

Deciding What to Do and Why Not Now?



A Legal Handbook for Hawai'i's Older Persons, Families and Caregivers

By James H. Pietsch, JD and Lenora H. Lee, PhD
University of Hawai'i Elder Law Program
William S. Richardson School of Law

*In Memory of Baba,
whose beautiful paintings grace this book and
for all who stop and smell the flowers.*





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the Hawai'i Justice Foundation*

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PREFACE

“Deciding What to Do and Why Not Now? — A Legal Handbook for Hawai‘i’s Older Persons, Families and Caregivers” will give you a comprehensive guide to several important areas of legal concerns affecting older persons. Portions of this book were taken or adapted from federal, state and the University of Hawai‘i Elder Law Program’s (UHELP) publications and websites.

Caution: While this book contains practical and helpful information, it is not intended to serve as a “do-it-yourself” legal guide or as a substitute for professional legal advice. If you have legal questions, you should seek the advice of an attorney.

Note: we use the term “attorney” rather than “lawyer” in this handbook, although there is very little distinction made between the two and the terms, attorney and lawyer are often used interchangeably in the United States. A lawyer is someone who is trained in the law although the lawyer may not actually practice law. Attorney or the longer version, “attorney-at-law,” is considered the official name for a lawyer in the United States who is “admitted to the bar,” (usually by taking a bar examination) and who is permitted by a particular court system to practice law in the jurisdiction and before those courts.

The Covid-19 pandemic has changed the way UHELP operates, leveraging technology to help accomplish our mission. In keeping up with technology, we include links to information and resources, and information about distance caregiving. This book will be accessible on our website through a grant from the Hawai‘i Justice Foundation and support from the William S. Richardson School of Law at the University of Hawai‘i at Mānoa.

Our website is at: www.hawaii.edu/uhelp

The University of Hawai'i Elder Law Program is especially grateful to the Hawai'i Justice Foundation, which provides access to justice for Hawai'i's people and makes possible this project. We at the William S. Richardson School of Law, in providing legal services to older persons for over a quarter of a century, wish to thank all our *kūpuna* and families. Special thanks to Attorney Neva Keres for her close and careful editing and Attorney Scott Suzuki for his input with respect to health care financing and special needs trusts.

We hope that this book will give you information and ideas that will help you access the legal, health, and financial care you may need in "Deciding What to Do" and why you should start now.

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CHAPTER 1

PLANNING AHEAD FOR A LIFETIME



When we wrote our first book at the University of Hawai'i Elder Law Program (UHELP), *The Elder Law Hawai'i Handbook*, life seemed simpler as we centered our attention on basic legal needs of older adults. Our motto was to “prepare for the worst so you can enjoy the best.” The Covid-19 pandemic challenged this basic assumption as few could predict the devastation that the disease and social isolation has had, especially among older persons.

We suggested that if our clients who were older adults had not started planning for longevity and the rest of their lives, they should start planning right away. To those who did not know where and how to start, we suggested that they begin by thinking about and answering some basic questions:

- Where will you live?
- What will you do for income?
- What will you do with your time?
- Who will care for you? and,
- What really matters to you?

While we at UHELP still advise older adults to start with that simple formula, we now caution them that answers to these basic questions have grown more complicated; laws may have changed as well as their lives and lifestyles.

For example, the answer to “Who will take care of you?” might mean buying long-term care insurance rather than counting on family members to provide care. Aging in place may not be possible because of your reduced income or family dynamics or the vagaries of life, even though it is a much desired way to spend the rest of your life. Further, there are different laws that affect older adults more than younger adults: Social Security and Medicare are two examples.

Demographics have also changed. Many “baby boomers” have already joined the “silver tsunami” and many of their friends and family are a hundred years old. Longevity has affected lifestyles, how persons live, where they live, their income or lack of income and even those who will care for them when loved ones become incapacitated or die. *Deciding What to Do* has become more urgent and complicated as evidenced by the effect the Covid-19 pandemic has had on the whole world and especially on older persons. To update plans for the best possible future, we suggest adding several more areas to the “to-do list” of preparing for the worst:

- Prepare for the possibility of diminished or lack of mental capacity. Dementia may make you more vulnerable to elder abuse, neglect and exploitation. The older you are, the more chance you will have of being affected by dementia.
- Prepare for possible assisted living if you need help to get around or take care of yourself. It would be ideal to age in place and stay in your own home and community, but it may not be possible.
- Save more money or at least know what benefits are available, because the cost of care, and especially long-term care, is very expensive. Even if you have children, you may or may not be able to count on them to help. Moreover, you will need to be money savvy and take steps to lessen your vulnerability to financial exploitation.

- Take care of yourself and do not assume that your children might take care of you. You might find yourself taking care of their children as well as yourself.

We urge you to talk to your family, your caregivers, and your health care providers about what matters to you and what your wishes are regarding your money and home, your medical treatment and your future. You can decide what matters to you and express your desires and thoughts in a legally recognizable manner by having the following documents prepared:

What Matters to Me . . .

- My will,
- My power of attorney,
- My advance health care directive,
- My trust, especially for any real property or other significant assets I might own,
- My POLST (Provider Orders for Life-Sustaining Treatment) form,
- My Written Instrument to Control Disposition of Remains; and,
- My personal “What Matters To Me” document about my wishes and values.

In the following chapters, we explain how these documents help you to pinpoint what matters to you. The theme and intention of these documents are to use them to “plan for a lifetime” by considering personal, legal, financial, social, and health care needs. We hope that these plans and legal documents will minimize the vagaries of life, those unexpected and unwelcome turns of fortune and mislaid plans. And most important, let your family and close ones know what matters to you.

You can use our *Kōkua Packet* to provide important information about yourself in case of emergency, become incapacitated or die. These additional tasks will require thoughtfulness and a realistic examination of your own situation and resources. They also act as a reminder to put into place legal, financial, health care or other documents and to do it now.

In this book we will describe how “dementia capable” attorneys and other professionals are trained to recognize and address the signs of dementia and other related problems. We will provide an overview of what

a “dementia capable” professional, trained caregiver or family caregiver should know in “deciding what to do.”

There are repeated warnings in this book about elder abuse. Unfortunately, family members continue to be the most common perpetrators of abuse, including financial exploitation. Interspersed throughout this book, you will get the sense that being too trusting could endanger your own independence and autonomy. This is especially significant due to new laws that empower agents and others to do many things, including potentially changing the intentions you had when you signed your legal documents.

The requirements for Medicaid and the rules of long-term care are reviewed and updated in this book, along with information about a new topic, “special needs trusts.” To avoid any confusion between Medicare and Medicaid, make sure to read the chapter on health care financing. Read about special needs trusts and how creating them may be able to help certain individuals with long-term care planning. If your child or spouse or loved one has an intellectual or physical disability, proper planning may help preserve government benefits and money for “special needs.”

Perhaps the best “advice” for living and enjoying longevity is simple and personal:

- Remember the golden rule – treat others as you wish to be treated.
- Be kind to yourselves as we all make mistakes.
- Maintain friendships or make new friends to avoid being isolated.
- Maintain or learn a skill to keep your mind active and have something to do even if you become less physically active.

CONTEMPORARY PLANNING ISSUES FOR OLDER PERSONS AND CAREGIVERS

This book is designed around a “planning for a lifetime” approach that takes into consideration personal, legal, financial, social, and health care needs. While you are planning for the future and preparing for the

unexpected, here are some contemporary issues that you might not have thought about but that can be troubling and surprising when they pop up.

Marriages, Reciprocal Beneficiaries, Domestic Partnerships

You should be mindful that both state and federal laws will impact various aspects of your “planning for a lifetime” and perhaps your relationships. Federal recognition of same-sex marriages provided federal protection or benefits to individuals enrolled in federal programs such as Medicaid, Medicare and Social Security and veterans’ benefits. The Hawai’i Marriage Equality Act legalized same-sex marriage in 2013 and allowed same-sex couples to marry. Couples in this relationship have all the legal rights, benefits, protections and responsibilities of traditional marriage such as the ability to file joint tax returns, to enjoy inheritance rights and to make hospital and prison visitations.

Hawai’i also has an older law, the Reciprocal Beneficiary Law, that was passed prior to the Hawai’i Marriage Equality Act. Those in a reciprocal beneficiary relationship are prohibited from marriage, for example, first cousins, or prior to 2013, same-sex couples. They must register as reciprocal beneficiaries to share in Hawai’i’s marital benefits and privileges, such as having access to Hawai’i’s inheritance laws, holding property as tenants by the entirety, and having hospital and jail visitation rights. However, unlike same-sex marriage, these couples may not share in the same federal benefits because they cannot or could not marry; for example, they cannot file a joint tax return unless they marry.

Another recent law concerns domestic partnership which is recognized in Hawai’i and among a small number of other states. In a domestic partnership, two people live together and are involved in a romantic or interpersonal relationship but are not legally married. They can share certain benefits such as employee health benefits, bereavement leave and visitation rights in hospitals and jail. However, they may not be entitled to make health care decisions, funeral arrangements, or claim any part of their partner’s estate or social security benefits. Currently, although some employers include domestic partners in their list of benefits, there are no federal or state laws that require employers to include domestic partners in their benefit plans.

Although Hawai'i recognizes domestic partnerships, it does not recognize common-law marriages. One of the misconceptions is that if you and your partner have lived together for 7 years (or some other designated period), you are considered to be in a common-law marriage. This is not true in Hawai'i although it may be true in some other states. If a "common-law spouse" who is not recognized in Hawai'i as married, dies without a will or does not adequately provide for the other common-law spouse in a will, there is no automatic right to an inheritance or to property and bank accounts unless that other common-law spouse is on title. Often, many older adults who assumed that they would inherit or be taken care of when their partner died are left with a broken heart when their partner's family rejects them and prevents their attempts to visit their partner in a health care facility or to have access to funds. Often, they are the ones who nursed and cared for their partners when the family was too busy or unavailable to lend a hand.

Marriage and relationship laws may continue to change. If you have a question about same-sex marriages, reciprocal beneficiaries, domestic partnerships or common-law marriages in Hawai'i you may wish to contact a local family law attorney for assistance. These various relationships may impact other areas such as inheritance, taxes and estate planning.

Real ID Act

Another important legal development that still concerns older persons and caregivers is the REAL ID Act, passed by Congress in 2005 and implemented by the 9/11 Commission's recommendation that the federal government "set standards for the issuance of sources of identification, such as driver's licenses." REAL IDs will be necessary for travelers within the United States by May 3, 2023. Your driver's license or state identification will need to be REAL ID-compliant if you want to use it to fly within the U.S. If your license or state ID is not compliant, and you don't have another acceptable form of identification, such as a valid passport, you will have trouble getting through airport security.

Proving identity for some people can be difficult, because of name changes, particularly for older married or divorced women and those with out-of-state marriages.

These standards can make it complicated, if not nearly impossible, for some people to renew their licenses or state IDs, especially if the identification is in question. It is not unusual for an individual to be denied boarding for air travel and even for benefits, including health care benefits for not having a “federally compliant” identification document. Very often complications arise when people lose their birth certificates or use different names from those indicated on their birth certificates. Now, to get a new ID, an applicant needs to demonstrate “name traceability,” that is, a connection between the name presented on the source document and the name requested to be on the issued document. To further complicate the matter, sometimes when individuals have been forced to legally change their names to comply with the REAL ID Act, their previously executed documents may no longer be accepted as valid.

To apply for a Hawai‘i State Identification Card for the first time, you must apply in person and provide documentary proof of legal name, date of birth, social security number, legal presence and Hawai‘i principal residence address. A photograph must also be taken. Full names on all documents must be the same or you must provide “connecting documents” to establish the link between the names of any documents that have different names. To view and print the “List of Acceptable Connecting Documents to Prove Legal Name Changes” document guide, you can visit:

<https://hidot.hawaii.gov/highways/files/2020/02/Acceptable-Documents-for-a-REAL-ID-Compliant-Star-DL-SID-Print-Button-2020-02-21.pdf>

If you need a Social Security card, visit:

<http://www.socialsecurity.gov/ssnumber/ss5doc.htm>

If you do not believe that things could get worse for these individuals, consider what may happen when it is the caregiver who is applying on behalf of an individual who is no longer mentally capacitated and whose ID has expired, and the caregiver has little information about where important documents may be found. This is another good reason to take a look at the Kōkua Packet at the end of this handbook.

Disappointment in Life and “Proxy” Decision-Makers

Frailty, illness, mental incapacity, fear, language barriers, and poverty are just a few of the reasons some older persons are unable to manage their own affairs and may need the assistance of a caregiver. They may need someone to take care of them, but many have no one to help. To make matters worse, some older persons are being abused, neglected, or exploited by strangers, acquaintances, and even family members.

Too many times older persons are disappointed at the end of their lives. Some thought they had planned well. Others did not do much planning at all. Most were hoping for the best but got the worst. One just has to read the newspaper or watch the news to see examples of high-profile cases in which matters seemed to have turned out badly for an older person. These cases include fights over an older person’s desire for autonomy and self-determination, over one’s own property decisions, allegations of fraud, theft or at least improper use of an older person’s assets, and efforts to override the older person’s medical choices at the end of life.

Just as often, it seems, entire families are disrupted by conflicts involving the care of an older person at the end of life or by manipulative family members scheming to get the older person’s assets before death or vying to gain a larger inheritance. Very often lawyers are involved, too, whether they represent the older person, the family member or caregiver or, maybe, themselves.

We will provide an overview of some of the Hawai’i statutes that are commonly applicable to proxy (substituted or legally authorized) decision-making on behalf of a person who lacks capacity, or who may have limited capacity, or who may be unable to make decisions, or unable to make critical decisions on a timely basis. We will also clarify what the term “surrogate” specifically means under Hawai’i’s health care decisions law.

For the most part, individuals who act as proxy decision-makers are trustworthy. Although both they and the person for whom they are making decisions are acting in good faith, proxy decision-making is often done in private without any oversight. Adding to the difficulty of monitoring and overseeing whether decisions are made to benefit the incapacitated

person, laws may often be inconsistent. This may result in having provisions in some statutes that appear to protect but may inadvertently give the proxy decision maker a “license to steal” or even putting it most dramatically, a “license to kill.”

Accordingly, be aware of high expenses and fees that proxies might charge, but also be mindful when someone decides to withhold treatment or services or resources too quickly to “spare grandpa or grandma from suffering too long.” Always ask for an accounting from proxies and, most of all, ask yourself what your loved one or person you care about would have wanted.

PLANNING FOR INCAPACITY

There are two important ethical considerations attorneys must address in dealing with older clients and with their health care providers, financial advisors, family members and caregivers:

- Who is (or will be) the client? and, when the identity of the client is clear,
- Is the client (or potential client) competent (does the client have sufficient mental capacity) to make decisions?

Family members may try to talk for their parents or relatives. And the conversation may turn to what they might want to see happen which might not be what the parent wants. Sometimes the conversation becomes overwhelming when there are different opinions in the “best interest” of the elder.

Family conflicts can happen when an adult child takes advantage of a parent’s diminished capacity; for instance, when the adult child asks a parent to sign a legal document such as a power of attorney, that gives that child power over personal, legal and financial matters concerning the parent and leaves out other family members. Often who pays the attorney’s fees influences how the legal document is structured.

Be aware that in addition to family, cultural practices may influence a person's decisions. In Hawai'i, as well as in various other parts of the nation, culture may affect autonomy and independence in decision-making. Yielding to a spouse's, child's or clan leader's wishes may be reflected in a number of decisions such as wills, health care, and even end of life.

To guard against the possible breach of confidentiality, the lawyer or health care provider must always be able to identify who the client is and to whom allegiance must be given. Some would propose that "the family" is the client but the ethical responsibility would still require a determination of the identity of the client.

Elder law attorneys and health care providers sometimes face enormous pressure to breach the confidentiality of their older clients or patients, who may not be very "sharp" or who depend heavily upon another person. Spouses, health care providers, hospitals and nursing homes, caregivers, and others may overlook the need for confidentiality and privacy. To guard against the possible breach of confidentiality, a lawyer or health care provider must always define who the client is and to whom allegiance is owed. If they can answer, "Who is the client?" and "Is the client mentally capacitated and free from undue influence?" they may be able to cut through the noise and confusion when families bring their older members to see the provider.

The following information can help you determine whether the client or potential client has capacity.

INCAPACITY, MEMORY LOSS AND DEMENTIA (NEUROCOGNITIVE DISORDER)

Mental incapacity or serious memory loss can affect activities of daily living, safety, the ability to live independently, to make personal choices or to execute valid legal documents that may affect a person's life. The law recognizes that adults (usually persons over age 18), have the right to manage their own affairs, conduct business, and among other things, to make their own health care decisions. Although an adult is presumed

to be “competent” or “capacitated,” it is a “rebuttable” presumption. In working with clients, the question often arises as to whether the individual has the “capacity” to make decisions. Judicial declarations of “incompetency” and “incapacity” are infrequent but may be required under certain circumstances.

The concept of capacity, or incapacity, is more activity specific than the concept of competency or incompetency, which often has a more global connotation. The most common court cases where capacity is an issue involve guardianship, conservatorship, adult protective services, and civil commitment. To be considered legally valid, each decisional activity (e.g., provision of informed consent for medical treatment, execution of a will, making gifts, completion of an advance health care directive, etc.) may require a different level of decisional capacity. These are areas in which doctors and lawyers often work together to help assess an individual’s ability to make decisions.

Various studies have shown that there is a significant decline in “financial literacy” in older persons, not necessarily related to dementia. This decline starts slowly, usually around the age of 60 and the rate of decline increases with age. Paradoxically, overconfidence about financial decision-making seems to increase with advancing age. This may explain why older persons may seem to make more mistakes regarding their finances as they grow older, and they may not even realize that they are making mistakes. This is similar to the phenomenon of reduced driving skills among many older persons. Studies have shown that older drivers may not be aware that their driving skills have declined even though they should know that their cognition, reflexes, eyesight and hearing decline with advancing age.

One of the least understood conditions that gives rise to questions of competency or capacity is dementia, a decline in mental ability. Alzheimer’s, the most common cause of dementia, is a specific disease and dementia is not. Dementia is a term many people fear to hear. As a matter of fact, in order to address the negative response that the term, “dementia,” may evoke, the American Psychiatric Association (APA) is essentially attempting to replace the term, “dementia,” in favor of the term, “neurocognitive disorder,” and for cases with clinical significance, “major

neurocognitive disorder." The term, "dementia," will be used for simplicity in this book.

If the condition is discovered and addressed early enough, it may be possible to make informed and reasoned decisions and to set appropriate legal mechanisms in place for the future. Writing a "values history" or noting what matters to the individual is often a good idea and many families are able to guide their loved ones to make decisions and take action to preserve as much of their personal independence and well-being as possible.

There is a difference between memory loss and dementia. You can have short-term memory loss but not have dementia. For example, a person who occasionally asks, "Where did I put those keys?" would probably not be considered to have 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. Depending on its stage, 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 may also have an effect on a person's personality, behavior or attention span.

Memory loss is a problem that many older persons (as well as many younger persons) worry about. However, having memory loss does not necessarily mean that you lose the capacity to make decisions. The aging process can have an effect on memory by changing how the brain stores and recalls information. As one ages, brain chemistry changes and brain cells die and are never replaced. Since the older brain has fewer brain cells and stores information differently from a younger brain, memory loss is not unusual. As one ages, it often becomes more difficult to recall stored information, especially newly stored information. This is why individuals may often be able to remember events from long ago with great clarity but may fail to remember more recent events such as the introduction of people they have just met.

In addition to dementia, memory loss can be caused by other things such as poor nutrition, the side effects from head injuries, heart attacks, strokes, alcohol consumption, depression, disease, or illness. Drugs, including

chemotherapy, anesthesia, and anti-depressants as well as other medical treatments can also lead to memory loss.

Memory loss can be a serious problem if it affects a person's daily living and decision-making capability. Most people can learn to cope with memory loss (and sometimes, the associated confusion) by keeping busy, making lists, following a daily routine, including exercising (with a doctor's approval), putting objects (such as keys) in the same place, and by keeping healthy (including eating nutritious foods and especially vegetables), and maybe by not worrying too much about forgetting things. A doctor, and especially a geriatrician, can also suggest how to keep the body and brain functioning at optimum levels.

While there are different types of dementia depending on the cause, Alzheimer's disease is the most commonly dreaded form and can place a great burden on the patient and on caregivers. Alzheimer's is an irreversible, progressive brain disease that slowly destroys memory and thinking skills, and eventually even the ability to carry out the simplest tasks. Symptoms usually develop slowly and get worse over time, becoming severe enough to interfere with daily tasks. Although it seems that current Alzheimer's treatments cannot stop it from progressing, they can temporarily slow the worsening of symptoms and improve quality of life for those with the disease and their caregivers.

Decisional Capacity

An individual is usually considered to have decisional capacity when the individual is sufficiently able to receive, understand, and evaluate information and to communicate a particular choice. This means, minimally, that the individual has the ability to understand the nature of the problem or activity the individual is facing, to understand available alternative courses of action (including no action), to understand the possible risks and benefits attached to each alternative, and that the individual is able to express a choice. Note that issues associated with decisional capacity are different from issues associated with "undue influence," which can be exerted by one person over another person. The more difficult cases involve situations where an individual may be experiencing diminished capacity and may also be subjected to the undue influence of another person to do or not to do something.

Whether a person is considered to have decisional capacity depends on each specific situation. For example, a judge may declare a person legally incapacitated to manage the person's own affairs and may appoint a guardian or conservator for that person. However, that person may still be deemed to have sufficient mental capacity to execute a will. Conversely, while that person has the capacity to execute a will, the person may not have the mental capacity to enter into a contract.

Danger! Danger!

Attorney David Zachary Kaufman wrote an article for other attorneys called Security for Seniors, "Danger Will Robinson," that appeared in the American Bar Association Voice of Experience Newsletter, May 19, 2019. An excerpt from his article may get you thinking about protecting yourself and, perhaps, writing up a "What Matters to Me" type of document before your decisional capacity diminishes and before you are subjected to undue influence.

"If someone asks you to change your plans you should hear the famous "Warning, warning, danger, Will Robinson. Danger." Don't do it unless you are absolutely sure it is your own idea. I once had a case where a very elderly person, living with one child, suddenly disinherited the other surviving child. The elder swore up and down that it was a voluntary decision. It was—if you believe that a decision is voluntary if it is arrived at after weeks of begging, pleading, and caterwauling by the beneficiary. Unfortunately, the original attorney didn't realize what was going on—even a private talk did not reveal what had happened and how much pressure was put on the elderly parent. I only determined what had happened after the lawsuit had been filed and we entered discovery."

Danger also can be found in matters relating to fraud abuse and financial exploitation, especially for those who may be experiencing diminished capacity. Later in this handbook we will be discussing a variety of issues relating to fraud, abuse and financial exploitation, but to get you thinking about your own protection or the protection of your loved ones, consider this additional protection about your finances. Bank privacy laws generally prohibit financial institutions from revealing account information to anyone not named on the account without permission. Joint account holders can monitor the account, of course, but they can also commit fraud without

detection or even suspicion. Frequently, nobody else is monitoring the situation since the joint owner is often known to and trusted by other family members.

New technology services could help provide more assurance that the “trusted helper” is not committing fraud. There are now financial service entities that use artificial intelligence to identify members’ financial-activity patterns as they monitor bank and investment accounts, credit cards, and credit data. Whenever a suspicious activity occurs, alerts are sent to a specified list of “trusted advocates,” such as family members, financial advisers and others who can review the member’s account activity.

Recently, FINRA, the Financial Industry Regulatory Authority, which is an independent nongovernmental organization that writes and enforces the rules governing registered brokers and broker-dealer firms in the US, enacted a new rule to protect investors from financial abuse. You can provide your broker with a name and contact information for a “trusted contact person” who your broker can contact if your broker suspects you were exposed to financial exploitation or fraud.

“Danger Will Robinson” is a reference to words spoken by the robot in the 1960’s TV series, “Lost in Space.” The robot served as young Will Robinson’s companion and guardian. The phrase served as a warning that someone was probably about to make a mistake. You can watch a bit of it at:

<https://www.youtube.com/watch?v=RG0ochx16Dg>

CHAPTER 2

GUARDIANSHIP, CONSERVATORSHIP AND ALTERNATIVES TO GUARDIANSHIP



We discuss guardianship and conservatorship early in this handbook since you should know about the legal procedures you may have to go through if you do not plan ahead effectively for incapacity. Often families are conflicted when a family member cannot self-care or is resistant to accept help. Sometimes it is possible for another family member to assume the responsibility of caring, paying bills, and making other medical and financial decisions for that individual. In other instances, when effective alternatives such as a power of attorney, have not been set up, it may be necessary or appropriate to seek a guardianship or a conservatorship.

It is easy to be confused about guardianships and conservatorships. Guardianships are court proceedings where someone, a “guardian,” is appointed by a court to protect the interests of another person who may be unable to care for themselves. Guardians are involved in decisions about a person’s living arrangements, unlike conservators, who are involved in decisions about a person’s finances. Guardians can decide where the ward is to live, who can visit, what the ward eats, what medication the ward takes, and in general, take charge of the ward’s daily

activities. Conservators, on the other hand, take charge of a person's finances, property, businesses and other financial affairs.

Guardianships and conservatorships are very serious matters. They may extinguish certain basic individual rights of the allegedly incapacitated person who is the subject of the court action and, once a guardian or conservator is appointed, the individual's consent is not required to make decisions. The court needs to be assured that the individual's rights are observed and an appropriate person is appointed as guardian or conservator. This can result in a long and expensive court process. After appointment, the court exercises oversight of the guardianship or conservatorship by requiring annual reports from the guardian and conservator regarding living arrangements, condition of the ward, the ward's financial situation and other information.

When the Uniform Guardianship and Protective Proceedings Act (UGPPA) went into effect in Hawai'i in 2005, the terminology used in the law in Hawai'i changed from "guardian of the person" and "guardian of the property" to "guardian" and "conservator," respectively. Other terms are "ward," which refers to the person for whom guardianship is sought and "protected person," which refers to the person for whom a conservatorship is sought. Different terms may be used in different states.

As previously mentioned, guardianship and conservatorship involve the legal processes through which someone is appointed by the court to take care of the person or property of an individual who is determined to be incapable of handling personal and property matters. Hawai'i courts have jurisdiction over guardianships for people domiciled or present in the state and over conservatorships for people who are domiciled and own property in Hawai'i. Court hearings for guardianships of incapacitated persons can be heard in Circuit (Probate) Court or in Family Court. This is what is called "concurrent jurisdiction." Hearings for conservatorships are in the Circuit (Probate) Court. Cases involving the guardianship and conservatorship of the same person can be consolidated in the Circuit (Probate) Court at the court's discretion. Petitioners are the individuals who ask the court for the responsibility of caring for and protecting another person. Petitioners can act both as the guardian and as the conservator of an incapacitated person. Finally, transfer of jurisdiction from one court to

another is permissible, if it is determined to be in the best interest of the ward or protected person.

Under the UGPPA, a guardianship or a conservatorship for a person or property, is appropriate if that person, 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.”

As noted above, the appointment of a guardian or a conservator usually requires rather lengthy and often expensive procedures. The petitioner (i.e., the person who appears before the court to request the appointment of a guardian or conservator), will need to provide medical and personal information about the incapacitated person, the spouse, parents, children, other close relatives, current custodian or guardian, and the proposed guardian or conservator. The court will require confirmation of the incapacitated person’s condition, usually through a written report from a doctor. The court must also find that it has jurisdiction over the incapacitated person, and property if a conservatorship is required, that the appointment is in the person’s best interest, and that it is necessary or desirable to continue the care and supervision of the incapacitated person.

A guardianship or conservatorship will last until the death, resignation, removal, or court termination of the guardian or conservator. The ward (under a guardianship) or the protected person (under a conservatorship) can also petition the court to terminate the guardianship or conservatorship when the person regains or attains the capacity or ability to take care of personal and property matters.

GUARDIANSHIP

Generally, a guardian can be appointed by a judge based on a petition that meets certain statutory requirements and which complies with other measures required by the court, such as proper notice to the interested parties. Except as otherwise limited by the court, a guardian has the duty

to make decisions regarding the ward's support, care, education, health, and welfare. The guardian should only exercise authority as necessitated by the ward's limitations and, to the extent possible, should encourage the ward to participate in making decisions for himself or herself. The guardian should also encourage the ward to regain or attain the capacity to manage the ward's own affairs.

Among other powers, the guardian will generally have the authority to take custody of the ward and establish the custodial dwelling within this state (or outside the state with the court's authorization). The guardian will also be authorized to consent to medical or other care, treatment or service for the ward, to take action to compel support for the ward, and to apply for and receive moneys for the support of the ward. Making decisions to accept or to refuse life-sustaining medical treatment, especially at the end of life is one of the customary decisions a guardian may make for an incapacitated ward in accordance with the court's guardianship order.

Please note: a guardian, without authorization of the court, may not revoke any health care directions or any individual instructions set forth in any medical directive or health care power of attorney of which the ward is the principal. However, the appointment of a guardian automatically terminates the authority of any agent designated in the medical directive or health care power of attorney.

Public Guardian

As a state-funded program at the State of Hawai'i Judiciary, the Office of the Public Guardian (OPG) serves as guardian for mentally incapacitated adults if there is no willing and suitable person, family member, relative, or close friend who can serve.

The OPG also provides temporary guardianship in emergency situations. While the OPG can be appointed guardian of the ward, it does not file the petition with the court to be appointed. Other organizations, including health care institutions, legal services agencies, private practice attorneys, or private individuals must file the petition with the court and obtain the appropriate documents to name the OPG as guardian.

Private individuals can represent themselves in court and file a petition on behalf of the incapacitated person with the assistance of a “*pro se* packet.” Information about such “do-it-yourself” packets is available through the OPG and the Family Court. However, the court system can be confusing and it is often a good idea to get a lawyer to help.

CONSERVATORSHIP

A conservatorship may be determined to be necessary under a variety of circumstances for the protection of the property (sometimes called estate) of an incapacitated individual. The court may determine that the individual is unable to manage property and business affairs because the individual cannot comprehend and evaluate information or make or communicate decisions even with help or because the individual is missing, detained, or unable to return to the United States. The court may also decide that unless management is provided, the property will be wasted or dissipated. Further, the court may decide that a conservatorship is necessary or desirable when money is needed for the support, care, education, health, and welfare of the individual or of individuals who are entitled to this support.

Generally, without needing further court approval, a conservator may authorize, direct, or ratify any transaction necessary or desirable to provide for the security, service, or care of the ward or protected person. The appointment of a conservator vests title in the conservator as trustee to all property of the protected person or to the part of the property specified in the court order. Upon notice of the appointment of a conservator, all agents acting under a previously created power of attorney by the protected person must take no further actions without the direct written authorization of the conservator, promptly report to the conservator as to any action taken under the power of attorney, and promptly account to the conservator for all actions taken under the power of attorney. Each year the guardian and the conservator must prepare an accounting and submit it to the respective court.

Conservatorships for Estates Less Than \$10,000

When the value of all of the protected person's assets (the estate) is less than \$10,000, the Clerk of the Circuit Court may be appointed to act as conservator and will be responsible for properly receiving and dispensing the protected person's funds. In addition to managing and administering funds for protected persons, the Estate and Guardianship clerks communicate with caregivers, guardians of the person, public agencies, and provide many other services that ensure that the protected person's funds are properly administered.

Although it is possible to have the Clerk of the Circuit Court establish a conservatorship for a protected person with assets of less than \$10,000 at the Small Estates and Guardianship Office, be aware that its resources may be limited and its workload very high.

To start the process, contact the Small Estates and Guardianship Office. Among other documents, it will ask for a letter from a physician stating that the incapacitated individual is incapable of managing financial affairs and in need of a conservatorship. To help determine if the incapacitated individual is qualified to have the Clerk of the Circuit Court become the conservator, the Small Estates and Guardianship Office will require names and addresses of family members and other information, such as bank accounts, to determine the value of the assets.

After the necessary information and documents have been submitted and approved, the Small Estates and Guardianship Office will prepare a petition for conservatorship. If the judge approves the petition, the protected person's bills and checks can be sent directly to the Small Estates and Guardianship Office for payment. The conservatorship will continue until the protected person dies, once again becomes capable of handling financial affairs, or until a successor conservator is appointed.

Once the estate reaches a certain sum in value (currently \$16,250), a conservator must be appointed or the court, in its discretion, may allow the conservator appointed under this section to continue to act even though the total assets exceed that amount.

Trust Companies and Attorneys as Conservators

Being a conservator can be complicated, time consuming, and require a great deal of responsibility. For these reasons, friends and family members are not the only ones who can be appointed as a conservator. However, be mindful that an owner, operator, or employee of a long-term care institution at which the respondent is receiving care shall not be appointed as conservator unless related to the respondent by blood, marriage, adoption, or otherwise ordered by the court. Where substantial assets are concerned (usually in excess of \$100,000), private trust companies and private attorneys are usually willing to be conservators for protected persons. To establish a conservatorship, these entities, caregivers, or financial organizations must go through the same proceedings as do private individuals.

Kōkua Kānāwai, Guardian Ad Litem, and Counsel

In Hawai'i, the judge will sometimes appoint an independent investigator to serve as an extension of the court to conduct an independent review in a guardianship or conservatorship proceeding. The *kōkua kānāwai* (which means "Helper in the Law") is usually an attorney whose duties include interviewing the parties to the case, reviewing financial and medical records and submitting a written report of findings and recommendations to the judge. The *kōkua kānāwai* does not advocate for or against the rights of the incapacitated individual. The *kōkua kānāwai* will charge for services.

Additionally, when necessary, and completely independent of the *kōkua kānāwai* recommendations, the court has the authority to appoint a guardian *ad litem* for a person who is the subject of a guardianship or conservatorship proceeding during the course of a case. While typical guardians or conservators have an on-going duty to protect the interests of their ward, guardians *ad litem* only protect their ward's interests in a single case.

The court may also appoint counsel for the subject of the proceeding if the court finds that the individual is a vulnerable adult, requires a separate legal advocate and is unable to afford private counsel.

ALTERNATIVES TO GUARDIANSHIP AND CONSERVATORSHIP

A guardianship or a conservatorship can involve significant time delays, costs, and a potential loss of privacy. Obtaining the required documents (such as birth certificates, marriage certificates, and a doctor's assessment), going through the judicial process, giving notice to the interested parties, and attending the court proceedings normally takes several months. Filing fees and attorneys' fees and costs are incurred with each proceeding. Further, while guardianship proceedings are usually confidential, conservatorship documents and proceedings are matters of public record and, accordingly, the financial affairs of the ward or protected person may become public knowledge.

With proper advance planning, guardianship or conservatorship proceedings may not be necessary. Less restrictive alternatives can serve the purpose of providing necessary assistance to an incapacitated adult. Advance directives for health care (to be discussed in the next chapter), financial and legal powers of attorney, living trusts, representative payeeships, and joint financial accounts to pay bills are a few of the frequently used alternatives.

POWERS OF ATTORNEY AND THE UNIFORM POWER OF ATTORNEY ACT (UPOAA)

A power of attorney (POA) can be an important alternative to both guardianship and conservatorship. A power of attorney is a written instrument through which a person (called the "principal") designates another person as an agent (or "attorney-in-fact") and grants the agent authority to perform certain acts on the principal's behalf. It is a dynamic tool that can be used in planning for incapacity by authorizing someone to act on behalf of another person in private affairs, business, or some other legal matter. Although it has all these attributes that enable the agent to do a lot of things, the agent cannot make health care decisions.

Powers of attorney can be drafted to take effect immediately or on a future date. A "springing" power of attorney "springs" into effect upon some

subsequent future event such as a particular date or upon the principal's disability or incapacity. A power of attorney can also be made for a specific period or can last indefinitely, until the principal's death. Upon the principal's death, the personal representative or trustee named in the principal's will or trust, if applicable, will take charge.

Caution:

You do not give up any of your powers to make decisions for yourself if your power of attorney is drafted to take effect immediately as long as you remain mentally capacitated. You also retain the right to revoke or to change your power of attorney at any time as long as you remain mentally capacitated. You should know that some government agencies do not accept powers of attorney or may require or recommend specific forms. The Internal Revenue Service has its own Power of Attorney Form 2848, which contains information and authority the IRS requires in designating an agent. The Social Security Administration does not recognize powers of attorney but has its own forms and processes to appoint a representative payee for individuals who need help with managing their Social Security benefits. You can contact Social Security at <https://www.SSA.gov> to obtain information and applications for this process.

2014 UPOAA

The 2014 Uniform Power of Attorney Act (UPOAA) was passed into law to make it easier for a properly executed power of attorney to be accepted by banks, financial institutions and ordinary citizens. Part of the reason for the change was that powers of attorney, historically, were not required to be accepted. Financial institutions, especially, were not required to accept them. Under the new law, when the power of attorney is presented to a third party, such as a bank, that party now has three choices – to accept it, to request that the agent sign a certificate, or to request the agent to provide an opinion of counsel.

The law applies to all powers of attorney in Hawai'i, with a few narrow exceptions, such as health care directives, voting proxies, parent/guardian agreements for care of ward/children by third parties, and powers granted via governmental forms. It applies retroactively to all powers of attorney, whether executed before or after passage of the Act. Powers of

attorney executed outside of Hawai'i remain valid if they were executed in compliance with the law of that jurisdiction.

Hawai'i's law provides a statutory form which may be used or modified. The statutory form provides a listing of general powers to be granted by initialing each subject the principal wants to include in the agent's general authority and, if the principal wishes to grant general authority over all of the subjects, the principal may initial "All Preceding Subjects."

The subjects are explained in the statute but not on the statutory form and are listed as: "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 and Taxes."

The extent of powers is not always obvious. While these provisions are intended both to alert the principal to the extent of the authority being delegated and as information to third parties about the agent's authority to conduct those transactions, practically speaking, it is not difficult to convince someone to "just initial here if you trust me."

If the principal has doubts about the potential agent but still wishes to grant that person certain powers, the principal can take those concerns into account and have a lawyer draft safeguards into the document. These safeguards can include periodic reports, much like those generally required by courts for guardians. While the reports would not be submitted to a court, at least there could be some mechanism to assure that the powers were utilized in a fiduciary capacity. In the same vein, as long as the principal is still mentally capacitated, the principal can revoke or modify the power of attorney at any time.

For a practical approach towards greater protection, individuals executing powers of attorney could be encouraged to utilize the optional "Special Instructions" section of the statutory form. This provides a good area to include or reference a "What Matters to Me" type of statement for future use in times when family, fiduciaries and courts may wonder, "What would they have wanted?" Lawyers will need to establish guidelines and

language that would be both helpful and legally sufficient. Lawyers can also encourage the use of the agent's certification, which is an optional form that may be used by an agent to certify facts concerning a power of attorney. This certification includes information about the agent's duties and liability. While this does not by any means ensure that the agent will not misuse the power of attorney, it may give the agent pause.

The UPOAA became effective upon signing in April 2014 and was codified in the Hawai'i Revised Statutes. The UPOAA repealed the Uniform Durable Power of Attorney Act. If you have a power of attorney (other than a health care power of attorney) executed prior to the April 2014 effective date of the statute, consult with your attorney to see if you should make a new one under the UPOAA.

The UPOAA provides a comprehensive legal framework for the creation and use of POAs and furnishes specific guidance to and protections for principals, agents and third parties. "Principal" means an individual who grants authority to an agent in a power of attorney. "Agent" means a person granted authority to act for a principal under a power of attorney, whether denominated an agent, attorney-in-fact, or otherwise. The term includes an original agent, co-agent, successor agent, and a person to which an agent's authority is delegated. "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

A power of attorney must be signed by the principal or in the principal's "conscious presence" by another individual directed by the principal to sign the principal's name on the power of attorney. A signature on a power of attorney is presumed to be genuine if the principal acknowledges the signature before a notary public or other individual authorized by law to take acknowledgments.

The UPOAA contains several mandatory provisions and a number of "default" provisions. A default provision is a provision that applies unless overridden by express language in the POA and is usually preceded by the phrase "unless the power of attorney otherwise provides." The UPOAA's default provisions present a variety of drafting options that allow it to be

individually tailored to a principal's needs, interests and preferences. Under the UPOAA, a POA by default is a "durable" power of attorney. "Durable" means not terminated by the principal's incapacity, with respect to a POA. This means that the POA survives the incapacity of the principal and helps avoid the need to initiate expensive and time-consuming conservatorship actions to care for the principal's assets.

The UPOAA serves to enhance the effectiveness of the POA as a vehicle that an individual can use to plan for potential incapacity and to avoid a court appointed conservatorship in the event of actual incapacity. "Incapacitated" or "incapacity" means the inability of an individual to manage property or business affairs because the individual:

- Has an impairment in the ability to receive and evaluate information or make or communicate decisions even with the use of technological assistance; or
- Is missing or detained, (including incarcerated in a penal system), or is outside of the United States and is unable to return.

A major aim of the UPOAA is to prevent, identify and redress the misuse or abuse of a POA by an agent. The law is aimed at striking a balance between preserving the durable power of attorney as a flexible, low cost, and private form of surrogate decision-making and deterring use of the power of attorney as a tool for financial abuse of incapacitated individuals.

The law incorporates language used in different jurisdictions pertaining to guardians and conservators. In a related vein, a principal may, in a POA, nominate a conservator of the principal's estate, or a guardian of the principal's person for consideration by the court if protective proceedings for the principal's estate or person are begun after the principal executes the POA. Except for good cause shown or disqualification, the court shall make its appointment in accordance with the principal's most recent nomination.

You should know that under the UPOAA certain specific powers rather than general powers are conferred. This helps eliminate questions about the agent's authority while ensuring that the agent is aware of the fiduciary responsibilities as agent. The UPOAA requires the agent to act in good faith and within the scope of authority granted in the power of attorney.

“Good faith” means honesty in fact. The UPOAA provides a form power of attorney that generally must be accepted by any third party and there are civil penalties for refusal to accept it if the third party has assets of the principal. Basically, if a person is leery about accepting the POA, the person can request an agent’s certification under penalty of perjury of any factual matter concerning the principal, agent, or power of attorney. The third party can also request an English translation of the power of attorney if the power of attorney contains, in whole or in part, language other than English. Lastly, the third party can request a written opinion of counsel as to any matter of law concerning the power of attorney if the person making the request provides in writing or other record the reason for the request.

With a few exceptions, a person must either accept an acknowledged power of attorney or request a certification, a translation, or an opinion of counsel no later than seven business days after presentation of the power of attorney for acceptance. If a person requests a certification, a translation or an opinion of counsel, the person must accept the power of attorney no later than five business days after receipt of the certification, translation or opinion of counsel. A person may not require an additional or different form of power of attorney for authority granted in the power of attorney presented.

Protections and Penalties

A legal and financial power of attorney is a very powerful tool. It allows you to appoint another to handle legal and financial matters on your behalf if you are incapacitated, or, in some cases, if you are unable or unavailable or simply want someone to help you. Granting power to another person can also make you vulnerable to fraud, abuse or exploitation. Your agent may exercise legal authority or gain access to your funds without your specific permission or knowledge. What can you do to lessen the risk?

First, you must attempt to verify and then hope and trust that your agent is honest and will act on your behalf and for your benefit. Children and grandchildren often are appointed as agents but can easily succumb to temptation when power or money is accessible. If contracts are signed on your behalf, you may be liable for the obligations and when the money is spent, without your specific knowledge or consent, it may be difficult to retrieve it.

The use of limited powers of attorney or “springing” powers of attorney upon incapacity may not be as flexible as one that is immediately effective, but it is a consideration. Consult with your attorney to talk about these options and perhaps to set up accountability mechanisms in your power of attorney, including a “What Matters to Me” type of statement in the special provisions section of the power of attorney or in a separate form.

There are specific provisions under the UPOAA that can help protect the principal from a dishonest agent. An agent who violates this chapter shall be liable to the principal or the principal’s successors-in-interest for the amount required to:

- Restore the value of the principal’s property to what it would have been had the violation not occurred; and
- Reimburse the principal or the principal’s successors-in-interest for the attorney’s fees and costs paid on the agent’s behalf.

Under the UPOAA, a POA terminates upon the following occurrences:

- The principal dies;
- The principal becomes incapacitated, if the power of attorney is not durable;
- The principal revokes the power of attorney;
- The power of attorney provides that it terminates;
- The purpose of the power of attorney is accomplished; or
- The principal revokes the agent’s authority or the agent dies, becomes incapacitated, or resigns, and the power of attorney does not provide for another agent to act under the power of attorney.

While the statutory form used in Hawai’i is included in the Forms Section of this book, use extreme caution in using this form without first seeking advice and counsel from your attorney. Remember that you can revoke or change your power of attorney as long as you are mentally capacitated. Also remember to ask your attorney about making a “What Matters to Me” type of statement in the special instructions section of the power of attorney or in a separate form.

Revoking a Power of Attorney

To revoke a power of attorney, the principal can create a document called a "Revocation of Power of Attorney" or create a new power of attorney that indicates the previous power of attorney is revoked. A principal can rescind a power of attorney at any time, even if the power of attorney has a specified end date, so long as the principal is competent and the agent is notified.

The principal can also prepare, sign, and give a document called "Notice of Revocation" to the agent and other individuals, institutions or agencies who might have dealt with the original power of attorney document. Make sure that they receive a copy of the revocation. Third parties (such as banks or the Bureau of Conveyances if you registered your power of attorney) should also be notified of the revocation.

In addition, if the power of attorney document was registered (which means it was filed with a certain agency such as the Bureau of Conveyances), the revocation must also be registered.

MONEY MANAGEMENT

One of the most common reasons that an older adult becomes the subject of conservatorship proceedings is that the individual has difficulty handling financial affairs and needs help with money management. Money management, a catch-all term for a wide range of services provided by individuals and organizations to help people manage their financial affairs, includes check writing, bill paying, depositing money, reconciling checkbooks, filing taxes and even arranging for financial counseling.

While many people still pay bills and manage their investments through checks and other paper transactions, computers, smart phones and other Internet devices have dramatically changed the way people take care of their finances. Electronic banking makes it possible to manage and access funds through electronic funds transfer, direct deposit, pay-by-phone systems, personal computer banking, credit and debit card purchases, and many other functions.

Close family members can provide basic, simple money management services electronically over the Internet. For example, a daughter living on one island can easily make bill payments (including utility and credit card payments) for her parents on another island just the way she makes her own bill payments. She can also manage savings accounts, mutual funds, stock portfolios, and other financial assets, and can even file federal and state tax returns over the Internet.

A word of caution—there are many schemes and scams perpetrated, especially since Internet and telephone transactions do not occur face-to-face. Be very cautious to whom you reveal your bank account information or to whom you entrust your ATM bank card, especially to people or companies you do not know. Always check your bank and credit card statements and report any unauthorized use immediately.

In addition to electronic banking systems that can be used by informal caregivers, there are non-profit and for-profit agencies that do money management, usually for a fee. If you use these services, make sure that the money manager is insured and bonded to protect you from theft or loss.

Social Security Checks

Social Security or Supplemental Security Income benefits should be paid electronically if possible. If you are still receiving checks, the US Department of the Treasury will contact you about complying with the requirement. It can grant exceptions in rare circumstances. For more information, call Social Security's toll free number: 1-(800) 772-1213. To request a waiver, call the Department of the Treasury at 1-(855) 290-1545.

Direct deposit is a program that electronically delivers incoming checks directly to a personal checking or savings account at a designated bank or other financial institution. The Social Security Administration strongly encourages all Social Security and SSI (Supplemental Security Income) beneficiaries to receive their monthly benefits by direct deposit because it is faster and safer than receiving a check through the mail. When signing up for direct deposit services, it would be helpful to have a personal check, bank statement and your Social Security number handy. Most banks, savings and loans and credit unions offer a variety of accounts, some

requiring low or no fees. More information about how direct deposit works can be obtained at your bank, savings and loan or credit union, or at Social Security. Signing up for direct deposit can also be done online through the Internet. For Social Security and SSI recipients without bank accounts, contact Social Security to find out what your options are.

Once you set up a direct deposit account, you may also wish to set up an automatic payment system to pay for recurring bills such as electricity, water, mortgage and insurance payments. It takes the worry out of remembering to make payments.

Having a joint account with another person can be useful for someone who needs help in writing checks, making deposits or withdrawing cash because it gives the person who is helping, access to the funds. Caution: while it may be simple and convenient, this alternative can also be very risky because the person whose name is added to the account is generally considered a co-owner of the account and can withdraw all of the money, anytime.

Representative Payees and Fiduciaries

When a person has memory loss, is incapacitated, or does not understand the process of paying bills or money management, a representative payee or fiduciary can be appointed to handle government benefits. For Social Security benefits, upon appointment, the representative payee receives checks (or direct deposit of funds) from the Social Security Administration and must use the money for the needs of the beneficiary.

Once a representative payee (often a family member) is appointed, the representative payee will need to decide how best to use the funds for the beneficiary's personal care and well-being. The Social Security Administration requires that any money left after meeting the beneficiary's current and reasonably foreseeable needs must be saved and maintained for the beneficiary. Periodically, the Social Security Administration will ask the representative payee to complete a form to account for funds received. A representative payee is also required to keep Social Security informed of changes that may affect the beneficiary's eligibility for benefits.

Although some groups of payees no longer have to complete the annual Representative Payee Report, all payees are responsible for keeping records of how the payments are spent or saved and making all records available for review if requested by SSA. For more information see:

<https://www.ssa.gov/payee/>

Similarly, the Department of Veterans Affairs (VA) Fiduciary Program was established to protect veterans and other beneficiaries who, due to injury, disease, or incapacity, are unable to manage their financial affairs. The VA will only determine an individual to be unable to manage financial affairs after receipt of medical documentation or if a court of competent jurisdiction has already made the determination. Upon determining that a beneficiary is unable to manage financial affairs, the VA will appoint a fiduciary. The fiduciary, normally chosen by the beneficiary, and often being a family member, must undergo an investigation of suitability to serve.

Be aware that the Treasury Department does not recognize a power of attorney for negotiating federal payments, including Social Security or SSI checks. This means, that if you have a power of attorney for someone who is incapable of managing benefits, you must still apply to serve as representative payee.

Pension Funds Verification Form

Many pension funds require that retirees complete a pension payment eligibility verification form each year verifying that they are alive and are receiving the benefits to which they are entitled. Similarly, many organizations and agencies are required to verify pension and annuities income for programs that they operate and to examine this income periodically. Some housing authorities also ask for periodic verification of information. These types of verifications and requests for release of information are not usually a problem for those individuals who are still mentally capacitated, but difficulties may arise if the person receiving the pension or annuity or benefit is not capable of responding to the request for information. Some funds, agencies and organizations may accept verifications made by family members or authorized representatives such as agents in powers of attorney, but others may require verification by

guardians or conservators or may have other requirements. Needless to say, a person would be wise to try to find out ahead of time what the requirements may be.

TRUSTS

A trust can be used as an effective estate planning tool (see Chapter 5) and to some extent, as an alternative to conservatorship, a court process that appoints someone to manage an incapacitated person's financial affairs. A trust is an arrangement that you, the maker of the trust (also called the settlor or the grantor) set up to transfer your property to a trustee (who could be yourself or someone else or an institution like a trust company) to hold for you and/or your beneficiaries.

You can decide the terms of the trust in a trust agreement. The trust can be used to manage any property you place into it. This can include your home, rental properties, vehicles, bank and savings accounts, stocks, bonds, and virtually anything you can hold title to. The trustee can use and manage assets in accordance with the instructions in the trust and can be held fiduciarily responsible for their actions. A successor trustee can be named to administer the assets in the trust if the trustee, who could be you, is unable to do so. By having these arrangements set out in the trust, there can be someone to take charge of administering the trust assets when the trustee is unavailable so that a conservatorship for the trust assets, which may be time-consuming, can be avoided.

There are several different types of trusts, each of which is created for a different purpose. For example, you can create a "testamentary trust" in your will, which does not take effect until you die. Note, however, that in a testamentary trust, property must go through the probate process before it passes into the trust. It is not an alternative to conservatorship and does not avoid probate.

There are also "special needs trusts" which we will cover under the discussion of Medicaid. Special Needs Trusts are trusts created to allow a person with a physical or intellectual disability or a chronically ill person to receive income without being disqualified from receiving public benefits.

Trusts can also be revocable or irrevocable. In a “revocable living trust” you can give your trustee instructions on how to manage the property during your lifetime and upon your death. You can give instructions on how much income and principal you want to distribute, who gets the property when you or other beneficiaries die, what the trustee’s fee is for the work, and so on. There is no requirement to involve a trust company. If your trust commences during your life and is revocable, you can be your own trustee, manage your own trust, change your trust at any time, make decisions concerning your trust, and appoint a successor trustee to carry on after you die or become mentally incapacitated. Remember, in addition to your living trust, you should have a will to take care of all other assets that may not have been placed or transferred into the trust. Revocable trusts allow the maker of the trust to amend or revoke the trust at any time. Irrevocable trusts cannot be amended or revoked. Once you transfer assets into an irrevocable trust, you relinquish control of them.

Many people think of trusts in the context of probate avoidance since property included in a living trust usually does not go through probate. Avoidance of the cost, time, and publicity of probate makes living trusts very appealing. Just as important, especially for purposes of this chapter, trusts can be utilized to ensure that property can be managed if individuals should become incompetent or incapable of handling their own affairs.

If you create a living trust, make sure that you or your attorney places or transfers your property into the trust. If you fail to change the title of your property to that of your trust, the trust cannot control that property. You should be aware that revocable living trusts usually cannot be used to get around eligibility guidelines for such assistance programs as Medicaid. There may be certain times when you do not want to place real estate in a trust such as if you are concerned about qualifying for Medicaid.

Before deciding whether to utilize a trust for your estate planning purposes you should talk with an attorney who is skilled in this area of law and you should probably avoid “living trust kits” if you do not know what you are doing in this increasingly complex area. And do not forget to transfer the title of your property (real estate, intellectual property, bank accounts, vehicles, boats, etc.) to the trust. Under this framework you can be a little more assured that your assets will be used for your care and for the payment of your bills in the event you are not able to do so. A court-

appointed conservator could accomplish the same thing, but court actions take time and money and many matters could remain undone while the conservatorship is being pursued.

CHAPTER 3

PLANNING FOR MEDICAL TREATMENT, HEALTH CARE DECISIONS, AND DECISIONS AT THE END OF LIFE



MEDICAL TREATMENT AND INFORMED CONSENT

During the Covid-19 pandemic, there was a new sense of urgency and interest in advance health care planning to help ensure that patients' wishes were accurately documented and respected. Right from the beginning of the crisis, there was a demand for information and an increase in completing advance directives. With the pandemic experience in mind and as both science and medical treatment protocols progress and allow people to live healthier and longer lives, more individuals are now deciding to take charge of their own medical decisions in consultation with physicians, family members, clergy, and close friends.

In Hawai'i, as in all other states, competent individuals have the fundamental right to control the decisions relating to their own medical care. This includes decisions whether to have life-sustaining medical treatment or surgical procedures provided, continued, withheld, or withdrawn. The basis for making medical treatment decisions lies in the concept

of informed consent. In Hawai'i, the Hawai'i Medical Board establishes standards for health care providers to follow in giving information to a patient or to a patient's guardian, health care agent or legal surrogate, if the patient lacks the capacity to give an informed consent. The standards include provisions which are designed to reasonably inform a patient, a patient's guardian or legal surrogate of the following:

- The condition to be treated;
- A description of the proposed treatment or surgical procedure;
- The intended and anticipated results of the proposed treatment or procedure;
- The recognized possible alternative forms of treatment;
- The recognized alternative treatments or procedures, including the option of not providing these treatments or procedures;
- The recognized material risk of serious complications or mortality associated with:
 - the proposed treatment;
 - the recognized alternative treatments or procedures; and
 - not undergoing any treatment or procedure; and
 - the recognized benefits of the recognized alternative treatments or procedures.

Health Care Decisions

Laws such as the federal Patient Self-Determination Act encourage individuals to decide the question of how health care decisions will be made when they are no longer able to make these decisions for themselves. No matter what an individual desires, it is important to communicate those desires so that health care providers will know what to do when that person can no longer make decisions. In determining how an individual wants to be treated, an individual should discuss these matters with family, friends, clergy and other advisors. Individuals should make sure that these personal desires are made known to concerned individuals and especially to health care providers.

Health care encompasses much more than medical treatment and decisions about end-of-life issues. In Hawai'i, the Uniform Health Care Decisions Act (Modified) defines health care as any care, treatment,

service, or procedure to maintain, diagnose, or otherwise affect an individual's physical or mental condition, including:

- Selection and discharge of health care providers and institutions;
- Approval or disapproval of diagnostic tests, surgical procedures, programs of medication and orders not to resuscitate; and,
- Direction to provide, withhold, or withdraw artificial nutrition and hydration, provided that withholding or withdrawing artificial nutrition or hydration is in accord with generally accepted health care standards applicable to health care providers or institutions.

Health Information and HIPAA

With a few exceptions, patient records belong to the patient and such information is considered confidential. A federal law, the Health Insurance Portability and Accountability Act of 1996 (HIPAA), requires that "covered entities" such as health plans, health care providers (e.g., hospitals and nursing facilities), or health care clearinghouses verify a person's identity to ensure that it is the patient or a delegated or authorized "personal representative" who is requesting the patient's medical records. Due to the complexity and confusion of the HIPAA statute, people who need access to medical records on behalf of an incapacitated patient may have a difficult time gaining access to those records unless they can produce evidence of their authority to receive medical information, including reviewing the medical record or chart, on behalf of the patient.

State or other law determines who is authorized to act as a personal representative for purposes of HIPAA. In Hawai'i, this would usually include an individual who:

- Has been delegated such authority by the patient in writing; or
- Has been appointed by the court to act as guardian; or
- Has been appointed by the patient as an agent in a power of attorney for health care; or
- Has been appointed as a "designated surrogate" by the patient; or
- Has been selected as a "non-designated surrogate" by consensus of "interested persons."

For deceased patients, the personal representative or executor of the patient's estate may qualify. More detailed information about the roles and authority of these individuals, as well as sample language regarding the release of health care information, is included later in this chapter.

ADVANCE HEALTH CARE DIRECTIVES

The term "Advance Health Care Directive," sometimes shortened to "Advance Directive," applies to all directives, instructions, or even desires that a person may communicate in writing, orally or in some other fashion, concerning decisions about medical treatment and health issues relating to one's body and life. The term "living will" was popular for many years but was confusing to many. In 1999, the Uniform Health Care Decisions Act (Modified), or UHCDA, was enacted in Hawai'i. This law uses the term "individual instruction" rather than "living will" which is still in use in several other states and by certain agencies, including the Department of Veterans Affairs.

Although advance directives are generally used in the context of making end-of-life decisions, the laws of Hawai'i cover a broad range of advance directives and make it easy for individuals to have their instructions followed. Accordingly, directions such as declining any cardiopulmonary resuscitation in the future or donating organs may be considered in a broad sense to be advance directives. Another example is a separate law which specifically addresses making decisions in advance with respect to mental health conditions.

Most commonly, advance directives are thought of as those written documents which provide health care providers with information about a patient's desires concerning medical treatment and which contain a designation of an agent to make health care decisions for the patient. As indicated in the previous chapter, powers of attorney for health care are no longer included under the provisions of the Uniform Power of Attorney Act but need to be completed in accordance with the UHCDA, which will be discussed in detail in this chapter.

Although written advance directives concerning life-sustaining medical treatment are encouraged and preferred under Hawai'i law, they are not required to be written. They can be orally communicated. An adult or emancipated minor may give an individual instruction regarding their health care. The instruction, oral or written, may take effect immediately or be limited to take effect only if a specified condition arises.

In Hawai'i, advance health care directive formats generally follow the optional form found in Hawai'i's UHCDA. An advance health care directive is never required but it can be very helpful. Every state has different laws and formats and some health care facilities may be reluctant to recognize out-of-state documents. There continues to be a strong movement toward creating uniformity among the states and especially in the "portability" of documents. It is particularly important to take preventive measures and look into the laws in another state ahead of time if you are moving to another state or if you plan to spend an extended period in that state. Some of this homework can be accomplished by looking the information up on the Internet, asking a relative or friend living in that area to find out from a health care provider, or asking an elder law attorney about advance directive guidelines and forms in that state.

Individual Instructions for Health Care

A good way to make your desires known concerning health care decisions, including life-sustaining medical treatment is to make an "individual instruction" in accordance with Hawai'i's current UHCDA. As previously mentioned, the individual instruction takes the place of what was commonly called the "living will" under the old law. Individual instructions may be made orally or in writing and can cover virtually all aspects of health care. If made orally, it may be best for you to provide the instruction directly to your doctor or other health care provider and ask them to document your discussions by placing the information you provide in your medical record or chart. You can provide an individual instruction in writing, for example by writing a letter to your doctor. The letter can let your doctor know about your desires for health care in the future.

Usually, an individual instruction is incorporated into an advance directive document, which can also include the designation of an agent through a

health care power of attorney, directions concerning organ donations, and the designation of a health care provider, among other matters.

The UHCDA provides an optional sample form with an accompanying explanation. Sample long and short forms are found in the Forms Section of this book. In the long form, choices are provided for you to express your wishes regarding the provision, withholding, or withdrawal of treatment to keep you alive, including the provision of artificial nutrition and hydration, as well as the provision of pain relief medication. Space is provided for you to add to the choices you have made or for you to write in any additional wishes. This form may be modified to suit your needs, or you may use a completely different form. During the Covid-19 pandemic, many individuals sought to clarify their advance directives, often with a focus on supplemental oxygen. Several organizations developed Covid-19 supplements, an example of which may be found on the UHELP website.

Health Care Power of Attorney

In addition to the “individual instruction” for health care, you should consider making a health care power of attorney. This is also called a “durable power of attorney for health care” or “medical power of attorney” and can be done in the advance health care directive under the UHCDA. Once again, do not confuse the durable power of attorney for health care, which expressly addresses health care decisions and has different execution requirements, with the powers of attorney under the Uniform Power of Attorney Act discussed in Chapter 2.

Sample long and short forms of advance directives which include health care powers of attorney are provided in the Forms Section of this book. If you are confused about the type of power of attorney you have, make sure to ask an attorney for advice and guidance. Giving a trusted health care agent the authority to carry out your individual instructions or to make health care decisions in the absence of such instructions is becoming a common method of planning for the future. It lets you continue to stay in charge of your own destiny. To help enhance your future autonomy and self-determination, consider filling out a “What Matters to Me” type of statement in your advance directive. There is space for these statements in the sample forms found in the Forms Section of this book.

Under Hawai'i law, you can choose to have the powers in the health care power of attorney take effect when you become incapable of making your own decisions or you can have it take effect immediately even when you are still capable. You may also name an alternate agent to act for you if your first choice is not willing, able, or reasonably available to make decisions for you. This is a very important consideration since you cannot always be sure if your primary agent will be available to make decisions when needed.

Unless related to you, your agent may not be an owner, operator, or employee of a health care institution where you are receiving care. Unless the form you sign limits the authority of your agent, your agent may make all health care decisions for you. Practically speaking, a physician normally will not want to act or perhaps will not be able to act as your agent, unless you are related to the physician or if the physician is a close friend and is not your treating physician.

Execution and Witnessing

Powers of attorney for health care must be properly witnessed or notarized. For the power of attorney to be valid for making health care decisions, you must sign it before two "qualified" adult witnesses who are personally known to you and who are present when you sign and who must also sign the document. In the alternative, you may sign the document before a notary public in the state that acknowledges your signature.

A witness for a power of attorney for health care cannot be a health care provider, an employee of a health care provider or facility, or the agent you have designated in your health care power of attorney. At least one of the individuals used as a witness for a power of attorney for health care must be someone who is neither related to you, the principal, by blood, marriage, or adoption, nor entitled to any portion of the estate upon your death under any will or codicil you may have made prior to the execution of the power of attorney for health care or by operation of law then existing.

What to Do with Your Advance Health Care Directive

When you complete an advance directive, which can include individual instructions and/or a power of attorney for health care, give a copy of any

signed and completed form to your physician, to any other health care providers you may have, to any health care institution at which you are receiving care and to any health care agents you have named. You should talk to the person you have named as agent to make sure that your agent understands your wishes and is willing to take on the responsibility. Once again, make sure that you consider designating alternate health care agents in case your first choice is unwilling or unable to act on your behalf.

Make certain that a copy of your executed document is placed into your medical record or chart. You may have several medical records or charts if you receive health care from several providers. This is your responsibility. In case of an emergency that requires a decision concerning your health care, make sure that you keep a copy where it is immediately available to your agent.

You can ask to have the initials, AHCD (Advance Health Care Directive), put on your driver's license or state identification card to indicate that you have made an advance directive. This will encourage people to look for the advance directive in an emergency, if for some reason you have not had it placed in your medical record or chart.

Revocation/Effectiveness of Advance Health Care Directives

The UHCDA makes it clear that you may revoke an advance directive, including a health care power of attorney. However, you may revoke the designation of an agent only by a signed writing or by personally informing the supervising health care provider. You may revoke all or part of an advance health care directive, other than the designation of an agent, at any time and in any manner that communicates intent to revoke. A decree of annulment, divorce, dissolution of marriage, or legal separation revokes a previous designation of a spouse as agent unless otherwise specified in the decree or in a power of attorney for health care. Except for the donation of your body or body parts under Hawai'i's Uniform Anatomical Gifts Act, a health care power of attorney ceases to be effective upon your death.

OTHER HEALTH CARE DOCUMENTS

Surrogate Decision-Making

During the Covid-19 pandemic, it was clear that many individuals who became sick and hospitalized had not completed advance directives. Who can make health care decisions for an individual no longer capable of making decisions, has no designated health care agent and has no guardian? Historically, health care providers have turned to family members to provide informed consent in these situations but there is no default "family consent" law in Hawai'i. Since 1999, Hawai'i's UHCDA has provided a mechanism for surrogates to make decisions for incapacitated individuals. A surrogate is a person who is not a guardian or health care agent but has the authority to make decisions for the patient.

Under the UHCDA surrogate provisions, a patient may designate or disqualify any individual to act as a surrogate by personally informing the supervising health care provider. In the absence of such a designation, or if the designee is not reasonably available, a surrogate may be appointed to make a health care decision for the patient. A surrogate may make a health care decision for a patient who is an adult or emancipated minor if the patient has been determined by the primary physician to lack capacity and no agent or guardian has been appointed or the appointed agent or guardian is not reasonably available.

The process of appointing a surrogate is somewhat complicated under Hawai'i's modified version of the UHCDA.

Upon a determination that a patient lacks decisional capacity to provide informed consent or refusal for medical treatment, the primary physician or the physician's designee first needs to make "reasonable efforts to notify the patient of the patient's lack of capacity."

The primary physician, or the physician's designee, then must make reasonable efforts to locate as many "interested persons" as practicable.

The primary physician may rely on such individuals to notify other family members or interested persons. Under this law "interested persons"

means the patient's spouse, unless legally separated or estranged, a reciprocal beneficiary, a civil union partner, 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.

Upon locating the interested persons, the primary physician, or the physician's designee, must inform such persons of the patient's lack of decisional capacity and that a surrogate decision-maker should be selected for the patient.

The interested persons are to 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.

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. Only interested persons involved in the discussions to choose a surrogate may initiate such proceedings for the patient.

The law provides that a surrogate designated by the patient may "make health care decisions for the patient that the patient could make on the patient's own behalf." In other words, a "designated surrogate" may make all decisions for the patient. The law further states that a surrogate not 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 for a patient upon a decision of the surrogate only when the primary physician and a second independent physician certify in the patient's medical records that the provision or continuation of artificial nutrition or hydration is merely prolonging the act of dying and the patient is highly unlikely

to have any neurological response in the future.” In other words, a “non-designated surrogate” has certain restrictions on making health care decisions about tube feeding.

This particular provision is ambiguous and subject to interpretation. This reinforces the notion that an individual should appoint an agent through a health care power of attorney or designate a surrogate if the individual’s wish is to grant another person the power to make health care decisions that the individual could make regarding such health care issues.

The law provides that the non-designated surrogate shall make health care decisions for the patient based on the wishes of the patient, or, if those wishes are unknown or unclear, in the patient’s best interest. The decision of a non-designated surrogate regarding whether life-sustaining procedures should be provided, withheld, or withdrawn shall not be based, in whole or in part, on either a patient’s preexisting, long-term mental or physical disability, or a patient’s economic status. A non-designated surrogate must inform the patient, to the extent possible, of the proposed procedure and the fact that someone else is authorized to make a decision regarding that procedure.

Whether the surrogate is “designated” or “non-designated,” a health care decision made by a surrogate for a patient is effective without judicial approval. Further, the supervising health care provider will 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. It is important to note that because of the ambiguity of the power of the non-designated surrogate to make decisions concerning withholding or withdrawing tube feeding, it is important for an individual in Hawai’i to consider making individual instructions for health care and designating an agent in a health care power of attorney or, at a minimum, designating a surrogate by informing the supervising health care provider.

Do Not Resuscitate (DNR) Codes

Do Not Resuscitate (DNR) codes are orders not to provide cardiopulmonary resuscitation (CPR) attempts to a person who has stopped breathing or whose heart has stopped beating.

There are two basic types of DNRs, "in-hospital" and "out-of-hospital" DNRs. The Hawai'i Department of Health program for out-of-hospital DNRs, often referred to as "Comfort Care Only" (CCO-DNR) or "Rapid Identification Documents," has been suspended indefinitely although bracelets and necklaces issued under the program are still recognized. Wearing a state-approved CCO-DNR necklace or bracelet notified emergency medical services personnel, first responder personnel, and health care providers not to administer chest compressions, rescue breathing, defibrillation, or medication to restart the heart or the person's breathing and that the person was to receive comfort care only (CCO), including oxygen, airway suctioning, splinting of fractures, pain medicine, and other measures required for comfort. Once again, this program has been suspended indefinitely and POLST forms, described below are intended to take its place.

In-hospital DNRs are placed by a physician with the patient's (or patient's legally authorized decision-maker's) consent in the patient's treatment chart. A "code" defines the type of medical action to be taken when a patient suffers from a medical distress such as a cardiac or respiratory arrest in a hospital or other health care facility. It is important to know that, in such an emergency, the patient may routinely be resuscitated unless there is a written DNR order in the medical record. This order is sometimes called a "Do Not Attempt Resuscitation" (DNAR) or "No Cardiopulmonary Resuscitation" order. The DNR order is only an order to forego the otherwise automatic initiation of CPR and it does not alter other treatment decisions. CPR can include such emergency medical interventions as artificial breathing, chest compressions, cardiac defibrillation (using electric shocks), and certain drugs.

A patient can designate an agent under a health care power of attorney to make such decisions. The decision to refuse CPR may also be made orally by a mentally competent patient to the treating physician. This can also serve as the basis for the DNR order, which is usually signed by the attending physician or supervising health care provider. DNR orders (or "no codes") are placed in the patient's medical chart and, thereafter, emergency procedures to resuscitate the patient will not be carried out. DNR codes are often written if it is felt that future resuscitation efforts would be futile.

Provider Orders for Life-Sustaining Treatment (POLST)

In 2009, the Hawai'i legislature passed a law providing for a health care protocol called Physician Orders for Life-Sustaining Treatment (POLST). In 2014, the Hawai'i legislature passed legislation providing for the expansion of the existing law to give advanced practice registered nurses (APRN), in addition to physicians, the authority to sign what are now called Provider Orders for Life-Sustaining Treatment. The POLST form developed under the law contains information and directions about an individual's end-of-life decisions, such as cardiopulmonary resuscitation (CPR) and tube feeding which emergency medical personnel and other health care professionals are required to follow. By law, the POLST form is not an advance directive but a provider's order signed by a physician or an APRN and, accordingly, is immediately actionable.

Even though it is not an advance directive, the most frequent use of the POLST form is as a summary of an individual's advance directive decisions and information about life-sustaining treatment. The form turns the information and expressed desires into a provider's order that is signed by either the physician or APRN and the individual or the guardian or health care agent or surrogate (legally authorized representative or LAR). The individual or the LAR is encouraged to discuss health care treatment decisions with the primary care doctor or APRN and document these decisions on a brightly colored POLST form, which as mentioned, is then signed by both the individual or the LAR and the physician or APRN.

The form is lime green in color, so it can easily be found when needed and because it copies clearly on white paper. A plain white copy, completed correctly, and signed by the patient (or LAR) and by a doctor or an APRN is equally legal and valid. The form can be downloaded from the Kokua Mau website www.kokuamau.org. Briefly, a POLST provides the following:

- The orders contained in the standardized form are immediately actionable, signed medical orders;
- The orders address a range of life-sustaining interventions as well as the patient's preferred intensity of treatment for each intervention;

- The form is recognized by the Hawai'i Emergency Medical Services System;
- The form follows the patient between settings of care, including acute care hospitals, nursing facilities and community settings.

Since the POLST form is not an advance directive and does not name an agent or surrogate, an individual should still consider providing individual instructions and appointing a health care agent through an advance directive. The combination of POLST and advance directive gives an individual the best opportunity to have health care treatment wishes followed. Individuals can ask their doctors about both types of forms.

MEDICAL AID IN DYING AND THE OUR CARE, OUR CHOICE ACT

End-of-Life decisions can include the desire to choose the time and place of one's death. This may provide comfort, especially to those facing painful deaths. As of 2021, Oregon, Washington, Vermont, California, Montana, Colorado, Hawai'i, New Jersey, Maine, the District of Columbia, Arizona and New Mexico authorize medical aid in dying. In Montana, a court case gives terminally ill patients the right to use prescribed life-ending medication.

In 2018, the Hawai'i legislature passed, and the Governor signed the Our Care, Our Choice Act that took effect on January 1, 2019. It allows qualified patients in Hawai'i who have a medically confirmed terminal illness with less than six months to live and who have a decisional capacity to request and obtain a prescription to end their lives.

The Our Care, Our Choice Act provides the following protections for patients:

1. Confirmation by two health care providers of the patient's diagnoses, prognosis, and medical decision-making capacity, and the voluntariness of the patient's request;
2. Determination by a counselor that the patient is capable, and does not appear to be suffering from undertreatment or nontreatment

- of depression or other conditions which may interfere with the patient's ability to make an informed decision;
3. Two oral requests from the patient, separated by not less than twenty days; one signed written request that is witnessed by two people, one of whom must be unrelated to the patient; and one signed final attestation;
 4. An additional waiting period between the written request and the writing of the prescription;
 5. Criminal penalties for those who abuse this act; and
 6. The right of the patient at all times to rescind the request for medication and be under no obligation to fill the prescription or use the medication.

The law does not mention aid in dying although the Hawai'i State Department of Health does use that term on its website. To meet eligibility criteria patients must be:

1. Age 18 or older and a Hawai'i resident;
2. Able to take the prescribed medication themselves;
3. Able to make two oral requests not less than 20 days apart to their attending physician;
4. Able to provide one written request after meeting eligibility criteria from all three (3) health care providers; and
5. Mentally capable to make an informed decision.

As of 2021, Hawai'i has the most stringent law of all the authorized states. The waiting period is five days longer than in most of the other states. Under the statute there are no provisions for permitting a health care provider to assist a patient who has difficulty in taking the prescribed drugs as they must be ingested by the patient. Also, under the statute in effect in 2021, there are no provisions for permitting a patient to request aid in dying in advance, for example, through an advance directive. Some individuals include language in their advance directives to address aid in dying in anticipation or in hope of future legislative changes. There are proposals that have been submitted to the Hawai'i legislature to address such changes to the law plus authorizing Advanced Practice Registered Nurses to participate.

Donations of Organs and Bodies

The Uniform Anatomical Gift Act enacted by the Hawai'i legislature in 2008, makes it much easier to donate a body or a body part for transplantation, therapy, research or education. It permits any individual at least eighteen years of age, prior to the death of the donor, to give all or any part of the individual's body for medical or dental education, research, advancement of medical science or dental science, therapy or transplantation. The agent under a health care power of attorney or a guardian may also make the anatomical gift. The gift becomes effective upon death without waiting for probate. Evidence of an intent to donate organs can be made by a will or by some other document such as a donor card, or a driver's license imprinted with the words, "organ donor." During a terminal illness or injury to the donor, a person may make an anatomical gift by any form of communication addressed to at least two individuals who are at least eighteen years of age, one of whom is a disinterested witness. The law also has provisions for revoking a donation and for refusing to make such a gift.

A large number of people in an order of priority established under the law can make an anatomical gift on behalf of the decedent for purposes of transplantation, therapy, research, or education. The priority classes of individuals include agents under a health care power of attorney, spouses, reciprocal beneficiaries, civil union partners, adult children, parents, adult grandchildren, grandparents, adults who have exhibited special care or concern for the decedent, guardians, and others who may have the authority to dispose of the decedent's body. The law provides detailed instructions if there are objections to the donation. For more information about organ donations or about body donations, contact the Hawai'i Legacy of Life Center at (808) 599-7630.

The John A. Burns School of Medicine at the University of Hawai'i has a program through which it accepts bodies for scientific purposes. However, it does reserve the right to refuse bodies, for example, when it does not need any more or when the body is not in an appropriate condition for the school's purposes. If the body is not located on O'ahu, arrangements must be made to transport it to O'ahu. For more information, contact the

Willed Body Program at the University of Hawai'i John A. Burns School of Medicine at (808) 692-1445.

Written Instrument to Control Disposition of Remains

Under a relatively new Hawai'i law, a person who wishes to authorize another person to control the disposition of the person's remains and the arrangements for funeral goods and services may execute a "written instrument to control disposition of remains" before a notary public. A sample form is found in the Forms Section of this book.

Autopsies

Autopsies can be authorized under the provisions of the Uniform Anatomical Gift Act. In addition, under other provisions of Hawai'i law, "if, in the opinion of the coroner, or of the coroner's physician, or of the prosecuting attorney, or of the chief of police (in the City and County of Honolulu), an autopsy of the remains of any human body appearing to have come to death under circumstances that would indicate that the death was a result of violence, or as the result of any accident, or by suicide, or suddenly when in apparent health, or when unattended by a physician, or in prison, or in a suspicious or unusual manner, or within twenty-four hours after admission to a hospital or institution, or if it is necessary in the interest of the public safety or welfare, that person shall cause to have performed such an autopsy."

CHAPTER 4

FINANCING HEALTH CARE, INCLUDING LONG-TERM CARE



HEALTH CARE IN THE USA

Unlike many countries, the United States does not have universal health care for its citizens but it spends more money, both private and public, on health care than any other country. And in tribute to its many health care providers such as nurses, doctors, medical and community social workers, its teams of medical researchers and medical boards, the US has world class hospitals, medical research facilities and well-trained and dedicated people providing health care.

In providing health care, the US has a plethora of publicly-funded health care programs such as Medicare and Medicaid, the Children's Health Insurance Program, the Veterans Health Administration, the Defense Health Agency and Tricare, as well as private health care programs such as those financed by employers and those mandated by the Affordable Care Act (ACA) of 2010. To make health care more accessible to all, the ACA expanded Medicaid eligibility, loosened restrictions on access to health care by mandating insurers to accept all applicants without

charging and to eliminate preexisting conditions or demographic status (except age). The act also mandated that individuals buy insurance (or pay a fine/tax) and that insurers cover a list of “essential health benefits.”

This chapter begins with Medicare, originally designed as an age and insurance-based program for those 65 and over. It continues with Hawai‘i’s mandated ACA coverage and how it is tied into Medicaid. The chapter ends with a description of Medicaid, as an entitlement program and a means to pay for long-term care for those who qualify.

MEDICARE

Medicare is our country’s health insurance program mainly for people age 65 or older. Certain people younger than age 65 can qualify for Medicare, too, including those with disabilities and those who have permanent kidney failure. Medicare is run by the Centers for Medicare and Medicaid Services, or CMS (formerly Health Care Financing Administration), of the US Department of Health and Human Services (DHHS). Social Security Administration (SSA) offices across the country take applications for Medicare and provide general information about the program. Eligibility for Medicare is determined by the SSA. The CMS, a federal agency within the (DHHS), is responsible for the overall administration of the program. Medical bills and claims are handled by private insurance companies under contract with DHHS and monitored by the government.

Generally, you are eligible for Medicare:

- If you or your spouse worked for at least 10 years in Social Security/Medicare-covered employment (earning at least 40 Social Security credits), and
- You are 65 years or older, and
- You are a citizen or permanent resident of the United States.

If you are under 65 and have End-Stage Renal Disease (permanent kidney failure requiring dialysis or transplant), or you have a disability or have been entitled to Social Security disability benefits for 24 months, you might also qualify for coverage. Others who may be entitled to Medicare coverage

are insured workers and their dependents who have Lou Gehrig's disease. Medicare has no resource limitations for eligibility, although there may be certain categories of individuals who may be eligible for subsidies or who may benefit more from Medicare Part D prescription drugs than others.

In most cases, you become eligible for Medicare when you turn 65, but there are a number of circumstances in which you may choose to delay signing up or become eligible earlier. When you enroll in Medicare, you will be able to choose among various options, including the original Medicare (Parts A, B, and D) and a Medicare Advantage Plan (MA), often collectively referred to as Part C. MA plans are private health plans that contract with Medicare to provide Medicare benefits. This chapter will not address the myriad issues relating to Medicare but will provide some basic information.

Medicare Coverage

There are three important rules to remember when Medicare coverage is an issue:

- First, Medicare covers care that is "reasonable and necessary" for the diagnosis or treatment of an illness or injury. Care is not considered reasonable and necessary, for example, if a doctor places a patient in a hospital or skilled nursing facility when the kind of care the patient needs could be provided elsewhere.
- Second, Medicare will not cover a stay in the hospital or skilled nursing facility longer than a patient needs to be there. Medicare coverage will end when further inpatient care is no longer reasonable and necessary.
- Third, Medicare coverage is limited. Medicare generally does not pay for long-term care. Medicare does not pay for help with activities of daily living or other care that most people can do themselves. Some examples of activities of daily living include eating, bathing, dressing, and using the bathroom. Medicare will help pay for skilled nursing or home health care when certain conditions are met, including a period of prior hospitalization.

One of the most complicated rules for nursing home coverage, under Medicare is the "three-day rule." This is a statutory requirement that if you are in the traditional Medicare Program, you must spend at least

three consecutive days in a hospital as an inpatient in order to qualify for Medicare coverage of a subsequent stay in a skilled nursing facility (SNF). Under this rule, individuals who were admitted as outpatients for observation or emergency treatment at a hospital do not qualify to have Medicare help finance their stay at a nursing home. In order to qualify for coverage, the doctor has to admit you as an inpatient for at least three consecutive days.

There are two exceptions to the three-day rule: 1) This rule is not usually applied to those enrolled in a Medicare Advantage plan; and 2) It only affects coverage in a skilled nursing facility. If you are discharged to a different kind of facility like a rehabilitation center, Medicare provides coverage under different rules.

Always ask your doctor whether you are an inpatient or under observation or an outpatient. The answer could affect how much you pay for hospital services.

MEDICARE PART A

Hospital Services

Hospital Insurance, Part A, helps pay for inpatient hospital care, some inpatient care in a skilled nursing facility, home health care, and hospice care. All persons age 65 and over who are receiving Social Security are automatically enrolled in Part A of Medicare.

You usually don't pay a monthly premium if you or your spouse paid Medicare taxes while working. This is sometimes called "premium-free Part A." To be eligible for premium-free Part A, an individual must first be "insured" based on their own earnings or those of a spouse, parent, or child. To be insured, the worker must have a specified number of quarters of coverage (QC's), the exact number required is dependent on whether the person is filing for Part A on the basis of age, disability, or End-Stage Renal Disease (ESRD). QC's are earned through payment of payroll taxes under the Federal Insurance Contributions Act (FICA) during the person's working years.

The Part A premium in 2021 is \$259 per month for people having 30-39 quarters of Medicare covered employment. The Part A premium in 2021 is \$471 per month for people who are not otherwise eligible for premium-free hospital insurance and have less than 30 quarters of Medicare covered employment.

Private insurance companies that handle Part A were originally known as “fiscal intermediaries.” Insurance companies, which administer payments to participating Part B providers (physicians and other practitioners), were originally called “carriers.” Congress later directed the Centers for Medicare & Medicaid Services (CMS) to replace the Part A fiscal intermediaries and Part B carriers with A/B Medicare Administrative Contractors (MACs). In addition to paying claims, fiscal MACs are responsible for setting payment rates and charges and assisting providers in complying with Medicare requirements and standards.

Financed primarily through payroll tax deductions, Part A covers expenses incurred during periods of acute illness that require inpatient hospital care. Following a hospital stay, Part A also covers the expense of inpatient care in an extended care facility, subject to the “three-day rule” described above. Benefits available under Medicare Part A primarily consist of payments to qualified participating hospitals and skilled nursing facilities for expenses incurred by persons as inpatients.

Medicare Part A can pay for home health services if a homebound patient requires “intermittent skilled nursing care,” or physical, occupational, or speech therapy. There is no limit to the number of home health services visits, but the services must be prescribed by a doctor and must not be performed on a daily basis.

Calculating Medicare Part A’s coverage and the deductibles for each benefit period is quite technical: The Medicare Part A inpatient hospital deductible that beneficiaries will pay when admitted to the hospital is \$1,484 in 2021. The Part A inpatient hospital deductible covers beneficiaries’ share of costs for the first 60 days of Medicare-covered inpatient hospital care in a benefit period. In 2021, beneficiaries pay a coinsurance amount of \$371 per day for the 61st through 90th day of a hospitalization in a benefit period, and \$742 per day for lifetime reserve days.

For beneficiaries in skilled nursing facilities (as distinguished from hospitals), the daily coinsurance for days 21 through 100 of extended care services in a benefit period is \$185.50 in 2021.

A single "spell of illness" (also referred to as a "benefit period") is defined as a period of consecutive days that begins the first day a patient receives inpatient hospital or post-hospital extended care services and ends 60 days after the patient is no longer in the hospital or extended care facility. A patient may pay more than one deductible amount per year if the patient has more than one "spell of illness."

Limited Skilled Nursing Facility

As mentioned above, Medicare Part A has very limited coverage for skilled nursing facility (SNF) care. Generally, a physician must order care and you must be an inpatient for three consecutive days. Examples of skilled nursing care that requires hospitalization which Medicare would pay for include recovering from an acute health condition such as a heart attack or stroke, physical or occupational therapy after an injury or surgery or care that requires intravenous medications. Custodial care is not covered. Note that most individuals in nursing homes do not require skilled nursing care and are, thus, not eligible for Medicare coverage.

Generally, a physician must order care. Check with your health care provider to find out how the three-day stay is calculated. As mentioned above, co-insurance payments are also required (\$185.50 per day in 2021) for days 21 to 100. Coverage is limited to 100 days per spell of illness and custodial care is not covered.

Note that Medicare Part A can pay for home health services if a homebound patient requires "intermittent skilled nursing care," or physical, occupational, or speech therapy. There is no limit to the number of home health services visits, but the services must be prescribed by a doctor and must not be performed on a daily basis.

Hospice

Hospice care is usually given in your home but may also be covered in a hospice inpatient facility. A certified terminally ill patient (with a

life expectancy of 6 months or less) may elect hospice benefits under Medicare. In obtaining Medicare coverage for hospice benefits, the attending physician needs to certify that the patient is terminally ill at the beginning of each period of care, which is limited to two 90-day periods and unlimited 60-day periods for the patient's lifetime. Hospice care includes medical and supportive services intended to provide comfort to the individual who is terminally ill. Hospice care provides palliative care to manage illness and pain, but does not treat the underlying terminal illness. Special co-payment rules apply for hospice care. The room and board expenses of the hospice inpatient facility may also be excluded from coverage.

- Medicare covers hospice care costs through the Medicare Hospice Benefit. See www.medicare.gov/coverage/hospice-care.
- Veterans Administration (VA) benefits also cover hospice care. See: www.va.gov/GERIATRICS/Guide/LongTermCare/Hospice_Care.asp.

Respite Care

If your usual caregiver (often a family member) needs a rest, you, the patient, can get inpatient respite care in a Medicare-approved facility (such as a hospice inpatient facility, hospital, or nursing home). Your hospice provider will arrange this for you. You can stay up to 5 days each time you get respite care. You can get respite care more than once, but it can only be provided on an occasional basis. You may have to pay a co-payment for the respite stay.

MEDICARE PART B

Outpatient Care

Medical Insurance (Part B) helps pay for medically necessary doctors' services, outpatient hospital services, home health care, and a number of other medical services and supplies that are not covered by the hospital insurance part of Medicare. It is voluntary and enrollees pay a monthly premium based on income. It includes coverage for medically necessary

physicians' services, outpatient hospital services, outpatient physical therapy and speech pathology services, home health services, diagnostic tests and medical appliances (durable medical equipment), including canes, walkers, wheelchairs, lift chairs and mobility scooters. Prosthetic devices are also covered. Talk to your doctor about why you need certain services or supplies and ask if Medicare will cover them.

Part B benefits are designed to supplement and extend the benefits provided by the Part A program. Under Part B, payment can be made for medical and health services and for home health services for up to 100 visits per year. (Remember that Part A can pay for unlimited visits.)

When you pay a premium each month for Part B, it is automatically deducted from your benefit payment if you get benefits from one of these programs:

- Social Security
- Railroad Retirement Board
- Office of Personnel Management

If you don't get these benefit payments, you'll get a bill every three months. The standard Part B premium amount in 2021 ranges from \$148.50 if an individual's income is less than \$88,000 a year to \$504.90 a month for individuals whose income is \$500,000 or above. The deductible for 2021 is \$203.00 a year. After you meet your deductible for the year, you typically pay 20% of the Medicare-approved amount for the following:

- Most doctor services (including most doctor services while you're a hospital inpatient)
- Outpatient therapy
- Durable Medical Equipment (DME)

Note that Medicare Part B premiums may change from year to year, and the amount can vary depending on your situation. For many of you, the premium is automatically deducted from your Social Security benefits. If your income exceeds a certain amount, your premium could be higher than the standard premium, as there are different premiums for different income levels.

If you do not sign up for Part B when you are first eligible, you will have to pay a late enrollment penalty. You will have to pay this penalty for as long as you have Part B. The monthly premium for Part B may go up 10% of the standard premium for each full 12-month period that you could have had Part B but did not sign up for it. Also, you may have to wait until the General Enrollment Period (from January 1 to March 31) to enroll in Part B. Coverage will start July 1 of that year.

MEDICARE PART C

Medicare Advantage

Medicare Advantage plans are sometimes referred to as “Medicare Part C” or “MA Plans.” They are offered by private companies and are alternatives to Original Medicare Part A and Part B plans. They include managed health care preferred provider organizations (PPO’s) or health maintenance organizations (HMO’s). Many Medicare services are covered through the plan and are not paid for under Original Medicare. Most Medicare Advantage plans also provide Part D, prescription drug coverage.

If you decide to join a Medicare Advantage Plan, you must be enrolled in Medicare Part A and Part B and, accordingly, must pay the monthly Medicare Part B premium (see above). In addition, enrollees may have to pay a monthly premium to the Medicare Advantage Plan for the extra benefits that they may offer.

In most plans, you need to use the plan’s doctors, hospitals, and other providers or you pay more or all of the costs. Your out-of-pocket costs depend on whether the plan charges a monthly premium in addition to the monthly Part B premium, how much you pay for each visit or service (“co-payments”), the type of health care you need, the types of extra benefits used and whether the plan covers them. Costs, extra coverage, and rules vary by plan.

Medicare Advantage plans have the option of covering more services and medical devices plus an array of non-traditional services for individuals who have chronic health conditions. These may include transportation for

medical appointments, nutritional services and improvements to homes and certain chore services to maintain a clean home environment.

Generally, enrollment in these plans has a limited enrollment period. You may have to live in the service area of the plan you want to join, and you may not have End-Stage Renal Disease (ESRD). However, if you are already in a plan, you can stay in the plan or join another plan offered by the same company in the same state. If you have a successful kidney transplant, you also may be able to join a plan. The different types of Medicare Advantage plans include the following:

Health Maintenance Organization

- Health Maintenance Organization Plan (HMO)
In HMO Plans, you cannot get your health care from any doctor, other health care provider, or hospital you chose. You generally must get your care and services from doctors, other health care providers, or hospitals in the plan's network (except emergency care, out-of-area urgent care, or out-of-area dialysis). In some plans, you may be able to go out-of-network for certain services, usually for a higher cost.
- Exclusive Provider Organization Plan (EPO)
An EPO plan is a type of HMO plan. As a member of an EPO, you can use the doctors and hospitals within the EPO network but cannot go outside the network for care. There are no out-of-network benefits.
- Preferred Provider Organization Plan (PPO)
In most cases, you can get your health care from any doctor, other health care provider, or hospital in PPO Plans. PPO Plans have network doctors, other health care providers, and hospitals. Generally, in a PPO Plan, you pay less if you use doctors, hospitals, and other health care providers that belong to the plan. You pay more if you use doctors, hospitals, and providers outside of the network. Each plan gives you flexibility to go to doctors, specialists, or hospitals that aren't on the plan's list, but it will usually cost more.
- Private Fee for Service Plan (PFFS)
PFFS Plans are offered by private insurance companies. The plan determines how much it will pay doctors, other health care

providers, and hospitals, and how much you must pay when you get care. If you join a PFFS Plan that has a network, you can also use any of the network providers who have agreed to always treat plan members. You can also choose an out-of-network doctor, hospital, or other provider, who accepts the plan's terms, but you may pay more.

- Medicare Special Needs Plan (SNP)
There are other less common types of Medicare Advantage Plans that may be available: Medicare SNPs are a type of Medicare Advantage Plan (like an HMO or PPO). Medicare SNPs limit membership to people with specific diseases or characteristics, and tailor their benefits, provider choices, and drug formularies to best meet the specific needs of the groups they serve.
- Medicare Savings Account Plan (MSA)
MSAs combine a high-deductible insurance plan with a medical savings account that you can use to pay for your health care costs.
- High Deductible Health Plan (HDHP)
This plan features higher deductibles than traditional insurance plans but has a lower monthly premium. High deductible health plans (HDHPs) can be combined with a health savings account or a health reimbursement arrangement to allow you to pay for qualified out-of-pocket medical expenses on a pre-tax basis. HDHPs minimum deductible and the maximum amount out-of-pocket limit for self-only and for self-and-family coverage may change each year.
- Health Savings Accounts (HSA)
A health savings account allows individuals covered by high-deductible health plans to receive tax-preferred treatment of money saved for medical expenses.

MEDICARE PART D

Prescription Drug Plan

Medicare offers prescription drug coverage to everyone with Medicare. If you decide not to join a Medicare Prescription Drug Plan when you're first eligible, and you do not have other creditable prescription drug coverage, or you do not get "Extra Help," (the benefit plan described in the following section) for low-income individuals, you'll likely pay a late enrollment penalty.

There are two ways to get Medicare prescription drug coverage:

- Through adding a Medicare Prescription Drug Plan (Part D) or
- Getting a Medicare Advantage Plan (Part C) such as an HMO or PPO that offers Medicare prescription drug coverage.

To get Medicare drug coverage, you must join a plan run by an insurance company or other private company approved by Medicare. Each plan can vary in cost and drugs covered. For most Medicare beneficiaries, prescription drug plans offered by insurance companies and other private companies will cover both generic and brand name prescription drugs. While Medicare prescription drug plans provide insurance coverage for prescription drugs, like other insurance plans, individuals who opt to join will pay a monthly premium and pay a share of the cost of their prescriptions. Costs will vary depending on the drug plan that is chosen.

Coverage Gap

Most Medicare Prescription Drug Plans such as Medicare Part D or Medicare Advantage Plan (Part C) have a coverage gap (also called the "donut hole"). This means there's a temporary limit on what the drug plan will cover for drugs.

The coverage gap refers to the point when you and your prescription drug plan or Medicare Advantage Prescription Drug plan have spent a certain total amount on your prescriptions; at this point, you have reached your

initial coverage limit and you are in what is known as the coverage gap, or “donut hole.”

Not everyone will enter the coverage gap. The coverage gap begins after you and your drug plan have spent a certain amount for covered drugs. Once you and your plan have spent \$4,130 on covered drugs in 2021, you are in the coverage gap. This amount may change each year. Also, people with Medicare who get “Extra Help” paying Part D costs will not enter the coverage gap.

In 2019, federal law removed the donut hole. As of 2020, there will no longer be a “hole” for brand-name or generic drugs: Enrollees in standard Part D plans will pay 25 percent of the cost (after meeting their deductible) until they reach the catastrophic coverage threshold (\$6,850 in 2021).

Once you’ve spent \$6,850 out-of-pocket in 2021, you are out of the coverage gap. Once you get out of the coverage gap (Medicare prescription drug coverage), you automatically get “catastrophic coverage.” It assures you only pay a small coinsurance amount or copayment for covered drugs for the rest of the year.

If you receive “Extra Help,” a Medicare program to help people with limited income and resources pay Medicare prescription drug costs, you do not have a coverage gap. See below for more information on “Extra Help.”

Dual Eligibles

Individuals who qualify for both Medicare and Medicaid are described as dual eligible beneficiaries. Medicare covers their acute care services, while Medicaid covers Medicare premiums and cost sharing, and for those below certain income and asset thresholds, long-term care services. Drug coverage for dual eligible beneficiaries is covered under Medicare Part D. Under Part D, dual eligible beneficiaries will pay reduced co-payments and receive a low-income subsidy to cover their entire deductible and help cover any Medicare prescription drug plan premiums.

Full dual eligible beneficiaries receive full Medicaid benefits including nursing home care, dental care, mental health care, eye care, transportation to and from health providers and prescription drug coverage.

OTHER MEDICAL COVERAGE PLANS

“Quimby and Slimby,” QI, Medicare Extra Help

If you have limited resources and are eligible for Medicare Part A, you may qualify for Medicaid programs that help pay your Medicare premiums. These programs are the federal Medicare Qualifying Individuals (QI) Program, Qualified Medicare Beneficiary (QMB) Program, Specified Low-Income Medicare Beneficiary (SLMB) Program and the Qualified Disabled and Working Individuals (QDWI) Program. They are also known by their phonetic nicknames and acronyms:

- “Quimby”: QMB pays all or part of the Medicare Part B premium for people with income higher than allowed for the SLMB Program;
- “Slimby”: SLMB pays for Medicare Part B premiums for individuals who have Medicare Part A, a low monthly income, and limited resources;
- “QWD”: Qualified Working Disabled program pays for Medicare Part A premiums for those who are blind and disabled, under 65, and who lose their Part A benefits when their earnings exceed federal guidelines;
- Medicare Extra Help: If you qualify for a QMB, SLMB, or QI program, you automatically qualify to get “Extra Help” in paying for Medicare prescription drug coverage.

Individuals who have low income and low resources can apply for and receive extra help for payment of their medical bills from DHS under the Qualified Medicare Beneficiary Program, (QMB), Specified Low-Income Medicare Beneficiary Program (SLMB) or Qualifying Individuals (QI) Programs. Through the DHS Med-QUEST Division, QI, QMB, and SLMB can help pay for Medicare Part A and Part B Insurance deductibles and premiums. These programs pay the balance of qualified hospital and doctors’ bills not paid by Medicare. Individuals with disabilities may be able to go to work or increase their hours of work and still receive Medicaid under the Qualified Working Disabled (QWD) program.

Medicaid will provide inpatient hospital care, outpatient hospital services, laboratory and x-ray services, skilled nursing facility services, the services

of physicians, and home health services to those who meet the standards for a “categorically needy” person. Before Medicaid will pay for these services, however, a physician must have ordered them and the hospital rendering the services must be approved for participation in Medicaid. Medicaid may be able to provide some benefits not covered by Medicare such as eyeglasses, hearing aids, drugs, and other health services. Consumers who need help with medical bills should apply for benefits at the appropriate state eligibility offices. Note that Medicaid beneficiaries who are enrolled in Medicare usually do not need to purchase Medigap insurance.

Medicare “Extra Help”

Some Medicare enrollees may qualify to get help in paying for prescription drugs. “Extra Help” from Medicare is also called the “low-income subsidy” or LIS. People whose yearly income and resources are below certain limits can qualify for this help. Extra Help is a program that provides additional financial assistance to seniors with limited resources to help pay for prescription drug costs.

Some Medicare beneficiaries are automatically eligible for Extra Help and do not need to apply. These beneficiaries are “deemed eligible,” as long as they:

- Are entitled to Medicare Part A, Medicare Part B, or both; and,
- Receive Supplemental Security Income (SSI); or
- Receive full Medicaid; or
- Are Qualified Medicare Beneficiaries (QMB), Specified Low-Income Medicare Beneficiaries (SLMB), or Qualifying Individuals (QI).

You can apply online at: <https://secure.ssa.gov/i1020/start> or call Social Security at 1-(800) 772-1213 to apply over the phone or to request an application; or apply at your local Social Security office.

Medicare Coverage for Alzheimer’s Disease

Several years ago, Medicare extended coverage to people with Alzheimer’s disease and other forms of dementia. In the past, patients were often automatically denied services when they were diagnosed with dementia

on the theory that treatment was not considered “to improve functioning.” These patients often did not receive such services as physical, occupational, mental health and speech therapy and home care. Under current policy, such services can be covered as long as they are determined to be reasonable and medically necessary. Unfortunately, Medicare still will not provide assistance for custodial in-home care or adult day care, long-term care in a nursing home or assisted-living costs. However, some services that are included under Medicare are the following:

- Home health care: Home care coverage under Medicare is available only if a patient is confined to the home and requires physical, occupational or speech therapy, or skilled nursing care, which will be provided from a home health agency under a doctor’s plan of treatment. It is important to understand that Medicare likely will not pay for round-the-clock custodial care.
- Rehabilitation care including physical, occupational, or speech therapy: Patients must show that they can benefit from the therapy.
- Mental health services: Part B can cover physical, occupational and speech therapy, as well as psychological counseling if prescribed by a doctor. The counseling must be provided by a Medicare-certified therapist or mental health provider. Patients must show that they can benefit from the therapy.
- Hospice coverage: Medicare coverage is available for Part A beneficiaries, if a physician certifies that the patient is terminally ill (when life expectancy is six months or less), and if the beneficiary chooses to receive hospice care. The coverage is limited to the hospice care and frequently excludes the costs of room and board.
- Medicare pays for most outpatient prescription drugs which include drugs to treat Alzheimer’s disease. In general, you get this coverage through private drug insurance plans, called Part D plans. Each plan covers different drugs and has different costs.

Medigap Insurance

As noted, Medicare covers many, but certainly not all, health costs for eligible persons. A Medicare Supplemental Insurance Policy, or “Medigap Policy,” is a health insurance policy designed to supplement Medicare. It is

sold by private insurance companies to fill in certain “gaps” in the federal Medicare program, for example, some Medigap policies cover medical care when you travel outside the US. These supplemental policies are designed primarily to supplement Parts A and B of Medicare. Generally, those who may need Medigap insurance are those who rely on Part A and Part B of Medicare for their health care benefits.

Those who have a Medicare Advantage plan generally do not need Medigap insurance. In fact, several former types of Medigap policies have been discontinued since the Medicare Part D prescription drug plan made them unnecessary.

Some things to know about Medigap policies:

- You must have Medicare Part A and Part B to be eligible for a Medigap policy.
- Any standardized Medigap policy is guaranteed renewable even if you have health problems. This means the insurance company cannot cancel your Medigap policy as long as you pay the premium on a timely basis.
- Some Medigap policies sold in the past cover prescription drugs, but Medigap policies sold after January 1, 2006, are not allowed to include prescription drug coverage. If you want prescription drug coverage, you can join a Medicare Prescription Drug Plan (Part D).
- Medigap policies generally do not cover long-term care, vision or dental care, hearing aids, eyeglasses, or private-duty nursing. Medigap policies generally supplement the amount of Medicare eligible expenses, but usually do not supplement the types of medical expenses covered. The Medigap policy covers co-insurance only after you’ve paid the deductible (unless the Medigap policy also pays the deductible).
- It’s illegal for anyone to sell you a Medigap policy if you have a Medicare Medical Savings Account (MSA) Plan.

Medicare Appeal Rights

Consumers enrolled in the Original Medicare plan may file an appeal if they think Medicare should have paid for, or did not pay enough for, an

item or service received. Appeal rights are on the back of the “Explanation of Medicare Benefits” or “Medicare Summary Notice” that is mailed to consumers from the company that handles bills for Medicare. The notice will also tell the consumer why the bill was not paid and what appeal steps are available.

Consumers in a Medicare managed care or private fee-for-service plan may file an appeal if the plan will not pay for, does not allow, or stops a service that the consumer thinks should be covered or provided. If the consumer’s health could be seriously harmed by waiting, the consumer may request an expedited decision. The plan must then answer within 72 hours, and must include, in writing, how the consumer may appeal. After an appeal is filed, the plan will review its decision. Then, if the plan does not decide in favor of the consumer, the appeal can be reviewed by an independent organization that works for Medicare, rather than the plan. Consumers should check the plan’s membership materials or contact the plan for details about Medicare appeal rights.

Medicare Resources

People approaching age 65 should remember that they do not need to retire to get Medicare coverage. The law provides for separate applications for Social Security retirement benefits and for Medicare. Most of the materials discussed above came from the Centers for Medicare and Medicaid Services. Medicare can be reached at 1-(800) MEDICARE (1-(800) 633-4227).

In Hawai‘i, SHIP (formerly Sage PLUS) provides volunteer counselors to help with Medicare questions. SHIP can be reached at (808) 586-7299 (toll-free at 1-888-875-9229).

MEDICAID, INCLUDING MEDICAID FOR LONG-TERM CARE

Medicaid is a public health insurance program for people of limited means administered by the state and financed jointly by state and federal funds. Medicaid is the single largest source of health coverage in the United

States. It will pay for many medical services including inpatient hospital care, outpatient hospital services, laboratory and x-ray services, skilled nursing care, nursing home care and home health services.

Medicaid rules and regulations may vary considerably from state to state. It is not unusual to confuse Medicaid and Medicare programs since both were started about the same time, deal with health care, and sound similar. The programs are very different, however. One of the primary differences between the two programs is that Medicaid is based on financial and other eligibility standards. Medicare is a federal program and is based primarily on age and on work history, rather than income.

To be eligible for Medicaid in Hawai'i, you must be a resident of the state of Hawai'i, a US national, citizen, permanent resident, or legal alien, in need of health care/insurance assistance. Your financial situation would be characterized as low income or very low income. You must also be in one of the following groups:

- Pregnant, or
- Responsible for a child 18 years of age or younger, or
- Blind, or
- Have a disability or a family member in your household with a disability or,
- Be 65 years of age or older.

To apply go to :

<https://medical.mybenefits.hawaii.gov/web/kolea/home-page>
or call Med-QUEST Customer Service on O'ahu (808) 524-3370; TTY/
TDD (808) 692-7182

On Neighbor Islands: 1-(800) 316-8005; TTY users, call 1-(800) 603-1201 toll-free for information.

Qualifying for Medicaid Long-Term Care

Many older adults are concerned about who would care for them in case they become seriously ill or disabled. Although most long-term care is provided by unpaid family members and friends, people often need more

help as they get older and frailer or when an illness or a disability gets worse. Professional help might be a choice. But a greater concern might be how to finance long-term care.

In general, there are three ways to finance long-term care:

- Personal money, such as savings and investments
- Long-term care insurance
- Medicaid (or other government benefits)

Since Medicaid covers the high cost of long-term care, qualifying for Medicaid long-term care is very desirable. Most people who enter nursing homes do not qualify for Medicaid at first because they pay for the very high costs of this care with their personal resources or long-term care insurance. After the insurance and private funds are spent down, they may become eligible for Medicaid.

Information about Medicaid eligibility in Hawai'i can be found at a number of websites including:

<https://www.medicaidplanningassistance.org/medicaid-eligibility-hawaii/>
<https://humanservices.hawaii.gov/mqd/ffs-long-term-care/>

Singles, Spouses and Spousal Impoverishment

When applying for Medicaid, be aware that Medicaid long-term care programs will take into consideration several factors. For example, whether a person is applying for Medicaid non-nursing home care (such as outpatient care or hospitalization) or for Medicaid long-term care; and whether a person who is applying is single or married. These are some of the factors that will affect eligibility and, if you are married, how much money your spouse may keep if you need Medicaid long-term care and your spouse remains in the community.

Some examples of Medicaid eligibility are the following:

- **If you are a single or married, and applying for Medicaid non-nursing home care:**

For Hawai'i residents aged 65 or older, or those who are officially blind or disabled, the monthly income limit is set at 100% of the Federal Poverty Level (FPL). It should be noted that Hawai'i has higher Federal Poverty Level limits than do the other states, with the exception of Alaska. In dollar terms, as of March 2021, an individual applicant must have income equal to or less than \$1,235 per month (\$14,820 per year) in income, and \$2000 or less in assets.

Married couples, with both spouses applying for Medicaid non-nursing home benefits, are able to have income up to \$1,670 per month (\$20,040 per year) and \$3000 in assets. There are certain assets that do not count toward these limits. These amounts are readjusted annually.

- **If you are a single applicant applying for Medicaid long-term care:**

If an individual is applying for a long-term care benefit, there is no specific income limit. Instead, there is a cost share calculation. This means that the individual will keep the first \$50 of monthly income and the rest will go to the long-term care facility. There is a \$2,000 asset limit, but certain assets do not count towards this limit.

- **If you are married with both spouses applying for Medicaid long-term care:**

Each spouse's entire income except for \$50/month per spouse must go towards cost of care. The asset limit is \$3000. There are certain assets that do not count towards this limit.

- **If you are a married applicant applying for long-term care and your spouse is in the community (see spousal impoverishment on the following pages):**

Asset limit: \$2,000 for applicant

Income limit: \$130,380 for non-applicant community spouse

The monthly income for the institutionalized spouse that is, the person's entire income except for \$50/month, must go towards cost of care. See the spousal impoverishment section for additional information about income for the spouse in the community.

- **Spending down to qualify - Medically Needy Pathway:**

Exceeding the income limits does not mean an individual cannot qualify for Medicaid. In Hawai'i, the Medically Needy Pathway (also called Medically Needy Spenddown Program) allows those who are categorically aged or disabled who would otherwise be over the income limit, to qualify for Medicaid if they have high medical expenses. They can "spend down" their excess income by paying for medical services and goods, including paying for medical bills, prescription drugs, private health insurance, and medical expenses that Medicaid does not cover. Once they have spent their excess income on medical expenses and reached an income level of \$469 per month for an individual or \$632 per month for a couple, they will be Medicaid eligible for the "spend down" period, which for Hawai'i is one month.

Spousal impoverishment

For many married couples, the cost of providing long-term care for just one spouse can cause both spouses to become impoverished. Thus, Congress has created special rules to prevent this "spousal impoverishment," through the Medicare Catastrophic Coverage Act of 1988 (MCCA). Medicaid calls the spouse who stays in the community and not in the nursing home the "community spouse." The spouse who is applying for long-term care Medicaid is referred to as the "institutionalized" spouse.

The MCCA helps protect against spousal impoverishment by setting special income and resource rules for married couples. The special rules only apply when a married couple consists of one spouse who needs long-term care services in a skilled nursing facility and one spouse who lives at home. The spouse who needs long-term care is referred to as the "institutionalized spouse" and the spouse who lives at home is referred to as the "community spouse." The MCCA sought to protect the community spouse from impoverishment by allowing that spouse to retain a much larger sum of resources and income than under Original Medicaid rules.

Under 2021 standards, the Community Spouse Resource Allowance is \$130,380. If the couple's "non-excluded resources" exceed \$130,380 then only the excess of \$130,380 will be attributed to the institutionalized spouse

in determining eligibility. In other words, the institutionalized spouse may retain \$2,000 of their own assets and the community spouse will be able to keep up to \$130,380 in assets, in addition to such “excluded assets” as the family residence, an automobile, and household and personal effects. This is dramatically different from basic Medicaid eligibility standards of \$2,000 per person or \$4,000 for a couple. Income is also examined differently under the MCCA than under Original Medicaid rules.

Income is considered to belong to the spouse in whose name the check or other instrument is made payable. However, if the check or instrument is in the name of both spouses, then one-half of the amount will be considered available to each spouse. This rule is called “attribution.” One reason this is so important is because there are limits on the amount of income the institutionalized spouse may retain.

The institutionalized spouse is allowed to keep \$50 of his or her own income each month. The rest of the institutionalized spouse’s income will be allocated between the community spouse and the nursing facility expenses.

The community spouse’s income is not considered to be available to the institutionalized spouse. Rather, the institutionalized spouse may be permitted to give some of his or her income to the community spouse. In 2021, the Monthly Maintenance Needs Allowance is \$3,259.50 for spouses in Hawai’i. Thus, if the community spouse has income of less than \$3,259.50 per month, they can request an amount of money from the institutionalized spouse that would bring their income up to \$3,259.50. The rest of the institutionalized spouse’s income will be applied to their long-term care expenses. The level of the “spousal allowance” can vary according to the cost of living factors and changes, if any, would take place on January 1 of each year.

The 2021 spousal impoverishment standards are currently published at:

<https://www.medicaid.gov/medicaid/eligibility/downloads/ssi-and-spousal-impoverishment-standards.pdf>

Home Equity

The Deficit Reduction Act of 2005 (DRA) provides for a denial of benefits for an individual who has more than a certain amount of equity value in a home. The home equity exemption in Hawai'i in 2021 was set at \$906,000. This restriction does not apply if a spouse, minor or disabled child resides in the home. It permits individuals to use tools such as a reverse mortgage or home equity loans to reduce their total equity. It also requires a process to waive the application of the denial of eligibility in cases of demonstrated hardship. The equity value of a home is the current fair market value (FMV), minus any encumbrance on it. An encumbrance is a legally binding debt against the home. This can be a mortgage, reverse mortgage, home equity loan, or other debt secured by the home.

Assets - Countable and Exempt

An applicant must reveal assets. Under Medicaid rules some are countable assets and others are exempt assets. Assets which include but would not be limited to cash, bank savings, stocks and bonds, and investments (including real estate) are totaled and compared against Medicaid's resource levels, which is generally \$2,000 for a person and \$3,000 for a couple (plus \$250 for each additional person). Property held by persons in their own names such as the home, clothing, household furnishings, and appliances; one wedding and one engagement ring; one burial space per family member; the value of a funeral plan, contract, or trust; and motor vehicles are all considered "exempt" assets that a person may keep and still be eligible if he or she meets other eligibility criteria. Assets owned in certain types of trusts may also be considered "exempt." However, in recent years, several noteworthy rules have changed relating to how Medicaid views the home property for individuals who apply for Medicaid long-term care benefits. One primary change to note concerning the ownership of a home is that a home placed in a trust is no longer considered an exempt asset.

Transfer of Assets Penalties

An application for long-term care assistance through the Medicaid program will require an evaluation of an individual's current assets but will

also require details about an individual's or couple's financial transactions during the sixty-month period immediately prior to the application date. This sixty-month period is referred to as the "look-back period." Every application for long-term care assistance will require an applicant to disclose the amount of assets the individual or couple transferred during this look-back period. If an applicant reports that assets were transferred for less than fair market value during this look-back period, the individual may have to wait a certain amount of time before Medicaid will provide long-term care assistance. This waiting period is known as the "penalty period."

The length of the penalty period is calculated by dividing the value of all assets transferred for less than fair market value (i.e., a "gift") during the look-back period by the state average daily cost of long-term care. In 2021 this amount is \$295 per day. For example, if the total gifts during the look-back period were \$295,000, the penalty period would be 1,000 days: $\$295,000 / \$295 = 1,000$). The penalty period will begin once the applicant is otherwise eligible for Medicaid long-term care assistance.

An individual or a couple may gift certain assets without triggering a penalty period, but these transfers should be done with extreme caution. Even if a gift is not penalized for Medicaid long-term care planning purposes, there may be other unintended consequences. The consequences may be worse than a penalty period, and could range from unnecessary taxation, accidental disinheritance, and even being kicked out of your own home.

Note that there are certain exempt transfers. Spouse-to-spouse gifts regardless of the amounts are exempt from the imposition of any period of Medicaid ineligibility penalty. There are exemptions that apply to the family home. A home can be transferred without penalty to the following individuals:

- A spouse,
- A child under the age of 21,
- A blind or disabled child of any age,
- A sibling who has an "equity interest" in the home and who has lived in the home for at least a year before the Medicaid application is filed,
- A child who has lived in the parent's home for at least two years

before the Medicaid application is filed and who has provided services to help avoid institutionalization of the parent.

Another exempt transfer is the funding of a Medicaid applicant's assets into a Supplemental Needs Trust, which will be discussed in a following section.

When a penalty period is assessed against an applicant, the applicant has a few options to remove the penalty. One option is to seek that the gifts be returned. Returning the gift will remove the penalty but may also cause the applicant to have too many resources to qualify for Medicaid. If the applicant cannot recover the gifted asset, the applicant may ask for an exception based on hardship. For such hardship provisions to apply, the application of the transfer of assets provisions would need to deprive the individual of either medical care such that the individual's health or life would be endangered, or of food, clothing, shelter, or other necessities of life. Such procedure must provide for notice to recipients that an undue hardship exception exists, a timely process for determining whether an undue hardship waiver will be granted, and a process under which an adverse determination can be appealed.

Spending Down and Annuities

Although the spousal impoverishment provisions may make it easier for married individuals to qualify for Medicaid, many people must still "spend down" some of their assets before they can qualify for long-term care assistance through the Medicaid program. Spending excess resources is relatively straight forward but may be difficult if the resources are illiquid or held in tax-qualified investments like retirement accounts. For example, it may not be possible to sell shares of a family home or business. While spousal impoverishment guidelines are helpful, the costs of long-term care can still significantly impact the financial stability of the community spouse.

In looking for creative options to extend private resources, some individuals will consider converting their resources into annuities. For purposes of being eligible for long-term care services under Medicaid, the applicant or the applicant's spouse must disclose any interest in an annuity (or similar financial instrument that may be specified by the Secretary of Health

and Human Services). The purchase of an annuity shall be treated as the disposal of an asset for less than fair market value unless:

- The State is named as the remainder beneficiary in the first position for at least the total amount of medical assistance paid on behalf of the annuitant under this title; or
- The State is named as such a beneficiary in the second position after the community spouse or minor or disabled child and is named in the first position if such spouse or a representative of such child disposes of any such remainder for less than fair market value.

There are numerous other complex issues regarding annuities and other provisions of the Medicare Catastrophic Coverage Act (MCCA). An individual would be best served by asking the previously mentioned SHIP, Med-QUEST or CMS offices or a qualified counselor such as an elder law attorney for advice regarding the spousal impoverishment provisions of Medicaid.

Medicaid Liens and Estate Recovery Provisions

Besides a period of ineligibility, federal regulations require the state to recover Medicaid payments from medically institutionalized recipients. The State of Hawai'i now has "lien" and "estate recovery" provisions to seek reimbursement of certain medical costs paid by the state. The state recovery of medical assistance payments is made from the estates of individuals who received assistance while in a nursing facility or from individuals not in nursing facilities who received benefits from the age of 55.

The state may place a lien on the real property of a medically institutionalized individual for the amount of medical assistance received, only after there is a determination that the individual cannot reasonably be expected to be discharged from the institution to return home. This provision is, as with everything else, subject to change. If the Medicaid recipient's stay in the medical institution is likely to be permanent, based on a determination as to whether the recipient can reasonably be expected to be discharged from the medical institution and return home, the state will send a notice to inform the affected recipients that a lien may be placed on the home.

The recipient or the recipient's authorized representative will have the opportunity to request a hearing if they disagree with the state's determination to file a lien. After the notice and the opportunity for a hearing, a lien will be filed on the home if there is no request for a hearing or if the outcome of the requested hearing is in the state's favor.

The state will not impose a lien on the home when the state has determined that the recipient is expected to be discharged from the medical institution and returned home or the following individuals are lawfully residing in the home:

- The recipient's surviving spouse;
- The recipient's child under the age of 22; or,
- A child over 21 years of age who is blind or disabled;
- The recipient's sibling who has an equity interest in the home and who was residing in the home at least one year prior to the recipient's admission to the medical institution.

The lien will be dissolved when the individual returns to the home property after being discharged from the nursing home. A lien on the home does not change the ownership of the property, but secures the asset for future reimbursement to the state for the cost of medical care when the property is sold or transferred. Recovery from the lien on the home will take place when the home is sold or transferred while the recipient is still living. After the death of the recipient, recovery will not be made while:

- The surviving spouse is living; or
- There is a child who is under 21 years; or
- A child over 21 years who is blind or disabled; or
- The recipient's sibling who has an equity interest in the home and who was residing in the home at least one year prior to the recipient's admission to the medical institution; or
- A non-dependent child who resided in the home for a period of at least two years immediately before the recipient's admission to the medical institution and who provided care to the individual that allowed the recipient to reside at home instead of the institution.

These individuals must have continuously lived in the home since the recipient's admission to the medical institution.

Recovery may be waived if it causes hardship under the following conditions:

- The real property is the sole income-producing asset, such as a family farm or other family business;
- The income produced by the property is not greater than one hundred percent of the federal poverty guidelines for the number of family members solely dependent on the real property; or
- The real property is a home of modest value that is occupied by family members who lawfully resided in the home for a continuous period that started at least three months immediately before the recipient's admission to the medical institution and provided care that allowed the recipient to reside at home rather than at an institution;
- These family members do not own other real property and have income not greater than one hundred percent of the federal poverty limit.

Cautions Regarding "Medicaid Planning"

There are many rules and exceptions that apply as to how the lien is to be placed and when estate recovery will be pursued. In view of the 60-month look-back period, the estate recovery provisions and the risk of liens, it is important to analyze the rules about transferring assets along with potential income, and estate and gift tax consequences in attempting to shelter assets. Medicaid laws have changed and can change again very quickly.

No one knows what the Medicaid rules will be in the future, so individuals should not rely on the information contained in this book for Medicaid planning, and be especially careful if you are considering transferring a home. Some of the saddest cases we have dealt with involved individuals who transferred their homes with the hopes of eventually qualifying for Medicaid long-term care coverage. Some made mistakes in transferring their homes and were disqualified for many years. Some have been subsequently evicted from their homes by their children, grandchildren

or other relatives. Some never needed long-term care and were unable to get their homes back.

We recommend that individuals consult an elder law or estate-planning attorney before making transfers of any assets for less than fair market value. Otherwise, they should at least check with SHIP or the Med-QUEST Division of the Department of Human Services about transfer penalty provisions when trying to qualify for Medicaid.

Medicaid Appeals

If an application has been denied or not processed within the required period of time, or if there has been a refusal to pay for medical services, or if there is a determination that the person is no longer eligible for Medicaid, under federal law the individual is entitled to written notice of any such decision. This notice should inform the individual of the right to file a request for a “fair hearing” within 90 days from the date of the notice. Once the individual has filed a request, a decision must be made within 90 days of the filing. If the decision is unfavorable, the government is required to provide information on how the individual may further appeal the decision, including appeals through the courts.

LONG-TERM CARE INSURANCE

Surveys report that Hawai'i's home health costs are among the highest in the nation. With the high cost of nursing homes and the desire to live independently, more and more individuals are examining the pros and cons of whether to buy long-term care insurance or whether they can manage without it.

Consumer advocates and insurance regulators caution that long-term care insurance coverage may not be a good buy for everyone. The policies can be confusing and the terms and features vary widely, from when benefits start and the maximum daily payout to how long benefits last and what services are covered. When deciding whether to purchase long-term care insurance, there are various items consumers should consider.

- Consumers should make sure the company writing the policy is licensed in the state of Hawai'i, or the State Insurance Division may not be able to assist consumers if they run into difficulty.
- Consumers should find out whether the policy has a guaranteed renewable provision, which means that as long as the consumer continues to pay the premiums on time, the company cannot refuse to continue the policy.
- Consumers should find out whether the policy requires prior hospitalization before the consumer can receive benefits in a nursing home since many people are not hospitalized before entering a nursing home.
- Consumers should find out about restrictions for coverage for pre-existing conditions which may disqualify the individual. Most policies have an elimination period or waiting period similar to a deductible. This is the period of time that you pay for care before benefits begin. Elimination days may be from 20 to 120 days and during that time when help is most needed, intended claimants may die and never receive benefits. The longer the deductible period, the lower the premium.
- Consumers should also find out the number of years of coverage offered. Premium costs usually increase with each additional year of coverage provided.
- Consumers should find out how much money the policy pays per day of nursing home care and how much the policy will pay for care provided at home. For nursing home care, consumers should find out the levels of care the policy covers. Traditionally, levels of care include: acute care, skilled nursing care, intermediate care, custodial care and home care. Not all policies cover all levels of care.
- Consumers should find out if there is an "inflation protection" option to protect benefits from inflation. This option can be expensive, however. It is usually best to avoid policies that are disease specific such as "cancer policies" since one may not be covered for any other conditions.
- Consumers should look at several policies to compare not only their premiums but also their benefits and restrictions. Premiums for "qualified" long-term care insurance policies are tax deductible to the extent that they, along with other unreimbursed medical

expenses (including Medicare premiums), exceed 10 percent of the insured's adjusted gross income.

VETERANS' SERVICES AND BENEFITS

Persons who have served their country in the military may be entitled to certain benefits. Veterans or their caregivers should apply to the United States Department of Veterans Affairs (VA) by writing, visiting, or calling the nearest VA regional office. For information about veterans' health care, education, disability and records, see <https://www.va.gov/>

The State of Hawai'i has an Office of Veterans' Services (OVS), which can provide information. Generally, veterans who were honorably discharged can qualify for certain benefits. Holders of undesirable or bad conduct discharges may qualify, depending upon the determination of the VA, based on the facts of each case. Dependents and survivors of veterans may also be eligible for certain VA benefits.

One important VA benefit is medical care. VA medical facilities give highest priority to providing medical care to veterans with service-connected disabilities, to those discharged from active duty for a disability incurred or aggravated while in military service, to those receiving a VA pension, to those eligible for Medicaid, former POW's, and to certain others exposed to nuclear tests. Another benefit is nursing home and outpatient care. The VA provides skilled or intermediate type nursing care and related medical care in VA or private nursing homes for convalescents or persons who are not acutely ill and not in need of hospital care. Outpatient care is provided for disabled veterans who are not in need of acute hospitalization and who do not need the skilled nursing services provided in nursing homes.

Another VA benefit that is of particular interest to many people is the "Improved Pension" or the "Aid and Attendance" (A&A) benefit. The A&A benefit is a monthly cash benefit paid to a VA pensioner who requires the aid of another person, or who is housebound. To be eligible, the veteran must require assistance with activities of daily living, be bedridden, legally blind or in a nursing home.

There are special veterans' benefits available to people age 65 and older who either served 90 days or more of honorable active wartime service or served less time but were discharged because of disabilities related to their service. Widows and widowers of such veterans are also eligible for benefits regardless of their age.

Veterans, their families or their caregivers should call or visit the Veterans Administration office in their area for assistance in applying for benefits. The VA website, <http://www.va.gov/> can provide information of where they are located and phone contacts. More help is available at the Office of Veterans' Services (OVS), the principal state office responsible for the development and management of policies and programs related to veterans, their dependents, and/or survivors. The OVS acts as a liaison between the Governor and veterans' organizations and also between the Department of Veterans Affairs and individual veterans. Its objectives are to assist veterans in obtaining state and federal entitlements, to supply the latest information on veterans' issues and to provide advice and support to veterans making the transition back into civilian life. Information about the OVS can be found at <http://dod.hawaii.gov/contact-us/> or by calling (808) 433-0600.

SPECIAL NEEDS TRUST

Special needs planning is an emerging area of law practice and is primarily seen as a sub-category of estate planning because of the frequent emphasis on the use of trusts. Because public benefits, such as Supplemental Security Income (SSI) and Medicaid, can be absolutely essential for people with disabilities, it is important to know when and how to include special needs planning into a variety of other legal disciplines, including but not limited to long-term care planning and health care law.

The general purpose of a special needs trust (also referred to as a supplemental needs trust) is to permit a person with special needs to benefit from private assets owned by the trust and to still qualify for important public benefits. Government benefits usually will provide for an individual's basic needs – food, shelter, and basic medical care. At least in

theory, the special needs trust will supplement such benefits and help the individual enjoy a higher quality of life.

Many of the public benefit programs that assist people with special needs are "means-tested." In order to qualify for these programs, beneficiaries must be able to show a financial need based on their income and assets. In some cases, applicants for public benefits also may have to report the income and assets of people who are assisting them. The special needs trust is a way to exempt certain assets so that they will not be factored into the particular public benefit program's means-testing. The trust must comply with applicable rules and regulations, but most importantly, must provide sufficient justification as to why the assets in the trust should not be countable within the means-test.

In addition to estate planning contexts, special needs trusts may be appropriate in family law settings, long-term care planning, and even in the field of personal injury and torts.

If you have a family member or loved one with special needs, you may want to plan for your loved one's future. A special needs trust can help ensure that proper care is provided. Be aware that there are so many different requirements and details that it is advisable that you consult with an experienced Special Needs Attorney to help you plan. This is an area that is both technically complicated and subject to change. For example, some states are clarifying what types of transfers will result in a penalty period. At least one State's highest court has decided that an individual over the age of 65 who is applying for long-term care benefits may not be penalized for transferring assets into a pooled special needs trust that is administered for the individual's sole lifetime benefit.

CHAPTER 5

BASIC ESTATE PLANNING



ESTATE PLANNING

Estate planning can be considered a continuation of “planning ahead for a lifetime” or planning for longevity that takes into consideration the possibility of illness and incapacity as discussed in Chapter 1. Estate planning is the development of a plan to manage your assets while you are alive and to pass your assets upon your death to those you choose. Effective estate planning can make the transfer as easy as possible, avoid unnecessary costs and taxes, and provide the desired security for your beneficiaries. In the broadest sense, it can also include other areas of importance; for example, under Hawai’i law, pet owners can make provisions for their animals through the use of pet trusts and you can arrange for the disposition of your remains. (See Chapter 3 for information about the Written Instrument To Control Disposition Of Remains and see the Forms Section of this book for a sample document).

Estate planning includes the process of determining what you own, deciding how to distribute your property after you die and implementing a plan such as writing a will or setting up a trust or establishing some other mechanisms to accomplish your goals and objectives. Good estate

planning is important for controlling and preserving assets for yourself and for your beneficiaries.

Although a “simple will” may seem to be one of the easiest ways to provide for your survivors, it may not be the best option if you have even a moderate estate. Trusts and other techniques of estate planning can reduce taxes, avoid probate, and manage your property. It would be wise to discuss various options with an attorney before making a simple will and be careful about using “form wills.” Likewise, if you choose to use joint ownership as an estate planning tool to avoid probate, you may not always avoid taxes or have the flexibility of other devices. You may also be inviting risk to yourself. Remember that joint ownership means that joint owners have an equal and undivided interest in the property and can sell or give it away without the permission of the other joint owner(s).

A few areas related to estate planning follow. As laws change, these changes can significantly affect your estate plan.

Federal and State Laws

Federal law has the most impact on the tax liability of your estate upon death while the state probate code has the most impact on who gets your estate upon death. Over the past few years, significant changes to the federal tax law, the Hawai'i Probate Code, and even changes to Medicaid laws have had a big impact on estate planning.

Estate Taxes

Be sure to consult with an attorney who is familiar with estate planning and tax laws when planning your estate. For example, in December 2017, the Tax Cuts and Jobs Act (TCJA) made sweeping tax law changes and the TCJA increased the estate tax exemption significantly; that includes estate and gift tax limits. For 2021 the estate and gift tax exemption is retained at \$11.7 million per individual. That means an individual can leave \$11.7 million to heirs and pay no federal estate or gift tax if the estate does not exceed that amount. A married couple can combine their estates and will be able to shield \$23.4 million. This change is scheduled to be reversed after 2025. With a new administration there may be other initiatives to change or amend these tax laws.

The annual gift exclusion amount remains the same at \$15,000. That means every year, you can make an unlimited number of gifts of up to \$15,000 per person to as many individuals as you choose.

The \$11.7 million exemption amount is a unified exemption that covers the values of Gifts, Estates, and Generation-Skipping Transfers combined. The exemption is portable for married couples. If one spouse dies before another and that spouse's estate does not use the entire \$11.7 exemption, the other spouse (or their estate) may make use of the remaining amount. Thus, a married couple will be able to shield \$23.4 million in estate taxes at the federal level.

In Hawai'i, likely due to pressures to raise more taxes, effective January 1, 2021, the state's estate tax exemption changed. In the past, the Hawai'i estate tax exemption was tied to the federal estate tax exemption. In 2021, Hawai'i residents can still leave up to \$5.49 million without owing state estate tax but any amount over that will be taxed at 20%. The legislature may make more changes to the law and as a word of caution, you should consult with your attorney or financial advisor on tax matters.

WILLS AND TRUSTS

A will is a legal document that expresses your wishes for the distribution of your property (or estate) upon death, how you want certain other matters to be resolved when you die and who you want to appoint to administer your estate. The contents of your will can be changed as many times as you wish, up to the time of death, provided that each new will or change to an existing will (called a codicil) meets the requirements of the law. You should know that a will does not take effect until you die and it only applies to property you own at the time of your death. There are several types of property. "Real property" refers to land and the buildings on the land. "Personal property" includes such possessions as money, clothes, cars, jewelry, and so on. "Intellectual property" includes patents and copyrights. All of these types of property can be included in your estate.

A rather new area of estate planning centers around issues relating to the ownership and disposition of or access to "digital assets" such as social

media or electronic or internet or “cloud-based” property or information. Who will/should be able to access your e-mail accounts, your on-line banking and bill-payment services, your Internet-based investment accounts and your cloud-based files and others? What will happen to your frequent flyer miles (and frequent buyer points)? Be sure to include this type of information when planning your estate.

The requirements for making a will are fairly simple. First, you must be at least 18 years old and of “sound mind.” Being of sound mind means you have the general knowledge of the property you own, the existence of your natural heirs (your spouse, children, parents, and other relatives), the nature and effect of making a will, and the ability to form a plan in your own mind for the distribution of your property. Second, you must intend for the document to be your will and have the intention to sign it. This also means that you are not under any “undue influence” of others to make the will. Although it is difficult to define, undue influence basically means that your actions are not voluntary and/or that somebody is taking improper advantage of you through any influence they may have on you. Third, you must satisfy the legal requirements (formalities) of putting the will in writing, signing it, and under most circumstances, having it properly witnessed.

A valid will in Hawai‘i must be in writing and must be signed by you or by someone who signs your name for you in your presence and at your request. When a person makes a will, that person is called a “testator.” Your will does not necessarily have to be typed or word-processed and there is no specified format that must be followed. Traditionally, you and at least two persons who witnessed your signature must also sign your will. This requirement has changed in several states, including Hawai‘i, and will be discussed in the next section. The best practice may still be to have your will witnessed. While it may be a valid will if the witnesses are persons who stand to inherit, it would be wiser to have disinterested witnesses. Your attorney can provide witnesses for you and they do not have to read the will itself.

To prove that you were the person who signed the will and that you appeared to be of sound mind and did not appear to be under any undue influence, you should execute a “self-proving clause” which is signed by you and your witnesses and is executed before a notary.

Finally, you do not need to be a citizen to make a will or to inherit. You should know, however, that certain provisions of the tax law affect non-citizens who inherit from a citizen. For proper estate planning, non-citizens may need to consult an attorney who understands the tax laws in this country as well as the succession laws and the inheritance laws of other countries.

Making a Will

Making a will is a well-established and, potentially, simple way to dispose of your property (real and personal) upon your death. Some of the provisions you can make in your will, include the following:

- Appoint or nominate a personal representative (executor) for your estate,
- Nominate a guardian for a minor or a mentally incapacitated person,
- Make provisions for your pet(s),
- Establish a “testamentary trust” to manage your assets for a beneficiary after your death,
- Make provisions for the donation of your body and organs (but see the section on written instruments for disposition of remains),
- Detail instructions concerning funeral and burial/cremation,
- Make provisions for a waiver of bond which otherwise might be required of your personal representative,
- Detail provisions for adopted, “hanai” and children born out of wedlock, and,
- Disinherit people.

A will can also provide instructions for collecting and distributing a deceased person’s assets. This is usually done through probate, the legal process that distributes the assets and pays the debts of the deceased.

A probated will provides a short statute of limitations within which claims against estates must be filed or be extinguished. A will provides an affordable means of accomplishing estate planning goals and can provide coverage for matters outside trusts or other will substitutes. Your personal representative has a fiduciary responsibility to settle and distribute the estate in accordance with your wishes. You can revoke or change your will

relatively easily. You can even make your own “do-it-yourself” holographic will in an emergency.

Holographic Wills

“Holographic” wills have been valid in Hawai‘i since 1997. In general terms, a holographic will is a will in the handwriting of the testator and is not typewritten or produced on a word processor. It is possible to use a “fill-in-the-blank” will commonly found in a stationery store or on the Internet and still have it considered a holographic will provided that the essential elements are in the handwriting of the testator. Although witnesses are not required, to be safe, it may be wise to have two persons witness your signature. In sum, holographic wills are valid, witnessed or not, if the signature and material portions of the document are in the handwriting of the person making the will.

Personal Representative

Upon your death, assets you owned personally (not in trust or owned jointly with rights of survivorship with someone else) will need to be administered and distributed according to your estate plan in your will or in accordance with intestate succession laws. The person who will administer these assets and who will take care of other matters relating to your estate is called your personal representative. The term “executor” was commonly used in the past.

You may also name alternates, if for some reason your chosen personal representative cannot act for you. If your personal representative and all the alternates are unable to act, the court will name a person to fill this role. The court-appointed personal representative may not be someone you would want to administer your estate and, unless you provide otherwise, your personal representative may have to post a bond and may have to report frequently to the court. You can avoid such complications by making your intentions known in your will. In Hawai‘i, a personal representative does not need to be a resident of the state, provided that the nonresident submits to the jurisdiction of the Hawai‘i state courts. In Hawai‘i, a person who is nominated in a will as a personal representative has the authority to carry out the decedent’s burial or cremation and funeral or memorial instructions, even before the will is probated.

Testate and Intestate Defined

If you die with a valid will you are considered to have died “testate.” If you die owning property in your own name and without a valid will you are considered to have died “intestate.” If you die intestate, your property will be distributed to your surviving relatives in accordance with the “intestate succession” laws of Hawai‘i. If you have no surviving relatives and die without naming anyone or any organization to receive your property, your estate will likely “escheat” to the state. However, escheat is generally used as a last resort. Having a will does not avoid probate. On the contrary, if you choose to use a will to distribute your estate, you will still need to go through the probate process, which will be discussed later. A will, however, is still the most common tool people use to plan their estates. There are many advantages to a will and you should consider one, even if you have a will substitute, such as a living trust.

Disposition of Remains

In 2013, Hawai‘i passed a law regarding who can make decisions about the disposition of remains after someone dies. Although wills can include instructions for the disposition of remains, under this law, a person who wishes to authorize another person to control the disposition of remains and the arrangements for funeral goods and services may execute a “Written Instrument to Control the Disposition of Remains” before a notary public. This document should be in substantially the same format as that in the Forms Section of this book.

Pets in a Will or Trust

Provisions can also be made for the care of your pets in your will. Under Hawai‘i law, a pet owner cannot leave any part of an estate outright to an animal. However, the owner may leave a sum of money to the person designated to care for the pet, along with a request that the money be used for the pet’s care. It is important for the pet owner to select a caretaker who will be devoted to the pet, because the caretaker has no legal obligation under the above provision to use the money for the purpose specified. The amount of money needed to care for the pet will

depend on the type of animal (e.g., a horse will need a lot more money than a goldfish!), the age of the animal, and the quality of life anticipated.

A pet trust can also be created to provide for the continuing care and well-being of a particular animal or animals. It can take effect upon your death or any disability that prevents you from caring properly for your pet. As the "grantor" of the trust, you can fund the trust with enough property or cash to care for your pet for the expected lifetime. The "trustee" can make payments on a regular basis to your pet's caregiver and pay for your pet's miscellaneous expenses as they come up.

Will Substitutes

Will substitutes are techniques for transferring property without will formalities and the disadvantages of probate. Some examples include trusts, jointly held property, and "payable on death" assets such as life insurance policies and annuities with named beneficiaries.

Since there are advantages and disadvantages involved, it is usually wise to have a will in addition to any will substitute. Seek professional advice before you attempt to "avoid probate." Many people have made serious mistakes by trying to avoid probate without looking at the overall picture. For many, probate may not be a bad option, especially if individuals desire court supervision of their estate. For most estates, probate is a much easier process now than previously. Here are some of the more common will substitutes.

TRUSTS

In Chapter 2 we demonstrated how trusts can be used as a substitute for conservatorship and as a money management tool if the grantor becomes incapacitated and cannot handle their finances. In this chapter, we go on to explain their role in estate planning.

As explained previously, a trust is simply an arrangement you (the settlor) make to give your property to a trustee, who holds it for you or your beneficiaries. You can be your own trustee or you can appoint another

person or a financial institution to act as your trustee. There are different types of trusts that can be set up for various purposes. One of the more common ones used for estate planning purposes is the "revocable living trust" which takes effect during your life. Another one is a "testamentary trust" which is created in your will and takes effect upon your death. However, note that testamentary trusts (since they are created in wills) do not avoid probate.

If your trust commences during your life and is revocable, you can be your own trustee, manage your own trust, change your trust at any time, make decisions concerning your trust, and appoint a successor trustee to carry on after you die or become incompetent. You can also give your trustee instructions, including but not limited to, instructions on property management, income and principal distribution, distribution of property when you or other beneficiaries die, and the amount of the trustee's fee, if any. Usually, you write this in a trust agreement. In many trusts, you, as the settlor will continue to control your assets since you have a right to freely amend or revoke your trust agreement. Further, trusts can ensure that property in the trust can be managed if you should become incompetent or incapable of handling your own affairs. There is no requirement to involve a trust company in the management or distribution of your trust assets.

While revocable living trusts can be revoked or changed, irrevocable trusts usually cannot be revoked or changed after the agreement has been signed or after the trust maker dies. These irrevocable trusts are usually used for estate planning purposes to reduce the size of a taxable estate, to protect assets from creditors and for use in charitable estate planning. These types of trusts, as well as other complicated types of trusts, usually will be used to address specific situations and should be discussed thoroughly with an attorney to avoid unforeseen consequences.

In the past, trusts were mainly used to avoid the time and the cost of probate, since property included in a living trust usually does not go through probate. The current law provides a more expedited probate process for most estates. Hawai'i law does not require a fee equal to a percentage of the value of the probate assets. The legal fees involved are usually based on the amount of time involved for the attorney to assist the personal representative to settle the probate estate. Most attorneys' fees

are based on an hourly rate. As discussed in Chapter 1, living trusts are now also commonly used to prepare for potential incapacity.

If you create a revocable living trust, make sure that you or your attorney places or transfers your property into the trust. If you fail to “fund” your trust, by making the trust the owner of your property, the trust cannot control that property and the goals of your estate plan may not be accomplished. Also, be aware that revocable living trusts usually cannot by-pass eligibility guidelines for public benefits programs such as Medicaid. Also, Medicaid laws relating to coverage for long-term care, disqualify individuals if their home is in a trust.

Before deciding whether to use a trust for your estate planning purposes you should speak to an attorney who is skilled in this area of law and you should probably avoid “living trust kits” and non-attorney services, especially if you are not well-versed in this increasingly complex area. Although trusts can be will substitutes, you should have a will to take care of all other assets that may not have been placed or transferred into the trust.

Uniform Real Property Transfers-on-Death Act

In 2011, the Hawai'i legislature passed a law that allows real estate to go to a beneficiary when the owner dies, without having to go to court for probate. This is done through a transfer-on-death deed that names a beneficiary who will inherit the property when you die. It is similar to a “pay-on-death” bank account. These transfer-on-death deeds must be prepared, signed, notarized and then recorded at the Bureau of Conveyances just like a regular deed. You still own the property and can still sell it or mortgage it, and you can change your beneficiary at any time. When you die, the property goes to your beneficiary without having to go to court for probate. But, to change your beneficiary, the changes must be recorded in the Bureau of Conveyances before you die. A word of caution: It may not be appropriate for many people and especially for those who might be concerned about Medicaid liens which were discussed in the previous chapter. Consult with an attorney if you have questions.

Gifts

Many people want to give their property away to others while they are still alive. Not only can you share the enjoyment of a gift with the recipient while you are still alive, but also you can use gifts as part of your estate plan to help avoid taxes by decreasing the size of your estate when you die. Be aware that your gift taxes and estate taxes are related, so consult an attorney or your accountant when planning your estate or making large gifts.

The first thing to know about the federal gift tax is that gift givers, not gift recipients, have to pay it. You can make a gift of \$15,000 (in 2021) to as many different people as you wish (whether they are your family or not) without having to pay any gift tax. Further, the recipient of the gift does not have to pay income tax on the gift. Your spouse can authorize you to use an additional \$15,000 gift tax exclusion for gifts you are making to others, increasing the value of your joint gift to \$30,000. One spouse can give to the other spouse an unlimited amount totally tax free (unless that spouse is not a citizen). There are other exclusions that you may qualify for when making gifts. Check with your attorney or tax advisor if you are planning to give away gifts exceeding the annual exclusion to any one individual within the year.

In addition to the annual exclusion amounts, you also can give the following without triggering the gift tax:

- Gifts to a charity;
- Gifts to a spouse (restrictions on non-US citizens or non-legal aliens);
- Gifts to a political organization for its use;
- Gifts of educational expenses which are unlimited as long as you make a direct payment to the educational institution for tuition only. Books, supplies and living expenses do not qualify;
- Gifts of medical expenses are unlimited as long as they are paid directly to the medical facility.

Some people use gifts as a means of avoiding probate, reducing estate taxes or qualifying for Medicaid. (You may incur a penalty if the gift is

made within five years of applying for Medicaid.) Occasionally these plans backfire. You should use great caution when you give away real property, especially your home. Once you give your property away, you may not be able to get it back. There are too many cases where people who have given their property to others, including children, later decide that they want it back or want to give it to someone else. It is usually too late, by then. Before you give something away, make sure you will not need it in the future.

In addition, a gift recipient may have to pay higher taxes if he or she later sells the gifted property. Such "capital gains" taxes can be especially burdensome when highly appreciated property, such as a home, is involved. For those considering estate planning, it may be more beneficial to retain property until death so that beneficiaries can take advantage of a "stepped-up basis" on inherited property. As you can see, these matters can be complicated and you should consult with an attorney before you make any significant gifts.

PROPERTY AND PROBATE

Tenancy

There are various ways of holding title to your property and how you hold title can determine who inherits and whether the property needs to go through probate.

- As the sole owner, you own the entire property yourself as a "tenant in severalty." Upon your death, this property goes through probate to your heir(s).
- As a "joint tenant with rights of survivorship," you and one or more other persons own the entire property together. In this type of ownership arrangement, each person has equal rights to share in the use and enjoyment of the entire property during their lives. Upon the death of any of the joint owners, with certain restrictions, the deceased's right or share to the property passes automatically by operation of law to the surviving joint owner(s), without going through probate.

- As a “tenant in common” with another person or persons, you own a particular percentage of the property. As with the other co-owners, you have a separate legal title to your undivided interest and can sell or dispose your share as you wish. Upon your death, your share passes to your heirs.
- As tenants by the entirety, you must be legally married or in a reciprocal beneficiary relationship. Upon an owner’s death, their interest passes automatically without probate to the surviving spouse, reciprocal beneficiary or civil union partner.

The term “jointly held property” can also be used to describe multiple-party accounts at a financial institution. Many people use such accounts for convenience during the lives of all parties and as a way to avoid probate.

Before setting up these accounts, you should understand how the concepts of ownership work and what the legal and tax consequences are for multiple-party accounts such as joint tenants with rights of survivorship accounts (JTWROS), payment-upon-death accounts (POD, also called “Totten” trusts), and other accounts such as trustee accounts. Check with your financial institution and attorney to make sure you understand the different types of accounts available and their benefits and drawbacks.

There are some restrictions imposed by law concerning transfers of the account to survivors. A transfer to a survivor of a multiple-party account can be set aside in the event the assets of the deceased party are insufficient to pay taxes, expenses of administration, and homestead and family allowances. Within a two-year period following the death of the deceased party, an accounting may be made to determine whether or not there is an “insufficiency” that must be first satisfied before distribution of any remaining assets.

Probate

The very word “probate” stirs up so much emotion and so many questions that we thought that it might be a good idea to devote an entire section to this subject. It may get you thinking about how to avoid it or it may make you feel more secure just knowing what it is. As previously mentioned, property included in a living trust or in jointly-owned property with rights

of survivorship, usually does not go through probate. It is also important to know that making a will does not avoid probate.

Probate is the court-supervised collection of your assets, payment of your bills, payment of your taxes, and distribution of your property to your beneficiaries or heirs. As previously indicated, your estate may have to be probated whether or not you have a will when you die. Your personal representative or heirs can normally settle your estate informally by filing with the Registrar of the Probate Court, disposing of your personal property, closing out accounts, and making distributions.

You should remember that property owned by you alone is not automatically passed to your spouse or children or other beneficiaries at your death. Upon your death, the law requires that certain formalities be followed before there can be a legal transfer of ownership. This is the probate process.

Disgruntled and unhappy heirs can ask for a supervised probate procedure. Under those circumstances, your personal representative will normally need an attorney to take your case before the probate court for a hearing before any distribution. The attorney's fee is not based on a percentage of the estate as in the past but on "reasonable fees" to be negotiated between your personal representative and the attorney.

Probate is normally needed whenever a deceased person owned any interest in property in their individual name. Again, if the deceased person had a will, the probate proceeding is called "testate" and, if the deceased person did not have a will, then the probate proceeding is called "intestate." The state will not take your property if you die without a will or will substitute, unless there are no living heirs or beneficiaries. Your property would be distributed to your heirs in accordance with state law which may differ from your wishes.

You should know that there are several disadvantages to probate. Probate takes time, incurs court fees, possibly attorney fees and personal representative fees. Probate also permits the public to have access to the particulars of the deceased person's estate. However, probate is still the primary means of transferring assets belonging to a deceased person to the deceased's beneficiaries. For those who desire to have the court

supervise the collection and distribution of their estates and who are not concerned with the disadvantages previously discussed, probate remains a useful option.

Because probate can be costly, many personal representatives who are family members and/or beneficiaries try to do it themselves. This is very common if the estate is small and the intended beneficiaries are cooperative. Moreover, some family members will do it and not request payment for their services. However, some find that having an attorney handle the legal paperwork and the court filings can save time and inconvenience especially if the individual is unfamiliar with the probate process. One drawback in sharing the probate process is that the personal representative and attorney need to sort out who will be responsible for the numerous tasks involved in probating the estate.

Collection of Personal Property by Affidavit

If, at the time you die, the value of your estate is no more than \$100,000, not including the value of any motor vehicles registered in your name, then your "successors" (such as your spouse, reciprocal beneficiary, civil union partner, children, or other relatives or beneficiaries named in the will) who are entitled to the property can obtain legal ownership of that property by completing an "Affidavit for Collection of Personal Property of the Decedent" (a written sworn statement).

The form is available at:

<https://www.courts.state.hi.us/docs/form/hawaii/3CE210.pdf>

After an individual's death, any person claiming to be the successor of the decedent may present an affidavit to any person indebted to the decedent or having possession of tangible personal property of the decedent. This affidavit is often used to close a bank or savings account, which is valued at less than \$100,000. The affidavit is submitted to the institution or person holding the property. Note that the affidavit must be notarized and a certified copy of the death certificate must accompany the affidavit.

The form to transfer ownership of a car, is available at: <https://www.courts.state.hi.us/docs/form/hawaii/3CE312.pdf>

The value of other types of property may have to be appraised by a qualified appraiser. The value of the car registered in your name is not included in determining the value of your assets. Although collection by affidavit is a relatively uncomplicated procedure, an attorney's help may sometimes be required.

Small Estates

If the estate includes real estate, regardless of its value, you cannot use an Affidavit of Collection of Personal Property. The estate has to go through the probate process. But if personal property and real estate together are worth less than \$100,000, the Small Estates Division of the Circuit Court may be willing to handle the probate for you. They charge 3% of the value of the assets, plus costs such as court filing fees and newspaper publication fees. If you have a small estate that does not include an interest in real property, your successors may collect your property through an affidavit as described above.

Formal Testacy and Supervised Administration

A formal testacy proceeding is used to resolve disputes including whether a decedent left a valid will or whether an estate may be probated or whether a personal representative should be appointed informally.

Supervised administration is available for a probate estate of any size. It is normally used when there is a major dispute over an estate or upon a finding by the court, that it is necessary to protect persons interested in the estate or is necessary because of the particular circumstances of the situation. The probate judge supervises the entire case. There may be many court appearances. These are the kinds of probate cases that are the most expensive and which may take years and require large legal fees.

If you have property in more than one state (or territory) when you die, such property may have to be probated individually in each of those states. This is called ancillary probate. Each state has its own procedures concerning property owned by an out-of-state individual.

HAWAIIAN HOME LANDS LEASEHOLDS SUCCESSORSHIP

Unlike state and federal laws of probate and inheritance, the Department of Hawaiian Home Lands has its own set of rules provided by law for the granting of leases and leasehold succession. Before registering for Hawaiian Home Lands leases, you must meet two requirements: you must be at least 18 years old and be a native Hawaiian with not less than 50 percent Hawaiian ancestry. Do not confuse this definition with that of the Office of Hawaiian Affairs (OHA). OHA defines those with any quantum of Hawaiian blood as "Hawaiian."

If you are a native Hawaiian and own a Hawaiian Homes homestead lease, remember that a will is not sufficient to pass the leasehold lease to your heirs. You must complete a "Designation of Beneficiary Form" provided by the Department of Hawaiian Home Lands (DHHL) to name your designee. The form and information about tracing your genealogy, determining Hawaiian ancestry, and determining blood quantum is available at their website at:

<https://dhhl.hawaii.gov>

The following information was obtained from the Department of Hawaiian Home Lands "Questions and Answers on Designating Successors" available through the same website above.

Section 209 of the Hawaiian Homes Commission Act specifies only certain relatives may be designated as successors. You may designate only from the following relatives:

1. Your spouse, children, grandchildren, brother or sister provided the person or persons designated have at least 25 percent Hawaiian blood;
2. Father and mother, the widows or widowers of your children, widows or widowers of your brothers and sisters, or your nieces and nephews, provided that person or persons designated have at least 50 percent Hawaiian blood.

It is very important that lessees, whose family members now meet the lower Hawaiian blood requirement and therefore now qualify, file a new designation if they wish to designate such family members as successors. Note that only children related to you by blood or legally adopted by you can qualify as successors. Children adopted by lessees cannot use their adopted parents' ancestry to meet the Hawaiian blood requirements but must use their natural parents' ancestry. The department has an arrangement with the Family Court to obtain ethnic data about adopted persons without disclosing information from sealed records.

There is no present requirement as to when this should be done. The department recommends that a designation be made at the time the homestead lease documents are executed. If it was not done at the time, it should be done as soon as the lessee can decide on a successor. You may change your designation at any time, and as many times as you wish. The law requires that your designation be in writing, filed with the department, and approved by the Hawaiian Homes Commission. The original of the designation is kept by the department. Forms are available at all offices of the Department of Hawaiian Home Lands.

Occupancy Requirements

According to the rules of the Hawaiian Home Lands' residential lease requirements, "the lessee must occupy the residential homestead lot for the duration of the lease." This may pose a problem when a kupuna or the individual who is the lessee needs to enter into a long-term care facility or move. It is possible for the lease to be cancelled if a lessee no longer lives there even though other family members may still live there. As a lessee, discuss with your family what would happen if you had to move and can no longer live there. And have in place a power of attorney and a health care directive. A word of caution, make sure your agent is trustworthy and will act in your interest, as the power of attorney is a powerful document.

CHAPTER 6

DECIDING WHO CARES AND PROTECTS?



CHANCES ARE . . .

Chances Are you will be a caregiver or care recipient, and in some instances, maybe both. The Covid-19 pandemic has demonstrated that caregivers will need to be adaptive and move quickly to address a myriad of issues, such as health care, financial and legal issues. Social isolation during the Covid-19 pandemic proved to be especially challenging and, in some cases, damaging.

Even under “normal” circumstances, caring for an older person with a disability (or for more than one person) can be difficult, stressful, and sometimes thankless, especially for a family caregiver. If you are a family caregiver, the person being cared for may be unappreciative, may be demanding, abusive, need constant supervision or may not even recognize you. You may not have enough time to sleep, much less take care of your own personal matters. If you do not have the proper tools, training, finances, support and respite, you may risk neglecting yourself as well as the person(s) being cared for. Some caregivers who become desperate may give up and may even abandon the person they are caring for if they do not know what else to do. This can lead to actual abuse of

the person being cared for, allegations of abuse filed against the caregiver, or even abuse directed at the caregiver.

Just as care receivers can be victims of abuse or neglect, caregivers can be victims of stress, anxiety, and caregiver burnout. This can happen when the caregiver has little support in giving care, has few financial resources, and is beset by the enormity of giving care to an elder person who may be sick or bedridden or suffers from dementia and requires constant supervision. Other family members may not be willing or able to help. A common example is a situation where a sibling who for years has not been caring for a parent flies in from another state and attempts to “take over” the situation. Family conflicts are not uncommon and can be detrimental to the health and the well-being of both care recipient and caregiver. Research has shown that caregivers often are at increased risk for depression and illness. By acknowledging the reality that being a caregiver is filled with stress and anxiety, and understanding the potential for burnout, caregivers can be forewarned and guard against this debilitating condition. It cannot be said too often, that the best way to be an effective caregiver is to know your limitations and to take care of yourself first.

Caregiver Services

Sometimes, older persons require help outside of health services. Household chores, transportation, yardwork, grooming, and meal preparation are all areas in which people may need assistance as they grow older. The local County Offices on Aging, which are the Hawai'i County Office on Aging, the Kaua'i County Agency on Elderly Affairs, the Maui County Office on Aging, and on O'ahu, the Elderly Affairs Division of the City and County of Honolulu, may be able to provide information about various social services. They can be reached at:

- Hawai'i County Office on Aging: (808) 961-8626;
Kona: (808) 323-4390
- Kaua'i County Agency on Elderly Affairs: (808) 241-4470
- Maui County Office on Aging: (808) 270-7774
- O'ahu, the Elderly Affairs Division of the City and County of Honolulu: (808) 768-7705

Caring for Native Hawaiian Persons

Older persons of native Hawaiian ancestry may be able to access caregiving services provided by the *Kumu Kahi* (Elderly Services) department of *Alu Like* on O'ahu and the neighbor islands. *Ke Ola Pono No Nā Kūpuna* (*Good Health and Living for the Elderly*) provides nutritional and supportive services for native Hawaiian persons 60 years and older. The Native Hawaiian Caregiver Support Program helps families caring for an older native Hawaiian person, 60 years and older with a chronic illness or disability. It also provides services to native Hawaiian grandparents or older relatives caring for children age 18 and under who meet certain criteria. A birth certificate is required or proof of age and ethnicity. The phone number to the *Alu Like Kumu Kahi* Elderly Services central office is (808) 535-6700.

Long-Term Care Facilities

When family caregiving becomes too much to handle, sometimes it is necessary to use the services of a long-term care facility that provides various levels of care, such as custodial, intermediate-level and skilled-level care services to persons who require nursing services. Descriptions, comparisons and ratings of nursing homes certified by Medicare and Medicaid are provided at the "Nursing Home Compare" website:

www.medicare.gov/NHCompare

You can search for long-term care facilities on the website by specific geographic areas. Adult Residential Care Homes (ARCH), Expanded ARCH, and Foster Family Homes provide shelter, supervision, and care for persons needing help with daily living activities. Most ARCH and Expanded ARCH facilities are private homes in residential communities, licensed for up to 5 persons. Some offer specialized care, such as for those with Alzheimer's disease. Costs vary depending on amenities and amount of care provided. When choosing an ARCH facility, it is a good idea to interview the caregiver and residents, observe the condition of the physical and social environment, understand the rules on visiting hours and so on. You may also want to inquire about the facility's most recent survey/inspection findings done by the licensing agency.

The State of Hawai'i, Department of Health, Office of Health Care Assurance provides a list of certified long-term care Nursing Facilities and Care Homes in the state, including location and available beds at:

<https://health.hawaii.gov/ohca/state-licensing-section/>

Also, for concerns about or assistance in the investigation and resolution of problems or complaints about the care or services provided in long-term care facilities located in Hawai'i, the Hawai'i State Long-Term Care Ombudsman can be contacted at (808) 586-7268.

Nursing Home Consumer Caution

Caregivers should also be aware that some health care facilities may try to take advantage of their vulnerabilities and the pressure they are under to force them to provide care for their family members. To add to the caregiver's problems, some health care providers, especially long-term care facilities, may request that caregivers sign documents to personally assume financial responsibility for the person receiving care. This is often done in the admission process when emotions are mixed and time is limited. If you sign such a document, you may be required to pay out-of-pocket any expenses not paid by insurance, government benefit programs, or the care recipient's own assets. You should understand that in Hawai'i there is generally no requirement for you to be responsible for any person other than your spouse or minor children unless you do so voluntarily. Federal law generally prohibits long-term care facilities from requiring you to assume such personal financial responsibility. The loophole that some facilities use is to ask you to sign the document "voluntarily."

Always have these types of documents reviewed by an attorney before signing them. Read and review the document and seek out those provisions that make you financially responsible and cross them out if you find them unacceptable. Also, when signing documents on behalf of another, it is usually wise to make it clear that you are signing as a legally authorized person such as the guardian, trustee or agent under a power of attorney and not in your personal capacity. If your care receiver does not have a power of attorney or trust and is still mentally capacitated, discuss getting one or both of these before it is too late.

ELDER ABUSE

The Covid-19 pandemic has been particularly harmful 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. Well before the pandemic, elder abuse was described as a “hidden epidemic” in our society and it just got worse. Elder abuse can be defined as physical or mental mistreatment or injury or neglect that harms or threatens an elderly person. It is often distinguished from ordinary crimes directed against elderly persons by the repetitive character of the acts, often committed by a relative or other caregiver. While there is no specific Hawai’i law that addresses elder abuse, various laws provide protection to vulnerable and dependent adults, including elderly persons.

Some Causes of Elder Abuse

There are many causes of abuse. Some abusers purposefully hurt an older person, especially if the older person is defenseless. These abusers may be evil, violent, mentally disturbed, or may abuse drugs or alcohol. Some use abuse as a means of control over the older person. Others use abuse as revenge or “pay back” for abuse that the older person may have committed in the past. Poverty or greed can cause abusers to steal money or property from their victims.

Abuse and neglect of older persons take place most commonly in the victim’s home and in institutions such as nursing and care homes. In the home setting, the person who cares for the victim may often be the abuser, someone who often has repeated contact with the victim and has the opportunity to commit the abuse. Spouses, children, grandchildren, nieces and nephews, siblings, neighbors, friends and hired caregivers are examples of people who may be abusers. In an institution, abuse is most often committed by employees on those who are physically or mentally incapacitated. Abused older persons often endure the abuse for fear of losing whatever support the abuser may be providing. They may feel helpless and feel they have nowhere to go or no one to turn to. If you

feel you are being abused or know someone who is being abused, help is available.

Older women who tend to live longer and make up the largest demographic in the world are more prone to abuse. Abuse toward women may be different from abuse toward men. Often there is domestic violence, intimidation or marginalization. Bullying might happen in the laundry room or the parking lot of the residential building, or management might favor others. Older women may be more isolated and poorer as family and friends move away or die.

The National Institute on Aging (<https://www.nia.nih.gov/health/elder-abuse>) identifies a number of different types of elder abuse such as the following:

- Physical Abuse—the use of physical force that may result in bodily injury, physical pain, or impairment;
- Sexual Abuse—non-consensual sexual contact of any kind with an elderly person;
- Emotional or Psychological Abuse—the infliction of anguish, pain, or distress through verbal or nonverbal acts;
- Neglect—the refusal or failure to fulfill any part of a person’s obligations or duties to an elderly person;
- Abandonment—the desertion of an elderly person by an individual who has physical custody of the elderly person or by someone who has assumed responsibility for providing care to the elderly person;
- Financial/Material Abuse—the illegal or improper use of an elderly person’s moneys, funds, property (including an elderly person’s home or other real estate), or assets; and,
- Self-Neglect—a self-behavior that threatens the elderly person’s health or safety.

Financial abuse and exploitation can happen to anyone and as previously indicated, there was a massive increase in reports of elder abuse during the pandemic. Abusers can be charming. They often pretend to be your friend and pressure you into giving them gifts. They may even say they are doing you a favor. They may be strangers or even your own family. Trust your instincts. Do not be fooled. Ask questions. Do not sign anything you

do not understand. Get advice from your bank, an attorney, or financial advisor before you commit yourself to any course of action involving money and other assets.

Financial exploitation can include theft of cash, abuse of a power of attorney, misuse of ATM or credit cards and withdrawals from joint bank accounts, misappropriation of pension and benefit checks, illegal property transfers, and a variety of frauds and scams. Reverse mortgages and home equity loans can serve the purpose of providing cash not only to you, the homeowner, but also potentially to the abuser. Unless you understand how these programs work and are financed, be careful about encumbering your home with debt, especially if you suspect that the proceeds are not going to be used for your benefit.

Identity Theft

Identity theft occurs when someone uses your personal information without your permission to commit fraud and other crimes. Mail and garbage theft is a common way of illegally obtaining your personal information. When thieves steal and use your name, Social Security number, credit card number, checking account number, or other identifying information, you may be sued for moneys you do not owe and you may be refused credit, housing, and bank loans. You may even be accused of a crime you did not commit. Even if it is not your fault, you may have to spend much time and money to clear your name and credit record.

Helpful Tips

- Do not give out your Social Security number without a good reason;
- Shred your personal bank checks and credit card receipts before disposing them;
- Be suspicious and careful if unsecured websites ask you for personal information which may lead to identity theft;
- Close any accounts that you think may have been tampered with;
- If you feel you have been a victim of Medicare fraud, the Senior Medicare Patrol (SMP) under the Executive Office on Aging can assist Medicare beneficiaries, their families, and caregivers; call Oahu (808) 586-7281 or toll free: 1-(800) 296-9422;

- Visit the Federal Trade Commission (FTC) website at <https://www.identitytheft.gov/Information> to obtain information about identity theft, fraud, scams or unfair business practices and get a recovery plan.
- If you are a victim, file your complaint with the FTC at: <https://www.identitytheft.gov/>

You can also contact one of the three major credit bureaus listed below to place a fraud alert and to obtain a copy of your credit report (sometimes fees may be charged). The credit bureau you contact will inform the other two credit bureaus of your fraud alert. An initial fraud alert makes it harder for an identity thief to open more accounts in your name. (Be forewarned that call wait times may be quite long.)

- Equifax
[Equifax.com/personal/credit-report-services](https://www.equifax.com/personal/credit-report-services)
- Experian
[Experian.com/help](https://www.experian.com/help)
- TransUnion
[TransUnion.com/credit-help](https://www.transunion.com/credit-help)

Another type of elder abuse is "caregiver neglect," described as 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:

- 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; and
- Protect the vulnerable adult from abuse by third parties.

In addition to caregiver neglect, there is “Self-neglect,” which occurs when a vulnerable adult’s inability or failure, due to physical or mental impairment, or both, to perform tasks essential to caring for oneself, include but are 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; or
- Managing financial assets with respect to the above; and,
- Lacking 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.

Self-neglect may also happen when vulnerable people are forced into or choose lifestyles that may seem strange to the observer. Some older persons may be too poor to take proper care of themselves. Others may exhibit unusual behavior due to a physical or mental illness, over or under medication, malnutrition, psychological changes, depression or substance abuse. Sometimes people reach the stage where they seem to be causing harm to themselves and appear to need some kind of protection. Deciding to intervene in individuals’ lives because of their eccentricity or self-neglect involves legal, ethical, and practical considerations. Lack of specific laws addressing elder abuse, plus concepts of civil rights, autonomy and self-determination very often limit the ability of concerned individuals and agencies to intervene. Sometimes the only recourse is to offer social or legal services or to attempt to persuade the people to change their lifestyle. As discussed below, the State of Hawai’i has authority to help protect certain vulnerable persons from self-neglect as well as other forms of abuse.

LAWS TO PROTECT OLDER PERSONS

While no specific law in Hawai’i addresses “elder abuse,” a wide range of laws can be used to protect abused older persons. The Hawai’i Penal Code provides criminal penalties for crimes against all persons in Hawai’i.

Frequently, elder abuse can be considered criminal and upon conviction, enhanced penalties may be sought by the prosecutor for the crime directed against an older or vulnerable person. There is a trend in law enforcement to establish specialized units to address crimes directed against older persons with prosecutors often leading the way. For example, there is now an Elder Abuse Justice Unit (EAJU) in the Department of the Prosecuting Attorney of the City and County of Honolulu. They can be contacted at (808) 768-7400 see also:

<https://honoluluprosecutor.org/elder-abuse-justice-unit/>

Adult Protective Services Law

The Hawai'i Adult Protective Services (APS) uses the term, "vulnerable," in defining who would be covered under this law. Note that this is not an "elder abuse" law but provides certain protections to vulnerable individuals in Hawai'i who are 18 years of age or older. The provisions of the Adult Protective Services law 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. In doing its investigation, it is entitled to have access to the allegedly abused vulnerable 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 DHS can only act with the consent of the victim unless it obtains court authorization to provide necessary services.

Under this law a "vulnerable adult" is 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 oneself from abuse.

Guidelines for mandated reporters are found at:

<http://humanservices.hawaii.gov/ssd/files/2013/01/APS-Guidelines.pdf>

Long-Term Care Ombudsman

As previously stated, Hawai'i has a Long-Term Care Ombudsman/ Advocate Law which grants investigative and access authority to the Long-Term Care Ombudsman. As an independent and politically neutral examiner, the Ombudsman receives, investigates and resolves problems with or complaints against long-term care facilities. Personal data relating to a complaint is treated as confidential and will not be released by the Ombudsman without written permission of the patient/resident or legally authorized representative.

A complaint can be lodged by anyone, including organizations, friends, staff, or anonymous persons. It is a crime to retaliate against any patient or resident who files a complaint with the Ombudsman. Persons in residential long-term care facilities, care homes, and boarding homes in Hawai'i are protected by this law. Investigation begins as soon as possible after the complaint is received. If verified, the facility's staff is asked to make corrections or provide a prompt response. The Ombudsman may also involve other responsible agencies.

Nursing Home Abuse

If you have made the difficult decision to place a family member in a nursing home, you should visit often and monitor your family member and the living environment. Take particular note of any sudden changes in your family member's appearance or demeanor, which may signal that some sort of mistreatment is taking place by the staff or another resident. Your family member may be hesitant or unwilling to speak about these abuses, because of embarrassment or fear of retaliation. If you suspect that your family member has been abused or mistreated in a nursing home, or has suffered any type of abuse, contact the Long-Term Care Ombudsman, APS or the Department of the Attorney General Medicaid Investigations Unit. You may also want to contact an attorney if you are seeking damages.

Other Interventions and Remedies

The Hawai'i Disability Rights Center can be contacted at (808) 949-2922. It may be able to assist certain disabled victims. Also, domestic violence organizations may be able to assist victims who are abused by household members. Private legal remedies, including actions for breach of contract, and tort and civil fraud may also be pursued.

You can protect yourself from an abusive individual by obtaining a "Temporary Restraining Order" (TRO) from the District or Family Court of the Hawai'i State Judiciary. The Family Court will hear cases in which the abuser is a relative, former spouse, dating partner, someone with whom you have had a child or someone with whom you have lived. Otherwise, the District Court may be able to hear the case. In all instances, you will need to fill out specific forms (available from the Clerk of the respective Court) to give the court information on the alleged abuse and certain contact information. You will also need to participate in a hearing on the matter and may need to pay a filing fee. The TRO will be effective when it is served.

If you are in danger or feel threatened, leave your home if it is unsafe. Get medical attention if you have been injured. Report the abuse to Adult Protective Services at (808) 832-5115 to help with your safety and protection. In an emergency, call 911 for help. Should you do so, try to stay calm and clear about the address or location of the emergency so that you can be found and helped. Do not be ashamed to seek help if you are a victim.

HIRING A CAREGIVER

Caregivers take care of children, other adults, most often parents, spouses, friends or relatives, and help with many things such as: bathing, bill paying and banking for finances, shopping, preparing meals, toileting, eating and medications. To better provide for care and to prepare for the worst, the care receiver should have the following legal documents in place:

- Advance Health Care Directive that names a health care agent and that provides individual instructions for health care;
- POLST (Provider Orders for Life-Sustaining Treatment);
- Powers of Attorney or other instruments to allow an agent access to private information, manage property and financial resources;
- Will and/or Trust;
- Written instrument to control disposition of remains.

And the following important information should be kept handy:

- Medicare or Medicaid information;
- Valid personal ID such as a current passport, driver's license or state ID;
- REAL IDs will be necessary for travelers within the United States by May 3, 2023. Your driver's license or state identification card will need to be REAL ID-compliant if you want to use it to fly within the U.S. If your license or state ID is not compliant, and you don't have another acceptable form of identification, you will have trouble getting through airport security.
- Social Security card. If you need to order one, visit: <http://www.socialsecurity.gov/ssnumber/ss5doc.html>
- Name and phone number of physician or other health care provider;
- List of emergency numbers;
- List of who to contact such as family members.

As "aging in place," that is, remaining in your own home and not moving to assisted living or a retirement community, becomes more popular, hiring a caregiver to help with the many tasks and responsibilities makes sense. For more about aging in place see the last topic in this chapter.

Many families have difficulty in finding a qualified and trustworthy caregiver at an affordable price. While abuse, neglect, theft and financial exploitation can happen with any caregiver, professional home caregiver agencies normally have the resources to provide bonded and insured, trained, and pre-checked caregivers. Further, such agencies can usually provide short-notice and continuous care with back-up caregivers, as necessary.

Although agencies may be more costly than hiring caregivers on your own, they provide services that may save you needless worry. For example, they may be better suited to screen applicants and terminate an unsuitable person. They are responsible for payroll, taxes, insurance and all the duties of running a business. Most of all, much of the stress is removed from being a caregiver.

If you hire your own caregiver you may save some money, since you will cut out the built-in overhead costs associated with a business enterprise and its profit objective. But, as an employer, you will need to comply with employment laws and payroll taxes.

To help employed caregivers, a pilot program called, Kupuna Caregivers Act, was launched in 2018. It made Hawai'i the first state in the nation to offer money to caregivers who also work full-time. The purpose of the act was to help ease financial stress so that the caregivers would not have to give up their jobs. The Kupuna Caregivers Program, pays employed individuals who are also caring for a loved one by providing support services that allow their loved one to remain at home so that the caregiver can remain employed. Through this program, up to \$350 per week may go towards the cost of long-term senior care and services, such as adult day care, in-home personal assistance, respite care, and more. Since it is not an entitlement program, there may be a waitlist for program participation.

For more information about both programs call ADRC (Aging and Disability Resource Center) at (808) 643-2372 to apply or the ADRC TTY line, (808) 643-0899.

Types of Caregivers

The type of caregiver you need, of course, depends on your own particular situation and the types of services and the levels of services required. You may or may not need round-the-clock services. You may or may not need to have household or chore services. You may or may not need close supervision for a frail or vulnerable or physically or mentally disabled person. You may or may not need to have intensive home health care services. Each situation is different and there is no set answer.

There are differences even among home health care providers. For example, Medicare-certified home health agencies are licensed by the State of Hawai'i and are reimbursed by Medicare. They provide part-time, intermittent, skilled nursing services with at least one other therapeutic service ordered by the physician (e.g., occupational, physical and speech therapy). Private duty service providers are hired by individuals to provide services that are not reimbursed by Medicare.

If you need to hire a home health care provider, one way to get assistance in locating an appropriate licensed provider is to use the services of a home care association such as the Home Care and Hospice Division of the Healthcare Association of Hawai'i (www.hah.org.) Note that physician orders are required for home health services to qualify for Medicare reimbursement.

Using a Professional Service Agency

If you decide to hire a professional service agency, check to see if:

- The agency is registered/licensed with the State Department of Commerce and Consumer Affairs;
- The agency is Medicare-certified if you will be seeking Medicare reimbursement;
- The agency has a record of complaints;
- The agency/supervisor is available by phone at all times;
- The agency has written policies and procedures pertaining to patients' bill of rights, services, costs, payment plans, malpractice/injury, thefts, unacceptable behavior, and disputes;
- Employees are insured and bonded;
- Employees are trained;
- Employees are screened for health, background and criminal histories;
- References for employees are available.

Although the cost of hiring a private caregiver may be significantly lower than using a licensed and certified caregiver agency, there are certain drawbacks. For example, Medicare will only provide reimbursement for eligible services provided by a Medicare-certified home health care agency. Private health insurance plans may have the same policies.

Benefits and Burdens of Being an Employer

Hiring your own caregiver may be better suited to your circumstances. You become the employer and thus you can demand greater loyalty and can provide greater direction to an employee that you select yourself. While there are advantages to being an employer, you also take on the responsibility for hiring, paying and supervising the caregiver. The responsibilities include those typically associated with running a business which hires people.

- First, you have to find your own qualified caregiver. This may mean advertising in a newspaper or the Internet, interviewing candidates, checking on references, checking on driver's licenses and medical records, and even performing abuse/criminal record background checks. You will need to get permission/privacy waiver documents from the prospective employee for some of these. Be sure to screen well. Abuse abounds.
- Second, you have to enter into an employment agreement. This usually includes a written contract which contains such matters as the job description, work schedule, back-up help, time off, wages, meals, use of automobile and other equipment, work rules dealing with such issues as alcohol use, smoking, personal phone use, and termination policy, including prior notification, if any. If you do not have a written agreement, you may be setting yourself up for trouble.
- Third, you have to supervise and manage your caregiver. This usually includes providing necessary instructions, training, orientation, demonstration of preferred techniques, and testing emergency responses. It also includes providing appropriate discipline, including dismissal, reporting to protective services agencies, and even bringing criminal charges.
- Fourth, you have to comply with federal, state, and local laws, regulations, and ordinances. These include legal eligibility, immigration assurance, wage and hour compliance, employment/labor practices, tax and insurance matters. It also includes obtaining tax identification numbers, withholding federal and state taxes, and paying Social Security/Medicare (FICA) and

unemployment taxes. It further includes obtaining workers' compensation and liability insurance. You will be required to fulfill federal and state record-keeping requirements on each employee to ensure compliance with all of these matters.

Even if you hire a caregiver for a short period of time, you will be required to comply with federal and state "nanny taxes" which are technically called "Employment Taxes for Household Employees," if wages to any caregiver exceed \$2,300 in 2021.

Checklist for Employers

At the end of this overview is a "Checklist for Employers" which will give you a head start in the process of engaging caregivers. The Internal Revenue Service (IRS), Social Security Administration as well as the State Departments of Taxation and Labor can provide you with valuable information, instructions, and required forms for employers. The Immigration and Naturalization Service (INS) can provide information about work registration requirements and legal documentation. A great resource to get you started is the Department of Commerce and Consumer Affairs' Consumer Resource Center.

Caution

You may be tempted to engage a so-called "independent contractor" to try to get the best of both worlds by avoiding the extra cost of a professional caregiver agency while also avoiding the effort of employing a caregiver. You should be aware that employment and tax laws are written in such a manner to presume that a person is an employee and not an independent contractor if the person engaging the services can control what is done, when it is done and how it is done. If you have the right to control the method and result of the service, you are probably an employer. It does not matter whether the person is full or part-time.

In Hawai'i, every individual or organization, which becomes "an employing unit," must file a status report (Form UC-1, "Report to Determine Liability") with the Unemployment Security Division of the State Department of Labor within twenty days after hiring an employee. You may call the Business Action Center of the Department of Commerce and Consumer

Affairs which will supply you with forms for registering your business. Also, the IRS has a very helpful guide (Publication 926–Household Employer’s Tax Guide), which you should read before hiring a caregiver. There are agencies that can help you fill out forms and file necessary taxes for a fee. Of course, your attorney can answer your questions and assist you in this matter.

Insurance

Whether you engage a professional caregiver agency, hire an employee or perhaps engage an independent contractor, make certain that you check with your insurance agent to ensure that your homeowner, automobile and other liability policies cover the caregiver in your home. If you are going to permit or request the caregiver to drive your automobile, check to make sure that the person has a valid driver’s license and check whether that person has been convicted of serious traffic offenses. Always check with your automobile insurer to see if your policy covers the caregiver. Further, look into having the caregiver bonded for your protection.

Caregiver’s Contract

Agreements and arrangements made with a caregiver should be documented in a contract. A contract will set the terms and conditions, include a description of services to be provided, fees and dispute resolution. Contracts can avoid misunderstandings as well as provide documentation of the respective rights and responsibilities of all the parties involved. Consult with an attorney if you have questions about any contract.

Criminal History Record Check

It is always a good idea to consider requesting a criminal history record check on prospective employees, especially if they are not well known to you. The Hawai’i Criminal Justice Data Center (part of the Department of the Attorney General) is responsible for the statewide criminal history record information system. You may search for, view, and purchase an individual’s conviction information online at <https://ecrim.ehawaii.gov/>. You can also access this information plus related services such as searches for sex offenders, information about individuals or businesses

licensed by the Professional & Vocational Licensing Division and searches for all businesses registered in the State of Hawai'i at:

<https://portal.ehawaii.gov/home/online-services/ecrim/>

Note that arrest records which have resulted in convictions (the individual has been found guilty) are considered public record. Arrest records which have resulted in non-convictions or are still pending, are considered confidential and not available to the general public.

Checklist for Employers

1. RECRUITING

- Non-discriminatory advertising
- Personal information permission/Privacy waiver
- Prior employment reference check
- Personal reference check
- Credit check
- Medical/health check (including contagious diseases)
- Abuse report check
- Criminal records history check
- Interview questionnaire

2. EMPLOYMENT AGREEMENT

- Enforceable legal contract format
- Job description
- Work schedule
- Back-up help schedule
- Time-off schedule
- Wages
- Meals
- Work rules (e.g., smoking, alcohol, personal phone calls, visitors, etc.)
- Acceptance and exchange of gifts (prohibition with person cared for to avoid theft and undue influence questions)
- Termination policy

3. SUPERVISING

- Introduction to person cared for, family, neighbors, and professionals
- Training (content, resources, materials, and courses)
- Orientation to job, home, support facilities and responsibilities
- Demonstration of preferred manner of commonly performed tasks
- Testing of emergency notification and substantive procedures
- Performance reports
 - Disciplinary options
 - Counseling
 - Warning

- Reporting to Adult Protective Services Unit,
Department of Human Services
- Reporting to Police
- Dismissal

4. TAXES, LAWS, REGULATIONS, INSURANCE

- US Citizenship or legal authorization to work:
INS Form I-9
- Minimum wage determination
- Federal Income Tax Withholding: IRS Form W-4
- Federal Wage and Tax Statement: IRS Form W-2
- State Wage and Tax Statement: IRS Form W-2
- Employer Identification Number Form SS-4
- Federal Insurance Compensation Act (FICA):
IRS Form 1040, Schedule H
- Social Security
- Medicare
- Federal Unemployment Tax Act (FUTA): Form 940
- State Unemployment Tax: Form UCB-6
- State of Hawai'i Business Registration: Form UC-1
- Employee Records
 - Name: _____
 - Address: _____
 - Phone Number/Cell: _____
 - Date and Place of Birth: _____
 - Social Security Number: _____
 - Driver's License Number: _____
 - Date hired: _____
 - Date discharged: _____
 - Dates and amounts of wages: _____
- Copies of contracts, other agreements, records checks,
performance reports, termination notice, other communications;
- Copies of Tax, FICA, and Insurance documents and filed forms;
- Homeowner's, automobile, and liability insurance policies;
- Employee bond.

COPING WITH DEATH AND DYING

Many families faced the prospect and the reality of death during the Covid-19 pandemic. People go through different emotional stages when confronted with death and dying. Denial, anger, bargaining, depression, and acceptance are mentioned as stages that a person experiences as a way of dealing with the fear and anxiety associated with dying. Counselors say that a person usually goes through each of these emotional stages in some degree or another before a resolution is made and a person is able to return to a somewhat normal life. Situations of death and dying affect each person differently and going through the emotional stages takes different lengths of time and varies in intensity for each person. Resources are available to support individuals going through the process of death and dying.

Hospice Care

The concept of hospice started in the 11th century as places of hospitality for the sick, wounded, or dying, as well as for travelers and pilgrims. The modern concept of hospice is based on a belief that death is a part of life and concentrates on relief from pain and support for the individual's emotional and spiritual needs. Hospice emphasizes palliative rather than curative treatment for the incurably ill and is given not only in such institutions as hospitals or nursing homes, but also in personal residences to those who choose to die in their own homes.

Most hospice care is covered completely by insurance, Medicare, or Medicaid. Room, board, and medications are not covered. Hospice workers and volunteers are trained to help the dying person, relatives, and friends to prepare for the death process as well as the actual death moment. The hospice program can also provide immediate emotional support for the survivors.

Kokua Mau is an organization that provides information and resources about end-of-life care. They can be contacted at (808) 585-9977 or to view their website or to download their forms go to: www.kokuamau.org

Steps to Take Upon Death

When death occurs, survivors will need to take steps to decide whom to notify, what to do with the body, what type of ceremony or memorial to have and, if any, what services and merchandise to purchase.

When Death Occurs At Home

If the care receiver dies and is not enrolled in a hospice program and if you have not made previous arrangements with the attending physician, call 911. The operator will ask if it is an emergency. Explain that a death has occurred and the circumstances. A medical examiner, paramedic, or coroner will be sent to the address to verify that a death has occurred. You can make arrangements with a funeral home or mortuary to remove and store the body until it can be buried or cremated. The morgue (Medical Examiner Facility) will normally not store the body unless there is evidence of a violent or suspicious death, the body is unclaimed or the body has a contagious disease.

The police may need to be notified if the death was unattended or unexpected. If the death was expected and a physician was attending the individual, the physician can inform the survivors what to do. Typically, prearrangements will have been made and the survivors call the prearranged contact at the funeral home or mortuary to take the body. If you are a survivor who will be taking charge of making decisions, you may want to notify relatives, close friends and business associates and arrange for funeral or memorial services. For deceased veterans or spouses of veterans, contact the U.S. Department of Veterans Affairs to see if they qualify for benefits at www.va.gov

When Death Occurs in a Hospice or Medical Facility

If the death occurs in a hospice or medical facility, the hospice and medical personnel and volunteers can help guide the survivors. If death occurs in another type of health care facility, appropriate procedures, including governmental agency notification, will already be in place.

When a nursing home, hospital, doctor, or the police notify the survivor that a death has occurred, the survivors are usually instructed to contact a funeral home or mortuary to make arrangements for the disposition of the body. Problems have occurred when two different parties have different opinions about who should be in charge of disposing the body or what should be done with the body. Hospitals will generally release the body to the "next of kin" or a family member such as the spouse, reciprocal beneficiary, civil union partner or other closely related family member.

Sometimes, when there is no legal next of kin, funeral homes will not honor the wishes of the unrelated party. Funeral homes will generally follow the directions of the next of kin unless there is evidence specifying another party. To avoid conflicts in an emotionally charged time, it would be best to put into writing a person's choice regarding who will make decisions regarding the disposal of the body. This can be done in a will and expanded upon in a letter to the personal representative but, as previously mentioned in both chapters 2 and 4, it may be best to execute a written instrument to control disposition of remains before a notary public.

Written Instrument to Control Disposition of Remains

As mentioned previously, a person who wishes to authorize another person to control the disposition of remains and the arrangements for funeral goods and services, may execute a written instrument to control disposition of remains before a notary public. The written instrument should be in substantially the same format as that in the Forms Section of this book.

Funeral and Memorial Plans

Funeral or memorial plans can be very simple or they can be very elaborate. Of course, pre-planning, which includes a pre-chosen funeral home or mortuary and pre-paid services, would be helpful in most situations. Many people are choosing to belong to a memorial society which is a non-profit organization dedicated to achieving dignity, simplicity, and economy through pre-planning. If you are a veteran, ask the U.S. Department of Veterans Affairs for advice concerning advance funeral and memorial arrangements. If you are receiving public assistance, you should also know

that the state may pay for certain expenses relating to the disposition of your body. Your plan, accordingly, may be as simple as letting your survivors know to call the Hawai'i State Department of Human Services for assistance upon your death. Talk to your Social Worker about this if you have a Social Worker.

Funeral and Memorial Services

There have been highly publicized problems about the funeral industry on the mainland and in Hawai'i. When you consider that funeral-related decisions are usually made in just a few hours, you can see why people are sometimes exploited. Good business practices should be followed by you as a consumer in getting the contract for services in writing, knowing what you are paying for, knowing which services are not necessary, and seeing that all these services are performed as agreed. Beware of such practices as substitution of one casket for another or charging for services you do not need such as thank you cards if you are providing your own, or a flower car if there are no flowers, pallbearers who were not requested, or charging for clothing for the deceased that you are providing. Plans are often made according to the prescribed religious funeral or memorial rites of the deceased and the funeral director, your minister, priest, rabbi, or spiritual advisor can help with the plans.

Funeral plans can include burial, entombment or cremation. Embalming is a method of preserving the appearance of the body for open viewing. Embalming is not always required and is usually unnecessary if the body is to be cremated within a certain time period. Scattering of ashes can be accomplished informally or can involve elaborate ceremonies. According to the state Department of Land and Natural Resources, no environmental permit from the Health Department is required to scatter cremated ashes on land, sea or from the air, but it should be done discreetly and some distance away from the general public. Also note that ashes are not allowed to be scattered within a state forest preserve or watershed area, or on state or federal property. While, generally speaking, there is little regulation of scattering of ashes in Hawai'i, there may be regulatory restrictions in other jurisdictions.

The funeral home or mortuary may be able to provide you with information about scattering of ashes. They may discourage such a practice, even if it

is legal, if they have their own plan that they may wish to sell to dispose of the ashes.

Be aware that payment for the costs of a funeral may need to be made in advance by those requesting the service. This can be financially difficult for families who do not have immediate access to the deceased's estate.

Memorial services differ from funeral services. Traditionally, funeral services are those which are held in the presence of the body and may include a viewing. Memorial services are held without the body and are usually less costly. Often, memorial services are held when friends and family cannot immediately meet after a death. Other things to consider for a funeral or memorial are the music, the eulogy, the gathering place, food, readings, obituaries, and pallbearers or attendants.

Making Your Own Preparations

When purchasing a funeral plot, you may wish to address some considerations:

- Who owns the cemetery and are there restrictions on who can be buried there?
- Is the cemetery well maintained and is its maintenance included in the price of a plot?
- How many individuals may use a single plot and are multiple burials permitted, and do the deceased have to be related?
- Can you change your mind and get a refund or even re-sell the plot?

Prepayment Plans

While preparing for the future need for funeral services and products, be very cautious about paying in advance (prepayment plans) especially if you do not know the company with which you are dealing. While most well-established funeral industry entities are trustworthy, there have been many reports of businesses which have mismanaged or stolen funds. Also, when mortuaries or funeral homes go out of business, the moneys you prepaid may be completely lost. You may also find that your moneys are non-refundable if you move to another location and do not need the

services of that particular plan or, if for some other reason you want your money back.

Burial at Punchbowl or Other Military or Veterans' Cemeteries

If you are a veteran or a spouse or dependent of a veteran who has served in the uniformed services, you may be entitled to have your remains interred in the National Memorial Cemetery of the Pacific at the Punchbowl or other military or veterans' cemeteries in Hawai'i or on the mainland. Space is limited at the Punchbowl, especially for burials. Gravesites in Department of Veterans Affairs (VA) national cemeteries cannot be reserved in advance; however, arrangements made prior to 1962 will be honored. Families are encouraged to prepare in advance by discussing cemetery options, collecting the veteran's military information, including discharge papers, and by contacting the cemetery where burial is desired. Call the US Department of Veterans Affairs (VA) or the Hawai'i State Office of Veterans' Services for information. Information about the OVS can be found at <http://hawaii.gov/dod/ovs/> or by calling (808) 433-0420.

Using and Closing Out Bank Accounts

Of immediate financial concern to many who have a joint account or a joint safe deposit box is whether the survivor will have access to the account. Usually, the bank will not freeze your assets if it is in a joint account. Since each financial institution's policies differ, check with them ahead of time. Not only can joint accounts be used prior to and after a death but they can also be easier to "close out" than one that is not jointly held with rights of survivorship. Also recall that joint accounts can be useful tools in estate planning to give survivors immediate access to funds upon death. To close out an account that was in the deceased's name only, you will need a death certificate and, depending on the amount in the account, an affidavit or letters from the court naming you as the personal representative of the estate.

FINDING AN ATTORNEY

Throughout this book, we have suggested that you may need the services of a lawyer. Finding a lawyer can be a very time-consuming and stressful experience, and especially for caregivers who are already stressed. Whether or not you or the person you are caring for is “old,” you may wish to consider a lawyer who practices “elder law.”

Elder Law

Elder law is the relatively new and evolving field of law that addresses issues older persons face. Rather than being defined by technical legal distinctions, elder law is defined by the client to be served. In a sense, most attorneys could think of themselves as elder law attorneys, especially when they are preparing estate planning documents, or consulting with a client on a pension plan or retirement timing or Social Security benefits. Elder law is different from traditional estate planning in that more emphasis is placed on planning for longevity and the contingencies of an extended lifetime. This includes planning for the time when finances, health, mental capacity and support structures may change, either rapidly or progressively.

DEMENTIA-CAPABLE ATTORNEYS

As our nation’s older population continues to grow, so does the importance of having professionals in our society capable of responding to the unique needs of older people, including responding to the physical and mental effects of aging on this segment of the population. These professionals should include attorneys who are so-called “dementia-capable,” individuals who are trained to recognize the issues of and address problems caused by Alzheimer’s Disease and related disorders or dementias (ADRD).

A dementia-capable attorney should be able to (or know someone to partner with who can):

- Recognize the signs of dementia in a client or potential client and be professionally competent to address legal and practical issues as client capacity diminishes;
- Assess the capacity of clients suspected of having dementia and have an understanding of the varying legal capacity requirements for specific legal tasks such as executing wills, powers of attorney, trusts, contracts, and advance health care directives, and other legal matters;
- Have some core competency with dementia-related medical terms and in using cognitive assessment tools;
- Have some core competency in understanding mental health, substance abuse and domestic violence issues that may be exacerbated or precipitated by the underlying causes of dementia;
- Understand and use “dementia-friendly” communication skills;
- Work with other professionals, including doctors, nurses, social workers, clergy or spiritual advisors, financial planners, insurance agents, mediators and other attorneys with specialized legal skills;
- Know the national and local services available to help people with dementia and their caregivers and to help make appropriate referrals;
- Be aware of the ethical issues of representing a client with diminished capacity, multiparty representation, conflicts, confidentiality, and professional competence;
- Know the signs of elder abuse and financial exploitation and be able to protect clients from potential abuse, neglect and exploitation;
- Know how to create an advance health care plan that states who will make decisions and the duties involved, including planning tools for individuals without families or friends;
- Understand the ethical concepts of autonomy, self-determination as well as best interests and cultural influences;
- Know when to talk about Guardianship and Conservatorship if suitable alternatives are not set in place;
- Address the range of issues that can be impacted by dementia, by taking appropriate action before the full impact of Alzheimer’s disease related dementias (ADRD) sets in, in such important areas as

- Health care advance planning, advance directives and surrogate decision-making;
- End-of-life decision-making including requests for life-prolonging treatment and requests for hastening death;
- Hiring a caregiver, including contracts, labor law, insurance and taxes;
- Driving a motor vehicle or utilizing other means of transportation. (Arranging other transportation when driving is no longer safe);
- Financial, disability and long-term care advance planning, including direct deposit, joint accounts, automatic bill payment, powers of attorney, representative payee (and fiduciary) planning, money management services, guardianship, conservatorship and protective services;
- Estate planning, including wills, living trusts, transfer on death trusts and accounts, taxes, probate, inheritance and beneficiary issues;
- Private and public health care and long-term care benefits and payment options, including private pay, insurance, Medicare, Medicaid, and veterans' benefits;
- Other public, private and governmental benefits, including income, housing, nutrition, home care and personal care services.

Do you know a "dementia-capable" attorney?

How to Locate an Attorney

If you do not have a personal or a family attorney, you may find that a colleague, relative or a friend may have one or know of one who has done a good job. Word of mouth is often a good way to find an attorney. Also a person may call Lawyer Referral Services which are usually run by state and local bar associations such as the Hawai'i State Bar Association which does not charge the public for the referral. Usually a person who calls a lawyer referral service will obtain the names and telephone numbers of attorneys who subscribe to the service and who have indicated a special interest in certain areas of the law. You can also check through the "yellow pages" of the telephone book or respond to commercial advertisements

but be cautious and be sure to ask questions about the attorney's experience and costs.

Free Civil Legal Services

The Legal Aid Society of Hawai'i at (808) 536-4302 and Volunteer Legal Services Hawai'i at (808) 528-7046 provide free legal services for eligible clients in Honolulu as well as on the neighbor islands in certain civil cases. The Legal Aid Society of Hawai'i also has a specialized Kūpuna Legal Aid Services program at (808) 536-0011 or 1-(888) 536-0011 for neighbor islands.

There are even specialty law offices such as our University of Hawai'i Elder Law Program at (808) 956-6544 for individuals and caregivers on O'ahu.

Finally, there are other non-profit organizations, such as the Hawai'i Disability Rights Center at (808) 949-2922 and the Domestic Violence Action Center at (808) 531-3771, which utilize attorneys and others to assist clients, including older persons.

Attorney Fees

The first question in entering into a relationship with an attorney may very well be, "How much is this going to cost me?" Always ask if your initial conversation will cost you money. It may surprise you that many attorneys do not offer a "free initial consultation" and you will be expected to pay for your time with the attorney even if it is a preliminary meeting and you decide not to retain the attorney. Be especially cautious about "non-refundable" deposits, which can be difficult or impossible to get back if you change your mind about the attorney.

Some attorneys may charge a flat fee for certain services. Even under these circumstances, be careful since any additional tasks, changes or modifications may cost you money. Some attorneys charge on an hourly basis. Under this system, time is truly money. Other attorneys may charge on a "contingent fee basis," a fee arrangement in which the attorney will receive a percentage of what the attorney is able to recover for the client. Not all cases are suitable for payment on a contingent basis and the law prohibits contingent fees for certain kinds of cases, such as criminal

cases. Finally, you may wish to “shop around” and get several quotes from different attorneys; but don’t sign with one attorney and then shop.

Working with Your Attorney

When you work with your attorney, be prepared and do your homework. Read this book. Keep your appointments. Show your attorney all of the documents affecting your case, not just selected documents. Make a list of concerns. Remember to bring your written questions with you so you will not forget them and be sure to take notes so that you will remember what your attorney told you. Ask questions. Share your own point of view. Be honest with your attorney. Do not hide facts. Stick to the point when you are talking since, remember, time is money. Make sure you hear and see as well as possible. If you have a hearing aid, wear it. If you have glasses (including reading glasses) bring them and wear them.

AGING IN PLACE?

For many people, aging in place is the ideal way to grow old, that is, staying in your own home and community with your friends and family close by. It is where you feel comfortable, know your neighbors and like the feeling that you belong there. But aging in place may not be possible. There may come a time when you (or your loved one) might have to go to assisted living or to a nursing home. In the US two out of every three older persons will enter a nursing home sometime during their lives and you or your parent or parents may be the ones. It is highly emotional if you have to move, but it could be even more emotional for older persons who think that they are still capable of living independently without strangers interfering in their lives.

Moving a person, especially someone who had been strong and independent, from the comfort and familiarity of home into a strange place like assisted living, or a senior living facility, could be highly emotional, especially if the person refuses to go. The older person or care receiver could be scared about aging, making new friends, and fitting in the new place. Perhaps you as a family member or caregiver may be feeling a

little guilty also. To help your care receiver feel more comfortable, some suggestions gathered from other caregivers are the following:

- Visit often. Frequent visits can ease any stress care recipients may have. Find out if there is someone in the care home that they might know. They might be afraid that they will be abandoned or they may be lonely. It might be easier for them to meet people at activities or in the dining room if they have a companion.
- Expect setbacks. Just when you think you are fine and your care receiver is settling in, things will change. Your care receiver might feel lonely or hate the food or the noise or the smells and may want to go home.
- Allow yourself to feel stressed and put upon. Speaking of home, know that when care receivers say they want to go home, it may not necessarily mean to their last address – especially if they have dementia; they may be referring to a childhood home. Home is both a place and a feeling.
- Surround your care receiver with personal belongings; but be sure to tag them. Things get lost or misplaced or even stolen. Moving into an assisted living facility is a major adjustment where everything is different – the people, the food, the routines and even the sounds and smells.
- Be your care receiver's advocate. No place is perfect. Many are hesitant to speak up in a facility, especially at first, and you may be the one who needs to speak up until your care receiver feels more comfortable.

Most of all, keep yourself safe, healthy and happy. Be ready for some setbacks and do not be afraid or embarrassed to ask for and to accept help. Know that you can only do so much. Take care of yourself, for those you care for and for those who care about you so that you can indeed expect the best!

Putting Your House in Order

Forms You May Need



FORMS SECTION

We have included the following forms:

1. Checklist for Making an Advance Health Care Directive
2. Sample Short Form for an Advance Health Care Directive
3. Sample Long Form for an Advance Health Care Directive
4. Sample Written Instrument to Control Disposition of Remains
5. Sample State of Hawai'i Statutory Form Power of Attorney
6. Sample Declaration of Authority to Act as a Surrogate for a Patient
7. What Matters to Me*

Note:

- The Provider Orders for Life-Sustaining Treatment (POLST) form is available at www.kokuamau.org
- The Affidavit for Collection of Personal Property of a Decedent is available at <http://www.state.hi.us/jud/Hawaii/Circuit/3CAffidavit.pdf>
- * The "What Matters to Me" type of form is not a legal form but is a document that conveys your values, hopes and aspirations and your feelings about how you expect others to treat you and others, even when you are no longer able to communicate. You may also want to set up a code phrase for trusted individuals as mentioned in the "Danger, Danger" section at the end of Chapter 1. Make sure your attorney reviews this document to assess its sufficiency if it is included in or attached to a legal document.

KŌKUA PACKET

1. CHECKLIST FOR MAKING AN ADVANCE HEALTH CARE DIRECTIVE

- Talk with family members, friends, spiritual advisors, physicians, other health care providers, and other trusted persons about what would be important to you if you become terminally or irreversibly ill or injured and you can no longer communicate your health care decisions or other wishes.
- Ask someone you trust and on whom you can depend to be your health care agent and discuss your wishes with this person. Select an alternate health care agent in case your agent is unable to serve.
- Complete either one of the following forms, change or cross out provisions, or make an entirely different document. Add pages if you wish.
- Have two qualified witnesses or a notary public witness your signature.
- Inform family members, your spouse, parents, children, siblings, friends, physicians, and other health care providers that you have executed an advance health care directive and that you expect them to honor your instructions. Keep them informed about your current wishes.
- Give copies of the document to your health care agent, health care providers, family, close friends, clergy, or any other individuals who might be involved in caring for you.
- Place the executed document in your medical files.
- When you renew your driver's license or State ID, you may designate that you have an advance directive by putting "AHCD" (which stands for Advance Health Care Directive) on it.
- Consider executing a Provider Orders for Life-Sustaining Treatment (POLST)
- Make plans to review the document on a regular basis. If necessary, make a new document and keep people informed of any changes.
- Do not delay!

2. SAMPLE SHORT FORM ADVANCE HEALTH CARE DIRECTIVE

MY NAME IS _____

PART 1: HEALTH CARE POWER OF ATTORNEY

DESIGNATION OF AGENT:

I designate the following individual as my agent to make health care decisions for me:

(Name and relationship of individual designated as health care agent)

(Address)

(City) (State) (Zip code)

(Home phone) (Work phone) (E-mail)

If I revoke my agent's authority or if my agent is not willing, able, or reasonably available to make decisions for me, I designate the following individual as my alternate agent:

(Name and relationship of individual designated as alternate health care agent)

(Address)

(City) (State) (Zip code)

(Home phone) (Work phone) (E-mail)

WHEN AGENT’S AUTHORITY BECOMES EFFECTIVE:

My agent’s authority becomes effective when my primary physician determines that I am unable to make my own health care decisions unless I mark the following box.

____ If I mark this box, my agent’s authority to make health care decisions for me takes effect immediately. However, I always retain the right to make my own decisions about my health care and to revoke this authority as long as I am mentally capacitated.

AGENT’S AUTHORITY AND OBLIGATION:

I intend my agent’s authority to be as broad as possible subject only to any instructions and limitations I may state in Part 2 of this form or as I may otherwise provide orally or in writing. To the extent my wishes are unknown, my agent shall make health care decisions for me in accordance with what my agent determines to be in my best interest. In determining my best interest, my agent shall consider my personal values to the extent known to my agent.

NOMINATION OF A GUARDIAN:

If a guardian needs to be appointed for me by a court, I nominate my agent.

PART 2: INSTRUCTIONS FOR HEALTH CARE

(If you are satisfied to allow your agent to determine what is best for you in making end-of-life decisions, you need not fill out this part of the form. If you do fill out this part of the form, you may add wording you may prefer and you may strike any wording you do not want.)

A. END-OF-LIFE DECISIONS:

- If I have an incurable and irreversible condition that will result in my death within a relatively short time, OR
- If I have lost the ability to communicate my wishes regarding my health care and it is unlikely that I will ever regain that ability, OR
- If the risks and burdens of treatment would outweigh the expected benefits,

THEN: I direct that my health care providers and others involved in my care provide, withhold or withdraw treatment in accordance with the following choice I have marked:

(Check only **one** of the following boxes. You may also initial your selection)

____ (a) Choice **Not** To Prolong Life—I do not want my life to be prolonged. **OR**

____ (b) Choice To Prolong Life—I want my life to be prolonged as long as possible within the limits of generally accepted health care standards. **OR**

____ (c) Choice To Be Made By Health Care Agent—I want my agent who is designated in Part 1 of this document or in a separate document to make end-of-life decisions for me.

(If you wish to add to the instructions or to write our own, you may do so in section D below.)

B. ARTIFICIAL NUTRITION AND HYDRATION—FOOD AND FLUIDS:

Artificial nutrition and hydration must be provided, withheld or withdrawn in accordance with the choice I have made in the preceding paragraph A unless I mark the following box.

____ If I mark this box, artificial nutrition and hydration must be provided regardless of my condition and regardless of the choice I have made in paragraph A.

C. RELIEF FROM PAIN AND HOSPICE CARE:

____ If I mark this box, I direct that treatment to alleviate pain or discomfort should be provided to me even if it hastens my death.

D. ADDITIONAL INSTRUCTIONS OR INFORMATION:

(Optional—what is important to you, what makes your life worth living, the things you value, your thoughts on life-prolonging treatment, preferences for physician/health care facility; hospice, directions for organ/body donation, religion or spiritual information, etc.)

____ If I mark this box, I have attached additional instructions or information that I wish to incorporate into this advance directive. (Sign and date each added page and attach to this form.)

OTHER MATTERS:

A copy of this document has the same effect as the original. (Strike through any provisions with which you do not agree). My agent has the following powers with respect to my health care:

- a. To talk with health care providers and insurers and to arrange for and authorize my treatment, admission to or discharge from any hospital, nursing home, residential care, assisted-living, home health, hospice or similar facility or service and to apply for and change any health care-related service, facility or insurance for me, and to apply for public or private health care benefits.
- b. To act as my Medicaid authorized representative.
- c. To request, receive, examine, copy and consent to the disclosure of medical or any other health care information, including medical files and records under the Health Insurance Portability and Accountability Act (HIPAA) and/or other federal and state laws pertaining to health care and health care information.
- d. To execute Provider Orders for Life-Sustaining Treatment (POLST) and/or Comfort Care Only-Do-Not-Resuscitate (CCO-DNR) documents on my behalf.
- e. To sign necessary documents on my behalf related to the above matters without my agent assuming personal financial responsibility.

(My Signature)

(Date)

(My Printed Name)

(My Address)

WITNESSES:

This document must either be signed by two **qualified** adult witnesses who witness or acknowledge the signature; **or** be acknowledged before a notary public in the state.

ALTERNATIVE NO. 1 (WITNESSES)

FIRST WITNESS*

*I declare under penalty of false swearing pursuant to section 710-1062, Hawai'i Revised Statutes, that the principal is personally known to me, that the principal signed or acknowledged this power of attorney in my presence, that the principal appears to be of sound mind and under no duress, fraud, or undue influence, that I am not the person appointed as agent by this document, and that I am not a health care provider, nor an employee of a health care provider or facility. I am not related to the principal by blood, marriage, or adoption, and to the best of my knowledge, I am not entitled to any part of the estate of the principal upon the death of the principal under a will now existing or by operation of law.

(Signature of Witness)

(Date)

(Printed Name of Witness)

(Address of Witness)

SECOND WITNESS**

**I declare under penalty of false swearing pursuant to section 710-1062, Hawai'i Revised Statutes, that the principal is personally known to me, that the principal signed or acknowledged this power of attorney in my presence, that the principal appears to be of sound mind and under no duress, fraud, or undue influence, that I am not the person appointed as agent by this document, and that I am not a health care provider, nor an employee of a health care provider or facility.

(Signature of Witness)

(Date)

(Printed Name of Witness)

(Address of Witness)

ALTERNATIVE NO. 2

State of Hawai'i _____)
) SS
County of _____)

On this _____ day of _____, in the year _____, before me, _____

(Insert name of notary public) appeared _____, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to this instrument, and acknowledged that he or she executed it.

Notary Seal

(Signature of Notary Public)

My Commission Expires: _____

Document Date _____ # Pages: _____

Name: _____, _____ Circuit

Doc. Description: _____

Signature _____ Date _____

Notary Certification

3. SAMPLE LONG FORM ADVANCE HEALTH CARE DIRECTIVE

MY NAME IS _____

MY ADDRESS IS:

(Address)

(City) (State) (Zip code)

PART 1 DURABLE POWER OF ATTORNEY FOR HEALTH CARE DECISIONS

(1) DESIGNATION OF AGENT: I designate the following individual as my agent to make health care decisions for me:

(Name of individual you choose as agent)

(Address)

(City) (State) (Zip code)

(Home phone) (Cell Phone) (E-mail)

OPTIONAL: If I revoke the authority of my agent or if my agent is not willing, able, or reasonably available to make a health care decision for me, I designate as my alternate agent:

(Name of individual you choose as alternate agent)

(Address)

(City) (State) (Zip code)

(Home phone) (Cell phone) (E-mail)

(2) AGENT'S AUTHORITY: (Strike through any of the following provisions you do not want. You can add provisions on the form or attach additional pages.)

My agent is authorized to make all of the following health care decisions for me:

- To provide consent (or refuse consent) to and to enter into contracts on my behalf for any care, treatment, service, or procedure to maintain, diagnose, or otherwise affect a physical or mental condition, including admission to or discharge from a health care facility or program, give approval or disapproval to diagnostic tests, medical or surgical procedures, programs of medication, the use of alternative or complementary therapies as well as decisions to participate in education, research and experimental programs.
- To make decisions regarding orders not to resuscitate or to attempt resuscitation (DNR or DNAR), including out-of-hospital "Comfort Care Only-Do-Not-Resuscitate" (CCO-DNR) documents, as well as Provider Orders for Life-Sustaining Treatment (POLST) forms for immediately actionable decisions to provide, withhold, or withdraw nutrition and hydration and all other forms of health care to keep me alive.
- To request, receive, examine, copy, and consent to the disclosure of medical or any other health care information, including medical files and records. I also grant my agent the power to authorize, or to revoke any authorization for, the release, disclosure and use of any of my health and medical information, including, but

not limited to, my entire medical record, my medical bills, all information in my medical records relating to AIDS (Acquired Immune Deficiency Syndrome) or HIV, alcohol and/or drug abuse treatment, or behavioral or mental health services, and any written opinion relating to my capacity, my competency, or my ability to manage my own affairs or to make my own decisions, and such power shall apply to any information governed by the Health Insurance Portability and Accountability Act of 1996 (also known as HIPAA), 42 USC 1320d and 45 CFR 160-164, and any other applicable federal, state or local statute or regulation. In addition, my agent shall have the power to pay any fee charged for duplication of records, and to release health care providers and other entities from all liability and claims whatsoever pertaining to the disclosure of information as contained in the records released pursuant to such authorization.

- To communicate with, select, and discharge health care providers, organizations, institutions and programs, including hospice programs and to make and change health care choices and options relating to plans, services, and benefits.
- To apply for public or private health care programs and benefits, to include Medicare, Medicaid, Med-Quest or other federal, state, local or private programs without my agent incurring any personal financial liability.
- To act as my Medicaid authorized representative.
- To make all other health care decisions for me, except as I state here:

(Consult with a mental health professional and/or attorney for appropriate language if you wish to give your agent additional information or instructions about decisions regarding mental illness. You may make a separate mental illness advance directive or include such provisions in this advance directive. Use additional sheets if needed.)

(3) WHEN AGENT'S AUTHORITY BECOMES EFFECTIVE: My agent's authority becomes effective when my primary physician determines that I am unable to make my own health care decisions unless I mark the following box.

____ If I mark this box, my agent's authority to make health care decisions for me takes effect immediately. However, I always retain the right to make my own decisions about my health care and to revoke this authority as long as I am mentally capacitated.

(4) AGENT'S OBLIGATION: My agent shall make health care decisions for me in accordance with this power of attorney for health care, any instructions I give in Part 2 of this form, and my other wishes to the extent known to my agent. To the extent my wishes are unknown, my agent shall make health care decisions for me in accordance with what my agent determines to be in my best interest. In determining my best interest, my agent shall consider my personal values to the extent known to my agent. My agent shall not be obligated to assume any personal financial responsibility when making decisions in accordance with this document.

(5) NOMINATION OF GUARDIAN: If a guardian of my person needs to be appointed for me by a court, I nominate my agent. If another person is appointed as guardian and my agent is willing and able to act, I would prefer my agent to have precedence in making health care decisions for me.

PART 2 INSTRUCTIONS FOR HEALTH CARE

If you are satisfied with allowing your agent to determine what is best for you in making end-of-life decisions, you need not fill out this part of the form. **If you do fill out this part of the form, you may strike through any wording you do not want.**

(6) END-OF-LIFE DECISIONS: I direct that my health care providers and others involved in my care to provide, withhold, or withdraw treatment in accordance with the choice I have marked below: (Check any one of the two following boxes. You may cross out any unwanted provisions.)

____ Choice Not To Prolong Life
I do not want my life to be prolonged if

- (i) I have an incurable and irreversible condition that will result in my death within a relatively short time, or
- (ii) I become unconscious and, to a reasonable degree of medical certainty, I will not regain consciousness, or
- (iii) The likely risks and burdens of treatment would outweigh the expected benefits, **OR**

_____ Choice To Prolong Life

I want my life to be prolonged as long as possible within the limits of generally accepted health care standards, **OR**

_____ Choice To Be Made By Health Care Agent

I want my agent who is designated in Part 1 of this document or in a separate document to make end-of-life decisions for me.

(7) **ARTIFICIAL NUTRITION AND HYDRATION:** Artificial nutrition and hydration must be provided, withheld or withdrawn in accordance with the choice I have made in paragraph (6) unless I mark the following box:

_____ If I mark this box, artificial nutrition and hydration must be provided regardless of my condition and regardless of the choice I have made in paragraph (6)

(8) **RELIEF FROM PAIN:** If I mark the following box,

_____ I direct that treatment to alleviate pain or discomfort should be provided to me even if it hastens my death.

(9) **OTHER WISHES:** (If you do not agree with any of the optional choices above and wish to write your own, or if you wish to add to the instructions you have given above, you may do so here:)

PART 3
DONATION OF ORGANS/BODY AT DEATH (OPTIONAL)

(10) Upon my death: (Mark applicable box(es):

_____ (a) I give any needed organs, tissues, or parts, OR

_____ (b) I give the following organs, tissues, or parts only

_____ (c) My gift is for the following purposes:
(Strike through any of the following you do not want)

- Transplant
- Therapy
- Research
- Education

_____ (d) I give my body to the University of Hawai'i John A. Burns School of Medicine for its research and education purposes. (Obtain information/forms from the Medical School's Department of Anatomy.)

PART 4
PRIMARY PHYSICIAN/HEALTH CARE/HOSPICE FACILITY
(OPTIONAL)

(11) I designate the following physician as my primary physician:

(Name of physician)

(Address)

(City) (State) (Zip code)

(Phone)

OPTIONAL: If the physician I have designated above is not willing, able, or reasonably available to act as my primary physician, I designate the following physician as my primary physician:

(Name of physician)

(Address)

(City) (State) (Zip code)

(Phone)

(12) I have the following preference of hospitals and/or nursing homes/ hospice facilities if I require such care:

(You may name a facility, or you may indicate a preference for hospice care administered at home or in a hospice facility, a preference not to be institutionalized, a preference to remain at home, etc.)

PART 5
RELIGIOUS OR SPIRITUAL INFORMATION (OPTIONAL)

(13) I identify with the following church, temple, or other spiritual group:

(14) I would like to receive my spiritual care from:

(Name of individual or group)

(Address)

(City) (State) (Zip code)

(Phone)

PART 6
ADDITIONAL INSTRUCTIONS OR INFORMATION (OPTIONAL)
WHAT IS IMPORTANT TO ME

(15) You may include information about yourself, what is important to you, your ethical, spiritual and religious instructions, requests for prayer and forgiveness, what makes your life worth living, and the things you value, etc. You may also include additional information about when you would not want your life prolonged by medical treatment (examples: if not able to communicate, if not able to enjoy eating), where you want to spend your last days, etc.:

____ If I mark this box, I have attached additional instructions or information. (Sign and date each added page and attach to this form.)

(16) EFFECT OF COPY: A copy of this form has the same effect as the original.

SIGNATURE: Sign and date the form here:

(*Sign Your Name*)

(*Date*)

(*Print Your Name*)

WITNESSES: The power of attorney portion of this document will not be valid for making health care decisions unless it is either (a) signed by two qualified adult witnesses who are personally known to you and who are present when you sign or acknowledge your signature; or (b) acknowledged before a notary public in the state.

ALTERNATIVE NO. 1 (WITNESSES)

FIRST WITNESS

I declare under penalty of false swearing pursuant to section 710-1062, Hawai'i Revised Statutes, that the principal is personally known to me, that the principal signed or acknowledged this power of attorney in my presence, that the principal appears to be of sound mind and under no duress, fraud, or undue influence, that I am not the person appointed as agent by this document, and that I am not a health care provider, nor an employee of a health care provider or facility. I am not related to the principal by blood, marriage, or adoption, and to the best of my knowledge, I am not entitled to any part of the estate of the principal upon the death of the principal under a will now existing or by operation of law.

(Signature of Witness)

(Date)

(Printed Name of Witness)

(Address of Witness)

SECOND WITNESS

I declare under penalty of false swearing pursuant to section 710-1062, Hawai'i Revised Statutes, that the principal is personally known to me, that the principal signed or acknowledged this power of attorney in my presence, that the principal appears to be of sound mind and under no duress, fraud, or undue influence, that I am not the person appointed as agent by this document, and that I am not a health care provider, nor an employee of a health care provider or facility.

(Signature of Witness)

(Date)

(Printed Name of Witness)

(Address of Witness)

ALTERNATIVE NO. 2 (NOTARY PUBLIC)

State of Hawai'i _____)
) SS
County of _____)

On this _____ day of _____, in the year _____, before me, _____
(Insert name of notary public) appeared _____,
personally known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to this instrument, and acknowledged that he or she executed it.

Notary Seal

(Signature of Notary Public)

My Commission Expires: _____

Document Date _____ # Pages: _____
Name: _____, _____ Circuit
Doc. Description: _____ _____
Signature _____ Date _____
<i>Notary Certification</i>

**4. SAMPLE WRITTEN INSTRUMENT
TO CONTROL DISPOSITION OF REMAINS**

State of Hawai'i _____)
) SS
County of _____)

I, _____ do hereby designate
_____ as the sole person who
will have the right to determine and decide the disposition of my remains
upon my death and the arrangements for funeral goods and services. I
_____ have/ _____ have not attached specific directions concerning
the disposition of my remains. If I have attached specific directions, the
designee shall substantially comply with the specific directions, provided
the directions are lawful and there are sufficient resources in my estate to
carry out the directions.

SIGNATURE: Sign and date the form here:

(Sign Your Name) (Date)

(Print Your Name)

DECLARATION OF NOTARY:

Subscribed and sworn before me, _____
(insert name of notary public), on this _____ day of _____, in
the year _____.

Notary Seal

(Signature of Notary Public)

My Commission Expires: _____

(Notary certification appears on back of page)

Document Date _____ # Pages: _____

Name: _____, _____ Circuit

Doc. Description: _____

Signature _____ Date _____

Notary Certification

5. SAMPLE STATE OF HAWAI'I STATUTORY FORM POWER OF ATTORNEY

UNDER HAWAI'I'S UNIFORM POWER OF ATTORNEY ACT

IMPORTANT INFORMATION

This power of attorney authorizes another person (your agent) to make decisions concerning your property for you (the principal). Your agent will be able to make decisions and act with respect to your property (including your money) whether or not you are able to act for yourself. The meaning of authority over subjects listed on this form is explained in the Uniform Power of Attorney Act in the Hawai'i Revised Statutes.

This power of attorney does not authorize the agent to make health care decisions for you.

You should select someone you trust to serve as your agent. Unless you specify otherwise, generally the agent's authority will continue until you die or revoke the power of attorney or the agent resigns or is unable to act for you.

Your agent is entitled to reasonable compensation unless you state otherwise in the Special Instructions.

This form provides for designation of one agent. If you wish to name more than one agent you may name a co-agent in the Special Instructions. Co-agents are not required to act together unless you include that requirement in the Special Instructions.

If your agent is unable or unwilling to act for you, your power of attorney will end unless you have named a successor agent. You may also name a second successor agent.

This power of attorney becomes effective immediately unless you state otherwise in the Special Instructions.

If you have questions about the power of attorney or the authority you are granting to your agent, you should seek legal advice before signing this form.

DESIGNATION OF AGENT

I _____ name the following
(Name of Principal)

person as my agent:

_____ (Name of Agent) _____ (Agent's Telephone Number)

_____ (Agent's Address)

DESIGNATION OF SUCCESSOR AGENT(S) (OPTIONAL)

If my agent is unable or unwilling to act for me, I name as my successor agent:

_____ (Name of Successor Agent)

_____ (Successor Agent's Telephone Number)

_____ (Successor Agent's Address)

If my successor agent is unable or unwilling to act for me, I name as my second successor agent:

_____ (Name of Second Successor Agent)

(Second Successor Agent's Telephone Number)

(Second Successor Agent's Address)

GRANT OF GENERAL AUTHORITY

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 the 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 under section 17 of the Uniform Power of Attorney Act in the 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

LIMITATION ON AGENT'S AUTHORITY

An agent that is not my ancestor, spouse, or descendant MAY NOT use my property to benefit the agent or a person to whom the agent owes an obligation of support unless I have included that authority in the Special Instructions.

SPECIAL INSTRUCTIONS (OPTIONAL)

You may give special instructions on the following lines:

EFFECTIVE DATE

This power of attorney is effective immediately unless I have stated otherwise in the Special Instructions.

NOMINATION OF [CONSERVATOR OR GUARDIAN] (OPTIONAL)

If it becomes necessary for a court to appoint a conservator of my estate or guardian of my person, I nominate the following person(s) for appointment:

(Name of Nominee for conservator or guardian of my estate)

(Nominee's Address)

(Nominee's Telephone Number)

(Name of Nominee for guardian of my person)

(Nominee's Address)

(Nominee's Telephone Number)

RELIANCE ON THIS POWER OF ATTORNEY

Any person, including my agent, may rely upon the validity of this power of attorney or a copy of it unless that person knows it has terminated or is invalid.

SIGNATURE AND ACKNOWLEDGMENT

(Your Signature)

(Date)

(Your Name Printed)

(Your Address)

(Your Telephone Number)

State of Hawai'i _____)

) SS

County of _____)

This document was acknowledged before me on _____,
(Date)

by _____
(Name of Principal)

Notary Seal

(Signature of Notary Public)

My Commission Expires: _____

Document Date _____ # Pages: _____

Name: _____, _____ Circuit

Doc. Description: _____

Signature _____ Date _____

Notary Certification

This document prepared by:

IMPORTANT INFORMATION FOR AGENT

AGENT'S DUTIES:

When you accept the authority granted under this power of attorney, a special legal relationship is created between you and the principal. This relationship imposes upon you legal duties that continue until you resign or the power of attorney is terminated or revoked. You must:

- (1) Do what you know the principal reasonably expects you to do with the principal's property or, if you do not know the principal's expectations, act in the principal's best interest;
- (2) Act in good faith;
- (3) Do nothing beyond the authority granted in this power of attorney; and
- (4) Disclose your identity as an agent whenever you act for the principal by writing or printing the name of the principal and

signing your own name as "agent" in the following manner:
(Principal's Name) by (Your Signature) as Agent

Unless the Special Instructions in this power of attorney state otherwise, you must also:

- (1) Act loyally for the principal's benefit;
- (2) Avoid conflicts that would impair your ability to act in the principal's best interest;
- (3) Act with care, competence, and diligence;
- (4) Keep a record of all receipts, disbursements, and transactions made on behalf of the principal;
- (5) Cooperate with any person that has authority to make health care decisions for the principal to do what you know the principal reasonably expects or, if you do not know the principal's expectations, to act in the principal's best interest; and
- (6) Attempt to preserve the principal's estate plan if you know the plan and preserving the plan is consistent with the principal's best interest.

TERMINATION OF AGENT'S AUTHORITY

You must stop acting on behalf of the principal if you learn of any event that terminates this power of attorney or your authority under this power of attorney. Events that terminate a power of attorney or your authority to act under a power of attorney include:

- (1) Death of the principal;
- (2) The principal's revocation of the power of attorney or your authority;
- (3) The occurrence of a termination event stated in the power of attorney;
- (4) The purpose of the power of attorney is fully accomplished; or
- (5) If you are married to the principal, a legal action is filed with a court to end your marriage, or for your legal separation, unless the Special Instructions in this power of attorney state that such an action will not terminate your authority.

LIABILITY OF AGENT

The meaning of the authority granted to you is defined in the Uniform Power of Attorney Act in the Hawai'i Revised Statutes. If you violate the Uniform Power of Attorney Act in the Hawai'i Revised Statutes or act outside the authority granted, you may be liable for any damages caused by your violation.

If there is anything about this document or your duties that you do not understand, you should seek legal advice.

AGENT'S CERTIFICATION. The following optional form may be used by an agent to certify facts concerning a power of attorney.

AGENT'S CERTIFICATION AS TO THE VALIDITY OF POWER OF ATTORNEY AND AGENT'S AUTHORITY

State of Hawai'i _____)
) SS
County of _____)

I, _____ (Name of Agent),
[certify] under penalty of perjury that _____
(Name of Principal) granted me authority as an agent or successor agent
in a power of attorney dated _____.

I further [certify] that to my knowledge:

- (1) The Principal is alive and has not revoked the Power of Attorney or my authority to act under the Power of Attorney and the Power of Attorney and my authority to act under the Power of Attorney have not terminated;
- (2) If the Power of Attorney was drafted to become effective upon the happening of an event or contingency, the event or contingency has occurred;
- (3) If I was named as a successor agent, the prior agent is no longer able or willing to serve; and

(4) _____

(Insert other relevant statements)

SIGNATURE AND ACKNOWLEDGMENT

(Agent's Signature) (Date)

(Agent's Name Printed)

(Agent's Address)

(Agent's Telephone Number)

This document was acknowledged before me on _____,
(Date)

by _____
(Name of Principal)

Notary Seal

(Signature of Notary Public)

My Commission Expires: _____

Document Date _____ # Pages: _____

Name: _____, _____ Circuit

Doc. Description: _____

Signature _____ Date _____

Notary Certification

This document prepared by:

6. SAMPLE DECLARATION OF AUTHORITY TO ACT AS A SURROGATE FOR A PATIENT

DECLARATION OF AUTHORITY TO ACT AS SURROGATE FOR A PATIENT

I, _____ (Name of Surrogate), under penalty of false swearing, provide the following statement of facts and circumstances establishing my authority to act as surrogate for _____ (Name of Patient) who has been determined by the primary physician _____ (Name of Primary Physician) to lack capacity to make health care decisions and no agent or guardian has been appointed or the agent or guardian is not reasonably available.

(MARK APPLICABLE BOX)

A. Patient-Designated Surrogate

____ I have been provided information that the above named patient personally informed the supervising health care provider that I have been designated by the patient to make health-care decisions for the patient. This information was provided to me by the following means:

(e.g., orally by _____ (name of supervising health care--primary physician/designee, health care provider or designee);
by letter dated _____ (copy attached); as recorded in patient's health care record, etc.)

OR

B. Appointed ("Non-Designated") Surrogate

____ I have been selected by consensus of interested persons of the above named patient to act as the patient's surrogate.

1. I am an interested person based on my relationship to the patient as:
(Mark or Circle One)

- (____) Spouse (not legally separated or estranged)
- (____) Reciprocal beneficiary
- (____) Adult Child
- (____) Parent
- (____) Adult Sibling
- (____) Adult Grandchild
- (____) Other Adult who has exhibited special care and concern for the patient and who is familiar with the patient's wishes.

2. The following persons took part in my selection: (names and relationship to patient)

3. The following individuals are interested persons but did not participate in my selection (names and relationship to patient and reasons for not participating)

4. Additional facts and circumstances to establish claimed authority (if any)
Attach additional sheets of paper and relevant documents as necessary.

I accept appointment as surrogate of the patient.

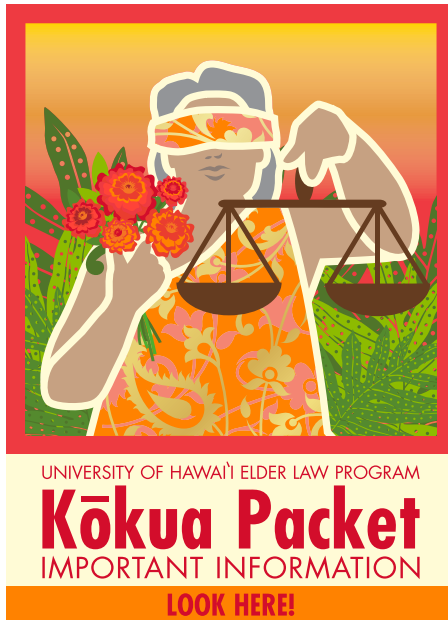
(Signature of Surrogate)

(Date)

(Printed Name of Surrogate)

KŌKUA PACKET

IMPORTANT INFORMATION



HOW TO USE THE KŌKUA PACKET

The *Kōkua Packet* is an organizer that can be used for planning or emergencies. It is not a legal document but is intended to provide important information and to mark where you may have put your legal documents and other important information. The *Kōkua Packet* can also be used as a guide to help you to put into place legal, financial and health care documents to prepare for the future.

What you place in the packet is up to you. **Be especially careful about including credit cards, bank accounts, and PIN numbers or log-in and password information which could be used to steal from you.**

Also, if you are worried about "Identity Theft" and you are uncomfortable in revealing your Social Security number and other personal information, you can leave such information out and indicate who has the information or where such information can be found.

You can store your ***Kōkua Packet*** in a plastic bag. You can place it in a file cabinet, on a shelf or even in your freezer! UHELP has a magnetic label for the ***Kōkua Packet*** to help identify where you keep your ***Kōkua Packet***.

If you use any online planning tools and or online storage of documents, let a trusted person know how to access the information which may include information about your user name and password.

Use the ***Kōkua Packet*** as a guide to start planning today. Remember to "Prepare for the Worst and Expect the Best" and that it is "Never Too Soon and Often Too Late."

IF YOU HAVE AN EMERGENCY:

CALL 911

**SPEAK CLEARLY AND
BE PREPARED TO GIVE YOUR LOCATION**

YOUR NAME:

YOUR ADDRESS:

YOUR TELEPHONE NUMBER:

DO NOT INCLUDE MATTERS IN THIS PACKET WHICH YOU WISH TO KEEP CONFIDENTIAL. THE CONTENTS MAY BE DISCOVERED AND USED BY DISHONEST PEOPLE.

**OTHER PEOPLE TO CONTACT IN AN
EMERGENCY**

Name: _____

Relationship: _____

Address: _____

Phone/Cell: _____

E-mail: _____

Name: _____

Relationship: _____

Address: _____

Phone/Cell: _____

E-mail: _____

Health Care Provider or Caregiver: _____

Relationship: _____

Address: _____

Phone/Cell: _____

E-mail: _____

DO NOT CONTACT

Name: _____

Relationship: _____

Name: _____

Relationship: _____

Date _____

PERSONAL INFORMATION

Full Name: _____
First Middle Last

Address Line 1: _____
Street Apt. No.

Address Line 2: _____
City State Zip Code

Birth Date: _____ Place of Birth: _____

Maiden or Other Names, Alias/Nickname:

Name of Current Spouse, Reciprocal Beneficiary or Partner to a Civil Union:

Name(s) of Your Former Spouse(s), Reciprocal Beneficiary(ies) or Former Partner(s) to a Civil Union:

Dates of Marriage(s), Partnership(s) and/or Divorce(s), and Dissolution(s) of Relationship(s):

Are you a citizen of the U.S.? Yes No

 If No, are you a legal alien? Yes No

 A citizen of which country? _____

Were you ever in the military? Yes No

 If Yes, service component and dates of service:

 Location of military discharge papers:

Religious Affiliation: _____

 Name of place of worship: _____

 Address: _____

Clubs, hobbies and interests:

PERSONAL RECORDS

Birth Certificate: _____
Where Issued *Its Location*

Marriage Certificate: _____
Where Issued *Its Location*

Divorce Decree or Dissolution Document:

Where Issued *Its Location*

Passport Number: _____
Country Where Issued *Its Location*

Hawai'i State ID or Driver's License:

Number *Its Location*

Are there other important documents that you wish to list?

Type of document: _____

Location: _____

Type of document: _____

Location: _____

Type of document: _____

Location: _____

Type of document: _____

Location: _____

CHILDREN

(Indicate relationship of child, e.g., if the child is a natural child, child from a former marriage, adopted child, step-child, deceased child, or "hānai" child.)

#1. Name: _____

Relationship: _____

Address: _____

Phone/Cell: _____

E-mail: _____

#2. Name: _____

Relationship: _____

Address: _____

Phone/Cell: _____

E-mail: _____

#3. Name: _____

Relationship: _____

Address: _____

Phone/Cell: _____

E-mail: _____

#4. Name: _____

Relationship: _____

Address: _____

Phone/Cell: _____

E-mail: _____

#5. Name: _____

Relationship: _____

Address: _____

Phone/Cell: _____

E-mail: _____

#6. Name: _____

Relationship: _____

Address: _____

Phone/Cell: _____

E-mail: _____

FRIENDS, RELATIVES, AND OTHER CONTACTS

Name: _____

Relationship: _____

Address: _____

Phone/Cell: _____

E-mail: _____

Name: _____

Relationship: _____

Address: _____

Phone/Cell: _____

E-mail: _____

Name: _____

Relationship: _____

Address: _____

Phone/Cell: _____

E-mail: _____

Name: _____

Relationship: _____

Address: _____

Phone/Cell: _____

E-mail: _____

Name: _____

Relationship: _____

Address: _____

Phone/Cell: _____

E-mail: _____

ADVISORS

(Accountant, Attorney, Financial Advisor, Social Worker, Spiritual Advisor
or Veterans Service Officer, etc.)

Name: _____

Relationship: _____

Address: _____

Phone/Cell: _____

E-mail: _____

Name: _____

Relationship: _____

Address: _____

Phone/Cell: _____

E-mail: _____

Name: _____

Relationship: _____

Address: _____

Phone/Cell: _____

E-mail: _____

Name: _____

Relationship: _____

Address: _____

Phone/Cell: _____

E-mail: _____

Name: _____

Relationship: _____

Address: _____

Phone/Cell: _____

E-mail: _____

PETS

Pets living in household, their names and species, e.g., Polly, my parakeet.

_____	_____
_____	_____
_____	_____

Caretaker to be contacted: _____

Address: _____

Phone/Cell: _____

E-mail: _____

Special instructions for pets: _____

Special diets, medications, etc: _____

Veterinarian contact number: _____

PLANTS AND OTHER NEAR AND DEAR THINGS

Plant and care instructions: _____

Plant and care instructions: _____

Care of Other Near and Dear Things: _____

HEALTH CARE INFORMATION AND MEDICAL RECORDS

Primary Physician: _____

Address: _____

Phone/Cell: _____

E-mail: _____

Other Physician or Health Care Professional:

Address: _____

Phone/Cell: _____

E-mail: _____

Other Physician or Health Care Professional:

Address: _____

Phone/Cell: _____

E-mail: _____

Dentist: _____

Address: _____

Phone/Cell: _____

E-mail: _____

Case Worker/Social Worker: _____

Address: _____

Phone/Cell: _____

E-mail: _____

HISTORY OF ILLNESSES: _____

MEDICAL INSURANCE:

Health Insurance Provider: _____

Medicare Number: _____

Location of Card

Medicaid Number: _____

Long-Term Care Insurance: Company Name:

Policy Number

Supplemental Insurance: Company Name:

Policy Number

PRESCRIPTION DRUGS: What Medications Do You Take?

Name of Drug

Purpose

Where do you get your prescriptions filled?

Are you allergic to certain medications or have other allergies?
If so, what are they?

Do you use special equipment, such as eyeglasses, contact lenses, hearing aids, pacemaker, walker? If so, what are they?

COVID-19 VACCINATION:

Type of Vaccination (e.g., Pfizer-BioNTech, Johnson & Johnson-Janssen, Moderna, etc.): _____

Date of First Dose: _____

Date of Second Dose: _____

Date of Booster Dose: _____

FINANCIAL INFORMATION

Do you have a "trusted advocate or trusted advisor"? (see pages 24-25)

Checking Account:

Financial Institution

Account Number

Who is (are) on the account

Savings Account:

Financial Institution

Account Number

Who is (are) on the account

Safe Deposit Box:

Financial Institution

Account Number

Who is (are) on the account

Location of key

Certificate of Deposit:

Financial Institution

CD Number

Owner(s)/Beneficiary(ies)

IRA/401K:

Financial Institution

Account Number

Who is (are) on the account

Annuities: _____

Financial Institution

Owner(s)/Beneficiary(ies)

Real Estate Owned:

Owner(s)

Address

Owner(s)

Address

Mortgage/Reverse Mortgage: _____

Name of Company

If Employed: _____

Employer

Phone or Email

Address

Credit/Debit Cards:

Name of Company

Name of Company

Name of Company

Name of Company

Loans Outstanding:

Name of Company

Name of Company

Refundable Deposits:

Name of Company

Name of Company

Contracts or Warranties:

Name of Company

Name of Company

ON-LINE ACCOUNTS (CAUTION! DO NOT PUT IN PASSWORD IF YOU HAVE ANY RESERVATIONS.)

Web Address: _____

Username

Password (change regularly)

Web Address: _____

Username

Password (change regularly)

Web Address: _____

Username

Password (change regularly)

Web Address: _____

Username

Password (change regularly)

Web Address: _____

Username

Password (change regularly)

Web Address: _____

Username

Password (change regularly)

Web Address: _____

Username

Password (change regularly)

HOUSEHOLD MANAGEMENT NOTES

Tax Returns - Location: _____

Credit Card Payments: _____

Mortgage Payments - Financial Institution:

Rent Payment - Landlord/ Rental Agency:

Homeowner's Association or Condo Fee: Payee/Agency:

Insurance: Life, Homeowner's/Renter's/Car:

Company

Policy Number

Vehicle(s): Make: _____

Model: _____ Year: _____

Cable Service Provider: _____

Cell Phone Service Provider: _____

Internet Service Provider: _____

Meals on Wheels Contact: _____

Clubs and Other Memberships: _____

Subscriptions: Newspaper, Magazines: _____

Yard and Other Services: _____

END-OF-LIFE PLANNING

PLANNING AHEAD FOR INCAPACITY AND END OF LIFE

DO YOU HAVE THESE LEGAL DOCUMENTS?

Will? Yes No

Location: _____

Trust? Yes No

Location: _____

Name of Trustee/Successor Trustee:

Power of Attorney? Yes No

Location: _____

Agent's Name: _____

DO YOU HAVE THESE HEALTH CARE DOCUMENTS?

Advance Health Care Directive? Yes No

Location: _____

Provider (Physician) Orders for Life Sustaining Treatment (POLST) Form?

Yes No

Location: _____

Do Not Resuscitate Bracelet/Necklace? Yes No

Do you have a Funeral/Memorial Plan? Yes No

Company's Name: _____

Address: _____

Phone/Cell: _____

E-mail: _____

Have you made arrangements or do you have any specific desires concerning donation of your body/organs?

Yes No

Do you have a Written Instrument to Control Disposition of Remains form?

Yes No

If yes, where is it? _____

Burial? Yes No

Cremation? Yes No

Disposition of ashes: _____

Covid-19 vaccination card or document?

Yes No

END

Keep yourself safe, healthy and happy. Pay attention to our theme,
"Prepare for the worst and expect the best." Why not start now?



UNIVERSITY OF HAWAII'I
ELDER LAW PROGRAM
KE KĀNĀWAI MĀMALAHOE



UNIVERSITY of HAWAII at MĀNOA
WILLIAM S. RICHARDSON
SCHOOL OF LAW

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