HAWAIʻI PROBATE RULES

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Comments and commentary are provided by the rules committee for interpretive assistance. The comments and commentary express the view of the committee and are not binding on the courts.

The Judiciary
State of Hawaiʻi

HAWAIʻI PROBATE RULES

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HAWAIʻI PROBATE RULES

PART A. GENERAL RULES

I. SCOPE OF RULES

Rule 1. SCOPE OF RULES.

These rules govern the procedure in the circuit courts of the State of Hawaiʻi in all probate, conservatorship, guardianship, trust, legal representation for no fault benefits, and determination of death proceedings, and more particularly proceedings arising under HRS Chapters 531 [Probate: Jurisdiction and Procedure], 532 [Descent of Property], 533 [Dower and Curtesy], 535 [Specific Performance of Deceased's Contracts to Convey Real Estate], 551 [Guardians and Wards], 551A [Office of the Public Guardian], 551D [Uniform Durable Power of Attorney Act] but only to the extent of issues arising from or between the attorney in fact and an incapacitated or deceased principal, 553A [Uniform Transfers to Minors Act], 554 [Trusts and Trustees; Accounts], 554A [Uniform Trustees' Powers Act], 554B [Uniform Custodial Trust Act], 554C [Uniform Prudent Investor Act], 556 [Uniform Fiduciaries Act], 557A [Uniform Principal and Income Act], and 560 [Uniform Probate Code] except Article V, Parts 2 and 6, and Section 603-21.6 [Probate Jurisdiction]. They shall be construed to secure the just, speedy, and inexpensive determination of every proceeding.

COMMENTARY:

These rules encompass all matters arising under Titles 29, 30, and 30A of the Hawaiʻi Revised Statutes, with five exceptions:

- Chapter 551A [Office of the Public Guardian] comes within the scope of the circuit court and the family court.

- Disputes involving powers of attorney where the issues do not relate to the fiduciary relationship between the principal and agent or to the effect of the disability or death of the principal or agent. Disputes involving third parties arising from transactions in which a power of attorney was used shall, except in cases described above, be considered civil actions not subject to these rules. These rules also do not cover issues relating to a Durable Power for Health Care Decisions, which is within the jurisdiction of the family court.

- Chapter 555 [Employee's Trusts], because that chapter is limited in its scope to definitional sections and a specific waiver of the Rule Against Perpetuities.

- Chapter 558 [Land Trusts], because that chapter does not establish a true fiduciary relationship, but is more in the order of a conveyancing and title-holding statute, and therefore should fall within the Hawaiʻi Rules of Civil Procedure.

- Parts 2 and 6 of Article V, Chapter 560, because those sections fall within the jurisdiction of the family court. HRS § 560:5-106(3) allows consolidation of protective and guardianship proceedings relating to the same person.

Note that these rules clearly apply to trust proceedings. Prior to these rules, some practitioners argued that a trust proceeding was a civil action requiring a complaint, summons, and answer. In 1995, these rules brought trust proceedings in line with the procedural rules applicable to probates and what was then known as guardianship of the property.

(Amended November 12, 1997, effective December 15, 1997; further amended April 28, 2006, effective July 1, 2006.)

Rule 2. ONE FORM OF ACTION.

There shall be one form of action for any case to which these rules apply, which shall be known as a "proceeding."

COMMENTARY:

Regular civil cases and family court cases are referred to as "civil actions." The Uniform Probate Code generally refers to all actions thereunder as "proceedings." The use of the term "proceeding" would maintain consistency and help eliminate confusion as to proceedings under these rules as opposed to proceedings controlled by other procedural rules.

Rule 2.1. MEDIATION RULES.

The Probate Court may direct parties to participate in mediation pursuant to the Mediation Rules for Probate, Trust, Conservatorship, and Guardianship (Mediation Rules), attached to these rules as Exhibit A and effective October 1, 1996, and as subsequently amended.

(Added August 23, 1996, effective October 1, 1996; further amended April 28, 2006, effective July 1, 2006.)

II. PLEADINGS AND PETITIONS

Rule 3. PLEADINGS ALLOWED; FORM OF PLEADINGS.

(a) Form. There shall be a petition and a response or objection. For purposes of these rules, an application in an informal proceeding is a petition, unless the context of the rule indicates otherwise. Persons may file a joinder, response, or objection to a petition or to a master's, guardian ad litem's, or Kokua Kanawai's report. Persons may file a memorandum in support of their pleadings. Every petition, except one entitled to be heard ex parte, shall be accompanied by an order setting date, time, and place of hearing, which shall include a statement notifying interested persons of the 30-day limit for responding to the petition as provided by Rule 10(c). No other pleading shall be allowed, provided that if a contested matter is referred to the regular civil calendar pursuant to Rule 20, then the Hawai'i Rules of Civil Procedure shall apply with respect to the referred petition.

COMMENTARY:

A pleading is a statement by a party to a proceeding or a court-appointed official which sets forth or responds to allegations, claims, denials or defenses, and may be supplemented or supported by affidavit or memorandum. To simplify probate court proceedings, to distinguish them from civil actions, and to address the confusion that currently exists with respect to the proper form of pleadings in trust and other proceedings, all requests for court relief or action shall be initiated by a petition. Motions as a form would be prohibited, except where a contested matter has been assigned to the regular civil calendar pursuant to Rule 20, during which assignment the Hawai'i Rules of Civil Procedure would apply. The committee considered combining the concepts of an "objection" and a "response," but felt that an objection is clearly and unequivocally in opposition to a pleading, while a response may not necessarily oppose all relief requested in a petition, and could raise additional issues related to the petition. A response could be a pleading referring to the initial petition, or could be in reference to an objection or another party's response or a master's, guardian ad litem's, or Kokua Kanawai's report. A response should state in its title clearly to what other pleading it is responding. This rule does not abolish other types of procedural documents, such as joinders, receipts, waivers, and the like, which do not contain substantive statements of position.

Orders setting time and place of hearing must contain a sentence notifying interested parties that they have 30 days to file a response or objection to the petition.

(b) Filings in Response to Petition or Master's, Guardian ad Litem's, or Kokua Kanawai's Report. Opposition to any or all of the relief prayed for in a petition or to a master's, guardian ad litem's, or Kokua Kanawai's report shall be in the form of a written objection. Opposition to an application in an informal proceeding shall also be made by filing a petition for formal proceedings. Interested persons may also file a written response to a petition or to a master's, guardian ad litem's, or Kokua Kanawai's report if they do not necessarily object to a petition or to a master's, guardian ad litem's, or Kokua Kanawai's report but desire to state on the record their position, or if they desire to raise additional issues that are related to the petition or to the master's, guardian ad litem's, or Kokua Kanawai's report.

COMMENTARY:

In informal proceedings, a person who objects to an application must file a formal petition for determination of intestacy or probate of a will in order to have the objection heard by the court. Such a petition can be filed either before or after the letters are issued (where, for example, no advance notice is given). While HRS § 560:3-302(b) allows the registrar to issue letters if more than 14 days have elapsed since service of the application, it may be difficult for an objecting party to file a formal petition within that time frame. This rule, therefore, allows the party to file a written objection with the court to at least put the registrar on notice of such objection, but a formal petition must also be filed in order for the court to consider the issue.

(c) Content of Petitions. A petition shall contain (1) a reference to the specific statute or rule, if any are applicable, under which the petition is brought, (2) a concise and plain statement of the facts giving rise to the need for the relief prayed for, (3) all specific facts, allegations, and representations, if any, required by any statute under which the petition is brought, and (4) a prayer for the findings, relief, or order sought. Prayers in the alternative or of several different types may be presented. Petitions shall be construed liberally, and may be deemed amended to conform to the evidence presented.

COMMENTARY:

This rule outlines what must be contained in a petition, including specific statutory citations. Petitioners should give sufficient facts in the petition to clearly support the relief requested, including all specific information required by any applicable statute. Given the equitable nature of the proceeding, alternative and multiple prayers may be made, and the petition may be deemed amended to reflect the evidence presented to the court. This rule is in keeping with the informal nature of the proceedings and the desire to dispose of matters quickly without delay caused by failure to follow technical rules of pleading.

(d) Documents Sealed Upon Filing. The following documents shall be sealed upon filing:

(1) birth certificate;
(2) marriage certificate;
(3) death certificate;
(4) tax return;
(5) Kokua Kanawai's report;
(6) court ordered professional evaluation; and
(7) responses and objections to a Kokua Kanawai's report or professional evaluation.

The foregoing documents shall remain sealed unless otherwise ordered by the court, or as provided in HRS §560:5-307 and -407.

COMMENTARY:

This rule is intended to protect the respondent's privacy and to minimize the risk of identity theft. Because of the sensitive information included in birth, death, and marriage certificates, and in tax returns, those documents must be sealed upon filing. The Kokua Kanawai report and any evaluations by court-ordered professionals are required to be sealed upon filing pursuant to Haw. Rev. Stat. § 560:5-306 and 5-406(f). Because the reports are sealed, responses and objections that refer to them are also sealed.

(e) Required Notice; Effect of Failure to Respond. An interested person who opposes a petition or a master's, guardian ad litem's, or Kokua Kanawai's report or intends to support a response or objection shall file the response or objection with the court and serve it on all counsel or parties who have made an appearance in the proceeding. Failure to respond within the time required under Rule 10(c) may be cause for determining that a party waives objection to the petition.

COMMENTARY:

This rule clearly establishes that an interested person cannot sit on his or her rights; all interested persons must let their positions be known, or they will be deemed to have waived any objections to the granting of the petition. The last sentence of the rule uses the term "may" because there may be circumstances in which an interested person does not receive notice of the petition within a sufficient time to respond, and such persons should be allowed to come in after the hearing and show why they should be heard.

(f) Amendment and Supplementation of Pleadings. A party may amend or supplement a pleading to reflect a change in facts after the time of filing of the original pleading, additional relevant facts or law not stated in the prior pleading, or to reflect the facts as established on the record. Any amendment or supplement relates back to the date of the original pleading. All amendments and supplements shall comply with the filing requirements of Rule 10(c).

COMMENTARY:

Generally in probate, amended pleadings to reflect newly-discovered facts, changes in circumstance, or changes in position are allowed. This rule continues that practice, as long as the new pleading is filed within the time constraints of Rule 10(c).

(Amended November 12, 1997, effective December 15, 1997; further amended May 17, 2004, effective July 1, 2004; further amended April 28, 2006, effective July 1, 2006.)

Rule 4. FORMAT OF DOCUMENTS.

(a) Compliance with Rules of the Circuit Courts. The form of pleadings, affidavits, and memoranda, and method of filing, shall comply with Rules 2 and 3 of the Rules of the Circuit Courts.

COMMENTARY:

The Rules of the Circuit Courts technically apply to probate proceedings at this time, but those rules are primarily focused on the conduct of litigation, and so should be made inapplicable. Circuit Court Rule 2, having to do with the mechanics of filing documents, and Rule 3, having to do with the actual format of pleadings, are incorporated by reference to achieve consistency in the filing of documents received by the court, and to eliminate the need for documents receiving clerks to check more than one set of rules for filing requirements.

(b) Stapling and Punching of Documents. All original documents shall be perforated at the top with a standard two-hole punch. Documents of 10 pages or less shall be secured by a single staple in the upper left corner of the document. Documents of more than 10 pages shall not be stapled, but shall be fastened with paper fasteners through the two-hole punch perforations.

COMMENTARY:

This rule is of minimal burden to the attorneys, but makes document handling less burdensome on the court staff.

(c) Size of Paper, Folding Oversized Documents to Fit. All documents presented to the court for filing shall not exceed 81/2 inches by 11 inches in size. Any exhibits, documents, or wills that exceed those measurements shall be folded in such a way that come within these restrictions, and any photocopies of any such documents shall likewise be folded or reproduced on letter-size paper in such a manner that the entire contents of the original document are visible and legible on the copy.

COMMENTARY:

This complies with current court policy, but expands the reference to copies to allow documents to be reduced through a photocopying process to fit on a letter-sized paper, so long as the copy is complete and legible.

(d) Notation of Hearing Time. Every pleading filed for which a hearing date has been previously assigned shall include under the case number on the first page of the pleading a notation of the date, time, and anticipated presiding judge for the hearing.

COMMENTARY:

This rule will assist the court in processing documents, particularly when courtesy copies have been delivered to the judge's chambers.

Rule 5. SIGNING OF DOCUMENTS.

(a) Verification of Documents. All petitions and applications (other than those signed by a party's attorney) shall include a statement at the end and before the signature of the person presenting the document to the effect that the person understands that the document is deemed to include an oath, affirmation, or statement to the effect that (1) its representations are true as far as the person executing or filing it knows or is informed, (2) it is not being presented for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation, and (3) penalties for perjury may follow deliberate falsification. Such a statement shall be accepted in lieu of an affidavit as to the facts stated in the document. If a submittal is not signed or is signed with the intent to defeat the purpose of this rule, it may be stricken as sham and false and the proceeding may proceed as though the submittal had not been served. For willful violation of this rule, a party may be subjected to an appropriate sanction. The signature of an applicant in informal proceedings shall be notarized.

If a document requires consideration of facts not appearing of record or verified as provided above (which may include a document signed by the party's attorney), it shall be supported by affidavit, signed by the person having knowledge of the facts and competent to testify. In lieu of an affidavit, an unsworn declaration may be made by a person, in writing, subscribed as true under penalty of law, and dated, in substantially the following form:

I, (name of person), do declare under penalty of law that the foregoing is true and correct.

Dated: _____

_____
(Signature)

COMMENTARY:

This rule requires verification of documents in both informal and formal proceedings. However, applicants in informal proceedings to probate a will, determine intestacy, or appoint a personal representative must also have their signatures notarized. Because the Registrar processes a large number of informal applications filed by pro se applicants, it is important to provide an easy mechanism for the Registrar to determine that the applicant is who he or she claims to be. A notarized signature gives the Registrar this proof without adding any significant cost to the probate process.

An application for informal probate or appointment must be signed by the applicant, not by and through counsel.

(b) Signing by Attorneys. Except as required by statute or by rule, any petition, application, response, objection, memorandum or other substantive document of a party represented by an attorney (including documents signed by an attorney) shall be signed by the attorney of record in the attorney's individual name. The signature of an attorney constitutes a certificate by the attorney that the attorney has read the submittal; that to the best of the attorney's knowledge, information, and belief, there is good ground to support it; and that it is not being presented for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a submittal is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the proceeding may proceed as though the submittal had not been served. For willful violation of this rule, an attorney may be subjected to an appropriate

sanction. Similar action may be taken if scandalous or indecent matter is inserted. The attorney's name shall be typed or legibly printed directly below the attorney's signature.

COMMENTARY:

This clarifies the role of the attorney in the preparation and presentation of documents. Whether or not the attorney signs any substantive document as counsel for a party, the attorney must also verify that the attorney understands and has complied with this Rule 5(b). A suggested form of verification follows:

HAWAII PROBATE RULE 5(b) CERTIFICATION

_____
NAME OF ATTORNEY
Attorney for [Party]

(Amended November 12, 1997, effective December 15, 1997; further amended February 5, 2013, effective July 1, 2013.)

Rule 6. STIPULATIONS.

(a) Presentation. Unless made in open court, all stipulations shall be in writing, signed by the parties or their attorneys, clearly identify all parties not participating in the stipulation, and be filed with the court.

(b) Format for Court Approval. An order based upon a stipulation shall be sufficient if the words "Approved and so ordered" are endorsed at the end of the stipulation and signed by the judge.

COMMENTARY:

This rule would conform probate court stipulations to common practice. The statement as to parties affected and not affected by the stipulation will speed up the processing of stipulations, as the court staff will not have to confirm that all parties have signed the stipulation. The attorneys do not have to sign the stipulation, but may do so in lieu of the signature of the attorney's client.

A stipulation is not necessarily signed or approved by the judge, but Rule 6(b) provides guidance as the proper format to use for court approval.

III. NOTICE; TIME

Rule 7. METHODS OF SERVING NOTICE.

Except as otherwise specifically provided by these rules, statutes, or court order, personal service of notice may be made by means of hand delivery or first-class mailing to the person at the person's last known address, by mailing or delivering a copy of any document to an attorney who makes an appearance for a person in the proceeding, by service of process and summons, by publication, or by any other method reasonably calculated to give notice to interested persons. Service of notice on a guardian ad litem shall be deemed to be equivalent to service on the persons represented by the guardian ad litem.

COMMENTARY:

HRS § 560:1-401 identifies various methods of serving notice. HRS § 560:5-309(b) requires notice in a conservatorship to be "served personally" on the respondent. Service of notice by a sheriff or other official is not necessary if a more informal process can achieve the same result.

The rule also clarifies that service of notice on a guardian ad litem is sufficient to cover notice on the individuals represented by that guardian ad litem, and that additional notice to the individuals is unnecessary.

(Commentary amended April 28, 2006, effective July 1, 2006.)

Rule 8. PROOF OF SERVICE.

A party required to prove service shall file (a) a written acknowledgment of service by the party or attorney served, or (b) an affidavit by the person making the service, together with original signed return receipts, or (c) a certificate of service by the attorney, or (d) any other proof satisfactory to the court, unless otherwise provided by law or by these rules. The filing of a postal return receipt, receipt for notice, waiver of notice, or joinder, signed by the addressee or the parent of a minor addressee, is prima facie proof of service on the person who signed such document. A party who is prejudiced by

failure to receive due notice or to be served, or who is prejudiced by reason that service was made by mail or publication, may petition the court for appropriate relief.

COMMENTARY:

The statutes are silent as to the proper method of making proof of service. This rule allows receipts to be filed, an affidavit of service to be filed, or any other method to be used that establishes on the record that notice was given. A proof of service under Rule 8(b) relying on postal return receipts must attach the return receipts. A document properly addressed and mailed is presumed to be received in the ordinary course of mail.

(Commentary amended June 15, 2010, effective July 1, 2010.)

Rule 9. PUBLICATION OF NOTICE.

(a) Permissible Publications. Whenever publication of notice is required, it shall be made in a newspaper of general circulation within the judicial circuit or district where the proceeding is being brought.

COMMENTARY:

There have been and continues to be abuses in publication of notice. A clear statement of the permissible publications would eliminate possible constitutional challenges and uncertainty. The committee decided against endorsing any specific newspapers because of concern that they may not have sufficient circulation to be considered of general circulation in the judicial circuit. Publication in the Honolulu Star-Advertiser would be presumed to provide adequate notice in all judicial circuits of this state. Use of any other publication shall provide adequate notice only if approved in advance by the court in the order for notice.

(Commentary amended February 5, 2013, effective July 1, 2013.)

(b) Proof of Publication. Whenever the publication in a newspaper of any summons, process, notice, or order is required, evidence of such publication shall be given by the affidavit of the editor, publisher, manager, foreman, clerk, or printer of such newspaper, to which affidavit is attached a copy of such summons, process, notice or order, and which affidavit also specifies the dates and times when and the newspaper in which the publication was made. The party required to prove service shall file or be responsible for the filing of the affidavit with the clerk before the time fixed for hearing.

COMMENTARY:

This formalizes the current practice.

(c) Content and Brevity of Notice. A person who prepares a notice to be published shall include in the notice the title of the case, case number, court involved, a brief description of the matter to be heard, the date, time, and location of the hearing, and the name, address, and telephone number of either the party or the party's attorney. Any additional information shall be restricted to that required by statute or rule or essential to provide notice of the reason for the publication.

COMMENTARY:

This rule is intended to keep costs of administration down by providing guidelines for the content of published notice. Only the essential information necessary to provide adequate notice is to be included in the publication; law firm names, attorney license numbers, names of multiple attorneys, fax numbers, and the like should be eliminated. Capitalized words should be avoided, as they take up more space and result in higher publication costs. Phrases such as "the Honorable John Doe, Judge of the above entitled court" and "on Monday the 12th day of October, 1992" should be dropped in favor of "Judge John Doe" and "Oct. 12, 1992." The idea is to give the public sufficient information to know what is happening, when, and where, and who to contact for additional information. The general guideline is to keep it simple. Use of

smaller fonts in the published notice might help to cut costs.

Rule 10. COMPUTATION OF TIME.

(a) Computation. In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, or a legal holiday, in which event the period runs until the end of the next day which is neither a Saturday, a Sunday, nor a legal holiday. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and holidays shall be excluded in the computation. As used in this rule, "holiday" includes any day designated as such pursuant to Section 8-1 of the Hawaiʻi Revised Statutes.

(b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without petition or notice, order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon petition made after the expiration of the specified period, permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rule 4 of the Hawaiʻi Rules of Appellate Procedure, except to the extent and under the conditions stated in that rule.

COMMENTARY:

These rules provide clarification on the measurement of time and conform probate court practice to common court rules.

(c) Time to File Pleadings or Reports.

(1) OBJECTION OR RESPONSE. A party objecting or responding to a petition must file the objection or response with the court and serve it on interested persons within 30 days after service of the petition and notice of hearing, or in the case of an informal application, within 14 days after service of any application under HRS § 560:3-302(b), except when a different time is prescribed by statute or court order, provided that in matters for which the court has appointed a master or Kokua Kanawai, the following provisions apply:

(A) Master's Report; Objection or Response to Master's Report. Unless otherwise ordered by the court, the court-appointed master shall file a report with the court and serve a copy of the report on all counsel who have appeared in the proceeding within 30 days after the date the master was appointed or within 30 days after the date responses to the petition are due, whichever is later. Any party objecting or responding to the master's report shall file an objection or response to reject or confirm, in whole or in part, the report and shall serve the objection or response on all counsel who have appeared in the proceeding within 10 days after the date the master's report is filed.

(B) Kokua Kanawai's Report; Objection or Response to Kokua Kanawai's Report. Unless otherwise ordered by the court, a Kokua Kanawai appointed pursuant to HRS § 560:5-305 and/or § 560:5-406 shall file a report with the court and serve a copy of the report only upon those persons authorized to receive such report pursuant to HRS § 560:5-307 and/or § 560:5-407 or pursuant to an order of the court, within 30 days after the date the Kokua Kanawai was appointed or within 30 days after the date responses to the petition are due, whichever is later. Any party objecting or responding to the Kokua Kanawai's report shall file an objection or response to reject or confirm, in whole or in part, the report and shall serve the objection or response only upon those persons authorized to receive such report pursuant to HRS § 560:5-307 and/or § 560:5-407 or pursuant to an order of the court, within 10 days after the date the Kokua Kanawai's report is filed.

(2) OBJECTION OR RESPONSE TO OBJECTION OR RESPONSE. Any party objecting or responding to an objection or response shall file an objection or response and serve it on all counsel who have appeared in the proceeding within 10 days after the responses or objections to the petition are filed, or 72 hours prior to the time set for the hearing as originally set, whichever is earlier, provided that in matters for which the court has appointed a master or Kokua Kanawai, the following provisions apply:

(A) Objection or Response to Objection or Response to Master's Report. Any party objecting or responding to an objection or response to a master's

report shall file the objection or response and serve it on all counsel who have appeared in the proceeding within 20 days after the date the master's report is filed.

(B) Objection or Response to Objection or Response to Kokua Kanawai's Report. Any party objecting or responding to an objection or response to a Kokua Kanawai's report shall file an objection or response and shall serve it only upon those persons authorized to receive such report pursuant to HRS § 560:5-307 and/or § 560:5-407 or pursuant to an order of the court, within 20 days after the date the Kokua Kanawai's report is filed.

(3) SERVICE ON WHOM; DELIVERY OF COPY TO JUDGE'S CHAMBERS. Any party filing an objection or response (including an objection or response to an objection or response) shall also serve it on all other interested persons who have not filed a waiver of notice, even though service may not be completed before the time set for hearing, and shall deliver a copy of the file-marked objection or response to the presiding judge's chambers; provided that in matters for which the court has appointed a Kokua Kanawai pursuant to HRS § 560:5-305 and/or § 560:5-406, the objection or response shall be served only upon those persons authorized to receive such report pursuant to HRS § 560:5-307 and/or § 560:5-407 or pursuant to an order of the court.

(4) GUARDIAN AD LITEM. A guardian ad litem appointed by the court in any matter shall comply with the same response dates as any other party, unless otherwise ordered by the court.

(5) SHORTENING OR EXPANDING TIME. The court for good cause may shorten or expand the time requirements of these rules to effectuate the efficient administration of estates.

COMMENTARY:

To prevent surprises at hearings, to improve the efficiency of the judicial process, and to fairly put parties on notice of the position of all parties prior to the hearing, objections and responses must be filed within 30 days of service of the petition. This expands the 20-day answer requirement of HRCP 12(a); the longer time period is provided because most interested persons in probate, guardianship and trust proceedings are individuals who are usually not represented by counsel and who often live out of state. In addition, many proceedings have mandatory notice provisions, which often take more than 20 days to satisfy. The rule outlines the response requirements when a master or Kokua Kanawai is appointed and is intended to provide all parties with special rules for filing responses and objections in a manner that will allow cases to proceed efficiently. Attempts should be made to serve all other interested parties as well, but the nature of probate and trust proceedings, with potentially many beneficiaries geographically dispersed, makes a requirement of service on everyone prior to the hearing impractical.

When a hearing is continued from the originally scheduled date, pleadings are due within the original time unless the court by order permits an expansion of time, to be measured by reference to the date to which the hearing is continued.

The court is granted the power to shorten any of the time requirements for good cause, such as to facilitate the closing of a sale of property, to distribute property or to settle a litigated or negotiated claim.

(d) Additional Time After Service by Mail. Whenever a person has the right or is required to act within a prescribed period after the service of a notice or other paper upon the person and the notice or paper is served upon the person by mail, two days shall be added to the prescribed period.

COMMENTARY:

This rule conforms the timing requirements with respect to mailings to other court rules.

(Amended November 12, 1997, effective December 15, 1997; further amended June 25, 2003, effective July 1, 2003; further amended May 17, 2004, effective July 1, 2004; further amended April 28, 2006, effective July 1, 2006.)

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IV. HEARINGS

Rule 11. TELEPHONE CONFERENCE CALL HEARINGS.

(a) Permissibility. The court, at its discretion, may allow a petition or other pleadings to be heard by telephone conference call.

(b) Arranging Conference Call. The party who requests the telephone conference call shall be responsible for arranging the telephone conference call with all parties and the telephone conference call operator and ensuring that the call is arranged and ready for court participation at the time appointed for the hearing.

(c) Procedure. Prior to the start of the conference call, the clerk shall call the case in the courtroom and outside the courtroom or by public address system and direct anyone appearing for the hearing to the appropriate location for the hearing.

COMMENTARY:

These rules formalize the procedures already in use in the Second, Third, and Fifth Circuits, and make them available to the First Circuit, in the court's discretion. Their goal is to decrease costs of proceedings and improve efficiency by avoiding having parties and attorneys from other islands, or remote areas of an island, fly to the island where court is in session or drive long distances for simple matters. The person who requested the conference call shall be responsible for all arrangements with a conference operator and the parties and attorneys to ensure that the call is made to the court with all parties on line at the appropriate time.

Rule 12. RESERVED.

Rule 13. CONTINUANCES.

(a) By the Court. The court in its discretion may continue any hearing to a later date and time (1) when it appears from the record that required filings, notice, or procedures have not been completed prior to the hearing, (2) when a report of a court-appointed master, guardian ad litem, Kokua Kanawai, or appraiser cannot or will not be ready by the hearing date, or (3) when in the interest of justice, judicial efficiency, or fairness, a continuance will permit all parties to the proceeding to be properly and fully represented. If a continuance is imposed by the court, the court shall notify counsel for the petitioner and instruct counsel to submit an amended notice of hearing, with the new hearing date.

COMMENTARY:

Continuances by the court are rare; usually they are only imposed when a flag sheet has not been presented to the court on time; where other documents (such as proof of service) are missing, the hearing is held and the documentary deficiency brought to the attorney's attention, giving the attorney the opportunity to point out if a document has in fact been filed but not delivered to the file in time. Requiring that flag sheets be filed prior to the hearing should help eliminate a portion of those continuances. Sometimes the deficiency is not one of the attorney's or party's own making; a document may have been misplaced or misrouted at the court. Parties may have traveled from off island or taken off time from work or school to attend the hearing. By putting a brief explanation of the reason for continuance on the court calendar, the attorney can either catch an error or rectify an omission in time to get the matter reinstated at the original hearing time. This would improve the efficiency of the judicial system, and help alleviate the congested calendar, by eliminating having some matters continued over to future hearing dates, which often prevents new matters from being scheduled for those future dates.

This rule would also allow the court to continue the hearing when justice demands; for example, when an heir or beneficiary appears without counsel and may want to object to the petition.

(b) By Request of the Parties. Any party, master, or guardian ad litem requesting a continuance shall file a petition to continue the hearing date, accompanied by an affidavit of counsel clearly setting forth the basis for continuance, and said petition for continuance shall be heard on the original hearing date, unless otherwise ordered by the court.

The party obtaining a continuance shall prepare and submit to the court an Amended Order Setting Time and Place of Hearing and shall serve the file-marked Amended Order on all parties who have appeared in the matter. Counsel may request a specific hearing date by way of cover letter or transmittal memorandum attached to the Amended Order, but if the court has not yet set the time and place of hearing, counsel shall submit a proposed order with the hearing date and time in blank.

COMMENTARY:

Continuances by the parties are confusing, and there are no standard procedures at this time. This rule provides guidance and certainty to the system. Any party may seek a continuance, but that request, unless otherwise ordered by the court, will be heard at the original time set for the hearing. By using the original hearing date to hear any petition for continuance, the court may proceed with the original petition if the continuance is not granted. This rule also clarifies that the person obtaining the continuance is to prepare, file, and serve an amended order setting time and place of hearing, although the order is to be presented to the court with the date and time left blank for the court to fill in.

(c) Effect of Continuance on Response Time. Unless otherwise ordered by the court, a continuance shall not enlarge the time in which to file responsive pleadings, memoranda, or other documents other than procedural documents.

COMMENTARY:

This rule would eliminate using a continuance as a means of buying time to respond to a pleading and would increase judicial efficiency by eliminating an incentive to continue. Parties would have to have their cases prepared for the original hearing date and could not use the continuance delay to improve their positions. This rule also clarifies the situation when a specific deadline is set by statute, rule, or stipulation, such as the requirement that overbids in a confirmation of sale proceeding be delivered to the court prior to the time set for the hearing. A continuance for failure to file a flag sheet in time would not give other prospective bidders additional time in which to submit bids.

Rule 14. CONSOLIDATION OF PROCEEDINGS.

The court may upon petition of any party order that proceedings involving essentially the same parties be consolidated for hearing; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delays. Any petition to consolidate must be filed in all proceedings sought to be consolidated.

COMMENTARY:

Under prior law, the family court had exclusive jurisdiction over all guardianships of the persons. Under the new guardianship statute, specifically HRS § 560:5-106, the probate court now has concurrent jurisdiction over guardianships of adult persons (but not minors) where there is also a conservatorship proceeding.

New Rule 100(b) provides that a party may file a single petition in probate court to initiate a guardianship of an adult person and a conservatorship of the same adult person. It is anticipated that an action to initiate a guardianship for an adult person but not a conservatorship for the same adult person will be filed in family court and that an action to initiate a conservatorship for an adult person but not a guardianship for the same adult person will be filed in probate court. If separate proceedings are filed (or for those matters filed before January 1, 2005 for guardianship of the person for an

adult and guardianship of the property for the same adult), then the court may permit consolidation of guardianship and conservatorship proceedings concerning the same adult person in probate court.

(Commentary amended February 16, 2005, effective nunc pro tunc January 1, 2005.)

Rule 15. PROOF OF OFFICIAL RECORD.

(a) Authentication.

(1) DOMESTIC. An official record kept within the United States or any state, district, commonwealth, territory, or insular possession thereof, or within the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by the officer's deputy, and accompanied by a certificate that such officer has the custody. The certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of that person's office.

(2) FOREIGN. A foreign official record, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof; or a copy thereof, attested by a person authorized to make the attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the attestation or is in a chain of certificates of genuineness of signature and official position relating to the attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of the documents, the court may, for good cause shown, (A) admit an attested copy without final certification or (B) permit the foreign official record to be evidenced by an attested summary with or without a final certification.

(b) Lack of Record. A written statement that after diligent search no record or entry of a specified tenor is found to exist in the records designated by the statement, authenticated as provided in subdivision (a) (1) of this rule in the case of a domestic record, or complying with the requirements of subdivision (a) (2) of this rule for a summary in the case of a foreign record, is admissible as evidence that the records contain no such record or entry.

(c) Other Proof. This rule does not prevent the proof of official records or of entry or lack of entry therein by any other method authorized by law.

COMMENTARY:

These rules clarify the proof needed when dealing with records from outside the state and is particularly important in proving foreign wills and trusts and vital statistics. This clarifies that a certified copy of a domestic record is sufficient, while an exemplified copy is only necessary when dealing with foreign documents.

(d) Non-English Documents. A party presenting a non-English document to the court shall attach to it (1) an English translation of the document and (2) an affidavit of the individual who prepared the translation certifying as to the accuracy of the translation and the qualifications of the individual.

COMMENTARY:

This rule establishes the method by which a foreign-language document (such as a will or death certificate) may be presented to the court. All such documents must be accompanied by an English translation and an affidavit of the person preparing the translation. This rule allows parties to select their own interpreters for document translation, as long as such person can establish competency in the affidavit.

(e) Interpreters. The court may appoint an interpreter of its own selection or recommended by a party and may fix the interpreter's reasonable compensation. The court may direct one or more of the parties to pay the compensation or may tax the compensation as costs.

COMMENTARY:

There is currently uncertainty in probate practice as to how to get documents translated. This will allow the court to approve of an interpreter that the parties can then rely on.

Rule 16. DETERMINATION OF FOREIGN LAW.

A person who intends to raise an issue concerning the law of another state or a foreign country shall give notice in the pleadings or other reasonable written notice. The court, in determining the law of another state or country, may consider any relevant material or source, including testimony and affidavits of law practitioners in that jurisdiction, whether or not submitted by a party or admissible under the Hawai'i Rules of Evidence, HRS Chapter 626. The court's determination shall be treated as a ruling on a question of law.

COMMENTARY:

This rule provides a means for the court to obtain information concerning and to rule on the applicable law of another jurisdiction. This is of primary importance in the probate of wills, where the validity of execution and form of the will is dependent upon the law of the jurisdiction where the will was signed. In such an instance, an affidavit of an experienced attorney in that other jurisdiction could be relied upon by the court.

Rule 17. WITHDRAWAL OF PLEADING.

(a) Procedure. A party may withdraw a petition or objection that has been scheduled for hearing by giving immediate notice of the withdrawal to the court and requesting that the hearing be stricken from the calendar. The party shall immediately contact all other counsel who appeared in the matter to notify them that the hearing is stricken. Within 72 hours of notifying the court of the withdrawal, but in any event no less than 72 hours prior to the scheduled hearing date, the party shall file a "Withdrawal of Petition" or "Withdrawal of Objection" clearly setting forth (1) the title of the pleading being withdrawn, (2) the time and date of the hearing, (3) the name of the presiding judge who was scheduled to hear the matter, (4) in the case of a withdrawal of a petition, that all court-appointed officials have been paid in full, and (5) the party's attorney's signature. File-marked copies of the Withdrawal shall be served on opposing counsel as soon as available. The court in its discretion may impose sanctions on a withdrawing party who fails to comply with this rule.

(b) Effect of Withdrawal on Hearing. When a petition is withdrawn, the hearing on the petition shall be stricken, except where the withdrawal is the result of a settlement or compromise by the parties. When an objection is withdrawn, the hearing shall continue as scheduled to consider the relief requested in the petition. Where the withdrawal of a pleading is the result of a settlement or compromise, the hearing shall be conducted as scheduled and the parties shall describe the settlement on the record to the extent required by the court.

COMMENTARY:

This clarifies the procedures required to strike a hearing date. A settled dispute shall be entered into the record to prevent later misunderstanding. This rule does not apply to contested matters assigned to the civil trials calendar.

Rule 18. RULES OF EVIDENCE.

The Hawai'i Rules of Evidence, HRS Chapter 626, shall apply to all proceedings. However, the court shall interpret and apply the rules broadly and liberally in the interest of fairness and justice and with the goal of judicial efficiency.

COMMENTARY:

By their terms (Rule 1101), the Hawai'i Rules of Evidence apply to probate, trust, and guardianship and conservatorship matters. However, the court, in exercising its equitable powers, has generally granted wide latitude in the admission of evidence, without tying itself up with technical readings of the rules. This rule acknowledges the effect of the Rules of Evidence, while encouraging broad and liberal application by the court. The committee felt that this clarification of the court's discretion was necessary.

(Commentary amended April 28, 2006, effective July 1, 2006.)

V. CONTESTED MATTERS

Rule 19. DEFINITION.

A contested matter is any one in which an objection has been filed. The contested matter shall be limited to facts and issues in dispute, and shall not affect other issues or pleadings before the court with respect to the same proceeding that are not in dispute, provided that no party is prejudiced thereby.

COMMENTARY:

This rule sets the stage for the rules that follow. Of importance is the recognition that a contested issue can be separated from the normal progress of the estate, conservatorship, guardianship, or trust, and dealt with separately, while normal uncontested matters may continue to be addressed in normal course while the contested issue is resolved. In this way, a proceeding is not completely put on hold because of a dispute about one issue.

(Commentary amended April 28, 2006, effective July 1, 2006.)

Rule 20. DISPOSITION OF CONTESTED MATTERS.

(a) Assignment. The court by written order may retain a contested matter on the regular probate calendar or may assign the contested matter to the civil trials calendar of the circuit court.

COMMENTARY:

This rule divides contested matters into two classes: those that the probate court will resolve and those that the court will refer to the civil trials calendar. It is anticipated that the court will assign to civil trials the more complex and time consuming cases, although the court may retain such a case if it involves technical issues that are within the experience and expertise of the probate court (and therefore involve less time and effort to educate a trial judge). By requiring a written order of assignment, which would ideally be a preprinted form, a clear record is created, and the court then has the opportunity to decide what procedures will be used if the contested matter is retained. (See Rule (d) below.)

(b) Guideline for Assignment. The court may use as a guideline on whether to assign a contested matter to the civil trials calendar the expected length of the hearing and whether it will take more than one-half day. The court may also assign other matters to the civil trials calendar, with or without the stipulation of the parties, and the court, at the request of all parties, may retain on the probate calendar a contested matter that would otherwise be assigned to the civil trials calendar, if the court determines the matter can be handled more efficiently and effectively. When the court assigns a contested matter to either calendar, the court may set a status conference date, which the court clerk will note in the order assigning the contested matter, or in a separate status conference order.

COMMENTARY:

This rule provides standards for assigning contested matters to either the probate calendar or the civil trials calendar, with a great deal of flexibility built in. The flexibility is essential, considering the great

difference in procedures available and the likelihood that a civil trial would take many months to get scheduled. A status conference date may be set at the same time the assignment is made, to prevent further delay in hearing the matter.

(c) Effect of Assignment to Civil Trials Calendar. The Hawaiʻi Rules of Civil Procedure and the Rules of the Circuit Courts will apply to all contested matters assigned to the civil trials calendar. However, no right to jury trial shall be created by assignment to the civil trials calendar where such a right does not exist in the underlying proceeding. Unless otherwise ordered by the court, when a matter is assigned to the civil trials calendar, then for all procedural purposes, the party objecting to the petition shall be considered the plaintiff, the objection is to be treated as a complaint, and the complaint shall be deemed to have been filed on the date of the assignment to the civil trials calendar.

COMMENTARY:

This rule makes clear that a contested matter assigned to civil trials is to be treated the same as, and be subject to the same rules as, a normal civil action. However, because the right to jury trial is limited under the Uniform Probate Code, assignment of a contested matter to civil trials does not thereby give rise to a right to jury trial.

The party who files the objections in a matter shall be considered the plaintiff, unless otherwise ordered by the court, for purposes of the civil procedural rules, but not necessarily for substantive issues as to the burden of proof or burden to go forward.

(d) Procedures in Retained Contested Matters. Whenever the court retains jurisdiction of a contested matter as a probate proceeding, the court in the order of assignment may, at the request of the parties, designate and order that any one or more of the Hawaiʻi Rules of Civil Procedure and/or the Rules of the Circuit Courts shall be applicable in such matter.

COMMENTARY:

This rule allows the court to adopt any of the Rules of Civil Procedure or Rules of the Circuit Court to govern the conduct of the contested matter. It is anticipated that most, if not all, of the rules regarding discovery, summary judgment, trial testimony, and pretrial practices will be adopted. Currently, contested matters in probate do not clearly give rise to the right to discovery, and it is rare for the court to specifically address the issue. Other issues not in dispute, and regular settlement or administration of the probate, guardianship, or trust estate, shall continue to the extent possible without regard to the contested matter.

(e) Effect on Underlying Matter. The designation of an issue as a contested matter and the assignment thereof to the civil trials calendar or the probate calendar shall not affect the underlying proceeding, and the proceeding shall continue to the extent that such administration is not inconsistent with the issues being contested.

(f) Appeals. An order resolving the issues in a contested matter shall be reduced to judgment in accordance with Rule 34 of these rules and may be appealed as provided therein.

COMMENTARY:

This rule is to clarify that orders disposing of an issue are appealable; this is so that contested issues can be resolved quickly and a proceeding terminated as soon as possible.

(g) Termination of Assignment. When the contested matter is finally resolved, whether by settlement, final unappealed order, or disposition on appeal, the assignment shall terminate and all matters relating to the proceeding shall thereafter be controlled by these rules.

COMMENTARY:

This rule is to make clear the assignments of contested matters are limited in scope to the matter actually contested,

and the use of other rules or procedures not within the scope of these rules terminates when the contested matter is concluded. (Amended June 15, 2010, effective July 1, 2010.)

Rule 21. RESERVED.

Rule 22. SUBPOENA.

(a) For Attendance of Witnesses; Form; Issuance. Every subpoena shall be issued by the clerk of the circuit court of the circuit in which the proceeding is pending under the seal of the court, shall state the name of the court and the title of the proceeding, and shall command each person to whom it is directed to attend and give testimony at a time and place therein specified. Upon payment of all required fees the clerk shall issue a subpoena, or a subpoena for the production of documentary evidence, signed and sealed but otherwise in blank, to a party requesting it, who shall fill it in before service.

(b) For Production of Documentary Evidence. A subpoena may also command the person to whom it is directed to produce the books, papers, documents, or tangible things designated therein; but the court, upon petition made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive or (2) condition denial of the petition upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things.

(c) Service. A subpoena may be served at any place within the state. A subpoena may be served: (1) anywhere in the state by the sheriff or the sheriff's deputy, or by any other person who is not a party and is not less than 18 years of age, or (2) in any county by the chief of police or the chief's duly authorized subordinate. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and by tendering to him or her the fees for one day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the state, or an officer or agency of the state, fees and mileage need not be tendered.

(d) Contempt. Failure by any person without adequate excuse to obey a subpoena upon that person may be deemed a contempt of the court from which the subpoena issued.

COMMENTARY:

These rules are taken verbatim from HRCP 45, except that HRCP 45(d) is excluded, it being within the power of the court in a contested matter to adopt that rule (relating to subpoenas for depositions) if the court so desires. As written, these rules would apply only to subpoenas for testimony at a hearing. They greatly expand the ability of the probate court to obtain witnesses and documents that may be necessary to the full and fair evaluation of the matter.

VI. EX PARTE PROCEEDINGS

Rule 23. MATTERS WHEN EX PARTE PROCEEDINGS APPROPRIATE.

Proceedings may be conducted on an ex parte basis (without notice or hearing) when:

(a) All interested parties who are entitled by statute to notice of the petition join in the petition; or

(b) An emergency exists such that delay for a hearing would cause irreparable harm and the basis for the emergency is supported by affidavit; or

(c) There is no controversy and the relief requested is automatic under statute or rule; or

(d) Other situations exist in the court's discretion that warrant action without notice or hearing.

The party presenting a petition under paragraph (b) of this Rule 23 requiring immediate action of the court shall title the petition "Emergency Ex Parte Petition for . . ." to distinguish it from any other form of ex parte petition.

COMMENTARY:

This rule establishes, for the guidance of counsel, the situations in which ex parte proceedings are appropriate.

Under paragraph (a) of this Rule 23, a petition may be granted when all persons entitled to notice of the petition join in the petition; this may differ from persons described as "interested persons" under

HRS § 560:1-201 either because a statute may not require notice to all interested persons (for example, see HRS § 560:-403(a) which requires notice to certain individuals but not to creditors), or because the particular matter being heard does not affect the interests of a person who is statutorily defined as an interested person (for example, an unpaid creditor remains an interested person until his or her claim is resolved, but that interest is not affected by a challenge to the validity of a will or codicil since it matters not to the creditor whether the debtor/decedent died testate or intestate. It must be kept in mind that a person who is an interested person at the outset of a probate may lose his or her status as such when his or her interest has been resolved. For example, a specific devisee who has received his or her devise or an heir who is not a beneficiary of a will is an interested person at the hearing on the petition for probate, because denying the petition and declaring an intestacy will result in an inheritance passing to the heir. Such an heir loses his or her status as an interested person once the will is admitted to probate, because a consequence of the admission of the will to probate is that he or she will not share in the decedent's estate.

Differentiating between emergency ex parte petitions in paragraph (b) of this Rule 23 and those for which notice and hearing are just being waived will facilitate document handling by the court and help expedite processing of emergency documents.

(Amended June 25, 2003, effective July 1, 2003.)

Rule 24. FORMAT AND PROCEDURE.

A party submitting an ex parte pleading to the court shall clearly state the relief being sought and the facts and legal basis justifying it. The party shall attach to the petition an affidavit of counsel explaining the basis for the court issuing an order ex parte and attach any exhibits relating to the relief sought and a proposed form of order granting the petition. The party shall file the petition, affidavit, and exhibits as one document and either attach the order to the other documents or submit it simultaneously with them, as a separate document.

The party shall present the ex parte petition to the presiding judge directly, with a certificate of service stating that the petitioner will serve notice on all interested persons entitled to notice immediately after filing of the order. If the petition is granted, the party shall then cause all of the documents to be filed with the clerk and then serve the petition and order on all interested parties entitled to notice (unless otherwise ordered by the court).

COMMENTARY:

This rule follows general practice, specifying the necessary elements to an ex parte submission to the court. The order may be attached to the petition and supporting documents or submitted separately, but at the same time and as part of the same packet to the court. The rule also adopts a prospective certificate of service, which is otherwise very rare in probate court practice.

VII. ACCOUNTINGS

Rule 25. APPROVALS BY INTERESTED PERSONS.

Prior to presentation of an accounting to the court for approval, the petitioner may secure and present with the petition for approval of accounts the approvals of the accounting by interested persons. If all interested persons approve the accounting and their approvals accompany the petition, the petition may be presented and the accounting approved on an ex parte basis. If approvals of fewer than all individual interested persons are obtained and the petitioner desires the court not to appoint a guardian ad litem or master, then the petitioner's counsel shall submit an affidavit regarding the effort made to secure approval of the interested persons and the court may appoint a guardian ad litem for any minor, unborn, and unascertained beneficiaries, and may appoint a master to review the actions and accounting of the fiduciary on behalf of the court. Where the accounting must be approved by the attorney general acting as parens patriae, the court shall appoint a master to review the actions and

accounting of the fiduciary on behalf of the court.

COMMENTARY:

The probate code no longer requires that accountings be filed and approved by the court. However, if accountings are submitted to the court for approval, they must conform with Rules 25 and 26. This rule also encourages attempts by the petitioner to obtain approvals of interested persons to an accounting prior to the presentation of the accounting to the court. Where all interested persons have approved, the petition will be granted in the court's discretion on an ex parte basis. If approvals cannot for some reason be obtained from all interested persons, then counsel may elect to submit an affidavit regarding the failure to do so and request waiver of a guardian ad litem or master. Based on the affidavit, the court may appoint a master or guardian ad litem, but may not necessarily do so, and may proceed without the approvals. Appointment of a master in charitable trust accountings is automatic, because the Attorney General's office does not normally review accountings in detail.

(Amended November 12, 1997, effective December 15, 1997.)

Rule 26. FORMAT AND CONTENT.

All accountings to the court shall be typewritten or prepared by computer and presented by petition, and shall include in the petition for a trust or conservatorship proceeding a brief description of the operations and holdings of the trust or estate during the period of the accounting and a list of the names and addresses of the current beneficiaries according to the fiduciary's records. Attached to the petition in all accountings shall be a complete financial accounting for the period of accounting, including in order (1) a brief summary at the beginning of the attachment summarizing receipts and disbursements during the accounting period, (2) a list of the assets of the trust or estate at the end of the accounting period, including its value for administration purposes (the inventory value for probate accountings and the current fair market value for all other accountings), (3) a summary explaining the amount and basis of fiduciary fees taken or charged during the accounting period, (4) a detailed accounting of the transactions of the trust or estate during the accounting period, and (5) a copy of any auditor's report and auditor's management letter received by the trust or estate during or with respect to the accounting period. In addition, trust accountings shall include as an exhibit once every five calendar years a copy of the controlling trust documents. The detailed accounting of transactions may summarize regular and minor transactions and transactions that are internal to the accounting system being used, with a goal of eliminating needless detail and making the accounting easier to understand, while presenting sufficient information to understand and track the transactions of the trust or estate.

COMMENTARY:

This rule is partially the result of concerns raised by the First Circuit Court and discussed by an ad hoc committee composed of attorneys, accountants, masters, the attorney general's office, and all Hawai'i trust companies in the fall of 1991. No agreement was reached by that committee as to any one form of accounting, but the need for the element described in items (1)-(5) of the rule were believed important. This rule does not mandate any form of detailed accounting, leaving that to the fiduciary's discretion. By requiring the additional exhibits (1)-(3) and any auditor's reports, the precise form of the accounting is less important; the summary sheets will provide the information at a glance that most interested parties want, while the detailed accounting is available for those wishing to delve into the minutiae of the detailed transactions. This rule attempts to achieve a balance between that detail and ease of understanding.

This rule will result in greater work for fiduciaries in producing the additional pages required by (1)-(3), but those are anticipated to be only a few pages in length, and the added time and cost to produce them should be offset by the time and cost saved

in challenges raised because a beneficiary cannot understand all of the detail.

Of great concern to the First Circuit Court and the committee in 1991 was decreasing the amount of paper circulated with an accounting. A suggestion was that the fiduciary file with the court only the summaries of (1)-(3) and any auditor's reports under (5), retaining the detailed accounting and giving it only to the master, attorney general, and any other interested party who requested it. Masters and the attorney general's office objected to any accounting system that did not provide a full and complete copy of the detailed accounting to them; the trust companies objected to not providing the detailed accounting to the court, because the trust companies rely on the court records for storage and do not save all detailed accountings in their own records. No consensus was reached by the committee, therefore, on the content of the accounting filed with the court and presented to beneficiaries.

The requirement for a copy of the controlling trust documents once every five calendar years is adopted in recognition that trust accountings can sometimes be quite lengthy and over time fill many volumes of files. By having copies of the controlling documents filed on a regular basis, the court and interested persons will not have to dig back too deeply in the files to locate the controlling documents.

(Amended April 28, 2006, effective July 1, 2006.)

Rule 27. REFERRAL TO MASTER.

All charitable trust accountings shall be referred to a master appointed by the court for review, analysis, and report to the court. In the event of a dispute among beneficiaries of a private trust or estate, the court may appoint a master for the same purposes.

COMMENTARY:

This rule echoes current court practice. It allows the court discretion in appointing a master for private trusts and estates, depending upon the circumstances, while always requiring a master in a charitable trust accounting.

VIII. MASTERS AND GUARDIANS AD LITEM

Rule 28. APPOINTMENT.

(a) Master. The court may appoint a master to review any petition or dispute before the court and to report the recommendations of the master to the court. The master shall serve as a representative of the court and shall be a person who has no conflict of interest with any party or issue in the proceeding.

(b) Guardian Ad Litem. The court may appoint a guardian ad litem for one or more minor, unborn, unascertained, or incompetent persons not otherwise represented in an action and may make such other order as it deems proper for the protection of a minor, unborn, unascertained, or incompetent person. The guardian ad litem shall represent the interests of the person or persons for whom the guardian ad litem is appointed. Where the interests of different classes of unrepresented beneficiaries differ, the court may appoint a separate guardian ad litem to represent each class of interests.

(c) Order of Appointment. The petitioner shall prepare and present to the court in blank an order appointing master or guardian ad litem, as applicable, for charitable trust accountings, petitions for instructions, and actions involving non-charitable trusts or estates in which there are minor, unborn, or unascertained beneficiaries.

(d) Notice to Official. When a master or guardian ad litem is appointed by the court with respect to any petition, the petitioner shall give notice of appointment and copies of all relevant pleadings to the master or guardian ad litem within 5 days of appointment. Thereafter, all parties shall serve copies of all pleadings filed in the proceeding on the master or guardian ad litem until the appointment is terminated.

(e) Termination of Appointment. The appointment of a master or guardian ad litem automatically terminates upon the entry of an order or judgment on the issues for which the master or the guardian ad litem is appointed. A guardian ad litem may, with the approval of the court, appeal an order or judgment of the court and pursue such appeal on

behalf of the beneficiary or beneficiaries that the guardian ad litem represents.

COMMENTARY:

This rule clarifies the procedures with respect to the appointment of a master or guardian ad litem, and their roles. The petitioner is charged with notifying the official of appointment and supplying copies of all relevant documents.

Rule 29. ROLE OF MASTER.

Unless otherwise ordered by the court, the master shall review the operations of the fiduciary in light of the terms of the controlling document, as well as the financial transactions of the trust or estate. The fiduciary shall supply to the master a copy of the accountings and any masters' reports for the prior three accounting periods and shall make available for the master's inspection all accounting records for the current accounting period. The master shall have unlimited access to the books and records of the fiduciary with respect to the trust or estate that are not protected by privilege, including minutes of all meetings, and may interview any employee of the fiduciary regarding the trust or estate as the master deems appropriate. The master shall submit a written report of the master's findings to the court and serve a copy on all interested persons. Interested persons may file objections or responses to the master's report, and parties may object or respond to such pleadings, within the time limits set forth in Rule 10(c).

COMMENTARY:

This rule clarifies the role of the master, as many masters currently are unsure of their position and limit themselves to a strict review of the financial accounting presented. While there is a presumption of good faith and regularity that applies to accountings, In re Estate of James Campbell, Deceased, 42 Haw. 586, 607 (1958), the master serves as the eyes and ears of the court, and therefore should review the entire scope of the fiduciary's performance during the accounting period pursuant to the governing instrument. In order to properly fulfill the obligation, the master is granted broad access to the records and staff of the fiduciary.

(Amended November 2, 1995, effective January 2, 1996; further amended May 17, 2004, effective July 1, 2004.)

Rule 30. RESERVED.

Rule 31. COMPENSATION AND EXPENSES.

The court shall set the compensation of masters, guardians ad litem, and Kokua Kanawai and order the payment of such compensation from the assets of the trust or estate or, when appropriate, taxed in whole or in part to a party to the proceeding or to a party's attorney. In setting compensation, the court may consider the knowledge, skill, and expertise of the official; the difficulty of the assignment; the quality of the work performed; and the time spent by the official on the assignment. The court shall also order the reimbursement of the reasonable expenses and costs of the master, guardian ad litem, or Kokua Kanawai incurred in fulfilling the official's duties. With prior court approval upon petition and after notice and hearing (which notice and hearing may be waived by the court in appropriate circumstances), the master, guardian ad litem, or Kokua Kanawai may retain the services of attorneys, accountants, or other professionals or agents. If the compensation and/or reimbursement is not paid within a reasonable time, the official may petition for an order to show cause.

COMMENTARY:

Compensation of court-appointed officials has never been very clear. This rule clarifies that court-appointed officials (including Kokua Kanawai appointed under Rule 113) will be paid, normally from the trust or estate, but the court can direct a party to pay in appropriate situations. This also clarifies that the official's reasonable out-of-pocket expenses will be reimbursed, and that the official may hire others to assist in carrying out the official's duties, where such employment and the terms of employment have been approved in advance by the court. Normally employment of assistants by the official will require notice

and hearing, but the rule allows the court to dispense with notice and hearing where circumstances warrant (such as in hiring an attorney to pursue an appeal of a court order which has strict time limitations). General excise tax will not be separately approved of by the court, but should be built in to the compensation sought by the official. (Amended April 28, 2006, effective July 1, 2006.)

IX. ORDERS

Rule 32. SETTLEMENT OF ORDERS.

Within 10 days after a decision of the court, including any interlocutory order, the prevailing party, unless otherwise ordered by the court, shall prepare an order in accordance with the decision and seek the approval as to form of opposing counsel, any master and guardian ad litem, and any pro se interested persons in opposition who appeared at the hearing thereon and deliver to the court the original and one copy. If approval as to form is not secured within 10 days, the prevailing party shall serve a copy upon each party who has appeared in the action and deliver to the court the original and one copy, along with notice of service on the other parties. If any party objects to the form of a proposed order, that person shall within 5 days serve upon the prevailing party and deliver to the court a statement of that party's objections and the reasons for failing to approve, if any, the form of the party's proposed order. Thereafter, the court shall settle the order. Approval as to form shall not affect the right of the approving party to appeal from any order issued.

COMMENTARY:

This rule provides a definite method of settling orders in probate proceedings and incorporates the civil rule of approval of counsel, which is not currently practiced in probate.

Rule 33. FORM OF ORDERS.

All parties submitting orders for the court's signature pursuant to a formal hearing shall:

(a) indicate the hearing date or dates and the name of the hearing judge under the case number and character of the document;

(b) have a blank date line and signature line for the judge, with the words "Judge of the Above-Entitled Court" and the judge's staff shall print, type or stamp the name of the judge under the signature line;

(c) note on the bottom of the court's signature page the case number, abbreviated case name, and title of the order, separated from the rest of the text on the page by a solid horizontal line; and

(d) when the court rules on a matter subject to the receipt of further documentation, submit the required documentation with a brief written explanation of what transpired at the hearing and the reason for submission of the documentation.

COMMENTARY:

This rule standardizes current court practice. On occasion the court will grant a petition even though some of the necessary paperwork (such as a receipt for notice, affidavit in support of extraordinary fees, or proof of service) has not been filed. In such circumstances, the party presenting the order should clip the requested documentation to the order when it is presented to the court, along with an explanation of the condition imposed at the hearing.

Rule 34. ENTRY OF JUDGMENT, INTERLOCUTORY ORDERS, APPEALS.

(a) Entry of Judgment. All formal testacy orders, orders of intestacy and determination of heirs, orders establishing conservatorship and/or guardianship, and orders establishing protective arrangements shall be reduced to judgment and the judgment shall be filed with the clerk of the court. Such judgments shall be final and immediately appealable as provided by statute. Any other order that fully addresses all claims raised in a petition to which it relates, but that does not finally end the proceeding, may be certified for appeal in the manner provided by Rule 54(b) of the Hawai'i Rules of Civil Procedure.

(b) Interlocutory Orders. In order to appeal from any other order prior to the conclusion of the proceeding, the order must be certified for appeal in accordance with Section 641-1(b) of the Hawai'i Revised Statutes.

(c) Final Judgment Closing Proceeding. At the conclusion of the proceeding, a final judgment closing the proceeding shall be entered and filed with the clerk of the court, at which time all prior uncertified interlocutory orders shall become immediately appealable.

(d) Appeals. Final judgments as to all claims and parties, certified judgments, certified orders, and other orders appealable as provided by law may be appealed pursuant to the Hawaiʻi Rules of Appellate Procedure applicable to civil actions.

COMMENTARY:

Probate practice has never had decrees, judgments, and other assorted forms of decision that are referred to in the rules of civil procedure. Therefore, it has been unclear when a probate order is final for appeal purposes, other than a formal testacy order, which is specifically appealable. HRS § 560:3-412. The committee recommended a rule that would have conformed to the practice of allowing dispositive orders to be appealed, rather than waiting for the final order settling and closing the estate, in effect, eliminating interlocutory orders. Rule 34 is written to conform probate practice to the policy against piecemeal appeals, see, e.g., Jenkins v. Cades Schutte Fleming & Wright, 76 Haw. 115, 869 P.2d 1334 (1994), to bring certainty to the timing of when and how an appeal can be taken, and to comply with the provisions of HRS § 641-1.

Original Rule 34 was misread to require all probate orders to be reduced to judgment, even if an immediate appeal was not contemplated. This revised rule clarifies that only certain probate court orders must be reduced to judgment and are thereafter immediately appealable when an appeal is allowed by statute. Those orders include: (1) formal testacy orders and orders determining that the decedent left no valid will and determining heirs, which are final and subject to immediate appeal under HRS § 560:3-412; (2) orders establishing conservatorships under HRS § 560:5-401; (3) orders establishing protective arrangements under HRS § 560:5-412;and (4) orders allowing a final report of a conservator under HRS § 560:5-420(a). All other orders may be certified for appeal pursuant to either Rule 54(b) or HRS § 641-1(b), depending upon the circumstances, but is not necessary to file a separate judgment if an immediate appeal is not contemplated.

(Amended November 2, 1995, effective January 2, 1996; further amended April 28, 2006, effective July 1, 2006.)

Rule 35. ORDER FOR SPECIFIC ACTS; VESTING TITLE.

If an order directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party does not comply within the time specified, the court may direct the act to be done at the cost of such party by some other person appointed by the court, which will have the same effect as if done by the party. On petition of the party entitled to performance, the clerk shall issue a writ of attachment or sequestration against the property of the disobedient party to compel obedience to the order. The court may also in proper cases adjudge the party in contempt. If real or personal property is within the state, the court in lieu of directing a conveyance thereof may enter an order divesting the title of any party and vesting it in others and such order has the effect of a conveyance executed in due form of law. When any order is for the delivery of possession, the party in whose favor it is entered is entitled to a writ of execution or assistance upon application to the clerk.

COMMENTARY:

This conforms to the Rules of Civil Procedure.

Rule 36. RELIEF FROM ORDER.

(a) Clerical Mistakes. The court may correct clerical mistakes in orders or other parts of the record and errors arising from oversight or omission at any time of its own initiative or on the petition of any interested person and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be corrected before the appeal is docketed, and thereafter while the appeal is pending may be corrected with leave of the appellate court.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. Upon petition and upon such terms as are just, the court may relieve an interested person from an order or judgment for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence which by due diligence could not have been discovered in time before the order was issued;

(3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(4) the order is void;

(5) the order has been satisfied, released, or discharged, or a prior order upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the order should have prospective application; or

(6) any other reason justifying relief from the operation of the order. The petition shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the order or proceeding was entered or taken. A petition under this subdivision (b) does not affect the finality of an order or suspend its operation.

(Amended May 30, 2006, effective July 1, 2006.)

COMMENTARY:

This rule complies substantially with HRCP 60. It does not override any statutory period of limitations to probate a will or determine heirs.

X. MODEL FORMS

Rule 37. AVAILABILITY.

The courts of the various circuits, acting unanimously through their administrative judges, may approve model forms of common probate, conservatorship, guardianship, trust, and miscellaneous proceeding pleadings and orders, which do not have to conform to the formatting rules applicable to individually prepared documents.

COMMENTARY:

Use of model forms would greatly lessen preparation time, mistakes, and court processing time of common court pleadings. The court should approve model forms of common petitions, notices, and orders, but the probate code no longer requires that the court provide such forms. This rule requires the administrative judges of all four circuit courts to approve the forms so that practice among the circuits will be consistent.

(Amended November 12, 1997, effective December 15, 1997; further amended April 28, 2006, effective July 1, 2006.)

Rule 38. USE OF FORMS.

Counsel shall follow substantially in form and content any approved model forms, making changes only for the specific facts and circumstances of a case.

COMMENTARY:

Once a model form has been approved, it should be substantially followed in form, order of presentation, and content throughout the state to assure conformity of application. However, the committee decided not to mandate use of preprinted forms, given strong public opposition and the difficulty of producing forms that could be used with all computer software. Thus, attorneys need not use any preprinted form but should closely follow any model forms published.

XI. ATTORNEYS' AND FIDUCIARY'S FEES

Rule 39. STATUTORY FEES; TIME OF PAYMENT.

Fees set by statute may be paid by the fiduciary and charged to the estate when they are earned, in regular installments over the accounting period, or when finally calculable. The liquidity of the estate may determine when the fees may be paid.

COMMENTARY:

Trustee's fees are still governed by statute. See HRS § 607-18. Therefore, this rule will still govern the payment of statutory trustee's fees. All other fees will be subject to Rule 40.

Rule 40. NON-STATUTORY AND EXTRAORDINARY FEES.

(a) Amount. A fiduciary may pay fees for services of a fiduciary, attorney, or other professional that are not set by statute or court rule as long as the fees are just and reasonable in amount for the scope of services rendered. The reasonableness of the fees allowed shall be determined by all the facts and circumstances of the work performed including the complexity or ease of the matter, the experience, expertise, and uniqueness of services rendered, the amount of time spent on the matter, and the amount charged by others in similar situations.

(b) Timing of Payment. A fiduciary may pay non-statutory and extraordinary fees as they are earned, subject to repayment if any interested person objects and if the court finds them excessive.

COMMENTARY:

The issue of what a fair fee is and when it gets paid is unsettled. This rule attempts to set forth some guidelines to provide certainty. Generally, professional fees, including those of an attorney, shall be compensated based on the types of services rendered. For example, where an attorney performs both legal and administrative services to an estate, the attorney should keep track, account for, and bill administrative services separate from, and probably at a lower rate from, the legal services rendered. HRS § 560:3-721(a) requires the refund of compensation paid in excess of that approved by the court.

(Amended November 12, 1997, effective December 15, 1997.)

Rule 41. EVIDENCE AND NOTICE.

Whenever there is an objection to the fees of a fiduciary or attorney, or court approval of such fees is sought for any reason, the fiduciary or attorney whose fees are at issue shall file an affidavit, setting forth the amount and basis of calculation of the fees sought and any costs advanced which are to be reimbursed, at the same time as any petition seeking approval of such fees or any response to a petition objecting to such fees. The affidavit should specifically detail the charges for the services and costs rendered to the date of the affidavit and the anticipated charges and costs to complete the matter through preparation, processing, and service of the order. Any interested person may file with the court and serve on the petitioner or its counsel an objection to the fees and costs requested no later than 24 hours prior to the hearing.

COMMENTARY:

Under the new probate code, the fees of an attorney or fiduciary are not subject to court review unless a party objects to the fees and review is sought. This revised rule requires that, whenever court approval of fiduciary or attorneys' fees is sought (either because a party objects or because a party wants such fees to be court-approved), an affidavit of the person whose fees are at issue must be filed with the initial petition or response, as the case may be. Where the work for which the fees are sought is not yet completed (such as in petitions for approval of accounts or for confirmation of sales), the affidavit should be forth an estimate of the fees to be incurred through the conclusion of the hearing.

(Amended November 12, 1997, effective December 15, 1997.)

XII. MISCELLANEOUS PROVISIONS

Rule 42. CONFLICTS OF INTEREST.

(a) Fiduciary as Attorney's Client. An attorney employed by a fiduciary for an estate, guardianship, or trust represents the fiduciary as client as defined in Rule 503(a) of the Hawai'i Rules of Evidence and shall have all the rights, privileges, and obligations of the attorney-client relationship with the fiduciary insofar as the fiduciary is acting in a fiduciary role for the benefit of one or more beneficiaries or a ward.

(b) Relationship to Beneficiaries. An attorney for an estate, guardianship, or trust does not have an attorney-client relationship with the beneficiaries of the estate or trust or the ward of the guardianship, but shall owe a duty to notify such beneficiaries or ward of activities of the fiduciary actually known by the attorney to be illegal that threaten the security of the assets under administration or the interests of the beneficiaries.

(c) Officer of Court. An attorney for an estate, guardianship, or trust is an officer of the court and shall assist the court in securing the efficient and effective management of the estate. The attorney has an obligation to monitor the status of the estate and to ensure that required actions such as accountings and closing a probate estate are performed timely. The attorney, after prior notice to the fiduciary, shall have an obligation to bring to the attention of the court the nonfeasance of the fiduciary.

(d) Sanctions. The court shall have the power and authority to impose sanctions upon any attorney who fails to properly carry out the attorney's duties to the fiduciary, the beneficiaries or ward, and the court.

COMMENTARY:

There is a great deal of uncertainty in the law as to the respective duties that an attorney owes to the fiduciary, the beneficiaries, and the court. This rule attempts to put some certainty in the respective relationships based on court rulings, ethical rules, and opinions and decisions of disciplinary counsel.

Where a fiduciary retains the services of an attorney to assist in the administration of the fiduciary estate or to represent the fiduciary in its capacity as fiduciary, an attorney-client relationship exists between the fiduciary and the attorney, and no such relationship exists between the attorney and the beneficiaries or ward of the estate. See Goldberg v. Frye, 266 Cal. Rptr. 483, 489 (Cal. App. 1990). ("Particularly in the case of services rendered for the fiduciary of a decedent's estate, we would apprehend great danger in finding stray duties in favor of beneficiaries."); see also Estate of Gory, 570 So. 2d 1381, 1383 (Fla. App. 4 Dist. 1990); Estate of Larson, 694 P.2d 1051, 1054 (Wash. 1985). Contra, see New York City Opinion 496 (1978). However, as both the Gory and Larson courts discuss, a fiduciary is not a normal client, but one who owes a fiduciary obligation to others. This fiduciary obligation, therefore, extends to the employees and agents of the fiduciary, including the attorney. Therefore, even though the attorney has no attorney-client relationship with the beneficiaries or ward, the attorney owes a fiduciary duty to notify the beneficiaries and the court of the improper action or inaction of the fiduciary. See Mallen & Smith, Legal Malpractice, §§ 26.4ff; New York City Opinion 269 (1933); ABA/BNA Lawyers' Manual on Professional Conduct 01:135 (1987). At least one court has stated that the attorney's duty of loyalty extends to the estate, and not to the individual holding the office of fiduciary: therefore, no conflict of interest existed where the attorney took action against the fiduciary for the benefit of the estate. In re Griffin, 589 N.Y.S.2d 933, 934 (A.D. 2 Dept. 1992).

This rule establishes clearly that the attorney-client relationship exists between the attorney and the fiduciary insofar as the fiduciary is acting in a fiduciary relationship, and it is therefore an amplification of the definition of the lawyer-client privilege under Rule 503 of the Hawai'i Rules of Evidence. An attorney who represents an individual who happens to be a fiduciary in an unrelated matter is not affected by this rule. The fiduciary must be

conscious of the difference between personal actions and fiduciary actions. For example, an attorney could not represent a fiduciary with respect to the administration of a trust and also represent that same individual with respect to the private business dealings of that individual, if the individual attempts to enter into a business arrangement with him or her as fiduciary because such dual representation would present a conflict of interest.

Because the fiduciary acts in a qualified manner (as a representative and for the benefit of others), the fiduciary relationship extends to the employees and agents of the fiduciary. Section (a) of the rule clarifies that the fiduciary relationship is paramount to the attorney-client relationship. Section (b) clarifies that there is no attorney-client relationship with the beneficiaries or ward of the estate, but because of the pervasive fiduciary relationship, the attorney has a duty to the beneficiaries to notify them of the malfeasance of the fiduciary. The committee limited the notification requirement to illegal activities known by the attorney to be illegal that threaten the security of the assets or the interests of the beneficiaries. If the attorney does not in fact know the acts to be illegal, he cannot be faulted for failing to inform the beneficiaries. This disclosure of what might otherwise be considered confidential information is permitted by Rule 1.6 of the Hawai'i Rules of Professional Conduct. Section (c) defines the attorney's relationship to the court, and recognizes the need to efficiently and effectively administer estates. Therefore, the attorney has an obligation to monitor the administration of the estate and to ensure that required actions take place on a timely basis. The attorney has an affirmative obligation to inform the court of the nonfeasance of the fiduciary. Section (d) allows the court to sanction the attorney for failing in his or her duties.

To summarize, the committee, after research and extensive discussion, concluded that the attorney and the fiduciary enjoy a qualified attorney-client relationship. It is qualified to the extent that the attorney also has a duty to the beneficiaries to inform them of any serious and clear malfeasance of the fiduciary, which the attorney knows to be illegal, so that they may take actions to protect themselves and their interests in the estate, and a duty to the court to monitor the progress of the estate and inform the court of the nonfeasance of the fiduciary, so that the court can call the fiduciary to account and enhance the efficiency and effectiveness of the judicial system.

Because of these qualifications to the normal attorney-client relationship, the attorney, when placed in the uncomfortable position of having to report the fiduciary client pursuant to sections (b) or (c), may feel obligated to withdraw from representation of the fiduciary. This is provided for in Rule 44.

The committee discussed the issue of whether there exist differences between the roles of the personal representative, the guardian, and the trustee, and therefore whether different standards should exist for each role. The conclusion of the committee was that the role of each type of fiduciary was so similar that the standards applied to each should be consistent.

Rule 43. COMMUNICATIONS WITH THE COURT; ADVICE.

Communication with the court staff shall be limited to essential matters that cannot be resolved in other ways. Under no circumstances shall court staff render any procedural or legal advice to attorneys, attorneys' staffs, or individuals.

COMMENTARY:

This rule conforms with current court policy. The First Circuit Court's Memo of December 22, 1983 provides that "the law clerks and all other staff will decline to provide attorneys with advice on the proper documents to file, the proper form of documents, and the appropriate contents of documents filed. They will also decline to explain written court orders and rulings."

Rule 44. WITHDRAWAL OF COUNSEL.

Effective upon approval by the court, an attorney may withdraw as counsel in matters pending before the court by filing a Withdrawal of Counsel and Substitution of Counsel, if any, signed by the client, evidencing the client's agreement to the withdrawal. If the client's consent cannot be obtained or if the attorney finds it necessary to withdraw because of a conflict of interest under Rule 42(b) or (c), an attorney may withdraw as counsel only upon filing a petition to withdraw, giving notice to the client, and receiving the approval of the court. Withdrawals are subject to the guidelines of Rule 1.16 of the Hawai'i Rules of Professional Conduct and other applicable law. The court shall determine the division of fees between the attorney who has withdrawn and the new attorney if mutual agreement cannot be reached.

COMMENTARY:

This rule adopts RCC 10.1 regarding withdrawal of counsel where the consent of the client cannot be obtained. Because of the qualified attorney-client relationship explained under Rule 42, it is possible that a conflict between the attorney's various duties exists to the extent that the attorney cannot continue to effectively represent the fiduciary. In such a situation, the attorney may petition the court for permission to withdraw, which the court will normally grant only where the attorney clearly establishes to the court (perhaps in chambers under sealed record) that effective representation is no longer possible.

There may also be circumstances where an attorney represents a client in an initial formal proceeding but the estate is then administered informally with the personal representative acting pro se. In such a situation, counsel could simply file a withdrawal of counsel signed by the client stating that the personal representative would thereafter act on his or her own behalf. Nothing in this rule is intended to supersede the law that provides that a corporate fiduciary cannot act pro se before the court.

(Amended November 12, 1997, effective December 15, 1997.)

Rule 45. EXPEDITION OF COURT BUSINESS.

(a) Required Notice. The attorney for the petitioner shall advise the court promptly when a contested matter is settled or the need for a hearing no longer exists. An attorney who fails to give the court such prompt advice may be subject to such sanctions as the court deems appropriate.

(b) Effect of Failure to Appear. The court may sanction any attorney who, without just cause, fails to appear at a hearing for which the attorney's client is the petitioner or an objecting party, or any attorney who unjustifiably fails to prepare for a presentation to the court necessitating a continuance.

Rule 46. BOND.

(a) Procedures for Posting. When the court orders that a bond be filed in connection with the issuance of letters to a fiduciary, the petitioner shall present the order appointing the fiduciary to the court for signature, without the letters evidencing appointment. The clerk shall then accept the order for filing without presentation of the letters. The fiduciary may then present a certified copy of the order by which the fiduciary was appointed to the insurer for issuance of the bond. The completed bond and letters may thereafter be presented to the court for filing and issuance of the letters.

COMMENTARY:

Posting of bond is rare in probate. However, in those rare cases where bond is required or the fiduciary wants to obtain it, the insurer will issue bond only upon receipt of a certified copy of the order appointing the fiduciary. The court clerks have balked at filing the order without issuing the letters at the same time. This rule clarifies the steps necessary to post bond and have letters issued.

(b) Payment of Costs. The fiduciary obtaining a bond may charge the costs as a proper cost of administration of the estate.

COMMENTARY:

This rule reflects statute and common practice and should eliminate uncertainty.

(c) Proceeding Against Surety. Each surety on a bond presented to the court submits itself to the jurisdiction of the court and irrevocably appoints the clerk of the court as the surety's agent upon whom any papers affecting the surety's liability on the bond may be served. The surety's liability may be enforced on petition without the necessity of an independent action. The petition and such notice of the petition as the court prescribes may be served on the clerk of the court, who shall forthwith mail copies to the surety if the surety's address is known.

COMMENTARY:

This rule conforms to the Rules of Civil Procedure to provide a consistent treatment of sureties.

Rule 47. RESERVED.

Rule 48. DELEGATION OF POWERS TO CLERK AND DEPUTY CLERKS.

(a) Permissible Delegation. In addition to duties and powers exercised as registrar in informal proceedings, the court by written order may delegate to the clerk or deputy clerks any one or more of the following duties, powers, and authorities to be exercised under the supervision of the court:

(1) to set a date for hearing on any matter and to vacate any such setting;

(2) to issue subpoenas;

(3) to certify copies of documents filed in the court;

(4) to correct any clerical error in documents filed in the court;

(5) to transfer a will to another jurisdiction pursuant to Rule 74;

(6) to enter estate closing orders in supervised and formal proceedings, if there is no objection to entry of such order by any interested person.

(b) Entry of Orders. The clerk shall enter and file all orders made and proceedings had by the clerk or deputy clerks in the permanent record of the case to which the order or proceeding pertains.

(c) Vacation and Effect of Orders. Any interested person affected by an order entered or an action taken under the authority of this rule may have the matter heard by the court by filing a petition for hearing within ten days after entry of the order or taking of the action. Upon filing of a petition, the order or action in question shall be vacated and the petition placed on the calendar of the court for the next available hearing date, and the matter shall then be heard by the judge. The court may, within the same ten-day period, vacate the order or action on the court's own motion. If a petition for hearing by the court is not filed within the ten-day period, or the order or action is not vacated by the court on its own motion within such period, the order or action of the clerk or deputy clerks shall be final as of its date subject to normal rights of appeal. The acts, records, and orders of the clerk or deputy clerks not vacated pursuant to the foregoing provision shall have the same force, validity, and effect as if made by a judge.

(d) Updating of Letters. A fiduciary at any time may request upon payment of the appropriate fee that the clerk of the court issue updated copies of the letters previously issued to the fiduciary and currently in effect, and the clerk shall certify on the face of the updated letters that they are still in full force and effect if more than three (3) years from the date the letters were originally issued has not elapsed or any renewal period has not expired.

COMMENTARY:

The definition of "Letters" in HRS § 560:1-201 provides that letters testamentary and letters of administration are effective for only three (3) years, unless renewed for good cause. Rule 48(d) has been revised to reflect this limitation.

(Amended November 12, 1997, effective December 15, 1997; further amended April 28, 2006, effective July 1, 2006.)

Rule 49. RESERVED.

PART B. PROBATE PROCEEDINGS

I. COMMENCEMENT

Rule 50. INITIAL PLEADINGS.

(a) Case Numbers. The clerk shall assign a P. No. to each probate case matter directly related to the administration of a deceased's estate. Each party presenting a document regarding the same administration of the estate of that deceased shall use the same P. No., and immediately below the P. No. on all documents shall note the type of proceeding (Small Estate, Informal, Supervised, Will Deposit, Demand for Notice, No Fault, Determination of Death) to which the pleading applies; the notation may change as the status of the proceeding changes.

COMMENTARY:

This rule changes the Rules of the Circuit Courts in defining the types of case filings allowed. Case filing designations S.E., W.D., D.N., and the like will be eliminated in favor of using a P. No. for all proceedings relating to a deceased's estate. By assigning a P. No. to a particular deceased upon the filing of an initial pleading with respect to that deceased and then requiring all later filings of any nature relating to that deceased to use the same P. No., the court can be assured of having all pleadings relating to a particular deceased in one file. In addition, assigning a P. No. upon the filing of a Demand for Notice or Will Deposit will lessen the chance that the Demand or Will is missed, because the court staff will not have to cross-index case numbers or check different classes of cases when a probate proceeding is initiated. Finally, using one case number throughout the administration of a deceased's estate will eliminate burdensome procedures and confusion when the proceeding changes form, such as when a small estate is converted into an informal probate, or an informal into a supervised. In the case of a proceeding relating to a testamentary trust, all filings shall use the same P. No. or E. No. used in the proceedings relating to a deceased's estate. E. No. refers to cases initiated as equity proceedings.

The second part of the rule, requiring a notation of the type of proceeding at the point the document is filed, conforms to civil court practice and assists the court staff and parties to readily identify the status and nature of the estate. The wording of the case caption may also change as the character of the proceeding changes, for example from "In the Disappearance of John Doe, born January 1, 1920" to "Estate of John Doe, Deceased."

(b) Identification of Beneficiaries and Heirs. The party preparing any petition shall list the names and addresses, to the extent known, of all heirs at law of the deceased and of all beneficiaries entitled to take under a will presented for probate and its codicils. If the heirs at law are other than the spouse or reciprocal beneficiary, descendants, or parents of the deceased, the petitioner shall affirmatively state that the deceased left no such survivors. The petitioner shall attach to the petition a copy of the death certificate for the beneficiary named in the will, who died before the deceased, or any other evidence, by affidavit or otherwise, to establish that the beneficiary is dead. If a beneficiary of an estate dies after the deceased but prior to the commencement of the proceeding, the petition shall identify such beneficiary's estate, or the successor beneficiary, as the case may be, as the appropriate party and shall notify such beneficiary's personal representative, if any. Alleged illegitimate children of a male deceased of whom the petitioner or applicant is aware shall also be identified and given notice of the commencement of the proceeding.

COMMENTARY:

This rule is intended to clarify the status of beneficiaries and heirs on the face of the petition and to establish why a particular person is not being considered a beneficiary of the estate. Contingent beneficiaries who will not take because the contingency giving rise to their right to take did not occur need not be given notice. (For example, where a will leaves the residuary estate to Joe, but if Joe does not survive the testator, to Bill, and Joe survives the testator, then Bill need not be given notice as his rights never vest. But if the contingency has not been settled at the time of the filing of the petition, then the contingent beneficiary must be given notice.)

The committee considered the rights of beneficiaries named in a prior will but found no statutory or common law right to notice to such possible parties solely to enable them to bring a will contest. HRS § 560:3-403(a) specifically limits the class of individuals entitled to notice of the commencement of a probate proceeding. Extending a notice right to persons named in a prior will raises many questions of whether an alleged prior will is the immediately prior will, and all the proof and capacity questions raised with the will presented for probate.

If a vested beneficiary dies prior to the filing of the petition or application, then the estate of the beneficiary shall be named as the beneficiary and given notice. If a probate estate has not been started for the deceased beneficiary, the petitioner is under no obligation to commence probate proceedings on behalf of the deceased beneficiary, but the petitioner should undertake reasonable efforts to notify known relatives of the deceased beneficiary of the vested interest.

The last sentence of the rule requires notice to those persons known to the petitioner or applicant to be alleged illegitimate children of a male deceased, so that those persons will have an early opportunity to take action to prove their relationship. In most cases, the actual determination of paternity will have to be made by the family court, but identifying the potential children should lead to more expedient and final settlement of the estate.

(c) Informal Probate Information Sheet. Any informal application that seeks probate of a will, determination of intestacy, or appointment of a personal representative shall be accompanied by a completed informal probate information sheet, in form acceptable to the registrar.

COMMENTARY:

To help the registrar determine whether advance notice will be required in informal applications, an informal probate information sheet that summarizes the nature of the proceeding must be filed.

(d) Flag Sheet. A flag sheet shall be presented pursuant to Rule 81 for any hearing on a petition that seeks admission of a will to probate, adjudication of intestacy, or appointment of a personal representative.

COMMENTARY:

A reference to the flag sheet requirement of Rule 81 is added for clarity.

(Amended November 12, 1997, effective December 15, 1997; further amended May 15, 2008, effective July, 1, 2008; further amended June 15, 2010, effective July 1, 2010.)

II. NOTICE

Rule 51. INITIAL REQUIREMENTS.

A party required to serve notice upon an interested person of the filing of a petition shall serve a copy of the pleading, the order setting time and place of hearing (if any), and will and codicils (if any), and any other documents relating to the pleading. Published notice to other interested parties shall be combined with the notice to creditors of the estate (if any), unless notice to creditors was previously published with respect to the same deceased. If a hearing is required, prior to the time set for hearing, the party shall file (a) a proof of service, with return receipts showing all persons who received service, and a statement setting forth the attempts to notify any persons who did not receive notice, along with (b) any general notice published in accordance with statute.

COMMENTARY:

This rule clarifies what documents are to be served on an interested person at the commencement of a probate proceeding. In addition, it mandates combined circuit court notice and notice to creditors (as has long been the practice), unless the notice to creditors has been previously filed, in which case the circuit court notice (if required) may be published separately. Published notice to interested persons is not required in informal proceedings (HRS § 560:3-301) but is required in formal and some small estate proceedings (HRS §§ 560:3-403(a), 560:3-1206(a)). The rule further provides that, where efforts to contact a particular person have been unsuccessful or unresponsive, the published notice will be deemed to have been sufficient service, so that the granting of any petition or application not be delayed. Rule 8 allows interested parties to appear later in the proceeding if they can establish that the attempted service was unreasonable.

(Amended November 12, 1997, effective December 15, 1997.)

Rule 52. RESERVED.

Rule 53. EFFECT OF WAIVERS AND JOINDERS.

Unless otherwise ordered by the court, a person filing a petition, memorandum, or other document shall not be required to serve the document upon any person who signed a waiver of notice or who joined in the petition; except that a person filing (a) an inventory (and any amendment or supplement) (b) a petition for approval of final accounts or (e) a petition to reopen an estate, shall serve a copy on each interested person, regardless of whether that person signed a waiver of notice. A person who has filed a waiver of notice may by ex parte petition request the court to set aside the waiver and require notice to the person thereafter.

COMMENTARY:

This rule clarifies the effect of the filing of a waiver of notice or joinder. If a waiver of notice is filed, the waiver shall apply to all regular filings except as may be specifically provided in the waiver. (For example, a beneficiary may waive notice of all proceedings except those relating to disposition of real property.) In all cases, interested persons must receive a copy of the final accounting, must receive notice of proceedings relating to real property that the beneficiaries would otherwise receive, and must receive a copy of the inventory (and any amendments or supplements).

In addition, the court always has the power to override a waiver of notice and order notice to a beneficiary despite the waiver. This might be the case where there

aware of the actions of the fiduciary. An individual who has filed a waiver could also by ex parte petition request that the court set aside the waiver.

(Amended November 12, 1997, effective December 15, 1997; further amended June 25, 2003, effective July 1, 2003.)

Rule 54. AT FINAL ACCOUNTING.

If formal approval of final accounts is sought, the personal representative shall serve a copy of the petition for approval of final accounts and the accounting on all beneficiaries whose interests have not been satisfied and on all creditors who filed claims which are neither barred nor satisfied, in the manner provided by Rule 7. Otherwise, the personal representative shall serve a copy of the final accounts to all distributees of the estate whose interests are affected thereby and a copy of the closing statement to all distributees, as well as to any creditors whose claims have neither been barred nor satisfied. A flag sheet shall be presented pursuant to Rule 81 for any hearing on a petition that seeks approval of final accounts of the personal representative

COMMENTARY:

This rule clarifies who the interested parties are to an estate at the time of final accounts and points out that unsatisfied creditors must also been given notice. This rule, combined with Rule 64, eliminates the need for publication of notice at final accounting. Notice must be served and proof made as provided in Rules 7 and 8.

A reference to the flag sheet requirement of Rule 81 is added for clarity.

(Amended November 12, 1997, effective December 15, 1997; further amended May 15, 2008, effective July 1, 2008.)

Rule 55. RESERVED.

III. SPECIAL ADMINISTRATION

Rule 56. WHEN APPROPRIATE.

An interested person may seek appointment of a special administrator where necessary to preserve the estate or to secure its proper administration, including but not limited to situations where:

(a) the existence of assets to be probated is uncertain, and an administrator is required to locate or identify assets, including investigating the merits of pursuing a lawsuit or claim for relief; or

(b) no probate assets exist, but an administrator is necessary either to complete an action of the deceased or to act on behalf of the deceased or the deceased's estate (other than receipt of no-fault insurance benefits), including but not limited to releasing legal or equitable interests of the deceased and executing documents in pending or threatened litigation where the deceased is a defendant; or

(c) for some reason, a probate cannot be opened rapidly enough to allow the commencement of a lawsuit before the running of the statute of limitations or the filing of a response or objection in cases where the deceased or the estate is a defendant; provided, however, that the special administrator's authority under this paragraph (c) shall be limited to a period of no longer than six (6) months, and a personal representative must be appointed prior to obtaining court approval of any settlement; or

(d) an emergency or other situation exists such that the estate will be prejudiced unless a special administrator is appointed pending appointment of a personal representative; or

(e) objections have been filed to the probate of a will or to the appointment of a personal representative, and it is advisable to appoint a special administrator to administer the estate with the powers of a personal representative, but not with the power of distribution, pending resolution of the objections; or

(f) a conflict of interest arises or a situation develops where the personal representative cannot or should not act temporarily, and a special administrator is appointed for the specific purpose of either resolving the conflict issue or temporarily acting until the personal representative can resume full powers.

All petitions seeking the appointment of a special administrator shall set forth the grounds for seeking the appointment.

COMMENTARY:

Many practitioners are uncertain of the proper use of a special administration, and some have, once a special administration is established, attempted to run a complete probate without having a personal representative appointed. This rule provides guidance as to the appropriate situations in which a special administrator should be appointed.

Paragraphs (a)-(d) of this Rule 56 describe the most common situations giving rise to the appointment of a special administrator. Paragraph (a) allows the appointment of a special administrator to track down assets, since many times financial institutions are reluctant to release information about a deceased's assets except to a court-appointed official. Paragraph (b) covers the situation where a lawsuit was threatened or pending against the defendant, but in settlement no assets will be paid to the probate estate, and therefore the special administrator is only required for purposes of signing documents (after court approval) and binding the deceased's estate; it does not allow a Special Administrator to collect no-fault benefits where no probate assets exists. Paragraph (b) also covers the situation of a deceased whose signature is required to sign a mortgage release or deed in satisfaction of agreement of sale or similar equitable document. Paragraph (c) covers the situation where a civil action is filed by or on behalf of the estate or the heirs or a suit is filed against the deceased or his or her estate. In most instances, informal probate can be opened rapidly enough that special administration should be unnecessary. If, however, the nominated personal representative is not a close family member, informal probate may take too long if the statute of limitations on the claim is about to expire or a response or objection must be filed. In those situations, appointment of a special administrator is appropriate, but a probate should be opened as soon as possible, and so the time allowed for special administration and the power of the special administrator are limited. Paragraph (d) covers the situation where there are probate assets and a personal representative's appointment is to be sought, but the estate will be prejudiced if no one is authorized to act on behalf of the estate in the meantime. Examples of this situation would be to track down a will, identify heirs or beneficiaries, sign tax returns on behalf of the deceased or estate, and many others.

Paragraphs (e) and (f) address the need for a special administrator when the regular probate proceeding has been commenced. Under paragraph (e), a special administrator may be appointed where a will contest or objections to the appointment of a specific individual as personal representative have been filed; rather thanhold up administration of the estate pending resolution of the contested matter, a special administrator can be appointed with all powers of a personal representative except for the power of distribution.

Paragraph (f) clarifies that a special administrator may be appointed even though a personal representative has been appointed and is acting where, for a limited period or with respect to a specific issue, the personal representative cannot or should not act. For example, if the personal representative has filed a creditor's claim against the estate, a special administrator may be appointed for the sole purpose of evaluating, allowing or disallowing, and defending the claim, while the personal representative can continue to serve on other issues. Another circumstance where paragraph (f) might apply is where the personal representative is physically incapacitated temporarily (such as by hospitalization), but will be able to resume his or her duties in the future.

(Amended June 25, 2003, effective July 1, 2003.)

Rule 57. TERMINATION.

A special administration terminates upon order of the court.

COMMENTARY:

It is often unclear when a special administrator's appointment ends. Where the special administration is a prelude to the appointment of a personal representative, the appointment of the personal representative automatically terminates the special administrator's appointment, but the order appointing the personal representative should specifically terminate the special administration.

Rule 58. ACCOUNTING.

Unless otherwise ordered by the court, a special administrator who is thereafter appointed personal representative shall not file a separate accounting, but shall include the accounting for the period of special administration with the accounting of the personal representative. A special administrator who is not appointed personal representative shall account to the court in the format and manner required of a personal representative.

COMMENTARY:

If a special administrator is later appointed personal representative, normally the fiduciary submits only one all-inclusive accounting, and this rule follows this practice. But where the special administrator is not the same as the personal representative (such as where the interim special administrator is not appointed personal representative or where a special administrator is appointed to handle a particular matter while the appointment of a general personal representative is still in effect), the rule clarifies that the special administrator must account to the court for his or her actions. Where the nature of the special administrator's duties did not involve handling assets, such accounting can often take the form of an affidavit setting forth the actions taken in compliance with the order of the court.

Rule 59. COMPENSATION.

Unless otherwise agreed between the special administrator and heirs or beneficiaries of an estate, the court shall set the compensation of a special administrator in the manner set forth under HRS § 560:3-719. The fees and costs of any petition to approve the special administrator's fees shall be borne by the estate unless otherwise ordered by the court.

COMMENTARY:

Where the special administration is instituted just to get a head start on the probate proceedings and the fiduciaries are the same, often there is no need for additional or separate compensation for the special administrator. Where a will contest or other contested matter causes a special administrator to be appointed to administer the estate, and a personal representative is later appointed, the fees should normally be allocated between the special administrator and the personal representative based on the relative work done for the estate.

(Amended November 12, 1997, effective December 15, 1997; further amended June 15, 2010, effective July 1, 2010.)

IV. INVENTORIES

Rule 60. FORMAT AND CONTENT.

The personal representative (or special administrator) may file an inventory with the court. Any inventory filed in court shall show on the first page the date of death, and the signature of the personal representative. The inventory shall show the aggregate gross value of the probate assets that have then been valued, the nature and value of each asset with a description of any loans secured by the assets, and if there is an appraisal, the name of the appraiser and the date of the appraisal. The personal representative shall make available for inspection by any interested person any appraisals or other documents indicating the valuation of any listed assets.

COMMENTARY:

The new probate code does not require that an inventory be filed with the court; it is optional. If the inventory is filed with the court, the cover sheet must show the date of death and personal representative's signature. This rule describes the other type of information that should also be included in the inventory.

(Amended November 12, 1997, effective December 15, 1997.)

Rule 61. AMENDMENT OR SUPPLEMENT.

The personal representative shall prepare an amended or supplemental inventory if necessary, as set forth in HRS § 560:3-708. If the original inventory was filed with the court, then any amendment or supplement thereto shall also be filed with the court and served upon all interested persons. An amended inventory shall completely restate the original inventory and shall clearly set forth the nature of the changes by bracketing deleted matter and underscoring added matter. The personal representative may supplement an inventory where the changes are minor in relation to the original inventory and shall only set forth the changes to be made. The personal representative shall prepare the first sheet of the amended or supplemental inventory in the same manner as the first sheet specified in Rule 60. If the original inventory was not filed with the court, then the personal representative need not file any amended or supplemental inventory with the court, but shall serve such amended or supplemental inventory upon interested persons who request it or who requested a copy of the original inventory.

COMMENTARY:

Often, personal representatives file amended or supplemental inventories, and it is unclear from the amendment or supplement just what is being changed and what effect the change has on the previously-filed inventory. This rule draws a distinction between amended inventories, which are completely restated, and supplemental inventories, which have only a few changes. By requiring compliance with Rule 60, the snapshot information on the first page is retained.

Under HRS § 560:3-708, any supplementary inventory or appraisal must be filed with the court, if the original was filed. If the original was not filed, however, HRS § 560:3-708 designates persons to whom the personal representative must furnish a copy of a supplementary inventory or appraisal, or information thereof. Prior to amendment effective July 1, 2008, the statute required the copy or information to be furnished to "persons interested in the new information." HRS § 560:3-708 now requires the copy or information to be furnished to interested persons who request it or who requested a copy of the original inventory. Rule 61 was amended to reflect this statutory amendment.

(Amended June 15, 2010, effective July 1, 2010.)

Rule 62. RESERVED.

COMMENTARY:

Rule 62 has been deleted because inventories are no longer required to be approved by the court.

(Amended November 12, 1997, effective December 15, 1997.)

V. CREDITORS' CLAIMS

Rule 63. PRESENTING CLAIMS.

A creditor seeking payment from the deceased shall present a claim by (a) delivering the claim, with an affidavit in support thereof, to the personal representative, or (b) filing the claim and affidavit with the court and timely serving a copy of the claim to the personal representative.

COMMENTARY:

This rule explains the two methods by which a claim may be presented to the personal representative under HRS § 560:3-804(1). Although presenting the claim to the personal representative directly is preferred, there may be times when filing with the court is necessary. If a claim is presented directly to the personal representative, the claimant may file a proof of service to establish a record of when the claim was presented. Claims are by and large administrative matters, and the courts

prefer to have as little paperwork in the probate files as possible. Therefore, an attempt is made in this rule to keep any court-filed documents with respect to presenting a claim as minimal as possible by not requiring that all supporting documentation be attached, but only that the claim be supported by affidavit. This rule does not prohibit the pursuit of claims by any other legal method.

Rule 64. CLOSING ESTATES; ARRANGEMENTS.

Where an estate is ready to be closed but outstanding claims remain, the personal representative shall include in the petition for approval of final accounts or Closing Statement (if any) a description of the arrangements made with the creditor for securing or satisfying the claim. These arrangements may include assumption in writing of the obligation by beneficiaries, posting of a bond or other security in an amount equal to the obligation owed plus twenty percent to cover costs of enforcement and collection where the claim is contingent or unmatured, or other arrangements approved by the court or the creditor.

COMMENTARY:

HRS § 560:3-810(b) provides the methods by which an estate may be closed, even though there are unsatisfied creditors' claims pending. This rule is intended to encourage the personal representative to work out arrangements with the claimant and present them to the court at the final accounting for approval.

(Amended November 12, 1997, effective December 15, 1997.)

VI. SALE OF REAL PROPERTY

Rule 65. PRE-EXISTING SALES CONTRACTS; CHANGES.

The personal representative may perform the deceased's contracts to sell or convey real property without an order of the court. However, when the terms of a contract are changed after the deceased's death, and the changes have a significant effect on what the deceased's estate will receive, the personal representative must first seek court approval.

COMMENTARY:

HRS § 535-1 permits the specific performance of a deceased's real estate contracts. This rule is intended to save time and money by allowing the personal representative to complete any real property transfer without the need for litigation or court approval. However, a substantialnegative alteration of the terms of the contract would be considered a new post-death sale, subject to court confirmation procedures.

Rule 66. AUTHORIZATION TO OFFER REAL PROPERTY FOR SALE.

A personal representative shall petition the court for authorization to offer for sale real property belonging to the estate if such a petition is required by the deceased's will or is demanded by a devisee in a testate probate proceeding or by an heir in an intestate probate proceeding. If all the beneficiaries, devisees or heirs who would otherwise be entitled to take the property absent a sale join in a petition for authorization to sell, then such authorization may be granted on an ex parte basis. If all such beneficiaries do not join in the petition, the court shall set the petition for hearing with notice to all beneficiaries who would otherwise be entitled to take the property absent a sale.

COMMENTARY:

HRS § 531-28.5 no longer requires a personal representative to obtain authority to offer real property for sale if the decedent's will is silent as to such authority. But the personal representative must petition the court for such authority if required by the will or demanded by a devisee in a testate probate proceeding or by an heir in an intestate probate proceeding. This rule clarifies that such authority can be granted on an ex parte basis if all interested persons join in the petition for authorization. This rule does not eliminate the need for a

confirmation of any sale if required under HRS § 531-29.

(Amended November 12, 1997, effective December 15, 1997; further amended June 25, 2003, effective July 1, 2003.)

Rule 67. CONSENT TO SALE AND DEMAND FOR COURT CONFIRMATION.

If the decedent died intestate or the will does not require that court approval of real estate sales be obtained, the personal representative may notify the beneficiaries or heirs of the personal representative's intention to list real property for sale and request the beneficiaries or heirs to consent to any sale of the property, so long as a specific price is obtained. If all the beneficiaries or heirs consent in writing, the personal representative may list and sell the real property for the approved price, without complying with the provisions of Rules 68 through 72. If the consent of all the beneficiaries or heirs cannot be obtained, then the Purchase Contract shall contain the terms set forth in Rule 68, except that the statement required in (d) thereof shall provide that the sale and commissions may be subject to court approval. Once the personal representative has received an offer which the personal representative wishes to accept, the personal representative shall advise the beneficiaries or heirs of the specific sale terms set forth in the Purchase Contract. If the beneficiaries or heirs do not demand court confirmation, then the sale may proceed without complying with Rules 69 through 72.

COMMENTARY:

The purpose of this rule is to allow the personal representative to obtain the beneficiaries' or heirs' consent to a specific sales price before listing the property for sale so that there is no need to include court confirmation as a possible condition to the sale. The possibility of court confirmation and overbid procedures may have an adverse impact on the personal representative's ability to sell the property and, thus, lower the sales price. If prior approval by all the beneficiaries or heirs is obtained beforehand, the property may be listed for sale without any reference to court confirmation.

(Amended November 12, 1997, effective December 15, 1997; further amended June 15, 2010, effective July 1, 2010.)

Rule 68. SALES CONTRACTS.

The personal representative may sign contracts for sale of real property, including in each contract: (a) the description of the property interest being sold; (b) the name and address of the buyer, (c) a statement whether an escrow agent will be used in the closing, (d) a statement that the sale and the commissions and fees payable to brokers may be subject to court confirmation and overbid procedures if required by the will or any devisee in a testate proceeding or an heir in an intestate proceeding, (e) a statement that the property will be conveyed "as is" by quitclaim or limited warranty deed, (f) a minimum deposit of the lesser of $5,000 or the full purchase price for the property, and (g) the signature of the personal representative. The personal representative shall retain the minimum deposit or place it with the escrow.

COMMENTARY:

This rule has been revised to reflect the amendment to HRS § 531-29, which now requires court confirmation of a sale only if required by the will of an heir or devisee with an interest in the property.

(Added November 12, 1997, effective December 15, 1997.)

Rule 69. NOTICE; FLAG SHEET.

If court confirmation of the sale is sought, the following procedures shall apply:

(a) Method of Notice. The petitioner shall prepare a notice of the petition for confirmation of sale and shall serve the notice on the prospective buyer and all persons interested in the property or the proceeds thereof. The petitioner shall post a copy of the notice at the courthouse. The petitioner shall set forth on the first page of the notice the offering price, the required minimum bid price, and the tax map key number(s) for the property being sold.

(b) Newspaper Publication. The personal representative may publish the notice in a newspaper in the circuit where the property is located. The court, upon petition of an interested person or upon its own motion, filed within 10 days of the filing of the petition for confirmation of sale, may order publication in the newspaper.

(c) Failure of Notice. When the personal representative does not cause the notice to be posted or served within the time required by statute, the court may continue the hearing on the petition for confirmation of sale to the next available hearing date. The court will accept written offers (overbids) until the time of the rescheduled hearing. The personal representative shall prepare the amended notice of hearing for the rescheduled hearing date and serve it on the same persons who were served with the notice of the original petition.

(d) Flag Sheet. A flag sheet shall be presented pursuant to Rule 81 for any hearing on a petition that seeks confirmation of sale of real property.

COMMENTARY:

This rule clarifies the provisions of HRS § 531-29, relating to confirmations of sale of real property, by normally waiving the need for published notice and requiring notice to the proposed buyer and the beneficiaries of the estate who would otherwise be entitled to the real property. The posted notice is required to have certain information on its first page, because often the notices run over one page, and are posted behind glass, making it difficult for potential bidders to gain access to the complete information required. Because notice must be posted at least 15 days prior to the hearing, the rule provides for continuances, and in the interest of getting the best price for the estate, allows further bids up to the time of the continued hearing.

A reference to the flag sheet requirement of Rule 81 is added for clarity.

(Amended November 12, 1997, effective December 15, 1997; further amended May 15, 2008, effective July 1, 2008.)

Rule 70. BIDS AND OVERBIDS.

(a) When Due; Deposits. A person desiring to bid on a property at a confirmation of sale hearing must deliver the bid to the court clerk prior to the time set for the hearing on the petition, accompanied by the required deposit. The court may determine that bids that are not received in time, or that are not accompanied by the required deposit, will not be considered.

COMMENTARY:

For the clarity and consistency of procedure, bids on a sale of real property are required to be delivered to the clerk prior to the time set for the hearing. The clerk will time-stamp the envelope containing the bid and deposit and then immediately deliver it to the court. However, the court can make exceptions to this general rule where the estate will benefit thereby.

(b) Overbids. If an initial bid has been offered and accepted, a further overbid from any person shall be permitted at least five percent greater than the initial acceptable bid. If such an overbid acceptable to the personal representative is made, the court shall solicit additional bids in such manner and amount as it shall determine. When more than one initial bid is offered prior to the hearing, the highest bid acceptable to the personal representative shall set the base for any additional overbids at the hearing, and where more than one initial bid is for the same amount, the bid received by the court first shall set the base for any additional overbids at the hearing. Overbids, when made, shall clearly state any conditions, contingencies, or financing terms, and the personal representative shall have the sole authority to determine whether an overbid is acceptable.

COMMENTARY:

This rule implements a number of requirements to make for the most efficient handling of confirmation of sale proceedings. The minimum first overbid amount after the initial bid is set at five percent, to save time and ensure meaningful overbids. Thereafter, additional bids will be accepted in such manner and in such

amounts as the court determines. The rule further clarifies that it is the decision of the personal representative, not the court, as to whether an overbid is acceptable.

The personal representative decides whether a bid is acceptable. Although a bid may be higher in amount than a previous bid, the personal representative may accept a lower bid whether the terms of the proposed sale are more favorable to the estate. The personal representative may want to consider whether the bid is for cash or on terms, the differences in the terms of different bids anticipating financing, and the credit worthiness of the bidder.

Rule 71. FAILURE TO COMPLETE SALE.

A successful bidder at a confirmation of sale hearing who fails to complete the purchase of the property shall pay, as the court in its discretion may order, (a) an amount sufficient to cover all escrow charges, attorneys' fees, extraordinary fees, and expenses incurred and paid by the personal representative and approved by the court as part of the confirmation of sale and (b) any additional damages proximately caused by the failure. After any such failure, the personal representative, in his or her discretion, may either reoffer the property for sale or may enter into a contract for sale with the next highest bidder who is willing to purchase at his or her last bid price, subject to court confirmation.

COMMENTARY:

If a bidder fails to complete a sale, this rule requires the bidder to pay the expenses incurred in going through the confirmation of sale process. In addition, the court may assess additional damages to make the estate whole and to discourage fraudulent bidding efforts, such as where a person who cannot satisfy a bid raises the price in an effort to scare off other bidders and then seeks to purchase the property at a lower price later, or where a speculator seeks to setup a back-to-back sale and plans to walk away from the purchase if the other buyer does not come through.

Once a sale falls through, the personal representative may then reoffer the property for sale. Backup bids are not accepted in the confirmation of sale process because so much time can elapse between the time of the confirmation hearing and the eventual closing of the sale, and market conditions can change. The attorney should be certain to include the forfeiture provision (subject to further order of the court) in the order confirming sale.

Rule 72. BROKERS', ATTORNEYS', AND PERSONAL REPRESENTATIVE'S FEES AND COMMISSIONS.

(a) Personal Representatives and Attorney's Fees. Personal representative's and attorneys' fees may be considered and approved at the time of the confirmation of sale, and may be paid directly from escrow as a cost of sale.

COMMENTARY:

This rule clarifies that extraordinary fees payable to the attorney and the personal representative are to be determined at the confirmation hearing if the attorney and personal representative desire, and may be paid out of escrow. By using this method, rather than waiting until final accounts, the fees are tied directly to the property sale and can have favorable income tax effects. Counsel should be certain to specify at the fees are to be paid from escrow at closing in the court order, so that escrow does not miss it.

Paying these fees from escrow as a portion of the sale fairly and timely compensates the personal representative and attorney and also may have tax advantages to the estate by clearly tying the fees to the sale as an expense of the sale. The language of the rule is permissive, however, as there may be reasons that the personal representative or attorney wants to wait until final accounts to have the fee approved.

(b) Broker's Commissions. In addition to the fees allowed to the personal representative and the attorney, the court may allow broker's commissions on the sale in an amount agreed to by the parties, unless there is a successful overbid.

Where a successful overbid is made at the confirmation of sale hearing and the original buyer's broker does not prevail, then the broker's commission shall be divided as follows:

Broker	Commission Allowed
Seller's	One-half of approved commission on original offered price
Original Buyer's (unsuccessful)	One-third of approved commission on original price
Successful Buyer's	One-sixth of approved commission on original offered price plus 100% of approved commission on overbid amount

No excise or sales taxes may be added to any commissions. Commissions shall be paid from escrow at the close of the sale.

COMMENTARY:

This rule has been amended to allow the parties to negotiate brokers' commissions, except where there is an overbid. Under the prior rule, if only one broker was involved, the court allowed only a 5% commission even if the parties had agreed to a 6% commission.

(Amended November 12, 1997, effective December 15, 1997.)

VII. DETERMINATION OF HEIRS

Rule 73. PROCEDURE FOR DETERMINATION OF HEIRS.

A proceeding to determine the heirs of an individual without probate and further administration may be brought where at least five years have passed since the date of the individual's death. The proceeding is commenced by the filing of a petition setting forth (1) the fact of the deceased's death with supporting evidence; (2) that the deceased left real property in the judicial circuit; (3) a description of the law determining those persons who were heirs at law of the deceased at the time of the deceased's death with citations; (4) that no estate of the deceased was previously probated in any jurisdiction; (5) the names and, to the extent known, the addresses of the heirs at law of the deceased at the time of the deceased's death; and (6) to the extent known, the names and addresses of the currently-living heirs at law of the deceased. The petitioner shall serve notice on all known living heirs at law of the deceased and shall publish notice once a week for three consecutive weeks in a newspaper of general circulation in the circuit where the property is located, with the last date of publication no later than ten days prior to the date of the hearing. At the hearing, the court may consider such evidence as is presented by the parties who appear and enter an order determining that the deceased is dead and the names of the deceased's heirs at law at the time of the deceased's death. A proceeding to determine heirs may be brought with respect to more than one individual in a family line in one proceeding. The order determining heirs shall be recorded in the Bureau of Conveyances of the State of Hawai'i.

COMMENTARY:

Proceedings to determine the heirs of an individual are frequently required to clear title to real property. This rule provides guidance to a petitioner in the elements required to bring such proceeding and requires notice after diligent inquiry to all interested persons.

VIII. DEPOSIT OF WILLS

Rule 74. DEPOSIT OF WILL WITHOUT PROBATE.

(a) Method of Deposit. Any individual may deposit with the court the original will and any codicils for safekeeping without probate after the death of the individual who executed the will. Such deposit shall be accomplished by the filing of a Deposit of Original Will signed by the person presenting the will, and to the extent known to the person presenting the will, setting forth the name and all known aliases of the deceased, the date and place of death, and the names and addresses of all known heirs at law and persons named in the will, including the nominated personal representative. The Deposit of Original Will shall be accompanied by the original will and any known codicils and a certificate of death or other suggestion of death for the individual.

(b) Assignment of Case Number. The clerk shall file the Deposit of Original Will under a P. No. for the deceased. Any later Deposit of Original Will or probate proceeding subsequently filed on behalf of the deceased shall use the same P. No.

(c) Access to Deposited Will. A will, once deposited, shall be considered a public document and open for inspection by the general public. No certified copies of deposited wills may be issued.

(d) Maintenance of Original Will; Time Limits. Unless probated or withdrawn pursuant to Rule 75, an original will deposited with the court shall be maintained for 20 years after the death of the person who executed the will, after which period the will may be recorded by the clerk in some fixed form that will provide an accurate image of the original and then the original may be destroyed.

COMMENTARY:

There is currently no formal mechanism for filing a will with the court without initiating a full probate proceeding, although HRS § 560:2-516 provides that a custodian of a will, on request of an interested person, must deliver the will to a person able to secure its probate or to an appropriate court. This rule establishes a procedure whereby the custodian of a will can deposit the will with the court, without further responsibility, and create a case file in the court system from which a probate proceeding could be initiated without further procedural obstacles (such as transferring a deposited will to a probate proceeding). Because the custodian of the will is likely not being compensated for his or her efforts, the rule does impose a notice requirement on the custodian.

The deposit of a will is not a judicial proceeding but an administrative function. No determination as to the validity of a will is made when a will is received for deposit, and the deposit does not serve to bar the general five-year period in which to probate the will of a deceased. However, the deposited will is a public record open to inspection by the general public.

Paragraph (d) provides that the will, unless probated or withdrawn, must be retained by the court for a period of 20 years from the deceased's death, which is beyond the longest period provided for probate of a will under HRS § 560:3-108. After that period, the will may be recorded by some method so as to affix the image for later retrieval (such as microfilm, microfiche, or CD-ROM), and then the will may be destroyed.

Rule 75. TRANSFER OF DEPOSITED WILL.

A will deposited with the court may be transferred by the clerk of the court at the expense of the petitioner upon petition of the withdrawing person after notice to all interested persons that establishes that the will is to be presented for probate in another jurisdiction, identifying the jurisdiction and court in which it is to be presented for probate, and attaching a certified copy of an order of the court in the transferee jurisdiction requesting the transfer. If the petition is filed by the personal representative nominated by the will, the court may grant the petition on an ex parte basis; otherwise, the petition may be granted only after notice to all interested parties and hearing.

COMMENTARY:

This rule allows a deposited will to be transferred for probate in another jurisdiction. The will is transferred directly

by the clerk of the court, so that the chances of fraud are decreased.

IX. ANCILLARY PROCEEDINGS

Rule 76. FILING OF DOMICILIARY DOCUMENTS.

When a proceeding is brought that is ancillary to a probate proceeding in another jurisdiction, the petitioner, in addition to the pleadings normally required for the proceeding, shall file with the court prior to the issuance of Letters Testamentary or Letters of Administration a certified copy of the domiciliary proceeding's (a) order of probate or administration; (b) letters testamentary or letters of administration; (c) will and any codicils admitted to probate in the domiciliary jurisdiction; and (d) any documents closing the domiciliary proceeding. Documents from a foreign jurisdiction shall be exemplified or have attached thereto an apostille.

COMMENTARY:

It should be noted that, under § 560:4-204, a domiciliary foreign personal representative will have all the powers of a local personal representative simply by filing certified copies of its appointment and any bond with the court. Neither an informal nor a formal proceeding is necessary. However, if an ancillary proceeding is initiated, then the documents described in Rule 76 must be filed.

(Amended November 12, 1997, effective December 15, 1997; further amended June 15, 2010, effective July 1, 2010.)

Rule 77. ANCILLARY INVENTORY.

The inventory filed in an ancillary probate shall include only assets subject to the jurisdiction of the court.

COMMENTARY:

Ancillary inventories should cover only assets under the court's jurisdiction. These include real property interests, certain tangible personal property, and possibly financial institution accounts located in theState of Hawaiʻi. With the Supreme Court's adoption of the doctrine of equitable conversion (Bank of Haw. v. Horwith, 71 Haw. 204, 212, 787 P.2d 674 (1990)), ancillary probate in Hawaiʻi of a vendor's interest in an agreement of sale or a mortgagee's security interest should no longer be required, but a special administration may be necessary to provide an authorized person to sign any deed in satisfaction of the agreement of sale or release of mortgage. The vendee's interest would clearly be subject to ancillary probate in Hawaiʻi.

Rule 78. RESERVED.

Rule 79. NOTICE IN ANCILLARY PROCEEDINGS.

In addition to the persons normally entitled to notice of a proceeding, the domiciliary personal representative shall be entitled to notice of all ancillary proceedings. Where the only assets under administration in this jurisdiction are specifically devised pursuant to a will admitted to probate in this jurisdiction, the residuary devisees of the estate shall not be considered interested persons after the will is admitted to probate.

COMMENTARY:

Where an ancillary proceeding administers only real property that is specifically devised by a will admitted to probate by the court, there is no need to notify other parties named in the will, including the will's residuary beneficiaries, of the local proceedings. Therefore, in such circumstances, only the specific devisee and the domiciliary personal representative are to be considered interested persons after the will is admitted to probate.

Rule 80. ACKNOWLEDGING DOMICILIARY FIDUCIARY OR BENEFICIARY AUTHORITY TO SIGN PROPERTY DOCUMENTS.

A domiciliary personal representative (or residuary beneficiary of the domiciliary estate, if the domiciliary estate has been closed) may petition the court for an order to authorize the petitioner to sign a release of mortgage or deed in satisfaction of agreement of sale or similar document affecting title to real property, without petitioning for ancillary administration. The petitioner shall state in the petition (a) the petitioner's name, address, and telephone number; (b) the state, court, and proceeding number and title of the domiciliary probate proceeding; (c) the name and address of the domiciliary personal representative and whether such fiduciary's appointment has been terminated; and (d) a description of the document for which a signature by a personal representative of the deceased is required. The petitioner shall attach to the petition a certified copy of the order appointing the domiciliary personal representative and the order of distribution of the domiciliary estate (if such latter order has been filed). The court may order the petitioner to sign the designated documents based upon the petition and accompanying papers, or upon such other evidence as the court requires.

COMMENTARY:

This rule addresses the common problem where a non-Hawaiʻi resident retains an equitable interest in real property in Hawaiʻi, such as through a mortgage or vendor's interest in an agreement of sale, and someone is needed to sign documents to release the deceased's interest. The doctrine of equitable conversion, which has been adopted in Hawaiʻi, gives that deceased's interest the character of personal property and, therefore is generally within the jurisdiction of the domiciliary estate, but Hawaiʻi's Land Court statutes and Hawaiʻi title insurers frequently require a Hawaiʻi court order acknowledging the authority of the person who attempts to sign documents. This rule provides a quick and simple way, giving full faith and credit to the domiciliary court proceedings, to acknowledge the person's ability to sign documents affecting Hawaiʻi real property. This rule should eliminate the need for special administrations previously used to appoint a person with authority to sign such documents.

(Amended June 15, 2010, effective July 1, 2010.)

X. FLAG SHEETS

Rule 81. FLAG SHEETS REQUIRED.

An original and 2 copies of flag sheets in substantially the same form as set forth in Appendix A herein, containing the information sought therein, shall be presented to the clerk of the court for all hearings to admit a will to probate, to adjudicate intestacy, to appoint a personal representative, to confirm the sale of real property, to determine an elective share, and to approve the final accounts of the personal representative. These flag sheets shall conform to the requirements of Rule 4 and shall be presented to the court no later than 10 days prior to the scheduled hearing. Flag sheets shall not be file-marked as a pleading, but shall be date-stamped by the clerk and placed in the court file for reference. Failure to present a required flag sheet in time shall cause the hearing to be continued to the next available date. Where the facts of the case as set forth in the flag sheet change after submission of the flag sheet to the court, an amended flag sheet shall be presented.

COMMENTARY:

This rule makes flag sheets mandatory in all probate proceedings in all circuits. The flag sheets are not filed as pleadings but are date-stamped as having been received by the clerk to eliminate the chance for lost documents and to provide a clear record. The flag sheet is normally placed in the court's file for ready reference by the judge and court staff.

(Amended November 2, 1995, effective January 2, 1996; further amended November 12, 1997, effective December 15, 1997; further amended May 15, 2008, effective July 1, 2008; further amended February 5, 2013, effective July 1, 2013.)

XI. CONCLUSION OF PROCEEDINGS

Rule 82. RESERVED.

Rule 83. INTERIM ACCOUNTING.

The personal representative may file a verified interim accounting with the court annually, or for longer periods, in the format and with the procedures set forth in Rule 26. If the court approves any interim accountings, the personal representative, upon filing of the final accounting, shall refer to, but not include prior approved accountings.

COMMENTARY:

In particularly complex estates which may run for years, supplying a single accounting at the end of the administration may be almost meaningless because it is so complex or records have been lost in the interim. This rule allows interim accountings to be presented and possibly also approved, so that the process can be kept up at a meaningful pace through the estate administration. The rule allows the filing of interim accountings, but they will not be approved by the court unless a request is made. If the personal representative asks for approval, the court can proceed in regular course.

(Amended November 12, 1997, effective December 15, 1997.)

Rule 84. SUPPLEMENTAL ACCOUNTING; FINAL RECEIPTS.

After approval of the final accounting, if any, the personal representative shall distribute the assets to the persons entitled thereto, file final receipts, and when applicable, file a supplemental accounting for receipts and disbursements which are not included in the final receipts for distributions. The filing of the final receipts and, if applicable, a supplemental accounting, shall serve to discharge the personal representative without further court order.

COMMENTARY:

This rule has been amended to reflect that the filing of final accounts and obtaining court approval is now optional.

(Amended November 12, 1997, effective December 15, 1997.)

Rule 85. DISTRIBUTION TO MISSING PERSONS.

If a beneficiary entitled to a portion of the estate cannot be located at the time of distribution, then the personal representative shall deal with such beneficiary's share of the estate pursuant to the provisions of Hawai'i Revised Statutes Section 560:3-914. Such distribution shall be reflected in the court order approving the distribution of assets and shall be filed by the clerk under the same P. No. as the original proceeding.

COMMENTARY:

Rarely, a beneficiary's address is unknown or is lost during the administration of the estate. In such instances, HRS § 560:3-914 allows the fiduciary to transfer the assets to the person's conservator, if any, or otherwise to the State. This rule clarifies that the transfer shall be made pursuant to court order and shall be carried in the same case number as the probate.

(Amended November 12, 1997, effective December 15, 1997.)

Rule 86. NEWLY DISCOVERED ASSETS.

Where a proceeding has been terminated and thereafter additional assets of the deceased are discovered that were not administered in the proceeding, the personal representative or other interested person may petition the court to reopen the proceeding for the purpose of administering the asset. The petition shall include statements that the creditors' claims and estate and transfer taxes, if any, have been fully satisfied, or explain to what extent they were not originally satisfied. Where the asset needs only to be distributed pursuant to court order, and all taxes and claims have been settled, the personal representative or interested person may petition the court for an amended order of distribution of the estate to include the newly discovered property. The court shall order distribution of the newly discovered property to the appropriate persons and determine whether the personal representative or interested persons and the attorney are entitled to additional fees, cost, and expenses, and the amount thereof.

COMMENTARY:

This rule addresses the situation of a forgotten asset and the need for an order distributing the asset (such as a small real property interest). This allows the amendment of the order of distribution to include the newly-discovered property and can often be completed on an ex parte basis. However, such a short-cut procedure cannot be used where the asset forms a large share of the estate and creditors' claims or tax claims were not fully satisfied in the proceeding. The court may allow reasonable fees and costs for the petition and transfer based on the effort expended.

XII. MISCELLANEOUS

Rule 87. SUBMISSION TO JURISDICTION BY NON-RESIDENT PERSONAL REPRESENTATIVE.

(a) Manner and Effect of Submission. Where an individual not a resident of the State of Hawai'i seeks appointment as special administrator or personal representative, the petition or application for appointment signed by the non-resident or the acceptance of appointment shall contain a clear and concise statement to the effect that (a) the individual fully and freely submits to the personal jurisdiction of the courts of the State of Hawai'i and (b) the individual fully, freely, and irrevocably appoints the clerk of the court in the circuit in which the proceeding is brought as the individual's agent for service of process for all purposes related to the proceeding in the State of Hawai'i.

(b) Procedure for Substituted Service. The individual so appointed shall keep the clerk of the court informed in writing of the individual's mailing address at all times. A non-resident so appointed shall keep the clerk of the court informed in writing of the non-resident's mailing address and telephone number at all times. Before any substituted service may be made on the clerk of the court, the party attempting service must make, and document to the satisfaction of the clerk of the court that the party attempting service has made, reasonable attempts at mailed or personal service. Upon service on the clerk of the court, the sole responsibility of the clerk of the court shall be to mail the pleadings and papers so served, postage prepaid, to the non-resident at the last mailing address which the non-resident shall have given the clerk of the court.

COMMENTARY:

The 1990 statutory change to allow non-residents to serve as personal representative in Hawai'i requires that the non-resident submit to the jurisdiction of Hawai'i state courts. This rule seeks to implement that requirement, both through an affirmative submission to jurisdiction (either in the petition or in a separate acceptance of appointment) and through appointment of the chief clerk of the court as the individual's agent for service of process related to the proceeding.

(As amended November 2, 1995, effective January 2, 1996; further amended November 12, 1997, effective December 15, 1997.)

Rule 88. DEMAND FOR NOTICE.

(a) Preparation and Filing. A Demand for Notice shall set forth the name of the deceased, any known aliases, approximate date and place of death (if known), the nature of the interest of the demandant in the estate, and the address of the demandant or the demandant's attorney. The Demand for Notice shall be assigned a P. No. if no proceedings have been commenced for the deceased's estate or the P. No. for the deceased's estate if proceedings have already commenced.

(b) Duty to Investigate: Demandant. Prior to filing a demand for notice in other than a pending probate proceeding, the demandant shall make a diligent search of the records of the circuit court in which the demand is being filed to determine whether probate proceedings have previously been filed. The Demand for Notice shall contain a statement that such search has been conducted.

(c) Duty to Investigate: Petitioner. Prior to filing a petition to commence a probate proceeding, the petitioner shall make a diligent search of the records of the circuit court in which the petition is being filed to determine whether a demand for notice has been filed with respect to the deceased.

(d) Validity of Demand. A Demand for Notice filed other than in a pending probate proceeding shall be effective for a period of five years from the date of filing. A Demand for Notice shall only be effective for the circuit in which it is filed.

COMMENTARY:

This rule attempts to clarify the ambiguous status of a Demand for Notice and to make sure that demands are not lost in the system. This rule puts an equal burden on the demandant and the petitioner to check the court records for pending demands and proceedings since the deceased's death or for a five-year period, whichever is shorter. The court should not have to check the files to determine if demands have been made.

Rule 89. TERMINATION OF POSSESSION OF REAL PROPERTY.

Termination of possession of real property held by the estate and distribution to those entitled thereto may be ordered on an ex parte basis upon petition that (1) states that the property is not necessary to the full and complete settlement of the estate and (2) is accompanied by the joinders of the beneficiaries who are entitled to the property under the will or the laws of intestacy.

COMMENTARY:

A personal representative has the authority to transfer assets of the estate, including real property, without court order, except under certain circumstances with respect to the sale of real property. HRS § 560:3-715. The Land Court statute, HRS § 501-171(a), provides for the transfer of an interest in real property from a probate estate to be supported by a court order of distribution, but no corresponding provision exists for Regular System property. In order to maintain consistency in probate court practice and procedures, this rule provides for an order terminating possession of property for all transfers during the administration of an estate, except those resulting from a sale (covered by other rules) or at termination and final distribution of the estate (covered by the order approving final accounts.)

(Amended June 25, 2003, effective July 1, 2003.)

Rule 90. STATUTORY ALLOWANCES.

(a) Homestead Allowance and Exempt Property. Property subject to a claim for Homestead Allowance or Exempt Property shall be distributed by the personal representative without court order upon the submission of a claim for such allowances by an eligible person to the personal representative. The person or persons receiving the allowance or property shall sign a receipt therefor.

(b) Family Allowance. A family allowance aggregating no more than $18,000 shall be distributed by the personal representative without court order upon the submission of a claim therefor by an eligible person to the personal representative. Family allowances in excess of $18,000 in the aggregate shall be paid only upon court order after petition by the individual or individuals seeking the allowance, with notice to all interested persons including creditors who have filed unsatisfied claims against the estate. The personal representative is permitted to assist and use estate resources to prepare and pursue the petition for family allowance in cooperation with or on behalf of those entitled to it. The person or persons receiving a family allowance shall sign a receipt therefor.

COMMENTARY:

Common court practice requires the filing of a claim, notice, hearings, and an order for the payment of statutory allowances. However, the governing statutes (HRS §§ 560:2-401 through -404) do not require a court order and make it clear that the allowances are to be paid by the personal representative upon claim. This rule reverses the common practice in favor of the statutory scheme.

(c) Elective Share. A petition for elective share shall be served upon all interested persons, including any recipient or beneficiary of property that may be included in the augmented estate. Any notice of hearing shall contain a statement notifying interested persons that they are required to file and serve, within 30 days from the date of service of the

petition, a statement describing any property they received from the decedent within two years of the decedent's death, its value if known, and the date it was received. Within 30 days from the date of service of the petition, any recipient of property that may be included in the augmented estate shall file and serve upon all interested parties a statement setting forth a description of the property, its value if known, and the date it was received. A flag sheet shall be presented pursuant to Rule 81 for any hearing on a petition for elective share.

COMMENTARY:

Under prior law, which allowed the surviving spouse an elective share of 1/3 of the net probate estate, the elective share petition was heard in conjunction with the petition for approval of final accounts. Current law gives the surviving spouse a percentage of the augmented estate, which includes property the decedent transferred to others, either by inter vivos gift or at death. Therefore, a separate hearing must be held to determine (a) the applicable percentage the surviving spouse is entitled to; (b) what assets are included in the augmented estate; and (c) the order in which assets shall be applied to satisfy the elective share. Creditors are not interested persons who must be served with the elective share petition. Recipients who are entitled to notice include but are not limited to trustees of trusts established by the decedent, beneficiaries under insurance policies or retirement accounts, joint tenants, and beneficiaries of trusts established by the decedent.

A reference to the flag sheet requirement of Rule 81 is added for clarity.

(Amended November 12, 1997, effective December 15, 1997; further amended May 15, 2008, effective July 1, 2008.)

Rule 91. AFFIDAVITS OF COLLECTION.

Where more than one person has equal standing to present an affidavit of collection, the person holding the asset to be collected shall transfer the asset to the first person who presents an affidavit in proper form, and the transferring person shall thereafter have no liability to any other person. Later claimants who claim that they have greater priority or right to the asset to be collected may bring a proceeding to determine rights to collected assets.

COMMENTARY:

This rule clarifies that the court will consider disputes between conflicting claimants under an affidavit of collection. (Note that to transfer an automobile, there must be coordination with the financing entity which usually holds the Certificate of Ownership, the person seeking the transfer who usually holds the Certificate of Registration, and the county finance department.)

Rule 92. TRANSFER OF TYPE OF PROCEEDING.

When a personal representative discovers after the commencement of a proceeding that the assets of the estate are greater in amount than originally thought, and that the value of the assets thereby exceeds the proper jurisdictional amount for a small estates proceeding, the personal representative shall petition the court for change to informal, formal, or supervised proceedings. Likewise, where the assets of the estate are less than originally thought, the personal representative in his or her discretion may petition the court for change to a small estates proceeding. In the event that the notice requirements for the new procedural level are more stringent than the notice requirements originally followed, the more stringent requirement shall be satisfied prior to the court granting the petition.

COMMENTARY:

This rule simplifies the transfer of a proceeding from small estates to informal or supervised and vice versa. With the use of a single case number under Rule 50 for all proceedings relating to a particular deceased, no petitions to terminate one level of proceeding and transfer of documents to new files will be necessary, as all factual data and prior determinations can remain in effect. The rule recognizes that notice requirements may be different for different levels of proceedings and therefore requires

that the more stringent requirement be satisfied. For example, there is a one-time publication requirement for estates under $10,000 compared to the three-time publication requirement for estates subject to supervised proceedings. In addition, if an estate is opened informally, there is no publication requirement. If it is desirable to close the estate formally before the statute of limitations provided in HRS § 560:3-108(a)(3) has expired, publication would be required prior to the submission of the Petition for Approval of Final Accounts.
(Amended June 25, 2003, effective July 1, 2003.)

Rule 93. PROBATE OF WILL WITHOUT ADMINISTRATION OF ASSETS.

Where there are no probate assets to be administered, and no will has been admitted to probate or a determination of heirs made in this jurisdiction or elsewhere, any interested person may file an application with the registrar or petition the court to probate the will of a deceased without the appointment of a personal representative and without continued administration. The content of the application or petition and the notice requirements (other than notice to creditors) shall be substantially similar to those for informal or formal probate of a will, as the case may be.

COMMENTARY:

Often a will contains clauses that nominate conservators of minors or incompetents or that exercise a power of appointment. If there are no probate assets, this rule allows the court to pass on the validity of a will without any other action.

(Amended November 12, 1997, effective December 15, 1997; further amended April 28, 2006, effective July 1, 2006.)

Rule 94. DISCLAIMERS.

A person who desires to disclaim an interest in property shall comply with the delivery and filing requirements of HRS § 526-12. If no probate estate has been opened for the deceased, the person shall file the disclaimer with the court having jurisdiction if there had been a probate estate, as provided in HRS § 526-12(c)(2) or (d)(2), and the clerk shall accept the document without court order and assign a P. No. to the disclaimer, which P. No. shall be used in any later proceedings regarding the deceased. Upon receipt of a disclaimer, the Personal Representative or Trustee may file the document in the probate or trust proceeding.

COMMENTARY:

Even though HRS § 526-12 does not require that the Personal Representative or Trustee or disclaimant file a disclaimer with the court, the fiduciary or disclaimant may desire to do so in order to have independent proof of the date the disclaimer was made for estate tax purposes. HRS § 526-15 permits recordation or filing of a disclaimer, and the rule acknowledges that the fiduciary or disclaimant can file the disclaimer in the probate or trust proceeding.
(Amended June 25, 2003, effective July 1, 2003.)

Rule 95. ACKNOWLEDGEMENT OF AUTHORITY.

(a) Application. To obtain an Acknowledgment of Authority pursuant to HRS. § 560:4-205, a domiciliary foreign personal representative shall file with the Registrar (1) an Application for Issuance of Acknowledgment of Authority signed by the foreign personal representative or its counsel verifying the foreign personal representative's appointment in the decedent's domicile and requesting the issuance of an Acknowledgment of Authority, and (2) certified copies of the foreign personal representative's Letters Testamentary or Letters of Administration, along with a certified copy of any official bond. A domiciliary foreign personal representative appointed in a country other than the United States, shall file with the Letters Testamentary or Letters of Administration and bond, (i) an authentication pursuant to Rule 15(a)(2) of the Hawaiʻi Probate Rules, and (ii) a translation of any non-English

documents pursuant to Rule 15(d) of the Hawaiʻi Probate Rules.

(b) Acknowledgment. If the Application for Issuance of Acknowledgment of Authority is approved by the Registrar, the Registrar shall issue an Acknowledgment of Authority, which shall expire three years from the date of issuance, and such limitation shall be stated on the face of the acknowledgment of authority.

(Added June 25, 2003, effective July 1, 2003.)

Rules 96.-99. RESERVED.

PART C. CONSERVATORSHIP AND GUARDIANSHIP PROCEEDINGS

PREFATORY NOTE: Unless otherwise provided, in Part C of these rules, the same rules that apply to conservatorship apply to guardianship of the property.

I. COMMENCEMENT OF PROCEEDING

Rule 100. CASE NUMBERS.

(a) Except as provided in subsection (b), the clerk of the court shall assign a C. No. to all proceedings for conservatorship. A person preparing a pleading shall indicate the C. No. and immediately below the C. No., in parentheses, a notation of whether the matter is for Protective Arrangement, Conservator of Minor, Conservator of Adult, or Small Conservatorship.

(b) Initial Protective and Guardianship Proceedings. The party may file one petition for a protective proceeding and for a guardianship of the same adult, which petition shall be assigned a CG. No. A person preparing a pleading shall indicate the CG. No. and immediately below the CG. No. in parentheses, a notation that the matter is for Conservator and Guardian of Adult. The petition shall also comply with the notice requirements applicable to both protective proceedings and guardianship proceedings. The petition shall also include all of the information required in HRS §§ 560:5-304 and 560:5-403.

(c) Flag Sheet. A flag sheet shall be presented pursuant to Rule 103 for any hearing on a petition that seeks appointment of a conservator or appointment of a conservator and a guardian for an incapacitated adult.

COMMENTARY:

1995 Commentary: This rule brings the guardianship practice in line with the probate practice under Rule 50, in that all guardianship of the property proceedings, no matter what the jurisdictional procedural amount, will have one case number. Thus, if a small guardianship grows beyond the clerk's jurisdiction, or a regular guardianship is depleted to the point of falling within the small guardianships jurisdiction, change of the jurisdictional procedure can be done simply by a petition and order to note the changed circumstances, and a new proceeding need not be initiated.

Indicating the nature of the proceeding below the case number will help clarify the context of the guardianship and the rules to be applied. A guardianship of a minor terminates automatically upon the minor's attaining the age of majority or emancipation unless extended by the court. If an incapacitated minor is under guardianship, then upon attaining majority, the guardian should file a petition to continue the guardianship as one for an adult.

2004 Commentary: Under HRS § 560:5-106, the probate court has exclusive jurisdiction over protective proceedings and concurrent jurisdiction with family court over guardianships of adults in cases where there is also a protective proceeding concerning the adult. Changing "G. No." to "C. No." reflects terminology in Article V of Chapter 560, effective January 1, 2005, where "guardian" is used instead of "guardian of the person" and "conservator" instead of "guardian of the property." In addition, H.R.S. §§ 571-14 and 603-21.5 were amended to provide the probate court concurrent jurisdiction with family court over adult guardianships, effective January 1, 2005, consistent with subject matter jurisdiction provisions in Article V of the

Hawaii Probate Code (previously H.R.S § 560:5-102; as of January 1, 2005, H.R.S § 560:5-106). The "CG. No." case number is for cases where guardianship and conservatorship are sought for the same adult person at the outset of the case. Guardianship (formerly "guardianship of the person") proceedings for an adult person initiated in the Family Court (in cases bearing an "FC-G" case number designation) and conservatorship (formerly "guardianship of the property") proceedings for the same adult person initiated in probate court (in cases initiated before the Hawaiʻi Probate Rules were adopted, bearing an "SP" number, or in cases initiated under the Probate Rules effective prior to January 1, 2005, bearing a "G. No." or in cases initiated on or after January 1, 2005, bearing a "C. No."), if consolidated in the probate court (as permitted effective January 1, 2005), will retain both separate case numbers and will not be assigned a "CG." number.

To the extent practicable, all Hawaiʻi Probate Rules and administrative orders that presently apply to "guardianship of the property" (G. No.) proceedings shall also apply to "conservatorship" and "conservatorship and guardianship" (C. No. and CG. No.) proceedings.

2008 Commentary: A reference to the flag sheet requirement of Rule 103 is added for clarity.

(Rule and commentary amended February 16, 2005, effective nunc pro tunc January 1, 2005; further amended May 15, 2008, effective July 1, 2008.)

Rule 101. PERSONAL INJURY RECOVERIES.

When a minor or incapacitated person receives a settlement or judgment from any claim or action, a conservatorship action must be initiated by the plaintiff's attorney and any settlement approved by the court insofar as it affects the prjotected person or respondent. The judge presiding in probate shall appoint a conservator for the minor or incapacitated individual and determine whether any settlement is reasonable. A flag sheet shall be presented pursuant to Rule 103 for any hearing on a petition that seeks compromise of a tort claim on behalf of a minor or incapacitated person.

COMMENTARY:

Too frequently in tort actions, the plaintiff's attorney forgets about the need for a conservator to represent the interest of an injured person and then attempts to have the trial judge assume jurisdiction of a conservatorship proceeding to wrap into any settlement or judgment. While this may not cause problems outside the First Circuit, in that judges of the other circuits are generally experienced in conservatorship matters, if a trial judge in the First Circuit assumes jurisdiction of the conservatorship for purposes of disposition of the tort action, very often the requirements of the statute and rules are not met and the conservatorship has to be "cleaned up" later by the probate judge. By requiring the probate judge, and not the trial judge, to pass on matters with respect to the receipt of a settlement or award, greater efficiency will result as "clean up" proceedings should be eliminated.

A reference to the flag sheet requirement of Rule 103 is added for clarity.

(Amended April 28, 2006, effective July 1, 2006; further amended May 15, 2008, effective July 1, 2008.)

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Rule 102. PHYSICIAN'S LETTERS.

(a) Conservatorship. The petitioner in a proceeding for a conservatorship may submit a physician's letter or report which states: (1) the respondent suffers from an impairment in the ability to receive and evaluate information or to make or communicate decisions (even with the use of appropriate and reasonably available technological assistance), or another physical, mental or health impairment; (2) the medical cause (diagnosis) of said impairment; (3) the prognosis for the impairment; (4) the impact of the impairment upon the respondent's ability to manage the respondent's property and business affairs effectively; (5) how long the physician has been treating the respondent; and (6) any other matter the physician deems relevant.

(b) Guardianship. The petitioner in a proceeding for a guardianship may submit a physician's letter or report which states: (1) the respondent is unable to receive and evaluate information or make or communicate decisions to such extent that the respondent lacks the ability to meet essential requirements for physical health, safety, or self-care (even with the use of appropriate and reasonably available technological assistance); (2) a description of the nature, type, and extent of the respondent's impairment; (3) the prognosis for the impairment; and (4) any other matter the physician deems relevant.

COMMENTARY:

Doctors are generally reluctant to declare a person "incompetent," but incompetency is not the test for protective proceedings. This rule clarifies that the letter or report of the doctor upon which a petition for conservatorship and guardianship relies must (1) address the respondent's ability to manage the respondent's property and affairs in an effective manner as a result of the respondent's impairment and (2) provide other information to enable the court to evaluate the weight to be given to the letter or report.

(Amended April 28, 2006, effective July 1, 2006; further amended February 5, 2013, effective July 1, 2013.)

II. HEARINGS

Rule 103. FLAG SHEETS.

An original and 2 copies of flag sheets in substantially the same form as set forth in Appendix A herein, containing the information sought therein, shall be presented to the clerk of the court for all hearings to appoint a conservator, to appoint a conservator and a guardian for an incapacitated adult, to compromise a tort claim on behalf of a minor or incapacitated person, and to confirm the sale of real property. These flag sheets shall be presented to the court no later than 10 days prior to the scheduled hearing. Flag sheets shall not be file-marked as a pleading but shall be date-stamped by the clerk and placed in the court file for reference. Failure to present a required flag sheet in time shall cause the hearing to be continued to the next available date. Where the facts of the case as set forth in the flag sheet change after submission of the flag sheet to the court, an amended flag sheet shall be presented.

COMMENTARY:

This rule makes flag sheets mandatory in all conservatorship and guardianship proceedings in all circuits. The flag sheets are not filed as pleadings but are date-stamped as having been received by the clerk, to eliminate the chance for lost documents and to provide a clear record. The flag sheet is normally placed in the court's file for ready reference by the judge and court staff.

(Amended June 25, 2003, effective July 1, 2003; further amended April 28, 2006, effective July 1, 2006; further amended May 15, 2008, effective July 1, 2008; further amended February 5, 2013, effective July 1, 2013.)

III. NOTICE

Rule 104. TO WHOM.

(a) Conservatorship. The petitioner in a conservatorship or protective arrangement proceeding shall notify the persons designated by statute and shall also serve notice on:

(1) Any attorney appointed by the court to represent the respondent.

(2) The Department of Veterans' Affairs in cases wherein the respondent is a veteran of the military receiving benefits from that department.

(3) Any other attorney representing the respondent.

(4) Any Kokua Kanawai appointed pursuant to Rule 113.

(5) Any guardian ad litem appointed pursuant to HRS §560:5-115.

(b) Guardianship. The petitioner in a guardianship proceeding shall notify the persons designated by statute and shall also serve notice on:

(1) Any attorney appointed by the court to represent a respondent.

(2) Any other attorney representing the respondent.

(3) Any Kokua Kanawai appointed pursuant to Rule 113.

(4) Any guardian ad litem appointed pursuant to HRS §560:5-115.

COMMENTARY:

This rule is consistent with HRS §§ 560:5-205, 560:5-404 and 560:5-309 and does not require service of notice of a conservatorship or guardianship proceeding on a child under the age of fourteen.

(Amended April 28, 2006, effective July 1, 2006.)

Rule 104.1. DEMAND FOR NOTICE.

(a) Preparation and Filing:

(1) CONSERVATORSHIP. A person filing a Demand for Notice shall set forth the name of the respondent or protected person, any known aliases, the nature of the interest of the demandant in the estate, and the address of the demandant or the demandant's attorney. The clerk of the court shall assign a C. No. to the Demand for Notice if no proceedings have been commenced for the respondent or protected person's estate or the C. No. or G. No. for the respondent or protected person's estate if proceedings have already commenced.

(2) CONSERVATORSHIP AND GUARDIANSHIP. A person filing a Demand for Notice shall set forth the name of the respondent or protected person, any known aliases, the nature of the interest of the demandant in the person and/or estate, and the address of the demandant or the demandant's attorney. The clerk of the court shall assign a CG. No. to the Demand for Notice if no proceedings have been commenced for the respondent or protected person's estate or the CG. No. for the respondent or protected person's estate if proceedings have already commenced.

(b) Duty to Investigate: Demandant. Prior to filing a demand for notice in other than a pending conservatorship and/or guardianship proceeding, the demandant shall make a diligent search of the records of the circuit court in which the demand is being filed to determine whether conservatorship and/or guardianship proceedings have previously been filed, and a diligent search of the records of the family court in the circuit in which the demand is being filed to determine whether guardianship proceedings have previously been filed in family court, and shall state in the Demand for Notice that such search has been conducted.

(c) Duty to Investigate: Petitioner. Prior to filing a petition to commence a conservatorship and/or guardianship proceeding, the petitioner shall make a diligent search of the records of the circuit court in which the petition is being filed and a diligent search of the records of the family court in the circuit in which the petition is being filed to determine whether a demand for notice has been filed with respect to the respondent or protected person.

(d) Validity of Demand. A Demand for Notice filed other than in a pending conservatorship and/or guardianship proceeding shall be effective for a period of five years from the date of filing. A Demand for Notice shall be effective only for the circuit in which it is filed.

(Added June 25, 2003, effective July 1, 2003; further amended April 28, 2006, effective July 1, 2006.)

Rule 105. METHODS OF PROVIDING NOTICE.

(a) Generally. Except as provided in paragraph (b) below, notice in protective proceedings shall be provided by any method permitted under HRS § 560:1-401 by which the person notified signs a receipt therefor. Whenever the statute or an order of court requires or permits service by publication of notice, any publication pursuant thereto shall be made at least once a week for three consecutive weeks, the last date of publication being at least ten days prior to the date set for the hearing, in a newspaper of general circulation in the judicial circuit in which the petition is brought, pursuant to the provisions of Rule 9.

(b) Personal Service. Pleadings to initiate a protective proceeding shall be personally served on the respondent as provided for by HRS §560:5-309 or 560:5-404, whichever is applicable, and a return of service filed with the court. The pleadings shall be personally served by any person who is not a party and not less than 18 years of age.

COMMENTARY:

HRS § 560:5-309(a) provides that notice of a hearing on the petition for guardianship "shall be served personally on the respondent." HRS § 560:5-404 provides that "notice of hearing on a petition for conservatorship or other protective order shall be served personally on the respondent, if the respondent has attained fourteen years of age." The meaning of the phrase "shall be served personally" has not been defined, and this has led to confusion about whether notice must be served by a sheriff or police officer, or whether the method can be "any method by which the person entitled to notice receipts for a copy thereof," as provided by HRS § 560:1-401(1). It would appear that if it can be shown that the individuals entitled to notice actually did receive notice and signed a receipt therefor, the expense and sometimes intimidating circumstances of having a public officer formally serve process is unnecessary.

This rule clarifies the method of notice required in conservatorship or guardianship proceedings. The rule tracks the Rules of Civil Procedure. The individual regarding whom the action is brought should be served if at all possible (and effective), given the person's mental capacity, but otherwise service may be made on other persons, in the priority stated in the rule. All other individuals who are entitled to notice by statute or court order may be served in person, by mail, or by any other method allowed by HRS § 560:1-401, and need not be served by sheriff or other official.

The rule requires formal service of process on the respondent only at the initiation of a protective proceeding. Notice by mail or hand delivery is sufficient for proceedings after the guardianship, conservatorship or protective arrangement has been established.

(Amended November 12, 1997, effective December 15, 1997; further amended April 28, 2006, effective July 1, 2006.)

Rule 106. AFTER APPOINTMENT PROCEEDINGS.

(a) Proceedings Commenced Prior to January 1, 2005.

Those persons initially entitled to notice of the petition for guardianship of the property or protective arrangement shall continue to receive notice of all subsequent pleadings in the case, except to the extent specifically waived by a person entitled to notice or ordered by the court.

(b) Proceedings Commenced After January 1, 2005.

(1) CONSERVATORSHIP. All subsequent pleadings and any petition for order after the appointment of a conservator or any other protective order shall be served upon the protected person (if 14 years of age or older, not missing, detained or unable to return to the United States), the conservator of the protected person's estate, and any other person as ordered by the court.

(2) GUARDIANSHIP. All subsequent pleadings and any petition for an order after the appointment of a guardian shall be served upon the ward, the guardian, and any other person as ordered by the court.

COMMENTARY:

See HRS § 560:5-404(b), effective January 1, 2005. The prior statutes required notice to particular persons at the initiation of a proceeding but had no specific notice requirements for later pleadings such as accountings and termination of the proceeding. For cases initiated prior to January 1, 2005, subsection (a) of this rule continues the notice obligation to those individuals originally entitled to notice, unless specifically waived by the person entitled to notice or ordered by the court. For cases initiated on or after January 1, 2005, subsection (b) of this rule clarifies the list of persons to whom notice must be provided after the initial appointment proceeding, unless specifically waived by the person entitled to notice or ordered by the court.

(Amended April 28, 2006, effective July 1, 2006.)

IV. FINANCIAL ARRANGEMENTS

Rule 107. DEPOSIT AND INVESTMENT OF FUNDS.

(a) Bond.

(1) The court may require a guardian of the property to furnish a bond to insure the guardian's faithful discharge of all duties according to law, with sureties as it shall specify. The bond shall be in an amount determined by the court. The court in lieu of sureties on a bond, may accept other security for the performance of the bond, including a pledge of securities or a mortgage of land.

(2) For conservatorships, the court may require a conservator to furnish bond in an amount as set forth in HRS § 560:5-415. If the court has required the conservator to furnish bond and the value of the estate in the conservator's control significantly increases or decreases, the court may order an appropriate adjustment in the amount of bond at the time of the conservator's regular accounting.

***COMMENTARY*:**

Rule 107(a)(1) reflects the language of former HRS §560:5-411.

(b) Reduction or Elimination of Bond Requirement. The court may consider reducing or eliminating the requirement for bond in the following situations:

(1) Where the bulk or all of the estate in the conservator's control will be deposited in a federally-insured financial institution located in the State of Hawaiʻi in the names of the conservator and the conservator's attorney or law firm, the signatures of both the conservator and such attorney, or a representative of the law firm, being required for withdrawal purposes.

(2) Other arrangements as counsel may suggest wherein the estate in the conservator's control will be adequately protected, without involvement of the court clerk.

COMMENTARY:

This rule when adopted in 1995, echoed the then current requirements of a First Circuit Court Probate Memo which was an attempt to eliminate the former role of the clerk of the court in having to counter-sign all guardianship withdrawals by substituting the guardian's attorney in the role formerly held by the clerk of the court. This rule now clarifies that the actual attorney, or any member of the law firm representing the conservator, may be so empowered to facilitate signatures by the attorney.

(c) Deposit of Funds. Unless otherwise ordered by the court, the conservator shall establish two accounts for the conservatorship funds as follows:

(1) Such amount or amounts approved by the court for regular expenses of the protected person and the conservator may be deposited in an interest-bearing checking or savings account with a federally-insured financial institution located in the State of Hawaiʻi in the name of the conservator as conservator of the protected person, the signature of only the conservator being necessary for withdrawal purposes.

(2) The balance (or all) of the funds of the conservatorship estate shall be deposited in an interest-bearing savings account with a federally-insured financial institution located in the State of Hawaiʻi in the name of the conservator as conservator of the protected person, with the

signature of both the conservator and the conservator's attorney (or any member of the law firm representing the conservator) being required for withdrawal purposes. The attorney for the conservator shall be responsible for ensuring that the accounts of the conservatorship are established as required by this rule. Where a corporate fiduciary is appointed conservator, or where an attorney is appointed as conservator, the court may order that funds may be maintained in a single account requiring the signature of only the fiduciary.

COMMENTARY:

This rule allows a conservatorship to have two accounts: one for regular approved expenditures requiring only the conservator's signature, and another to hold all other funds requiring two signatures, that of the conservator and the conservator's attorney (or any member of the law firm representing the conservator). The rule requires the accounts to be interest-bearing (unless otherwise ordered by the court), so that maximum advantage can be had to the estate. All such accounts must be in a federally-insured financial institution in the State of Hawaiʻi to ensure the court has jurisdiction over the funds.

Where the funds of the conservatorship are so large as to exceed the insured amount provided by the financial institution, the court may order that additional accounts be maintained at additional financial institutions, so as to provide the maximum insurance on deposits possible. Where the conservatorship funds are so large that multiple accounts are required, however, the conservator may suggest to the court that a more formal and flexible investment policy be adopted, allowing funds to be invested in securities or mutual funds.

Because corporate fiduciaries are generally adequately insured or bonded, and where an attorney is appointed who has malpractice insurance covering the attorney's rule as a conservator, the court may dispense with the two-signature requirement.

(d) Investment of Assets. Where the assets of the conservatorship estate are sufficiently large in amount, a corporate fiduciary, and with prior court authority, an individual conservator may invest conservatorship assets in securities, mutual funds, common trusts funds, or other investments that provide a higher return than a financial institution account with adequate security of investment.

COMMENTARY:

Where the assets of the conservatorship are significant in amount, depositing all funds in a bank account may be unreasonable. This rule allows the court to permit more diversity of investment as long as the assets are invested in reasonably safe vehicles. The rule is automatically approved for corporate fiduciaries, but individual fiduciaries would have to have specific court authority.

***(*e) Setting Forth Plan in Petition.** All budgets, investment plans, and account arrangement plans must be set forth in the petition by which the plan is proposed to the court. Every petition for appointment of a conservator shall set forth a proposed investment plan consistent with this rule.

COMMENTARY:

By requiring the petitioner to think out the overall plan of investment, distribution, and administration prior to the filing of the petition, Rules 107 and 108 will lead to better fiduciary administration and greater efficiency in the courts by shortening the time needed for court review and evaluation of the conservatorship plans. A budget is required by statute. HRS § 560:5-403(b)(9).

(Amended April 28, 2006, effective July 1, 2006.)

Rule 108. BUDGETS.

Where it is anticipated that regular distributions will be made for the benefit of the protected person during the conservatorship administration, the petition for appointment of the conservator, and all subsequent petitions for approval of accounts, shall include a proposed itemized budget of income and expenditures, including all sources of income no matter where derived or to whom paid for the benefit

of the protected person. Such budget as shall be approved by the court shall control the actions of the conservator until amended by court order, provided that:

(1) the conservator may vary the allocation of funds expended between approved budget categories, as long as the overall budget limitations are not exceeded;

(2) the conservator may not in any accounting year exceed the overall approved budget by more than ten percent without prior court order;

(3) where an approved budget is intended to be in effect for more than one calendar year, the budget amounts shall be automatically increased to reflect inflation based on changes in the Consumer Price Index for urban Honolulu as established by the United States Department of Commerce;

(4) necessary medical and dental expenses of an adult protected person, regardless of amount, may be paid without prior court order;

(5) extraordinary necessary medical and dental expenses of a minor may be paid without prior court order; and

(6) all taxes owed by the protected person may be paid without prior court order.

COMMENTARY:

By having a pre-approved budget, conservatorship administration should be better planned and more responsive to the protected person's needs. Having a clear budget will also prevent misuse of funds resulting from the conservator's misunderstanding of his or her authority. Because a budget is by definition anticipatory, the rule provides several degrees of flexibility, to prevent unnecessary court proceedings for minor items (shifting between budget categories or small variations from the approved budget) and essential expenditures (medical and dental costs and taxes). However, a distinction is drawn between the medical and dental expenses of an adult (which can be paid in total without court approval) and those of a minor (which are limited to extraordinary expenses). This distinction is drawn because of the parents' continuing obligation of support of the minor, which obligation includes provision of normal medical and dental care. Catastrophic expenses of a minor, therefore, may be paid without prior court order.

"Necessary" medical and dental expenses are those that are not purely cosmetic in nature and would include those of a cosmetic nature where a medical doctor certifies that such expenses are necessary to the mental or emotional health of the protected person.

The rule requires full disclosure of all funds available to protected person, such as social security benefits, retirement benefits, and annuities, whether paid to the conservator or some other person, so that the court may effectively evaluate the suggested budget.

(Amended April 28, 2006, effective July 1, 2006.)

Rule 109. NEED FOR ADDITIONAL FUNDS.

Where funds are necessary or advisable to be expended for the benefit of the protected person in excess of those approved by budget pursuant to Rule 108, the conservator may not make any such expenditures without prior court approval. Any petition for approval of special expenditure shall clearly and completely set forth (1) the nature and value of the conservatorship estate at that time; (2) the nature and cost of the proposed special expenditure; (3) the reason why such expenditure is necessary or advisable; and (4) the impact the special expenditure will have on the ability of the conservatorship to provide for the future needs of the protected person. The court may impose sanctions on the conservator for any expenditures made beyond those approved pursuant to Rule 108 without prior court approval.

COMMENTARY:

This rule sets forth the necessity of the conservator to seek prior court approval for expenditures beyond those pre-approved under Rule 108. The conservator must justify the expenditure and evaluate the impact of the expenditure on the future ability of the conservatorship to meet the needs of the protected person.

(Amended April 28, 2008, effective July 1, 2006.)

Rule 110. Conversion to trust; funding trust.

(a) Funding a Pre-Existing Trust. Where an individual or any other person has established a trust of which the individual is the primary beneficiary for life, the court upon petition may order the individual's assets to be transferred to said trust or may appoint a conservator or special conservator to transfer some or all of the individual's assets to the trustee of said trust, without further accounting to the court. In appropriate circumstances, the court may order the conservator to transfer future assets such as a cash flow, annuities, royalties, or the like to be transferred to the trust upon receipt.

COMMENTARY:

Many individuals establish revocable trusts for their own benefit and intend them to act as will substitutes. Where such a management vehicle has been voluntarily established by the individual before becoming incapacitated, the court may order that assets not already placed in trust be transferred to the trust and thereby remove them from the continued supervision of the court. In some cases, someone other than the individual (e.g., the individual's parent or grandparent) may have established a trust for the individual's benefit. While the court may authorize the transfer of the individual's assets to a trust established by another, before seeking such action, the petitioner should consider and advise the court of the potential tax consequences to the individual and how the proposed transfer affects the individual's estate plan.

Although the court can order the funding directly without appointing a conservator pursuant to HRS §560:5-412, in most cases, a conservator or special conservator should be appointed to facilitate the transfer of the assets into the trust.

Where assets may continue to be received by the individual, such as from an annuity, retirement plan, irrevocable trust, and the like, the court may appoint a permanent conservator whose authority is limited to transferring the assets to the trust as they are received by the protected person.

(b) Converting Conservatorship into a Newly-Created Trust. Upon petition of the conservator or other interested person, the court may grant the conservator or a special conservator the authority to establish a trust for the benefit of the protected person and to transfer the assets of the protected person to the trustee of the trust for administration. Any such trust must be for the exclusive benefit of the protected person provided that the court may include as beneficiaries of the conservatorship assets the protected person's spouse or reciprocal beneficiary (if any) and the protected person's dependents (if any). Unless the court has approved the designation of other beneficiaries, the trust shall provide that, upon the death of the protected person, the remaining assets be distributed to or held in continued trust for those individuals who are determined to be the beneficiaries of the protected person's will in a probate proceeding or a proceeding brought under Rule 93 or similar law in another jurisdiction, or if the protected person leaves no will, those persons determined to be the heirs at law of the protected person. No amendments may be made to the trust after establishment except by order of the court. The court in its discretion may provide for periodic accounting to the court by the trustee or waive such accounting to the court in lieu of accounting to the protected person and other interested persons.

COMMENTARY:

HRS § 560:5-411(a)(4) grants the court the authority to create revocable or irrevocable trusts for a protected person which may extend beyond the person's life or disability. This rule provides guidance for transferring assets of the conservatorship estate to a newly-created trust. To conform to the individual's estate plan (if any), the trust may benefit those persons during the protected person's life that would normally benefit from the protected person's assets (such as a spouse or reciprocal beneficiary and dependents) and must be distributed or retained in trust at the protected person's death in conformity to the protected person's last will and testament as determined under regular probate proceedings or Rule 93, or in the absence of a valid will, to the

individual's heirs at law. Such transfer will be pursuant to the controlling authority, but will not thereby be subject to probate proceedings themselves. Because HRS § 560:5-411(a)(4) and (7) will permit the conservator to create, revoke or amend the protected person's revocable trust or will, with the approval of the court, the conservator may be able to change the beneficiaries of the protected person's estate plan to persons other than those designated in the documents created by the protected person prior to the adjudication of incapacity. Absent extraordinary circumstances, the protected person's existing estate plan should be maintained.

No amendments may be made to the trust without court order, to prevent misapplication of the protected person's funds. The court may order that the trust be under the continued supervision of the court, and may require periodic accountings, or it may in appropriate circumstances release the trust from further supervision and allow it to operate as a regular free-standing trust.

The court will generally not approve a newly-created trust unless the trustee is the nominated personal representative of the protected person's will, another individual who would be entitled by priority to be appointed personal representative of the protected person's estate, or a corporate fiduciary.

Where the court retains jurisdiction over the administration of a newly-created trust, later proceedings relating to the trust will be brought under the original C. No. or CG. No., and not under a T. No., so that the court will have all relevant information as to the history of the trust in one file.

(As amended November 2, 1995, effective January 2, 1996; further amended November 12, 1997, effective December 15, 1997; further amended April 28, 2006, effective July 1, 2006.)

Rule 111. CONVERSION TO CUSTODIAL ARRANGEMENT.

The court, upon petition of the conservator, may authorize the conservator to transfer up to $10,000 to a custodial account under Hawaiʻi Revised Statutes Chapter 553A, the Uniform Transfers to Minors Act, to be held until age 18 or 21, as provided by that Act.

COMMENTARY:

The Uniform Transfers to Minors Act permits the court to transfer certain assets to an UTMA account for the benefit of a minor, including the authority to transfer assets valued at more than $10,000. However, because of the lack of accountability under UTMA to the court, the courts in practice have not granted petitions to transfer more than $10,000 to an UTMA account, and this rule formalizes that policy. All estates for minors subject to the jurisdiction of the court will have to be administered by conservatorship or trust arrangement, because the courts will thereby have greater opportunity to exercise oversight as to the administration and disposition of the funds.

(Amended April 28, 2006, effective July 1, 2006.)

Rule 112. CONVERSION TO SMALL CONSERVATORSHIP.

The court, upon petition of the conservator showing that the aggregate value of the assets are less than the maximum for small conservatorship administration, may order the conservator to transfer the assets to the clerk of the court pursuant to Hawaiʻi Revised Statutes Section 551-21. Upon completion of the transfer, the conservator shall be discharged. With the petition, the conservator shall file the conservator's resignation, a complete accounting of all receipts and disbursements of the estate from the time of appointment or the closing date of the last accounting approved by the court (whichever is later), and the consent to appointment by the clerk of the court.

COMMENTARY:

HRS § 551-21 provides for a small conservatorship procedure whereby the clerk of the court may act as conservator for small estates. The section is permissive, not mandatory, and this rule establishes the procedure to be used to seek the transfer of a conservatorship to small conservatorship. The conservator must petition the court for approval of the conservator's resignation, establish that the assets are within the jurisdictional limits of the small conservatorship proceeding, request the appointment of the clerk of the court as successor conservator, and attach the consent of the clerk of the court to appointment. Because the clerk's consent is required, the court will not grant a petition to change to small conservatorship if the clerk declines to serve.

The rule requires the conservator to file an accounting with the resignation petition so that the clerk of the court, if appointed, will not have to review and approve the prior conservator's accounts.

(Amended April 28, 2006, effective July 1, 2006.)

V. KOKUA KANAWAI

Rule 113. ROLE AND AUTHORITY OF KOKUA KANAWAI.

A Kokua Kanawai appointed in a protective proceeding shall serve as and shall be limited to serving as an extension of the court to conduct an independent review of the situation, to interview the respondent and the person seeking to be appointed conservator or guardian, and to report its findings and recommendations to the court. In conservatorship proceedings, the Kokua Kanawai's duties shall include those items listed in Hawaiʻi Revised Statutes Section 560:5-406(c) and (d); in guardianship proceedings the duties shall include those items listed in Hawaiʻi Revised Statutes Section 560:5-305(c) and (d). The Kokua Kanawai shall have access to all medical and psychological records of the respondent without further court order, but shall not reveal confidential information to others. The Kokua Kanawai must prepare and file a written report to the court with the Kokua Kanawai's findings and recommendations. The Kokua Kanawai's report in a conservatorship shall include those items listed in Hawaiʻi Revised Statutes Section 560:5-406(e); in guardianship proceedings the report shall include those items listed in Hawaiʻi Revised Statutes Section 560:5-305(e). Any reports of the Kokua Kanawai shall be filed under seal. The order appointing the Kokua Kanawai may specifically list any additional interested persons other than the petitioner and respondent and their lawyers who shall be entitled to receive copies of the report. The appointment of the Kokua Kanawai shall continue until termination by the court.

The court may appoint a Kokua Kanawai to review any account or report or make any other investigation the court directs. See HRS §560:5-420(c); §560:5-317(b).

COMMENTARY:

The term "Kokua Kanawai" (Helper in the Law) was retained in lieu of the term "visitor" which is used in the Uniform Act. The Kokua Kanawai is appointed to serve as an extension of the court for independent review, analysis, and report. As such, the Kokua Kanawai is not an advocate for or against the rights of the individual and is

limited in role to responding to the petition for protective proceeding. The Kokua Kanawai, without prior court order, has no authority to initiate actions on behalf of the respondent. Rather, the court could appoint an attorney for the respondent.

Given this relationship and role, the Kokua Kanawai does not represent the respondent, and, therefore, service upon the Kokua Kanawai does not constitute service on the respondent. Rule 104 requires that notice be served on a respondent or attorney even when a Kokua Kanawai is appointed and served.

To enable the Kokua Kanawai to fully review the pertinent facts and make a fair recommendation to the court, this rule gives the Kokua Kanawai authority to review the medical records of the protected person. Hawaiʻi Rules of Evidence 504(c) and 504.1(c), relating to the physician-patient and psychologist-client privileges, provide that the conservator or guardian for the patient or client may claim the privilege. However, Hawaiʻi Rules of Evidence 504(d)(3) and 504.1(d)(3) provide that there is no privilege as to a communication relevant to the physical, mental, or emotional condition of the patient or client in which the patient or client relies upon the condition as an element of the person's position with respect to the proceeding. Thus, where the Kokua Kanawai is acting on behalf of the court, that person may and must have access to the medical and psychological records of the respondent to be able to fully advise the court, but may not thereby further reveal any privileged information.

(Amended April 28, 2006, effective July 1, 2006.)

Rule 113.1. CONFIDENTIALITY OF RECORDS.

In proceedings for guardianships and conservatorships, any written report of a Kokua Kanawai, any court-ordered professional evaluation, and any responses or objections thereto, shall be sealed upon filing. A court order will continue to be required to authorize the clerk to unseal a confidential report or evaluation.

COMMENTARY:

HRS §560:5-307 and HRS §560:5-407 require Kokua Kanawai reports and professional evaluations to be sealed upon filing, but made available to the court; the respondent (without limitation as to use); the petitioner, the Kokua Kanawai, the petitioner's and respondent's lawyers (for purposes of the proceeding); and other persons (for any purpose the court may order for good cause).

The comment that accompanies both Article 307 and Article 407 of the Uniform Guardianship and Protective Proceedings Act explains:

> *. . . . This section is designed to protect the respondent's privacy, but still make the records accessible when needed to any of the involved parties or to others on a showing of good cause. The drafting committee recognized that "watch-dog" groups, the media, and others can perform essential functions of deterring abuse and facilitating reform, and in drafting this provision balanced the need to protect the respondent's privacy with the need of others to access this information.*

Normally, documents are not filed under seal without a court order, which the filing party may seek by ex parte petition. This rule makes clear, however, that court staff must file under seal Kokua Kanawai reports filed pursuant to §560:5-303(e) or §560:5-406(e), and reports of a "physician, psychologist, or other individual appointed by the court who is qualified to evaluate the

respondent's alleged impairment," pursuant to §560:5-306 or §560:5-406(f). Because the reports are sealed, responses and objections that refer to them are also sealed.

It is anticipated that at the time an individual is appointed to serve as a Kokua Kanawai or to evaluate an alleged incapacity, court staff will inform the appointee of the customary mechanics of preparing and presenting documents for filing under seal.

(Added April 28, 2006, effective July 1, 2006.)

VI. SALE OF REAL PROPERTY

Rule 114. PROBATE RULES APPLICABLE.

Where real property is to be sold out of a conservatorship estate, the provisions of Rules 65 to 72 shall apply, except that (a) all references to the personal representative therein shall be substituted with references to the conservator, and (b) a petition for court confirmation of sales of Hawaiʻi real property is required in all circumstances. A flag sheet shall be presented pursuant to Rule 103 for any hearing on a petition for confirmation of the sale of real property.

COMMENTARY:

A reference to the flag sheet requirement of Rule 103 is added for clarity.

(Amended April 28, 2006, effective July 1, 1006; further amended May 15, 2008, effective July 1, 2008; further amended June 15, 2010, effective July 1, 2010.)

VII. ACCOUNTINGS

Rule 115. V.A. CONSERVATORSHIP.

(a) Definition. A V.A. Conservatorship is a conservatorship proceeding for a veteran of the United States military receiving funds from the Department of Veterans' Affairs.

(b) Approval of Accountings. The guardian shall file with the petition for approval of conservatorship accounts and for approval of other actions involving V.A. Conservatorships the written approval of the Department of Veterans' Affairs.

(c) Certificate of Audit. The conservator is responsible for filing a Certificate of Audit issued by the Department of Veterans' Affairs with respect to any accounting in a V.A. Conservatorship.

(d) No Master, Guardian Ad Litem, or Kokua Kanawai. Unless otherwise ordered by the court upon petition of an interested person, no master, guardian ad litem, or Kokua Kanawai shall be appointed in a V.A. Conservatorship.

COMMENTARY:

This rule formalizes current practice relating to V.A. Conservatorships. Because the V.A. audits and scrutinizes the activities of the conservator, additional protections are unnecessary. It is anticipated that V.A. Conservatorship accounts accompanied by the required Certificate of Audit will be approved on an ex parte basis.

(Amended April 28, 2006, effective July 1, 2006.)

Rule 116. REQUIRED ELEMENTS.

A conservator shall prepare accounts in the format required by Rule 26 and shall carry forward the ending balances from the last approved accounting (if any). The conservator shall include in the petition for approval of the accounting: (1) a clear and concise statement of any restrictions by court order on the conservator's distributive powers of the conservator, citing the date of the order; (2) a statement describing how the distributions during the accounting period conformed to the restrictions imposed by the court; and (3) a statement that all distributions during the accounting period comply with the limits imposed by the court, or if any distribution did not comply, an explanation of why the distribution was made.

COMMENTARY:

This rule will make it easier for the court to supervise conservatorships, by placing a burden on the conservator to review and specifically set forth the restrictions on the conservator and to explain to the court just how the conservator's actions have conformed to court order.

(Amended April 28, 2006, effective July 1, 2006.)

VIII. FEES

Rule 117. CONSERVATOR'S FEES: BASIS AND AMOUNT.

Unless otherwise ordered by the court, a conservator shall be entitled to charge and collect against the conservatorship estate compensation in the amount equal to that permitted by statute to be charged by trustees of a private trust under Hawaiʻi Revised Statutes Section 607-18.

COMMENTARY:

HRS § 560:5-417 allows the conservator "reasonable compensation." Much confusion has resulted in trying to determine the appropriate basis for a conservator's compensation. By using the trustee fee schedule, certainty will result with a consistent fee schedule for similar work.

(Amended April 28, 2006, effective July 1, 2006.)

IX. TERMINATION OF PROCEEDINGS

Rule 118. SPECIAL CONSERVATORSHIPS AND PROTECTIVE ARRANGEMENTS.

When a special conservator has been appointed on an ex parte basis pursuant to HRS § 560:5-405(b) or § 560:5-406(g), unless otherwise provided by court order, the authority of the special conservator terminates automatically 90 days after the issuance of the letters of special conservatorship, unless there is then pending before the court a petition for appointment of a permanent conservator or a petition to extend the appointment of the special conservator for good cause, in which case the special conservator's appointment continues until the court orders otherwise. A special conservator whose powers are terminated automatically shall account to the court for his or her actions.

COMMENTARY:

If a special conservatorship or protective arrangement is established on an ex parte basis and a need for a permanent conservator is evident, the protected person must be given rights to due process to challenge the conservatorship imposed without notice or hearing. This rule forces a special conservator to promptly file for permanent conservatorship or face automatic termination after 90 days, thereby giving the protected person the opportunity to challenge the proceedings. If a permanent conservatorship petition or a petition to extend the special conservator's appointment is pending, the special conservator's authority is extended until further court order.

Ideally, where the need for a permanent conservator is evident, all ex parte petitions for appointment of a special conservator will be accompanied by the petition for appointment of a permanent conservator, so that there are no delays in determining the rights of the protected person. Other situations may arise where there is no need for a permanent conservator, but the original 90 day period is not sufficient for the special conservator to complete his or her duties, and the special conservator's appointment may be extended by the court for good cause.

This rule pertains to special conservators appointed pursuant to HRS §§ 560:5-405(b) and -406(g). HRS § 506:5-412 authorizes appointment of a special conservator, but not on an ex parte basis.

(Amended June 25, 2003, effective July 1, 2003; further amended April 28, 2006, effective July 1, 2006; further amended June 15, 2010, effective July 1, 2010.)

Rule 119. EX PARTE TERMINATION OF PROCEEDINGS.

Within 60 days of the death of the protected person or within 60 days of the minor attaining the age of majority or emancipation, the conservator shall file a final report, and a petition for approval of final accounts, termination of conservatorship, and discharge. In the petition, the conservator shall set forth the relevant facts and attach any approval of the accounts signed by the personal representative of the protected person's estate or the former protected minor. If such approval is attached to the petition, the conservator may present the petition on an ex parte basis.

COMMENTARY:

1995 Commentary: HRS § 560:5-430 was amended in 1992 to eliminate the requirement for a hearing to terminate a guardianship where the guardianship automatically terminates because of the death of or attainment of the age of majority by the protected person. This rule adds the additional requirement that for the guardian to be discharged on an ex parte basis, the personal representative of the deceased protected person or the former protected person must consent to the final accounting; otherwise a hearing will be held on any objections to the accounting.

2005 Commentary: HRS § 560:5-431 requires filing a final report within 60 days after the death of the protected person or attainment of majority or emancipation for a protected person who is subject to conservatorship because of minority. HRS § 560:5-420 sets forth the contents of the report, including assets, income, and expenditures -- the same items as an "accounting" previously required.

Prior to the time the final report and petition for discharge are due, the court for good cause may enlarge the time requirement for the conservator to file the final report and petition for discharge.

Notwithstanding HRS § 560:5-431(d), where a conservatorship terminates because of the death of the protected person or attainment of the age of majority or emancipation by the protected person, the conservator may be discharged on an ex parte basis. The ex parte petition shall specifically request that the court waive the safeguard requirements of Part 4 of Article V of Chapter 560.

(Amended April 28, 2006, effective July 1, 2006.)

Rule 120. A C K N O W L E D G M E N T O F CONSERVATOR'S AUTHORITY.

(a) Application. To obtain an Acknowledgment of Conservator's Authority pursuant to HRS § 560:5-433, a domiciliary conservator shall file with the Registrar:

(1) an Application for Issuance of Acknowledgment of Conservator's Authority signed by the conservator verifying the conservator's appointment in the protected person's domiciliary state and requesting the issuance of an Acknowledgment of Conservator's Authority, and

(2) certified copies of the conservator's Letters of Conservatorship, along with a certified copy of any official bond.

(b) Acknowledgment. If the Application for Issuance of Acknowledgment of Conservator's Authority is approved by the Registrar, the Registrar shall issue an Acknowledgment of Conservator's Authority.

COMMENTARY:

This rule follows the same procedure as Probate Rule 95's procedure for obtaining acknowledgments of a domiciliary Personal Representative's authority in probate proceedings, except that pursuant to HRS § 560:5-433, only a conservator appointed in another state (as the term is defined in HRS § 560:1-201) may obtain an Acknowledgment of Authority.

(Added April 28, 2006, effective July 1, 2006; further amended June 15, 2010, effective July 1, 2010.)

Rules 121-124. RESERVED.

PART D. TRUST PROCEEDINGS

I. GENERAL PROVISIONS

Rule 125. CASE NUMBER ASSIGNMENT.

The clerk of the court shall assign a T. No. to all initial proceedings involving trust estates, unless the trust relates to (1) a testamentary trust, in which case the P. No. for the original probate shall be used, or (2) a trust established by the court in a conservatorship proceeding in which case the G. No., C. No. or CG. No. for the original conservatorship shall be used. Once a case number is assigned to a particular trust, that same case number shall be used in all court proceedings involving that trust. Therefore, for all trusts for which proceedings were commenced prior to the enactment of this Rule, the

S.P. No., E. No. or P. No., as the case may be, initially assigned to the trust shall continue to be used for all future proceedings relating thereto.

COMMENTARY:

The purpose of case number assignments is to assign a number based upon the nature of the proceeding before the court. Allowing proceedings relating to testamentary trusts, trusts created in protective proceedings, and proceedings filed with respect to trusts for which proceedings were commenced prior to the enactment of the Rule to retain the same case number assignment and remain in the original action allows the court to more easily research the history of the trust.

(Amended April 28, 2006, effective July 1, 2006; further amended June 15, 2010, effective July 1, 2010.)

II. COMMENCEMENT OF PROCEEDINGS

Rule 126. TRUST PROCEEDINGS.

(a) Petition. A trustee or interested person shall commence any proceeding relating to a trust by filing a petition complying with Rule 3.

COMMENTARY:

This rule clarifies that a trust proceeding is an equity proceeding subject to these rules, rather than a civil action subject to the Hawaiʻi Rules of Civil Procedure.

(b) Vesting Orders. Any interested person seeking an order vesting title to trust assets in a successor trustee shall petition the court, setting forth the name of the settlor of the trust, the date the trust was created, the nature and value of the trust assets, the name and address of the trustee being replaced, the names and addresses of the current beneficiaries, name and address of the nominated successor trustee, and the authority (by trust provisions or statute), if any, by which the nomination or appointment of the successor trustee was made. If all persons entitled by statute or the trust provisions to appoint a successor trustee join in the petition, the court may issue the vesting order ex parte.

COMMENTARY:

This rule clarifies the means by which a vesting order may be obtained where a mechanism exists either by statute or the governing instrument for selection of a successor trustee. In such situations, third parties dealing with the successor trustees may desire proof of the trustee's authority to act, and a vesting order may be obtained. Where all persons who by statute or the governing instrument join in the petition, the vesting order will be issued on an ex parte basis, because there are no issues for the court to decide.

(c) Instructions. A trustee or other interested person seeking an interpretation of a trust instrument or instructions regarding the administration of the trust may file a petition, setting forth the name of the settlor of the trust, the date the trust was created, the nature and value of the trust assets, the name and address of the trustee, the names and addresses of the current beneficiaries, the names and addresses of any contingent or remainder beneficiaries whose rights may be affected by the issue raised in the petition, the trust provisions applicable to the issues raised in the petition, and a description of the specific issues for which instructions are sought. The court may appoint a guardian ad litem to represent the interests of unborn, unascertained, or minor beneficiaries. The petitioner shall serve notice of the date, time, and place of the hearing on all interested persons.

COMMENTARY:

This rule clarifies the information required to obtain instructions from the court. A hearing will almost always be required. To preserve the privacy of the trust, only those provisions of the trust that are in issue must be presented to the court.

(d) Approval of Accountings. Where an order is sought for approval of a trustee's accounts, the petition shall comply with the requirements of Rules 25, 26, and 27 and shall in addition set forth the name of the settlor of the trust, the date the trust was created, the name and address of the trustee, and the names and addresses of any vested remainder beneficiaries. The court may appoint a guardian ad

litem to represent the interests of unborn, unascertained, or minor beneficiaries. Notice of the time and date of the hearing shall be given to all interested persons named in the petition.

COMMENTARY:

This rule clarifies the information required for approval of a trustee's accounts. In addition to the general requirements of Rule 26, additional information regarding the origination of the trust is required. To encourage the trustee to maintain current records of vested remainder takers, they must be identified in the petition.

(e) Distribution of Assets to Missing Beneficiaries. When a trustee is unable to locate a beneficiary entitled to real or personal property, at the termination of the trust, the trustee shall dispose of the unclaimed assets by complying with the requirements of Hawaiʻi Revised Statutes § 560:3-914.

(Amended June 25, 2003, effective July 1, 2003; further amended September 29, 2003, effective September 29, 2003.)

III. TRUST REGISTRATION

Rule 127. TRUST REGISTRATION.

To register a trust, a person shall file with the clerk of the court in the judicial circuit in which the trust has its administrative situs a Trust Registration Statement that complies with the requirements of Rule 4 and contains the name of the trust, the date the trust was created, the name and address of the settlor, the name and address of the original trustee, and the name and address of the current trustee (if different from the original trustee). The Trust Registration Statement need not identify the beneficiaries, assets, or provisions of the trust.

COMMENTARY:

This rule provides guidance for the content of Trust Registration Statements required by HRS § 560:1-108. Although required by the statute, very few trusts are actually registered. The registration provides a benefit to the trust estate, in that it establishes the location of the trust for purposes of securing the venue of any proceedings or lawsuits involving the trust.

Rule 128. RELEASE OF REGISTRATION.

To release a trust registration at the termination of the trust or upon change of the administrative situs of the trust, a person shall file with the clerk of the court of the judicial circuit in which the trust is currently registered a Release of Trust Registration containing the information required by Rule 127 and also setting forth the reason for the release of registration. If the reason for release is change of the administrative situs of the trust, the Release of Trust Registration shall also identify the new administrative situs of the trust and attach a copy of the Trust Registration Statement filed in the new jurisdiction.

COMMENTARY:

This rule allows the trust to terminate its registration at the termination of the trust or upon change of the administrative situs of the trust. If the administrative situs is changed, identification of the new situs will assist interested persons in tracing the trust location. A Release of Trust Registration cannot be filed for change of situs until the trust has been registered in the new jurisdiction, and a copy of the new trust registration must be filed with the Release. This rule will ensure that the benefits of registration will not lapse during a change in situs.

IV. TRUSTEE FEES

Rule 129. RESERVED.

Rule 130. EXTRAORDINARY FEES.

A trustee seeking fees for extraordinary services performed prior to the filing of a petition shall request allowance of such fees as part of the petition for approval of accounts, and in the request shall state the nature of the services rendered, the economic or other benefit to the estate from the services, and a summary of any special expertise of

the petitioner in performing the services. The trustee shall request extraordinary fees earned after the filing of the petition through an affidavit. The court shall award extraordinary fees based on the time, effort, and expertise expended on the extraordinary services rendered and will normally compensate the trustee on the basis of the hours spent on the services, with variations allowed based on the expertise of the individual rendering the services.

COMMENTARY:

In the past, some trustees have charged trust estates for extraordinary services based on formulas that have no relation to the amount of work or expertise involved in rendering the services. Generally, the court practice has been to grant extraordinary fees based on an hourly rate, with variations in the hourly rate allowed to reflect the expertise of the person performing the services. This rule clarifies the basis upon which extraordinary fees will be granted by the court.

Rules 131-139. RESERVED.

PART E. NO-FAULT LEGAL REPRESENTATIVE PROCEEDINGS

I. COMMENCEMENT OF ACTION

Rule 140. PETITION.

An interested person may petition for appointment of a legal representative to collect no-fault benefits by filing a petition and death certificate for the deceased. The petitioner shall show the name of the deceased, the insurer, the no-fault benefits to be paid, and the names and addresses of the family members to receive the benefits.

COMMENTARY:

The no-fault statutes provide no guidance on how a legal representative is to be appointed. This rule clarifies the steps to take. Rules 140 through 144 apply only to accidents that occurred or proceedings begun before January 1, 1998. See Act 251 §§ 41, 61, 1997 Haw. Sess. Laws at 538-40 and 551.

(Amended June 25, 2003, effective July 1, 2003.)

Rule 141. CASE NUMBER.

When a proceeding is brought to appoint a legal representative for no-fault benefits, the clerk shall assign a P. No., which case number shall then be used for all proceedings relating to the deceased.

COMMENTARY:

To maintain consistency in having all matters relating to a particular deceased contained in one court file, this rule changes no-fault legal representation proceedings from special proceedings to probate proceedings. However, this does not mean that the no-fault proceeds are thereby to be considered probate assets and thereby subject to creditors' claims; no change in the character of the assets results from the case number assignment.

Rule 142. WAIVER OF NOTICE AND HEARING.

When all interested persons entitled to receive the no-fault benefits join in the petition for appointment of a legal representative, the court may waive further notice and hearing and grant the petition on an ex parte basis.

COMMENTARY:

This rule eliminated unnecessary hearings.

II. TERMINATION OF ACTION

Rule 143. ACCOUNTING AND DISCHARGE.

The legal representative appointed to collect no-fault benefits may petition to terminate the proceeding by filing an affidavit of the legal representative describing the actions taken by the legal representative to transfer the funds to those entitled to them, supported by appropriate receipts. Upon receipt of the petition and affidavit, and upon determining compliance with this rule, the clerk of the court shall enter an order terminating the proceeding and discharging the legal representative.

COMMENTARY:

The role of the no-fault legal representative is so limited and administrative in nature that the legal representative's appointment should be terminated in a summary fashion, without further court order, once he or she can show that the job has been completed. This rule allows the clerk to directly enter an order of termination and discharge.

III. WHEN PROBATE PROCEEDINGS ARE PENDING

Rule 144. PERSONAL REPRESENTATIVE TO ACT.

When probate proceedings are pending, the special administrator or personal representative of the estate, without court order, may collect and distribute no-fault benefits.

COMMENTARY:

When a personal representative has been appointed for the deceased, there is no need to have a legal representative appointed for no-fault benefits, and the personal representative may handle the transfer of proceeds to the family. The proceeds are not thereby subject to creditors' claims, considered probate assets, or subject to any statutory fee by the personal representative or attorney. No-fault benefits are non-probate assets.

Rules 145-149. RESERVED.

PART F. DETERMINATION OF DEATH PROCEEDINGS

I. COMMENCEMENT OF ACTION

Rule 150. PETITION.

An interested person may file a petition for determination of death, setting forth:

(a) the name, all known aliases, last known address of the missing person; and

(b) the name and address of the missing person's spouse or reciprocal beneficiary, parents, and children, or if no such relatives survive, the person's closest living relatives by degree of relationship; and

(c) the approximate date of disappearance and a complete description of the circumstances and evidence surrounding the disappearance, including governmental reports and published accounts; and

(d) a description of all efforts made to locate the individual and the results of such search, including affidavits or other testimony of all immediate relatives of the individual that they have had no contact with the individual since the disappearance.

Prior to the hearing on the petition, the person filing the petition for determination of death shall also file under seal and under separate cover the missing person's date of birth and social security number, if known.

COMMENTARY:

HRS § 560:3-403(c) sets forth the statutory requirements for a determination of death. This rule addresses the content of the petition and imposes additional notice requirements.

(Amended November 12, 1997, effective December 15, 1997; further amended November 25, 2008, effective January 1, 2009.)

Rule 151. CASE NUMBER AND CAPTION.

The clerk of the court shall assign a P. No. to a petition for determination of death, and all subsequent probate proceedings involving that individual in the circuit shall use the same case number.

COMMENTARY:

To maintain consistency in these rules, proceedings for determination of death will be assigned a P. No., which would then be used in any later probate proceeding so that all pleadings relating to the deceased are contained in one court file.

(Amended November 25, 2008, effective January 1, 2009.)

II. NOTICE

Rule 152. METHOD OF PROVIDING NOTICE.

The petitioner for determination of death shall serve notice on all individuals named in the petition in the manner provided by Rule 7 and shall cause publication of the notice in a newspaper of general circulation in Hawaiʻi once a week for three consecutive weeks, addressed to the missing person, if known, and notifying that person of the filing of the petition and the date and time set for hearing. In addition, petitioner shall serve notice of the hearing on the alleged decedent at his or her last known address by registered or certified mail.

COMMENTARY:

This rule establishes standard notice requirements consistent with those used in other proceedings before the probate court.

(Amended November 12, 1997, effective December 15, 1997; further amended November 25, 2008, effective January 1, 2009.)

III. EVIDENCE

Rule 153. RESERVED.

IV. ORDER

Rule 154. CONTENT OF ORDER.

If, after notice and hearing, the court determines that (a) the missing person's death is reasonably certain from the circumstances of the disappearance, or (b) the person has been missing for a period of at least five years, during which the person has not been heard from and whose absence is not explained after diligent search and inquiry, the court may issue an Order Determining Death. The Order Determining Death shall set forth (a) the likely date and place death occurred based on the evidence, or (b) if the court cannot determine the likely date, the date and place of death as being the date five years after disappearance at the place the missing person was last seen or heard from.

COMMENTARY:

This rule clarifies the two most common situations giving rise to a determination of death: the catastrophic incident where death is certain to have occurred but no body was recovered and the unexplained disappearance. In the former case, the court may set the time and date of disappearance. In the latter case, the statute determines the death to have occurred five years after disappearance. In compliance with State Department of Health requirements, this rule requires the court to include in its order specific wording regarding the timing and place of death.

APPENDIX A

Flag Sheet 1-A	Petition to Admit a Will to Probate and Appointment of Personal Representative
Flag Sheet 1-B	Petition for Adjudication of Intestacy
Flag Sheet 1-C-C	Petition to Appoint a Conservator, and/or for Authority to Compromise a Tort Claim
Flag Sheet 1-C-CG	Petition to Appoint a Conservator and Guardian, and/or for Authority to Compromise a Tort Claim
Flag Sheet 1-D	Petition for Confirmation of Sale of Real Property
Flag Sheet 1-E	Petition for Approval of Final Accounts of a Personal Representative
Flag Sheet 1-F	Petition for Determination of Elective Share

Hearing Date:_____

FLAG SHEET NO. 1-A
(Petition for Probate of Will and Appointment of Personal Representative)

_____ Probate No. _____
(Attorney for Petitioner or Pro Se Petitioner)

Tel. No. _____ Estate of _____

I. **Death Certificate**

The death certificate actually shows the following information:

1. Name of decedent in full: _____
2. Date of death: _____
3. Marital status: _____

II. **Publication Notice**

1. Name of decedent as actually published _____
_____

2. Dates of actual publication (in 3 consecutive weeks):
_____; _____; _____.

III. **Affidavit of Attesting Witness for Wills and Codicils**

HRS §560:2-502(b) provides that a will may be valid as a holographic will "whether or not witnessed, if the signature and material portions of the document are in the testator's handwriting."

Is this will presented as a holographic will? Yes __ No ___
If "No," continue. If "Yes," you may skip to section IV.

(*Note*: No affidavit is required for a self-proved will or codicil. If the will or codicil is not self-proved, one (1) properly executed affidavit of attesting witness is required for

each will and codicil. The affidavit should include the mandatory language that the "decedent appeared to be of *sound mind and under no constraint or undue influence at the time of the execution* of the said document." In the absence of the affidavit of attesting witness, oral testimony is required.)

1. Is the will or codicil self-proved? Yes __ No __

2. If "No," state the name of the attesting witness: _____

3. Proof of will or codicil is by

   Affidavit: Yes __ No __
   Oral testimony: Yes __ No __

IV. **Proof of Service**

1. List or attach a list of all interested persons who are entitled to notice of hearing, and their relationship to the decedent.

Name	Relationship
_____	_____
_____	_____

2. Was notice served on all interested persons? (HRS §560:1-401) Yes __ No __

3. If "No," were waivers of notice obtained and filed for all interested persons other than those served under 2 above? Yes __ No __

4. If "No," list the names of all interested persons who have not been served and have not waived notice.

   _____ _____

   _____ _____

V. **Appointment of Personal Representative (PR) and Bond**

1. Does the petition name the person with the highest priority? Yes __ No __

2. If "No," list or attach a list of the name of those persons who have higher or equal priority with the proposed PR, and whether their renunciation and consent to the appointment of the proposed PR have been obtained and filed.

Name	Consent to Appointment Filed? Yes	No
_____	____	____
_____	____	____

3. Does the petition request the appointment of the proposed PR without bond? Yes __ No __

   If "Yes," is bond waived by will? Yes __ No __

   If bond is not waived by will, state the reason for this request and include the relationship of the proposed PR to the decedent or beneficiaries.

4. If the appointment of the PR is with bond, state the amount of the bond requested. $ _____

VI. **Prayer for Special Matters**

(*Note:* Anything beyond the normal and ordinary probate matters shall be specified in this classification as special or unusual matters.)

1. Special matters requested? Yes __ No __
2. If "Yes," enumerate such special matters.

VII. **Objection or Opposition**

1. Are you aware of any opposition or objection to this petition? Yes __ No __
2. If "Yes," state by whom (include the relationship of the objector to the decedent or beneficiaries) and the grounds for the objection, if known.

THE UNDERSIGNED HEREBY CERTIFIES THAT TO THE BEST OF SAID INDIVIDUAL'S KNOWLEDGE AND BELIEF ALL OF THE FOREGOING FACTS AND FIGURES ARE TRUE AND CORRECT.

_____
Attorney for Petitioner or Pro Se Petitioner

Hearing Date:_____

FLAG SHEET NO. 1-B
(Petition for Adjudication of Intestacy)

_____ Probate No. _____
(Attorney for Petitioner or Pro Se Petitioner)

Tel. No. _____ Estate of _____

I. **Death Certificate**

The death certificate actually shows the following information:

1. Name of decedent in full: _____
2. Date of death: _____
3. Marital status: _____

II. **Publication Notice**

1. Name of decedent as actually published _____
_____

2. Dates of actual publication (in 3 consecutive weeks):
_____; _____; _____.

III. **Proof of Service**

1. List or attach a list of all interested persons who are entitled to notice of hearing, and their relationship to the decedent.

Name	Relationship
_____	_____
_____	_____

2. Was notice served on all interested persons? (HRS §560:1-401) Yes __ No __

3. If "No," were waivers of notice obtained and filed for all interested persons other than those served under 2 above? Yes __ No __

4. If "No," list the names of all interested persons who have not been served and have not waived notice.

_____ _____
_____ _____

IV. **Consent, Renunciation & Waiver (CRW)**

1. Does the petition name the person with the highest priority to be appointed? Yes __ No __

2. If "No," list or attach a list of the names of those persons who have higher or equal priority with the proposed PR, and whether their consent, renunciation and waiver (CRW) have been obtained and filed.

Name	CRW Filed? Yes	No
_____	____	_____
_____	____	_____

V. **Bond (Personal Representative (PR))**

1. Does the petition request the appointment of the proposed PR without bond? Yes __ No __

State the reason for this request and include the relationship of the proposed PR to the decedent or heirs.

VI. **Prayer for Special Matters**

(*Note*: Anything beyond the normal and ordinary probate matters shall be specified in this classification as special or unusual matters.)

1. Special matters requested? Yes __ No __

2. If "Yes," enumerate such special matters.

VII. **Existence of a Will That is Not Being Probated**

1. Are you aware of any will that for any reason is not being offered for probate? Yes __ No __

2. If "Yes," state briefly the reason why the will is not being offered for probate, and list any persons entitled to notice under said will who are not entitled to notice under this Petition for Adjudication of Intestacy.

VIII. **Objection or Opposition**

1. Are you aware of any opposition or objection to this petition? Yes __ No __
2. If "Yes," state by whom (include the relationship of the objector to the decedent or beneficiaries) and the grounds for the objection, if known.

THE UNDERSIGNED HEREBY CERTIFIES THAT TO THE BEST OF SAID INDIVIDUAL'S KNOWLEDGE AND BELIEF ALL OF THE FOREGOING FACTS AND FIGURES ARE TRUE AND CORRECT.

_____
Attorney for Petitioner or Pro Se Petitioner

Hearing Date:_____

FLAG SHEET NO. 1-C-C
(Petition for Appointment of Conservator and Authority to Compromise Claim)

_____ C. No. _____
(Attorney for Petitioner or Pro Se Petitioner)

Tel. No. _____ Name of Respondent _____

I. **Respondent**

1. The Respondent is a(n):
   a. Minor: Yes ___ Age _____
      If Yes, will the minor have attained the age of fourteen by the date of the hearing? Yes __ No __
   b. Adult (incapacitated) : Yes ___ Age _____

2. Has the Respondent's attendance been excused? Yes __ No __
   (HRS §560:5-408(a))

II. **Appointment of Conservator**

1. State the relationship of the proposed Conservator to the Respondent.

2. Is there any person who has higher priority to be appointed Conservator?
   Yes __ No __

3. If "Yes," list the name(s) of the person(s) who have higher priority, and whether waiver(s) of their right to be appointed Conservator have been filed.

Name	Waiver Filed? Yes	No
_____	____	____
_____	____	____

4. If the Respondent is a minor, 14 years or older, has the minor filed a nomination? Yes __ No __
5. If "Yes," state the name of the person nominated and the relationship of that person to the Respondent.
6. Has the proposed Conservator's attendance been excused? Yes __ No __
(HRS §560:5-408(a))

III. **Property (The Respondent's Assets)**

1. Estimated dollar value of property
   a. Real Property $ _____
   b. Personal Property $ _____
   Total Value $ _____
2. If the Respondent has a claim for damages, describe the nature of the claim, the amount of the settlement offer, and whether the offer is fair and reasonable in light of all the circumstances of the claim.

IV. **Deposit**

1. Deposit of the property shall be in accordance with Rule 107(c) of the Hawaii Probate Rules. Yes __ No __
2. If "No," state the method of deposit.

V. **Withdrawals**

1. State the amount requested, if any, for the support and maintenance of the Respondent: $ _____ per month
2. In the case of a minor, if there is a requested allowance, what is the gross family income per month of the person(s) responsible for the support of the minor? $ _____ per month
3. State the amount requested, if any, for extraordinary withdrawals, and the reason therefor: $ _____

VI. **Accounting Period Requested**

Check one of the following:
(1) Annual ___ ; (2) Biennial ___ ; (3) Triennial ___ ; (4) Other ___ .

State the accounting period: _____

VII. **Proof of Service**

1. List or attach a list of all interested persons who are entitled to notice of hearing, and their relationship to the Respondent.

Name	Relationship
_____	_____
_____	_____

2. Was the petition and notice personally served on the Respondent? (HRS §560:5-309; 5-404; 5-406(c)) Yes __ No __

3. Was notice served on all interested persons? (HRS §560:5-309; 5-404; 1-401) Yes __ No __

4. If "No," were waivers of notice obtained and filed for all interested persons other than those served under 3 above? Yes __ No __

5. If "No," list the names of all interested persons who have not been served and have not waived notice.

_____ _____

_____ _____

VIII. **Limitations on Conservatorship**

1. Is Limited or Unlimited Conservatorship requested? Limited __ Unlimited __ (HRS § 560:5-403(c)(3), 5-409(b))
2. Explain: _____
_____
_____
_____

IX. **Recommendation of Kokua Kanawai**
(Applicable ___ ; Not applicable ___ .)

The Kokua Kanawai's specific recommendations are:

(a) Need for a Conservator exists? Yes __ No __
(b) Should a Guardian ad Litem be appointed? Yes __ No __
(c) Appointment of Petitioner? Yes __ No __
(d) Accounting period (specify) _____
(e) Limited or Unlimited Conservatorship? Limited __ Unlimited __

(f) Other: _____
_____
_____
_____
_____

X. **Estimated Fees**

1. Kokua Kanawai $ _____
2. Attorney for Petitioner $ _____
3. Attorney or Guardian ad Litem for Respondent $ _____

XI. **Bond**

1. Is the appointment of the Conservator with bond? Yes __ No __

2. If "Yes," state the amount of the bond requested. $ _____

XII. **Objection or Opposition**

1. Are you aware of any opposition or objection to this petition? Yes __ No __

2. If "Yes," state by whom (include the relationship of the objector to the Respondent or proposed Conservator) and the grounds for the objection, if known.

THE UNDERSIGNED HEREBY CERTIFIES THAT TO THE BEST OF SAID INDIVIDUAL'S KNOWLEDGE AND BELIEF ALL OF THE FOREGOING FACTS AND FIGURES ARE TRUE AND CORRECT.

_____
Attorney for Petitioner or Pro Se Petitioner

Hearing Date:_____

FLAG SHEET NO. 1-C-CG
(Petition for Appointment of Conservator and Guardian and Authority to Compromise Claim)

_____ CG. No. _____
(Attorney for Petitioner or Pro Se Petitioner)

Tel. No. _____ Name of Respondent _____

I. **Respondent**

1. The Respondent is an adult: Yes ___ Age _____
2. Has the Respondent's attendance/participation been excused? Yes __ No __
(HRS §560:5-308(a), -408(a))

II. **Appointment of Conservator and Guardian**

A. Proposed Conservator

1. State the relationship of the proposed Conservator to the Respondent.

2. Is there any person who has higher priority to be appointed Conservator?
Yes __ No __

3. If "Yes," list the name(s) of the person(s) who have higher priority, and whether waiver(s) of their right to be appointed Conservator have been filed.

Name	Waiver Filed? Yes	No
_____	____	_____
_____	____	_____

4. Has the proposed Conservator's attendance been excused? Yes __ No __
(HRS §560:5-408(a))

B. Proposed Guardian

1. State the relationship of the proposed Guardian to the Respondent.

2. Is there any person who has higher priority to be appointed Guardian?
Yes __ No __

3. If "Yes," list the name(s) of the person(s) who have higher priority, and whether waiver(s) of their right to be appointed Guardian have been filed.

Name	Waiver Filed? Yes	No
_____	____	____
_____	____	____

4. Has the proposed Guardian's attendance been excused? Yes __ No __
(HRS §560:5-308(a))

III. **The Respondent's Assets**

1. Estimated dollar value of property
   a. Real Property $ _____
   b. Personal Property $ _____
   Total Value $ _____

2. If the Respondent has a claim for damages, describe the nature of the claim, the amount of the settlement offer, and whether the offer is fair and reasonable in light of all the circumstances of the claim.

IV. **Deposit**

1. Deposit of the property shall be in accordance with Rule 107(c) of the Hawaii Probate Rules.
Yes __ No __

2. If "No," state the method of deposit.

V. **Withdrawals**

1. State the amount requested, if any, for the support and maintenance of the Respondent: $ _____ per month

2. State the amount requested, if any, for extraordinary withdrawals, and the reason therefor: $ _____

VI. **Accounting Period Requested**

Check one of the following:
(1) Annual ___ ; (2) Biennial ___ ; (3) Triennial ___ ; (4) Other ___ .
State the accounting period: _____

VII. **Proof of Service**

1. List or attach a list of all interested persons who are entitled to notice of hearing, and their relationship to the Respondent.

Name	Relationship
_____	_____
_____	_____

2. Was the petition and notice personally served on the Respondent? (HRS §560:5-309; 5-404; 5-406(b)) Yes __ No __
3. Was notice served on all interested persons? (HRS §560:5-309; 5-404; 1-401) Yes __ No __
4. If "No," were waivers of notice obtained and filed for all interested persons other than those served under 3 above? Yes __ No __
5. If "No," list the names of all interested persons who have not been served and have not waived notice.

_____ _____
_____ _____

VIII. **Limitations on Conservatorship and/or Guardianship**

A. Conservatorship
1. Is Limited or Unlimited Conservatorship requested? (HRS § 560:5-403(c)(3), 5-409(b)) Limited __ Unlimited __
2. Explain: _____
_____
_____
_____

B. Guardianship
1. Is Limited or Unlimited Guardianship requested? (HRS § 560:5-304(b)(9), 5-311(b)) Limited __ Unlimited __
2. Explain: _____
_____
_____
_____

IX. **Recommendation of Kokua Kanawai**
(Applicable ___ ; Not applicable ___ .)

The Kokua Kanawai's specific recommendations are:

(a) Need for a Guardian and Conservator exists? Yes __ No __
(b) Should a Guardian ad Litem be appointed? Yes __ No __
(c) Appointment of Petitioner?
  1. As Conservator? Yes __ No __
  2. As Guardian? Yes __ No __
(d) Accounting period (specify) _____
(e) Limited or Unlimited?
  1. Conservatorship? Limited __ Unlimited __
  2. Guardianship? Limited __ Unlimited __
(f) Other: _____
_____
_____
_____

X. **Estimated Fees**

1. Kokua Kanawai $ _____
2. Attorney for Petitioner $ _____
3. Attorney or Guardian ad Litem for Respondent $ _____

XI. **Bond**

1. Is the appointment of the Guardian with bond? Yes __ No __
2. If "Yes," state the amount of the bond requested. $ _____
3. Is the appointment of the Conservator with bond? Yes __ No __
4. If "Yes," state the amount of the bond requested. $ _____

XII. **Objection or Opposition**

1. Are you aware of any opposition or objection to this petition? Yes __ No __
2. If "Yes," state by whom (include the relationship of the objector to the Respondent or proposed Conservator and/or Guardian) and the grounds for the objection, if known.

THE UNDERSIGNED HEREBY CERTIFIES THAT TO THE BEST OF SAID INDIVIDUAL'S KNOWLEDGE AND BELIEF ALL OF THE FOREGOING FACTS AND FIGURES ARE TRUE AND CORRECT.

_____
Attorney for Petitioner or Pro Se Petitioner

Hearing Date:_____

FLAG SHEET NO. 1-D
(Petition for Confirmation of Sale)

_____ Probate No. _____
(Attorney for Petitioner or Pro Se Petitioner)

Tel. No. _____ Estate of _____

I. **Property**

State the following information:

1. Address of the property: _____
2. Tax Map Key Number: _____

II. **Appraisal**

1. Has an appraisal been filed? Yes __ No __

2. If "Yes," state the appraised value. $ _____

3. If "No," state the reasons why no appraisal has been filed.

III. **Offer**

1. State the amount of the offer. $ _____

2. State the names(s) of the buyer(s), and their relationship, if any, to the estate, personal representative, or attorney.

IV. **Affidavit of Posting at Courthouse (Notice of Sale)**

Date the Notice was posted (at least 15 days prior to hearing): _____

V. **Proof of Service**

1. List or attach a list of all interested persons who are entitled to notice of hearing.

Name	Basis Upon Which Person is Entitled to Notice
_____	_____
_____	_____

2. Was notice served on all interested persons by first class mail, postage prepaid? Yes __ No __

3. If "No," were waivers of notice obtained and filed for all interested persons? Yes __ No __

4. If "No," list the names of all interested persons who have not been served.

_____ _____
_____ _____

VI. **Minimum Bid Price (HRS §531-29)** $ _____

VII. **Fees**

1. Broker
   a. Seller's Broker % ____ $ _____
   b. Buyer's Broker % ____ $ _____
   c. Total Amount of Commission % ____ $ _____

2. Personal Representative $ _____

3. Attorney $ _____

VIII. **Financing**

1. Cash Sale Yes __ No __
2. If "No," describe the terms of the sale.

IX. **Objection or Opposition**

1. Are you aware of any opposition or objection to this petition? Yes __ No __
2. If "Yes," state by whom (include the relationship of the objector to the decedent or beneficiaries) and the grounds for the objection, if known.

THE UNDERSIGNED HEREBY CERTIFIES THAT TO THE BEST OF SAID INDIVIDUAL'S KNOWLEDGE AND BELIEF ALL OF THE FOREGOING FACTS AND FIGURES ARE TRUE AND CORRECT.

_____
Attorney for Petitioner or Pro Se Petitioner

Hearing Date:_____

FLAG SHEET NO. 1-E
(Petition for Approval of Final Accounts)

_____ Probate No. _____
(Attorney for Petitioner or Pro Se Petitioner)

Tel. No. _____ Estate of _____

I. **Publication Notice**

1. Name of decedent as actually published _____
_____

2. Dates of actual publication (in 3 consecutive weeks):

_____ ; _____ ; _____ .

II. **Tax (Estate or Transfer Tax)**

1. Has a receipt, certificate, or release from the Taxation Department been filed? Yes __ No __

2. If "No," will it be filed by the date of the hearing? Yes __ No __

III. **Inventory**

1. State the date of decedent's death: _____

2. State the value of the estate at death: $ _____

IV. **Approvals by Beneficiaries**

1. List the names of all residuary beneficiaries under the will, or by intestacy, and state whether their approvals have been filed.

Name	Approval Filed? Yes	No
_____	____	____
_____	____	____
_____	____	____
_____	____	____

2. Have all receipts for specific bequests been filed? Yes __ No __

3. If "No," list such specific devisees under item No. 1 above.

V. **Proof of Service**

1. List or attach a list of all interested persons who are entitled to notice of hearing.

Name	Basis Upon Which Person Is Entitled to Notice
_____	_____
_____	_____

2. Was notice served on all interested persons? (HRS §560:1-401) Yes __ No __

3. If "No," were waivers of notice obtained and filed for all interested persons other than those served under 2 above? Yes __ No __

4. If "No," list the names of all interested persons who have not been served.

_____ _____
_____ _____

VI. **Fees**

Has the court been requested to review the reasonableness of the compensation of any person employed by the personal representative or the reasonableness of the compensation determined by the personal representative as reasonable for the personal representative's own services pursuant to HRS §560:3-721? Yes __ No __

An affidavit detailing the hourly rate and time spent for the services provided must be filed.

VII. **Prayer for Special Matters**

(*Note*: Anything beyond the normal and ordinary probate matters shall be specified in this classification as special or unusual matters.)

1. Special matters requested? Yes __ No __

2. If "Yes," enumerate such special matters.

VIII. **Objection or Opposition**

1. Are you aware of any opposition or objection to this petition? Yes __ No __

2. If "Yes," state by whom (include the relationship of the objector to the decedent or beneficiaries) and the grounds for the objection, if known.

THE UNDERSIGNED HEREBY CERTIFIES THAT TO THE BEST OF SAID INDIVIDUAL'S KNOWLEDGE AND BELIEF ALL OF THE FOREGOING FACTS AND FIGURES ARE TRUE AND CORRECT.

_____
Attorney for Petitioner or Pro Se Petitioner

Hearing Date _____

FLAG SHEET NO. 1-F
(Petition for Determination of Elective Share)

_____ Probate No. _____
(Attorney for Petitioner or Pro Se Petitioner)

Tel. No. _____ Estate of _____

For estates of decedents dying on or before January 1, 1997, skip to Item VI, Objection or Opposition.

I. **Timeliness of Election** (HRS §560:2-211(a), (b))

1. Date of Death: _____
2. Date of Probate of Will: _____
3. Date of Extension Granted by the Court, if any: _____

II. **Persons Entitled to Notice**

1. List the names of all interested persons (HRS §560:1-401) and state whether they have been notified of this proceeding.

Name	Notified? Yes	No
_____	____	____
_____	____	____
_____	____	____
_____	____	____

2. List all persons interested in the decedent's nonprobate transfers to others (HRS §560:2-211(b)) and state whether they have been notified of this proceeding.

Name	Notified? Yes	No
_____	____	____
_____	____	____
_____	____	____
_____	____	____

III. **Elective Share Percentage**

1. a. For how many years were the surviving spouse and the decedent married to each other? _____ years

or

b. For how many years were the surviving reciprocal beneficiary and the decedent in a reciprocal beneficiary relationship? _____ years

2. State the elective share percentage that corresponds to the years stated in item 1. (HRS §560:2-202(a)). _____ percent

IV. **Augmented Estate**

Summarize, by stating the value of the following:

1. Decedent's net probate estate (HRS §560:2-204) $ _____
2. Decedent's nonprobate transfers to others (HRS §560:2-205) $ _____
3. Decedent's nonprobate transfers to the surviving spouse (HRS §560:2-206) $ _____
4. The surviving spouse's property and nonprobate transfers to others (HRS §560:2-207) $ _____
5. The amount of any exclusions pursuant to HRS §560:2-208(a) $ _____
6. Any property excluded to avoid overlapping application pursuant to HRS §560:2-208 $ _____

State the value of the augmented estate $ _____

V. **Determination of Elective Share Amount**

State the value of the elective share amount (the elective share percentage of the augmented estate, HRS §560:2-202). $ _____

VI. **Objection or Opposition**

1. Are you aware of any opposition or objection to this petition? Yes __ No __
2. If "Yes," state by whom (include the relationship of the objector to the decedent or beneficiaries) and the grounds for the objection, if known.

THE UNDERSIGNED HEREBY CERTIFIES THAT TO THE BEST OF SAID INDIVIDUAL'S KNOWLEDGE AND BELIEF ALL OF THE FOREGOING FACTS AND FIGURES ARE TRUE AND CORRECT.

_____
Attorney for Petitioner or Pro Se Petitioner

EXHIBIT A

MEDIATION RULES FOR PROBATE, TRUST, CONSERVATORSHIP, AND GUARDIANSHIP (MEDIATION RULES)

Adopted and promulgated by the Supreme Court of the State of Hawaiʻi, August 23, 1996, effective October 1, 1996.

Rule 1. PROBATE, TRUST, CONSERVATORSHIP, AND GUARDIANSHIP MEDIATION.

The probate court may refer probate, trust, conservatorship, and guardianship, cases in the State of Hawaiʻi to mediation. Cases may be referred upon the petition of a party, by written stipulation of all parties, or upon the court's own motion. Participation in the mediation is mandatory in all cases that the court refers to mediation.

(Amended April 28, 2006, effective July 1, 2006.)

Rule 2. INTENT AND APPLICATION OF RULES.

The purpose of probate, trust, conservatorship, and guardianship mediation is to provide parties with an alternative to litigation in probate, trust, conservatorship, and guardianship matters.

(Amended April 28, 2006, effective July 1, 2006.)

Rule 3. MATTERS SUBJECT TO MEDIATION.

All contested probate, trust, conservatorship, and guardianship matters subject to probate court jurisdiction shall be eligible for referral to mediation. All probate, trust, conservatorship, and guardianship cases referred to mediation shall abide by these Mediation Rules.

(Amended April 28, 2006, effective July 1, 2006.)

Rule 4. ASSIGNMENT TO MEDIATOR.

(A) Parties may jointly select any person to serve as a mediator who has agreed to serve on a private basis. Such stipulation must be made within twenty (20) days after referral to mediation and must include a statement signed by the mediator expressing his or her willingness to mediate under the Mediation Rules. Alternatively, the court will assign a mediator to the case.

(B) Mediators shall be compensated, unless otherwise determined by the court. All fees or expenses related to the use of mediators in cases referred to mediation shall be borne by the parties, and not by the estate, unless otherwise ordered by the court.

Rule 5. AUTHORITY OF MEDIATORS.

Mediators shall work with the parties to facilitate agreements on substantive and procedural matters and attempt to aid in the voluntary resolution of cases. Mediators shall terminate the mediation if the mediator believes the process is unproductive or that any party or attorney is not mediating in good faith. Upon prior written approval of all parties to the mediation, mediators may recommend to the court that sanctions be imposed against a party or attorney who has failed to comply with these Mediation Rules. Mediators shall not issue decisions or make procedural or substantive recommendations about the case to the court.

(Amended August 26, 2014, effective January 1, 2015.)

Rule 6. ATTENDANCE AT THE MEDIATION.

If a party is represented by counsel, counsel with the most direct relationship to the party for the purpose of settlement shall participate in the mediation. The mediator may request that parties or third persons attend the mediation. If the mediator believes the presence of parties or third persons is critical to the resolution of a case, the mediator may require them to attend the mediation.

Rule 7. CONFIDENTIALITY.

The mediator shall not communicate any matters discussed at the mediation conference to any court, except as allowed by the Uniform Mediation Act or other relevant law. Likewise, parties and attorneys are prohibited from informing the court of discussions or actions taken at the mediation except as allowed by the Uniform Mediation Act or other relevant law. This rule does not require the exclusion of any evidence otherwise discoverable merely because it was presented in the course of the mediation. This rule also does not require exclusion of evidence that is offered for another purpose such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

(Amended August 26, 2014, effective January 1, 2015.)

Rule 8. SANCTIONS.

The court may, upon petition of a party or upon the recommendation of the mediator, award sanctions against any party or attorney for failure to comply with these Mediation RULES. Before imposition of a sanction, the court shall issue an order to show cause as to why a sanction should not be imposed. Sanctions may include costs and attorneys' fees reasonably incurred by all other parties to the mediation and in the prosecution of the petition or recommendation for sanctions.

(Amended April 28, 2006, effective July 1, 2006.)

Rule 9. IMMUNITY.

Mediators selected by the parties or assigned by the court pursuant to Rule 4 of these Mediation Rules shall be absolutely immune from suit for all conduct in the course of their official duties.