

## First Supplement to Memorandum 2001-25

### Health Care Decisions Law: Miscellaneous Revisions (Duration of Surrogate Designation)

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This supplement forwards the complete updated Recommendation on *Health Care Decisions Law: Miscellaneous Revisions*, which has been revised to include the new material discussed in Memorandum 2001-25.

Review of the draft attached to the main memorandum suggests the need for additional revisions. Language that appeared in subdivision (b) should be moved to subdivision (d), which clarifies the relation between the surrogate and the agent. Subdivision (b) in the earlier draft was potentially misleading where it combined the duration of the surrogacy with the clause making clear that the surrogate prevails over the agent during the effective period. The revised language reads as follows (and is included in the attached preprint recommendation):

4711. (a) A patient may designate an adult as a surrogate to make health care decisions by personally informing the supervising health care provider. ~~An oral~~ The designation of a surrogate shall be promptly recorded in the patient's health care record and.

(b) A surrogate designation under subdivision (a) is effective only during the course of treatment or illness or during the stay in the health care institution when the surrogate designation is made, or for 30 days, whichever period is shorter.

(c) The expiration of a surrogate designation under subdivision (b) does not affect any role the former surrogate may have in making health care decisions for the patient under any other law or standards of practice.

(d) If the patient has designated an agent under a power of attorney for health care, the surrogate designated under subdivision (a) has priority over the agent for the period provided in subdivision (b), but designation of a surrogate does not revoke the designation of an agent unless the patient communicates the intention to revoke in compliance with subdivision (a) of Section 4695.

Respectfully submitted,

Stan Ulrich  
Assistant Executive Secretary

STATE OF CALIFORNIA

# CALIFORNIA LAW REVISION COMMISSION

*PREPRINT* RECOMMENDATION

Health Care Decisions Law:  
Miscellaneous Revisions

February 2001

California Law Revision Commission  
4000 Middlefield Road, Room D-1  
Palo Alto, CA 94303-4739

#### NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative.

Cite this report as *Health Care Decisions Law: Miscellaneous Revisions*, 30 Cal. L. Revision Comm'n Reports 621 (2000). This is part of publication #209.

STATE OF CALIFORNIA

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CALIFORNIA LAW REVISION COMMISSION

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February 1, 2001

To: The Honorable Gray Davis  
*Governor of California*, and  
The Legislature of California

This recommendation proposes a number of minor substantive and technical revisions as a follow-up to the Health Care Decisions Law enacted in 1999 on recommendation of the Law Revision Commission:

- (1) The definition of “capacity” would be amended to apply a contract standard to situations involving execution of advance directives.
- (2) The patient’s designation of a surrogate health care decisionmaker would not revoke a prior designation of an agent in a power of attorney for health care unless the patient expresses the intention to remove the agent.
- (3) The duration of an informal surrogate designation would be limited to 30 days maximum, but expiration of the designation would not affect health care decisionmaking under other law or standards of practice.
- (4) The health care agent would not be automatically liable for the costs of disposition of the principal’s remains.
- (5) The grounds for petitioning the court would be amended to include a petition to compel a third person to honor the authority of a health care agent or surrogate.
- (6) The rules limiting who can act as agent would be amended to make clear that a supervising health care provider can never act as agent for his or her patient, even if related to the patient by blood, marriage,

adoption, or registered domestic partnership, or where they are coworkers.

This recommendation is submitted pursuant to Resolution Chapter 81 of the Statutes of 1999.

Respectfully submitted,

David Huebner  
*Chairperson*

## HEALTH CARE DECISIONS LAW: MISCELLANEOUS REVISIONS

The Health Care Decisions Law was enacted in 1999 on recommendation of the Law Revision Commission.<sup>1</sup> As health care institutions and professional groups have begun to study and implement the new law, the Commission has learned of several problems that need further attention. This recommendation proposes a number of minor substantive and technical revisions as a follow-up to the 1999 legislation.

### **Definition of Capacity**

Capacity is a fluid concept. Its meaning varies depending on the circumstances and the nature of the action an individual wishes to take. In the Power of Attorney Law, which included the durable power of attorney for health care, the Commission did not attempt to flesh out the meaning of capacity, but adopted the general rule that a “natural person having the capacity to contract may execute a power of attorney.”<sup>2</sup>

In the new Health Care Decisions Law, the Commission included a definition of capacity based on Health and Safety Code Section 1418.8 and the Uniform Health-Care Decisions Law of 1993. The new definition was crafted to apply in the health care decisionmaking context: “‘Capacity’ means a

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1. 1999 Cal. Stat. ch. 658 (AB 891, Alquist) (operative July 1, 2000). For the Commission’s original recommendation, see *Health Care Decisions for Adults Without Decisionmaking Capacity*, 29 Cal. L. Revision Comm’n Reports 1 (1999). The law as enacted, with revised Comments, is included in *2000 Health Care Decisions Law and Revised Power of Attorney Law*, 30 Cal. L. Revision Comm’n Reports 1 (2000).

2. Prob. Code § 4120 & Comment. This is consistent with the general agency rule in Civil Code Section 2296. See also Civ. Code § 1556 (“All persons are capable of contracting, except minors, persons of unsound mind, and persons deprived of civil rights.”).

Unless otherwise indicated, all further statutory references are to the Probate Code.

patient's ability to understand the nature and consequences of proposed health care, including its significant benefits, risks, and alternatives, and to make and communicate a health care decision."<sup>3</sup>

A technical problem has been noted in the application of this definition where there is no "proposed health care" at the time the individual's capacity is relevant. This would commonly be the situation where a person is filling out an advance health care directive to appoint a health care agent or to give future health care instructions.<sup>4</sup> The "capacity" definition can still work in these cases, because the other prong of the test would apply — the "ability to make and communicate a health care decision."<sup>5</sup> It would be better, of course, if the statute were not phrased in a way that might cause confusion or mislead.

In effect, both the health care decisionmaking standard and the instrument execution standard are aspects of the same rule: the person must have the ability to understand the nature and consequences of the decision or action and be able to communicate it. Accordingly, the Commission recommends generalizing and rewording the capacity definition to avoid the technical problem where there is no "proposed" health care.<sup>6</sup> In effect, this would return the law concerning capacity to execute a power of attorney for health care to the rule in effect under the Power of Attorney Law.<sup>7</sup> This standard

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3. Section 4609.

4. See Sections 4605 ("advance health care directive" defined), 4607 ("agent" defined), 4623 ("individual health care instruction" defined), 4629 ("power of attorney for health care" defined), 4670 *et seq.* (provisions governing advance health care directives).

5. Definitions in the Health Care Decisions Law govern its construction "unless the context otherwise requires." See Section 4603.

6. See proposed amendment to Section 4609 *infra*.

7. See, e.g., *Hellman Commercial Trust & Sav. Bank v. Alden*, 206 Cal. 592, 603, 275 P. 974 (1929) (discussing "nature, purposes, and effect" of the

would also be applied to selecting or disqualifying a surrogate.<sup>8</sup>

The helpful language in the existing section concerning the person's ability to understand the significant benefits, risks, and alternatives of proposed health care would be retained as an application of the general capacity standard in the context of making health care decisions.

### **Patient's Designation of Surrogate**

The Health Care Decisions Law includes provisions recognizing the patient's right to designate a "surrogate" by personally informing the supervising health care provider, orally or in writing.<sup>9</sup> While designation of an agent under a power of attorney for health care is preferred, recognition of the clinical reality of surrogate designations affirms the fundamental principle of patient autonomy. Due to concerns about the possibility of giving effect to obsolete oral statements in the patient's record, the effectiveness of oral surrogate designations under Section 4711 was limited to the "course of treatment or illness or during the stay in the health care institution when the designation is made."<sup>10</sup> A surrogate designation communicated to the supervising health care provider in writing would not be subject to this limitation.

Two concerns have arisen in applying Section 4711: (1) The default rule that a surrogate designation, whether oral or written, would act as a revocation of the appointment of an agent

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action); *Burgess v. Security-First Nat'l Bank*, 44 Cal. App. 2d 808, 816, 113 P.2d 298 (1941). The specialized rules for determining capacity under the Due Process in Competence Determinations Act (Sections 810-813) are applicable in judicial determination. See Sections 811(e), 813.

8. See Section 4711. A "surrogate" is an adult, other than an agent or conservator, authorized to make health care decisions for the patient. See Section 4643.

9. Sections 4711-4715 & Comments.

10. See second sentence of Section 4711 & Comment.

under a power of attorney for health care<sup>11</sup> is too harsh and may actually defeat a patient's intent. (2) Particularly in the nursing home setting, the restriction on the duration of oral surrogate designations to the "stay in the health care institution" is not a meaningful limitation. Further analysis also suggests that the "course of treatment or illness" rule would not provide any real limit where the patient has diabetes or some other chronic condition.

The Commission recommends amending Section 4711 to address these problems and provide additional statutory guidance on surrogate designations:<sup>12</sup>

*(1) Relation of Surrogate Designation to Health Care Agent*

The presumption that a surrogate designation revokes the appointment of a health care agent should be reversed. Designating a surrogate should act as a revocation of the agency only if the patient expresses that intention in compliance with the general rule governing powers of attorney for health care.<sup>13</sup> A patient may want the surrogate to act in place of an agent named in a power of attorney for any number of reasons, without intending to permanently replace the agent. The agent may be unavailable because he or she is on a vacation or otherwise unavailable when the patient is hospitalized. Or

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11. The statute does not provide explicitly that the surrogate designation revokes the agent's authority, but the Uniform Health-Care Decisions Act comment incorporated as background in the Commission's Comment to Section 4711 states that an "oral designation of a surrogate made by a patient directly to the supervising health-care provider revokes a previous designation of an agent." The uniform act comment does not suggest the effect of a written surrogate designation, but there is no reason to think it would have a less significant effect than an oral communication to the supervising health care provider. See also Section 2(b) (provisions drawn from uniform acts to be construed to make law uniform in enacting states).

12. See proposed amendment of Section 4711 *infra*. In addition, the proposed amendments eliminate any difference in treatment between oral and written communications to the supervising health care provider.

13. See Section 4695(a).

the named agent may be experiencing health or personal problems that impel the patient to seek someone else as a temporary surrogate.

*(2) Duration of Surrogate Designation*

A surrogate designation should be effective for no more than 30 days.<sup>14</sup> This rule preserves the authority of the formally designated agent under a power of attorney for health care, but recognizes patient autonomy and the potential need for a surrogate where the agent can't act. It also bolsters the power of attorney for health care by making clear that informal surrogate designations, while entitled to respect as expressions of the patient's wishes, are not an alternative to complying with statutory formalities. A patient may not have time to execute a power of attorney for health care, so it is appropriate to recognize the need for surrogate designations. But after a sufficient time has passed, such as 30 days, the person should consider executing a formal advance directive and not rely on statements made in the hospital and the recording of those statements in the person's medical record.

*(3) Effect of Surrogacy Expiration*

There is a danger that terminating the authority of statutory surrogates under Section 4711 might be read too broadly. Consequently, the proposed law makes clear that the duration limit is intended to affect only the special statutory surrogate rules, and not the ability of a designated surrogate to make or participate in making health care decisions for the patient under other principles.<sup>15</sup>

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14. The designation may terminate sooner under the existing standard providing that surrogate designations are effective "during the course of treatment or illness or during the stay in the health care institution." Section 4711.

15. *Cf.* Section 4654 (compliance with generally accepted health care standards). See proposed Section 4711(d) *infra*.

### **Agent's Liability for Disposition of Remains**

The Health and Safety Code sets up a detailed scheme defining rights, duties, and liabilities of surviving family members and other persons, including agents and public guardians, pertaining to disposition of remains.<sup>16</sup> An agent under a power of attorney for health care has priority over all others to control the disposition of a decedent's remains.<sup>17</sup> The statutory scheme also includes provisions making it a misdemeanor to fail to perform the statutory duty and providing liability for treble damages.<sup>18</sup>

The top priority for health care agents was added to the law by an amendment of Health and Safety Code Section 7100 in 1998.<sup>19</sup> The 1998 legislation focused on the problem of a person charged with the decedent's murder having priority in disposition of the remains.<sup>20</sup> The legislative committee analyses do not discuss or recognize the potential effect of the amendment on the liability of attorneys-in-fact, nor is the purpose of adding attorneys-in-fact explained.

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

17. 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. In 1999, this section was amended to conform to the terminology of the Health Care Decisions Law. 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.

18. 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.

19. 1998 Cal. Stat. ch. 253, § 1 (SB 1360).

20. 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.

The Commission has received reports that some potential agents, when informed of the apparent liability under the Health and Safety Code, are reluctant to agree to act as agents, and persons preparing powers of attorney for health care are worried about imposing such a liability on their relatives or friends whom they want to name as agents.<sup>21</sup> Clarifying the relation between the Health and Safety Code provisions and the Probate Code, and resolving internal inconsistencies in the Health and Safety Code provisions, are outside the scope of this recommendation.<sup>22</sup> But it is important to insulate agents under powers of attorney for health care from this apparently unintended imposition of liability, which can act to defeat the fundamental purpose of the Health Care Decisions Law of effectuating patient autonomy through the use of advance health care directives.

Accordingly, the Commission recommends that Health and Safety Code Section 7100 be amended to make clear that, unless they agree otherwise, agents do not have an enforceable duty to direct the disposition of the principal's remains and are not liable under that section for failure or refusal to act. Furthermore, in a case where an agent does exercise the

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21. 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).

22. 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").

authority to direct disposition of remains, the agent should be liable only for reasonable costs that cannot be satisfied out of the principal's estate or other appropriate fund. The proposed liability limitation would apply only to the person when acting as agent and not in situations where the statute imposes liability based on some other relationship, such as a spouse, child, or parent.

### **Scope of Petition**

The Health Care Decisions Law, like its predecessor, provides an expeditious procedure for obtaining judicial review in appropriate situations. The grounds for a petition are broad, but not unlimited, and include determining (1) whether the patient has capacity to make health care decisions, (2) whether an advance health care directive is in effect, and (3) whether the acts or proposed acts of an agent or surrogate are consistent with the patient's desires as expressed in an advance health care directive or otherwise made known to the court or, where the patient's desires are unknown or unclear, whether the acts or proposed acts of the agent or surrogate are in the patient's best interest.

The Commission proposes to permit a petition requiring third persons to honor the agent's authority under the power of attorney for health care.<sup>23</sup> This would include health care decisions,<sup>24</sup> as well as decisions concerning disposition under the Uniform Anatomical Gift Act, authorizing an autopsy, and directing disposition of remains,<sup>25</sup> or making personal care decisions.<sup>26</sup> The petition should also be available to compel a third person to honor the authority of a surrogate, i.e., a

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23. See proposed amendment to Section 4766 *infra*.

24. See Section 4615 ("health care" defined).

25. See Section 4683 (scope of agent's authority). See also Sections 4678 (right to health care information), 4690 (agent's right of consultation and to receive information).

26. See Section 4671(b).

person (other than an agent or conservator) with the authority to make health care decisions for an adult under the Health Care Decisions Law.

### **Supervising Health Care Provider as Agent**

The Health Care Decisions Law carried forward the limitations on who can be designated as a health care agent and the exceptions to the limitations, which were enacted in the 1980s.<sup>27</sup> Section 4659 now provides that the patient's supervising health care provider or an employee of the health care institution cannot act as an agent or surrogate health care decisionmaker. However, subdivision (b) of Section 4659 provides an exception to this limitation, which permits employees who are related to the patient by blood, marriage, or adoption, or who are employed by the same health care institution, to act as the relative's or coworker's health care agent. Thus, if a patient is employed by the same institution as his or her doctor, or is related to the doctor and the doctor is an employee, the exception to the statutory prohibition would literally seem to apply.

It does not appear that this statute ever intended to permit the treating physician (included within the term "supervising health care provider") to serve as the patient's health care agent, but this construction is possible under a literal reading of the statute in circumstances where the physician falls into the class of employees and the patient is a relative or coworker.

The proposed amendment makes clear that a supervising health care provider cannot make decisions as a health care agent for his or her patient in any circumstances.<sup>28</sup> Under this rule, if a doctor wants to act as the agent for his or her spouse,

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27. Section 4659 restates former Section 4702 (enacted as part of the Power of Attorney Law, 1994 Cal. Stat. ch. § 16), which continued former Civil Code Section 2432.5 (enacted by 1984 Cal. Stat. ch. 312, § 4).

28. See proposed amendment to Section 4659 *infra*.

for example, the doctor would need to decline to act as the supervising health care provider.

The statute should also be amended to add registered domestic partners<sup>29</sup> to the list of excepted classes in existing law, which currently includes persons related to the patient by blood, marriage, or adoption.

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29. For provisions governing domestic partner registration, see Fam. Code § 297 *et seq.*

## PROPOSED LEGISLATION

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

SECTION 1. Section 7100 of the Health and Safety Code is amended to read:

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

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

(2) The competent surviving spouse.

(3) The sole surviving competent adult child of the decedent, or if there is more than one competent adult child of the decedent, the majority of the surviving competent adult children. However, less than one-half of the surviving adult children shall be vested with the rights and duties of this section if they have used reasonable efforts to notify all other surviving competent adult children of their instructions and are not aware of any opposition to those instructions on the part of more than one-half of all surviving competent adult children.

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

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

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

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

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

(3) Notwithstanding this subdivision, no person who has been charged with first or second degree murder or voluntary manslaughter in connection with the decedent's death to whom the right of control has not been returned pursuant to

paragraph (2) shall have any right to control disposition pursuant to subdivision (a) which shall be applied, to the extent the funeral director or cemetery authority know about the charges, as if that person did not exist.

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

(1) Either of the following applies:

(A) The funeral director or cemetery authority has knowledge that none of the persons described in paragraphs (1) to (5), inclusive, of subdivision (a) exists.

(B) None of the persons described in paragraphs (1) to (5), inclusive, of subdivision (a) can be found after reasonable inquiry, or contacted by reasonable means.

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

(d) The 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. However, if a person accepts the gift of an entire body under subdivision (a) of Section 7155.5, that person, subject to the terms of the gift, shall be liable for the reasonable cost of final disposition of the decedent.

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

(f) A funeral director or cemetery authority shall not be liable to any person or persons for carrying out the

instructions of the decedent or the person entitled to control the disposition.

(g) For purposes of this section, “adult” means an individual who has attained 18 years of age, “child” means a natural or adopted child of the decedent, and “competent” means an individual who has not been declared incompetent by a court of law or who has been declared competent by a court of law following a declaration of incompetence.

**Comment.** Subdivision (a)(1) of Section 7100 is amended to make clear that an agent under a power of attorney for health care is not automatically liable for the costs of disposition of remains. Nor does the agent have a duty greater than that agreed to under the Health Care Decisions Law, Probate Code Section 4600 *et seq.* Even if the agent assumes the duty to make decisions under this section, the agent is not liable unless the estate or other fund is insufficient. See Section 7100.1; see also Prob. Code §§ 11421 (payment of funeral expenses from estate), 11446 (funeral expenses from estate, not community property). The limitation on liability in subdivision (a)(1) applies only to the person when acting as agent and not where the statute imposes liability based on some other relationship, such as a spouse under subdivision (a)(2) or child under subdivision (a)(3).

**Prob. Code § 4123 (technical amendment). Permissible purposes of general power of attorney**

SEC. 2. Section 4123 of the Probate Code is amended to read:

4123. (a) In a power of attorney *under this division*, a principal may grant authority to an attorney-in-fact to act on the principal’s behalf with respect to all lawful subjects and purposes or with respect to one or more express subjects or purposes. The attorney-in-fact may be granted authority with regard to the principal’s property, personal care, ~~health care~~, or any other matter.

(b) With regard to property matters, a power of attorney may grant authority to make decisions concerning all or part of the principal’s real and personal property, whether owned by the principal at the time of the execution of the power of

attorney or thereafter acquired or whether located in this state or elsewhere, without the need for a description of each item or parcel of property.

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

**Comment.** Subdivision (a) of Section 4123 is amended to recognize the limitations on the scope of this division. Powers of attorney for health care are governed by the Health Care Decisions Law, Division 4.7 (commencing with Section 4600). This division — the Power of Attorney Law, Division 4.5 (commencing with Section 4000) — does not apply to powers of attorney for health care. See Section 4050 (types of powers of attorney governed by this division).

**Prob. Code § 4609 (amended). “Capacity”**

SEC. 3. Section 4609 of the Probate Code is amended to read:

4609. “Capacity” means a ~~patient’s~~ *person’s* ability to understand the nature and consequences of *a decision and to make and communicate a decision*, and includes, in the case of proposed health care, ~~including the ability to understand its significant benefits, risks, and alternatives, and to make and communicate a health care decision.~~

**Comment.** Section 4609 is amended to generalize the capacity definition to avoid the implication that the definition would only apply in situations where there is proposed health care. Thus, the definition applies to an individual’s capacity to make or revoke an advance health care directive, as well as to the making of a health care decision. In the latter case, the final clause provides additional guidance on the application of the capacity standard.

For provisions invoking capacity definition, see Sections 4651 (authority of person having capacity not affected), 4658 (determination of capacity and other medical conditions), 4670 (authority to give individual health care instruction), 4671 (authority to execute power of attorney for health care), 4682 (when agent’s authority effective), 4683

(scope of agent's authority), 4695 (revocation of power of attorney for health care), 4715 (disqualification of surrogate).

See also Sections 4657 (presumption of capacity), 4732 (duty of primary physician to record relevant information), 4733 (obligations of health care provider), 4766 (petition as to durable power of attorney for health care).

**Prob. Code § 4659 (technical amendment). Limitations on who may act as agent or surrogate**

SEC. 4. Section 4659 of the Probate Code is amended to read:

4659. (a) Except as provided in subdivision (b), none of the following persons may make health care decisions as an agent under a power of attorney for health care or a surrogate under this division:

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

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

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

(1) An employee, *other than the supervising health care provider*, who is related to the patient by blood, marriage, or adoption, *or is a registered domestic partner of the patient*.

(2) An employee, *other than the supervising health care provider*, who is employed by the same health care institution, community care facility, or residential care facility for the elderly as the patient.

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

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

(2) The conservatee is represented by legal counsel.

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

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

**Comment.** Section 4659 is amended to clarify an ambiguity that existed in prior law. See former Section 4702. As amended, the exception in subdivision (b) does not apply to supervising health care providers. Consequently, the bar on supervising health care providers acting as agents or surrogates for their patients, as provided in subdivision (a), is absolute. If a supervising health care provider is the spouse of a patient, he or she would need to cease acting as the patient’s primary physician or other supervising health care provider in order to undertake responsibilities as an agent under a power of attorney for health care or as a surrogate health care decisionmaker. The extension of the relationship exception in subdivision (b)(1) to include registered domestic partners is new. See Fam. Code § 297 *et seq.* (domestic partner registration).

**Prob. Code § 4711 (amended). Patient’s designation of surrogate**

SEC. 5. Section 4711 of the Probate Code is amended to read:

4711. (a) A patient may designate an adult as a surrogate to make health care decisions by personally informing the supervising health care provider. ~~An oral~~ *The* designation of a surrogate shall be promptly recorded in the patient’s health care record ~~and~~.

(b) *A surrogate designation under subdivision (a) is effective only during the course of treatment or illness or during the stay in the health care institution when the*

*surrogate designation is made, or for 30 days, whichever period is shorter.*

*(c) The expiration of a surrogate designation under subdivision (b) does not affect any role the former surrogate may have in making health care decisions for the patient under any other law or standards of practice.*

*(d) If the patient has designated an agent under a power of attorney for health care, the surrogate designated under subdivision (a) has priority over the agent for the period provided in subdivision (b), but designation of a surrogate does not revoke the designation of an agent unless the patient communicates the intention to revoke in compliance with subdivision (a) of Section 4695.*

**Comment.** Section 4711 is amended to clarify the relation between a surrogate designation under this section and a formal agent designation in a power of attorney for health care under Section 4671 and related provisions, and to provide additional qualifications on surrogacy designations. Both the patient and the surrogate must be adults. See Sections 4625 (“patient” defined), 4643 (“surrogate” defined). “Adult” includes an emancipated minor. See Fam. Code § 7002 (emancipation). “Personally informing,” as used in this section, includes both oral and written communications.

Consistent with the statutory purpose of effectuating patient intent, subdivision (a) recognizes the patient’s ability to name a person to act as surrogate health care decisionmaker. As amended, this section no longer distinguishes between surrogates named orally and surrogates named in a written communication to the supervising health care provider. Whether it is communicated to the supervising health care provider orally or in writing, the surrogate designation must be promptly recorded in the patient’s health care record. See also Section 4731 (supervising health care provider’s duty to record relevant information).

Subdivision (b) provides a new maximum limit of 30 days on the duration of surrogate designations under this section. If the patient has an agent under a power of attorney for health care, the agent’s authority is suspended during the time the surrogacy is in effect. See subdivision (d). If the patient names an agent in a power of attorney for health care executed after making a surrogate designation, the agent would have priority over the surrogate as provided in Section 4685 (agent’s priority).

Subdivision (c) makes clear that the limits on the duration of a surrogacy designation affect only the special surrogate rules in this

section, and not the ability of the person who had been designated as surrogate to make or participate in making health care decisions for the patient under other principles. *Cf.* Section 4654 (compliance with generally accepted health care standards). After expiration of the period specified in subdivision (b), this section does not affect who may make health care decisions for adults lacking capacity.

Subdivision (d) makes clear that designation of a surrogate under this section suspends, but does not revoke, the appointment of an agent under a power of attorney for health care, unless the patient expresses the intent to revoke the agent's appointment, under the terms of the general rule in Section 4695(a). Subdivision (d) reverses the implication in background material that a surrogate designation made directly to the supervising health care provider revoked a previous designation of an agent. See Background from Uniform Act in Comment to Section 4711 as enacted, 1999 Cal. Stat. ch. 658, § 39 (operative July 1, 2000).

See also Sections 4617 ("health care decision" defined), 4619 ("health care institution" defined), 4635 ("reasonably available" defined), 4639 ("skilled nursing facility" defined), 4641 ("supervising health care provider" defined).

### **Heading of Chapter 3 (commencing with Section 4765) (technical amendment)**

SEC. 6. The heading of Chapter 3 (commencing with Section 4765) of Part 3 of Division 4.7 of the Probate Code is amended to read:

### CHAPTER 3. PETITIONS, AND ORDERS, APPEALS

**Comment.** The chapter heading is amended to accurately reflect the contents of the chapter. Appeals under the Probate Code are governed generally by Part 3 (commencing with Section 1300) of Division 3. See Section 1302.5 (grounds for appeal under Health Care Decisions Law).

### **Prob. Code § 4766 (amended). Purposes of petition**

SEC. 7. Section 4766 of the Probate Code is amended to read:

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

(a) Determining whether or not the patient has capacity to make health care decisions.

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

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

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

(1) The agent or surrogate has violated, has failed to perform, or is unfit to perform, the duty under an advance health care directive to act consistent with the patient's desires or, where the patient's desires are unknown or unclear, is acting (by action or inaction) in a manner that is clearly contrary to the patient's best interest.

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

*(e) Compelling a third person to honor individual health care instructions or the authority of an agent or surrogate.*

**Comment.** Section 4766 is amended to add the grounds for a petition specified in subdivision (e)/ This subdivision is consistent with the provision applicable to compel compliance with powers of attorney for property matters in Section 4541(f). The remedy provided by this subdivision would be appropriate where the third person has a duty to honor the authority of an agent or surrogate. See, e.g., Sections 4685 (agent's priority), 4733 (duty of health care provider or institution to comply with health care instructions and decisions).

The extent to which a third person may be compelled to comply with decisions of an agent or surrogate is subject to other limitations in this

division. See, e.g., Sections 4652 (excluded acts), 4653 (mercy killing, assisted suicide, euthanasia not approved), 4654 (compliance with generally accepted health care standards), 4734 (right to decline for reasons of conscience or institutional policy), 4735 (right to decline to provide ineffective care).

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

See also Sections 4605 (“advance health care directive” defined), 4607 (“agent” defined), 4609 (“capacity” defined), 4613 (“conservator” defined), 4623 (“individual health care instructions” defined), 4629 (“power of attorney for health care” defined), 4633 (“principal” defined), 4643 (“surrogate” defined).

### **Prob. Code § 4769 (amended). Notice of hearing**

SEC. 8. Section 4769 of the Probate Code is amended to read:

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

- (1) The agent or surrogate, if not the petitioner.
- (2) The patient, if not the petitioner.

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

**Comment.** Subdivision (b) of Section 4769 is amended for consistency with Section 4766(e) (petition to compel third person to honor health care instructions or authority of agent or surrogate).

See also Sections 4607 (“agent” defined), 4623 (“individual health care instructions” defined), 4625 (“patient” defined), 4633 (“principal” defined), 4643 (“surrogate” defined).

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