

ASSEMBLY BILL

No. 1278

Introduced by Assembly Member Wayne

February 23, 2001

An act to amend Section 7100 of the Health and Safety Code, to amend Sections 4123, 4609, 4659, 4711, 4766, and 4769 of, and to amend the heading of Chapter 3 (commencing with Section 4765) of Part 3 of Division 4.7 of, the Probate Code, relating to health care decisions.

LEGISLATIVE COUNSEL'S DIGEST

AB 1278, as introduced, Wayne. Health care decisions.

Existing law permits a person to authorize another to make certain decisions on their behalf pursuant to a power of attorney or pursuant to an advance health care directive, as specified.

This bill would exclude health care decisions from the authority of an attorney-in-fact under a general power of attorney. The bill would revise certain provisions with respect to the following: the duties and liabilities of an agent under a power of attorney for health care with respect to funeral decisions; the definition of "capacity" with respect to a person's ability to understand, make, and communicate decisions, including health care decisions; the person who may be designated to make health care decisions as an agent or surrogate; the authority of a surrogate, rather than an agent, to make health care decisions, if both have been designated; and the use of petitions in court to honor individual health care instructions or to enforce health care decisions by an agent or surrogate.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

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

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

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

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

17 (2) The competent surviving spouse.

18 (3) The sole surviving competent adult child of the decedent,
19 or if there is more than one competent adult child of the decedent,
20 the majority of the surviving competent adult children. However,
21 less than one-half of the surviving adult children shall be vested
22 with the rights and duties of this section if they have used
23 reasonable efforts to notify all other surviving competent adult
24 children of their instructions and are not aware of any opposition
25 to those instructions on the part of more than one-half of all
26 surviving competent adult children.

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

32 (5) The surviving competent adult person or persons
33 respectively in the next degrees of kindred. If there is more than
34 one surviving competent adult person of the same degree of
35 kindred, the majority of those persons. Less than the majority of
36 surviving competent adult persons of the same degree of kindred
37 shall be vested with the rights and duties of this section if those
38 persons have used reasonable efforts to notify all other surviving



1 competent adult persons of the same degree of kindred of their
2 instructions and are not aware of any opposition to those
3 instructions on the part of one-half or more of all surviving
4 competent adult persons of the same degree of kindred.

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

7 (b) (1) If any person to whom the right of control has vested
8 pursuant to subdivision (a) has been charged with first or second
9 degree murder or voluntary manslaughter in connection with the
10 decedent's death and those charges are known to the funeral
11 director or cemetery authority, the right of control is relinquished
12 and passed on to the next of kin in accordance with subdivision (a).

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

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

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

28 (1) Either of the following applies:

29 (A) The funeral director or cemetery authority has knowledge
30 that none of the persons described in paragraphs (1) to (5),
31 inclusive, of subdivision (a) exists.

32 (B) None of the persons described in paragraphs (1) to (5),
33 inclusive, of subdivision (a) can be found after reasonable inquiry,
34 or contacted by reasonable means.

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

39 (d) The liability for the reasonable cost of final disposition
40 devolves jointly and severally upon all kin of the decedent in the



1 same degree of kindred and upon the estate of the decedent.
2 However, if a person accepts the gift of an entire body under
3 subdivision (a) of Section 7155.5, that person, subject to the terms
4 of the gift, shall be liable for the reasonable cost of final disposition
5 of the decedent.

6 (e) This section shall be administered and construed to the end
7 that the expressed instructions of the decedent or the person
8 entitled to control the disposition shall be faithfully and promptly
9 performed.

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

13 (g) For purposes of this section, “adult” means an individual
14 who has attained 18 years of age, “child” means a natural or
15 adopted child of the decedent, and “competent” means an
16 individual who has not been declared incompetent by a court of
17 law or who has been declared competent by a court of law
18 following a declaration of incompetence.

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

20 4123. (a) In a power of attorney *under this division*, a
21 principal may grant authority to an attorney-in-fact to act on the
22 principal’s behalf with respect to all lawful subjects and purposes
23 or with respect to one or more express subjects or purposes. The
24 attorney-in-fact may be granted authority with regard to the
25 principal’s property, personal care, ~~health care~~, or any other matter.

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

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

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



1 4609. “Capacity” means a ~~patient’s~~ *person’s* ability to
2 understand the nature and consequences of *a decision and to make*
3 *and communicate a decision, and includes in the case of* proposed
4 health care, ~~including the ability to understand its significant~~
5 benefits, risks, and alternatives, ~~and to make and communicate a~~
6 ~~health care decision.~~

7 SEC. 4. Section 4659 of the Probate Code is amended to read:
8 4659. (a) Except as provided in subdivision (b), none of the
9 following persons may make health care decisions as an agent
10 under a power of attorney for health care or a surrogate under this
11 division:

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

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

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

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

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

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

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

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

32 (3) The lawyer representing the conservatee signs a certificate
33 stating in substance:

34

35 “I am a lawyer authorized to practice law in the state where this
36 advance health care directive was executed, and the principal or
37 patient was my client at the time this advance directive was
38 executed. I have advised my client concerning his or her rights in
39 connection with this advance directive and the applicable law and
40 the consequences of signing or not signing this advance directive,



1 and my client, after being so advised, has executed this advance
2 directive.”

3
4 SEC. 5. Section 4711 of the Probate Code is amended to read:
5 4711. (a) A patient may designate an adult as a surrogate to
6 make health care decisions by personally informing the
7 supervising health care provider. An oral designation of a
8 surrogate shall be promptly recorded in the patient’s health care
9 record and is effective only during the course of treatment or
10 illness or during the stay in the health care institution when the
11 surrogate designation is made.

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

16 SEC. 6. The heading of Chapter 3 (commencing with Section
17 4765) of Part 3 of Division 4.7 of the Probate Code is amended to
18 read:

19
20 CHAPTER 3. PETITIONS, AND ORDERS, ~~APPEALS~~

21
22 SEC. 7. Section 4766 of the Probate Code is amended to read:
23 4766. A petition may be filed under this part for any one or
24 more of the following purposes:

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

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

29 (c) Determining whether the acts or proposed acts of an agent
30 or surrogate are consistent with the patient’s desires as expressed
31 in an advance health care directive or otherwise made known to the
32 court or, where the patient’s desires are unknown or unclear,
33 whether the acts or proposed acts of the agent or surrogate are in
34 the patient’s best interest.

35 (d) Declaring that the authority of an agent or surrogate is
36 terminated, upon a determination by the court that the agent or
37 surrogate has made a health care decision for the patient that
38 authorized anything illegal or upon a determination by the court
39 of both of the following:



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

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

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

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

13 4769. (a) Subject to subdivision (b), at least 15 days before
14 the time set for hearing, the petitioner shall serve notice of the time
15 and place of the hearing, together with a copy of the petition, on
16 the following:

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

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

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

