PLANNING FOR INCAPACITY

• Everyone needs a plan
• How will decisions be made?
• Who will make decisions?
• Who will help?
AUTO PILOT

- Income on Direct Deposit
  - Social Security
  - Pensions
  - Interest and dividends
- Automatic Bill Pay
  - Utilities
  - Recurring bills
  - Credit cards
NOT QUITE AUTOMATIC

- Additional trusted signers on bank and brokerage accounts
  - Back up plan for the back up plan
- Online Bill Pay – with trusted third party having access
- Daily money managers – bill paying services
- If planning fails
- Social Security Representative Payee / VA Fiduciary
- Pension payees (rare – but ask.)
POWERS OF ATTORNEY
UNIFORM POWER OF ATTORNEY ACT

UPOAA--HRS Chapter 551E (2014)

- General or Special (Limited)
  - Health Care Powers—Not included in UPOAA
- Durable--Default;
- Effective Immediately—Default (or can be “Springing”)
- Specific Protections Provided in UPOAA
  - Principal
  - Agent
  - Persons Accepting POA

Execution – Capacity
Agent’s Certification (Optional)

UPOAA Seminar at UHELP
UPOAA—HRS CHAPTER 551E

- Defines the levels of authority granted in a power of attorney to the principal's agent.
- Requires the agent to act in good faith and within the scope of authority granted in the power of attorney.
- Under most circumstances, it requires that the powers be accepted within a certain period of time.
- Provides sample documents to be used to create a statutory form power of attorney.
- Repeals Chapter 551D, Hawaii Revised Statutes, the Uniform Durable Power of Attorney Act.
- Applies to a power of attorney created before, on, or after the effective date of this new chapter in the Hawaii Revised Statutes.
GENERAL DIFFERENCES FROM REPEALED ACT

- Defaults to the POA being durable. “Durable,” with respect to a power of attorney, means not terminated by the principal’s incapacity.
- Defaults to a POA becoming effective immediately [unless expressly provided otherwise in the POA].
- Revokes a spouse-agent’s authority upon divorce [unless expressly provided otherwise in the POA].
- Includes optional “Agent’s Certification as to the Validity of Power of Attorney and Agent’s Authority.”
Advance Health Care Directives

Uniform Health Care Decisions Act (Modified)--"UHCDA" 1999

Chapter 327E Hawaii Revised Statutes
INDIVIDUAL INSTRUCTIONS AND POWERS OF ATTORNEY FOR HEALTH CARE

- Individual Instruction
  - Oral or Written
POWERS OF ATTORNEY FOR HEALTH CARE

- In writing; dated; signed; witnessed by two qualified individuals or notarized
- May be revoked
- May authorize an agent to make any health-care decision
- Unless otherwise specified--effective only during periods of incapacity
RAPID IDENTIFICATION DOCUMENTS

COMFORT CARE ONLY--DO NOT RESUSCITATE

- Certified in “comfort care only” document
- Directs EMS, first responders and health care providers not to provide CPR but only comfort care
- Prescribed “comfort care only” bracelet or necklace

Execution

Revocation

- Changes to Law in 2006
  - Forms (and ID) available through Department of Health-EMS.
"Provider Orders for Life Sustaining Treatment form" or POLST which is a form signed by a patient, or if incapacitated, by a legally authorized representative and the patient's physician or advanced practice registered nurse, that records the patient's wishes and that directs a health care provider regarding the provision of resuscitative and life sustaining measures.
"Surrogate" means an individual, other than a patient's agent or guardian, authorized under Chapter 327E to make a health-care decision for the patient.

(There is no Family Consent Law in Hawaii)
DESIGNATED SURROGATE

- A “Patient” may designate or disqualify any individual to act as a surrogate by informing the supervising health-care provider.
- Designated surrogates may make health-care decisions for the patient that the patient could make on the patient’s own behalf.
In the absence of a designation, or if the designee is not reasonably available, a surrogate may be appointed to make a health-care decision for the patient.
APPOINTMENT OF A SURROGATE

Upon determination that patient lacks decisional capacity, primary physician or physician’s designee:

1. Attempts to notify patient of condition
2. Makes reasonable efforts to locate as many interested persons as practicable
3. Informs interested persons of patient’s lack of decisional capacity and that a surrogate decision-maker should be selected for patient
INTERESTED PERSONS

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.
“INTERESTED PERSON”

“Interested persons" means the patient's spouse, unless legally separated or estranged, a reciprocal beneficiary, any adult child, either parent of the patient, an adult sibling or adult grandchild of the patient, or any adult who has exhibited special care and concern for the patient and who is familiar with the patient's personal values.
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.
“A surrogate who has not been 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 upon a decision by the surrogate only when the primary physician and a second independent physician certify in the patient’s medical records that the provision of artificial nutrition or hydration is merely prolonging the act of dying and that the patient is highly unlikely to have any neurological response in the future. “
A supervising health-care provider shall require a surrogate to provide a written declaration under the penalty of false swearing stating facts and circumstances reasonably sufficient to establish the claimed authority.
HAWAI’I LAWS TO PROTECT OLDER PERSONS ABUSED BY OTHERS

While there are no specific Hawai’i laws that address “Elder Abuse,” there are a wide range of laws and legal remedies that can be used to protect abused older persons.

- Penal Code (Federal and State Criminal Codes)
- Long Term Care Ombudsman
- Medicaid Fraud (Federal-State Partnership)
- Elder Justice Act
- Dependent Adult Protective Services Act
- Restraining Orders
- Consumer Protection Laws
- Civil Remedies, e.g. Torts
ADULT PROTECTIVE SERVICES
(AMENDMENTS TOOK EFFECT JULY 2009)
[HRS 346 Part X]

• Requires Department of Human Services (Adult Protective Services) to investigate cases of abuse of a vulnerable adult who has incurred abuse or is in danger of abuse if immediate action is not taken.

• Requires certain persons to promptly report the matter orally to the (Department of Human Services) Adult Protective Services.
“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” means 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:
CAREGIVER NEGLECT (CONT.)

♦ 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 oneself, 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;
♦ Management of one’s financial assets, and.
The vulnerable adult appears to lack 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.
MANDATED REPORTERS

(1) Any licensed or registered professional of the healing arts and health-related occupation who examines, treats, or provides other professional or specialized services to dependent adults, including, but not limited to, physicians, physicians in training, psychologists, dentists, nurses, osteopathic physicians and surgeons, optometrists, chiropractors, podiatrists, pharmacists, and other health-related professionals;

(2) Employees or officers of any public or private agency or institution providing social, medical, hospital or mental health services, including financial assistance;
(3) Employees or officers of any law enforcement including, but not limited to, the courts, police departments, correctional institutions, and parole or probation offices;

(4) Employees or officers of any adult residential care home, adult day care center, or similar institution; and

(5) Medical examiners and coroners.
• The Adult Protective Services (APS) Unit of the DHS is required to investigate reports of alleged abuse against a vulnerable adult and take steps to prevent further abuse, including legal action in the Family Court which has overall jurisdiction over cases of vulnerable adult abuse.

• DHS may only act with the consent of the vulnerable adult unless he or she is determined by the family court to lack capacity.
"Capacity" means the ability to understand and appreciate the nature and consequences of making decisions concerning one's person or to communicate such decisions. An individual is presumed capable of making his or her own decisions. If it is determined that an individual lacks capacity under this part of the law, it does not mean that he lacks capacity for any other purpose.
FORMAT FOR THIS SECTION

• Case Studies - Small Groups
• Please focus on the assigned case
• 15 minutes to review the case
  • We will circulate for questions or input
  • If there are missing facts, assume and tell us
• Select a reporter to tell the group your assessment of the case
• Let us know if the answer would be different for clients from different backgrounds
WHAT WOULD YOU DO?
WRAP UP

- Share – Mentor
- Learn More
- Pro Bono
SHARE THE KNOWLEDGE

- Need exceeds supply
- Train using tools we have supplied
- Mentor other attorneys
ADDITIONAL TRAINING

- Long Term Care, Home and Community Based care and Inpatient long term care
- Housing options
- Paying for long term care
  - Private pay
  - Long term care insurance
  - Caregiver agreements
  - Medicaid rules – Veterans Benefits
- Elder Abuse Prevention and Intervention
PRO BONO RESOURCES AND TRAINING OPPORTUNITIES

Hawai`i State Bar Association
(808) 537-1868
www.hsba.org

Legal Aid Society of Hawai`i
Main Office (808) 536-4302
www.legalaidhawaii.org

University of Hawaii Elder Law Program
(808) 956-6544
www.hawaii.edu/uhelp

Volunteer Legal Services of Hawai`i
(808) 528-7046
www.vlsh.org