

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

Balancing Autonomy and Self-Determination with Best Interests and Protection Part 2: March 19, 2021

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Continuation of Alternatives to Court Intervention in Hawai`i

Topics

- Decisional Capacity
- Dementia and Managing Income and Assets
- 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

Decision-Making Standards for Capacity in Hawai`i Capacity for What?

Remember--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.

Accordingly, some individuals diagnosed with some stage of dementia may still have capacity to make some decisions for themselves.

Dementia and Managing Income and Assets

- Supported Decision-Making in Hawai`i (No Hawai`i State Law)
- Asking Family Members, Trusted Friends or Personal Money Managers (individuals or organizations) to handle finances for an individual, including:
 - Paying bills
 - Managing finances
 - Handling Investments
 - Troubleshooting

Tools to Help Manage Assets (with cautions)

Periodic monitoring is wise

- Automatic Bill Paying for Recurring Bills
 - Eliminates some of the ongoing need for bill payment assistance
- Providing Online Access to manage assets, pay bills etc.
- Common use of ATM Access
- Adding Co-Signer on Account (Caution Regarding Joint Property)

Danger

Jointly Held Property

- Types of property ownership of accounts or other property
 - Severalty; Tenancy in Common; Joint Tenancy with Right of Survivorship
(Caution regarding Joint Tenancy with Right of Survivorship)

Alternatives to Joint Accounts

Convenience Accounts or Limited Bank Account

- Co-signers
- “Limited Bank Account,” “Ceiling Limit Account” and “Convenience Account”
Danger

Representative Payees and Appointed Fiduciaries

Oversight (e.g., SSA, VA)

- E.g., Representative Payee--a person or organization designated through the Social Security Administration to handle a person's Social Security account.
 - SSA has special paperwork and procedures for appointing a representative payee
 - Can be changed or revoked only if SSA consents

Alternatives to Guardianship--Healthcare Decisions Under Hawai'i Law

- Informed Consent Haw. Rev. Stat. 673-1
- Uniform Health Care Decisions Act (Modified) 1999
(Chapter 327E Haw. Rev. Stat.)
 - “One Source” for most Advance Directives—combines Individual Instructions and Durable Power of Attorney for Health Care
 - Acceptance/Portability of Advance Health Care Directive and Ease of Execution
 - Surrogacy Provisions (Designation or selection of surrogate where patient lacks capacity and there is no guardian or healthcare agent)
- Provider Orders for Life Sustaining Treatment (POLST) Haw. Rev. Stat. 327K

Advance Health Care Directives (AD) Under the Uniform Health Care Decisions Act (No Longer Called “Living Will”)

Advance Directives (AD) May Include Individual Instructions
For Health Care and Durable Power of Attorney for Health Care

- Individual Instructions for Health Care
 - Under the UHCDA individual instruction for health care may be oral (not in AD) or may be in writing (in AD).
 - Note: Healthcare providers are required to comply with a patient’s individual instructions under most circumstances.

Advance Health Care Directives Under the Uniform Health Care Decisions Act

- Durable Power of Attorney for Health Care
 - Must be in writing; dated; signed; witnessed by two qualified individuals or notarized
 - May be revoked
 - May authorize an agent to make any health-care decision
 - Unless otherwise specified--effective only during periods of incapacity

Note: Since 2014 Health Care Powers can no longer be included in general powers of attorney (legal/financial) executed under the provision of the Uniform Power of Attorney Act (UPOAA).

Surrogates under UHCDA HRS 327E

"Surrogate" means an individual, other than a patient's agent or guardian, authorized under Chapter 327E to make a health-care decision for the patient.

(In many jurisdictions—hierarchy of decision-makers for an incapacitated person under "Family Consent" laws but not in Hawai'i)

Designated Surrogate

- A “Patient” may designate or disqualify any individual to act as a surrogate by informing the supervising health-care provider
- Designated surrogates may make health-care decisions for the patient that the patient could make on the patient’s own behalf.

Non-Designated Surrogate

In the absence of a designation, or if the designee is not reasonable available, a surrogate may be appointed to make a health-care decision for the patient.

Appointment of a (Non-Designated) Surrogate

Upon determination that patient lacks decisional capacity, primary physician or physician's designee:

1. Attempts to notify patient of condition
2. Makes reasonable efforts to locate as many interested persons as practicable
3. Informs interested persons of patient's lack of decisional capacity and that a surrogate decision-maker should be selected for patient

Interested Persons

Make reasonable efforts to reach a consensus as to who among them shall make health-care decisions on behalf of the patient. The person selected to act as the patient's surrogate should be the person who has a close relationship with the patient and who is the most likely to be currently informed of the patient's wishes regarding health-care decisions.

“Interested Person”

“Interested persons” means the patient's spouse, unless legally separated or estranged, a reciprocal beneficiary, any adult child, either parent of the patient, an adult sibling or adult grandchild of the patient, or any adult who has exhibited special care and concern for the patient and who is familiar with the patient's personal values.

If any of the interested persons disagrees with the selection or the decision of the surrogate, or, if after reasonable efforts the interested persons are unable to reach a consensus as to who should act as the surrogate decision-maker, then any of the interested persons may seek guardianship of the patient by initiating guardianship proceedings.

Decisions by Non-Designated Surrogate

“A surrogate who has not been designated by the patient may make all health-care decisions for the patient that the patient could make on the patient’s own behalf, except:

..that artificial nutrition and hydration may be withheld or withdrawn upon a decision by the surrogate **only when** the primary physician and a second independent physician certify in the patient's medical records that the provision of artificial nutrition or hydration is merely prolonging the act of dying and that the patient is highly unlikely to have any neurological response in the future. "

Declaration of a Surrogate (Designated or Non-Designated)

A supervising health-care provider shall require a surrogate to provide a written declaration under the penalty of false swearing stating facts and circumstances reasonably sufficient to establish the claimed authority.

Obligations of Health-Care Provider or Institution*

Under UHCDA

* (with exceptions)

- ✓ Comply with individual instruction or reasonable interpretation by a person authorized to make decisions.
- ✓ Comply with health-care decisions made by authorized person to the same extent as if the decision had been made by the patient.

Exceptions

Reasons of Conscience

A health-care provider may decline to comply with an individual instruction or health-care decision for reasons of conscience. A health-care institution may decline to comply with an individual instruction or health-care decision if the instruction or decision is contrary to a policy of the institution which is expressly based on reasons of conscience and if the policy was timely communicated to the patient or to a person then authorized to make health-care decisions for the patient.

Exceptions “Futility”

A health-care provider or institution may decline to comply with an individual instruction or health-care decision that requires medically ineffective health care or health care contrary to generally accepted health-care standards applicable to the health-care provider or institution.

When health-care provider or institution declines-- must

- ☐ Promptly inform patient/authorized decision-maker.
- ☐ Provide continuing care until transfer.
- ☐ Make reasonable efforts to assist in the transfer of patient to another health-care provider or institution that is willing to comply with instruction or decision.

POLST

(Revised Law July 2014)

A sample of a POLST (Provider Orders for Life Sustaining Treatment) form. The form is titled "POLST - Provider Orders for Life Sustaining Treatment" and includes sections for "Patient Information", "Physician Orders", "Patient's Wishes", and "Physician's Orders". It contains checkboxes for "Resuscitation", "Artificial Airway", and "Artificial Nutrition and Hydration". The form is designed to be filled out by a patient or their representative and a physician or advanced practice registered nurse.

"Provider Orders for Life Sustaining Treatment form" or POLST which is a form signed by a patient, or if incapacitated, by a legally authorized representative and the patient's physician or advanced practice registered nurse, that records the patient's wishes and that directs a health care provider regarding the provision of resuscitative and life sustaining measures.

Danger

POLST

What is POLST's objectives?

- Helps physicians, nurses, health care facilities and emergency personnel honor patient wishes regarding life-sustaining treatments.
- It is especially suggested for those with a chronic debilitating disease, a seriously ill patient, or a terminally ill patient.

Caution—you should know that :

- Under Hawai`i law, if a person is incapacitated, the patient's legally authorized representative, may revoke a Provider Orders for Life Sustaining Treatment (POLST) form at any time and in any manner that communicates intent to revoke.

Elder Abuse Hawai'i

While there are no specific Hawai'i laws that address "Elder Abuse," there are a wide range of laws that can be used to protect abused older persons.

Most Comprehensive-(Vulnerable) Adult Protective Services Act

Selected Hawai'i Laws to Protect/Assist Older Persons Abused By Others or Themselves

There are a wide range of laws that are used to protect abused older persons.

- Penal Code (Federal and State Criminal Codes)
- Long Term Care Ombudsman
- Medicaid Fraud (Federal-State Partnership)
- Hawaii's "Elder Justice Act" for Care Facilities
- Domestic Violence Laws
- Consumer Protection Laws
- Adult Protective Services Act
- (Disability Rights Center)
- (TROs)
- Office of Public Guardian
- (Involuntary Civil Commitment and Treatment Laws)
- Civil Remedies, e.g., torts, civil fraud actions

Adult Protective Services (Amendments took effect July 2009)

[HRS 346 Part X]

- Requires Department of Human Services (Adult Protective Services to investigate cases of abuse of a vulnerable adult who has incurred abuse **or is in danger of abuse if immediate action is not taken** and to take steps to prevent further abuse, including legal action in the **Family Court** which has overall jurisdiction over cases of vulnerable adult abuse.
- Requires certain persons to promptly report the matter orally to the (Department of Human Services) Adult Protective Services.
- DHS may only act with the consent of the vulnerable adult unless he or she is determined by the family court to lack capacity.

APS Law

“Vulnerable adult” means a person eighteen years of age or older who, because of mental, developmental, or physical impairment, is unable to:

- Communicate or make responsible decisions to manage the person’s own care or resources;
- Carry out or arrange for essential activities of daily living; or
- Protect himself or herself from abuse.

APS Law

- “Abuse” means any of the following, separately or in combination:
 - Physical abuse,
 - Psychological abuse,
 - Sexual abuse,
 - Financial exploitation,
 - Caregiver neglect, or
 - Self-neglect.

APS Law

“ Caregiver neglect” means the failure of a caregiver to exercise that degree of care for a vulnerable adult that a reasonable person with the responsibility of a caregiver would exercise within the scope of the caregiver’s assumed, legal, or contractual duties, including but not limited to the failure to:

Caregiver Neglect (Cont.)

- Assist with personal hygiene;
- Protect the vulnerable adult from abandonment;
- Provide, in a timely manner, necessary food, shelter, or clothing;
- Provide, in a timely manner, necessary health care, access to health care, prescribed medication, psychological care, physical care, or supervision;
- Protect the vulnerable adult from dangerous, harmful, or detrimental drugs;
- Protect the vulnerable adult from health and safety hazards; or
- Protect the vulnerable adult from abuse by third parties.

Self Neglect Means:

A vulnerable adult's inability or failure, due to physical or mental impairment, or both, to perform tasks essential to caring for oneself, including but not limited to:

Obtaining essential food, clothing, shelter, and medical care;

Obtaining goods and services reasonably necessary to maintain minimum standards of physical health, mental health, emotional well-being, and general safety;

Management of one's financial assets, and.....

Self Neglect (Cont.)

The vulnerable adult appears to lack sufficient understanding or capacity to make or communicate responsible decisions and appears to be exposed to a situation or condition that poses an immediate risk of death or serious physical harm.

APS Law

The law has mandated reporting provisions that require certain persons who, in the performance of their professional or official duties, know or have reason to believe that a vulnerable adult has been abused and is threatened with imminent abuse to promptly report the matter orally to the Department of Human Services (DHS). The Adult Protective Services (APS) Unit of the DHS oversees reports of suspected abuse. APS is required to investigate reports of alleged abuse against a vulnerable adult and has the authority to prevent further abuse.

APS Law

In doing its investigation, APS is entitled to have access to the allegedly abused dependent adult and may seek the assistance of the police to gain access. If abuse is discovered, DHS must take action to prevent further abuse.

It should be noted that Under the Hawai'i Adult Protective Services statute, the Department of Human Services DHS must have the consent of the victim before an investigation or protective action can commence unless the court finds that there is probable cause to believe that the vulnerable adult lacks the capacity to make decisions concerning the vulnerable adult's person.

Mandated Reporters

- (1) Any licensed or registered professional of the healing arts and health-related occupation who examines, treats, or provides other professional or specialized services to dependent adults, including, but not limited to, physicians, physicians in training, psychologists, dentists, nurses, osteopathic physicians and surgeons, optometrists, chiropractors, podiatrists, pharmacists, and other health-related professionals;
- (2) Employees or officers of any public or private agency or institution providing social, medical, hospital or mental health services, including financial assistance;

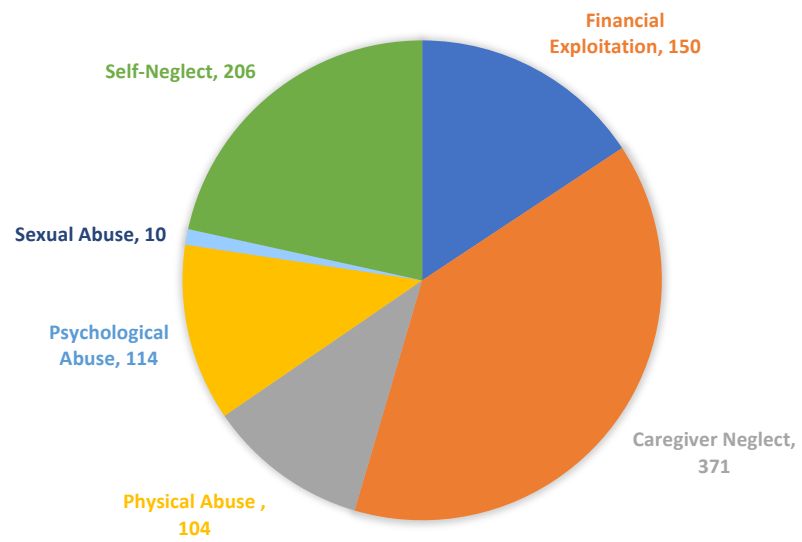
Mandated Reporters (Cont.)

- (3) Employees or officers of any law enforcement including, but not limited to, the courts, police departments, correctional institutions, and parole or probation offices;
- (4) Employees or officers of any adult residential care home, adult day care center, or similar institution;
and
- (5) Medical examiners and coroners.

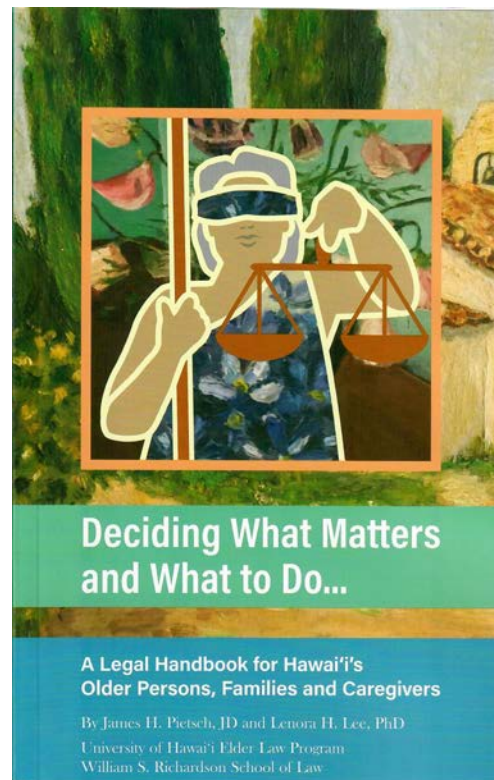
Capacity Under APS Law

"Capacity" means the ability to understand and appreciate the nature and consequences of making decisions concerning one's person or to communicate such decisions. An individual is presumed capable of making his or her own decisions. If it is determined that an individual lacks capacity under this part of the law, it does not mean that he lacks capacity for any other purpose.

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QUESTIONS?



Legal Handbook
Available at
hawaii.edu/uhelp