

AMENDED IN SENATE JUNE 14, 2001

AMENDED IN ASSEMBLY APRIL 5, 2001

CALIFORNIA LEGISLATURE—2001–02 REGULAR SESSION

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 amended, 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 who has the right and duty of disposition under Division 4.7~~
12 ~~(commencing with Section 4600) of the Probate Code. Unless the~~
13 ~~agent specifically agrees, the agent does not have a duty or liability~~
14 ~~under this section. If the agent assumes the duty under this section,~~
15 *Code, except that the agent is liable for the costs of disposition only*
16 *in either of the following cases:*

17 (A) *Where the agent makes a specific agreement to pay the costs*
18 *of disposition.*

19 (B) *Where, in the absence of a specific agreement, the agent*
20 *makes decisions concerning disposition that incur cost, in which*
21 *case the agent is liable only for the reasonable costs incurred as a*
22 *result of the agent's decisions, to the extent that the decedent's*
23 *estate or other appropriate fund is insufficient.*

24 (2) The competent surviving spouse.

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

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

6 (5) The surviving competent adult person or persons
7 respectively in the next degrees of kindred. If there is more than
8 one surviving competent adult person of the same degree of
9 kindred, the majority of those persons. Less than the majority of
10 surviving competent adult persons of the same degree of kindred
11 shall be vested with the rights and duties of this section if those
12 persons have used reasonable efforts to notify all other surviving
13 competent adult persons of the same degree of kindred of their
14 instructions and are not aware of any opposition to those
15 instructions on the part of one-half or more of all surviving
16 competent adult persons of the same degree of kindred.

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

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

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

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

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

40 (1) Either of the following applies:

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

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

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

11 (d) The liability for the reasonable cost of final disposition
12 devolves jointly and severally upon all kin of the decedent in the
13 same degree of kindred and upon the estate of the decedent.
14 However, if a person accepts the gift of an entire body under
15 subdivision (a) of Section 7155.5, that person, subject to the terms
16 of the gift, shall be liable for the reasonable cost of final disposition
17 of the decedent.

18 (e) This section shall be administered and construed to the end
19 that the expressed instructions of the decedent or the person
20 entitled to control the disposition shall be faithfully and promptly
21 performed.

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

25 (g) For purposes of this section, “adult” means an individual
26 who has attained 18 years of age, “child” means a natural or
27 adopted child of the decedent, and “competent” means an
28 individual who has not been declared incompetent by a court of
29 law or who has been declared competent by a court of law
30 following a declaration of incompetence.

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

32 4123. (a) In a power of attorney under this division, a
33 principal may grant authority to an attorney-in-fact to act on the
34 principal’s behalf with respect to all lawful subjects and purposes
35 or with respect to one or more express subjects or purposes. The
36 attorney-in-fact may be granted authority with regard to the
37 principal’s property, personal care, or any other matter.

38 (b) With regard to property matters, a power of attorney may
39 grant authority to make decisions concerning all or part of the
40 principal’s real and personal property, whether owned by the

principal at the time of the execution of the power of attorney or thereafter acquired or whether located in this state or elsewhere, without the need for a description of each item or parcel of property.

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

SEC. 3. Section 4609 of the Probate Code is amended to read: 4609. “Capacity” means a person’s ability to understand the nature and consequences of a decision and to make and communicate a decision, and includes in the case of proposed health care, the ability to understand its significant benefits, risks, and alternatives.

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

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

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

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

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

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

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

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

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

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

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5 “I am a lawyer authorized to practice law in the state where this
6 advance health care directive was executed, and the principal or
7 patient was my client at the time this advance directive was
8 executed. I have advised my client concerning his or her rights in
9 connection with this advance directive and the applicable law and
10 the consequences of signing or not signing this advance directive,
11 and my client, after being so advised, has executed this advance
12 directive.”

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

15 4711. (a) A patient may designate an adult as a surrogate to
16 make health care decisions by personally informing the
17 supervising health care provider. The designation of a surrogate
18 shall be promptly recorded in the patient’s health care record.

19 (b) Unless the patient specifies a shorter period, a surrogate
20 designation under subdivision (a) is effective only during the
21 course of treatment or illness or during the stay in the health care
22 institution when the surrogate designation is made, or for 60 days,
23 whichever period is shorter.

24 (c) The expiration of a surrogate designation under subdivision
25 (b) does not affect any role the person designated under
26 subdivision (a) may have in making health care decisions for the
27 patient under any other law or standards of practice.

28 (d) If the patient has designated an agent under a power of
29 attorney for health care, the surrogate designated under
30 subdivision (a) has priority over the agent for the period provided
31 in subdivision (b), but the designation of a surrogate does not
32 revoke the designation of an agent unless the patient
33 communicates the intention to revoke in compliance with
34 subdivision (a) of Section 4695.

35 SEC. 6. The heading of Chapter 3 (commencing with Section
36 4765) of Part 3 of Division 4.7 of the Probate Code is amended to
37 read:

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CHAPTER 3. PETITIONS AND ORDERS

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

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

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

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

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

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

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

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

SEC. 8. Section 4769 of the Probate Code is amended to read:
4769. (a) Subject to subdivision (b), at least 15 days before the time set for hearing, the petitioner shall serve notice of the time and place of the hearing, together with a copy of the petition, on the following:

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

(2) The patient, if not the petitioner.

(b) In the case of a petition to compel a third person to honor individual health care instructions or the authority of an agent or

- 1 surrogate, notice of the time and place of the hearing, together with
- 2 a copy of the petition, shall be served on the third person in the
- 3 manner provided in Chapter 4 (commencing with Section 413.10)
- 4 of Title 5 of Part 2 of the Code of Civil Procedure.

