

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.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN **January 25, 2001.**

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.

1 health care decision.”⁵ It would be better, of course, if the statute were not phrased
2 in a way that might cause confusion or mislead.

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

12 **Patient’s Designation of Surrogate**

13 The Health Care Decisions Law includes provisions recognizing the patient’s
14 right to designate a “surrogate” by personally informing the supervising health
15 care provider, orally or in writing.⁹ While designation of an agent under a power
16 of attorney for health care is preferred, recognition of the clinical reality of
17 surrogate designations affirms the fundamental principle of patient autonomy. Due
18 to concerns about the possibility of giving effect to obsolete oral statements in the
19 patient’s record, the effectiveness of oral surrogate designations under Section
20 4711 was limited to the “course of treatment or illness or during the stay in the
21 health care institution when the designation is made.”¹⁰ A surrogate designation
22 communicated to the supervising health care provider in writing would not be
23 subject to this limitation.

24 Two concerns have arisen in applying Section 4711: (1) The default rule that a
25 surrogate designation, whether oral or written, would act as a revocation of the
26 appointment of an agent under a power of attorney for health care¹¹ is too harsh

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

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

7. See, e.g., *Hellman Commercial Trust & Sav. Bank v. Alden*, 206 Cal. 592, 603, 275 P. 974 (1929) (discussing “nature, purposes, and effect” of the action); *Burgess v. Security-First Nat’l Bank*, 44 Cal. App. 2d 808, 816, 113 P.2d 298 (1941). The specialized rules for determining capacity under the Due Process in Competence Determinations Act (Sections 810-813) are applicable in judicial determination. See Sections 811(e), 813.

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

9. Sections 4711-4715 & Comments.

10. See second sentence of Section 4711 & Comment.

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).

1 and may actually defeat the patient’s intent. (2) In the nursing home setting, the
2 restriction on the duration of oral surrogate designations to the “stay in the health
3 care institution” is not a meaningful limitation.

4 The Commission recommends amending Section 4711 to address these problems
5 and provide additional statutory guidance on surrogate designations:¹²

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

7 The presumption that a surrogate designation revokes the appointment of a
8 health care agent should be reversed. Designating a surrogate should act as a
9 revocation of the agency only if the patient expresses that intention in compliance
10 with the general rule governing powers of attorney for health care.¹³ A patient may
11 want the surrogate to act in place of an agent named in a power of attorney for any
12 number of reasons, without intending to permanently replace the agent. The agent
13 may be unavailable because he or she is on a vacation or otherwise unavailable
14 when the patient is hospitalized. Or the named agent may be experiencing health
15 or personal problems that impel the patient to seek someone else as a temporary
16 surrogate.

17 *(2) Duration of Surrogate Designation in Nursing Home Setting*

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

25 *(3) Duration of Surrogate Designation in Hospital Setting*

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

12. See proposed amendment to Section 4711 *infra*.

13. See Section 4695(a),

1 (4) *Patient Control*

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

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

9 The Health and Safety Code sets up a detailed scheme defining rights, duties,
10 and liabilities of surviving family members and other persons, including agents
11 and public guardians, pertaining to disposition of remains.¹⁴ An agent under a
12 power of attorney for health care has priority over all others to control the
13 disposition of a decedent's remains.¹⁵ The statutory scheme also includes
14 provisions making it a misdemeanor to fail to perform the statutory duty and
15 providing liability for treble damages.¹⁶

16 The top priority for health care agents was added to the law by an amendment of
17 Health and Safety Code Section 7100 in 1998.¹⁷ The 1998 legislation focused on
18 the problem of a person charged with the decedent's murder having priority in
19 disposition of the remains.¹⁸ The legislative committee analyses do not discuss or
20 recognize the potential effect of the amendment on the liability of attorneys-in-
21 fact, nor is the purpose of adding attorneys-in-fact explained.

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

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

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.

17. 1998 Cal. Stat. ch. 253, § 1 (SB 1360).

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

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

1 Health and Safety Code provisions, are outside the scope of this
2 recommendation.²⁰ But it is important to insulate agents under powers of attorney
3 for health care from this apparently unintended imposition of liability, which can
4 act to defeat the fundamental purpose of the Health Care Decisions Law of
5 effectuating patient autonomy through the use of advance health care directives.

6 Accordingly, the Commission recommends that Health and Safety Code Section
7 7100 be amended to make clear that, unless they agree otherwise, agents do not
8 have an enforceable duty to direct the disposition of the principal's remains and
9 are not liable under that section for failure or refusal to act. Furthermore, in a case
10 where an agent does exercise the authority to direct disposition of remains, the
11 agent should be liable only for reasonable costs that cannot be satisfied out of the
12 principal's estate or other appropriate fund. The proposed liability limitation
13 would apply only to the person when acting as agent and not in situations where
14 the statute imposes liability based on some other relationship, such as a spouse,
15 child, or parent.

16 **Scope of Petition**

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

26 For the purpose of getting comments from interested persons, the Commission
27 tentatively proposes to permit a petition requiring third persons to honor the
28 agent's authority under the power of attorney for health care.²¹ This would include
29 health care decisions,²² as well as decisions concerning disposition under the
30 Uniform Anatomical Gift Act, authorizing an autopsy, and directing disposition of

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).

1 remains,²³ or making personal care decisions.²⁴ The petition should also be
2 available to compel a third person to honor the authority of a surrogate, i.e., a
3 person (other than an agent or conservator) with the authority to make health care
4 decisions for an adult under the Health Care Decisions Law or other governing
5 principles.

6 **Supervising Health Care Provider as Agent**

7 The Health Care Decisions Law carried forward the limitations on who can be
8 designated as a health care agent and the exceptions to the limitations, which were
9 enacted in the 1980s.²⁵ Section 4659 now provides that the patient’s supervising
10 health care provider or an employee of the health care institution cannot act as an
11 agent or surrogate health care decisionmaker. However, subdivision (b) of Section
12 4659 provides an exception to this limitation, which permits employees who are
13 related to the patient by blood, marriage, or adoption, or who are employed by the
14 same health care institution, to act as the relative’s or coworker’s health care
15 agent. Thus, if a patient is employed by the same institution as his or her doctor, or
16 is related to the doctor and the doctor is an employee, the exception to the statutory
17 prohibition would literally seem to apply.

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

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

28 The statute should also be amended to add registered domestic partners²⁷ to the
29 list of excepted classes in existing law, which currently includes persons related to
30 the patient by blood, marriage, or adoption.

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).

24. See Section 4671(b).

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).

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

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

PROPOSED LEGISLATION

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

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

3 7100. (a) The right to control the disposition of the remains of a deceased
4 person, the location and conditions of interment, and arrangements for funeral
5 goods and services to be provided, unless other directions have been given by the
6 decedent pursuant to Section 7100.1, vests in, and the duty of disposition and the
7 liability for the reasonable cost of disposition of the remains devolves upon, the
8 following in the order named:

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

15 (2) The surviving spouse.

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

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

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

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

37 (b)(1) If any person to whom the right of control has vested pursuant to
38 subdivision (a) has been charged with first or second degree murder or voluntary
39 manslaughter in connection with the decedent's death and those charges are

1 known to the funeral director or cemetery authority, the right of control is
2 relinquished and passed on to the next of kin in accordance with subdivision (a).

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

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

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

14 (1) Either of the following applies:

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

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

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

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

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

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

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

38 **Comment.** Subdivision (a)(1) of Section 7100 is amended to make clear that an agent under a
39 power of attorney for health care is not automatically liable for the costs of disposition of
40 remains. Nor does the agent have a duty greater than that agreed to under the Health Care
41 Decisions Law, Probate Code Section 4600 *et seq.* Even if the agent assumes the duty to make
42 decisions under this section, the agent is not liable unless the estate or other fund is insufficient.
43 See Section 7100.1; see also Prob. Code §§ 11421 (payment of funeral expenses from estate),
44 11446 (funeral expenses from estate, not community property). The limitation on liability in

1 subdivision (a)(1) applies only to the person when acting as agent and not where the statute
2 imposes liability based on some other relationship, such as a spouse under subdivision (a)(2) or
3 child under subdivision (a)(3).

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

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

7 4123. (a) In a power of attorney under this division, a principal may grant
8 authority to an attorney-in-fact to act on the principal's behalf with respect to all
9 lawful subjects and purposes or with respect to one or more express subjects or
10 purposes. The attorney-in-fact may be granted authority with regard to the
11 principal's property, personal care, ~~health care~~, or any other matter.

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

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

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

27 **Prob. Code § 4609 (amended). "Capacity"**

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

29 4609. "Capacity" (a) With respect to making health care decisions, "capacity"
30 means a patient's ability to understand the nature and consequences of proposed
31 health care, including its significant benefits, risks, and alternatives, and to make
32 and communicate a health care decision.

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

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

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

43 For provisions relating to the capacity definition in subdivision (b), see, e.g., Sections 4670
44 (authority to give individual health care instruction), 4671 (authority to execute power of attorney

1 for health care), 4695 (revocation of power of attorney for health care), 4715 (disqualification of
2 surrogate).

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

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

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

9 4659. (a) Except as provided in subdivision (b), none of the following persons
10 may make health care decisions as an agent under a power of attorney for health
11 care or a surrogate under this division:

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

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

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

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

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

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

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

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

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

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

38 **Comment.** Section 4659 is amended to clarify an ambiguity that existed in prior law. See
39 former Section 4702. As amended, the exception in subdivision (b) does not apply to supervising
40 health care providers. Consequently, the bar on supervising health care providers acting as agents
41 or surrogates for their patients, as provided in subdivision (a), is absolute. If a supervising health
42 care provider is the spouse of a patient, he or she would need to cease acting as the patient’s
43 primary physician or other supervising health care provider in order to undertake responsibilities
44 as an agent under a power of attorney for health care or as a surrogate health care decisionmaker.

1 The extension of the relationship exception in subdivision (b)(1) to include registered domestic
2 partners is new. See Fam. Code § 297 *et seq.* (domestic partner registration).

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

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

5 4711. (a) A patient may designate an adult as a surrogate to make health care
6 decisions by personally informing the supervising health care provider. ~~An oral~~
7 The designation of a surrogate shall be promptly recorded in the patient’s health
8 care record and is effective.

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

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

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

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

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

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

39 Subdivision (b) provides special limitations on the duration of surrogate designations where the
40 patient has designated an agent under a power of attorney for health care and that designation is in
41 the patient’s record or otherwise known to the supervising health care provider. Subdivision
42 (b)(1) provides a new rule concerning the duration of a surrogate designation in situations
43 involving custodial or long-term care. In acute care settings, the duration of the surrogate
44 designation depends on the length of the patient’s stay in the hospital or the patient’s illness or
45 course of treatment, as provided in subdivision (b)(2). The default limitations on surrogate
46 designations are subject to the patient’s expression of a different limitation, as recognized in the

1 introductory paragraph of subdivision (b). Thus, for example, a patient in either a long-term or
2 acute care setting may designate a surrogate to make decisions until the agent returns from an
3 overseas trip or some other period depending on events. The default time limitations in
4 subdivision (b) are not intended to override the patient’s intent, as expressed to the supervising
5 health care provider. The arbitrary 30-day period in subdivision (b)(1) and the limitations in
6 subdivision (b)(2) are provided as general guidelines subject to the patient’s control. Subdivision
7 (b) applies only in cases where the patient has made a previous designation of an agent under a
8 power of attorney for health care. If there is no agent, the time limitations are not applicable. If
9 the patient names an agent in a power of attorney for health care executed after making a
10 surrogate designation, the agent would have priority over the surrogate as provided in Section
11 4685 (agent’s priority).

12 Subdivision (c) makes clear that the appointment of an agent under a power of attorney for
13 health care is not revoked simply by the act of naming a surrogate under this section. Instead, the
14 patient must express the intent to revoke the agent’s appointment, under the terms of the general
15 rule in Section 4695(a). Subdivision (c) reverses the former presumption that a surrogate
16 designation made directly to the supervising health care provider revoked a previous designation
17 of an agent. See Background from Uniform Act in Comment to Section 4711 as enacted, 1999
18 Cal. Stat. ch. 658, § 39 (operative July 1, 2000).

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

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

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

25 CHAPTER 3. PETITIONS, AND ORDERS, ~~APPEALS~~

26 **Comment.** The chapter heading is amended to accurately reflect the contents of the chapter.
27 Appeals under the Probate Code are governed generally by Part 3 (commencing with Section
28 1300) of Division 3. See Section 1302.5 (grounds for appeal under Health Care Decisions Law).

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

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

31 4766. A petition may be filed under this part for any one or more of the
32 following purposes:

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

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

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

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

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

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

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

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

16 The extent to which a third person may be compelled to comply with decisions of an agent or
17 surrogate is subject to other limitations in this division. See, e.g., Sections 4652 (excluded acts),
18 4653 (mercy killing, assisted suicide, euthanasia not approved), 4654 (compliance with generally
19 accepted health care standards), 4734 (right to decline for reasons of conscience or institutional
20 policy), 4735 (right to decline to provide ineffective care).

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

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

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

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

30 4769. (a) Subject to subdivision (b), at least 15 days before the time set for
31 hearing, the petitioner shall serve notice of the time and place of the hearing,
32 together with a copy of the petition, on the following:

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

34 (2) The patient, if not the petitioner.

35 (b) In the case of a petition to compel a third person to honor individual health
36 care instructions or the authority of an agent or surrogate, notice of the time and
37 place of the hearing, together with a copy of the petition, shall be served on the
38 third person in the manner provided in Chapter 4 (commencing with Section
39 413.10) of Title 5 of Part 2 of the Code of Civil Procedure.

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

43 See also Sections 4607 ("agent" defined), 4623 ("individual health care instructions" defined),
44 4625 ("patient" defined), 4633 ("principal" defined), 4643 ("surrogate" defined).