

Elder Law, Special Needs, and Access to Justice

Updates on issues in elder law and related issues in disability law, including financing long-term care and special needs trusts.

Presented by James H. Pietsch, JD Professor of Law, Director, UHELP and Scott C. Suzuki, JD, MPH Attorney-at-Law, Lecturer in Law

James Pietsch first provided an overview of Elder Law, which is the legal practice of counseling and representing older persons or their representatives. It is defined by the client, not by any particular area of law and is one of the fastest-growing legal client populations in the United States and globally.

Jim then addressed legal and practical issues regarding diminished capacity including assessment of capacity and legal facets of diminished capacity.

With respect to incapacitated adults, he provided a brief overview of guardianship, conservatorship, and their alternatives, including court jurisdiction and proceedings with an emphasis on the importance of alternatives in order to help preserve autonomy and self-determination while seeking added levels of protection for the older person.

Jim then discussed proposed, deferred and adopted new laws.

Due to deferral of a proposed change to the guardianship and conservatorship statutes through an adoption of The Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act in Hawai'i, two new interim bills were passed by the 2025 legislature and sent to the governor:

A Pilot Program Guardianship and Conservatorship, which establishes a two-year pilot program in the Probate Court and Family Court of the First Circuit to fund certain guardianship- and conservatorship-related court resources in situations where the respondent does not have sufficient funds to pay for one or more of the resources and the court has deemed the resource or resources beneficial.

A Supported Decision-Making Agreements law, which supports a process where a qualified adult has made or is making decisions by using friends, family members, professionals, or other people the qualified adult trusts to assist the individual.

Finally, Jim addressed the proposed new Uniform Health Care Decisions Act (modified) which was recommitted in the last days of the 2025 legislative session but which may be addressed again in 2026. The proposed law would, among other matters:

Address both advance health care directives and advance mental health care directives within the same statutory framework and would allow an individual to assent to a "Ulysses clause" in an advance mental health care directive, which allows an individual to include an instruction that

prevents the individual from revoking the advance directive if the individual is experiencing a psychiatric or psychological event specified in the directive;

Expand upon the framework for determining whether an individual has capacity; and

Change the witnessing requirements under existing law.

This complex and lengthy proposed statute would, if enacted, have a great impact on healthcare decision-making and the provision of healthcare across the state.

Scott Suzuki discussed issues in disability law, including financing long-term care and special needs trusts. He began with the premise that, with approximately 80 million Americans on Medicaid and 65 million Americans receiving a Social Security benefit each month, and the Trillions of dollars required to finance these programs, special needs planning impacts all of us. We are all care recipients, care givers, and investors in each other.

Scott then summarized the successes of the key public benefit programs involved in special needs planning, including the Supplemental Security Income and Medicaid programs. Despite these successes, emerging laws, demographics, economics, and policies threaten to limit access to justice and quality of life for countless Americans. This led Scott to pose the question: Are our gold standards of practice keeping up with our realities?

Scott then outlined conflicts between our existing policies and our emerging needs. The conflicts, which include the unsustainable cost of our public benefit programs with a diminishing population available to support them, will force us to reimagine what “special needs planning” can be. Efforts to address these needs will require us to explore non-traditional areas of special needs laws, like taxation, immigration, labor, education, and criminal justice, while improving and expanding our advocacy through existing tools such as special needs trusts, pooled trusts, and innovations from the private sector.