STATE OF CALIFORNIA

CALIFORNIA LAW
REVISION COMMISSION

TENTATIVE RECOMMENDATION

Health Care Decisions Law:
Technical Revisions

December 2000

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.


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

1. The definition of “capacity” would be amended to apply a contract standard to situations involving execution of advance directives.
2. The patient’s designation of a surrogate health care decisionmaker would not revoke a prior designation of an agent in a power of attorney for health care unless the patient expresses the intention to remove the agent.
3. The duration of a surrogate designation by a patient in a nursing home would generally be limited to 30 days where the patient has already named a health care agent.
4. The health care agent would not be automatically liable for the costs of disposition of the principal’s remains.
5. The grounds for petitioning the court would be amended to include a petition to compel a third person to honor the authority of a health care agent or surrogate.
6. The rules limiting who can act as agent would be amended to make clear that a supervising health care provider can never act as agent for his or her patient, even if related to the patient by blood, marriage, adoption, or registered domestic partnership, or where they are coworkers.

This recommendation was prepared pursuant to Resolution Chapter 81 of the Statutes of 1999.
HEALTH CARE DECISIONS LAW:
TECHNICAL REVISIONS

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

Definition of Capacity

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

In the new Health Care Decisions Law, the Commission included a definition of
capacity based on Health and Safety Code Section 1418.8 and the Uniform Health-
Care Decisions Law of 1993. The new definition is specifically crafted to apply in
the health care decisionmaking context: “‘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.”3

A technical problem has been noted in the application of this definition where
there is no “proposed health care” at the time the individual’s capacity is relevant.
This would commonly be the situation where a person is filling out an advance
health care directive to appoint a health care agent or to give future health care
instructions.4 The “capacity” definition can still work in these cases, because the
other prong of the test would apply — the “ability to make and communicate a

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

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

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

3. Section 4609.

4. See Sections 4605 (“advance health care directive” defined), 4607 (“agent” defined), 4623
(“individual health care instruction” defined), 4629 (“power of attorney for health care” defined), 4670 et
seq. (provisions governing advance health care directives).
health care decision.”\(^5\) It would be better, of course, if the statute were not phrased
in a way that might cause confusion or mislead.

Accordingly, the Commission recommends splitting the definition of capacity
into two parts, one applicable to the capacity to make health care decisions and the
other applicable to execution of advance directives. The existing definition should
continue to apply to making health care decisions. A general contract standard
should apply to execution of advance directives, based on the individual’s ability
to understand the nature and consequences of the action.\(^6\) In effect, this would
return the law concerning capacity to execute a power of attorney for health care to
the rule in effect under the Power of Attorney Law.\(^7\) In addition, the contract
standard would be applied to selecting or disqualifying a surrogate.\(^8\)

**Patient’s Designation of Surrogate**

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

Two concerns have arisen in applying Section 4711: (1) The default rule that a
surrogate designation, whether oral or written, would act as a revocation of the
appointment of an agent under a power of attorney for health care\(^11\) is too harsh

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

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

2d 808, 816, 113 P.2d 298 (1941). The specialized rules for determining capacity under the Due Process in
Competence Determinations Act (Sections 810-813) are applicable in judicial determination. See Sections
811(e), 813.

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


10. See second sentence of Section 4711 & Comment.

11. The statute does not provide explicitly that the surrogate designation revokes the agent’s authority,
but Uniform Health-Care Decisions Act comment incorporated as background in the Commission’s
Comment to Section 4711 states that an “oral designation of a surrogate made by a patient directly to the
supervising health-care provider revokes a previous designation of an agent.” The uniform act comment
does not suggest the effect of a written surrogate designation, but there is no reason to think it would have a
less significant effect than an oral communication to the supervising health care provider. See also Section
2(b) (provisions drawn from uniform acts to be construed to make law uniform in enacting states).
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and may actually defeat the patient’s intent. (2) In the nursing home setting, the restriction on the duration of oral surrogate designations to the “stay in the health care institution” is not a meaningful limitation.

The Commission recommends amending Section 4711 to address these problems and provide additional statutory guidance on surrogate designations:

1. Relation of Surrogate Designation to Health Care Agent

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

2. Duration of Surrogate Designation in Nursing Home Setting

In the long-term, custodial care setting, if there is a health care agency in force, a surrogate designation should be effective for no more than 30 days, unless at the end of that period the agent under the power of attorney for health care is not reasonably available, in which case the surrogate designation remains effective until the agent is ready to act. This rule preserves the authority of the formally designated agent under a power of attorney for health care, but recognizes patient autonomy and the potential need for a surrogate where the agent can’t act.

3. Duration of Surrogate Designation in Hospital Setting

The existing general limitation on the duration of oral surrogacies should be narrowed to apply in the acute care setting where there is no known agent under a power of attorney for health care. In these situations, the surrogate designation would be effective “during the course of treatment or illness or during the stay in the health care institution,” as under existing law. In cases where there is no agent, it would defeat the patient’s intent to preclude resort to a surrogate designated in a prior hospital visit and entered in the patient’s record. It is unlikely that a patient would think it was necessary to renew his or her surrogate designation every hospital visit. While regular communication between patient and the supervising health care provider is ideal, the statute should not defeat likely expectations where the ideal is not met. There may also be situations where the patient is unable to communicate any intention on a later hospitalization, and in such cases the statute should not nullify the patient’s earlier surrogate designation noted in the medical record.

12. See proposed amendment to Section 4711 infra.

13. See Section 4695(a),
(4) Patient Control

The statutory rules concerning the relation of surrogate designations to agent designations, and the duration and conditions governing surrogates, should be subject to control by the patient. If the patient wants the surrogate designation to last longer than the statutory default period, the patient’s intention, expressed to the supervising health care provider and recorded in the patient’s record, should govern.

Agent’s Liability for Disposition of Remains

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

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

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


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

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


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

Accordingly, the Commission recommends that Health and Safety Code Section 7100 be amended to make clear that, unless they agree otherwise, agents do not have an enforceable duty to direct the disposition of the principal’s remains and are not liable under that section for failure or refusal to act. Furthermore, in a case where an agent does exercise the authority to direct disposition of remains, the agent should be liable only for reasonable costs that cannot be satisfied out of the principal’s estate or other appropriate fund. The proposed liability limitation would apply only to the person when acting as agent and not in situations where the statute imposes liability based on some other relationship, such as a spouse, child, or parent.

Scope of Petition

The Health Care Decisions Law, like its predecessor, provides an expeditious procedure for obtaining judicial review in appropriate situations. The grounds for a petition are broad, but not unlimited, and include determining (1) whether the patient has capacity to make health care decisions, (2) whether an advance health care directive is in effect, and (3) whether the acts or proposed acts of an agent or surrogate (including a surrogate committee) 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.

For the purpose of getting comments from interested persons, the Commission tentatively proposes to permit a petition requiring third persons to honor the agent’s authority under the power of attorney for health care. This would include health care decisions, as well as decisions concerning disposition under the Uniform Anatomical Gift Act, authorizing an autopsy, and directing disposition of

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

21. See proposed amendment to Section 4766 infra.

22. See Section 4615 (“health care” defined).
remains,\textsuperscript{23} or making personal care decisions.\textsuperscript{24} The petition should also be available to compel a third person to honor the authority of a surrogate, i.e., a person (other than an agent or conservator) with the authority to make health care decisions for an adult under the Health Care Decisions Law or other governing principles.

**Supervising Health Care Provider as Agent**

The Health Care Decisions Law carried forward the limitations on who can be designated as a health care agent and the exceptions to the limitations, which were enacted in the 1980s.\textsuperscript{25} Section 4659 now provides that the patient’s supervising health care provider or an employee of the health care institution cannot act as an agent or surrogate health care decisionmaker. However, subdivision (b) of Section 4659 provides an exception to this limitation, which permits employees who are related to the patient by blood, marriage, or adoption, or who are employed by the same health care institution, to act as the relative’s or coworker’s health care agent. Thus, if a patient is employed by the same institution as his or her doctor, or is related to the doctor and the doctor is an employee, the exception to the statutory prohibition would literally seem to apply.

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

The proposed amendment makes clear that a supervising health care provider cannot make decisions as a health care agent for his or her patient in any circumstances.\textsuperscript{26} Under this rule, if a doctor wants to act as the agent for his or her spouse, for example, the doctor would need to decline to act as the supervising health care provider.

The statute should also be amended to add registered domestic partners\textsuperscript{27} to the list of excepted classes in existing law, which currently includes persons related to the patient by blood, marriage, or adoption.

\textsuperscript{23} See Section 4683 (scope of agent’s authority). See also Sections 4678 (right to health care information), 4690 (agent’s right of consultation and to receive information).

\textsuperscript{24} See Section 4671(b).

\textsuperscript{25} Section 4659 restates former Section 4702 (enacted as part of the Power of Attorney Law, 1994 Cal. Stat. ch. § 16), which continued former Civil Code Section 2432.5 (enacted by 1984 Cal. Stat. ch. 312, § 4).

\textsuperscript{26} See proposed amendment to Section 4659 \textit{infra}.

\textsuperscript{27} For provisions governing domestic partner registration, see Fam. Code § 297 \textit{et seq.}
PROPOSED LEGISLATION

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

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

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

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

(2) The surviving spouse.

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

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

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

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

(b)(1) If any person to whom the right of control has vested pursuant to subdivision (a) has been charged with first or second degree murder or voluntary manslaughter in connection with the decedent’s death and those charges are
known to the funeral director or cemetery authority, the right of control is
relinquished and passed on to the next of kin in accordance with subdivision (a).
(2) If the charges against the person are dropped, or if the person is acquitted of
the charges, the right of control is returned to the person.
(3) Notwithstanding this subdivision, no person who has been charged with first
or second degree murder or voluntary manslaughter in connection with the
decedent’s death to whom the right of control has not been returned pursuant to
paragraph (2) shall have any right to control disposition pursuant to subdivision (a)
which shall be applied, to the extent the funeral director or cemetery authority
know about the charges, as if that person did not exist.
(c) A funeral director or cemetery authority shall have complete authority to
control the disposition of the remains, and to proceed under this chapter to recover
usual and customary charges for the disposition, when both of the following apply:
(1) Either of the following applies:
(A) The funeral director or cemetery authority has knowledge that none of the
persons described in paragraphs (1) to (6), inclusive, of subdivision (a) exists.
(B) None of the persons described in paragraphs (1) to (6), inclusive, of
subdivision (a) can be found after reasonable inquiry, or contacted by reasonable
means.
(2) The public administrator fails to assume responsibility for disposition of the
remains within seven days after having been given written notice of the facts.
Written notice may be delivered by hand, U.S. mail, facsimile transmission, or
telegraph.
(d) The liability for the reasonable cost of final disposition devolves jointly and
severally upon all kin of the decedent in the same degree of kindred and upon the
estate of the decedent. However, if a person accepts the gift of an entire body
under subdivision (a) of Section 7155.5, that person, subject to the terms of the
gift, shall be liable for the reasonable cost of final disposition of the decedent.
(e) This section shall be administered and construed to the end that the expressed
instructions of the decedent or the person entitled to control the disposition shall
be faithfully and promptly performed.
(f) A funeral director or cemetery authority shall not be liable to any person or
persons for carrying out the instructions of the decedent or the person entitled to
control the disposition.
(g) For purposes of paragraph (5) of subdivision (a), “competent adult” means an
adult who has not been declared incompetent by a court of law or who has been
declared competent by a court of law following a declaration of incompetence.

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

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

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

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

(b) With regard to property matters, a power of attorney may grant authority to make decisions concerning all or part of the principal’s real and personal property, whether owned by the principal at the time of the execution of the power of attorney or thereafter acquired or whether located in this state or elsewhere, without the need for a description of each item or parcel of property.

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

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


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

4609. “Capacity” (a) With respect to making health care decisions, “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.

(b) With respect to giving or revoking an advance health care directive or selecting or disqualifying a surrogate, “capacity” means the patient’s ability to understand the nature and consequences of the action.

Comment. Subdivision (b) is added to Section 4609 to recognize a contract standard of capacity as applied to actions involving advance health care directives. Subdivision (b) is consistent with the rule formerly applicable to durable powers of attorney for health care under Section 4120 in the Power of Attorney Law.

For provisions relating to the capacity definition in subdivision (a), see Sections 4651 (authority of person having capacity not affected), 4658 (determination of capacity and other medical conditions), 4682 (when agent’s authority effective), 4683 (scope of agent’s authority).

For provisions relating to the capacity definition in subdivision (b), see, e.g., Sections 4670 (authority to give individual health care instruction), 4671 (authority to execute power of attorney
for health care), 4695 (revocation of power of attorney for health care), 4715 (disqualification of surrogate).

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

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

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

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

1. The supervising health care provider or an employee of the health care institution where the patient is receiving care.
2. An operator or employee of a community care facility or residential care facility where the patient is receiving care.

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

1. An employee (other than the supervising health care provider) who is related to the patient by blood, marriage, or adoption, or is a registered domestic partner of the patient.
2. An employee (other than the supervising health care provider) who is employed by the same health care institution, community care facility, or residential care facility for the elderly as the patient.

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

1. The advance health care directive is otherwise valid.
2. The conservatee is represented by legal counsel.
3. The lawyer representing the conservatee signs a certificate stating in substance:

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

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

Prob. Code § 4711 (amended). Patient’s designation of surrogate
SEC. 5. Section 4711 of the Probate Code is amended to read:

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

(b) If the patient has designated an agent in a power of attorney for health care and the existence of the power of attorney for health care is recorded in the patient’s health care record or otherwise known to the supervising health care provider, the duration of a surrogate designation under this section is subject to the following limitations, except as the patient otherwise informs the supervising health care provider:

(1) In the case of a patient in custodial or long-term care in a skilled nursing facility or other health care institution, the surrogate replaces the agent for 30 days or until the agent is reasonably available and willing to make health care decisions pursuant to Section 4685, whichever period is longer.

(2) In other cases, the surrogate replaces the agent only during the course of treatment or illness or during the stay in the health care institution when the surrogate designation is made.

(c) Designation of a surrogate under subdivision (a) does not revoke the designation of an agent under a power of attorney for health care unless the patient communicates the intention to revoke in compliance with subdivision (a) of Section 4695.

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

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

Subdivision (b) provides special limitations on the duration of surrogate designations where the patient has designated an agent under a power of attorney for health care and that designation is in the patient’s record or otherwise known to the supervising health care provider. Subdivision (b)(1) provides a new rule concerning the duration of a surrogate designation in situations involving custodial or long-term care. In acute care settings, the duration of the surrogate designation depends on the length of the patient’s stay in the hospital or the patient’s illness or course of treatment, as provided in subdivision (b)(2). The default limitations on surrogate designations are subject to the patient’s expression of a different limitation, as recognized in the
introductory paragraph of subdivision (b). Thus, for example, a patient in either a long-term or
acute care setting may designate a surrogate to make decisions until the agent returns from an
overseas trip or some other period depending on events. The default time limitations in
subdivision (b) are not intended to override the patient’s intent, as expressed to the supervising
health care provider. The arbitrary 30-day period in subdivision (b)(1) and the limitations in
subdivision (b)(2) are provided as general guidelines subject to the patient’s control. Subdivision
(b) applies only in cases where the patient has made a previous designation of an agent under a
power of attorney for health care. If there is no agent, the time limitations are not applicable. If
the patient names an agent in a power of attorney for health care executed after making a
surrogate designation, the agent would have priority over the surrogate as provided in Section
4685 (agent’s priority).

Subdivision (c) makes clear that the appointment of an agent under a power of attorney for
health care is not revoked simply by the act of naming a surrogate under this section. Instead, the
patient must express the intent to revoke the agent’s appointment, under the terms of the general
rule in Section 4695(a). Subdivision (c) reverses the former presumption that a surrogate
designation made directly to the supervising health care provider revoked a previous designation
of an agent. See Background from Uniform Act in Comment to Section 4711 as enacted, 1999

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

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

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

CHAPTER 3. PETITIONS, AND ORDERS, APPEALS

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


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

4766. A petition may be filed under this part for any one or more of the
following purposes:
(a) Determining whether or not the patient has capacity to make health care
decisions.
(b) Determining whether an advance health care directive is in effect or has
terminated.
(c) Determining whether the acts or proposed acts of an agent or surrogate are
consistent with the patient’s desires as expressed in an advance health care
directive or otherwise made known to the court or, where the patient’s desires are
unknown or unclear, whether the acts or proposed acts of the agent or surrogate
are in the patient’s best interest.
(d) Declaring that the authority of an agent or surrogate is terminated, upon a
determination by the court that the agent or surrogate has made a health care
decision for the patient that authorized anything illegal or upon a determination by
the court of both of the following:
(1) The agent or surrogate has violated, has failed to perform, or is unfit to perform, the duty under an advance health care directive to act consistent with the patient’s desires or, where the patient’s desires are unknown or unclear, is acting (by action or inaction) in a manner that is clearly contrary to the patient’s best interest.

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

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

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

The extent to which a third person may be compelled to comply with decisions of an agent or surrogate is subject to other limitations in this division. See, e.g., Sections 4652 (excluded acts), 4653 (mercy killing, assisted suicide, euthanasia not approved), 4654 (compliance with generally accepted health care standards), 4734 (right to decline for reasons of conscience or institutional policy), 4735 (right to decline to provide ineffective care).

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

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

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

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

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

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

(2) The patient, if not the petitioner.

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

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

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