

## 2023 HAWAI‘I ACCESS TO JUSTICE CONFERENCE

### “BUILDING TRUST AND UNDERSTANDING ABOUT CIVIL ACCESS TO JUSTICE”

Friday, June 16, 2023

William S. Richardson School of Law, University of Hawai‘i

2:15 - 3:30 p.m.

#### **“Hawai‘i Elder and Vulnerable Adult Abuse Laws and Decisional Capacity Considerations” [Professor James Pietsch and Dr. Marvin Acklin]<sup>1</sup>**

Professor Pietsch began the workshop by providing an overview of the laws that govern diminished capacity and elder and vulnerable adult abuse.

*Diminished capacity.* Professor Pietsch explained that there are multiple facets of legal thinking about diminished capacity, including decisional capacity, capacity and undue influence, and assessments of capacity. As to decisional capacity, there are different standards for specific legal transactions under statutory and case law. For example, the standard of capacity to make a will is set forth in HRS 560:2-501 and was interpreted by the ICA in *Estate of Coleman*, 615 P.2d 750 (1980); capacity to make health care decisions is set forth in HRS 327E-2; and capacity is also defined under the Adult Protective Services Act, HRS 346-222. As to undue influence, the elements are susceptibility, opportunity for the exertion of undue influence, disposition to exert undue influence, and the result (the so-called “SODR” factors that were described in *In re Estate of Herbert*, 90 Haw. 443, 979 P.2d 39 (1999)).

Separately, there is a standard of diminished capacity that applies to conservatorships, and there is a standard that applies to being incapacitated.

The ethical guidelines for assessing capacity are set out in Model Rule 1.14 and the comments to the rule.

*Elder and vulnerable abuse laws.* Professor Pietsch explained that there is no overall Hawai‘i law directed at preventing elder and vulnerable adults abuse. Instead, there is a wide range of laws and legal remedies that can be used to protect elder and vulnerable persons. These laws and legal remedies include the penal code (certain statutes provide enhanced penalties for crimes targeting older, disabled, or vulnerable victims), the Long-Term Care Ombudsman Program, the Medicaid Fraud Control Unit, Elder Justice Act, the Hawai‘i Disability Rights Center, domestic violence laws, restraining orders,

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<sup>1</sup> Teri-Ann Nagata, a member of the Commission’s Committee on Education, Communications, and Conference Planning, prepared this workshop summary.

consumer protection laws, civil remedies, powers of attorney, and the Adult Protective Services Act.

The Adult Protective Services Act (APS), HRS ch. 346, part X, identifies certain mandated reporters of abuse. The APS Unit of DHS is required to investigate reports of alleged abuse against vulnerable adults and take steps to prevent further abuse, including taking legal action in family court.

*Assessments of capacity.* Dr. Acklin described several different methods of assessing decisional capacity, including the Mini Mental State Examination and the Clinical Dementia Rating. The MacArthur model for assessing capacity involves an assessment of cognitive function, a consideration of other variables, and determination of the degree of an individual's competence. Dr. Acklin summarized by stating that the forensic assessment model for capacity is designed to operationalize and link clinical facts to statutory elements based on a foundation of behavioral science.

In response to a question regarding opposing assessments, Dr. Acklin stated that it is not uncommon for experts to disagree. At that point, the expert's methodology comes into play. A forensic expert should be able to demonstrate that the data and analysis supports his or her conclusion. At times, judges must decide which assessment is more persuasive, or the parties may need to consult another expert.

In response to a question regarding assessments of individuals with medical conditions, Dr. Acklin stated that he normally will rely on medical records. He will ask if an individual's condition is reversible, for example.

In response to a question regarding desirable changes in the APS law, Professor Pietsch stated his belief that elder law practitioners can work with the legal tools they have. A larger concern is the lack of resources.

Professor Pietsch and Dr. Acklin concluded the session by discussing the difficult questions that may arise in these cases. For example, if a child brings in his or her parent to meet with an attorney, does the parent have capacity to enter into a contract with the attorney? Does the individual who requires an assessment have capacity to consent to evaluation? Does an individual require an immediate protective order, services, or treatment?