

First Supplement to Memorandum 2000-86

Health Care Decisions Law: Technical Revisions — Additional Issue (Draft Tentative Recommendation)

At the last meeting, the Commission received a letter from Theresa Drought, Ethics Committee Chair, Kaiser Oakland Medical Center, which included a suggested revision of the statute governing persons with authority to direct disposition of remains. (See Third Supplement to Memorandum 2000-62, Exhibit p. 3.)

The problem is that Health and Safety Code Section 7100, which gives an agent under a power of attorney for health care top priority in controlling disposition of remains, also imposes a duty and makes the person liable for the reasonable cost of disposition. Ms. Drought reports: "When I inform people of these costs when teaching about advance directives, people are universally appalled that an agent should be confronted with such a responsibility and identify it as a barrier to appointing an agent." The staff has heard similar reactions to this section in a number of conferences and committee meetings.

A staff draft of language that could be added to the tentative recommendation, if the Commission decides to address this issue, is attached. Even if the Commission has doubts about revising this section as proposed, it would be worth soliciting comments from interested persons.

Ms. Drought also asks whether the responsibility would devolve on a surrogate appointed orally. This should not happen (unless the person designated as surrogate falls into a class that is liable under Section 7100), because a surrogate is not included within the definition of agent under the Health Care Decisions Law. Compare Prob. Code § 4607 ("agent" defined) with § 4643 ("surrogate" defined). Section 4714 imposes the same standards in carrying out health care decisionmaking duties by a surrogate as apply to agents, but there is no general application of the agent's duties to surrogates.

Respectfully submitted,

Stan Ulrich
Assistant Executive Secretary

HEALTH CARE DECISIONS LAW: TECHNICAL REVISIONS

 **Staff Note.** If approved, this material will be integrated into the tentative recommendation attached to Memorandum 2000-86.

1 Agent's Liability for Disposition of Remains

2 The Health and Safety Code sets up a detailed scheme defining rights, duties,
3 and liabilities of surviving family members and other persons, including agents
4 and public guardians, pertaining to disposition of remains.¹ An agent under a
5 power of attorney for health care has priority over all others to control the
6 disposition of a decedent's remains.² The statutory scheme also includes
7 provisions making it a misdemeanor to fail to perform the statutory duty and
8 providing liability for treble damages.³

9 The top priority for health care agents was added to the law by an amendment of
10 Health and Safety Code Section 7100 in 1998.⁴ The 1998 legislation focused on
11 the problem of a person charged with the decedent's murder having priority in
12 disposition of the remains.⁵ The legislative committee analyses do not discuss or
13 recognize the potential effect of the amendment on the liability of attorneys-in-
14 fact, nor is the purpose of adding attorneys-in-fact explained.

15 The Commission has received reports that some potential agents, when informed
16 of the apparent liability under the Health and Safety Code, are reluctant to agree to
17 act as agents, and persons preparing powers of attorney for health care are worried
18 about imposing such a liability on their relatives or friends whom they want to
19 name as agents.⁶ Clarifying the relation between the Health and Safety Code
20 provisions and the Probate Code, and resolving internal inconsistencies in the

1. See generally Health and Safety Code §§ 7100-7117.

2. Health & Safety Code § 7100. This section was amended in 1998 to provide that an attorney-in-fact under a durable power of attorney has the top priority to control disposition of remains. See 1998 Cal. Stat. ch. 253, § 1 (SB 1360). The liability and duty provisions were already in place. This section was amended to conform to the terminology of the Health Care Decisions Law in 1999. See 1999 Cal. Stat. ch. 658, § 5.5 (AB 891). The latter amendment was made on Commission recommendation as a conforming revision, but the Commission did not reexamine the language or underlying policy of Section 7100 at that time.

3. Health & Safety Code § 7103. In addition, Section 7105(a) provides that a cemetery authority has a cause of action against a person with a duty of interment.

4. 1998 Cal. Stat. ch. 253, § 1 (SB 1360).

5. See, e.g., Senate Committee on Business and Provisions, Analysis of SB 1360, as amended April 1, 1998 (hearing date April 13, 1998); Assembly Committee on Consumer Protection, Governmental Efficiency, and Economic Development, Analysis of SB 1360, as amended June 10 1998 (hearing date June 23, 1998); Senate Rules Committee, Floor Analysis of SB 1360, as amended July 2, 1998.

6. See, e.g., Letter from Theresa Drought, Ph.D., RN, Ethics Committee Chair, Kaiser Oakland Medical Center, to Stan Ulrich (Oct. 5, 2000) (attached to Third Supplement to Commission Staff Memorandum 2000-62, Oct. 5, 2000).

1 Health and Safety Code provisions, are outside the scope of this recommendation.⁷
2 But it is important to insulate agents under powers of attorney for health care from
3 this apparently unintended imposition of liability, which can act to defeat the
4 fundamental purpose of the Health Care Decisions Law of effectuating patient
5 autonomy through the use of advance health care directives.

6 Accordingly, the Commission recommends that Health and Safety Code Section
7 7100 be amended to make clear that, unless they agree otherwise, agents do not
8 have an enforceable duty to direct the disposition of the principal's remains and
9 are not liable under that section for failure or refusal to act. Furthermore, in a case
10 where an agent does exercise the authority to direct disposition of remains, the
11 agent should be liable only for reasonable costs that cannot be satisfied out of the
12 principal's estate or other appropriate fund.

7. Some of these provisions, including Section 7100, may be misleading when read in isolation. The decedent's estate is primarily liable, and some courts have declined to apply the literal statutory rule. See *In re Kemmerrer*, 114 Cal. App. 2d 810, 251 P.2d 345 (1952); *Benbough Mortuary v. Barney*, 196 Cal. App. 2d Supp. 861, 16 Cal. Rptr. 811 (1961). Section 7100(d) provides that liability for the reasonable cost of final disposition "devolves jointly and severally upon all kin of the decedent in the same degree of kindred and upon the estate of the decedent." If the decedent has given instructions for disposition, the cost is payable from designated funds or the decedent's estate, as provided in Section 7100.1. See also Prob. Code §§ 11421(a) (funeral expenses as priority claim on decedent's estate), 11446 (funeral expenses charged against estate, not community share of surviving spouse, notwithstanding any other statute or whether spouse or "any other person is also liable for the expenses").

PROPOSED LAW

1 ☞ **Staff Note.** If approved, this material will be integrated into the tentative recommendation
2 attached to Memorandum 2000-86.

3 **Health & Safety Code § 7100 (amended). Right to control disposition of remains**

4 SEC. _____. Section 7100 of the Health and Safety Code is amended to read:

5 7100. (a) The right to control the disposition of the remains of a deceased
6 person, the location and conditions of interment, and arrangements for funeral
7 goods and services to be provided, unless other directions have been given by the
8 decedent pursuant to Section 7100.1, vests in, and the duty of disposition and the
9 liability for the reasonable cost of disposition of the remains devolves upon, the
10 following in the order named:

11 (1) An agent under a power of attorney for health care governed by Division 4.7
12 (commencing with Section 4600) of the Probate Code. Unless the agent
13 specifically agrees, the agent does not have a duty or liability under this section. If
14 the agent assumes the duty under this section, the agent is liable only for the
15 reasonable costs incurred as a result of the agent's decisions, to the extent that the
16 decedent's estate or other appropriate fund is insufficient.

17 (2) The surviving spouse.

18 (3) The sole surviving adult child of the decedent, or if there is more than one
19 adult child of the decedent, one-half or more of the surviving adult children.
20 However, less than one-half of the surviving adult children shall be vested with the
21 rights and duties of this section if they have used reasonable efforts to notify all
22 other surviving adult children of their instructions and are not aware of any
23 opposition to those instructions on the part of more than one-half of all surviving
24 adult children. For purposes of this section, "adult child" means a competent
25 natural or adopted child of the decedent who has attained 18 years of age.

26 (4) The surviving parent or parents of the decedent. If one of the surviving
27 parents is absent, the remaining parent shall be vested with the rights and duties of
28 this section after reasonable efforts have been unsuccessful in locating the absent
29 surviving parent.

30 (5) The surviving competent adult person or persons respectively in the next
31 degrees of kindred. If there is more than one surviving person of the same degree
32 of kindred, the majority of those persons. Less than the majority of surviving
33 persons of the same degree of kindred shall be vested with the rights and duties of
34 this section if those persons have used reasonable efforts to notify all other
35 surviving persons of the same degree of kindred of their instructions and are not
36 aware of any opposition to those instructions on the part of one-half or more of all
37 surviving persons of the same degree of kindred.

38 (6) The public administrator when the deceased has sufficient assets.

1 (b)(1) If any person to whom the right of control has vested pursuant to
2 subdivision (a) has been charged with first or second degree murder or voluntary
3 manslaughter in connection with the decedent's death and those charges are
4 known to the funeral director or cemetery authority, the right of control is
5 relinquished and passed on to the next of kin in accordance with subdivision (a).

6 (2) If the charges against the person are dropped, or if the person is acquitted of
7 the charges, the right of control is returned to the person.

8 (3) Notwithstanding this subdivision, no person who has been charged with first
9 or second degree murder or voluntary manslaughter in connection with the
10 decedent's death to whom the right of control has not been returned pursuant to
11 paragraph (2) shall have any right to control disposition pursuant to subdivision (a)
12 which shall be applied, to the extent the funeral director or cemetery authority
13 know about the charges, as if that person did not exist.

14 (c) A funeral director or cemetery authority shall have complete authority to
15 control the disposition of the remains, and to proceed under this chapter to recover
16 usual and customary charges for the disposition, when both of the following apply:

17 (1) Either of the following applies:

18 (A) The funeral director or cemetery authority has knowledge that none of the
19 persons described in paragraphs (1) to (6), inclusive, of subdivision (a) exists.

20 (B) None of the persons described in paragraphs (1) to (6), inclusive, of
21 subdivision (a) can be found after reasonable inquiry, or contacted by reasonable
22 means.

23 (2) The public administrator fails to assume responsibility for disposition of the
24 remains within seven days after having been given written notice of the facts.
25 Written notice may be delivered by hand, U.S. mail, facsimile transmission, or
26 telegraph.

27 (d) The liability for the reasonable cost of final disposition devolves jointly and
28 severally upon all kin of the decedent in the same degree of kindred and upon the
29 estate of the decedent. However, if a person accepts the gift of an entire body
30 under subdivision (a) of Section 7155.5, that person, subject to the terms of the
31 gift, shall be liable for the reasonable cost of final disposition of the decedent.

32 (e) This section shall be administered and construed to the end that the expressed
33 instructions of the decedent or the person entitled to control the disposition shall
34 be faithfully and promptly performed.

35 (f) A funeral director or cemetery authority shall not be liable to any person or
36 persons for carrying out the instructions of the decedent or the person entitled to
37 control the disposition.

38 (g) For purposes of paragraph (5) of subdivision (a), "competent adult" means an
39 adult who has not been declared incompetent by a court of law or who has been
40 declared competent by a court of law following a declaration of incompetence.

41 **Comment.** Subdivision (a)(1) of Section 7100 is amended to make clear that an agent under a
42 power of attorney for health care is not automatically liable for the costs of disposition of
43 remains. Nor does the agent have a duty greater than that agreed to under the Health Care

- 1 Decisions Law, Probate Code Section 4600 *et seq.* Even if the agent assumes the duty to make
- 2 decisions under this section, the agent is not liable unless the estate or other fund is insufficient.
- 3 See Section 7100.1; see also Prob. Code §§ 11421 (payment of funeral expenses from estate),
- 4 11446 (funeral expenses from estate, not community property).