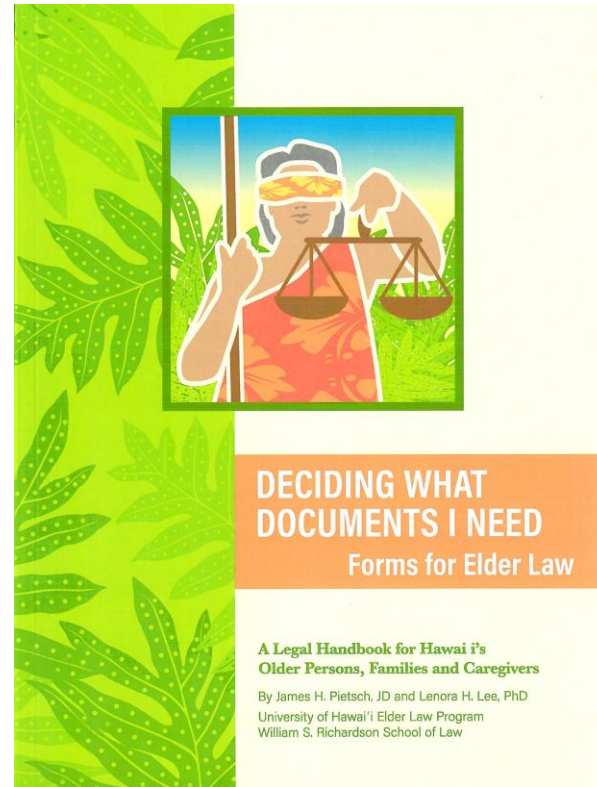


Essential Legal Planning Issues for Dementia



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[HTTPS://WWW.HAWAII.EDU/UHELP/HANDBOOK-DOCUMENTS.HTM](https://www.hawaii.edu/uhelp/handbook-documents.htm)

(PROTOTYPE)

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Affairs Division of the City & County of Honolulu
through Federal Older Americans Act funding.

This presentation is not intended to provide legal advice—you should seek appropriate professional health care, caregiving, legal, and financial advice.

Today's Topics

Dementia, Decision-Making and Capacity

- Basic Estate Planning
- Guardianship and Conservatorship Alternatives
 - Advance Health Care Directives and Planning
 - Provider Orders for Life Sustaining Treatment (POLST)
 - Comfort Care Only-DNR Documents
 - Surrogate decision-making
 - Powers of Attorney under Hawai'i Uniform Power of Attorney Act (2014)

Background-Dementia

- Dementia is a term that applies to a medical disorder which may be evidenced by symptoms of damage or disease to the brain's cognitive function. Dementia may be reversible or irreversible and progressive.
- A person with dementia may suffer from short-term or long-term memory loss, confusion or disorientation or may lose the ability to problem-solve or to complete multi-step activities.
- Sometimes dementia can affect a person's personality, behavior or attention span.

Note: Period of Mild Cognitive Impairment

- Before an individual reaches the point of having dementia, there may be a period of time during which they may be experiencing mild cognitive impairment (MCI).
- An individual with MCI may still have retained substantial ability (decisional capacity) to pursue appropriate legal, financial and personal planning for future incapacity.
 - MCI can be a time for an individual to obtain essential counsel, advice and document preparation to enhance, preserve the individual's autonomy and self-determination and to set into place substitute decision-makers with stand-by authority to act on behalf of the individual when needed.

Capacity For What?

Overview

- Decisional Capacity—varying levels required
 - Will, Power of Attorney, Health Care Decision-Making, etc., have a different levels of capacity that are required
- For legal documents, usually an assessment by an attorney is sufficient but in cases where decisional capacity is questionable, a physician, psychiatrist, psychologist, or other skilled professional may be requested to make an evaluation.
- Capacity and Undue Influence are not the same but may co-exist.
- Decision-making in the absence of capacity
 - Use of Legal Documents and Instruments, such as Advance Health Care Directives and “Surrogates” under Hawai`i law.
 - Guardianship/Conservatorship and Alternatives

Elder Law and Dementia Qualified Attorneys Expanded View of Estate Planning

Planning for transfer of property upon death as well as planning for extended periods of incapacity.

Wills

Advance Health Care Directives

Powers of Attorney

Disposition of Remains

Living Trusts—management of property during periods of incapacity plus distribution upon death normally without necessity of probate.

WILLS

The requirements for making a will are fairly simple.

First, the testator must be at least 18 years old and of “sound mind.” Being of sound of mind means having the general knowledge of the property one owns, the existence of one’s natural heirs (spouse, children, parents, and other relatives), the nature and effect of making a will, and the ability to form a plan in one’s own mind for the distribution of property.

Second, the testator must intend for the document to be his or her will and have the intention to sign it. This also means that the testator is not under any “undue influence” of others to make the will.

Third, the legal requirements must be satisfied (formalities) of putting the will in writing, signing it, and under most circumstances, having it properly witnessed.

Wills

- Execution
 - Capacity
 - Witnesses (2) unless Holographic Will (Hand-Written; No Witnesses)
 - Optional--Self Proved Will--Affidavit (Notarized)
- Restrictions on Testators (e.g., elective share)
- Personal Representative (executor)
- Testate vs. Intestate
- Will Substitutes
 - Jointly held property, POD accounts, Trusts, Life Insurance, etc.

(Sample Simple Will in Handbook)

Alternatives to Guardianship and Conservatorship

Personal (Including Health Care) Matters (Guardianship)

- ✓ Powers of Attorney
- ✓ Advance Directives/POLST
- ✓ Surrogates

Financial and Legal Matters (Conservatorship)

- ✓ Living Trusts
- ✓ Joint Accounts/Property Management
- ✓ Powers of Attorney

Health Care Decisions--Who Decides?

Hawai'i Uniform Health Care Decisions Act (UHCDA)

Informed consent /refusal for healthcare decisions (including application, withholding and withdrawal of hydration and nutrition) is made by capacitated patient or other legally authorized decision-maker:

- Patient
- Guardian
- Agent in Health Care Power of Attorney, or
- Surrogate.

(Consent is required with limited exceptions, e.g., emergencies).

Advance Directives for Healthcare

(Samples in Handbook)

May Include Individual Instructions for Health Care and Durable Powers of Attorney for Health Care)

An Advance Directive for Health Care takes effect upon a determination of incapacity, but patient may decide to have the advance directive take effect immediately. Capacitated patients always retain the right to decide about their own health care treatment.

Advance Health Care Directives

- Individual Instructions for Health Care
 - May be oral or written
 - May be revoked
- Durable Powers of Attorney for Health Care
 - In writing; dated; signed; witnessed by two qualified individuals or notarized.
 - May be revoked.
 - May go into effect immediately as determined by patient but a capacitated patient always retains the right to make health care decisions.

SURROGATES

Needed when the patient is incapacitated and does not have a guardian or a health care agent or the guardian or agent is unable or unwilling to act.

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

- There is No Hierarchy of Authorized Decision-Makers
 - No Hawai`i “Family Consent” Provision--[Spouse, Child, Parent, etc., as provided in some other states]
- In Hawai`i a surrogate may be appointed by “Selection by Consensus of Interested Persons” through a process conducted by the primary physician, or the physician's designee.
 - Interested Persons include the Spouse unless legally separated or estranged, a Child, Parent, Sibling, Grandchild, or a Person who has “exhibited special care and concern for the patient and who is familiar with the person’s personal values.”

Non-Designated Surrogate May Make All Healthcare Decisions 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."

Written Declaration of Surrogate

Under the law: “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.”

There is no sample in the statute but there is a sample in the Handbook.

POLST

"Provider orders for life sustaining treatment form" or POLST is a form signed by a patient, or if the patient is incapacitated, by the "surrogate*" and the patient's physician, Physician's Assistant (PA) or Advanced Practice Registered Nurse (APRN) that records the patient's wishes and that directs a health care provider regarding the provision of resuscitative and life sustaining measures.

* Guardian or health care agent

By Statute--A POLST is not an Advance Directive but Provider Orders (Immediately Actionable)

Form at www.kokuamau.org

The image shows two pages of a POLST form. The left page contains sections A, B, and C, which are checkboxes for resuscitation and life-sustaining treatment preferences. The right page contains section E, which is a section for the patient's signature and date. The form is printed on a light-colored background with black text and checkboxes.

Powers of Attorney

Hawai`i Uniform Power of Attorney Act (UPOAA) (2014)

- General or Special (Limited)
 - **Health Care Powers (and some others)—Not included in UPOAA**
 - Government entity may prescribe own form.
- “Durable”—by Default (but can be made not effective during periods of incapacity);
- Effective Immediately—by Default (or can be made “Springing” upon some future event)
- Generally, must be accepted but with exceptions.
- Specific Protections Provided in UPOAA
 - Principal (Despite protections a POA still can be dangerous in the wrong hands); Agent; Persons Accepting POA

Statutory Form

Execution – Capacity

Agent’s Certification (Optional)

Talking Points

1. It is wise for adults to have a plan in place in the event of death or incapacity, especially for those who may be starting to experience memory loss or a decline in thinking skills as can be seen in dementia.
2. Planning for death and incapacity, especially for those diagnosed with dementia, usually involves the consideration of such essential legal and related documents such as wills, durable powers of attorney for legal and financial matters, advance health care directives, including durable powers of attorney for health care and individual instructions for health care, plus for many, provider orders for life-sustaining treatment and living trusts.
3. A diagnosis of dementia does not necessarily indicate a current lack of capacity to execute essential documents legal and related documents, so it is important to seek professional legal and health care advice early on.
4. The levels of capacity necessary to understand and to execute various legal documents vary and it is important to seek the assistance of a qualified attorney to provide counsel, advice, and assistance.
5. Legal Documents and related forms are often complicated so it may be beneficial to look over some samples commonly used in Hawai`i found in the handbook highlighted in this presentation.

QUESTIONS?