

Working Together in Hawaii to Empower and Protect Persons Living with Dementia:

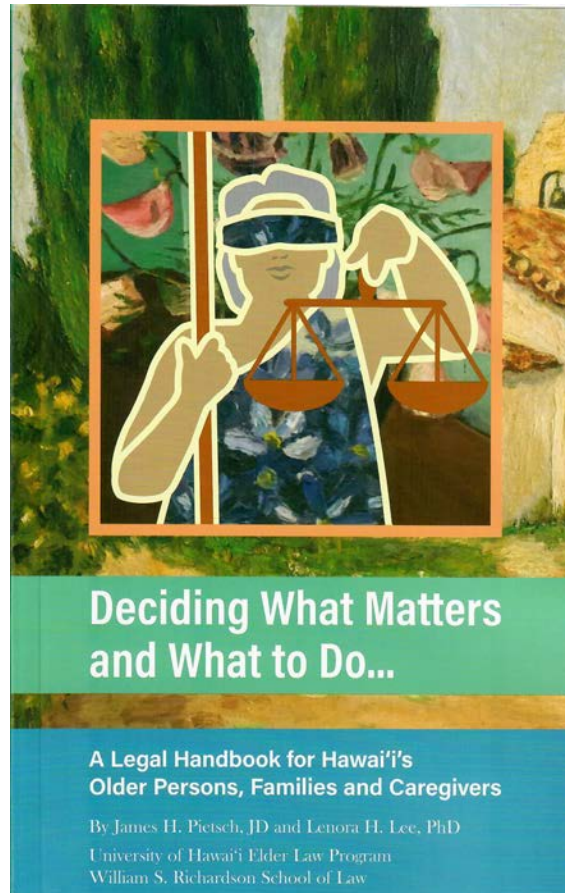
**Balancing Autonomy and Self-Determination
with Best Interests and Protection
Part 1: February 10, 2021**

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Topics

- Decision-Making Capacity Standards under Hawai`i Law
- Guardianship, Conservatorship and Alternatives to Court Intervention in Hawai`i
 - Supported Decision-Making in Hawai`i (No Hawai`i State Law)
- Powers of Attorney under the 2014 Hawai`i Uniform Power of Attorney Act
- Advance Health Care Directives and other Healthcare Planning Tools under Hawai`i Law
 - (Powers of Attorney for Health Care; Individual Instructions for Health Care; Surrogate Decision-Making; Provider Orders for Life Sustaining Treatment (POLST))
- Hawai`i Laws Protecting Persons from Abuse, Neglect and Exploitation

Impact of Covid 19

- Coronavirus disease 2019 (COVID-19) continues to impact older adults disproportionately with respect to serious consequences ranging from severe illness and hospitalization to increased mortality risk. Concurrently, concerns about potential shortages of healthcare professionals and health supplies to address these issues have focused attention on how these resources are ultimately allocated and used. Some strategies, for example, misguidedly use age as an arbitrary criterion that disfavors older adults in resource allocation decisions . . . The COVID-19 pandemic further highlights the widespread and urgent need for all adults to engage in advance care planning discussions and create an advance directive.

Teneille Brown et al., *Rationing Limited Healthcare Resources in the COVID-19 Era and Beyond: Ethical Considerations Regarding Older Adults*, 68 J. OF AM. GERIATRICS SOCIETY 1143 (2020).

- Coronavirus disease 2019 (COVID-19) is particularly deleterious to older adults, and there has been a massive increase in reports of elder abuse during the pandemic. Reports of elder abuse range from financial scams to incidents of family violence, with public warnings issued accordingly from the Federal Trade Commission and the American Bar Association.

Letter to the Editor, S. Duke Han PhD & Laura Mosqueda MD, *Elder Abuse in the COVID-19 Era*, 68 J. of Am. Geriatrics Society 7 (Jul. 2020).

Balancing Autonomy and Self-Determination With Best Interests and Protection

- Empowering persons with diminished capacity to fully participate in life and to direct future decisions.
- Avoiding overly restrictive interventions often used to help assure protection.
- Utilizing mediators and other facilitators to help address areas of potential disagreement and conflict among family members and caregivers with respect to care and support of persons with dementia.
- Protecting persons from abuse, neglect and exploitation.
 - Persons with dementia may be more susceptible to abuse, neglect (including self neglect and caregiver neglect) and financial exploitation.
 - “Hidden Epidemic.”
 - Lawyers note Rule 1.14—Hawaii Rules of Professional Conduct—Client Under Disability.
 - Health Care Providers note requirement to report to APS.

Capacity For What?

Overview

- Decisional Capacity—varying levels
 - Will, Power of Attorney, Health Care Decision-Making, etc.
- Assessment by attorney, physician, psychiatrist, psychologist
- Capacity and Undue Influence
- Decision-making in the absence of capacity
 - Legal Instruments, Advance Directives and Surrogates

Decision-Making Standards for Capacity in Hawai`i

Capacity for What?

Each specific activity that involves a decision, such as the provision of informed consent for medical treatment or the execution of a will, trust, advance directive, or power of attorney, may have a different required level of decisional capacity to be considered legally effective. Examples of Specific Capacities:

Health Care Decisions under Uniform Health Care Decisions Act (Modified)

HRS Chapter 327E-2 “capacity means the individual’s ability to understand the significant benefits, risks, and alternatives to proposed health care and to make and communicate a health care decision.”

Capacity and Undue Influence and the Adult Protective Services Act. The concepts of undue influence and mental capacity are often joined together.

HRS. § 346-222(7) defines capacity as, “the ability to understand and appreciate the nature and consequences of making decisions concerning one’s person or to communicate such decisions. It points out that exploiting a vulnerable adult through undue influence may constitute abuse under the law. “The exploitations may involve coercion, manipulation, threats, intimidation, misrepresentation, or exertion of undue influence. HRS. § 346-222(7).

Other Examples of Specific Capacities

Capacity in Making a Will

According to H.R.S. § 560: 2-501, “An individual eighteen or more years of age who is of sound mind may make a will.”

See In re Estate of Coleman, 1 Haw. App. 136, 615 P.2d 760 (1980).

In order to be considered to be of sound mind, a testator:

- a. Must understand the nature of the act being performed
- b. Must know the nature and extent of one’s property
- c. Must be cognizant of the natural objects of one’s bounty
- d. Must be capable of forming an orderly scheme of distribution

Guardianship and Conservatorship

- Guardianship (and Conservatorship)—legal mechanism by which the judgment of a more capable person is substituted for the judgment of an impaired person—decisions necessary to manage personal affairs and property. Only a court can appoint a guardian for a ward or a conservator for a protected person. Medical Testimony is usually required.
- Guardianship should only be considered When someone is incapable of making or communicating necessary decisions for his or her own safety or to take care of his/her own personal or property interests and suitable or effective alternatives have not been set up or are not available. (Also, can be expensive and take a long time).
- Balance Autonomy/Self-determination vs. Protection/Best Interests.
- Guardianship is different from Involuntary Civil Commitment.

Uniform Guardianship and Protective Proceedings Act (Hawai`i) Terminology

"Incapacitated person" means an individual who, for reasons other than being a minor, is unable to receive and evaluate information or make or communicate decisions to such an extent that the individual lacks the ability to meet essential requirements for physical health, safety, or self-care, even with appropriate and reasonably available technological assistance.

Kokua Kanawai (Helper of the law) is used instead of "visitor" or "master" in other states. The *Kokua Kanawai* is not an advocate for or against the rights of the individual and is limited in role to responding to the petition for protective proceeding. The *Kokua Kanawai*, without prior court order, has no authority to initiate actions on behalf of the protected person. Rather, the court could appoint a guardian ad litem for the protected person....

Ward is to Guardian as Protected Person is to Conservator.

The term "guardian of the property" was changed from the previous law to "conservator."

The term "guardian of the person" is now simply "guardian."

HRS §560:5-102

Appointment of a Guardian

The court may appoint a limited or unlimited guardian for a respondent only if it finds by clear and convincing evidence that:

- (A) The respondent is an incapacitated person; and
- (B) The respondent's identified needs cannot be met by less restrictive means, including the use of appropriate and reasonably available technological assistance...

HRS § 560:5-311

Appointment of a Conservator

The appointment of a limited or unlimited conservator or other protective order in relation to the estate and affairs of any individual, including a minor, may be made if the court determines that, for reasons other than age:

By clear and convincing evidence, the individual is unable to manage property and business affairs effectively (2009) because of an impairment in the ability to receive and evaluate information or to make or communicate decisions, even with the use of appropriate and reasonably available technological assistance, or because of another physical, mental, or health impairment or because the individual is missing, detained, or unable to return to the United States; and

By a preponderance of evidence, the individual has property that will be wasted or dissipated unless management is provided or money is needed for the support, care, education, health, and welfare of the individual or of individuals who are entitled to the individual's support and that protection is necessary or desirable to obtain or provide money.

HRS § 560:5-401

Limited Guardianship--Limited Order

- Limited versus plenary order (Guardianship)
- Guardian assigned only those duties & powers the incapacitated person is incapable of exercising
- Protective Order
- Conservatorship for Specific Purpose

Alternatives to Guardianship and Conservatorship

Limited Guardianship and Conservatorship for Specific Purpose
Supported Decision-Making (no Hawai`i statute as of now)

Selected “Traditional” Alternatives:

Personal (Including Health Care) Matters

- ✓ Powers of Attorney (UPOAA)
- ✓ Advance Directives including Health Care Power of Attorney (UHCDA)
- ✓ POLST
- ✓ Surrogates

Financial and Legal Matters

- ✓ Powers of Attorney (UPOAA)
- ✓ Living Trusts
- ✓ Joint Accounts/Property Management
- ✓ Representative Payees and Appointed Fiduciaries

Powers of Attorney as Alternatives to Guardianship and Conservatorship

CAPACITY

- Types of POAs
 - Durable
 - Springing
 - General
 - Special
 - (Health Care)
- Terms
 - Principle
 - Agent

Danger

Powers of Attorney

Hawai`i Uniform Power of Attorney Act (UPOAA)

HRS Chapter 551E (2014)

- General or Special (Limited)
 - **Health Care Powers (and some others)—Not included in UPOAA**

Capacity

- Specific Protections Provided in UPOAA
 - Principal
 - Agent
 - Persons Accepting POA

Execution – Can (should) be Authenticated

“Durable” by Default or can be “Springing.”

Generally, must be accepted (or ask for certification, translation or legal counsel’s opinion)

Agent’s Certification (Optional)

Danger!

I grant my agent and any successor agent general authority to act for me with respect to the following subjects as defined in the Uniform Power of Attorney Act in chapter 551E, Hawai`i Revised Statutes:

(INITIAL each subject you want to include in the agent’s general authority. If you wish to grant general authority over all of the subjects you may initial “All Preceding Subjects” instead of initialing each subject.)

- Real Property
- Tangible Personal Property
- Stocks and Bonds
- Commodities and Options
- Banks and Other Financial Institutions
- Operation of Entity or Business
- Insurance and Annuities
- Estates, Trusts, and Other Beneficial Interests
- Claims and Litigation
- Personal and Family Maintenance
- Benefits from Governmental Programs or Civil or Military Service
- Retirement Plans
- Taxes
- All Preceding Subjects

GRANT OF SPECIFIC AUTHORITY (OPTIONAL)

My agent MAY NOT do any of the following specific acts for me UNLESS I have INITIALED the specific authority listed below:

(CAUTION: Granting any of the following will give your agent the authority to take actions that could significantly reduce your property or change how your property is distributed at your death. INITIAL ONLY the specific authority you WANT to give your agent.)

- Create, amend, revoke, or terminate an inter vivos trust
- Make a gift, subject to the limitations of the Uniform Power of Attorney Act under section 551E-47, Hawai`i Revised Statutes, and any special instructions in this power of attorney
- Create or change rights of survivorship
- Create or change a beneficiary designation
- Authorize another person to exercise the authority granted under this power of attorney
- Waive the principal's right to be a beneficiary of a joint and survivor annuity, including a survivor benefit under a retirement plan
- Exercise fiduciary powers that the principal has authority to delegate

General Differences from POA Law in effect Prior to March 2014

- Defaults to the POA being durable. “Durable,” with respect to a power of attorney, means not terminated by the principal’s incapacity.
- Defaults to a POA becoming effective immediately [unless expressly provided otherwise in the POA].
- Revokes a spouse-agent’s authority upon divorce [unless expressly provided otherwise in the POA].
- Includes optional “Agent’s Certification as to the Validity of Power of Attorney and Agent’s Authority.”

Other Alternatives for Finances and Property

- Trusts
 - Types of Trusts
 - (Testamentary)
 - Living
 - Revocable
 - Irrevocable
 - (Special Needs)
 - Danger

Money Management

Personal Money Managers are individuals or organizations that can handle finances for an individual. Services may include:

- Paying bills
- Managing finances
- Handling Investments
- Troubleshooting

Danger

Online, including Automatic Bill Paying

- Individual with access to online account can manage assets, pay bills etc.
- Automatic bill payment can be set up for an individual
 - Eliminates the ongoing need for bill payment assistance
- Periodic monitoring is helpful

- Common use of ATM Access

Danger

Please see Part 2 of Professor Pietsch's series

Friday, March 19, 2021



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