Memorandum 85-8

Subject: Study L-500 - Durable Powers of Attorney

The Commission's Tentative Recommendation Relating to Durable Powers of Attorney was distributed to approximately 350 persons and organizations for review and comment. A copy of the tentative recommendation is attached.

We received 13 letters commenting on the tentative recommendation. These letters are attached to this memorandum. The letters support the recommendation although some of them object to a particular provision of the tentative recommendation. Exhibits 2 and 3 approve the tentative recommendation without any suggestions for revision. The following is an analysis of the other letters.

COMPLEXITY OF STATUTES

Exhibit 11 is a letter from Elliot D. Pearl, Sacramento, noting the complexity of the statutes governing durable powers of attorney and suggesting that one simple statute be substituted. Exhibit 13 (Francis J. Collin, Jr.) suggests that a single uniform execution procedure be provided. It cannot be denied that these statutes are complex. But the complexity is the result of compromises made to satisfy concerns of various groups interested in the controversial matter of delegation of life-and-death decisions to an agent. There is no practical possibility of achieving the objective sought by attorney Pearl. And to achieve the objective sought by Mr. Collin would require that the execution procedure for durable powers of attorney concerning property matters be made more complex. The tentative recommendation does, however, seek to make the statutes more consistent. The Continuing Education of the Bar needs to give a course on durable powers and to publish material explaining the law and how to use it.

USE OF NOTARY PUBLIC

In preparing the tentative recommendation, the Commission considered the question whether to continue the existing authority to use a notary public as an alternate to two ordinary witnesses for a durable power of attorney for health care. The new statutory form for a durable power of attorney for health care does not permit use of a notary public instead

of two ordinary witnesses. The Commission decided to continue the existing requirement that permits use of the notary public as the sole witness for a durable power of attorney for health care that is NOT a statutory form durable power of attorney for health care. The existing statutory provision is set out at the middle of page 9 of the attached tentative recommendation. The Commission was advised that some notaries are willing to take an acknowledgment of a durable power using the form of acknowledgment required by the existing statute, and the Commission was urged not to delete this authority.

Exhibit 5 is a letter from the National Notary Association that notes the inconsistency between the statutory form and other durable powers of attorney for health care insofar as use of a notary is concerned. The letter takes the position that a notary can not determine whether a signer "appears to be of sound mind and under no duress, fraud, or undue influence," although this is the same determination that the ordinary witnesses to the durable power are required to make. In this connection, you should read Exhibit 6 which is an article written by a staff attorney, Society for the Right to Die, New York, discussing the provision to which the Association object and concluding that it is a desirable and workable provision. The staff is not persuaded by the letter that any change is needed in the tentative recommendation or the existing law.

OBJECTION BY PRINCIPAL TO THE PROVIDING OF HEALTH CARE

The most controversial provision of the tentative recommendation is the revision of Section 2440 on page 15 of the tentative recommendation. The tentative recommendation deleted a provision from Section 2440 that stated that nothing in the statute authorizes an attorney in fact to consent to health care if the principal objects to the health care.

The Bioethics Committee of the Los Angeles County Bar Association (Exhibit 7) wrote a strong letter in support of the deletion of this provision. The Committee stated in part:

> The Committee believes that this language should in fact be deleted from the statute, and that it has in many cases created substantial problems, and in effect makes the use of a durable power of attorney questionable and useless.

Exhibit 4 (Cyril Lawrence, Merced) objects to the deletion on the ground that "it is unreasonable to remove safeguards of the patient's desires during lucid moments." To make clear that the attorney in fact does not have authority to require medical treatment when the patient

has the capacity to make the decision whether or not to have the treatment (the capacity to give informed consent), the staff suggests that the last sentence of the Comment to Section 2440 on page 15 of the tentative recommendation be revised to read:

> However, the attorney in fact does not have authority to require that health care be provided over the principal's objection if the principal at that time has the capacity to make the decision whether or not to consent to the providing of the health care. See Section 2434(a). And the principal can revoke the authority to provide the health care under the durable power of attorney if the principal has the capacity to do so. See Section 2437(a), (c).

The persons who object to the deletion of consent-to-health-care provision fear that a patient will be kept alive over his or her objections. However, there are several protections against this. The primary protection is that the attorney in fact is selected by the principal and is a person to whom the principal when competent was willing to give authority to make life-and-death decisions. Moreover, the attorney in fact must comply with the desires of the principal when the principal was competent to express desires. The staff does not believe that a patient who is not lucid should be permitted to refuse necessary medical care that the person the patient selected to make the decision believes is necessary where providing the health care is not inconsistent with the patient's known desires when lucid.

Exhibit 8 (Grace K. Banoff, La Jolla) objects to the deletion on the grounds that a conscious person who cannot give informed consent still should be able to refuse painful health care. Exhibit 9 (Richard A. Gorini, San Jose) objects on the ground that it is inconsistent to permit the incompetent patient to object to the withdrawal of health care but at the same time refuse to permit the incompetent patient to object to the providing of health care. The staff believes there is a difference between the case where the patient objects to removal of health care needed to keep the patient alive and the case where the patient objects to the providing of health care that is necessary to keep the patient alive. In both cases, the policy decision is that it is best to keep the patient alive if that is not inconsistent with the known desires of the patient at the time the patient had capacity.

LIMITATION OF AUTHORITY GIVEN UNDER STATUTORY SHORT FORM POWER OF ATTORNEY

Exhibit 8 (Grace K. Banoff, La Jolla) comments concerning the Statutory Short Form Power of Attorney (set out on pages 16-20 of the tentative recommendation):

> Although the printed warning mandated by Civil Code § 2450 gives notice that the document authorizes the attorney in fact to borrow money using the principal's property as security, the Statement of Authority in ¶3 of the form does not provide a convenient way of witholding authority to borrow money with or without security by merely striking out an enumerated power.

The relevant portions of the form are paragraph 3 at the bottom of page 17 and the top of page 18, and paragraph 4 on page 18, of the tentative recommendation. If one desires to limit any power otherwise given to the attorney in fact by the statutory form, the person need merely so state in paragraph 4 of the form. For example, if it is desired to withold authority to borrow money with or without security, it would be necessary only to add the following in the blank space in paragraph 4:

The agent has no authority to borrow money with or without security.

This should become clearer when the California Continuing Education of the Bar (or some other publisher) publishes a book on how to use the various durable power of attorney in California. Such a publication also should minimize the confusion that some lawyers (e.g., Exhibit 11) have concerning the use of the form.

The staff is not persuaded that any change is needed in the form.

PROOF OF IDENTITY OF PRINCIPAL BY CONVINCING EVIDENCE

The new Statutory Short Form Power of Attorney and the new Statutory Form Durable Power of Attorney for Health Care require that the document be signed by two adult witnesses. The declaration under penalty of perjury that each witness must sign includes a declaration that the person who signed or acknowledged the document "is personally known to me (or proved to me on the basis of convincing evidence) to be the principal." The statute does not define what constitutes "convincing evidence" for the purposes of this declaration, and the meaning of those words is unclear.

The tentative recommendation adds a statutory definition of "convincing evidence" to the statute and adds instructions to the forms that tell the witness what constitutes "convincing evidence." See page 19 of

tentative recommendation (Statutory Short Form Durable Power of Attorney) and pages 27-28 (Statutory Form Durable Power of Attorney for Health Care). If the witness does not personally know the principal, the witness must reasonably rely on one of the kinds of proof of identity listed. Other kinds of proof of identity are not allowed. This scheme was designed to provide some certainty to the statute.

In a preliminary draft of the tentative recommendation, the instructions advised the witness to refer to the pertinent section of the Civil Code (Section 2511 on pages 31 and 32 of the tentative recommendation) for a listing of the types of proof the witness could use to establish the identity of the principal. The Commission revised this preliminary draft to reflect the Commission's decision that the types of proof should be listed in the instructions because the Civil Code might not be available to the witnesses who use a printed form.

Three of the comments include comments that relate to this scheme. Exhibit 5 (National Notary Association) states that "few witnesses without notarial, retail or law enforcement experience would be able to spot a counterfeit or tampered phony ID card" and suggests that the witness be allowed to rely only upon the identification of a credible individual personally known to the witness. If there is someone who personally knows both the principal and the witness, that person could serve as the witness unless the witness is disqualified because the person is the health care agent or a relative that will inherit property or one of the other persons described in the first paragraph of the instructions under Statement of Witnesses on page 27. It would not make much sense to allow a person who is disqualified from serving as a witness because of the possibility of fraud or the like to identify the principal for a witness who does not know the principal. There will be cases where there are not two eligible witnesses who personally know the principal, yet the principal wants to designate a trusted person to serve as his or her health care agent. The staff is not persuaded that the fear of phony identification cards is one that justifies depriving such a person of the right to designate a health care agent. Accordingly, we believe that it is sound to specify by statute precisely what kind of documents constitute convincing proof.

Exhibit 10 (Probate and Estate Planning Section, Kern County Bar Association) concluded that the instructional information under the

heading "Statement of Witnesses" (see page 27 of the tentative recommendation) is too long, but the section could not agree on the best method of simplifying the instructions. You should read this letter for the three alternative solutions that different factions of the section supported.

Exhibit 1 (Justice Robert Kingsley) suggests that the form be supplemented by an addition:

> I think it would be desirable, in the case the witness(es) rely on "convincing evidence" to have the witness(es) indicate (probably by check off) which of the six forms of proffered [evidence] he (she) relied on.

Justice Kingsley's suggestion has appeal. The staff in preparing the draft relating to the use of an affidavit to collect personal property belonging to a decedent included the following provision in the staff draft:

> If the affidavit does not contain a notary public's certificate of acknowledgment of the identity of the persons executing the affidavit, the holder [of the decedent's property] shall note on the affidavit for each person either that the person executing the affidavit is personally known or a description of the identification provided by the person executing the affidavit.

The staff believes that it will be a rare case where the witnesses do not personally know the principal. We agree that the detail in the instructions complicates the form and that the length of the instruction creates a likelihood that the witness will not read the instructions. We believe that the form should be designed primarily for the case where the witnesses personally know the principal. Where the witnesses do not personally know the principal, we do not believe that it is unreasonable to require them to examine the relevant statute. Although the suggestion of Justice Kingsley has appeal, it would greatly complicate the statute. We would need to provide space for a checklist for <u>each</u> witness, since one might know the principal and the other rely on identification. The form is complex now; we do not want to make it more complex. Accordingly, the staff recommends that the following be substituted for the underlined material on page 27:

> (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.)
>
> (SPECIAL REQUIREMENT IF YOU DO NOT PERSONALLY KNOW THE PRINCIPAL. If you do not personally know the principal, do not sign until after you have read and complied with Section 2511 of the California

Civil Code. That section tells you the kinds of proof of identity that must be shown to you. No other kind of proof of identity is allowed. IF YOU SIGN WITHOUT COMPLYING WITH THIS REQUIREMENT, YOU ARE SUBJECT TO THE PENALTY FOR PERJURY.)

The staff recommends that a comparable substitution be made for the underlined material on page 19.

If the Commission does not adopt the staff recommendation, we recommend that this portion of the tentative recommendation be approved after revising the first portion of the second sentence of the underlined material to read:

> To have convincing proof of the identity of the principal you ~~must not be aware of any information, evidence, or other circumstances that would lead you, as a reasonable person to believe that the person signing or acknowledging this instrument as principal is not the individual he or she claims to be and, in addition,~~ you must be presented with and reasonably rely on any one or more of the following:

DISPOSITION OF PRINCIPAL'S REMAINS

Exhibit 12 (Jerome Sapiro) is concerned that there may be a conflict between the directions in the principal's will concerning prepaid arrangements or other disposition of the remains and the authority given the attorney in fact to dispose of the principal's remains.

Exhibit 14 is a draft of a provision that seeks to clarify this matter. The staff recommends it as a desirable clarification.

AFTER-ACQUIRED PROPERTY

Exhibit 13 (Francis J. Collin, Jr.) is concerned that durable powers of attorney drawn by lawyers will fail to include a provision that makes clear that the authority of the attorney in fact extends to after-acquired property. He suggests that some provision be made by statute to allow a durable power of attorney to pick up after-acquired property. The staff is reluctant to propose such a statute; we believe that the matter should be determined by the intent reflected in the instrument.

It is of interest to note that the Statutory Short Form Durable Power of Attorney (drafted by the Commission) specifically deals with this matter. The statutory provision describing what authority is given by giving authority with respect to "real estate transactions" (Civil Code § 2460) provides in part:

> (b) All powers described in this section are exercisable equally with respect to any interest in real property owned by the

principal at the time of the giving of the power of attorney or thereafter acquired, whether located in this state or elsewhere.

The statutory provisions that spell out the powers given to the attorney in fact by the statutory short form durable power of attorney serve as a model that can be used by an attorney drafting such a power of attorney. Moreover, it is unnecessary to spell out in a power of attorney drafted by a lawyer all of the details of the powers granted; the powers given by the various Civil Code sections relating to the statutory short form durable power of attorney can be incorporated by reference. This leaves only those powers of attorney in existence now. The staff would be reluctant to draft a provision governing their interpretation.

APPROVAL FOR PRINTING AND SUBMISSION TO LEGISLATION

This tentative recommendation was well received. The comments received are concerned with details of the tentative recommendation or with matters not dealt with in the tentative recommendation.

The staff recommends that the tentative recommendation be approved for printing after it has been revised to reflect the Commission's decisions in reviewing this memorandum. We further recommend that the proposed legislation, revised to reflect the Commission's decisions at the meeting, be introduced in the 1985 legislative session. We propose to ask Senator Keene who has carried our bills in this field to carry the proposed legislation.

Respectfully submitted,

John H. DeMoully
Executive Secretary

STATE OF CALIFORNIA
COURT OF APPEAL
SECOND DISTRICT—DIVISION FOUR
3580 WILSHIRE BOULEVARD
LOS ANGELES, CALIFORNIA 90010

ROBERT KINGSLEY
ASSOCIATE JUSTICE

November 27, 1984

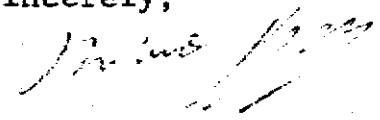
California Law Revision Commission,
4000 Middlefield Road, Suite D-2,
Palo Alto, California 94303

Gentlemen:

I have received, and read, the Tentative Recommendations on: (1) Provision for Support if Support Obligor Dies; (2) Effect of Adoption or Out of Wedlock Birth on Rights at Death; (3) Distribution Under a Will or Trust; (4) Protection of Mediation Communications; (5) Recording Severance of Joint Tenancy; (6) Abandoned Easement; and (7) Durable Powers of Attorney. I find no comments necessary as to five of the Recommendations, but do have comments as to two:

(2) Durable Powers: I think it would be desirable, in the case the witness(es) rely on "convincing evidence" to have the witness(es) indicate (probably by check off) which of the six forms of proffered he (she) relied on.

Sincerely,



HENRY ANGERBAUER, CPA
8401 WILLOW GLEN CT.
CONCORD, CA 94521

12/2/84

Law Revision Commission

I have read your tentative recommendations relating to Durable Powers of attorney and agree with your proposals and conclusions. I ~~and~~ suggest you implement them by suggesting them to the legislature for enactment in to law. Best Personal Regards to all of you there and keep up the good work

Sincerely

H

Exhibit 3

VERNE H. PYNN
ATTORNEY AT LAW
4318 LEEWOOD PLACE
P.O. BOX 21418
CONCORD, CALIFORNIA 94521
Telephone (415) 680-1984

December 3, 1984

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

Re: Tentative Recommendation
Relating to
(1) DURABLE POWERS OF ATTORNEY

Gentlemen:

I have reviewed the subject tentative recommendation and am in full accord with same.

Thank you for sending the document on to me for my perusal.

Yours very truly,

VERNE H. PYNN

VHP:j

LAW OFFICES OF
CYRIL LAWRENCE, INC.
PROFESSIONAL CORPORATION
555 West 26th Street - Suite B
P.O. Box 2528
Merced, California 95344

Cyril L. Lawrence

Telephone
(209) 383-6854

November 27, 1984

Mr. John H. DeMoully
Executive Secretary
CALIFORNIA LAW REVISION
COMMISSION
400 Middlefield Road, Suite D-2
Palo Alto, CA 94303

RE: New Probate Code

Dear Mr. DeMoully:

I have reviewed the material forwarded by letter of November 14th. Having reviewed the various recommendations, I wish to express my comments relating to Durable Powers of Attorney.

The Durable Power of Attorney is expressly designed to deal with temporary or permanent incapacity short of death. To eliminate the specific restrictions dealing with patient objections creates in my mind a serious question of objective. While the execution of the Durable Power of Attorney is often well in advance of the disability, it is unreasonable to remove safeguards of the patient's desires during lucid moments under the theory that the patient is not deprived of the power to revoke the Durable Power of Attorney.

I urge the Committee to reconsider its tentative recommendation to delete that portion of the statute which authorizes an Attorney in Fact to consent to provide a health care where the patient/principal objects.

Very truly yours,

CYRIL LAWRENCE, INC.
Professional Corporation

BY: Cyril L. Lawrence
CYRIL L. LAWRENCE

CLL:lg

NATIONAL NOTARY ASSOCIATION
Since 1957
23012 Ventura Blvd., P.O. Box 4625, Woodland Hills, California 91364-1186
Telephone: (213) 347-2035, Cable: NOTARIAN

MILTON G. VALERA
President
DEBORAH M. THAW
Executive Director
RAYMOND C. ROTHMAN
Founder

November 27, 1984

Mr. John DeMoully
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94306

Dear Mr. DeMoully:

Thank you for the opportunity to comment on the five legislative proposals relating, respectively, to abandoned easements, recording severance of joint tenancy, distribution under a will or trust, effect of adoption or out-of-wedlock birth on rights at death, and durable powers of attorney.

Our only comments are on the tentative recommendations relating to durable powers of attorney:

1. It seems inconsistent that notarization of the Statutory Short Form Power of Attorney (Section 2450) is mandatory but notarization of the Statutory Form Durable Power of Attorney for Health Care (Section 2500) is optional, according to Section 2432. Furthermore, there is no instruction on the latter statutory form itself that notarization is an option.

2. Although guidelines for "convincing" documentary evidence of identity would be provided for witnesses (as borrowed from Civil Code Section 1185), few witnesses without notarial, retail or law enforcement experience would be able to spot a counterfeit or tampered phony ID card. Why not make identification through a credible individual personally known to the witness an option, as it is in Civil Code Section 1185? No special expertise would then be required of the witness.

3. The notarial certificates in the Statutory Short Form Power of Attorney (Section 2450) and in Section 2432 are inconsistent. The former complies with the certificate prescribed in Civil Code Section 1189, while the latter requires a Notary to declare that a signer "appears to be of sound mind and under no duress, fraud, or undue influence." At present, no law in any state asks the ministerial Notary to determine a signer's

soundness of mind or the lawfulness of a transaction; these are determinations about which even experienced physicians and attorneys can disagree.

Please contact me or Charles N. Faerber, our vice president of Legislative and Educational Affairs, if you wish a fuller explanation of my comments.

Sincerely,

Milton G. Valera
President

MGV:jd
020120

cc: Charles N. Faerber

EXHIBIT 6

NOTARY Viewpoint

October 1984 Volume XII, Number 5

Durable Power of Attorney

Should California Notaries Be Judging A 'Sound Mind'?

Do Notaries have the training or skill to know whether a document signer is competent — that is, fully understands what the signed document means? Most states answer, "No." However, there has been an interesting development in one state in regard to the Notary's duty to assess the competence of signers of certain powers of attorney — Editor.

By Fenella Rouse, Staff Attorney
Society for the Right to Die
New York, New York

California now has a Durable Power of Attorney Act which allows people to appoint an agent to make medical treatment decisions on their behalf if they should become incompetent.

The procedure for appointing an agent to make these decisions is reasonably complex but the provision which is of particular interest to Notaries Public is that to be valid, the power of attorney must be *either* acknowledged before a Notary Public in California or signed by two witnesses.

In what appears to be the first example of a Notary Public being specifically required to attest to the signer's mental abilities, the Notary Public before whom the document is acknowledged is required to declare, under penalty of perjury, that the person whose name is subscribed "appears to be of sound mind and under no duress, fraud, or undue influence."

In fact the requirement may not be as innovative as it at first seems, and Notaries Public should not be alarmed, nor think of it as onerous. As stated in the National Notary Association pamplet, "What is a Notary Public?", what a Notary does is to certify to the identity of the signer and to the fact, "that the signer intends the document to be used for the purposes stated in the document." The California Act is really asking no more than that. What is at issue is whether the person subscribing knows what he or she is doing, and intends to do it. Thus the question of perjury would arise only if the Notary Public's best estimation was that the subscriber's mind was not sound, so that he or she did not know what was being signed and/or did not realize what grant of power was in fact being given, and ignoring this, the Notary willfully and deliberately, nonetheless, certified the signature.

It is worth noting, at this point, that if the person appointing an agent under the Act chooses to have two witnesses, instead of a Notary Public

attest to the signature, the witnesses are also required to declare that the principal "appears to be of sound mind and under no duress, fraud or undue influence."

Implicit in the witnessing requirements is the legislature's concern that durable powers of attorney should only be executed knowingly, willingly and voluntarily.

It is for this reason that the law limits those who can serve as witnesses. At least one must not be related to the appointor nor stand to inherit: neither witness can be an employee of the health care provider, nor an operator of a community care facility and, of course, neither witness can be the principal's agent.

Neither Notaries nor witnesses are expected to be pyschiatrists. The role that Notaries are required to play under the California Durable Power of Attorney Act, is their traditional one of impartial witness assuring the public that the agreement that has in fact been signed was entered into knowingly and willingly.

Although the California Durable Power Act stipulates that the appointing document can be either witnessed or notarized, it is not clear from the statute whether this alternative exists when the principal is a patient in a "skilled nursing facility." The Act requires that in such a circumstance one of the witnesses must be a patient advocate or ombudsman. The statute is unclear as to whether the power will be valid if acknowl-

Continued on page 5

Judging A 'Sound Mind'

Continued from page 2

edged by a Notary alone, without a patient advocate or ombudsman as a witness, even if a Notary has certified the document.

California's Durable Power of Attorney for health care was recently changed — effective January 1, 1985 — to remove the option for notarization. Instead, the new version asks two non-Notary witnesses to attest to the signer's "sound mind." — Editor

Memo 85-8

Exhibit 7

IRENE L. SILVERMAN
ATTORNEY AT LAW
10100 SANTA MONICA BOULEVARD
SUITE 2500
LOS ANGELES, CALIFORNIA 90067
TELEPHONE (213) 553-4999

December 13, 1984

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
4000 Middlefield Road
Suite D-2
Palo Alto, Ca. 94303

Re: Durable Power of Attorney

Dear John:

As you know, the Bioethics Committee of the Los Angeles County Bar Association was quite actively involved with the language and making suggestions in connection therewith regarding the current statutes relating to the Durable Power of Attorney for Health Care.

I have recently received the Commission's tenative Recommendation relating to the Durable Power of Attorney for Health Care, and brought it to the attention of our committee.

Since we were particulary concerned at the time, with the language relating to medical treatment of a principal over the principal's objections, we have noted with great interest the Staff's recommendation to delete the langauge in Section 2440, relating to consenting to health care over the objections of the principal.

The Committee believes that this language should in fact be deleted from the statute, and that it has in many cases created substantial problems, and in effect makes the use of a durable power of attorney questionable and useless.

Accordingly, the Bioethics Committee of the Los Angeles County Bar Association wanted the Commission to know that it supports the commission's recommendation to delete this language in Section 2440, and believes that it is necessary to make the statute more meaningful.

This comment and opinion is that of the Bioethics Committee only, and does not in any way represent the position of the Los Angeles County Bar Association.

IRENE L. SILVERMAN
ATTORNEY AT LAW

We welcome the opportunity to continue to work with the Commission in connection with the Durable Power of Attorney for Health Care, as well as any other related health care issues which may come before the Commission.

Best personal regards, and my sincerest wishes for a very happy and healthy holiday season.

Very truly yours,

Irene Silverman

IRENE L. SILVERMAN
Chair of the Subcommittee on
Durable Power of Attorney for
Health Care
Bioethics Committee of the Los
Angeles County Bar Association

ILS:dh
cc: Jan Almquist, Co-Chair, Bioethics Committee
Vicki Michel, Co-Chair, Bioethics Committee

GRACE K. BANOFF
Attorney at Law
733 Kline Street #304
La Jolla, CA 92037
(619) 459-9563

December 12, 1984

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303

Gentlemen:

The enclosed memoranda comment on discussion drafts H601, L500, and L659.

I omit comment on L605, DISTRIBUTION UNDER A WILL OR TRUST, as I am neutral on its recommendation.

Very truly yours,

Grace K. Banoff

TO: LAW REVISION COMMISSION

FROM: GRACE K. BANOFF

RE: #L500
Discussion Draft dated 11/13/84
DURABLE POWERS OF ATTORNEY

DATE: DECEMBER 10, 1984

HEALTH CARE

I strongly oppose the proposed amendment of Civil Code §2440.

To my mind, a conscious person who may not be able to give informed consent should still be able at any time to refuse health care especially if the treatment is painful. Requiring the principal formally to revoke the power of attorney before countermanding previous instructions is unrealistic if a conscious patient wants to order a physician to omit or to stop a painful procedure immediately. Moreover, the patient may want to refuse particular care but may want the durable power to remain in effect in the event he becomes unconscious.

The proposed amendment would benefit the physician at the expense of the patient.

STATUTORY SHORT FORM POWER OF ATTORNEY

Although the printed warning mandated by Civil Code §2450 gives notice that the document authorizes the attorney in fact to borrow money using the principal's property as security, the Statement of Authority in ¶3 of the form does not provide a convenient way of withholding authority to borrow money with or without security by merely striking out an enumerated power.

I believe that alternative should be added to the list of specific items which may be prohibited.

Respectfully submitted,

Grace K. Banoff

Memo 85-8

Exhibit 9

BOSKOVICH, GORINI & VANASSE
ATTORNEYS AT LAW

1671 THE ALAMEDA
SUITE 304
SAN JOSE, CALIFORNIA 95126-2222

Peter J. Boskovich
Richard A. Gorini

(408) 286-6314

Charles F. Vanasse
Associate Counsel

December 12, 1984

Mr. John DeMoully
Executive Secretary
California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, California 94306

Dear Mr. DeMoully:

The following are comments on Tentative Recommendations L-500 and H-601. These are solely my opinions since I have just been appointed to replace Carla Holt as head of the legislative subcommittee for the Santa Clara County Bar Estate Planning Sections and have not yet been able to schedule a meeting of the new members.

L-500 DURABLE POWERS OF ATTORNEY: Your recommendations regarding the authority of the attorney in fact where the principal objects to the providing of health care seems to create a double standard .

For example, if an incompetent (frequently an opinion rather than an adjudication) principal objects to the providing of health care, the attorney in fact can consent to its provision if consistent with the principal's expressed desires or best interests. But if that same incompetent principal objects to the withdrawal of health care, the attorney in fact cannot consent to such withdrawal.

Although it may be difficult to imagine disputing the requests for health care from anyone, be they incompetent or not, it would appear that a logical approach would require a petition for instructions from a court to resolve any disputes between the principal and attorney in fact, absent the revocation of the durable power. Otherwise, in one case the attorney in fact can dispute the incompetent principal and in the other, the attorney in fact cannot dispute such principal's requests.

Sincerely,

Richard A. Gorini, Esq.

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THOMAS A. CREAR
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DAVID M. ZELIGS

December 17, 1984

FILE NO.

Mr. John H. DeMoully, Executive Secretary
CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Suite D-2
Palo Alto, California 94303

Dear Mr. DeMoully:

This letter contains the comments of the Probate and Estate Planning Section of the Kern County Bar Association on the five specific recommendations you sent to me. Please add the following persons to your mailing list who would like to review and comment on future recommendations:

Thomas A. Tutton, Esq.
DEADRICH, BATES & TUTTON
1122 Truxtun Avenue
Bakersfield, CA 93301

James Hulsy, Esq.
HULSY & HULSY LAW OFFICES
412 Truxtun Avenue
Bakersfield, CA 93301

Vernon Kalshan, Esq.
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The Probate and Estate Planning Section of the Kern County Bar Association is willing to review and comment on preliminary drafts of the new Probate Code and would like to receive copies of the materials the Commission distributes. We request that the materials be sent out more than one month before the comment period ends, if possible, to give us more time to study the recommendations.

Our committee which reviewed the five recommendations had no objection to the recommendations on transfer without probate of title to certain property registered by the state and effect of adoption or out of wedlock birth on rights at death. We have specific comments on the other three recommendations.

Durable Powers of Attorney

The only section we objected to was the "Proof of identify of principal by convincing evidence" section. Our committee was badly split over this section.

1. One faction of the committee approved of the concept of having an instruction to the witnesses, but would prefer that it be condensed into half the number of words. Our concern is that if it is too long, the witnesses will not read it. For example, you could combine (2) and (3)(a) into one sentence and you could combine (3)(b), (3)(c) and (3)(d) into one sentence. This faction of the committee had no problem with these types of proof being exclusive.

2. Another faction of the committee would change the word "convincing" in the existing statute to "satisfactory" and would cross-reference the term to the definition in Civil Code section 1185. This faction would include on the form only your first sentence stating that a witness must personally know the principal or the identity of the principal must be proved by convincing evidence and a simple reference to see Civil Code section 1185 for what constitutes "convincing evidence." This faction did not believe the witnesses needed any guidance.

3. A third faction of the committee felt that a very simplified version of the instruction be on the form. This faction felt that the requirement that the witness not be aware of any evidence which would lead him to believe the principal was other than he claimed to be is unnecessary since such a witness could not be "convinced" by any amount of other proof. This faction would shorten the warning to three short statements (much like in 1. above) but would not limit the proof to only those types of proofs listed.

As I stated, the committee was very split over this issue. Everyone agreed that the warning was too long.

We hope that our comments have been of some use to you.

PROBATE AND ESTATE PLANNING
SECTION, KERN COUNTY BAR
ASSOCIATION

By: Hal M. Koontz
HAL M. KOONTZ, President

HMK:alm

LAW OFFICES OF
ELLIOT D. PEARL
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December 6, 1984

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

Attn: John H. DeMoully

Dear Mr. DeMoully:

I am pleased to have been nominated by Mr. Frantz to serve on the committee and to review the tentative proposals of the Law Revision Commission relating to probate law. I have reviewed the same and have the following general comments which perhaps will be of some assistance. Should specific recommendations be desired, I will be happy to meet with other committee members or with the Commission itself to discuss these.

5. With regard to the health care durable power of attorney, I have found this to be a virtually impossible document, even under the present law, and the requirements of executing the same are so onerous that it is virtually unusable. I do not feel that the changes being proposed will make this any less difficult. With regard to the regular durable power of attorney, the printed form is confusing and contains too much verbiage. It should be simplified. Even those which are drafted by attorneys are so complicated that it makes it difficult to explain.

With regard to the present form power of attorney, it is our suggestion that only one form of power of attorney be designated and that this power of attorney include place for the health care provisions, with the portion which is not to be used set forth in such fashion so that it can be deleted by interlineation. If the power of attorney is to include the health care provisions, then the formal requisites of this shall be required, ie. various witnesses, etc. If it is to be a simple statutory durable power of attorney, then the requirements for its execution can be carried out. This could be done by indicating what must be accomplished for the various types of power of attorney, either on the document itself or by an attachment which would be provided by the stationary store. I feel also, that since there is a Uniform Act

regarding durable power of attorney, we must be careful that we not differ in any material form from the laws of other states which have adopted the act, so as to assure that these power of attorneys will be valid in other states. This is particularly true not only because we have a mobile population but because of the fact that the transfer agents for many of the corporations are not within the State of California and the difficulty in convincing these transfer agents or brokerage houses that the power of attorney is valid might present itself.

Thank you for having allowed us to review these very important proposals; if further review is desirable or if the commission would like me to appear or consult directly with it, I would be happy to do so.

Respectfully submitted,

ELLIOT D. PEARL

EDP:ap

cc: Benjamin Frantz

Memo 85-8

Exhibit 12

LAW OFFICES
JEROME SAPIRO
100 BUSH STREET
SAN FRANCISCO 94104
(415) 362-7807

November 26, 1984

California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA, 94306
Thru: John DeMoully, Executive Secretary

Re: Comments on Proposed Recommendation #H-601, Proposed Tentative Recommendations #L-605 and #L-500, and Discussion Draft #1-659

Dear Mr. DeMoully:

Herewith for the California Law Revision Commission are my comments and recommendations concerning the above mentioned proposals, recently received from your office.

TENTATIVE RECOMMENDATION RE DURABLE POWERS OF ATTORNEY (11/13/84, #L-500)

Good work has been done in this area and the revisions appear to be in order.

However, there is one questionable area concerning the provisions of the Warning CC 2500, Statutory Form Durable Power of Attorney, subdivision (3) at the end of page 22, which reads:

"and (3) Direct the disposition of your remains".

This may conflict with directions in a will or codicil re funeral, burial, or other disposition. Such conflict should be avoided. There should be something added to the effect that in the event of conflict the provisions of the will, codicil, prepaid arrangements or other disposition of the remains (donor of power) shall prevail, - thereby requiring the attorney in fact to make appropriate inquiry. The arrangements for disposition of remains by the donor of the power should be preserved and protected.

This also affects 7 (c) and the instructional language there should be changed.

Thank you for this opportunity to participate.

I hope that my suggestions will help to make better law for our people and State.

Sincerely,

Jerome Sapiro

JS:mes
cc to Kenneth M. Klug, Chair
Estate Planning, Trust & Probate Law Section

FRANCIS J. COLLIN, JR.

DICKENSON, PEATMAN & FOGARTY
A PROFESSIONAL LAW CORPORATION
809 COOMBS STREET
NAPA, CALIFORNIA 94559-2977
TELEPHONE 707 252-7122

December 10, 1984

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

Re: Revisions to California's law on the Durable Power of Attorney

Gentlemen:

I understand that you are working on some clean-up legislation for California's Durable Power of Attorney law. I fully support your current proposal, especially your attempt to clear up the problem relating to the granting of proxies. I suggest that you also consider legislation addressed to the following problems:

1. Transactions regarding real estate. Most powers of attorney for asset management provide the attorney-in-fact with authority to make various transactions with respect to real property owned by the principal. There is a case in California, Jay v. Dollarhide, (1970) 3 Cal. App. 3d 1001, which apparently requires powers of attorney relating to real estate to include a description of the real estate to which the power applies or to grant to the attorney-in-fact the power to insert the legal descriptions of after-acquired real property into the Durable Power of Attorney. Many attorneys are not familiar with this apparent requirement. In addition, it creates a serious problem with respect to the identification of after-acquired real property and leaves open the possibility that the Durable Power of Attorney will not apply to such after-acquired real property. I think it would be extremely helpful if legislation can be drafted that would avoid the application of this case.

2. Execution procedures. With the adoption of two statutory forms, our Durable Power statute now incorporates three different execution procedures. The statutory Durable Power for Health Care must be witnessed. The statutory Durable Power for asset management must be witnessed and acknowledged. Other Durable Powers, i.e., Durable Powers other than the statutory powers, may be witnessed or acknowledged. I suggest that you revise the statute to incorporate a single execution procedure.

For whatever help it may be, I am enclosing memoranda dealing with the Dollarhide issue.

Very truly yours,

Francis J. Collin, Jr.
of Dickenson, Peatman & Fogarty

FJC:jb-s

MEMORANDUM

TO: Frank Collin

FROM: Steve Goldberg

RE: Jay v. Dollarhide

DATE: June 17, 1983

ISSUE

Whether Jay v. Dollarhide, (1970) 3 C.A.3d 1001, 84 C.R. 538 stands for the proposition that a durable power of attorney (DPA) can effectively authorize an agent, who deals with all of the principal's real property, to insert the description of later acquired property or whether the property must be specifically described in the instrument.

ANSWER

Jay v. Dollarhide, supra, should be interpreted to stand for the proposition that a durable power of attorney can authorize an agent, who is authorized to dispose of or deal with all (or some other similarly definite part) of the principal's real property, to fill in the description of real property acquired after the power of attorney is executed.

DISCUSSION

It is possible to interpret Jay v. Dollarhide, supra, as Anthony Cermak does in his letter of May 16, 1983, to require

specific descriptions of any real property in a DPA, but only by reading the case narrowly. When Cermak quotes Dollarhide for the rule that a specific description of land authorized to be sold or conveyed may not be inserted afterward, he is quoting the case somewhat out of context. The full quotation is:

> "The power to act is determined solely from the language of the instrument. (citation). Powers of attorney are strictly construed. Authority never is extended beyond that which is directly given or necessary and proper to carry the authority into full effect. (citation). A power of attorney to convey land must contain a description of the land authorized to be sold or conveyed. Stafford v. Lick, 13 Cal. 240; Honore v. Lemm, 181 Cal. 420, 184 P. 664. It may not be inserted afterward.

Id. at 1020. Thus, if a DPA grants an agent the right to dispose of or deal with all of his property (authorized solely by the language of the instrument), a requirement that each parcel of land be specifically described would defeat the purpose of the DPA. This apparent problem can be resolved by looking at the case that Dollarhide cites for the "specifically described land" rule. (See Fred Clarke memo of 11/22/82 for Honore v. Lemm discussion.)

In Stafford v. Lick, (1859) 13 Cal. 240, the court held that a DPA that purported to convey real property had to specifically describe that property where the principal had other property. The Stafford court seemed concerned with the uncertainty caused by the fact that the principal may have had other property. The Court stated:

> "What lot? Where situated? The paper would answer as well for a lot in San Jose, Monterey, or Los Angeles as in Yerba Buena. It is not shown that the premises in controversy is the only lot which was owned by Fernandez at the time and we are not to presume, in the absence of proof, that such was the case."

Stafford 13 Cal. at 242. Thus, if the grantor in Stafford had granted all of his property (e.g., the grantor grants one lot and owns only one lot) to the grantee, the Court implied that it would have given effect to the grant (the grant in Stafford was a power of attorney).

Dollarhide held that this particular power of attorney failed because the designated attorney-in-fact could not nominate a new agent.

The Court indicated that the designation of a new agent by the old agent was impossible because the creation of a personal agency relationship must involve the principal.

> "It is not competent for him (the principal) to transfer an incompleted instrument to another and for that other to make that nomination, since a personal relation of agency is created with the principal. This relationship goes beyond the designation of a mere sub-agent."

Dollarhide, 3 C.A.3d at 1020. While the Dollarhide court was also concerned with potential abuse of a substitute designation of an agent, its concern with the conceptual difficulty discussed above, renders it distinguishable from an insertion of the description of later-acquired real property. The uncertainty associated with the insertion of such a description can

be eliminated by using an authorization clause, as described in your article, that affects all later-acquired property.

Two negative inferences from the Dollarhide opinion support this conclusion. First, the Court states:

> "Semantically speaking, filling in a blank may not constitute an alteration (emphasis in original) when it is done with consent and authority. Nevertheless, to include and describe property other than that which was authorized (emphasis added) is a material alteration. (citation)."

Id. at 1021-22. Thus, the description of authorized property can be filled in when it is done with consent and authority. Second, as pointed out by Fred Clarke in his 11/22/82 memo, the Court states:

> "The donee of the power has no title to the property itself but has authority to act for the donor in the disposition of the property. Maggart, having no authority in writing, could not insert the name of the substitute attorney-in-fact nor a description of the property."

Id. at 1022. Thus, if Maggart had authority in writing, he could insert the name of a substitute attorney-in-fact and a description of the property. The danger of negative implications is highlighted here since the Dollarhide Court, as discussed, would be likely to disallow the designation of a substitute agent. Finally, it must be pointed out that these statements are dicta.

Dollarhide also held that the power of attorney to convey real property failed because the instrument did not contain a de-

scription of the land that was to be received in lieu of the base land that the principal had given to the United States (for the right to "in lieu" land). The United States never did give any land in lieu of the base land; it returned the base land to the heirs of the principal. Thus, even though the later-acquired land that was to be conveyed was easily identified, the Court still invalidated the power of attorney. While Cermak may think that this observation would support his conclusion, another paragraph on page 1022 indicates that the Court decided as it did based on a finding of fact rather than on an iron-clad conclusion of law. The Court stated:

> "The argument here is that the alterations were immaterial since they only supplied what otherwise would have been supplied by intendment. (citation) We find no such intendment in the specific terms of the powers of attorney.

Id. An authorization in the powers of attorney that includes all of the property of the principal should enable the courts to find such an intendment.

A policy argument in favor of allowing the DPA to include property that would be acquired after the instrument is executed can be analogized from the policy that allows wills to be ambulatory. Since a DPA becomes effective only upon the incapacity of the principal, it resembles a will as in both cases the principal cannot be consulted as to what he or she wanted. Just as a non-ambulatory will would force later-acquired property to

pass intestate, a non-ambulatory DPA would prevent later-acquired property from being utilized for the benefit of the incapacitated principal. As long as the execution of a DPA is guarded by adequate safeguards, there does not seem to be any policy for holding that a DPA should be non-ambulatory. Even if a DPA has fewer safeguards than a will, if a DPA's safeguards against forgery are sufficient, it should be allowed to be ambulatory where there is specific authorization to that effect. I need not comment on the sense of preventing a principal from utilizing a DPA to take care of the principal during his incapacity and in planning the principal's estate where it serves no sound policy.

CONCLUSION

Where the problem of uncertainty is eliminated by concise drafting of a DPA, the rationale of Jay v. Dollarhide, supra, poses no obstacle to the insertion of the description of later-acquired property by the agent in a properly authorized DPA.

M E M O R A N D U M

TO: Frank Collin
FROM: Fred Clarke
RE: Article on Durable Powers of Attorney
DATE: November 23, 1982

ISSUE

Whether a durable power of attorney which authorizes the agent to deal with real property must describe the real property.

ANSWER

Yes, except if the instrument authorizes the agent to fill in the description of the real estate.

ANALYSIS:

Jay v. Dollarhide (1970) 3 Cal.App. 3d 1001, 1020, 84 Cal. Rptr. 538 held that a power of attorney to convey real property was ineffective because the instrument failed to contain a description of the land. The court also held that an attempt by the attorney-in-fact who was not so authorized to fill in the description of the land rendered the instrument void as a material alteration of the instrument. No subsequent California case has apparently even cited this holding.

The court cited only two old cases as authority for this proposition: Stafford v. Lick, 13 Cal. 240, 242 and Honore v. Lemm, 181 Cal. 420, 422, 184 P.664. Honore v. Lemm was not exactly on point. It held that a receipt would be insufficient to establish a contract for the purchase and sale of land where the description of the land was inserted in the receipt after vendor had signed it and during his

absence. While St...ord v. Lick is not in ou. .ibrary (since it was published before Pacific Reporter began), I would guess that it too provides oblique support for the Dollarhide holding.

The court in Dollarhide relied mainly on the well-established principle that an authority to convey real estate must itself be in writing. Civil Code 1624(4). Since powers of attorney are strictly construed and an authority is never extended beyond that which is directly given or necessary and proper to carry the authority into full effect, it would be incongruous to allow a personal agent who is not specifically authorized to simply fill in a description of the real property "willy-nilly". Jay v. Dollarhide, 3 Cal.App. 3d at 1021.

This reasoning supports the suggestion of Mr. Palmer in his November 18, 1982 letter to you that a durable power of attorney should contain a specific provision authorizing the agent to insert a description of any real property referred to in the power. In fact, Dollarhide implies this in the following language:

> The donee of the power has no title to the property itself but has authority to act for the donor in the disposition of the property. Maggart, having no authority in writing, could not insert the name of the substitute attorney-in-fact nor a description of the property.

Id. at 1022.

Thus, the court points to a device that would allow an attorney-in-fact under a durable power of attorney to perform his duties and obligation to the donor, including conveying interests in the donor's real property, with great flexibility. The agent could be authorized in the instrument to insert the descriptions of the real property referred to in the power.

EXHIBIT 14

968/859

Civil Code § 2434 (amended). Priority of attorney in fact to make health care decisions

SEC. ____. Section 2434 of the Civil Code is amended to read:

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 decisions, but the attorney in fact does not have authority to make 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, before or after the death of 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, including~~:~~ (1) making a disposition under the Uniform Anatomical Gift Act, Chapter 3.5 (commencing with Section 7150.5) of Part 1 of Division 7 of the Health and Safety Code, (2) authorizing an autopsy under Section 7113 of the Health and Safety Code, and (3) directing the disposition of remains under Section 7100 of the Health and Safety Code. In exercising the authority under the durable power of attorney for health care, the attorney in fact has a duty to act consistent with the desires of the principal as expressed in the durable power of attorney or otherwise made known to the attorney in fact at any time or, if the principal's desires are unknown, to act in the best interests of the principal.

(c) Nothing in this article affects any right the person designated as attorney in fact may have, apart from the durable power of attorney for health care, to make or participate in the making of health care decisions on behalf of the principal.

(d) Notwithstanding subdivision (a) and (b), a person designated in the principal's will to direct the disposition of the principal's remains has priority over the attorney in fact in directing the disposi-

tion of the principal's remains; but neither the attorney in fact nor any other person is subject to criminal prosecution, civil liability, or professional disciplinary action for disposition of remains under the authority of the durable power of attorney if the person acts in good faith under the authority of the durable power of attorney without actual knowledge that a person other than the attorney in fact has priority for disposition of remains under the principal's will.

Comment. Subdivision (d) is added to Section 2434 to make clear that a person designated in the principal's will to make disposition of the principal's remains has priority for disposition of the principal's remains. The rule set out in subdivision (d) applies whether the will is executed before or after the durable power of attorney. However, if the attorney in fact acts to dispose of the principal's remains without actual knowledge that another person has priority to act under the principal's will, both the attorney in fact and any other person acting in good faith reliance upon the authority of the attorney in fact are protected from liability. Neither the attorney in fact nor any other person has a duty to investigate to determine whether another person has priority under the principal's will. A provision in the principal's will concerning, for example, the manner of disposition of the principal's remains is an expression of the principal's desires and governs the actions of the attorney in fact in disposing of the remains unless inconsistent with the desires of the principal expressed after the will was executed.

#L-500 11/13/84

STATE OF CALIFORNIA

C A L I F O R N I A L A W

R E V I S I O N C O M M I S S I O N

TENTATIVE RECOMMENDATION

relating to

DURABLE POWERS OF ATTORNEY

November 1984

Important Note: This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be considered when the Commission determines what recommendation, if any, it will make to the California Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you object to the tentative recommendation or that you believe that it needs to be revised. COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE SENT TO THE COMMISSION NOT LATER THAN DECEMBER 15, 1984.

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

CALIFORNIA LAW REVISION COMMISSION
4000 Middlefield Road, Suite D-2
Palo Alto, CA 94303

TENTATIVE RECOMMENDATION

relating to

DURABLE POWERS OF ATTORNEY

During recent years, four separate statutes relating to durable powers of attorney have been enacted upon recommendation of the Law Revision Commission.[1] The Commission has reviewed these statutes and the communications it has received concerning them. As a result of this review, the Commission recommends that a number of revisions, primarily technical or clarifying, be made in the statutes. These revisions are described below.[2]

Providing health care where principal objects

The durable power of attorney for health care statute includes a provision that nothing in the statute authorizes an attorney in fact to consent to the providing of health care if the patient objects to the health care.[3] This provision, for example, prevents the attorney in

1. The four statutes are:
   (1) Uniform Durable Power of Attorney Act (1981 Cal. Stats. ch. 511, adding Civil Code §§ 2400-2407 and 2410-2423, and 1984 Cal. Stats. ch. 312 §§ 1-3, amending Civil Code §§ 2410, 2416, and 2421). See 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).
   (2) Durable Power of Attorney for Health Care (1983 Cal. Stats. ch. 1204, adding Civil Code §§ 2430-2443 and 1984 Cal. Stats. ch. 312 §§ 4-7, amending Civil Code §§ 2433, 2434, and 2437 and adding Civil Code § 2432.5. See Recommendation Relating to Durable Power of Attorney for Health Care Decisions, 17 Cal. L. Revision Comm'n Reports 101 (1984). For additional legislative history, see 17 Cal. L. Revision Comm'n Reports 822, 889-95 (1984).
   (3) Keene Health Care Agent Act--Statutory Form Durable Power of Attorney for Health Care (1984 Cal. Stats. ch. 312, adding Civil Code §§ 2500-2508). See Recommendation Relating to Statutory Forms for Durable Power of Attorney, 17 Cal. L. Revision Comm'n Reports 701 (1984).
   (4) Statutory Short Form Power of Attorney (1984 Cal. Stats. ch. 602, adding Civil Code §§ 2450-2473). See Recommendation Relating to Statutory Forms for Durable Power of Attorney, 17 Cal. L. Revision Comm'n Reports 701 (1984).

2. In addition to the revisions described in the text, other technical and clarifying revisions are recommended. These are noted in the Comments that follow the text of the recommended statutory provisions.

3. Civil Code § 2440.

fact from giving consent to health care necessary to keep an incompetent patient alive if the patient objects at the time, even where providing the health care is consistent with the patient's desires before the patient became incompetent.[4] The Commission recommends that this provision be deleted from the statute. Whether the attorney in fact can consent to the providing of health care would then depend on whether the providing of the health care is consistent with the desires of the principal or, if the desires are not known, whether the providing of the health care is in the best interests of the principal.[5] The deletion would not deprive the principal of the power to revoke the durable power of attorney if the principal has the capacity to do so.[6] Nor would the deletion affect the existing provision that the durable power of attorney for health care does not authorize the attorney in fact to consent to the withholding or withdrawal of health care necessary to keep the principal alive if the principal objects to the withholding or withdrawal of the health care.[7]

Proof of identity of principal by "convincing evidence"

The new Statutory Short Form Power of Attorney and the new Statutory Form Durable Power of Attorney for Health Care require that the document be signed by two adult witnesses.[8] The declaration under penalty of

4. The attorney in fact who is available and willing to make health care decisions has priority over other persons to act for the principal in all matters of health care decisions. Civil Code § 2434(a). But the durable power of attorney for health care statute does not affect any right the person designated as attorney in fact may have, apart from the durable power of attorney for health care, to make or participate in the making of health care decisions on behalf of the principal. Civil Code § 2434(c).

5. See Civil Code § 2434 ("In exercising the authority under the durable power of attorney for health care, the attorney in fact has a duty to act consistent with the desires of the principal as expressed in the durable power of attorney or otherwise made known to the attorney in fact at any time or, if the principal's desires are unknown, to act in the best interests of the principal.").

6. See Civil Code § 2437.

7. Civil Code § 2440.

8. Civil Code §§ 2452 (Statutory Short Form Power of Attorney), 2502 (Statutory Form Durable Power of Attorney for Health Care).

perjury that each witness must sign includes a declaration that the person who signed or acknowledged the document "is personally known to me (or proved to me on the basis of convincing evidence) to be the principal."[9] The statute does not define what constitutes "convincing evidence" for the purposes of this declaration, and the meaning of those words is unclear.

The Commission recommends that a statutory definition of "convincing evidence" be provided and that the instructions in the forms tell the witness what constitutes "convincing evidence." The recommended legislation requires both of the following in order that the identity of the principal be proved to the witness on the basis of "convincing evidence":

(a) The witness must not be aware of any information, evidence, or other circumstances that would lead the witness, as a reasonable person, to believe that the person signing or acknowledging the document as principal is not the individual he or she claims to be.

(b) The witness 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:

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

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

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

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

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9. See the Statement of Witnesses in Civil Code Sections 2450 and 2500.

Voting of corporate shares

The California Uniform Durable Power of Attorney Act[10] contains language not found in the official version of the Uniform Act:

> For the purposes of this article, a durable 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 another statute of California.

This language may create a problem by suggesting that one cannot give a durable power to vote corporate shares, thus requiring a cumbersome and expensive conservatorship for that purpose.[11] The Commission recommends that the statute be revised to make clear that a principal may give an attorney in fact the power to vote the principal's shares either in person or by giving a proxy to a third person.[12] The proxies themselves would continue to be governed by the Corporations Code, not the durable power of attorney statute.[13] This clarification would be consistent with the new statutory short form power of attorney which permits the attorney in fact to vote corporate shares "in person or by the granting of a proxy."[14]

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10. Civil Code § 2400(a) (last sentence).

11. See letter from Louis Naiditch, Los Angeles lawyer, dated August 27, 1984, to California Law Revision Commission (on file in office of Commission).

12. The proposed legislation adds to Section 702 of the Corporations Code the following new subdivision:

> (e) If authorized to vote the shares by the power of attorney by which the attorney in fact was appointed, shares held by or under the control of an attorney in fact may be voted and the corporation may treat all rights incident thereto as exercisable by the attorney in fact, in person or by proxy, without the transfer of the shares into the name of the attorney in fact.

13. The proposed legislation adds the following new section to the Civil Code:

> 2400.5. Where a durable power of attorney gives an attorney in fact the power to exercise voting rights, a proxy given by the attorney in fact to another to exercise the voting rights is subject to all the provisions of law applicable to such proxy and is not a durable power of attorney subject to this article.

14. Civil Code § 2462(a)(5)(H), enacted by 1984 Cal. Stats. ch. 602.

Printed forms distributed for use by person without lawyer

The new Statutory Form Durable Power of Attorney for Health Care requires that a "warning" (using the exact language contained in the statute) be included in any printed form sold "or otherwise distributed" for use by a person who does not have the advice of legal counsel.[15] Other existing earlier enacted provisions require a similar warning only in forms "sold" for use by persons without a lawyer.[16] These provisions should be expanded to apply not only where the form is sold but also where it is "otherwise distributed" for use by a person without a lawyer. Requiring the warning in these forms, whether sold or "otherwise distributed," will provide some assurance that a person who uses one of the forms will be aware of the important facts contained in the warning before he or she execute the document.

Other conforming revisions

Other conforming revisions are recommended to make the various provisions governing durable powers of attorney consistent with one another. These changes include:

(1) Conforming the language of the lawyer's certificate in Section 2432 to the language prescribed for the lawyer's certificate under Civil Code Sections 2421, 2433(c)(2), 2451, and 2501.

(2) Conforming the requirements for the size of type required for the warning in a form by Civil Code Sections 2400 and 2433 to the size of type requirements stated in Civil Code Sections 2451(a), 2501(a), and 2503(c).

(3) Making the warning required by Civil Code Section 2433 consistent with the warning required by Civil Code Section 2500.

Use of existing printed forms

Although the proposed legislation recommended by the Commission will make changes in the form for the Statutory Short Form Power of Attorney[17] and the Statutory Form Durable Power of Attorney for Health

15. Civil Code § 2503. See also Civil Code § 2451 (absent a certificate signed by the principal's lawyer, a Statutory Short Form Power of Attorney, to be valid, must include the warning contained in Section 2450).

16. Civil Code §§ 2400(b) (printed form of a durable power of attorney), 2433(a) (introductory clause) (printed form of a durable power of attorney for health care).

17. Civil Code § 2450.

Care,[18] the changes are made in the warning or informational portions of the form and not in the text of the durable power of attorney itself. For this reason, the recommended legislation includes provisions that permit use of a form that complies with present law after the proposed legislation goes into effect. In addition, the proposed legislation includes a provision that makes clear that the validity of a power of attorney executed before the proposed legislation goes into effect is not affected by the enactment of the proposed legislation.

Recommended Legislation

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

An act to amend Sections 2400, 2432, 2432.5, 2433, 2440, 2450, 2451, and 2500 of, to add Sections 2400.5, 2457, and 2503.5 to, and to add Chapter 5 (commencing with Section 2510) to Title 9 of Part 4 of Division 3 of, the Civil Code, and to amend Section 702 of the Corporations Code, relating to powers of attorney.

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

18. Civil Code § 2500.

Civil Code § 2400 (amended). Durable power of attorney

SECTION 1. Section 2400 of the Civil Code is amended to read:

2400. ~~(a)~~ A durable power of attorney is a power of attorney by which a principal designates another his or her attorney in fact in writing and the writing contains the words "This power of attorney shall not be affected by subsequent incapacity of the principal," or "This power of attorney shall become effective upon the incapacity of the principal," or similar words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding the principal's subsequent incapacity. ~~For the purposes of this article, a durable 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.~~

~~(b) 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:~~

~~WARNING TO PERSON EXECUTING THIS DOCUMENT~~

~~This is an important legal document. It creates a durable power of attorney. Before executing this document, you should know these important facts:~~

~~1. This document may provide the person you designate as your attorney in fact with broad powers to dispose, sell, convey, and encumber your real and personal property.~~

~~2. These powers will exist for an indefinite period of time unless you limit their duration in this document. These powers will continue to exist notwithstanding your subsequent disability or incapacity.~~

~~3. You have the right to revoke or terminate this durable power of attorney at any time.~~

~~(c) Nothing in subdivision (b) invalidates any transaction in which a third person relied in good faith upon the authority created by the durable power of attorney.~~

Comment. Section 2400 is amended to delete the last sentence of subdivision (a) and all of subdivisions (b) and (c). The last sentence of subdivision (a) is superseded by Section 2400.5. See also Corp. Code § 702(e). Subdivisions (b) and (c) are superseded by Section 2510.

Civil Code § 2400.5 (added). Proxy given by attorney in fact

SEC. 2. Section 2400.5 is added to the Civil Code, to read:

2400.5. Where a durable power of attorney gives an attorney in fact the power to exercise voting rights, a proxy given by the attorney in fact to another to exercise the voting rights is subject to all the provisions of law applicable to such proxy and is not a durable power of attorney subject to this article.

Comment. Section 2400.5 supersedes language formerly found in subdivision (a) of Section 2400. This revision is clarifying and more accurately states the original intent of the superseded language. See also Corp. Code § 702(e).

For the rules applicable to proxy voting in business corporations, see Corp. Code Section 705. For other statutes dealing with proxies, see Corp. Code §§ 178, 702, 5069, 5613, 7613, 9417, 12405, 13242; Fin. Code §§ 7654, 7655, 9251, 9253, 9309.

09936

Civil Code § 2432 (technical amendment). Requirements for durable power of attorney for health care

SEC. 3. Section 2432 of the Civil Code is amended to read:

2432. (a) An attorney in fact under a durable power of attorney may not make health care decisions unless ~~both~~ all 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 contains the date of its execution ~~and~~.

(3) The durable power of attorney is witnessed by one of the following methods:

(A) ~~Be~~ The durable power of attorney is signed by at least two ~~persons~~ witnesses each of whom witnessed either the signing of the instrument by the principal or the principal's acknowledgment of the signature or of the instrument, each witness making the following declaration in substance: "I declare under penalty of perjury under the laws of California that the ~~principal~~ person who signed or acknowledged this document is personally known to me to be the principal, that the principal signed or acknowledged 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, nor an employee of an operator of a community care facility." ~~In addition, the declaration of at~~ At least one of the witnesses must ~~include~~ also have signed 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."

(B) ~~Be~~ The durable power of attorney is acknowledged before a notary public at any place within this state, the notary public certifying to the substance of the following:

State of California)
County of _____) SS.

On this _____ day of _____ in the year _____, before me,

_____, personally appeared
(~~here insert~~ Insert name of notary public)

_____, personally known to me (or proved to me
(Insert name of principal)

on the basis of satisfactory evidence) to be the person whose name is subscribed to this instrument, and acknowledged that he or she executed it. I declare under penalty of perjury that the person whose name is subscribed to this instrument appears to be of sound mind and under no duress, fraud, or undue influence.

NOTARY SEAL

_____
(Signature of Notary Public)

(b) Except as provided in Section 2432.5:

(1) Neither the treating health care provider nor an employee of the treating health care provider, nor an operator of a community care facility nor an employee of an operator of a community care facility, may be designated as the attorney in fact to make health care decisions under a durable power of attorney.

(2) 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) A conservator may not be designated as the attorney in fact to make health care decisions under a durable power of attorney for health care executed by a person who is a conservatee under the Lanterman-Petris-Short Act, Part 1 (commencing with Section 5000) of Division 5 of the Welfare and Institutions Code, unless (1) the power of attorney is otherwise valid, (2) the conservatee is represented by legal counsel, and (3) the lawyer representing the conservatee signs a certificate stating in substance: "I am a lawyer authorized to practice law in the state where this 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 ~~matter~~ power of attorney and the applicable law and the consequences of signing or not signing this ~~durable~~ power of attorney, and my client, after being so advised, has executed this ~~durable~~ power of attorney."

(d) 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.

(4) The operator of a community care facility.

(5) An employee of an operator of a community care facility.

(e) At least one of the persons used as a witness under subdivision (a) shall be a person who is not one of the following:

(1) A relative of the principal by blood, marriage, or adoption.

(2) A person who would be entitled to any portion of the estate of the principal upon his or her death under any will or codicil thereto of the principal existing at the time of execution of the durable power of attorney or by operation of law then existing.

(f) A durable power of attorney for health care is not effective if the principal is a patient in a skilled nursing facility as defined in subdivision (c) of Section 1250 of the Health and Safety Code at the time of its execution unless one of the witnesses is a patient advocate or ombudsman as may be designated by the State Department of Aging for this purpose pursuant to any other applicable provision of law. The patient advocate or ombudsman shall include in the declaration required by subdivision (a)~~(2)(A)~~ a declaration that he or she is serving as a witness as required by this subdivision. It is the intent of this subdivision to recognize that some patients in skilled nursing facilities

are insulated from a voluntary decisionmaking role, by virtue of the custodial nature of their care, so as to require special assurance that they are capable of willfully and voluntarily executing a durable power of attorney for health care.

Comment. Subdivision (c) of Section 2432 is amended to conform the certificate to the language used for the attorney's certificate in Sections 2421, 2433(c)(2), 2451, and 2501. The remaining revisions of Section 2432 are technical or clarifying.

09943

Civil Code § 2432.5 (technical amendment). Relative of principal may be attorney in fact even though employed by health care provider or community care facility

SEC. 4. Section 2432.5 of the Civil Code is amended to read:

2432.5. ~~Notwithstanding subdivision (b) of Section 2432, an~~ An employee of the treating health care provider or an employee of an operator of a community care facility may be designated as the attorney in fact to make health care decisions under a durable power of attorney if (a) the employee so designated is a relative of the principal by blood, marriage, or adoption, and (b) the other requirements of this article are satisfied.

Comment. Section 2432.5 is amended to delete language that is unnecessary in view of the amendment to subdivision (b) of Section 2432.

101/177

Civil Code § 2433 (amended). Requirements for printed form; certificate of attorney in lieu of warning statements

SEC. 5. Section 2433 of the Civil Code is amended to read:

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 ~~include the following notice in~~ 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. ~~It creates a durable power of attorney for health care.~~ Before executing this document, you should know these important facts:

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 that 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. You may state in this document any types of treatment or placements that you do not desire.

The person you designate in this document has a duty to act consistent with your desires as stated in this document or otherwise made known or, if your desires are unknown, to act in your best interests.

Except as you otherwise specify in this document, the power of the person you designate to make health care decisions for you may include the power to consent to your doctor not giving treatment or stopping treatment which would keep you alive.

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.

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 if you object.

You have the right to revoke the appointment of the person designated in this document by notifying that person of the revocation orally or in writing.

You have the right to revoke the authority granted to the person designated in this document to make health care decisions for you by notifying the treating physician, hospital, or other health care provider orally or in writing.

The person designated in this document to make health care decisions for you has the right to examine your medical records and to consent to their disclosure unless you limit this right in this document.

ALL IN

STRIKEOUT

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, 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 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.

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.

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 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. The introductory clause of subdivision (a) of Section 2433 is extended to apply to any printed form that is "otherwise distributed" in this state and the requirement that the statement be in 10-point boldface type is made more flexible by providing that the statement be "in not less than 10-point boldface type or a reasonable equivalent thereof." These revisions conform Section 2433 to Section 2451(a) (Statutory Short Form Power of Attorney), Sections 2501(a) and 2503(c) (Statutory Form Durable Power of Attorney for Health Care), and Section 2510(b) (introductory clause).

A new warning statement is substituted for the one formerly provided by subdivision (a). The new warning statement is drawn from the warning statement prescribed in Section 2500 (Statutory Form Durable Power of Attorney for Health Care). See the Comment to that section.

Civil Code § 2440 (amended). Effect of principal objecting to not providing health care

SEC. 6. Section 2440 of the Civil Code is amended to read:

2440. Nothing in this article authorizes an attorney in fact ~~to consent to health care, or~~ to consent to the withholding or withdrawal of health care necessary to keep the principal alive, if the principal objects ~~to the health care or~~ to the withholding or withdrawal of the health care. In such a case, the case is governed by the law that would apply if there were no durable power of attorney for health care.

Comment. Section 2440 is amended to delete the provision that nothing in the article authorizes an attorney in fact to consent to the providing of health care if the patient objects to the health care. Whether an attorney in fact can consent to the providing of health care depends on whether the providing of the health care is consistent with the desires of the principal as expressed in the power of attorney or otherwise made known or, if not known, whether the providing of the health care is in the best interests of the principal. See Section 2434(b). Accordingly, for example, the objection of an incompetent patient to the providing of health care necessary to keep the patient alive would not preclude the providing of the health care if that would be consistent with the desires of the principal as expressed in the power of attorney. However, the principal can revoke the authority to provide the health care under the power of attorney if the principal has the capacity to do so. See Section 2434(a), (c).

09730

Civil Code § 2450 (amended). Statutory Short Form Power of Attorney

SEC. 7. Section 2450 of the Civil Code is amended to read:

2450. The use of the following form in the creation of a power of attorney is lawful, and when used, the power of attorney shall be construed in accordance with the provisions of this chapter and, if the power of attorney is a durable power of attorney, shall be subject to the provisions of Article 3 (commencing with Section 2400) of Chapter 2:

STATUTORY SHORT FORM POWER OF ATTORNEY
(California Civil Code Section 2450)

WARNING. UNLESS YOU LIMIT THE POWER IN THIS DOCUMENT, THIS DOCUMENT GIVES YOUR AGENT THE POWER TO ACT FOR YOU IN ANY WAY YOU COULD ACT FOR YOURSELF. FOR EXAMPLE, YOUR AGENT CAN:

---BUY, SELL, AND MANAGE REAL AND PERSONAL PROPERTY FOR YOU. THIS MEANS THAT YOUR AGENT CAN SELL YOUR HOME, YOUR SECURITIES, AND YOUR OTHER PROPERTY.

---DEPOSIT AND WITHDRAW MONEY FROM YOUR CHECKING AND SAVINGS ACCOUNTS.

---BORROW MONEY USING YOUR PROPERTY AS SECURITY FOR THE LOAN.

---PUT THINGS IN AND TAKE THINGS OUT OF YOUR SAFETY DEPOSIT BOX.

---OPERATE YOUR BUSINESS FOR YOU.

---PREPARE AND FILE TAX RETURNS FOR YOU AND ACT FOR YOU IN TAX MATTERS.

---ESTABLISH TRUSTS FOR YOU AND TAKE OTHER ACTIONS FOR YOU IN CONNECTION WITH PROBATE AND ESTATE PLANNING MATTERS.

---PROVIDE FOR THE SUPPORT AND WELFARE OF YOUR SPOUSE, CHILDREN, AND DEPENDENTS.

---CONTINUE PAYMENTS TO THE CHURCH AND OTHER ORGANIZATIONS OF WHICH YOU ARE A MEMBER AND MAKE GIFTS TO YOUR SPOUSE, DESCENDANTS, AND CHARITIES.

THIS DOCUMENT DOES NOT AUTHORIZE YOUR AGENT TO MAKE MEDICAL AND OTHER HEALTH CARE DECISIONS FOR YOU. YOU CAN DESIGNATE AN AGENT TO MAKE HEALTH CARE DECISIONS FOR YOU ONLY BY A SEPARATE DOCUMENT.

IT MAY BE IN YOUR BEST INTEREST TO CONSULT WITH A CALIFORNIA LAWYER BECAUSE THE POWERS GRANTED BY THIS DOCUMENT ARE BROAD AND SWEEPING. THEY ARE DEFINED IN SECTIONS 2460 TO 2473, INCLUSIVE, OF THE CALIFORNIA CIVIL CODE.

THE POWERS GRANTED BY THIS DOCUMENT WILL EXIST FOR AN INDEFINITE PERIOD OF TIME UNLESS YOU LIMIT THEIR DURATION IN THIS DOCUMENT. THESE POWERS WILL CONTINUE TO EXIST NOTWITHSTANDING YOUR SUBSEQUENT DISABILITY OR INCAPACITY UNLESS YOU INDICATE OTHERWISE IN THIS DOCUMENT.

YOU CAN ELIMINATE POWERS OF YOUR AGENT BY CROSSING OUT ANY ONE OR MORE OF THE POWERS LISTED IN PARAGRAPH 3 OF THIS FORM. YOU CAN WRITE OTHER LIMITATIONS AND SPECIAL PROVISIONS IN PARAGRAPH 4 OF THIS FORM. HOWEVER, IF YOU DO NOT WANT TO GRANT YOUR AGENT THE POWER TO ACT FOR YOU IN ANY WAY YOU COULD ACT FOR YOURSELF, IT MAY BE IN YOUR BEST INTEREST TO CONSULT WITH A LAWYER INSTEAD OF USING THIS FORM.

THIS DOCUMENT MUST BE SIGNED BY TWO WITNESSES AND BE NOTARIZED TO BE VALID.

YOU HAVE THE RIGHT TO REVOKE OR TERMINATE THIS POWER OF ATTORNEY.

YOU ARE NOT REQUIRED TO USE THIS FORM; YOU MAY USE A DIFFERENT POWER OF ATTORNEY IF THAT IS DESIRED BY THE PARTIES CONCERNED.

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

1. DESIGNATION OF AGENT.

I, _____

(Insert your name and address)

do hereby appoint _____

_____

(Insert name and address of your agent, or each agent if you want to designate more than one)

as my attorney(s)-in-fact (agent) to act for me and in my name as authorized in this document.

2. CREATION OF DURABLE POWER OF ATTORNEY. By this document I intend to create a general power of attorney under Sections 2450 to 2473, inclusive, of the California Civil Code. Subject to any limitations in this document, this power of attorney is a durable power of attorney and shall not be affected by my subsequent incapacity.

(If you want this power of attorney to terminate automatically when you lack capacity, you must so state in paragraph 4 ("Special Provisions and Limitations") below.)

3. STATEMENT OF AUTHORITY GRANTED. Subject to any limitations in this document, I hereby grant to my agent(s) full power and authority to act for me and in my name, in any way which I myself could act, if I were personally present and able to act, with respect to the following matters as each of them is defined in Chapter 3 (commencing with Section 2450) of Title 9 of Part 4 of Division 3 of the California Civil Code to the extent that I am permitted by law to act through an agent:

(1) Real estate transactions.
(2) Tangible personal property transactions.
(3) Bond, share, and commodity transactions.
(4) Financial institution transactions.
(5) Business operating transactions.
(6) Insurance transactions.
(7) Retirement plan transactions.
(8) Estate transactions.

(9) Claims and litigation.
(10) Tax matters.
(11) Personal relationships and affairs.
(12) Benefits from military service.
(13) Records, reports, and statements.
(14) Full and unqualified authority to my agent(s) to delegate any or all of the foregoing powers to any person or persons whom my agent(s) shall select.
(15) All other matters.

(Strike out any one or more of the items above to which you do NOT desire to give your agent authority. Such elimination of any one or more of items (1) to (14), inclusive, automatically constitutes an elimination of item (15). TO STRIKE OUT AN ITEM, YOU MUST DRAW A LINE THROUGH THE TEXT OF THAT ITEM.)

4. SPECIAL PROVISIONS AND LIMITATIONS. In exercising the authority under this power of attorney, my agent(s) is subject to the following special provisions and limitations:

_____
_____
_____
_____
_____
_____

(Special provisions and limitations may be included in the statutory short form power of attorney only if they conform to the requirements of Section 2455 of the California Civil Code.)

5. EXERCISE OF POWER OF ATTORNEY WHERE MORE THAN ONE AGENT DESIGNATED. If I have designated more than one agent, the agents are to act _____.

(If you designate more than one agent and wish each agent alone to be able to exercise this power, insert in this blank the word "severally." Failure to make an insertion or the insertion of the word "jointly" will require that the agents act jointly.)

6. DURATION.

(The powers granted by this document will exist for an indefinite period of time unless you limit their duration below.)

This power of attorney expires on _____

(Fill in this space ONLY if you want the authority of your agent to terminate before your death.)

7. NOMINATION OF CONSERVATOR OF ESTATE.

(A conservator of the estate may be appointed for you if a court decides that one should be appointed. The conservator is responsible for the management of your financial affairs and your property. 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 agent. You may nominate a person as your conservator by completing the space below.)

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

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

DATE AND SIGNATURE OF PRINCIPAL

(YOU MUST DATE AND SIGN THIS POWER OF ATTORNEY)

I sign my name to this Statutory Short Form Power of Attorney on _____ (Date) at _____ (City), _____ (State).

_____
(You sign here)

(THIS POWER OF ATTORNEY WILL NOT BE VALID UNLESS IT IS BOTH (1) SIGNED BY TWO ADULT WITNESSES WHO ARE PRESENT WHEN YOU SIGN OR ACKNOWLEDGE YOUR SIGNATURE AND (2) ACKNOWLEDGED BEFORE A NOTARY PUBLIC IN CALIFORNIA.)

STATEMENT OF WITNESSES

(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 proof of the identity of the principal, you must not be aware of any information, evidence, or other circumstances that would lead you, as a reasonable person, to believe that the person signing or acknowledging this instrument as principal is not the individual he or she claims to be and, in addition, 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.

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 acknowledged this power of attorney in my presence, and that the principal appears to be of sound mind and under no duress, fraud, or undue influence.

Signature: _____ Residence Address: _____
Print Name: _____ _____
Date: _____ _____

Signature: _____ Residence Address: _____
Print Name: _____ _____
Date: _____ _____

CERTIFICATE OF ACKNOWLEDGEMENT OF NOTARY PUBLIC

State of California
County of _____ } ss.

On this _____ day of _____, in the year _____, before me,

_____,
(Insert name of notary public)

personally appeared _____,
(Insert name of principal)

personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to this instrument, and acknowledged that he or she executed it.

NOTARY SEAL

_____
(Signature of Notary Public)

Comment. Section 2450 is amended to add an informational statement that alerts the witnesses to the requirements of Section 2511 as to what constitutes "convincing evidence." Forms that comply with prior law may still be used after the time the amendment to Section 2450 goes into effect. See Section 2457.

09742

Civil Code § 2451 (technical amendment). Form must contain "warning" or lawyer's certificate

SEC. 8. Section 2451 of the Civil Code is amended to read:

2451. (a) ~~Notwithstanding Section 2400, except~~ Except as provided in subdivision (b), a statutory short form power of attorney, to be valid, shall contain, in not less than 10-point bold-face type or a reasonable equivalent thereof, the warning which is printed in capital letters at the beginning of Section 2450.

(b) Subdivision (a) does not apply if the statutory short form power of attorney contains a certificate signed by the principal's lawyer stating in substance: "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 when 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."

Comment. Section 2451 is amended to delete the reference to Section 2400. This reference becomes unnecessary in view of the amendment of Section 2400 and the enactment of Section 2510.

Civil Code § 2457 (added). Use of form prescribed by prior law

SEC. 9. Section 2457 is added to the Civil Code, to read:

2457. A statutory short form power of attorney executed on or after January 1, 1986, using a form that complied with Section 2450 as originally enacted is as valid as if it had been executed using a form that complied with Section 2450 as amended.

Comment. Section 2457 permits continued use of the form prescribed for a statutory short form power of attorney under Section 2450 before the amendment to that section added the informational statement for the Statement of Witnesses. Section 2457 permits use of the original form even after the amendment takes effect. Accordingly, after the amendment to Section 2450 takes effect, either the form set forth in Section 2450 as originally enacted or the form set forth in Section 2450 as amended may be used. This avoids the need to discard existing printed forms on the date the amendment to Section 2450 takes effect.

09930

Civil Code § 2500 (amended). Statutory Form Durable Power of Attorney for Health Care

SEC. 10. Section 2500 of the Civil Code is amended to read:

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 the provisions of this chapter and shall be subject to the provisions of Article 5 (commencing with Section 2430) of Chapter 2.

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 MAYBE 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 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.

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, or (4) a nonrelative employee of an operator of a community care facility.)

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. ~~UNIFORM ANATOMICAL GIFT ACT.~~ AUTOPSY; ANATOMICAL GIFTS; DISPOSITION OF REMAINS. Subject to any limitations in this document, my agent has the power and authority to ~~make~~ 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 ~~make a disposition under the Uniform Anatomical Gift Act,~~ 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 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.)

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.)

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. At least one of the witnesses must make the additional declaration set out following the place where the witnesses sign.)

(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 proof of the identity of the principal, you must not be aware of any information, evidence, or other circumstances that would lead you, as a reasonable person, to believe that the person signing or acknowledging this instrument as principal is not the individual he or she claims to be and, in addition, 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.

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 acknowledged 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, nor an employee of an operator of a community care facility.

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 add an additional informational statement that alerts the witnesses to the requirements of Section 2511 as to what constitutes "convincing evidence." The Warning Statement is revised to conform to the revision of Section 2440. The other revisions in the Warning Statement and in paragraph 7 of the form merely provide additional information concerning the power and authority of the agent and make no change in applicable law. Forms that comply with prior law may still be used after the time the amendment to Section 2500 goes into effect. See Section 2503.5.

09933

Civil Code § 2503.5 (added). Use of form prescribed by prior law

SEC. 11. Section 2503.5 is added to the Civil Code, to read:

2503.5. (a) 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 is as valid as if it had been executed using a form that complied with Section 2500 as amended.

(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 instead of the warning using the language set forth in that section as amended.

(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, 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, 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, including the warning and instructions, and nothing else.

Comment. Section 2503.5 permits continued use of the form prescribed for a statutory form durable power of attorney for health care under Section 2500 as originally enacted. Section 2503.5 permits use of the original form even after the amendment to Section 2500 takes effect. Accordingly, after the amendment to Section 2500 takes effect, either the form set forth in Section 2500 as originally enacted or the form set forth in Section 2500 as amended may be used. This avoids the need to discard existing printed forms on the date the amendment to Section 2500 takes effect. However, forms printed on or after January 1, 1986, must contain the exact wording of the form set out in Section 2500 as amended, including the warning and instructions, and nothing else.

09585

Civil Code §§ 2510-2511 (added)

SEC. 12. Chapter 5 (commencing with Section 2510) is added to Title 9 of Part 4 of Division 3 of the Civil Code, to read:

CHAPTER 5. MISCELLANEOUS PROVISIONS RELATING TO POWERS OF ATTORNEY

Civil Code § 2510. Warning statement in printed form

2510. (a) This section does not apply to either of the following:

(1) A durable power of attorney for health care.

(2) A Statutory Short Form Power of Attorney that satisfies the requirements of Chapter 3 (commencing with Section 2450).

(b) A printed form of a durable power of attorney that is sold or otherwise distributed in this state for use by a person who does not have the advice of legal counsel shall contain, in not less than 10-point boldface type or a reasonable equivalent thereof, the following warning statement:

WARNING TO PERSON EXECUTING THIS DOCUMENT

This is an important legal document. It creates a durable power of attorney. Before executing this document, you should know these important facts:

This document may provide the person you designate as your attorney in fact with broad powers to manage, dispose, sell, and convey your real and personal property and to borrow money using your property as security for the loan.

These powers will exist for an indefinite period of time unless you limit their duration in this document. These powers will continue to exist notwithstanding your subsequent disability or incapacity.

You have the right to revoke or terminate this power of attorney.

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

(c) Nothing in subdivision (b) invalidates any transaction in which a third person relied in good faith upon the authority created by the durable power of attorney.

Comment. Section 2510 continues the substance of former subdivisions (b) and (c) of Section 2400 with the following revisions:

(1) Subdivision (a) of Section 2510 is a new provision that recognizes that other provisions prescribe the content of the warning statement for particular types of durable powers of attorney. See Sections 2433 and 2500 (durable power of attorney for health care); Sections 2450 and 2451 (Statutory Short Form Power of Attorney). See also Section 2433(a) (introductory clause) (printed form of a durable power of attorney for health care to provide only authority to make health care decisions).

(2) The warning statement requirement is extended to apply to a printed form that is "otherwise distributed" in this state and the requirement that the statement be in 10-point boldface type is made more flexible by providing that the statement be "in not less than 10-point boldface type or a reasonable equivalent thereof." These changes make Section 2510 consistent with portions of Section 2433(a) (introductory clause), Section 2451(a) (Statutory Short Form Power of Attorney), and Sections 2501(a) and 2503(c) (Statutory Form Durable Power of Attorney For Health Care).

(3) The last paragraph of the warning statement is added. A comparable provision is included in other required warning statements. See Sections 2433, 2450, and 2500.

09726

Civil Code § 2511. What constitutes "convincing evidence" of the identity of person executing power of attorney

SEC. 13. Section 2511 is added to the Civil Code, to read:

2511. For the purposes of the declaration of witnesses required by Section 2450 or 2500, "convincing evidence" means the absence of any information, evidence, or other circumstances which would lead a reasonable person to believe that the person signing or acknowledging the power of attorney as principal is not the individual he or she claims to be and any one of the following:

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

(1) An identification card or driver's license issued by the California Department of Motor Vehicles.

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

(b) Reasonable reliance on the presentation of any one of the following, 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, bears a serial or other identifying number, and, in the event that the document is a passport, has been stamped by the United States Immigration and Naturalization Service:

(1) A passport issued by a foreign government.

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

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

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

Comment. Section 2511 is drawn from Section 1185 (acknowledgment of instrument by notary public) but is more restrictive than that section because Section 2511 does not include the substance of subdivision (c)(1) of Section 1185.

992/901

Corporations Code § 702 (amended). Who may vote corporate shares

SEC. 14. Section 702 of the Corporations Code is amended to read:

702. (a) Subject to subdivision (c) of Section 703, shares held by an administrator, executor, guardian, conservator or custodian may be voted by such holder either in person or by proxy, without a transfer of such shares into the holder's name; and shares standing in the name of a trustee may be voted by the trustee, either in person or by proxy, but no trustee shall be entitled to vote shares held by such trustee without a transfer of such shares into the trustee's name.

(b) Shares standing in the name of a receiver may be voted by such receiver; and shares held by or under the control of a receiver may be voted by such receiver without the transfer thereof into the receiver's name if authority to do so is contained in the order of the court by which such receiver was appointed.

(c) Subject to the provisions of Section 705 and except where otherwise agreed in writing between the parties, a shareholder whose shares are pledged shall be entitled to vote such shares until the shares have been transferred into the name of the pledgee, and thereafter the pledgee shall be entitled to vote the shares so transferred.

(d) Shares standing in the name of a minor may be voted and the corporation may treat all rights incident thereto as exercisable by the minor, in person or by proxy, whether or not the corporation has notice, actual or constructive, of the nonage, unless a guardian of the minor's property has been appointed and written notice of such appointment given to the corporation.

(e) If authorized to vote the shares by the power of attorney by which the attorney in fact was appointed, shares held by or under the control of an attorney in fact may be voted and the corporation may treat all rights incident thereto as exercisable by the attorney in fact, in person or by proxy, without the transfer of the shares into the name of the attorney in fact.

Comment. Subdivision (e) is added to Section 702 to make clear that an attorney in fact may vote shares without transfer of the shares into the name of the attorney in fact if authorized by the power of attorney.

12804

Savings Clause

SEC. 15. Nothing in this act affects the validity of a power of attorney executed prior to the date this act becomes operative.