



by James H. Pietsch

### Introduction

Part 1 of this series of articles included a short description of the cuckoo bird's behavior in nesting and a story told by a caller to the University of Hawai'i Elder Law Program ("UHELP"). The caller reported that his family had a "cuckoo" in its nest. The family included the father, the mother, and three children: two brothers and a sister. See Part 1 of this series of articles. *The Role of Laws and Lawyers in Helping Avoid Disappointment at the End of Life*, 5 *Hawaii Bar Journal*, Vol.23 No. 8 (2019). The stories in both parts of this series of articles are representative of the calls received at UHELP and the characters bear no resemblance to any actual persons.

There appears to be an uptick in reports of older persons who are disappointed at the end of their lives. Within a week after Part 1 of this series was submitted for publication, UHELP received separate distressing calls from a brother, a sister, a health care provider, a visitor to a care facility, and directly from an apparent victim. All five cases involved some sort of financial exploitation or fraud against an individual over the age of 80. Most of the victims, but not all, had

# The Role of Laws and Lawyers in Helping Avoid Disappointment at the *End of Life*

## PART 2

diminished physical and/or mental capacity. In one of those cases, a health care decision by a health care agent would have led to the principal's premature death and the subsequent automatic ownership of valuable property by the agent, who was a relative. Disturbingly, several of the cases involved lawyers engaged by apparent malefactors, including lawyers who held themselves out as practitioners of "elder law." See Part 1 for discussion of several of the applicable rules under HAW. RULES OF PROF. CONDUCT (amended 2013). These cases raise the concern that, "Even if some of these lawyers did not consider the older, incapacitated person as their client, did they not think that they had any responsibility to the incapacitated/older

person?" As one caller who observed the frequent comings and goings of a lawyer who finally got the older person to sign the documents commented, "Why didn't the lawyer ever come back to check on her?" "Didn't the lawyer think that there was a danger that the house and money would be taken?"

A separate question may be, "Why did some of the victims acquiesce so easily?" In addition to the overview of the problem in Part 1 of elder abuse, it may be important to consider some of the science. For example, in *Finke et al., Old Age and the Decline in Financial Literacy*, Management Science, 2016, Vol.63(1), p. 213-230, it is stated:

We find a consistent linear decline in financial literacy scores after age 60. A nearly identical rate of decline among men, stockowners, older, and college educated respondents indicates that cohort effects are not driving the results. Confidence in financial decision-making abilities does not decline with age. A separate analysis using data that include measures of cognitive ability suggests that a natural decline in both fluid and crystallized intelligence in old age contributes to falling financial literacy scores . . . Our study finds that, in aggregate and within all financial decision-making domains, advanced age increases

overconfidence in financial decision-making abilities.

These are challenges not only for doctors and lawyers, families, and caregivers but also for financial institutions. In another article, *Penn Memory Center, Federal Reserve Challenge Financial Leaders to Take Steps to Protect Wealth of Older Adults*, <http://www.whealthcare.org/2017-conference>, cognitive aging is described:

The decline of fluid intelligence, the ability to learn new things, is one characteristic of aging... Both this 'cognitive aging' and neurodegenerative diseases like Alzheimer's disease can lead to problems of 'higher cortical function,' which can make tasks of daily living such as managing money and making sound financial decisions more difficult.

### **The Cuckoo's Nest (continued)**

To continue the Cuckoo's Nest story from Part 1, the father held most of the family's assets, including the highly valuable family home, stocks, and savings accounts. His wife died first, after a short illness. Surprisingly, the father started saying that his wife was the only woman he had ever loved even though he had never shown her any affection in front of their children. After their mother's death, his daughter became more aggressive in going after the father's assets. The caller (a son) said that he tried to help his father, and even suggested that they visit an elder law attorney whom the son thought was competent and ethical. The father just glared at him and said, "When I want your help, I'll ask for it." Despite warning his father about giving the sister a power of attorney for legal and financial matters as well as a health care power of attorney, the sister found a lawyer to draft these documents for the father's execution, designating her as his agent. Subsequently, she had the father change his will, designating her as his personal representative, and had him set up a trust appointing her as the trustee. Shortly thereafter, the sister and her

unemployed husband purchased a condominium and moved out of the old-fashioned family home.

The father was left to fend for himself, but did not want to spend money on a caregiver. The son said that he would stop by to bring food for his father on his way home from work, and his brother and he visited and helped to clean the house. The brothers seldom saw their sister who became more distant from them, but she also visited the father. The father was getting frailer, and after the sister moved away, he was having a hard time coping with his new situation in life. He was unable to maintain the large home and needed more assistance with activities of daily living. However, he always refused outside help. He fell a few times, but luckily did not break any bones. After one fall, he was taken to a hospital for observation and tests. He was then placed in a nursing home after an anonymous complaint of self-neglect was made to Adult Protective Services. The sister was interviewed by Adult Protective Services, but they eventually declined to investigate since the father was now in a safe situation in the nursing home, and the daughter seemed to be accomplishing everything as the father's legal authorized representative.

When the caller and his brother discovered that their father was in a nursing home, the two boys tried to visit as often as possible. They could see that their father was very upset about being taken away from his home. He was especially upset about having to share his room with two others and felt that he could take care of himself back at his own home. Their sister kept deceiving their father by telling him that he was going to be able to go home after a few more tests, but she told others that "he is never going home." The father barely ate anything, saying, "What's the use—I have nothing to live for." Eventually he just stopped eating altogether, and the sister, as his health care agent, had her father admitted into a hospice program.

The sons tried to complain to the nursing home but were told that their sister

"was in charge." They tried mediation, but their sister refused to cooperate. See e.g., Mediation Center of the Pacific *Kūpuna Pono* Project, <https://www.mediatehawaii.org/kupuna-pono>. The doctor said that she could not talk to the brothers without the permission of their father's legally authorized representative, their sister. The brothers even called the lawyer who made the father's power of attorney, will, and trust, but the attorney would not speak with them, citing attorney-client confidentiality.

When the brothers tried to get more information or to ask for intervention, their sister used the power of attorney to bar them from visiting their father at the nursing home. After receiving advice and assistance from the state Long-Term Care Ombudsman<sup>1</sup>, the brothers were finally able to visit their father again.

The caller said that one of the last times he saw his father—it was early in the morning—his father looked up at him, called him by name, and asked how he and his wife and child were doing and engaged in conversation. When the son offered to help him "escape," the father told him he needed to talk to his sister and said, "I guess it's not for me to say." The two brothers did not know what to think about their family, how the sister obtained most of the assets, or what they could have done differently.

### **Update:**

We heard back from the caller, who discovered more interesting things about his family. It turned out that cuckoo's nest was a fitting metaphor as his sister is actually a half-sister who has a different father. The caller now believes that she probably knew this fact before the father died and perhaps this led to some of the disruption. The caller now has this additional unanswered question, "Was his father trying to protect their mother or their sister or the boys?" Although the two brothers had never harbored any animosity toward their sister, they are still upset. However, given their recent discovery, they are now more inclined to

re-establish contact, re-attempt mediation services, and to seek an amicable solution. They also want an accounting of what happened to their father's property, before and after he died.

### Relevant Statutes

Selected Hawai'i statutes pertaining to financial and health care decision-making will be discussed with an emphasis on those codifying powers of attorney and health care decision-making. Without effective alternatives to make financial and health care decisions, guardianship and conservatorship may need to be pursued on behalf of incapacitated adults. Hawai'i's Uniform Guardianship and Protective Proceedings Act ("UGPPA") is codified as Article V of the Uniform Probate Code under Hawai'i Revised Statutes Chapter 560.

Under HAW. REV. STAT. § 560:5-311 (a) (2008) the Court may appoint a guardian for a respondent only if it finds by clear and convincing evidence the respondent's identified needs cannot be met by less restrictive means, including use of appropriate and reasonably available technological assistance.

While not directly addressed, as in the guardianship provisions cited above, under HAW. REV. STAT. § 560:5-406 (e) (2) (2009), if a kokua kanawai is appointed, the kokua kanawai's report must include recommendations regarding the appropriateness of a conservatorship, including "whether less restrictive means of intervention are available." *See* HAW. REV. STAT. § 560:5-102 (2004). "Kokua kanawai" means an individual appointed by a court who has the role and authority

granted under rule 113 of the Hawaii probate rules. Haw. Probate Rule 113 commentary indicates that "[t]he term 'Kokua Kanawai' (Helper in the Law) was retained in lieu of the term 'visitor' which is used in the Uniform Act." *See* Uniform Guardianship and Protective Proceedings Act 1997/1998.

There was no guardianship (of the person) or conservatorship (of the estate) in the "Cuckoo's Nest" since, in general, courts appoint a guardian or a conservator only if it finds that a person is incapacitated and that the person's needs cannot be met by less restrictive means, such as powers of attorney, trusts, and joint accounts, which the sister had arranged to get accomplished. In the past, trusts were primarily used as estate planning tools, but are now seen as both an effective tool for estate planning as well as for planning for incapacity and avoiding conservatorship. For simplicity, a trust will be defined as an arrangement a person (sometimes called the "settlor" or "trustor") makes to give control of his or her property to a trustee (who could also be the settlor), who holds it for the benefit of the settlor and/or other beneficiaries. Testamentary trusts are established in wills and are, thus, not useful as alternatives to conservatorship since the testamentary trust only becomes effective upon death. Trusts established during the settlor's lifetime are called "living trusts"

and can be established by an individual for the specific purpose of managing assets in the event of incapacity. Living trusts can be either revocable or irrevocable.

An individual who is planning for incapacity can use a trust as an effective alternative to conservatorship and, if that person should become incompetent or incapable of handling his or her own affairs, the trust can be drafted to go into effect when needed and to utilize assets placed in the trust for the benefit of the person, thus avoiding the need to appoint a conservator. As with powers of attorney, there are increasing reports of financial exploitation involving trusts and, unfortunately, the same can be said of guardianships and conservatorships.<sup>2</sup> An evolving concept among the states looking at more protection for settlors and beneficiaries is the role of "Trust Protectors," although Hawai'i has not yet adopted the Uniform Trust Code, which contains such provisions.<sup>3</sup> The penal code or the adult protective services statute may provide some remedies if the abuse is detected.<sup>4</sup>

### Powers of Attorney

A power of attorney is a written instrument through which a person (called the "principal," "grantor" or "donor") designates another person to be his or her agent (or "donee" or "attorney-in-fact")

and grants the agent authority to perform certain acts on the principal's behalf. Some states, including Hawai'i, have enacted the Uniform Power of Attorney Act or Ch. UPOAA. HAW. REV. STAT. 551E (2014). This law applies to powers of attorney created before, on, or after April 17, 2014. HAW. REV. STAT. § 551E-63. (2014).

Powers of attorney come in two basic types: "general" and "special."





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A general power of attorney is a very broad and sweeping grant of authority and is normally intended to grant virtually all of the powers to an agent that the principal possesses. This is the reason a general power of attorney is most often utilized as an alternative to guardianship and conservatorship. A general power of attorney theoretically can handle any personal, legal, or financial situation that may arise. In contrast, a special power of attorney grants authority to an individual to act in specific matters. Since it is limited in scope, the use of a special power of attorney reduces some of the risks involved in giving another person power, but it is not always helpful as an effective alternative to guardianship or conservatorship.

Powers of attorney can be drafted to take effect immediately or on a future date or upon a future contingency. In Hawai'i, the statutory default is that a power of attorney is durable unless specifically stated otherwise in the document. HAW. REV. STAT. § 551E-6 (2014).

These documents can be tailored in accordance with the known intentions and desires of the principal who can empower an agent of choice and who can put into place safeguards, accountability standards, and limitation of powers as the principal may deem appropriate. Unlike a guardian or conservator, whom a court appoints and who is usually given plenary powers, the agent is selected by the principal prior to incapacitation and, presumably, is someone the principal knows and whom the principal feels can be trusted, but of course, this is not always the case.

Powers of attorney are relatively simple to draft and to execute and do not require any court involvement. Very often powers of attorney are do-it-yourself types of documents that are easily found over the Internet. This easy access directly leads to some of the inherent dangers, namely the abuse of powers of attorney.<sup>5</sup>

Hawai'i's law provides a statutory form that may be used or modified. HAW. REV. STAT. § 551E-51 (2014). The statutory form provides a listing of powers



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that the principal may grant. The principal may initial the specific powers granted. If the principal wishes to grant general authority over all of the subjects, the principal may initial “All Preceding Subjects.” *Id.* The subjects, which the principal may grant, are explained in the statute but not on the statutory form. They are simply 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. *Id.*

The extent of powers is not always obvious. For example, among nine other powers in this subject area, unless the power of attorney otherwise provides, language in a power of attorney granting general authority with respect to real property authorizes the agent to “[p]ledge or mortgage an interest in real property or right incident to real property as security to borrow money or pay, renew, or extend the time of payment of a debt of the principal or a debt guaranteed by the principal.” *Id.*

It is possible to grant powers to an agent that the court may be reluctant to grant to a guardian or to a conservator. For example, the so-called “Hot Powers” in the statute and which are included in the statutory form, if initialed, may grant the following specific authority: to create, amend, revoke, or terminate an inter vivos trust, make a gift, subject to the limitations of the Uniform Power of Attorney Act under HAW. REV. STAT. § 551E-47, 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, and

exercise fiduciary powers that the principal has authority to delegate. *Id.*

While these provisions are intended to alert the principal to the extent of the authority being delegated and inform third parties about the agent’s authority to conduct those transactions,<sup>6</sup> practically speaking, it is not difficult to convince someone to “just initial here if you trust me.” Even 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 and conservators. While the agent would not be required to report to a court, at least there could be some mechanism to assure that the powers are utilized in a fiduciary capacity. In the same vein, as long as the principal is still competent, the principal can revoke or modify the power of attorney at any time.

Agents are considered fiduciaries and statutes often prescribe protections for the principal,<sup>7</sup> but the execution and use of powers of attorney are generally private matters and not normally subject to any oversight. Accordingly, there are distinct dangers in using powers of attorney. *See, e.g.,* HAW. REV. STAT. § 551E-10 (2014) (Agent’s Duties), HAW. REV. STAT. § 551E-51 (2014) (Statutory Form; Important Information for Agent). In the *Liability of Agent* section, it states, in part:

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. The meaning of the authority granted to you is defined in the Uniform Power of Attorney Act in chapter 551E, Hawai‘i Revised Statutes. If you violate the Uniform Power of Attorney Act in chapter 551E, Hawai‘i Revised Statutes or act outside the authority granted, you may

be liable for any damages caused by your violation.

Although it is often difficult to ascertain, the principal should make every effort to be certain that the agent is trustworthy and, of course, the principal should make sure to read and understand the document when signing it. If there are any doubts, the principal should not sign the document until the trustworthiness of the agent is assured or, assuming a lawyer is involved, that the lawyer drafting the document has built in sufficient protections in the document and that the lawyer is working in the best interests of the principal. Nevertheless, the potential for fraud exists in every power of attorney arrangement, through self-dealing, embezzlement, and unlawful gifting.

When an agent acts with the apparent authority granted by the power of attorney, it may be impossible to undo what the agent has done, especially if the principal is no longer capacitated and is unable to provide testimony about the principal’s intentions in granting the authority. Hawai‘i law provides that powers of attorney must be accepted under specific criteria.<sup>8</sup> Accordingly, this often makes powers of attorney an effective “license to steal” in the hands of unscrupulous agents, since most often there is no oversight. Hawai‘i law does provide for judicial relief to construe a power of attorney or review the agent’s conduct and grant appropriate relief. HAW. REV. STAT. § 551E-12 (2014) (Judicial relief) provides, in relevant part, as follows:

(a) The following persons may petition a court to construe a power of attorney or review the agent’s conduct, and grant appropriate relief:

- (1) The principal or the agent;
- (2) A guardian, conservator, or other fiduciary acting for the principal;
- (3) A person authorized to make health care decisions for the principal;
- (4) The principal’s spouse, parent, or

descendant;

(5) An individual who would qualify as a presumptive heir of the principal;

(6) A person named as a beneficiary to receive any property, benefit, or contractual right on the principal's death or as a beneficiary of a trust created by or for the principal that has a financial interest in the principal's estate;

(7) A governmental agency having regulatory authority to protect the welfare of the principal;

(8) The principal's caregiver or another person that demonstrates sufficient interest in the principal's welfare; and

(9) A person asked to accept the power of attorney.

(b) Upon motion by the principal, the court shall dismiss a petition filed under this section, unless the court finds that the principal lacks capacity to revoke the agent's authority or the power of attorney.

Agents may also be held liable for violations of the law. *See* HAW. REV. STAT. § 551E-13 (2014) (Agent's liability). Section 551E-13 provides:

An agent that violates this chapter shall be liable to the principal or the principal's successors in interest for the amount required to:

- (1) Restore the value of the principal's property to what it would have been had the violation not occurred; and
- (2) Reimburse the principal or the principal's successors in interest for the attorney's fees and costs paid on the agent's behalf.<sup>9</sup>

As mentioned in Part 1 of this series, Hawai'i's Adult Protective Services statute<sup>10</sup> has limited authority to remedy elder abuse, although Hawai'i does have dedicated prosecutors, who prosecute cases involving older victims, including victims of financial exploitation, if a criminal complaint has been filed with the police.<sup>11</sup>

On the civil side, Hawai'i may need to examine new models of protection. Florida, for example, enacted a specific elder exploitation statute that gives "vulnerable adults" a civil cause of action

for damages, punitive damages and attorney fees and costs when they have been financially exploited.<sup>12</sup> Florida law also has provisions regarding violations of fiduciary duties to elderly or disabled adults by guardians, trustees, and agents under powers of attorney for:

Misappropriating, misusing, or transferring without authorization money belonging to an elderly person or disabled adult from an account in which the elderly person or disabled adult placed the funds, owned the funds, and was the sole contributor or payee of the funds before the misappropriation, misuse, or unauthorized transfer.<sup>13</sup>

Since 2014, there is a presumption of exploitation independent of capacity issues with respect to older persons in Florida as follows:

Any inter vivos transfer of money or property valued in excess of \$10,000 at the time of the transfer, whether in a single transaction or multiple transactions, by a person age 65 or older to a nonrelative whom the transferor knew for fewer than 2 years before the first transfer and for which the transferor did not receive the reasonably equivalent financial value in goods or services creates a permissive presumption that the transfer was the result of exploitation.<sup>14</sup>

### Practical Protections

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. *See* HAW. REV. STAT. § 551E-51 (2014). This provides a good area to include or reference a "what matters to me" or "what is important to me" type of statement for future use in times when family, fiduciaries, and courts may wonder, "What would they have wanted?"<sup>15</sup> Lawyers will need to establish guidelines and language that would be both helpful and legally sufficient. Lawyers can

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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. See HAW. REV. STAT. § 551E-52 (2014). This can be done in conjunction with or separately from having the agent read the section labeled as Important Information in the statutory form outlined in the previous section. HAW. REV. STAT. § 551E-51 (2014). This 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.

As outlined in Part 1 of this series of articles, frail, incapacitated, isolated, and fearful people can be persuaded to sign documents. Family members, friends, and other concerned people may wish to establish a presumption that any legal document not drawn up by a person's own lawyer is done under duress. They can also establish a code word or phrase which can be used verbally or in writing to authenticate that the document was voluntarily prepared. See, e.g., David Zachary Kaufman, Security for Seniors, "Danger Will Robinson," American Bar Association Voice of Experience Newsletter, May 19, 2019, [https://www.americanbar.org/groups/senior\\_lawyers/publications/voice\\_of\\_experience/2019/may-2019/security-for-seniors/](https://www.americanbar.org/groups/senior_lawyers/publications/voice_of_experience/2019/may-2019/security-for-seniors/). Kaufman writes:

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.<sup>16</sup>

This approach should also be kept in mind as we move into the field of health care decision-making and advance directives.

### Health Care Decision-Making

The process for making health care treatment decisions revolves around the concepts of informed consent and a person's right to accept or refuse unwanted health care treatment.<sup>17</sup> An individual with decision-making capacity has the right to consent to or refuse any suggested treatment, even if refusal may result in death.<sup>18</sup> When an individual is no longer mentally capacitated, a legally authorized representative makes such decisions for the individual, except in an emergency. A guardian is a legally authorized representative for an individual and there are several alternatives to guardianship for health care decision-making. Hawai'i has adopted a modified version of the Uniform Health Care Decisions Act ("UHCDA"), which provides for advance health care directives, among other matters. HAW. REV. STAT. § 327E-3 (1999).

Under the UHCDA, an adult or emancipated minor may make advance health care directives by giving an "individual instruction" orally or in writing and/or by executing a power of attorney for health care, which may authorize the agent to make any health care decision the principal could have made while having capacity. HAW. REV. STAT. § 327E-3 (1999). An individual may revoke the designation of an agent only by a signed writing or by personally informing the supervising health care provider, HAW. REV. STAT. § 327E-4(a) (1999), but an individual 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 an intent to revoke. HAW. REV. STAT. § 327E-4(b) (1999). The law even provides an optional sample form (and explanation), which may be duplicated or modified to suit the needs of the person. HAW. REV. STAT. § 327E-16 (1999). Alternately, one may use a completely different form that contains the substance of the sample form found in the statute. *Id.*

An "individual instruction"<sup>19</sup> permits an individual to provide information to health care providers about health care decisions in the future, including desires with respect to artificially-provided nutrition and hydration (tube feeding), other life-sustaining treatments, pain management, mental health treatment, and virtually any other health care decision that an individual could make if incapacitated.

An individual instruction for health care generally should prevail over conflicting decisions for an incapacitated patient made by a legally authorized representative, but this is not always the case. Respect for autonomy is a guiding ethical principle for health care providers and, for patients who have lost decision-making capacity; health care providers are generally obliged to honor patient preferences that they may have stated in advance to the extent permitted by clinical and professional standards, and the law.<sup>20</sup>

Although written advance directives are encouraged and preferred under Hawai'i law, they are not required, and an adult or emancipated minor may give an individual instruction regarding health care orally or in writing. HAW. REV. STAT. § 327E-3 (a) (1999).

Unless related to the patient, the agent may not be an owner, operator, or employee of a health care institution in which the patient is receiving care and, unless the form limits the authority of the agent, the agent may make all health care decisions for the patient. HAW. REV. STAT. § 327E-3 (b) (1999).

Powers of attorney for health care must be properly witnessed or notarized and, for the power of attorney to be valid for making health care decisions, a person must sign it before two "qualified" adult witnesses who are personally known to the patient and who are present when the patient signs and who must also sign the document, or the patient may sign the document before a notary public. HAW. REV. STAT. § 327E-3 (c) (1999).

Under Hawai'i law, a person may choose to have the powers in the health care power of attorney take effect when the person becomes incapable of making

decisions or it can take effect immediately even if the person is still capable. HAW. REV. STAT.

§ 327E-3 (e) (1999). If the powers become effective immediately, the patient still retains the power to make health care decisions and the power to revoke the health care power of attorney while still capable of making decisions.

A patient may revoke an advance directive, including a health care power of attorney; however, the revocation of the designation of an agent may only be accomplished by a signed writing or by personally informing the supervising health care provider. HAW. REV. STAT. § 327E-4 (1999). 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. *Id.*

Who can make health care decisions for an individual no longer capable of making decisions, who has no designated health care agent, and who has no guardian? Historically, health care providers have turned to family members to provide informed consent in these situations; however, Hawai'i has established a unique framework for appointing or selecting surrogates. A patient may designate or disqualify any individual to act as a surrogate by personally informing the supervising health care provider and, 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. HAW. REV. STAT. § 327E-5(a) (2018).

Hawai'i's modified version of the UHCDA does not provide for the more common approach of a hierarchy of decision makers for a decisionally incapacitated patient, but instead provides for decision making by surrogates selected from a group of "interested persons." HAW. REV. STAT. § 327E-5(b) (2018).

Under the Hawai'i statute, "interested persons" include "the patient's spouse, unless legally separated or estranged, a reciprocal beneficiary, any adult child, either parent of the patient, an adult sibling or adult grandchild of the patient, or any

adult who has exhibited special care and concern for the patient and is familiar with the patient's personal values." HAW. REV. STAT. § 327E-2 (1999). 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, but only interested persons involved in the discussions to choose a surrogate may initiate such proceedings for the patient. HAW. REV. STAT. § 327E-5(e) (2018).

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," HAW. REV. STAT. § 327E-5(f) (2018), but Hawai'i's version of the UHCDA places restrictions on decisions by surrogates who have not been designated. Specifically, the statute provides that "artificial nutrition and hydration may be withheld or withdrawn upon a decision by the surrogate only when the primary physician and a second independent physician certify in the patient's medical records that the provision of artificial nutrition or hydration is merely prolonging the act of dying and that the patient is highly unlikely to have any neurological response in the future." HAW. REV. STAT. § 327E-5 (g) (1999).<sup>21</sup>

Do Not Resuscitate ("DNR") codes are medical orders not to provide cardiopulmonary resuscitation ("CPR") attempts to a person who has stopped breathing or whose heart has stopped beating. In-hospital DNRs are placed 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. 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.

The decision to refuse CPR may also be made orally by a mentally competent patient to the treating health care provider or by the patient's legally authorized representative. 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 but there may be dangers.<sup>22</sup> Provider Orders for Life-Sustaining Treatment ("POLST") forms, discussed in the next section can also identify DNR preferences.

## **POLST**

In 2009, the Hawai'i Legislature passed a law providing for a health care protocol called POLST, but this law was modified in 2014 to include advance practice registered nurses and is now called Provider Orders for Life-Sustaining Treatment. HAW. REV. STAT. § 327K -1 (2014). A POLST is a form signed by a patient, or if incapacitated, by the patient's legally authorized representative and the patient's provider, that records the patient's wishes and that directs a health care provider regarding the provision of resuscitative and life-sustaining measures. *Id.* By law, the POLST form is not an advance directive but a physician's or advanced practice registered nurse's order and, accordingly, is immediately actionable. *Id.*

The POLST form turns the patient's information and expressed desires into a provider's order. The individual or his or her health care agent or surrogate is encouraged to discuss health care treatment decisions with the primary care provider and document these decisions on a brightly colored POLST form, which is then signed by both the individual and his or her health care agent or surrogate and the provider. In Hawai'i, the form normally utilized is lime green in color, so it can be found easily when needed and



because it copies clearly on white paper.<sup>23</sup> There is no requirement in the statute to use colored paper and a plain white copy, completed correctly, and signed by a provider is equally legal and valid.<sup>24</sup> The form is recognized by the Hawai'i Emergency Medical Services System<sup>25</sup> and provides immediately actionable directions pertaining to life-sustaining treatment and follows the patient between settings of care, including acute care hospitals, nursing facilities and community settings.<sup>26</sup>

Unfortunately, there are built-in dangers in the POLST law. Under the law, the following may execute a form: (1) the patient; (2) the patient's provider; and (3) the legally authorized representative, but only if the patient: (A) lacks capacity; or (B) has designated that the legally authorized representative is authorized to execute the form. HAW. REV. STAT. § 327K - 2(a).(2014).

The patient's provider may medically evaluate the patient and, based upon the evaluation, may recommend new orders consistent with the most current information available about the individual's health status and goals of care. *Id.* There are some protections, although it seems that it may be difficult to ascertain what the patient might prefer without a clear "what matters to me" statement. First, the patient's provider shall consult with the patient or the patient's legally authorized representative before issuing any new orders on a form. *Id.* Second, if a patient is incapacitated, the patient's legally authorized representative shall consult with the patient's provider before requesting the patient's provider to modify treatment orders on the form. *Id.*

Dangers are compounded if the patient's preferences are not clearly articulated with respect to proposed changes or the revocation of a POLST form. At any time, a patient, or, if the patient is incapacitated, the patient's legally authorized representative, may request alternative treatment that differs from the treatment indicated on the form. *Id.* Finally, a patient having capacity (or, if the patient is incapacitated, the patient's legally authorized representative) may revoke a form at any time and in any manner that

communicates intent to revoke. HAW. REV. STAT. § 327K-2(d) (2014).

POLST forms were meant to support, not supplant, the advance directive but some lawyers express concern that POLST form orders are now replacing the advance directive.<sup>27</sup> Part of the reason for the misunderstanding concerning how POLST form orders complement the advance directive is that lawyers (and their clients) often lack familiarity with what actually happens in the clinical setting throughout the trajectory of a client's illness.<sup>28</sup>

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 (which includes a "what matters to me" statement) gives an individual the best opportunity to have health care treatment wishes followed but, with each, there are still dangers if the legally authorized representative does not act in the best interests of the patient. Since there is limited oversight of decisions made by legally authorized representatives of incapacitated patients, unscrupulous decision-makers may use their powers as a "license to kill" for their own benefit, to put it dramatically.

The example in the beginning of this article involved a health care decision by a health care agent, which almost led to a premature death of the victim and the subsequent automatic ownership of valuable property by a relative. It was a close call. Two siblings had never gotten along very well. Years ago, one of the siblings, now diagnosed with dementia and now a widow and undergoing life-prolonging treatment, had been encouraged to designate the other sibling as an alternate health care agent in case her husband was unable to do so since "she was family." The patient's husband was the primary agent. Not long after the husband's death, the healthy sibling refused to authorize continued treatment of the sister's chronic condition. Luckily, a compassionate treating physician asked a geriatrician to make an independent

assessment. The geriatrician found that the patient had sufficient residual capacity to request continuing care. This reflects the importance of reviewing issues found in Part 1 regarding the question "capacity for what?" The patient was hospitalized briefly after having deteriorated from lack of treatment but is now happily engaged in her "new normal" life. Legal and practical courses of action are being pursued to assure documentation of the patient's oral individual instruction, the proper oversight of her health care and the management of her assets.

This example helps reiterate the importance of incorporating a "what matters to me" type of statement. These statements can be included as oral or written individual instructions as previously described and can be inserted into an advance directive. Kokua Mau has such a mechanism in its forms available at <https://kokuamau.org/advance-directives>. UHELP also has such a section in its forms available at [www.hawaii.edu/uhelp](http://www.hawaii.edu/uhelp).

It probably would not be excessive to include a "Danger Will Robinson" mechanism mentioned in the practical protections section of this article.

### **Our Care, Our Choice Act**

Finally, it is important to address the question of medical aid-in-dying. Many people fear extreme pain and suffering at the end of life. The Our Care, Our Choice Act H.B. 2739, 29th Leg. (Haw. 2018) and codified as HAW. REV. STAT. CH. 327L (2018), allows a mentally competent adult resident of Hawai'i who has a terminal illness to voluntarily request and receive a prescription medication that would allow that person to die in a "peaceful, humane, and dignified manner," went into effect on January 1, 2019. In passing the bill, the legislature found:

Hawai'i patients who are terminally ill and mentally capable currently have access to options which can, in most cases, alleviate their suffering during the dying process. Palliative care, hospice care, VSED (voluntarily stopping eating and drinking), or stopping artificial ventilation or other life-sustaining therapy to allow a comfortable natural death are options

currently available to terminally ill persons in Hawai'i. However, physicians and other health care providers often do not offer these options to their patients. These options do not always result in a quick or peaceful death.<sup>29</sup>

The purpose of the Our Care, Our Choice Act is thus to "allow qualified patients in this State with a medically confirmed terminal illness with less than six months to live and possessing decisional capacity to determine their own medical care at the end of their lives." *Id.*

On July 1, 2019, the Hawai'i Department of Health issued its first Our Care, Our Choice annual report, which covered the period from January 1, 2019 through May 31, 2019 as follows:<sup>30</sup>

For the first reporting period there were a total of eight (8) qualified patients who received aid-in-dying prescriptions. Of those eight, three (3) patients expired: two (2) patients ingested the aid-in-dying medication and one (1) patient died from lung cancer without ingesting the prescription.

The eligibility process from the first oral request to the date of receipt of the written prescription was approximately 37 days with the shortest period being 22 days.

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.<sup>31</sup>

Much progress has been made in Hawai'i as in the other nine states that have aid-in-dying laws<sup>32</sup> but, according to the state director of Compassion and Choices, "Hawai'i has the most stringent of all the authorized states. The waiting

period is five days longer than most of the other states."<sup>33</sup>

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. Previously in Hawai'i, the suggested model law on assisted death proposed by the Governor's Blue Ribbon Panel on Living and Dying With Dignity<sup>34</sup> would have allowed a physician to prescribe or supply to a patient medical substances or devices for the purpose of enabling the patient to end his or her own life or to administer a medication which ends the patient's life,<sup>35</sup> but no such legislation was ever passed. Also, under the current statute, there are no provisions for permitting a patient to request aid-in-dying in advance, for example, through an advance directive.

A frequent caller to UHELP, for example, is particularly concerned that, although he has cancer, a neurological disorder, and progressing dementia, he will most likely not be able to take advantage of the new law because his attending physician has not diagnosed him as terminal and he will be denied access to the provisions of the law. He is afraid that by the time he is diagnosed as terminal, he may not be deemed to have sufficient capacity to provide the multiple requests required under the statute or that he will not be able to take the medication himself, and he will suffer. With his permission, UHELP is assisting him with contacting the appropriate health care and community resources.

### Conclusion

This series of articles related stories about disappointments at the end of life that UHELP has heard. It has provided basic information about some of the ethical standards and statutes relevant to the stories and, it has suggested a few practical approaches to protecting individuals from harm. Stories about disappointment toward the end of life and the roles attorneys play continue to make headlines.<sup>36</sup> Hopefully, this series of articles will provide an opportunity to

reflect upon these matters and the role of lawyers in helping to avoid disappointment at the end of life. To continue the discussion raised by these articles, UHELP will be hosting seminars on these topics and will be developing additional information for lawyers, healthcare providers, caregivers, families, and consumers in its new publication, *Deciding What Matters and What to Do*, and on its website: [www.hawaii.edu/uhelp](http://www.hawaii.edu/uhelp).

<sup>1</sup> See <https://health.hawaii.gov/eoa/home/long-term-care-ombudsman-program>.

The Long-Term Care Ombudsman ("LTCO") program was established by federal and state statutes. The LTCO identifies, investigates, and resolves complaints that are made by, or on behalf of residents and related to action, inaction, or decisions that may adversely affect the health, safety, welfare, and rights of residents of long-term care facilities such as nursing homes, adult residential care homes, assisted living facilities, and other long-term care settings.

<sup>2</sup> See The U.S. Gov't Accountability Office Report, *Guardianships: Cases of Financial Exploitation, Neglect, and Abuse of Seniors* (2010). <http://www.gao.gov/assets/320/310745.html>.

<sup>3</sup> See, e.g., Andrew T. Huber, *Trust Protectors: The Role Continues to Evolve*, American Bar Association Real Property, Trust and Estate Law Section, *Probate and Property Magazine*, January/February 2017 [https://www.americanbar.org/groups/real\\_property\\_trust\\_estate/publications/probate-property-magazine/2017/january\\_february\\_2017/2017\\_aba\\_rpte\\_pp\\_v31\\_1\\_article\\_huber\\_trust\\_protectors/](https://www.americanbar.org/groups/real_property_trust_estate/publications/probate-property-magazine/2017/january_february_2017/2017_aba_rpte_pp_v31_1_article_huber_trust_protectors/).

<sup>4</sup> See HAW. REV. STAT. § 708 et seq. (2012) (Offenses Against the Person) and HAW. REV. STAT. §§ 346-221 to -253 (2012) (Adult Protective Services). "Financial exploitation" means the wrongful taking, withholding, appropriation, or use of a vulnerable adult's money, real property, or personal property, including but not limited to (1) The breach of a fiduciary duty, such as the misuse of a power of attorney or the misuse of guardianship privileges, resulting in the unauthorized appropriation, sale, or transfer of property. . ." HAW. REV. STAT. § 346-22 (2012).

<sup>5</sup> See Linda Whitton, *Durable Powers as an Alternative to Guardianship: Lessons We Have Learned*, 37 STETSON L. REV. 7 (2007).

<sup>6</sup> See, e.g., Susan Keilitz & Paula Hannaford Ago, "Addressing Power of Attorney Abuse: What Courts Can Do to Enhance the Justice System Response," National Center for State Courts, 2013, available at [http://www.eldersandcourts.org/~media/Microsites/Files/cec/POA%20White%20Paper%20Final%2009\\_3\\_2013.ashx](http://www.eldersandcourts.org/~media/Microsites/Files/cec/POA%20White%20Paper%20Final%2009_3_2013.ashx).

<sup>7</sup> See, e.g., Haw. Rev. Stat. § 551E-10 (2014) (Agent's Duties), HAW. REV. STAT. § 551E-51 (2014) (Statu-

tory Form; Important Information for Agent). In the *Liability of Agent* section, it states: “The meaning of the authority granted to you is defined in the Uniform Power of Attorney Act in chapter 551E, Hawaii Revised Statutes. If you violate the Uniform Power of Attorney Act in chapter 551E, Hawaii Revised Statutes or act outside the authority granted, you may be liable for any damages caused by your violation.”

<sup>8</sup> See HAW. REV. STAT. § 551E-16 (2014), which provides: “A person that refuses to accept an acknowledged power of attorney in violation of this section shall be subject to: (1) A court order mandating acceptance of the power of attorney; and (2) Liability for reasonable attorney’s fees and costs incurred in any action or proceeding that confirms the validity of the power of attorney or mandates acceptance of the power of attorney.”

<sup>9</sup> See HAW. REV. STAT. § 551E-13 (2014) (Agent’s liability). An agent that violates this chapter shall be liable to the principal or the principal’s successors in interest for the amount required to:

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

<sup>10</sup> HAW. REV. STAT. Ch. 346 Part X (2009).

<sup>11</sup> See, e.g., City and County of Honolulu, Office of the Prosecutor, Elder Abuse Justice Unit <https://honolulu.prosecutor.org/elder-abuse-justice-unit/>. The Elder Abuse Justice Unit (“EAJU”) prosecutes all felony crimes where the victims are age 60 or older. The unit, established in 2008, vertically prosecutes elder abuse cases, meaning one attorney handles the case from start to finish. This establishes a thorough understanding of the crime and a good rapport with the victim. The attorneys in this unit are on call 24 hours a day, seven days a week to meet with law enforcement and agencies that provide services for persons age 60 or older. The EAJU also works closely with victim advocates to give victims the support they need.

<sup>12</sup> Fla. Stat. ch. 415.1111 (2006).

<sup>13</sup> Fla. Stat. ch. 825.103 (1) (2014).

<sup>14</sup> Fla. Stat. ch. 825.103 (2) (2014).

<sup>15</sup> As mentioned in Part 1, the “what matters to me” types of documents have their roots in the medical profession. See, e.g., Tom Cramer, Veterans Adding Life Story to Medical Records, available at <https://www.va.gov/HEALTH/NewsFeatures/2015/June/Veterans-Adding-Life-Story-to-Medical-Records.asp> regarding the Department of Veterans Affairs, “My Life, My Story” program. Cramer writes:

When you’re meeting your new doctor for the first time, do you want her to know that you were wounded during the Tet Offensive in 1968 while trying to pull a wounded comrade out of harm’s way? And that a month later you accidentally shot that same guy in the leg and crippled him for life?

<sup>16</sup> “Danger Will Robinson” is a reference to words spoken by the robot in the 1960’s TV series, “Lost in Space” served as the character young Will Robinson’s companion and guardian. The phrase became somewhat popular and served as a warning that someone is probably about to make a mistake.

See e.g., <https://www.youtube.com/watch?v=RG0ochx16Dg>.

<sup>17</sup> Issues relating to informed consent, who is empowered to make medical treatment decisions and whether the patient’s rights or preferences trump those of the health care provider or the patient’s family, guardian, surrogate or community continue to vary around the world. The relatively new “Western” approaches to autonomy and self-determination are not universally accepted. See, for example, Robert Levine, *Informed Consent: Some Challenges to the Universal Validity of the Western Model*, *The Journal of Law, Medicine & Ethics*, Vol. 19, 207-213 (1991). These issues may arise even more intensely when regarding decision-making at the end of life. See, e.g., KATHRYN BRAUN, JAMES PIETSCH AND PATRICIA BLANCHETTE (eds.), *CULTURAL ISSUES IN END OF LIFE DECISION-MAKING* (1999).

<sup>18</sup> See, e.g., U.S. CONST. amend XIV; *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261 (1990).

<sup>19</sup> The term “living will,” is sometimes used to refer to what under the UHCDA is called an individual instruction in an advance health care directive. While the use of the former term has been largely abandoned, it may still appear in some jurisdictions and may still be used by some organizations. An example is the US Department of Veterans Affairs VA Form 10-0137, dated May 2018, “VA Advance Directive Durable Power of Attorney For Health Care and Living Will.” See <https://www.va.gov/vaforms/medical/pdf/vha-10-0137-fill.pdf>.

<sup>20</sup> See, e.g., Albert R. Jonsen, Mark Siegler, William J. Winslade, Topic Two: Preferences of Patients, *Clinical Ethics: A Practical Approach to Ethical Decisions in Clinical Medicine*, 8th Edition, McGraw-Hill Education (2015).

<sup>21</sup> This particular provision has been the source of some confusion. There are several unanswered questions. Does “any neurological response” equate to something less than brain death and if so, what? Must tube feeding be applied or continued for every patient who has a “non-designated” surrogate selected to make health care decisions if no definition of “any neurological response” can be agreed on by the medical community? Would seeking guardianship rather than selecting a “non-designated” surrogate be an effective means of circumventing the limitations?

<sup>22</sup> See, e.g., Thiyyagalingam, et. al., “Do Not Resuscitate: What Does It Mean?” *Critical Care Medicine*, Volume 47(1) Supplement 1, January 2019, p 182 and Perman, et.al., Sex Differences in “Do Not Attempt Resuscitation” Orders After Out-of-Hospital Cardiac Arrest and the Relationship to Critical Hospital Interventions, *Clinical Therapeutics*, Volume 41, Issue 6, June 2019, Pages 1029-

1037.

<sup>23</sup> A free copy of the form may be downloaded at Kokua Mau, Hawai’i Hospice and Palliative Care Organization, <http://www.kokuamau.org/professionals/polst>.

<sup>24</sup> See *id.*

<sup>25</sup> Emergency Medical Services, Hawai’i State Dep’t of Health, <http://health.hawaii.gov/ems/home/comfort-care-only-do-not-resuscitate-information/>.

<sup>26</sup> KOKUA MAU, A PROVIDER’S GUIDE TO POLST, [http://www.kokuamau.org/sites/default/files/uploads/A\\_Providers\\_Guide\\_to\\_POLST\\_Hawaii.pdf](http://www.kokuamau.org/sites/default/files/uploads/A_Providers_Guide_to_POLST_Hawaii.pdf)

<sup>27</sup> See, e.g., Fay Blix, POLST®: Co-Piloting, Not Hijacking, the Advance Directive, NAELA News & Journal Online, <https://www.naela.org/NewsJournalOnline/OnlineJournalArticles/OnlineJune2019/POLSTBlix-Tolle.aspx> June 2019.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> Hawai’i Department of Health (DOH) 2019 Our Care Our Choice Annual Report, July 1, 2019, available at <https://health.hawaii.gov/opppd/files/2019/06/2019-Annual-OCOCA-Report-062819.pdf>.

<sup>31</sup> *Id.*

<sup>32</sup> Compassion and Choices lists Arizona, California, Colorado, Hawaii, Maine, Montana, Oregon, New Jersey, Washington, Vermont, <https://www.compassionandchoices.org/in-your-state/hawaii/>.

<sup>33</sup> 8 isle patients obtain aid-in-dying prescriptions, B-1, B-4, Honolulu Star-Advertiser, July 2, 2019

<sup>34</sup> FINAL REPORT OF THE GOVERNOR’S BLUE RIBBON PANEL ON LIVING AND DYING WITH DIGNITY, Honolulu, Hawai’i, May 1998.

<sup>35</sup> *Id.*, Appendix F.

<sup>36</sup> The two stories concerning Florence Puana and Princess Abigail Kawanakoa mentioned in Part 1 are still not resolved and still make headlines. See, e.g., *Katherine and Louis Kealoha Admit Guilt*, A-1, HONOLULU STAR-ADVERTISER, October 23, 2019, *Financial Affairs of Abigail Kawanakoa May Be Overseen by Conservator*, B-1, HONOLULU STAR-ADVERTISER, October 26, 2019, and *Judge Grants New Trial for Puanas in Civil Case*, A-1, HONOLULU STAR-ADVERTISER, November 6, 2019.

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