IN THE SUPREME COURT OF THE STATE OF HAWAI I

In the Matter of the Amendment

of the

Hawai i Probate Rules

ORDER AMENDING HAWAI I PROBATE RULES

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

IT IS HEREBY ORDERED that Rules 1, 2.1, 3, 7, 10(c), 18, 19, 26, 31, 34(a), 37, 48, 93, 101 through 104, 104.1, 105 through 113, 113.1, 114 through 120, 125, and Exhibit A-Mediation Rules 1, 2, 3, and 8 of the Hawai i Probate Rules are amended, effective July 1, 2006, as follows (deleted material is bracketed and stricken; new material is underscored):

Rule 1. SCOPE OF RULES.

These rules govern the procedure in the circuit courts of the State of Hawai i in all probate, conservatorship, guardianship [~~of property~~], 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], [~~557~~]557A [~~Revised~~][Uniform Principal and Income Act], and 560 [Uniform Probate Code] except Article V, Parts 2[~~, 3~~] 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 Hawai i 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 Hawai i Rules of Civil Procedure.

- Parts 2[~~, 3, ~~]and 6 of Article V, Chapter 560, because those sections fall within the jurisdiction of the family court. [~~Although~~] HRS § 560:5-[~~102~~]-106(3) allows consolidation of [~~guardian of the person and guardian of the property~~] protective and guardianship proceedings relating to the same person.[~~, the consolidation is only for evidentiary and administrative purposes; the actions remain separate, in the two separate courts. It is clear that the family court has exclusive jurisdiction over guardian of the person proceedings. HRS §§ 560:5-102, 571-11(3), 571-14(9).~~]

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~~] these rules [~~bring~~] brought trust proceedings in line with the procedural rules applicable to probates and what was then known as guardianship of the property.

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 [~~of the Property~~] (Mediation Rules), attached to these rules as Exhibit A and effective October 1, 1996, and as subsequently amended.

Rule 3. PLEADINGS ALLOWED; FORM OF PLEADINGS.

* * *

(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.

[~~(d)~~]**(e) Required Notice; Effect of Failure to Respond.**

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[~~(e)~~]**(f) Amendment and Supplementation of Pleadings.**

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Rule 7. METHODS OF SERVING NOTICE.

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COMMENTARY:

HRS § 560:1-401 identifies various methods of serving notice. HRS § 560:5-309(b) requires notice in a [~~guardianship~~] 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.

Rule 10. COMPUTATION OF TIME.

* * *

(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 [~~part~~] whole or in [~~whole~~] 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 [~~such~~] 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. [~~In all other cases and unless otherwise ordered by the court, any~~] Any party objecting or responding to an objection or response to a Kokua Kanawai's report[~~,~~] shall file [~~the~~] an objection or response [~~to reject or confirm the report~~] and shall serve it [~~on all counsel for parties who have appeared in the proceeding no less than 72 hours prior to the time set for the hearing as originally set~~] 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 [~~the~~] 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 [~~speedy and~~] 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. [~~Further responsive documents, including master, Kokua Kanawai (under rule 113) and guardian ad litem reports must be filed and served no later than 72 hours prior to the scheduled hearing date. This rule should result in greater efficiency of the court by allowing the court and the parties to be better prepared for hearings.~~] 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 [~~original~~] <u>originally</u> 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 72-hour response requirement conforms to language in the Rules of the Circuit Courts.~~]

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.

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Rule 18. RULES OF EVIDENCE.

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COMMENTARY:

By their terms (Rule 1101), the Hawai i Rules of Evidence apply to probate, trust, and guardianship <u>and conservatorship</u> 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.

Rule 19. DEFINITION.

* * *

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.

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 [~~guardianship~~] 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.

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 [~~the petitioner's~~] 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, [~~or~~] 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.

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

(a) Entry of Judgment. All formal testacy orders, orders of intestacy and determination of heirs, orders establishing conservatorship and/or guardianship [~~of the property~~], 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.

* * *

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 [~~guardianships~~] conservatorships under HRS § 560:5-401; [~~and~~] (3) orders establishing protective arrangements under HRS § [~~560:5-409~~] 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 Section 641-1(b), depending upon the circumstances, but is not necessary to file a separate judgment if an immediate appeal is not contemplated.

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.

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

* * *

COMMENTARY:

[~~*This rule would provide greater efficiency in the courts allowing the court to delegate what are purely ministerial powers under the circumstances to the clerk of the court or a deputy clerk. The majority of orders entered in proceedings in probate are automatic, because no one objects to the entry of the order prayed for. At this time, the court hears and signs almost all of the orders arising from probate, guardianship, and trust proceedings. Delegation of powers would more effectively use the court's time for true controversies.*~~]

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.

Rule 93 PROBATE OF WILL WITHOUT ADMINISTRATION OF ASSETS.

* * *

COMMENTARY:

Often a will contains clauses that nominate [~~guardians~~] 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.

PART C. CONSERVATORSHIP AND GUARDIANSHIP [~~OF THE PROPERTY~~] 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.

Rule 101. PERSONAL INJURY RECOVERIES.

When a minor or incapacitated person receives a settlement or judgment from any claim or action, a [~~guardianship~~] conservatorship action must be initiated by the plaintiff's attorney and any settlement approved by the court insofar as it affects the [~~ward~~] protected person or respondent. The judge presiding in probate shall appoint a [~~guardian~~] conservator for the minor or incapacitated individual and determine whether any settlement is reasonable.

COMMENTARY:

Too frequently in tort actions, the plaintiff's attorney forgets about the need for a [~~guardian~~] conservator to represent the interest of an injured person and then attempts to have the trial judge assume jurisdiction of a [~~guardianship~~] 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 [~~guardianship~~] conservatorship matters, if a trial judge in the First Circuit assumes jurisdiction of the [~~guardianship~~] conservatorship for purposes of disposition of the tort action, very often the requirements of the statute and rules are not met and the [~~guardianship~~] 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.

Rule 102. PHYSICIAN'S LETTERS.

(a) Conservatorship. The petitioner for [~~guardianship~~] conservatorship may submit a physician's letter or report which states: (1) the [~~protected person is under a disability~~] respondent's ability to receive and evaluate information or to make or communicate decisions (even with the use of appropriate and reasonably available technological assistance) is impaired; (2) the medical cause (diagnosis) of said [~~disability~~] impairment; (3) the prognosis for the [~~disability~~] impairment; (4) the impact of the [~~disability~~] impairment upon the [~~person's~~] individual's ability to manage the [~~person's~~] individual's property and business affairs effectively; (5) how long the physician has been treating the [~~protected person~~] respondent; and (6) any other matter the physician deems relevant.

(b) Guardianship. The petitioner for 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 individual 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 person's ability to manage the person's property and affairs in an effective manner, if the person's ability to receive and evaluate information or to make or communicate decisions is impaired, even with the use of appropriate and reasonably available technological assistance, HRS § 560:5-401, and (2) provide other information to enable the court to evaluate the weight to be given to the letter or report.

Rule 103. FLAG SHEETS.

An original and no fewer than two copies of flag sheets in the form ordered by the court shall be presented to the clerk of the court for all hearings to appoint a [~~guardian of the property~~] 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 ten 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 [~~adopts the~~] rule [~~of Probate Memo 1 and~~] 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. It is anticipated that, with an appropriate top margin for the date-stamp, the flag sheets will follow generally the format of current flag sheet forms 1-C and 1-D; ideally, they will be prepared as pre-printed forms.

Rule 104. TO WHOM.

(a) Conservatorship. The petitioner [~~for an order~~] in a [~~guardianship of the property~~] conservatorship or protective arrangement proceeding shall notify the persons designated by statute and shall also serve notice on:

(1) Any [~~guardian ad litem~~] attorney appointed by the court to represent [~~a minor or protected person~~] the respondent.

[~~(2) The person who has care and custody of a minor under the age of 13, when no guardian ad litem has been appointed.~~]

[~~(3)~~] (2) The Department of Veterans' Affairs in cases wherein the [~~protected person~~] respondent is a veteran of the military receiving benefits from that department.

[~~(4)~~] (3) Any other attorney representing the [~~protected person~~] respondent.

[~~(5)~~] (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 [~~clarifies and expands the list of persons to whom notice of guardianship proceedings must be~~

~~provided.~~] is consistent with HRS §§ 560:5-205, 560:5-40[~~5~~]4 and 560:5-309 [~~enumerate the individuals to whom notice must be given. This rule eliminates the need to serve~~] and does not require service of notice of a conservatorship or guardianship proceeding on a [~~young~~] child[~~-~~] under the age of fourteen.

~~[The rule expands the notice requirements of the statute to include the guardian ad litem and any attorney for the individual. In addition, the Department of Veterans' Affairs must be notified if the proceeding is a V.A. guardianship. With the addition of the concept of the "Kokua Kanawai," notice to that person is also required.]~~

Rule 104.1. DEMAND FOR NOTICE.

(a) Preparation and Filing:

(1) [~~GUARDIANSHIP~~] 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 [~~G.~~]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.

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 [~~Hawai i Revised Statutes Section~~] 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 [~~those who have not joined in the petition~~] 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 [~~anywhere in the State by the sheriff or the sheriff's deputy, by the chief of police or the chief's duly authorized subordinate, by some other person specially appointed by the court for that purpose, or~~] by any person who is not a party and not less than 18 years of age.[~~, on the following individuals:~~

~~(1) the person concerning whom the proceeding has been commenced, subject to Rule 104;~~

~~(2) the person's spouse or reciprocal beneficiary;~~

~~(3) the person's legal parents, if living;~~

~~(4) the person's adult children.~~

~~**(c) Other Methods of Service.** If the person's spouse or reciprocal beneficiary, the person's legal parents, and the person's adult children cannot be found within the state, personal service need not be effected and notice to such persons and to all other persons entitled to notice, except the person concerning whom the proceeding has been commenced, shall be given as provided in Hawai i Revised Statutes Section 560:1-401.~~]

COMMENTARY:

~~[HRS § 560:5-405 provides generally that "notice shall be given to the persons . . . and in the manner specified in section 560:5-309 . . . ."]~~ 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-~~[309(b)]~~ 404 provides that

"notice of hearing on a petition for conservatorship or other protective order shall be served personally on the [alleged incapacitated person, the person's spouse or reciprocal beneficiary, the person's legal parents, and the person's adult children, if they can be found within the State."] 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 [of the property] proceedings. [To ensure that in fact notice was provided to the protected person or an individual in close relationship to that person, service of notice by an eligible person must be made on at least one individual interested in the proceeding, and the rule establishes an order of priority.] 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 intent of the rule is to provide official service of process on at least one individual, in order of priority, and reasonable notice to all other interested persons, but without the formality and expense of using a state official.]

The rule requires formal service of process on the respondent only at the initiation of a protective proceeding.[; because thereafter all interested persons will already be on notice regarding the proceeding, and simple receipted notice should be] Notice by mail or hand delivery is sufficient for proceedings after the guardianship, conservatorship or protective arrangement has been established.

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 [~~current~~] prior statutes [~~require~~] required notice to particular persons at the initiation of a proceeding but [~~have~~] 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~~] 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.

Rule 107. DEPOSIT AND INVESTMENT OF FUNDS.

(a) Bond.

(1) [~~Unless otherwise ordered by the court, a guardian of the property shall post bond in an amount equal to the initial value of the guardianship assets plus one year's anticipated income. Should the value of the guardianship estate significantly increase or decrease, the court may order an appropriate adjustment in the amount of bond at the time of the guardian's regular accounting.~~] 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*:**

[~~*This rule starts on the premise that bond is required in all guardianship estates, unless otherwise ordered by the court. Of the various fiduciary arrangements under the jurisdiction of the court, guardianships appear to have the largest cases of misapplication or misappropriation of funds, and therefore bond is appropriate to protect the estate. The remainder of this rule sets forth exceptions to this general policy, where the protection of the estate assets are otherwise adequately protected.*~~] *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 [~~guardianship~~] estate in the conservator's control will be deposited in a federally-insured financial institution located in the State of Hawai i in the names of the [~~guardian~~] conservator and the [~~guardian's~~] conservator's attorney or law firm, the signatures of both the [~~guardian~~] 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 [~~guardianship~~] estate in the conservator's control will be adequately protected, without involvement of the court clerk.

COMMENTARY:

This rule [~~basically echoes~~] when adopted in 1995, echoed the then current requirements of a First Circuit Court Probate Memo [~~3. That Probate~~] 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 [~~further~~] now clarifies that the actual attorney, or any member of the law firm representing the [~~guardian~~] conservator, may be so empowered to facilitate signatures by the attorney.

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

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

(2) The balance (or all) of the funds of the [~~guardianship~~] conservatorship estate shall be deposited in an interest-bearing savings account with a federally-insured financial institution located in the State of Hawai i in the name of the [~~guardian~~] conservator as [~~guardian of the property~~] conservator of the protected person, with the signature of both the [~~guardian~~] conservator and the [~~guardian's~~] conservator's attorney (or any member of the law firm representing the [~~guardian~~] conservator) being required for withdrawal purposes. The attorney for the [~~guardian~~] conservator shall be responsible for ensuring that the accounts of the [~~guardianship~~] conservatorship are established as required by this rule. Where a corporate fiduciary is appointed [~~guardian~~] conservator, or where an attorney is appointed as [~~guardian~~] 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 [~~guardianship~~] conservatorship to have two accounts: one for regular approved expenditures requiring only the [~~guardian's~~] conservator's signature, and another to hold all other funds requiring two signatures, that of the [~~guardian~~] conservator and the [~~guardian's~~] conservator's attorney (or any member of the law firm representing the [~~guardian~~] 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 Hawai i to ensure the court has jurisdiction [~~has~~] over the funds.

Where the funds of the [~~guardianship~~] 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 [~~guardianship~~] conservatorship funds are so large that multiple accounts

are required, however, the [~~guardian~~] 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 [~~guardian~~] conservator, the court may dispense with the two-signature requirement.

(d) Investment of Assets. Where the assets of the [~~guardianship~~] conservatorship estate are sufficiently large in amount, a corporate fiduciary, and with prior court authority, an individual [~~guardian~~] conservator may invest [~~guardianship~~] 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 [~~guardianship~~] 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 [~~guardian~~] 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 [~~guardianship~~] conservatorship plans. A budget is required by statute. HRS § 560:5-403(b)(9).

Rule 108. BUDGETS.

Where it is anticipated that regular distributions will be made for the benefit of the protected person during the [~~guardianship~~]

conservatorship administration, the petition for appointment of the [~~guardian~~] 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 [~~guardian~~] conservator until amended by court order, provided that:

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

(2) the [~~guardian~~] 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,[~~guardianship~~] 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 [~~guardian's~~] 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 [~~guardian~~] conservator or some other person, so that the court may effectively evaluate the suggested budget.

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 [~~guardian~~] 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 [~~guardianship~~] 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 [~~guardianship~~] conservatorship to provide for the future needs of the protected person. The court may impose sanctions on the [~~guardian~~] 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 [~~guardian~~] conservator to seek prior court approval for expenditures beyond those pre-approved under Rule 108. The [~~guardian~~] conservator must justify the expenditure and evaluate the impact of the expenditure on the future ability of the [~~guardianship~~] conservatorship to meet the needs of the protected person.

Rule 110. CONVERSION TO TRUST; FUNDING TRUST.

(a) Funding a Pre-Existing Trust. Where [~~a protected person~~] an individual or any other person has established a trust of which the [~~protected person~~] 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 [~~permit~~] a [~~guardian~~] conservator or special [~~guardian~~] conservator to transfer some or all of the [~~protected persons's~~] individual's assets to the trustee of said trust, without further accounting to the court. In appropriate circumstances, the court may order the [~~guardian~~] 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.

[~~Often this can be attained through a protective arrangement granting a special guardian temporary authority to transfer the individual's assets into the trust, but where~~] 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 [~~guardian~~] conservator whose authority is limited to transferring the assets to the trust as they are received by the protected person.

(b) Converting [~~Guardianship~~] Conservatorship into a Newly-Created Trust. Upon petition of the [~~guardian~~] conservator or other interested person, the court may grant the [~~guardian~~] conservator or a special [~~guardian~~] 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 [~~guardianship~~] 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~~] 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 § [~~560:5-408(3)~~] 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 [~~guardianship~~] 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 [~~G.~~] 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.

Rule 111. CONVERSION TO CUSTODIAL ARRANGEMENT.

The court, upon petition of the [~~guardian~~] conservator, may authorize the [~~guardian~~] conservator to transfer up to $10,000 to a custodial account under Hawai i 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 [~~guardianship~~] conservatorship or trust arrangement, because the courts will thereby have greater opportunity to exercise oversight as to the administration and disposition of the funds.

Rule 112. CONVERSION TO SMALL [~~GUARDIANSHIP~~] CONSERVATORSHIP.

The court, upon petition of the [~~guardian~~] conservator showing that the aggregate value of the assets are less than the maximum for small [~~guardianship~~] conservatorship administration, may order the [~~guardian~~] conservator to transfer the assets to the clerk of the court pursuant to Hawai i Revised Statutes Section 551-21. Upon completion of the transfer, the [~~guardian~~] conservator shall be discharged. With the petition, the [~~guardian~~] conservator shall file the [~~guardian's~~] 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 [~~guardianship~~] conservatorship procedure whereby the clerk of the court may act as [~~guardian of the property~~] 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 [~~guardianship~~] conservatorship to small [~~guardianship~~] conservatorship. The [~~guardian~~] conservator must petition the court for approval of the [~~guardian's~~] conservator's resignation, establish that the assets are within the jurisdictional limits of the small [~~guardianship~~] conservatorship proceeding, request the appointment of the clerk of the court as successor [~~guardian~~] 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 [~~guardianship~~] conservatorship if the clerk declines to serve.

The rule requires the [~~guardian~~] 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 [~~guardian's~~] conservator's accounts.

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 [~~protected person~~] 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 Hawai i Revised Statutes Section 560:5-406(c) and (d); in guardianship proceedings the duties shall include those items listed in Hawai i Revised Statutes Section 560:5-305(c) and (d). The Kokua Kanawai shall have access to all medical and psychological records of the [~~protected person~~] 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 Hawai i Revised Statutes Section 560:5-406(e); in guardianship proceedings the report shall include those items listed in Hawai i 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 [~~automatically terminates upon the~~

~~court's acceptance of the Kokua Kanawai's report~~] 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 [~~new~~] term "Kokua Kanawai" (Helper in the Law) was [~~adopted to eliminate the confusion that currently exists in the use of the term "guardian ad litem." In the normal meaning, the guardian ad litem is an advocate for one or more persons who otherwise are not represented. In the context of a guardianship of the property, however, the court has traditionally placed a different meaning on the role, more akin to that of a master.~~] 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 [~~protected person~~] respondent. Rather, the court could appoint [~~a guardian ad litem~~] an attorney for the [~~protected person~~] respondent.

Given this relationship and role, the Kokua Kanawai does not represent the [~~protected person~~] respondent, and [~~does not step into the protected person's shoes for purposes of notice and discovery. Therefore,~~], therefore, service upon the Kokua Kanawai does not constitute service on the respondent. Rule 104 requires that notice be served on a [~~protected person or guardian ad litem~~] respondent or attorney [~~where~~] 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. Hawai i 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, Hawai i 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 [~~ward~~] respondent to be able to fully advise the court, but may not thereby further reveal any privileged information.

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.

Rule 114. PROBATE RULES APPLICABLE.

Where real property is to be sold out of a [~~guardianship~~] conservatorship estate, the provisions of Rules 65 to 72 shall apply, substituting the references to the personal representative therein with references to the [~~guardian of the property~~] conservator.

Rule 115. V.A. [~~GUARDIANSHIPS~~] CONSERVATORSHIP.

(a) Definition. A V.A. [~~Guardianship~~] Conservatorship is a [~~guardianship~~] 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 [~~guardianship~~] conservatorship accounts and for approval of other actions involving V.A. [~~Guardianships~~] Conservatorships the written approval of the Department of Veterans' Affairs.

(c) Certificate of Audit. The [~~guardian~~] 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.[~~Guardianship~~] 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.[~~Guardianship~~] Conservatorship.

COMMENTARY:

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

Rule 116. REQUIRED ELEMENTS.

A [~~guardian~~] 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 [~~guardian~~] 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 [~~guardian's~~] conservator's distributive powers of the [~~guardian~~] 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 [~~guardianships~~] conservatorships, by placing a burden on the [~~guardian~~] conservator to review and specifically set forth the restrictions on the [~~guardian~~] conservator and to explain to the court just how the [~~guardian's~~] conservator's actions have conformed to court order.

Rule 117. [~~GUARDIAN'S~~] CONSERVATOR'S FEES: BASIS AND AMOUNT.

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

COMMENTARY:

HRS § [~~560:5-414~~] 560:5-417 allows the [~~guardian~~] conservator "reasonable compensation." Much confusion has resulted in trying to determine the appropriate basis for a [~~guardian's~~] conservator's compensation. By using the trustee fee schedule, certainty will result with a consistent fee schedule for similar work.

Rule 118. SPECIAL [~~GUARDIANSHIPS~~] CONSERVATORSHIPS AND PROTECTIVE ARRANGEMENTS.

When a special [~~guardian~~] conservator has been appointed on an ex parte basis, unless otherwise provided by court order, the authority of the special [~~guardian~~] conservator terminates automatically 90 days after the issuance of the letters of special [~~guardianship~~] conservatorship, unless there is then pending before the court a petition for appointment of a permanent [~~guardian~~] conservator or a petition to extend the appointment of the special [~~guardian~~] conservator for good cause, in which case the special [~~guardian's~~] conservator's appointment continues until the court orders otherwise. A special [~~guardian~~] conservator whose powers are terminated automatically shall account to the court for his or her actions.

COMMENTARY:

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

Ideally, where the need for a permanent [~~guardian~~] conservator is evident, all ex parte petitions for appointment of a special [~~guardian~~] conservator will be accompanied by the petition for appointment of a permanent [~~guardian~~] 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 [~~guardian~~] conservator, but the original 90 day period is not sufficient for the special [~~guardian~~] conservator to complete his or her duties, and the special [~~guardian's~~] conservator's appointment may be extended by the court for good cause.

Rule 119. EX PARTE TERMINATION OF PROCEEDINGS.

[~~U~~pon] Within 60 days of the death of the protected person or [~~upon~~] within 60 days of the minor attaining the age of majority or emancipation, the [~~guardian~~] conservator shall file a final report, and a petition for approval of final accounts, termination of [~~guardianship~~] conservatorship, and discharge. In the petition, the [~~guardian~~] 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 [~~guardian~~] 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.

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 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.

Rule 125. CASE NUMBER ASSIGNMENT.

The clerk of the court shall assign a T. No. to all 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 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.

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 [~~three~~] five assignments: P., G., C., CG., or T., based upon the nature of the issues before the court. Exceptions are made to trusts originating from probate or guardianship proceedings, so that all pleadings remain in the original action and the court may thereby 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.

EXHIBIT A

MEDIATION RULES FOR PROBATE, TRUST, CONSERVATORSHIP AND GUARDIANSHIP [~~OF THE PROPERTY~~] (MEDIATION RULES)

Rule 1. PROBATE, TRUST, CONSERVATORSHIP, AND GUARDIANSHIP [~~OF THE PROPERTY~~] MEDIATION.

The probate court may refer probate, trust, conservatorship, and guardianship, [~~of the property (guardianship)~~] cases in the State of Hawai i to mediation. Cases may be referred upon the [~~motion~~] 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.

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 [~~of the property (guardianship)~~] matters.

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.

Rule 8. SANCTIONS.

The court may, upon [~~motion~~] 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 [~~motion~~] petition or recommendation for sanctions.

IT IS FURTHER ORDERED that Comments and Commentary are provided by the rules committees for interpretive assistance. The comments and commentary express the views of the committees and are not binding on the courts.

DATED: Honolulu, Hawai i, April 28, 2006.