

Memorandum 98-28

Health Care Decisions: Staff Draft Tentative Recommendation

Attached to this memorandum is the staff draft tentative recommendation on *Health Care Decisions for Incapacitated Adults*. (The staff recommends adding the last three words to the recommendation title in response to a recurring need to explain the scope of the recommendation, particularly to those who have just become aware of the study.) This draft implements decisions made at the March meeting. Issues that were not addressed at the last meeting are noted below and in staff notes in the draft. The explanatory text and the conforming revisions have not been discussed at previous meetings.

A number of exhibits are also attached to this memorandum:

	<i>Exhibit pp.</i>
1. Disposition of the UHCDA in the Draft Statute	1
2. Kate Christensen, M.D., Kaiser Permanente (March 23, 1998)	2
3. Harley Spitler (March 10, 1998)	3
4. Harley Spitler (April [16], 1998)	9
5. Linda Daniels, M.D., J.D., Chair, Bioethics Committee, San Diego County Medical Society (April 1, 1998)	15

SCHEDULE

There are only a limited number of issues that need to be resolved before the draft tentative recommendation can be distributed for comment.

If the Commission completes its review of the draft at the April meeting, and if we are close enough to final language, the staff can complete the tentative recommendation and send it out in early May with a July 31 return date. Comments would be considered at the September meeting — this would provide nearly three months for review by interested persons and time for the Commission to consider their comments at one or two meetings in the fall. Ideally, we could have a final recommendation prepared in plenty of time for introduction in the 1999 legislative session. If the Commission wants to consider the tentative recommendation one more time before distributing

it, this could be done at the June 4 meeting, but that would probably push the time for consideration of comments back to the October meeting.

At the April meeting, we need to concentrate the discussion on new policy implementations and some issues in other parts of the draft raised below and in staff notes that remain from the March meeting. A number of technical revisions have been made as a result of additional staff review and the detailed comments provided by Harley Spitler (see generally Exhibit pp. 3-14).

PRELIMINARY PART

The draft preliminary part was distributed for the March meeting (attached to the First Supplement to Memorandum 98-16). The staff has not had time to flesh out this material as we would like, so the material in this draft still has some gaps and rough spots. We have not received any comment on this material, except from Harley Spitler (see Exhibit p. 9) and the staff has adjusted the text in response to his comments.

STATUTORY MATERIAL

Revocation — §§ 4695-4698, at pp. 28-30

These basic rules on revocation have been redrafted to adopt the uniform act approach, as decided at the March meeting.

Issues remain concerning the scope of the rule on revocation by dissolution or annulment. The Commission directed the staff to give further consideration to the existing rule in light of the uniform act. These rules differ in that draft Section 4697 *does not* provide for revocation on legal separation or filing for dissolution and it *does* provide for revival on remarriage. This is exactly the same structure existing for powers of attorney generally (Prob. Code § 4154) and health care powers (Prob. Code § 4727(e)). It is also the same as the rule applicable to wills under Probate Code Section 6122(a)-(b). And it is the rule applicable to statutory wills under Probate Code Section 6227. The PERS statute (Gov't Code § 21492) does not revoke on legal separation; it does not contain a revival rule. Only the federal absentee statute in Probate Code Section 3722 revokes a power of attorney on legal separation, and it goes even further and revokes on *commencing* a proceeding for dissolution, annulment, or legal separation; it does not provide for revival.

The staff does not believe it is appropriate to revise only the rule applicable to powers of attorney for health care, unless there is some significant distinguishing policy reason that can be identified. We have not found one. Perhaps those involved in drafting the UHCDA can assist in explaining the difference in policy. (Note that Section 2-804 of the Uniform Probate Code (1993) does not revoke testamentary dispositions on legal separation and does revive on remarriage.) It may be argued that health care powers are more personal, and should be revoked (or suspended?) if the parties' relationship has deteriorated to the extent that they have obtained a legal separation. But others could argue that filing a petition also evidences a breakdown that should revoke the health care power. The argument was made, successfully in California, that only a final dissolution or annulment is significant enough to revoke the power.

The staff recommends continuation of the existing revocation rule in draft Section 4697 until the subject can be studied generally. The revival rule does not seem particularly important in practice, but it does avoid invalidating some instruments. In any event, it is existing law and that law was enacted (except for the statutory will) on recommendation of the Commission. If it is to be changed, the staff believes it would be best to consider all of the similar sections together, and that should be a separate study. The same reasoning applies to the more significant issue of revocation on legal separation. Our aim should be to provide consistent rules unless there is a good reason to depart from consistency. The draft rule in Section 4697 is consistent with existing law and should not be changed simply to adopt the rule in Uniform Health-Care Decisions Act 3(d).

If it turns out that the difference between the uniform act and the California rule creates a problem some day when some form of uniformity develops, then it would be appropriate to reconsider the issue. As of now, there is no uniformity among the three states that have adopted the substance of the UHCDA — New Mexico revokes on filing a petition and revives on withdrawal or amendment of a petition for dissolution, etc.

Health care surrogates — §§ 4712, at pp. 40-42

Some issues are discussed in the Staff Note concerning the statutory surrogate priority list, and other matters.

Decisions for the “unbefriended” patient— §§ 4720-4725, at pp. 43-47

Additional revisions have been made in this procedure following the March meeting, and several commentators have raised important issues (discussed in Staff Notes) that need to be reviewed.

Statutory damages — § 4742, at pp. 52-53

The Staff Note considers the issue whether other remedies are adequate and other issues with regard to this section. Serious consideration should be given to the suggestion of Professors Larson and Eaton (1) that the patient (and the patient’s estate) should not have to pay for health care *provided* in knowing violation or reckless disregard of an advance directive, and (2) that the patient (and the patient’s estate) should be able to recover more than nominal damages where a health care provider *fails to provide* treatment in knowing violation or reckless disregard of an advance directive.

Petitioners — § 4765, at pp. 58-59

The Commission needs to be sure that the class of permissible petitioners is correctly described and not overly inclusive. Harley Spitler has also raised a question about whether this section imposes a priority. See Exhibit p. 12 (directed toward the similar existing section). It does not.

Request to forego resuscitative measures — §§ 4780-4786, at pp. 62-64

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

Secretary of State’s registry system — §§ 4800-4805, at pp. 64-66

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

Other Issues

There are other Staff Notes raising technical issues in the following locations in the statutory material in part B of the draft:

§ 4653	14	§ 4665	19
§ 4660	17	§ 4701	39

CONFORMING REVISIONS AND COMMENTS TO REPEALS

The conforming revisions portion of the draft tentative recommendation includes 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 reviewed most of this material. 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 any 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. 71-73

Criminal penalties under Natural Death Act — Health & Safety Code § 7197, at p. 79

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

Harley Spittler raises a number of technical issues concerning disposition of the Natural Death Act. See Exhibit pp. 10-11. Some matters relate to drafting style (which we believe are settled issues), such as whether to put definitions in separate sections or all in one section. Other matters are more substantive, such as whether the phrase “terminal condition or permanent unconscious condition” should be retained in the legislative findings in Probate Code Section 4650. These terms were omitted because they act as a *limitation* on the finding concerning patient autonomy. In the broader context of the draft Health Care Decisions Law, these limitations are inappropriate, although they make perfect sense in the Natural Death Act, which applies only to patients in a terminal or permanent unconscious condition. Without getting into the detail here, it should be noted that the

Uniform Health-Care Decisions Act is intended to replace the type of statute represented by the Natural Death Act. The history of the NDA and earlier uniform acts (the two Uniform Rights of the Terminally Ill Acts) have been presented in earlier memorandums and the Commission decided to replace the NDA with a broad statute based on the Uniform Health-Care Decisions Act. Thus, there is no place for continuing a declaration or directive under the NDA in this scheme. The draft statute and the optional form completely cover the subject matter of the NDA.

Respectfully submitted,

Stan Ulrich
Assistant Executive Secretary

Table Showing Location of UHCDA Provisions in Draft Statute

UHCDA	Current Draft	UHCDA	Current Draft
1(1)	4605	5(g)	4750(c)
1(2)	4607(a)	5(h)	4714
1(3)	4609	5(i).....	see 4660
1(4)	4613	5(j).....	see 4712(d)
1(5)	4615		
1(6)	4617	6(a)	
1(7)	4619	6(b)	4686
1(8)	4621	6(c)	<i>Drabick</i>
1(9)	4623		
1(10)	56	7(a)	4730
1(11)	4625	7(b)	4731
1(12)	4627	7(c)	4732
1(13)	4629	7(d)	4733
1(14)	4631	7(e)	4734
1(15)	74	7(f).....	4735
1(16)	4637	7(g)	4736
1(17)	4639	7(h)	4675
2(a)	4670	8.....	4676
2(b) snt. 1	4671(a), 4684(a)		
2(b) snt. 2	4627, 4680(b)	9(a)	4740
2(b) snt. 3	4671(a)	9(b)	4741
2(b) snt. 4	see 4660		
2(c)	4683	10(a)	4742(a)
2(d)	4658	10(b)	4742(b)
2(e)	4685		
2(f).....	4750(b)	11(a)	4651(b)(1)
2(g)	4672	11(b)	4657
2(h)	4674		
		12.....	4661
3(a)	4695(a)		
3(b)	4695(b)	13(a)	4655(a)
3(c)	4696	13(b)	4656
3(d)	see 4697	13(c)	4653
3(e)	4698	13(d)	4654
		13(e)	see 4652(a)
4 intro ¶	4700	13(f).....	no
4 form.....	4701		
		14.....	see 4750 <i>ff</i>
5(a)	4710		
5(b)	4711	15.....	2(b)
5(c)	see 4712(a)-(c)	16.....	4601
5(d)	see 4712(d)	17.....	11
5(e)	see 4712(b)(1)	18.....	3, 4665 <i>ff</i>
5(f).....	4713		

From: KTC001 <KTC001@aol.com>
Date: Tue, 24 Mar 1998 22:21:38 EST
To: sulrich@clrc.ca.gov
Subject: Re: Health Care Decisions

I have been following the California Law Revision Commission's work on recommendations for revisions to the Health Care Decisions law. As the Director of the Regional Ethics Office of TPMG, I have also shared your draft recommendations with the chairs of our hospital ethics committees in Northern California. We want to applaud the work of the Commission in recommending some much-needed changes in the law, which should make the forms more accessible and less intimidating to our patients.

However, I question the need to include a specific instruction on nutrition/hydration in Part 2.

1) For the purpose of ensuring awareness, this issue is already raised under Agent's Authority;

2) This decision at the end of life can be tricky. Many times continuing nutrition/hydration leads directly to patient harm, through increased secretions, aspiration and pneumonia, edema, nausea, and more. Asking patients to make this decision in a binding manner ahead of time, without full knowledge of the possible impact on their well-being, is not doing them a service. Giving this decision it's own instruction unnecessarily emphasizes nutrition/hydration over other technical decisions, such as dialysis or the use of vasopressors, and will surely lead many patients to indicate an inappropriate binding decision.

3) If the patient has a particular issue with nutrition/hydration, they can write it in, just as Jehovah's Witness patients would for refusal of blood and blood products;

I am looking forward to further drafts and the conclusion of your work this fall.

Sincerely,

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March 10, 1998

HARLEY J. SPITLER
415 693-2060

Stan Ulrich
Assistant Executive Secretary
California Law Revision Commission
4000 Middlefield Road, D-1
Palo Alto, CA 94303-4739

Law Revision Commission
RECEIVED

APR - 1 1998

Re: CLRC Staff Memorandum 98-16 dated March 2, 1998

File: _____

Dear Stan:

This letter contains my comments re CLRC Staff Memorandum 98-16 dated March 2, 1998. If I make no comment, I approve the section.

Stan, my overall comment: You have produced a very thorough tentative recommendation. David English is your best source to determine the *intent* of the UHCDA Drafting Committee. David, alone and/or with Michael Franck, did the major drafting of the Act. I believe that David, *alone*, prepared the comments.

I. DEFINITIONS.

- a. § 4609: OK I hope that you will be able to persuade the CLRC that any additional detail, standards or procedure should *not* be added and is not needed.
- b. § 4625: Delete "and surgeon" for the reason that *every surgeon is a physician!*
- c. § 4639: Change "part" to "*Division*"

II. GENERAL PROVISIONS.

- a. § 4650(c): Change to read:

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

Stan Ulrich
March 9, 1998
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"To withhold or withdraw life sustaining treatment does not include "to continue"! This is a very important change!

"for himself or herself" seems superfluous and should be deleted.

- b. § 4651(a): Delete "for himself or herself" for same reason as in 4650(c).
- c. § 4653: Delete "so as to permit the natural process of dying." Very important change! Most acts authorized by the principal(P) pursuant to the P's advance health care directive, or by a surrogate either slow up or speed up "the natural process of dying". An individual does not need any instrument to cause his "natural process of dying"! That is how most people, in the United States, die! They just die!
- d. § 4659: Add the term "continuance" before the word "withholding" in lines 8 and 9 for same reason noted above re § 4650(c)!
- e. § 4660(a)(1): Delete! This section prohibits the P's "primary physician" from making a health care decision for P.
- f. § 4660(a)(2): Add "(except P's primary physician)" after the word "employee" in line 27. I am assuming that in some hospitals, P's "primary physician" would be either an "operator or employee".
- g. § 4660(c)(3): Delete the brackets in lines 41 and 42.
- h. § 4660(d): Add ", or decision making by," after the words "participation in" in line 5, page B-14.
- i. § 4662: Change to read:

The general law of agency applies to powers of attorney except where this division provides a contrary rule.

Three comments:

- (i) Do *not* omit this section. Many attorneys do not even know that health care directives are agencies!

Stan Ulrich
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(ii) I have phrased my clause in the positive-rather in the negative language of the staff draft.

(iii) Delete the technical stuff! Make it simple! If you want the technical stuff, put it in a comment.

j. § 4665(a):

This section, as written, creates an impossible situation in those cases in which the P has become incapacitated before January 1, 2000.

You should assume that there is not a single advance health care directive that meets all of the requirements of your March 2, 1998 staff draft. Hence, please consider making the March 2, 1998 staff draft prospective only, that is, *to apply only to instruments executed after January 1, 2000!*

III. ADVANCE HEALTH CARE DIRECTIVES.

a. Powers of Attorney for Health Care.

Re Staff Note: The term "adult" is correct in subdivision (b). Stay away, totally, from "unemancipated minors"; that area of the law is too complex and unsettled.

b. § 4689(a): The words "or otherwise indicates that the law of this state governs the power of attorney" are troublesome, very difficult to apply in practice and should be deleted.

IV. MODIFICATION AND REVOCATION OF ADVANCE DIRECTIVES.

a. § 4695(b): Change to read:

(b) An individual may revoke all or part of an advance health-care directive at any time and in any manner that communicates an intent to revoke.

Revocation should be simple procedure. There is absolutely no reason to require a writing!

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b. § 4696:

- (i) Delete "orally or in writing" in lines 24 and 26. Unnecessary as there can only be those two ways!
- (ii) I do not understand Marc Hankin's concern.

c. § 4697: change to read:

A decree of annulment, divorce, dissolution of marriage, or legal separation revokes a previous designation of a spouse as agent unless otherwise specified in the decree or in a power of attorney for health care.

- (i) § 4697(a) is wholly inadequate in that it does not cover "legal separation" which is very common.
- (ii) § 4697(b) is very scary! There should not be automatic reviver! If P is foolish enough to again appoint his spouse, he can execute a new power of attorney for health care.

d. § 4698: Change to read:

An Advance Health Care Directive that conflicts with an earlier Advance Health Care Directive revokes the earlier directive to the extent of the conflict.

- (i) The staff's section is ok but is too long. Simplicity is helpful to all principals!

V. OPTIONAL FORM OF ADVANCE HEALTH CARE DIRECTIVE.

a. Explanation

- (i) Delete "a residential long-term health care institution"; and substitute:

"Residential care facility for the elderly"
No brackets!

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b. Part 1

In (5) delete "[Guardian]" in three places; and substitute "Conservator" which is a defined term. "Guardian" is not a defined term.

No brackets!

c. Part 5: There is no "Section 4673 of the Probate Code"

Stan, this is the only place CLRC deals with the *practice* of law. All other material is concerned with *substantive rules of law - either legislative or decisional*. As you know, the U.S. Congress is becoming increasingly interested in the subject of health care decision making. I am enclosing a paper I presented on February 24, 1998 at the 1998 Annual meeting of ACTEC in Orlando. Please carefully read the sections re the two mirror bills (one in the Senate and one in the House) dealing with health care decision making. These bills will move very slowly. However, one thing is quite certain: 5 or 10 years from now, there will be some mandated *federal* requirements for all DPAHCs and health care directives that deal with continuance, withholding or withdrawal of medical treatment or procedures to keep the principal alive.

So, I am using the following, or a similar, clause in my instruments:

"_____ you are directed, from time to time, to add an addendum to this instrument to include any clause(s) that may be required to conform this instrument to any federal legislation that may be enacted after the date of this instrument"

Possibly, something like that clause could be *Part 5: Federal Requirements* of the optional form.

VI. HEALTH CARE SURROGATES

- a. § 4711: Delete brackets.
- b. § 4715(a): After the terms "replaced" add "by the primary physician."

VII. HEALTH CARE DECISIONS FOR PATIENTS WITHOUT SURROGATES

- a. § 4724: change opening words of second sentence to read:

PROPOSED AMENDMENTS

§ 4652. Unauthorized Acts

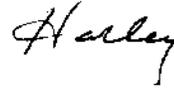
This division does not authorize an agent or surrogate to consent to any of the following acts unless the individual's written advance health care directive expressly so provides:

- a. Commitment to or placement in a mental health treatment facility.
- b. Convulsive treatment (as defined in Section 5325 of the Welfare and Institutions Code).
- c. Psychosurgery (as defined in Section 5325 of the Welfare and Institutions Code).
- d. Sterilization.

This division does not authorize an agent or surrogate to consent to any individual's abortion.

The reason for the different treatment of abortion: it deals with *two lives*: the mother and the fetus!

Best Wishes Always,



21458136

APR - 9 1998

April 16, 1998

Stan Ulrich
Assistant Executive Secretary
California Law Revision Commission
4000 Middlefield Road, D-1
Palo Alto, CA 94303-4739

Re: **First, Second and Third Supplement to Staff Memorandum 98-16**

File: _____

Dear Stan:

This letter contains my comments re the First, Second and Third Supplement to Staff Memorandum 98-16. If I make no comment, I approve the section.

FIRST SUPPLEMENT

I. **Footnote 25:** Where does it say that “the statutory form power of attorney for healthcare cannot be notarized”? I believe that any signature on any instrument can be notarized.

II. **Family Consent:** Your following statement is not correct:

“Existing California Law

California statutory law does not provide general rules governing surrogate decisionmaking. However, the procedure governing consent to “medical interventions” regarding residents in nursing homes directly implies that the “next of kin” can make decisions for incapacitated persons by including the next of kin in the group of persons ‘with legal authority to make medical treatment decisions on behalf of a patient.’”

There is nothing in H&S Code 1418.8(c) that implies, directly or indirectly, that the “next of kin” “can make decisions for incapacitated persons” generally! The provisions of H&S Code 1418.8(c) are limited under H&S Code 1418.8(a) to “a resident in a skilled nursing facility or intermediate care facility”!

SECOND SUPPLEMENT

I. **HEALTH AND SAFETY CODE 1418.8 LEGISLATIVE FINDINGS AND INTENTIONS**

Stan, Legislative Findings and Intentions are very important. Increasingly, they are used by courts in the construction of a statute. I cannot determine from your staff note which “uncodified legislative findings and intentions...accompanied Health and Safety Code Section

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1418.8 when it was enacted.” If those Legislative Findings and Intentions are in the three paragraphs of 1992 Cal. Stat. ch. 1303 that follow your staff note, I favor including them.

II. DISPOSITION OF NATURAL DEATH ACT

a. §7185.5: The Legislative Findings and Declarations are most important and should be included.

I prefer the findings and declarations in §7185.5 to those in §4650.

b. §7186: I do not favor your proposed scattering of definitions in various sections of the Probate Code. I have never seen a health care statute that does that. All definitions should be in one section to simplify reading.

- (i) Subdivisions (d) and (e) should be continued
- (ii) Delete “and surgeon” in Pr. C 4625. A “surgeon” is a physician!
- (iii) Pr. C 4670 is wrong reference to subdivision “(h)”!
- (iv) Subdivision (j) should be retained

Stan, please take a long look at the very careful and concise way the definitions are set forth in the Natural Death Act (H & S Code 7186). Or in the UHCDA (Section 1). Then compare those with your proposed scattering of definitions in various sections of the Probate Code.

c. §7185.5(a): I strongly prefer §7185.5(a) to §4650. “Terminal condition or permanent unconscious condition” should not be eliminated!

d. §7186.5(b): Your following statement is not accurate: “The declaration form in subdivision (b) is superseded by the optional form of an advance health care directive in Probate Code Section 4701 and related substantive rules.” The declaration in §7186.5(b) should be retained. There is no “declaration form” in §4701.

e. §7186.5 Comment: As 7186.5 does not deal with conscience or institutional policy, the last sentence of the comment is misplaced in your memorandum.

f. §7187.5: Change term “declaration” to “directive” in title and in lines 27, 31, 35 and 39.

I would retain §7187.5 with above correction.

Cooley Godward LLP

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g. §7188(a): I strongly prefer the clarity, brevity and simplicity of Section 3(b) of the UHCDA:

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

h. §7189: Retain this section after making the following term changes: change “declarant” to “patient” in line 8; change “declarant’s” to “patient’s” in line 10; change “declaration” to “directive” in lines 9, 10 and 11.

Please note that “terminal condition or permanent unconscious condition” are in this section; that is why those words should not be eliminated from §7185.5(a). As both “terminal condition” and “permanent unconscious condition” are very critical concepts in any health care decisions statute, they must be defined. Compare the definitions in H & S Code §7186(e) and (j).

Stan, I now have discovered where you went wrong in the use of the term “declarations” instead of “directive”. It is in H & S Code §7186(b) which makes that error. The Natural Death Act was in the legislative process for several years prior to 1976 – long before the present terms “directive” and “health care directive” became modern terms. “Declarations” was a good term in 1976 – but not now!

i. §7189.5(b): Should be retained.

j. §7189.5(c): Why have you eliminated this subdivision?

k. §4742(a) and (b): Strongly concur in the staff recommendation that the limits be revised to at least \$2,500.00 and \$10,000, respectively.

l. §4675: Please at least think about permitting an insurance carrier to have a lower rate structure for those persons who have an advance health care directive in effect at the time(s) the policy is issued and renewed. That, most certainly, is not undue influence. The same comment pertains to §7191.5(b) and (c).

m. §7191(b): Should be retained. Same comment re words “terminal condition or permanent unconscious condition” as noted above under §7189!

III. PROBATE CODE

a. §4625: I have commented many times on this unfortunate section.

Stan Ulrich
April 16, 1998
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There is no reason whatsoever, public policy or otherwise, why a Principal (P) should be prohibited from authorizing his agent to "make, publish, declare, amend, or revoke" P's will. Several comments:

- (i) The term "publish" is obsolete and should be eliminated. Compare U.P.C. §502(a)(2) Comment.
- (ii) §4265(a) is far too rigid for these more modern times. I strongly favor U.P.C. §502(a)(2) which uses the "Testator's Conscious presence" test. Compare U.P.C. §502(a) comment re cases cited on "Testator's" conscious presence".

Similarly there is no reason whatsoever, public policy or otherwise, why a Principal (P) should be prohibited from authorizing his agent to consent to any or all of the acts and procedures set forth in Prob. C §4722(a), (b), (c) and (d). Prob. C §4722(e) should be retained because it deals with two lives: (i) The mother; (ii) the fetus.

IV. JUDICIAL PROCEEDINGS

a. General Provisions

- (i) §4503(b)(2): Change "Section 4542" to "Section 4541" in line 5.

b. Petitions, Orders, Appeals

- (i) §4540: I, and other members of Leah V. Granof's Advance Directives Committee would move subsection "(k)" ["Any other interested person or friend of the principal"] to subsection "(c)".

Stan, shouldn't these persons be prioritized? Or, do you intend that the first persons to file a petition always prevails?

- (ii) §4654: No! New Section 4665 does not solve the very practical, and common, problem that was attempted to be solved by Prob. C Section 4654(b).

Prob. C Section 4654(b) serves no useful purpose and should be repealed. Or, if you want something about length of time say:

Cooley Godward LLP

Stan Ulrich
April 16, 1998
Page Five

“(b) Unless a shorter period is provided in the durable power of attorney for health care, a durable power of attorney for health care described in subdivision (a) never expires solely by lapse of time.”

(iii) §4702: See page 2 of my March 9, 1998 letter:

“§4660(a)(2): Add “(except P’s primary physician)” after the word “employee” in line 27. I am assuming that in some hospitals, P’s “primary physician” would be either an “operator or employee”.

§4660(c)(3): Delete the brackets in lines 41 and 42.

§4660(d): Add “, or decision making by,” after the words “participation in” in line 5, page B-14.

§4720: I believe all sections references in §4720 are wrong!

§4721: Again, wrong reference §4737 has nothing whatsoever to do with §4721. In §4721, I suggest changing “may” to “shall” in line 41 on B-41.

[Note to Stan: I’m not commenting on §4722 through §4948 because there appear to be wrong section references throughout those sections. I will await your next draft.

REVISED COMMENTS

§I: I admire your precision in terminology. However, your eleven terminologies will not be comprehensive to the average layman and will require a well-trained attorney to delineate between the various terms.

[Note to Stan: Same as above note re: §4014 through §4450. I await your final draft.]

THIRD SUPPLEMENT

Dr. Orr’s comment:

“My only comment is on para 4724 where the surrogate committee’s consensus or majority decision may be negated by a lone dissenter. I recognize the need for protection of vulnerable individuals, and this provision may need to be left as is in order to fulfill that need. However, I can envision a situation where a single family member might then be able to dictate a plan of treatment which several other involved individuals believe is contrary to the patient’s best interests. I don’t really have any constructive way to change this, but thought I would raise this for the Commission’s consideration.”

Cooley Godward LLP

Stan Ulrich
April 16, 1998
Page Six

has been considered, at length, by Leah V. Granof's Advance Directives Committee; and was rejected by, I believe, a unanimous vote of the Committee. Most certainly, the vote of the surrogate committee to kill the patient should be unanimous! One would like to ask Dr. Orr if he would want his life to be terminated by a simple majority vote of any group.

Best wishes.

Sincerely,


Harley J. Spitler

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To: Stan Ulrich, Assistant Executive Secretary

April 1, 1998

Thank you for sending me the California Law Revision Commission's "Health Care Decisions" staff memos and recommendations which I use to help update the San Diego County Medical Society Bioethics Committee. At our last meeting, discussion was held on "Health Care Decisions for Patients Without Surrogates." Feedback from representatives of both acute and longterm care facilities was very positive. Some concerns were addressed which I would like to present to you and the Commission.

- (1) With regard to 4722(a)(2): "A registered professional nurse with responsibility for the patient."

My committee believes it is very important that this nurse also be knowledgeable about the patient, and not have mere supervisory responsibility. A nurse administrator, acting in a supervisory capacity without bedside contact, would be less knowledgeable about the patient's health care concerns, wishes, and values than would a nurse with bedside responsibility for the patient.

- (2) With regard to 4722(a)(5) "...a member of the community who is not employed by or regularly associated with the primary physician, the health care institution, or employees of the health care institution."

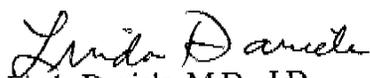
This would seem to eliminate community members who regularly serve on, but are not employed by, ethics committees and who would have more knowledge about ethical end-of-life medical decisions than community members with no ethics committee experience. This would also seem to eliminate the independent Ombudsman who often is involved in these kinds of decisions in longterm care facilities. Is this the intent of your recommendation?

- (3) With regard to 4724: "...decisions relating to refusal or withdrawal of life-sustaining treatment may not be approved if any member of the surrogate committee is opposed."

Members of my committee expressed the same concern raised by Dr. Robert Orr in his memo dated 3/16/98 that a single party might have veto power over a medical decision that the other surrogate committee members believe is in the patient's best interest. Our committee was divided between those who felt that some type of supermajority vote would be sufficiently protective of vulnerable patients, and others who agreed with the recommendation requiring a unanimous decision in such cases.

Our Bioethics Committee wishes to thank you and the Commission for your effort and for the opportunity to provide input.

Yours truly,



Linda Daniels, M.D., J.D.

Chair, Bioethics Committee, San Diego County Medical Society

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CALIFORNIA LAW REVISION COMMISSION

STAFF DRAFT

TENTATIVE RECOMMENDATION

Health Care Decisions for Incapacitated Adults

[April 1998]

This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be a part of the public record and will be considered at a public meeting when the Commission determines the provisions it will include in legislation the Commission plans to recommend to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made in the tentative recommendation.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN July 31, 1998.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739
650-494-1335 FAX: 650-494-1827

SUMMARY OF TENTATIVE RECOMMENDATION

This tentative recommendation proposes a new Health Care Decisions Law to consolidate the Natural Death Act and the statutes governing the durable power of attorney for health care, and provide comprehensive rules relating to health care decisionmaking for incapacitated adults. The proposed law, drawing heavily from the Uniform Health-Care Decisions Act (1993), includes new rules governing individual health care instructions, and provides a new optional statutory form for the power of attorney for health care. The proposed law would add procedures governing surrogate health care decisionmakers (“family consent”) where an individual has not appointed an agent and no conservator of the person has been appointed, and procedures for making health care decisions for patients who do not have any surrogate willing to serve.

This recommendation was prepared pursuant to Resolution Chapter 102 of the Statutes of 1997.

1 HEALTH CARE DECISIONS

2 California has been a pioneer in the area of health care decisionmaking for
3 incapacitated persons, with the enactment of the 1976 Natural Death Act¹ and the
4 1983 Durable Power of Attorney for Health Care.² Legislation in other states over
5 the last 10 years, enactment of the federal Patient Self-Determination Act in
6 1990,³ and promulgation of a new Uniform Health-Care Decisions Act in 1993,⁴
7 suggest the need to review existing California law and consider revising and
8 supplementing the law.

9 California law does not adequately address several important areas:

10 (1) Existing law does not provide a convenient mechanism for making health
11 care treatment wishes known and effective.

12 (2) The principles governing family consent or surrogate decisionmaking in the
13 absence of a power of attorney for health care are not clear.

14 (3) There are no general rules governing health care decisions for incapacitated
15 persons who have no advance directive or known family or friends to act as
16 surrogates.

17 The proposed Health Care Decisions Law would provide procedures and
18 standards for making decisions in these situations. The proposed law would make
19 many revisions to promote the use and recognition of advance directives, improve
20 effectuation of patients' wishes once they become incapable of making decisions
21 for themselves, simplify the statutory form, and modernize terminology. The
22 scope of the proposed law is limited: it governs health care decisions for adults at
23 a time when they are incapable of making their own decisions and provides
24 mechanisms for directing their health care in the event they become incapacitated.

25 NEED FOR REVISED LAW

26 In a 1991 article entitled *Time for a New Law on Health Care Advance*
27 *Directives*, Professor George Alexander gives the following overview:⁵

28 During the last decade, states have enacted three different kinds of documents to
29 deal with health care of incompetent patients. The legislation's main impetus and
30 central focus have been to provide a procedure to approve life support termination

1. 1976 Cal. Stat. ch. 1439. This was also the year the New Jersey Supreme Court decided the well-known Karen Ann Quinlan case. *In re Quinlan*, 70 N.J. 10, 355 A.2d 647 (1976), *cert. denied*, 429 U.S. 922 (1976).

2. 1983 Cal. Stat. ch. 1204, enacted on Commission recommendation.

3. Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, §§ 4206, 4751, 104 Stat. 1388, 1388-115 to 1388-117, 1388-204 to 1388-206. See 42 U.S.C. §§

4. ___ U.L.A. ___ (West Supp. ____).

5. 42 Hastings L.J. 755, ____ (1991) (footnotes omitted).

1 in appropriate cases, although it also addresses other health care concerns. The
2 earliest of the statutes was a natural death act, which authorizes a directive,
3 popularly called a living will, to physicians. The second was a general durable
4 power of attorney, sometimes in the form of a specially crafted health care
5 durable power of attorney, which essentially empowers an appointed agent to
6 make appropriate decisions for an incompetent patient. The agent is bound by
7 directions contained in the appointing power. Finally, some states have enacted
8 family consent laws empowering others, typically family, to decide health care
9 matters absent a directive or power of attorney to guide them. At the end of 1990,
10 Congress gave these laws new importance by mandating their observance.

11 The statutes differ; provisions of one form conflict with provisions of another
12 form. Most contradictions raise problems, some nettlesome, others destructive of
13 important interests. After more than a decade of experience with such forms, it is
14 time to review the present state of the laws and to coordinate and debug them. In
15 the author's view, a single statute incorporating the best of each of the three types
16 of law is now in order.

17 These concerns are addressed by the proposed Health Care Decisions Law.

18 BACKGROUND AND OVERVIEW

19 The right of a competent adult to direct or refuse medical treatment is a
20 constitutionally protected right. This "fundamental liberty interest" is inherent in
21 the common law and protected by federal and state constitutional privacy
22 guarantees.⁶ The proposed law reaffirms this fundamental right along the lines of
23 the Uniform Health-Care Decisions Act, which

24 acknowledges the right of a competent individual to decide all aspects of his or
25 her own health care in all circumstances, including the right to decline health care
26 or to direct that health care be discontinued, even if death ensues. An individual's
27 instructions may extend to any and all health-care decisions that might arise and,
28 unless limited by the principal, an agent has authority to make all health-care
29 decisions which the individual could have made. The Act recognizes and validates
30 an individual's authority to define the scope of an instruction or agency as broadly
31 or as narrowly as the individual chooses.

32 There are four main approaches to health care decisionmaking for patients
33 lacking capacity that are appropriate for statutory implementation:

6. See generally *Cruzan v. Commissioner, Missouri Dept. of Health*, 497 U.S. 261 (1990); *Cobbs v. Grant*, 8 Cal. 3d 229, 242, 501 P.2d 1, 104 Cal. Rptr. 505 (1972); *Barber v. Superior Court*, 147 Cal. App. 3d 1006, 1015, 195 Cal. Rptr. 484 (1983); *Bartling v. Superior Court*, 163 Cal. App. 3d 186, 195, 209 Cal. Rptr. 220 (1984); *Bouvia v. Superior Court*, 179 Cal. App. 3d 1127, 1137, 225 Cal. Rptr. 297 (1986); *Conservatorship of Drabick*, 200 Cal. App. 3d 185, 206, 245 Cal. Rptr. 840 (1988); *People v. Adams*, 216 Cal. App. 3d 1431, 1437, 265 Cal. Rptr. 568 (1990); *Donaldson v. Van de Kamp*, 2 Cal. App. 4th 1614, 1619, 4 Cal. Rptr 2d 59 (1992); *Thor v. Superior Court*, 5 Cal. 4th, 725, 731, 855 P.2d 375, 21 Cal. Rptr. 2d 357 (1993); *Rains v. Belshé*, 32 Cal. App. 4th 157, 166, 38 Cal. Rptr. 2d 185 (1995).

In the Natural Death Act, the Legislature made the explicit finding that "an adult person has the fundamental right to control the decisions relating to the rendering of his or her own medical care, including the decision to have life-sustaining treatment withheld or withdrawn in instances of a terminal condition or permanent unconscious condition." Health & Safety Code § 7185.5(a). The right is not dependent on statutory recognition and continues to exist outside of statutory provisions.

1 **1. Court-Appointed Conservator or Other Judicial Intervention**

2 California law provides a highly developed guardianship-conservatorship law.⁷
3 There is also a special procedure for court authorized medical treatment for adults
4 without conservators.⁸ The Lanterman-Petris-Short Act provides a special type of
5 conservatorship for the gravely disabled.⁹ These provisions are not the subject of
6 this recommendation.¹⁰

7 **2. Natural Death Act, Living Will**

8 California's Natural Death Act (NDA) provides for a declaration concerning
9 continuation of life sustaining treatment in the circumstances of a permanent
10 unconscious condition. Under the original NDA, the patient executed a "directive
11 to physicians." Under the new UHCDA, this type of writing is an "individual
12 instruction" (although the instruction may also be given orally). Case law validates
13 expressions of the patient's health care desires that would fall under the general
14 category of a "living will." The proposed law integrates these forms into the
15 comprehensive statute.

16 **3. Power of Attorney**

17 California has a detailed statute governing durable powers of attorney for health
18 care and providing a special statutory form durable power of attorney for health
19 care.¹¹ The DPAHC requires appointment of an attorney-in-fact ("agent" in the

7. Prob. Code § 1400 *et seq.* The Guardianship-Conservatorship Law was enacted on Commission recommendation. See *Guardianship-Conservatorship Law*, 15 Cal. L. Revision Comm'n Reports 451 (1980).

8. Prob. Code § 3200 *et seq.*

9. Welf. & Inst. § 5350 *et seq.*

10. Communications to the Commission suggest, however, that the procedure for court-authorized medical treatment and some conservatorship provisions, should be reviewed for consistency with the scope of the proposed Health Care Decisions Law. This matter is reserved for further study.

11. Prob. Code § 4600 *et seq.* This statute and its predecessor in the Civil Code were enacted on Commission recommendation. See:

Recommendation Relating to Durable Power of Attorney for Health Care Decisions, 17 Cal. L. Revision Comm'n Reports 101 (1984) (enacted as 1983 Cal. Stat. ch. 1204). For legislative history, see 17 Cal. L. Revision Comm'n Reports 822 (1984); *Report of Assembly Committee on Judiciary on Senate Bill 762*, 17 Cal. L. Revision Comm'n Reports 889 (1984).

Recommendation Relating to Statutory Forms for Durable Powers of Attorney, 17 Cal. L. Revision Comm'n Reports 701 (1984) (enacted as 1984 Cal. Stat. chs. 312 & 602). For legislative history, see 18 Cal. L. Revision Comm'n Reports 18-19 (1986); *Report of Assembly Committee on Judiciary on Senate Bill 1365*, 18 Cal. L. Revision Comm'n Reports 45 (1986).

Recommendation Relating to Elimination of Seven-Year Limit for Durable Power of Attorney for Health Care, 20 Cal. L. Revision Comm'n Reports 2605 (1990) (enacted as 1991 Cal. Stat. ch. 896). For legislative history, see 21 Cal. L. Revision Comm'n Reports 22 (1991).

Comprehensive Power of Attorney Law, 24 Cal. L. Revision Comm'n Reports 111 (1994) (enacted as 1994 Cal. Stat. ch. 307). For legislative history, see 24 Cal. L. Revision Comm'n Reports 567 (1994). The law as enacted, with revised Comments and explanatory text, was printed as *1995 Comprehensive Power of Attorney Law*, 24 Cal. L. Revision Comm'n Reports 323 (1994).

1 statutory form durable power of attorney for health care) to carry out the
2 principal's wishes as expressed in the power of attorney or otherwise made known
3 to the attorney-in-fact, but the attorney-in-fact also has authority to act in the best
4 interest of the principal where the principal's desires are unknown.¹² The power of
5 attorney for health care rules are generally carried forward in the proposed law.

6 **4. Statutory Surrogacy**

7 As in the case of wills and trusts, most people do not execute a power of
8 attorney for health care or an "individual instruction" or "living will." Estimates
9 vary, but it is a safe guess to say that only 10-20% of adults have advance
10 directives.¹³ Consequently, from a public policy standpoint, the law governing
11 powers of attorney and other advance directives potentially affects far fewer
12 people than a law on consent by family members and other surrogates. Just as the
13 law of wills is complemented by the law of intestacy, so the power of attorney for
14 health care needs an intestacy equivalent — some form of statutory surrogate
15 health care decisionmaking. This critical area is addressed by the proposed Health
16 Care Decisions Law.

17 The general power of attorney statutes were recently reviewed and revised on
18 Commission recommendation.¹⁴ In its report, the Commission noted that it had
19 "not made a substantive review of the statutes concerning the durable power of
20 attorney for health care [I]t would have been premature to undertake a detailed
21 review of the health care power statutes before the National Conference of
22 Commissioners on Uniform State Laws completed its work on the Uniform
23 Health-Care Decisions Act."¹⁵

24 **POWER OF ATTORNEY FOR HEALTH CARE**

25 The proposed Health Care Decisions Law continues and recasts the existing law
26 governing the durable power of attorney for health care, including the statutory
27 form durable power of attorney for health care.¹⁶ For the well-advised or careful
28 individual who is making sensible arrangements for the time when he or she may

In the Commission's study resulting in the comprehensive Power of Attorney Law, substantive review of health care decisionmaking issues was deferred for consideration as the second part of the study. This enabled legislative enactment of the comprehensive restructuring of the power of attorney statutes to proceed without further delay and was also necessary in light of other legislative priorities.

12. See Prob. Code § 4720.

13. See *infra* text accompanying notes ____.

14. See 1994 Cal. Stat. ch. 307; 1995 *Comprehensive Power of Attorney Law*, 24 Cal. L. Revision Comm'n Reports 323 (1994).

15. *Id.* at 335.

16. For the central provisions governing the durable power of attorney for health care, see Prob. Code §§ 4600-4752. For the statutory form durable power of attorney for health care, see Prob. Code §§ 4770-4779.

1 be incapacitated, the power of attorney for health care¹⁷ is clearly the best
2 approach. Expressing desires about health care and naming one or more agents¹⁸
3 subject to appropriate standards is the best way to accomplish “incapacity
4 planning” and seek to effectuate a person’s intent with regard to health care
5 decisions, especially with regard to life-sustaining treatment.

6 In the new terminology — not so new in practice, but new to the Probate Code
7 — a power of attorney for health care is one type of “advance health care
8 directive” (or advance directive).¹⁹ The proposed law restructures the power of
9 attorney for health care provisions based on a mix of principles from the existing
10 Power of Attorney Law²⁰ and the Uniform Health-Care Decisions Act. Where
11 rules apply only to powers of attorney for health care, the proposed law uses that
12 terminology. Where rules apply to all written advance health care directives, the
13 language will vary, but the general substance of the law continues, except as
14 noted.

15 **Execution Formalities**

16 The original durable power of attorney for health care was subject to a number
17 of restrictions that have been judged to be overly protective. When first enacted,
18 the durable power of attorney for property was only valid for a year following the
19 principal’s incapacity.²¹ The original durable power of attorney for health care
20 expired after seven years, except when the expiration date fell in a time of
21 incapacity.²² These restrictive rules may have had a role to play when the concepts
22 were new, but were abandoned as the law progressed and the concepts and
23 instruments became familiar and even necessary.

24 Now it is recognized that overly restrictive execution requirements for powers of
25 attorney for health care unnecessarily impede the effectuation of intent. The

17. The proposed law uses the term “power of attorney for health care” instead of “durable power of attorney for health care” for convenience. The reference to durability was more important in earlier years, when the idea of an agency surviving the incapacity of the principal was still a novel concept. It should now be clear and, in any event, in the realm of health care decisionmaking, it is common sense that almost all powers of attorney for health care will operate only after the principal becomes incapable of making health care decisions. The substance of the law is clear in the proposed law, notwithstanding the omission of the term “durable.”

18. The proposed law uses the more “user-friendly” term “agent” in place of “attorney-in-fact” used in the existing durable power of attorney for health care statute. However, the terms are interchangeable, as provided in existing law (Prob. Code § 4014(a)) and in the proposed law (proposed Prob. Code § 4607(a)).

19. The comment to UHCDA Section 1(1) notes that the term “appears in the federal Patient Self-Determination Act enacted as sections 4206 and 4751 of the Omnibus Budget Reconciliation Act of 1990 and has gained widespread usage among health-care professionals.”

20. For a discussion of the relation between powers of attorney for health care and other types of powers of attorney under the Power of Attorney Law, see *supra* text accompanying notes ____.

21. 1979 Cal. Stat. ch. 234 (enacting Civ. Code § 2307.1, repealed by 1981 Cal. Stat. ch. 511, § 1).

22. See former Civ. Code § 2436.5, as enacted by 1983 Cal. Stat. ch. 1204, § 10. See also Prob. Code § 4654 (transitional provision concerning former seven-year powers). The proposed law does not provide any special rules for these earlier powers.

1 progression from more restrictive execution requirements to more intent-
2 promoting provisions can also be seen in the development of the Uniform Health-
3 Care Decisions Act. The original Uniform Rights of the Terminally Ill Act of 1985
4 (URTIA), based in part on the 1976 California Natural Death Act, required two
5 witnesses.²³ The Uniform Health-Care Decisions Act, which is intended to replace
6 URTIA, adopts the principle that no witnesses should be required in a power of
7 attorney for health care.²⁴ As a general rule, the proposed law also adopts this
8 principle in place of the existing requirement of two witnesses or a notarization.²⁵

9 Witnessing can be useful, however, even if it is not required. The proposed law
10 follows the UHCDA in recommending but not requiring witnesses. Witness
11 requirements can operate as more of an intent-defeating technicality than a
12 protection against possible fraud.²⁶ The drafters of the UHCDA viewed technical
13 execution formalities as unnecessarily inhibiting while at the same time doing
14 “little, if anything, to prevent fraud or enhance reliability.”²⁷ The genuineness of
15 advance health care directives is bolstered by placing reliance on the health care
16 providers. Recordkeeping plays a critical role. Health care providers are required
17 to enter the advance directive in the patient’s health care records. Medical ethics
18 also reinforce the duty to determine and effectuate genuine intent. The proposed
19 law also provides penalties for violation of statutory duties.²⁸

20 However, there are circumstances where additional protections are necessary.
21 The proposed law continues the special rules applicable to executing a power of
22 attorney for health care by a patient in a skilled nursing facility.²⁹ These
23 restrictions are also applied to other written advance directives, i.e., individual
24 health care instructions expressing treatment preferences that do not appoint an
25 agent.

26 **Statutorily Required Warnings**

27 Existing law provides a number of “warnings” that must be included depending
28 on whether a form durable power of attorney for health care is on a printed form,
29 from the statutory form, or drafted by an attorney or someone else.³⁰ There is an

23. URTIA § 2. The 1989 revision of URTIA continued this requirement.

24. UHCDA § 2(b).

25. Prob. Code §§ 4121-4122, 4700-4701. To be valid, the statutory form power of attorney for health care must be witnessed; it is not validated by notarization. Prob. Code § 4771 & Comment.

26. This is not to say that more formal requirements are not important in powers of attorney for property, where the possibility of fraud is more of a real concern. The execution formalities in the Power of Attorney Law applicable to non-health care powers of attorney would continue to apply. See Prob. Code §§ 4121 (formalities for executing a power of attorney), 4122 (requirements for witnesses).

27. English & Meisel, *Uniform Health-Care Decisions Act Gives New Guidance*, Est. Plan. 355, 358-59 (Dec. 1994).

28. See *infra* text accompanying notes ____.

29. See Prob. Code §§ 4121-4122, 4701.

30. See Prob. Code §§ 4703 (requirements for printed form), 4704 (warnings in power of attorney for health care not on printed form), 4771 (statutory form), 4772 (warning or lawyer’s certificate), 4774

1 important alternative to complying with the strict execution requirements in
2 California law. The law recognizes the validity of durable powers of attorney for
3 health care and similar instruments executed in another state or jurisdiction in
4 compliance with their law.³¹

5 The existing warning provisions are too confusing and rigid. While there has
6 been an attempt to educate potential users through concise and simple statements,
7 the net effect of the existing scheme may have been to inhibit usage. Some form of
8 introductory explanation is still needed, however, and the optional statutory form
9 drawn from the UHCDA in the proposed law fulfills this purpose. But lawyers are
10 no longer instructed on what they must advise their clients or how to sign off with
11 a warning substitute. The Commission expects that those who prepare printed
12 forms will copy the language of the optional form or use a reasonable equivalent
13 without the need to mandate specific language.

14 INDIVIDUAL HEALTH CARE INSTRUCTIONS

15 California does not generally provide for what the UHCDA calls an “individual
16 instruction” other than through the mechanism of the Natural Death Act,
17 applicable only to terminal or permanent unconscious cases, and in the context of
18 appointing and instructing an attorney-in-fact under a durable power of attorney
19 for health care. The Commission is informed that individuals will execute a
20 durable power of attorney for health care *without* appointing an attorney-in-fact so
21 that they can use that vehicle to state their health care instructions. It is also
22 possible to appoint an attorney-in-fact, but limit the agent’s authority while
23 expressing broad health care instructions. These approaches may succeed in
24 getting formal health care instructions into the patient’s record, but the law is not
25 well-adapted for this purpose, since the duties to comply under the power of
26 attorney for health care statute revolve around the agent’s decisions and the duty
27 to comply with them. In this scenario, the power of attorney for health care
28 becomes a “living will” given effect by custom without any validating or
29 effectuating statute.

30 The proposed law adopts the individual health care instruction principle of the
31 UHCDA to make the law clearer, more direct, and easier to use. The option of
32 giving independent individual health care instructions is also implemented as part
33 of the optional statutory form. Using the simple and relatively short statutory form
34 will enable an individual to record his or her select an agent, or do both.

35 [*Staff Note: This part of the discussion will also catalog existing power of*
36 *attorney rules that would be applied to all advance directives.*]

(requirements for statutory form). For a number of complicated, technical rules governing earlier printed form requirements, see Prob. Code §§ 4651, 4775.

31. Prob. Code § 4653. A similar rule applies under the Section 7192.5 in the NDA.

1 Given the general standards for determining when there is a duty to provide
2 medical treatment of debatable value, the question still remains as to who should
3 make these vital decisions. Clearly, the medical diagnoses and prognoses must be
4 determined by the treating and consulting physicians under the generally accepted
5 standards of medical practice in the community and, whenever possible, the
6 patient himself should then be the ultimate decision-maker.

7 When the patient, however, is incapable of deciding for himself, because of his
8 medical condition or for other reasons, there is no clear authority on the issue of
9 who and under what procedure is to make the final decision.

10 It seems clear, in the instant case, that if the family had insisted on continued
11 treatment, petitioners would have acceded to that request. The family's decision
12 to the contrary was, as noted, ignored by the superior court as being a legal
13 nullity.

14 In support of that conclusion the People argue that only duly appointed legal
15 guardians have the authority to act on behalf of another. While guardianship
16 proceedings might be used in this context, we are not aware of any authority
17 *requiring* such procedure. In the case at bench, petitioners consulted with and
18 relied on the decisions of the immediate family, which included the patient's wife
19 and several of his children. No formal guardianship proceedings were instituted.

20

21 The authorities are in agreement that any surrogate, court appointed or
22 otherwise, ought to be guided in his or her decisions first by his knowledge of the
23 patient's own desires and feelings, to the extent that they were expressed before
24 the patient became incompetent....

25 If it is not possible to ascertain the choice the patient would have made, the
26 surrogate ought to be guided in his decision by the patient's best interests. Under
27 this standard, such factors as the relief of suffering, the preservation or restoration
28 of functioning and the quality as well as the extent of life sustained may be
29 considered. Finally, since most people are concerned about the well-being of their
30 loved ones, the surrogate may take into account the impact of the decision on
31 those people closest to the patient....

32 There was evidence that Mr. Herbert had, prior to his incapacitation, expressed
33 to his wife his feeling that he would not want to be kept alive by machines or
34 "become another Karen Ann Quinlan." The family made its decision together (the
35 directive to the hospital was signed by the wife and eight of his children) after
36 consultation with the doctors.

37 Under the circumstances of this case, the wife was the proper person to act as a
38 surrogate for the patient with the authority to decide issues regarding further
39 treatment, and would have so qualified had judicial approval been sought. There
40 is no evidence that there was any disagreement among the wife and children. Nor
41 was there any evidence that they were motivated in their decision by anything
42 other than love and concern for the dignity of their husband and father.

43 Furthermore, in the absence of legislative guidance, we find no legal
44 requirement that prior judicial approval is necessary before any decision to
45 withdraw treatment can be made.

46 Despite the breadth of its language, *Barber* does not dispose of the issues of who
47 can consent, due to the way in which the case arose — reliance on requests from
48 the family of the patient as a defense to a charge of murder against the doctors

36. 147 Cal. App. 3d 1006, 195 Cal. Rptr. 484 (1983).

1 who removed the patient’s life support. Note also that the court is not in a position
2 to determine issues such as who is included in the patient’s “family.” It is implicit
3 that the wife, children, and sister-in-law were all family members. However, the
4 court’s statement that the “wife was the proper person to act as a surrogate for the
5 patient” based on the assumption she would have been qualified if judicial
6 approval had been sought, is not completely consistent with other statements
7 referring to the “family’s decision” and that the “wife and children were the most
8 obviously appropriate surrogates,” and speculation on what would have happened
9 if “the family had insisted on continued treatment.”

10 Nevertheless, *Barber* has been characterized as an “enormously important”
11 decision: “Indeed, literature generated from within the medical community
12 indicates that health care providers rely upon *Barber* — presumably every day —
13 in deciding together with families to forego treatment for persistently vegetative
14 patients who have no reasonable hope of recovery.”³⁷

15 **Current Practice: LACMA-LACBA Pamphlet**

16 In the mid-1980s, the Joint Committee on Biomedical Ethics of the Los Angeles
17 County Medical Association (LACMA) and Los Angeles County Bar Association
18 (LACBA) issued and has since updated a pamphlet entitled “Guidelines: Forgoing
19 Life-Sustaining Treatment for Adult Patients.” It is expected that the *Guidelines*
20 are widely relied on by medical professionals and are an important statement of
21 custom and practice in California. The *Guidelines* were cited in *Bouvia* and
22 *Drabick*. A 1993 addendum to the *Guidelines*, pertaining to decisionmaking for
23 incapacitated patients without surrogates, provides a concise statement of the
24 “Relevant Legal and Ethical Principles”:

25 The process suggested in these Guidelines has been developed in light of the
26 following principles established by the California courts and drawn from the Joint
27 Committee’s Guidelines for Forgoing Life-Sustaining Treatment for Adult
28 Patients:

29 (a) Competent adult patients have the right to refuse treatment, including life-
30 sustaining treatment, whether or not they are terminally ill.

31 (b) Patients who lack capacity to make healthcare decisions retain the right to
32 have appropriate medical decisions made on their behalf, including decisions
33 regarding life-sustaining treatment. An appropriate medical decision is one that is
34 made in the best interests of the patient, not the hospital, the physician, the legal
35 system, or someone else.

36 (c) A surrogate decision-maker is to make decisions for the patient who lacks
37 capacity to decide based on the expressed wishes of the patient, if known, or
38 based on the best interests of the patient, if the patient’s wishes are not known.

39 (d) A surrogate decision-maker may refuse life support on behalf of a patient
40 who lacks capacity to decide where the burdens of continued treatment are
41 disproportionate to the benefits. Even a treatment course which is only minimally
42 painful or intrusive may be disproportionate to the potential benefits if the

37. Conservatorship of Drabick, 200 Cal. App. 3d 185, 198, 245 Cal. Rptr. 840 (1988).

1 prognosis is virtually hopeless for any significant improvement in the patient's
2 condition.

3 (e) The best interests of the patient do not require that life support be continued
4 in all circumstances, such as when the patient is terminally ill and suffering, or
5 where there is no hope of recovery of cognitive functions.

6 (f) Physicians are not required to provide treatment that has been proven to be
7 ineffective or will not provide a benefit.

8 (g) Healthcare providers are not required to continue life support simply
9 because it has been initiated.

10 **Current Practice: Patient Information Pamphlet**

11 A patient information pamphlet (“Your Right To Make Decisions About
12 Medical Treatment”) has been prepared by the California Consortium on Patient
13 Self-Determination and adopted by the Department of Health Services for
14 distribution to patients at the time of admission. This is in compliance with the
15 federal Patient Self Determination Act of 1990. The PSDA requires the pamphlet
16 to include a summary of the state’s law on patients’ rights to make medical
17 treatment decisions and to make advance directives. The California pamphlet
18 contains the following statement:

19 *What if I'm too sick to decide?*

20 If you can't make treatment decisions, your doctor will ask your closest
21 available relative or friend to help decide what is best for you. Most of the time,
22 that works. But sometimes everyone doesn't agree about what to do. That's why it
23 is helpful if you say in advance what you want to happen if you can't speak for
24 yourself. There are several kinds of “advance directives” that you can use to say
25 *what* you want and *who* you want to speak for you.

26 Based on the case law, the Commission is not confident that California law says
27 the *closest* available relative *or friend* can make health care decisions. However, it
28 may be true in practice that these are the persons doctors will ask, as stated in the
29 pamphlet.³⁸

30 **Alternative Approaches to Statutory Surrogate Priorities**

31 The general understanding is that close relatives and friends who are familiar
32 with the patient’s desires and values should make health care decisions in
33 consultation with medical professionals. Wives, brothers, mothers, sisters-in-law,
34 and domestic partners have been involved implicitly as “family” surrogate
35 decisionmakers in reported California cases, although no case is exactly on point.
36 The practice, as described in authoritative sources, is consistent with this

38. See, e.g., AMA Code of Medical Ethics § 2.20, at 36 (1994) (“[W]hen there is no person closely associated with the patient, but there are persons who both care about the patient and have sufficient relevant knowledge of the patient, such persons may be appropriate surrogates.”); President’s Comm’n etc., Deciding To Forego Life-Sustaining Treatment 126-27 (1983) (“When a patient lacks the capacity to make a decision, a surrogate decisionmaker should be designated. Ordinarily this will be the patient’s next of kin, although it may be a close friend or another relative if the responsible health care professional judges that this other person is in fact the best advocate for the patient’s interests.”)

1 understanding. Courts and legislatures nationwide naturally rely on a family or
2 next of kin approach because these are the people who are presumed to best know
3 the desires of the patient and to determine the patient's best interests.³⁹

4 Priority schemes among relatives and friends seem natural. Intestate succession
5 law⁴⁰ provides a ready analogy — thus, the spouse, children, parents, siblings, and
6 so forth, seem to be a natural order. The same order is established in the
7 preference for appointment as conservator.⁴¹ But the analogy between health care,
8 life-sustaining treatment, and personal autonomy on one hand and succession to
9 property on the other is weak. A health care decision cannot be parceled out like
10 property in an intestate's estate. The consequences of a serious health care
11 decision are different in kind from decisions on how to distribute property.

12 The trend in other states is decidedly in favor of providing statutory guidance,
13 generally through a priority scheme. The collective judgment of the states would
14 seem to be that, since most people will not execute any form of advance directive,
15 the problem needs to be addressed with some sort of default rules, perhaps based
16 on an intestate succession analogy. As described by Professor Meisel:⁴²

17 The primary purpose of these statutes is to make clear what is at least implicit in
18 the case law: that the customary medical professional practice of using family
19 members to make decisions for patients who lack decisionmaking capacity and
20 who lack an advance directive is legally valid, and that ordinarily judicial
21 proceedings need not be initiated for the appointment of a guardian. Another
22 purpose of these statutes is to provide a means, short of cumbersome and possibly
23 expensive guardianship proceedings, for designating a surrogate decisionmaker
24 when the patient has no close family members to act as surrogate.

25 The UHCDA scheme lists the familiar top four classes of surrogates (spouse,
26 children, parents, siblings), but is less restrictive than many state statutes in several
27 respects:⁴³

28 (1) Class members *may* act as surrogate and need to *assume authority* to do so. It
29 is not clear whether a class member must affirmatively decline to act or may be
30 disregarded if he or she fails to assume authority, but unlike some state statutes, an
31 abstaining class member does not prevent action.

32 (2) Determinations within classes can be made by majority vote under the
33 UHCDA. This is not likely to be a common approach to making decisions where
34 there are disagreements, but it would be a useful rule enabling decisionmaking
35 where there are minority class members whose views are unknown or in doubt.

36 (3) An orally designated surrogate, who appears first on the UHCDA priority
37 list, is an attempt to deal with the fact that a strict statutory priority list does not

39. See generally 2 A. Meisel, *The Right to Die* §§ 14.1-14.10 (2d ed. 1995)

40. Prob. Code § 6400 *et seq.*

41. Prob. Code § 1812.

42. 2 A. Meisel, *The Right to Die* § 14.1 at 249-50 (2d ed. 1995)

43. UHCDA Section 5.

1 necessarily reflect reality. The “orally designated surrogate was added to the Act
2 not because its use is recommended but because it is how decision makers are
3 often designated in clinical practice.”⁴⁴

4 (4) The authorization for adults who have “exhibited special care and concern”
5 is relatively new. Under the common law, the status of friends as surrogates is, in
6 Professor Meisel’s words, “highly uncertain.”⁴⁵ Health and Safety Code Section
7 1418.8 requires consultation with friends of nursing home patients and authorizes
8 a friend to be appointed as the patient’s representative. These features are noted
9 with approval in *Rains v. Belshé*,⁴⁶ but the authority is strictly statutory and quite
10 limited.

11 **Statutory Surrogates Under Proposed Law**

12 The Commission believes that a rigid priority scheme based on an intestate
13 succession analogy would be too restrictive and not in accord with the
14 fundamental principle that decisions should be made based on the patient’s desires
15 or, where not known, in the patient’s best interest. The focus of statutory
16 surrogacy rules should be to provide some needed clarity without creating
17 technical rules that would make compliance confusing or risky, thereby bogging
18 the process down or paralyzing medical decisionmaking. Just as California courts
19 have consistently resisted judicial involvement in health care decisionmaking,
20 except as a last resort, the statutory surrogacy scheme should assist, rather than
21 disrupt, existing practice.

22 Professor Meisel describes this fundamental problem with priority classes as
23 follows:⁴⁷

24 Although the intent of such priority lists is a good one — to eliminate possible
25 confusion about who has the legal authority to make decisions for incompetent
26 patients — the result of surrogate-designation pursuant to statute is not only
27 mechanical but can be contrary or even inimical to the patient’s wishes or best
28 interests. This would occur, for example, if the patient were estranged from his
29 spouse or parents. However, it is not clear that the result would be much different
30 in the absence of a statute because the ordinary custom of physicians sanctioned
31 by judicial decision, is to look to incompetent patients’ close family members to
32 make decisions for them. In the absence of a statute, the physician might ignore a
33 spouse known to be estranged from the patient in favor of another close family
34 member as surrogate, but because there is nothing in most statutes to permit a
35 physician to ignore the statutory order of priority, the result could be worse under
36 a statute than in its absence.

44. English, ____.

45. 2 A. Meisel, *The Right to Die* §14.4, at 51 (Supp. #1, 1997). *But cf.* *Conservatorship of Drabick*, 200 Cal. App. 3d 185, 204, 245 Cal. Rptr. 840 91988 (“...faced with a persistently vegetative patient and a diagnosis establishing that further treatment offers no reasonable hope of returning the patient to cognitive life, the decision whether to continue noncurative treatment is an ethical one for the physicians and family members or other persons who are making health care decisions for the patient.”)

46. 32 Cal. App. 4th 157, 166, 38 Cal. Rptr. 2d 185 (1995).

47. 2 A. Meisel, *The Right to Die* § 14.4 at 255 (2d ed. 1995) (footnotes omitted).

1 In recognition of the problems as well as the benefits of a priority scheme, the
2 proposed law sets out a default list of statutory surrogates: (1) The spouse, unless
3 legally separated, (2) children, (3) parents, (4) brothers and sisters, (5)
4 grandchildren, (6) an individual in a long-term relationship of indefinite duration
5 with the patient in which the individual has demonstrated an actual commitment to
6 the patient similar to the commitment of a spouse and in which the individual and
7 the patient consider themselves to be responsible for each other's well-being
8 (including a person known as a domestic partner), and (7) close friends.

9 As a general rule, the primary physician is required to select the surrogate, with
10 the assistance of other health care providers or institutional committees, in the
11 order of priority as set out in the statute. However, where there are multiple
12 possible surrogates at the same priority level, the primary physician has a duty to
13 select the individual who reasonably appears after a good faith inquiry to be best
14 qualified.⁴⁸ The primary physician may select as the surrogate an individual who is
15 ranked lower in priority if, in the primary physician's judgment, the individual is
16 best qualified to serve as the patient's surrogate. These rules are directly related to
17 the fundamental principal that the law should attempt to find the best surrogate
18 who can make health care decisions according to the patient's known desires or in
19 the patient's best interests.

20 Providing flexibility based on fundamental principles of self-determination and
21 ethical standards ameliorates the defects of a rigid priority scheme. The procedure
22 for varying the default priority rules is not arbitrary but subject to a set of
23 important statutory standards. In determining which listed person is best qualified
24 to serve as the surrogate, the following factors must be considered:

- 25 (1) Whether the proposed surrogate reasonably appears to be best able to make
26 decisions in accordance with Section 4713.
- 27 (2) The degree of regular contact with the patient before and during the patient's
28 illness.
- 29 (3) Demonstrated care and concern for the patient.
- 30 (4) Familiarity with the patient's personal values.
- 31 (5) Availability to visit the patient.
- 32 (6) Availability to engage in face-to-face contact with health care providers for
33 the purpose of fully participating in the health care decisionmaking process.

34 In addition, the process of applying these standards and making the determination
35 must be documented in the patient's medical record.

36 The recommended procedure also reduces the problem of resolving differences
37 between potential surrogates. There can be problems under the existing state of
38 law and custom, as illustrated by cases where family members — e.g., children,
39 parents, or the patient's spouse — compete for appointment as conservator of an

48. The recommended procedure is drawn, in part, from West Virginia law. See W.Va. Code § 16-30B-7 (1997). Elements are also drawn from New Mexico's implementation of the UHCDA. See N.M. Stat. Ann. § 24-7A-5 (Michie 19__).

1 incapacitated person. These disputes will still occur and it is difficult to imagine a
2 fair and flexible statutory procedure that could resolve all issues.

3 As discussed, the UHCDA provides a rigid priority scheme between classes of
4 close relatives and provides for voting within a class with multiple members.⁴⁹ If a
5 class is deadlocked, then the surrogacy procedure comes to a halt; lower classes do
6 not get an opportunity to act, although it is possible for a higher class to reassert its
7 priority, and the evenly split class could resolve the deadlock over time. This type
8 of procedure seems overly mechanical and lacking in needed flexibility.

9 The Commission also considered the family consensus approach, such as that
10 provided under Colorado law.⁵⁰ In this procedure, the class of potential surrogates,
11 comprised of close family members and friends, is given the responsibility and
12 duty to select a surrogate from among their number. It is difficult to judge how
13 well this type of procedure would work in practice. The concern is that it might
14 result in too much confusion and administrative burden, without improving the
15 prospects for effective decisionmaking or resolving disputes. [*Staff Note: Is it*
16 *worth considering authorizing this type of approach as an alternative within the*
17 *framework of the priority scheme in the draft?*]

18 The proposed law adopts a presumptive “pecking order” like the UHCDA, but
19 places the responsibility on the primary physician to select the best situated person
20 based on standards set out in the statute. This avoids the rigidity of the UHCDA
21 approach and the indefiniteness and administrative burden of the consensus
22 approach. Notice of the selection should be given to other family members.
23 Potential surrogates with serious objections to the selection of the surrogate or the
24 decisions being made by the surrogate would still have the right to bring a judicial
25 challenge or seek appointment as a conservator.⁵¹

26 Like the UHCDA, the proposed law gives priority over the statutory list to a
27 surrogate who has been designated by the patient. [*Staff Note: The scope of this*
28 *rule is an issue discussed in the draft attached to Memorandum 98-16, p. B-38.*]

29 DECISIONMAKING WHERE NO SURROGATE IS AVAILABLE

30 Providing statutory surrogate rules where a patient has not executed an advance
31 directive or designated a surrogate, and for whom a conservator of the person has
32 not been appointed, does not answer all of the problems. The statutory surrogate
33 rules will not apply to a significant group of incapacitated adults for whom there
34 are no potential surrogates because they have no close relatives or friends familiar
35 with their health care treatment desires or values, or potential surrogates are
36 unwilling or unable to make decisions.

49. UHCDA § 5.

50. See Colo. Rev. Stat. Ann. § 15-18.5-103 (West 1997). Illinois and Louisiana also implement some consensus standards. See generally, 2 A. Meisel, *The Right to Die* § ____.

51. See *infra* text accompanying notes ____.

1 Existing law addresses this problem with respect to “medical interventions” for
2 patients in the nursing home context,⁵² but there is no general surrogacy rule
3 applicable in these circumstances. The UHCDA does not address this problem.

4 The alternative of appointing a conservator of the person in each of these cases
5 is not an adequate solution to the problem, as recognized by the Legislature when
6 it enacted the medical intervention procedure.⁵³ While it is possible to seek court
7 approval for medical “treatment” under Probate Code Section 3200 *et seq.*
8 (authorization of medical treatment for adult without conservator), it is not clear
9 that this procedure authorizes orders for *withdrawal* of treatment or *refusal* of
10 consent.⁵⁴

11 The proposed law adopt a procedure based on nursing home medical
12 intervention procedure. Under this proposal, health care decisions for the
13 “friendless” incapacitated adult could be made by a “surrogate committee.” The
14 committee would be made up of the following persons, as appropriate under the
15 circumstances:

- 16 (1) The patient’s primary physician.
- 17 (2) A registered professional nurse with responsibility for the patient.
- 18 (3) Other appropriate health care institution staff in disciplines as determined by
19 the patient’s needs.
- 20 (4) One or more patient representatives, who may be a family member or friend
21 of the patient who is unable to take full responsibility for the patient’s health care
22 decisions, but has agreed to serve on the surrogacy committee.
- 23 (5) In cases involving major health care decisions, a member of the community
24 who is not employed by or regularly associated with the primary physician, the
25 health care institution, or employees of the health care institution.
- 26 (6) In cases involving major health care decisions, a member of the health care
27 institution’s ethics committee or an outside ethics consultant.

28 In reviewing proposed health care decisions, the surrogate committee would be
29 required to consider and review all of the following factors:

- 30 (1) The primary physician’s assessment of the patient’s condition.
- 31 (2) The reason for the proposed health care decision.
- 32 (3) The desires of the patient, if known. To determine the desires of the patient,
33 the surrogate committee must interview the patient, review the patient’s medical
34 records, and consult with family members or friends, if any have been identified.
- 35 (4) The type of health care to be used in the patient’s care, including its
36 probable frequency and duration.

52. Health & Safety Code § 1418.8. See *Rains v. Belshé*, 32 Cal. App. 4th 157, 166, 38 Cal. Rptr. 2d 185 (1995) (upholding the constitutionality of the procedure for patients in nursing homes who lack capacity to make health care decisions, “even though they do not have a next of kin, an appointed conservator, or another authorized decision maker to act as their surrogate”).

53. In most cases, the conservator will be the Public Guardian, which may be a non-solution if the Public Guardian’s policy is not to exercise the duty to decide as set down in *Drabick*.

54. Probate Code Section 3208 refers to “authorizing the recommended course of medical treatment of the patient” and “the existing or continuing medical condition.”

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

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

5 The surrogate committee is required to periodically evaluate the results of
6 approved health care decisions at least quarterly or whenever there is a significant
7 change in the patient's medical condition.

8 The proposed law intends the surrogate committee to try to operate on a
9 consensus basis. If consensus cannot be reached, the committee is authorized to
10 approve proposed health care decisions by majority vote. There is an important
11 exception: proposed health care decisions relating to withdrawal of life-sustaining
12 treatment cannot be approved if any member of the surrogate committee is
13 opposed.

14 STANDARDS FOR SURROGATE DECISIONMAKING

15 The existing power of attorney for health care law requires the attorney-in-fact
16 to "act consistent with the desires of the principal as expressed in the durable
17 power of attorney or otherwise made known to the attorney-in-fact at any time or,
18 if the principal's desires are unknown, to act in the best interests of the
19 principal."⁵⁵ The UHCDA adopts the same rule as a general standard for all
20 surrogates:

21 [T]he Act seeks to ensure to the extent possible that decisions about an
22 individual's health care will be governed by the individual's own desires
23 concerning the issues to be resolved. The Act requires an agent or surrogate
24 authorized to make health-care decisions for an individual to make those
25 decisions in accordance with the instructions and other wishes of the individual to
26 the extent known. Otherwise, the agent or surrogate must make those decisions in
27 accordance with the best interest of the individual but in light of the individual's
28 personal values known to the agent or surrogate. Furthermore, the Act requires a
29 guardian to comply with a ward's previously given instructions and prohibits a
30 guardian from revoking the ward's advance health-care directive without express
31 court approval.

32 The proposed law, like the UHCDA, applies these standards generally
33 throughout the statute.

34 DUTIES AND LIABILITIES OF HEALTH CARE PROVIDERS

35 [Not completed.]

36 JUDICIAL REVIEW

37 California law does not favor judicial involvement in health care decisions. The
38 Power of Attorney Law provides as a general rule that a power of attorney is

55. Prob. Code § 4720(c).

1 exercisable free of judicial intervention.⁵⁶ The Natural Death Act declares that “in
2 the absence of a controversy, a court normally is not the proper forum in which to
3 make decisions regarding life-sustaining treatment.”⁵⁷ In connection with
4 incapacitated patients in nursing homes, the Legislature has found:⁵⁸

5 The current system is not adequate to deal with the legal, ethical, and practical
6 issues that are involved in making health care decisions for incapacitated skilled
7 nursing facility or intermediate care facility residents who lack surrogate
8 decisionmakers. Existing Probate Code procedures, including public
9 conservatorship, are inconsistently interpreted and applied, cumbersome, and
10 sometimes unavailable for use in situations in which day-to-day medical treatment
11 decisions must be made on an on-going basis.

12 Appellate decisions also caution against overinvolvement of courts in the
13 intensely personal realm of health care decisionmaking.⁵⁹ However, there may be
14 occasions where a dispute must be resolved and an appropriately tailored
15 procedure is needed.⁶⁰

16 The UHCDA takes a similar approach, but provides less detail than existing
17 law:⁶¹

18 [T]he Act provides a procedure for the resolution of disputes. While the Act is
19 in general to be effectuated without litigation, situations will arise where resort to
20 the courts may be necessary. For that reason, the Act authorizes the court to
21 enjoin or direct a health-care decision or order other equitable relief and specifies
22 who is entitled to bring a petition.

23 The proposed law contains a procedure drawn largely from the Power of
24 Attorney Law.⁶² Under this procedure, any of the following persons may file a
25 petition in the superior court: the patient, the patient’s spouse (unless legally
26 separated), a relative of the patient, the patient’s agent or surrogate, the
27 conservator of the person of the patient, a court investigator, the public guardian of
28 the county where the patient resides, the supervising health care provider or health
29 care institution, and any other interested person or friend of the patient. [*Staff*

56. Prob. Code § 4900.

57. Health & Safety Code § 7185.5(e).

58. 1992 Cal. Stat. ch. 1303, § 1(b).

59. [cites]

60. This is consistent with one of the features of the UHCDA as explained in the Prefatory Note:

Sixth, the Act provides a procedure for the resolution of disputes. While the Act is in general to be effectuated without litigation, situations will arise where resort to the courts may be necessary. For that reason, the Act authorizes the court to enjoin or direct a health-care decision or order other equitable relief and specifies who is entitled to bring a petition.

61. UHCDA Prefatory Note.

62. See Prob. Code §§ 4900-4948. Because of the placement of the Health Care Decisions Law beginning at Section 4600, the judicial proceedings provisions (Part 5) applicable to non-health care powers of attorney is moved to form a new Part 4 (commencing with Section 4500). The law applicable to non-health care powers remains the same; only the special provisions concerning health care powers of attorney have been removed.

1 *Note: the scope of this provision is an issue raised in connection with draft Section*
2 *4765 in Memorandum 98-16, p. B-55.] As under existing law, there is no right to a*
3 *jury trial.*⁶³

4 The grounds for a petition are broad, but not unlimited, and include determining
5 (1) whether the patient has capacity to make health care decisions, (2) whether an
6 advance health care directive is in effect, and (3) whether the acts or proposed acts
7 of an agent or surrogate are consistent with the patient's desires as expressed in an
8 advance health care directive or otherwise made known to the court or, where the
9 patient's desires are unknown or unclear, whether the acts or proposed acts of the
10 agent or surrogate are in the patient's best interest. When capacity is to be
11 determined in judicial proceedings, the provisions of the Due Process in Capacity
12 Determinations Act⁶⁴ are applicable. The standard for reviewing the agent's or
13 surrogate's actions is consistent with the general standard applicable under the
14 proposed Health Care Decisions Law, as already discussed.⁶⁵

15 TECHNICAL MATTERS

16 **Location of Proposed Law**

17 The proposed Health Care Decisions Law would be located in the Probate Code
18 following the Power of Attorney Law. There is no ideal location for a statute that
19 applies both to incapacity planning options (e.g., the power of attorney for health
20 care) and to standards governing health care decisionmaking for incapacitated
21 adults. But considering the alternatives, the Probate Code appears to be the best
22 location because of associated statutes governing conservatorship of the person,
23 court authorized medical treatment, and powers of attorney. In addition, estate
24 planning and elder law practitioners are familiar with the probate code.

25 **Severance from Power of Attorney Law**

26 Drafting health care decisionmaking rules as a separate statute should eliminate
27 or minimize these exceptions and overlays in the Power of Attorney Law (PAL),
28 thereby improving the organization and usability of both the PAL as it relates to
29 property and financial matters and the law relating to health care powers. [A
30 catalogue of PAL provisions relevant to powers of attorney for health care under
31 existing law will be included here.]

32 **Application to Pre-existing Instruments**

33 [Not completed.]

34 **Application to Out-of-State Advance Directives**

35 [Not completed.]

63. Prob. Code § 4904.

64. Prob. Code §§ 810-813.

65. See *supra* text accompanying notes ____.

1 OTHER PROCEDURES

2 **DNR Orders**

3 The proposed law continues the existing special procedures governing requests
4 to forego resuscitative measure (DNR orders)⁶⁶ with a few technical revisions for
5 consistency with definitions under the Health Care Decisions Law. The
6 Commission did not undertake a substantive review of the DNR rules.

7 **Secretary of State's Registry**

8 Existing law requires the Secretary of State to establish a registry for durable
9 powers of attorney.⁶⁷ The registry is intended to provide information concerning
10 the existence and location of a person's durable power of attorney for health care.
11 The registry is strictly voluntary. It has no effect on the validity of a power of
12 attorney for health care,⁶⁸ nor is a health care provider required to apply to the
13 registry for information.⁶⁹

14 The proposed law continues the registry provisions, but in the interest of treating
15 all advance health care directives equally, provides for registration of individual
16 health care instructions on the same basis as powers of attorney for health care.
17 The Commission has not evaluated the registry system, although the Commission
18 is informed that as of mid-1997 there were fewer than 100 filings and no inquiries
19 had been directed to the registry system.

66. See Prob. Code § 4753.

67. Prob. Code §§ 4800-4806. The registry was established pursuant to 1994 Cal. Stat. ch. 1280.

68. Prob. Code §§ 4803-4804.

69. Prob. Code § 4806.

STAFF DRAFT
HEALTH CARE DECISIONS

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STAFF DRAFT

HEALTH CARE DECISIONS

Division 4.7 (added). Health care decisions

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

DIVISION 4.7. HEALTH CARE DECISIONS

PART 1. DEFINITIONS AND GENERAL

CHAPTER 1. SHORT TITLE AND DEFINITIONS

§ 4600. Short title

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

Comment. Section 4600 is new and provides a convenient means of referring to this division. The Health Care Decisions Law is essentially self-contained, but other agency statutes may be applied as provided in Section 4662. See also Sections 20 *et seq.* (general definitions applicable in Probate Code depending on context), 4755 (application of general procedural rules). For the scope of this division, see Section 4650.

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

§ 4603. Application of definitions

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

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

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

§ 4605. Advance health care directive; advance directive

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

Comment. Section 4605 is new. The first sentence is the same as Section 1(1) of the Uniform Health-Care Decisions Act (1993), except that the term “advance directive” is defined for convenience. “Advance directive” is commonly used in practice as a shorthand. Statutory

1 language also may use the shorter term. See, e.g., Section 4698. A declaration or directive under
2 the repealed Natural Death Act (former Health & Safety Code § 7185 *et seq.*) is a type of advance
3 directive. See Section 4623 Comment.

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

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

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

10 § 4607. Agent

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

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

15 **Comment.** Section 4607 is consistent with the definition of attorney-in-fact in the Power of
16 Attorney Law. See Section 4014. The first part of subdivision (a) is the same as Section 1(2) of
17 the Uniform Health-Care Decisions Act (1993). For qualifications of health care agents, see
18 Sections 4660.

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

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

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

24 § 4609. Capacity

25 4609. “Capacity” means a patient’s ability to understand the nature and
26 consequences of proposed health care, including its significant benefits, risks, and
27 alternatives, and to make and communicate a health care decision.

28 **Comment.** Section 4609 is a new provision drawn from former Health and Safety Code
29 Section 1418.8 and Section 1(3) of the Uniform Health-Care Decisions Act (1993).

30 For provisions in this division relating to capacity, see Sections 4651 (authority of person
31 having capacity not affected), 4657 (presumption of capacity), 4658 (determination of capacity
32 and other medical conditions), 4659 (patient’s objections), 4683 (when agent’s authority
33 effective), 4684 (scope of agent’s authority), 4696 (revocation of power of attorney for health
34 care), 4710 (authority of surrogate to make health care decisions), 4720 (health care decisions for
35 patient without surrogates), 4732 (duty of primary physician to record relevant information), 4733
36 (obligations of health care provider), 4740 (immunities of health care provider), 4766 (petition as
37 to durable power of attorney for health care).

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

39 § 4611. Community care facility

40 4611. “Community care facility” means a “community care facility” as defined
41 in Section 1502 of the Health and Safety Code.

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

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

1 **§ 4613. Conservator**

2 4613. “Conservator” means a court-appointed conservator or guardian having
3 authority to make a health care decision for a patient.

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

7 For provisions in this division concerning conservators, see Sections 4617 (“health care
8 decision” defined), 4629 (“primary physician” defined), 4639 (“surrogate” defined), 4660
9 (limitations on who may act as agent), 4672 (nomination of conservator in written advance health
10 care directive), 4710 (authority of surrogate to make health care decisions), 4712 (determination
11 of statutory surrogate), 4732 (duty of primary physician to record relevant information), 4753
12 (limitations on right to petition), 4765 (petitioners), 4766 (petition as to power of attorney for
13 health care), 4770 (temporary health care order), 4771 (award of attorney’s fees).

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

15 **§ 4615. Health care**

16 4615. “Health care” means any care, treatment, service, or procedure to
17 maintain, diagnose, or otherwise affect a patient’s physical or mental condition.

18 **Comment.** Section 4615 continues the first part of former Section 4609 without substantive
19 change and is the same in substance as Section 1(5) of the Uniform Health-Care Decisions Act
20 (1993).

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

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

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

27 **§ 4617. Health care decision**

28 4617. “Health care decision” means a decision made by a patient or the patient’s
29 agent, conservator, or surrogate, regarding the patient’s health care, including the
30 following:

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

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

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

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

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

1 **§ 4619. Health care institution**

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

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

7 For provisions in this division using this term, see Sections 4654 (compliance with generally
8 accepted health care standards), 4660 (limitation on who may act as agent or surrogate), 4701
9 (optional form of advance health care directive), 4733 (obligations of health care institution),
10 4735 (health care institution’s right to decline ineffective care), 4736 (obligations of declining
11 health care institution), 4740 (immunities of health care provider or institution), 4675 (restriction
12 on requiring or prohibiting advance directive), 4742 (statutory damages).

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

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

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

17 **§ 4621. Health care provider**

18 4621. “Health care provider” means an individual licensed, certified, or
19 otherwise authorized or permitted by the law of this state to provide health care in
20 the ordinary course of business or practice of a profession.

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

26 For provisions in this division using this term, see Sections 4617 (“health care decision”
27 defined), 4654 (compliance with generally accepted health care standards), 4660 (limitations on
28 who may act as agent), 4673 (witnessing requirements in skilled nursing facility), 4686 (agent’s
29 priority), 4701 (optional form of advance health care directive), 4712 (determination of statutory
30 surrogate), 4733 (obligations of health care provider), 4734 (health care provider’s right to
31 decline for reasons of conscience), 4735 (health care provider’s right to decline ineffective care),
32 4736 (obligations of declining health care provider), 4740 (immunities of health care provider),
33 4675 (restriction on requiring or prohibiting advance directive), 4742 (statutory damages), 4740
34 (immunities of health care provider).

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

36 **§ 4623. Individual health care instruction; individual instruction**

37 4623. “Individual health care instruction” or “individual instruction” means a
38 patient’s written or oral direction concerning a health care decision for herself or
39 himself.

40 **Comment.** Section 4623 is a new provision and is the same in substance as Section 1(9) of the
41 Uniform Health-Care Decisions Act (1993). The term “individual health care instruction” is
42 included to provide more clarity. A declaration or directive under the repealed Natural Death Act
43 (former Health & Safety Code § 7185 *et seq.*) is an individual health care instruction.

44 For provisions in this division using this term, see Sections 4605 (“advance health care
45 directive” defined), 4624 (“patient” defined), 4658 (determination of capacity and other medical
46 conditions), 4670 (individual health care instruction recognized), 4671 (power of attorney for
47 health care may include individual instruction), 4685 (standard governing agent’s health care

1 decisions), 4698 (effect of later advance directive on earlier advance directive), 4713 (standard
2 governing surrogate’s health care decisions), 4732 (duty of primary physician to record relevant
3 information), 4733 (obligations of health care provider or institution), 4734 (health care
4 provider’s or institution’s right to decline), 4736 (obligations of declining health care provider or
5 institution).

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

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

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

15 § 4624. Patient

16 4624. “Patient” means an adult whose health care is under consideration, and
17 includes a principal under a power of attorney for health care and an adult who has
18 given an individual health care instruction or designated a surrogate.

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

23 See also Sections 4615 (“health care” defined), 4623 (“individual health care instruction”
24 defined), 4627 (“power of attorney for health care” defined), 4630 (“principal” defined), 4639
25 (“surrogate” defined). Compare Section 3200 (“patient” defined for purposes of court-authorized
26 medical treatment procedure).

27 § 4625. Physician

28 4625. “Physician” means a physician and surgeon licensed by the Medical Board
29 of California or the Osteopathic Medical Board of California.

30 **Comment.** Section 4625 continues and generalizes former Health and Safety Code Section
31 7186(g) (Natural Death Act) and is the same in substance as Section 1(11) of the Uniform Health-
32 Care Decisions Act (1993).

33 § 4627. Power of attorney for health care

34 4627. “Power of attorney for health care” means a written instrument
35 designating an agent to make health care decisions for the principal.

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

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

1 **§ 4629. Primary physician**

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

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

10 For provisions in this division using this term, see Sections 4637 (“supervising health care
11 provider” defined), 4658 (determination of capacity and other medical conditions), 4701 (optional
12 form of advance health care directive), 4710 (authority of surrogate to make health care
13 decisions), 4712 (determination of statutory surrogate), 4715 (reassessment of surrogate
14 determination), 4721 (referral to interdisciplinary team), 4732 (duty of primary physician to
15 record relevant information).

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

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

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

25 **§ 4630. Principal**

26 4030. “Principal” means an adult who executes a power of attorney for health
27 care.

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

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

32 **§ 4631. Reasonably available**

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

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

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

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

44 **Background from Uniform Act.** The term “reasonably available” is used in the Act to
45 accommodate the reality that individuals will sometimes not be timely available. The term is
46 incorporated into the definition of “supervising health-care provider” [Prob. Code § 4637]. It

1 appears in the optional statutory form (Section 4) [Prob. Code § 4701] to indicate when an
2 alternate agent may act. In Section 5 [Prob. Code § 4712] it is used to determine when a surrogate
3 will be authorized to make health-care decisions for an individual, and if so, which class of
4 individuals has authority to act.

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

6 **§ 4633. Residential care facility for the elderly**

7 4633. “Residential care facility for the elderly” means a “residential care facility
8 for the elderly” as defined in Section 1569.2 of the Health and Safety Code.

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

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

12 **§ 4635. Skilled nursing facility**

13 4635. “Skilled nursing facility” means a “skilled nursing facility” as defined in
14 Section 1250 of the Health and Safety Code.

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

17 For provisions in this division using this term, see Sections 4673 (witnessing requirements in
18 skilled nursing facility), 4701 (optional form of advance health care directive), 4720 (application
19 of rules on patients without surrogates), 4745 (convincing evidence of identity of principal).

20 **§ 4637. Supervising health care provider**

21 4637. “Supervising health care provider” means the primary physician or, if
22 there is no primary physician or the primary physician is not reasonably available,
23 the health care provider who has undertaken primary responsibility for a patient’s
24 health care.

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

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

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

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

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

38 **§ 4639. Surrogate**

39 4639. “Surrogate” means an adult, other than a patient’s agent or conservator,
40 authorized under this division to make a health care decision for the patient.

41 **Comment.** Section 4639 is a new provision and is the same in substance as Section 1(17) of the
42 Uniform Health-Care Decisions Act (1993), except that this section refers to “conservator”
43 instead of “guardian” and to “adult” instead of “individual.” “Adult” includes an emancipated

1 minor. See Fam. Code §§ 7002 (emancipation). For provisions governing surrogates, see Section
2 4710 *et seq.*

3 For provisions in this division using this term, see Sections 4617 (health care decision), 4624
4 (patient), 4629 (primary physician), 4653 (mercy killing, assisted suicide, euthanasia not
5 approved), 4657 (presumption of capacity), 4658 (determination of capacity and other medical
6 conditions), 4659 (patient’s objections), 4660 (limitation on who may act as agent or surrogate),
7 4661 (use of copies), 4696. (duty to communicate revocation), 4710-4715 (health care
8 surrogates), 4720 (application of rules on patients without surrogates), 4725 (general surrogate
9 rules applicable to surrogate committee), 4731 (duty of supervising health care provider to record
10 relevant information), 4732 (duty of primary physician to record relevant information), 4741
11 (immunities of agent and surrogate), 4750 (judicial intervention disfavored), 4762 (jurisdiction
12 over agent or surrogate), 4763 (venue), 4765 (petitioners), 4766 (purposes of petition), 4769
13 (notice of hearing), 4771 (award of attorney’s fees), 4780 “(request to forego resuscitative
14 measures)”, 4783 (forms for requests to forego resuscitative measures).

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

17 **Background from Uniform Act.** The definition of “surrogate” refers to the individual having
18 present authority under Section 5 [Prob. Code § 4710 *et seq.*] to make a health-care decision for a
19 patient. It does not include an individual who might have such authority under a given set of
20 circumstances which have not occurred.

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

22 CHAPTER 2. GENERAL PROVISIONS

23 § 4650. Legislative findings

24 4650. The Legislature finds the following:

25 (a) An adult has the fundamental right to control the decisions relating to his or
26 her own health care, including the decision to have life-sustaining treatment
27 withheld or withdrawn.

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

34 (c) In recognition of the dignity and privacy a person has a right to expect, the
35 law recognizes that an adult has the right to instruct his or her physician to
36 continue, withhold, or withdraw life-sustaining treatment, in the event that the
37 person is unable to make those decisions.

38 (d) In the absence of controversy, a court is normally not the proper forum in
39 which to make health care decisions, including decisions regarding life-sustaining
40 treatment.

41 **Comment.** Section 4650 preserves and continues the substance of the legislative findings set
42 out in former Health and Safety Code Section 7185.5 (Natural Death Act). These findings, in an
43 earlier form, have been relied upon by the courts. *Conservatorship of Drabick*, 200 Cal. App. 3d
44 185, 206, 245 Cal. Rptr. 840, 853 (1988); *Bouvia v. Superior Court*, 179 Cal. App. 3d 1127,
45 1137, 225 Cal. Rptr. 297, 302 (1986); *Bartling v. Superior Court*, 163 Cal. App. 3d 186, 194-95,
46 209 Cal. Rptr. 220, 224-25 (1984); *Barber v. Superior Court*, 147 Cal. App. 3d 1006, 1015-16,

1 195 Cal. Rptr. 484, 489-90 (1983). The earlier legislative findings were limited to persons with a
2 terminal condition or permanent unconscious condition. This restriction is not continued here in
3 recognition of the broader scope of this division and the development of case law since enactment
4 of the original Natural Death Act in 1976. References to “medical care” in former law have been
5 changed to “health care” for consistency with the language of this division. See Section 4615
6 (“health care” defined). This is not intended as a substantive change. “Adult” includes an
7 emancipated minor. See Fam. Code §§ 7002 (emancipation), 7050 (emancipated minor
8 considered as adult for consent to medical, dental, or psychiatric care). “Continue” as been added
9 to subdivision (c) for consistency with the scope of this division. See, e.g., Sections 4615 (“health
10 care” defined), 4617 (“health care decision” defined), 4701 (optional form of advance directive).

11 Parts of former Health and Safety Code Section 7185.5 that are more appropriately stated as
12 substantive provisions are not continued here. See also Section 4750 (judicial intervention
13 disfavored).

14 § 4651. Scope of division

15 4651. (a) Except as otherwise provided, this division applies to health care
16 decisions for adults who lack capacity to make

17 (b) This division does not affect any of the following:

18 (1) The right of an individual to make health care decisions while having the
19 capacity to do so.

20 (2) The law governing health care in an emergency.

21 (3) The law governing health care for unemancipated minors.

22 **Comment.** Subdivision (a) of Section 4651

23 Subdivision (b)(1) is the same in substance as Section 11(a) of the Uniform Health-Care
24 Decisions Act (1993) and replaces former Health and Safety Code Section 7189.5(a) (Natural
25 Death Act).

26 Subdivision (b)(2) continues the substance of former Section 4652(b).

27 Subdivision (b)(3) is new. This division applies to emancipated minors to the same extent as
28 adults. See Fam. Code §§ 7002 (emancipation), 7050 (emancipated minor considered as adult for
29 consent to medical, dental, or psychiatric care).

30 See also Sections 4605 (“advance health care directive” defined), 4615 (“health care” defined),
31 4617 (“health care decision” defined), 4688 (other authority of person named as agent not
32 affected).

33 § 4652. Unauthorized acts

34 4652. This division does not authorize consent to any of the following on behalf
35 of a patient:

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

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

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

41 (d) Sterilization.

42 (e) Abortion.

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

1 **§ 4653. Mercy killing, assisted suicide, euthanasia not approved**

2 4653. This division does not condone, authorize, or approve mercy killing,
3 assisted suicide, or euthanasia, nor does it permit any affirmative or deliberate act
4 or omission to end life other than the withholding or withdrawal of health care
5 pursuant to an advance health care directive or by a surrogate so as to permit the
6 natural process of dying.

7 **Comment.** Section 4653 continues the first sentence of former Section 4723 without
8 substantive change, and is consistent with Section 13(c) of the Uniform Health-Care Decisions
9 Act (1993). This section also continues the substance of former Health and Safety Code Section
10 7191.5(g) (Natural Death Act). Language has been revised to conform to the broader scope of this
11 division.

12 See also Sections 4605 (“advance health care directive” defined), 4615 (“health care” defined),
13 4639 (“surrogate” defined).

14  **Staff Note.** Harley Spitler would delete the reference to “natural process of dying.” See
15 Exhibit p. 4.

16 **§ 4654. Compliance with generally accepted health care standards**

17 4654. This division does not authorize or require a health care provider or health
18 care institution to provide health care contrary to generally accepted health care
19 standards applicable to the health care provider or institution.

20 **Comment.** Section 4654 is the same as Section 13(d) of the Uniform Health-Care Decisions
21 Act (1993). For a special application of this general rule, see Section 4735 (right to decline to
22 provide ineffective care). This section subsumes the specific duty under former Health and Safety
23 Code Section 7189.5(b)(Natural Death Act) concerning providing comfort care and alleviation of
24 pain.

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

27 **§ 4655. Impermissible constructions**

28 4655. (a) This division does not create a presumption concerning the intention of
29 a patient who has not made or who has revoked an advance health care directive.

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

33 **Comment.** Subdivision (a) of Section 4655 is the same in substance as Section 13(a) of the
34 Uniform Health-Care Decisions Act (1993).

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

37 See also Sections 4605 (“advance health care directive” defined), 4615 (“health care” defined),
38 4617 (“health-care decision” defined), 4624 (“patient” defined).

39 **§ 4656. Effect on death benefits**

40 4656. Death resulting from withholding or withdrawing health care in
41 accordance with this division does not for any purpose constitute a suicide or
42 homicide or legally impair or invalidate a policy of insurance or an annuity

1 providing a death benefit, notwithstanding any term of the policy or annuity to the
2 contrary.

3 **Comment.** Section 4656 continues and generalizes former Health and Safety Code Section
4 7191.5(a) (Natural Death Act), and is the same in substance as Section 13(b) of the Uniform
5 Health-Care Decisions Act (1993).

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

7 **§ 4657. Presumption of capacity**

8 4657. A patient is presumed to have capacity to make a health care decision, to
9 give or revoke an advance health care directive, and to designate or disqualify a
10 surrogate.

11 **Comment.** Section 4657 is the same in substance as Section 11(b) of the Uniform Health-Care
12 Decisions Act (1993). The presumption of capacity with regard to revocation continues the
13 substance of the first sentence of former Section 4727(c), and is consistent with former Health
14 and Safety Code Section 7189.5(a) (Natural Death Act). See also Section 4766(a) (petition to
15 review capacity determinations).

16 See also Sections 4605 (“advance health care directive” defined), 4609 (“capacity” defined),
17 4617 (“health care decision” defined), 4624 (“patient” defined), 4639 (“surrogate” defined).

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

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

22 **§ 4658. Determination of capacity and other medical conditions**

23 4658. Unless otherwise specified in a written advance health care directive, for
24 the purposes of this division, a determination that a patient lacks or has recovered
25 capacity, or that another condition exists that affects an individual health care
26 instruction or the authority of an agent or surrogate, shall be made by the primary
27 physician.

28 **Comment.** Section 4658 is drawn from Section 2(d) and part of Section 5(a) of the Uniform
29 Health-Care Decisions Act (1993). This section makes clear that capacity determinations need not
30 be made by the courts. For provisions governing judicial determinations of capacity, see Sections
31 810-813 (Due Process in Capacity Determinations Act). See also Section 4766 (petitions
32 concerning advance directives). For the primary physician’s duty to record capacity
33 determinations, see Section 4732. See also Section 4766(a) (petition to review capacity
34 determinations).

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

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

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

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

10 **§ 4659. Patient's objections**

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

17 **Comment.** Section 4659 is drawn from former Section 4724, which applied only to powers of
18 attorney for health care. The scope of this section is broader, however, since it applies to powers
19 of attorney for health care, other written advance health care directives, oral advance directives,
20 and statutory surrogates. The reference to the patient's capacity has been added for consistency
21 with the statutory scheme. See Section 4657 (presumption of capacity) & Comment. This section
22 supersedes part of former Health and Safety Code Section 7188(a).

23 See also Sections 4605 ("advance health care directive" defined), 4609 ("capacity" defined),
24 4615 ("health care" defined), 4617 ("health-care decision" defined), 4624 ("patient" defined),
25 4639 ("surrogate" defined).

26 **§ 4660. Limitations on who may act as agent or surrogate**

27 4660. (a) Except as provided in subdivision (b), none of the following persons
28 may make health care decisions as an agent under a power of attorney for health
29 care or a surrogate under this division:

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

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

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

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

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

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

42 (1) The [advance health care directive] is otherwise valid.

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

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

3 “I am a lawyer authorized to practice law in the state where this [advance
4 health care directive] was executed, and the principal or patient was my client
5 at the time this advance directive was executed. I have advised my client
6 concerning his or her rights in connection with this advance directive and the
7 applicable law and the consequences of signing or not signing this advance
8 directive, and my client, after being so advised, has executed this advance
9 directive.”

10 (d) This section does not apply to participation in or decisionmaking by a
11 surrogate committee pursuant to Chapter 4 (commencing with Section 4720) of
12 Part 2.

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

18 Subdivisions (a) and (b) serve the same purpose as Section 2(b) (fourth sentence) and Section
19 5(i) of the Uniform Health-Care Decisions Act (1993). Subdivision (a) does not preclude a person
20 from appointing, for example, a friend who is a physician as the agent under the person’s power
21 of attorney for health care, but if the physician becomes the person’s “supervising health care
22 provider,” the physician is precluded from acting as the agent under the power of attorney. See
23 also Section 4673 (witnessing requirements in skilled nursing facilities).

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

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

30 Subdivision (d) makes clear that the rules governing surrogate committees under Sections
31 4720-4725 prevail over this section.

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

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

40 § 4661. Use of copies

41 4661. A copy of a written advance health care directive, revocation of an
42 advance directive, or designation or disqualification of a surrogate has the same
43 effect as the original.

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

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

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

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

9 **§ 4662. Relation to general agency law**

10 4662. Where this division does not provide a rule, the law of agency may be
11 applied.

12 **Comment.** Section 4662 is analogous to Section 4051 in the Power of Attorney Law. Under
13 this section, reference may be made to relevant agency principles set forth in case law and
14 statutes. See, e.g., Civ. Code §§ 2019 *et seq.*, 2295 *et seq.*; Prob. Code § 4000 *et seq.* (Power of
15 Attorney Law).

16 **CHAPTER 3. TRANSITIONAL PROVISIONS**

17 **§ 4665. Application to existing advance directives and pending proceedings**

18 4665. Except as otherwise provided by statute:

19 (a) On and after January 1, 2000, this division applies to all advance health care
20 directives, including but not limited to durable powers of attorney for health care
21 and declarations under the former Natural Death Act (former Chapter 3.9
22 (commencing with Section 7185) of Part 1 of Division 7 of the Health and Safety
23 Code), regardless of whether they were given or executed before, on, or after
24 January 1, 2000.

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

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

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

35 **Comment.** Section 4665 serves the same purpose as Section 4054 in the Power of Attorney
36 Law, but covers all advance health care directives, including powers of attorney, written or oral
37 individual health care instructions, and surrogate designations.

38 Subdivision (a) provides the general rule that this division applies to all advance health care
39 directives, regardless of when a written advance directive was executed or an oral individual
40 instruction was made.

41 Subdivision (b) is a specific application of the general rule in subdivision (a). See Section 4750
42 *et seq.* (judicial proceedings). Subdivision (c) provides discretion to the court to resolve problems
43 arising in proceedings commenced before the operative date.

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

4 ☞ **Staff Note.** The scope of this section has been expanded to apply to all advance directives, not
5 just written ones. Once again, however, we face the issue of what surrogate designations are. See
6 the Staff Note under Section 4660.

7 Harley Spitler would make the new law prospective only. See Exhibit p. 5. He believes that
8 advance directives executed before the operative date would not meet the requirements of this
9 division. The staff does not understand how this could be, but if we can identify where or if this
10 division would invalidate a pre-existing advance directive, we could fix the problem. It is hard to
11 imagine what harm can result, however, since subdivision (d) provides a blanket savings clause.

12 Mr. Spitler has also expressed concern over elimination of the existing technical rules
13 concerning how to deal with old durable powers of attorney for health care subject to the now
14 repealed seven-year statutory limits. See Exhibit pp. 12-13.

15 PART 2 . UNIFORM HEALTH CARE DECISIONS ACT

16 CHAPTER 1. ADVANCE HEALTH CARE DIRECTIVES

17 Article 1. General Provisions

18 § 4670. Authority to give individual health care instruction

19 4670. An adult having capacity may give an individual health care instruction.
20 The individual instruction may be oral or written. The individual instruction may
21 be limited to take effect only if a specified condition arises.

22 **Comment.** Section 4670 is drawn from Section 2(a) of the Uniform Health-Care Decisions Act
23 (1993). This section supersedes part of former Health and Safety Code Section 7186.5 (Natural
24 Death Act). “Adult” includes an emancipated minor. See Fam. Code §§ 7002 (emancipation),
25 7050 (emancipated minor considered as adult for consent to medical, dental, or psychiatric care).

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

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

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

32 § 4671. Authority to execute power of attorney for health care

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

37 (b) The principal in a power of attorney for health care may grant authority to
38 make decisions relating to the personal care of the principal, including, but not
39 limited to, determining where the principal will live, providing meals, hiring
40 household employees, providing transportation, handling mail, and arranging
41 recreation and entertainment.

1 **Comment.** Subdivision (a) of Section 4671 is drawn from the first and third sentences of
2 Section 2(b) of the Uniform Health-Care Decisions Act (1993). The first sentence supersedes
3 Section 4120 (who may execute power of attorney) to the extent it applied to powers of attorney
4 for health care. “Adult” includes an emancipated minor. See Fam. Code §§ 7002 (emancipation),
5 7050 (emancipated minor considered as adult for consent to medical, dental, or psychiatric care).

6 Subdivision (b), relating to personal care authority, is parallel to Section 4123(c) (personal care
7 authority permissible in non-health care power of attorney). For powers of attorney generally, see
8 the Power of Attorney Law, Section 4000 *et seq.* Personal care powers are not automatic. Under
9 subdivision (b), the agent does not have personal care powers except to the extent that they are
10 granted by the principal.

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

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

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

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

25 **§ 4672. Nomination of conservator in written advance directive**

26 4672. (a) A written advance health care directive may include the individual’s
27 nomination of a conservator of the person or estate or both, or a guardian of the
28 person or estate or both, for consideration by the court if protective proceedings
29 for the individual’s person or estate are thereafter commenced.

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

34 **Comment.** Section 4672 continues Section 4126 without substantive change, insofar as that
35 section applied to powers of attorney for health care, and expands the scope of the rule to apply to
36 other written advance health care directives. Subdivision (a) is the same in substance as Section
37 2(g) of the Uniform Health-Care Decisions Act (1993).

38 See also Sections 4605 (“advance health care directive” defined), 4613 (“conservator” defined).

39 **§ 4673. Witnessing required in skilled nursing facility**

40 4673. (a) If an individual is a patient in a skilled nursing facility when the
41 advance health care directive is executed, the advance directive shall be
42 acknowledged before a notary public or signed by at least two witnesses as
43 provided in this section.

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

46 (1) The witnesses shall be adults.

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

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

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

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

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

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

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

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

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

32 (d) For the purposes of the declaration of witnesses, "convincing evidence"
33 means the absence of any information, evidence, or other circumstances that
34 would lead a reasonable person to believe the individual executing the advance
35 health care directive, whether by signing or acknowledging his or her signature, is
36 not the individual he or she claims to be, and any one of the following:

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

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

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

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

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

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

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

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

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

17 **Comment.** Subdivisions (a)-(c) of Section 4673 continue Sections 4121 and 4122 without
18 substantive change, to the extent they applied to powers of attorney for health care, and continues
19 former Section 4701 without substantive change, to the extent it applied to powers of attorney
20 governed by this section. This section expands the witnessing and notarization rules under former
21 law to cover all written advance directives executed in nursing homes, not just powers of
22 attorney.

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

26 See also Sections 4605 ("advance health care directive" defined), 4611 ("community care
27 facility" defined), 4621 ("health care provider" defined), 4624 ("patient" defined), 4633
28 ("residential care facility for the elderly" defined), 4635 ("skilled nursing facility" defined).

29 **§ 4674. Validity of written advance directive executed in another jurisdiction**

30 4674. (a) A written advance health care directive or similar instrument executed
31 in another state or jurisdiction in compliance with the laws of that state or
32 jurisdiction or of this state, is valid and enforceable in this state to the same extent
33 as a written advance directive validly executed in this state.

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

38 **Comment.** Subdivision (a) of Section 4674 continues former Section 4653 without substantive
39 change, and extends its principles to apply to all written advance health care directives, which
40 include both powers of attorney for health care and written individual instructions. This section is
41 consistent with Section 2(h) of the Uniform Health-Care Decisions Act (1993), as applied to
42 instruments.

43 Subdivision (b) continues former Section 4752 without substantive change, and broadens the
44 former rule for consistency with the scope of this division. This subdivision also continues and
45 generalizes former Health and Safety Code Section 7192 (Natural Death Act).

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

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

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

11 **§ 4675. Restriction on requiring or prohibiting advance directive**

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

17 **Comment.** Section 4675 continues and generalizes former Section 4725, and contains the
18 substance of Section 7(h) of the Uniform Health-Care Decisions Act (1993). The former
19 provision applied only to powers of attorney for health care. This section supersedes former
20 Health and Safety Code Sections 7191(e)-(f) and 7191.5(c) (Natural Death Act) This section is
21 intended to eliminate the possibility that duress might be used by a health care provider, insurer,
22 or other entity to cause the patient to execute or revoke an advance directive.

23 See also Sections 4605 (“advance health care directive” defined), 4615 (“health care” defined),
24 4619 (“health care institution” defined), 4621 (“health care provider” defined).

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

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

30 **§ 4676. Right to health care information**

31 4676. Unless otherwise specified in an advance health care directive, a person
32 then authorized to make health care decisions for a patient has the same rights as
33 the patient to request, receive, examine, copy, and consent to the disclosure of
34 medical or any other health care information.

35 **Comment.** Section 4676 is drawn from Section 8 of the Uniform Health-Care Decisions Act
36 (1993). This section continues former Section 4721 without substantive change, but is broader in
37 scope since it covers all persons authorized to make health care decisions a patient, not just
38 agents. A power of attorney may limit the right of the agent, for example, by precluding
39 examination of specified medical records or by providing that the examination of medical records
40 is authorized only if the principal lacks the capacity to give informed consent. The right of the
41 agent is subject to any limitations on the right of the patient to reach medical records. See Health
42 & Safety Code §§ 1795.14 (denial of right to inspect mental health records), 1795.20 (providing
43 summary of record rather than allowing access to entire record).

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

46 **Background from Uniform Act.** An agent, conservator, [guardian,] or surrogate stands in the
47 shoes of the patient when making health-care decisions. To assure fully informed

1 decisionmaking, this section provides that a person who is then authorized to make health-care
2 decisions for a patient has the same right of access to health-care information as does the patient
3 unless otherwise specified in the patient’s advance health-care directive.

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

5 Article 2. Powers of Attorney for Health Care

6 **§ 4680. Formalities for executing a power of attorney for health care**

7 4680. A power of attorney for health care is legally sufficient if all of the
8 following requirements are satisfied:

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

10 (b) The power of attorney is signed either (1) by the principal or (2) in the
11 principal’s name by another adult in the principal’s presence and at the principal’s
12 direction.

13 (c) The power of attorney satisfies applicable witnessing requirements of Section
14 4673.

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

21 A power of attorney must be in writing. See Section 4627 (“power of attorney for health care”
22 defined). This section provides the general execution formalities for a power of attorney under
23 this division. A power of attorney that complies with this section is legally sufficient as a grant of
24 authority to an agent. The dating requirement in subdivision (a) generalizes the rule applicable to
25 durable powers of attorney for health care under former Civil Code Section 2432(a)(2). This rule
26 is also consistent with the statutory forms. See Sections 4401 (statutory form power of attorney),
27 4771 (statutory form durable power of attorney for health care).

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

30 **§ 4681. Limitations expressed in power of attorney for health care**

31 4681. (a) Except as provided in subdivision (b), the principal may limit the
32 application of any provision of this division by an express statement in the power
33 of attorney for health care or by providing an inconsistent rule in the power of
34 attorney.

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

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

39 (2) Operative dates of statutory enactments or amendments.

40 (3) Execution formalities.

41 (4) Qualifications of witnesses.

42 (5) Qualifications of agents.

43 (6) Protection of third persons from liability.

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

6 See also Sections 4607 (“agent” defined), 4627 (“power of attorney for health care” defined),
7 4630 (“principal” defined).

8 **§ 4683. When agent’s authority effective**

9 4683. Unless otherwise provided in a power of attorney for health care, the
10 authority of an agent becomes effective only on a determination that the principal
11 lacks capacity, and ceases to be effective on a determination that the principal has
12 recovered capacity.

13 **Comment.** Section 4683 is drawn from Section 2(c) of the Uniform Health-Care Decisions Act
14 (1993) and continues the substance of the last part of former Section 4720(a). See Sections 4657
15 (presumption of capacity), 4658 (determination of capacity and other medical conditions) &
16 Comment. As under former law, the default rule is that the agent is not authorized to make health
17 care decisions if the principal has the capacity to make health care decisions. The power of
18 attorney may, however, give the agent authority to make health care decisions for the principal
19 even though the principal does have capacity, but the power of attorney is always subject to
20 Section 4659 (if principal objects, agent not authorized to consent to health care or to the
21 withholding or withdrawal of health care necessary to keep the principal alive).

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

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

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

35 **§ 4684. Scope of agent’s authority**

36 4684. Subject to any limitations in the power of attorney for health care:

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

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

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

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

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

3 **Comment.** Section 4684 continues former Section 4720(b) without substantive change.
4 Subdivision (a) is consistent with the last part of the first sentence of Section 2(b) of the Uniform
5 Health-Care Decisions Act (1993). Technical revisions have made to conform to the language of
6 this division. See Section 4658 (determination of capacity and other medical conditions). The
7 agent’s authority is subject to Section 4652 which precludes consent to certain specified types of
8 treatment. See also Section 4653 (impermissible acts and constructions). The principal is free to
9 provide any limitations on types of treatment in the durable power of attorney that are desired.
10 See also Section 4750 *et seq.* (judicial proceedings).

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

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

16 **§ 4685. Standard governing agent’s health care decisions**

17 4685. An agent shall make a health care decision in accordance with the
18 principal’s individual health care instructions, if any, and other wishes to the
19 extent known to the agent. Otherwise, the agent shall make the decision in
20 accordance with the agent’s determination of the principal’s best interest. In
21 determining the principal’s best interest, the agent shall consider the principal’s
22 personal values to the extent known to the agent.

23 **Comment.** Section 4685 continues the substance of former Section 4720(c) and is the same as
24 Section 2(e) of the Uniform Health-Care Decisions Act (1993). Although the new wording of this
25 fundamental rule is different, Section 4685 continues the principle of former law that, in
26 exercising authority, the agent has the duty to act consistent with the principal’s desires if known
27 or, if the principal’s desires are unknown, to act in the best interest of the principal. The agent’s
28 authority is subject to Section 4652, which precludes consent to certain specified types of
29 treatment. See also Section 4653 (mercy killing, assisted suicide, euthanasia not approved). The
30 principal is free to provide any limitations on types of treatment in the power of attorney that are
31 desired. See also Section 4750 *et seq.* (judicial proceedings). This fundamental standard is also
32 applicable to decisions made by surrogate committees. See Section 4713.

33 See also Sections 4607 (“agent” defined), 4623 (“individual health care instruction” defined),
34 4630 (“principal” defined).

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

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

43 **§ 4686. Agent’s priority**

44 4686. Unless the power of attorney for health care provides otherwise, the agent
45 designated in the power of attorney who is known to the health care provider to be
46 reasonably available and willing to make health care decisions has priority over
47 any other person in making health care decisions for the principal.

1 **Comment.** Section 4686 continues without substantive change the first part of former Section
2 4720(a) and part of former Section 4652(a) relating to availability, willingness, and ability of
3 agents. This section gives the agent priority over others, including a conservator or statutory
4 surrogate, to make health care decisions if the agent is known to the health care provider to be
5 available and willing to act. See Section 4710 (statutory surrogate’s authority dependent on
6 appointment and availability of agent). The power of attorney may vary this priority, as
7 recognized in the introductory clause, and the rule of this section is subject to a contrary court
8 order. See Section 4766. In part, this section serves the same purpose as Section 6(b) of the
9 Uniform Health-Care Decisions Act (1993).

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

13 **§ 4687. Duration**

14 4687. Unless the power of attorney for health care provides a time of
15 termination, the authority of the agent is exercisable notwithstanding any lapse of
16 time since execution of the power of attorney.

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

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

23 **§ 4688. Other authority of person named as agent not affected**

24 4688. Nothing in this division affects any right the person designated as an agent
25 under a power of attorney for health care may have, apart from the power of
26 attorney, to make or participate in making health care decisions for the principal.

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

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

37 **§ 4689. Application to acts and transactions under power of attorney**

38 4689. (a) If a power of attorney for health care provides that the law of this state
39 governs the power of attorney or otherwise indicates that the law of this state
40 governs the power of attorney, this division governs the power of attorney and
41 applies to an agent’s activities in this state or outside this state where any of the
42 following conditions is satisfied:

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

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

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

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

3 (5) There is otherwise a reasonable relationship between this state and the
4 principal's health care.

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

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

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

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

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

15 See also Sections 4607 ("agent" defined), 4627 ("power of attorney for health care" defined),
16 4630 ("principal" defined).

17 Article 3. Revocation of Advance Directives

18 § 4695. Revocation of advance health care directive

19 4695. (a) A patient having capacity may revoke the designation of an agent only
20 by a signed writing or by personally informing the supervising health care
21 provider.

22 (b) A patient having capacity may revoke all or part of an advance health care
23 directive, other than the designation of an agent, at any time and in any manner
24 that communicates an intent to revoke.

25 **Comment.** Section 4695 is drawn from Section 3(a)-(b) of the Uniform Health-Care Decisions
26 Act (1993). This section replaces former Section 4727(a) (revocation rules applicable to durable
27 power of attorney for health care) and former Health and Safety Code Section 7188(a) (revocation
28 under former Natural Death Act). This section also supersedes Sections 4150 and 4151 in the
29 Power of Attorney Law to the extent they applied to powers of attorney for health care. The
30 principal may revoke the designation or authority only if, at the time of revocation, the principal
31 has sufficient capacity to make a power of attorney for health care. The burden of proof is on the
32 person who seeks to establish that the principal did not have capacity to revoke the designation or
33 authority. See Section 4657 (presumption of capacity). "Personally informing," as used in
34 subdivision (a), includes both oral and written communications.

35 See also Sections 4605 ("advance health care directive" defined), 4624 ("patient" defined),
36 4627 ("power of attorney for health care" defined), 4637 ("supervising health care provider"
37 defined).

38 **Background from Uniform Act.** Section 3(b) provides that an individual may revoke any
39 portion of an advance health-care directive at any time and in any manner that communicates an
40 intent to revoke. However, a more restrictive standard applies to the revocation of the portion of a
41 power of attorney for health care relating to the designation of an agent. Section 3(a) provides that
42 an individual may revoke the designation of an agent only by a signed writing or by personally
43 informing the supervising health-care provider. This higher standard is justified by the risk of a
44 false revocation of an agent's designation or of a misinterpretation or miscommunication of a
45 principal's statement communicated through a third party. For example, without this higher

1 standard, an individual motivated by a desire to gain control over a patient might be able to
2 assume authority to act as agent by falsely informing a health-care provider that the principal no
3 longer wishes the previously designated agent to act but instead wishes to appoint the individual.

4 The section does not specifically address amendment of an advance health-care directive
5 because such reference is not necessary. Section 3(b) specifically authorizes partial revocation,
6 and Section 3(e) [Prob. Code § 4698] recognizes that an advance health-care directive may be
7 modified by a later directive.

8 [Adapted from Unif. Health-Care Decisions Act § 3(a)-(b), (e) comment (1993).]

9 **§ 4696. Duty to communicate revocation**

10 4696. A health care provider, agent, conservator, or surrogate who is informed of
11 a revocation shall promptly communicate the fact of the revocation to the
12 supervising health care provider and to any health care institution where the
13 patient is receiving care.

14 **Comment.** Section 4696 is the same as Section 3(c) of the Uniform Health-Care Decisions Act
15 (1993).

16 See also Sections 4607 (“agent” defined), 4613 (“conservator” defined), 4619 (“health care
17 institution” defined), 4621 (“health care provider” defined), 4624 (“patient” defined), 4637
18 (“supervising health care provider” defined), 4639 (“surrogate” defined).

19 **Background from Uniform Act.** Section 3(c) requires any health-care provider, agent,
20 guardian or surrogate who is informed of a revocation to promptly communicate that fact to the
21 supervising health-care provider and to any health-care institution at which the patient is
22 receiving care. The communication triggers the Section 7(b) [Prob. Code § 4731] obligation of
23 the supervising health-care provider to record the revocation in the patient’s health-care record
24 and reduces the risk that a health-care provider or agent, guardian or surrogate will rely on a
25 health-care directive that is no longer valid.

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

27 **§ 4697. Effect of dissolution or annulment**

28 4697. (a) If after executing a power of attorney for health care the principal’s
29 marriage to the agent is dissolved or annulled, the principal’s designation of the
30 former spouse as an agent to make health care decisions for the principal is
31 revoked.

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

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

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

42 **§ 4698. Effect of later advance directive on earlier advance directive**

43 4698. An advance health care directive that conflicts with an earlier advance
44 directive revokes the earlier advance directive to the extent of the conflict.

1 **Comment.** Section 4698 is the same as Section 3(e) of the Uniform Health-Care Decisions Act
2 (1993) and supersedes former Section 4727(d). This section is also consistent with former Health
3 and Safety Code Section 7193 (Natural Death Act).

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

5 **Background from Uniform Act.** Section 3(e) establishes a rule of construction permitting
6 multiple advance health-care directives to be construed together in order to determine the
7 individual’s intent, with the later advance health-care directive superseding the former to the
8 extent of any inconsistency.

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

1 CHAPTER 2. ADVANCE HEALTH CARE DIRECTIVE FORMS

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

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

7 **Comment.** Section 4700 is drawn from the introductory paragraph of Section 4 of the Uniform
8 Health-Care Decisions Act (1993). This section supersedes former Section 4779 (use of other
9 forms).

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

11 **§ 4701. Optional form of advance directive**

12 4701. The statutory advance health care directive form is as follows:

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

15 **Explanation**

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

22 Part 1 of this form is a power of attorney for health care. Part 1 lets you name
23 another individual as agent to make health care decisions for you if you become
24 incapable of making your own decisions or if you want someone else to make
25 those decisions for you now even though you are still capable. You may also name
26 an alternate agent to act for you if your first choice is not willing, able, or
27 reasonably available to make decisions for you. (Your agent may not be an
28 operator or employee of a community care facility or a residential care facility
29 where you are receiving care, or your supervising health care provider or
30 employee of the health care institution where you are receiving care, unless your
31 agent is related to you or a is a co-worker.)

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

- 37 (a) consent or refuse consent to any care, treatment, service, or procedure to
38 maintain, diagnose, or otherwise affect a physical or mental condition;

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

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

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

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

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

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

25 * * * * *

26 PART 1

27 POWER OF ATTORNEY FOR HEALTH CARE

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

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

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

34 _____
35 (home phone) (work phone)

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

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

7 PART 2

8 INSTRUCTIONS FOR HEALTH CARE

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

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

15 (a) Choice Not To Prolong Life

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

21 (b) Choice To Prolong Life

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

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

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

33
34 (Add additional sheets if needed.)

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

5
6 (Add additional sheets if needed.)

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

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

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

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

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

15 (1) Transplant

16 (2) Therapy

17 (3) Research

18 (4) Education

19 PART 4
20 PRIMARY PHYSICIAN
21 (OPTIONAL)

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

24 _____
25 (name of physician)

26 _____
27 (address)

(city)

(state)

(zip code)

28 _____
(phone)

PART 5

SPECIAL WITNESS REQUIREMENT

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

Statement of Patient Advocate or Ombudsman

I declare under penalty of perjury under the laws of California that I am a patient advocate or ombudsman as designated by the State Department of Aging and that I am serving as a witness as required by Section 4673 of the Probate Code.

_____	_____
(date)	(sign your name)
_____	_____
(address)	(print your name)
_____	_____
(city)	(state)

Comment. Section 4701 provides the contents of the optional statutory form for the Advance Health Care Directive. Parts 1-4 of this form are drawn from Section 4 of the Uniform Health-Care Decisions Act (1993). This form supersedes the Statutory Form Durable Power of Attorney for Health Care in former Section 4771 and the related rules in former Sections 4772-4774, 4776-4778. Part 5 of this form continues a portion of the former statutory form applicable to patients in skilled nursing facilities.

Background from Uniform Act. The optional form set forth in this section incorporates the Section 2 [Prob. Code § 4670 *et seq.*] requirements applicable to advance health-care directives. There are four parts to the form. An individual may complete all or any parts of the form. Any part of the form left blank is not to be given effect. For example, an individual may complete the instructions for health care part of the form alone. Or an individual may complete the power of attorney for health care part of the form alone. Or an individual may complete both the instructions and power of attorney for health care parts of the form. An individual may also, but need not, complete the parts of the form pertaining to donation of bodily organs and tissue and the designation of a primary physician.

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

Part 1(1) of the power of attorney for health care form requires only the designation of a single agent, but with opportunity given to designate a single first alternate and a single second alternate, if the individual chooses. No provision is made in the form for the designation of co-agents in order not to encourage the practice. Designation of co-agents is discouraged because of the difficulties likely to be encountered if the co-agents are not all readily available or do not agree. If

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

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

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

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

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

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

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

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

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

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

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

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

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

21 ☞ **Staff Note.** Dr. Kate Christensen raises some concerns about the specific instruction in Part 2
22 of the form relating to nutrition and hydration. See Exhibit p. 2. The gist of her remarks are that
23 providing particular treatment instructions in this form may interfere with proper medical
24 treatment. The problem should be answered by Section 4654, which provides that the division
25 does not authorize or require provision of health care contrary to generally accepted health care
26 standards, and Section 4735, which recognizes the physician's right to decline to provide
27 ineffective care. At this point, we would prefer not to start revising the language of the uniform
28 act form, although we would be interested in hearing further commentary on the issue raised.

29 CHAPTER 3. HEALTH CARE SURROGATES

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

31 4710. A surrogate who is designated or determined under this chapter may make
32 health care decisions for a patient if all of the following conditions are satisfied:

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

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

37 **Comment.** Section 4710 is drawn from Section 5(a) of the Uniform Health-Care Decisions Act
38 (1993). Section 4658 provides for capacity determinations by the primary physician under this
39 division. Both the patient and the surrogate must be adults. See Sections 4624 ("patient" defined),
40 4639 ("surrogate" defined). "Adult" includes an emancipated minor. See Fam. Code §§ 7002
41 (emancipation), 7050 (emancipated minor considered as adult for consent to medical, dental, or
42 psychiatric care).

43 See also Sections 4609 ("capacity" defined), 4613 ("conservator" defined), 4615 ("health care"
44 defined), 4617 ("health care decision" defined), 4624 ("patient" defined), 4627 ("power of
45 attorney for health care" defined), 4629 ("primary physician" defined), 4631 ("reasonably
46 available" defined), 4639 ("surrogate" defined).

47 **Background from Uniform Act.** Section 5(a) authorizes a surrogate to make a health-care
48 decision for a patient who is an adult or emancipated minor if the patient lacks capacity to make

1 health-care decisions and if no agent or guardian has been appointed or the agent or guardian is
2 not reasonably available. Health-care decision making for unemancipated minors is not covered
3 by this section. The subject of consent for treatment of minors is a complex one which in many
4 states is covered by a variety of statutes and is therefore left to other state law.

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

6 **§ 4711. Patient’s designation of surrogate**

7 4711. A patient may designate an individual as a surrogate to make health care
8 decisions by personally informing the supervising health care provider. An oral
9 designation of a surrogate is effective only during the course of treatment or illness
10 or during the stay in the health care institution when the designation is made.

11 **Comment.** The first sentence of Section 4711 is drawn from Section 5(b) of the Uniform
12 Health-Care Decisions Act (1993). Both the patient and the surrogate must be adults. See
13 Sections 4624 (“patient” defined), 4639 (“surrogate” defined). “Personally informing,” as used in
14 this section, includes both oral and written communications. The second sentence is intended to
15 guard against the possibility of giving effect to obsolete oral statements entered in the patient’s
16 record.

17 See also Sections 4617 (“health care decision” defined), 4619 (“health care institution”
18 defined), 4624 (“patient” defined), 4631 (“reasonably available” defined), 4637 (“supervising
19 health care provider” defined), 4639 (“surrogate” defined).

20 **Background from Uniform Act.** While a designation of an agent in a written power of
21 attorney for health care is preferred, situations may arise where an individual will not be in a
22 position to execute a power of attorney for health care. In that event, subsection (b) affirms the
23 principle of patient autonomy by allowing an individual to designate a surrogate by personally
24 informing the supervising health-care provider. The supervising health-care provider would then,
25 in accordance with Section 7(b) [Prob. Code § 4731], be obligated to promptly record the
26 designation in the individual’s health-care record. An oral designation of a surrogate made by a
27 patient directly to the supervising health-care provider revokes a previous designation of an agent.
28 See Section 3(a) [Prob. Code § 4695(a)].

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

30 **§ 4712. Selection of statutory surrogate**

31 4712. (a) Subject to Section 4710, if no surrogate has been designated under
32 Section 4711 or if the designated surrogate is not reasonably available, the primary
33 physician may select a surrogate to make health care decisions for the patient from
34 among the following adults with a relationship to the patient:

35 (1) The spouse, unless legally separated.

36 (2) Children.

37 (3) Parents.

38 (4) Brothers and sisters.

39 (5) Grandchildren.

40 (6) An individual in a long-term relationship of indefinite duration with the
41 patient in which the individual has demonstrated an actual commitment to the
42 patient similar to the commitment of a spouse and in which the individual and the
43 patient consider themselves to be responsible for each other’s well-being. This
44 individual may be known as a domestic partner.

45 (7) Close friends.

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

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

7 (2) The primary physician may select as the surrogate an individual who is
8 ranked lower in priority if, in the primary physician’s judgment, the individual is
9 best qualified to serve as the patient’s surrogate.

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

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

14 (2) The degree of regular contact with the patient before and during the patient’s
15 illness.

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

17 (4) Familiarity with the patient’s personal values.

18 (5) Availability to visit the patient.

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

21 (d) The primary physician may require a surrogate or proposed surrogate (1) to
22 provide information to assist in making the determinations under this section and
23 (2) to provide information to family members and other persons concerning the
24 selection of the surrogate and communicate with them concerning health care
25 decisions for the patient.

26 (e) The primary physician shall document in the patient’s health care record the
27 reasons for selecting a surrogate.

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

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

37 **Background from Uniform Act.** Section 5(d) requires a surrogate who assumes authority to
38 act to immediately so notify the members of the patient’s family who in given circumstances
39 would be eligible to act as surrogate. Notice to the specified family members will enable them to
40 follow health-care developments with respect to their now incapacitated relative. It will also alert
41 them to take appropriate action, including the appointment of a guardian or the commencement of
42 judicial proceedings under Section 14 [Prob. Code § 4750 *et seq.*], should the need arise.

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

44  **Staff Note**

45 (1) Uniform Health Care Decisions Act Section 5(d) requires the surrogate to “communicate his
46 or her assumption of authority as promptly as practicable to members of the patient’s family ...

1 who can readily be contacted” and Section 5(j) permits the supervising health care provider to
2 require a person who claims the right to act as surrogate to provide a declaration “under penalty
3 of perjury stating facts and circumstances reasonably sufficient to establish the claimed
4 authority.” We have not continued the detail and stricter duties in these provisions, since the draft
5 does not use the assumption of authority model and rigid priorities provided in the uniform act.

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

8 (2) The Advance Directives Committee of the State Bar Estate Planning, Trust and Probate Law
9 Section Executive Committee objects to the order of priority in subdivision (a):

10 Our members strongly urge that number 6 should be in number one or number two priority.
11 They are very opposed philosophically and realistically to putting alternate lifestyles in the
12 last position of priority.

13 An earlier draft placed “domestic partners” in the second position, but the Commission decided to
14 list relatives before companions and friends. Legal relationships, as recognized in paragraphs (1)-
15 (5) are easier to determine than the “fuzzier” standards in paragraphs (6)-(7). The ordering in
16 subdivision (a) is not intended to be judgmental, nor is it a rigid pattern of priorities that must be
17 followed as under many other state statutes or under intestate succession rules. Subdivision (b)(2)
18 and subdivision (c) make clear that there are substantive standards that can be applied to select
19 the best surrogate in the circumstances of the patient’s situation. Thus, if a domestic partner or
20 long-time companion or friend is the best surrogate under these principles, the priority list in
21 subdivision (a) does not control.

22 (3) The State Bar Committee also recommends striking language in subdivision (b) as follows:

23 The primary physician shall select the surrogate, with the assistance of other health care
24 providers or institutional committees as ~~desired~~, in the order of priority set forth in
25 subdivision (a)

26 This suggestion has been implemented in the current draft.

27 **§ 4713. Standard governing surrogate’s health care decisions**

28 4713. A surrogate shall make a health care decision in accordance with the
29 patient’s individual health care instructions, if any, and other wishes to the extent
30 known to the surrogate. Otherwise, the surrogate shall make the decision in
31 accordance with the surrogate’s determination of the patient’s best interest. In
32 determining the patient’s best interest, the surrogate shall consider the patient’s
33 personal values to the extent known to the surrogate.

34 **Comment.** Section 4713 is drawn from Section 5(f) of the Uniform Health-Care Decisions Act
35 (1993). This standard is consistent with the health care decisionmaking standard applicable to
36 agents. See Section 4685.

37 See also Sections 4617 (“health care decision” defined), 4623 (“individual health care
38 instruction” defined), 4624 (“patient” defined), 4639 (“surrogate” defined).

39 **Background from Uniform Act.** Section 5(f) imposes on surrogates the same standard for
40 health-care decision making as is prescribed for agents in Section 2(e) [Prob. Code § 4685]. The
41 surrogate must follow the patient’s individual instructions and other expressed wishes to the
42 extent known to the surrogate. To the extent such instructions or other wishes are unknown, the
43 surrogate must act in the patient’s best interest. In determining the patient’s best interest, the
44 surrogate is to consider the patient’s personal values to the extent known to the surrogate.

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

1 **§ 4714. Disqualification of surrogate**

2 4714. A patient at any time may disqualify another person, including a member
3 of the patient’s family, from acting as the patient’s surrogate by a signed writing or
4 by personally informing the supervising health care provider of the
5 disqualification.

6 **Comment.** Section 4714 is drawn from Section 5(h) of the Uniform Health-Care Decisions Act
7 (1993). See Section 4731 (duty to record surrogate’s disqualification). “Personally informing,” as
8 used in this section, includes both oral and written communications.

9 See also Sections 4624 (“patient” defined), 4637 (“supervising health care provider” defined),
10 4639 (“surrogate” defined).

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

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

15 **§ 4715. Reassessment of surrogate selection**

16 4715. (a) If a surrogate is not reasonably available, the surrogate may be
17 replaced.

18 (b) If an individual who ranks higher in priority under subdivision (a) of Section
19 4712 relative to a selected surrogate becomes reasonably available, the individual
20 with higher priority may be substituted for the identified surrogate unless the
21 primary physician determines that the lower ranked individual is best qualified to
22 serve as the surrogate.

23 **Comment.** Section 4715 is drawn from West Virginia law. See W. Va. Code § 16-30B-7
24 (1997). A surrogate is replaced in the circumstances described in this section by applying the
25 rules in Section 4712. The determination of whether a surrogate has become unavailable or
26 whether a higher priority potential surrogate has become reasonably available is made by the
27 primary physician under Section 4712 and this section. Accordingly, a person who believes it is
28 appropriate to reassess the surrogate selection would need to communicate with the primary
29 physician.

30 See also Sections 4629 (“primary physician” defined), 4631 (“reasonably available” defined),
31 4639 (“surrogate” defined).

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

34 **§ 4720. Application of chapter**

35 4720. This chapter applies to health care decisions where a health care decision
36 needs to be made for a patient and all of the following conditions are satisfied:

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

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

41 (c) No surrogate can be selected under Chapter 3 (commencing with Section
42 4710) or the surrogate is not reasonably available.

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

2 **Comment.** Section 4720 is new. The procedure in this chapter is in part drawn from and
3 supersedes former Health and Safety Code Section 1418.8 applicable to medical interventions in
4 long-term care facilities. This chapter does not apply to emergency health care. See Section
5 4651(b)(2).

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

10 **§ 4721. Referral to surrogate committee**

11 4721. A patient’s primary physician may obtain approval for a proposed health
12 care decision by referring the matter to a surrogate committee before the health
13 care decision is implemented.

14 **Comment.** Section 4721 is new. It supersedes former Health and Safety Code Section
15 1418.8(d) applicable to medical interventions in long-term care facilities. The procedure for
16 making health care decisions on behalf of incapacitated adults with no other surrogate
17 decisionmakers is optional and it does not displace any other means for making such decisions.

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

20 ☞ **Staff Note.** The Commission has decided that this procedure should be optional, in effect a
21 safe harbor, and that it is not intended to displace other appropriate practice under existing law
22 and medical practice. However, the Commission has also decided that this procedure should
23 *replace* the Epple bill (Health & Safety Code 1418.8), i.e., the existing procedure for using a
24 “team approach” to medical interventions where consent is required in long-term care facilities
25 would be repealed, as reflected in the conforming revisions and repeals *infra*. The Epple bill
26 procedure, it should be noted, is phrased in mandatory terms.

27 The staff remains concerned about the disruptive effect of replacing the Epple bill procedure
28 with the surrogate committee procedure in this chapter. The surrogate committee is broader based
29 than the interdisciplinary team of the Epple bill and so is more cumbersome. At the March
30 meeting, testimony indicated that it would be “prohibitive to convene a surrogate committee in
31 the long-term care setting,” although it could be done in the acute care setting. It is beginning to
32 appear that providing one procedure for both long-term and acute care facilities may not be
33 possible, although we could attempt to provide a “ratcheted” procedure with a series of standards
34 and types of committees or teams available in different institutions and for different classes of
35 health care decision.

36 Unless we can somehow preserve the appropriate efficiencies of the Epple bill in the new
37 procedure, and reserve the more protective standards for “major” and end-of-life decisions, the
38 staff anticipates significant opposition to replacing the Epple bill. Remember also that the Epple
39 bill is a recent enactment and was subject to a sunset clause and several amendments before
40 taking its current form. The legislation was controversial and the subject of a constitutional
41 challenge on the grounds that it deprived patients of due process and violated their right of
42 privacy. *Rains v. Belshé*, 32 Cal. App. 4th 167, 38 Cal. Rptr. 2d 185 (1995). The court cited the
43 importance of state and federal regulations that “both limit and supplement the interdisciplinary
44 team decisionmaking approach by granting certain rights and safeguards to affected residents.”
45 *Id.* at 186. The court concluded with this troubling dictum:

46 In addition, section 1418.8 by its own terms applies only to the relatively nonintrusive and
47 routine, ongoing medical intervention, which may be afforded by physicians in nursing
48 homes; it does not purport to grant blanket authority for more severe medical interventions
49 such as medically necessary, one-time procedures which would be carried out at a hospital or

1 other acute care facility, as to which compliance with Probate Code section 3200 et seq.
2 would still be required, except in emergency situations.

3 There is a risk in repealing a statute that has survived constitutional challenge and replacing it
4 with a broader statute that would probably be challenged, as are most significant statutes in
5 California. A more conservative approach would be to preserve the Epple bill but make clear that
6 either that procedure or the surrogate committee can be used where they overlap (i.e., in “medical
7 interventions” in long-term care facilities

8 **§ 4722. Composition of surrogate committee**

9 4722. (a) The surrogate committee shall include the following individuals:

10 (1) The patient’s primary physician.

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

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

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

17 (5) In cases involving critical health care decisions, a member of the community
18 who is not employed by or regularly associated with the primary physician, the
19 health care institution, or employees of the health care institution.

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

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

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

30 See also Sections 4615 (“health care” defined), 4617 (“health care decision” defined), 4619
31 (“health care institution” defined), 4624 (“patient” defined), 4629 (“primary physician” defined).

32  **Staff Note**

33 (1) We have replaced “major” with “critical” in paragraphs (5) and (6) of subdivision (a). This
34 is a slight improvement, and probably more in line with medical terminology, but doesn’t provide
35 much clarity. At this point, the staff has not been able to devise a better standard. At the March
36 meeting, there was some sentiment on the Commission to distribute the tentative recommendation
37 for comment as a way to refine the terminology. If any of our expert advisors and participants
38 have any suggestions on how to improve this language, we would like to receive them. We are
39 reluctant to attempt to specify types of treatments, such as administration of psychoactive drugs,
40 amputation, types of surgery. Note also that this section does not govern when the procedure can
41 be used or must be used, nor does it govern what decisions can be made. It only provides
42 guidelines on the composition of the surrogate committee.

43 (2) On behalf of the Bioethics Committee of the San Diego County Medical Society, Dr. Linda
44 Daniels raises two issues concerning the makeup of the surrogate committee. See Exhibit p. 15. In
45 subdivision (a)(2), the Committee is concerned that the nurse be required to have more than

1 “mere supervisory responsibility” over the patient. We could add a qualification that the nurse
2 also be knowledgeable about the patient, as suggested.

3 As to subdivision (a)(5), the Committee is concerned that the language is too restrictive, and
4 would eliminate participation by community members who regularly serve on ethics committees,
5 even though not employed by the health care institution. We should reconsider this language in
6 response to this concern.

7 **§ 4723. Standards of review by surrogate committee**

8 4723. (a) The surrogate committee’s review of proposed health care shall include
9 all of the following:

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

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

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

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

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

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

22 (b) The surrogate committee shall periodically evaluate the results of an
23 approved health care decision at least quarterly or upon a significant change in the
24 patient’s medical condition.

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

27 Subdivision (b) is continues and generalizes former Health and Safety Code Section 1418.8(g).

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

30 **§ 4724. Decisionmaking by surrogate committee**

31 4724. The surrogate committee shall attempt to reach consensus on proposed
32 health care decisions, but may approve proposed health care decisions by majority
33 vote. However, proposed health care decisions relating to refusal or withdrawal of
34 life-sustaining treatment may not be approved if any member of the surrogate
35 committee is opposed.

36 **Comment.** Section 4724 is new. The principle of decisionmaking by a majority is consistent
37 with the rule applicable to statutory surrogates under Section 5(e) of the Uniform Health-Care
38 Decisions Act (1993). With respect to medical interventions in long-term care facilities, this
39 section supersedes part of the second sentence of former Health and Safety Code Section
40 1418.8(e) relating to “a team approach to assessment and care planning.” For the standard
41 governing surrogate decisionmaking generally, see Section 4713.

42 See also Sections 4617 (“health care decision” defined), 4722 (composition of surrogate
43 committee).

1 ☞ **Staff Note.** On behalf of the Bioethics Committee of the San Diego County Medical
2 Society, Dr. Linda Daniels echoes the concern of Dr. Robert Orr in the Third Supplement to
3 Memorandum 98-16 — that the unanimity requirement results in a veto power. She indicates that
4 opinion on the Committee was split, however. Harley Spitler argues for preservation of the
5 unanimity requirement. See Exhibit pp. 13-14. The Commission has struggled with this issue
6 before and the staff believes that the existing rule is the correct resolution of a difficult problem.

7 **§ 4725. General surrogate rules applicable to surrogate committee**

8 4725. Provisions applicable to health care decisionmaking, duties, and
9 immunities of surrogates apply to a surrogate committee and its members.

10 **Comment.** Section 4725 is new. For provisions applicable to health care surrogates generally,
11 see Chapter 3 (commencing with Section 4710), Section 4741 (immunities of surrogate). See also
12 Section 4653 (mercy killing, assisted suicide, euthanasia not approved). For a list of sections
13 applicable to surrogates, see Section 4639 Comment. For the standard governing surrogate
14 decisionmaking generally, see Section 4713.

15 See also Sections 4617 (“health care decision” defined), 4639 (“surrogate” defined), 4722
16 (composition of surrogate committee).

17 CHAPTER 5. DUTIES OF HEALTH CARE PROVIDERS

18 **§ 4730. Supervising health care provider’s duty to communicate**

19 4730. Before implementing a health care decision made for a patient, a
20 supervising health care provider, if possible, shall promptly communicate to the
21 patient the decision made and the identity of the person making the decision.

22 **Comment.** Section 4730 is drawn from Section 7(a) of the Uniform Health-Care Decisions Act
23 (1993). The duty to communicate the identity of the decisionmaker also applies to a surrogate
24 committee. See Section 4725 (general surrogate rules applicable to surrogate committee).

25 See also Sections 4617 (“health care decision” defined), 4624 (“patient” defined), 4637
26 (“supervising health care provider” defined).

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

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

32 **§ 4731. Supervising health care provider’s duty to record relevant information**

33 4731. (a) A supervising health care provider who knows of the existence of an
34 advance health care directive, a revocation of an advance health care directive, or a
35 designation or disqualification of a surrogate, shall promptly record its existence in
36 the patient’s health care record and, if it is in writing, shall request a copy. If a
37 copy is furnished, the supervising health care provider shall arrange for its
38 maintenance in the patient’s health care record.

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

42 **Comment.** Subdivision (a) of Section 4731 is drawn from Section 7(b) of the Uniform Health-
43 Care Decisions Act (1993). With respect to recording notice of revocation of a power of attorney

1 for health care, this section continues the substance of part of former Section 4727(b). The
2 recordkeeping duty continues part of former Health and Safety Code Section 7186.5(c) (Natural
3 Death Act).

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

6 See also Sections 4605 (“advance health care directive” defined), 4624 (“patient” defined),
7 4627 (“power of attorney for health care” defined), 4637 (“supervising health care provider”
8 defined), 4639 (“surrogate” defined).

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

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

13 **§ 4732. Primary physician’s duty to record relevant information**

14 4732. A primary physician who makes or is informed of a determination that a
15 patient lacks or has recovered capacity, or that another condition exists affecting
16 an individual health care instruction or the authority of an agent, conservator of the
17 person, or surrogate, shall promptly record the determination in the patient’s health
18 care record and communicate the determination to the patient, if possible, and to a
19 person then authorized to make health care decisions for the patient.

20 **Comment.** Section 4732 is drawn from Section 7(c) of the Uniform Health-Care Decisions Act
21 (1993). This duty also applies to a surrogate committee. See Section 4725 (general surrogate rules
22 applicable to surrogate committee). This duty generally continues recordkeeping duties in former
23 Health and Safety Code Sections 7186.5(c) and 7189 (Natural Death Act).

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

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

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

33 **§ 4733. Duty of health care provider or institution to comply with health care instructions** 34 **and decisions**

35 4733. Except as provided in Sections 4734 and 4735, a health care provider or
36 health care institution providing care to a patient shall do the following:

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

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

43 **Comment.** Section 4733 is drawn from Section 7(d) of the Uniform Health-Care Decisions Act
44 (1993). This section generalizes a duty to comply provided in former Health and Safety Code
45 Section 7187.5 (2d sentence) (Natural Death Act).

1 See also Sections 4609 (“capacity” defined), 4617 (“health care decision” defined), 4619
2 (“health care institution” defined), 4621 (“health care provider” defined), 4623 (“individual health
3 care instruction” defined), 4624 (“patient” defined).

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

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

13 **§ 4734. Right to decline for reasons of conscience or institutional policy**

14 4734. (a) A health care provider may decline to comply with an individual health
15 care instruction or health care decision for reasons of conscience.

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

21 **Comment.** Section 4734 is drawn from Section 7(e) of the Uniform Health-Care Decisions Act
22 (1993).

23 See also Sections 4615 (“health care” defined), 4619 (“health care institution” defined), 4621
24 (“health care provider” defined), 4623 (“individual health care instruction” defined), 4624
25 (“patient” defined).

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

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

34 **§ 4735. Right to decline to provide ineffective care**

35 4735. A health care provider or health care institution may decline to comply
36 with an individual health care instruction or health care decision that requires
37 medically ineffective health care or health care contrary to generally accepted
38 health care standards applicable to the health care provider or institution.

39 **Comment.** Section 4734 is drawn from Section 7(f) of the Uniform Health-Care Decisions Act
40 (1993). This section is a special application of the general rule in Section 4654.

41 See also Sections 4615 (“health care” defined), 4619 (“health care institution” defined), 4621
42 (“health care provider” defined), 4623 (“individual health care instruction” defined), 4624
43 (“patient” defined).

44 **Background from Uniform Act.** Section 7(f) [Prob. Code § 4734(b)] further authorizes a
45 health-care provider or institution to decline to comply with an instruction or decision that
46 requires the provision of care which would be medically ineffective or contrary to generally

1 accepted health-care standards applicable to the provider or institution. “Medically ineffective
2 health care”, as used in this section, means treatment which would not offer the patient any
3 significant benefit.

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

5 **§ 4736. Duty of declining health care provider or institution**

6 4736. A health care provider or health care institution that declines to comply
7 with an individual health care instruction or health care decision shall do all of the
8 following:

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

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

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

16 **Comment.** Section 4736 is drawn from Section 7(g) of the Uniform Health-Care Decisions Act
17 (1993). Nothing in this section requires administration of ineffective care. See Sections 4654,
18 4735. This section continues the duty to transfer provided in former Health and Safety Code
19 Sections 7187.5 (2d sentence) and 7190 (Natural Death Act).

20 See also Sections 4617 (“health care decision” defined), 4619 (“health care institution”
21 defined), 4621 (“health care provider” defined), 4623 (“individual health care instruction”
22 defined), 4624 (“patient” defined).

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

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

33 **CHAPTER 6. IMMUNITIES AND LIABILITIES**

34 **§ 4740. Immunities of health care provider and institution**

35 4740. A health care provider or health care institution acting in good faith and in
36 accordance with generally accepted health care standards applicable to the health
37 care provider or institution is not subject to civil or criminal liability or to
38 discipline for unprofessional conduct for any actions in compliance with this
39 division, including any of the following conduct:

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

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

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

5 **Comment.** Section 4740 is drawn from Section 9(a) of the Uniform Health-Care Decisions Act
6 (1993) and supersedes former Sections 4727(f) and 4750 (durable power of attorney for health
7 care). This section also supersedes former Health and Safety Code Sections 1418.8(k) (medical
8 interventions in nursing homes) and 7190.5 (Natural Death Act). The major categories of actions
9 listed in subdivisions (a)-(c) are given as examples and not by way of limitation on the general
10 rule stated in the introductory paragraph. Hence, the protections of this section apply to selection
11 of a surrogate under Section 4712. This immunity also applies where health care decisions are
12 approved by a surrogate committee. See Section 4725 (general surrogate rules applicable to
13 surrogate committee).

14 The good faith standard of former law is continued in this section. Like former law, this section
15 protects the health care provider who acts in good faith reliance on a health care decision made by
16 an agent pursuant to this division. The reference to acting in accordance with generally accepted
17 health care standards makes clear that a health care provider is not protected from liability for
18 malpractice. The specific qualifications built into the rules provided in former Section 4750(a) are
19 superseded by the good faith rule in this section and by the affirmative requirements of other
20 provisions. See, e. g., Sections 4684(a) (scope of agent's authority) (compare to second part of
21 introductory language of former Section 4750(a)), 4685 (standard governing agent's health care
22 decisions) (compare to former Section 4750(a)(1)-(2)). Subdivision (b) is comparable to former
23 Section 4750(c). See also Section 4733 (obligations of health care provider or institution), 4734
24 (health care provider's or institution's right to decline), 4736 (obligations of declining health care
25 provider or institution).

26 See also Sections 4605 ("advance health care directive" defined), 4617 ("health care decision"
27 defined), 4619 ("health care institution" defined), 4621 ("health care provider" defined), 4624
28 ("patient" defined).

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

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

38 § 4741. Immunities of agent and surrogate

39 4741. A person acting as agent or surrogate under this part is not subject to civil
40 or criminal liability or to discipline for unprofessional conduct for health care
41 decisions made in good faith.

42 **Comment.** Section 4741 is drawn from Section 9(b) of the Uniform Health-Care Decisions Act
43 (1993). This immunity also applies where health care decisions are approved by a surrogate
44 committee. See Section 4725 (general surrogate rules applicable to surrogate committee).

45 See also Sections 4607 ("agent" defined), 4617 ("health care decision" defined), 4639
46 ("surrogate" defined).

47 **Background from Uniform Act.** Section 9(b) protects agents and surrogates acting in good
48 faith from liability for making a health-care decision for a patient. Also protected from liability
49 are individuals who mistakenly but in good faith believe they have the authority to make a health-

1 care decision for a patient. For example, an individual who has been designated as agent in a
2 power of attorney for health care might assume authority unaware that the power has been
3 revoked. Or a family member might assume authority to act as surrogate unaware that a family
4 member having a higher priority was reasonably available and authorized to act.

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

6 **§ 4742. Statutory damages**

7 4742. (a) A health care provider or health care institution that intentionally
8 violates this part is subject to liability to the aggrieved individual for damages of
9 \$[500] or actual damages resulting from the violation, whichever is greater, plus
10 reasonable attorney's fees.

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

18 (c) The damages provided in this section are cumulative and not exclusive of any
19 other remedies provided by law.

20 **Comment.** Subdivisions (a) and (b) of Section 4742 are drawn from Section 10 of the Uniform
21 Health-Care Decisions Act (1993) and supersede former Health and Safety Code Section 7191(a)-
22 (b) (Natural Death Act).

23 Subdivision (c) continues the rule of former Health and Safety Code Section 7191(g) (Natural
24 Death Act) and is consistent with the uniform act. See Unif. Health-Care Decisions Act § 10
25 comment (1993).

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

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

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

37  **Staff Note.** At the November 1997 meeting, the Commission requested further research into
38 the need for a statutory damages rule. The Commission thought liability for minimum statutory
39 damages and attorney's fees under this section should be eliminated if there are adequate
40 remedies elsewhere under California law. It was suggested that the statutory minimum damages
41 would provide a more useful remedy where actual damages are difficult or expensive to prove,
42 but that to be effective deterrents, the amounts would have to be substantially increased from the
43 \$500 and \$2500 levels drawn from the Uniform Health Care Decisions Act.

44 If this section were entirely deleted from the draft, a cause of action for violating the statutory
45 duties, as distinct from tort remedies and professional discipline, would have to be based on
46 negligence per se. Violation of a statutory duty establishes negligence per se, and if the statutory
47 violation proximately caused injury and no excuse or justification is shown, responsibility may be
48 fixed on the violator without other proof of failure to exercise due care. 6 B. Witkin, Summary of

1 California Law *Torts*, § 818, at 170 (9th ed. 1988); see also Evid. Code § 669 (codifying doctrine
2 of negligence per se); *Derrick v. Ontario Community Hosp.*, 47 Cal. App. 3d 145, 151, 120 Cal.
3 Rptr. 566 (1975) (requiring report of infectious disease to local health officer).

4 Compensatory damages in tort are to restore plaintiff as nearly as possible to his or her former
5 position, or to give some pecuniary equivalent. 6 B. Witkin, *supra*, § 1319, at 776. Punitive
6 damages may be awarded where the defendant's conduct has been "outrageous." *Id.* § 1327, at
7 785; see Civ. Code § 3294. Not every intentional tort will result in punitive damages.

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

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

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

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

36 First, where a health care provider provides treatment in knowing violation or reckless
37 disregard of an advance directive, the patient-or the patient's estate-should not be liable for
38 payment of that treatment. This recognized legal principle should be expressly incorporated
39 into advance directive statutes with exemptions for the cost of comfort care, appropriate pain
40 medication, and any treatment provided for reasons of conscience in accordance with section
41 7(e) of the UHCDA. This could minimize the financial incentive to provide excess treatment
42 under a fee-for-service payment method.

43 Second, where a health care provider fails to provide treatment in knowing violation or
44 reckless disregard of an advance directive, the patient-or the patient's estate-should be able to
45 recover more than nominal damages. Many state advance directive statutes, including the
46 UHCDA, give individuals the option of directing that artificial nutrition and hydration not be
47 discontinued. The advance directive in the UHCDA also extends to individuals the "Choice to
48 Prolong Life" in addition to the "Choice Not to Prolong Life." Ignoring these requests should
49 not go uncompensated simply because it is difficult to measure the actual damages from
50 speeding up of the passing of a dying patient. Further, minimum statutory damages may be
51 insufficient to discourage violations. Concern about under-treatment has been raised in the
52 context of managed care organizations and Medicare DRG-prospective payment methods,
53 which create financial incentives to minimize treatment. Just as the financial incentive for

1 over-treating fee-for- service patients can be reduced by eliminating the duty to pay for the
2 excess treatment, the financial incentive for under-treating managed-care patients can be
3 reduced by awarding damages in an amount at least equal to the cost of the unprovided
4 services. Advance directive statutes should expressly recognize this principle as an alternative
5 minimum measure of damages.

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

9 The Advance Directives Committee of the State Bar Estate Planning, Trust and Probate Law
10 Section Executive Committee agrees that the amounts should be raised as suggested.

11 **§ 4743. Criminal penalties**

12 4743. Any person who alters or forges a written advance health care directive of
13 another, or willfully conceals or withholds personal knowledge of a revocation of
14 an advance directive, with the intent to cause a withholding or withdrawal of
15 health care necessary to keep the patient alive contrary to the desires of the patient,
16 and thereby directly causes health care necessary to keep the patient alive to be
17 withheld or withdrawn and the death of the patient thereby to be hastened, is
18 subject to prosecution for unlawful homicide as provided in Chapter 1
19 (commencing with Section 187) of Title 4 of Part 1 of the Penal Code.

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

24 See also Sections 4605 (“advance health care directive” defined), 4615 (“health care” defined),
25 4624 (“patient” defined).

1 **§ 4753. Limitations on right to petition**

2 4753. (a) Subject to subdivision (b), an advance health care directive may
3 expressly eliminate the authority of a person listed in Section 4765 to petition the
4 court for any one or more of the purposes enumerated in Section 4766, if both of
5 the following requirements are satisfied:

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

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

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

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

19 (1) The conservator of the person, with respect to a petition relating to an
20 advance directive, for a purpose specified in subdivision (b) or (d) of Section
21 4766.

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

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

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

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

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

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

1 **§ 4754. Jury trial**

2 4754. There is no right to a jury trial in proceedings under this division.

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

7 **§ 4755. Application of general procedural rules**

8 4755. Except as otherwise provided in this division, the general provisions in
9 Division 3 (commencing with Section 1000) apply to proceedings under this
10 division.

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

16 **CHAPTER 2. JURISDICTION AND VENUE**

17 **§ 4760. Jurisdiction and authority of court or judge**

18 4760. (a) The superior court has jurisdiction in proceedings under this division.

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

24 **Comment.** Section 4760 continues former Section 4920 to the extent it applied to powers of
25 attorney for health care. Like Section 4520, this section is comparable to Section 7050 governing
26 the jurisdiction and authority of the court in proceedings concerning administration of decedents'
27 estates. See Section 7050 Comment.

28 **§ 4761. Basis of jurisdiction**

29 4761. The court may exercise jurisdiction in proceedings under this division on
30 any basis permitted by Section 410.10 of the Code of Civil Procedure.

31 **Comment.** Section 4761 continues former Section 4921 to the extent it applied to powers of
32 attorney for health care. Like Section 4521, this section is comparable to Section 17004
33 (jurisdiction under Trust Law). This section recognizes that the court, in proceedings relating to
34 powers of attorney under this division, may exercise jurisdiction on any basis that is not
35 inconsistent with the California or United States Constitutions, as provided in Code of Civil
36 Procedure Section 410.10. See generally Judicial Council Comment to Code Civ. Proc. § 410.10;
37 Prob. Code § 17004 Comment (basis of jurisdiction under Trust Law).

38 **§ 4762. Jurisdiction over agent or surrogate**

39 4762. Without limiting Section 4761, a person who acts as an agent under a
40 power of attorney for health care or as a surrogate under this division is subject to
41 personal jurisdiction in this state with respect to matters relating to acts and

1 transactions of the agent or surrogate performed in this state or affecting a patient
2 in this state.

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

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

14 § 4763. Venue

15 4763. The proper county for commencement of a proceeding under this division
16 shall be determined in the following order of priority:

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

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

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

23 CHAPTER 3. PETITIONS, ORDERS, APPEALS

24 § 4765. Petitioners

25 4765. Subject to Section 4753, a petition may be filed under this part by any of
26 the following persons:

- 27 (a) The patient.
- 28 (b) The patient’s spouse, unless legally separated.
- 29 (c) A relative of the patient.
- 30 (d) The agent or surrogate.
- 31 (e) The conservator of the person of the patient.
- 32 (f) The court investigator, described in Section 1454, of the county where the
33 patient resides.
- 34 (g) The public guardian of the county where the patient resides.
- 35 (h) The supervising health care provider or health care institution involved with
36 the patient’s care.
- 37 (i) Any other interested person or friend of the patient.

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

1 See also Sections 4607 (“agent” defined), 4613 (“conservator” defined), 4619 (“health care
2 institution” defined), 4624 (“patient” defined), 4637 (“supervising health care provider” defined),
3 4639 (“surrogate” defined).

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

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

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

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

21 **§ 4766. Purposes of petition**

22 4766. A petition may be filed under this part for any one or more of the
23 following purposes:

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

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

27 (c) Determining whether the acts or proposed acts of an agent or surrogate are
28 consistent with the patient’s desires as expressed in an advance health care
29 directive or otherwise made known to the court or, where the patient’s desires are
30 unknown or unclear, whether the acts or proposed acts of the agent or surrogate
31 are in the patient’s best interest.

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

36 (1) The agent or surrogate has violated, has failed to perform, or is unfit to
37 perform, the duty under an advance health care directive to act consistent with the
38 patient’s desires or, where the patient’s desires are unknown or unclear, is acting
39 (by action or inaction) in a manner that is clearly contrary to the patient’s best
40 interest.

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

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

1 A determination of capacity under subdivision (b) is subject to the Due Process in Competency
2 Determinations Act. See Sections 810-813.

3 Under subdivision (c), the patient’s desires as expressed in the power of attorney for health
4 care, individual health care instructions, or otherwise made known to the court provide the
5 standard for judging the acts of the agent or surrogate. See Section 4713 (standard governing
6 surrogate’s health care decisions). Where it is not possible to use a standard based on the patient’s
7 desires because they are not stated in an advance directive or otherwise known or are unclear,
8 subdivision (c) provides that the “patient’s best interest” standard be used.

9 Subdivision (d) permits the court to terminate health care decisionmaking authority where an
10 agent or surrogate is not complying with the duty to carry out the patient’s desires or act in the
11 patient’s best interest. See Section 4713 (standard governing surrogate’s health care decisions).
12 Subdivision (d) permits termination of authority under an advance health care directive not only
13 where an agent, for example, is acting illegally or failing to perform the duties under a power of
14 attorney or is acting contrary to the known desires of the principal, but also where the desires of
15 the principal are unknown or unclear and the agent is acting in a manner that is clearly contrary to
16 the patient’s best interest. The patient’s desires may become unclear as a result of developments
17 in medical treatment techniques that have occurred since the patient’s desires were expressed,
18 such developments having changed the nature or consequences of the treatment.

19 An advance health care directive may limit the authority to petition under this part. See
20 Sections 4752 (effect of provision in advance directive attempting to limit right to petition), 4753
21 (limitations on right to petition).

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

25 **§ 4767. Commencement of proceeding**

26 4767. A proceeding under this part is commenced by filing a petition stating
27 facts showing that the petition is authorized under this part, the grounds of the
28 petition, and, if known to the petitioner, the terms of any advance health care
29 directive in question.

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

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

33 **§ 4768. Dismissal of petition**

34 4768. The court may dismiss a petition if it appears that the proceeding is not
35 reasonably necessary for the protection of the interests of the patient and shall stay
36 or dismiss the proceeding in whole or in part when required by Section 410.30 of
37 the Code of Civil Procedure.

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

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

43 **§ 4769. Notice of hearing**

44 4769. (a) Subject to subdivision (b), at least 15 days before the time set for
45 hearing, the petitioner shall serve notice of the time and place of the hearing,
46 together with a copy of the petition, on the following:

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

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

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

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

11 See also Sections 4607 (“agent” defined), 4624 (“patient” defined), 4630 (“principal” defined),
12 4639 (“surrogate” defined).

13 **§ 4770. Temporary health care order**

14 4770. The court in its discretion, on a showing of good cause, may issue a
15 temporary order prescribing the health care of the patient until the disposition of
16 the petition filed under Section 4766. If a power of attorney for health care is in
17 effect and a conservator (including a temporary conservator) of the person is
18 appointed for the principal, the court that appoints the conservator in its discretion,
19 on a showing of good cause, may issue a temporary order prescribing the health
20 care of the principal, the order to continue in effect for the period ordered by the
21 court but in no case longer than the period necessary to permit the filing and
22 determination of a petition filed under Section 4766.

23 **Comment.** Section 4770 continues former Section 4946 to the extent it applied to powers of
24 attorney for health care. This section is intended to make clear that the court has authority to
25 provide, for example, for the continuance of treatment necessary to keep the patient alive pending
26 the court’s action on the petition. See also Section 1046 (court authority to make appropriate
27 orders).

28 See also Sections 4605 (“advance health care directive” defined), 4613 (“conservator” defined),
29 4615 (“health care” defined), 4624 (“patient” defined), 4630 (“principal” defined).

30 **§ 4771. Award of attorney’s fees**

31 4771. In a proceeding under this part commenced by the filing of a petition by a
32 person other than the agent or surrogate, the court may in its discretion award
33 reasonable attorney’s fees to one of the following:

34 (a) The agent or surrogate, if the court determines that the proceeding was
35 commenced without any reasonable cause.

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

39 **Comment.** Section 4771 continues part of former Section 4947 to the extent it applied to
40 powers of attorney for health care.

41 See also Sections 4605 (“advance health care directive” defined), 4607 (“agent” defined), 4630
42 (“principal” defined), 4639 (“surrogate” defined).

1 **§ 4772. Appeal**

2 4772. An appeal may be taken from any of the following:

3 (a) Any final order made pursuant to Section 4766.

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

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

8 **PART 4 . REQUEST TO FOREGO**
9 **RESUSCITATIVE MEASURES**

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

14 Harley Spitler finds these provisions to be a “mish-mash of ambiguity.” (Letter of Oct. 10,
15 1997, p. 7.)

16 **§ 4780. Request to forego resuscitative measures**

17 4780. (a) As used in this part:

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

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

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

30 **Comment.** Section 4780 continues former Section 4753(b) without substantive change. The
31 phrase “for the individual” has been added at the end of subdivision (a) for clarity. The former
32 reference to “physician and surgeon” has been changed to “physician” for clarity. See Section
33 4623 (“physician” defined). For rules governing “legally recognized surrogate health care
34 decisionmakers,” see Part 2 (commencing with Section 4670) (Uniform Health Care Decisions
35 Act).

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

37 **§ 4781. Health care provider**

38 4781. As used in this part, “health care provider” includes, but is not limited to,
39 the following:

40 (a) Persons described in Section 4621.

1 (b) Emergency response employees, including, but not limited to, firefighters,
2 law enforcement officers, emergency medical technicians I and II, paramedics, and
3 employees and volunteer members of legally organized and recognized volunteer
4 organizations, who are trained in accordance with standards adopted as regulations
5 by the Emergency Medical Services Authority pursuant to Sections 1797.170,
6 1797.171, 1797.172, 1797.182, and 1797.183 of the Health and Safety Code to
7 respond to medical emergencies in the course of performing their volunteer or
8 employee duties with the organization.

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

10 **§ 4782. Immunity for honoring request to forego resuscitative measures**

11 4782. A health care provider who honors a request to forego resuscitative
12 measures is not subject to criminal prosecution, civil liability, discipline for
13 unprofessional conduct, administrative sanction, or any other sanction, as a result
14 of his or her reliance on the request, if the health care provider (1) believes in good
15 faith that the action or decision is consistent with this part, and (2) has no
16 knowledge that the action or decision would be inconsistent with a health care
17 decision that the individual signing the request would have made on his or her own
18 behalf under like circumstances.

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

20 See also Sections 4617 (“health care decision” defined), 4781 (“health care provider” defined),
21 4780 (“request to forego resuscitative measures” defined).

22 **§ 4783. Forms for requests to forego resuscitative measures**

23 4783. (a) Forms for requests to forego resuscitative measures printed after
24 January 1, 1995, shall contain the following:

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

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

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

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

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

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

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

1 **§ 4784. Presumption of validity**

2 4784. In the absence of knowledge to the contrary, a health care provider may
3 presume that a request to forego resuscitative measures is valid and unrevoked.

4 **Comment.** Section 4784 continues former Section 4753(e) without change.
5 See also Sections 4780 (“request to forego resuscitative measures” defined), 4781 (“health care
6 provider” defined).

7 **§ 4785. Application of part**

8 4785. This part applies regardless of whether the individual executing a request
9 to forego resuscitative measures is within or outside a hospital or other health care
10 institution.

11 **Comment.** Section 4785 continues former Section 4753(f) without substantive change.
12 See also Section 4619 (“health care institution” defined), 4780 (“request to forego resuscitative
13 measures” defined).

14 **§ 4786. Relation to other law**

15 4786. This part does not repeal or narrow laws relating to health care
16 decisionmaking.

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

20 **PART 5. ADVANCE HEALTH CARE DIRECTIVE REGISTRY**

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

25 **§ 4800. Registry system established by Secretary of State**

26 4800. (a) The Secretary of State shall establish a registry system through which a
27 person who has executed a written advance health care directive may register in a
28 central information center information regarding the advance directive, making
29 that information available upon request to any health care provider, the public
30 guardian, or other person authorized by the registrant.

31 (b) Information that may be received and released is limited to the registrant’s
32 name, social security or driver’s license or other individual identifying number
33 established by law, if any, address, date and place of birth, the intended place of
34 deposit or safekeeping of the written advance health care directive, and the name
35 and telephone number of the agent and any alternative agent.

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

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

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

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

10 **§ 4801. Identity and fees**

11 4801. The Secretary of State shall establish procedures to verify the identities of
12 health care providers, the public guardian, and other authorized persons requesting
13 information pursuant to Section 4800. No fee shall be charged to any health care
14 provider, the public guardian, or other authorized person requesting information
15 pursuant to Section 4800.

16 **Comment.** Section 4801 continues former Section 4801 without change.
17 See also Section 4621 (“health care provider” defined).

18 **§ 4802. Notice**

19 4802. The Secretary of State shall establish procedures to advise each registrant
20 of the following:

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

23 (b) Each registrant must notify the registry upon revocation of the advance
24 directive.

25 (c) Each registrant must reregister upon execution of a subsequent advance
26 directive.

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

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

33 **§ 4803. Effect of failure to register**

34 4803. Failure to register with the Secretary of State does not affect the validity of
35 any advance health care directive.

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

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

1 **§ 4804. Effect of registration on revocation and validity**

2 4804. Registration with the Secretary of State does not affect the ability of the
3 registrant to revoke the registrant’s advance health care directive or a later
4 executed advance directive, nor does registration raise any presumption of validity
5 or superiority among any competing advance directives or revocations.

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

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

11 **§ 4805. Effect on health care provider**

12 4805. Nothing in this chapter shall be construed to require a health care provider
13 to request from the registry information about whether a patient has executed an
14 advance health care directive. Nothing in this chapter shall be construed to affect
15 the duty of a health care provider to provide information to a patient regarding
16 advance health care directives pursuant to any provision of federal law.

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

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

23

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)(2). 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)(2) (emergency care). [... is continued
20 and 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 4676 (right to health care information)
29 and 4732 (duty of primary physician to record relevant 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 Harley Spitler favors including these findings in the new law. See Exhibit pp. 9-10.

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

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

17 **§ 7185 (repealed). Short title**

18 7185. This act shall be known and may be cited as the Natural Death Act.

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

23 **§ 7185.5 (repealed). Legislative findings and declarations**

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

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

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

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

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

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

4 **Comment.** The substance of subdivisions (a)-(e) of former Section 7185 is continued in
5 Probate Code Section 4650 (legislative findings), except that the references to “terminal condition
6 or permanent unconscious decision” have been omitted to reflect relevant case law and the scope
7 of the Uniform Health Care Decisions Act (Prob. Code § 4670 *et seq.*). See also Section 4750
8 (judicial intervention disfavored). Subdivision (f) is omitted as surplus. See former Section 7185
9 Comment.

10 § 7186 (repealed). Definitions

11 7186. As used in this chapter, unless the context otherwise requires:

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

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

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

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

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

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

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

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

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

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

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

45 Subdivision (f) is unnecessary in view of Probate Code Section 56 (“person” defined).
46 Subdivision (g) is continued in Probate Code Section 4625 without change. Subdivision (h) is
47 superseded by Probate Code Sections 4670 (who may give individual instruction). Subdivision (i)
48 is unnecessary in view of Probate Code Section 74 (“state” defined). Subdivision (j) is not
49 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(b)(1) (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 (revocation of advance directive).

5 The duty to record the revocation provided in subdivision (b) is continued in Probate Code
6 Section 4731(a) without 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 replaced by Probate Code Section
23 4651(b)(1). 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 Prob. Code § 4736(b)
27 (continuing care until transfer can be accomplished).

28 Subdivision (c) is not continued. But *cf.* Prob. Code § 4652(e) (Health Care Decisions Law
29 does not authorize consent to abortion).

30 **§ 7190 (repealed). Duties of health care provider unwilling to comply with chapter**

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

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

36 **§ 7190.5 (repealed). Liability and professional discipline**

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

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

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

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

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

6 (b) A physician who willfully fails to record a determination of terminal condition or
7 permanent unconscious condition or the terms of a declaration in accordance with Section
8 7189 is guilty of a misdemeanor.

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

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

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

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

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

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

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

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

29 The rule in subdivision (g) is continued in Probate Code Section 4742(c).

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.

1 (d) This chapter creates no presumption concerning the intention of an individual who
2 has revoked or has not executed a declaration with respect to the use, withholding, or
3 withdrawal of life-sustaining treatment in the event of a terminal condition or permanent
4 unconscious condition.

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

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

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

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

16 **Comment.** Subdivision (a) of former Section 7191.5 is generalized in Probate Code Section
17 4656. Subdivision (b) is replaced by Probate Code Section 4656.

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

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

20 Subdivision (e) is superseded by Probate Code Section 4651(b)(1) (authority not affected). See
21 also Prob. Code § 4657 (presumption of capacity)

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

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

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

26 **§ 7192 (repealed). Presumption of validity of declaration**

27 7192. In the absence of knowledge to the contrary, a physician or other health care
28 provider may presume that a declaration complies with this chapter and is valid.

29 **Comment.** Former Section 7192 is continued and generalized in Probate Code Section
30 4674(b).

31 **§ 7192.5 (repealed). Validity of declarations executed in another state**

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

35 **Comment.** Former Section 7192.5 is continued in Probate Code Section 4674 without
36 substantive change.

37 **§ 7193 (repealed). Effect of Durable Power of Attorney for Health Care**

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

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

1 **§ 7193.5 (repealed). Instruments to be given effect**

2 7193.5. The following instruments shall be given effect pursuant to the provisions of
3 this chapter:

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

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

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

12 **§ 7194 (repealed). Severability clause**

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

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

18 **§ 7194.5 (repealed). Conformity with Uniform Rights of the Terminally Ill Act**

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

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

25 **PROBATE CODE**

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

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

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

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

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

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

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

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

42 4050. (a) This division applies to the following:

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

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

4 (3) Durable powers of attorney for health care under Part 4 (commencing with Section
5 4600).

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

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

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

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

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

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

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

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

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

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

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

45 See also Sections 4014 (“attorney-in-fact” defined), 4018 (“durable power of attorney”
46 defined), 4022 (“power of attorney” defined), 4606 (“durable power of attorney for health care”
47 defined).

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

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

1 4100. This part applies to all powers of attorney under this division, subject to any
2 special rules applicable to statutory form powers of attorney under Part 3 (commencing
3 with Section 4400) ~~or durable powers of attorney for health care under Part 4~~
4 ~~(commencing with Section 4600).~~

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

8 **Prob. Code § 4121 (amended). Requirements for witnesses**

9 4121. A power of attorney is legally sufficient if all of the following requirements are
10 satisfied:

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

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

15 (c) The power of attorney is either (1) acknowledged before a notary public or (2)
16 signed by at least two witnesses who satisfy the requirements of Section 4122.

17 **Comment.** Subdivision (b) of Section 4121 is amended to make clear that the person signing at
18 the principal's direction must be an adult. This is consistent with the language of Section 4680
19 (formalities for executing power of attorney for health care).

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

21 SEC. _____. Section 4122 of the Probate Code is amended to read:

22 4122. If the power of attorney is signed by witnesses, as provided in Section 4121, the
23 following requirements shall be satisfied:

24 (a) The witnesses shall be adults.

25 (b) The attorney-in-fact may not act as a witness.

26 (c) Each witness signing the power of attorney shall witness either the signing of the
27 instrument by the principal or the principal's acknowledgment of the signature or the
28 power of attorney.

29 ~~(d) In the case of a durable power of attorney for health care, the additional~~
30 ~~requirements of Section 4701.~~

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

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

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

38 SEC. _____. Section 4123 of the Probate Code is amended to read:

39 4123. (a) In a power of attorney, a principal may grant authority to an attorney-in-fact
40 to act on the principal's behalf with respect to all lawful subjects and purposes or with
41 respect to one or more express subjects or purposes. The attorney-in-fact may be granted
42 authority with regard to the principal's property, personal care, health care, or any other
43 matter.

44 (b) With regard to property matters, a power of attorney may grant authority to make
45 decisions concerning all or part of the principal's real and personal property, whether

1 owned by the principal at the time of the execution of the power of attorney or thereafter
2 acquired or whether located in this state or elsewhere, without the need for a description
3 of each item or parcel of property.

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

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

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

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

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

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

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

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

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

31 4128. (a) Subject to subdivision (b), a printed form of a durable power of attorney that
32 is sold or otherwise distributed in this state for use by a person who does not have the
33 advice of legal counsel shall contain, in not less than 10-point boldface type or a
34 reasonable equivalent thereof, the following warning statement:

35 NOTICE TO PERSON EXECUTING DURABLE
36 POWER OF ATTORNEY

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

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

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

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

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

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

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

15 You should read this durable power of attorney carefully. When effective, this durable
16 power of attorney will give your agent the right to deal with property that you now have
17 or might acquire in the future. The durable power of attorney is important to you. If you
18 do not understand the durable power of attorney, or any provision of it, then you should
19 obtain the assistance of an attorney or other qualified person.

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

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

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

24 ~~(2) A durable power of attorney for health care under Part 4 (commencing with Section~~
25 ~~4600).~~

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

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

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

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

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

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

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

48 4203. (a) A principal may designate one or more successor attorneys-in-fact to act if the
49 authority of a predecessor attorney-in-fact terminates.

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

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

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

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

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

12 4206. (a) If, following execution of a durable power of attorney, a court of the
13 principal's domicile appoints a conservator of the estate, guardian of the estate, or other
14 fiduciary charged with the management of all of the principal's property or all of the
15 principal's property except specified exclusions, the attorney-in-fact is accountable to the
16 fiduciary as well as to the principal. Except as provided in subdivision (b), the fiduciary
17 has the same power to revoke or amend the durable power of attorney that the principal
18 would have had if not incapacitated, subject to any required court approval.

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

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

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

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

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

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

31 4260. This article does not apply to the following:

32 ~~(a) Statutory statutory form powers of attorney under Part 3 (commencing with Section~~
33 ~~4400).~~

34 ~~(b) Durable powers of attorney for health care under Part 4 (commencing with Section~~
35 ~~4600).~~

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

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

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

41 4265. A power of attorney may not authorize an attorney-in-fact to ~~perform any of the~~
42 ~~following acts:~~

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

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

1 **Comment.** Section 4265 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 Section 4050 (scope of division).

4 Section 4265 is consistent with the general agency rule in Civil Code Section 2304. See also
5 Sections 4014 (“attorney-in-fact” defined), 4022 (“power of attorney” defined), 4026 (“principal”
6 defined).

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

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

10 PART 4. JUDICIAL PROCEEDINGS CONCERNING
11 POWERS OF ATTORNEY

12 CHAPTER 1. GENERAL PROVISIONS

13 **§ 4500. Power of attorney freely exercisable**

14 4500. A power of attorney is exercisable free of judicial intervention, subject to this
15 part.

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

18 **§ 4501. Cumulative remedies**

19 4501. The remedies provided in this part are cumulative and not exclusive of any other
20 remedies provided by law.

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

22 **§ 4502. Effect of provision in power of attorney attempting to limit right to petition**

23 4502. Except as provided in Section 4503, this part is not subject to limitation in the
24 power of attorney.

25 **Comment.** Section 4502 continues former Section 4502 without change. See also Sections
26 4022 (“power of attorney” defined), 4101(b) (general rule on limitations provided in power of
27 attorney).

28 **§ 4503. Limitations on right to petition**

29 4503. (a) Subject to subdivision (b), a power of attorney may expressly eliminate the
30 authority of a person listed in Section 4540 to petition the court for any one or more of
31 the purposes enumerated in Section 4541 if both of the following requirements are
32 satisfied:

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

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

37 “I am a lawyer authorized to practice law in the state where this power of attorney was
38 executed, and the principal was my client at the time this power of attorney was executed.
39 I have advised my client concerning his or her rights in connection with this power of

1 attorney and the applicable law and the consequences of signing or not signing this power
2 of attorney, and my client, after being so advised, has executed this power of attorney.”

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

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

7 (2) The conservator of the person of the principal, with respect to a petition relating to a
8 durable power of attorney for health care for a purpose specified in subdivision (a), (c), or
9 (d) of Section 4541.

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

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

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

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

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

26 § 4504. Jury trial

27 4504. There is no right to a jury trial in proceedings under this division.

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

31 § 4505. Application of general procedural rules

32 4505. Except as otherwise provided in this division, the general provisions in Division
33 3 (commencing with Section 1000) apply to proceedings under this division.

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

39 CHAPTER 2. JURISDICTION AND VENUE

40 § 4520. Jurisdiction and authority of court or judge

41 4520. (a) The superior court has jurisdiction in proceedings under this division.

42 (b) The court in proceedings under this division is a court of general jurisdiction and
43 the court, or a judge of the court, has the same power and authority with respect to the
44 proceedings as otherwise provided by law for a superior court, or a judge of the superior

1 court, including, but not limited to, the matters authorized by Section 128 of the Code of
2 Civil Procedure.

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

6 **§ 4521. Basis of jurisdiction**

7 4521. The court may exercise jurisdiction in proceedings under this division on any
8 basis permitted by Section 410.10 of the Code of Civil Procedure.

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

15 **§ 4522. Jurisdiction over attorney-in-fact**

16 4522. Without limiting Section 4521, a person who acts as an attorney-in-fact under a
17 power of attorney governed by this division is subject to personal jurisdiction in this state
18 with respect to matters relating to acts and transactions of the attorney-in-fact performed
19 in this state or affecting property or a principal in this state.

20 **Comment.** Section 4522 continues former Section 4922 without change, and is comparable to
21 Sections 3902(b) (jurisdiction over custodian under Uniform Transfers to Minors Act) and
22 17003(a) (jurisdiction over trustee). This section is intended to facilitate exercise of the court's
23 power under this part when the court's jurisdiction is properly invoked. As recognized by the
24 introductory clause, constitutional limitations on assertion of jurisdiction apply to the exercise of
25 jurisdiction under this section. Consequently, appropriate notice must be given to an attorney-in-
26 fact as a condition of personal jurisdiction. *Cf.* *Mullane v. Central Hanover Bank & Trust Co.*,
27 339 U.S. 306 (1950).

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

30 **§ 4523. Venue**

31 4523. The proper county for commencement of a proceeding under this division shall
32 be determined in the following order of priority:

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

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

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

41 **§ 4540. Petitioners**

42 4540. Subject to Section 4503, a petition may be filed under this part by any of the
43 following persons:

- 1 (a) The attorney-in-fact.
- 2 (b) The principal.
- 3 (c) The spouse of the principal.
- 4 (d) A relative of the principal.
- 5 (e) The conservator of the person or estate of the principal.
- 6 (f) The court investigator, described in Section 1454, of the county where the power of
- 7 attorney was executed or where the principal resides.
- 8 (g) The public guardian of the county where the power of attorney was executed or
- 9 where the principal resides.
- 10 (h) The personal representative or trustee of the principal's estate.
- 11 (i) The principal's successor in interest.
- 12 (j) A person who is requested in writing by an attorney-in-fact to take action.
- 13 (k) Any other interested person or friend of the principal.

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

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

23 **§ 4541. Petition as to powers of attorney**

24 4541. A petition may be filed under this part for any one or more of the following
25 purposes:

- 26 (a) Determining whether the power of attorney is in effect or has terminated.
- 27 (b) Passing on the acts or proposed acts of the attorney-in-fact, including approval of
- 28 authority to disobey the principal's instructions pursuant to subdivision (b) of Section
- 29 4234.
- 30 (c) Compelling the attorney-in-fact to submit the attorney-in-fact's accounts or report
- 31 the attorney-in-fact's acts as attorney-in-fact to the principal, the spouse of the principal,
- 32 the conservator of the person or the estate of the principal, or to any other person required
- 33 by the court in its discretion, if the attorney-in-fact has failed to submit an accounting or
- 34 report within 60 days after written request from the person filing the petition.
- 35 (d) Declaring that the authority of the attorney-in-fact is revoked on a determination by
- 36 the court of all of the following:
 - 37 (1) The attorney-in-fact has violated or is unfit to perform the fiduciary duties under the
 - 38 power of attorney.
 - 39 (2) At the time of the determination by the court, the principal lacks the capacity to give
 - 40 or to revoke a power of attorney.
 - 41 (3) The revocation of the attorney-in-fact's authority is in the best interest of the
 - 42 principal or the principal's estate.
- 43 (e) Approving the resignation of the attorney-in-fact:
 - 44 (1) If the attorney-in-fact is subject to a duty to act under Section 4230, the court may
 - 45 approve the resignation, subject to any orders the court determines are necessary to
 - 46 protect the principal's interests.

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

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

5 **Comment.** Section 4541 continues former Section 4941 without change, except that the
6 reference to powers of attorney for health care in the introductory paragraph of former law is
7 omitted. Powers of attorney for health care are governed by Division 4.7 (commencing with
8 Section 4600). This section applies to petitions concerning both durable and nondurable powers
9 of attorney. See Sections 4022 (“power of attorney” defined), 4050 (scope of division).

10 Subdivision (a) makes clear that a petition may be filed to determine whether the power of
11 attorney was ever effective, thus permitting, for example, a determination that the power of
12 attorney was invalid when executed because its execution was induced by fraud. See also Section
13 4201 (unqualified attorney-in-fact).

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

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

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

30 Subdivision (f) provides a remedy to achieve compliance with the power of attorney through
31 recognition of the attorney-in-fact’s authority. This remedy is also available to compel disclosure
32 of information under Section 4235 (consultation and disclosure). The former limitation of the
33 provision in subdivision (f) to statutory form powers of attorney has been eliminated. See Section
34 4300 *et seq.* (relations with third persons).

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

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

40 **§ 4542. Commencement of proceeding**

41 4542. A proceeding under this part is commenced by filing a petition stating facts
42 showing that the petition is authorized under this part, the grounds of the petition, and, if
43 known to the petitioner, the terms of the power of attorney.

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

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

1 **§ 4543. Dismissal of petition**

2 4543. The court may dismiss a petition if it appears that the proceeding is not
3 reasonably necessary for the protection of the interests of the principal or the principal's
4 estate and shall stay or dismiss the proceeding in whole or in part when required by
5 Section 410.30 of the Code of Civil Procedure.

6 **Comment.** Section 4543 continues former Section 4944 without change. Under former Section
7 4944, the dismissal standard was revised to permit dismissal when the proceeding is not
8 "reasonably necessary," rather than "necessary" as under the prior section (Civil Code Section
9 2416). Under this section, the court has authority to stay or dismiss a proceeding in this state if, in
10 the interest of substantial justice, the proceeding should be heard in a forum outside this state. See
11 Code Civ. Proc. § 410.30.

12 See also Section 4026 ("principal" defined).

13 **§ 4544. Notice of hearing**

14 4544. (a) Subject to subdivision (b), at least 15 days before the time set for hearing, the
15 petitioner shall serve notice of the time and place of the hearing, together with a copy of
16 the petition, on the following:

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

18 (2) The principal if not the petitioner.

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

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

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

29 See also Sections 4014 ("attorney-in-fact" defined), 4026 ("principal" defined).

30 **§ 4545. Award of attorney's fees**

31 4545. In a proceeding under this part commenced by the filing of a petition by a person
32 other than the attorney-in-fact, the court may in its discretion award reasonable attorney's
33 fees to one of the following:

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

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

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

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

1 **§ 4546. Appeal**

2 4546. An appeal may be taken from any of the following:

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

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

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

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

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

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

16 **§ 4600 (repealed). Application of definitions**

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

18 **§ 4603 (repealed). Community care facility**

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

20 **§ 4606 (repealed). Durable power of attorney for health care**

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

24 **§ 4609 (repealed). Health care**

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

29 **§ 4612 (repealed). Health care decision**

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

31 **§ 4615 (repealed). Health care provider**

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

33 **§ 4618 (repealed). Residential care facility for the elderly**

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

35 **§ 4621 (repealed). Statutory form durable power of attorney for health care**

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

1 **§ 4650 (repealed). Application of chapter**

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

5 **§ 4651 (repealed). Form of durable power of attorney for health care after January 1, 1995**

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

8 **§ 4652 (repealed). Other authority not affected**

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

11 Subdivision (b) is continued in Section 4651(b)(2) (emergency treatment) without substantive
12 change.

13 **§ 4653 (repealed). Validity of durable power of attorney for health care executed in another**
14 **jurisdiction**

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

16 **§ 4654 (repealed). Durable power of attorney for health care subject to former 7-year limit**

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

19 **§ 4700 (repealed). Requirements for durable power of attorney for health care**

20 **Comment.** Former Section 4700 is superseded by Section 4671 and related provisions. See
21 Section 4671 Comment.

22 **§ 4701 (repealed). Additional requirements for witnesses of durable power of attorney for**
23 **health care**

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

26 **§ 4702 (repealed). Limitations on who may be attorney-in-fact**

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

29 **§ 4703 (repealed). Requirements for printed form of durable power of attorney for health**
30 **care**

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

33 **§ 4704 (repealed). Warnings in durable power of attorney for health care not on printed**
34 **form**

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

1 **§ 4720 (repealed). Attorney-in-fact’s authority to make health care decisions**

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

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

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

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

7 **§ 4721 (repealed). Availability of medical information to attorney-in-fact**

8 **Comment.** Former Section 4721 is continued in Section 4676 without substantive change.

9 **§ 4722 (repealed). Limitations on attorney-in-fact’s authority**

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

11 **§ 4723 (repealed). Unauthorized acts and omissions**

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

13 **§ 4724 (repealed). Principal’s objections**

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

15 **§ 4725 (repealed). Restriction on execution of durable power of attorney for health care as**
16 **condition for admission, treatment, or insurance**

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

18 **§ 4726 (repealed). Alteration or forging, or concealment or withholding knowledge of**
19 **revocation of durable power of attorney for health care**

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

21 **§ 4727 (repealed). Revocation of durable power of attorney for health care**

22 **Comment.** Subdivision (a) of former Section 4727 is superseded by Section 4695(a)
23 (revocation of advance health care directive).

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

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

28 Subdivision (d) is superseded by Section 4698 (effect of later advance directive on earlier
29 advance directive).

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

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

34 **§ 4750 (repealed). Immunities of health care provider**

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

36 **§ 4751 (repealed). Convincing evidence of identity of principal**

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

1 **§ 4752 (repealed). Presumption concerning power executed in other jurisdiction**

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

3 **§ 4753 (repealed). Request to forego resuscitative measures**

4 **Comment.** Former Section 4753 is continued in Part 4 (commencing with Section 4780) of
5 Division 4.7 without substantive change. Subdivision (a) is continued in Section 4782 without
6 substantive change. Subdivision (b) is continued in Section 4780 without substantive change.
7 Subdivisions (c) and (d) are continued in Section 4783 without substantive change. Subdivision
8 (e) is continued in Section 4784 without change. Subdivision (f) is continued in Section 4785
9 without substantive change. Subdivision (g) is continued in Section 4781 without substantive
10 change. Subdivision (h) is continued in Section 4786 without substantive change.

11 **§ 4770 (repealed). Short title**

12 **Comment.** Former Section 4770 is not continued. The statutory form durable power of attorney
13 for health care is replaced by the optional form of an advance health care directive in Section
14 4701.

15 **§ 4771 (repealed). Statutory form durable power of attorney for health care**

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

19 **§ 4772 (repealed). Warning or lawyer's certificate**

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

22 **§ 4773 (repealed). Formal requirements**

23 **Comment.** Former Section 4773 is not continued. For execution requirements, see Section
24 4680. See also Sections 4700 (substantive rules applicable to form), 4701 (optional advance
25 directive form) & Comment.

26 **§ 4774 (repealed). Requirements for statutory form**

27 **Comment.** Former Section 4774 is not continued. For execution requirements, see Section
28 4680. See also Sections 4700 (substantive rules applicable to form), 4701 (optional advance
29 directive form) & Comment.

30 **§ 4775 (repealed). Use of forms valid under prior law**

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

33 **§ 4776 (repealed). Language conferring general authority**

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

36 **§ 4777 (repealed). Effect of documents executed by attorney-in-fact**

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

1 **§ 4778 (repealed). Termination of authority; alternate attorney-in-fact**

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

4 **§ 4779 (repealed). Use of other forms**

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

6 **§ 4800 (repealed). Registry system established by Secretary of State**

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

11 **§ 4801 (repealed). Identity and fees**

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

13 **§ 4802 (repealed). Notice**

14 **Comment.** Former Section 4802 is continued in new Section 4802 without substantive change.
15 See Section 4800 Comment.

16 **§ 4804 (repealed). Effect of failure to register**

17 **Comment.** Former Section 4804 is continued in Section 4803 without substantive change. See
18 Section 4800 Comment.

19 **§ 4805 (repealed). Effect of registration on revocation and validity**

20 **Comment.** Former Section 4805 is continued in Section 4804 without substantive change. See
21 Section 4800 Comment.

22 **§ 4806 (repealed). Effect on health care provider**

23 **Comment.** Former Section 4806 is continued in Section 4805 without substantive change. See
24 Section 4800 Comment.

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

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

28 **Comment.** Sections 4900-4948 have been moved to a new Part 4 (commencing with Section
29 4500) as part of the reorganization related to enactment of the Health Care Decisions Law,
30 Division 4.7 (commencing with Section 4600). With respect to powers of attorney for health care,
31 this part is replaced by Part 3 (commencing with Section 4750) in Division 4.7.

32 **§ 4900 (repealed). Power of attorney freely exercisable**

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

35 **§ 4901 (repealed). Cumulative remedies**

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

1 **§ 4902 (repealed). Effect of provision in power of attorney attempting to limit right to**
2 **petition**

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

5 **§ 4903 (repealed). Limitations on right to petition**

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

8 **§ 4904 (repealed). Jury trial**

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

11 **§ 4905 (repealed). Application of general procedural rules**

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

14 **§ 4920 (repealed). Jurisdiction and authority of court or judge**

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

17 **§ 4921 (repealed). Basis of jurisdiction**

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

20 **§ 4922 (repealed). Jurisdiction over attorney-in-fact**

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

23 **§ 4923 (repealed). Venue**

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

26 **§ 4940 (repealed). Petitioners**

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

30 **§ 4941 (repealed). Petition as to powers of attorney other than durable power of attorney**
31 **for health care**

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

36 **§ 4942 (repealed). Petition as to durable power of attorney for health care**

37 **Comment.** Former Section 4942 is continued in Section 4766 with several changes. See
38 Section 4766 & Comment.

1 **§ 4943 (repealed). Commencement of proceeding**

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

4 **§ 4944 (repealed). Dismissal of petition**

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

7 **§ 4945 (repealed). Notice of hearing**

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

10 **§ 4946 (repealed). Temporary health care order**

11 **Comment.** Former Section 4946 is continued in Section 4770 without several changes. See
12 Section 4770 Comment.

13 **§ 4947 (repealed). Award of attorney's fees**

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

16 **§ 4948 (repealed). Appeal**

17 **Comment.** Former Section 4948 is continued in Sections 4546 (property powers) and 4772
18 (health care powers) without substantive change.
19

20 **REVISED COMMENTS**

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

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

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

32 Sections 220-224 — Uniform Simultaneous Death Act (1953)

33 Sections 260-288 — Uniform Disclaimer of Transfers by Will, Intestacy or
34 Appointment Act (1978)

35 Sections 260-288 — Uniform Disclaimer of Transfers Under Nontestamentary
36 Instrument Act (1978)

37 Sections 3900-3925 — Uniform Transfers to Minors Act (1983)

38 Sections 4001, 4124-4127, 4206, 4304-4305 — Uniform Durable Power of Attorney Act

39 Sections 4400-4465 — Uniform Statutory Form Power of Attorney Act

40 Sections 4670-4772 — Uniform Health-Care Decisions Act

41 Sections 6300-6303 — Uniform Testamentary Additions to Trusts Act (1960)

- 1 Sections 6380-6390 — Uniform International Wills Act (1977). See also Section 6387
- 2 (need for uniform interpretation of Uniform International Wills Act)
- 3 Sections 16002(a), 16003, 16045-16054 — Uniform Prudent Investor Act (1994)
- 4 Sections 16200-16249 — Uniform Trustees' Powers Act (1964)
- 5 Sections 16300-16313 — Revised Uniform Principal and Income Act (1962)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

31 **Revised Comment.** Section 4101 is new. This section makes clear that many of the statutory
32 rules provided in this division are subject to express or implicit limitations in the power of
33 attorney. If a statutory rule is not subject to control by the power of attorney, this is stated
34 explicitly, either in a particular section or as to a group of sections. See, e.g., Sections 4130
35 (inconsistent authority), 4151(a)(2) (revocation of power of attorney by writing), 4153(a)(2)-(3)
36 (revocation of attorney-in-fact’s authority), 4155 (termination of authority under nondurable
37 power of attorney on principal’s incapacity), 4206 (relation of attorney-in-fact to court-appointed
38 fiduciary), 4207 (resignation of attorney-in-fact), 4232 (duty of loyalty), 4233 (duty to keep
39 principal’s property separate and identified), 4234(b) (authority to disobey instructions with court
40 approval), 4236 (duty to keep records and account; availability of records to other persons), 4902
41 ~~4502~~ (effect of provision in power of attorney attempting to limit right to petition), 4903 ~~4503~~
42 (limitations on right to petition).

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

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

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

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

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

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

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

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

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

30 **Revised Comment.** Section 4124 restates former Civil Code Section 2400 without substantive
31 change. For special rules applicable to statutory form powers of attorney, see Sections 4401,
32 4402. ~~For special rules applicable to durable powers of attorney for health care, see Sections~~
33 ~~4703, 4771. See also Section 4050 (powers subject to this division).~~

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

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

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

47 **Revised Comment.** Section 4130 is new. ~~For a special rule applicable to durable powers of~~
48 ~~attorney for health care, see Section 4727(d). See also Sections 4014 ("attorney-in-fact" defined),~~
49 ~~4022 ("power of attorney" defined), 4026 ("principal" defined).~~

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

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

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

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

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

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

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

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

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

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

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

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

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

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

40 **Revised Comment.** Section 4234 is drawn from general agency rules. The duty to follow the
41 principal’s instructions is consistent with the general agency rule in Civil Code Section 2309. See
42 also Civ. Code § 2019 (agent not to exceed limits of actual authority). The duty to communicate
43 with the principal is consistent with the general agency rule in Civil Code Sections 2020 and
44 2332.

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

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

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

4 **Revised Comment.** Section 4235 is drawn from the Missouri Durable Power of Attorney Law.
5 See Mo. Ann. Stat. § 404.714(4) (Vernon 1990). This section does not provide anything
6 inconsistent with permissible practice under former law, but is intended to recognize the
7 desirability of consultation in appropriate circumstances and provide assurance to third persons
8 that consultation with the attorney-in-fact is proper and does not contravene privacy rights. As to
9 the right to obtain medical records under the durable power of attorney for health care, see
10 Section 4721. See also Section 4455(f) (receipt of bank statements, etc., under statutory form
11 powers of attorney). The right to obtain information may be enforced pursuant to Section 4941
12 4541(f).

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

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

16 **Revised Comment.** Section 4236 is drawn in part from Minnesota law. See Minn. Stat. Ann. §
17 523.21 (West Supp. 1994). For provisions relating to judicial proceedings, see Section 4900 4500
18 *et seq.*

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

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

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

34 This general rule is subject to some specific exceptions. See, e.g., Sections 4309 (prior breach
35 by attorney-in-fact), 4310 (transactions relating to accounts and loans in financial institution),
36 4720 (attorney-in-fact’s authority to make health care decisions).

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

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

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

45 See also Sections 4014 (“attorney-in-fact” defined), 4022 (“power of attorney” defined), 4034
46 (“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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