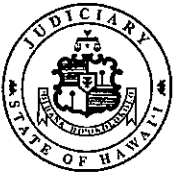


RE: **Proposed Amendments to
Hawai'i Probate Rules 8, 20(c), 50(a), 59, 61, 67, 76, 80, 114, 118, 120, and 125**

The Supreme Court of Hawai'i seeks public comment regarding a proposal to amend Rules 8, 20(c), 50(a), 59, 61, 67, 76, 80, 114, 118, 120, and 125 of the Hawai'i Probate Rules. The proposed amendments, including an explanatory letter, are attached hereto.

Comments about the proposed rules should be submitted, in writing, **no later than Monday, March 15, 2010**, to the Judiciary Public Affairs Office by mail to 417 South King Street, Honolulu, HI 96813, by facsimile to 539-4801, or via the Judiciary's website at www.courts.state.hi.us.

Attachment



Circuit Court of the Third Judicial Circuit - THE JUDICIARY • STATE OF HAWAII

DRUG COURT: 81-940 HALEKI'I STREET - KEALAKEKUA, HAWAII 96750 - TELEPHONE (808) 322-5910

HILO: 777 KILAUEA AVENUE • HILO, HAWAII 96720-4212 • TELEPHONE (808) 961-7440

KONA: 79-1020 HAUKAPILA STREET - P.O. BOX 1970 • KEALAKEKUA, HAWAII 96750-1970 - TELEPHONE (808) 322-8750

Ronald Ibarra
CHIEF JUDGE, THIRD JUDICIAL CIRCUIT
THIRD DIVISION - KONA

Greg K. Nakamura
DEPUTY CHIEF JUDGE
FIRST DIVISION - HILO
SENIOR FAMILY JUDGE, FAMILY DIVISION

Glenn S. Hara
JUDGE, SECOND DIVISION - HILO

Elizabeth A. Strance
JUDGE, FOURTH DIVISION - KONA

Lester D. Oshiro
CHIEF COURT ADMINISTRATOR

November 5, 2009

Hon. Ronald T.Y. Moon, Chief Justice
Hawai'i Supreme Court
Ali'iolani Hale
417 S. King Street
Honolulu, HI 96813

Proposed Amendments to the Hawai'i Probate Rules

Dear Chief Justice Moon:

The Committee on the Uniform Probate Code and Probate Court Practices ("Committee") respectfully recommends changes to the Hawai'i Probate Rules ("HPR"). A draft order is attached.

Amended Rules

The Committee proposes amendments to the following rules and/or Commentary thereto: HPR Rules 8, 20(c), 50(a), 59, 61, 67, 76, 80, 114, 118, 120, and 125.

Rule 8 Commentary.

The Commentary to Rule 8, Proof of Service, is amended by deleting "and received" from the phrase "any other method . . . that establishes on the record that notice was given and received." Although service by ordinary mail is permissible under Rule 8(b), and a certified mail return receipt is not required to be filed in the court record, the requirement that the record show "that notice was . . . received" has caused some to wonder whether a certified mail return receipt is required to prove service.

The new sentence added to the commentary regarding the presumption that a "document" properly addressed and mailed is received in the ordinary course of mail reflects a provision in

Rule 303(c)(10) of the Hawaii Rules of Evidence (HRE) pertaining to a letter. The Committee considered but decided against including a reference to the HRE.

Rule 20(c) and Commentary.

Rule 20(c) is amended to allow the court flexibility to decide in matters assigned to the civil trials calendar whether, for procedural purposes, the party objecting to a petition should necessarily be considered the plaintiff.

Rule 50(a) Commentary.

The Commentary to Rule 50(a) is amended to clarify case numbering in proceedings relating to testamentary trusts. A question had arisen as to whether a "T. No." proceeding would need to be initiated. This language added to the Commentary clarifies that the same number used in the decedent's probate estate will be used.

Rule 59 and Commentary.

Rule 59 and the Commentary are amended for consistency with statutory provisions. The obsolete references to a statutory fee schedule are deleted. Personal representative's fees are no longer set by statute.

Rule 61 and Commentary.

Rule 61 and the Commentary are amended for consistency with statutory amendments that took effect on July 1, 2008.

Rule 67 and Commentary.

Rule 67 is amended to include "heirs" as well as "beneficiaries" to reflect the applicability of this rule in cases where the decedent died intestate. In addition, the obsolete term "Deposit Receipt Offer and Acceptance (DROA)" is replaced with currently used "Purchase Contract."

Rule 76.

Rule 76 is amended to eliminate the requirement that a certified copy of a petition for probate or a petition for adjudication of intestacy filed in the domiciliary jurisdiction

be filed in ancillary proceedings in Hawaii, and to require a certified copy of any will or codicil *admitted to probate* in the domiciliary jurisdiction to be filed in the ancillary proceeding in Hawaii, instead of any will or codicil *presented for probate* in the domiciliary jurisdiction.

Rule 80 and Commentary.

Out of concern for informational privacy, the amendment to Rule 80 deletes the federal tax identification number from the list of information to be stated in a document filed in court. The Commentary is amended for accuracy, deleting "This rule requires very little involvement by the court, and the clerk serves the order as an administrative function."

Rule 114.

Sales of real property from a conservatorship estate requires court confirmation in all circumstances, unlike sales of real property from a probate estate, where court confirmation is mandatory only if required by the will or demanded by heirs or devisees. As worded, Rule 114 seems to suggest that, aside from the difference in terminology ("conservator" versus "personal representative"), the provisions of Rules 65 to 72 are applicable to sales of real property from a conservatorship estate. This amendment recognizes the substantive distinction.

Rule 118 and Commentary.

Rule 118 and the Commentary are amended to distinguish proceedings where ex parte appointment of a "special conservator" is permissible from those where notice and hearing are required. As currently worded, the rule could be interpreted to suggest that a special conservator could be appointed pursuant to HRS §560:5-412 on an ex parte basis.

Rule 120 and Commentary.

Rule 120 is amended for consistency with statutory requirements, to recognize that the provisions of HRS §560:5-433 are inapplicable to conservators appointed in a country other than the United States.

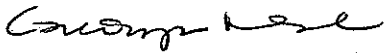
Hon. Ronald T.Y. Moon, Chief Justice
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Rule 125 and Commentary.

The amendments to Rule 125 refer to the new C. No. and CG. No. case types provided for in Rule 100. The Commentary is updated to distinguish between current and past history of the T. No. case type designation.

Please contact me if you have any questions.

Very truly yours,


for Ronald Ibarra, Chair
Committee on the Uniform Probate
Code and Probate Court Practices

Enclosure
cc: Committee Members

Probate Committee Proposed Amendments
November 5, 2009

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

In the Matter of the Amendment
of the
Hawai'i Probate Rules

ORDER AMENDING THE HAWAI'I PROBATE RULES

(By: Moon, C.J., Nakayama, Acoba, Duffy, and Recktenwald, JJ.)

IT IS HEREBY ORDERED that the Hawai'i Probate Rules are amended, effective July 1, 2010, as follows (deleted material is bracketed and stricken, new material is underlined):

1. Rule 8 is amended by amending the Commentary as follows:

Rule 8. PROOF OF SERVICE.

...

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 [~~and received~~]. A proof of service under Rule 8(b) relying on postal return receipts must attach copies of the return receipts. A document properly addressed and mailed is presumed to be received in the ordinary course of mail.

2. Rule 20 is amended by amending subsection (c) and Commentary as as follows:

Rule 20. DISPOSITION OF CONTESTED MATTERS.

...

Probate Committee Proposed Amendments

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(c) Effect of Assignment to Civil Trials Calendar. The Hawai'i 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. When a matter is assigned to the civil trials calendar, unless otherwise ordered by the court, 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.

3. Rule 50(a) is amended by amending the Commentary as follows:

RULE 50. INITIAL PLEADINGS

...

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

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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.

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."

5. Rule 59 and the Commentary are amended as follows:

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 statutory]~~ the fees should normally be allocated between the special administrator and the personal representative based on the relative work done for the estate. [In other situations, the court may allow the personal representative to take the full statutory fee and allow the special administrator additional fees.]

5. Rule 61 and the Commentary are amended as follows:

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

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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 ~~all~~ 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.

6. Rule 67 and the Commentary are amended as follows:

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

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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 ~~[Deposit Receipt Offer and Acceptance (DROA)]~~ 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 ~~[may again ask]~~ shall advise the beneficiaries or heirs [to consent to] of the specific sale terms set forth in the ~~[DROA]~~ Purchase Contract . If the beneficiaries or heirs ~~[consent in writing]~~ 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, ~~[court confirmation can be avoided and]~~ the property may be listed for sale without any reference to court confirmation.

7. Rule 76 is amended as follows:

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 (1) ~~[petition for probate or adjudication of intestacy; (2)]~~ order of probate or administration; ~~[(3)]~~(2) letters testamentary or letters of administration; ~~[(4)]~~(3) will and any codicils ~~[presented for]~~ admitted to probate in the domiciliary jurisdiction; and ~~[(5)]~~(4) any documents closing the domiciliary proceeding. Documents from a foreign jurisdiction shall be exemplified or have attached thereto an apostille.

8. Rule 80 and the Commentary are amended as follows:

**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~~[-and federal tax identification 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-Hawai'i resident retains an equitable interest in real property in Hawai'i, 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 Hawai'i, gives that deceased's interest the character of personal property and, therefore is generally within the jurisdiction of the domiciliary estate, but Hawai'i's Land Court statutes and Hawai'i title insurers frequently require a Hawai'i 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 Hawai'i real property. [This rule requires very little involvement by the court, and the clerk issues the order as an administrative function.] This rule should eliminate the need for special administrations previously used to appoint a person with authority to sign such documents.

9. Rule 114 is amended as follows:

Rule 114. PROBATE RULES APPLICABLE.

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Where real property is to be sold out of a conservatorship estate, the provisions of Rules 65 to 72 shall apply, ~~[substituting the]~~ except that (i) all references to the personal representative therein shall be substituted with references to the conservator, and (ii) a petition for court confirmation of sales of Hawai'i real property is required in all circumstances.

10. Rule 118 and the Commentary are amended as

follows:

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.

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

11. Rule 120 and the Commentary are amended as

follows:

Rule 120. ACKNOWLEDGMENT OF 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 [~~domicile~~] 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. [~~A conservator appointed in a country other than the United States, shall file with the Letters of Conservatorship and bond;~~

~~(A) an authentication pursuant to Rule 15(a)(2) of the Hawai'i Probate Rules, and~~

~~(B) a translation of any non-English documents pursuant to Rule 15(d) of the Hawai'i Probate Rules.]~~

(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.

12. Rule 125 and the Commentary are amended as

follows:

RULE 125. CASE NUMBER ASSIGNMENT

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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 [~~or a pourover trust from a will~~], in which case the P. No. [(if any)] for the original probate shall be used, or (2) a trust established by the court in a conservatorship [~~or guardianship~~] proceeding in which case the G. No., C. No.[:] or CG. No. for the original conservatorship [~~or guardianship~~] 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:

[Currently, all trust proceedings are filed in the catch-all "Special Proceedings" category. By creating a separate "T. No." category, all actions brought before the probate court will have one of five assignments: P., G., C., CG., or T.,] The purpose of case number assignments is to assign a number based upon the nature of the [issues] proceeding before the court. [Exceptions are made to trusts originating from probate or guardianship proceedings, so that all pleadings] 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 enactment of the Rule to retain the same case number assignment and remain in the original action [and] allows the court [may thereby] to more easily research the history of the trust. [Amended to reflect the statutory change brought about by Act 161, SLH 2004. See Commentary to HPR Rule 100.]

IT IS NOTED that Comment is provided by rules committees for interpretive assistance. Comments express the views of the committees and are not binding on the courts.

DATED: Honolulu, Hawai'i,