

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATIONS

relating to

Powers of Attorney

**Elimination of Seven-Year Limit for Durable
Power of Attorney for Health Care**

**Recognition of Agent's Authority Under
Statutory Form Power of Attorney**

November 1990

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

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The Commission's annual reports and its recommendations and studies are published in separate pamphlets which are later bound in permanent volumes. The page numbers in each pamphlet are the same as in the volume in which the pamphlet is bound. The purpose of this numbering system is to facilitate consecutive pagination of the bound volumes. This pamphlet will appear in Volume 20 of the Commission's *Reports, Recommendations, and Studies* which is scheduled to be published late in 1991.

Cite this pamphlet as *Recommendations Relating to Powers of Attorney*, 20 Cal. L. Revision Comm'n Reports 2601 (1990).

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STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

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**Elimination of Seven-Year Limit for
Durable Power of Attorney
for Health Care**

September 1990

California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739

NOTE

This recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted since their primary purpose is to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

Cite this recommendation as *Recommendation Relating to Elimination of Seven-Year Limit for Durable Power of Attorney for Health Care*, 20 Cal. L. Revision Comm'n Reports 2605 (1990).

STATE OF CALIFORNIA

GEORGE DEUKMEJIAN, Governor

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September 13, 1990

To: **The Honorable George Deukmejian**
Governor of California, and
The Legislature of California

This recommendation proposes to repeal the seven-year maximum limit for a durable power of attorney for health care.

This recommendation is made pursuant to Resolution Chapter 19 of the Statutes of 1979.

Respectfully submitted,

Roger Arnebergh
Chairperson

RECOMMENDATION

A durable power of attorney for health care¹ authorizes an attorney in fact to make health care decisions for the principal after the principal is no longer able to give informed consent. This is a useful and effective alternative to leaving authority to make health care decisions with the courts for persons who cannot give informed consent.² It promotes self-determination and personal autonomy: Instead of leaving health care decisions to a judge, the principal may choose a trusted relative or friend to make health care decisions on his or her behalf if the need should arise.

A durable power of attorney for health care expires seven years after its execution, unless at the end of the seven-year period the principal lacks capacity to make health care decisions.³ The seven-year limit was included in the 1983 legislation because it was thought that a person who makes a durable power of attorney for health care should review it periodically, and at least every seven years. But experienced

1. Durable powers of attorney for health care are authorized by a 1983 statute enacted on recommendation of the Law Revision Commission. See 1983 Cal. Stat. ch. 1204, § 10 (codified at Civ. Code §§ 2430-2443); *Recommendation Relating to Durable Power of Attorney for Health Care Decisions*, 17 Cal. L. Revision Comm'n Reports 101 (1984). See also 1984 Cal. Stat. ch. 312 (statutory form for durable power of attorney for health care); *Recommendation Relating to Statutory Forms for Durable Powers of Attorney*, 17 Cal. L. Revision Comm'n Reports 701 (1984).

2. 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).

3. Civ. Code § 2436.5. If at the end of the seven-year period the principal lacks capacity to make health care decisions, the durable power of attorney for health care continues in effect until the principal regains capacity. Under Section 2436.5, the durable power of attorney for health care may provide that it expires earlier than seven years after its execution. The principal may also revoke the durable power at any time if the principal has legal capacity. Civ. Code § 2437.

The seven-year limit was not in the legislation recommended by the Law Revision Commission. See *Recommendation Relating to Durable Power of Attorney for Health Care Decisions*, 17 Cal. L. Revision Comm'n Reports 101 (1984). It was added in the Legislature at the urging of interested groups, and only applies to a durable power of attorney executed after January 1, 1984.

probate practitioners report that this has not been the effect of the legislation; instead it is a potential trap and is inconsistent with the intent of people who make a durable power of attorney for health care.⁴ The seven-year limit creates a likelihood that the durable power will expire and the principal will be unaware of the expiration. If this happens and the principal loses capacity, he or she will be unable to get needed health care without cumbersome and expensive court proceedings.

For this reason, the Commission recommends that the seven-year limit for durable powers of attorney for health care be eliminated.⁵ Although the mandatory seven-year limit is not continued, a person who so desires can provide in the durable power that it will expire seven years, or at some other longer or shorter time, after its execution.

The statutory form for a durable power of attorney for health care⁶ is revised in the recommended legislation to substitute for the seven-year limit a provision that the principal can complete if the principal desires to limit the duration of the durable power.⁷ This will alert the person using the statutory form to the need to consider whether the duration of the durable power should be limited.

4. Letter from William J. Hoehler to Nathaniel Sterling (February 16, 1990).

5. The recommended legislation keeps the seven-year limit for durable powers of attorney for health care executed after January 1, 1984, but before January 1, 1992 (the operative date of the recommended legislation), and for those executed on a form that contains a warning statement that refers to a seven-year limit on its duration. Such a power will expire seven years from the date of its execution unless at the end of the seven-year period the principal lacks capacity to make health care decisions, in which case the power will continue in effect until the principal regains capacity. This will avoid catching unaware a person who made a durable power in reliance on automatic revocation at the end of seven years.

6. Civ. Code § 2500. The recommended legislation also conforms the warning statement in a durable power of attorney for health care by deleting the reference to the seven-year limit. See *id.* §§ 2433, 2500.

7. If a person uses an old form that refers to the seven-year limit after the recommended legislation becomes operative, the power will expire seven years from its execution unless at the end of the seven-year period the principal lacks capacity to make health care decisions, in which case the power will continue in effect until the principal regains capacity. See *supra* note 5.

PROPOSED LEGISLATION

The Commission's recommendation would be effectuated by enactment of the following amendments.

Civil Code § 2433 (amended). Warning statement

2433. (a) A printed form of a durable power of attorney for health care that is sold or otherwise distributed in this state for use by a person who does not have the advice of legal counsel shall provide no other authority than the authority to make health care decisions on behalf of the principal and shall contain, in not less than 10-point boldface type or a reasonable equivalent thereof, the following warning statement:

WARNING TO PERSON EXECUTING THIS DOCUMENT

This is an important legal document. Before executing this document, you should know these important facts:

This document gives the person you designate as your agent (the attorney in fact) the power to make health care decisions for you. Your agent must act consistently with your desires as stated in this document or otherwise made known.

Except as you otherwise specify in this document, this document gives your agent the power to consent to your doctor not giving treatment or stopping treatment necessary to keep you alive.

Notwithstanding this document, you have the right to make medical and other health care decisions for yourself so long as you can give informed consent with respect to the particular decision. In addition, no treatment may be given to you over your objection, and health care necessary to keep you alive may not be stopped or withheld if you object at the time.

This document gives your agent authority to consent, to refuse to consent, or to withdraw consent to any care, treatment, service, or procedure to maintain, diagnose, or treat a physical or mental condition. This power is subject to any statement of your desires and any limitations that you include in this document. You may state in this document any types of

treatment that you do not desire. In addition, the court can take away the power of your agent to make health care decisions for you if your agent (1) authorizes anything that is illegal, (2) acts contrary to your known desires, or (3) where your desires are not known, does anything that is clearly contrary to your best interests.

~~Unless you specify a shorter period in this document, this power will exist for seven years from the date you execute this document and, if you are unable to make health care decisions for yourself at the time when this seven-year period ends, this power will continue to exist until the time when you become able to make health care decisions for yourself. This power will exist for an indefinite period of time unless you limit its duration in this document.~~

You have the right to revoke the authority of your agent by notifying your agent or your treating doctor, hospital, or other health care provider orally or in writing of the revocation.

Your agent has the right to examine your medical records and to consent to their disclosure unless you limit this right in this document.

Unless you otherwise specify in this document, this document gives you agent the power after you die to (1) authorize an autopsy, (2) donate your body or parts thereof for transplant or therapeutic or educational or scientific purposes, and (3) direct the disposition of your remains.

If there is anything in this document that you do not understand, you should ask a lawyer to explain it to you.

(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 qualified adult witnesses who are personally known to you and who are present when you sign or acknowledge your signature or (2) acknowledged before a notary public in California."

(c) A durable power of attorney prepared for execution by a person resident in this state that permits the attorney in fact to make health care decisions and that is not a printed form shall include one of the following:

(1) The substance of the statements provided for in subdivision (a) in capital letters.

(2) A certificate signed by the principal's lawyer stating: "I am a lawyer authorized to practice law in the state where this power of attorney was executed, and the principal was my client at the time this power of attorney was executed. I have advised my client concerning his or her rights in connection with this power of attorney and the applicable law and the consequences of signing or not signing this power of attorney, and my client, after being so advised, has executed this power of attorney."

(d) If a durable power of attorney includes the certificate provided for in paragraph (2) of subdivision (c) and permits the attorney in fact to make health care decisions for the principal, the applicable law of which the client is to be advised by the lawyer signing the certificate includes, but is not limited to, the matters listed in subdivision (a).

Comment. Section 2433 is amended to delete the former reference to the seven-year limit on a durable power of attorney for health care, and to substitute new language drawn from the warning statement for a printed form durable power of attorney that is not a durable power of attorney for health care. See Section 2510. The former seven-year limit has been repealed for a power executed on or after January 1, 1992, that does not contain a warning statement that refers to a seven-year limit on its duration. See Section 2436.5.

Civil Code § 2436.5 (amended). Expiration of durable power of attorney for health care

2436.5. (a) This section applies only to a durable power of attorney for health care that satisfies one of the following requirements:

(1) The power of attorney was executed after January 1, 1984, but before January 1, 1992.

(2) *The power of attorney was executed on or after January 1, 1992, and contains a warning statement that refers to a seven-year limit on its duration.*

(b) Unless a shorter period is provided in the durable power of attorney for health care, a durable power of attorney for health care ~~executed after January 1, 1984,~~ expires seven years after the date of its execution unless at the end of the seven-year period the principal lacks the capacity to make health care decisions for himself or herself, in which case the durable power of attorney for health care continues in effect until the time when the principal regains the capacity to make health care decisions for himself or herself.

Comment. Section 2436.5 is amended to add subdivision (a). Subdivision (a) restricts the seven-year limit for a durable power of attorney for health care (1) to those executed between January 1, 1984, and December 31, 1991, and (2) to those containing a warning statement that refers to a seven-year limit on its duration. For a durable power of attorney for health care executed on or after January 1, 1992, that does not contain a warning statement that refers to a seven-year limit on its duration, there is no statutory limit, but only the limit, if any, provided in the durable power itself.

The principal may revoke a durable power of attorney for health care if the principal has legal capacity. Civ. Code § 2437. A durable power of attorney for health care is also revoked by death of the principal or attorney in fact. Civ. Code §§ 2355, 2356.

Civil Code § 2444 (amended). Forms

2444. (a) Notwithstanding Section 2433, on and after January 1, 1986, a printed form of a durable power of attorney for health care may be sold or otherwise distributed if it complies with Section 2433 as amended by Section 5 of Chapter 312 of the Statutes of 1984, *with Section 2433 as amended by Chapter 403 of the Statutes of 1985*, or with Section 2433 as in effect at the time of sale or distribution. However, any printed form of a durable power of attorney for health care printed on or after January 1, 1986, that is sold or otherwise distributed in this state for use by a person who

does not have the advice of legal counsel shall comply with Section 2433 as in effect at the time of printing.

(b) Notwithstanding Section 2432, a printed form of a durable power of attorney for health care may be sold or otherwise distributed if it complies with Section 2342 as originally enacted, or with Section 2432 as subsequently amended. However, any printed form of a durable power of attorney for health care printed on or after January 1, 1986, shall comply with the requirements of Section 2432 in effect at the time of printing.

(c) A durable power of attorney for health care executed on or after January 1, 1986, is not invalid if it complies with Section 2432 as originally enacted or as subsequently amended. *A Subject to Section 2436.5, a durable power of attorney for health care executed on or after January 1, 1986, using a printed form that complied with Section 2433 as amended by Section 5 of Chapter 312 of the Statutes of 1984, or with Section 2433 as amended by Chapter 403 of the Statutes of 1985, is as valid as if it had been executed using a printed form that complied with Section 2433 as thereafter amended.*

Comment. Section 2444 is amended to validate a durable power of attorney for health care made on a printed form that complied with prior versions of Section 2433, including Section 2433 as amended by Chapter 403 of the Statutes of 1985.

A durable power of attorney for health care executed after January 1, 1984, but before January 1, 1992, or one that contains a warning statement that refers to a seven-year limit on its duration, expires seven years after the date of its execution unless at the end of the seven-year period the principal lacks capacity to make health care decisions, in which case the durable power of attorney for health care continues in effect until the principal regains capacity to make health care decisions. Section 2436.5.

Civil Code § 2500 (amended). Statutory form durable power of attorney for health care

2500. The use of the following form in the creation of a durable power of attorney for health care under Article 5

(commencing with Section 2430) of Chapter 2 is lawful, and when used, the power of attorney shall be construed in accordance with this chapter and shall be subject to Article 5 (commencing with Section 2430) of Chapter 2; provided, however, that the use of the form previously authorized by this section (at the time it was so authorized) remains valid.

**STATUTORY FORM DURABLE POWER OF
ATTORNEY FOR HEALTH CARE
(California Civil Code Section 2500)**

**WARNING TO PERSON EXECUTING THIS
DOCUMENT**

THIS IS AN IMPORTANT LEGAL DOCUMENT WHICH IS AUTHORIZED BY THE KEENE HEALTH CARE AGENT ACT. BEFORE EXECUTING THIS DOCUMENT, YOU SHOULD KNOW THESE IMPORTANT FACTS:

THIS DOCUMENT GIVES THE PERSON YOU DESIGNATE AS YOUR AGENT (THE ATTORNEY IN FACT) THE POWER TO MAKE HEALTH CARE DECISIONS FOR YOU. YOUR AGENT MUST ACT CONSISTENTLY WITH YOUR DESIRES AS STATED IN THIS DOCUMENT OR OTHERWISE MADE KNOWN.

EXCEPT AS YOU OTHERWISE SPECIFY IN THIS DOCUMENT, THIS DOCUMENT GIVES YOUR AGENT THE POWER TO CONSENT TO YOUR DOCTOR NOT GIVING TREATMENT OR STOPPING TREATMENT NECESSARY TO KEEP YOU ALIVE.

NOTWITHSTANDING THIS DOCUMENT, YOU HAVE THE RIGHT TO MAKE MEDICAL AND OTHER HEALTH CARE DECISIONS FOR YOURSELF SO LONG AS YOU CAN GIVE INFORMED CONSENT WITH RESPECT TO THE PARTICULAR DECISION. IN ADDITION, NO TREATMENT MAY BE GIVEN TO YOU OVER YOUR OBJECTION AT THE TIME, AND HEALTH CARE NECESSARY TO KEEP YOU ALIVE MAY NOT BE

STOPPED OR WITHHELD IF YOU OBJECT AT THE TIME.

THIS DOCUMENT GIVES YOUR AGENT AUTHORITY TO CONSENT, TO REFUSE TO CONSENT, OR TO WITHDRAW CONSENT TO ANY CARE, TREATMENT, SERVICE, OR PROCEDURE TO MAINTAIN, DIAGNOSE, OR TREAT A PHYSICAL OR MENTAL CONDITION. THIS POWER IS SUBJECT TO ANY STATEMENT OF YOUR DESIRES AND ANY LIMITATIONS THAT YOU INCLUDE IN THIS DOCUMENT. YOU MAY STATE IN THIS DOCUMENT ANY TYPES OF TREATMENT THAT YOU DO NOT DESIRE. IN ADDITION, A COURT CAN TAKE AWAY THE POWER OF YOUR AGENT TO MAKE HEALTH CARE DECISIONS FOR YOU IF YOUR AGENT (1) AUTHORIZES ANYTHING THAT IS ILLEGAL, (2) ACTS CONTRARY TO YOUR KNOWN DESIRES, OR (3) WHERE YOUR DESIRES ARE NOT KNOWN, DOES ANYTHING THAT IS CLEARLY CONTRARY TO YOUR BEST INTERESTS.

~~UNLESS YOU SPECIFY A SHORTER PERIOD IN THIS DOCUMENT, THIS POWER WILL EXIST FOR SEVEN YEARS FROM THE DATE YOU EXECUTE AND, IF YOU ARE UNABLE TO MAKE HEALTH CARE DECISIONS FOR YOURSELF AT THE TIME WHEN THIS SEVEN-YEAR PERIOD ENDS, THIS POWER WILL CONTINUE TO EXIST UNTIL THE TIME WHEN YOU BECOME ABLE TO MAKE HEALTH CARE DECISIONS FOR YOURSELF. THE POWERS GIVEN BY THIS DOCUMENT WILL EXIST FOR AN INDEFINITE PERIOD OF TIME UNLESS YOU LIMIT THEIR DURATION IN THIS DOCUMENT.~~

YOU HAVE THE RIGHT TO REVOKE THE AUTHORITY OF YOUR AGENT BY NOTIFYING YOUR AGENT OR YOUR TREATING DOCTOR, HOSPITAL, OR

OTHER HEALTH CARE PROVIDER ORALLY OR IN WRITING OF THE REVOCATION.

YOUR AGENT HAS THE RIGHT TO EXAMINE YOUR MEDICAL RECORDS AND TO CONSENT TO THEIR DISCLOSURE UNLESS YOU LIMIT THIS RIGHT IN THIS DOCUMENT.

UNLESS YOU OTHERWISE SPECIFY IN THIS DOCUMENT, THIS DOCUMENT GIVES YOUR AGENT THE POWER AFTER YOU DIE TO (1) AUTHORIZE AN AUTOPSY, (2) DONATE YOUR BODY OR PARTS THEREOF FOR TRANSPLANT OR THERAPEUTIC OR EDUCATIONAL OR SCIENTIFIC PURPOSES, AND (3) DIRECT THE DISPOSITION OF YOUR REMAINS.

THIS DOCUMENT REVOKES ANY PRIOR DURABLE POWER OF ATTORNEY FOR HEALTH CARE.

YOU SHOULD CAREFULLY READ AND FOLLOW THE WITNESSING PROCEDURE DESCRIBED AT THE END OF THIS FORM. THIS DOCUMENT WILL NOT BE VALID UNLESS YOU COMPLY WITH THE WITNESSING PROCEDURE.

IF THERE IS ANYTHING IN THIS DOCUMENT THAT YOU DO NOT UNDERSTAND, YOU SHOULD ASK A LAWYER TO EXPLAIN IT TO YOU.

YOUR AGENT MAY NEED THIS DOCUMENT IMMEDIATELY IN CASE OF AN EMERGENCY THAT REQUIRES A DECISION CONCERNING YOUR HEALTH CARE. EITHER KEEP THIS DOCUMENT WHERE IT IS IMMEDIATELY AVAILABLE TO YOUR AGENT AND ALTERNATE AGENTS OR GIVE EACH OF THEM AN EXECUTED COPY OF THIS DOCUMENT. YOU MAY ALSO WANT TO GIVE YOUR DOCTOR AN EXECUTED COPY OF THIS DOCUMENT.

DO NOT USE THIS FORM IF YOU ARE A CONSERVATEE UNDER THE LANTERMAN-PETRIS-SHORT ACT AND YOU WANT TO APPOINT YOUR

CONSERVATOR AS YOUR AGENT. YOU CAN DO THAT ONLY IF THE APPOINTMENT DOCUMENT INCLUDES A CERTIFICATE OF YOUR ATTORNEY.

1. DESIGNATION OF HEALTH CARE AGENT. I,

(Insert your name and address)

do hereby designate and appoint _____

(Insert name, address, and telephone number of one individual only as your agent to make health care decisions for you. None of the following may be designated as your agent: (1) your treating health care provider, (2) a nonrelative employee of your treating health care provider, (3) an operator of a community care facility, (4) a nonrelative employee of an operator of a community care facility, (5) an operator of a residential care facility for the elderly, or (6) a nonrelative employee of an operator of a residential care facility for the elderly.)

as my attorney in fact (agent) to make health care decisions for me as authorized in this document. For the purposes of this document, "health care decision" means consent, refusal of consent, or withdrawal of consent to any care, treatment, service, or procedure to maintain, diagnose, or treat an individual's physical or mental condition.

2. CREATION OF DURABLE POWER OF ATTORNEY FOR HEALTH CARE. By this document I intend to create a durable power of attorney for health care under Sections 2430 to 2443, inclusive, of the California Civil Code. This power of attorney is authorized by the Keene Health Care Agent Act and shall be construed in accordance with the provisions of Sections 2500 to 2506, inclusive, of the California Civil Code. This power of attorney shall not be affected by my subsequent incapacity.

3. GENERAL STATEMENT OF AUTHORITY GRANTED. Subject to any limitations in this document, I hereby grant to my agent full power and authority to make health care decisions for me to the same extent that I could make such decisions for myself if I had the capacity to do so.

In exercising this authority, my agent shall make health care decisions that are consistent with my desires as stated in this document or otherwise made known to my agent, including, but not limited to, my desires concerning obtaining or refusing or withdrawing life-prolonging care, treatment, services, and procedures.

(If you want to limit the authority of your agent to make health care decisions for you, you can state the limitations in paragraph 4 ("Statement of Desires, Special Provisions, and Limitations") below. You can indicate your desires by including a statement of your desires in the same paragraph.)

4. STATEMENT OF DESIRES, SPECIAL PROVISIONS, AND LIMITATIONS.

(Your agent must make health care decisions that are consistent with your known desires. You can, but are not required to, state your desires in the space provided below. You should consider whether you want to include a statement of your desires concerning life-prolonging care, treatment, services, and procedures. You can also include a statement of your desires concerning other matters relating to your health care. You can also make your desires known to your agent by discussing your desires with your agent or by some other means. If there are any types of treatment that you do not want to be used, you should state them in the space below. If you want to limit in any other way the authority given your agent by this document, you should state the limits in the space below. If you do not state any limits, your agent will have broad powers to make health care decisions for you, except to the extent that there are limits provided by law.)

In exercising the authority under this durable power of attorney for health care, my agent shall act consistently with my desires as stated below and is subject to the special provisions and limitations stated below:

(a) Statement of desires concerning life-prolonging care, treatment, services, and procedures:

(b) Additional statement of desires, special provisions, and limitations: _____

(You may attach additional pages if you need more space to complete your statement. If you attach additional pages, you must date and sign EACH of the additional pages at the same time you date and sign this document.)

5. INSPECTION AND DISCLOSURE OF INFORMATION RELATING TO MY PHYSICAL OR MENTAL HEALTH. Subject to any limitations in this document, my agent has the power and authority to do all of the following:

- (a) Request, review, and receive any information, verbal or written, regarding my physical or mental health, including, but not limited to, medical and hospital records.
- (b) Execute on my behalf any releases or other documents that may be required in order to obtain this information.
- (c) Consent to the disclosure of this information.

(If you want to limit the authority of your agent to receive and disclose information relating to your health, you must state the limitations in paragraph 4 ("Statement of Desires, Special Provisions, and Limitations") above.)

6. SIGNING DOCUMENTS, WAIVERS, AND RELEASES. Where necessary to implement the health care decisions that my agent is authorized by this document to make, my agent has the power and authority to execute on my behalf all of the following:

- (a) Documents titled or purporting to be a "Refusal to Permit Treatment" and "Leaving Hospital Against Medical Advice."

(b) Any necessary waiver or release from liability required by a hospital or physician.

7. AUTOPSY; ANATOMICAL GIFTS; DISPOSITION OF REMAINS. Subject to any limitations in this document, my agent has the power and authority to do all of the following:

(a) Authorize an autopsy under Section 7113 of the Health and Safety Code.

(b) Make a disposition of a part or parts of my body under the Uniform Anatomical Gift Act (Chapter 3.5 (commencing with Section 7150) of Part 1 of Division 7 of the Health and Safety Code).

(c) Direct the disposition of my remains under Section 7100 of the Health and Safety Code.

(If you want to limit the authority of your agent to consent to an autopsy, make an anatomical gift, or direct the disposition of your remains, you must state the limitations in paragraph 4 ("Statement of Desires, Special Provisions, and Limitations") above.)

8. DURATION.

(Unless you specify a shorter period *otherwise* in the space below, this power of attorney will exist for ~~seven years from the date you execute this document and, if you are unable to make health care decisions for yourself at the time when this seven-year period ends, the power will continue to exist until the time when you become able to make health care decisions for yourself an indefinite period of time.~~)

This durable power of attorney for health care expires on

(Fill in this space **ONLY** if you want ~~the authority of your agent to end EARLIER than the seven-year period described above.~~ to limit the duration of this power of attorney.)

9. DESIGNATION OF ALTERNATE AGENTS.

(You are not required to designate any alternate agents but you may do so. Any alternate agent you designate will be able to make the same health care decisions as the agent you designated in paragraph 1, above, in the event that agent is unable or ineligible to act as your agent. If the agent you designated is your spouse, he or she becomes ineligible to act as your agent if your marriage is dissolved.)

If the person designated as my agent in paragraph 1 is not available or becomes ineligible to act as my agent to make a health care decision for me or loses the mental capacity to

make health care decisions for me, or if I revoke that person's appointment or authority to act as my agent to make health care decisions for me, then I designate and appoint the following persons to serve as my agent to make health care decisions for me as authorized in this document, such persons to serve in the order listed below:

A. First Alternate Agent _____

(Insert name, address, and telephone number of first alternate agent)

B. Second Alternate Agent _____

(Insert name, address, and telephone number of second alternate agent)

10. NOMINATION OF CONSERVATOR OF PERSON.

(A conservator of the person may be appointed for you if a court decides that one should be appointed. The conservator is responsible for your physical care, which under some circumstances includes making health care decisions for you. You are not required to nominate a conservator but you may do so. The court will appoint the person you nominate unless that would be contrary to your best interests. You may, but are not required to, nominate as your conservator the same person you named in paragraph 1 as your health care agent. You can nominate an individual as your conservator by completing the space below.)

If a conservator of the person is to be appointed for me, I nominate the following individual to serve as conservator of the person _____

(Insert name and address of person nominated as conservator of the person)

11. PRIOR DESIGNATIONS REVOKED. I revoke any prior durable power of attorney for health care.

DATE AND SIGNATURE OF PRINCIPAL

(YOU MUST DATE AND SIGN THIS POWER OF ATTORNEY)

I sign my name to this Statutory Form Durable Power of Attorney for Health Care on _____ at _____,

(Date)

(City)

(State)

(You sign here)

(THIS POWER OF ATTORNEY WILL NOT BE VALID UNLESS IT IS SIGNED BY TWO QUALIFIED WITNESSES WHO ARE PRESENT WHEN YOU SIGN OR ACKNOWLEDGE YOUR SIGNATURE. IF YOU HAVE ATTACHED ANY ADDITIONAL PAGES TO THIS FORM, YOU MUST DATE AND SIGN EACH OF THE ADDITIONAL PAGES AT THE SAME TIME YOU DATE AND SIGN THIS POWER OF ATTORNEY.)

STATEMENT OF WITNESSES

(This document must be witnessed by two qualified adult witnesses. None of the following may be used as a witness: (1) a person you designate as your agent or alternate agent, (2) a health care provider, (3) an employee of a health care provider, (4) the operator of a community care facility, (5) an employee of an operator of a community care facility, (6) the operator of a residential care facility for the elderly, or (7) an employee of an operator of a residential care facility for the elderly. At least one of the witnesses must make the additional declaration set out following the place where the witnesses sign.)

(READ CAREFULLY BEFORE SIGNING. You can sign as a witness only if you personally know the principal or the identity of the principal is proved to you by convincing evidence.)

(To have convincing evidence of the identity of the principal, you must be presented with and reasonably rely on any one or more of the following:

(1) An identification card or driver's license issued by the California Department of Motor Vehicles that is current or has been issued within five years.

(2) A passport issued by the Department of State of the United States that is current or has been issued within five years.

(3) Any of the following documents if the document is current or has been issued within five years and contains a photograph and description of the person named on it, is signed by the person, and bears a serial or other identifying number:

(a) A passport issued by a foreign government that has been stamped by the United States Immigration and Naturalization Service.

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

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

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

(4) If the principal is a patient in a skilled nursing facility, a witness who is a patient advocate or ombudsman may rely upon the representations of the administrator or staff of the skilled nursing facility, or of family members, as convincing evidence of the identity of the principal if the patient advocate or ombudsman believes that the

representations provide a reasonable basis for determining the identity of the principal.)

(Other kinds of proof of identity are not allowed.)

I declare under penalty of perjury under the laws of California that the person who signed or acknowledged this document is personally known to me (or proved to me on the basis of convincing evidence) to be the principal, that the principal signed or acknowledges this durable power of attorney in my presence, that the principal appears to be of sound mind and under no duress, fraud, or undue influence, that I am not the person appointed as attorney in fact by this document, and that I am not a health care provider, an employee of a health care provider, the operator of a community care facility, an employee of an operator of a community care facility, the operator of a residential care facility for the elderly, nor an employee of an operator of a residential care facility for the elderly.

Signature: _____ Residence address: _____

Print name: _____

Date: _____

Signature: _____ Residence address: _____

Print name: _____

Date: _____

(AT LEAST ONE OF THE ABOVE WITNESSES MUST ALSO SIGN THE FOLLOWING DECLARATION.)

I further declare under penalty of perjury under the laws of California that I am not related to the principal by blood, marriage, or adoption, and, to the best of my knowledge, I am not entitled to any part of the estate of the principal upon the death of the principal under a will now existing or by operation of law.

Signature: _____

Signature: _____

STATEMENT OF PATIENT ADVOCATE OR OMBUDSMAN

(If you are a patient in a skilled nursing facility, one of the witnesses must be a patient advocate or ombudsman. The following statement is required only if you are a patient in a skilled nursing facility — a health care facility that provides the following basic services: skilled nursing care and supportive care to patients whose primary need is for availability of skilled nursing care on an extended basis. The patient advocate or ombudsman must sign both parts of the “Statement of Witnesses” above AND must also sign the following statement.)

I further declare under penalty of perjury under the laws of California that I am a patient advocate or ombudsman as designated by the State Department of Aging and that I am serving as a witness as required by subdivision (f) of Section 2432 of the Civil Code.

Signature: _____

Comment. Section 2500 is amended to delete the former reference to the seven-year limit for a durable power of attorney for health care, and to substitute new language drawn from the warning statement for a printed form durable power of attorney that is not a durable power of attorney for health care. See Section 2510. The former seven-year limit has been repealed for a power executed on or after January 1, 1992, that does not contain a warning statement that refers to a seven-year limit on its duration. See Section 2436.5.

Civil Code § 2503.5 (amended). Forms

2503.5. (a) *Subject to Section 2436.5, a statutory form durable power of attorney for health care executed on or after January 1, 1986, using a form that complied with Section 2500 as originally enacted, or as amended by Chapter 403 of the Statutes of 1985, or as amended by Chapter 1543 of the Statutes of 1988, or as amended by Chapter 331 of the Statutes of 1990, is as valid as if it had been executed using a form that complied with the requirements of Section 2500 as amended in effect at the time of execution.*

(b) Notwithstanding Section 2501, a statutory form durable power of attorney for health care executed on or after January 1, 1986, is not invalid if it contains the warning using the

language set forth in Section 2500 as originally enacted, *or as amended by Chapter 403 of the Statutes of 1985, or as amended by Chapter 1543 of the Statutes of 1988, or as amended by Chapter 331 of the Statutes of 1990*, instead of the warning using the language set forth in that section as **amended in effect at the time of execution.**

(c) For the purposes of subdivision (c) of Section 2503, on and after January 1, 1986, a printed statutory form durable power of attorney for health care may be sold or otherwise distributed if it contains the exact wording of the form set out in Section 2500 as originally enacted, or the exact wording of the form set out in Section 2500 as amended *by Chapter 403 of the Statutes of 1985, or as amended by Chapter 1543 of the Statutes of 1988, or as amended by Chapter 331 of the Statutes of 1990*, including the warning and instructions, and nothing else; but any printed statutory form durable power of attorney for health care printed on or after January 1, 1986, 1992, that is sold or otherwise distributed in this state for use by a person who does not have the advice of legal counsel shall contain the exact wording of the form set out in Section 2500 ~~as amended in effect at the time of printing~~, including the warning and instructions, and nothing else.

Comment. Section 2503.5 is amended to do the following:

(1) To validate a durable power of attorney for health care executed on a statutory form that complied with any of the prior amended versions of Section 2500 or 2501.

(2) To permit sale or distribution of a printed statutory form durable power of attorney for health care if it contains the exact wording of the form set out in any of the prior amended versions of Section 2500.

(3) To require that a statutory form durable power of attorney for health care printed on or after January 1, 1992, that is sold or distributed in this state for use by a person without counsel have the exact wording set out in Section 2500 in effect at the time of printing.

A durable power of attorney for health care containing a warning statement that refers to a seven-year limit on its duration expires seven years after the date of its execution unless at the end of the seven-year period the principal lacks capacity to make health care decisions, in

which case the durable power of attorney for health care continues in effect until the time when the principal regains the capacity to make health care decisions. Section 2436.5.

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

relating to

**Recognition of Agent's Authority Under
Statutory Form Power of Attorney**

November 1990

**California Law Revision Commission
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303-4739**

This recommendation includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were enacted since their primary purpose is to explain the law as it would exist (if enacted) to those who will have occasion to use it after it is in effect.

Cite this recommendation as *Recommendation Relating to Recognition of Agent's Authority Under Statutory Form Power of Attorney*, 20 Cal. L. Revision Comm'n Reports 2629 (1990).

STATE OF CALIFORNIA

GEORGE DEUKMEJIAN, Governor

CALIFORNIA LAW REVISION COMMISSION

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November 29, 1990

To: **The Honorable George Deukmejian**
 Governor of California, and
 The Legislature of California

The Uniform Statutory Form Power of Attorney Act was enacted on Commission recommendation in the 1990 legislative session. See Civil Code §§ 2475-2499.5, enacted by 1990 Cal. Stat. ch. 986. This recommendation would make the statutory form more effective by making clear that a third person may be compelled to honor the agent's authority under the statutory form to the same extent as the principal could compel the third person to act. A third person who acts unreasonably in refusing to honor the agent's authority under the statutory form would be liable for attorney's fees in an action to compel acceptance. The recommended legislation would also protect third persons whose refusal is required by a state or federal statute or regulation.

This recommendation is made pursuant to Resolution Chapter 37 of the Statutes of 1980.

Respectfully submitted,

Roger Arnebergh
Chairperson

RECOMMENDATION

The Uniform Statutory Form Power of Attorney Act was enacted in 1990 to provide a simple, readily understandable, and widely usable power of attorney form.¹ In order to fully accomplish its purposes, the statutory form needs to be accepted by third persons with whom the agent desires to transact business on behalf of the principal. Judging from past experience with powers of attorney prepared by attorneys and with statutory and nonstatutory forms, the intentions of persons who believe they have put their affairs in order, consistent with the applicable law, have been frustrated by the unwillingness of some third persons to honor a power of attorney and accept the authority of the agent under a power of attorney.² In many cases, this reluctance may simply be a bureaucratic reaction to the variety of powers of attorney that the particular business or institution may encounter. Some businesses have adopted a general policy of not honoring powers of attorney unless executed on a form approved by the business itself. In other cases, a third person may genuinely be in doubt as to the authority of the agent even after taking the time to examine the power of attorney.

Existing law attempts to deal with this problem by protecting third persons from liability in specified circumstances. Civil Code Section 2404 protects a third person who relies on the agent's affidavit in support of the

1. Civil Code §§ 2475-2499.5, enacted by 1990 Cal. Stat. ch. 986, § 2. This legislation was enacted on recommendation of the Law Revision Commission. See *Recommendation Relating to Uniform Statutory Form Power of Attorney Act*, 20 Cal. L. Revision Comm'n Reports 415 (1990).

2. See, e.g., Montgomery & Wright, *Durable Powers of Attorney for Property Management*, in 1990 California Durable Power of Attorney Handbook §§ 2.56-2.61 (Cal. Cont. Ed. Bar), discussing policies of banks with regard to accounts, safe deposit boxes, and trusts, and of title companies, insurance companies, and stock transfer agents.

statutory form, the same as any other power of attorney.³ This affidavit protects a third person from liability for actions undertaken in good faith reliance on the affidavit as to issues of termination and revocation of the power of attorney,⁴ but has no compulsory effect on third persons. Similarly, Civil Code Section 2512 protects a third person who acts in good faith reliance on a power of attorney, including a statutory form power of attorney,⁵ if the power of attorney is presented by the named agent, appears to be valid on its face, and includes a notary public's acknowledgment.⁶ This protection should work well with a statutory form power of attorney presented to a third person by the agent named in the instrument because the statute requires it to be acknowledged before a notary public⁷ and the facial validity of the form should be easy to determine. As before, however, these provisions encourage, but do not compel, acceptance by third persons.

The Law Revision Commission recommends adding a provision to the Uniform Statutory Form Power of Attorney Act to address these problems. The proposed legislation would permit the agent under a properly executed statutory form power of attorney to bring an action to compel a third person to accept the agent's authority to the same extent as the principal would be able to compel the third person to act if an

3. For background on Civil Code Section 2404, see *Recommendation Relating to Uniform Durable Power of Attorney Act*, 15 Cal. L. Revision Comm'n Reports 351 (1980). This general provision in the Uniform Durable Power of Attorney Act (Civil Code §§ 2400-2407) applies to the Uniform Statutory Form Power of Attorney Act (Civil Code §§ 2475-2499.5) as provided in Civil Code Section 2480(a).

4. The appropriate extent of the protection afforded by Civil Code Section 2404 for powers of attorney generally is the subject of a pending study by the Law Revision Commission. See also *Recommendation Relating to Recognition of Trustees' Powers* [November 1990].

5. See Civil Code § 2480(c).

6. For background on Civil Code Section 2512, see *Recommendation Relating to Durable Powers of Attorney*, 18 Cal. L. Revision Comm'n Reports 305 (1986).

7. See Civil Code §§ 2475 (form), 2476(c) (acknowledgment of principal's signature).

action were brought on the principal's own behalf.⁸ This provision would permit an action against a business, insurance company, financial institution, or other person who holds property of the principal, who owes a debt to the principal, or who owes a duty or performance to the principal. It would not permit the agent to compel a third person to act where the principal could not do so. Thus, a business that could choose not to accept the principal as a customer would be completely free to decline to deal with the agent.

In order to make the proposed remedy effective, the proposed legislation also requires the court to award attorney's fees in an action to compel acceptance of the agent's authority if the court finds that the third person acted unreasonably in refusing to accept the agent's authority.⁹ The proposed legislation makes clear, however, that a third person would not be acting unreasonably if the refusal to accept the agent's authority under the power of attorney was authorized or required by a state or federal statute or regulation. On the other hand, the proposed legislation provides that a third person will not be found to have acted reasonably if the sole reason for refusing to accept the agent's authority was insistence on use of the third person's own form.

8. This rule is similar to the power of a decedent's successor to enforce delivery or payment of property under the affidavit procedure for collection and transfer of property of a small estate. See Prob. Code § 13105(b). The general power of attorney statute in Minnesota also contains a similar provision. See Minn. Stat. Ann. § 523.20 (West Supp. 1990).

9. This provision is also drawn from the affidavit procedure for collection and transfer of a small estate to a successor. See Prob. Code § 13105(b).

PROPOSED LEGISLATION

Civil Code § 2412 (amended). Relief available

2412. 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 in effect 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.

(e) *Compelling a third person to honor the authority of an agent under a statutory form power of attorney pursuant to Section 2480.5.*

Comment. Section 2412 is amended to add subdivision (e) which recognizes the remedy provided under Section 2480.5 (compelling third person to honor statutory form power of attorney).

Civil Code § 2480.5 (added). Compelling third person to honor statutory form power of attorney; liability for attorney's fees

2480.5. (a) If a third person to whom a properly executed statutory form power of attorney under this chapter is

presented refuses to honor the agent's authority under the power of attorney within a reasonable time, the third person may be compelled to honor the agent's authority under the power of attorney, in an action for this purpose brought against the third person, to the same extent as the principal would be able to compel the third person to honor the authority of the principal acting in the principal's own behalf.

(b) If an action is brought under this section, the court shall award attorney's fees to the agent if the court finds that the third person acted unreasonably in refusing to accept the agent's authority under the statutory form power of attorney.

(c) For the purpose of subdivision (b) and without limiting other grounds that may constitute a reasonable refusal to accept an agent's authority under a statutory form power of attorney, a third person does not act unreasonably in refusing to accept the agent's authority if the refusal is authorized or required by a provision of a state or federal statute or regulation.

(d) Notwithstanding subdivision (c), a third person's refusal to accept an agent's authority under a statutory form power of attorney under this chapter is unreasonable if the only reason for the refusal is that the power of attorney is not on a form prescribed by the third person to whom the power of attorney is presented.

(e) The remedy provided in this section is cumulative and nonexclusive.

Comment. Section 2480.5 is a new provision not found in the Uniform Statutory Form Power of Attorney Act (1988). Subdivisions (a) and (b) are drawn in part from Probate Code Section 13105(b) (compelling payment or delivery under affidavit procedure for collection or transfer of personal property of small estate). See also Section 2404 (affidavit of lack of knowledge of termination of power of attorney).

Subdivision (a) permits an agent to bring an action to compel a third person to honor a statutory form power of attorney to the same extent as the principal, disregarding any legal disability, could bring an action to compel the third person to act. Under this rule, a third person who could not be forced to do business with the principal consequently may not be

forced to deal with the agent. However, a third person who holds property of the principal, who owes a debt to the principal, or who is obligated by contract to the principal may be compelled to accept the agent's authority.

In addition, as provided in subdivision (b), if the refusal to deal with the agent is found to be unreasonable, the third person will also be liable for attorney's fees incurred in the action to compel compliance. The determination of reasonableness depends on the particular circumstances of each case. A person to whom the power of attorney is presented may, for example, act reasonably in refusing to accept the agent's authority where it is not clear that the power of attorney grants the agent authority with respect to the particular transaction. Likewise, a third person may reasonably refuse to honor the power of attorney if, for example, the person is not reasonably satisfied as to the identity of the agent or has information that would lead a reasonable person to question the validity of the power of attorney. See also Section 2512 (protection of person relying in good faith).

Subdivision (c) provides some specific guidelines as to the meaning of the reasonableness rule in subdivision (b) as it relates to the liability for attorney's fees. However, subdivision (d) makes clear that an institution's preference for its own power of attorney form is never a reasonable ground for refusing to accept the authority of an agent under a properly executed and effective statutory form power of attorney.

The general provisions governing judicial proceedings concerning powers of attorney under Sections 2410-2423 apply to the remedies set forth in Section 2480.5. See Sections 2412(e), 2480(b).