attorney. ~~For special limitations on attorneys-in-fact under durable powers of attorney for health~~
25 ~~care, see Sections 4700(b)-(e), 4720.~~

26 See also Sections 56 (“person” defined), 4014 (“attorney-in-fact” defined).

27 **Prob. Code § 4207 (revised comment). Resignation of attorney-in-fact**

28 **Revised Comment.** Section 4207 is new. For judicial procedures for approving the attorney-in-
29 fact’s resignation, see Sections 4941(e) (petition as to power of attorney other than durable power
30 of attorney for health care), ~~4942(e) (petition as to durable power of attorney for health care)~~.

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

33 **Prob. Code § 4234 (revised comment). Duty to keep principal informed and follow** 34 **instructions**

35 **Revised Comment.** Section 4234 is drawn from general agency rules. The duty to follow the
36 principal’s instructions is consistent with the general agency rule in Civil Code Section 2309. See
37 also Civ. Code § 2019 (agent not to exceed limits of actual authority). The duty to communicate
38 with the principal is consistent with the general agency rule in Civil Code Sections 2020 and
39 2332.

40 Subdivision (b) is a limitation on the general agency rule in Civil Code Section 2320 (power to
41 disobey instructions). For provisions relating to judicial proceedings, see Section 4900 4500 *et*
42 *seq.*

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

1 **Prob. Code § 4235 (revised comment). Consultation and disclosure**

2 **Revised Comment.** Section 4235 is drawn from the Missouri Durable Power of Attorney Law.
3 See Mo. Ann. Stat. § 404.714(4) (Vernon 1990). This section does not provide anything
4 inconsistent with permissible practice under former law, but is intended to recognize the
5 desirability of consultation in appropriate circumstances and provide assurance to third persons
6 that consultation with the attorney-in-fact is proper and does not contravene privacy rights. As to
7 the right to obtain medical records under the durable power of attorney for health care, see
8 Section 4721. See also Section 4455(f) (receipt of bank statements, etc., under statutory form
9 powers of attorney). The right to obtain information may be enforced pursuant to Section 4941
10 4541(f).

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

12 **Prob. Code § 4236 (revised comment). Duty to keep records and account; availability of**
13 **records to other persons**

14 **Revised Comment.** Section 4236 is drawn in part from Minnesota law. See Minn. Stat. Ann. §
15 523.21 (West Supp. 1994). For provisions relating to judicial proceedings, see Section 4900 4500
16 *et seq.*

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

19 **Prob. Code § 4300 (revised comment). Third persons required to respect attorney-in-fact’s**
20 **authority**

21 **Revised Comment.** Section 4300 is new. This section provides the basic rule concerning the
22 position of an attorney-in-fact: that the attorney-in-fact acts in place of the principal, within the
23 scope of the power of attorney, and is to be treated as if the principal were acting. The second
24 sentence generalizes a rule in former Civil Code Section 2480.5, which was applicable only to the
25 Uniform Statutory Form Power of Attorney. Under this rule, a third person may be compelled to
26 honor a power of attorney only to the extent that the principal, disregarding any legal disability,
27 could bring an action to compel the third person to act. A third person who could not be forced to
28 do business with the principal consequently may not be forced to deal with the attorney-in-fact.
29 However, a third person who holds property of the principal, who owes a debt to the principal, or
30 who is obligated by contract to the principal may be compelled to accept the attorney-in-fact’s
31 authority.

32 This general rule is subject to some specific exceptions. See, e.g., Sections 4309 (prior breach
33 by attorney-in-fact), 4310 (transactions relating to accounts and loans in financial institution),
34 4720 (attorney-in-fact’s authority to make health care decisions).

35 See also Sections 4014 (“attorney-in-fact” defined), 4022 (“power of attorney” defined), 4026
36 (“principal” defined), 4034 (“third person” defined).

37 **Prob. Code § 4301 (revised comment). Reliance by third person on general authority**

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

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

1 **Prob. Code § 4302 (revised comment). Identification of attorney-in-fact and principal**

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

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

8 **Prob. Code § 4303 (revised comment). Protection of third person relying in good faith on**
9 **power of attorney**

10 **Revised Comment.** Section 4303 continues former Civil Code Section 2512 without
11 substantive change, with the addition of the witnessing rule in subdivision (a)(3). This section is
12 intended to ensure that a power of attorney, whether durable or nondurable, will be accepted and
13 relied on by third persons. The person presenting the power of attorney must actually be the
14 attorney-in-fact designated in the power of attorney. If the person purporting to be the attorney-in-
15 fact is an impostor, the immunity does not apply. The third person can rely in good faith on the
16 notary public’s certificate of acknowledgment or the signatures of the witnesses that the person
17 who executed the power of attorney is the principal.

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

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

32 See also Sections 4014 (“attorney-in-fact” defined), 4018 (“durable power of attorney”
33 defined), 4022 (“power of attorney” defined), 4026 (“principal” defined), 4034 (“third person”
34 defined).

35 **Prob. Code § 4307 (revised comment). Certified copy of power of attorney**

36 **Revised Comment.** Section 4307 is new. This section facilitates use of a power of attorney
37 executed in this state as well as powers of attorney executed in other states. Subdivision (d)
38 makes clear that certification under this section is not a requirement for use of copies of powers of
39 attorney. This recognizes, for example, the existing practice of good faith reliance on copies of
40 durable powers of attorney for health care. See former Section 4750 (immunities of health care
41 provider).

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

43 **Prob. Code § 4401 (revised comment). Statutory form power of attorney**

44 **Revised Comment.** Section 4401 continues former Civil Code Section 2475 without change,
45 except for the revision of cross-references to other provisions, the restoration of language
46 erroneously omitted in 1993, and inclusion of a general reference to the law governing the
47 notary’s certificate of acknowledgment. Section 4401 is the same in substance as Section 1(a)
48 of the Uniform Statutory Form Power of Attorney Act (1988), with the addition of provisions to

1 permit designation of co-agents. See Section 2(b) (construction of provisions drawn from uniform
2 acts).

3 The provisions added by former Civil Code Section 2475 were drawn from the former
4 Statutory Short Form Power of Attorney statute. See former Civ. Code § 2450 (repealed by 1990
5 Cal. Stat. ch. 986, § 1). The acknowledgment portion of the form was revised to be consistent
6 with the form used under California law. The word “incapacitated” was substituted for the words
7 “disabled, incapacitated, or incompetent” used in the uniform act. This substitution conforms the
8 statutory form to the California version of the Uniform Durable Power of Attorney Act. See
9 Section 4018 (requirements for creation of durable power of attorney).

10 Section 4401 provides the text of the form that is sufficient and necessary to bring this part into
11 operation. The statutory form can be used in whole or part instead of individually drafted forms or
12 forms adapted from a form book.

13 A form used to create a power of attorney subject to this part should use the language provided
14 in Section 4401. Minor variances in wording will not take it out of the scope of the part. For
15 example, the use of the language of the official text of the uniform act in the last paragraph of the
16 text of the statutory form (protection of third party who receives a copy of the statutory form
17 power of attorney and acts in reliance on it) instead of the language provided in Section 4401
18 does not take the form out of the scope of this part. See Section 4402(a). Nor does the omission of
19 the provisions relating to designation of co-agents take the form out of the scope of this part. See
20 Section 4402(a).

21 After the introductory phrase, the term “agent” is used throughout the uniform act in place of
22 the longer and less familiar “attorney-in-fact.” Special effort is made throughout the uniform act
23 to make the language as informal as possible without impairing its effectiveness.

24 The statutory form contains a list of powers. The powers listed relate to various separate classes
25 of activities, except the last, which includes all the others. Health care matters are not included.
26 See Sections 4609 (“health care” defined), 4612 (“health care decision” defined). For a durable
27 power of attorney form for health care, see Section 4771.

28 Space is provided in the statutory form for “Special Instructions.” In this space, the principal
29 can add specially drafted provisions limiting or extending the powers granted to the agent. (If the
30 space provided is not sufficient, a reference can be made in this space to an attached sheet or
31 sheets, and the special provisions can be included on the attached sheet or sheets.)

32 The statutory form contains only a limited list of powers. If it is desired to give the agent the
33 broadest possible powers, language similar to the following can be added under the “Special
34 Instructions” portion of the form:

35 In addition to all of the powers listed in lines (A) to (M) above, I grant to my agent full power
36 and authority to act for me, in any way which I myself could act if I were personally present and
37 able to act, with respect to all other matters and affairs not listed in lines (A) to (M) above, but this
38 authority does not include authority to make health care decisions.

39 Neither the form in this section, nor the constructional provisions in Sections 4450-4465,
40 attempt to allow the grant of the power to make a will or to give the agent extensive estate
41 planning authority, although several of the powers, especially lines (G), (H), and (L) of the
42 statutory form, may be useful in planning the disposition of an estate. An individually tailored
43 power of attorney can be used if the principal wants to give the agent extensive estate planning
44 authority, or additional estate planning powers can be granted to the agent by stating those
45 additional powers in the space provided in the form for “Special Instructions.” For example,
46 provisions like the following might be included under the special instructions portion of the
47 statutory form:

48 In addition to the powers listed in lines (A) to (M) above, the agent is empowered to do all of the
49 following:

50 (1) Establish a trust with property of the principal for the benefit of the principal and the spouse
51 and descendants of the principal, or any one or more of them, upon such terms as the agent

1 determines are necessary or proper, and transfer any property in which the principal has an interest
2 to the trust.

3 (2) Exercise in whole or in part, release, or let lapse any power the principal may have under any
4 trust whether or not created by the principal, including any power of appointment, revocation, or
5 withdrawal, but a trust created by the principal may only be modified or revoked by the agent as
6 provided in the trust instrument.

7 (3) Make a gift, grant, or other transfer without consideration to or for the benefit of the spouse
8 or descendants of the principal or a charitable organization, or more than one or all of them, either
9 outright or in trust, including the forgiveness of indebtedness and the completion of any charitable
10 pledges the principal may have made; consent to the splitting of gifts under Internal Revenue Code
11 Section 2513, or successor sections, if the spouse of the principal makes gifts to any one or more
12 of the descendants of the principal or to a charitable institution; pay any gift tax that may arise by
13 reason of those gifts.

14 (4) Loan any of the property of the principal to the spouse or descendants of the principal, or
15 their personal representatives or a trustee for their benefit, the loan bearing such interest, and to be
16 secured or unsecured, as the agent determines advisable.

17 (5) In general, and in addition to all the specific acts enumerated, do any other act which the
18 principal can do through an agent for the welfare of the spouse, children, or dependents of the
19 principal or for the preservation and maintenance of other personal relationships of the principal to
20 parents, relatives, friends, and organizations.

21 It should be noted that a trust may not be modified or revoked by an agent under a statutory
22 form power of attorney unless it is expressly permitted by the instrument granting the power and
23 by the trust instrument. See Section 15401(b).

24 Section 4404 and the statutory form itself make the power of attorney a durable power of
25 attorney, remaining in effect after the incapacity of the principal, unless the person executing the
26 form strikes out the language in the form that makes the instrument a durable power of attorney.
27 See also Section 4018 (“durable power of attorney” defined).

28 The last paragraph of the text of the statutory form protects a third party who receives a copy of
29 the statutory form power of attorney and acts in reliance on it. See also Section 4034 (“third
30 person” defined). The statement in the statutory form — that revocation of the power of attorney
31 is not effective as to a third party until the third party has actual knowledge of the revocation — is
32 consistent with Sections 4304 (good faith reliance on power of attorney without actual knowledge
33 of death or incapacity of principal), 4305 (affidavit of lack of knowledge of termination of
34 power). See also Sections 4300 (third persons required to respect agent’s authority), 4301
35 (immunities of third person), 4303 (protection of person who acts in good faith reliance upon
36 power of attorney where specified requirements are satisfied). The protection provided by these
37 sections and other immunities that may protect persons who rely on a power of attorney (see
38 Section 4303(b)) apply to a statutory form power of attorney. See Sections 4100 (application of
39 division to statutory form power of attorney), 4407 (general provisions applicable to statutory
40 form power of attorney).

41 The language of the last portion of the text of the statutory form set forth in Section 4401
42 substitutes the phrase “has actual knowledge of the revocation” for the phrase “learns of the
43 revocation” which is used in the uniform act form. This substitution does not preclude use of a
44 form including the uniform act language. See Section 4402(a) (third sentence).

45 Neither this section, nor the part as a whole, attempts to provide an exclusive method for
46 creating a power of attorney. Other forms may be used and other law employed to create powers
47 of attorney. See Section 4408. However, this part should be sufficient for most purposes.

48 For provisions relating to court enforcement of the duties of the agent, see Sections 4900-4948
49 4500-4546.

50 The form provided by Section 4401 supersedes the former statutory short form power of
51 attorney under former Civil Code Sections 2450-2473 (repealed by 1990 Cal. Stat. ch. 986, § 1).

1 But older forms consistent with former Civil Code Sections 2450-2473 are still effective. See
2 Section 4409 & Comment.

3 See also Sections 4014 (“attorney-in-fact” defined to include agent), 4026 (“principal”
4 defined), 4034 (“third person” defined).

5 **Prob. Code § 4405 (revised comment). Springing statutory form power of attorney**

6 **Revised Comment.** Section 4405 continues former Civil Code Section 2479 without
7 substantive change. Section 4405 is not found in the Uniform Statutory Form Power of Attorney
8 Act (1988). This section is drawn from Section 5-1602 of the New York General Obligations
9 Law. A provision described in subdivision (a) protects a third person who relies on the
10 declaration under penalty of perjury of the person or persons designated in the power of attorney
11 that the specified event or contingency has occurred. The principal may designate the agent or
12 another person, or several persons, to make this declaration.

13 Subdivision (d) makes clear that subdivisions (a) and (b) are not the exclusive method for
14 creating a “springing power” (a power of attorney that goes into effect upon the occurrence of a
15 specified event or contingency). The principal is free to set forth in a power of attorney under this
16 part any provision the principal desires to provide for the method of determining whether the
17 specified event or contingency has occurred. For example, the principal may provide that his or
18 her “incapacity” be determined by a court under Part 5 4 (commencing with Section 4900 4500).
19 See Section 4941 4541(a). If the power of attorney provides only that it shall become effective
20 “upon the incapacity of the principal,” the determination whether the power of attorney is in
21 effect also may be made under Part 5 4(commencing with Section 4900 4500).

22 See also Sections 4026 (“principal” defined), 4030 (“springing power of attorney” defined).

23 **Prob. Code § 4407 (revised comment). General provisions applicable to statutory form**
24 **power of attorney**

25 **Revised Comment.** Section 4407 restates the substance of former Civil Code Section 2480.
26 Section 4407 makes clear that the general provisions that apply to powers of attorney generally
27 apply to statutory form powers of attorney under this part. Thus, for example, the following
28 provisions apply to a power of attorney under this part:

29 Section 4123(b) (application of power of attorney to all or part of principal’s property;
30 unnecessary to describe items or parcels of property).

31 Section 4124 (requirements for durable power of attorney). The statutory form set forth in
32 Section 4401 satisfies the requirements for creation of a durable power of attorney, unless
33 the provision making the power of attorney durable is struck out on the form.

34 Section 4125 (effect of acts by attorney-in-fact during incapacity of principal).

35 Section 4206 (relation of attorney-in-fact to court-appointed fiduciary).

36 Section 4303 (protection of person relying in good faith on power of attorney).

37 Section 4304 (good faith reliance on power of attorney after death or incapacity of
38 principal).

39 Section 4306 (good faith reliance on attorney-in-fact’s affidavit as conclusive proof of the
40 nonrevocation or nontermination of the power).

41 Sections 4900-4948 4500-4546 (judicial proceedings).

42 **Prob. Code § 4450 (revised comment). Construction of powers generally**

43 **Revised Comment.** Section 4450 continues former Civil Code Section 2485 without change,
44 except for the revision of a cross-reference to another provision. Section 4450 is the same in
45 substance as Section 3 of the Uniform Statutory Form Power of Attorney Act (1988). See Section
46 2(b) (construction of provisions drawn from uniform acts). See the Comment to this chapter under

- 1 the chapter heading. See also Sections 4900-4948 4500-4546 (court enforcement of agent's
2 duties).
3 See also Sections 4014 ("attorney-in-fact" defined to include agent), 4022 ("power of attorney"
4 defined), 4026 ("principal" defined).
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