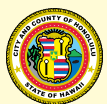




Deciding What's Next?

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



Published by the City & County of Honolulu Elderly Affairs Division, the Hawai'i County Office on Aging, the Kaua'i County Agency on Elderly Affairs, and the Maui County Office on Aging, with funding from the U.S. Administration on Aging.

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Spring 2011

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PREFACE

DECIDING "WHAT'S NEXT?" — A Legal Handbook for Hawai'i's Older Persons, Families, and Caregivers will guide you in a simplified way through several areas of legal concerns affecting older persons as well as their families and those who care for them. This is a sequel to our handbook, *Deciding Who Cares?* and provides updates on laws and data current to spring 2011. It also addresses the various challenges caregivers face in helping elders in the home and in the community. Often the work that caregivers do is underappreciated, invisible and uncompensated. This book highlights their need for support, information, resources and solutions to better be prepared to meet those challenges and be comfortable in their role as caregivers.

Portions of this handbook, and in particular the materials pertaining to health care decision making, were adapted with permission from *The Elder Law Hawai'i Handbook*, (Pietsch & Lee, 1998) published and copyrighted by the University of Hawai'i Press. Also, some materials in this handbook were adapted from federal and state publications.

Caution: While this handbook 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. We, and all the staff and members of the University of Hawai'i Elder Law Program (UHELP), are grateful to the Elderly Affairs Division, Department of Community Service, City and County of Honolulu for the opportunity to provide legal services to older persons for close to two decades at the William S. Richardson School of Law. We also extend our *Aloha* to the State of Hawai'i Executive Office on Aging, the Hawai'i County Office on Aging, the Kaua'i County Agency on Elderly Affairs, the Maui County Office on Aging, and especially to the Elderly Affairs Division of the City and County of Honolulu and to Jane Pang, UHELP board member. They make possible the publication of this handbook for all care receivers and caregivers in our community.

We hope that this handbook will give you information and ideas that will help you access the legal, health, or financial care you may need and help you to meet the challenges of "*Deciding What's Next?*" As you put into action the necessary plans for "What's Next," we wish you a long, prosperous and rewarding life.

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CHAPTER 1 PLANNING FOR A LIFETIME

..... Planning For A Lifetime

Deciding What's Next? almost instinctively follows our previous handbook, *Deciding Who Cares?* It updates the previous handbook and examines several trends emerging in health law, legal services for older persons and caregiving. These trends were anticipated two decades ago when the University of Hawai'i Elder Law Program was first established. These trends have evolved and are now part of our lives. The number of older persons in Hawai'i has nearly doubled, the "boomers" have arrived, "clouds," "webs" and "blogs" bring far away caregivers closer to home. Now a new president, a new governor, new law that creates a new relationship status plus a new health care reform act are impacting our norms and lives. So, as we track these trends, we ask ourselves, "What's Next"?

Deciding What's Next? is designed around a "planning for a lifetime" approach that takes into consideration personal, legal, financial, social, and health care needs. It starts with planning for incapacity, guardianship, alternatives to guardianship, and protective services. It then proceeds to medical treatment and health care decisions. Important information about advance directives for health care, surrogate decision making, and donations of organs and bodies are included to round out an individual's lifetime plans. At the heart of health care issues are those that involve financing health care, including long-term care and caregiving at home. When these issues involve Medicare, Medicaid and/or veterans benefits, they can sometimes be complex. Here they are discussed in a simplified manner and are aimed at first time caregivers. Basic estate planning is also discussed in layman's terms.

A separate section is focused on special laws that pertain to successorship to Hawaiian Home Lands leaseholds which are different from the inheritance laws in Hawai'i. Also in this section, eligible native Hawaiian elders are reminded that caregiving support and other benefit programs are available to them. Two additional topics are addressed: long term care resources for veterans and some laws that impact caregiving.

A thread that runs throughout our book, is the relationships we have with each other—families, caregivers, care receivers. The newest relationship, that of civil unions, was passed by the legislature in 2011 to be effective in 2012. It establishes civil unions as a separate status and offers protections of state law to all residents of Hawai‘i, including same-sex couples, who are ineligible under that law to be married. It provides the same state benefits to these partners, regardless of sexual orientation as it does to spouses in a marriage. The new civil unions law gives couples more rights, benefits and privileges than they have as reciprocal beneficiaries.

Even prior to the civil unions legislation, since 1997, Hawai‘i has offered reciprocal beneficiary registration for adults who are prohibited by state law from marrying, including both same-sex and different-sex couples. Couples wishing to enroll as reciprocal beneficiaries must register with the state Health Department. Reciprocal beneficiaries have access to a limited number of rights and benefits on the state level, including inheritance rights, workers compensation, the right to sue for wrongful death, health insurance and pension benefits for state employees, hospital visitation, and health care decision making, and the option to jointly own property as “tenants by the entirety.”

Be aware that both laws do not offer federal protection or rights such as social security survivor’s benefits and may not be recognized by other states or the federal government. It is still too early to tell what legal challenges, if any, the civil unions law will face and how far-reaching it will be following enactment. Be mindful that both laws will impact various aspects of your “planning for a lifetime” and perhaps your relationships.

Deciding Who Cares?

Frailty, illness, mental incapacity, fear, language barriers, and poverty are just a few of the reasons why some elders are unable to manage their own affairs and may need the assistance of a caregiver. They need someone to take care of them and many have no one to help. To make matters worse, some of our senior citizens are being abused, neglected, or exploited by strangers, acquaintances, and even families. (Often, prior planning and having good information can help prevent problems and be better prepared.) Knowing how to locate a service, or how to apply for a benefit or knowing what resources are available for whatever the topic, is a first step for helping caregivers and their care receivers be better prepared to decide what’s next.

..... Incapacity And Memory Loss

Mental incapacity or serious memory loss can affect activities of daily living, safety, and the ability to live independently, to make personal choices or to execute valid legal document that may affect a person’s life. The law recognizes that an adult, (a person over age 18) has the right to manage his or her own affairs, conduct business, including the right to make health care

decisions. Although an adult is presumed to be “competent,” 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 are infrequent and usually not required. The concept of capacity, or incapacity, is more activity specific than the concept of competency or incompetency. 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, 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.

There is a difference between memory loss and dementia. You can have short-term memory loss but not have dementia, for example, “Where did I put those keys?” Notably, dementia is a term that applies to a medical disorder which may be evidenced by symptoms of damage or disease to the brain’s cognitive function. Dementia may be reversible or irreversible and progressive. A person with dementia may suffer from short-term or long term memory loss, confusion or disorientation or may lose the ability to problem-solve or to complete multi-step activities. Sometimes dementia 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 than 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 a person may often be able to remember events from long ago with great clarity but cannot remember more recent events such as the introduction of people he or she may 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 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 or gerontologist 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 common form and can place a great burden on caregivers. Alzheimer's disease 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 current Alzheimer treatments cannot stop Alzheimer's from progressing, they can temporarily slow the worsening of symptoms and improve quality of life for those with Alzheimer's and their caregivers.

Decisional Capacity

An individual is usually considered to have decisional capacity or to be capacitated when he or she is sufficiently able to receive, understand, and evaluate information and to communicate a particular choice. This means, minimally, that he or she has the ability to understand the nature of the problem or activity he or she 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 he or she is able to express a choice. Note that an issue associated with decisional capacity is different from an issue 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 his or her 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. Likewise, while that person has the capacity to execute a will, he or she may not have the mental capacity to enter into a contract.

..... Guardianship And Conservatorship

When a person is incapable of making or communicating necessary decisions for his or her own safety or to take care of his or her own personal or property interests and effective alternatives have not been set up, it may be appropriate to seek guardianship or conservatorship for that individual. Since the Uniform Guardianship and Protective Proceedings Act (UGPPA) went into effect in Hawai'i in 2005, the terminology used in the law has 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.

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 his or her affairs. 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 either court at the court's discretion. The petitioner, who is the individual who asks the court to be responsible for the care and protection of another person, 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 his or her 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."

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, his or her 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 his or her 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 he or she regains or attains the capacity or ability to take care of his or her person and property again.

Guardianship

A guardian can be appointed by a parent, spouse, reciprocal beneficiary or a civil union partner by means of a will or other signed writing. Upon the death or incapacity of the appointing parent, spouse or reciprocal beneficiary person, if there is no objection by the ward or other interested

person and if the guardian accepts the appointment, the guardianship will become effective. The will or writing can specify any limitations on the power of the guardian and is freely revocable until the court appoints a guardian. A guardian who is appointed by such writing must file an acceptance with the court within 30 days of appointment.

A guardian can also 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 his or her 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 his or her 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 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. A guardian, without authorization of the court, may not revoke any health care directions 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. Making decisions to accept or to refuse life-sustaining medical treatment, especially at the end of life is one of the most difficult decisions a guardian can make for an incapacitated adult.

Conservatorship

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 he or she 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 the individual's 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.

Conservatorships For Estates Less Than \$10,000

When the value of all of the protected person's assets (his or her 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 persons' 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 their resources may be limited and their workload is 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 his or her 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 his or her 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 his or her assets.

After the necessary information and documents have been submitted and approved, the Small Estates and Guardianship Office prepares 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 his or her own financial affairs, or until a successor conservator is appointed.

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, 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.

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. 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, the trust company or attorney must go through the same proceedings as a private individual.

..... 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 take several months. Filing fees and attorneys' fees and costs are incurred with each proceeding. Further, guardianship and 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, durable powers of attorney, living trusts, representative payeeships, joint financial accounts to pay bills are a few of the frequently used alternatives.

Powers Of Attorney

A power of attorney is a powerful tool that can be used in planning for incapacity. As such, it can be an important alternative to guardianship or conservatorship. A power of attorney is a written instrument through which a person (called the “principal”) designates another person to be his or her agent (or “attorney-in-fact”) and grants the agent authority to perform certain acts on the principal’s behalf. Powers of attorney can be drafted to take effect immediately or on a future date, or “spring” into effect upon some subsequent future event such as a particular date or upon the principal’s disability or incapacity. It can be effective for a specific period or can be effective indefinitely, until death, which terminates a power of attorney.

Durable Powers Of Attorney

Mental disability of the principal terminates a power of attorney unless the instrument contains a provision that states that the power will not be terminated by such disability. There are certain words that need to be included in the power of attorney for it to be considered “durable.” Phrases such as “these powers will not be affected by my disability or incapacity” or “these powers will only be effective upon my incapacity or disability” would serve to create a durable power of attorney. The latter phrase would create a springing durable power of attorney which can be useful for individuals who do not want to grant powers effective immediately but who do want someone to have power in the event of incapacity or disability. For example, a power of attorney document can provide that the agent will only be authorized to act for the principal when the principal has been determined by a doctor to be disabled or incapacitated. However, problems may arise if the agent and doctor disagree as to when the disability or incapacity occurs.

Powers of attorney come in two basic types: “general” and “special.” A general power of attorney is a very broad and sweeping grant of authority and should be used with extreme caution. Unless prescribed by law or regulation, this instrument authorizes the agent to do any legal act which the principal might do. In contrast, a special power of attorney grants authority to an individual to act in specific matters. A special power of attorney is often used to allow an agent to handle specific situations when the principal is unavailable or unable to act. For example, the principle may be traveling outside the state or country, or may be unable to handle a specific situation because of other commitments or health reasons. 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 very helpful as an effective alternative to guardianship and conservatorship.

Caution

Powers of attorney can be dangerous in the wrong hands. In Hawai'i, as across the nation, there are increasing reports of financial abuse, exploitation, and theft through the use of powers of attorney. Be especially careful when giving a power of attorney to someone to handle real estate matters. Be certain that the agent is trustworthy and make sure to read and understand the document when signing it. If there are any doubts, do not sign it until the trustworthiness of the agent is assured or that the lawyer drafting the document has built in sufficient protections in the document. 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.

To partially safeguard against abuse, some people include a “self-executing revocation date,” which specifies an expiration date. However, this provision would not be very effective as an alternative to guardianship and conservatorship.

Of course, it is wise to keep track of to whom the power of attorney is given and where the document is located. The principal has the right to revoke, terminate, or modify the power of attorney at any time. Although it can be revoked either orally or in writing, to be safe, the revocation should be in writing and given to the agent and to any person or organization where it may have been used.

There are also certain drawbacks to relying on a power of attorney as an alternative to guardianship or conservatorship. Generally there is no requirement for an individual or organization to accept a power of attorney. Many organizations have their own forms or required formats. For example, the Internal Revenue Service has its own Power of Attorney Form 2848 that allows a person to authorize an agent to represent him or her before the IRS, receive and read confidential tax information and correspondence, sign returns and perform other actions related to tax returns. Be aware that some institutions require a more detailed and formal property description before a power of attorney can be accepted in a real estate transaction. Some institutions may require the agent to have a specifically delegated power rather than just broad general powers to act on behalf of the principal. To be certain whether a power of attorney will be accepted by a particular organization or financial institution, it would be wise to verify this in advance.

With a few exceptions, death automatically terminates the power of attorney. One exception is found under the Uniform Anatomical Gifts Act, effective July 1, 2008 where an agent under a health care power of attorney, may donate a decedent's body or body parts. See Chapter 2 for details.

Note that durable powers of attorney can include health care powers but only if such powers are specifically stated in the document. Information about “Durable Powers of Attorney for Health Care” are discussed in detail in Chapter 2.

..... **Trusts**

A trust is simply an arrangement a person (the “settlor”) makes to give 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. Living trusts are very useful as estate planning tools but should be used with great caution in “Medicaid Planning” as described in Chapter 3.

Trusts can also be used in planning for incapacity. If a person should become incompetent or incapable of handling his or her own affairs, the trust can be a very useful and effective alternative to conservatorship. The trustee (or successor trustee) can be given instructions on how to utilize the property for the benefit of the beneficiary in accordance with the desires of the settlor. If the settlor and the beneficiary are the same person, that person’s autonomy and self-determination can be preserved even during periods of incapacity through the instructions incorporated into the trust.

One of the most important considerations in setting up a living trust is to properly transfer into the trust the property that is to be managed. This can include a home and rental properties, vehicles, bank and savings accounts, stocks and bonds, and virtually anything that is tangible and can be legally owned. Transferring title of the property to the trust is not automatic and often involves the services of an attorney. Once property is transferred into a trust, the trustee can use and manage the property in accordance with instructions in the trust.

Although a trustee may be seen as similar to a conservator in that both are fiduciarily responsible for the property entrusted to them, there are marked differences. A conservator is appointed by court and must follow the rules of the probate code and of the court, such as making yearly reports. In contrast, the individual settlor selects the trustee as well as the successor trustee and decides under what conditions the successor trustee will serve, what the terms of the trust are and who the beneficiaries are. Thus, a trust can be seen as both an effective tool for estate planning as well as for planning for incapacity.

Representative Payees

When a person has memory loss, is incapacitated , or does not understand the process of paying bills or money management, a representative payee can be appointed to handle his or her government benefits. Upon appointment, the representative payee receives checks (or direct

deposit of funds) from the Social Security Administration, the Department of Veterans Affairs, or other agencies and must use the money for the needs of the beneficiary. As each agency has its own procedures for designating or appointing a representative payee, the potential representative payee must apply to the particular agency to be appointed.

Once a representative payee is appointed, he or she 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.

Money Management

One of the most common reasons that an older adult becomes the subject of guardianship and conservatorship proceedings is that the individual has difficulty handling his or her 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 financial counseling.

While many people still pay bills and manage their investments through checks and other paper transactions, computers and the Internet 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 and debit card purchases, and to perform many other functions.

Close family members can provide basic, simple money management services, and much of the work can be done 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 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 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.

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 with little 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 forgetting 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.

Pension Funds Verification Form

Many pension funds require that every retiree 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 reexamine 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 durable 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.

..... Protective Services

The term “protective services” encompasses a wide range of services and actions to help persons who experience difficulty or who are incapable of managing their own personal affairs. These services can include providing health, nutrition, transportation, nursing and chore services, representative payeeships, guardianship, conservatorship and civil commitments as well as governmental intervention through its police powers. Usually, however, the term “protective services” is used to address incidents of elder abuse, neglect and exploitation.

Elder Abuse

Abuse, neglect and exploitation of the elderly is a serious problem that until recently, has not received the same attention or resources as child abuse or domestic violence. Elder abuse has been described as a “hidden epidemic” in our society. Elder abuse can be defined as physical or mental mistreatment or injury or neglect that harms or threatens an elderly person. Elder abuse is often distinguished from ordinary crimes directed against the elderly 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 do provide protection to vulnerable and dependent adults, including the elderly.

Examples Of The Types Of Elder Abuse

The National Center on Elder Abuse identifies seven different types of elder abuse:

1. Physical Abuse—the use of physical force that may result in bodily injury, physical pain, or impairment.
 2. Sexual Abuse—non-consensual sexual contact of any kind with an elderly person.
 3. Emotional Abuse—the infliction of anguish, pain, or distress through verbal or nonverbal acts.
 4. Financial/Material Abuse—the illegal or improper use of an elder’s monies, funds, property (including an elder’s home or other real estate), or assets.
 5. Neglect—the refusal or failure to fulfill any part of a person’s obligations or duties to an elderly person.
 6. Abandonment—the desertion of an elderly person by an individual who has physical custody of the elder or by a person who has assumed responsibility for providing care to the elder.
 7. Self-Neglect—a behavior that threatens the elder’s health or safety.
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Some Of The 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 abuse drugs or alcohol. Some use abuse as a means of control over the older person. Others use abuse as revenge or a “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 victim.

Abuse and neglect of the elderly 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 elderly 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. Some resources are listed in the back of this booklet.

Financial Abuse

Financial abuse can happen to anyone. 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 taking cash from a person, 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 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. Mailbox 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.
 - ◆ Visit the FTC website at <http://www.ftc.gov/> to obtain information identity theft, fraud, scams or unfair business practices. If you are a victim, file your complaint with the Federal Trade Commission (FTC) 1-877- 438-4338.
 - ◆ If you are a victim of identity theft, contact the three major credit bureaus to place a fraud alert or to obtain a copy of your credit report (sometimes fees may be charged):
 - ◆ TransUnion: 1-800-680-7289; www.transunion.com; Fraud Victim Assistance Division, P.O. Box 6790, Fullerton, CA 92834-6790
 - ◆ Equifax: 1-888-7660008; www.equifax.com; P.O. Box 740250, Atlanta, GA 30374-0241
 - ◆ Experian: 1-888-EXPERIAN (397-3742); www.experian.com; P.O. Box 9532, Allen, TX 75013
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Who Cares?

The question, “Who cares?” can be very important to caregivers and care receivers. Caring for older or disabled person (or persons) 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 of what you are doing, 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 are 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 to the caregiver.

Just as care receivers can be victims of abuse, 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 who may be sick or bedridden or suffers from dementia and requires constant watchfulness. 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 health and well being of both care recipient and care giver. 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 take care of yourself first. Some caregiving resources are listed in the back of this book and others are described below.

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 put you in touch with services that include *Kupuna* Care for elders, respite services for caregivers, help in bathing, transportation and shopping, Meals on Wheels, Home Health Services, hospice care for the terminally ill, and legal services for socially or economically needy elders. Phone numbers for the county offices on aging are listed in the “Resources for Caregivers” section at the end of this handbook.

Deciding Who Cares For Native Hawaiian Elders?

Native Hawaiian elders 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 elderly 60 years and older. The Native Hawaiian Caregiver Support Program helps families caring for an older native Hawaiian relative, 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 on O‘ahu is (808) 535-6700.

Long-Term Care Facilities

In assuring that adequate protection is provided to a frail or vulnerable person, sometimes it is necessary to use the services of a long-term care facility that provides 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 accessible through 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 Hawai`i State Department of Health Office of Health Care Assurance provides a list of certified LTC Nursing Facilities and Care Homes in the state including location and available beds. See www.hawaii.gov/health/elder-care/health-assurance. Also, for concerns about a facility, the Long Term Care Ombudsman can be contacted at 808-586-7268.

Caregivers should also be aware that some healthcare 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 high 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. If you cannot pay, you may be forced to sell your home or file for bankruptcy. 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 a lawyer 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 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.

Self-Neglect

Certain people may be forced into or may 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 a person's life because of his or her 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 recourses are to offer social or legal services or to attempt to persuade individuals 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 Abused Elderly

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 the elderly with prosecutors often leading the way. For example, there is now an Elder Abuse Unit in the Department of the Prosecuting Attorney of the City and County of Honolulu. They can be contacted at (808) 768-6452.

Other agencies that have been established by law to investigate and prevent abuse include the following: The State of Hawai'i Office of the Long-Term Care Ombudsman which has the power to investigate incidents of alleged abuse in long-term care facilities such as nursing homes and care homes; the Medicaid Investigations Division of the Department of the Attorney General of the State of Hawai'i which has the power to investigate and prosecute alleged incidents of abuse in health care facilities that receive Medicaid funding; and the Department of the Attorney General which also has the authority under the federal Elder Justice Act to seek damages from institutional caregivers who abuse or neglect their residents who are 62 years of age or older. In addition, other layers of protection for persons 62 and older are found in consumer protection laws that provide enhanced penalties for consumer fraud and that require financial institutions to report suspected financial abuse, impose penalties for securities violations and prescribe penalties against companies, mortgage brokers or solicitors for violations.

The Adult Protective Services Law

Effective July 1, 2009 a new “Adult Protective Services” law for the state of Hawai‘i replaced many provisions of the former Dependent Adult Protective Services law and specifically deleted the word “dependent” from its title. Now the Adult Protective Services Law uses a more inclusive term, “vulnerable,” in defining who would be covered under this law. The new provisions of the law requires 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 dependent adult and may seek the assistance of the police to gain access. If abuse is discovered, DHS must take action to prevent further abuse. It should be noted that DHS can only act with the consent of the victim, unless it obtains court authorization to provide necessary services.

Under the new law a “vulnerable adult” means a person eighteen years of age or older who, because of mental, developmental, or physical impairment, is unable to communicate or make responsible decisions to manage the person’s own care or resources, carry out or arrange for essential activities of daily living or, protect himself or herself from abuse.

“Abuse” means any of the following, separately or in combination:

- ◆ Physical abuse,
- ◆ Psychological abuse,
- ◆ Sexual abuse,
- ◆ Financial exploitation,
- ◆ Caregiver neglect, or
- ◆ Self-neglect.

“Caregiver neglect” is 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; or
- ◆ Protect the vulnerable adult from abuse by third parties.

“Self-neglect” means:

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

- ◆ Obtaining essential food, clothing, shelter, and medical care;
- ◆ Obtaining goods and services reasonably necessary to maintain minimum standards of physical health, mental health, emotional well-being, and general safety;
- ◆ Managing his or her financial assets, 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.

If you suspect abuse, report it to APS. On O’ahu, the APS Hotline is 808-832-5115. See the “Resources for Caregivers” section at the end of this booklet to reach APS on the neighbor islands.

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 his or her legal 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

As the elderly population increases and the social dynamics of our society begin to favor nursing home care over in-home care, nursing home abuse is becoming much more prevalent. 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 his or her 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. He or she may be hesitant or unwilling to speak about these abuses, because of embarrassment or fear of retaliation. If you suspect that he or she has been abused or mistreated in a nursing home, or has suffered any type of abuse, contact the Long Term Care Ombudsman and/or APS. The Department of the Attorney General has a Medicaid Investigations Unit which can investigate abuse in nursing facilities. You may also want to contact an attorney if you are seeking damages.

Other Interventions And Remedies

The Hawai'i Disability Rights Center 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 Courts) 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 to help with your safety and protection. In an emergency, call 911 for help. Should you do so, be 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 become a victim.



CHAPTER 2

PLANNING FOR THE FUTURE: MEDICAL TREATMENT AND HEALTH CARE DECISIONS

As medical science progresses and allows people to live healthier and longer lives, many individuals are now deciding to take charge of their own medical decisions in consultation with physicians, family members, clergy, and close friends.

..... Medical Treatment And Informed Consent

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 State of Hawai`i Board of Medicine establishes standards for health care providers to follow in giving information to a patient or to a patient's guardian, healthcare agent or legal surrogate, if the patient is not competent 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:

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- ◆ 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: a) the proposed treatment; b) the recognized alternative treatments or procedures; and c) not undergoing any treatment or procedure; and the recognized benefits of the recognized alternative treatments or procedures.
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Health Care Decisions

Laws such as the federal Patient Self-Determination Act encourage people 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 he or she wishes to be treated, an individual may want to 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, an individual who needs 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 file, 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 selected as a “designated surrogate” by consensus of “interested persons,” or
- ◆ Has been appointed as a non-designated surrogate acting on behalf of the patient.

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 his or her 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 the state of Hawai‘i. This law uses the term “individual instruction” rather than “living will” which is still in use in several other states.

Although advance directives are generally used in the context of making end-of-life decisions, the laws of the State 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 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. Although written advance directives concerning life sustaining medical treatment are encouraged and preferred under Hawai‘i law, they are not required. An adult or emancipated minor may give an individual instruction regarding health care. The instruction, oral or written, may 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 are planning on spending 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 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 attending physician and ask him or her to “chart” your discussions by placing the information you provide in your medical file. You can provide an individual instruction in writing, for example by writing a letter to your physician. The letter can let your physician 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 at the end of this chapter. 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 out any additional wishes. This form may be modified to suit your needs, or you may use a completely different form.

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. Do not confuse the durable power of attorney for health care, which expressly addresses health care decisions and has different execution requirements, with the durable powers of attorney discussed in Chapter 1, which may or may not include health care decisions. Again, sample long and short forms of advance directives which include health care powers of attorney are provided at the end of this chapter. 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.

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 you need him or her.

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.

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. OR, 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 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 the principal by blood, marriage, or adoption, nor entitled to any portion of the estate of the principal upon the principal's death under any will or codicil the principal 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 forms 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 he or she 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 in your medical file(s). 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), be 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 file.

Revocation/Effectiveness Of Advance Health Care Directive

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 an 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 a decedent's body or body parts under the Hawai'i's Uniform Anatomical Gifts Act, effective July 1, 2008, a health care power of attorney ceases to be effective upon the death of the principal.

..... Surrogate Decision-Making

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. 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 subject to interpretation and some have claimed that it is unconstitutional as written. 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 on the his or her own behalf.

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 the constitutionality of the non-designated surrogate provisions under the UHCDA has been questioned, it is even more crucial for an individual in Hawai'i to consider 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 cardio-pulmonary 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. Out-of-hospital DNRs, often referred to as "Comfort Care Only" (CCO-DNR) or "Rapid Identification Documents," will be discussed later in this chapter.

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 Cardio-pulmonary 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.

Comfort Care Only—DNR Documents and Identification

Advance directives are not generally used to make emergency resuscitation decisions although they may be used as the basis to withhold cardio-pulmonary resuscitation attempts in cases where a person has been determined to be in a condition as stated in his or her advance directive. As previously discussed, traditionally, DNR codes only apply in situations when a patient is in a health care facility. However for several years, Hawai‘i law has permitted terminally ill patients to obtain a special bracelet or necklace which would tell “first responders” not to resuscitate them in an emergency. This is referred to as “Comfort Care Only-Do-Not-Resuscitate,” (CCO-DNR) or “Rapid Identification Documents.” In 2006 the law was changed to remove the terminal illness requirement and to make other changes for the purpose of making it easier to complete a “CCO-DNR” document.

The Department of Health is required under the revised law to adopt rules for emergency medical services. These rules include uniform methods of rapidly identifying an adult person who has certified, or for whom it has been certified, in a written CCO-DNR document that he or she or the person’s guardian, agent, or surrogate, directs 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. These rules further direct that the person is to receive comfort care only (CCO), including oxygen, airway suctioning, splinting of fractures, pain medicine, and other measures required for comfort.

The written document containing the certification needs to be signed by the person or, consistent with the UHCDA, the person’s guardian, agent, or surrogate and by any two other adult persons who personally know him or her. The Department of Health provides forms and instructions to complete the forms as well as information about the law. It is important to note that the person, or the person’s guardian, agent, or surrogate, may verbally revoke the CCO-DNR document at any time, including during the emergency situation.

..... Physician Orders For Life Sustaining Treatment (POLST)

In 2009, the Hawai‘i Legislature passed a new law providing for a health care protocol called Physician Orders for Life-Sustaining Treatment (POLST). 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 physician's order 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 physician's order that is signed by both the physician and the individual or his or her health care agent or surrogate. The individual or his or her health care agent or surrogate is encouraged to discuss health care treatment decisions with the primary care doctor and document these decisions on a brightly colored POLST form, which as mentioned, is then signed by both the individual or his or her health care agent or surrogate and the doctor.

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 a doctor is equally legal and valid. Briefly, 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, although it does not replace the Comfort Care Only/Do Not Resuscitate Bracelet/Necklace;
- ◆ 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 doctor about both types of forms.

..... **Donations Of Organs And Bodies**

The Uniform Anatomical Gift Act was enacted by the Hawai'i Legislature in 2008. It makes it much easier to donate a body or a body part for transplantation, therapy, research or education. It permits any individual eighteen years of age, prior to the death of the donor, to give all or any part of his or her 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 word, "organ donor." During a terminal illness or injury to the donor, he or she 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 new law also has provisions for revoking a donation and for refusing to make such a gift.

A wide number of people in an order of priority established under the new law can make an anatomical gift on behalf of the decedent for purpose 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, guardian, and others who may have the authority to dispose of the decedent's body. The new law provides detailed instructions if there are objections to the donation.

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 or if the body is not located on O'ahu. Contact the Hawai'i Legacy of Life Center for more information about organ donations or the University of Hawai'i John A. Burns School of Medicine about body donations.

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."

..... **Forms**

We have included the following forms:

- ◆ Checklist For Making An Advance Health Care Directive
- ◆ Sample Short Form For Advance Health Care Directive
- ◆ Sample Long Form For Advance Health Care Directive

Note: The POLST Form (Physician Orders for Life Sustaining Treatment) is available at www.kokuamau.com

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 Physician Orders for Life Sustaining Treatment (POLST) and/or Comfort Care Only-Do-Not-Resuscitate document.
- ☐ 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!

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

PART 2: INDIVIDUAL INSTRUCTIONS FOR HEALTH CARE

A. END-OF-LIFE DECISIONS:

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

____ ☐ (a) 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

____ ☐ (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.

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:

____ ☐ 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. OTHER MATTERS: A copy of this form has the same effect as the original.

My agent shall not be obligated to assume any personal financial responsibility when making decisions in accordance with this document. My agent has the authority to request, receive, examine, copy, and consent to the disclosure of medical or any other healthcare information, including medical files and records. This includes my delegated authority for my agent to act as my personal representative for release of all individually identifiable health information concerning me by both covered and non-covered entities under the provisions of the Health Insurance Portability and Accountability Act (HIPAA) and/or other Federal and State laws pertaining to

health care and health care information. My agent shall have the authority to decide whether to execute a Comfort Care Only Document which instructs first responders and other health care providers not to provide Cardio Pulmonary Resuscitation in an emergency or a Physician Orders for Life Sustaining Treatment (POLST) form which instructs first responders and other health care providers not to provide Cardio Pulmonary Resuscitation in an emergency and makes other immediately actionable health care decisions for me.

X _____	_____
(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

(Signature of Witness)	(Date)
(Printed Name of Witness)	(Address of Witness)

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

Notary Seal

My Commission Expires: _____

Name: _____, Circuit _____

Signature _____ Date _____

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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) (Work phone) (E-mail or other means of contact)

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

(Name of individual you choose as agent)

(Address) (City) (State) (Zip code)

(Home phone) (Work phone) (E-mail or other means of contact)

OPTIONAL: If I revoke the authority of my agent and first alternate agent or if neither is willing, able, or reasonably available to make a health care decision for me, I designate as my second alternate agent:

(Name of individual you choose as agent)

(Address) (City) (State) (Zip code)

(Home phone) (Work phone) (E-mail or other means of contact)

(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, approval or disapproval of 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 Physician 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 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 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.)

____ ☐ (a) 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

____ ☐ (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.

(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. Examples of additional instructions include preferences to receive Hospice Care and/or to die at home. Add additional sheets if needed.) I direct that:

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 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 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)

(15) 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 _____

Notary Certification



CHAPTER 3

FINANCING HEALTH CARE, INCLUDING LONG-TERM CARE

Unlike many countries, the United States does not have universal health care for its citizens. Health insurance in the United States is mostly financed by the private sector primarily through employers health care benefits or purchased directly from private companies. Many others use government sponsored programs such as Medicare, Medicaid, Tricare (a military health plan), the Children's Health Insurance Program (CHIP) and programs sponsored by the Veterans Health Administration under the US Department of Veterans Affairs.

In 2010, President Obama signed into law a sweeping bill overhauling the U.S. health care system that will certainly have an effect on all Americans including older persons. However, as of this printing, Congress is still debating a package of changes to reconcile the differences between Senate and House bills. If those changes are worked out, here is how health care reforms will affect you.

The new legislation calls for multiple changes to occur over a staggered time period, extending at least as far out as 2018. Some changes include new Medicare and Medicaid provisions, insurance coverage, taxes, the appeals process, business practices and services:

- ◆ New insurance plans must provide coverage for preventative health services without co-pays.
- ◆ Co-payments and deductibles for preventative care visits will be eliminated and personalized prevention plans provided under Medicare.
- ◆ Medicare beneficiaries who fall into the "Part D prescription drug donut hole" will get a \$250 rebate. They get a 50% discount on brand name drugs in 2011, and the donut hole will be steadily closed and eliminated in 2020.
- ◆ Insurance companies will not be allowed to drop coverage for individuals who become sick, deny coverage to children with pre-existing conditions, or create lifetime coverage limits. People with pre-existing conditions who have been denied coverage will get access to temporary health insurance coverage.
- ◆ Medicaid is expanded to cover more beneficiaries.

Unfortunately, health care remains quite expensive and unaffordable for many. Planning ahead is important. Consumers should know what health care coverage is available and then determine what is affordable. Consumers should be sure to take advantage of the various federal and state initiatives for seniors in the area of health care, including prescription drug coverage. Also, consumers should know that Medicare beneficiaries with limited incomes may now qualify for extra help in paying for prescription drugs.

..... **Medicare**

The Medicare program is a federal health insurance program for people 65 or older and certain disabled people. Medicare is run by the Centers for Medicare and Medicaid Services, formerly the Health Care Financing Administration, of the U.S. Department of Health and Human Services. But the Social Security Administration offices across the country take applications for Medicare and provide general information about the program. Eligibility for Medicare is determined by the Social Security Administration (SSA). The Centers for Medicare and Medicaid Services (CMS), a federal agency within the U.S. Department of Health and Human Services (HHS), is responsible for the overall administration of the program. Medical bills and claims are handled by private insurance companies under contract with HHS and monitored by the government.

Medicare is financed by a portion of the payroll taxes paid by workers and their employers. It also is financed in part by monthly premiums deducted from Social Security checks. Generally, you are eligible for Medicare if you or your spouse worked for at least 10 years in Medicare-covered employment and earn at least 40 Social Security credits and you are 65 years or older and 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 eligible for Medicare coverage are insured workers and their dependents who have permanent Lou Gehrig's Disease or certain other diseases. Currently, 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.

Medicare Coverage

There are two 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. Also, 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.

Medicare coverage is limited. Medicare generally does not pay for long-term care. Medicare also 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.

Medicare Part A

There were two major parts to the original or “traditional” Medicare program that was established in 1965. These two parts, Part A and Part B, continue to this day under the original program and two additional parts, Part C and Part D were added over the years. Hospital Insurance is Part A and 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. Most people do not pay a monthly Part A premium because they or their spouse have 40 or more quarters of Medicare-covered employment. The Part A premium in 2011 is \$254.00 per month for people having 30-39 quarters of Medicare-covered employment. The Part A premium in 2011 is \$461.00 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 administer Part A are known as “fiscal intermediaries.” They are chosen by the Part A providers of services (hospitals, nursing homes, and home health agencies which participate in the Medicare program). Insurance companies, which administer payments to participating Part B providers (physicians and other practitioners), are called “carriers.” In addition to paying claims, fiscal intermediaries and carriers are responsible for setting payment rates and charges and assisting providers in complying with Medicare requirements and standards.

Part A is financed primarily through payroll tax deductions and covers expenses incurred during periods of acute illness that requires inpatient hospital care. Following a hospital stay, Part A also covers the expense of inpatient care in an extended care facility. 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.

After payment of an insurance deductible (\$1,132 in 2011) reasonable hospital costs are covered for 90 days in any single “spell of illness” (also referred to as a “benefit period”). This 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 he or she has more than one “spell of illness.” A patient will also have to pay a co-insurance amount per day (\$283 in 2011) for the 61st through the 90th day of care, and coinsurance charges (\$566 per day in 2011) for “lifetime reserve” days used. After these days are used, the patient or his or her other private insurer is responsible for the entire bill. Currently, each eligible Medicare Part A enrollee is entitled to a total of 60 reserve days to draw upon.

Medicare Part A has very limited coverage for skilled nursing facility (SNF) care. Generally, a physician must order this care. Skilled care is health care given when you need skilled nursing or rehabilitation staff to treat, manage, observe, and evaluate your care. Examples of skilled care include intravenous injections and physical therapy. Care that can be given by non-professional staff isn’t considered skilled care. People don’t usually stay in an SNF until they are completely recovered. There is a requirement for a three-day hospitalization immediately prior to or within 30 days following entry into an SNF. Co-insurance payments are also required (\$141.50 per day in 2011) for days 21 to 100. Coverage is limited to 100 days per spell of illness and custodial care is not covered. Note that most individuals in nursing homes do not require skilled care and are, thus, not eligible for Medicare coverage.

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 service visits but the services must be prescribed by a doctor and must not be performed on a daily basis.

A certified terminally ill patient 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. If the 2010 Health Reform Act finally passes intact, a hospice physician or nurse practitioner must have a face-to-face visit with each hospice patient to determine continued eligibility for hospice care prior to the 180th-day recertification and each subsequent recertification, and attest that such visit took place.

Medicare Part B

Medicare Part B medical insurance 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. It includes coverage for medically necessary physicians' service, outpatient hospital services, outpatient physical therapy and speech pathology services, home health services, diagnostic tests and medical appliances (durable medical equipment). 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. (Note: Remember that Part A can pay for unlimited visits.)

Most beneficiaries will continue to pay the same \$96.40 or \$110.50 premium amount in 2011. Beneficiaries who currently have the Social Security Administration (SSA) withhold their Part B premium and have incomes of \$85,000 or less (or \$170,000 or less for joint filers) will not have an increase in their Part B premium in 2011. If your income is above \$85,000 (single) or \$170,000 (married couple), then your Medicare Part B premium may be higher than \$115.40 per month. For all others, the standard Medicare Part B monthly premium will be \$115.40 in 2011, which is a 4.4% increase over the 2010 premium. There is a \$162.00 deductible, after which you pay 20% of the Medicare-approved amount for services.

Medicare Part C—Medicare Advantage

In addition to the original Medicare Program, there are several other Medicare optional plans to choose from. These options are collectively known as Medicare Advantage (formerly called Medicare+Choice) or Medicare Part C. These options include Medicare Managed Care Plans provided by Health Maintenance Organizations (HMOs), and newer private fee-for-service plans. If an individual decides to join a Medicare Advantage Plan, he or she must be enrolled in Medicare Part A and Part B and accordingly, must pay the monthly Medicare Part B premium ranging from \$96.40 to \$243.10 in 2011, depending on income. In addition, enrollees may have to pay a monthly premium to the Medicare Advantage Plan for the extra benefits that the plan may offer.

The official Medicare website at www.Medicare.gov lists examples of various health plans available in different geographical areas. Enrollment in these plans have limited enrollment periods, may be limited in the number of people who can be enrolled, and may be limited to certain geographic areas. Individuals with End-Stage Renal Disease (ESRD) usually cannot join a Medicare Advantage plan. However, if a person is already in a plan, he or she can stay in the plan or join another plan offered by the same company in the same state. If an individual has had a successful kidney transplant, he or she may also be able to join a plan.

What an enrollee pays for out-of-pocket depends on whether the plan charges a monthly premium in addition to the monthly Part B premium, how much "co-payments" enrollees pay for each visit or service, the type of medical care the individual needs, the types of extra benefits used and whether the plan covers them.

Managed Care Plans (Medicare Health Maintenance Organizations)

While many individuals still participate in the original Medicare fee-for-service program, a growing trend among Medicare beneficiaries is to look into “managed care” plans through health maintenance organizations (HMOs). Managed care plans for Medicare recipients can be seen as a collaboration between insurers and health care delivery systems. Medicare HMOs provide eligible consumers with coverage for Parts A and B, and, except for the HMOs contracted co-payments, enrollees do not have to pay the Medicare deductibles or the Medicare co-payments.

HMOs operate in a variety of structures. When a person joins an HMO, he or she may be asked to choose a primary care physician who determines what treatment is needed. Enrollees will need to receive most or all of their health care from an organized network of health care providers employed or contracted with the HMO. Some of the enrollee’s options may be more limited than in a fee-for-service plan. Choices of doctors and coverage outside of the HMO service area may be limited to urgent care services. If an enrollee chooses to go to a doctor outside the HMO’s network, he or she may have to pay all or most of the cost for that care.

Another type of health plan is the preferred provider organizations (PPOs) which is a network of “preferred” providers from which a consumer can choose. Enrollees do not need to have a primary care physician and usually do not need referrals to see other providers in the network. However, if an enrollee chooses someone outside the network, the cost may be higher.

Private Fee-For-Service Plans

In private fee-for-service plans, a private company provides health care coverage to consumers with Medicare who join this plan. The plan, rather than the Medicare program, decides how much it pays and how much enrollees pay for the services rendered. An enrollee can go to any doctor or hospital that accepts the terms of the plan’s payment. The private company pays a fee for each doctor visit or services received and enrollees also may pay a fee. In a private fee-for-service plan, enrollees may pay more if the plan lets doctors, hospitals, and other providers bill the patient more than the plan pays for services.

Medicare Part D—Prescription Drugs

Significant changes were made by Congress through the Medicare Modernization Act (MMA) enacted in 2003. It created a voluntary outpatient prescription drug benefit, known as Medicare Part D, which began on January 1, 2006. It provided no coverage for prescription drug costs between the time the initial coverage limit was met and before catastrophic costs triggered

additional coverage. In 2010, those enrolled in a Medicare Part D plan paid 25% of the cost of their prescription drugs until the total bill reached \$2,830. At that point, they fell into a gap that is referred to as the “donut hole” and were financially responsible for the entire cost of prescription drugs until the end of the year or until their expense reached the catastrophic coverage threshold of \$6,440. Once they reached that level, catastrophic coverage then kicked in and they paid only 5% of the drug costs for the rest of the year. The 2010 Federal Health Care Reform Bill provisions will start to close the Medicare Part D “donut hole” by providing a \$250 rebate to Medicare beneficiaries who entered the gap (the “donut hole”) in prescription drug coverage in 2010. Beginning in 2011, the bill institutes a 50% discount on prescription drugs in the “donut hole”. The “donut hole” is slated to close in 2020.

For most Medicare beneficiaries, prescription drug plans offered by insurance companies and other private companies will cover both generic and brand-name prescription drugs. There are two types of Medicare prescription drug plans. There are prescription drug plans that add coverage to the Original Medicare Plan and prescription drug plans that are part of Medicare Health Plans (Medicare Advantage and Medicare Cost Plans). 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.

Medicare “Extra Help” and the Hawai`i State Pharmacy Assistance Program

Some Medicare enrollees may qualify to get help in paying for prescription drugs. There are two basic kinds of help. “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. The State Pharmacy Assistance Program (SPAP) is a state-funded program that will pay for Medicare Part D co-payments for certain Hawai`i residents. To be eligible, an individual must meet the following criteria:

- ◆ Be a resident of Hawai`i;
- ◆ Be 65 years or older, or disabled and receiving or is eligible for Medicare;
- ◆ Not a member of a retirement plan who is receiving a benefit from Medicare Part D;
- ◆ Not enrolled in a public assistance program, other than the Hawai`i Rx Plus program, that provides drug benefits other than those provided by Medicare Part D;
- ◆ Not enrolled in a private sector plan or insurance providing payments for prescription drugs;
- ◆ Household income (before deductions, not take home pay) does not exceed 100% of the Federal Poverty Level (FPL);
- ◆ Assets are within the limits set by federal law for applicable family size.

“Dual Eligibles”

Individuals who qualify for both Medicare and Medicaid are “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.

Limited Medicaid coverage is provided to other qualified beneficiaries under the federal Medicare Qualifying Individuals (QI), Qualified Medicare Beneficiary, (QMB) and Specified Low-Income Medicare Beneficiary (SLMB) programs. These are administered by the Hawaiʻi State Department of Human Services (DHS) Medicaid Program and can help pay for Medicare Part A and Part B Insurance deductibles and premiums. (Additional information about Medicaid is contained later on in this section.) QMB pays Medicare Part A premiums, Part B premiums, and Medicare deductibles and coinsurance amounts for Medicare services. SLMB pays for Medicare Part B premiums for individuals who have Medicare Part A, a low monthly income, and limited resources. QI pays all or part of the Medicare Part B premium for people with income higher than allowed for the SLMB Program. These are relatively underutilized programs and can be of significant benefit to many individuals. Information is readily available through Medicare or the State of Hawaiʻi Department of Human Services.

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, and speech therapy, mental health, and home care. Under the new policy, such services can now be covered as long as they are determined to be reasonable and medically necessary. Medicare still does not provide assistance for custodial in-home care or adult day care.

Health Care And 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. 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 healthcare benefits. Those who have a Medicare Advantage plan generally do not need Medigap insurance.

Medigap policies generally supplement the amount of Medicare eligible expenses but no Medicare Supplemental Insurance policy will cover everything which Medicare does not cover. Medigap insurance is regulated by federal and state law.

Beginning June 1, 2010, there were changes to the standardized Medigap policy offerings that impacted all companies offering Medigap policies. The reason for the change in the policies was the recent adoption of the Medicare Part D prescription drug plan which made several former types of Medigap policies unnecessary and which were thus, discontinued. Other policies were modernized and two new plans (Plan M and Plan N) were created. A new hospice care benefit was added to all policies. Details can be found at the Centers for Medicare and Medicaid Services (CMS) website, www.cms.gov and www.medicare.gov/medigap

Individuals considering buying Medigap policies should be aware of these important facts concerning Medicare and Medicare supplemental policies:

- ◆ Medicare does not cover custodial care even if it is provided in what may be called a “skilled nursing facility.” Medicare only covers skilled nursing care, which requires ongoing professional supervision. Most Medigap policies also do not cover custodial care and may be vague on the entire subject of nursing home care.
- ◆ The provider’s medical charges may not be entirely covered under either Medicare or Medigap policies. This can happen when the physician’s actual charge may be greater than what Medicare considers “medically necessary” or “customary and reasonable.”
- ◆ If Medicare pays a percentage of these “allowed” charges and a Medigap policy pays the balance of the “allowed” charges, there still may be an excess amount, which the consumer must pay.
- ◆ If a consumer joins a Medicare Advantage Plan, the Medigap policy is not applicable. This means the Medigap policy will not pay any deductibles, co-payments, or other cost-sharing under a Medicare Advantage Health Plan. Therefore, consumers may want to drop their Medigap policy if they join a Medicare Advantage Plan. However, consumers always have a legal right to keep their Medigap policy.

Appeal Rights

If a consumer is enrolled in the original Medicare plan, he or she may file an appeal if he or she thinks 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, he or she 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. 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 Information

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 (CMS). Consumers should call 1-800 MEDICARE (1-800-633-4227). In Hawai‘i they can call Sage Plus at (808) 586-7299 (toll-free at 1-888-875-9229). Sage Plus is a program of the State of Hawai‘i Executive Office on Aging that provides volunteer counselors to help with Medicare questions.

..... Medicaid

Medicaid is a program designed to help people who have limited income and resources pay for certain health care services. The Medicaid program is administered by the State of Hawai‘i and is financed jointly with state and federal funds. Medicaid rules and regulations vary 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. Hawai‘i’s Medicaid program is run by the State of Hawai‘i Department of Human Services (DHS) Med-QUEST Division operates under federal and state laws and regulations. Medical assistance is provided to eligible residents through several programs.

- ◆ The original Medicaid Fee-for-Service (FFS) program is no longer in existence. It was set up for individuals who were 65 years and older, blind, or disabled. The acronym, “ABD,” was used to describe the eligibility requirements for the aged, blind or disabled. In 2010 the State initiated a new program, QUEST Expanded Access (QExA), which brought the ABD recipients into a managed care program instead of the previous fee-for-service (FFS) program.
- ◆ The Hawai‘i QUEST program is for individuals and family members who are not aged, blind or disabled.
- ◆ The QUEST-Net program provides a limited coverage “safety net” for FFS or QUEST recipients who become ineligible for assistance due to excess assets or for recipients who voluntarily choose a more limited coverage package.

The Med-QUEST Division’s Eligibility Branch processes and screens the applications for completeness and schedules eligibility interviews for the applicant or the appointed representative. The eligibility worker processes the application and make an eligibility determination, usually within 45 days or within 60 days if the certification of disability status is involved. If a determination is not made within the proper time frame because of the department’s delay, “presumptive medical assistance” may be provided until a determination is made.

Qualified Aged, Blind and Disabled (ABD) individuals, as previously mentioned, can receive healthcare benefits through the QExA (QUEST Expanded Access) program, a new Medicaid program for those 65 and older, and people of all ages with disabilities. QExA is a Medicaid managed care program created by the Department of Human Services to provide healthcare services to members through their managed care health plan. When QExA members choose their QExA health plan they use the doctors, hospitals, care facilities and pharmacies that are in the QExA health plan they choose. The QExA managed care program gives members improved access to health care by covering all regular Medicaid services plus some additional services including:

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-
- ◆ A primary care provider (PCP) who is responsible for the member’s care,
 - ◆ Long Term Care (LTC) Services,
 - ◆ Regular check-ups and health assessments to keep members well,
 - ◆ When QExA members need to see a medical specialist, their PCP helps and sends them to another provider in their health plan,
 - ◆ Access to healthcare 24 hours a day, 7 days a week through their health plan, and
 - ◆ A Service Coordinator to work with members to make sure their health needs are met.
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An individual who wishes to qualify for basic Medicaid (including QExA benefits) cannot be receiving more than a certain amount per month in income and cannot have more than a certain amount in assets based on Federal poverty level guidelines. In 2011, to qualify for Medicaid in Hawai'i, a single person cannot receive more than \$12,460 in yearly income nor have more than \$2,000 in assets. These levels may change every year and will vary depending on the number of people in the household. Certain income and/or assets of other individuals may be "deemed" or available to the Medicaid applicant. Coverage for long-term care for married people is an exception to the basic rules and will be discussed later.

When applying for Medicaid, a person's assets such as 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, funeral 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. For example, a home owned in a trust is no longer considered an exempt asset for purposes of Medicaid qualification. Individuals and their advisors (including estate planning attorneys) need to take this into consideration when planning for the future.

Many complicated changes to Medicaid long-term care coverage were enacted into law through the Deficit Reduction Act of 2005 (DRA). Several of these provisions will be discussed in some detail later in this chapter in the section "Paying for Long-Term Care."

As indicated in the Medicare section of this handbook, if the person's income is insufficient to meet the entire cost of medical care, a person may become eligible for supplementary medical assistance. These persons 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 Program (QI). 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 doctor's bills not paid by Medicare.

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 state DHS eligibility offices. Note: Medicaid beneficiaries who are enrolled in Medicare usually do not need to purchase Medigap insurance.

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 that he or she has the right to appeal the decision by filing 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.

Paying For Long-Term Care

It is very important to note that Medicare does not provide for an unlimited number of days in a hospital. Medicare coverage continues only for acute stages of illness or injury and does not cover an extended stay in a nursing home. Medicare does not pay for “custodial care” and, on average, across the nation, pays for only a very small percentage of services provided in “skilled nursing facilities,” which are commonly referred to as nursing homes.

The three most common means of financing long-term care are by direct payment by patients or their families, by long-term care insurance, or by the Medicaid program. Coverage under Medicaid requires that individuals have certain limited incomes and assets, as discussed in the previous section. Although most individuals do not qualify for Medicaid, it would be very wise to look into this program to determine eligibility and alternatives. As usual, pre-planning is most important. There are dramatic exceptions for married people.

Spousal Impoverishment Provisions (Medicaid)

In a survey, the average cost of skilled nursing care in Hawai'i was estimated in 2010 to be \$9421.58 per month for a semi-private room. The average cost for “custodial care” in a nursing facility is recognized by the Department of Human Services as \$8,500 per month. For many married couples, the cost of providing long-term care for just one spouse can cause both spouses

to be impoverished. Congress has created special rules to prevent this “spousal impoverishment” through the Medicare Catastrophic Coverage Act (MCCA).

The MCCA protects 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 “institutional 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 2011 standards, if the couple’s “non-excluded resources” exceed \$109,560, then only the excess of \$109,560 will be attributed to the institutionalized spouse in determining eligibility. In other words, the institutional spouse may retain \$2,000 of his/her own assets and the community spouse will be able to keep up to \$109,560 in assets in addition to such “excluded assets” as the family residence, automobiles, and household and personal effects. This is dramatically different from basic Medicaid eligibility standards of \$2,000 per person or \$3,000 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 institutional spouse may retain. In 2011, the institutional spouse is allowed to keep \$50 of his or her own income each month. The rest of the institutional 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 institutional spouse. Rather, the institutional spouse may be permitted to give some of his or her income to the community spouse. In 2011, in Hawai`i, the community spouse can retain up to \$2,739 of the institutional spouse’s monthly income as a monthly maintenance needs allowance. Thus, if the community spouse has income of less than \$2,739 per month he or she can request an amount of money from the institutionalized spouse that would bring his or her income up to \$2,739. The rest of the institutional spouse’s income would be applied to his or her long-term care expenses. The level of the “spousal allowance” can vary to take into consideration the cost of living factors and any changes in the spousal allowance amount would take place on January 1 of each year.

The Federal Deficit Reduction Act of 2005 (DRA) provides for a denial of benefits for an individual who has more than \$500,000 equity value in a home. However, states have the authority

to increase the limit to an amount not greater than \$750,000, which is the limit in Hawai'i. This restriction does not apply if a spouse, minor or disabled child resides in the home. 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. While the law permits nursing home residents to reduce the equity through reverse mortgages and home equity loans, such loans are generally not available to nursing home residents who no longer live in the property to be mortgaged.

The DRA went into effect in February of 2006 and the State of Hawai'i DHS Med-QUEST Division issued final rules (instructions on how these changes will be implemented) in October of 2009. Updates to changes in the Medicaid Long-Term Care Spousal Impoverishment provisions, can be found on the Med-QUEST website at www.med-quest.us, on the QExA website at www.qexa.org, or on the website for the Center for Medicare and Medicaid Services at www.cms.hhs.gov. Qualified counselors such as elder law attorneys or the Executive Office on Aging's Sage Plus Office at (808) 586-7299 or 1-888-875-9229 can also provide information.

Transfer Of Assets Penalties

The transfer of any assets, other than the couple's home (under certain circumstances), for less than fair market value (i.e., a "gift"), for the purpose of qualifying for benefits can result in a period of disqualification. If such a transfer occurs, Medicaid eligibility will be denied the applicant for as many months as would have been required to spend the uncompensated value of the transferred asset on nursing home care, based on the average cost of nursing home care in the community. In other words, the Medicaid department will calculate a penalty period by dividing the total value of all gifts during the look-back period by \$8,500. The resulting number will be the number of months a person will not receive medical assistance for long-term care through the Medicaid program.

As mentioned several times, Medicaid rules are subject to change and the most dramatic change recently passed by Congress involved transfer of asset penalties. Until 2006, there was a 36-month "look-back period" upon application for Medicaid long-term care coverage and a 60-month look-back period for assets transferred into an "irrevocable trust." If there had been a transfer during the look-back period, a period of disqualification as described above may be applied commencing on the date of transfer of assets. However effective February 2006 the look-back period is now 60 months for all transfers including outright transfers as well as transfers to and from certain trusts.

The new law further provides that the beginning date for the period of ineligibility is the first day of a month during or after which assets have been transferred for less than fair market value, or

the date on which the individual is eligible for medical assistance under the State plan and would otherwise be receiving institutional level care based on an approved application for such care but for the application of the penalty period, whichever is later, and which does not occur during any other period of ineligibility. In other words, the penalty period does not automatically start at the time of transfer of assets but would normally be at the time a person applies for and otherwise qualifies for assistance. If the transferred asset is a home, however, such a transfer will not be penalized if the transfer is to the individual's spouse, dependent or disabled child, a sibling with equity interest who resided in the individual's home for one year before institutionalization, or the individual's son or daughter who lived in the individual's home for two years prior to the individual's institutionalization and had cared for the individual.

Individuals affected by these provisions 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" the bulk of their assets before they can qualify for coverage under Medicaid. In the past, the purchase of certain annuities had become a method of trying to maximize the spousal impoverishment provisions. Following the enactment of the Deficit Reduction Act of 2005, however, long-term care planning involving annuities should be re-considered. For purposes of being eligible for long-term care services under Medicaid, the applicant and his or her spouse must disclose any interest in an annuity (or similar financial instrument that may be specified by the Secretary of Health and Human Services). Further, 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 Med-QUEST or CMS offices, a qualified counselor such as an elder law attorney, or the Sage Plus Office 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.

Currently, a lien will not be placed on the home of an individual in a nursing facility if there is a stated intention to return to the property. 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 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 21, or 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,
- ◆ There is a child who is under 21 years, or a child over 21 years 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,
- ◆ 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 the 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 in at home rather than 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 new 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.

No one knows what the Medicaid rules will be in the future, so individuals should not rely on the information contained in this handbook 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. Giving general rules for so-called “Medicaid planning” is difficult because every client’s case is different. You may know about Medicaid planning but maybe not the particular rule that applies in your case or the newest changes in the law. It behooves you to at least check with Sage Plus or the Med-QUEST Division of the Department of Human Services (QExA) about transfer penalty provisions when trying to qualify for Medicaid.

..... **Long-Term Care Insurance**

An important part of planning for long-term care is deciding how to pay for health care. As discussed previously, Medicare will not pay for long-term care and while some people may qualify for Medicaid, many will not. Note that Hawai`i’s home health costs are among the highest in the nation. The median cost of assisted living in Hawai`i is \$45,000 a year compared to \$38,220 on the mainland. The median cost of a private room in a nursing home in Hawai`i has jumped to \$114,975 compared to \$75,190 on the mainland. 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 or not to purchase long-term care insurance, there are various items consumers should consider. First of all, 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 the consumer if he or she runs into difficulty. Next, the consumer should find out whether the policy has a guaranteed renewable provision, which means that as long as that 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 are paid. Elimination days may be from 20 to 120 days and during that time when help is most needed, intended claimants may die and benefits never received. Many policies have lower premiums when the deductible period is longer. 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.

There is some good news about the deductibility of insurance premiums. Congress passed the Health Insurance Portability and Accountability Act (HIPAA) in 1996, which includes provisions that long term care insurance policies that meet certain standards can receive favorable tax benefits. For an individual who itemizes tax deductions, and whose medical expenses exceed 7.5% of the individual’s Adjusted Gross Income (AGI), the premiums for these tax qualified long term care policies can be considered medical expenses and are deductible. The yearly maximum deductible amount for each individual depends on the insured’s age. In 2011, \$340 is deductible if the insured is 40 years old or under to \$4,240 if the insured is over 70.

..... **Veterans 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. The address and toll-free telephone numbers are in the white pages of the telephone directory under “U.S. Government.” The State of Hawai`i also has an Office of Veterans Affairs, which can help 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.

An important benefit is medical care. In providing medical care, VA medical facilities give highest priority 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, to former POW's and to certain others exposed to nuclear tests. Another important 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 veterans disabled by age or disease who are not in need of acute hospitalization and who do not need the skilled nursing services provided in nursing homes.

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. Since there are many factors that affect eligibility, veterans or their caregivers should call or visit the Veterans Administration office in their area for assistance in applying for benefits. More information can be found at <http://www.va.gov/> or by calling (800) 827-1000 for assistance.

Additional information is available at The State of Hawai'i 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 Federal 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://hawaii.gov/dod/ovs/> or by calling (808) 433-0420.



CHAPTER 4

BASIC ESTATE PLANNING

..... Estate Planning

Estate planning can be considered a continuation of “planning for a lifetime” 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, even pet owners can make provisions for their animals through the use of pet trusts (discussed in a later section).

Estate planning includes the process of determining what you own, deciding how to disburse your property after you die, and implementing a plan such as writing a will or setting up a trust 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 “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. Here are a few areas related to estate planning. 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

On Dec. 17, 2010 President Barack Obama signed the Tax Relief, Unemployment Insurance Reauthorization and Job Creation Act of 2010. As a provision of the law, the top rate on estate taxes will be capped at 35 percent beginning in 2011, and individuals will be able to exempt up to \$5 million with proper planning. Couples can exempt up to \$10 million. Without the new law, the estate tax would have reverted back to levels set in 2001. The new law is effective only for 2011 and 2012. After that, the 2001 rates from the Clinton era of 55 percent with a \$1 million exemption could go back into effect. The new 2010 bill also revives the traditional stepped-up basis for all assets included in the gross estate for decedents dying on or after January 1, 2011 and on or before December 31, 2012. Be sure to consult with an attorney who is familiar with estate planning and tax laws when planning your estate.

..... 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 whom you 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.

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 of 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 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, he or she 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 make it easier upon death to prove that you were of sound mind when you executed the will and that that you were not 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.

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 his or her 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 he or she trusts and 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. You can choose for a pet trust to 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 his or her 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.

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 by anyone else) will need to be administered and distributed according to your estate plan in your will or in accordance with intestate succession laws which will be discussed later in this handbook. 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, he or she 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

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 leave your property to, 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.

Making a will is a well-established and can potentially, be a rather simple way to dispose of your property (real and personal) upon your death.

In your will you can:

- ◆ 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,
- ◆ Detail instructions concerning funeral and burial/cremation,
- ◆ Make provisions for waiver of bond which otherwise might be required of your personal representative,
- ◆ Detail provisions for adopted and illegitimate children,
- ◆ Disinherit people,
- ◆ Make a designation of apportionment of estate taxes, if you have a very large estate.

A will can also provide instructions for collecting and distributing a decedent’s assets. Such administration may be court-supervised. A probated will provides a short statute of limitations within which claims against estate 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. A will can be revoked or changed relatively easily. You can even make your own “do-it-yourself” holographic will in an emergency.

Will Substitutes

Will substitutes are techniques of 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 that bad of an option, especially if a person desires court supervision of his or her estate. For most estates, probate is a much easier process now than previously. Here are some of the more common will substitutes.

Trusts

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 basically two different kinds of trusts. You can set up a “revocable living trust” which takes effect during your life or you can create a “testamentary trust” in your will, which does not take effect until you die. 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 down 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 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 attorney’s fees are based on an hourly rate. As discussed in Chapter 1, living trusts are now also commonly used to prepare for potential future 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 new Medicaid laws relating to coverage for long-term care disqualify individuals if their home is in a trust.

Before deciding whether or not 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.

..... **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 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 \$13,000 (as of 2011) 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 his or her additional \$13,000 gift tax exclusion for gifts you are making to others, increasing the value of your joint non-reported gift to \$26,000. One spouse can give to the other spouse an unlimited amount totally tax free (unless he or she 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.

Some people use gifts as a means of avoiding probate, reducing estate taxes, or Medicaid planning. Occasionally these plans backfire. You should use great caution when you give away real property especially as your home. Once you have given your property away, you may not be able to get it back. There have been too many cases where people, who have given their property to others, including children, later decided they wanted it back or wanted to give it to someone else. It was 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 of the printing of this handbook, however, the “stepped-up basis” provision in the Tax Relief, Unemployment Insurance Reauthorization and

Job Creation Act of 2010 applies only to inherited property of those dying in 2011 and 2012. As you can see, these matters can be complicated and you should consult with an attorney before you make any significant gifts.

..... **Property, Probate And Other Topics**

There are different ways of owning property. When you are the sole owner, you own the property as a “tenant in severalty.” Upon your death, this property must be probated to pass to your heirs. You can own the property as a “tenant in common,” through which you own a particular percentage of the property. Upon your death, your share will go through probate. You can also own property as a “joint tenant with rights of survivorship,” through which 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 a joint owner, with certain restrictions, his or her right or share to the property pass automatically by operation of law to the surviving joint owner(s) without going through probate.

There are drawbacks to joint ownership. One drawback is that, except for a certain type of joint ownership called “tenancy by the entireties,” exclusive to married people, reciprocal beneficiaries and civil union partners, creditors may be able to attach all of or a portion of the jointly held property. Further, joint owners who have equal access to the joint asset may be able to deplete it, even if they had not contributed to it in the first place. Also establishing a joint tenancy can trigger a tax liability. Anything held jointly and available to the decedent may be included and taxable in his or her estate. You never know who will die first.

Tenants by the entirety is a form of joint ownership of property with rights of survivorship between spouses, reciprocal beneficiaries or those in a civil union relationship. They may choose this form of tenancy because it provides protection of the property from creditors.

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 in the

hands of the personal representative 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, the personal representative, the surviving spouse, reciprocal beneficiary or someone acting for a dependent or minor child of the deceased may apply for an accounting for the deceased party's net contribution to the account to the extent necessary to discharge the "insufficiency."

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 might 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.

Disgruntled and unhappy heirs can ask for a supervised probate procedure. Under those circumstances, your personal representative will normally need a lawyer to take your case before the probate court for a hearing before any distribution. The lawyer'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 lawyer.

Probate is normally needed whenever a deceased person owned any interest in property in his or her 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, attorney fees, and personal representative fees and 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 his or her beneficiaries. For those who desire to have the court supervise the collection and distribution of their estate and who are not concerned with the disadvantages previously discussed, probate remains a useful option.

You should remember that property owned by you alone is not automatically passed on 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.

Collection 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 (a written sworn statement). 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. 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.

This affidavit is often used to close a bank or savings account, which is valued at less than \$100,000, or to transfer ownership of a car. 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. The estate has to go through probate. 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 <http://www.hawaii.gov/dhhl/>.

The following information was obtained from the Department of Hawaiian Home Lands “Questions and Answers on Designating Successors” available through the listing, 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. Blank 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. Since successorship to the lease occurs only upon death of the lessee, the lessee might be forced to voluntarily surrender the lease or sell it. Remember, it is best to be prepared. As lessee, discuss the possibility of your incapacitation with the DHHL and your family and have in place a durable power of attorney and a health care directive. A word of caution, make sure your agent is trustworthy and will act on your interest as the power of attorney is a powerful document and actions done on your behalf, generally, cannot be undone.



CHAPTER 5 WHO CARES?

Often older persons are faced with the question, “Who will care for me when I am unable to care for myself?” Caregivers take care of other adults, most often parents, spouses, friends or relatives and help with many things such as: bathing, finances, shopping, preparing meals, toileting, eating and medications. To be prepared for emergencies, your care receiver should have the following legal documents in place:

- ◆ Advance Health Care Directive that names a health care agent,
- ◆ POLST (Physician Orders for Life Sustaining Treatment),
- ◆ General Durable Power of Attorney or other instruments to access financial resources,
- ◆ Will and/or Trust.

And the following important information should be kept handy:

- ◆ Medicare or Medicaid information,
- ◆ Personal ID such as passport, drivers license or state ID,
- ◆ Name and phone number of physician,
- ◆ List of emergency numbers.

..... **Hiring A Caregiver**

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. One major drawback of course, is the cost. 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. Even so-called “non-profit” agencies still need to make money to continue in existence.

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.hahc.org), which is listed in the resource section of this handbook. Note that physician orders are required for home health services that qualify for medicare reimbursement.

Utilizing 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 records;
 - ◆ References for employees are available.
-

Although the cost of hiring a private caregiver may be significantly lower than utilizing 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 bulletin board, 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.
- ◆ Second, you have to enter into an employment agreement. This usually includes a written contract which contains such matters as the job description, scheduling work, 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 insure 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 \$1,700 per year.

..... **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 one source 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 him or her 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 homeowners, 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 he

or she has a valid driver's license and 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, including 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—see resource section) is responsible for the statewide criminal history record information system.

Basically, a criminal history record check is a search of a person's criminal history by name or fingerprints. It is also known as a "police abstract" or "rap sheet." Arrest records which have resulted in convictions (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

A. 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

B. EMPLOYMENT AGREEMENT

- ___ Enforceable legal contract format
- ___ Job description
- ___ Work schedule
- ___ Back-up help schedule
- ___ Time-off schedule
- ___ Wages
- ___ Meals
- ___ Use of automobile/equipment
- ___ 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

C. 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

D. TAXES, LAWS, REGULATIONS, INSURANCE

- ___ U.S. 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)—IRS Form 1040, Schedule H
- ___ 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
- ___ Home owners, automobile, and liability insurance policies
- ___ Employee bond

..... **Coping With Death And Dying**

Survivors 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 take different lengths of time and vary 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 those 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 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. Hospice programs are listed in the resource section of this handbook.

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 go to: www.kokuamau.org

Steps To Take Upon Death

When death occurs, survivors will need to take steps to decide who 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. 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. If the deceased or his or her spouse is a veteran contact the U.S. Department of Veterans Affairs to see if he or she qualifies for benefits.

When The 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 police notifies 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 his or her body. This can be done in a will and expanded upon in a letter to the personal representative. Sometimes the directions contained in a power of attorney can be followed.

Funeral And Memorial Plans

Funeral or memorial plans can be very simple or they can be very elaborate. Of course, preplanning, 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 achieve dignity, simplicity, and economy through preplanning. If you are a veteran, ask the U.S. Department of Veteran 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 one.

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 not needed 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. While, generally speaking, there is little regulation of scattering of ashes in Hawai'i, health ordinances may be different in some 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.

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 if there are restrictions on who can be buried there;
- ◆ Is the cemetery well maintained and if its maintenance is included in the price of a plot;
- ◆ How many individuals may use a single plot and if multiple burials are permitted, 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 you are dealing

with. 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 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 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 U.S. Department of Veterans Affairs (VA) or the Hawai'i State Office of Veteran's Services for information. See resource list.

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 his or her estate.

..... Finding A Lawyer

Throughout this handbook, 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 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 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.

How To Locate A Lawyer

If you do not have a family lawyer, you may find that a colleague, relative or a friend may have one or know of one who has done a good job for him or her. Word of mouth is often a good way to find a lawyer. 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. The University of Hawai'i Elder Law Program (UHELP) also maintains a list of attorneys prepared by the Elder Law Section of the Hawai'i State Bar for referrals. You can also check through the "yellow pages" of the telephone book or respond to commercial advertisements.

Free Legal Services

The Legal Aid Society of Hawai'i and Volunteer Legal Services Hawai'i provide free legal services for eligible clients in certain civil cases. The Public Defender provides free legal services for eligible clients in criminal cases. There are even specialty non-profit law offices such as the University of Hawai'i Elder Law Program for individuals and caregivers on O'ahu and the Senior Law Program on Kaua'i. Finally there are other non-profit organizations, such as the Hawai'i Disability Rights Center and the Domestic Violence Action Center and Legal Hotline, which utilize attorneys to assist clients.

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 he or she 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.

Working With Your Lawyer

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 with him or her 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.

..... Deciding What’s Next?

“Prepare for the worst and expect the best” is a strategy that underlies “*Deciding What’s Next?*” The more you are prepared for your potential needs and the needs of persons you may be caring for, the more likely you will be able to keep yourselves safe, healthy and happy. Make the legal and financial preparations to prepare for the worst. Don’t be afraid or embarrassed to accept help. Take care of yourself and the person or persons you are caring for and expect the best. A list of resources follows to help you in “*Deciding What’s Next?*”

RESOURCES FOR OLDER PERSONS, FAMILY MEMBERS AND CAREGIVERS

AARP

O`ahu State Office	1-866-295-7282
Big Island Information Center	(808) 334-1212
Kaua`i Office	(808) 246-4500
Maui Information Center	(808) 244-2082
O`ahu Information Center	(808) 843-1906
National	1-888-OUR-AARP, or 1-888-687-2277 www.aarp.org

Administration on Aging, US Department of Health and Human Services

Public Inquiries	1-202-619-0724 www.aoa.gov
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Adult Protective Services (APS) and Community Care Services Branch Department of Human Services (DHS)

O`ahu	(808) 832-5115
Kaua`i	(808) 241-3337
Maui/Molokai/Lāna`i	(808) 243-5151
East Hawai`i (Hilo/Hamakua/Puna)	(808) 933-8820
West Kaua`i (Kau/Kona/Kohala/Kamuela)	(808) 327-6280 www.hawaii.gov/dhs

Aloha United Way 211

Statewide community information and referral service: Dial 211 (free call)	www.auw.org/211
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Alu Like	(808) 535-6700
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Alzheimer's Association Aloha Chapter	1-800-272-3900 www.alz.org/hawaii/
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American Hospice Foundation	1-202-223-0204 www.americanhospice.org
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Centers for Medicare and Medicaid Services (CMS)	1-800-633-4221 www.cms.gov
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Credit Reporting Companies:

Equifax	1-877-576-5734 <i>www.alerts.equifax.com</i>
Experian	1-888-397-3742 <i>www.experian.com/fraud</i>
TransUnion	1-800-680-7289 <i>www.transunion.com</i>

Criminal Justice Data Center, State of Hawai`i

(808) 587-3100
www.hawaii.gov/ag/hcjdc/

Department of Commerce and Consumer Affairs, State of Hawai`i, Business Action Center

O`ahu	(808) 586-2545
Kaua`i	(808) 274-3141
Mau	(808) 984-2400
Hawai`i	(808) 974-4000
Lana`i & Moloka`i	1-800-468-4644 <i>www.hawaii.gov/dcca</i>

**Department of Commerce and Consumer Affairs, State of Hawai`i,
Consumer Resource Center (Consumer Protection)**

O`ahu	(808) 587-3222
Mau`i	(808) 984-2400
Hawai`i	(808) 933-0910
Kaua`i,	(808) 274-3141
Lana`i/Moloka`i	1-800-468-4644 <i>www.hawaii.gov/dcca</i>

Department of Human Services (DHS), State of Hawai`i

Financial/Food stamps and Medical Information (including Medicaid/MedQuest)	
Public Assistance information Line	(808) 643-1643
Child Abuse Reporting	(808) 832-5300
Adult Abuse Reporting	(808) 832-5115
Medical Assistance	
Information: 211	
Emergency: 911	
Public Housing Application	(808) 832-5960

General Information:

(808) 586-4997
www.hawaii.gov/dhs/

DHS Med-QUEST Division

O`ahu Applications Unit: (808) 587-3521
East Hawai`i Island (Hilo) (808) 933-0339
West Hawai`i Island (Kona) (808) 327-4970
Kaua`i (808) 241-3575
Maui (808) 327-4970
Moloka`i (808) 553-3295
Lana`i 1-800-894-5755

www.med-quest.us

Department of Hawaiian Home Lands, State of Hawai`i

(808) 620-9500

Department of Labor and Industrial Relations (DLIR), State of Hawai`i

O`ahu (808) 586-8842
Hawai`i (Big Island) (Hilo) (808) 974-6464
Hawai`i (Big Island) (Kona) (808) 322-4808
Kaua`i (808) 274-3351
Maui (808) 984-2072

<http://hawaii.gov/labor/forms>

Domestic Violence Action Center

(808) 531-3771
www.domesticviolenceactioncenter.org

Eldercare Locator (U.S. Administration on Aging)

1-800-677-1116
www.eldercare.gov

Elderly Affairs Division, City and County of Honolulu (Area Agency on Aging)

Information and Assistance Hotline (808) 768-7700
www.elderlyaffairs.com

Executive Office on Aging (including Long-Term-Care Ombudsman and Sage Plus)

O`ahu, General Information (808) 586-0100

Funeral Consumers Alliance of Hawai'i (formerly, the Memorial Society of Hawai'i)
(808) 638-5580

Hawai'i County Office on Aging (Area Agency on Aging)

Hilo (808) 961-8600
Kona (808) 327-3599
www.hcoahawaii.org

Hawai'i Disability Rights Center (Protection and Advocacy System in Hawai'i)

(808) 949-2922
<http://www.hawaiidisabilityrights.org>

Hawai'i Legacy of Life Center (formerly Organ Donor Center of Hawai'i)

585-3416
<http://www.legacyoflifehawaii.org/>

Hawai'i State Bar Association

(808) 537-1868
www.hsba.org

Healthcare Association of Hawai'i

(808) 521-8961
www.hah.org

Hospice

Hospice Hawai'i Honolulu (808) 924-9255
www.hospicehawaii.org
Hospice of Hilo (808) 969-1733
www.hospiceofhilo.org/
Hospice of Kona (808) 334-0334
www.hospiceofkona.org/
North Hawai'i Hospice (808) 885-7547
(Waimea, Big Island) www.northhawaii hospice.org/
Kaua'i Hospice (808) 245-7277
www.kauai hospice.org/
Hospice Mau'i (808) 244-5555
www.hospicemaui.org/
St. Francis Hospice (O'ahu) (808) 595-7566
www.stfrancishawaii.org

Kaua`i County Agency on Elderly Affairs (Area Agency on Aging)

(808) 241-4470

www.kauai.gov

Kaua`i Seniors Law Program

(808) 246-8868

Kokua Mau

(808) 585-9977

www.kokuamau.org

Legal Aid Society of Hawai`i

Honolulu

(808) 536-4302

Windward

(808) 239-5707

Waianae

(808) 696-6322

Hilo

(808) 934-0678

Kona

(808) 329-8331

Kaua`i

(808) 245-7580

Lana`i

(808) 565-6089

Maui

(808) 242-0724

Moloka`i

(808) 553-3251

East Hawai`i

(808) 961-8600

West Hawai`i

(808) 327-3597

Mau`i County Office on Aging (Area Agency on Aging)

(808) 270-7774

www.mauicounty.gov

Medicare

1-800-633-4227

www.medicare.gov

National Academy of Elder Law Attorneys (NAELA)

1-703-942-5711

www.naela.com

National Alliance for Caregiving

www.caregiving.org

National Memorial Cemetery of the Pacific

(808) 532-3720

www.cem.va.gov/nchp/nchp.htm

National Senior Citizens Law Center www.nsclc.org/

Office of the Public Guardian of the Judiciary (OPG)

(808) 548-0006 (O`ahu)

<http://hawaii.gov/health/disability-services/neurotrauma/key-services-legal.html>

Office of the Public Defender

(808) 586-2300 (O`ahu Family Section)

Small Estates and Guardianship

O`ahu (Estate and Probate Branch) (808) 539-4399

Maui (808) 244-2939

Big Island (808) 961-7650

Kaua`i (808) 246-3300

Social Security Administration

1-800-772-1213

www.ssa.gov

Temporary Restraining Order (TRO) for abusive family relationships

Family Adult Service Branch of the Family Court

O`ahu (808) 954-8290

Hawai`i (Big Island) (808) 969-7798

Hawai`i (Big Island) (Kona) (808) 326-1607

Kaua`i (808) 482-2330

Maui (808) 244-2706

<http://www.courts.state.hi.us>

Temporary Restraining Order (TRO) for non-familial relationships

District Court

O`ahu (808) 538-5151

Hawai`i (Big Island) (808) 961-7430

Kaua`i (808) 482-2303

Maui (808) 244-2838

<http://www.courts.state.hi.us>

University of Hawai`i Elder Law Program (UHELP)

(808) 956-6544

www.hawaii.edu/uhelp

University of Hawai'i John A. Burns School of Medicine, Willed Body Program

(808) 692-1445

jabsom.hawaii.edu/JABSOM/community/WilledBody.php

U.S. Department of Veterans Affairs (VA) (Federal)

VA Benefits

1-800-827-1000

www.va.gov

Veterans Services (State Office)

O`ahu

(808) 433-0420

Hawai'i (Big Island)

(808) 933-0315

Kaua'i

(808) 241-3348

Maui, Moloka'i, Lana'i

(808) 873-3145

<http://www.dod.state.hi.us/ovs/>

Volunteer Legal Services of Hawai'i

(808) 528-7046

www.vlsh.org

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