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JOSH GREEN, M.D.
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KE KIA‘ĀINA

Testimony of
Michael K. Champion, MD
Senior Advisor for Mental Health and the Justice System

Before the
Senate Committee on Health and Human Services
Wednesday, February 5, 2025, at 1:00 PM
State Capitol, Conference Room 225 and Videoconference

In consideration of
Senate Bill No. 1323, Relating to Health Care

Chair San Buenaventura, Vice Chair Aquino, and members of the Senate Committee on Health and Human Services:

I am writing in **SUPPORT** of Senate Bill 1323, which provides an updated legal framework for advance health care directives by adopting a modified version of the Uniform Health Care Decisions Act (2023). The framework outlined in this measure reduces barriers to creating advance directives for general and mental health care along with simplifying the process to execute them. A more effective method for developing and implementing advance directives will support successfully engaging those individuals who are experiencing a mental health crisis to support stabilization and recovery.

Thank you for the opportunity to provide testimony on this measure.

TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
KA ʻOIHANA O KA LOIO KUHINA
THIRTY-THIRD LEGISLATURE, 2025

ON THE FOLLOWING MEASURE:
S.B. NO. 1323, RELATING TO HEALTHCARE.

BEFORE THE:
SENATE COMMITTEE ON HEALTH AND HUMAN SERVICES

DATE: Wednesday, February 5, 2025 **TIME:** 1:00 p.m.

LOCATION: State Capitol, Room 225

TESTIFIER(S): Anne E. Lopez, Attorney General, or
Erin N. Lau, Deputy Attorney General

Chair San Buenaventura and Members of the Committee:

The Department of the Attorney General supports this bill.

Currently, two separate chapters of the Hawaii Revised Statutes (HRS), chapters 327E and 327G, HRS, provide a legal framework for advance health-care directives. The purpose of this bill is to update and consolidate our current laws by adopting a modified version of the Uniform Health-Care Decisions Act (2023), as promulgated by the Uniform Laws Commission, which reflects a better understanding of capacity and reduces barriers to creating advance directives relating to general health care and mental health.

Key updates in this bill include:

1. **Recognizing the nuances of capacity:** The bill acknowledges that an individual may have the capacity to make certain decisions related to their health care, even if they lack the capacity to make specific health-care decisions. For example, a person might not be able to make an informed decision about whether to undergo surgery but could competently identify who should make that decision on their behalf. By addressing these subtleties, the bill respects an individual's ability to participate in their care to the extent possible. In contrast, the current law defines capacity narrowly as the ability to make a health-care decision and communicate that decision.

2. **Simplifying the requirements to execute a power of attorney for health care:** The bill reduces the number of witnesses required to create a power of attorney instruction from two witnesses or a notarization to one witness.
3. **Clarifying and safeguarding an individual's right to receive treatment during a psychiatric or psychological event:** The bill explicitly permits an individual to include an enforceable instruction in their advance mental health-care directive. While current law allows an individual to create an advance mental health-care directive, it does not clearly address the enforceability of treatment instructions contained in the advance mental health-care directive during psychiatric or psychological events, nor does it provide any safeguards to ensure that the individual instructed such treatment. This bill provides those safeguards missing in the current law to ensure the instruction was consented to by the individual by requiring the signatures of two in-person witnesses in the advance mental-health care directive. Those safeguards make the treatment instructions enforceable during psychiatric or psychological events, even if the individual refuses treatment due to their medical condition.
4. **Streamlining capacity determinations:** The bill reduces the requirement for determining an individual's capacity from two separate examinations by health-care providers to a single examination conducted at the same time the determination of capacity is made. Under current law, two health-care providers must conduct separate examinations to determine capacity without a requirement that those examinations occur when the patient presents with the same symptoms. The bill streamlines this process, requiring only one contemporaneous examination while allowing for additional examinations by another provider if needed. If the individual disagrees with the initial determination of incapacity, an examination by another provider may be conducted to confirm or reassess the determination of incapacity.
5. **Expanding capacity determination health-care providers:** The bill allows an advance practice registered nurse (APRN) with advanced education and specialized clinical training to determine whether an individual has capacity. Under current law, only a physician or a licensed psychologist can make that

determination. The addition of APRNs will enhance accessibility to timely capacity assessments while maintaining high professional standards.

6. **Making it easier for sample forms to be updated:** The bill shifts the responsibility of creating and updating sample forms for advance health-care directives from statutory inclusion to the Department of Health (in consultation with the Department of the Attorney General). This change ensures that the sample forms can be updated promptly to address evolving community needs. The current statutory forms, based on the previous Uniform Health-Care Decisions Act (1993), do not reflect a modern understanding of capacity, treatment options, or accessibility, creating unnecessary barriers for individuals seeking to create an advance health-care directive.

This bill maintains two key aspects of Hawaii's current law that are not found in the Uniform Health-Care Decisions Act (2023):

1. **Default surrogate as an authorized Medicaid representative:** In 2018, chapter 327E, HRS, was amended to allow a default surrogate to act as an authorized representative for Medicaid purposes. The bill preserves this authority to ensure continuity in health-care decision making for individuals relying on Medicaid.
2. **Default surrogate selection process:** When Hawaii adopted the Uniform Health-Care Decisions Act (1993), it created a process for choosing a default surrogate by requiring a physician, or their designee, to locate interested persons and have those persons choose a default surrogate from amongst themselves. This process has been effective, as reported by medical providers, and reflects Hawaii's unique cultural context, including the recognition of "hanai" relationships.

We believe this bill introduces significant and meaningful updates to the laws regarding advance health-care directives and advance mental health-care directives. These changes will make it easier for individuals and their family to use these tools to provide appropriate care and decision-making. We respectfully ask the Committee to pass this bill. Thank you for the opportunity to provide testimony.

HAWAII HEALTH SYSTEMS
C O R P O R A T I O N

"Quality Healthcare For All"

LATE

COMMITTEE ON HEALTH & HUMAN SERVICES
Senator Joy A. San Buenaventura, Chair
Senator Henry J.C. Aquino, Vice-Chair

February 5, 2025
1:00 PM
Hawaii State Capitol
Room 225 & Via Videoconference

Testimony with Concerns on S.B. 1323
RELATING TO HEALTH CARE
Adopts the Uniform Health-Care Decisions Act (2023) with amendments to replace chapters 327E and 327G, HRS. Effective 1/1/2026.

Edward N. Chu
President & Chief Executive Officer
Hawaii Health Systems Corporation

On behalf of the Hawaii Health Systems Corporation (HHSC) Corporate Board of Directors, thank you for the opportunity to present testimony **with a number of concerns on S.B. 1323, Relating to Health Care.**

1. Per the bill, (section -12) default surrogates are named when the patient lacks capacity and has failed to appoint an authorized decisionmaker. However, throughout the bill, it references in that an individual, *who has capacity*, can name a default surrogate- which is the exact opposite of section -12.
2. There is a $50,000 penalty (Section -24) if a provider violates section -21, however, section -21 has a number of "if possible" language which may open the door to lawsuits being filed for failing to follow unclear guidelines.
3. There is a part that mandates providers to recognize capacity (-5(d)), unless the individual is experiencing a health condition requiring a decision regarding health-care treatment to be made promptly to avoid imminent loss of life or serious harm to the health of the individual. It is not clear how this works, i.e. the timing of all of it. As written, the provider can *ignore* the patient claiming to have capacity *if* they need treatment promptly. For instance, what if the patient claims to have capacity, and doesn't want a blood transfusion, and we can ignore that?
4. In section -7, it states that a witness to a power of attorney cannot include the agent appointed by the individual, or the agent's spouse, civil union partner, or cohabitant. This could leave opportunity for manipulation. As a suggestion, current law could be amended such that the witness is not "related to the principal by blood, marriage, or adoption; nor entitled to any

portion of the estate upon the principal's death. This language should also be inserted in section -9(e) (2).

5. Page 36, line 13- that sentence seems like it may be missing words.
6. Section -19 (b) should plainly list what health care decisions a default surrogate should not make- the current language is unclear saying – paraphrase: they cannot make decisions that a guardian cannot make or that can only be made by a guardian if a court says a guardian can make it.
7. Section -24(d) provides an exemption for emergency medical services personnel or first responder personnel, but we suggest that it include emergency department providers as well.

While HHSC does have these outlined concerns and suggestions, we are open to continuing to work with the Department of the Attorney General on further developing and refining language in this measure.

Thank you for the opportunity to provide testimony on this matter.

TESTIMONY OF THE
COMMISSION TO PROMOTE UNIFORM LEGISLATION

on SB1323

RELATING TO HEALTH CARE (Adopts the Uniform Health-Care Decisions Act (2023) with amendments to replace chapters 327E and 327G, HRS. Effective 1/1/2026.)

BEFORE THE SENATE COMMITTEE ON HEALTH AND HUMAN SERVICES

DATE: Tuesday, February 5, 2025, at 1:00 p.m.

PERSON TESTIFYING: PETER HAMASAKI
Commission to Promote Uniform Legislation

Chair San Buenaventura, Vice-Chair Aquino and Members of the Committee on Health and Human Services:

My name is Peter Hamasaki, and I am a member of the State of Hawai'i Commission to Promote Uniform Legislation. Thank you for this opportunity to submit this testimony in **support** of Senate Bill No. 1323.

Hawai'i previously adopted the Uniform Law Commission's ("ULC") 1993 version of Uniform Health-Care Decisions Act ("UHCDA"). Senate Bill No. 1323 replaces the 1993 UHCDA with the updated version of the UHCDA which was approved by the ULC in 2023.

The 2023 UHCDA enables individuals to appoint agents to make health care decisions for them should they become unable to make those decisions for themselves, to provide their health-care professionals and agents with instructions about their values and priorities regarding their health care, and to indicate particular medical treatment they do or do not wish to receive. It also authorizes certain people to make health-care decisions for individuals incapable of making their own decisions but who have not appointed agents, thus avoiding the need to appoint a guardian or otherwise involve a court in most situations. In addition, it sets forth the related duties and powers of agents and health-care professionals, and provides protection in the form of immunity to both under specified circumstances

Like the 1993 version adopted previously adopted by Hawai'i, the 2023 UHCDA's goals include: (1) acknowledging the right of a competent individual to make decisions about the provision, withdrawal or withholding of health care; (2) providing a single statute to govern both the appointment of a health-care agent and the recording of an individual's wishes regarding their health care; (3) simplifying and facilitating the making of an advance health-care directive; (4) ensuring that decisions about an individual's health care will be governed, to the extent possible, by the individual's own desires; (5) addressing compliance with an individual's instructions by health-care institutions and professionals; and (6) providing a procedure for resolution of disputes.

Some of the key benefits of the 2023 UHCDA are that it:

- ***Reduces unnecessary barriers to the execution of advance directives:*** By making it easier to create an advance directive, the 2023 UHCDA seeks to reduce the number of Americans who lack an advance directive. The 2023 UHCDA also authorizes the use of mental health care, or psychiatric, advance directives in a way that helps resolve conflicts between competing advance directives.
- ***Clarifies when agents may act:*** The 2023 UHCDA adds provisions clearly indicating when a surrogate's power commences and addresses what happens if a patient objects to a surrogate making a decision for them. It also allows an individual to specifically authorize their appointed agent to obtain health information while the individual has capacity, thus allowing the agent to assist the individual in making health-care decisions.
- ***Clarifies agents' powers and gives individuals the option to authorize special powers.*** For example, to reduce the likelihood that an individual's health-care needs will go unmet due to financial barriers, the 2023 UHCDA authorizes a surrogate to apply for health insurance for a patient who does not have another fiduciary authorized to do so. It also provides that an agent has only those powers that are expressly authorized in the power of attorney that appointed the agent.
- ***Modernizes default surrogate provisions:*** The 2023 UHCDA updates the priority list in the 1993 version to reflect a broader array of relationships, family

structures, and living arrangements.

- ***Brings the definition of capacity and approaches to capacity determinations in line with modern practice:*** A surrogate's authority to make health-care decisions for a patient typically commences when the patient lacks capacity to make decisions for themselves. The 2023 UHCDA modernizes the definition of capacity to focus on an individual's *functional* abilities and clarifies that an individual may lack capacity to make one decision yet retain capacity to make others. The 2023 UHCDA also expands the list of health-care professionals who may determine that an individual lacks capacity.

The commission also offers the following comments on Senate Bill No. 1323 for the committee's consideration.

- Section -2 contains a definition for "advance practice registered nurse"; we note that "advance practice registered nurse" also is defined in section 457-2, HRS, and the committee may wish to have a single, consistent definition.
- Section -11 provides for the Department of Health, in consultation with the Department of the Attorney General, to develop model forms. We note that the 2023 UHCDA contains an optional form, and we hope that this form will be considered in developing forms for Hawai'i.

A summary of the UHCDA prepared by the ULC is attached for the committee's additional information and reference.

Thank you very much for this opportunity to testify in support of this measure.

Uniform Law Commission
NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS

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UNIFORM HEALTH-CARE DECISIONS ACT (2023)

The Uniform Health-Care Decisions Act ("UHCDA") was promulgated by the Uniform Law Commission ("ULC") in 2023, reflecting a multiyear collaborative and non-partisan process to modernize and expand on the Uniform Health-Care Decisions Act approved by the ULC in 1993 ("1993 Act"). This Act enables individuals to appoint agents to make health-care decisions for them if they cannot make those decisions for themselves, provide their health-care professionals and surrogates with instructions about their values and priorities regarding health care, and indicate particular medical treatment they do or do not wish to receive. It also authorizes certain people to make health-care decisions for those incapable of making their own decisions who have not appointed an agent, thus avoiding the need to appoint a guardian or otherwise involve a court in most situations. In addition, it sets forth the related duties and powers of surrogates and health-care professionals, and provides protection in the form of immunity to both under specified circumstances. The Act seeks to improve upon the 1993 Act by drawing on decades of experience and knowledge about how people make health-care decisions and about the challenges associated with creating and using advance directives.

This Act shares the key goals of the 1993 Act, including: (1) acknowledging the right of a competent individual to make decisions about the provision, withdrawal or withholding of health care; (2) providing a single statute to govern the appointment of a health-care agent and the recording of an individual's wishes regarding the individual's own health care; (3) simplifying and facilitating the making of an advance health-care directive; (4) ensuring that decisions about an individual's health care will be governed, to the extent possible, by the individual's own desires; (5) addressing compliance with an individual's instructions by health-care institutions and professionals; and (6) providing a procedure for resolution of disputes.

The new Act reflects substantial changes in how health care is delivered, increases in non-traditional familial relationships and living arrangements, the proliferation of the use of electronic documents, the growing use of separate advance directives exclusively for mental health care, and other recent developments.

A state enacting it would repeal any statute governing the issues addressed in this Act, including the 1993 Act. Below are several key improvements of the Uniform Health-Care Decisions Act:

- This Act incorporates approaches designed to facilitate the use of advance directives. This is important because, although all states have enacted statutes enabling the use of advance directives, many adult Americans have never made one. Without an advance directive, individuals' wishes are less likely to be honored. In addition, their health-care professionals, family, and friends may struggle to determine how to make health-care decisions for them and to identify what decisions to make. The Act therefore seeks to reduce the number of Americans who lack an advance directive by reducing unnecessary barriers to execution of these documents.

- This Act adds clarity around when a surrogate may act by specifying when the surrogate's power commences. Patients, surrogates, and health-care professionals are all disadvantaged when it is unclear

whether a surrogate has authority to make decisions. In addition, it addresses an issue on which state statutes are typically silent: what happens if patients object to a surrogate making a decision for them.

- This Act adds provisions to guide determinations of incapacity, which is important because a surrogate's authority to make health-care decisions for a patient typically commences when the patient lacks capacity to make decisions. The Act modernizes the definition of capacity so that it accounts for the functional abilities of an individual and clarifies that the individual may lack capacity to make one decision but retain capacity to make other decisions. In addition, recognizing the growth of allied health professions, and that a variety of health-care professionals may have training and expertise in assessing capacity, the Act expands the list of health-care professionals who are recognized as being able to determine that an individual lacks capacity.

- This Act authorizes the use of advance directives exclusively for mental health care. Since the 1993 Act, many states have authorized such advance directives, sometimes called "psychiatric advance directives." Among other things, these allow individuals with chronic mental health challenges to provide specific instructions as to their preferences for mental health care and to choose to allow those instructions to be binding in the event of an acute mental health crisis.

- This Act modernizes default surrogate provisions that allow family members and certain other people close to a patient to make decisions in the event the patient lacks capacity and has not appointed a health-care agent. The new default surrogate provisions update the priority list in the 1993 Act to reflect a broader array of relationships and family structures. They also provide additional options to address disagreements among default surrogates who have equal priority.

- This Act clarifies the duties and powers of surrogates. For example, to reduce the likelihood that an individual's health-care needs will go unmet due to financial barriers, the Act authorizes a surrogate to apply for health insurance for a patient who does not have another fiduciary authorized to do so. It also provides that an agent only possesses those powers expressly authorized in the power of attorney that appointed the agent.

- This Act includes an optional model form that is designed to be readily understandable and accessible to diverse populations. The form gives individuals the opportunity to readily share information about their values and goals for medical care. Thus, it addresses a common concern raised by health-care professionals in the context of advance planning: that instructions included in advance directives often focus exclusively on preferences for particular treatments, and do not provide health-care professionals or surrogates with the type of information about patients' goals and values that could be used to make value-congruent decisions when novel or unexpected situations arise. The form addresses these concerns by providing options for individuals to indicate goals and values, in addition to specific treatment preferences.

For further information about the Uniform Health-Care Decisions Act, please contact Legislative Counsel Haley Tanzman at (312) 450-6620 or htanzman@uniformlaws.org.

SB-1323
Submitted on: 2/4/2025 12:37:42 PM
Testimony for HHS on 2/5/2025 1:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Louis Erteschik	Testifying for Hawaii Disability Rights Center	Oppose	Remotely Via Zoom

Comments:

We oppose the so called Ulysses clause. It is nothing more than an attempt to get people to waive their legal and constitutional rights. Aside from being bad policy, we question its validity and legality. If the individual changes their mind at the moment it would otherwise occur, we believe it may be unenforceable and would still require a Court order. We also question if the person who would administer the medication is really going to want to follow through without legal intervention.

SB-1323
Submitted on: 2/4/2025 12:28:06 PM
Testimony for HHS on 2/5/2025 1:00:00 PM

Submitted By	Organization	Testifier Position	Testify
Raelyn Reyno Yeomans	Individual	Oppose	Remotely Via Zoom

Comments:

I am submitting testimony in STRONG OPPOSITION to SB1323. This bill asks the Attorney General to produce and make available onliine, model forms that would allow for an individual to assent to a "Ulysses Clause" in an Advance Mental Health-Care Directive. This type of mental health-care directive is very new and was just added to the Act 2023. There is little evidence of it's potential impacts and unintended consequences as there has been little research done. The Ulysses Clause is very difficult to revoke and this bill would only require two adult signatures and NO REQUIREMENT that a licensed provider or legal representative explain to an individual the ramifications of including a Ulysses Clause in their Advanced Mental-Health Care directive.

Why instruct the Attorney General's office to make this so easily available when it is so new?

State law provides other avenues to order treatment over objection that are used every day in our state. Please do not pass this bill.