

## Memorandum 98-74

### Health Care Decisions: Draft Recommendation Revisions

---

Attached to this memorandum are redrafted portions of the draft recommendation on *Health Care Decisions for Incapacitated Adults*, implementing decisions made at the September meeting. At the December meeting, the Commission needs to consider the remaining issues and suggestions discussed in the Staff Notes following the sections in the draft attached to Memorandum 98-63 that were not considered in September.

If the Commission can complete its review, we will be in a position to approve a final recommendation to the Legislature for the 1999 session. Following the December meeting, our intention is to make any revisions needed to implement Commission decisions and prepare the final recommendation for printing and introduction in the 1999 legislative session. The next Commission meeting is currently scheduled for February 18-19, 1999, so the Commission will not have an opportunity to further review the bill until it is in print. The final text of the recommendation, however, including the preliminary part and the Comments can be brought back for final review and approval before a recommendation is printed.

We have not reproduced a complete, revised draft recommendation in order to save the cost of reproducing and distributing the 220 pages of statute and comments for only minimal revisions, and to avoid the need to transfer reviewers' notes from one copy to another. (A revised preliminary part of the draft recommendation will follow in a supplement.)

The following replacements for portions of the draft recommendation are attached to this memorandum:

	<i>Memo 98-63 Draft</i>	<i>Replacements</i>
Form	§ 4701, pp. 63-73	§ 4701, pp. A1-A9
Statutory surrogates	§ 4712, pp. 74-76	§§ 4712-4713, pp. B11-B12
Surrogate committee	§§ 4722-4724, pp. 79-81	§§ 4722-4724, pp. C15-C17
Declining provider	§ 4736, p. 85	§ 4736, p. D20


These redrafted portions represent the most difficult or controversial parts of the draft, and should be reviewed with care to make sure they implement the Commission's intent.

The Staff Notes have been omitted from the attached redrafted parts of the recommendation. However, there are still a number of Staff Notes regarding some of this material that have not been fully considered. The staff will raise these issues as the Commission works through the draft. The Staff Notes concerning Sections 4712, 4722-4724, and 4736 have been fully reviewed.

Respectfully submitted,

Stan Ulrich  
Assistant Executive Secretary

1 A.

2  **Staff Note.** The form has been revised to make the statements concerning the agent's  
3 authority consistent with the statutory authority, e.g., with respect to anatomical gifts. Part 1.5 has  
4 been added to provide for special instructions and make clear that the agent's authority is limited  
5 by statements in Part 3.

6 **§ 4701. Optional form of advance directive**

---

7 4701. The statutory advance health care directive form is as follows:

8 ADVANCE HEALTH CARE DIRECTIVE  
9 (California Probate Code Section 4701)

10 **Explanation**

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

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

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

- 32 (a) consent or refuse consent to any care, treatment, service, or procedure to  
33 maintain, diagnose, or otherwise affect a physical or mental condition;
- 34 (b) select or discharge health care providers and institutions;
- 35 (c) approve or disapprove diagnostic tests, surgical procedures, and  
36 programs of medication;
- 37 (d) direct the provision, withholding, or withdrawal of artificial nutrition  
38 and hydration and all other forms of health care, including  
39 cardiopulmonary resuscitation; and

1 (e) make anatomical gifts, authorize an autopsy, and direct disposition of  
2 remains.

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

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

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

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

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

\*\*\*\*\*

PART 1  
POWER OF ATTORNEY FOR HEALTH CARE

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

---

(name of individual you choose as agent)

---

(address)

(city)

(state)

(zip code)

---

(home phone)

(work phone)

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

---

(name of individual you choose as first alternate agent)

---

(address) (city) (state) (zip code)

---

(home phone) (work phone)

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

---

(name of individual you choose as second alternate agent)

---

(address) (city) (state) (zip code)

---

(home phone) (work phone)

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

---

(Add additional sheets if needed.)

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

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

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

(1.5) AGENT'S POST-DEATH AUTHORITY: My agent is authorized to make anatomical gifts, authorize an autopsy, and direct disposition of my remains, except as I state here or in Part 3 of this form:

---

---

---

(Add additional sheets if needed.)

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

## PART 2 INSTRUCTIONS FOR HEALTH CARE

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

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

(a) Choice Not To Prolong Life

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

(b) Choice To Prolong Life

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

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

---

---

(Add additional sheets if needed.)

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

---

---

(Add additional sheets if needed.)

PART 3  
DONATION OF ORGANS AT DEATH  
(OPTIONAL)

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

- (a) I give any needed organs, tissues, or parts, OR
- (b) I give the following organs, tissues, or parts only.
- 

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

- (1) Transplant
- (2) Therapy
- (3) Research
- (4) Education

PART 4  
PRIMARY PHYSICIAN  
(OPTIONAL)

(4.1) I designate the following physician as my primary physician:

---

(name of physician)

---

(address) (city) (state) (zip code)

---

(phone)

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

---

(name of physician)

---

(address) (city) (state) (zip code)

---

(phone)

\*\*\*\*\*

PART 5

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

(5.2) SIGNATURES: Sign and date the form here:

<hr/> <p>(date)</p>	<hr/> <p>(sign your name)</p>
<hr/> <p>(address)</p>	<hr/> <p>(print your name)</p>
<hr/> <p>(city)</p>	<hr/> <p>(state)</p>



(Optional) SIGNATURES OF WITNESSES:

First witness	Second witness
_____	_____
(print name)	(print name)
_____	_____
(address)	(address)
_____	_____
(city) (state)	(city) (state)
_____	_____
(signature of witness)	(signature of witness)
_____	_____
(date)	(date)

PART 6  
SPECIAL WITNESS REQUIREMENT

(6.1) 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)	

1 **Comment.** Section 4701 provides the contents of the optional statutory form for the Advance  
2 Health Care Directive. Parts 1-5 of this form are drawn from Section 4 of the Uniform Health-  
3 Care Decisions Act (1993). This form supersedes the Statutory Form Durable Power of Attorney  
4 for Health Care in former Section 4771 and the related rules in former Sections 4772-4774, 4776-

1 4778. Part 6 of this form continues a portion of the former statutory form applicable to patients in  
2 skilled nursing facilities.

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

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

17 Part [1.1] of the power of attorney for health care form requires only the designation of a single  
18 agent, but with opportunity given to designate a single first alternate and a single second alternate,  
19 if the individual chooses. No provision is made in the form for the designation of co-agents in  
20 order not to encourage the practice. Designation of co-agents is discouraged because of the  
21 difficulties likely to be encountered if the co-agents are not all readily available or do not agree. If  
22 co-agents are appointed, the instrument should specify that either is authorized to act if the other  
23 is not reasonably available. It should also specify a method for resolving disagreements.

24 Part [1.2] of the power of attorney for health care form grants the agent authority to make all  
25 health-care decisions for the individual subject to any limitations which the individual may state  
26 in the form. Reference is made to artificial nutrition and hydration and other forms of treatment to  
27 keep an individual alive in order to ensure that the individual is aware that those are forms of  
28 health care that the agent would have the authority to withdraw or withhold absent specific  
29 limitation.

30 Part [1.3] of the power of attorney for health care form provides that the agent's authority  
31 becomes effective upon a determination that the individual lacks capacity, but as authorized by  
32 Section 2(c) [Prob. Code § 4682] a box is provided for the individual to indicate that the authority  
33 of the agent takes effect immediately.

34 Part [1.4] of the power of attorney for health care form directs the agent to make health-care  
35 decisions in accordance with the power of attorney, any instructions given by the individual in  
36 Part 2 of the form, and the individual's other wishes to the extent known to the agent. To the  
37 extent the individual's wishes in the matter are not known, the agent is to make health-care  
38 decisions based on what the agent determines to be in the individual's best interest. In  
39 determining the individual's best interest, the agent is to consider the individual's personal values  
40 to the extent known to the agent. Section 2(e) imposes this standard, whether or not it is included  
41 in the form, but its inclusion in the form will bring it to the attention of the individual granting the  
42 power, to the agent, to any guardian or surrogate, and to the individual's health-care providers.

43 [Part 1.5 implements Probate Code Section 4683.]

44 Part [1.6] of the power of attorney for health care form nominates the agent, if available, able,  
45 and willing to act, otherwise the alternate agents in order of priority stated, as guardians of the  
46 person for the individual. This provision is included in the form for two reasons. First, if an  
47 appointment of a guardian becomes necessary the agent is the one whom the individual would  
48 most likely want to serve in that role. Second, the nomination of the agent as guardian will reduce  
49 the possibility that someone other than the agent will be appointed as guardian who could use the  
50 position to thwart the agent's authority.

51 Because the variety of treatment decisions to which health-care instructions may relate is  
52 virtually unlimited, Part 2 of the form does not attempt to be comprehensive, but is directed at the  
53 types of treatment for which an individual is most likely to have special wishes. Part [2.1] of the

1 form, entitled “End-of-Life Decisions,” provides two alternative choices for the expression of  
2 wishes concerning the provision, withholding, or withdrawal of treatment. Under the first choice,  
3 the individual’s life is not to be prolonged if the individual has an incurable and irreversible  
4 condition that will result in death within a relatively short time, if the individual becomes  
5 unconscious and, to a reasonable degree of medical certainty, will not regain consciousness, or if  
6 the likely risks and burdens of treatment would outweigh the expected benefits. Under the second  
7 choice, the individual’s life is to be prolonged within the limits of generally accepted health-care  
8 standards.... Part [2.2] of the form provides space for an individual to specify any circumstance  
9 when the individual would prefer not to receive pain relief. Because the choices provided in Parts  
10 [2.1-2.2] do not cover all possible situations, Part [2.3] of the form provides space for the  
11 individual to write out his or her own instructions or to supplement the instructions given in the  
12 previous subparts of the form. Should the space be insufficient, the individual is free to add  
13 additional pages.

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

19 Part 3 of the form provides the individual an opportunity to express an intention to donate  
20 bodily organs and tissues at death. The options provided are derived from a suggested form in the  
21 Comment to Section 2 of the Uniform Anatomical Gift Act (1987). [See Health & Safety Code §  
22 7150 *et seq.*]

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

26 [Part 5.1] of the form conforms with the provisions of Section 12 [Prob. Code § 4661] by  
27 providing that a copy of the form has the same effect as the original.

28 The Act does not require witnessing, [except as provided in Prob. Code § 4673,] but to  
29 encourage the practice [Part 5.2 of] the form provides space for the signatures of two witnesses.

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

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

1 B.

2 ☞ **Staff Note.** Section 4712 has been revised. Section 4713 is new and the following sections  
3 have been renumbered. The complete chapter is set out here because it is an integrated procedure.

4 CHAPTER 3. HEALTH CARE SURROGATES

5 **§ 4710. Authority of surrogate to make health care decisions**

---

6 4710. A surrogate who is designated or selected under this chapter may make  
7 health care decisions for a patient if all of the following conditions are satisfied:

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

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

12 **Comment.** Section 4710 is drawn from Section 5(a) of the Uniform Health-Care Decisions Act  
13 (1993). Section 4658 provides for capacity determinations by the primary physician under this  
14 division. Both the patient and the surrogate must be adults. See Sections 4625 (“patient” defined),  
15 4641 (“surrogate” defined). “Adult” includes an emancipated minor. See Fam. Code §§ 7002  
16 (emancipation), 7050 (emancipated minor considered as adult for consent to medical, dental, or  
17 psychiatric care).

18 See also Sections 4609 (“capacity” defined), 4613 (“conservator” defined), 4615 (“health care”  
19 defined), 4617 (“health care decision” defined), 4625 (“patient” defined), 4629 (“power of  
20 attorney for health care” defined), 4631 (“primary physician” defined), 4633 (“reasonably  
21 available” defined), 4641 (“surrogate” defined).

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

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

29 **§ 4711. Patient’s designation of surrogate**

---

30 4711. A patient may designate an individual as a surrogate to make health care  
31 decisions by personally informing the supervising health care provider. An oral  
32 designation of a surrogate is effective only during the course of treatment or illness  
33 or during the stay in the health care institution when the designation is made.

34 **Comment.** The first sentence of Section 4711 is drawn from Section 5(b) of the Uniform  
35 Health-Care Decisions Act (1993). Both the patient and the surrogate must be adults. See  
36 Sections 4625 (“patient” defined), 4641 (“surrogate” defined). “Personally informing,” as used in  
37 this section, includes both oral and written communications. The second sentence is intended to  
38 guard against the possibility of giving effect to obsolete oral statements entered in the patient’s  
39 record.

40 See also Sections 4617 (“health care decision” defined), 4619 (“health care institution”  
41 defined), 4625 (“patient” defined), 4633 (“reasonably available” defined), 4639 (“supervising  
42 health care provider” defined), 4641 (“surrogate” defined).

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

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

11       **§ 4712. Selection of statutory surrogate**

---

12       4712. (a) Subject to Section 4710, if no surrogate has been designated under  
13 Section 4711 or if the designated surrogate is not reasonably available, the primary  
14 physician may select a surrogate to make health care decisions for the patient from  
15 among the following adults with a relationship to the patient:

16       (1) The spouse, unless legally separated.

17       (2) An adult in a long-term relationship of indefinite duration with the patient in  
18 which the individual has demonstrated an actual commitment to the patient similar  
19 to the commitment of a spouse and in which the individual and the patient  
20 consider themselves to be responsible for each other's well-being and reside or  
21 have been residing together. This individual may be known as a domestic partner.

22       (3) Children.

23       (4) Parents.

24       (5) Brothers and sisters.

25       (6) Grandchildren.

26       (7) Close friends.

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

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

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

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

38       (1) Whether the proposed surrogate appears to be best able to make decisions in  
39 accordance with Section 4714.

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

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

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

44       (5) Availability to visit the patient.

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

3 (e) The primary physician may require a surrogate or proposed surrogate (1) to  
4 provide information to assist in making the determinations under this section and

5 (2) to provide information to family members and other persons concerning the  
6 selection of the surrogate and communicate with them concerning health care  
7 decisions for the patient.

8 (f) The primary physician shall document in the patient’s health care record the  
9 reasons for selecting the surrogate.

10 **Comment.** Section 4712 is a new provision, drawn in part from West Virginia law and the  
11 Uniform Health-Care Decisions Act (1993). See W.Va. Code § 16-30B-7 (1997); Unif. Health-  
12 Care Decisions Act § 5(b)-(c) (1993). Subdivision (a)(2) is drawn from New Mexico law. See  
13 N.M. Stat. Ann. § 24-7A-5(B)(2) (Westlaw 1998). “Adult” includes an emancipated minor. See  
14 Fam. Code § 7002 (emancipation). A prospective surrogate and other persons may also seek  
15 judicial relief as provided in Sections 4765-4766.

16 See also Sections 4617 (“health care decision” defined), 4625 (“patient” defined), 4633  
17 (“reasonably available” defined), 4639 (“supervising health care provider” defined), 4641  
18 (“surrogate” defined).

#### 19 **§ 4713. Selection of statutory surrogate**

---

20 4713. (a) The surrogate designated or selected under this chapter shall promptly  
21 communicate his or her assumption of authority to all adults described in  
22 paragraphs (1) to (5), inclusive, of subdivision (a) of Section 4712 who can readily  
23 be contacted.

24 (b) The supervising health care provider, in the case of a surrogate designation  
25 under Section 4711, or the primary physician, in the case of a surrogate selection  
26 under Section 4712 shall inform the surrogate of the duty under subdivision (a).

27 **Comment.** Subdivision (a) of Section 4713 is drawn from Section 5(d) of the Uniform Health-  
28 Care Decisions Act (1993). The persons required to be notified are the spouse, domestic partner,  
29 adult children, parents, and adult siblings. See Section 4712(a)(1)-(5). There is no statutory duty  
30 to notify the class of grandchildren or close friends. See Section 4712(a)(6)-(7). However, all  
31 surrogates have the duty to notify under subdivision (a), regardless of whether they would have a  
32 right to notice.

33 Subdivision (b) recognizes that the supervising health care provider or primary physician is  
34 more likely to know of the duty in subdivision (a) than the surrogate, and so is in a position to  
35 notify the surrogate of the duty.

36 See also Sections 4629 (“primary physician” defined), 4637 (“supervising health care provider”  
37 defined), 4641 (“surrogate” defined).

38 **Background from Uniform Act.** Section 5(d) [Prob. Code § 4713(a)] requires a surrogate who  
39 assumes authority to act to immediately so notify [the persons described in subdivision (a)(1)-(5)]  
40 who in given circumstances would be eligible to act as surrogate. Notice to the specified family  
41 members will enable them to follow health-care developments with respect to their now  
42 incapacitated relative. It will also alert them to take appropriate action, including the appointment  
43 of a guardian or the commencement of judicial proceedings under Section 14 [Prob. Code § 4750  
44 *et seq.*], should the need arise.

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

1 **§ 4714. Standard governing surrogate’s health care decisions**

---

2 4714. A surrogate shall make a health care decision in accordance with the  
3 patient’s individual health care instructions, if any, and other wishes to the extent  
4 known to the surrogate. Otherwise, the surrogate shall make the decision in  
5 accordance with the surrogate’s determination of the patient’s best interest. In  
6 determining the patient’s best interest, the surrogate shall consider the patient’s  
7 personal values to the extent known to the surrogate.

8 **Comment.** Section 4714 is drawn from Section 5(f) of the Uniform Health-Care Decisions Act  
9 (1993). This standard is consistent with the health care decisionmaking standard applicable to  
10 agents. See Section 4684.

11 See also Sections 4617 (“health care decision” defined), 4623 (“individual health care  
12 instruction” defined), 4625 (“patient” defined), 4641 (“surrogate” defined).

13 **Background from Uniform Act.** Section 5(f) imposes on surrogates the same standard for  
14 health-care decision making as is prescribed for agents in Section 2(e) [Prob. Code § 4684]. The  
15 surrogate must follow the patient’s individual instructions and other expressed wishes to the  
16 extent known to the surrogate. To the extent such instructions or other wishes are unknown, the  
17 surrogate must act in the patient’s best interest. In determining the patient’s best interest, the  
18 surrogate is to consider the patient’s personal values to the extent known to the surrogate.

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

20 **§ 4715. Disqualification of surrogate**

---

21 4715. A patient having capacity at any time may disqualify another person,  
22 including a member of the patient’s family, from acting as the patient’s surrogate  
23 by a signed writing or by personally informing the supervising health care  
24 provider of the disqualification.

25 **Comment.** Section 4715 is drawn from Section 5(h) of the Uniform Health-Care Decisions Act  
26 (1993). See Section 4731 (duty to record surrogate’s disqualification). “Personally informing,” as  
27 used in this section, includes both oral and written communications.

28 See also Sections 4625 (“patient” defined), 4639 (“supervising health care provider” defined),  
29 4641 (“surrogate” defined).

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

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

34 **§ 4716. Reassessment of surrogate selection**

---

35 4716. (a) If a surrogate selected pursuant to Section 4712 is not reasonably  
36 available, the surrogate may be replaced.

37 (b) If an individual who ranks higher in priority under subdivision (a) of Section  
38 4712 relative to a selected surrogate becomes reasonably available, the individual  
39 with higher priority may be substituted for the selected surrogate unless the  
40 primary physician determines that the lower ranked individual is best qualified to  
41 serve as the surrogate.


42 **Comment.** Section 4716 is drawn from West Virginia law. See W. Va. Code § 16-30B-7  
43 (1997). A surrogate is replaced in the circumstances described in this section by applying the  
44 rules in Section 4712. The determination of whether a surrogate has become unavailable or  
45 whether a higher priority potential surrogate has become reasonably available is made by the

1 primary physician under Section 4712 and this section. Accordingly, a person who believes it is  
2 appropriate to reassess the surrogate selection would need to communicate with the primary  
3 physician.

4 See also Sections 4631 (“primary physician” defined), 4633 (“reasonably available” defined),  
5 4641 (“surrogate” defined).



1 C.

2  **Staff Note.** Sections 4722-4724 have been revised. The complete chapter is set out here  
3 because it is an integrated procedure.

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

6 **§ 4720. Application of chapter**

---

7 4720. This chapter applies where a health care decision needs to be made for a  
8 patient and all of the following conditions are satisfied:

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

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

13 (c) No surrogate can be selected under Chapter 3 (commencing with Section  
14 4710) or the surrogate is not reasonably available.

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

16 **Comment.** Section 4720 is new. The procedure in this chapter is drawn in part from and  
17 supersedes former Health and Safety Code Section 1418.8 applicable to medical interventions in  
18 long-term care facilities. This chapter does not apply to emergency health care. See Section  
19 4651(b)(2).

20 See also Sections 4607 ("agent" defined), 4609 ("capacity" defined), 4613 ("conservator"  
21 defined), 4617 ("health care decision" defined), 4623 ("individual health care instruction"  
22 defined), 4625 ("patient" defined), 4631 ("primary physician" defined), 4633 ("reasonably  
23 available" defined), 4641 ("surrogate" defined).

24 **§ 4721. Referral to surrogate committee**

---

25 4721. A patient's primary physician may obtain approval for a proposed health  
26 care decision by referring the matter to a surrogate committee before the health  
27 care decision is implemented.

28 **Comment.** Section 4721 is new. It supersedes former Health and Safety Code Section  
29 1418.8(d) applicable to medical interventions in long-term care facilities. The procedure for  
30 making health care decisions on behalf of incapacitated adults with no other surrogate  
31 decisionmakers is optional and it does not displace any other means for making such decisions.  
32 See, e.g., Section 3200 *et seq.* (court authorized health care decisions). The scope of a health care  
33 decision depends on the circumstances and may include a course of treatment. See Section 4617  
34 Comment.

35 See also Sections 4617 ("health care decision" defined), 4625 ("patient" defined), 4631  
36 ("primary physician" defined), 4633 ("reasonably available" defined), 4641 ("surrogate" defined).

37 **§ 4722. Composition of surrogate committee**

---

38 4722. (a) A surrogate committee may be established by the health care  
39 institution. If a surrogate committee has not been established by the patient's  
40 health care institution, or if the patient is not in a health care institution, the

1 surrogate committee may be established by the county health officer or as  
2 otherwise determined by the county board of supervisors.

3 (b) The surrogate committee shall include the following individuals:

4 (1) The patient's primary physician.

5 (2) A professional nurse with responsibility for the patient and with knowledge  
6 of the patient's condition.

7 (3) A patient representative or community member. The patient representative  
8 may be a family member or friend of the patient who is unable to take full  
9 responsibility for the patient's health care decisions, but has agreed to serve on the  
10 surrogate committee. A community member is an adult who is not employed by or  
11 regularly associated with the primary physician, the health care institution, or  
12 employees of the health care institution.

13 (c) In cases involving withholding or withdrawal of life-sustaining treatment or  
14 other critical health care decisions, in addition to the individuals described in  
15 subdivision (b), the surrogate committee shall include a member of the health care  
16 institution's ethics committee or an outside ethics consultant.

17 (d) This section provides minimum guidelines for the composition of the  
18 surrogate committee and is not intended to restrict participation by other  
19 appropriate persons, including health care institution staff in disciplines as  
20 determined by the patient's needs.

21 **Comment.** Section 4722 is new. Subdivision (a) provides for establishment of surrogate  
22 committees.

23 Subdivision (b) is drawn in part from provisions of former Health and Safety Code Section  
24 1418.8(e)-(f) applicable to medical interventions in long-term care facilities. Subdivision (b)(3)  
25 makes clear that a person who may be qualified to serve as a surrogate under Chapter 3  
26 (commencing with Section 4710) may still participate in health care decisionmaking as a patient  
27 representative. As provided in subdivision (b), the surrogate committee must always include at  
28 least three persons, the primary physician, a professional nurse, and a patient representative or  
29 community member. Subdivision (c) requires an additional ethics advisor in cases involving life-  
30 sustaining treatment or other critical health care decisions. The statute does not attempt to define  
31 "critical" health care decisions because of the vast variety of factual circumstances. Routine  
32 medical interventions of a type governed by former Health and Safety Code Section 1418.8  
33 would generally not be included in the class of critical health care decisions. However, major  
34 surgery, amputation, and treatments involving a significant risk should require participation of an  
35 ethicist under subdivision (c).

36 See also Sections 4615 ("health care" defined), 4617 ("health care decision" defined), 4619  
37 ("health care institution" defined), 4625 ("patient" defined), 4631 ("primary physician" defined).

38 **§ 4723. Conduct and standards of review by surrogate committee**

---

39 4723. (a) The surrogate committee's review of proposed health care shall include  
40 all of the following:

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

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

43 (3) A discussion of the desires of the patient, if known. To determine the desires  
44 of the patient, the surrogate committee shall interview the patient, if the patient is

1 capable of communicating, review the patient’s medical records, and consult with  
2 family members or friends, if any have been identified.

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

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

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

9 (b) The surrogate committee shall periodically evaluate the results of an  
10 approved health care decision, as appropriate under applicable standards of health  
11 care.

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

14 Subdivision (b) generalizes the duty to evaluate periodically under former Health and Safety  
15 Code Section 1418.8(g), but does not provide any particular time period, as under former law.

16 See also Sections 4617 (“health care decision” defined), 4625 (“patient” defined), 4631  
17 (“primary physician” defined), 4722 (composition of surrogate committee).

18 **§ 4724. Decisionmaking by surrogate committee**

19 4724. (a) The surrogate committee shall attempt to reach consensus on proposed  
20 health care decisions, but may approve proposed health care decisions by majority  
21 vote. However, proposed health care decisions relating to withholding or  
22 withdrawal of life-sustaining treatment may not be approved if any member of the  
23 surrogate committee is opposed.

24 (b) The surrogate committee shall keep a record of its membership, showing  
25 who participated in making a health care decision with regard to a patient, and the  
26 result of votes taken, and shall keep a record of its deliberations and conclusions  
27 under Section 4723.

28 **Comment.** Section 4724 is new. The principle of decisionmaking by a majority in subdivision  
29 (a) is consistent with the rule applicable to statutory surrogates under Section 5(e) of the Uniform  
30 Health-Care Decisions Act (1993). With respect to medical interventions in long-term care  
31 facilities, this section supersedes part of the second sentence of former Health and Safety Code  
32 Section 1418.8(e) relating to the “team approach to assessment and care planning.” For the  
33 standard governing surrogate decisionmaking generally, see Section 4714. Decisions relating to  
34 withholding or withdrawal of life-sustaining treatment are subject to a higher standard. If any  
35 surrogate committee member votes against the proposed health care decision, the proposal fails;  
36 however, an abstention is not counted as opposition.

37 Subdivision (b) requires that records be kept of the membership, voting, and deliberations of  
38 the surrogate committee. This is in addition to any other recordkeeping requirements applicable  
39 under this part.

40 See also Sections 4617 (“health care decision” defined), 4722 (composition of surrogate  
41 committee). For provisions concerning judicial proceedings, see Sections 4765(d) (petitioners),  
42 4766 (purposes of petition).

43 **§ 4725. General surrogate rules applicable to surrogate committee**

44 4725. Provisions applicable to health care decisionmaking, duties, and  
45 immunities of surrogates apply to a surrogate committee and its members.

1       **Comment.** Section 4725 is new. For provisions applicable to health care surrogates generally,  
2 see Chapter 3 (commencing with Section 4710), Section 4741 (immunities of surrogate). See also  
3 Section 4653 (mercy killing, assisted suicide, euthanasia not approved). For a list of sections  
4 applicable to surrogates, see Section 4641 Comment. For the standard governing surrogate  
5 decisionmaking generally, see Section 4714.

6       See also Sections 4617 (“health care decision” defined), 4641 (“surrogate” defined), 4722  
7 (composition of surrogate committee).

8       **§ 4726. Review of emergency care**

---

9       4726. In a case subject to this chapter where emergency care is administered  
10 without approval by a surrogate committee, if the emergency results in the  
11 application of physical or chemical restraints, the surrogate committee shall meet  
12 within one week of the emergency for an evaluation of the health care decision.

13       **Comment.** Section 4726 generalizes former Health and Safety Code Section 1418.8(h).

D.

☞ **Staff Note.** Section 4736 has been revised. Sections 4734-4736 are set out because they are interrelated.

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

---

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

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

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

See also Sections 4615 (“health care” defined), 4619 (“health care institution” defined), 4621 (“health care provider” defined), 4623 (“individual health care instruction” defined), 4625 (“patient” defined).

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

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

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

---

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

**Comment.** Section 4735 is drawn from Section 7(f) of the Uniform Health-Care Decisions Act (1993). This section is a special application of the general rule in Section 4654.

See also Sections 4615 (“health care” defined), 4619 (“health care institution” defined), 4621 (“health care provider” defined), 4623 (“individual health care instruction” defined), 4625 (“patient” defined).

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

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

1 **§ 4736. Duty of declining health care provider or institution**

2 4736. A health care provider or health care institution that declines to comply  
3 with an individual health care instruction or health care decision shall do all of the  
4 following:

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

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

11 (c) Provide continuing care to the patient until a transfer can be accomplished or  
12 until it appears that a transfer cannot be accomplished. In all cases, appropriate  
13 palliative care shall be continued.

14 **Comment.** Section 4736 is drawn in part from Section 7(g) of the Uniform Health-Care  
15 Decisions Act (1993). This section applies to situations where the health care provider or  
16 institution declines to comply under Section 4734 or 4735. This section continues the duty to  
17 transfer provided in former Health and Safety Code Sections 7187.5 (2d sentence) and 7190  
18 (Natural Death Act). Nothing in this section requires administration of ineffective care. See  
19 Sections 4654, 4735. This section does not resolve the problem that may occur where a transfer  
20 cannot be accomplished and the continuing care required by subdivision (b) is a form of care the  
21 health care provider or institution has a right to decline under Section 4734 or 4735.

22 See also Sections 4617 (“health care decision” defined), 4619 (“health care institution”  
23 defined), 4621 (“health care provider” defined), 4623 (“individual health care instruction”  
24 defined), 4625 (“patient” defined).

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

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