



Elder Law

Approaching the Post Covid-19 Pandemic Era

By James H. Pietsch

INTRODUCTION

Prior to and during the Covid-19 pandemic, the University of Hawai'i Elder Law Program ("UHELP")¹ received accounts of abuse, neglect and exploitation of older persons in our community. The pandemic may have helped exacerbate problems, but there may be a silver lining; more members of our community, including the legal community, are recognizing existing problem areas and potential remedies. Politicians may be seeking additional protections for what has been called for decades the "epidemic of elder abuse,"² and most importantly, older persons, often with the help of their families and lawyers, are finding better ways to enhance their autonomy and self-determination while protecting themselves from abuse and exploitation, even while maintaining social distancing and, for some, isolation.

There is some good news for nursing home residents and their families, who have faced a year of isolation. Following the roll-out of Covid-19 vaccines, nursing home residents and health care workers had priority status. Infection rates and deaths have dropped significantly in nursing homes,³ and on March 10, 2021, the Centers for Medicare and Medicaid Services released revised guidance for nursing home visitation during the Covid-19 Public Health Emergency to loosen restrictions to allow indoor visitation "regardless of vaccination status of the resident or visitor, unless certain scenarios arise that would limit visitation ..."⁴ There is also good news for older persons in general as Covid-19 hospitalizations among older Americans tumble and deaths among them decrease as well as more older persons are vaccinated.⁵

During the Covid-19 pandemic, there was a new sense of urgency and interest in advance care planning to help ensure that patients' wishes were accurately documented and respected⁶ as well as an increase in completion of advance directives, even early on in the crisis.⁷ UHELP saw an increase in requests, not only to help with advance health care directives on behalf of individuals who had never before executed them, but also from individuals who were very much afraid that their existing advance directives would not be sufficient for them during the pandemic. The UHELP website⁸ added a Covid-19 update, which included information about how to execute advance planning documents

and provided a reference to a specific Covid-19 addendum. UHELP also made presentations via Zoom to the community on topics of urgent concern to older persons.⁹

During this extended period of isolation, more individuals decided to take charge and to look into “do-it-yourself” (“DIY”) wills, including holographic wills, which have been valid in Hawai‘i since 1997. *See generally* HAW. REV. STAT. § 560-2-502 (2010). A recent study found that (1) it is unclear whether people who create their own wills are less wealthy than those who hire lawyers, (2) there is some evidence that DIY devices are particularly useful for testators who fall gravely ill, and (3) even controlling for the effect of other variables, DIY wills are correlated with a statistically significant increase in the odds of litigation.¹⁰

During the transition period between the election and inauguration of a new president, Congress enacted legislation to

amend the Elder Abuse Prevention and Prosecution Act¹¹ to improve the prevention of elder abuse and exploitation of individuals with Alzheimer’s disease and related dementias.¹²

But problems continue, even with oversight. Across the country, including in Hawai‘i, claims of financial abuse and exploitation of older or vulnerable persons are often addressed by probate courts by means of conservatorships, which are sought to prevent someone from abusing or exploiting an older or vulnerable adult.¹³ Sometimes, unfortunately, the perpetrator is someone who was appointed by the court to prevent such abuse from happening in the first place, namely, the conservator.¹⁴

Most abuse directed against older persons, including financial abuse, is hidden.¹⁵ In a call to UHELP during the Covid-19 pandemic, a caller lamented that his nephew, “Cubby,” most likely with the support of his mother “the

Lioness,” had influenced “Nana” to put the nephew’s name on her account and upon her death, he owned the account valued at over \$500,000, to the exclusion of Nana’s children and her other grandchildren.¹⁶ Once Nana had said that her daughter was “fierce as a lioness in protecting her cub.” The situation has now caused estrangement between the Lionesses’ family and the rest of the extended family. The last time any of them talked to her, the Lioness proclaimed, “Nana liked Cubby more than anyone else and wanted him to get everything. You know she did not like any of the four of us when we were growing up—we were a burden.” The three siblings were astounded and want to find out what happened to all of Nana’s money and wonder what role the Lioness may have had in protecting or even encouraging Cubby to go after Nana’s money. If Nana really did want Cubby to get the bulk of her assets and to the exclusion of



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all the other grandchildren, how could that be proven?

Nana did not have a will or a trust, but issues of capacity and undue influence also abound in wills and trust conflicts involving disappointed heirs.¹⁷ How can one prove the intentions of an individual before his or her capacity diminished or before death? In some states this can be accomplished through pre-death contests, or “pre-mortem validation,” which refers to the use of a statutory procedure to validate, during the lifetime of the maker of that document, a will, trust, or other instrument taking effect at death. It may be the testator of a will, the trustee of a trust, or the power holder of a power of appointment who initiates the statutory procedure.¹⁸ The term “pre-mortem probate” is used exclusively when the document being validated is the maker’s will.¹⁹

Aging, Dementia and Abuse

“Coronavirus disease 2019 (Covid-19)

is particularly deleterious to older adults, and there has been a massive increase in reports of elder abuse during the pandemic. Reports of elder abuse range from financial scams to incidents of family violence, with public warnings issued accordingly from the Federal Trade Commission and the American Bar Association.”²⁰

Over the next 20 years persons age 65 and older will increase from 15 to 23 percent of the total population.²¹ By the year 2060, the number of persons age 65 and older is estimated to be 94 million, which is more than double the 2010 estimate for the same age group.²² Many older persons lead active lives well into their 80s, 90s, and 100s. While the aging population is diverse, their longevity and the pressing need for health care and legal advocacy are summarized by a sobering Administration on Aging report.²³ The elder population itself is becoming increasingly older.²⁴ The 85 and older population is projected to increase

from 6.4 million in 2016 to 14.6 million in 2040, a 129% increase.²⁵ The year 2030 marks an important demographic turning point in U.S. history according to the U.S. Census Bureau’s 2017 National Population Projections.²⁶ By 2030, all baby boomers will be older than age 65.²⁷ This will expand the size of the older population so that 1 in every 5 residents will be retirement age.²⁸ By 2035, there will be 78 million people 65 years and older compared to 76.7 million under the age of 18.²⁹ A majority of Hawai‘i’s population of baby boomers have reached the age of 60 and over resulting in the rapid growth of Hawai‘i’s aging population.³⁰ With the aging of the baby boomers and the decreasing mortality, projections indicate that by the year 2030, one in every four individuals will be an older adult.³¹

Age is a known risk factor for developing dementia, and with the number of Americans age 65 or older doubling by

NOTICE TO ATTORNEYS INTERESTED IN PROVIDING LEGAL SERVICES TO THE STATE OF HAWAII DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS

Licensed attorneys who wish to provide legal services to the State of Hawaii Department of Commerce and Consumer Affairs (DCCA) for matters related to the enforcement of violations of Chapter 480 of the Hawaii Revised Statutes, focusing on unfair or deceptive trade practices, are invited to submit a Statement of Qualifications and Expression of Interest to the DCCA pursuant to Hawaii Revised Statutes §103D-304.

Please submit your statement(s) to: Department of Commerce and Consumer Affairs, Office of Consumer Protection, 235 South Beretania Street, Suite 801, Honolulu, Hawaii 96813, Attention: Stephen H. Levins, Executive Director, Office of Consumer Protection. Attorneys from the same firm must submit separate statements.

Statement forms are available at <http://cca.hawaii.gov/ocp/provide-legal-services-to-the-office-of-consumer-protection/> or may be requested by telephone at (808) 586-2636

Your completed statements must be postmarked or received by the Department of Commerce and Consumer Affairs by June 30, 2021, to be eligible for consideration for the entire fiscal year commencing July 1, 2021 and ending June 30, 2022. A statement received after June 30, 2021, will be considered a “late submittal” for the balance of the fiscal year as follows:

A late submittal received between:
July 1, 2021 – September 1, 2021
September 2, 2021– November 30, 2021
December 1, 2021 – March 4, 2022

Will be considered beginning:
October 1, 2021
January 1, 2022
April 1, 2022

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2060, so could the number of people with dementia.³² There are various forms of dementia disorders,³³ but by far the most common form of dementia in those over age 65 is Alzheimer's disease.³⁴

"Alzheimer's is a disease of the brain that causes problems with memory, thinking, and behavior."³⁵ The disease worsens over time and there is no cure.³⁶ Dementia is the loss of cognitive functioning—the ability to think, remember, or reason—to such an extent that it interferes with a person's daily life and activities. These functions include memory, language skills, visual perception, problem solving, self-management, and the ability to focus and pay attention. Some people with dementia cannot control their emotions, and their personalities may change. These effects, if caused by Alzheimer's disease, generally worsen over time.³⁷ Alzheimer's disease is the most common cause of dementia in older adults.³⁸ Approximately 6.2 million Americans of all

ages had Alzheimer's disease in 2020, seventy-two percent are age 75 or older, with an estimated number of 29,000 individuals in Hawai'i.³⁹ According to the Alzheimer's Association:⁴⁰

There are three broad phases for the disease, preclinical Alzheimer's disease, mild cognitive impairment (MCI) due to Alzheimer's disease and dementia due to Alzheimer's disease ...[and] the Alzheimer's dementia phase is further broken down into the stages of mild, moderate and severe, which reflect the degree to which symptoms interfere with one's ability to carry out everyday activities.

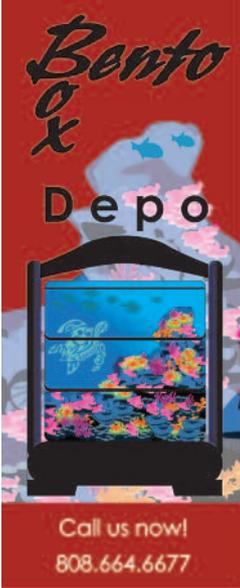
In the past, Alzheimer's disease was often used to describe the dementia phase of the disease. Today we know that dementia is only one part of the disease. It is preceded by mild cognitive impairment (MCI), a period when individuals have subtle cognitive changes that do not interfere with everyday activities.

The Alzheimer's Association also notes:⁴¹

... some individuals have dementia-like symptoms without the progressive brain changes of Alzheimer's or other degenerative brain diseases. Common causes of dementia-like symptoms are depression, untreated sleep apnea, delirium, side effects of medications, thyroid problems, certain vitamin deficiencies and excessive alcohol consumption. Unlike Alzheimer's and other dementias, these conditions often may be reversed with treatment. Consulting a medical professional to determine the cause of symptoms is critical to one's physical and emotional well-being.

Capacity and Incapacity and Undue Influence

The concepts of undue influence and mental capacity may intersect. A valuable resource for lawyers with respect to issues relating to capacity and undue influence is a newly updated handbook



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produced through a collaborative effort of members of the American Bar Association (“ABA”) and the American Psychological Association (“APA”), *Assessment of Older Adults With Diminished Capacities: A Handbook for Lawyers 2nd Edition*.⁴²

The handbook provides good reasons for attorneys to have a basic understanding of capacity issues and provides guidance as to when to seek a formal assessment of a client or a potential client from mental health professionals in cases of questionable capacity.⁴³

Although lawyers seldom receive formal training in capacity assessment, they make capacity judgments every time they interactively communicate with a client, whether they realize it or not. As a legal and ethical matter, capacity is presumed. It is only when a client presents signs that he or she is struggling with or unable to make an informed, independent choice, that capacity determination becomes a conscious mental process – one deliberately undertaken, haphazardly muddled through, or mistakenly ignored.

In the context of litigation, capacity may be the sole issue



in controversy—such as in a guardianship action or a challenge to a will, trust, or donative transfer based on an allegation of legal incapacity. In this context, the lawyer’s role is straightforward—to advocate fairly but zealously for the conclusion that represents the interests of the party he or she represents.

In non-adversarial situations, such as estate

planning or the handling of specific transactions, issues of capacity are confronted more informally in the daily practice setting. In this setting, legal practitioners by necessity make implicit determinations of clients’ capacity on at least two points.

First, the lawyer must determine whether a prospective client has sufficient legal capacity to enter into a contract for the lawyer’s services. Failing this, representation cannot proceed.

Second, the lawyer must evaluate the client’s legal capacity to carry out the specific legal transactions desired as part of the representation (e.g., making a will, buying real estate, executing a trust, making a gift, etc.).

It also lists several “[u]navoidable capacity determinations” and

a caution:⁴⁴

1. Does the client have the capacity to contract for my services?
2. Does the client have the capacity to understand and complete the legal transaction?
3. Are there supports and services that would address concerns about capacity and allow my client to contract for my services and/or complete the legal transaction?

Lawyers need a conceptually sound and consistent process for answering these questions.

Related to capacity issues, the handbook discusses the contemporary use of the term “dementia” and the emergence of the term “Major Neurocognitive Disorder.”⁴⁵

The handbook also addresses the related issue of undue influence.⁴⁶

Undue influence is a separate issue from capacity. Under the right circumstances, any adult of any age can be unduly influenced, including individuals whose legal capacity is not in question in any way. It is also true, however, that it can be easier to unduly influence someone who has diminished capacity or who is vulnerable under stressful circumstances, such as recent bereavement, a major life transition, illness, isolation, substance abuse, or imminent death. Thus, diminished capacity is a significant risk factor for undue influence.

The handbook includes information about the “SODR” legal model to provide a legal framework for considering undue

influence⁴⁷ found in a handful of states, including Hawai‘i,⁴⁸ and which helps courts determine whether to deny probate of a will based upon the theory of undue influence. The handbook includes “The Undue Influence Wheel,” which “focuses on undue influence tactics most often used to accomplish financial exploitation” and which is based on the assumption that undue influence has parallels to domestic violence, stalking, and sexual assault in which predatory perpetrators ‘groom’ victims to gain power and control.”⁴⁹ The handbook also includes the California Influence Screening Tool, the purpose of which is to aid Adult Protective Service personnel to screen for suspected undue influence.⁵⁰

Undue influence refers to questions as to whether the individual is acting freely and knows what he or she is doing. Undue influence was often seen in questions relating to contracts,⁵¹ but is also seen as a process or method used to commit financial or sexual exploitation through manipulation or deceit. People are more vulnerable to manipulation when they have certain psychological or medical conditions or difficult or complex personal circumstances, such as mental disorders, depression, stroke, dementia, and social isolation among many others.⁵²

Why do some older victims of financial abuse acquiesce so easily? Consider some of the science:

We find a consistent linear decline in financial literacy scores after age 60. A nearly identical rate of decline among men, stockowners, older, and college educated respondents indicates that cohort effects are not driving the results. Confidence in financial decision-making abilities does not decline with age. A

separate analysis using data that include measures of cognitive ability suggests that a natural decline in both fluid and crystallized intelligence in old age contributes to falling financial literacy scores . . . Our study finds that, in aggregate and within all financial decision-making domains, advanced age increases overconfidence in financial decision-making abilities.⁵³

Such a decline may ultimately result in individuals being unable to care for themselves or their property. Without suitable



alternatives, this may lead to the requirement of petitioning courts for guardianship or conservatorship or both. One study suggests that twenty percent of adults over 65 years of age will fall victim to financial exploitation.⁵⁴

Approximately 25 percent of financial fraud reports related to Covid-19 received by the Federal Trade Commission have involved scams specifically targeting older persons.⁵⁵ Social isolation is a known risk factor associated with elder abuse,⁵⁶ and the imposition of social distancing measures in response to Covid-19 has created new degrees of social isolation for the elderly.⁵⁷ Coronavirus isolation may heighten risk for elder abuse, including financial exploitation⁵⁸ as well as to greater risk of depression, and anxiety.⁵⁹

Individuals with dementia (neurocognitive disorder), including dementia resulting from Alzheimer's disease, may be more susceptible to abuse, neglect, and exploitation.⁶⁰ Because most individuals who suffer from dementia are age 65 and older, the laws, policies, procedures and structures established to protect older persons from abuse, neglect and exploitation may often be used to protect individuals with dementia. Some states have specific elder protective services laws or programs but other states, like Hawai'i, use a vulnerability criterion for protective services laws.⁶¹ There are many other laws and interventions that may provide protection of older adults, including the Penal Code, consumer protection laws and laws establishing oversight agencies for long term care facilities.⁶²

Adult Protective Services

In Hawai'i, the Adult Protective Services ("APS") statute (HAW. REV. STAT. § 346-221 (2009)) confers the Department of Human Services ("DHS") with the jurisdiction 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.

Attorneys working with older persons need to know at least the basics of



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Hawai'i's APS statute.⁶³ Individuals with dementia may fit one or more criteria for protection. The law does not make specific provisions based on age although it does mention older persons as an important segment of the population deserving protection.⁶⁴ The statute uses the term "vulnerable adult," which means a person 18 years of age or older who, because of mental, developmental, or physical impairment, is unable to:

- (1) Communicate or make responsible decisions to manage the person's own care or resources;
- (2) Carry out or arrange for essential activities of daily living; or
- (3) Protect oneself from abuse, as defined in this part.

HAW. REV. STAT. § 346-222 (2009).

Intervention is initiated by a report to the DHS Adult Intake. HAW. REV. STAT. § 346-224 (2009). If the abuse criteria are met, the report is sent to the Adult Protective Services Unit of DHS for investigation. HAW. REV. STAT. § 346-227 (2009). However, DHS must have the consent of the victim before an investigation or protective action can commence. HAW. REV. STAT. § 346-230 (2009). The law provides penalties for mandated reporters who fail to report (HAW. REV. STAT. §346-224(e) (2009)) and immunities from liability for those who do report. HAW. REV. STAT. §346-250 (2009).

The Hawai'i Adult Protective Service Act provides mandatory reporting for certain persons who, in the performance of their professional or official duties, know or have reason to believe that a vulnerable adult has incurred abuse or is in danger of abuse if immediate action is not taken. HAW. REV. STAT. § 346-224 (2012). Mandated reporters include licensed or registered professionals of healing arts, physicians, nurses, pharmacists, employees or officers of any public or private agency or institution providing medical services, law enforcement, and employees or officers of any adult residential care home or similar institution.⁶⁵ A report may also be made by any other person who has reason to believe that a vulnerable adult has incurred abuse or is in danger of abuse if immediate action is not taken.⁶⁶ If the abuse criteria are met, the report is sent to the APS Unit of DHS for investigation. HAW. REV. STAT. § 346-227 (2009). However, the department may act only with the consent of the vulnerable adult, unless the department obtains court authorization to provide necessary services, as further provided in the statute. HAW. REV. STAT. § 346-230 (2009). Immunity is granted to anyone making a report in good faith who might otherwise have incurred liability. HAW. REV. STAT. § 346-250 (2009).

The goal of protective services offered by the department is to remedy abuse, neglect, or exploitation of vulnerable adults. HAW. ADMIN. R. § 17-1421-1. Hawai'i administrative rules specify details of how adult protective services are provided throughout the state upon receiving a report.⁶⁷ APS must investigate all

reports of abuse or potential abuse and has the authority (but not the explicit duty) to prevent any future abuse.⁶⁸ Covid-19, of course, has made this more difficult.

In its first annual report submitted during the Covid-19 pandemic,⁶⁹ financial exploitation was listed as the third-leading problem referred to APS (150 cases) after caregiver neglect (371) and self-neglect (206). This is consistent with previous reports, and the vast majority of the victims in those investigations were older adults.⁷⁰

As to capacity to protect oneself, the concepts of undue influence and mental capacity are often joined. The Hawai'i APS law defines capacity as "the ability to understand and appreciate the nature and consequences of making decisions concerning one's person or to communicate such decisions." HAW. REV. STAT. § 346-222 (2014). Screening for specific capacities with respect to abuse, neglect or exploitation may be required.⁷¹

Hawai'i's APS law clarifies that exploiting a vulnerable adult through undue influence may constitute abuse under the statute.⁷² These nuances are critical for individuals mandated or who wish to report suspected elder abuse and for professions and disciplines that collaborate with APS.

Case Management for Elderly Victims of Crime Program

This program funded under the Victims of Crimes Act ("VOCA") provides case management and financial management services for elders on Oahu when a crime has been committed or abuse, neglect, or financial exploitation has already occurred. Services include ongoing case management to provide monitoring for victims, financial monitoring, and direct services including respite and counseling for victims. To receive services, an individual must be 60 years of age or older, a victim of a crime or abuse, have unmet needs, and must not fit the previously mentioned APS's criteria of being a vulnerable adult.⁷³

Consumer Protection Laws

The Department of Commerce and Consumer Affairs is responsible for investigating reports of consumer fraud and for imposing penalties, including enhanced penalties for fraud directed against older persons.⁷⁴

Financial institutions in Hawai'i are required to report any suspected financial abuse committed against a person age 62 or older to the Department of Human Services ("DHS") or a local law enforcement agency. HAW. REV. STAT. § 412: 3-114 (2011). This law imposes a mandatory duty on any financial institution to report any such suspected incident of financial abuse immediately by telephone to DHS, followed by a written report within five business days. *Id.* The Commissioner of Securities may impose an extra \$50,000 fine per violation added to any existing civil or administrative fine levied for securities violations against

NOTICE TO ATTORNEYS INTERESTED IN PROVIDING LEGAL SERVICES TO THE CITY AND COUNTY OF HONOLULU

Under the Hawaii Public Procurement Code, Haw. Rev. Stat. Chapter 103D, and the Revised Charter of the City and County of Honolulu, the Corporation Counsel of the City and County of Honolulu is responsible for securing legal services from licensed private attorneys to provide legal advice and representation for City agencies, officers, employees, boards, commissions and semi-autonomous agencies. Corporation Counsel invites licensed attorneys to submit Statements of Qualifications and Expressions of Interest for evaluation. Those private attorneys who are deemed qualified will be included on a list from which special deputies corporation counsel, special counsel, and legal consultants will be selected by the Corporation Counsel to provide necessary legal services.

Following are the areas of law in which such services may be required by the Corporation Counsel during the period of July 1, 2021 to June 30, 2022:

Administrative Law	Government Ethics
Appellate Practice	Health Law
Antitrust	Information and Computer Technology
Bankruptcy/Receiverships	Insurance
Business Law, including Contract Law, Corporate Law and Business Transactions	Intellectual Property
Civil Rights	Labor
Collections/Foreclosures	Law Enforcement
Litigation, including Complex Civil Litigation and Class Actions	Maritime Law
Constitutional Law	Plaintiffs Qui Tam
Condemnation	Project Labor Agreements
Construction Law, including Construction Litigation	Public Benefits Law, including ADA
Criminal Law (including Federal Criminal Law)	Public Financing, including Bond Counsel, Investment Banking, and Financing Leases
Election Law	Public Utilities Law
Employment Law, including Employee Benefits	Real Property, including Financing, Development, Land Use Entitlements and Transactions
Energy Law	Securities Law
Environmental Law, including Clean Water Act, Clean Air Act, HEPA/NEPA, Regulatory Compliance & Enforcement, Solid Waste Management, Environmental Attributes, and Storm Water Management	State Compliance with REAL ID Act Requirements
Fair Housing	Tax
Probate, Estates & Trusts, including Guardianships	Telecommunications
Government Contracts & Procurement, including Bid Protests, State and Federal Procurement, and Public Private Partnerships	Tort Law, including Personal Injury, Products Liability, Design Defects and Professional Malpractice
	Transportation Law, including Mass Transit, Transit Financing, and Land Use Entitlements
	Water Law
	Workers' Compensation

Licensed attorneys interested in providing legal services in one or more of these areas are invited to submit a Statement of Qualifications and Expression of Interest. Attorneys from the same law firm wishing to be considered must submit separate statements. Attorney statements may include areas not listed above.

Forms are available for download at <http://www.honolulu.gov/cor>. Forms may also be requested by telephone ((808) 768-5100) or facsimile ((808) 768-5104). Corporation Counsel's General Policy Regarding Waiver of Conflicts is also available at that website or upon request; however, the decision as to whether to waive a conflict of interest will depend on the facts of that particular situation and is in the sole discretion of the Corporation Counsel.

ALL MATERIALS shall be emailed to: professionalservices@honolulu.gov. NO HARD COPIES, CDs, OR FACSIMILES SHALL BE ACCEPTED.

All forms should be submitted no later than 4:30 p.m., June 30, 2021, to receive full consideration for the above-stated period. Late submittals that meet all applicable criteria will be accepted, but will only be available for consultant selections conducted after the submittals have been reviewed and the service category qualification(s) determined.

a person 62 years or older. HAW. REV. STAT. § 486-27 (2011). The State also may impose fines of up to \$10,000 for each violation by mortgage brokers and solicitors committed against elders, defined as consumers 62 years or older. HAW. REV. STAT. § 454-4.5 (2011).

Other Interventions and Remedies

There are myriad other laws and resources to address elder abuse, depending on the particular situation. Under the Penal Code, if a person commits a crime against an older or handicapped person, the act may be prosecuted as a crime and the perpetrator may receive an extended sentence. *See* HAW. REV. STAT. § 706-662 (2014).

If someone is stealing checks from an older person's mailbox, the federal postal inspector, the county police, and prosecutor can step forward to investigate and intervene.⁷⁵ The victim, family members and caregivers may also formulate a plan for electronic direct deposit of checks to help prevent future abuse. Private remedies may also be available through tort or other civil action. For example, a private practice attorney may seek restitution through a civil fraud action in court.⁷⁶ Private legal remedies, including actions for breach of contract, and tort and civil fraud may also be pursued.⁷⁷

Conclusion

For the past three decades, UHELP has played a role in educating future lawyers, healthcare providers and the community as it has represented and has advocated for legal reform on behalf of older persons in the community,⁷⁸ who have demonstrated great resiliency during the pandemic despite the disproportionate numbers of deaths among this segment of the population.⁷⁹ This work will continue with key lessons learned, perhaps some new ideas for the practice of elder law as we approach the post-pandemic era and an even greater respect for the resiliency of our kūpuna.

⁴ *See*, Press Release, Centers for Medicare & Medicaid Services, Revised Guidance for Nursing Home Visitation during COVID-19, <https://www.cms.gov/files/document/covid-visitation-nursing-home-residents.pdf>; *see also* Memorandum from the Dept. of Health & Hum. Services Centers for Medicare & Medicaid Services to the State Survey Agency Directors (Sept. 17, 2020) <https://www.cms.gov/medicare-provider-enrollment-and-certificationsurveycertificationgeninpopolicy-and-memos-states-and/nursing-home-visitation-covid-19-revised> (discussing updated guidelines to nursing home visitation during the COVID-19 pandemic).

⁵ *See, e.g.*, Matthew Perrone and Carla K. Johnson, COVID-19 hospitalizations tumble among US senior citizens, *U.S. News and World Report*, April 22, 2021, <https://www.usnews.com/news/health-news/articles/2021-04-22/covid-19-hospitalizations-tumble-among-us-senior-citizens>.

⁶ *See, e.g.*, Funk, Moss, & Speis, *How COVID-19 Changed Advance Care Planning: Insights From the West Virginia Center for End-of-Life*, J. PAIN & SYMPTOM MGMT. CARE, Dec. 2020, at e5.

⁷ *See, e.g.*, CL Auremma et al., *Completion of Advance Directives and Documented Care Preferences During the Coronavirus Disease 2019 (COVID-19) Pandemic*, J. AM. MED. ASS'N NETWORK OPEN, July 20, 2020 at 1–4.

⁸ UNIVERSITY OF HAWAII ELDER LAW PROGRAM: COVID 19 UPDATE, <http://www.hawaii.edu/uhelp/covid-19.htm> (last visited Apr. 8, 2021)

⁹ *E.g.*, the UHELP annual “Nite of the Living Will” attracted nearly 200 viewers and two sessions of a legal series sponsored by Catholic Charities Hawaii (CCH) Circle of Care for Dementia, in collaboration with the American Bar Association Commission on Law and Aging, Hale Ku'ike and UHELP attracted over 300 viewers. *See* UNIVERSITY OF HAWAII ELDER LAW PROGRAM: NITE OF THE LIVING WILL, <https://www.hawaii.edu/uhelp/nite-of-the-living-will.htm>.

¹⁰ Horton, *Do-It-Yourself Wills*, 53 UC DAVIS L. REV. 2357, 2357 (2020).

¹¹ 42 U.S.C. §1397m-1 (West 2017).

¹² Promoting Alzheimer's Awareness to Prevent Elder Abuse Act, Pub. L. No.: 116-252, (2020).

¹³ Kenneth Heisz, *Beware of the Con in Conservatorships: A Perfect Storm for Financial Elder Abuse in California*, 17 NAT'L ACAD. ELDER L. ATTORNEYS J. 1, 2–4 (2021), <https://www.naela.org/NewsJournalOnline/Online-JournalArticles/OnlineMarch2021/Conservatorships.aspx>.

¹⁴ *Id.*

¹⁵ *See* NAT'L COUNCIL ON AGING, *Get the Facts on Elder Abuse*, <https://www.ncoa.org/public-policy-action/elder-justice/elder-abuse-facts>, (last visited Mar. 22, 2021).

¹⁶ The story is a representative tale of calls received at UHELP and the characters bear no resemblance to any actual family. Citations to specific records or persons in the UHELP Tales are omitted for the purposes of confidentiality. More details of this story and other calls to UHELP will be included in a future UHELP publication.

¹⁷ *See, e.g.*, James H. Pietsch, *The Role of Laws and Lawyers in Helping Avoid Disappointment at the End of Life*, Haw. B. J. 5, Aug. 2019 at 5, 5–10, <https://hsba.org/images/hsba/Transitioning%20Lawyers/article-end%20of%20life%20decisions%201.pdf>.

¹⁸ Michael Sneeringer et al., *Mom Liked Me Better, and She Will Prove It: Pre-Mortem Validation—Permanent Solution or Fad?* AM. B. ASS'N: REAL PROP., TR. & EST. SECTION, PROB. & PROP. MAG., Mar.–Apr. 2021, at 41, 42. Nine states (Alaska, Arkansas, Delaware, Nevada, New Hampshire, North Carolina, North Dakota, Ohio, and South Dakota) have statutes allowing pre-mortem probate of wills in some form, six states (Alaska, Delaware, Nevada, New Hampshire, Ohio, and South Dakota) permit pre-mortem validation of trusts and two states (Delaware and

¹ Visit UNIVERSITY OF HAWAII ELDER LAW PROGRAM, www.hawaii.edu/uhelp (last visited April 2, 2021).

² *See, e.g.*, Priscilla Vargas Wrosch, *What More Can Congress Do About the Elder Abuse Epidemic? A Proposal For National Movement*, 23 TEMP. POL. & CIV. RTS. L. REV. ix (2013); U. S. DEPARTMENT OF JUSTICE ARCHIVES: FIGHTING BACK AGAINST THE HIDDEN EPIDEMIC OF ELDER ABUSE (2020), <https://www.justice.gov/archives/opa/blog/fighting-back-against-hidden-epidemic-elder-abuse>.

³ *See*, National Healthcare Safety Network, *COVID-19 Deaths among Residents and Rate per 1,000 Resident-Weeks in Nursing Homes, by Week—United States, CENTERS FOR DISEASE CONTROL AND PREVENTION: NURSING HOME COVID-19 DASHBOARD*, (Apr. 5, 2021), https://www.cdc.gov/nhsn/covid19/ltc-report-overview.html#anchor_1594393305.

Nevada) permit pre-mortem validation proceeding for the holder or exerciser of a power of appointment. *Id.*

¹⁹ *Id.*

²⁰ See Letter to the Editor, S. Duke Han PhD & Laura Mosqueda MD, *Elder Abuse in the COVID 19 Era*, 68 J. OF AM. GERIATRICS SOCIETY 7 (Apr. 20, 2020),

<https://doi.org/10.1111/jgs.16496>.

²¹ *Id.*

²² *Id.*

²³ U.S. DEP'T OF HUM. SERVICES: ADMIN. FOR CMTY. LIVING & ADMIN ON AGING. 2017 PROFILE OF OLDER AMERICANS, (Apr. 2018),

<https://www.acl.gov/sites/default/files/Aging%20and%20Disability%20in%20America/2017OlderAmericansProfile.pdf>.

²⁴ *Id.*

²⁵ *Id.*

²⁶ Press Release, U.S. Census Bureau, Older People Projected to Outnumber Children for First Time in U.S. History (Mar. 13, 2018), <https://www.census.gov/newsroom/press-releases/2018/cb18-41-population-projections.html>.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ STATE OF HAW. DEP'T OF HEALTH EXEC. OFF. ON AGING: 2019 – 2023 HAWAII STATE PLAN ON AGING,

https://www.hawaiiadc.org/Portals/_AgencySite/State%20Plan/StatePlanOnAging2019_2023.pdf.

³¹ *Id.*

³² NAT'L INST. OF HEALTH: NAT'L INST. OF NEUROLOGICAL DISORDERS & STROKE, WHAT IS DEMENTIA? SYMPTOMS, A TYPES, AND DIAGNOSIS 1 (2017),

<https://www.nia.nih.gov/health/what-dementia-symptoms-types-and-diagnosis> [hereinafter WHAT IS DEMENTIA?].

³³ ALZHEIMER'S ASS'N, ABOUT ALZHEIMER'S DISEASE (2019),

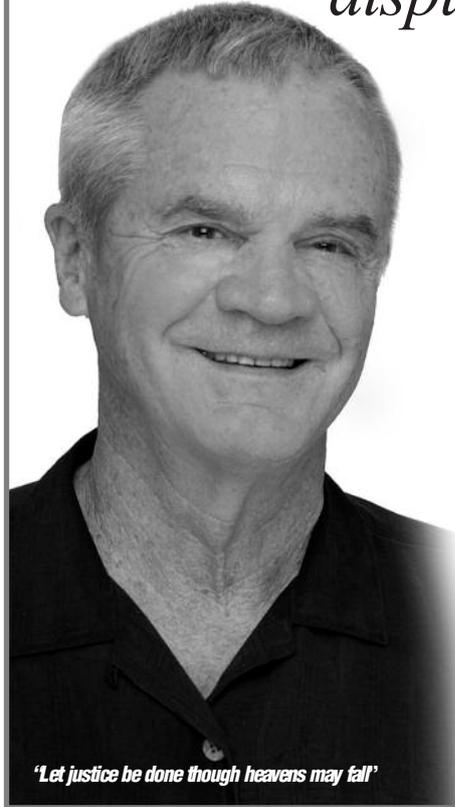
<https://www.alz.org/media/Documents/alzheimers-dementia-about-alzheimers-disease-ts.pdf>.

³⁴ *Id.*

³⁵ See NAT'L INST. ON AGING, ALZHEIMER'S BASICS <http://www.nia.nih.gov/alzheimers/topics/alzheimers-basics> (last visited Mar. 22, 2021).

"The disease is named after Dr. Alois Alzheimer. In 1906, Dr. Alzheimer noticed changes in the brain tissue of a woman who had died of an unusual mental illness. Her symptoms included memory loss, language problems, and unpredictable behavior. After she died, he examined her brain and found

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many abnormal clumps (now called amyloid plaques) and tangled bundles of fibers (now called neurofibrillary tangles). Plaques and tangles in the brain are two of the main features of Alzheimer's disease. The third is the loss of connections between nerve cells (neurons) in the brain." *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ ALZHEIMER'S ASS'N., 2021 ALZHEIMER'S FACTS AND FIGURES, at 19, 22, <https://www.alz.org/media/documents/alzheimers-facts-and-figures.pdf> (last visited March 20, 2021).

⁴⁰ *Id.* at 8.

⁴¹ *Id.* at 9.

⁴² A.B.A COMM'N. ON L. & AGING & AM. PSYCHOLOGICAL ASS'N, ASSESSMENT OF OLDER ADULTS WITH DIMINISHED CAPACITIES: A HANDBOOK FOR LAWYERS (2nd ed. 2021), <http://www.apa.org/pi/aging/resources/guides/diminished-capacity.pdf> [hereinafter *Handbook for Lawyers*]. This handbook represents the second edition of the original collaborative effort of members of the American Bar Association (ABA) and the American Psychological Association (APA) which produced the original handbook in 2005. Since the original publication, the legal views of capacity have been heavily influenced by human rights trends, a growing awareness of the need for robust decision supports, growing concerns over abuse and exploitation of older persons, and more nuanced clinical tools for understanding and assessing the variations of capacity. The resulting changes in this edition of the handbook include the inclusion of separate chapters on specific capacities and undue influence; a greater emphasis on the importance of supported decision-making strategies; greater attention to financial capacity red flags; and a greater emphasis on the fact that capacity is multi-dimensional and rarely an all-or-nothing proposition. This latter principle is even reflected in the slight change in the title which changes the original "Capacity" to "Capacities."

⁴³ *Id.* at 1.

⁴⁴ *Id.*

⁴⁵ *Id.* at 88.

"Importantly, in recent years the term Major Neurocognitive Disorder has emerged and is now found in the fifth edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-5) as the new term for dementia (although we are likely still to hear both terms used). This term reflects the wealth of new information about the biological underpinnings of dementia. It also sets aside the stigma attached to "dementia." Legal professionals may also encounter the term Mild Neurocognitive Disorder or Mild Cognitive Impairment. These terms describe declines in cognitive functioning that are greater than expected for one's age but not to such an extent that the person is unable to perform important tasks to living independently. They are less efficient. For example, an older client may have more trouble with memory than would be expected, but has demonstrated an ability to still drive safely, shop, and prepare their own meals.

"Advances in biology have not replaced an essential fact: To diagnose dementia or major neurocognitive disorder, or mild cognitive impairment, or mild neurocognitive disorder, a clinical evaluation is needed. Because of the ever-evolving research and practice in diagnosis and labels, legal professionals wanting to learn more are encouraged to review the suggested resources in the handbook."

⁴⁶ *Id.* at 26.

⁴⁷ *Id.* at 26.

⁴⁸ *In re Estate of Herbert*, 90 Haw. 443, 979 P.2d 39 (Mar. 17, 1999) (addressing whether undue influence was exerted upon the deceased, to induce her to change her will). The Hawai'i Supreme Court discussed the

SODR factors in the case: "It is sometimes said that the elements of undue influence are, susceptibility of [the] testator [or testatrix], opportunity for the exertion of undue influence, disposition to exert undue influence, and the result, in the will, of such undue influence." *Id.* at 457, P.2d 53. "The so-called 'SODR' factors have evolved to aid courts in determining whether to deny probate of a will based upon the theory of undue influence. Well established Hawai'i case law involving undue influence has impliedly recognized and adopted the 'SODR' factors." *Id.* (citing *In re Notley's Will*, 15 Haw. 435, 440-41 (1904).

⁴⁹ *Handbook for Lawyers*, *supra* note 42, at 27.

⁵⁰ *Id.* at 29. "Undue influence means excessive persuasion that causes another person to act or refrain from acting by overcoming that person's free will and results in inequity." CUIST is divided into four categories: Client Vulnerability, Influencer's Authority/Power, Actions/Tactics, and Unfair/Improper Outcomes. Check all the factors that apply to the victim's circumstances and provide examples." *Id.*

⁵¹ RESTATEMENT (SECOND) OF CONTRACTS §177 (AM. L. INST. 1981).

"Undue influence is unfair persuasion of a party who is under the domination of the person exercising the persuasion or who by virtue of the relation between them is justified in assuming that that person will not act in a manner inconsistent with his welfare."

⁵² See, e.g., ANN STANYER, FINANCIAL ABUSE OF OLDER CLIENTS: LAW, PRACTICE AND PROCEDURE, (Bloomsbury Publishing, 2017).

⁵³ See Michael S. Finke et al., *Old Age and the Decline in Financial Literacy*, 63 MANAGEMENT SCIENCE 1, 213-30 (2011).

⁵⁴ Mikhail Zinshteyn, *Bank Tellers Can Help Fight Financial Exploitation*, Study Finds, AARP.ORG (Oct. 17, 2019), <https://www.aarp.org/money/scams-fraud/2019/bank-tellers-prevent-financial-fraud.html>.

⁵⁵ Judy Stringer, *Danger: Watch Out For These Covid-19 Scams*, FORBES (Aug. 30, 2020), <https://www.forbes.com/sites/nextavenue/2020/08/30/danger-watch-out-for-these-covid-19-scams/#d0793ec760ca>.

⁵⁶ David Burnes et al., *Prevalence of and Risk Factors for Elder Abuse and Neglect in the Community: A Population-Based Study*, 63 J. AM. GERIATRICS SOC., 2015, at 1908-11, n. 9, https://www.researchgate.net/profile/Paul_Cacamise/publication/281340166_Prevalence_of_and_Risk_Factors_for_Elder_Abuse_and_Neglect_in_the_Community_A_Population-Based_Study/links/5ac23d710f7e9bfc045e53bd/Prevalence-of-and-Risk-Factors-for-Elder-Abuse-and-Neglect-in-the-Community-A-Population-Based-Study.pdf.

⁵⁷ Lena K. Makaroun, Rachel L. Bachrach & Ann-Marie Rosland, *Elder Abuse in the Time of COVID-19—Increased Risks for Older Adults and Their Caregivers*, AM. J. GERIATRIC PSYCHIATRY (May 19, 2020), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7234937/#bib0006>.

⁵⁸ David Godfrey, *Coronavirus Isolation May Heighten Risk for Elder Abuse*, AM. BAR. ASS'N (Mar. 26, 2020), https://www.americanbar.org/groups/law_aging/resources/coronavirus-update-and-the-elder-law-community/coronavirus-and-elder-abuse/.

⁵⁹ *Id.*; Ziggi Ivan Santini et al., *Social Disconnectedness, Perceived Isolation, and Symptoms of Depression and Anxiety Among Older Americans (NSHAP): A Longitudinal Mediation Analysis*, 5 LANCET, no. 1, January 2020, <https://www.sciencedirect.com/science/article/pii/S2468266719302300>.

⁶⁰ See e.g., Lichtenberg, *Financial exploitation, financial capacity, and Alzheimer's disease*, 71 AMERICAN PSYCHOLOGIST 4, 312-320 (2016).

⁶¹ See, e.g., STETSON UNIVERSITY: STATUTORY UPDATES, <https://www.stetson.edu/law/academics/elder/home/statutory-updates.php>. Stetson University College of Law, by and through the Center for Excellence in Elder Law and the Elder Consumer Protection Program, produces

certain statutory monitoring and update materials for the use by and the benefit of the public and professional communities. These statutes vary widely based on who may be eligible for services and the types of abuse that may be actionable. At the same time, federal laws, such as the Older Americans Act, do little more than authorize funds for local awareness and coordination endeavors. *See* 42 U.S.C. §3002 (2006 & Supp. 2012). Unlike federal laws on child abuse and domestic violence, which fund services and shelters for victims, there is no comparable federal law on elder abuse.

⁶² *See, e.g.*, James H. Pietsch, *Elder Abuse and Laws to Protect Older Persons in Hawaii*, 93 HAW. BAR J., 16, 13 (2013).

⁶³ *See*, James H. Pietsch, *Elder Abuse and Laws to Protect Older Persons in Hawaii*, 16 HAW. B. J. 13, 93 (2013).

⁶⁴ *Id.* at 98 (citing HAW. REV. STAT. § 346-221):

While advanced age alone is not sufficient reason to intervene in a person's life, the legislature finds that many elders have become subjects of abuse, neglect, and exploitation. Substantial public interest exists to ensure that this segment of the population receives protection.

⁶⁵ *Id.* The list does not include attorneys, but any person may report, and the reports are confidential. However, attorneys should note HAW. R. OF PROF'L CONDUCT R. 1.6 (amended 2013), which imposes a duty of confidentiality on lawyers, allowing them to disclose information related to representation of a client only in very limited circumstances, such as when the client gives informed consent, or the disclosure is "impliedly authorized in order to carry out the representation."

⁶⁶ *Id.*

⁶⁷ HAW. ADMIN. R. §17-1421-4 Geographic areas of service, provides that protective services for vulnerable adults shall be available throughout the State subject to the availability of resources.

⁶⁸ *See id.*

⁶⁹ Email from Administrator, Adult Protective and Community Services Branch, "APS Statistics for 2020," (Feb. 5, 2021) (on file with author).

⁷⁰ *See, e.g.*, MATTHEW COKE, HAW. LEGIS. REFERENCE BUREAU, A SURVEY OF ADULT PROTECTIVE LAWS IN HAWAII AND NATIONWIDE, https://lrh.hawaii.gov/wp-content/uploads/2007_ASurveyOfAdultProtectiveServicesAndElderAbuseInHawaiiAndNationwide.pdf (Dec 2007).

⁷¹ The University of Alabama at Birmingham ("UAB") "Brief Financial Capacity Screen" (BFCS) was developed by Daniel Marson, JD, PhD., specifically for APS workers in Georgia to use (agencies involved were the Georgia Alzheimer's Association and Georgia Division of Aging Services). There are two attachments that comprise the BFCS: a clinical interview screen and an optional direct assessment module (where APS workers can directly test certain client financial abilities). There are also administration manuals linked to this measure, which are available to APS workers. UAB retains all the intellectual property rights in this measure. For a discussion of Daniel Marson's work in the area of capacity in elder law, *see* Daniel C. Marson et al., *Testamentary Capacity and Undue Influence in the Elderly: A Jurisprudent Therapy Perspective*, 28 L. & Psychol. Rev 71, (2004).

⁷² HAW. REV. STAT. §346-222 (2014) ("Financial exploitation may be accomplished through coercion, manipulation, threats, intimidation, misrepresentation, or exertion of undue influence.").

⁷³ *See* HAW. DEP'T OF HUM. SERVICES: ADULT PROTECTIVE AND COMMUNITY SERVICES, <http://humanservices.hawaii.gov/ssd/home/adult-services/> (last visited Mar 11, 2021).

⁷⁴ HAW. REV. STAT. § 480-13.5 (1998) provides:

(a) Additional civil penalties for consumer frauds committed against elders. If a person commits a violation under section 480-2 which is directed toward, targets, or injures an elder, a court, in addition to any other civil penalty, may impose a civil penalty not to exceed \$10,000 for each violation.

(b) In determining the amount, if any, of civil penalty under subsection (a), the court shall consider the following:

- (1) Whether the person's conduct was in willful disregard of the rights of the elder;
- (2) Whether the person knew or should have known that the person's conduct was directed toward or targeted an elder;
- (3) Whether the elder was more vulnerable to the person's conduct than other consumers because of age, poor health, infirmity, impaired understanding, restricted mobility, or disability;
- (4) The extent of injury, loss, or damages suffered by the elder; and
- (5) Any other factors the court deems appropriate.

(c) As used in this chapter, "elder" means a consumer who is sixty-two years of age or older.

⁷⁵ *See generally* Sarah B. Berson, *Prosecuting Elder Abuse Cases*, National Institute of Justice (Apr. 14, 2010), <https://nij.ojp.gov/topics/articles/prosecuting-elder-abuse-cases> (discussing the challenges and unique disposition of elder abuse cases in the realm of criminal prosecution, and the importance of multidisciplinary prosecution teams that involve both criminal and elder law professionals).

⁷⁶ *See generally* David Godfrey, *Understanding and Utilizing State Elder Abuse Statutes*, NAT'L CTR. ON L. & ELDER RTS. (Jan. 2020) (discussing the mechanics of state elder abuse laws and charting out civil litigation strategies for elder abuse cases), <https://ncler.acl.gov/getattachment/Legal-Training/State-Elder-Abuse-Statutes-Issue-Brief.pdf.aspx?lang=en-US>.

⁷⁷ *Id.*

⁷⁸ *See*, James H. Pietsch, *The University of Hawai'i Elder Law Program: Celebrating 30 Years of Advocating for Older Persons, their Families and their Care Providers*, 25 HAW. BAR J. 2, (2021).

⁷⁹ *See, e.g.*, Neal Milner, *Elderly Hit Hard By Pandemic Aren't Just Vulnerable Victims*, CIVIL BEAT (Feb. 11, 2021), <https://www.civilbeat.org/2021/02/neal-milner-elderly-hit-hard-by-pandemic-arent-just-vulnerable-victims/>.

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