

# **CALIFORNIA LAW REVISION COMMISSION**

## **TENTATIVE RECOMMENDATION**

### **Health Care Decisions for Incapacitated Adults**

**June 1998**

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

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

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

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## SUMMARY OF TENTATIVE RECOMMENDATION

This tentative recommendation proposes a new Health Care Decisions Law to consolidate the Natural Death Act and the statutes governing the durable power of attorney for health care, and provide comprehensive rules relating to health care decisionmaking for incapacitated adults. The proposed law, drawing heavily from the Uniform Health-Care Decisions Act (1993), includes new rules governing individual health care instructions, and provides a new optional statutory form of an advance health care directive.

The proposed law would add procedures governing surrogate health care decisionmakers ("family consent") where an individual has not appointed an agent and no conservator of the person has been appointed, and procedures for making health care decisions for patients who do not have any surrogate willing to serve.

Conforming changes in the procedure for obtaining court authorization for medical treatment would make clear that courts in proper cases have the same authority as other surrogates to make health care decisions, including withholding or withdrawal of life-sustaining treatment. Similarly, the statute governing decisionmaking by conservators for patients who have been adjudicated to lack the capacity to make health care decisions are conformed to the standards governing other health care surrogates.

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

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## HEALTH CARE DECISIONS FOR INCAPACITATED ADULTS

1 California has been a pioneer in the area of health care decisionmaking for inca-  
2 pacitated persons, with the enactment of the 1976 Natural Death Act<sup>1</sup> and the 1983  
3 Durable Power of Attorney for Health Care.<sup>2</sup> Legislation in other states over the  
4 last 15 years, enactment of the federal Patient Self-Determination Act in 1990,<sup>3</sup>  
5 and promulgation of a new Uniform Health-Care Decisions Act in 1993,<sup>4</sup> suggest  
6 the need to review existing California law and consider revising and supplement-  
7 ing it.

8 California law does not adequately address several important areas:

9 (1) Existing law does not provide a convenient mechanism for making health  
10 care treatment wishes known and effective, separate from the procedure for  
11 appointing an agent.

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

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

17 (4) Statutes governing court-authorized medical treatment for patients without  
18 conservators is unduly limited.

19 The proposed Health Care Decisions Law provides procedures and standards for  
20 making decisions in these situations, and adopts consistent rules governing health  
21 care decisionmaking by surrogates, whether they are family members, agents,  
22 public or private conservators, surrogate committees, or courts. The proposed law  
23 makes many revisions to promote the use and recognition of advance directives, to  
24 improve effectuation of patients' wishes once they become incapable of making  
25 decisions for themselves, to simplify the statutory form and make it easier to use  
26 and understand, and to modernize terminology. However, the scope of the pro-  
27 posed law is limited: it governs only health care decisions to be made for adults at  
28 a time when they are incapable of making their own decisions and provides mech-  
29 anisms for directing their health care in anticipation of a time when they may

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

2. 1983 Cal. Stat. ch. 1204, enacted on Commission recommendation. See *infra* note 8.

3. Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, §§ 4206, 4751, 104 Stat. 1388, 1388-115 to 1388-117, 1388-204 to 1388-206. See esp. 42 U.S.C.A. §§ 1395cc(a), 1396a(w)(1) (Westlaw 1998).

4. 9 (Pt. 1) U.L.A. 285 (West Supp. 1998) [hereinafter UHCDA].



1 become incapacitated. It does not govern health care decisions for minors or adults  
2 having capacity.

### 3 NEED FOR REVISED LAW

4 In a 1991 article entitled *Time for a New Law on Health Care Advance*  
5 *Directives*, Professor George Alexander gives the following overview:<sup>5</sup>

6 During the last decade, states have enacted three different kinds of documents to  
7 deal with health care of incompetent patients. The legislation's main impetus and  
8 central focus have been to provide a procedure to approve life support termination  
9 in appropriate cases, although it also addresses other health care concerns. The  
10 earliest of the statutes was a natural death act, which authorizes a directive, popu-  
11 larly called a living will, to physicians. The second was a general durable power  
12 of attorney, sometimes in the form of a specially crafted health care durable power  
13 of attorney, which essentially empowers an appointed agent to make appropriate  
14 decisions for an incompetent patient. The agent is bound by directions contained  
15 in the appointing power. Finally, some states have enacted family consent laws  
16 empowering others, typically family, to decide health care matters absent a direc-  
17 tive or power of attorney to guide them. At the end of 1990, Congress gave these  
18 laws new importance by mandating their observance.

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

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

### 26 BACKGROUND AND OVERVIEW

27 The right of a competent adult to direct or refuse medical treatment is a constitu-  
28 tionally protected right. This "fundamental liberty interest" is inherent in the  
29 common law and protected by federal and state constitutional privacy guarantees.<sup>6</sup>

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

6. See generally *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261 (1990); *Cobbs v. Grant*, 8 Cal. 3d 229, 242, 502 P.2d 1, 104 Cal. Rptr. 505 (1972); *Barber v. Superior Court*, 147 Cal. App. 3d 1006, 1015, 195 Cal. Rptr. 484 (1983); *Bartling v. Superior Court*, 163 Cal. App. 3d 186, 195, 209 Cal. Rptr. 220 (1984); *Bouvia v. Superior Court*, 179 Cal. App. 3d 1127, 1137, 225 Cal. Rptr. 297 (1986); *Conservatorship of Drabick*, 200 Cal. App. 3d 185, 206, 245 Cal. Rptr. 840 (1988); *People v. Adams*, 216 Cal. App. 3d 1431, 1437, 265 Cal. Rptr. 568 (1990); *Donaldson v. Van de Kamp*, 2 Cal. App. 4th 1614, 1619, 4 Cal. Rptr. 2d 59 (1992); *Thor v. Superior Court*, 5 Cal. 4th, 725, 731, 855 P.2d 375, 21 Cal. Rptr. 2d 357 (1993); *Rains v. Belshé*, 32 Cal. App. 4th 157, 166, 38 Cal. Rptr. 2d 185 (1995).

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

The proposed law reaffirms this fundamental right along the lines of the Uniform Health-Care Decisions Act, which

acknowledges the right of a competent individual to decide all aspects of his or her own health care in all circumstances, including the right to decline health care or to direct that health care be discontinued, even if death ensues. An individual's instructions may extend to any and all health-care decisions that might arise and, unless limited by the principal, an agent has authority to make all health-care decisions which the individual could have made. The Act recognizes and validates an individual's authority to define the scope of an instruction or agency as broadly or as narrowly as the individual chooses.<sup>7</sup>

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

### 1. Power of Attorney

California has a detailed statute governing durable powers of attorney for health care and providing a special statutory form durable power of attorney for health care.<sup>8</sup> The DPAHC requires appointment of an attorney-in-fact ("agent" in the statutory form durable power of attorney for health care) to carry out the principal's wishes as expressed in the power of attorney or otherwise made known to the attorney-in-fact, but the attorney-in-fact also has authority to act in the best interest of the principal where the principal's desires are unknown.<sup>9</sup> The power of attorney for health care rules are generally carried forward in the proposed law.

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7. UHCDA Prefatory Note.

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

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

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

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

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

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

9. See Prob. Code § 4720.

## 2. Natural Death Act, Living Will

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

## 3. Statutory Surrogacy

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

## 4. Court-Appointed Conservator

California law provides a highly developed Guardianship-Conservatorship Law.<sup>11</sup> The Lanterman-Petris-Short Act provides a special type of conservatorship for the gravely disabled.<sup>12</sup> These provisions are not the focus of this recommendation.<sup>13</sup>

10. See Hamman, *Family Surrogate Laws: A Necessary Supplement to Living Wills and Durable Powers of Attorney*, 38 Vill. L. Rev. 103, 105 n.5 (1993) (reporting 8-15% in 1982, 1987, and 1988 surveys). One intention of the federal Patient Self-Determination Act in 1990, *supra* note 3, was to increase the number of patients who execute advance directives. See Larson & Eaton, *The Limits of Advance Directives: A History and Assessment of the Patient Self-Determination Act*, 32 Wake Forest L. Rev. 249, 257-59 (1997). The educational efforts under the PSDA may have resulted in greater use of powers of attorney for health care, but not significantly. See *id.* at 276-78 (estimates prior to PSDA ranged from 4-28%, mostly in 15-20% range; afterwards, "little or no increase" or "no significant increase"). A Government Accounting Office report found that 18% of hospital patients had advance directives, as compared with 50% of nursing home residents. *Id.* at 275 n.184.

11. Prob. Code § 1400 *et seq.* The Guardianship-Conservatorship Law was enacted on Commission recommendation. See *Guardianship-Conservatorship Law*, 15 Cal. L. Revision Comm'n Reports 451 (1980). For provisions relating to health care, see, e.g., Prob. Code §§ 1880-1898 (capacity to give informed consent to medical treatment), 2354 (medical treatment of conservatee not adjudicated to lack capacity), 2355 (medical treatment of conservatee adjudicated to lack capacity), 2357 (court-ordered medical treatment).

12. Welf. & Inst. § 5350 *et seq.*

13. Communications to the Commission suggest that the procedure for court-authorized medical treatment and related conservatorship provisions should be reviewed for consistency with the scope of the proposed Health Care Decisions Law. As noted below, this recommendation proposes revisions in Probate Code Sections 3200-3211, and in Section 2355 (medical treatment of conservatee adjudicated to lack

## 5. Other Judicial Intervention

A special procedure for court-authorized medical treatment is available for adults without conservators.<sup>14</sup>

The general power of attorney statutes were recently reviewed and revised on Commission recommendation.<sup>15</sup> In its report, the Commission noted that it had “not made a substantive review of the statutes concerning the durable power of attorney for health care .... [I]t would have been premature to undertake a detailed review of the health care power statutes before the National Conference of Commissioners on Uniform State Laws completed its work on the Uniform Health-Care Decisions Act.”<sup>16</sup>

## POWER OF ATTORNEY FOR HEALTH CARE

The proposed Health Care Decisions Law continues and recasts the existing law governing the durable power of attorney for health care, including the statutory form durable power of attorney for health care.<sup>17</sup> For the well-advised or careful individual who is making sensible arrangements for the time when he or she may be incapacitated, the power of attorney for health care<sup>18</sup> is clearly the best approach. Expressing desires about health care and naming one or more agents<sup>19</sup> subject to appropriate standards is the best way to accomplish “incapacity planning” and seek to effectuate a person’s intent with regard to health care decisions, especially with regard to life-sustaining treatment.

In the new terminology — not so new in practice, but new to the Probate Code — a power of attorney for health care is one type of “advance health care direc-

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capacity); but consideration of broader revisions in the Guardianship-Conservatorship Law is reserved for future study.

14. Prob. Code § 3200 *et seq.*

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

16. *Id.* at 335.

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

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

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

1 tive” (or “advance directive”).<sup>20</sup> The proposed law restructures the power of attor-  
 2 ney for health care provisions based on a mix of principles from the existing  
 3 Power of Attorney Law and the Uniform Health-Care Decisions Act. Where rules  
 4 apply only to powers of attorney for health care, the proposed law uses that termi-  
 5 nology. Where rules apply to all written advance health care directives, the lan-  
 6 guage will vary, but the general substance of the law continues, except as noted.

## 7 Execution Formalities

8 The original durable power of attorney for health care was subject to a number  
 9 of restrictions that are now considered to be overly protective. When first enacted,  
 10 the durable power of attorney for property was only valid for a year following the  
 11 principal’s incapacity.<sup>21</sup> The original durable power of attorney for health care  
 12 expired after seven years, except when the expiration date fell in a time of incapac-  
 13 ity.<sup>22</sup> These restrictive rules may have had a role to play when the concepts were  
 14 new, but were abandoned as the law progressed and the concepts and instruments  
 15 became familiar and even necessary.

16 Now it is recognized that overly restrictive execution requirements for powers of  
 17 attorney for health care unnecessarily impede the effectuation of intent. The pro-  
 18 gression from more restrictive execution requirements to more intent-promoting  
 19 provisions can also be seen in the development of the Uniform Health-Care Deci-  
 20 sions Act. The original Uniform Rights of the Terminally Ill Act of 1985  
 21 (URTIA), based in part on the 1976 California Natural Death Act, required two  
 22 witnesses.<sup>23</sup> The Uniform Health-Care Decisions Act, which is intended to replace  
 23 URTIA, adopts the principle that no witnesses should be required in a power of  
 24 attorney for health care.<sup>24</sup> As a general rule, the proposed law also adopts this  
 25 principle in place of the existing requirement of two witnesses or notarization.<sup>25</sup>

26 Witnessing can be useful, however, even if it is not required. The proposed law  
 27 follows the UHCDA in recommending but not requiring witnesses. Witness  
 28 requirements can operate as more of an intent-defeating technicality than a protec-  
 29 tion against possible fraud.<sup>26</sup> The drafters of the UHCDA viewed technical execu-

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

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

22. See former Civ. Code § 2436.5, as enacted by 1983 Cal. Stat. ch. 1204, § 10. See also Prob. Code § 4654 (transitional provision concerning former seven-year powers). The proposed law does not provide any special rules for these earlier powers. See *infra* text accompanying note 85.

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

24. UHCDA § 2(b).

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

26. This is not to say that more formal requirements are not important in powers of attorney for property, where the possibility of fraud is more significant. The execution formalities in the Power of Attorney Law

tion formalities as unnecessarily inhibiting while at the same time doing “little, if anything, to prevent fraud or enhance reliability.”<sup>27</sup> The genuineness of advance health care directives is bolstered by placing reliance on the health care providers. Recordkeeping plays a critical role. Health care providers are required to enter the advance directive in the patient’s health care records. Medical ethics also reinforce the duty to determine and effectuate genuine intent. The proposed law also provides penalties for violation of statutory duties.<sup>28</sup>

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

### Statutorily Required Warnings

Existing law provides a number of “warnings” that must be included depending on whether a form durable power of attorney for health care is on a printed form, from the statutory form, or drafted by an attorney or someone else.<sup>30</sup> There is an important alternative to complying with the strict execution requirements in California law. The law recognizes the validity of durable powers of attorney for health care and similar instruments executed in another state or jurisdiction in compliance with their law.<sup>31</sup>

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

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applicable to non-health care powers of attorney would continue to apply. See Prob. Code §§ 4121 (formalities for executing a power of attorney), 4122 (requirements for witnesses).

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

28. See *infra* text accompanying notes 66-69.

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

30. See Prob. Code §§ 4703 (requirements for printed form), 4704 (warnings in power of attorney for health care not on printed form), 4771 (statutory form), 4772 (warning or lawyer’s certificate), 4774 (requirements for statutory form). For a number of complicated, technical rules governing earlier printed form requirements, see Prob. Code §§ 4651, 4775.

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

## 1    **Revocation**

2    A durable power of attorney for health care under existing law can be revoked  
3    expressly in writing or by notifying the health care provider orally or in writing,  
4    but it is also revoked by operation of law if the principal executes a later power of  
5    attorney for health care.<sup>32</sup> This last rule provides administrative simplicity, since a  
6    comparison of dates would show which power was in force. Unfortunately, it is  
7    also a trap, since a principal may attempt to amend or clarify an earlier power, or  
8    designate a new attorney-in-fact, in ignorance of the rule and inadvertently wipe  
9    out important instructions. It is also quite difficult to implement this all-or-nothing  
10   rule in the context of a broader statute permitting written individual health care  
11   instructions and direct surrogate designations.

12   A better approach is adopted in the proposed law, based on the UHCDA.<sup>33</sup> The  
13   intentional revocation rule is similar: a patient with capacity can revoke a designa-  
14   tion of an agent only by a signed writing or by personally informing the supervis-  
15   ing health care provider; individual health care instructions can be revoked in any  
16   manner communicating an intent to revoke. The distinct treatment of agent designa-  
17   tions and health care instructions is justified because the patient should have  
18   only one agent at a time, and a revocation should be clear and evidenced, whereas  
19   health care instructions do not share this feature and can be revised and supple-  
20   mented without any inherent restriction. Recognizing this practical reality, a later  
21   advance directive revokes a prior directive only to the extent of the conflict, thus  
22   promoting the fundamental purpose of implementing the patient's intent.

23   The proposed law continues the existing rule that a person's designation of his or  
24   her spouse as agent to make health care decisions is revoked if the marriage is dis-  
25   solved or annulled.<sup>34</sup>

## 26                    **INDIVIDUAL HEALTH CARE INSTRUCTIONS**

27   California does not authorize what the UHCDA calls an "individual instruction,"  
28   other than through the mechanism of the Natural Death Act which applies only to  
29   patients in a terminal or permanent unconscious condition. Health care instructions  
30   may, of course, be given in the context of appointing and instructing an attorney-  
31   in-fact under a durable power of attorney for health care. The Commission is  
32   informed that, in practice, individuals will execute a durable power of attorney for  
33   health care *without* appointing an attorney-in-fact so that they can use that vehicle  
34   to effectively state their health care instructions. It is also possible to appoint an  
35   attorney-in-fact, but limit the agent's authority while expressing broad health care  
36   instructions. These approaches may succeed in getting formal health care instruc-  
37   tions into the patient's record, but existing law is not well-adapted for this purpose.

32. Prob. Code § 4727(a), (b), (d).

33. UHCDA § 3.

34. Prob. Code § 4727(e). The designation is revived if the principal and the former spouse are remarried.

Health care providers' duties under the existing durable power of attorney for health care focus on the *agent's* decisions, not the *principal's* instructions.

The proposed law adopts the UHCDA's broader concept of authorizing individual health care instructions. This makes the law clearer, more direct, and easier to use. The option of giving independent health care instructions is also implemented as part of the optional statutory form. Using the simple and relatively short statutory form will enable an individual to record his or her preferences concerning health care or to select an agent, or to do both.

## STATUTORY SURROGATES — FAMILY CONSENT

Most incapacitated adults for whom health care decisions need to be made will not have formal written advance health care directives. It is likely that less than one-fifth of adults have executed written advance directives for health care.<sup>35</sup> The law, focusing as it does on execution of advance directives, is deficient if it does not address the health care decisionmaking process for the great majority of incapacitated adults who have not executed written advance directives.

### Existing California Law

California statutory law does not provide general rules governing surrogate decisionmaking. However, in the nursing home context, the procedure governing consent to "medical interventions" implies that the "next of kin" can make decisions for incapacitated persons by including the next of kin in the group of persons "with legal authority to make medical treatment decisions on behalf of a patient."<sup>36</sup>

There are supportive statements in case law, but due to the nature of the cases, they do not provide comprehensive guidance as to who can make health care decisions for incapacitated persons. For example, in *Cobbs v. Grant*, the Supreme Court wrote:

A patient should be denied the opportunity to weigh the risks only where it is evident he cannot evaluate the data, as for example, where there is an emergency or the patient is a child or incompetent. For this reason the law provides that in an emergency consent is implied ..., and if the patient is a minor or incompetent, the authority to consent is transferred to the patient's legal guardian or closest available relative .... In all cases other than the foregoing, the decision whether or not to undertake treatment is vested in the party most directly affected: the patient.<sup>37</sup>

But this language is not a holding of the case.<sup>38</sup>

35. See *supra* note 10.

36. Health & Safety Code § 1418.8(c).

37. 8 Cal. 3d 229, 243-44, 502 P.2d 1, 104 Cal. Rptr. 505 (1972) (citations omitted).

38. The "closest available relative" statement cites three cases, none of which involve incapacitated adults. Consent on behalf of an incapacitated adult was not an issue in the case, since the patient did not lack capacity, but was claiming that he had not given informed consent. Still, *Cobbs* is cited frequently in later cases involving consent or withdrawal of consent to medical treatment.



1 The leading case of *Barber v. Superior Court*<sup>39</sup> contains a thorough discussion  
2 of the problems:

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

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

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

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

21 ....

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

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

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

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

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

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39. 147 Cal. App. 3d 1006, 1020-21, 195 Cal. Rptr. 484 (1983).

Despite the breadth of its language, *Barber* does not dispose of the issue of who can consent, due to the way in which the case arose — reliance on requests from the family of the patient as a defense to a charge of murder against the doctors who removed the patient's life support. Note also that the court is not in a position to determine issues such as who is included in the patient's "family." It is implicit that the wife, children, and sister-in-law were all family members. However, the court's statement that the "wife was the proper person to act as a surrogate for the patient" based on the assumption she would have been qualified if judicial approval had been sought, is not completely consistent with other statements referring to the "family's decision" and that the "wife and children were the most obviously appropriate surrogates," and speculation on what would have happened if "the family had insisted on continued treatment."

Nevertheless, *Barber* has been characterized as an "enormously important" decision: "Indeed, literature generated from within the medical community indicates that health care providers rely upon *Barber* — presumably every day — in deciding together with families to forego treatment for persistently vegetative patients who have no reasonable hope of recovery."<sup>40</sup>

#### Current Practice: LACMA-LACBA Pamphlet

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

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

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

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

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

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

(d) A surrogate decision-maker may refuse life support on behalf of a patient who lacks capacity to decide where the burdens of continued treatment are disproportionate to the benefits. Even a treatment course which is only minimally painful or intrusive may be disproportionate to the potential benefits if the prognosis is virtually hopeless for any significant improvement in the patient's condition.

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

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

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

#### Current Practice: Patient Information Pamphlet

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

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

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

Based on the case law, the Commission is not confident that California law says the *closest* available relative *or friend* can make health care decisions. However, it may be true in practice that these are the persons doctors will ask, as stated in the pamphlet.<sup>41</sup>

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41. See also American Medical Ass'n, Code of Medical Ethics § 2.20, at 40 (1997-98) ("[W]hen there is no person closely associated with the patient, but there are persons who both care about the patient and have sufficient relevant knowledge of the patient, such persons may be appropriate surrogates."); California Healthcare Ass'n, Consent Manual: A Reference for Consent and Related Health Care Law 2-18 (23d ed. 1996) ("In some circumstances, it may be necessary or desirable to rely upon the consent given by the incompetent patient's 'closest available relative.' The validity of such consent cannot be stated with certainty, but the California Supreme Court has indicated that in some cases it is appropriate for a relative to give consent." [citing *Cobbs v. Grant*]); President's Comm'n etc., Deciding To Forego Life-Sustaining Treatment 126-27 (1983) ("When a patient lacks the capacity to make a decision, a surrogate decisionmaker should be designated. Ordinarily this will be the patient's next of kin, although it may be a close friend or another relative if the responsible health care professional judges that this other person is in fact the best advocate for the patient's interests.").

# Alternative Approaches to Statutory Surrogate Priorities

The general understanding is that close relatives and friends who are familiar with the patient's desires and values should make health care decisions in consultation with medical professionals. Wives, brothers, mothers, sisters-in-law, and domestic partners have been involved implicitly as "family" surrogate decisionmakers in reported California cases. The practice, as described in authoritative sources, is consistent with this understanding. Courts and legislatures nationwide naturally rely on a family or next of kin approach because these are the people who are presumed to best know the desires of the patient and to determine the patient's best interests.<sup>42</sup>

Priority schemes among relatives and friends seem natural. Intestate succession law<sup>43</sup> provides a ready analogy — thus, the spouse, children, parents, siblings, and so forth, seem to be a natural order. The same order is established in the preference for appointment as conservator.<sup>44</sup> But the analogy between health care, life-sustaining treatment, and personal autonomy on one hand and succession to property on the other is weak. A health care decision cannot be parceled out like property in an intestate's estate. The consequences of a serious health care decision are different in kind from decisions about distributing property.

The trend in other states is decidedly in favor of providing statutory guidance, generally through a priority scheme. The collective judgment of the states would seem to be that, since most people will not execute any form of advance directive, the problem needs to be addressed with some sort of default rules, perhaps based on an intestate succession analogy. As described by Professor Meisel:<sup>45</sup>

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

The UHCDA scheme lists the familiar top four classes of surrogates (spouse, children, parents, siblings), but is less restrictive than many state statutes in several respects:<sup>46</sup> (1) Class members *may* act as surrogate and need to *assume authority* to do so. It is not clear whether a class member must affirmatively decline to act or may be disregarded if he or she fails to assume authority, but unlike some state statutes, an abstaining class member does not prevent action. (2) Determinations

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

43. Prob. Code § 6400 *et seq.*

44. Prob. Code § 1812.

45. 2 A. Meisel, *The Right to Die* § 14.1, at 249-50 (2d ed. 1995)

46. UHCDA § 5.

within classes can be made by majority vote under the UHCDA. This is not likely to be a common approach to making decisions where there are disagreements, but could be useful to validate a decision of a majority where there are other class members whose views are unknown or in doubt. (3) Orally designated surrogates are first on the UHCDA priority list, as an attempt to deal with the fact that a strict statutory priority list does not necessarily reflect reality. The “orally designated surrogate was added to the Act not because its use is recommended but because it is how decision makers are often designated in clinical practice.”<sup>47</sup> (4) The authorization for adults who have “exhibited special care and concern” is relatively new. Under the common law, the status of friends as surrogates is, in Professor Meisel’s words, “highly uncertain.”<sup>48</sup> In a special procedure applicable to “medical interventions” in nursing homes, California law requires consultation with friends of nursing home patients and authorizes a friend to be appointed as the patient’s representative,<sup>49</sup> but the health care decision is made by an “interdisciplinary team.”

#### Statutory Surrogates Under Proposed Law

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

Professor Meisel describes this fundamental problem with priority classes as follows:<sup>50</sup>

Although the intent of such priority lists is a good one — to eliminate possible confusion about who has the legal authority to make decisions for incompetent patients — the result of surrogate-designation pursuant to statute is not only mechanical but can be contrary or even inimical to the patient’s wishes or best interests. This would occur, for example, if the patient were estranged from his spouse or parents. However, it is not clear that the result would be much different

47. English, *Recent Trends in Health Care Decisions Legislation* 17 (1998) (unpublished manuscript, on file with California Law Revision Commission).

48. 2 A. Meisel, *The Right to Die* §14.4, at 51 (2d ed. Supp. #1 1997). *But cf.* *Conservatorship of Drabick*, 200 Cal. App. 3d 185, 204, 245 Cal. Rptr. 840 (1988) (“[F]aced with a persistently vegetative patient and a diagnosis establishing that further treatment offers no reasonable hope of returning the patient to cognitive life, the decision whether to continue noncurative treatment is an ethical one for the physicians and family members or other persons who are making health care decisions for the patient.”)

49. Health & Safety Code § 1418.8. For the purposes of this section, subdivision (c) lists “next of kin” as a person with “legal authority to make medical treatment decisions.” See also *Rains v. Belshé*, 32 Cal. App. 4th 157, 166, 38 Cal. Rptr. 2d 185 (1995) (upholding the procedure and citing with approval the duty to consult with friends and the participation of the patient representative).

50. 2 A. Meisel, *The Right to Die* § 14.4 at 255 (2d ed. 1995) (footnotes omitted).

1 in the absence of a statute because the ordinary custom of physicians sanctioned  
2 by judicial decision, is to look to incompetent patients' close family members to  
3 make decisions for them. In the absence of a statute, the physician might ignore a  
4 spouse known to be estranged from the patient in favor of another close family  
5 member as surrogate, but because there is nothing in most statutes to permit a  
6 physician to ignore the statutory order of priority, the result could be worse under  
7 a statute than in its absence.

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

16 As a general rule, the primary physician is required to select the surrogate, with  
17 the assistance of other health care providers or institutional committees, in the  
18 order of priority as set out in the statute. However, where there are multiple possi-  
19 ble surrogates at the same priority level, the primary physician has a duty to select  
20 the individual who reasonably appears after a good faith inquiry to be best quali-  
21 fied.<sup>51</sup> The primary physician may select as the surrogate an individual who is  
22 ranked lower in priority if, in the primary physician's judgment, the individual is  
23 best qualified to serve as the patient's surrogate. These rules are directly related to  
24 the fundamental principal that the law should attempt to find the best surrogate  
25 who can make health care decisions according to the patient's known desires or in  
26 the patient's best interests.

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

32 (1) Whether the proposed surrogate reasonably appears to be best able to make  
33 decisions in accordance with the statutory standard (patient's instructions, if  
34 known, or best interest, taking into account personal values).

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

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

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

39 (5) Availability to visit the patient.

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

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51. The recommended procedure is drawn, in part, from West Virginia law. See W.Va. Code § 16-30B-7 (1997). Elements are also drawn from New Mexico's implementation of the UHCDA. See N.M. Stat. Ann. § 24-7A-5 (Westlaw 1998).

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

3 The recommended procedure also reduces the problem of resolving differences  
4 between potential surrogates. There can be problems under the existing state of  
5 law and custom, as illustrated by cases where family members — e.g., children,  
6 parents, or the patient's spouse — compete for appointment as conservator of an  
7 incapacitated person. These disputes will still occur and it is difficult to imagine a  
8 fair and flexible statutory procedure that could resolve all issues.

9 As discussed, the UHCDA provides a rigid priority scheme between classes of  
10 close relatives and provides for voting within a class with multiple members.<sup>52</sup> If a  
11 class is deadlocked, then the surrogacy procedure comes to a halt; lower classes do  
12 not get an opportunity to act, although it is possible for a higher class to reassert its  
13 priority, and the evenly split class could resolve the deadlock over time. This type  
14 of procedure seems overly mechanical and lacking in needed flexibility.

15 The Commission also considered a family consensus approach, such as that pro-  
16 vided under Colorado law.<sup>53</sup> In this procedure, the class of potential surrogates,  
17 composed of close family members and friends, is given the responsibility and  
18 duty to select a surrogate from among their number. It is difficult to judge how  
19 well this type of procedure would work in practice. The concern is that it might  
20 result in too much confusion and administrative burden, without improving the  
21 prospects for effective decisionmaking or resolving disputes.

22 The proposed law adopts a presumptive "pecking order" like the UHCDA, but  
23 places the responsibility on the primary physician to select the best-situated person  
24 based on standards set out in the statute. This avoids the rigidity of the UHCDA  
25 approach and the indefiniteness and administrative burden of the consensus  
26 approach. Notice of the selection should be given to other family members. Poten-  
27 tial surrogates with serious objections to the selection of the surrogate or the deci-  
28 sions being made by the surrogate would still have the right to bring a judicial  
29 challenge<sup>54</sup> or seek appointment as a conservator.

30 Like the UHCDA, the proposed law gives priority over the statutory list to a  
31 surrogate who has been designated by the patient.

## 32 DECISIONMAKING WHERE NO SURROGATE IS AVAILABLE

33 Providing statutory surrogate rules where a patient has not executed an advance  
34 directive or designated a surrogate, and for whom a conservator of the person has  
35 not been appointed, does not answer all of the problems. The statutory surrogate  
36 rules will not apply to a significant group of incapacitated adults for whom there

52. UHCDA § 5.

53. See Colo. Rev. Stat. Ann. § 15-18.5-103 (West 1997). Illinois and Louisiana also implement some consensus standards. See generally, 2 A. Meisel, *The Right to Die* § 14.1 *et seq.* (2d ed. 1995 & Supp. #1 1997).

54. See *infra* text accompanying notes 73-77.

1 are no potential surrogates because they have no close relatives or friends familiar  
2 with their health care treatment desires or values, or because potential surrogates  
3 are unwilling or unable to make decisions.

4 Existing law addresses this problem with respect to “medical interventions” for  
5 patients in the nursing home context,<sup>55</sup> but there is no general surrogacy rule  
6 applicable in these circumstances. The UHCDA does not address this problem.

7 The alternative of appointing a conservator of the person in each of these cases is  
8 not an adequate solution to the problem, as recognized by the Legislature when it  
9 enacted the nursing home medical intervention procedure.<sup>56</sup> While it is possible to  
10 seek court approval for medical “treatment” under Probate Code Section 3200 *et*  
11 *seq.* (authorization of medical treatment for adult without conservator), this proce-  
12 dure does not authorize orders for *withdrawal* of treatment or *refusal* of consent.<sup>57</sup>

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

18 (1) The patient’s primary physician.

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

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

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

25 (5) In cases involving major health care decisions, a member of the community  
26 who is not employed by or regularly associated with the primary physician, the  
27 health care institution, or employees of the health care institution.

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

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

32 (1) The primary physician’s assessment of the patient’s condition.

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

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55. Health & Safety Code § 1418.8. See *Rains v. Belshé*, 32 Cal. App. 4th 157, 166, 170, 38 Cal. Rptr. 2d 185 (1995) (upholding the constitutionality of the procedure for patients in nursing homes who lack capacity to make health care decisions, “even though they do not have a next of kin, an appointed conservator, or another authorized decision maker to act as their surrogate”).

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

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



(3) The desires of the patient, if known. To determine the desires of the patient, the surrogate committee must interview the patient, review the patient's medical records, and consult with family members or friends, if any have been identified.

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

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

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

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

The proposed law intends the surrogate committee to try to operate on a consensus basis. If consensus cannot be reached, the committee is authorized to approve proposed health care decisions by majority vote. There is an important exception: proposed health care decisions relating to withdrawal of life-sustaining treatment cannot be approved if any member of the surrogate committee is opposed. If a surrogate committee becomes hopelessly deadlocked, resort to judicial proceedings may be necessary.

#### STANDARDS FOR SURROGATE DECISIONMAKING

The existing power of attorney for health care law requires the attorney-in-fact to "act consistent with the desires of the principal as expressed in the durable power of attorney or otherwise made known to the attorney-in-fact at any time or, if the principal's desires are unknown, to act in the best interests of the principal."<sup>58</sup>

The UHCDA adopts the same rule as a general standard for all surrogates:

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

The proposed law, like the UHCDA, applies these standards generally throughout the statute. Thus, the same fundamental standard will apply to all surrogate health care decisionmakers: agents under powers of attorney, surrogates designated by the patient, family and friends who can act as surrogates under general principles codified in the statutory surrogate rules, surrogate committees acting for the "friendless" patient, private conservators and Public Guardians acting for conser-

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58. Prob. Code § 4720(c).

1 vatees without the capacity to make health care decisions,<sup>59</sup> and courts deciding  
2 cases under the court-authorized health care procedure.<sup>60</sup>

### 3 DUTIES OF HEALTH CARE PROVIDERS AND OTHERS

4 The proposed law sets out a number of specific duties of health care providers,  
5 drawn from the UHCDA,<sup>61</sup> that are more detailed than existing law. Since a fun-  
6 damental feature of the uniform act is reliance on health care professionals to  
7 make necessary determinations and to comply with advance directives and health  
8 care decisions made by surrogates, the proposed law requires communication with  
9 the patient, entry in the patient's medical records of the existence of an advance  
10 directive (including a copy) or a surrogate designation, and of any revocation or  
11 modification. The recordkeeping duties are extremely important since in the clini-  
12 cal setting, the patient's records provide the best means to make advance directives  
13 and surrogate designations effective.

14 The proposed law requires the health care provider and institution to comply  
15 with the patient's advance directive and with health care decisions made by the  
16 patient's surrogate decisionmaker, to the same extent as if the patient made the  
17 decision while having capacity.<sup>62</sup> However, a health care provider may lawfully  
18 decline to comply for reasons of conscience or institutional policy. This rule,  
19 drawn from the UHCDA,<sup>63</sup> is consistent with the Natural Death Act and case  
20 law.<sup>64</sup> If the health care provider declines to comply, however, there is a duty to  
21 transfer the patient to another health care institution.

22 Another important limitation on the health care provider's duty to comply is rec-  
23 ognized in the proposed law. The health care provider or institution may decline to  
24 provide medically ineffective care or care that is contrary to generally accepted  
25 health care standards.<sup>65</sup> But as in other cases where compliance can be declined,  
26 the health care provider and institution have a duty to continue care until a transfer  
27 can be accomplished. The proposed law does not go beyond the statement of these  
28 basic rules — it does not attempt to resolve the issue that may arise where a trans-  
29 fer is not practicable and the duty to provide continuing care conflicts with the  
30 right to decline to provide ineffective treatment.

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59. See *infra* text accompanying notes 81-84.

60. See *infra* text accompanying notes 78-80.

61. UHCDA § 7.

62. These duties are not specified, although they are implicit, in the existing law on durable powers of attorney for health care. See Prob. Code § 4720. A duty to comply with a directive or transfer the patient is provided in the Natural Death Act. See Health & Safety Code § 7187.5. (2d sentence).

63. UHCDA §

64. Health & Safety Code § 7190; Conservatorship of Morrison, 206 Cal. App. 3d 304, 310-12, 253 Cal. Rptr. 530 (1988).

65. This is drawn from UHCDA Section 7(f).

1                    **LIABILITIES OF HEALTH CARE PROVIDERS AND OTHERS**

2        The existing law governing durable powers of attorney for health care provides  
3 protection from criminal prosecution, civil liability, and professional disciplinary  
4 action for health care providers who in good faith rely on the decision of an  
5 attorney-in-fact in circumstances where in good faith the health care provider  
6 believes the decision is consistent with the desires and best interests of the princi-  
7 pal.<sup>66</sup> Similarly, the Natural Death Act protects health care providers who comply  
8 with a declaration in good faith and in accordance with reasonable medical  
9 standards.<sup>67</sup>

10       The proposed law combines and generalizes these rules based on the UHCDA.<sup>68</sup>  
11 Health care providers and institutions are protected for actions taken under the law  
12 if they act in good faith and in accordance with generally accepted health care  
13 standards applicable to them. Specifically listed are compliance with a health care  
14 decision by a person apparently having authority to make the decision, declining to  
15 comply where a person does not appear to have authority, and complying with an  
16 advance directive assumed to be validly executed and not revoked.

17       The proposed law provides new statutory penalties, based on the UHCDA,<sup>69</sup> for  
18 intentional violation of the law in the amount of \$2500 or actual damages,  
19 whichever is greater, plus attorney's fees. Any person who intentionally forges,  
20 conceals, or destroys an advance directive or revocation without consent, or who  
21 coerces or fraudulently induces a person to give, revoke, or refrain from give an  
22 advance directive is similarly liable in the amount of \$10,000. The statutory  
23 penalties are in addition to any other remedies that may exist in tort or contract,  
24 and to criminal penalties and professional discipline.

25                    **JUDICIAL REVIEW**

26       California law does not favor judicial involvement in health care decisions. The  
27 Power of Attorney Law provides as a general rule that a power of attorney is exer-  
28 cisable free of judicial intervention.<sup>70</sup> The Natural Death Act declares that "in the  
29 absence of a controversy, a court normally is not the proper forum in which to  
30 make decisions regarding life-sustaining treatment."<sup>71</sup> In connection with  
31 incapacitated patients in nursing homes, the Legislature has found:<sup>72</sup>

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66. Prob. Code § 4750.

67. Health & Safety Code § 7190.5.

68. UHCDA § 9(a).

69. UHCDA § 10.

70. Prob. Code § 4900.

71. Health & Safety Code § 7185.5(e).

72. 1992 Cal. Stat. ch. 1303, § 1(b).

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

8 Appellate decisions also caution against overinvolvement of courts in the intensely  
9 personal realm of health care decisionmaking. However, there may be occasions  
10 where a dispute must be resolved and an appropriately tailored procedure is  
11 needed.

12       The UHCDA takes a similar approach, but provides less detail than existing  
13 law.<sup>73</sup>

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

19       The proposed law contains a procedure drawn largely from the Power of Attor-  
20 ney Law.<sup>74</sup> Under this procedure, any of the following persons may file a petition  
21 in the superior court: the patient, the patient's spouse (unless legally separated), a  
22 relative of the patient, the patient's agent or surrogate, the conservator of the per-  
23 son of the patient, a court investigator, the public guardian of the county where the  
24 patient resides, the supervising health care provider or health care institution, and  
25 any other interested person or friend of the patient. As under existing law, there is  
26 no right to a jury trial.<sup>75</sup>

27       The grounds for a petition are broad, but not unlimited, and include determining  
28 (1) whether the patient has capacity to make health care decisions, (2) whether an  
29 advance health care directive is in effect, and (3) whether the acts or proposed acts  
30 of an agent or surrogate are consistent with the patient's desires as expressed in an  
31 advance health care directive or otherwise made known to the court or, where the  
32 patient's desires are unknown or unclear, whether the acts or proposed acts of the  
33 agent or surrogate are in the patient's best interest. When capacity is to be deter-  
34 mined in judicial proceedings, the provisions of the Due Process in Capacity  
35 Determinations Act<sup>76</sup> are applicable. The standard for reviewing the agent's or sur-

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73. UHCDA Prefatory Note.

74. See Prob. Code §§ 4900-4947. Because of the placement of the Health Care Decisions Law beginning at Section 4600, the judicial proceedings provisions (Part 5) applicable to non-health care powers of attorney is moved to form a new Part 4 (commencing with Section 4500). The law applicable to non-health care powers remains the same; only the special provisions concerning health care powers of attorney have been removed.

75. Prob. Code § 4904.

76. Prob. Code §§ 810-813.

rogate's actions is consistent with the general standard applicable under the proposed Health Care Decisions Law, as already discussed.<sup>77</sup>

### COURT-AUTHORIZED MEDICAL TREATMENT

The court-authorized medical treatment procedure was enacted on Commission recommendation in 1979.<sup>78</sup> The original intent of this procedure, as described in the Commission's Comment preceding Probate Code Section 3200, was as follows:

The provisions of this part afford an alternative to establishing a conservatorship of the person where there is no ongoing need for a conservatorship. The procedural rules of this part provide an expeditious means of obtaining authorization for medical treatment while safeguarding basic rights of the patient: The patient has a right to counsel.... The hearing is held after notice to the patient, the patient's attorney, and such other persons as the court orders.... The court may determine the issue on medical affidavits alone if the attorney for the petitioner and the attorney for the patient so stipulate.... The court may not order medical treatment under this part if the patient has capacity to give informed consent to the treatment but refuses to do so....

The authority of the court, or a surrogate appointed by the court, to authorize medical treatment under the Section 3200 procedure is not as broad as a conservator with full powers, an agent under a power of attorney for health care, or a statutory surrogate under the proposed Health Care Decisions Law. Where the conservatee has been adjudicated to lack the capacity to give informed consent to medical treatment, a conservator under Section 2355 can authorize removal of life-sustaining treatment (i.e., refuse consent to further treatment), if the decision is made in good faith and is based on appropriate medical advice.<sup>79</sup>

The Section 3200 procedure has not been interpreted by the appellate courts to permit withholding or withdrawing life support. The statutory language is clearly directed toward care needed to maintain health that does not fall into the category of emergency care. The statute permits an order authorizing the "recommended course of medical treatment" and "designating a person to give consent to the

77. See *supra* text accompanying note 58.

78. Prob. Code §§ 3200-3211, enacted by 1979 Cal. Stat. ch. 726, § 3; *Recommendation Relating to Guardianship-Conservatorship Law*, 14 Cal. L. Revision Comm'n Reports 501, 577-78 (1978); *Guardianship-Conservatorship Law with Official Comments*, 15 Cal. L. Revision Comm'n Reports 451, 540-41, 870-76 (1980). The procedure was repealed and reenacted in 1990 when the new Probate Code replaced the former Probate Code. See 1990 Cal. Stat. ch. 79, § 14. Coverage was extended to mental health, operative in 1991. See 1990 Cal. Stat. ch. 710, § 12; *Recommendation Relating to Court-Authorized Medical Treatment*, 20 Cal. L. Revision Comm'n Reports 537 (1990).

Some additional amendments have been made to the original procedure, mainly as a result of the Due Process in Competency Determinations Act (DPCDA) (1995 Cal. Stat. ch. 842, §§ 9-11), which revised the procedural rules in Sections 3201, 3204, and 3208 related to determinations of capacity to make health care decisions ("give informed consent").

79. *Conservatorship of Drabick*, 200 Cal. App. 3d 185, 216-17, 245 Cal. Rptr. 840 (1988); see also *Conservatorship of Morrison*, 206 Cal. App. 3d 304, 309-10, 253 Cal. Rptr. 530 (1988).

recommended course of medical treatment” if all of the following are determined from the evidence:<sup>80</sup>

(1) The existing or continuing medical condition of the patient requires the recommended course of medical treatment.

(2) If untreated, there is a probability that the condition will become life-endangering or result in a serious threat to the physical or mental health of the patient.

(3) The patient is unable to give an informed consent to the recommended course of treatment.

The reference to the probability that the condition will become life-endangering is not designed to address the situation of the patient in a persistent vegetative state whose continued existence is not seriously threatened. Since the Section 3200 procedure is not designed to deal with end-of-life decisionmaking, there is no statutory procedure available for making decisions in the best interest of a patient in a persistent vegetative state, short of appointment of a conservator with full powers under Section 2355. Appointment of a conservator is usually not a feasible alternative because of the expense and the lack of a person willing to serve as the conservator of the person.

The proposed law would remedy this problem by amending the court-authorized medical treatment procedure to cover withholding or withdrawing life-sustaining treatment. These revisions would make the court’s authority to order treatment (or appoint a person to make health care decisions) consistent with the scope of other surrogates’ authority under the proposed Health Care Decisions Law. While the proposed law makes clear, consistent with case law, that resort to the courts is disfavored, and should only be a last resort when all other means of resolving the issue have failed, the law still needs to provide an effective and consistent remedy for the difficult cases that cannot be resolved short of judicial proceedings.

#### CONSERVATOR’S RESPONSIBILITY TO MAKE HEALTH CARE DECISIONS

As discussed above, the proposed law adopts a general standard for making health care decisions by surrogates, including conservators, both private and public. The Commission is not proposing in this recommendation to overhaul the health care provisions in the Guardianship-Conservatorship Law.<sup>81</sup> However, it is important to conform the section governing health care decisions for conservatees who have been adjudged to lack capacity to make health care decisions, Probate Code Section 2355. The amendments adopt some terminology of the proposed law, so that it is clear that all health care decisions are covered, including withholding and withdrawal of life-sustaining treatment, and adds the requirement that the conservator make decisions based on the conservatee’s desires, if known, or

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80. Prob. Code § 3208.

81. See *supra* note 11.

1 based on a determination of the conservatee's best interest, taking into account the  
2 conservatee's personal values known to the conservator.

3 The proposed revision is consistent with *Conservatorship of Drabick*:<sup>82</sup>

4 Incapacitated patients "retain the right to have appropriate medical decisions made  
5 on their behalf. An appropriate medical decision is one that is made in the  
6 patient's best interests, as opposed to the interests of the hospital, the physicians,  
7 the legal system, or someone else. To summarize, California law gives persons a  
8 right to determine the scope of their own medical treatment, this right survives  
9 incompetence in the sense that incompetent patients retain the right to have  
10 appropriate decisions made on their behalf, and Probate Code section 2355 dele-  
11 gates to conservators the right and duty to make such decisions.

12 Use of the terms "health care" and "health care decision" from the proposed  
13 Health Care Decisions Law make clear that the scope of health care decisions that  
14 can be made by a conservator under this section is the same as provided in the  
15 Health Care Decisions Law.

16 The importance of the existing statutory language concerning the exclusive  
17 authority of the conservator and the duty this places on the conservator was also  
18 emphasized in *Drabick*:<sup>83</sup>

19 The statute gives the conservator the exclusive authority to exercise the conserva-  
20 tee's rights, and it is the conservator who must make the final treatment decision  
21 regardless of how much or how little information about the conservatee's prefer-  
22 ences is available. There is no necessity or authority for adopting a rule to the  
23 effect that the conservatee's desire to have medical treatment withdrawn must be  
24 proved by clear and convincing evidence or another standard. Acknowledging that  
25 the patient's expressed preferences are relevant, it is enough for the conservator,  
26 who must act in the conservatee's best interests, to consider them in good faith.

27 The intent of the rule in the proposed law is to protect and further the patient's  
28 interest in making a health care decision in accordance with the patient's expressed  
29 desires, where known, and if not, to make a decision in the patient's best interest,  
30 taking personal values into account. The necessary determinations are to be made  
31 by the conservator, whether private or public, in accordance with the statutory  
32 standard. Court control or intervention in this process is neither required by  
33 statute, nor desired by the courts.<sup>84</sup>

## 34 TECHNICAL MATTERS

### 35 Location of Proposed Law

36 The proposed Health Care Decisions Law would be located in the Probate Code  
37 following the Power of Attorney Law. There is no ideal location for a statute that

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82. 220 Cal. App. 3d 185, 205, 245 Cal. Rptr. 840 (1988).

83. *Id.* at 211-12.

84. See, e.g., *Conservatorship of Morrison*, 206 Cal. App. 3d 304, 312, 253 Cal. Rptr. 530 (1988).  
*Drabick*, 200 Cal. App. 3d at 198-200.

1 applies both to incapacity planning options (e.g., the power of attorney for health  
2 care) and to standards governing health care decisionmaking for incapacitated  
3 adults. But considering the alternatives, the Probate Code appears to be the best  
4 location because of associated statutes governing conservatorship of the person,  
5 court-authorized medical treatment, and powers of attorney. In addition, estate  
6 planning and elder law practitioners are familiar with the Probate Code.

7 **Severance from Power of Attorney Law**

8 Drafting health care decisionmaking rules as a separate statute should eliminate  
9 or minimize these exceptions and overlays in the Power of Attorney Law (PAL),  
10 thereby improving the organization and usability of both the PAL as it relates to  
11 property and financial matters and the law relating to health care powers.<sup>85</sup>

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

13 Existing law recognizes the validity of certain advance directives executed under  
14 the law of another state, or executed outside California in compliance with Cali-  
15 fornia law, both as to powers of attorney for health care<sup>86</sup> and declarations of a  
16 type permitted by the Natural Death Act.<sup>87</sup> The proposed law consolidates these  
17 rules and applies them to all written advance directives, thus treating individual  
18 health care instructions the same as powers of attorney.

19 **Application to Pre-existing Instruments**

20 The proposed law would apply to all advance directives, as broadly defined in  
21 the new law, beginning on January 1, 2000. It is unlikely that circumstances could  
22 arise where the new law would invalidate older powers of attorney or declarations  
23 under the Natural Death Act, but the proposed law makes clear that it does not  
24 affect the validity of an older instrument that was valid under prior law. The new  
25 law would not revive instruments that are invalid under existing law.<sup>88</sup> However,

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85. The general rule in Probate Code Section 4050 provides that the PAL (Division 4.5 of the Probate Code) "applies to" various types of powers of attorney, including DPAHCs under Part 4 (commencing with Section 4600). Section 4051 provides that the general agency rules in the Civil Code apply to "powers of attorney" unless the PAL provides a specific rule. Section 4100 provides that Part 2 governing "Powers of Attorney Generally" applies to all powers under the division, subject to special rules applicable to DPAHCs. The general rules on creation and effect of powers of attorney are set out in Sections 4120-4130, modification and revocation are governed by Sections 4150-4155, qualifications and duties of attorneys-in-fact are in Sections 4200 — these rules apply in general to all types of powers.

Several PAL sections have special additional health care rules or exceptions: §§ 4122(d) (witnesses), 4123(d) (permissible purposes), 4128(c)(2) (warning statement), 4152(a)(4) (exercise of authority after death of principal), 4203(b) (attorney-in-fact's authority to appoint successor), 4206(c) (relation to court-appointed fiduciary)). As an exception to the general rule, Section 4260 provides that Article 3 (§§ 4260-4266) of Chapter 4 concerning authority of attorneys-in-fact does not apply to DPAHCs.

86. Prob. Code § 4653; see also Section 4752 (presumption of validity regardless of place of execution).

87. Health & Safety Code § 7192.5; see also Section 7192 (presumption of validity).

88. For example, some durable powers of attorney for health care executed between January 1, 1984, and December 31, 1991, were subject to a seven-year term (which could be extended if the term expired



1 where a surrogate is required to take into account the wishes of a patient, it may be  
2 appropriate to consider and evaluate expressions of the patient's health care wishes  
3 stated in a now obsolete form.

4 **OTHER PROCEDURES**

5 **DNR Orders**

6 The proposed law continues the existing special procedures governing requests  
7 to forgo resuscitative measure (DNR orders)<sup>89</sup> with a few technical revisions for  
8 consistency with definitions under the Health Care Decisions Law. The Commis-  
9 sion did not undertake a substantive review of the recently enacted DNR rules.

10 **Secretary of State's Registry**

11 Existing law requires the Secretary of State to establish a registry for durable  
12 powers of attorney.<sup>90</sup> The registry is intended to provide information concerning  
13 the existence and location of a person's durable power of attorney for health care.  
14 The registry is strictly voluntary. It has no effect on the validity of a power of  
15 attorney for health care,<sup>91</sup> nor is a health care provider required to apply to the reg-  
16 istry for information.<sup>92</sup>

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

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when the principal was incapacitated). See Prob. Code § 4654. Practically speaking, it is virtually certain that this class of powers will have expired by January 1, 2000.

89. See Prob. Code § 4753, enacted by 1994 Cal. Stat. ch. 966, § 3.

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

91. Prob. Code §§ 4804-4805.

92. Prob. Code § 4806.

## HEALTH CARE DECISIONS FOR INCAPACITATED ADULTS

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## HEALTH CARE DECISIONS FOR INCAPACITATED ADULTS

### **Division 4.7 (added). Health care decisions**

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

### **DIVISION 4.7. HEALTH CARE DECISIONS**

#### **PART 1. DEFINITIONS AND GENERAL**

#### **CHAPTER 1. SHORT TITLE AND DEFINITIONS**

##### **§ 4600. Short title**

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

**Comment.** Section 4600 is new and provides a convenient means of referring to this division. The Health Care Decisions Law is essentially self-contained, but other agency statutes may be applied as provided in Section 4662. See also Sections 20 *et seq.* (general definitions applicable in Probate Code depending on context), 4755 (application of general procedural rules). For the scope of this division, see Section 4651.

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

##### **§ 4603. Application of definitions**

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

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

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

##### **§ 4605. Advance health care directive; advance directive**

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

**Comment.** Section 4605 is new. The first sentence is the same as Section 1(1) of the Uniform Health-Care Decisions Act (1993), except that the term “advance directive” is defined for convenience. “Advance directive” is commonly used in practice as a shorthand. Statutory language also may use the shorter term. See, e.g., Section 4698. A declaration or directive under the repealed Natural Death Act (former Health & Safety Code § 7185 *et seq.*) is a type of advance directive. See Section 4623 Comment.

See also Sections 4623 (“individual health care instruction” defined), 4629 (“power of attorney for health care” defined).

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

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

#### § 4607. Agent

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

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

**Comment.** Section 4607 is consistent with the definition of attorney-in-fact in the Power of Attorney Law. See Section 4014. The first part of subdivision (a) is the same as Section 1(2) of the Uniform Health-Care Decisions Act (1993). For limitations on who may act as a health care agent, see Section 4660.

See also Sections 4629 (“power of attorney for health care” defined), 4630 (“principal” defined).

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

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

#### § 4609. Capacity

4609. “Capacity” means a 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.

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

For provisions in this division relating to capacity, see Sections 4651 (authority of person having capacity not affected), 4657 (presumption of capacity), 4658 (determination of capacity and other medical conditions), 4659 (patient’s objections), 4682 (when agent’s authority effective), 4670 (authority to give individual health care instruction), 4671 (authority to execute power of attorney for health care), 4683 (scope of agent’s authority), 4695 (revocation of power of attorney for health care), 4710 (authority of surrogate to make health care decisions), 4720 (health care decisions for patient without surrogates), 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).

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

#### § 4611. Community care facility

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

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

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

**§ 4613. Conservator**

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

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

For provisions in this division concerning conservators, see Sections 4617 ("health care decision" defined), 4631 ("primary physician" defined), 4641 ("surrogate" defined), 4660 (limitations on who may act as agent), 4672 (nomination of conservator in written advance health care directive), 4696 (duty to communicate revocation), 4710 (authority of surrogate to make health care decisions), 4732 (duty of primary physician to record relevant information), 4753 (limitations on right to petition), 4765 (petitioners), 4770 (temporary health care order).

See also Section 4617 ("health care decision" defined), 4625 ("patient" defined).

**§ 4615. Health care**

4615. "Health care" means any care, treatment, service, or procedure to maintain, diagnose, or otherwise affect a patient's physical or mental condition.

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

See also Section 4625 ("patient" defined).

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

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

**§ 4617. Health care decision**

4617. "Health care decision" means a decision made by a patient or the patient's agent, conservator, or surrogate, regarding the patient's health care, including the following:

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

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

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

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

See also Sections 4607 ("agent" defined), 4613 ("conservator" defined), 4615 ("health care" defined), 4625 ("patient" defined), 4641 ("surrogate" defined).



**§ 4619. Health care institution**

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

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

For provisions in this division using this term, see Sections 4654 (compliance with generally accepted health care standards), 4660 (limitation on who may act as agent or surrogate), 4675 (restriction on requiring or prohibiting advance directive), 4696 (duty to communicate revocation), 4701 (optional form of advance health care directive), 4711 (patient's designation of surrogate), 4722 (composition of surrogate committee), 4733 (obligations of health care institution), 4734 (right to decline for reasons of conscience or institutional policy), 4735 (health care institution's right to decline ineffective care), 4736 (obligations of declining health care institution), 4740 (immunities of health care provider or institution), 4742 (statutory damages), 4765 (petitioners), 4785 (application of request to forgo resuscitative measures).

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

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

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

**§ 4621. Health care provider**

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

**Comment.** Section 4621 continues former Section 4615 without substantive change and is the same as Section 1(8) of the Uniform Health-Care Decisions Act (1993). This section also continues former Health and Safety Code Section 7186(c) (Natural Death Act) without substantive change.

For provisions in this division using this term, see Sections 4617 ("health care decision" defined), 4639 ("supervising health care provider" defined), 4654 (compliance with generally accepted health care standards), 4660 (limitations on who may act as agent), 4673 (witnessing requirements in skilled nursing facility), 4674 (validity of written advance directive executed in another jurisdiction), 4675 (restriction on requiring or prohibiting advance directive), 4685 (agent's priority), 4696 (duty to communicate revocation), 4701 (optional form of advance health care directive), 4712 (selection of statutory surrogate), 4733 (obligations of health care provider), 4734 (health care provider's right to decline for reasons of conscience), 4735 (health care provider's right to decline ineffective care), 4736 (obligations of declining health care provider), 4740 (immunities of health care provider), 4742 (statutory damages).

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

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

4623. "Individual health care instruction" or "individual instruction" means a patient's written or oral direction concerning a health care decision for herself or himself.

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

For provisions in this division using this term, see Sections 4605 (“advance health care directive” defined), 4625 (“patient” defined), 4658 (determination of capacity and other medical conditions), 4670 (individual health care instruction recognized), 4671 (power of attorney for health care may include individual instruction), 4684 (standard governing agent’s health care decisions), 4713 (standard governing surrogate’s health care decisions), 4720 (application of chapter governing health care decisions for patients without surrogates), 4732 (duty of primary physician to record relevant information), 4733 (obligations of health care provider or institution), 4734 (health care provider’s or institution’s right to decline), 4735 (right to decline to provide ineffective care), 4736 (obligations of declining health care provider or institution).

See also Section 4617 (“health care decision” defined), 4625 (“patient” defined).

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

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

#### § 4625. Patient

4625. “Patient” means an adult whose health care is under consideration, and includes a principal under a power of attorney for health care and an adult who has given an individual health care instruction or designated a surrogate.

**Comment.** Section 4625 is a new provision added for drafting convenience. “Adult” includes an emancipated minor. See Fam. Code §§ 7002 (emancipation), 7050 (emancipated minor considered as adult for consent to medical, dental, or psychiatric care). For provisions governing surrogates, see Section 4710 *et seq.*

See also Sections 4615 (“health care” defined), 4623 (“individual health care instruction” defined), 4629 (“power of attorney for health care” defined), 4630 (“principal” defined), 4641 (“surrogate” defined). Compare Section 3200 (“patient” defined for purposes of court-authorized medical treatment procedure).

#### § 4627. Physician

4627. “Physician” means a physician and surgeon licensed by the Medical Board of California or the Osteopathic Medical Board of California.

**Comment.** Section 4627 continues and generalizes former Health and Safety Code Section 7186(g) (Natural Death Act) and is the same in substance as Section 1(11) of the Uniform Health-Care Decisions Act (1993).

#### § 4629. Power of attorney for health care

4629. “Power of attorney for health care” means a written instrument designating an agent to make health care decisions for the principal.

**Comment.** Section 4629 supersedes former Section 4606 (defining “durable power of attorney for health care”) and is the same in substance as Section 1(12) of the Uniform Health-Care Decisions Act (1993). The writing requirement continues part of Section 4022 (defining “power of attorney” generally) as it applied to powers of attorney for health care under former law, and is consistent with part of the second sentence of Section 2(b) of the Uniform Health-Care Decisions Act (1993).

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

**§ 4631. Primary physician**

4631. “Primary physician” means a physician designated by a patient or the patient’s agent, conservator, or surrogate, to have primary responsibility for the patient’s health care or, in the absence of a designation or if the designated physician is not reasonably available, a physician who undertakes the responsibility.

**Comment.** Section 4631 supersedes former Health and Safety Code Section 7186(a) (“attending physician” defined) and is the same in substance as Section 1(13) of the Uniform Health-Care Decisions Act (1993).

For provisions in this division using this term, see Sections 4639 (“supervising health care provider” defined), 4658 (determination of capacity and other medical conditions), 4701 (optional form of advance health care directive), 4710 (authority of surrogate to make health care decisions), 4712 (selection of statutory surrogate), 4715 (reassessment of surrogate selection), 4720 (application of rules on patients without surrogates), 4721 (referral to interdisciplinary team), 4722 (composition of surrogate committee), 4723 (standards of review by surrogate committee), 4732 (duty of primary physician to record relevant information).

See also Sections 4607 (agent” defined), 4613 (“conservator” defined), 4615 (“health care” defined), 4627 (“physician” defined), 4633 (“reasonably available” defined), 4641 (“surrogate” defined).

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

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

**§ 4630. Principal**

4630. “Principal” means an adult who executes a power of attorney for health care.

**Comment.** Section 4630 is the same in substance as Section 4026 in the Power of Attorney Law. “Adult” includes an emancipated minor. See Fam. Code §§ 7002 (emancipation), 7050 (emancipated minor considered as adult for consent to medical, dental, or psychiatric care).

See also Section 4629 (“power of attorney for health care” defined).

**§ 4633. Reasonably available**

4633. “Reasonably available” means readily able to be contacted without undue effort and willing and able to act in a timely manner considering the urgency of the patient’s health care needs.

**Comment.** Section 4633 is the same as Section 1(14) of the Uniform Health-Care Decisions Act (1993).

For provisions in this division the use this term, see Sections 4631 (“primary physician” defined), 4639 (“supervising health care provider” defined), 4685 (agent’s priority), 4701 (optional form of advance health care directive), 4710 (authority of surrogate to make health care decisions), 4712 (selection of statutory surrogate), 4715 (reassessment of surrogate selection), 4720 (application of rules on patients without surrogates).

See also Section 4615 (“health care” defined), 4625 (“patient” defined).

**Background from Uniform Act.** The term “reasonably available” is used in the Act to accommodate the reality that individuals will sometimes not be timely available. The term is incorporated into the definition of “supervising health-care provider” [Prob. Code § 4639]. It

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

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

#### **§ 4635. Residential care facility for the elderly**

4635. “Residential care facility for the elderly” means a “residential care facility for the elderly” as defined in Section 1569.2 of the Health and Safety Code.

**Comment.** Section 4635 continues former Section 4618 without substantive change.

For provisions in this division using this term, see Sections 4660 (limitations on who may act as agent), 4673 (witnessing requirements in skilled nursing facility), 4701 (optional form of advance health care directive).

#### **§ 4637. Skilled nursing facility**

4637. “Skilled nursing facility” means a “skilled nursing facility” as defined in Section 1250 of the Health and Safety Code.

**Comment.** Section 4637 is a new provision that incorporates the relevant definition from the Health and Safety Code.

For provisions in this division using this term, see Sections 4673 (witnessing requirements in skilled nursing facility), 4701 (optional form of advance health care directive).

#### **§ 4639. Supervising health care provider**

4639. “Supervising health care provider” means the primary physician or, if there is no primary physician or the primary physician is not reasonably available, the health care provider who has undertaken primary responsibility for a patient’s health care.

**Comment.** Section 4639 is a new provision and is the same in substance as Section 1(16) of the Uniform Health-Care Decisions Act (1993).

For provisions in this division using this term, see Sections 4660 (limitations on who may act as agent or surrogate), 4695 (revocation of power of attorney for health care), 4696 (duty to communicate revocation), 4701 (optional form of advance health care directive), 4711 (patient’s designation of surrogate), 4714 (disqualification of surrogate), 4730 (duty of health care provider to communicate), 4731 (duty of supervising health care provider to record relevant information), 4765 (petitioners).

See also Sections 4607 (“agent” defined), 4615 (“health care” defined), 4625 (“patient” defined), 4631 (“primary physician” defined), 4633 (“reasonably available” defined).

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

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

#### **§ 4641. Surrogate**

4641. “Surrogate” means an adult, other than a patient’s agent or conservator, authorized under this division to make a health care decision for the patient.

**Comment.** Section 4641 is a new provision and is the same in substance as Section 1(17) of the Uniform Health-Care Decisions Act (1993), except that this section refers to “conservator”

instead of “guardian” and to “adult” instead of “individual.” “Adult” includes an emancipated minor. See Fam. Code §§ 7002 (emancipation). For provisions governing surrogates, see Section 4710 *et seq.*

For provisions in this division using this term, see Sections 4617 (health care decision), 4625 (patient), 4631 (primary physician), 4653 (mercy killing, assisted suicide, euthanasia not approved), 4657 (presumption of capacity), 4658 (determination of capacity and other medical conditions), 4659 (patient’s objections), 4660 (limitation on who may act as agent or surrogate), 4661 (use of copies), 4696 (duty to communicate revocation), 4710-4715 (health care surrogates), 4720 (application of rules on patients without surrogates), 4725 (general surrogate rules applicable to surrogate committee), 4731 (duty of supervising health care provider to record relevant information), 4732 (duty of primary physician to record relevant information), 4741 (immunities of agent and surrogate), 4750 (judicial intervention disfavored), 4762 (jurisdiction over agent or surrogate), 4763 (venue), 4765 (petitioners), 4766 (purposes of petition), 4769 (notice of hearing), 4771 (award of attorney’s fees). See also 4780 (“request to forgo resuscitative measures”), 4783 (forms for requests to forgo resuscitative measures).

See also Sections 4607 (“agent” defined), 4617 (“health care decision” defined), 4625 (“patient” defined).

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

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

## CHAPTER 2. GENERAL PROVISIONS

### § 4650. Legislative findings

4650. The Legislature finds the following:

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

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

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

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

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

209 Cal. Rptr. 220, 224-25 (1984); Barber v. Superior Court, 147 Cal. App. 3d 1006, 1015-16, 195 Cal. Rptr. 484, 489-90 (1983). The earlier legislative findings were limited to persons with a terminal condition or permanent unconscious condition. This restriction is not continued here in recognition of the broader scope of this division and the development of case law since enactment of the original Natural Death Act in 1976. References to "medical care" in former law have been changed to "health care" for consistency with the language of this division. See Section 4615 ("health care" defined). This is not intended as a substantive change. "Adult" includes an emancipated minor. See Fam. Code §§ 7002 (emancipation), 7050 (emancipated minor considered as adult for consent to medical, dental, or psychiatric care). "Continue" has been added to subdivision (c) for consistency with the scope of this division. See, e.g., Sections 4615 ("health care" defined), 4617 ("health care decision" defined), 4701 (optional form of advance directive).

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

#### **§ 4651. Scope of division**

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

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

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

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

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

**Comment.** Subdivision (a) of Section 4651 is a new provision

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

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

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

See also Sections 4605 ("advance health care directive" defined), 4615 ("health care" defined), 4617 ("health care decision" defined), 4687 (other authority of person named as agent not affected).

#### **§ 4652. Unauthorized acts**

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

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

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

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

(d) Sterilization.

(e) Abortion.

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

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

4653. Nothing in this division shall be construed to condone, authorize, or approve mercy killing, assisted suicide, or euthanasia. This division is not intended to permit any affirmative or deliberate act or omission to end life other than the withholding or withdrawal of health care pursuant to an advance health care directive, by a surrogate, or as otherwise provided, so as to permit the natural process of dying.

**Comment.** Section 4653 continues the first sentence of former Section 4723 without substantive change, and is consistent with Section 13(c) of the Uniform Health-Care Decisions Act (1993). This section also continues the substance of former Health and Safety Code Section 7191.5(g) (Natural Death Act). Language has been revised to conform to the broader scope of this division. This section provides a rule governing the interpretation of this division. It is not intended as a general statement beyond the scope of this division nor is it intended to affect any other authority that may exist.

See Sections 4670 *et seq.* (advance health care directives), 4710 *et seq.* (health care surrogates), 4725 (surrogate rules applicable to surrogate committee). See also Sections 4605 (“advance health care directive” defined), 4615 (“health care” defined), 4641 (“surrogate” defined).

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

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

**Comment.** Section 4654 is the same as Section 13(d) of the Uniform Health-Care Decisions Act (1993). For a special application of this general rule, see Section 4735 (right to decline to provide ineffective care). This section continues the substance of former Health & Safety Code Section 7191.5(f) (Natural Death Act) and subsumes the specific duty under former Health and Safety Code Section 7189.5(b) concerning providing comfort care and alleviation of pain.

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

**§ 4655. Impermissible constructions**

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

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

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

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

See also Sections 4605 (“advance health care directive” defined), 4615 (“health care” defined), 4617 (“health care decision” defined), 4625 (“patient” defined).

**§ 4656. Effect on death benefits**

4656. Death resulting from withholding or withdrawing health care in accordance with this division does not for any purpose constitute a suicide or homicide or legally impair or invalidate a policy of insurance or an annuity providing a death benefit, notwithstanding any term of the policy or annuity to the contrary.

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

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

**§ 4657. Presumption of capacity**

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

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

See also Sections 4605 ("advance health care directive" defined), 4609 ("capacity" defined), 4617 ("health care decision" defined), 4625 ("patient" defined), 4641 ("surrogate" defined).

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

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

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

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

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

See also Sections 4605 ("advance health care directive" defined), 4607 ("agent" defined), 4609 ("capacity" defined), 4623 ("individual health care instruction" defined), 4625 ("patient" defined), 4631 ("primary physician" defined), 4641 ("surrogate" defined).

**Background from Uniform Act.** Section 2(d) provides that unless otherwise specified in a written advance health-care directive, a determination that a principal has lost or recovered capacity to make health-care decisions must be made by the primary physician. For example, a principal might specify that the determination of capacity is to be made by the agent in consultation with the primary physician. Or a principal, such as a member of the Christian



1 Science faith who relies on a religious method of healing and who has no primary physician,  
2 might specify that capacity be determined by other means. In the event that multiple decision  
3 makers are specified and they cannot agree, it may be necessary to seek court instruction as  
4 authorized by Section 14 [see Prob. Code § 4766].

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

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

#### 14 **§ 4659. Patient's objections**

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

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

27 See also Sections 4605 ("advance health care directive" defined), 4609 ("capacity" defined),  
28 4615 ("health care" defined), 4617 ("health care decision" defined), 4625 ("patient" defined),  
29 4641 ("surrogate" defined).

#### 30 **§ 4660. Limitations on who may act as agent or surrogate**

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31 4660. (a) Except as provided in subdivision (b), none of the following persons  
32 may make health care decisions as an agent under a power of attorney for health  
33 care or a surrogate under this division:

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

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

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

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

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

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

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

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

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

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

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

15 **Comment.** Subdivisions (a)-(c) of Section 4660 restate former Section 4702 without  
16 substantive change, and extend its principles to cover surrogates. The terms "supervising health  
17 care provider" and "health care institution" have been substituted for "treating health care  
18 provider" as appropriate, for consistency with the terms used in this division. See Section 4639  
19 ("supervising health care provider" defined).

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

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

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

32 Subdivision (d) makes clear that the rules governing surrogate committees under Sections  
33 4720-4725 prevail over this section.

34 See also Sections 4605 ("advance health care directive" defined), 4607 ("agent" defined), 4611  
35 ("community care facility" defined), 4613 ("conservator" defined), 4617 ("health care decision"  
36 defined), 4619 ("health care institution" defined), 4625 ("patient" defined), 4629 ("power of  
37 attorney for health care" defined), 4635 ("residential care facility for the elderly" defined), 4639  
38 ("supervising health care provider" defined), 4641 ("surrogate" defined).

#### 39 **§ 4661. Use of copies**

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40 4661. A copy of a written advance health care directive, revocation of an  
41 advance directive, or designation or disqualification of a surrogate has the same  
42 effect as the original.

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

47 See also Sections 4605 ("advance health care directive" defined), 4641 ("surrogate" defined).

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

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

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

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

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

### **CHAPTER 3. TRANSITIONAL PROVISIONS**

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

4665. Except as otherwise provided by statute:

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

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

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

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

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

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

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

See also Sections 4605 ("advance health care directive" defined), 4629 ("power of attorney for health care" defined).

## PART 2. UNIFORM HEALTH CARE DECISIONS ACT

### CHAPTER 1. ADVANCE HEALTH CARE DIRECTIVES

#### Article 1. General Provisions

##### **§ 4670. Authority to give individual health care instruction**

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

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

See also Sections 4615 ("health care" defined), 4623 ("individual health care instruction" defined).

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

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

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

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

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

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

See also Sections 4607 ("agent" defined), 4617 ("health care decision" defined), 4623 ("individual health care instruction" defined), 4629 ("power of attorney for health care" defined).

**Background from Uniform Act.** Section 2(b) authorizes a power of attorney for health care to include instructions regarding the principal's health care. This provision has been included in

1 order to validate the practice of designating an agent and giving individual instructions in one  
2 document instead of two. The authority of an agent falls within the discretion of the principal as  
3 expressed in the instrument creating the power and may extend to any health-care decision the  
4 principal could have made while having capacity.

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

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

#### 11 **§ 4672. Nomination of conservator in written advance directive**

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12 4672. (a) A written advance health care directive may include the individual's  
13 nomination of a conservator of the person or estate or both, or a guardian of the  
14 person or estate or both, for consideration by the court if protective proceedings  
15 for the individual's person or estate are thereafter commenced.

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

20 **Comment.** Section 4672 continues Section 4126 without substantive change, insofar as that  
21 section applied to powers of attorney for health care, and expands the scope of the rule to apply to  
22 other written advance health care directives. Subdivision (a) is the same in substance as Section  
23 2(g) of the Uniform Health-Care Decisions Act (1993).

24 See also Sections 4605 ("advance health care directive" defined), 4613 ("conservator" defined).

#### 25 **§ 4673. Witnessing required in skilled nursing facility**

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26 4673. (a) If an individual is a patient in a skilled nursing facility when the  
27 advance health care directive is executed, the advance directive shall be  
28 acknowledged before a notary public or signed by at least two witnesses as  
29 provided in this section.

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

32 (1) The witnesses shall be adults.

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

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

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

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

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

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

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

1     “I declare under penalty of perjury under the laws of California that the  
2     individual who signed or acknowledged this document is personally known  
3     to me, or that the identity of the individual was proven to me by convincing  
4     evidence, that the individual signed or acknowledged this advance health care  
5     directive in my presence, that the individual appears to be of sound mind and  
6     under no duress, fraud, or undue influence, that I am not the person appointed  
7     as agent by this document, and that I am not the individual’s health care  
8     provider, an employee of the individual’s health care provider, the operator of  
9     a community care facility, an employee of an operator of a community care  
10    facility, the operator of a residential care facility for the elderly, nor an  
11    employee of an operator of a residential care facility for the elderly.”

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

22    (d) For the purposes of the declaration of witnesses, “convincing evidence”  
23    means the absence of any information, evidence, or other circumstances that  
24    would lead a reasonable person to believe the individual executing the advance  
25    health care directive, whether by signing or acknowledging his or her signature, is  
26    not the individual he or she claims to be, and any one of the following:

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

29    (A) An identification card or driver’s license issued by the California  
30    Department of Motor Vehicles.

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

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

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

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

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

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

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

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

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

See also Sections 4605 (“advance health care directive” defined), 4611 (“community care facility” defined), 4621 (“health care provider” defined), 4625 (“patient” defined), 4635 (“residential care facility for the elderly” defined), 4637 (“skilled nursing facility” defined).

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

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

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

**Comment.** Subdivision (a) of Section 4674 continues former Section 4653 without substantive change, and extends its principles to apply to all written advance health care directives, which include both powers of attorney for health care and written individual instructions. This subdivision also continues and generalizes former Health and Safety Code Section 7192.5 (Natural Death Act). This subdivision is consistent with Section 2(h) of the Uniform Health-Care Decisions Act (1993), as applied to instruments.

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

See also Section 4605 (“advance health care directive” defined), 4621 (“health care provider” defined), 4627 (“physician” defined). For the rule applicable under the Power of Attorney Law, see Section 4053.

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

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

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

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

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

See also Sections 4605 ("advance health care directive" defined), 4615 ("health care" defined), 4619 ("health care institution" defined), 4621 ("health care provider" defined).

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

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

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

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

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

See also Sections 4605 ("advance health care directive" defined), 4617 ("health care decision" defined), 4625 ("patient" defined).

**Background from Uniform Act.** An agent, conservator, [guardian,] or surrogate stands in the shoes of the patient when making health-care decisions. To assure fully informed decisionmaking, this section provides that a person who is then authorized to make health-care decisions for a patient has the same right of access to health-care information as does the patient unless otherwise specified in the patient's advance health-care directive.

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

**Article 2. Powers of Attorney for Health Care**

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

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



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

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

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

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

A power of attorney must be in writing. See Section 4629 ("power of attorney for health care" defined). This section provides the general execution formalities for a power of attorney under this division. A power of attorney that complies with this section is legally sufficient as a grant of authority to an agent.

See also Section 4630 ("principal" defined).

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

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

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

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

(2) Operative dates of statutory enactments or amendments.

(3) Execution formalities.

(4) Qualifications of witnesses.

(5) Qualifications of agents.

(6) Protection of third persons from liability.

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

See also Sections 4607 ("agent" defined), 4629 ("power of attorney for health care" defined), 4630 ("principal" defined).

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**§ 4682. When agent's authority effective**

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4682. Unless otherwise provided in a power of attorney for health care, the authority of an agent becomes effective only on a determination that the principal lacks capacity, and ceases to be effective on a determination that the principal has recovered capacity.

**Comment.** Section 4682 is drawn from Section 2(c) of the Uniform Health-Care Decisions Act (1993) and continues the substance of the last part of former Section 4720(a). See Sections 4657 (presumption of capacity), 4658 (determination of capacity and other medical conditions) & Comment. As under former law, the default rule is that the agent is not authorized to make health care decisions if the principal has the capacity to make health care decisions. The power of attorney may, however, give the agent authority to make health care decisions for the principal even though the principal does have capacity, but the power of attorney is always subject to Section 4659 (if principal objects, agent not authorized to consent to health care or to the withholding or withdrawal of health care necessary to keep the principal alive).

See also Sections 4607 (“agent” defined), 4609 (“capacity” defined), 4629 (“power of attorney for health care” defined), 4630 (“principal” defined).

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

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

### **§ 4683. Scope of agent’s authority**

4683. Subject to any limitations in the power of attorney for health care:

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

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

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

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

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

**Comment.** Section 4683 continues former Section 4720(b) without substantive change. Subdivision (a) is consistent with the last part of the first sentence of Section 2(b) of the Uniform Health-Care Decisions Act (1993). Technical revisions have made to conform to the language of this division. See Section 4658 (determination of capacity and other medical conditions). The agent’s authority is subject to Section 4652 which precludes consent to certain specified types of treatment. See also Section 4653 (impermissible acts and constructions). The principal is free to provide any limitations on types of treatment in the durable power of attorney that are desired. See also Section 4750 *et seq.* (judicial proceedings).

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

See also Sections 4607 (“agent” defined), 4609 (“capacity” defined), 4615 (“health care” defined), 4617 (“health care decision” defined), 4629 (“power of attorney for health care” defined), 4633 (“reasonably available” defined).

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**§ 4684. Standard governing agent's health care decisions**


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4684. An agent shall make a health care decision in accordance with the principal's individual health care instructions, if any, and other wishes to the extent known to the agent. Otherwise, the agent shall make the decision in accordance with the agent's determination of the principal's best interest. In determining the principal's best interest, the agent shall consider the principal's personal values to the extent known to the agent.

**Comment.** Section 4684 continues the substance of former Section 4720(c) and is the same as Section 2(e) of the Uniform Health-Care Decisions Act (1993). Although the new wording of this fundamental rule is different, Section 4684 continues the principle of former law that, in exercising authority, the agent has the duty to act consistent with the principal's desires if known or, if the principal's desires are unknown, to act in the best interest of the principal. The agent's authority is subject to Section 4652, which precludes consent to certain specified types of treatment. See also Section 4653 (mercy killing, assisted suicide, euthanasia not approved). The principal is free to provide any limitations on types of treatment in the power of attorney that are desired. See also Section 4750 *et seq.* (judicial proceedings). This fundamental standard is also applicable to decisions made by surrogate committees. See Section 4713.

See also Sections 4607 ("agent" defined), 4623 ("individual health care instruction" defined), 4630 ("principal" defined).

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

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

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**§ 4685. Agent's priority**


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4685. Unless the power of attorney for health care provides otherwise, the agent designated in the power of attorney who is known to the health care provider to be reasonably available and willing to make health care decisions has priority over any other person in making health care decisions for the principal.

**Comment.** Section 4685 continues without substantive change the first part of former Section 4720(a) and part of former Section 4652(a) relating to availability, willingness, and ability of agents. This section gives the agent priority over others, including a conservator or statutory surrogate, to make health care decisions if the agent is known to the health care provider to be available and willing to act. See Section 4710 (statutory surrogate's authority dependent on appointment and availability of agent). The power of attorney may vary this priority, as recognized in the introductory clause, and the rule of this section is subject to a contrary court order. See Section 4766. In part, this section serves the same purpose as Section 6(b) of the Uniform Health-Care Decisions Act (1993).

See also Sections 4607 ("agent" defined), 4617 ("health care decision" defined), 4621 ("health care provider" defined), 4629 ("power of attorney for health care" defined), 4630 ("principal" defined), 4633 ("reasonably available" defined).

**§ 4686. Duration**

4686. Unless the power of attorney for health care provides a time of termination, the authority of the agent is exercisable notwithstanding any lapse of time since execution of the power of attorney.

**Comment.** Section 4686 continues Section 4127, insofar as it applied to powers of attorney for health care, without substantive change. This rule is the same in substance as the second sentence of the official text of Section 2 of the Uniform Durable Power of Attorney Act (1987), Uniform Probate Code Section 5-502 (1991). See Section 2(b) (construction of provisions drawn from uniform acts).

See also Sections 4607 (“agent” defined), 4629 (“power of attorney for health care” defined).

**§ 4687. Other authority of person named as agent not affected**

4687. Nothing in this division affects any right the person designated as an agent under a power of attorney for health care may have, apart from the power of attorney, to make or participate in making health care decisions for the principal.

**Comment.** Section 4687 continues former Section 4720(d) without substantive change, and supersedes part of former Section 4652(a). An agent may, without liability, decline to act under the power of attorney. For example, the agent may not be willing to follow the desires of the principal as stated in the power of attorney because of changed circumstances. This section makes clear that, in such a case, the person may make or participate in making health care decisions for the principal without being bound by the stated desires of the principal to the extent that the person designated as the agent has the right under the applicable law apart from the power of attorney. See Section 4722(b)(4) (patient representative on surrogate committee).

See also Sections 4607 (“agent” defined), 4617 (“health care decision” defined), 4629 (“power of attorney for health care” defined), 4630 (“principal” defined).

**§ 4688. Application to acts and transactions under power of attorney**

4688. (a) If a power of attorney for health care provides that the law of this state governs the power of attorney or otherwise indicates that the law of this state governs the power of attorney, this division governs the power of attorney and applies to an agent’s activities in this state or outside this state where any of the following conditions is satisfied:

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

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

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

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

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

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

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

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

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

**Comment.** Section 4688 is drawn from Section 4052 in the Power of Attorney Law. Nothing in this section limits the jurisdiction exercisable under Code of Civil Procedure Section 410.10.

See also Sections 4607 (“agent” defined), 4629 (“power of attorney for health care” defined), 4630 (“principal” defined).

### Article 3. Revocation of Advance Directives

#### **§ 4695. Revocation of advance health care directive**

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

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

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

See also Sections 4605 (“advance health care directive” defined), 4625 (“patient” defined), 4629 (“power of attorney for health care” defined), 4639 (“supervising health care provider” defined).

**Background from Uniform Act.** Section 3(b) provides that an individual may revoke any portion of an advance health-care directive at any time and in any manner that communicates an intent to revoke. However, a more restrictive standard applies to the revocation of the portion of a power of attorney for health care relating to the designation of an agent. Section 3(a) provides that an individual may revoke the designation of an agent only by a signed writing or by personally informing the supervising health-care provider. This higher standard is justified by the risk of a false revocation of an agent’s designation or of a misinterpretation or miscommunication of a principal’s statement communicated through a third party. For example, without this higher standard, an individual motivated by a desire to gain control over a patient might be able to assume authority to act as agent by falsely informing a health-care provider that the principal no longer wishes the previously designated agent to act but instead wishes to appoint the individual.

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

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

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

4696. A health care provider, agent, conservator, or surrogate who is informed of a revocation shall promptly communicate the fact of the revocation to the

supervising health care provider and to any health care institution where the patient is receiving care.

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

See also Sections 4607 (“agent” defined), 4613 (“conservator” defined), 4619 (“health care institution” defined), 4621 (“health care provider” defined), 4625 (“patient” defined), 4639 (“supervising health care provider” defined), 4641 (“surrogate” defined).

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

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

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

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

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

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

This section is subject to limitation by the power of attorney. See Section 4681 (limitations expressed in power of attorney for health care). See also Sections 4607 (“agent” defined), 4617 (“health care decision” defined), 4629 (“power of attorney for health care” defined), 4630 (“principal” defined).

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

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

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

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

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

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

1                   **CHAPTER 2. ADVANCE HEALTH CARE DIRECTIVE FORMS**

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

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

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

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

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

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

13                               **ADVANCE HEALTH CARE DIRECTIVE**

14                               (California Probate Code Section 4701)

15                               **Explanation**

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

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

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

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

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

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

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

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

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

22 You have the right to revoke this advance health care directive or replace this  
23 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) **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:

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

(Optional) SIGNATURES OF WITNESSES:

First witness

Second witness

_____	_____
(print name)	(print name)
_____	_____
(address)	(address)
_____	_____
(city)	(city)
(state)	(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)

**Comment.** Section 4701 provides the contents of the optional statutory form for the Advance Health Care Directive. Parts 1-5 of this form are drawn from Section 4 of the Uniform Health-Care Decisions Act (1993). This form supersedes the Statutory Form Durable Power of Attorney for Health Care in former Section 4771 and the related rules in former Sections 4772-4774, 4776-4778. Part 6 of this form continues a portion of the former statutory form applicable to patients in skilled nursing facilities.

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

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

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

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

Part [1.3] of the power of attorney for health care form provides that the agent's authority becomes effective upon a determination that the individual lacks capacity, but as authorized by

Section 2(c) [Prob. Code § 4682] a box is provided for the individual to indicate that the authority of the agent takes effect immediately.

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

Part [1.5] of the power of attorney for health care form nominates the agent, if available, able, and willing to act, otherwise the alternate agents in order of priority stated, as guardians of the person for the individual. This provision is included in the form for two reasons. First, if an appointment of a guardian becomes necessary the agent is the one whom the individual would most likely want to serve in that role. Second, the nomination of the agent as guardian will reduce the possibility that someone other than the agent will be appointed as guardian who could use the position to thwart the agent's authority.

Because the variety of treatment decisions to which health-care instructions may relate is virtually unlimited, Part 2 of the form does not attempt to be comprehensive, but is directed at the types of treatment for which an individual is most likely to have special wishes. Part [2.1] of the form, entitled "End-of-Life Decisions," provides two alternative choices for the expression of wishes concerning the provision, withholding, or withdrawal of treatment. Under the first choice, the individual's life is not to be prolonged if the individual has an incurable and irreversible condition that will result in death within a relatively short time, if the individual becomes unconscious and, to a reasonable degree of medical certainty, will not regain consciousness, or if the likely risks and burdens of treatment would outweigh the expected benefits. Under the second choice, the individual's life is to be prolonged within the limits of generally accepted health-care standards.... Part [2.2] of the form provides space for an individual to specify any circumstance when the individual would prefer not to receive pain relief. Because the choices provided in Parts [2.1-2.2] do not cover all possible situations, Part [2.3] of the form provides space for the individual to write out his or her own instructions or to supplement the instructions given in the previous subparts of the form. Should the space be insufficient, the individual is free to add additional pages.

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

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

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

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

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

The form does not require formal acceptance by an agent. Formal acceptance by an agent has been omitted not because it is an undesirable practice but because it would add another stage to executing an advance health-care directive, thereby further reducing the number of individuals who will follow through and create directives. However, practitioners who wish to adapt this

form for use by their clients are strongly encouraged to add a formal acceptance. Designated agents have no duty to act until they accept the office either expressly or through their conduct. Consequently, requiring formal acceptance reduces the risk that a designated agent will decline to act when the need arises. Formal acceptance also makes it more likely that the agent will become familiar with the principal's personal values and views on health care. While the form does not require formal acceptance, the explanation to the form does encourage principals to talk to the person they have named as agent to make certain that the designated agent understands their wishes and is willing to take the responsibility.

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

## CHAPTER 3. HEALTH CARE SURROGATES

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

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

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

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

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

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

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

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

### **§ 4711. Patient's designation of surrogate**

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

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

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

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

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

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

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

(1) The spouse, unless legally separated.

(2) Children.

(3) Parents.

(4) Brothers and sisters.

(5) Grandchildren.

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

(7) Close friends.

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

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

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

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

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

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



(3) Demonstrated care and concern for the patient.

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

(5) Availability to visit the patient.

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

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

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

**Comment.** Section 4712 is a new provision, drawn from West Virginia law and the Uniform Health-Care Decisions Act (1993). See W.Va. Code § 16-30B-7 (1997); Unif. Health-Care Decisions Act § 5(b)-(d) (1993). Subdivision (a)(6) is drawn from New Mexico law. See N.M. Stat. Ann. § 24-7A-5(B)(2) (Westlaw 1998). "Adult" includes an emancipated minor. See Fam. Code § 7002 (emancipation). A prospective surrogate and other persons may also seek judicial relief as provided in Sections 4765-4766.

See also Sections 4617 ("health care decision" defined), 4625 ("patient" defined), 4633 ("reasonably available" defined), 4639 ("supervising health care provider" defined), 4641 ("surrogate" defined).

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

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

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#### § 4713. Standard governing surrogate's health care decisions

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

**Comment.** Section 4713 is drawn from Section 5(f) of the Uniform Health-Care Decisions Act (1993). This standard is consistent with the health care decisionmaking standard applicable to agents. See Section 4684.

See also Sections 4617 ("health care decision" defined), 4623 ("individual health care instruction" defined), 4625 ("patient" defined), 4641 ("surrogate" defined).

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

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

**§ 4714. Disqualification of surrogate**

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

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

See also Sections 4625 ("patient" defined), 4639 ("supervising health care provider" defined), 4641 ("surrogate" defined).

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

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

**§ 4715. Reassessment of surrogate selection**

4715. (a) If a surrogate selected pursuant to Section 4712 is not reasonably available, the surrogate may be replaced.

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

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

See also Sections 4631 ("primary physician" defined), 4633 ("reasonably available" defined), 4641 ("surrogate" defined).

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

**§ 4720. Application of chapter**

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

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

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

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

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

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

5     See also Sections 4607 (“agent” defined), 4609 (“capacity” defined), 4613 (“conservator”  
6 defined), 4617 (“health care decision” defined), 4623 (“individual health care instruction”  
7 defined), 4625 (“patient” defined), 4631 (“primary physician” defined), 4633 (“reasonably  
8 available” defined), 4641 (“surrogate” defined).

#### 9     **§ 4721. Referral to surrogate committee**

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10     4721. A patient’s primary physician may obtain approval for a proposed health  
11 care decision by referring the matter to a surrogate committee before the health  
12 care decision is implemented.

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

17     See also Sections 4617 (“health care decision” defined), 4625 (“patient” defined), 4631  
18 (“primary physician” defined), 4633 (“reasonably available” defined), 4641 (“surrogate” defined).

#### 19     **§ 4722. Composition of surrogate committee**

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20     4722. (a) A surrogate committee may be established by the health care  
21 institution. If a surrogate committee has not been established by the patient’s  
22 health care institution, or if the patient is not in a health care institution, the  
23 surrogate committee may be established by the county health officer or as  
24 otherwise determined by the county board of supervisors.

25     (b) The surrogate shall include the following individuals:

26     (1) The patient’s primary physician.

27     (2) A registered professional nurse with responsibility for the patient and with  
28 knowledge of the patient’s condition.

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

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

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

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

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

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

Subdivision (b) is drawn in part from provisions of former Health and Safety Code Section 1418.8(e)-(f) applicable to medical interventions in long-term care facilities. Subdivision (b)(4) makes clear that a person who may be qualified to serve as a surrogate under Chapter 3 (commencing with Section 4710) may still participate in health care decisionmaking as a patient representative.

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

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

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

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

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

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

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

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

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

(b) The surrogate committee shall periodically evaluate the results of an approved health care decision at least quarterly or upon a significant change in the patient's medical condition.

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

Subdivision (b) continues and generalizes former Health and Safety Code Section 1418.8(g).

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

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

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

**Comment.** Section 4724 is new. The principle of decisionmaking by a majority is consistent with the rule applicable to statutory surrogates under Section 5(e) of the Uniform Health-Care Decisions Act (1993). With respect to medical interventions in long-term care facilities, this section supersedes part of the second sentence of former Health and Safety Code Section 1418.8(e) relating to "a team approach to assessment and care planning." For the standard governing surrogate decisionmaking generally, see Section 4713.

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

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

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

**Comment.** Section 4725 is new. For provisions applicable to health care surrogates generally, see Chapter 3 (commencing with Section 4710), Section 4741 (immunities of surrogate). See also Section 4653 (mercy killing, assisted suicide, euthanasia not approved). For a list of sections applicable to surrogates, see Section 4641 Comment. For the standard governing surrogate decisionmaking generally, see Section 4713.

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

**§ 4726. Review of emergency care**

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

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

**CHAPTER 5. DUTIES OF HEALTH CARE PROVIDERS**

**§ 4730. Supervising health care provider’s duty to communicate**

4730. Before implementing a health care decision made for a patient, a supervising health care provider, if possible, shall promptly communicate to the patient the decision made and the identity of the person making the decision.

**Comment.** Section 4730 is drawn from Section 7(a) of the Uniform Health-Care Decisions Act (1993). The duty to communicate the identity of the decisionmaker also applies to a surrogate committee. See Section 4725 (general surrogate rules applicable to surrogate committee).

See also Sections 4617 (“health care decision” defined), 4625 (“patient” defined), 4639 (“supervising health care provider” defined).

**Background from Uniform Act.** Section 7(a) further reinforces the Act’s respect for patient autonomy by requiring a supervising health-care provider, if possible, to promptly communicate to a patient, prior to implementation, a health-care decision made for the patient and the identity of the person making the decision.

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

**§ 4731. Supervising health care provider’s duty to record relevant information**

4731. (a) A supervising health care provider who knows of the existence of an advance health care directive, a revocation of an advance health care directive, or a designation or disqualification of a surrogate, shall promptly record its existence in the patient’s health care record and, if it is in writing, shall request a copy. If a copy is furnished, the supervising health care provider shall arrange for its maintenance in the patient’s health care record.

(b) A supervising health care provider who knows of a revocation of a power of attorney for health care or a disqualification of a surrogate shall make a reasonable effort to notify the agent or surrogate of the revocation or disqualification.

**Comment.** Subdivision (a) of Section 4731 is drawn from Section 7(b) of the Uniform Health-Care Decisions Act (1993). With respect to recording notice of revocation of a power of attorney for health care, this section continues the substance of part of former Section 4727(b). The recordkeeping duty continues part of former Health and Safety Code Section 7186.5(c) (Natural Death Act).

Subdivision (b) continues the substance of part of former Section 4727(b) and applies the same duty to surrogate disqualification.

See also Sections 4605 ("advance health care directive" defined), 4625 ("patient" defined), 4629 ("power of attorney for health care" defined), 4639 ("supervising health care provider" defined), 4641 ("surrogate" defined).

**Background from Uniform Act.** The recording requirement in Section 7(b) reduces the risk that a health-care provider or institution, or agent, guardian or surrogate, will rely on an outdated individual instruction or the decision of an individual whose authority has been revoked.

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

#### **§ 4732. Primary physician's duty to record relevant information**

**4732.** A primary physician who makes or is informed of a determination that a patient lacks or has recovered capacity, or that another condition exists affecting an individual health care instruction or the authority of an agent, conservator of the person, or surrogate, shall promptly record the determination in the patient's health care record and communicate the determination to the patient, if possible, and to a person then authorized to make health care decisions for the patient.

**Comment.** Section 4732 is drawn from Section 7(c) of the Uniform Health-Care Decisions Act (1993). This duty also applies to a surrogate committee. See Section 4725 (general surrogate rules applicable to surrogate committee). This duty generally continues recordkeeping duties in former Health and Safety Code Sections 7186.5(c) and 7189 (Natural Death Act).

See also Sections 4607 ("agent" defined), 4609 ("capacity" defined), 4613 ("conservator" defined), 4617 ("health care decision" defined), 4623 ("individual health care instruction" defined), 4625 ("patient" defined), 4631 ("primary physician" defined).

**Background from Uniform Act.** Section 7(c) imposes recording and communication requirements relating to determinations that may trigger the authority of an agent, guardian or surrogate to make health-care decisions on an individual's behalf. The determinations covered by these requirements are those specified in Sections 2(c)-(d) and 5(a) [Prob. Code §§ 4658, 4682 & 4710 respectively].

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

#### **§ 4733. Duty of health care provider or institution to comply with health care instructions and decisions**

**4733.** Except as provided in Sections 4734 and 4735, a health care provider or health care institution providing care to a patient shall do the following:

(a) Comply with an individual health care instruction of the patient and with a reasonable interpretation of that instruction made by a person then authorized to make health care decisions for the patient.

(b) Comply with a health care decision for the patient made by a person then authorized to make health care decisions for the patient to the same extent as if the decision had been made by the patient while having capacity.

**Comment.** Section 4733 is drawn from Section 7(d) of the Uniform Health-Care Decisions Act (1993). This section generalizes a duty to comply provided in former Health and Safety Code Section 7187.5 (2d sentence) (Natural Death Act).

See also Sections 4609 ("capacity" defined), 4617 ("health care decision" 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(d) requires health-care providers and institutions to comply with a patient's individual instruction and with a reasonable interpretation of that instruction made by a person then authorized to make health-care decisions for the patient. A health-care provider or institution must also comply with a health-care decision made by a person then authorized to make health-care decisions for the patient to the same extent as if the decision had been made by the patient while having capacity. These requirements help to protect the patient's rights to autonomy and self-determination and validate and seek to effectuate the substitute decision making authorized by the Act.

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

#### **§ 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).]

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

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

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

(b) Provide continuing care to the patient until a transfer can be accomplished.

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

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

See also Sections 4617 (“health care decision” 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(g) requires a health-care provider or institution that declines to comply with an individual instruction or health-care decision to promptly communicate the refusal to the patient, if possible, and to any person then authorized to make health-care decisions for the patient. The provider or institution also must provide continuing care to the patient until a transfer can be effected. In addition, unless the patient or person then authorized to make health-care decisions for the patient refuses assistance, the health-care provider or institution must immediately make all reasonable efforts to assist in the transfer of the patient to another health-care provider or institution that is willing to comply with the instruction or decision.

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

## **CHAPTER 6. IMMUNITIES AND LIABILITIES**

#### **§ 4740. Immunities of health care provider and institution**

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4740. A health care provider or health care institution acting in good faith and in accordance with generally accepted health care standards applicable to the health care provider or institution is not subject to civil or criminal liability or to



discipline for unprofessional conduct for any actions in compliance with this division, including any of the following conduct:

(a) Complying with a health care decision of a person apparently having authority to make a health care decision for a patient, including a decision to withhold or withdraw health care.

(b) Declining to comply with a health care decision of a person based on a belief that the person then lacked authority.

(c) Complying with an advance health care directive and assuming that the directive was valid when made and has not been revoked or terminated.

**Comment.** Section 4740 is drawn from Section 9(a) of the Uniform Health-Care Decisions Act (1993) and supersedes former Sections 4727(f) and 4750 (durable power of attorney for health care). This section also supersedes former Health and Safety Code Sections 1418.8(k) (medical interventions in nursing homes) and 7190.5 (Natural Death Act). The major categories of actions listed in subdivisions (a)-(c) are given as examples and not by way of limitation on the general rule stated in the introductory paragraph. Hence, the protections of this section apply to selection of a surrogate under Section 4712. This immunity also applies where health care decisions are approved by a surrogate committee. See Section 4725 (general surrogate rules applicable to surrogate committee).

The good faith standard of former law is continued in this section. Like former law, this section protects the health care provider who acts in good faith reliance on a health care decision made by an agent pursuant to this division. The reference to acting in accordance with generally accepted health care standards makes clear that a health care provider is not protected from liability for malpractice. The specific qualifications built into the rules provided in former Section 4750(a) are superseded by the good faith rule in this section and by the affirmative requirements of other provisions. See, e. g., Sections 4683(a) (scope of agent's authority) (compare to second part of introductory language of former Section 4750(a)), 4684 (standard governing agent's health care decisions) (compare to former Section 4750(a)(1)-(2)). See also Section 4733 (duty of health care provider or institution to comply with health care instructions and decisions), 4734 (health care provider's or institution's right to decline), 4736 (duty of declining health care provider or institution).

See also Sections 4605 ("advance health care directive" defined), 4617 ("health care decision" defined), 4619 ("health care institution" defined), 4621 ("health care provider" defined), 4625 ("patient" defined).

**Background from Uniform Act.** Section 9 [Prob. Code §§ 4740-4741] grants broad protection from liability for actions taken in good faith. Section 9(a) permits a health-care provider or institution to comply with a health-care decision made by a person appearing to have authority to make health-care decisions for a patient; to decline to comply with a health-care decision made by a person believed to be without authority; and to assume the validity of and to comply with an advance health-care directive. Absent bad faith or actions taken that are not in accord with generally accepted health-care standards, a health-care provider or institution has no duty to investigate a claim of authority or the validity of an advance health-care directive.

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

#### § 4741. Immunities of agent and surrogate

4741. A person acting as agent or surrogate under this part is not subject to civil or criminal liability or to discipline for unprofessional conduct for health care decisions made in good faith.

**Comment.** Section 4741 is drawn from Section 9(b) of the Uniform Health-Care Decisions Act (1993). This immunity also applies where health care decisions are approved by a surrogate committee. See Section 4725 (general surrogate rules applicable to surrogate committee).

See also Sections 4607 (“agent” defined), 4617 (“health care decision” defined), 4641 (“surrogate” defined).

**Background from Uniform Act.** Section 9(b) protects agents and surrogates acting in good faith from liability for making a health-care decision for a patient. Also protected from liability are individuals who mistakenly but in good faith believe they have the authority to make a health-care decision for a patient. For example, an individual who has been designated as agent in a power of attorney for health care might assume authority unaware that the power has been revoked. Or a family member might assume authority to act as surrogate unaware that a family member having a higher priority was reasonably available and authorized to act.

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

## § 4742. Statutory damages

4742. (a) A health care provider or health care institution that intentionally violates this part is subject to liability to the aggrieved individual for damages of \$2,500 or actual damages resulting from the violation, whichever is greater, plus reasonable attorney’s fees.

(b) A person who intentionally falsifies, forges, conceals, defaces, or obliterates an individual’s advance health care directive or a revocation of an advance health care directive without the individual’s consent, or who coerces or fraudulently induces an individual to give, revoke, or not to give an advance health care directive, is subject to liability to that individual for damages of \$10,000 or actual damages resulting from the action, whichever is greater, plus reasonable attorney’s fees.

(c) The damages provided in this section are cumulative and not exclusive of any other remedies provided by law.

**Comment.** Subdivisions (a) and (b) of Section 4742 are drawn from Section 10 of the Uniform Health-Care Decisions Act (1993) and supersede former Health and Safety Code Section 7191(a)-(b) (Natural Death Act).

Subdivision (c) continues the rule of former Health and Safety Code Section 7191(g) (Natural Death Act) and is consistent with the uniform act. See Unif. Health-Care Decisions Act § 10 comment (1993).

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

**Background from Uniform Act.** Conduct which intentionally violates the Act and which interferes with an individual’s autonomy to make health-care decisions, either personally or through others as provided under the Act, is subject to civil damages rather than criminal penalties out of a recognition that prosecutions are unlikely to occur. The legislature of an enacting state will have to determine the amount of damages which needs to be authorized in order to encourage the level of potential private enforcement actions necessary to effect compliance with the obligations and responsibilities imposed by the Act. The damages provided by this section do not supersede but are in addition to remedies available under other law.

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

## § 4743. Criminal penalties

4743. Any person who alters or forges a written advance health care directive of another, or willfully conceals or withholds personal knowledge of a revocation of an advance directive, with the intent to cause a withholding or withdrawal of health care necessary to keep the patient alive contrary to the desires of the patient,

1 and thereby directly causes health care necessary to keep the patient alive to be  
2 withheld or withdrawn and the death of the patient thereby to be hastened, is  
3 subject to prosecution for unlawful homicide as provided in Chapter 1  
4 (commencing with Section 187) of Title 4 of Part 1 of the Penal Code.

5 **Comment.** Section 4743 continues former Section 4726 without substantive change and  
6 supersedes former Health and Safety Code Section 7191(c)-(d) (Natural Death Act). References  
7 to “principal” have been changed to “patient” to reflect the broader scope of this division, and  
8 some surplus language has been omitted.

9 See also Sections 4605 (“advance health care directive” defined), 4615 (“health care” defined),  
10 4625 (“patient” defined).

## PART 3. JUDICIAL PROCEEDINGS

**Note.** This part mirrors the existing rules in Probate Code Sections 4900-4947. In order to adjust to the new Division 4.7, existing Sections 4900-4947 need to be revised in a few technical respects and renumbered to fit within the Power of Attorney Law (commencing with Section 4500), which no longer covers powers of attorney for health care.

### CHAPTER 1. GENERAL PROVISIONS

#### **§ 4750. Judicial intervention disfavored**

4750. Subject to this division:

(a) An advance health care directive is effective and exercisable free of judicial intervention.

(b) A health care decision made by an agent for a principal is effective without judicial approval.

(c) A health care decision made by a surrogate for a patient is effective without judicial approval.

(d) A health care decision made pursuant to Chapter 4 (commencing with Section 4720) is effective without judicial approval.

**Comment.** This section makes clear that judicial involvement in health care decisionmaking is disfavored. See Section 4650(d) (legislative findings). Subdivision (a) of Section 4750 continues former Section 4900 to the extent it applied to powers of attorney for health care.

Subdivision (b) is drawn from Section 2(f) of the Uniform Health-Care Decisions Act (1993).

Subdivision (c) is drawn from Sections 2(f) and 5(g) of the Uniform Health-Care Decisions Act (1993).

Subdivision (d) is patterned after subdivisions (b) and (c) and is analogous to former Health and Safety Code Section 1418.8(i) (medical interventions for resident of long-term care facility).

See also Sections 4605 ("advance health care directive" defined), 4607 ("agent" defined), 4617 ("health care decision" defined), 4625 ("patient" defined), 4630 ("principal" defined), 4641 ("surrogate" defined).

#### **§ 4751. Cumulative remedies**

4751. The remedies provided in this part are cumulative and not exclusive of any other remedies provided by law.

**Comment.** Section 4751 continues former Section 4901 to the extent it applied to powers of attorney for health care.

#### **§ 4752. Effect of provision in advance directive attempting to limit right to petition**

4752. Except as provided in Section 4753, this part is not subject to limitation in an advance health care directive.

**Comment.** Section 4752 continues former Section 4902 to the extent it applied to powers of attorney for health care.

See also Sections 4605 ("advance health care directive" defined), 4681 (general rule on limitations provided in power of attorney).

§ 4753. Limitations on right to petition

4753. (a) Subject to subdivision (b), an advance health care directive may expressly eliminate the authority of a person listed in Section 4765 to petition the court for any one or more of the purposes enumerated in Section 4766, if both of the following requirements are satisfied:

(1) The advance directive is executed by an individual having the advice of a lawyer authorized to practice law in the state where the advance directive is executed.

(2) The individual's lawyer 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 \_\_\_\_\_ [insert name] 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."

(b) An advance health care directive may not limit the authority of the following persons to petition under this part:

(1) The conservator of the person, with respect to a petition relating to an advance directive, for a purpose specified in subdivision (b) or (d) of Section 4766.

(2) The agent, with respect to a petition relating to a power of attorney for health care, for a purpose specified in subdivision (b) or (c) of Section 4766.

**Comment.** Section 4753 continues former Section 4903 to the extent it applied to powers of attorney for health care. Subdivision (a) makes clear that a power of attorney may limit the applicability of this part only if it is executed with the advice and approval of the principal's counsel. This limitation is designed to ensure that the execution of a power of attorney that restricts the remedies of this part is accomplished knowingly by the principal. The inclusion of a provision in the power of attorney making this part inapplicable does not affect the right to resort to any judicial remedies that may otherwise be available.

Subdivision (b) specifies the purposes for which a conservator of the person or an agent may petition the court under this part with respect to a power of attorney for health care. The rights provided in these paragraphs cannot be limited by a provision in an advance directive, but the advance directive may restrict or eliminate the right of any other persons to petition the court under this part if the individual executing the advance directive has the advice of legal counsel and the other requirements of subdivision (a) are met. See Section 4681 (effect of provision in power of attorney attempting to limit right to petition).

Under subdivision (b)(1), despite a contrary provision in the advance directive, the conservator of the person may obtain a determination of whether an advance directive is in effect or has terminated (Section 4766(b)) or whether the authority of an agent or surrogate is terminated (Section 4766(d)). See also Section 4766 Comment.

Under subdivision (b)(2), despite a contrary provision in the power of attorney, the agent may obtain a determination of whether the power of attorney for health care is in effect or has terminated (Section 4766(b)), or an order passing on the acts or proposed acts of the agent under the power of attorney (Section 4766(c)).

See also Sections 4605 ("advance health care directive" defined), 4607 ("agent" defined), 4613 ("conservator" defined), 4629 ("power of attorney for health care" defined).

**§ 4754. Jury trial**

4754. There is no right to a jury trial in proceedings under this division.

**Comment.** Section 4754 continues former Section 4904 to the extent it applied to powers of attorney for health care. This section is consistent with the rule applicable to other fiduciaries. See Sections 1452 (guardianships and conservatorships), 4504 (powers of attorney generally), 7200 (decedents' estates), 17006 (trusts).

**§ 4755. Application of general procedural rules**

4755. Except as otherwise provided in this division, the general provisions in Division 3 (commencing with Section 1000) apply to proceedings under this division.

**Comment.** Section 4755 continues former Section 4905 to the extent it applied to powers of attorney for health care. Like Section 4505, this section provides a cross-reference to the general procedural rules that apply to this division. See, e.g., Sections 1003 (guardian ad litem), 1021 (verification required), 1041 (clerk to set matters for hearing), 1046 (hearing and orders), 1203 (order shortening time for notice), 1215-1216 (service), 1260 (proof of service).

**CHAPTER 2. JURISDICTION AND VENUE**

**§ 4760. Jurisdiction and authority of court or judge**

4760. (a) The superior court has jurisdiction in proceedings under this division.

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

**Comment.** Section 4760 continues former Section 4920 to the extent it applied to powers of attorney for health care. Like Section 4520, this section is comparable to Section 7050 governing the jurisdiction and authority of the court in proceedings concerning administration of decedents' estates. See Section 7050 Comment.

**§ 4761. Basis of jurisdiction**

4761. The court may exercise jurisdiction in proceedings under this division on any basis permitted by Section 410.10 of the Code of Civil Procedure.

**Comment.** Section 4761 continues former Section 4921 to the extent it applied to powers of attorney for health care. Like Section 4521, this section is comparable to Section 17004 (jurisdiction under Trust Law). This section recognizes that the court, in proceedings relating to powers of attorney under this division, may exercise jurisdiction on any basis that is not inconsistent with the California or United States Constitutions, as provided in Code of Civil Procedure Section 410.10. See generally Judicial Council Comment to Code Civ. Proc. § 410.10; Prob. Code § 17004 Comment (basis of jurisdiction under Trust Law).

**§ 4762. Jurisdiction over agent or surrogate**

4762. Without limiting Section 4761, a person who acts as an agent under a power of attorney for health care or as a surrogate under this division is subject to personal jurisdiction in this state with respect to matters relating to acts and

transactions of the agent or surrogate performed in this state or affecting a patient in this state.

**Comment.** Section 4762 continues former Section 4922 to the extent it applied to powers of attorney for health care, and extends its principles to cover surrogates. Like Section 4522, this section is comparable to Sections 3902(b) (jurisdiction over custodian under Uniform Transfers to Minors Act) and 17003(a) (jurisdiction over trustee). This section is intended to facilitate exercise of the court's power under this part when the court's jurisdiction is properly invoked. As recognized by the introductory clause, constitutional limitations on assertion of jurisdiction apply to the exercise of jurisdiction under this section. Consequently, appropriate notice must be given to an agent or surrogate as a condition of personal jurisdiction. *Cf. Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

See also Sections 4607 ("agent" defined), 4625 ("patient" defined), 4629 ("power of attorney for health care" defined), 4641 ("surrogate" defined).

#### § 4763. Venue

4763. The proper county for commencement of a proceeding under this division shall be determined in the following order of priority:

- (a) The county in which the patient resides.
- (b) The county in which the agent or surrogate resides.
- (c) Any other county that is in the patient's best interest.

**Comment.** Section 4763 continues former Section 4923 to the extent it applied to powers of attorney for health care.

See also Sections 4607 ("agent" defined), 4625 ("patient" defined), 4641 ("surrogate" defined).

### CHAPTER 3. PETITIONS, ORDERS, APPEALS

#### § 4765. Petitioners

4765. Subject to Section 4753, a petition may be filed under this part by any of the following persons:

- (a) The patient.
- (b) The patient's spouse, unless legally separated.
- (c) A relative of the patient.
- (d) The agent or surrogate, including a member of a surrogate committee.
- (e) The conservator of the person of the patient.
- (f) The court investigator, described in Section 1454, of the county where the patient resides.
- (g) The public guardian of the county where the patient resides.
- (h) The supervising health care provider or health care institution involved with the patient's care.
- (i) Any other interested person or friend of the patient.

**Comment.** Section 4765 continues former Section 4940 to the extent it applied to powers of attorney for health care, with some omissions and clarifications appropriate for the scope of this division. The purposes for which a person may file a petition under this part are limited by other rules. See Sections 4752 (effect of provision in advance directive attempting to limit right to petition), 4753 (limitations on right to petition), 4766 (petition with respect to advance directive). See also Section 4751 (other remedies not affected).

See also Sections 4607 (“agent” defined), 4613 (“conservator” defined), 4619 (“health care institution” defined), 4625 (“patient” defined), 4639 (“supervising health care provider” defined), 4641 (“surrogate” defined), 4720-4726 (surrogate committees).

#### **§ 4766. Purposes of petition**

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.

**Comment.** Section 4766 continues the substance of former Section 4942 to the extent it applied to powers of attorney for health care, and adds language relating to advance directives and surrogates for consistency with the scope of this division.

A determination of capacity under subdivision (a) is subject to the Due Process in Competency Determinations Act. See Sections 810-813.

Under subdivision (c), the patient’s desires as expressed in the power of attorney for health care, individual health care instructions, or otherwise made known to the court provide the standard for judging the acts of the agent or surrogate. See Section 4713 (standard governing surrogate’s health care decisions). Where it is not possible to use a standard based on the patient’s desires because they are not stated in an advance directive or otherwise known or are unclear, subdivision (c) provides that the “patient’s best interest” standard be used.

Subdivision (d) permits the court to terminate health care decisionmaking authority where an agent or surrogate is not complying with the duty to carry out the patient’s desires or act in the patient’s best interest. See Section 4713 (standard governing surrogate’s health care decisions). Subdivision (d) permits termination of authority under an advance health care directive not only where an agent, for example, is acting illegally or failing to perform the duties under a power of attorney or is acting contrary to the known desires of the principal, but also where the desires of the principal are unknown or unclear and the agent is acting in a manner that is clearly contrary to the patient’s best interest. The patient’s desires may become unclear as a result of developments



1 in medical treatment techniques that have occurred since the patient's desires were expressed,  
2 such developments having changed the nature or consequences of the treatment.

3 This section also applies to surrogate committees under Sections 4720-4726. Thus, under  
4 subdivision (d), the action (or nonaction) of a surrogate committee may be reviewed by the court.  
5 For the decisionmaking standards applicable to surrogate committees, see Section 4723. See also  
6 Section 4725 (general surrogate rules applicable to surrogate committee).

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

10 See also Sections 4605 ("advance health care directive" defined), 4607 ("agent" defined), 4609  
11 ("capacity" defined), 4613 ("conservator" defined), 4629 ("power of attorney for health care"  
12 defined), 4630 ("principal" defined), 4641 ("surrogate" defined).

### 13 **§ 4767. Commencement of proceeding**

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14 4767. A proceeding under this part is commenced by filing a petition stating  
15 facts showing that the petition is authorized under this part, the grounds of the  
16 petition, and, if known to the petitioner, the terms of any advance health care  
17 directive in question.

18 **Comment.** Section 4767 continues former Section 4943 to the extent it applied to powers of  
19 attorney for health care.

20 See also Section 4605 ("advance health care directive" defined).

### 21 **§ 4768. Dismissal of petition**

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22 4768. The court may dismiss a petition if it appears that the proceeding is not  
23 reasonably necessary for the protection of the interests of the patient and shall stay  
24 or dismiss the proceeding in whole or in part when required by Section 410.30 of  
25 the Code of Civil Procedure.

26 **Comment.** Section 4768 is similar to Section 4944 in the Power of Attorney Law. Under this  
27 section, the court has authority to stay or dismiss a proceeding in this state if, in the interest of  
28 substantial justice, the proceeding should be heard in a forum outside this state. See Code Civ.  
29 Proc. § 410.30.

30 See also Section 4625 ("patient" defined).

### 31 **§ 4769. Notice of hearing**

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32 4769. (a) Subject to subdivision (b), at least 15 days before the time set for  
33 hearing, the petitioner shall serve notice of the time and place of the hearing,  
34 together with a copy of the petition, on the following:

35 (1) The agent or surrogate, if not the petitioner.

36 (2) The patient, if not the petitioner.

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

42 **Comment.** Section 4769 continues former Section 4945 to the extent it applied to powers of  
43 attorney for health care and extends its principles to apply to surrogates. Subdivision (b) is  
44 generalized from former Section 4945(b) applicable to property powers of attorney.

1 See also Sections 4607 (“agent” defined), 4625 (“patient” defined), 4630 (“principal” defined),  
2 4641 (“surrogate” defined).

3 **§ 4770. Temporary health care order**

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4 4770. The court in its discretion, on a showing of good cause, may issue a  
5 temporary order prescribing the health care of the patient until the disposition of  
6 the petition filed under Section 4766. If a power of attorney for health care is in  
7 effect and a conservator (including a temporary conservator) of the person is  
8 appointed for the principal, the court that appoints the conservator in its discretion,  
9 on a showing of good cause, may issue a temporary order prescribing the health  
10 care of the principal, the order to continue in effect for the period ordered by the  
11 court but in no case longer than the period necessary to permit the filing and  
12 determination of a petition filed under Section 4766.

13 **Comment.** Section 4770 continues former Section 4946 to the extent it applied to powers of  
14 attorney for health care. This section is intended to make clear that the court has authority to  
15 provide, for example, for the continuance of treatment necessary to keep the patient alive pending  
16 the court’s action on the petition. See also Section 1046 (court authority to make appropriate  
17 orders).

18 See also Sections 4605 (“advance health care directive” defined), 4613 (“conservator” defined),  
19 4615 (“health care” defined), 4625 (“patient” defined), 4630 (“principal” defined).

20 **§ 4771. Award of attorney’s fees**

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21 4771. In a proceeding under this part commenced by the filing of a petition by a  
22 person other than the agent or surrogate, the court may in its discretion award  
23 reasonable attorney’s fees to one of the following:

24 (a) The agent or surrogate, if the court determines that the proceeding was  
25 commenced without any reasonable cause.

26 (b) The person commencing the proceeding, if the court determines that the  
27 agent or surrogate has clearly violated the duties under the advance health care  
28 directive.

29 **Comment.** Section 4771 continues part of former Section 4947 to the extent it applied to  
30 powers of attorney for health care.

31 See also Sections 4605 (“advance health care directive” defined), 4607 (“agent” defined), 4630  
32 (“principal” defined), 4641 (“surrogate” defined).

**PART 4. REQUEST TO FORGO  
RESUSCITATIVE MEASURES**

**§ 4780. Request to forgo resuscitative measures**

4780. (a) As used in this part:

(1) "Request to forgo resuscitative measures" means a written document, signed by (A) an individual, or a legally recognized surrogate health care decisionmaker, and (B) a physician, that directs a health care provider to forgo resuscitative measures for the individual.

(2) "Request to forgo resuscitative measures" includes a prehospital "do not resuscitate" form as developed by the Emergency Medical Services Authority or other substantially similar form.

(b) A request to forgo resuscitative measures may also be evidenced by a medallion engraved with the words "do not resuscitate" or the letters "DNR," a patient identification number, and a 24-hour toll-free telephone number, issued by a person pursuant to an agreement with the Emergency Medical Services Authority.

**Comment.** Section 4780 continues former Section 4753(b) without substantive change. The phrase "for the individual" has been added at the end of subdivision (a)(1) for clarity. The former reference to "physician and surgeon" has been changed to "physician" for clarity. See Section 4627 ("physician" defined). For rules governing "legally recognized surrogate health care decisionmakers," see Part 2 (commencing with Section 4670) (Uniform Health Care Decisions Act).

See also Section 4781 ("health care provider" defined), 4625 ("patient" defined).

**§ 4781. Health care provider**

4781. As used in this part, "health care provider" includes, but is not limited to, the following:

(a) Persons described in Section 4621.

(b) Emergency response employees, including, but not limited to, firefighters, law enforcement officers, emergency medical technicians I and II, paramedics, and employees and volunteer members of legally organized and recognized volunteer organizations, who are trained in accordance with standards adopted as regulations by the Emergency Medical Services Authority pursuant to Sections 1797.170, 1797.171, 1797.172, 1797.182, and 1797.183 of the Health and Safety Code to respond to medical emergencies in the course of performing their volunteer or employee duties with the organization.

**Comment.** Section 4781 continues former Section 4753(g) without substantive change.

**§ 4782. Immunity for honoring request to forgo resuscitative measures**

4782. A health care provider who honors a request to forgo resuscitative measures is not subject to criminal prosecution, civil liability, discipline for

unprofessional conduct, administrative sanction, or any other sanction, as a result of his or her reliance on the request, if the health care provider (1) believes in good faith that the action or decision is consistent with this part, and (2) has no knowledge that the action or decision would be inconsistent with a health care decision that the individual signing the request would have made on his or her own behalf under like circumstances.

**Comment.** Section 4782 continues former Section 4753(a) without substantive change.

See also Sections 4617 ("health care decision" defined), 4780 ("request to forgo resuscitative measures" defined), 4781 ("health care provider" defined).

#### **§ 4783. Forms for requests to forgo resuscitative measures**

4783. (a) Forms for requests to forgo resuscitative measures printed after January 1, 1995, shall contain the following:

"By signing this form, the surrogate acknowledges that this request to forgo resuscitative measures is consistent with the known desires of, and with the best interest of, the individual who is the subject of the form."

(b) A substantially similar printed form is valid and enforceable if all of the following conditions are met:

(1) The form is signed by the individual, or the individual's legally recognized surrogate health care decisionmaker, and a physician.

(2) The form directs health care providers to forgo resuscitative measures.

(3) The form contains all other information required by this section.

**Comment.** Section 4783 continues former Section 4753(c)-(d) without substantive change. For rules governing "legally recognized surrogate health care decisionmakers," see Part 2 (commencing with Section 4670) (Uniform Health Care Decisions Act).

See also Sections 4627 ("physician" defined), 4780 ("request to forgo resuscitative measures" defined), 4781 ("health care provider" defined).

#### **§ 4784. Presumption of validity**

4784. In the absence of knowledge to the contrary, a health care provider may presume that a request to forgo resuscitative measures is valid and unrevoked.

**Comment.** Section 4784 continues former Section 4753(e) without change.

See also Sections 4780 ("request to forgo resuscitative measures" defined), 4781 ("health care provider" defined).

#### **§ 4785. Application of part**

4785. This part applies regardless of whether the individual executing a request to forgo resuscitative measures is within or outside a hospital or other health care institution.

**Comment.** Section 4785 continues former Section 4753(f) without substantive change.

See also Section 4619 ("health care institution" defined), 4780 ("request to forgo resuscitative measures" defined).

1    **§ 4786. Relation to other law**

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2        4786. This part does not repeal or narrow laws relating to health care  
3        decisionmaking.

4        **Comment.** Section 4786 restates former Section 4753(h) without substantive change. The  
5        references to the Durable Power of Attorney for Health Care and the Natural Death Act have been  
6        omitted as unnecessary. The reference to “current” laws had been eliminated as obsolete.

7    **PART 5. ADVANCE HEALTH CARE DIRECTIVE REGISTRY**

8    **§ 4800. Registry system established by Secretary of State**

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9        4800. (a) The Secretary of State shall establish a registry system through which a  
10       person who has executed a written advance health care directive may register in a  
11       central information center information regarding the advance directive, making  
12       that information available upon request to any health care provider, the public  
13       guardian, or other person authorized by the registrant.

14       (b) Information that may be received and released is limited to the registrant’s  
15       name, social security or driver’s license or other individual identifying number  
16       established by law, if any, address, date and place of birth, the intended place of  
17       deposit or safekeeping of the written advance health care directive, and the name  
18       and telephone number of the agent and any alternative agent.

19       (c) The Secretary of State, at the request of the registrant, may transmit the  
20       information received regarding the written advance health care directive to the  
21       registry system of another jurisdiction as identified by the registrant.

22       (d) The Secretary of State may charge a fee to each registrant in an amount such  
23       that, when all fees charged to registrants are aggregated, the aggregated fees do not  
24       exceed the actual cost of establishing and maintaining the registry.

25       **Comment.** Section 4800 continues former Section 4800 without substantive change as applied  
26       to powers of attorney for health care, and generalizes the former provision to apply to all written  
27       advance health care directives. Hence, in addition to powers of attorney for health care, this  
28       section as revised permits registration of individual health care instructions.

29       See Section 4605 (“advance health care directive” defined), 4607 (“agent” defined), 4621  
30       (“health care provider” defined).

31    **§ 4801. Identity and fees**

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32       4801. The Secretary of State shall establish procedures to verify the identities of  
33       health care providers, the public guardian, and other authorized persons requesting  
34       information pursuant to Section 4800. No fee shall be charged to any health care  
35       provider, the public guardian, or other authorized person requesting information  
36       pursuant to Section 4800.

37       **Comment.** Section 4801 continues former Section 4801 without change.

38       See also Section 4621 (“health care provider” defined).

1   **§ 4802. Notice**

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2       4802. The Secretary of State shall establish procedures to advise each registrant  
3 of the following:

4       (a) A health care provider may not honor a written advance health care directive  
5 until it receives a copy from the registrant.

6       (b) Each registrant must notify the registry upon revocation of the advance  
7 directive.

8       (c) Each registrant must reregister upon execution of a subsequent advance  
9 directive.

10       **Comment.** Section 4802 continues former Section 4802 without substantive change as applied  
11 to powers of attorney for health care, and generalizes it to apply to all written advance health care  
12 directives. Hence, in addition to powers of attorney for health care, this section as revised permits  
13 registration of individual health care instructions.

14       See also Section 4605 (“advance health care directive” defined), 4621 (“health care provider”  
15 defined).

16   **§ 4803. Effect of failure to register**

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17       4803. Failure to register with the Secretary of State does not affect the validity of  
18 any advance health care directive.

19       **Comment.** Section 4803 continues former Section 4804 without substantive change as applied  
20 to powers of attorney for health care, and generalizes it to apply to all written advance health care  
21 directives instead of the more limited class of durable powers of attorney for health care.

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

23   **§ 4804. Effect of registration on revocation and validity**

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24       4804. Registration with the Secretary of State does not affect the ability of the  
25 registrant to revoke the registrant’s advance health care directive or a later  
26 executed advance directive, nor does registration raise any presumption of validity  
27 or superiority among any competing advance directives or revocations.

28       **Comment.** Section 4804 continues former Section 4805 without substantive change as applied  
29 to powers of attorney for health care, and generalizes it to apply to all written advance health care  
30 directives. Hence, in addition to powers of attorney for health care, this section as revised permits  
31 registration of individual health care instructions.

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

33   **§ 4805. Effect on health care provider**

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34       4805. Nothing in this chapter shall be construed to require a health care provider  
35 to request from the registry information about whether a patient has executed an  
36 advance health care directive. Nothing in this chapter shall be construed to affect  
37 the duty of a health care provider to provide information to a patient regarding  
38 advance health care directives pursuant to any provision of federal law.

39       **Comment.** Section 4805 continues former Section 4806 without substantive change as applied  
40 to powers of attorney for health care, and generalizes it to apply to all written advance health care  
41 directives. Hence, in addition to powers of attorney for health care, this section as revised permits  
42 registration of individual health care instructions.

- 1     See also Section 4605 (“advance health care directive” defined), 4621 (“health care provider”  
2 defined), 4625 (“patient” defined).
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## CONFORMING REVISIONS AND REPEALS

**Note.** For convenience of reference, the text of some repealed sections is included in this document. To improve readability, repealed sections reproduced below are not shown in ~~strikeout~~. The section heading indicates the disposition of each amended or repealed section.

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## CONFORMING REVISIONS AND REPEALS

### HEALTH AND SAFETY CODE

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

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SEC. \_\_\_\_\_. Section 1418.8 of the Health and Safety Code is repealed.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Subdivision (c) is superseded by Probate Code Section 4720 (application of surrogate committee chapter). See also Prob. Code § 4712 (selection of statutory surrogate).

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

4 The first sentence of subdivision (e) is superseded by Probate Code Sections 4720 (conditions  
5 for application of chapter) and 4721 (referral to surrogate committee). The interdisciplinary team  
6 is superseded by a surrogate committee. As to emergency care, see Prob. Code § 4651(b)(2). The  
7 second sentence is superseded by Probate Code Sections 4722 (composition of surrogate  
8 committee) and 4724 (decisionmaking by surrogate committee). The standards of review in the  
9 third sentence are continued and generalized in Probate Code Section 4723(a).

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

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

16 Subdivision (h) is continued and generalized in Probate Code Section 4726 (review of  
17 emergency care).

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

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

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

25 Subdivision (l) is superseded by Probate Code Sections 4676 (right to health care information)  
26 and 4732 (duty of primary physician to record relevant information).

#### 27 **Health & Safety Code § 1599.73. Statement of patients' right to confidential treatment**

28 SEC. \_\_\_\_\_. Section 1599.73 of the Health and Safety Code is amended to read:

29 1599.73. (a) Every contract of admission shall state that residents have a right to  
30 confidential treatment of medical information.

31 (b) The contract shall provide a means by which the resident may authorize the  
32 disclosure of information to specific persons, by attachment of a separate sheet that  
33 conforms to the specifications of Section 56 of the Civil Code. After admission, the  
34 facility shall encourage competent residents having capacity to make health care  
35 decisions to execute a durable power of attorney for health care an advance health care  
36 directive in the event that he or she becomes unable to give consent for disclosure. The  
37 facility shall make available upon request to the long-term care ombudsman a list of  
38 newly admitted patients.

39 **Comment.** Section 1599.73 is amended to reflect the replacement of the durable power of  
40 attorney for health care under the Power of Attorney Law with advance health care directives  
41 under the Health Care Decisions Law

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

43 SEC. \_\_\_\_\_. Chapter 3.9 (commencing with Section 7185) of Part 1 of Division 7 of the  
44 Health and Safety Code is repealed.

#### 45 **§ 7185 (repealed). Short title**

46 **Comment.** Former Section 7185 is not continued. The Natural Death Act is superseded by the  
47 provisions of Division 4.7 (commencing with Section 4600) of the Probate Code relating to

1 advance health care directives. The new law is not limited to decisions concerning life-sustaining  
2 treatment of persons in a terminal or permanent unconscious condition.

3 **§ 7185.5 (repealed). Legislative findings and declarations**

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4 **Comment.** The substance of subdivisions (a)-(e) of former Section 7185 is continued in  
5 Probate Code Section 4650 (legislative findings), except that the references to “terminal condition  
6 or permanent unconscious decision” have been omitted to reflect relevant case law and the scope  
7 of the Uniform Health Care Decisions Act (Prob. Code § 4670 *et seq.*). See also Section 4750  
8 (judicial intervention disfavored).

9 Subdivision (f) is omitted as surplus. See former Section 7185 Comment.

10 **§ 7186 (repealed). Definitions**

---

11 **Comment.** Subdivision (a) of former Section 7186 is continued in Probate Code Section 4631  
12 (“primary physician” defined) without substantive change. Subdivision (b) is superseded by  
13 Probate Code Section 4605 (“advance health care directive” defined). Subdivision (c) is  
14 continued in Probate Code Section 4621 without substantive change. Subdivisions (d) and (e) are  
15 not continued. See former Section 7185 Comment.

16 Subdivision (f) is unnecessary in view of Probate Code Section 56 (“person” defined).  
17 Subdivision (g) is continued in Probate Code Section 4627 without change. Subdivision (h) is  
18 superseded by Probate Code Sections 4670 (who may give individual instruction). Subdivision (i)  
19 is unnecessary in view of Probate Code Section 74 (“state” defined). Subdivision (j) is not  
20 continued. See former Section 7185 Comment.

21 **§ 7186.5 (repealed). Declaration governing life-sustaining treatment**

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

27 The declaration form in subdivision (b) is superseded by the optional form of an advance health  
28 care directive in Probate Code Section 4701 and related substantive rules. For transitional  
29 provisions relating to declarations executed under the repealed Natural Death Act, see Prob. Code  
30 § 4665(a).

31 The substance of the record-keeping duty in subdivision (c) is continued in Probate Code  
32 Section 4731. The language concerning a health care provider who is unwilling to comply is  
33 superseded by Probate Code Sections 4734 (right to decline for reasons of conscience or  
34 institutional policy), 4735 (right to decline to provide ineffective care), and 4736 (obligation of  
35 declining health care provider or institution).

36 **§ 7187 (repealed). Skilled nursing facility or long-term health care facility**

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37 **Comment.** Former Section 7187 is continued in Probate Code Section 4673(c) without  
38 substantive change. See also Prob. Code Section 4637 (“skilled nursing facility” defined).

39 **§ 7187.5 (repealed). When declaration becomes operative**

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40 **Comment.** The first sentence of former Section 7187.5 is not continued. See former Section  
41 7185 Comment. As to the determination of preconditions to operation of the declaration (advance  
42 health care directive), see Probate Code Sections 4651(b)(1) (authority of individual with capacity  
43 not affected), 4657 (presumption of capacity), 4658 (determination of capacity and other  
44 conditions).

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

**§ 7188 (repealed). Revocation**

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

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

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

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

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

**Comment.** Subdivision (a) of former Section 7189.5 is replaced by Probate Code Section 4651(b)(1). See also Prob. Code §§ 4657 (presumption of capacity), 4659 (patient's objections).

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

Subdivision (c) is not continued. But *cf.* Prob. Code § 4652(e) (Health Care Decisions Law does not authorize consent to abortion).

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

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

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

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

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

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

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

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

The rule in subdivision (g) is continued in Probate Code Section 4742(c).

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

**Comment.** Subdivision (a) of former Section 7191.5 is generalized in Probate Code Section 4656.

Subdivision (b) is replaced by Probate Code Section 4656.

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

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

Subdivision (e) is superseded by Probate Code Section 4651(b)(1) (authority not affected). See also Prob. Code § 4657 (presumption of capacity)

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

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

Subdivision (h) is superseded by Probate Code Sections 4651(b) (other authority not affected) and 4751 (cumulative remedies).



1 **§ 7192 (repealed). Presumption of validity of declaration**

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2 **Comment.** Former Section 7192 is continued and generalized in Probate Code Section  
3 4674(b).

4 **§ 7192.5 (repealed). Validity of declarations executed in another state**

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5 **Comment.** Former Section 7192.5 is continued in Probate Code Section 4674(a) without  
6 substantive change.

7 **§ 7193 (repealed). Effect of Durable Power of Attorney for Health Care**

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

10 **§ 7193.5 (repealed). Instruments to be given effect**

---

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

14 **§ 7194 (repealed). Severability clause**

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

16 **§ 7194.5 (repealed). Conformity with Uniform Rights of the Terminally Ill Act**

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

19 **Health & Safety Code § 24179.5. Application of chapter to withholding or withdrawal of**  
20 **life-sustaining procedures**

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21 SEC. \_\_\_\_\_. Section 24179.5 of the Health and Safety Code is amended to read:

22 24179.5. Notwithstanding any other provision of this chapter, this chapter shall does  
23 not apply to an adult person in a terminal condition who executes a directive directing the  
24 withholding or withdrawal of life-sustaining procedures pursuant to Section 7188. To the  
25 extent of any conflict, ~~the provisions of Chapter 3.9 (commencing with Section 7185) of~~  
26 ~~Part 1, of Division 7 shall prevail~~ Division 4.7 (commencing with Section 4600) of the  
27 Probate Code prevails over the provisions of this chapter.

28 **Comment.** Section 24179.5 is amended to reflect the replacement of the Natural Death Act in  
29 former Section 7185 *et seq.* with the Health Care Decisions Law, Probate Code Section 4600 *et*  
30 *seq.*

31 **PROBATE CODE**

32 **Prob. Code § 811 (amended). Deficits in mental functions**

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33 SEC. \_\_\_\_\_. Section 811 of the Probate Code is amended to read:

34 811. (a) A determination that a person is of unsound mind or lacks the capacity to make  
35 a decision or do a certain act, including, but not limited to, the incapacity to contract, to  
36 make a conveyance, to marry, to make medical decisions, to vote, or to execute wills or  
37 trusts, shall be supported by evidence of a deficit in at least one of the following mental  
38 functions, subject to subdivision (b):

39 (1) Alertness and attention, including, but not limited to, the following:

40 (A) Level of arousal or consciousness.

(B) Orientation to time, place, person, and situation.

(C) Ability to attend and concentrate.

(2) Information processing, including, but not limited to, the following:

(A) Short- and long-term memory, including immediate recall.

(B) Ability to understand or communicate with others, either verbally or otherwise.

(C) Recognition of familiar objects and familiar persons.

(D) Ability to understand and appreciate quantities.

(E) Ability to reason using abstract concepts.

(F) Ability to plan, organize, and carry out actions in one's own rational self-interest.

(G) Ability to reason logically.

(3) Thought processes. Deficits in these functions may be demonstrated by the presence of the following:

(A) Severely disorganized thinking.

(B) Hallucinations.

(C) Delusions.

(D) Uncontrollable, repetitive, or intrusive thoughts.

(4) Ability to modulate mood and affect. Deficits in this ability may be demonstrated by the presence of a pervasive and persistent or recurrent state of euphoria, anger, anxiety, fear, panic, depression, hopelessness or despair, helplessness, apathy or indifference, which is inappropriate in degree to the individual's circumstances.

(b) A deficit in the mental functions listed above may be considered only if the deficit, by itself or in combination with one or more other mental function deficits, significantly impairs the person's ability to understand and appreciate the consequences of his or her actions with regard to the type of act or decision in question.

(c) In determining whether a person suffers from a deficit in mental function so substantial that the person lacks the capacity to do a certain act, the court may take into consideration the frequency, severity, and duration of periods of impairment.

(d) The mere diagnosis of a mental or physical disorder shall not be sufficient in and of itself to support a determination that a person is of unsound mind or lacks the capacity to do a certain act.

(e) This part applies only to the evidence that is presented to, and the findings that are made by, a court determining the capacity of a person to do a certain act or make a decision, including, but not limited to, making medical decisions. Nothing in this part shall affect affects the decisionmaking process set forth in Section 1418.8 of the Health and Safety Code, ~~nor provided in Chapter 4 (commencing with Section 4720) of Part 2 of Division 4.7. This part does not~~ increase or decrease the burdens of documentation on, or potential liability of, physicians and surgeons who, outside the judicial context, determine the capacity of patients to make a medical decision.

**Comment.** Section 811 is amended to reflect the replacement of Health and Safety Code Section 1418.8 with Probate Code Sections 4720-4726 in the Uniform Health Care Decisions Act.

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**Prob. Code § 1302 (amended). Grounds for appeal under Power of Attorney Law**

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SEC. \_\_\_\_\_. Section 1302 of the Probate Code is amended to read:

1302. With respect to a power of attorney, ~~the grant or refusal to grant the following orders is appealable governed by the Power of Attorney Law, Division 4.5 (commencing with Section 4000), an appeal may be taken from any of the following:~~

(a) Any final order under Section 4941 ~~4541~~, except an order pursuant to subdivision (c) of Section 4941 ~~4541~~.

(b) ~~Any final order under Section 4942, except an order pursuant to subdivision (c) of Section 4942.~~

(e) An order dismissing the petition or denying a motion to dismiss under Section 4944 ~~4544.~~

**Comment.** Section 1302 is amended to reflect the renumbering of former Sections 4900-4947 and to refer to powers of attorney governed by the Power of Attorney Law. Appeals relating to powers of attorney governed by the Health Care Decisions Law are governed by Section 1302.5. The introductory clause is also revised to correct erroneous language.

**Prob. Code § 1302.5 (added). Grounds for appeal under Health Care Decisions Law**

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SEC. \_\_\_\_\_. Section 1302.5 is added to the Probate Code, to read:

1302.5. With respect to an advance health care directive governed by the Health Care Decisions Law, Division 4.7 (commencing with Section 4600), an appeal may be taken from any of the following:

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

(b) An order dismissing the petition or denying a motion to dismiss under Section 4544.

**Comment.** Section 1302.5 is added to reflect enactment of the Health Care Decisions Law (Section 4600 *et seq.*) and the removal of health care powers of attorney from the Power of Attorney Law (Section 4000 *et seq.*).

**Prob. Code § 2105 (amended). Joint guardians or conservators**

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SEC. \_\_\_\_\_. Section 2105 of the Probate Code is amended to read:

2105. (a) The court, in its discretion, may appoint for a ward or conservatee:

(1) Two or more joint guardians or conservators of the person.

(2) Two or more joint guardians or conservators of the estate.

(3) Two or more joint guardians or conservators of the person and estate.

(b) When joint guardians or conservators are appointed, each shall qualify in the same manner as a sole guardian or conservator.

(c) Subject to subdivisions (d) and (e):

(1) Where there are two guardians or conservators, both must concur to exercise a power.

(2) Where there are more than two guardians or conservators, a majority must concur to exercise a power.

(d) If one of the joint guardians or conservators dies or is removed or resigns, the powers and duties continue in the remaining joint guardians or conservators until further appointment is made by the court.

(e) Where joint guardians or conservators have been appointed and one or more are (1) absent from the state and unable to act, (2) otherwise unable to act, or (3) legally disqualified from serving, the court may, by order made with or without notice, authorize the remaining joint guardians or conservators to act as to all matters embraced within its order.

(f) If a custodial parent has been diagnosed as having a terminal condition, as evidenced by a declaration executed by a licensed physician, the court, in its discretion, may appoint the custodial parent and a person nominated by the custodial parent as joint guardians of the person of the minor. However, this appointment shall not be made over the objection of a noncustodial parent without a finding that the noncustodial parent's custody would be detrimental to the minor, as provided in Section 3041 of the Family Code. It is the intent of the Legislature in enacting the amendments to this subdivision

adopted during the 1995-96 Regular Session for a parent with a terminal condition to be able to make arrangements for the joint care, custody, and control of his or her minor children so as to minimize the emotional stress of, and disruption for, the minor children whenever the parent is incapacitated or upon the parent's death, and to avoid the need to provide a temporary guardian or place the minor children in foster care, pending appointment of a guardian, as might otherwise be required.

"Terminal condition," for purposes of this subdivision, means an incurable and irreversible condition that, without the administration of life-sustaining treatment, will, within reasonable medical judgment, result in death.

~~Nothing in this section shall be construed to broaden or narrow the definition of the term "terminal condition," as defined in subdivision (j) of Section 7186 of the Health and Safety Code.~~

**Comment.** The last paragraph of Section 2105 is deleted because the definition to which it referred is repealed. See former Health & Safety Code § 7186 Comment.

**Prob. Code § 2355 (amended). Health care where conservatee lacks capacity**

SEC. \_\_\_\_\_. Section 2355 of the Probate Code is amended to read:

2355. (a) If the conservatee has been adjudicated to lack the capacity to ~~give informed consent for medical treatment~~ make health care decisions, the conservator has the exclusive authority to ~~give consent for such medical treatment to be performed on~~ make health care decisions for the conservatee as ~~that~~ the conservator in good faith based on medical advice determines to be necessary ~~and the~~. The conservator shall make health care decisions for the conservatee in accordance with the conservatee's individual health care instructions, if any, and other wishes to the extent known to the conservator. Otherwise, the conservator shall make the decision in accordance with the conservator's determination of the conservatee's best interest. In determining the conservatee's best interest, the conservator shall consider the conservatee's personal values to the extent known to the conservator. The conservator may require the conservatee to receive such ~~medical treatment~~ the health care, whether or not the conservatee objects. In ~~any such~~ this case, the ~~consent~~ health care decision of the conservator alone is sufficient and no person is liable because the ~~medical treatment is performed upon~~ health care administered to the conservatee without the conservatee's consent. For the purposes of this subdivision, "health care" and "health care decision" have the meanings provided in Sections 4615 and 4617, respectively.

(b) If prior to the establishment of the conservatorship the conservatee was an adherent of a religion whose tenets and practices call for reliance on prayer alone for healing, the treatment required by the conservator under the provisions of this section shall be by an accredited practitioner of that religion.

**Comment.** Subdivision (a) of Section 2105 is amended to add the second sentence providing a standard for making health care decisions. This standard is the same in substance as the standard applicable to other surrogate health care decisionmakers under the Health Care Decisions Law of Division 4.7 (commencing with Section 4600). See Sections 4684 (standard governing agent's health care decisions under power of attorney for health care), 4713 (standard governing statutory surrogate's health care decisions), 4725 (application of statutory surrogate rules to surrogate committee). Under this standard, the surrogate has both the right and fiduciary duty ("shall make health care decisions") to make a decision based on the individual circumstances of the conservatee. As amended, subdivision (a) is consistent with *Conservatorship of Drabick*, 220 Cal. App. 3d 185, 245 Cal. Rptr. 840 (1988):

Incapacitated patients "retain the right to have appropriate medical decisions made on their behalf. An appropriate medical decision is one that is made in the patient's best interests, as opposed to

the interests of the hospital, the physicians, the legal system, or someone else. To summarize, California law gives persons a right to determine the scope of their own medical treatment, this right survives incompetence in the sense that incompetent patients retain the right to have appropriate decisions made on their behalf, and Probate Code section 2355 delegates to conservators the right and duty to make such decisions.

*Id.* at 205. Use of the terms “health care” and “health care decision” from the Health Care Decisions Law make clear that the scope of health care decisions that can be made by a conservator under this section is the same as provided in the Health Care Decisions Law.

The importance of the statutory language concerning the exclusive authority of the conservator and the duty this places on the conservator was also emphasized in *Drabick*:

The statute gives the conservator the exclusive authority to exercise the conservatee’s rights, and it is the conservator who must make the final treatment decision regardless of how much or how little information about the conservatee’s preferences is available. There is no necessity or authority for adopting a rule to the effect that the conservatee’s desire to have medical treatment withdrawn must be proved by clear and convincing evidence or another standard. Acknowledging that the patient’s expressed preferences are relevant, it is enough for the conservator, who must act in the conservatee’s best interests, to consider them in good faith.

*Id.* at 211-12. The intent of the rule in subdivision (a) is to protect and further the patient’s interest in making a health care decision in accordance with the patient’s expressed desires, where known, and if not, to make a decision in the patient’s best interest, taking personal values into account. The necessary determinations are to be made by the conservator, whether private or public, in accordance with the statutory standard. Court control or intervention in this process is neither required by statute, nor desired by the courts. See, e.g., *Conservatorship of Morrison*, 206 Cal. App. 3d 304, 312, 253 Cal. Rptr. 530 (1988). *Drabick*, 200 Cal. App. 3d at 198-200. See also Sections 4650(d) (legislative findings), 4750 (judicial intervention disfavored).

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**Prob. Code § 2356 (amended). Limitations on application of chapter**

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SEC. \_\_\_\_\_. Section 2356 of the Probate Code is amended to read:

2356. (a) No ward or conservatee may be placed in a mental health treatment facility under this division against the will of the ward or conservatee. Involuntary civil placement of a ward or conservatee in a mental health treatment facility may be obtained only pursuant to Chapter 2 (commencing with Section 5150) or Chapter 3 (commencing with Section 5350) of Part 1 of Division 5 of the Welfare and Institutions Code. Nothing in this subdivision precludes the placing of a ward in a state hospital under Section 6000 of the Welfare and Institutions Code upon application of the guardian as provided in that section. The Director of Mental Health shall adopt and issue regulations defining “mental health treatment facility” for the purposes of this subdivision.

(b) No experimental drug as defined in Section 111515 of the Health and Safety Code may be prescribed for or administered to a ward or conservatee under this division. Such an experimental drug may be prescribed for or administered to a ward or conservatee only as provided in Article 4 (commencing with Section 111515) of Chapter 6 of Part 5 of Division 104 of the Health and Safety Code.

(c) No convulsive treatment as defined in Section 5325 of the Welfare and Institutions Code may be performed on a ward or conservatee under this division. Convulsive treatment may be performed on a ward or conservatee only as provided in Article 7 (commencing with Section 5325) of Chapter 2 of Part 1 of Division 5 of the Welfare and Institutions Code.

(d) No minor may be sterilized under this division.

(e) This chapter is subject to ~~any of the following instruments if a valid and effective:~~  
advance health care directive under the Health Care Decisions Law, Division 4.7  
(commencing with Section 4600).

~~(1) A directive of the conservatee under Chapter 3.9 (commencing with Section 7185) of Part 1 of Division 7 of the Health and Safety Code (Natural Death Act).~~

~~(2) A power of attorney for health care, whether or not a durable power of attorney.~~

**Heading amended**

SEC. \_\_\_\_\_. The heading for Part 7 (commencing with Section 3200) of Division 4 of the Probate Code is amended to read:

**PART 7. AUTHORIZATION OF MEDICAL TREATMENT  
CAPACITY DETERMINATIONS AND HEALTH CARE  
DECISIONS FOR ADULT WITHOUT CONSERVATOR**

**Comment.** The part heading is amended to reflect the expanded scope of this part. See 1995 Cal. Stat. ch. 842, § 9 (adding determination of capacity to consent to specified medical treatment as independent ground for petition under Section 3201).

**Revised 1990 Comment.** This part supersedes Part 7 (commencing with Section 3200) of Division 4 of the repealed Probate Code. The superseded part was enacted on recommendation of the California Law Revision Commission. See *Recommendation Relating to Guardianship-Conservatorship Law*, 14 Cal. L. Revision Comm'n Reports 501 (1978). See also *Report of Assembly Committee on Judiciary on Assembly Bills Nos. 261 and 167*, republished in 15 Cal. L. Revision Comm'n Reports 1061, 1091 (1980). For the Guardianship-Conservatorship Law as enacted in 1979 (Chapter 726 of the Statutes of 1979) with the revisions made by Chapters 89 and 246 of the Statutes of 1980, see *Guardianship-Conservatorship Law*, 15 Cal. L. Revision Comm'n Reports 451 (1980).

The provisions of this part afford an alternative to establishing a conservatorship of the person where there is no ongoing need for a conservatorship. The procedural rules of this part provide an expeditious means of obtaining authorization for medical treatment while safeguarding basic rights of the patient: The patient has a right to counsel. Section 3205. The hearing is held after notice to the patient, the patient's attorney, and such other persons as the court orders. Section 3206. The court may determine the issue on medical declarations alone if the attorney for the petitioner and the attorney for the patient so stipulate. Section 3207. The court may not order medical treatment under this part if the patient has capacity to give informed consent to the treatment but refuses to do so. Section 3208.5.

**Note.** The following material includes a draft of one alternative approach to expand the scope of the Section 3200 procedure to cover all health care decisions, including end-of-life decisions. This drafting approach leaves the procedure in its current location. An alternative would be to merge the procedure into the judicial proceedings portion of the proposed Health Care Decisions Law. See proposed Prob. Code §§ 4750-4771 *supra*.

**The Commission solicits comments on the preferable drafting approach.** Amending the Section 3200 series would maintain greater continuity with existing law, whereas merging the procedure into the Health Care Decisions Law would result in a more efficient statute and eliminate overlapping and inconsistent procedural rules.

**Prob. Code § 3200 (amended). Definitions**

SEC. \_\_\_\_\_. Section 3200 of the Probate Code is amended to read:  
3200. As used in this part, "patient" part:

1 (a) "Health care" means any care, treatment, service, or procedure to maintain,  
2 diagnose, or otherwise affect a patient's physical or mental condition.

3 (b) "Health care decision" means a decision regarding the patient's health care,  
4 including the following:

5 (1) Selection and discharge of health care providers and institutions.

6 (2) Approval or disapproval of diagnostic tests, surgical procedures, programs of  
7 medication, and orders not to resuscitate.

8 (3) Directions to provide, withhold, or withdraw artificial nutrition and hydration and  
9 all other forms of health care.

10 (c) "Health care institution" means an institution, facility, or agency licensed, certified,  
11 or otherwise authorized or permitted by law to provide health care in the ordinary course  
12 of business.

13 (d) "Patient" means an adult who does not have a conservator of the person and who is  
14 in need of medical treatment for whom health care decision needs to be made.

15 **Comment.** Section 3200 is amended to adopt definitions that are consistent with the Health  
16 Care Decisions Law. See Section 4500 *et seq.* The definition of "health care decision" in  
17 subdivision (b) makes clear, as used in other provisions in this part, that court-authorized health  
18 care decisions include end-of-life decisions. See Section 3208(c). This is consistent with the  
19 scope of the Health Care Decisions Law.

20 **Prob. Code § 3201 (amended). Petition for court authorization**

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21 SEC. \_\_\_\_\_. Section 3201 of the Probate Code is amended to read:

22 3201. (a) A petition may be filed to determine that a patient has the capacity to give  
23 ~~informed consent to a specified medical treatment for~~ make a health care decision  
24 ~~concerning~~ an existing or continuing medical condition.

25 (b) A petition may be filed to determine that a patient lacks the capacity to give  
26 ~~informed consent to a~~ make a health care decision concerning specified medical treatment  
27 for an existing or continuing medical condition, and further for an order authorizing a  
28 designated person to give consent to such treatment make a health care decision on behalf  
29 of the patient.

30 (c) One proceeding may be brought under this part under both subdivisions (a) and (b).

31 ~~(d) In determining whether a person's mental functioning is so severely impaired that~~  
32 ~~the person lacks the capacity to give informed consent to any form of medical treatment,~~  
33 ~~the court may take into consideration the frequency, severity and duration of periods of~~  
34 ~~impairment.~~

35 ~~(e) Nothing in this part shall supersede the right that any person may have under~~  
36 ~~existing law to make medical decisions on behalf of a patient, or affect the~~  
37 ~~decisionmaking process of a long term health care facility, as defined in subdivision (b)~~  
38 ~~of Section 1418.8 of the Health and Safety Code.~~

39 ~~(f) This chapter is permissive and cumulative for the relief to which it applies.~~

40 ~~(g) Nothing in this part shall be construed to supersede or impair the right of any~~  
41 ~~individual to choose treatment by spiritual means in lieu of medical treatment, nor shall~~  
42 ~~any person choosing treatment by spiritual means, in accordance with the tenets and~~  
43 ~~practices of that individual's established religious tradition, be required to submit to~~  
44 ~~medical testing of any kind pursuant to a determination of competency.~~

45 **Comment.** Subdivisions (a) and (b) of Section 3201 are amended to use the terminology of  
46 Section 3200 and make the language internally consistent. See Section 3200 Comment. Other  
47 technical, nonsubstantive changes are also made.

1 Subdivision (d) is continued in Section 3208(b) without substantive change. See Section 3208  
2 Comment.

3 Subdivision (e) is continued in Section 3210(c) without substantive change. Subdivision (f) is  
4 continued in Section 3210(a) without substantive change. See Section 3210 Comment.

5 Subdivision (g) is continued in Section 3212 without substantive change. See Section 3212  
6 Comment.

7 **Prob. Code § 3202 (unchanged). Jurisdiction and venue**

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8 3202. The petition may be filed in the superior court of any of the following counties:

9 (a) The county in which the patient resides.

10 (b) The county in which the patient is temporarily living.

11 (c) Such other county as may be in the best interests of the patient.

12 **Prob. Code § 3203 (amended). Persons authorized to file petition**

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13 SEC. \_\_\_\_\_. Section 3203 of the Probate Code is amended to read:

14 3203. A petition may be filed by any of the following:

15 (a) The patient.

16 (b) The patient's spouse ~~of the patient~~.

17 (c) A relative or friend of the patient or other interested person.

18 (d) The patient's physician.

19 (e) A person acting on behalf of the ~~medical facility~~ health care institution in which the  
20 patient is located if the patient is in a ~~medical facility~~ health care institution.

21 (f) The public guardian or ~~such other county officer as is~~ designated by the board of  
22 supervisors of the county in which the patient is located or resides or is temporarily  
23 living.

24 **Comment.** Section 3203 is amended to use the terminology of Section 3200. See Section 3200  
25 Comment. Other technical, nonsubstantive changes are also made.

26 **Prob. Code § 3204 (amended). Contents of petition**

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27 SEC. \_\_\_\_\_. Section 3204 of the Probate Code is amended to read:

28 3204. The petition shall state, or set forth by a medical declaration attached thereto to  
29 the petition, all of the following ~~so far as is~~ known to the petitioner at the time the petition  
30 is filed:

31 (a) The ~~nature~~ condition of the ~~medical condition of the patient which~~ patient's health  
32 that requires treatment.

33 (b) The recommended ~~course of medical treatment which~~ health care that is considered  
34 to be medically appropriate.

35 (c) The threat to the ~~health of the patient~~ patient's condition if authorization for the  
36 recommended ~~course of treatment~~ health care is delayed or denied by the court.

37 (d) The predictable or probable outcome of the recommended ~~course of treatment~~  
38 health care.

39 (e) The medically available alternatives, if any, to the ~~course of treatment~~  
40 recommended health care.

41 (f) The efforts made to obtain ~~an informed~~ consent from the patient.

42 (g) If the petition is filed by a person on behalf of a ~~medical facility~~ health care  
43 institution, the name of the person to be designated to give consent to the recommended  
44 ~~course of treatment~~ health care on behalf of the patient.

45 (h) The deficit or deficits in the patient's mental functions listed in subdivision (a) of  
46 Section 811 ~~which that~~ are impaired, and ~~identifying an~~ identification of a link between



1 the deficit or deficits and the patient's inability to respond knowingly and intelligently to  
2 queries about the recommended ~~medical treatment~~ health care or inability to participate in  
3 a ~~treatment~~ decision about the recommended ~~medical treatment~~ health care by means of a  
4 rational thought process.

5 (i) The names and addresses, so far as they are known to the petitioner, of the persons  
6 specified in subdivision (b) of Section 1821.

7 **Comment.** Section 3204 is amended to use the terminology of Section 3200. See Section 3200  
8 **Comment.** Other technical, nonsubstantive changes are also made. The reference to "informed"  
9 consent is omitted as unnecessary. See Section 3208.5 **Comment.**

10 **Prob. Code § 3205 (unchanged). Appointment of legal counsel**

11 3205. Upon the filing of the petition, the court shall determine the name of the attorney  
12 the patient has retained to represent the patient in the proceeding under this part or the  
13 name of the attorney the patient plans to retain for that purpose. If the patient has not  
14 retained an attorney and does not plan to retain one, the court shall appoint the public  
15 defender or private counsel under Section 1471 to consult with and represent the patient  
16 at the hearing on the petition and, if such appointment is made, Section 1472 applies.

17 **Prob. Code § 3206 (amended). Notice of hearing**

18 SEC. \_\_\_\_\_. Section 3206 of the Probate Code is amended to read:

19 3206. (a) Not less than 15 days before the hearing, notice of the time and place of the  
20 hearing and a copy of the petition shall be personally served on the patient and the  
21 patient's attorney.

22 (b) Not less than 15 days before the hearing, notice of the time and place of the hearing  
23 and a copy of the petition shall be mailed to the following persons:

24 (1) The patient's spouse, if any, ~~of the proposed conservatee~~ at the address stated in the  
25 petition.

26 (2) The patient's relatives named in the petition at their addresses stated in the petition.

27 (c) For good cause, the court may shorten or waive notice of the hearing as provided by  
28 this section. In determining the period of notice to be required, the court shall take into  
29 account both of the following:

30 (1) The existing medical facts and circumstances set forth in the petition or in a medical  
31 affidavit declaration attached to the petition or in a medical affidavit declaration  
32 presented to the court.

33 (2) The desirability, where the condition of the patient permits, of giving adequate  
34 notice to all interested persons.

35 **Comment.** Subdivision (b) of Section 3206 is amended to correct the reference to a "proposed  
36 conservatee." See Section 3200(d) ("patient" defined).

37 Subdivision (c) is amended to replace the references to "affidavit," in conformity with Section  
38 3204.

39 **Prob. Code § 3207 (amended). Submission for determination on medical affidavits**

40 SEC. \_\_\_\_\_. Section 3207 of the Probate Code is amended to read:

41 3207. Notwithstanding Section 3206, the matter presented by the petition may be  
42 submitted for the determination of the court ~~upon~~ on proper and sufficient medical  
43 ~~affidavits or declarations~~ if the attorney for the petitioner and the attorney for the patient  
44 so stipulate and further stipulate that there remains no issue of fact to be determined.

45 **Comment.** Section 3207 is amended to eliminate the reference to "affidavits," in conformity  
46 with Section 3204.

**Prob. Code § 3208 (amended). Order authorizing treatment**

SEC. \_\_\_\_\_. Section 3208 of the Probate Code is amended to read:

3208. (a) ~~The Except as provided in subdivision (b), the court may make an order authorizing the recommended course of medical treatment of health care for the patient and designating a person to give consent to the recommended course of medical treatment health care on behalf of the patient if the court determines from the evidence all of the following:~~

(1) ~~The existing or continuing medical condition of the patient patient's health requires the recommended course of medical treatment health care.~~

(2) ~~If untreated, there is a probability that the condition will become life-endangering or result in a serious threat to the physical or mental health of the patient.~~

(3) ~~The patient is unable to give an informed consent to the recommended course of treatment health care.~~

(b) In determining whether a patient's mental functioning is so severely impaired that the patient lacks the capacity to make any health care decision, the court may take into consideration the frequency, severity, and duration of periods of impairment.

(c) The court may make an order authorizing withdrawal or withholding of artificial nutrition and hydration and all other forms of health care and designating a person to give or withhold consent to the recommended health care on behalf of the patient if the court determines from the evidence all of the following:

(1) The recommended health care is in accordance with the patient's best interest, taking into consideration the patient's personal values to the extent known.

(2) The patient is unable to consent to the recommended health care.

(d) Instead of designating a person to make health care decisions on behalf of the patient under this section, the court may refer the matter to a surrogate committee under Chapter 4 (commencing with Section 4720) of Part 2 of Division 4.7. If there is no appropriate surrogate committee in existence, the court may order creation of a surrogate committee to act under Chapter 4 (commencing with Section 4720) of Part 2 of Division 4.7.

~~(b) If the patient has the capacity to give informed consent to the recommended course of medical treatment, the court shall so find in its order.~~

~~(c) If the court finds that the patient has the capacity to give informed consent to the recommended course of medical treatment, but that the patient refuses consent, the court shall not make an order authorizing the course of recommended medical treatment or designating a person to give consent to such treatment. If an order has been made authorizing the recommended course of medical treatment and designating a person to give consent to that treatment, the order shall be revoked if the court determines that the patient has recovered the capacity to give informed consent to the recommended course of medical treatment. Until revoked or modified, the order is effective authorization for the course of medical treatment.~~

~~(d) In a proceeding under this part, where the court has determined that the patient has the capacity to give informed consent, the court shall, if requested, determine whether the patient has accepted or refused the recommended course of treatment, and whether a patient's consent to the recommended course of treatment is an informed consent.~~

**Comment.** Subdivision (a) of Section 3208 is amended to use the terminology of Section 3200. See Section 3200 Comment. Other technical, nonsubstantive changes are also made. The reference to "informed" consent has been omitted as surplus. See Section 3805 Comment.

New subdivision (b) continues former subdivision (d) of Section 3201 without substantive change.

1 A new subdivision (c) is added to permit withholding or withdrawal of health care, including  
2 artificial nutrition and hydration. This amendment extends the authority of the court to authorize  
3 health care decisions to the same extent as surrogates and subject to the same standards as  
4 provided in the Health Care Decisions Law. See, e.g., Sections 4684 (standard governing agent's  
5 health care decisions under power of attorney for health care), 4713 (standard governing  
6 surrogate's health care decisions).

7 New subdivision (d) provides a mechanism for the court to use the surrogate committee  
8 procedure in the Health Care Decisions Law. See Sections 4720-4726. In such a case, the  
9 surrogate committee would be governed by the Health Care Decisions Law, except as limited by  
10 the court's order. Nothing in this section is intended to encourage court control or involvement in  
11 the surrogate committee process, but in appropriate cases, such as were continuing health care  
12 decisions will need to be made, the surrogate committee may offer the best approach.

13 Former subdivisions (b)-(d) are continued in Section 3208.5 without substantive change. See  
14 Section 3208.5 Comment.

15 **Prob. Code § 3208.5 (added). Effect of order determining that patient has capacity**

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16 SEC. \_\_\_\_\_. Section 3208.5 is added to the Probate Code, to read:

17 3208.5. In a proceeding under this part:

18 (a) Where the patient has the capacity to consent to the recommended health care, the  
19 court shall so find in its order.

20 (b) Where the court has determined that the patient has the capacity to consent to the  
21 recommended health care, the court shall, if requested, determine whether the patient has  
22 accepted or refused the recommended health care, and whether the patient's consent to  
23 the recommended health care is an informed consent.

24 (c) Where the court finds that the patient has the capacity to consent to the  
25 recommended health care, but that the patient refuses consent, the court shall not make an  
26 order authorizing the recommended health care or designating a person to give consent to  
27 the recommended health care. If an order has been made authorizing the recommended  
28 health care and designating a person to give consent to the recommended health care, the  
29 order shall be revoked if the court determines that the patient has recovered the capacity  
30 to consent to the recommended health care. Until revoked or modified, the order is  
31 effective authorization for the recommended health care.

32 **Comment.** Section 3208.5 continues former subdivisions (b)-(d) of Section 3208 without  
33 substantive change. The subdivisions have been placed in a different order. Terminology has been  
34 conformed to the definitions in Section 3200. Thus, for example, "health care" replaces "medical  
35 treatment" appearing in the former provision. Except in subdivision (b), references to "informed"  
36 consent have been omitted as surplus and for consistency with other provisions in this part and in  
37 the Health Care Decisions Law (Section 4600 *et seq.*). To be effective, the patient's consent must  
38 satisfy the law of informed consent.

39 **Prob. Code § 3209 (unchanged). Continuing jurisdiction of court**

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40 3209. The court in which the petition is filed has continuing jurisdiction to revoke or  
41 modify an order made under this part upon a petition filed, noticed, and heard in the same  
42 manner as an original petition filed under this part.

43 **Prob. Code § 3210 (amended). Procedure supplemental and alternative**

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44 SEC. \_\_\_\_\_. Section 3210 of the Probate Code is amended to read:

45 3210. (a) This part is supplemental and alternative to other procedures or methods for  
46 obtaining medieal consent to health care or making health care decisions, and is  
47 permissive and cumulative for the relief to which it applies.

(b) Nothing in this part limits the providing of ~~medical treatment~~ health care in an emergency case in which the ~~medical treatment~~ health care is required because (1) such ~~treatment the health care~~ is required for the alleviation of severe pain or (2) the patient has a medical condition ~~which that~~, if not immediately diagnosed and treated, will lead to serious disability or death.

(c) Nothing in this part supersedes the right that any person may have under existing law to make health care decisions on behalf of a patient, or affects the decisionmaking process of a health care institution.

**Comment.** Subdivisions (a) and (b) of Section 3210 are amended to use the terminology of Section 3200. See Section 3200 Comment. Other technical, nonsubstantive changes are also made. The second clause added to subdivision (a) continues former subdivision (f) of Section 3201 without substantive change. The erroneous reference to “this chapter” in the former provision is corrected.

Subdivision (c) continues former subdivision (e) of Section 3201, with revisions reflecting the replacement of Health and Safety Code Section 1418.8 with Probate Code Sections 4720-4726 (surrogate committee). Subdivision (c) thus applies to all health care institutions, as defined in Section 3200(c), not just long-term health care facilities, as defined in former Health and Safety Code Section 1418.8(b). Other technical, nonsubstantive changes are also made.

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**Prob. Code § 3211 (amended). Limitations on part**

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SEC. \_\_\_\_\_. Section 3211 of the Probate Code is amended to read:

3211. (a) No person may be placed in a mental health treatment facility under the provisions of this part.

(b) No experimental drug as defined in Section 111515 of the Health and Safety Code may be prescribed for or administered to any person under this part.

(c) No convulsive treatment as defined in Section 5325 of the Welfare and Institutions Code may be performed on any person under this part.

(d) No person may be sterilized under this part.

(e) The provisions of this part are subject to ~~any of the following instruments if a valid and effective:~~ advance health care directive under the Health Care Decisions Law, Division 4.7 (commencing with Section 4600).

~~(1) A directive of the patient under Chapter 3.9 (commencing with Section 7185) of Part 1 of Division 7 of the Health and Safety Code (Natural Death Act).~~

~~(2) A power of attorney for health care, whether or not a durable power of attorney.~~

**Comment.** Subdivision (e) of Section 3211 is amended to use the inclusive term “advance health care directive” used in the Health Care Decisions Law. This continues the substance of former law, since declarations under the former Natural Death Act and powers of attorney for health care are types of advance directives. See Section 4605 & Comment. Also covered by this language are “individual health care instructions.” See Section 4623 & Comment.

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**Prob. Code § 3212 (added). Choice of treatment by spiritual means**

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SEC. \_\_\_\_\_. Section 3212 is added to the Probate Code, to read:

3212. Nothing in this part shall be construed to supersede or impair the right of any individual to choose treatment by spiritual means in lieu of medical treatment, nor shall any individual choosing treatment by spiritual means, in accordance with the tenets and practices of that individual’s established religious tradition, be required to submit to medical testing of any kind pursuant to a determination of capacity.

**Comment.** Section 3212 continues former subdivision (g) of Section 3201 without substantive change. The former reference to “competency” has been changed to “capacity” to conform to the terminology of this part and related statutes. See, e.g., Section 3201 (capacity determination).

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

SEC. \_\_\_\_\_. Section 3722 of the Probate Code is amended to read:

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

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

See also Sections 1403 ("absentee" defined), 4014 ("attorney-in-fact" defined), 4022 ("power of attorney" defined).

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

SEC. \_\_\_\_\_. Section 4050 of the Probate Code is amended to read:

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

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

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

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

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

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

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

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

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

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

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

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

Subdivision (b) makes clear that certain specialized types of power of attorney are not subject to the Power of Attorney Law. This list is not intended to be exclusive. See subdivision (c). Subdivision (b)(1) recognizes the special rule applicable to a power coupled with an interest in the subject of a power of attorney provided in Civil Code Section 2356(a). Subdivision (b)(2) continues the substance of the limitation in former Civil Code Section 2420(b) and broadens it to apply to the entire Power of Attorney Law. See Ins. Code § 1280 *et seq.* For the rules applicable to proxy voting in business corporations, see Corp. Code § 705. For other statutes dealing with proxies, see Corp. Code §§ 178, 702, 5069, 5613, 7613, 9417, 12405, 13242; Fin. Code §§ 5701, 5702, 5710, 6005. See also Civ. Code § 2356(e) (proxy under general agency rules).

Subdivision (c) makes clear that this division does not affect the validity of other agencies and powers of attorney. The Power of Attorney Law thus does not apply to other specialized agencies,

1 such as real estate agents under Civil Code Sections 2373-2382. As a corollary, an instrument  
2 denominated a power of attorney that does not satisfy the execution requirements for a power of  
3 attorney under this division may be valid under general agency law or other principles.

4 See also Sections 4014 ("attorney-in-fact" defined), 4018 ("durable power of attorney"  
5 defined), 4022 ("power of attorney" defined).

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

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7 SEC. \_\_\_\_\_. Section 4100 of the Probate Code is amended to read:

8 4100. This part applies to all powers of attorney under this division, subject to any  
9 special rules applicable to statutory form powers of attorney under Part 3 (commencing  
10 with Section 4400) ~~or durable powers of attorney for health care under Part 4~~  
11 ~~(commencing with Section 4600).~~

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

#### 15 **Prob. Code § 4121 (amended). Formalities for executing a power of attorney**

---

16 SEC. \_\_\_\_\_. Section 4121 of the Probate Code is amended to read:

17 4121. A power of attorney is legally sufficient if all of the following requirements are  
18 satisfied:

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

20 (b) The power of attorney is signed either (1) by the principal or (2) in the principal's  
21 name by ~~some other person~~ another adult in the principal's presence and at the principal's  
22 direction.

23 (c) The power of attorney is either (1) acknowledged before a notary public or (2)  
24 signed by at least two witnesses who satisfy the requirements of Section 4122.

25 **Comment.** Subdivision (b) of Section 4121 is amended to make clear that the person signing at  
26 the principal's direction must be an adult. This is consistent with the language of Section 4680  
27 (formalities for executing power of attorney for health care).

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

---

29 SEC. \_\_\_\_\_. Section 4122 of the Probate Code is amended to read:

30 4122. If the power of attorney is signed by witnesses, as provided in Section 4121, the  
31 following requirements shall be satisfied:

32 (a) The witnesses shall be adults.

33 (b) The attorney-in-fact may not act as a witness.

34 (c) Each witness signing the power of attorney shall witness either the signing of the  
35 instrument by the principal or the principal's acknowledgment of the signature or the  
36 power of attorney.

37 ~~(d) In the case of a durable power of attorney for health care, the additional~~  
38 ~~requirements of Section 4701.~~

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

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

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

---

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

4123. (a) In a power of attorney, 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.

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

**Comment.** Section 4123 is amended to delete subdivision (d), which referred to powers of attorney for health care that are now governed by Division 4.7 (commencing with Section 4600) (Health Care Decisions Law). See Section 4050 (types of powers of attorney governed by this division).

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

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

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

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

---

SEC. \_\_\_\_\_. Section 4128 of the Probate Code is amended to read:

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

**NOTICE TO PERSON EXECUTING DURABLE POWER OF ATTORNEY**

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

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

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

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

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

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

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

21 You should read this durable power of attorney carefully. When effective, this durable  
22 power of attorney will give your agent the right to deal with property that you now have  
23 or might acquire in the future. The durable power of attorney is important to you. If you  
24 do not understand the durable power of attorney, or any provision of it, then you should  
25 obtain the assistance of an attorney or other qualified person.

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

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

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

30 (2) ~~A durable power of attorney for health care under Part 4 (commencing with Section~~  
31 ~~4600).~~

32 **Comment.** Subdivision (c) of Section 4128 is amended to delete a reference to powers of  
33 attorney for health care, which are governed by Division 4.7 (commencing with Section 4600)  
34 (Health Care Decisions Law). This is a technical, nonsubstantive change.

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

41 Other provisions prescribe the contents of the warning statements for particular types of durable  
42 powers of attorney. See Section 4401 (statutory form power of attorney).

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

47 See also Sections 4014 ("attorney-in-fact" defined), 4018 ("durable power of attorney"  
48 defined), 4026 ("principal" defined), 4034 ("third person" defined).



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

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SEC. \_\_\_\_\_. Section 4203 of the Probate Code is amended to read:

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

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

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

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

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

---

SEC. \_\_\_\_\_. Section 4206 of the Probate Code is amended to read:

4206. (a) If, following execution of a durable power of attorney, a court of the principal's domicile appoints a conservator of the estate, guardian of the estate, or other fiduciary charged with the management of all of the principal's property or all of the principal's property except specified exclusions, the attorney-in-fact is accountable to the fiduciary as well as to the principal. Except as provided in subdivision (b), the fiduciary has the same power to revoke or amend the durable power of attorney that the principal would have had if not incapacitated, subject to any required court approval.

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

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

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

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

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

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SEC. \_\_\_\_\_. Section 4260 of the Probate Code is amended to read:

4260. This article does not apply to the following:

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

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

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

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

---

SEC. \_\_\_\_\_. Section 4265 of the Probate Code is amended to read:

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

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

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

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

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

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**Prob. Code §§ 4500-4545 (added). Judicial proceedings concerning powers of attorney**

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

**PART 4. JUDICIAL PROCEEDINGS CONCERNING  
POWERS OF ATTORNEY**

**CHAPTER 1. GENERAL PROVISIONS**

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

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

**Comment.** Section 4500 continues former Section 4900 without change. See also Section 4022 ("power of attorney" defined).

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**§ 4501. Cumulative remedies**

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

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

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

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

**Comment.** Section 4502 continues former Section 4902 without change. See also Sections 4022 ("power of attorney" defined), 4101(b) (general rule on limitations provided in power of attorney).

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

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

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

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

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

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

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

10 (2) The conservator of the person of the principal, with respect to a petition relating to a  
11 durable power of attorney for health care for a purpose specified in subdivision (a), (c), or  
12 (d) of Section 4541.

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

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

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

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

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

#### 29 **§ 4504. Jury trial**

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30 4504. There is no right to a jury trial in proceedings under this division.

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

#### 34 **§ 4505. Application of general procedural rules**

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35 4505. Except as otherwise provided in this division, the general provisions in Division  
36 3 (commencing with Section 1000) apply to proceedings under this division.

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

## 42 **CHAPTER 2. JURISDICTION AND VENUE**

#### 43 **§ 4520. Jurisdiction and authority of court or judge**

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44 4520. (a) The superior court has jurisdiction in proceedings under this division.

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

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

#### **§ 4521. Basis of jurisdiction**

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

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

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

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

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

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

#### **§ 4523. Venue**

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

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

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

1 CHAPTER 3. PETITIONS, ORDERS, APPEALS

2 **§ 4540. Petitioners**

3 4540. Subject to Section 4503, a petition may be filed under this part by any of the  
4 following persons:

- 5 (a) The attorney-in-fact.
- 6 (b) The principal.
- 7 (c) The spouse of the principal.
- 8 (d) A relative of the principal.
- 9 (e) The conservator of the person or estate of the principal.
- 10 (f) The court investigator, described in Section 1454, of the county where the power of  
11 attorney was executed or where the principal resides.
- 12 (g) The public guardian of the county where the power of attorney was executed or  
13 where the principal resides.
- 14 (h) The personal representative or trustee of the principal's estate.
- 15 (i) The principal's successor in interest.
- 16 (j) A person who is requested in writing by an attorney-in-fact to take action.
- 17 (k) Any other interested person or friend of the principal.

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

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

27 **§ 4541. Petition as to powers of attorney**

28 4541. A petition may be filed under this part for any one or more of the following  
29 purposes:

- 30 (a) Determining whether the power of attorney is in effect or has terminated.
- 31 (b) Passing on the acts or proposed acts of the attorney-in-fact, including approval of  
32 authority to disobey the principal's instructions pursuant to subdivision (b) of Section  
33 4234.
- 34 (c) Compelling the attorney-in-fact to submit the attorney-in-fact's accounts or report  
35 the attorney-in-fact's acts as attorney-in-fact to the principal, the spouse of the principal,  
36 the conservator of the person or the estate of the principal, or to any other person required  
37 by the court in its discretion, if the attorney-in-fact has failed to submit an accounting or  
38 report within 60 days after written request from the person filing the petition.
- 39 (d) Declaring that the authority of the attorney-in-fact is revoked on a determination by  
40 the court of all of the following:
  - 41 (1) The attorney-in-fact has violated or is unfit to perform the fiduciary duties under the  
42 power of attorney.
  - 43 (2) At the time of the determination by the court, the principal lacks the capacity to give  
44 or to revoke a power of attorney.
  - 45 (3) The revocation of the attorney-in-fact's authority is in the best interest of the  
46 principal or the principal's estate.
- 47 (e) Approving the resignation of the attorney-in-fact:

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

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

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

**Comment.** Section 4541 continues former Section 4941 without change, except that the reference to powers of attorney for health care in the introductory paragraph of former law is omitted. Powers of attorney for health care are governed by Division 4.7 (commencing with Section 4600). This section applies to petitions concerning both durable and nondurable powers of attorney. See Sections 4022 ("power of attorney" defined), 4050 (scope of division).

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

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

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

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

Subdivision (f) provides a remedy to achieve compliance with the power of attorney through recognition of the attorney-in-fact's authority. This remedy is also available to compel disclosure of information under Section 4235 (consultation and disclosure). See Section 4300 *et seq.* (relations with third persons).

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

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

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#### § 4542. Commencement of proceeding

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

**Comment.** Section 4542 continues former Section 4943 without change. For a comparable provision, see Section 17201 (commencement of proceeding under Trust Law). A petition is required to be verified. See Section 1021.

See also Section 4022 ("power of attorney" defined).

1    **§ 4543. Dismissal of petition**

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2       4543. The court may dismiss a petition if it appears that the proceeding is not  
3 reasonably necessary for the protection of the interests of the principal or the principal's  
4 estate and shall stay or dismiss the proceeding in whole or in part when required by  
5 Section 410.30 of the Code of Civil Procedure.

6       **Comment.** Section 4543 continues former Section 4944 without change. Under former Section  
7 4944, the dismissal standard was revised to permit dismissal when the proceeding is not  
8 "reasonably necessary," rather than "necessary" as under the prior section (Civil Code Section  
9 2416). Under this section, the court has authority to stay or dismiss a proceeding in this state if, in  
10 the interest of substantial justice, the proceeding should be heard in a forum outside this state. See  
11 Code Civ. Proc. § 410.30.

12       See also Section 4026 ("principal" defined).

13    **§ 4544. Notice of hearing**

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14       4544. (a) Subject to subdivision (b), at least 15 days before the time set for hearing, the  
15 petitioner shall serve notice of the time and place of the hearing, together with a copy of  
16 the petition, on the following:

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

18       (2) The principal if not the petitioner.

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

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

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

29       See also Sections 4014 ("attorney-in-fact" defined), 4026 ("principal" defined).

30    **§ 4545. Award of attorney's fees**

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31       4545. In a proceeding under this part commenced by the filing of a petition by a person  
32 other than the attorney-in-fact, the court may in its discretion award reasonable attorney's  
33 fees to one of the following:

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

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

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

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

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

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45       SEC. \_\_\_\_\_. Part 4 (commencing with Section 4600) of Division 4.5 of the Probate  
46 Code is repealed.

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

4     **§ 4600 (repealed). Application of definitions**

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

6     **§ 4603 (repealed). Community care facility**

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

8     **§ 4606 (repealed). Durable power of attorney for health care**

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9     **Comment.** Former Section 4606 is superseded by Section 4629 (“power of attorney for health  
10 care” defined). See Section 4629 Comment. The durability of powers of attorney for health care is  
11 implicit, so the term has been shortened in the new law to “power of attorney for health care.”

12    **§ 4609 (repealed). Health care**

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13    **Comment.** The first part of former Section 4609 is continued in Section 4615 without  
14 substantive change. The language relating to decisions affecting the principal after death is not  
15 continued in the definition, but the authority is continued in Section 4683(b) without substantive  
16 change.

17    **§ 4612 (repealed). Health care decision**

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

19    **§ 4615 (repealed). Health care provider**

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

21    **§ 4618 (repealed). Residential care facility for the elderly**

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22    **Comment.** Former Section 4618 is continued in Section 4635 without substantive change.

23    **§ 4621 (repealed). Statutory form durable power of attorney for health care**

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

26    **§ 4650 (repealed). Application of chapter**

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

30    **§ 4651 (repealed). Form of durable power of attorney for health care after January 1, 1995**

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

33    **§ 4652 (repealed). Other authority not affected**

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34    **Comment.** Subdivision (a) of former Section 4652 is superseded by Sections 4685 (agent’s  
35 priority) and 4687 (other authority of person named as agent not affected).

36    Subdivision (b) is continued in Section 4651(b)(2) (emergency treatment) without substantive  
37 change.



1 **§ 4653 (repealed). Validity of durable power of attorney for health care executed elsewhere**

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

3 **§ 4654 (repealed). Durable power of attorney for health care subject to former 7-year limit**

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

6 **§ 4700 (repealed). Requirements for durable power of attorney for health care**

7 **Comment.** Former Section 4700 is superseded by Section 4671 and related provisions. See  
8 Section 4671 Comment.

9 **§ 4701 (repealed). Witnesses of durable power of attorney for health care**

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

12 **§ 4702 (repealed). Limitations on who may be attorney-in-fact**

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

15 **§ 4703 (repealed). Printed form of durable power of attorney for health care**

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

18 **§ 4704 (repealed). Warnings not on printed form**

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

21 **§ 4720 (repealed). Attorney-in-fact's authority to make health care decisions**

22 **Comment.** Subdivision (a) of former Section 4720 is continued in Sections 4682 (when agent's  
23 authority effective) and 4685 (agent's priority) without substantive change.

24 Subdivision (b) is continued in Section 4683 without substantive change.

25 Subdivision (c) is continued in Section 4684 without substantive change.

26 Subdivision (d) is continued in Section 4687 without substantive change.

27 **§ 4721 (repealed). Availability of medical information to attorney-in-fact**

28 **Comment.** Former Section 4721 is continued in Section 4676 without substantive change.

29 **§ 4722 (repealed). Limitations on attorney-in-fact's authority**

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

31 **§ 4723 (repealed). Unauthorized acts and omissions**

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

33 **§ 4724 (repealed). Principal's objections**

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

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

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

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

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

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

**Comment.** Subdivision (a) of former Section 4727 is superseded by Section 4695(a) (revocation of advance health care directive).

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

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

Subdivision (d) is superseded by Section 4698 (effect of later advance directive on earlier advance directive).

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

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

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

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

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

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

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

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

**§ 4753 (repealed). Request to forgo resuscitative measures**

**Comment.** Former Section 4753 is continued in Part 4 (commencing with Section 4780) of Division 4.7 without substantive change. Subdivision (a) is continued in Section 4782 without substantive change.

Subdivision (b) is continued in Section 4780 without substantive change.

Subdivisions (c) and (d) are continued in Section 4783 without substantive change.

Subdivision (e) is continued in Section 4784 without change.

Subdivision (f) is continued in Section 4785 without substantive change.

Subdivision (g) is continued in Section 4781 without substantive change.

Subdivision (h) is continued in Section 4786 without substantive change.

**§ 4770 (repealed). Short title**

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

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

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

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

---

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

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

---

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

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

---

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

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

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

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

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

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

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**Comment.** Former Section 4777 is not continued. See Sections 4683 (scope of agent's authority), 4701 (optional advance directive form) & Comment.

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

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

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

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

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

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

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

---

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

1 **§ 4802 (repealed). Notice**

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2 **Comment.** Former Section 4802 is continued in new Section 4802 without substantive change.  
3 See Section 4800 Comment.

4 **§ 4804 (repealed). Effect of failure to register**

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5 **Comment.** Former Section 4804 is continued in Section 4803 without substantive change. See  
6 Section 4800 Comment.

7 **§ 4805 (repealed). Effect of registration on revocation and validity**

---

8 **Comment.** Former Section 4805 is continued in Section 4804 without substantive change. See  
9 Section 4800 Comment.

10 **§ 4806 (repealed). Effect on health care provider**

---

11 **Comment.** Former Section 4806 is continued in Section 4805 without substantive change. See  
12 Section 4800 Comment.

13 **Prob. Code §§ 4900-4947 (repealed). Judicial proceedings concerning powers of attorney**

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14 **SEC. \_\_\_\_.** Part 5 (commencing with Section 4900) of Division 4.5 of the Probate  
15 Code is repealed.

16 **Comment.** Sections 4900-4947 have been moved to a new Part 4 (commencing with Section  
17 4500) as part of the reorganization related to enactment of the Health Care Decisions Law,  
18 Division 4.7 (commencing with Section 4600). With respect to powers of attorney for health care,  
19 this part of former law is replaced by a new Part 3 (commencing with Section 4750) in Division  
20 4.7.

21 **§ 4900 (repealed). Power of attorney freely exercisable**

---

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

24 **§ 4901 (repealed). Cumulative remedies**

---

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

27 **§ 4902 (repealed). Effect of provision in power of attorney limiting right to petition**

---

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

30 **§ 4903 (repealed). Limitations on right to petition**

---

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

33 **§ 4904 (repealed). Jury trial**

---

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

36 **§ 4905 (repealed). Application of general procedural rules**

---

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

1 **§ 4920 (repealed). Jurisdiction and authority of court or judge**

---

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

4 **§ 4921 (repealed). Basis of jurisdiction**

---

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

7 **§ 4922 (repealed). Jurisdiction over attorney-in-fact**

---

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

10 **§ 4923 (repealed). Venue**

---

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

13 **§ 4940 (repealed). Petitioners**

---

14 **Comment.** Former Section 4940 is continued in Section 4540 without change, except that the  
15 reference to the treating health care provider in subdivision (h) is omitted. Powers of attorney for  
16 health care are governed by Division 4.7 (commencing with Section 4600). As to health care  
17 powers, the former section is continued in Section 4765, with several changes. See Section 4765  
18 **Comment.**

19 **§ 4941 (repealed). Petition as to powers of attorney other than for health care**

---

20 **Comment.** As to property powers, former Section 4941 is continued in Section 4541 without  
21 change, except that the reference to powers of attorney for health care in the introductory  
22 paragraph is omitted. Powers of attorney for health care are governed by Division 4.7  
23 (commencing with Section 4600).

24 **§ 4942 (repealed). Petition as to durable power of attorney for health care**

---

25 **Comment.** Former Section 4942 is continued in Section 4766 with several changes. See  
26 Section 4766 & **Comment.**

27 **§ 4943 (repealed). Commencement of proceeding**

---

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

30 **§ 4944 (repealed). Dismissal of petition**

---

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

33 **§ 4945 (repealed). Notice of hearing**

---

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

36 **§ 4946 (repealed). Temporary health care order**

---

37 **Comment.** Former Section 4946 is continued in Section 4770 without several changes. See  
38 Section 4770 **Comment.**

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

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

**REVISED COMMENTS**

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

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

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

- Sections 220-224 — Uniform Simultaneous Death Act (1953)
- Sections 260-288 — Uniform Disclaimer of Transfers by Will, Intestacy or Appointment Act (1978)
- Sections 260-288 — Uniform Disclaimer of Transfers Under Nontestamentary Instrument Act (1978)
- Sections 3900-3925 — Uniform Transfers to Minors Act (1983)
- Sections 4001, 4124-4127, 4206, 4304-4305 — Uniform Durable Power of Attorney Act
- Sections 4400-4465 — Uniform Statutory Form Power of Attorney Act
- Sections 4670-4743 — Uniform Health-Care Decisions Act (1993)
- Sections 6300-6303 — Uniform Testamentary Additions to Trusts Act (1960)
- Sections 6380-6390 — Uniform International Wills Act (1977). See also Section 6387 (need for uniform interpretation of Uniform International Wills Act)
- Sections 16002(a), 16003, 16045-16054 — Uniform Prudent Investor Act (1994)
- Sections 16200-16249 — Uniform Trustees' Powers Act (1964)
- Sections 16300-16313 — Revised Uniform Principal and Income Act (1962)

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

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

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

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

(3) *Restates without substantive change.* A new provision "restates" a former provision "without substantive change" if the substantive law remains the same but the language differs to a

significant degree. Some Comments may describe the new provision as being the “same in substance.”

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

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

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

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

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

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

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

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

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

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

Subdivision (b) is comparable to Section 84 (“trustee” includes successor trustee). See Sections 4202 (multiple attorneys-in-fact), 4203 (successor attorneys-in-fact), 4205 (delegation of attorney-in-fact’s authority). The purpose of subdivision (b) is to make clear that the rules applicable to attorneys-in-fact under the Power of Attorney Law apply as well to successors and alternates of the original attorney-in-fact, and to other persons who act in place of the attorney-in-fact.

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

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

**Revised Comment.** Section 4053 is new. This section promotes use and enforceability of durable powers of attorney executed in other states. See also Section 4018 (“durable power of attorney” defined).

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

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

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

For special transitional provisions, see Sections 4102 (durable power of attorney form); see also Section 4129(c) (springing powers).

See also Section 4022 ("power of attorney" defined).

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

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

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

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

**Revised Comment.** Section 4121 provides the general execution formalities for a power of attorney under this division. A power of attorney that complies with this section is legally sufficient as a grant of authority to an attorney-in-fact. Special rules apply to a statutory form power of attorney. See Section 4402.

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

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

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

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



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

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

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**Revised Comment.** Section 4124 restates former Civil Code Section 2400 without substantive change. For special rules applicable to statutory form powers of attorney, see Sections 4401, 4402. See also Section 4050 (powers subject to this division).

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

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

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

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**Revised Comment.** Section 4130 is new. See also Sections 4014 (“attorney-in-fact” defined), 4022 (“power of attorney” defined), 4026 (“principal” defined).

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

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

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

Subdivision (a)(4) is the same as Civil Code Section 2356(a)(2), but recognizes that certain tasks may remain to be performed after death. See, e.g., Sections 4238 (attorney-in-fact’s duties on termination of authority).

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

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

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

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

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**Revised Comment.** Section 4200 supersedes the last part of Civil Code Section 2296 (“any person may be an agent”) to the extent that it applied to attorneys-in-fact under powers of attorney.

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

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

**Revised Comment.** Section 4207 is new. For judicial procedures for approving the attorney-in-fact’s resignation, see Section 4541(e) (petition as to power of attorney other than durable power of attorney for health care).

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

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

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

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

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

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

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

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

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

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

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

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

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

1 This general rule is subject to some specific exceptions. See, e.g., Sections 4309 (prior breach  
2 by attorney-in-fact), 4310 (transactions relating to accounts and loans in financial institution).

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

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

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6 **Revised Comment.** Section 4301 is drawn from the Missouri Durable Power of Attorney Law.  
7 See Mo. Ann. Stat. § 404.710(8) (Vernon 1990). This general rule is subject to specific  
8 limitations provided elsewhere. See, e.g., Sections 4264 (authority that must be specifically  
9 granted).

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

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

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13 **Revised Comment.** Section 4302 is drawn in part from the Missouri Durable Power of  
14 Attorney Law. See Mo. Ann. Stat. § 404.719(4) (Vernon 1990). See also former Civ. Code §  
15 2512(a)(1) (presentation by attorney-in-fact named in power of attorney) & Comment.

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

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

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

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

33 For other immunity provisions not affected by Section 4303, see, e.g., Sections 4128(b)  
34 (reliance in good faith on durable power of attorney not containing “warning” statement required  
35 by Section 4128), 4301 (reliance by third person on general authority), 4304 (lack of knowledge  
36 of death or incapacity of principal). See also Section 3720 (“Any person who acts in reliance  
37 upon the power of attorney [of an absentee as defined in Section 1403] when accompanied by a  
38 copy of a certificate of missing status is not liable for relying and acting upon the power of  
39 attorney.”).

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

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

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44 **Revised Comment.** Section 4307 is new. This section facilitates use of a power of attorney  
45 executed in this state as well as powers of attorney executed in other states. Subdivision (d)  
46 makes clear that certification under this section is not a requirement for use of copies of powers of  
47 attorney. This recognizes, for example, the existing practice of good faith reliance on copies of

1 durable powers of attorney for health care. See former Section 4750 (immunities of health care  
2 provider); new Section 4740.

3 See also Section 4022 ("power of attorney" defined).

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

5 **Revised Comment.** Section 4401 continues former Civil Code Section 2475 without change,  
6 except for the revision of cross-references to other provisions, the restoration of language  
7 erroneously omitted in 1993, and inclusion of a general reference to the law governing the  
8 notary's certificate of acknowledgment. Section 4401 is the same in substance as Section 1(a) of  
9 the Uniform Statutory Form Power of Attorney Act (1988), with the addition of provisions to  
10 permit designation of co-agents. See Section 2(b) (construction of provisions drawn from uniform  
11 acts).

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

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

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

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

33 The statutory form contains a list of powers. The powers listed relate to various separate classes  
34 of activities, except the last, which includes all the others. Health care matters are not included.  
35 For a power of attorney form for health care, see Section 4701.

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

40 The statutory form contains only a limited list of powers. If it is desired to give the agent the  
41 broadest possible powers, language similar to the following can be added under the "Special  
42 Instructions" portion of the form:

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

47 Neither the form in this section, nor the constructional provisions in Sections 4450-4465,  
48 attempt to allow the grant of the power to make a will or to give the agent extensive estate  
49 planning authority, although several of the powers, especially lines (G), (H), and (L) of the  
50 statutory form, may be useful in planning the disposition of an estate. An individually tailored

1 power of attorney can be used if the principal wants to give the agent extensive estate planning  
2 authority, or additional estate planning powers can be granted to the agent by stating those  
3 additional powers in the space provided in the form for "Special Instructions." For example,  
4 provisions like the following might be included under the special instructions portion of the  
5 statutory form:

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

8 (1) Establish a trust with property of the principal for the benefit of the principal and the spouse  
9 and descendants of the principal, or any one or more of them, upon such terms as the agent  
10 determines are necessary or proper, and transfer any property in which the principal has an interest  
11 to the trust.

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

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

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

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

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

33 Section 4404 and the statutory form itself make the power of attorney a durable power of  
34 attorney, remaining in effect after the incapacity of the principal, unless the person executing the  
35 form strikes out the language in the form that makes the instrument a durable power of attorney.  
36 See also Section 4018 ("durable power of attorney" defined).

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

50 The language of the last portion of the text of the statutory form set forth in Section 4401  
51 substitutes the phrase "has actual knowledge of the revocation" for the phrase "learns of the

1 revocation” which is used in the uniform act form. This substitution does not preclude use of a  
2 form including the uniform act language. See Section 4402(a) (third sentence).

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

6 For provisions relating to court enforcement of the duties of the agent, see Sections 4500-4545.

7 The form provided by Section 4401 supersedes the former statutory short form power of  
8 attorney under former Civil Code Sections 2450-2473 (repealed by 1990 Cal. Stat. ch. 986, § 1).  
9 But older forms consistent with former Civil Code Sections 2450-2473 are still effective. See  
10 Section 4409 & Comment.

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

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

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

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

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

### 31 **Prob. Code § 4407 (revised comment). General provisions applicable to statutory form** 32 **power of attorney**

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

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

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

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

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

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

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

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

49 Sections 4500-4545 (judicial proceedings).

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

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2 **Revised Comment.** Section 4450 continues former Civil Code Section 2485 without change,  
3 except for the revision of a cross-reference to another provision. Section 4450 is the same in  
4 substance as Section 3 of the Uniform Statutory Form Power of Attorney Act (1988). See Section  
5 2(b) (construction of provisions drawn from uniform acts). See the Comment to this chapter under  
6 the chapter heading. See also Sections 4500–4545 (court enforcement of agent’s duties).

7 See also Sections 4014 (“attorney-in-fact” defined to include agent), 4022 (“power of attorney”  
8 defined), 4026 (“principal” defined).

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Table Showing Location of UHCDA Provisions in Tentative Recommendation

UHCDA	Tent. Rec.	UHCDA	Tent. Rec.
1(1) .....	4605	5(g) .....	4750(c)
1(2) .....	4607(a)	5(h) .....	4714
1(3) .....	4609	5(i) .....	see 4660
1(4) .....	4613	5(j) .....	see 4712(d)
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