

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

Durable Power of Attorney
for Health Care Decisions

March 1983

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Suite D-2
Palo Alto, California 94306

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March 18, 1983

To: THE HONORABLE GEORGE DEUKMEJIAN
Governor of California and
THE LEGISLATURE OF CALIFORNIA

The Law Revision Commission was authorized by Resolution Chapter 19 of the Statutes of 1979 to study the rights and disabilities of minors and incompetent persons. This recommendation relates to one aspect of this topic—use of a durable power of attorney to make health care decisions.

The legislation proposed by the Commission would (1) make clear that a durable power of attorney may authorize the attorney in fact to make health care decisions on behalf of the principal, (2) require additional formalities before a durable power of attorney is effective to authorize health care decisions, and (3) give the health care provider who relies in good faith on a decision of the attorney in fact protection from civil and criminal liability.

Under this legislation, a person would be able to plan effectively for a time when he or she may become incapable of giving informed consent to medical care. This legislation recognizes the power in the individual to determine the course of his or her medical care by appointing a trusted friend or relative as attorney in fact under a durable power of attorney for

health care. This freely-selected representative of an individual would have priority to make health care decisions over a court or court-appointed conservator.

Respectfully submitted,

DAVID ROSENBERG
Chairperson

RECOMMENDATION

relating to

DURABLE POWER OF ATTORNEY FOR HEALTH CARE DECISIONS

The Uniform Durable Power of Attorney Act¹ was enacted in California upon recommendation of the Law Revision Commission.² Some lawyers advise the use of a durable power of attorney to delegate the authority to make health care decisions for the person giving the power.³ However, it is unclear under existing law whether a durable power of attorney can be used for this purpose.⁴ For this reason, a health care provider may not be willing to rely on a decision made by the attorney in fact under a durable power of attorney.

The Law Revision Commission recommends that the durable power of attorney statute be revised to provide expressly that a durable power of attorney may authorize the attorney in fact to make health care decisions for the principal. Making clear that a durable power of attorney may be used for this purpose will provide a useful and effective alternative to leaving the authority to make health

¹ Civil Code §§ 2400-2407.

² 1981 Cal. Stats. ch. 511; *Recommendation Relating to Uniform Durable Power of Attorney Act*, 15 Cal. L. Revision Comm'n Reports 351 (1980). For additional legislative history, see 16 Cal. L. Revision Comm'n Reports 25, 43-46 (1982).

³ See, e.g., Spitler, *California's "New" Durable Power of Attorney Act—The Second Time Around*, 3 CEB Est. Plan. R. 41, 43-45 (1981).

⁴ There is no reference to health care decisions in Civil Code Sections 2400-2407, in the Comments to these sections, nor in the Comments to the Uniform Durable Power of Attorney Act. There are explicit and implicit references to property matters. Civil Code Section 2400 provides a warning that the durable power of attorney gives the attorney in fact "broad powers to dispose, sell, convey, and encumber your real and personal property." Civil Code Section 2402 deals with the relation of the attorney in fact to court-appointed fiduciaries by reference to 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 his or her property except specified exclusions." The absence of any reference to a guardian of the person or conservator of the person is recognized in the Comment to Section 2402. No case has been found involving the issue whether the Uniform Durable Power of Attorney Act or the California version of that act would cover health care decisions. One state has provided specifically by statute that a power of attorney may give the attorney in fact authority to authorize medical and surgical procedures. 1982 Pa. Legis. Serv., Act 26, § 9 (Purdon) (to be codified as 20 Pa. Cons. Stat. §§ 5601-5606).

care decisions with the court system for persons unable to give informed consent.⁵ It will further the interest of the individual in self-determination and personal autonomy.⁶ Instead of leaving health care decisions to a judge, the individual may designate a trusted relative or friend to make the decision on his or her behalf if the need should arise.

The recommended legislation has the following features:

(1) An attorney in fact under a durable power of attorney is not empowered to make health care decisions on behalf of the principal unless the power of attorney specifically grants this authority. The power of attorney may specify any limitations on the exercise of the power to make health care decisions and may state the desires of the principal which are to be followed in making health care decisions. This scheme leaves to the individual substantial freedom to fashion a durable power of attorney suited to the individual's particular needs and beliefs.

(2) A durable power of attorney enables the attorney in fact to make health care decisions on behalf of the principal only if the power of attorney is either signed by two witnesses or acknowledged before a notary public in California. However, existing durable powers of attorney that permit the attorney in fact to make health care decisions are excused from this requirement.

(3) Subject to any limitations in the durable power of attorney, the attorney in fact may make health care decisions for the principal to the same extent as the principal could make health care decisions for himself or herself if he or she had the capacity to do so. The attorney in fact is under a duty to make health care decisions consistent with the desires of the principal.

(4) The attorney in fact has priority over other persons to make health care decisions for the principal. Thus, the

⁵ See Prob. Code §§ 2354 (medical treatment of conservatee not adjudicated to lack capacity to give informed consent), 2355 (medical treatment of conservatee adjudicated to lack capacity to give informed consent), 2357 (court-ordered medical treatment), 3200-3211 (court-ordered medical treatment for person without conservator).

⁶ For a discussion of the need to recognize the power in the individual to provide for health care in the eventuality of incompetence, see Alexander, *Premature Probate: A Different Perspective on Guardianship for the Elderly*, 31 Stan. L. Rev. 1003 (1979). See also the Prefatory Note to the Model Health-Care Consent Act (1982).

attorney in fact, as the freely-selected agent of the principal, has priority over a court or court-appointed conservator. However, the principal has priority with respect to a particular decision if the principal is able to give informed consent in that case.

(5) If the principal has the capacity to give a durable power of attorney for health care, he or she may revoke the appointment by oral or written notice to the attorney in fact or may revoke the authority to make health care decisions by oral or written notice to the health care provider. Where the health care provider receives notice, it is to be entered in the principal's medical records.

(6) The general procedure for court enforcement of the duties of an attorney in fact provided by Civil Code Sections 2410-2423 is revised to apply to the attorney in fact empowered to make health care decisions. Under this procedure, the principal, the attorney in fact, a treating health care provider, a spouse, child, or heir of the principal, a conservator, a court investigator, or public guardian may petition the court for a variety of purposes such as to determine whether the power of attorney is still effective, to determine whether the attorney in fact is acting consistent with the desires of the principal, to compel a report by the attorney in fact, or to determine whether the durable power of attorney should be terminated because the attorney in fact is not acting consistent with the desires of the principal. A durable power of attorney for health care that is drafted with advice of counsel may restrict the right to petition for court review. However, the durable power of attorney may not prevent a conservator from petitioning to have the court (1) determine whether the durable power of attorney is still in effect, (2) compel a report by the attorney in fact, or (3) terminate the durable power of attorney. Nor may the durable power of attorney prevent the attorney in fact from petitioning to determine whether the power of attorney is still in effect or to determine if the acts or proposed acts of the attorney in fact are consistent with the principal's desires.

(7) The attorney in fact empowered to make health care decisions has the same right as the principal to receive

information relating to proposed health care, to receive and review medical records, and to consent to the disclosure of medical records.

(8) Health care providers are protected from liability for relying in good faith on a health care decision made by an attorney in fact.

(9) Any printed form of a durable power of attorney sold in California for use by a person who does not have the advice of an attorney is required to have a warning advising of the consequences of a delegation of the power to make health care decisions. This is consistent with the warning provided in Civil Code Section 2400 for a printed form of a durable power of attorney as it relates to property matters.

(10) A treating health care provider may not be appointed as an attorney in fact under a durable power of attorney for health care. Health care providers are also barred as witnesses to such powers of attorney.

The Commission's recommendation would be effectuated by enactment of the following measure:

An act to amend Sections 2356, 2402, 2410, 2411, 2412, 2417, 2419, and 2421 of, to add Section 2412.5 to, and to add Article 5 (commencing with Section 2430) to Chapter 2 of Title 9 of Part 4 of Division 3 of, the Civil Code, relating to durable powers of attorney.

The people of the State of California do enact as follows:

Civil Code § 2356 (technical amendment). Termination of agency; binding effect of transactions

SECTION 1. Section 2356 of the Civil Code is amended to read:

2356. (a) Unless the power of an agent is coupled with an interest in the subject of the agency, it is terminated by any of the following:

- (1) Its revocation by the principal.
- (2) The death of the principal.
- (3) The incapacity of the principal to contract.

(b) Notwithstanding subdivision (a), any bona fide transaction entered into with such agent by any person acting without actual knowledge of such revocation, death, or incapacity shall be binding upon the principal, his or her heirs, devisees, legatees, and other successors in interest.

(c) Nothing in this section shall affect the provisions of Section 1216.

(d) With respect to a power of attorney, the provisions of this section are subject to the provisions of ~~Article~~ *Articles 3 (commencing with Section 2400) and 5 (commencing with Section 2430)* of Chapter 2.

(e) With respect to a proxy given by a person to another person relating to the exercise of voting rights, to the extent the provisions of this section conflict with or contravene any other provisions of the statutes of California pertaining to the proxy, the latter provisions shall prevail.

Comment. Subdivision (d) of Section 2356 is amended to add a reference to Article 5 pertaining to powers of attorney for health care decisions.

Civil Code § 2402 (amended). Relation of attorney in fact to court-appointed fiduciary

SEC. 2. Section 2402 of the Civil Code is amended to read:

2402. (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 his or her property except specified exclusions, the attorney in fact is accountable to the fiduciary as well as to the principal. The fiduciary has the same power to revoke or amend the power of attorney that the principal would have had if he or she were not incapacitated; but, if a conservator is appointed by a court of this state, the conservator can revoke or amend the 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 revoke or amend the durable power of attorney and the revocation or amendment is in accord with the order. *This subdivision does not apply to a durable power of attorney to the extent that the durable power of attorney authorizes the attorney in fact to make health care decisions (as defined in Section 2430) for the principal.*

(b) A principal may nominate, by a durable power of attorney, a conservator of the person or estate or both, or a guardian of the person or estate or both, for consideration by the court if protective proceedings for the principal's person or estate are thereafter commenced. If the protective proceedings are conservatorship proceedings in this state, the nomination shall have the effect provided in Section 1810 of the Probate Code, and the court shall give effect to the most recent writing executed in accordance with Section 1810 of the Probate Code, whether or not such writing is a durable power of attorney.

Comment. The last sentence is added to subdivision (a) of Section 2402 because special provisions apply to a durable power of attorney to make health care decisions. See Sections 2412.5 and 2421.

Civil Code § 2410 (amended). Definitions

SEC. 3. Section 2410 of the Civil Code is amended to read:

2410. As used in this article:

(a) "Attorney in fact" means an attorney in fact designated in a power of attorney.

(b) "*Durable power of attorney for health care*" means a durable power of attorney to the extent that it authorizes an attorney in fact to make health care decisions (as defined in Section 2430) for the principal.

~~(b)~~ (c) "Power of attorney" means a written power of attorney, durable or otherwise, which designates for a natural person an attorney in fact who was a resident of this state at the time the power of attorney was created or is a resident of this state at the time the petition is filed under this article. For the purposes of this article, a power of

attorney does not include a proxy given by a person to another person with respect to the exercise of voting rights that is governed by any other statute of California.

~~(e)~~ (d) “Principal” means the natural person who has designated another as his or her attorney in fact in a power of attorney.

Comment. Subdivision (b) is added to Section 2410 in recognition that some of the provisions of this article apply only to a durable power of attorney for health care. Where a durable power of attorney authorizes the attorney in fact to take action both with respect to property matters and health care decisions, this article applies generally to the extent that the power of attorney relates to property matters and the provisions of this article that apply to a durable power of attorney for health care apply to the extent that the power of attorney relates to health care decisions.

Civil Code § 2411 (amended). Who may petition

SEC. 4. Section 2411 of the Civil Code is amended to read:

2411. A petition may be filed under this article by any of the following:

- (a) The attorney in fact.
- (b) The principal.
- (c) The spouse or any child of the principal.
- (d) The conservator of the person or estate of the principal.
- (e) Any person who would take property of the principal under the laws of intestate succession if the principal died at the time the petition is filed, whether or not the principal has a will.

(f) The court investigator, referred to in Section 1454 of the Probate Code, of the county where the power of attorney was executed or where the principal resides.

(g) The public guardian of the county where the power of attorney was executed or where the principal resides.

(h) A treating health care provider with respect to a durable power of attorney for health care.

Comment. Subdivision (h) is added to Section 2411 to make clear that a treating health care provider may petition under this

article. See Section 2412.5 (petition with respect to durable power of attorney for health care).

Civil Code § 2412 (technical amendment). Petition; purposes

SEC. 5. Section 2412 of the Civil Code is amended to read:

2412. *A Except as provided in Section 2412.5, a petition may be filed under this article for any one or more of the following purposes:*

(a) Determining whether the power of attorney is still effective or has terminated.

(b) Passing on the acts or proposed acts of the attorney in fact.

(c) Compelling the attorney in fact to submit his or her accounts or report his or her acts as attorney in fact to the principal, the spouse of the principal, the conservator of the person or the estate of the principal, or to such other person as the court in its discretion may require, if the attorney in fact has failed to submit an accounting and report within 60 days after written request from the person filing the petition.

(d) Declaring that the power of attorney is terminated upon a determination by the court of all of the following:

(1) The attorney in fact has violated or is unfit to perform the fiduciary duties under the power of attorney.

(2) At the time of the determination by the court, the principal lacks the capacity to give or to revoke a power of attorney.

(3) The termination of the power of attorney is in the best interests of the principal or the principal's estate.

Comment. The introductory clause is added to Section 2412 to recognize that a different provision (Section 2412.5) applies to a petition with respect to a durable power of attorney for health care.

Civil Code § 2412.5 (added). Petition with respect to durable power of attorney for health care

SEC. 6. Section 2412.5 is added to the Civil Code, to read:

2412.5. With respect to a durable power of attorney for health care, a petition may be filed under this article for any one or more of the following purposes:

(a) Determining whether the durable power of attorney for health care is still effective or has terminated.

(b) Determining whether the acts or proposed acts of the attorney in fact are consistent with the desires of the principal as expressed in the durable power of attorney or otherwise made known to the court.

(c) Compelling the attorney in fact to report his or her acts as attorney in fact to the principal, the spouse of the principal, the conservator of the person of the principal, or to such other person as the court in its discretion may require, if the attorney in fact has failed to submit such a report within 10 days after written request from the person filing the petition.

(d) Declaring that the durable power of attorney for health care is terminated upon a determination by the court of both of the following:

(1) The attorney in fact has violated or is unfit to perform the duty under the durable power of attorney for health care to act consistent with the desires of the principal.

(2) At the time of the determination by the court, the principal lacks the capacity to give or to revoke a durable power of attorney for health care.

Comment. Section 2412.5 is a special provision that enumerates the purposes for which a petition may be filed under this article with respect to a durable power of attorney for health care. Under subdivision (b), the desires of the principal as expressed in the durable power of attorney or otherwise made known to the court provide the standard for judging the acts of the attorney in fact. Subdivision (d) permits the court to terminate the durable power of attorney for health care where the attorney in fact is not complying with the duty to carry out the desires of the principal. This provision adopts a substituted judgment standard based on the principal's desires in place of a general standard of what may constitute the best interests of the principal. Subdivision (d) permits termination of the durable power of attorney for health care to be terminated if the attorney in fact, for example, is failing to perform his or her duties as

expressed in the power of attorney or is acting contrary to the desires of the principal as expressed in the power of attorney. A durable power of attorney for health care may limit the authority to petition under this article. See Section 2421.

Civil Code § 2417 (technical amendment). Hearing on petition

SEC. 7. Section 2417 of the Civil Code is amended to read:

2417. (a) Upon the filing of a petition under this article, the clerk shall set the petition for hearing.

(b) At least 30 days before the time set for hearing, the petitioner shall serve notice of time and place of the hearing, together with a copy of the petition, on all of the following:

- (1) The attorney in fact if not the petitioner.
- (2) The principal if not the petitioner.
- (3) Any other persons the court in its discretion requires.

(c) Service shall be made by mailing to the last known address of the person required to be served unless the court in its discretion requires that notice be served in some other manner. Personal delivery is the equivalent of mailing.

(d) Proof of compliance with subdivisions (b) and (c) shall be made at or before the hearing. If it appears to the satisfaction of the court that the notice has been given as required, the court shall so find in its order, and the order, when it becomes final, is conclusive on all persons.

(e) Proceedings under this article shall be governed, whenever possible, by the provisions of this article, and where the provisions of this article do not appear applicable, the provisions of Division 3 (commencing with Section 300) of the Probate Code shall apply.

(f) The court for good cause may shorten the time required for the performance of any act required by this section.

(g) In a proceeding under this article commenced by the filing of a petition by a person other than the attorney in fact, the court may in its discretion award reasonable attorney's fees to:

- (1) The attorney in fact if the court determines that the proceeding was commenced without any reasonable cause.

(2) The person commencing the proceeding if the court determines that the attorney in fact has clearly violated the fiduciary duties under the power of attorney or has failed without any reasonable cause or justification to submit accounts or report acts to the principal or conservator of the estate *or of the person, as the case may be, within 60 days* after written request from the principal or conservator.

Comment. Subdivision (g) (2) of Section 2417 is revised to permit the court to award attorney's fees to the conservator of the person in a case where the attorney in fact fails without any reasonable cause or justification to submit a report requested under subdivision (c) of Section 2412.5.

Civil Code § 2419 (amended). Appeal

SEC. 8. Section 2419 of the Civil Code is amended to read:

2419. An appeal may be taken from any *of the following*:

(a) Any final order or decree made pursuant to subdivision (a), (b), or (d) of Section 2412 *or subdivision (a), (b), or (d) of Section 2412.5 or from an*.

(b) An order dismissing the petition or denying a motion to dismiss under Section 2416.

Comment. The amendment of Section 2419 permits appeal from certain final orders or decrees under Section 2412.5 (petition with respect to durable power of attorney for health care).

Civil Code § 2421 (amended). Restriction in power of attorney of authority to petition

SEC. 9. Section 2421 of the Civil Code is amended to read:

2421. (a) Except as provided in ~~subdivision (b)~~ *subdivisions (b), (c), and (d)*, a power of attorney may expressly eliminate the authority of any person listed in Section 2411 to petition the court under this article for any one or more of the purposes enumerated in Section 2412 *or Section 2412.5* if both of the following requirements are met:

(1) The power of attorney is executed by the principal at a time when the principal has the advice of a lawyer

licensed to practice law in the state where the power of attorney is executed.

(2) The approval of the lawyer described in paragraph (1) of the power of attorney is included as a part of the instrument that constitutes the power of attorney.

(b) Notwithstanding any provision of the power of attorney, *except as provided in subdivision (c)*, the conservator of the estate of the principal may petition the court under this article for any one or more of the purposes enumerated in Section 2412.

(c) Notwithstanding any provision of the power of attorney, in the case of a durable power of attorney for health care, the conservator of the person of the principal may petition the court under this article for any of the purposes enumerated in subdivisions (a), (c), and (d) of Section 2412.5.

(d) Notwithstanding any provision of the power of attorney, in the case of a durable power of attorney for health care, the attorney in fact may petition the court under this article for any of the purposes enumerated in subdivisions (a) and (b) of Section 2412.5.

Comment. Subdivisions (c) and (d) are added to Section 2421 to specify the purposes for which a conservator of the person or an attorney in fact may petition the court under this article with respect to a durable power of attorney for health care. Although a power of attorney may eliminate the authority of any person to petition the court under this article if the requirements of subdivision (a) are met, subdivisions (c) and (d) provide certain exceptions.

Under subdivision (c), the conservator of the person may obtain a determination of whether the durable power of attorney for health care is still effective or has terminated, despite a contrary provision in the power of attorney. See Section 2412.5(a). The conservator of the person may obtain a court order requiring the attorney in fact to report his or her acts under the durable power of attorney for health care if the attorney in fact fails to submit such a report within 10 days after a written request. See Section 2412.5(c). The conservator of the person may obtain a court determination that the durable power of attorney for health care is terminated upon a determination

by the court that the attorney in fact is not performing the duty under the durable power of attorney for health care to act consistent with the desires of the principal. See Section 2412.5(d); see also the Comment to Section 2412.5.

Under subdivision (d), the attorney in fact may obtain a determination of whether the durable power of attorney for health care is still effective or has terminated, despite a contrary provision in the power of attorney. See Section 2412.5(a). The attorney in fact may also obtain a court order passing on the acts or proposed acts of the attorney in fact under the durable power of attorney for health care. See Section 2412.5(b).

Civil Code §§ 2430-2439 (added). Durable power of attorney for health care

SEC. 10. Article 5 (commencing with Section 2430) is added to Chapter 2 of Title 9 of Part 4 of Division 3 of the Civil Code, to read:

Article 5. Durable Power of Attorney for Health Care

§ 2430. Definitions

2430. As used in this article:

(a) “Durable power of attorney for health care” means a durable power of attorney to the extent that it authorizes an attorney in fact to make health care decisions for the principal.

(b) “Health care” means any care, treatment, service, or procedure to maintain, diagnose, or treat an individual’s physical or mental condition.

(c) “Health care decision” means consent, refusal of consent, or withdrawal of consent to health care.

(d) “Health care provider” means a person who is licensed, certified, or otherwise authorized by the law of this state to administer health care in the ordinary course of business or practice of a profession.

(e) “Person” includes an individual, corporation, partnership, association, the State, a city, county, city and county, or other public entity or governmental subdivision or agency, or any other legal entity.

Comment. The definitions of “health care” and “health care provider” in Section 2430 are the same in substance as the

definitions of those terms found in Section 1 of the Uniform Law Commissioners' Model Health-Care Consent Act (1982).

§ 2431. **Application of article**

2431. (a) A durable power of attorney executed after December 31, 1983, is effective to authorize the attorney in fact to make health care decisions for the principal only if the power of attorney complies with this article.

(b) A durable power of attorney executed before January 1, 1984, that specifically authorizes the attorney in fact to make decisions relating to the medical or health care of the principal shall be deemed to be valid under this article after January 1, 1984, notwithstanding that it fails to comply with the requirement of paragraph (2) of subdivision (a) of Section 2432; but, to the extent that the durable power of attorney authorizes the attorney in fact to make health care decisions for the principal, the durable power of attorney is subject to all the provisions of this article and to Article 4 (commencing with Section 2410).

(c) Nothing in this article affects the validity of a decision made under a durable power of attorney before January 1, 1984.

Comment. Subdivision (a) of Section 2431 makes clear that the additional requirements of this article must be satisfied if a durable power of attorney executed after December 31, 1983, is intended to authorize health care decisions. See Section 2400 (durable power of attorney). Nothing in this article affects a durable power of attorney executed after December 31, 1983, insofar as it relates to matters other than health care decisions. See Section 2430 ("health care decision" defined).

Subdivision (b) validates durable powers of attorney for health care executed before January 1, 1984, even though the witnessing or acknowledgement requirement of Section 2432(a) (2) is not satisfied. However, after the operative date of this article, any such durable powers of attorney are subject to the same provisions as durable powers of attorney executed after the operative date. See, *e.g.*, Sections 2412.5 (grounds for petition), 2421 (exceptions to limitations in power of attorney), 2434 (priority to act), 2437 (revocation), 2438 (protections from liability).

Subdivision (c) makes clear that this article has no effect on decisions made before January 1, 1984, under durable powers of attorney executed before that date. The validity of such health care decisions is determined by the law that would apply if this article had not been enacted.

§ 2432. Requirements for durable power of attorney for health care

2432. (a) An attorney in fact under a durable power of attorney may not make health care decisions unless both of the following requirements are satisfied:

(1) The durable power of attorney specifically authorizes the attorney in fact to make health care decisions.

(2) The durable power of attorney either (A) is signed by at least two witnesses who are present when the durable power of attorney is signed by the principal or when the principal acknowledges his or her signature or (B) is acknowledged before a notary public at any place within this state.

(b) Neither the treating health care provider nor an employee of the treating health care provider may be designated as the attorney in fact to make health care decisions under a durable power of attorney. A health care provider or employee of a health care provider may not act as an attorney in fact to make health care decisions if the health care provider becomes the principal's treating health care provider.

(c) None of the following may be used as a witness under subdivision (a):

(1) A health care provider.

(2) An employee of a health care provider.

(3) The attorney in fact.

Comment. Subdivision (a) of Section 2432 makes clear that a durable power of attorney is not sufficient to enable the attorney in fact to consent to health care or make other health care decisions unless the formalities of this section are satisfied. See also Sections 2400 (general requirements for durable power of attorney), 2433 (requirements for printed form). See also Section 2431 (exception to formalities requirement for powers of attorney executed before operative date).

Subdivision (b) precludes the treating health care provider or an employee of the treating health care provider from acting as the attorney in fact under a durable power of attorney for health care. Subdivision (c) precludes health care providers in general and their employees from acting as witnesses to such powers of attorney. These limitations are included in recognition that Section 2438 provides protections from liability for a health care provider who relies in good faith on a decision of the attorney in fact. Subdivision (b) does not preclude a person from appointing, for example, a friend who is a doctor to be an attorney in fact under the durable power of attorney for health care, but if the doctor becomes a “treating health care provider” of the principal, the doctor is precluded from acting as the attorney in fact under the durable power of attorney for health care.

§ 2433. Requirements for printed form

2433. (a) A printed form of a durable power of attorney sold in this state for use by a person who does not have the advice of legal counsel shall include the following notice in 10-point bold face type, in addition to the warning required by subdivision (b) of Section 2400, if it permits the attorney in fact to make health care decisions: “This document gives the person you designate as your attorney in fact the power to make health care decisions for you, subject to any limitations or statement of your desires you include in this document. The power to make health care decisions for you may include consent, refusal of consent, or withdrawal of consent to any care, treatment, service, or procedure to maintain, diagnose, or treat a physical or mental condition.”

(b) The printed form described in subdivision (a) shall also include the following notice: “This power of attorney will not be valid for making health care decisions unless it is either (1) signed by two witnesses who are present when you sign or acknowledge your signature or (2) acknowledged before a notary public in California.”

Comment. Section 2433 provides additional warnings required to be in certain printed forms if the durable power of attorney is designed to authorize health care decisions.

§ 2434. Authority of attorney in fact to make health care decisions

2434. (a) Unless the durable power of attorney provides otherwise, the attorney in fact designated in a durable power of attorney for health care who is known to the health care provider to be available and willing to make health care decisions has priority over any other person to act for the principal in all matters of health care, but the attorney in fact does not have priority over the principal with respect to a particular health care decision if the principal is able to give informed consent with respect to that decision.

(b) Subject to any limitations in the durable power of attorney, the attorney in fact designated in a durable power of attorney for health care may make health care decisions for the principal to the same extent as the principal could make health care decisions for himself or herself if the principal had the capacity to do so.

Comment. Subdivision (a) of Section 2434 gives the attorney in fact priority to make health care decisions if known to the health care provider to be available and willing to act. The power of attorney may vary this priority. Subdivision (a) also makes clear that the principal has overall priority where he or she is able to give informed consent.

Subdivision (b) gives the broadest possible authority to an attorney in fact authorized to make health care decisions, except as limited by the power of attorney. The principal is free to provide any limitations on types of treatment in the durable power of attorney that are desired. See also Sections 2410-2423 (court enforcement of duties of attorney in fact).

§ 2435. [Reserved]

§ 2436. Availability of medical information to attorney in fact

2436. An attorney in fact authorized to make health care decisions under a durable power of attorney has the same right as the principal to receive information regarding the proposed health care, to receive and review medical records, and to consent to the disclosure of medical records.

Comment. Section 2436 makes clear that the attorney in fact can obtain and disclose information as necessary to exercise the authority given in the durable power of attorney.

§ 2437. Revocation

2437. (a) At any time while the principal has the capacity to give a durable power of attorney for health care, the principal may do any of the following:

(1) Revoke the appointment of the attorney in fact under the durable power of attorney for health care by notifying the attorney in fact orally or in writing.

(2) Revoke the authority granted to the attorney in fact to make health care decisions by notifying the health care provider orally or in writing.

(b) If the principal notifies the health care provider orally or in writing that the authority granted to the attorney in fact to make health care decisions is revoked, the health care provider shall make the notification a part of the principal's medical records.

Comment. Section 2437 makes clear that the principal can revoke the appointment of the attorney in fact or the authority granted to the attorney in fact by oral or written notification to the attorney in fact or health care provider. The principal may revoke the appointment or authority only if, at the time of revocation, the principal has sufficient capacity to give a durable power of attorney for health care. Although the authorization to act as attorney in fact to make health care decisions is revoked if the principal notifies the attorney in fact orally or in writing that the appointment of the attorney in fact is revoked, a health care provider is protected if the health care provider without knowledge of the revocation acts in good faith on a health care decision of the attorney in fact. See Section 2438.

Subdivision (b) is included to preserve a record of a written or oral revocation. It also provides a means by which notice of an oral or written revocation to a health care provider may come to the attention of a successor health care provider.

§ 2438. Protection of health care provider from liability

2438. A health care provider is not subject to criminal prosecution, civil liability, or professional disciplinary action where the health care provider relies on a health

care decision and both of the following requirements are satisfied:

(a) The decision is made by an attorney in fact who the health care provider believes in good faith is authorized by a durable power of attorney under this article to make the decision.

(b) The health care provider believes in good faith that the decision is consistent with the desires of the principal as expressed in the durable power of attorney or otherwise made known to the health care provider.

Comment. Section 2438 implements this article by protecting the health care provider who acts in good faith in reliance on a health care decision made by an attorney in fact pursuant to this article.

§ 2439. Other authority not affected

2439. (a) Subject to Section 2434, nothing in this article affects any right a person may have to make health care decisions on behalf of another.

(b) This article does not affect the law governing health care treatment in an emergency.

Comment. Section 2439 makes clear that the enactment of this article has no effect on any right a person may have to consent for another or on emergency treatment. Thus, this article is cumulative to whatever other ways there may be to consent for another.

(124-200 Blank)

