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University of Hawaii Center on Aging

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# **HADI** Hawai'i Alzheimer's Disease Initiative

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A PROJECT OF THE UH CENTER ON AGING

[www.hawaii.edu/aging/hadi](http://www.hawaii.edu/aging/hadi)

# Addressing Legal Issues For Persons with Dementia

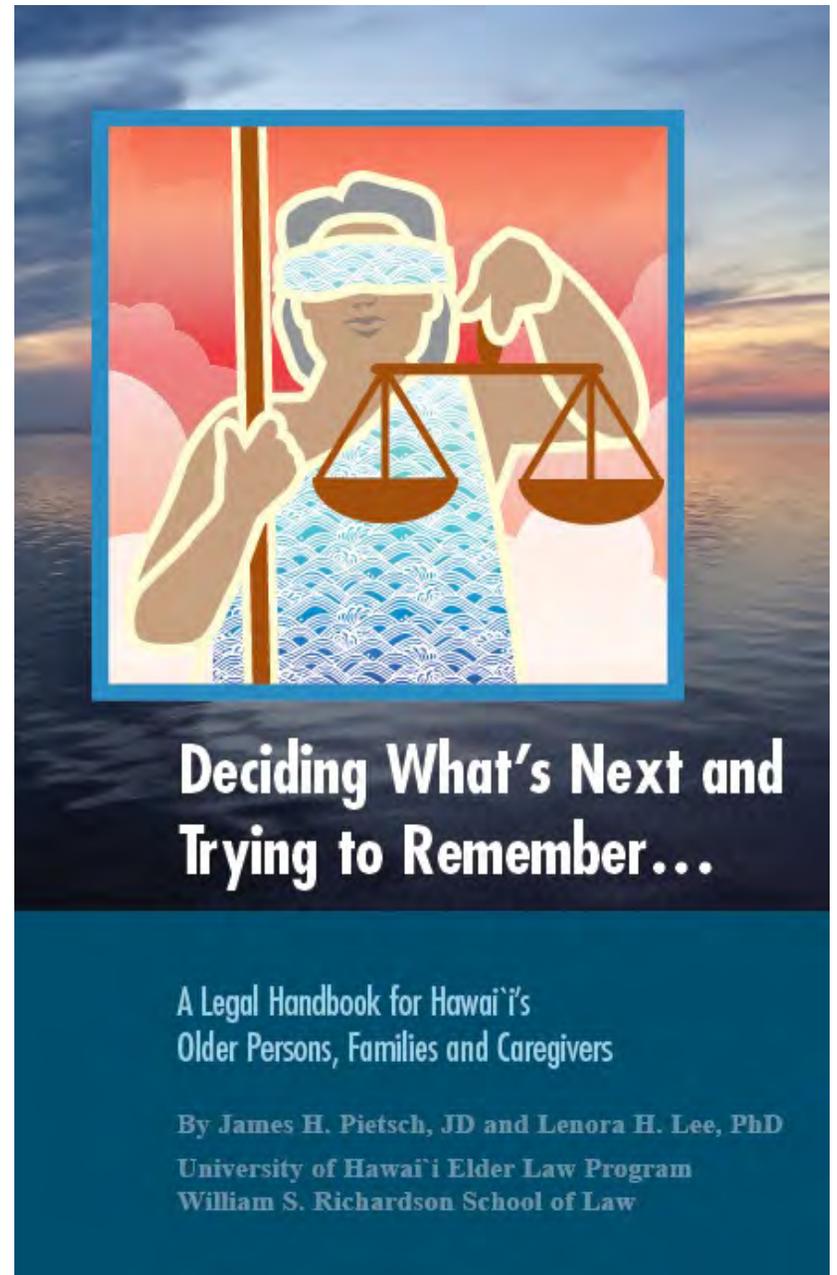


**JAMES PIETSCH**

**PROFESSOR OF LAW; ADJUNCT PROFESSOR OF GERIATRIC MEDICINE AND PSYCHIATRY  
DIRECTOR, UNIVERSITY OF HAWAII ELDER LAW PROGRAM (UHELP)**

# RESOURCES

[www.hawaii.edu/uhelp](http://www.hawaii.edu/uhelp)



# University of Hawai`i Elder Law Program (UHELP) 25 Years

- Courses
  - Law School: Elder Law (Law Aging and Medicine), Bioethics, Elder Law Clinic, Advanced Elder Law Clinic
  - Medical School: Legal Topics for Geriatric and Geriatric Psychiatry Fellows
  - Nursing Students (DNP and PhD) must take Bioethics
- Direct Legal Services



# UH Elder Law Program

Director/Attorney - Professor James Pietsch  
Program Administrator/Legal Assistant - Dr. Lenora Lee  
Elder Law Clinic Students and Attorney Volunteers

UHELP provides limited basic legal assistance, advice, and information to qualified individuals (age/income) including:

- Legal Advice and Counsel to Socially and Economically Needy Older Persons (60+) [Veterans]
- Simple Wills
- Advanced Health Care Directives
- Powers of Attorney
- Caregiver Legal Counseling
- CANNOT help with criminal, commercial, personal injury

# Today's Topics

- Dementia, Elder Decision-Making and Capacity
  - Powers of Attorney under the new (2014) law,
  - Advance Health Care Directives and Planning
    - Provider Orders for Life Sustaining Treatment (POLST)
    - Comfort Care Only-DNR Documents
  - Alternatives to court interventions and probate

# 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 in which they may be experiencing moderate or mild cognitive impairment (MCI).
- An individual with MCI may still have or have retained substantial ability to pursue appropriate legal, financial and personal planning for future incapacity.
  - MCI--A time to provide essential counsel, advice and document preparation to enhance, preserve or continue an individual's autonomy and self-determination and to set into place "surrogate" decision-makers with stand-by authority to act on behalf of the client when needed.

# Capacity and Competency

- “Incompetent” was used to describe persons with diminished mental abilities.
  - Term may be considered stigmatizing and implies a global deficit that has little practical meaning or application.
- Mental capacity is the term used to describe the cluster of mental skills that people use in their everyday lives.
  - Mental status assessment is a complex process involving a variety of measurements carried out by trained professionals. MSE and as developed by MMSE; SLUMS; MoCa, etc.

# Decisional Capacity Skills or Standards

- Communication of a stable choice
- Relevant information is understood
- Appreciation of the situation (personal consequences)
- Manipulation of information in a rational manner
- Note: Mental illness alone not sufficient for lack of decisional capacity

# 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
  - Guardianship/Conservatorship and Alternatives

# 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.
  - Growing concern--[Elder Drivers—no mandatory reporting laws for MDs in Hawaii.](#)
- 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.” [Elder Abuse—variety of state laws plus federal Elder Justice Initiatives.](#)
  - Lawyers note Rule 1.14—Hawaii Rules of Professional Conduct—Client Under Disability.
  - Health Care Providers requirement to report to APS.

# Guardianship/Conservatorship

- Court-Appointed Decision-Makers for Individuals Who Lack Capacity
- Terminology
- Alternatives and Positives/Negatives

# Terminology

- UGPPA (Hawaii) 2005—Terminology
  - Ward is to Guardian as Protected Person is to Conservator.
  - The term “guardian of the property” is changed to “conservator”
  - The term “guardian of the person” is now simply “guardian.”
  
- “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.
  
- Kookua Kanawai (Helper of the law) is used instead of “visitor” in Uniform Act.

# Alternatives to Court Intervention, Including Guardianship/Conservatorship

- Living Trusts
- Powers of Attorney
- Representative Payeeships
- Payable-on-Death Accounts
- Joint Property Ownership
- Money Management Services
- Advance Health Care Directives including Health Care Powers of Attorney (POLST)
- Health Care Surrogates
- Transfer on Death Deeds

# Powers of Attorney

## New 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--Default;
- Effective Immediately—Default (or can be “Springing”)
- Specific Protections Provided in UPOAA
  - Principal
  - Agent
  - Persons Accepting POA

Statutory Form

Execution – Capacity

Agent’s Certification (Optional)

WHO IS YOUR CLIENT?

# Health Care Decision Making

- Capacitated Patient
  - Legally Authorized Representative
    - Guardian
    - Health care agents
    - Surrogate
      - Designated Surrogate
      - Surrogate selected by consensus of interested persons
- Advance Health Care Directive (AHCD)
  - Individual Instructions
  - Health care Power of Attorney
- In-Hospital DNR
- Provider Orders for Life Sustaining Treatment (POLST)
- Comfort Care Only - Do Not Resuscitate



QUESTIONS?



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