

In the Matter of the Amendment
of the
HAWAII PROBATE RULES

ORDER AMENDING HAWAII PROBATE RULES

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

IT IS HEREBY ORDERED that Rules 50, 54, 69, 81, 90, 100, 101, 103, and 114 of the Hawaii Probate Rules, are amended, effective July 1, 2008 as follows (deleted material is bracketed and stricken; new material is underscored):

Rule 50. INITIAL PLEADINGS.

* * *

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

COMMENTARY:

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

Rule 54. AT FINAL ACCOUNTING.

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

COMMENTARY:

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

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

Rule 69. NOTICE; FLAG SHEET.

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

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

* * *

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

COMMENTARY:

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

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

Rule 81. FLAG SHEETS REQUIRED.

An original and ~~not less than~~ two copies of flag sheets in the form ~~ordered~~ approved by the court, containing the information sought therein, shall be presented to the clerk of the court for all hearings to admit a will to probate, to adjudicate intestacy, to appoint a personal representative, to confirm the sale of real property, to determine an elective share, and to approve the final accounts of

the personal representative. These flag sheets shall conform to the requirements of Rule 4 and shall be presented to the court no later than 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] rule makes flag sheets mandatory in all probate proceedings in all circuits. The flag sheets are not filed as pleadings but are date-stamped as having been received by the clerk to eliminate the chance for lost documents and to provide a clear record. The flag sheet is normally placed in the court's file for ready reference by the judge and court staff. [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-A, 1-B, 1-D, and 1-E; they will ideally be prepared as pre-printed forms.] Sample flag sheets are available at the court and may be available on-line.

Rule 90. STATUTORY ALLOWANCES.

* * *

(c) **Elective Share.** A petition for elective share shall be served upon all interested persons, including any recipient or beneficiary of property that may be included in the augmented estate. Any notice of hearing shall contain a statement notifying interested persons that they are required to file and serve, within 30 days from the date of service of the petition, a statement describing any property they received from the decedent within two years of the decedent's death, its value if known, and the date it was received. Within 30 days from the date of service of the petition, any recipient of property that may be included in the augmented estate shall file and serve upon all interested parties a statement setting forth a description of the property, its value if known, and the date it was received. A flag sheet shall be presented pursuant to Rule 81 for any hearing on a petition for elective share.

COMMENTARY:

Under prior law, which allowed the surviving spouse an elective share of 1/3 of the net probate estate, the elective share petition was heard in conjunction with the petition for approval of final accounts. [The new] Current law gives the surviving spouse a percentage of the augmented estate, which includes property the decedent transferred to others, either by inter vivos gift or at death. Therefore, a separate hearing must be held to determine (a) the applicable percentage the surviving spouse is entitled to; (b) what assets are included in the augmented estate;

and (c) the order in which assets shall be applied to satisfy the elective share. Creditors are not interested persons who must be served with the elective share petition. Recipients who are entitled to notice include but are not limited to trustees of trusts established by the decedent, beneficiaries under insurance policies or retirement accounts, joint tenants, and beneficiaries of trusts established by the decedent.

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

Rule 100. CASE NUMBERS.

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

COMMENTARY:

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

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

2004 Commentary: Under HRS § 560:5-106, the probate court has exclusive jurisdiction over protective proceedings and concurrent jurisdiction with family court over guardianships of adults in cases where there is also a protective proceeding concerning the adult. Changing "G. No." to "C. No." reflects terminology in Article V of Chapter 560, effective January 1, 2005, where "guardian" is used instead of "guardian of the person" and "conservator" instead of "guardian of the property." In addition, H.R.S. §§ 571-14 and 603-21.5 were amended to provide the probate court concurrent jurisdiction with family court over adult guardianships, effective January 1, 2005, consistent with subject matter jurisdiction provisions in Article V of the Hawaii Probate Code (previously H.R.S § 560:5-102; as of

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

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

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

Rule 101. PERSONAL INJURY RECOVERIES.

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

COMMENTARY:

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

settlement or award, greater efficiency will result as "clean up" proceedings should be eliminated.

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

Rule 103. FLAG SHEETS.

An original and [~~no fewer than~~] two copies of flag sheets in the form [~~ordered~~] approved by the court, containing the information sought therein, shall be presented to the clerk of the court for all hearings to appoint a conservator, to appoint a conservator and a guardian for an incapacitated adult, to compromise a tort claim on behalf of a minor or incapacitated person, and to confirm the sale of real property. These flag sheets shall be presented to the court no later than 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 rule makes flag sheets mandatory in all conservatorship and guardianship proceedings in all circuits. The flag sheets are not filed as pleadings but are date-stamped as having been received by the clerk, to eliminate the chance for lost documents and to provide a clear record. The flag sheet is normally placed in the court's file for ready reference by the judge and court staff. [~~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.]~~ Sample flag sheets are available at the court and may be available on-line.

Rule 114. PROBATE RULES APPLICABLE.

Where real property is to be sold out of a conservatorship estate, the provisions of Rules 65 to 72 shall apply, substituting the references to the personal representative therein with references to the conservator. A flag sheet shall be presented pursuant to Rule 103 for any hearing on a petition for confirmation of the sale of real property.

COMMENTARY:

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

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, Hawaii, May 15, 2008.