

CHAPTER 560
UNIFORM PROBATE CODE

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Cross References

Effect and transition of L 1996, c 288 amendments, see §560:8-201.

Uniform transfer-on-death (TOD) security registration act, see chapter 539.

Rules of Court

See Hawaii Probate Rules.

Applicability of Hawaii Rules of Civil Procedure, see HRCPC rule 81(a)(1), (c), (f), (g), (h).

"ARTICLE I GENERAL PROVISIONS, DEFINITIONS, AND PROBATE JURISDICTION OF COURT

PART 1. SHORT TITLE, CONSTRUCTION, GENERAL PROVISIONS

Cross References

Effect and transition of L 1996, c 288 amendments, see §560:8-201.

§560:1-101 Short title. This chapter shall be known and may be cited as the Uniform Probate Code. [L 1996, c 288, pt of §1]

" **§560:1-102 Purposes; rule of construction.** (a) This chapter shall be liberally construed and applied to promote its underlying purposes and policies.

(b) The underlying purposes and policies of this chapter are to:

- (1) Simplify and clarify the law concerning the affairs of decedents, missing persons, protected persons, minors and incapacitated persons;
- (2) Discover and make effective the intent of a decedent in distribution of the decedent's property;
- (3) Promote a speedy and efficient system for liquidating the estate of the decedent and making distribution to the decedent's successors;
- (4) Facilitate use and enforcement of certain trusts; and
- (5) Make uniform the law among the various jurisdictions.
[L 1996, c 288, pt of §1]

" **§560:1-103 Supplementary general principles of law applicable.** Unless displaced by the particular provisions of this chapter, the principles of law and equity supplement its provisions. [L 1996, c 288, pt of §1]

Case Notes

As no "particular provision" in chapter 560 displaces a right of access to probate proceedings and records, third parties have a right to file petitions challenging the closure of probate court proceedings or the sealing of court records under a principle of law supplementing the probate code. 106 H. 453, 106 P.3d 1096.

" **§560:1-104 Severability.** If any provision of this chapter or the application thereof to any person or circumstances is held invalid, the invalidity shall not affect other provisions or applications of the chapter which can be given effect without the invalid provision or application, and to this end the provisions of this chapter are declared to be severable. [L 1996, c 288, pt of §1]

" **§560:1-105 Construction against implied repeal.** This chapter is a general act intended as a unified coverage of its subject matter and no part of it shall be deemed impliedly repealed by subsequent legislation if it can reasonably be avoided. [L 1996, c 288, pt of §1]

" **§560:1-106 Effect of fraud and evasion.** Whenever fraud has been perpetrated in connection with any proceeding or in any statement filed under this chapter or if fraud is used to avoid or circumvent the provisions or purposes of this chapter, any person injured thereby may obtain appropriate relief against the perpetrator of the fraud or restitution from any person (other than a bona fide purchaser) benefitting from the fraud, whether innocent or not. Any proceeding must be commenced within two years after the discovery of the fraud, but no proceeding may be brought against one not a perpetrator of the fraud later than five years after the time of commission of the fraud. This section has no bearing on remedies relating to fraud practiced on a decedent during the decedent's lifetime which affects the succession of the decedent's estate. [L 1996, c 288, pt of §1]

" **§560:1-107 Evidence of death or status.** In addition to the rules of evidence, the following rules relating to a determination of death and status apply:

- (1) Death occurs when an individual has sustained either:

- (A) Irreversible cessation of circulatory and respiratory functions; or
 - (B) Irreversible cessation of all functions of the entire brain, including the brain stem. A determination of death must be made in accordance with accepted medical standards;
- (2) A certified or authenticated copy of a death certificate purporting to be issued by an official or agency of the place where the death purportedly occurred is prima facie evidence of the fact, place, date, and time of death and the identity of the decedent;
 - (3) A certified or authenticated copy of any record or report of a governmental agency, domestic or foreign, that an individual is missing, detained, dead, or alive is prima facie evidence of the status and of the dates, circumstances, and places disclosed by the record or report;
 - (4) In the absence of prima facie evidence of death under paragraph (2) or (3), the fact of death may be established by clear and convincing evidence, including circumstantial evidence;
 - (5) An individual whose death is not established under the preceding paragraphs who is absent for a continuous period of five years, during which the individual has not been heard from, and whose absence is not satisfactorily explained after diligent search or inquiry, is presumed to be dead. The individual's death is presumed to have occurred at the end of the period unless there is sufficient evidence for determining that death occurred earlier;
 - (6) In the absence of evidence disputing the time of death stated on a document described in paragraph (2) or (3), a document described in paragraph (2) or (3) that states a time of death one hundred twenty hours or more after the time of death of another individual, however the time of death of the other individual is determined, establishes by clear and convincing evidence that the individual survived the other individual by one hundred twenty hours. [L 1996, c 288, pt of §1]

Rules of Court

Determination of death, see HPR rules 150, 154.

" **§560:1-108 Acts by holder of general power.** For the purpose of granting consent or approval with regard to the acts or accounts of a personal representative or trustee, including relief from liability or penalty for failure to post bond, to register a trust, or to perform other duties, and for purposes of consenting to modification or termination of a trust or to deviation from its terms, the sole holder or all co-holders of a presently exercisable general power of appointment, including one in the form of a power of amendment or revocation, are deemed to act for beneficiaries to the extent their interests (as objects, takers in default, or otherwise) are subject to the power. [L 1996, c 288, pt of §1]

Rules of Court

Trust registration, see HPR rule 127.

"PART 2. DEFINITIONS

§560:1-201 General definitions. Subject to additional definitions contained in the subsequent articles that are applicable to specific articles, parts, or sections, and unless the context otherwise requires, in this chapter:

"Agent" includes an attorney-in-fact under a durable or nondurable power of attorney, an individual authorized to make decisions concerning another's health care, and an individual authorized to make decisions for another under a natural death act.

"Application" means a written request to the registrar for an order of informal probate or appointment under part 3 of article III.

"Beneficiary", as it relates to a trust beneficiary, includes a person who has any present or future interest, vested or contingent, and also includes the owner of an interest by assignment or other transfer; as it relates to a charitable trust, includes any person entitled to enforce the trust; as it relates to a "beneficiary of a beneficiary designation", refers to a beneficiary of an insurance or annuity policy, of an account with POD designation, of a security registered in beneficiary form (TOD), or of a pension, profit-sharing, retirement, or similar benefit plan, or other nonprobate transfer at death; and, as it relates to a "beneficiary designated in a governing instrument", includes a grantee of a deed, a devisee, a trust beneficiary, a beneficiary of a beneficiary designation, a donee, appointee, or taker in default of a power of appointment, or a person in whose favor a power of

attorney or a power held in any individual, fiduciary, or representative capacity is exercised.

"Beneficiary designation" refers to a governing instrument naming a beneficiary of an insurance or annuity policy, of an account with POD designation, of a security registered in beneficiary form (TOD), or of a pension, profit-sharing, retirement, or similar benefit plan, or other nonprobate transfer at death.

"Child" includes an individual entitled to take as a child under this chapter by intestate succession from the parent whose relationship is involved and excludes a person who is only a stepchild, a foster child, a grandchild, or any more remote descendant.

"Claims", in respect to estates of decedents and protected persons, includes liabilities of the decedent or protected person, whether arising in contract, in tort, or otherwise, and liabilities of the estate which arise at or after the death of the decedent or after the appointment of a conservator, including funeral expenses and expenses of administration. The term does not include estate or inheritance taxes, or demands or disputes regarding title of a decedent or protected person to specific assets alleged to be included in the estate.

"Court" means the circuit court in this State having jurisdiction in matters relating to the affairs of decedents.

"Conservator" shall have the meaning provided in section 560:5-102.

"Descendant" of an individual means all of the individual's descendants of all generations, with the relationship of parent and child at each generation being determined by the definition of child and parent contained in this chapter.

"Devise", when used as a noun, means a testamentary disposition of real or personal property and, when used as a verb, means to dispose of real or personal property by will.

"Devisee" means a person designated in a will to receive a devise. For the purposes of article II, in the case of a devise to an existing trust or trustee, or to a trustee on trust described by will, the trust or trustee is the devisee and the beneficiaries are not devisees.

"Distributee" means any person who has received property of a decedent from the decedent's personal representative other than as a creditor or purchaser. A testamentary trustee is a distributee only to the extent of distributed assets or increment thereto remaining in the trustee's hands. A beneficiary of a testamentary trust to whom the trustee has distributed property received from a personal representative is a distributee of the personal representative. For the purposes of this provision, "testamentary trustee" includes a trustee to

whom assets are transferred by will, to the extent of the devised assets.

"Estate" includes the property of the decedent, trust, or other person whose affairs are subject to this chapter as originally constituted and as it exists from time to time during administration.

"Exempt property" means that property of a decedent's estate which is described in section 560:2-403.

"Fiduciary" includes a personal representative, guardian, conservator, and trustee.

"Foreign personal representative" means a personal representative appointed by another jurisdiction.

"Formal proceedings" means proceedings conducted before a judge with notice to interested persons.

"Governing instrument" means a deed, will, trust, insurance or annuity policy, account with POD designation, security registered in beneficiary form (TOD), pension, profit-sharing, retirement, or similar benefit plan, instrument creating or exercising a power of appointment or a power of attorney, or a dispositive, appointive, or nominative instrument of any similar type.

"Guardian" shall have the meaning provided in section 560:5-102.

"Heirs", except as controlled by section 560:2-711, means persons, including the surviving spouse or reciprocal beneficiary and the State, who are entitled under the statutes of intestate succession to the property of a decedent.

"Incapacitated person" shall have the meaning provided in section 560:5-102.

"Informal proceedings" means those conducted without notice to interested persons by an officer of the court acting as a registrar for probate of a will or appointment of a personal representative.

"Interested person" includes heirs, devisees, children, spouses or reciprocal beneficiaries, creditors, beneficiaries, and any others having a property right in or claim against a trust estate or the estate of a decedent, ward, or protected person. It also includes persons having priority for appointment as personal representative, and other fiduciaries representing interested persons. The meaning as it relates to particular persons may vary from time to time and must be determined according to the particular purposes of, and matter involved in, any proceeding.

"Issue" of a person means descendant as defined in this section.

"Joint tenants with the right of survivorship" and "community property with the right of survivorship" includes

tenancies by the entirety and co-ownership of property held under circumstances that entitle one or more owners to the whole of the property on the death of the other or others, but excludes forms of co-ownership registration in which the underlying ownership of each party is in proportion to that party's contribution.

"Lease" includes an oil, gas, or other mineral lease.

"Letters" includes letters testamentary, letters of guardianship, letters of administration, and letters of conservatorship. Unless otherwise provided by order of the court or registrar, letters testamentary and letters of administration shall only be effective for three years unless renewed for good cause, and such limitation shall be stated on the face of the letters.

"Minor" shall have the meaning provided in section 560:5-102.

"Mortgage" means any conveyance, agreement, or arrangement in which property is encumbered or used as security.

"Nonresident decedent" means a decedent who was domiciled in another jurisdiction at the time of decedent's death.

"Organization" means a corporation, business trust, estate, trust, partnership, joint venture, association, government or governmental subdivision or agency, or any other legal or commercial entity.

"Parent" includes any person entitled to take, or who would be entitled to take if the child died without a will, as a parent under this chapter by intestate succession from the child whose relationship is in question and excludes any person who is only a stepparent, foster parent, or grandparent.

"Payor" means a trustee, insurer, business entity, employer, government, governmental agency or subdivision, or any other person authorized or obligated by law or a governing instrument to make payments.

"Person" means an individual or an organization.

"Personal representative" includes executor, administrator, successor personal representative, special administrator, and persons who perform substantially the same function under the law governing their status. "General personal representative" excludes special administrator.

"Petition" means a written request to the court for an order after notice.

"Proceeding" includes action at law and suit in equity.

"Property" includes both real and personal property or any interest therein and means anything that may be the subject of ownership.

"Protected person" shall have the meaning provided in section 560:5-102.

"Protective proceeding" means a proceeding held pursuant to part 4 of article V.

"Registrar" refers to the official of the court designated to perform the functions of registrar as provided in section 560:1-307.

"Security" includes any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in an oil, gas, or mining title or lease or in payments out of production under such a title or lease, collateral trust certificate, transferable share, voting trust certificate or, in general, any interest or instrument commonly known as a security, or any certificate of interest or participation, any temporary or interim certificate, receipt, or certificate of deposit for, or any warrant or right to subscribe to or purchase, any of the foregoing.

"Settlement", in reference to a decedent's estate, includes the full process of administration, distribution, and closing.

"Special administrator" means a personal representative as described by sections 560:3-614 through 560:3-618.

"State" means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or insular possession subject to the jurisdiction of the United States.

"Successor personal representative" means a personal representative, other than a special administrator, who is appointed to succeed a previously appointed personal representative.

"Successors" means persons, other than creditors, who are entitled to property of a decedent under the decedent's will or this chapter.

"Supervised administration" refers to the proceedings described in article III, part 5.

"Survive" means that an individual has neither predeceased an event, including the death of another individual, nor is deemed to have predeceased an event under section 560:2-104 or 560:2-702. The term includes its derivatives, such as "survives", "survived", "survivor", "surviving".

"Testacy proceeding" means a proceeding to establish a will or determine intestacy.

"Testator" includes an individual of either sex.

"Trust" includes an express trust, private or charitable, with additions thereto, wherever and however created. The term also includes a trust created or determined by judgment or decree under which the trust is to be administered in the manner of an express trust. The term excludes other constructive trusts and excludes resulting trusts, conservatorships, personal representatives, trust accounts as defined in article VI,

custodial arrangements pursuant to chapters 553A and 554B, business trusts providing for certificates to be issued to beneficiaries, common trust funds, voting trusts, security arrangements, liquidation trusts, and trusts for the primary purpose of paying debts, dividends, interest, salaries, wages, profits, pensions, or employee benefits of any kind, and any arrangement under which a person is nominee or escrowee for another.

"Trustee" includes an original, additional, or successor trustee, whether or not appointed or confirmed by court.

"Ward" shall have the meaning provided in section 560:5-102.

"Will" includes codicil and any testamentary instrument that merely appoints an executor, revokes or revises another will, nominates a guardian, or expressly excludes or limits the right of an individual or class to succeed to property of the decedent passing by intestate succession. [L 1996, c 288, pt of §1; am L 1997, c 383, §19; am L 2004, c 161, §25]

Case Notes

Appellant was not an "interested person", as defined in this section, who could petition the court under §560:3-614 for appointment as special administrator where appellant had no familial relationship to decedent's family, did not have a property right or claim against decedent's estate, and did not have priority under §560:3-203 to be appointed as personal representative of decedent's estate; circuit court thus properly denied appellant's petition. 88 H. 148, 963 P.2d 1124.

The term "interested person" as defined in this section does not include a party interested solely in challenging a closure order in a probate proceeding; where appellants did not "possess an interest in the estate itself" nor were trustees, heirs, devisees, children, spouses or reciprocal beneficiaries, creditors, or beneficiaries, trial court correctly denied appellant media's petition to intervene as "interested persons". 106 H. 453, 106 P.3d 1096.

Decisions under prior law.

Hearing on complaint for determination and declaration of heirs was not a probate proceeding. 77 H. 251 (App.), 883 P.2d 673.

"PART 3. SCOPE, JURISDICTION, AND COURTS

§560:1-301 Territorial application. Except as otherwise provided in this chapter, this chapter applies to:

- (1) The affairs and estates of decedents, missing persons, and persons to be protected, domiciled in this State;
- (2) The property of nonresidents located in this State or property coming into the control of a fiduciary who is subject to the laws of this State;
- (3) Incapacitated persons and minors in this State;
- (4) Survivorship and related accounts in this State; and
- (5) Trusts subject to administration in this State. [L 1996, c 288, pt of §1]

Case Notes

Circuit court properly ruled it did not have jurisdiction to open probate proceedings where appellant failed to prove decedent was domiciled in Hawaii or owned property located in Hawaii. 88 H. 148, 963 P.2d 1124.

Property held in federal custody at the time of circuit court proceedings may not serve as the jurisdictional basis for a Hawaii probate proceeding under paragraph (2). 88 H. 148, 963 P.2d 1124.

" **§560:1-302 Subject matter jurisdiction.** (a) To the full extent permitted by the Constitution and except as otherwise provided by law, the court has jurisdiction over all subject matter relating to:

- (1) Estates of decedents, including construction of wills and determination of heirs and successors of decedents, and estates of protected persons;
- (2) Protection of minors and incapacitated persons; and
- (3) Trusts.

(b) The court has full power to make orders, judgments and decrees and take all other action necessary and proper to administer justice in the matters which come before it.

(c) The court has jurisdiction over protective proceedings and the family court has jurisdiction over guardianship proceedings.

(d) Where protective and guardianship proceedings relating to the same person have been initiated, they may be consolidated in the court or in the family court as the court and the family court in the exercise of their discretion shall determine. [L 1996, c 288, pt of §1]

Rules of Court

Consolidation of proceedings, see HPR rule 14.

Case Notes

Family court had subject matter jurisdiction to issue temporary restraining order under subsection (b), §§571-8.5 and 560:5-106(2) and (3) where resolution of ward's capacity was required to be resolved, and an apparent threat of ward's removal from the court's jurisdiction was alleged. 113 H. 211, 151 P.3d 692 (2007).

" **§560:1-303 Venue; multiple proceedings; transfer.** (a) Where a proceeding under this chapter could be maintained in more than one place in this State, the court in which the proceeding is first commenced has the exclusive right to proceed.

(b) If proceedings concerning the same estate, protected person, ward, or trust are commenced in more than one court of this State, the court in which the proceeding was first commenced shall continue to hear the matter, and the other courts shall hold the matter in abeyance until the question of venue is decided, and if the ruling court determines that venue is properly in another court, it shall transfer the proceeding to the other court.

(c) If a court finds that in the interest of justice a proceeding or a file should be located in another court of this State, the court making the finding may transfer the proceeding or file to the other court. [L 1996, c 288, pt of §1]

" **§560:1-304 Practice in court.** Unless specifically provided to the contrary in this chapter or unless inconsistent with its provisions, the Hawai'i probate rules govern formal and informal proceedings under this chapter. [L 1996, c 288, pt of §1]

" **§560:1-305 Records and certified copies.** The clerk of court shall keep a record for each decedent, ward, protected person, or trust involved in any document which may be filed with the court under this chapter, including petitions and applications, demands for notices or bonds, trust registrations, and of any orders or responses relating thereto by the registrar or court, and establish and maintain a system for indexing, filing, or recording which is sufficient to enable users of the records to obtain adequate information. Upon payment of the fees required by law the clerk shall issue certified copies of any probated wills, letters issued to personal representatives, or any other record or paper filed or recorded. Certificates relating to probated wills shall indicate whether the decedent was domiciled in this State and whether the probate was formal

or informal. Certificates relating to letters shall show the date of appointment. [L 1996, c 288, pt of §1]

" **§560:1-306 Jury trial.** (a) If duly demanded, a party is entitled to trial by jury in a formal testacy proceeding and any proceeding in which any controverted question of fact arises as to which any party has a constitutional right to trial by jury.

(b) If there is no right to trial by jury under subsection (a) or the right is waived, the court in its discretion may call a jury to decide any issue of fact, in which case the verdict is advisory only. [L 1996, c 288, pt of §1]

" **§560:1-307 Registrar; powers.** The acts and orders which this chapter specifies as performable by the registrar may be performed either by a judge of the court or by a person, including the clerk, designated by the court by a written order filed and recorded in the office of the court. [L 1996, c 288, pt of §1]

" **§560:1-308 Appeals.** Appellate review, including the right to appellate review, interlocutory appeal, provisions as to time, manner, notice, appeal bond, stays, scope of review, record on appeal, briefs, arguments and power of the appellate court, is governed by the Hawai`i rules of appellate procedure and the Hawai`i rules of civil procedure. [L 1996, c 288, pt of §1]

Rules of Court

Appeal to circuit court, see HRCF rule 72; appeal to supreme court, see Hawaii Rules of Appellate Procedure.

" **§560:1-309 Reserved.**

" **§560:1-310 Oath or affirmation on filed documents.** Except as otherwise specifically provided in this chapter or by rule, every document filed with the court under this chapter including applications, petitions, and demands for notice, shall be deemed to include an oath, affirmation, or statement to the effect that its representations are true as far as the person executing or filing it knows or is informed, and penalties for perjury may follow deliberate falsification therein. [L 1996, c 288, pt of §1]

Rules of Court

Verification, see HPR rule 5.

**"PART 4. NOTICE, PARTIES, AND REPRESENTATION IN ESTATE
LITIGATION AND OTHER MATTERS**

§560:1-401 Notice; method and time of giving. (a) If notice of a hearing on any petition is required and except for specific notice requirements as otherwise provided, the petitioner shall cause notice of the time and place of hearing of any petition to be given to any interested person or the person's attorney if the person has appeared by attorney or requested that notice be sent to the person's attorney, or, in the case of a minor or an incapacitated person, the minor's or incapacitated person's parent or guardian, as appropriate. Notice shall be given:

- (1) By mailing a copy thereof at least fourteen days before the time set for the hearing by certified, registered, or ordinary first class mail addressed to the person being notified at the post office address given in the person's demand for notice, if any, or at the person's office or place of residence, if known;
- (2) By delivering a copy thereof to the person being notified personally at least fourteen days before the time set for the hearing; or
- (3) If the address or identity of any person is not known and cannot be ascertained with reasonable diligence, by publishing at least once a week for three consecutive weeks, a copy thereof in a newspaper having general circulation in the judicial circuit where the hearing is to be held, the last publication of which is to be at least ten days before the time set for the hearing.

(b) The court for good cause shown may provide for a different method or time of giving notice for any hearing.

(c) Proof of the giving of notice shall be made on or before the hearing and filed in the proceeding. [L 1996, c 288, pt of §1]

Rules of Court

Service, see Hawaii Probate Rules, part A(III); HPR rule 51.

" **§560:1-402 Notice; waiver.** A person, including a guardian ad litem, conservator, or other fiduciary, may waive notice by a writing signed by the person or the person's attorney and filed in the proceeding. A person for whom a guardianship or other protective order is sought, a ward, or a protected person may not waive notice. [L 1996, c 288, pt of §1]

Rules of Court

Waiver of notice, see HPR rule 53.

- " **§560:1-403 Pleadings; when parties bound by others; notice.** In formal proceedings involving trusts or estates of decedents, minors, protected persons, or incapacitated persons, and in judicially supervised settlements, the following apply:
- (1) Interests to be affected shall be described in pleadings which give reasonable information to owners by name or class, by reference to the instrument creating the interests, or in other appropriate manner;
 - (2) Persons are bound by orders binding others in the following cases:
 - (A) Orders binding the sole holder or all co-holders of a power of revocation or a presently exercisable general power of appointment, including one in the form of a power of amendment, bind other persons to the extent their interests (as objects, takers in default, or otherwise) are subject to the power;
 - (B) To the extent there is no conflict of interest between them or among persons represented, orders binding a conservator bind the person whose estate the conservator controls; orders binding a guardian bind the ward if no conservator of the ward's estate has been appointed; orders binding a trustee bind beneficiaries of the trust in proceedings to probate a will establishing or adding to a trust, to review the acts or accounts of a prior fiduciary and in proceedings involving creditors or other third parties; and orders binding a personal representative bind persons interested in the undistributed assets of a decedent's estate in actions or proceedings by or against the estate. If there is no conflict of interest and no conservator or guardian has been appointed, a parent may represent the parent's minor child; and
 - (C) An unborn or unascertained person who is not otherwise represented is bound by an order to the extent the person's interest is adequately represented by another party having a substantially identical interest in the proceeding;

- (3) Notice is required as follows:
- (A) Notice as prescribed by section 560:1-401 shall be given to every interested person or to one who can bind an interested person as described in paragraph (2)(A) or (2)(B). Notice may be given both to a person and to another who may bind the person;
 - (B) Notice is given to unborn or unascertained persons, who are not represented under paragraph (2)(A) or (2)(B), by giving notice to all known persons whose interests in the proceedings are substantially identical to those of the unborn or unascertained persons;
- (4) At any point in a proceeding, a court may appoint a guardian ad litem to represent the interest of a minor, an incapacitated, unborn, or unascertained person, or a person whose identity or address is unknown, if the court determines that representation of the interest otherwise would be inadequate. If not precluded by conflict of interests, a guardian ad litem may be appointed to represent several persons or interests. The court shall set out its reasons for appointing a guardian ad litem as a part of the record of the proceeding. [L 1996, c 288, pt of §1]

Rules of Court

Pleadings, see Hawaii Probate Rules, part A(II); HPR rules 17, 50.

Guardian ad litem, see HPR rule 28.

"ARTICLE I [OLD] GENERAL PROVISIONS, DEFINITIONS AND PROBATE JURISDICTION OF COURT

PART 1. SHORT TITLE, CONSTRUCTION, GENERAL PROVISIONS

§§560:1-101 to 560:1-403 REPEALED. L 1996, c 288, pt of §6.

Cross References

As to rights accruing before July 1, 1977, see chapters 531 and 532.

"ARTICLE II [OLD] INTTESTATE SUCCESSION AND WILLS

§§560:2-101 TO 560:2-902 REPEALED. L 1996, c 288, pt of §6.

**ARTICLE II
INTESTATE SUCCESSION AND WILLS**

Cross References

Applies only to the estates of decedents dying after January 1, 1997; for other effect and transition provisions, see §560:8-201.

§560:2-101 Intestate estate. (a) Any part of a decedent's estate not effectively disposed of by will passes by intestate succession to the decedent's heirs as prescribed in this chapter, except as modified by the decedent's will.

(b) A decedent by will may expressly exclude or limit the right of an individual or class to succeed to property of the decedent passing by intestate succession. If that individual or a member of that class survives the decedent, the share of the decedent's intestate estate to which that individual or class would have succeeded passes as if that individual or each member of that class had disclaimed the intestate share. [L 1996, c 288, pt of §1]

" **§560:2-102 Share of spouse or reciprocal beneficiary.** The intestate share of a decedent's surviving spouse or reciprocal beneficiary is:

- (1) The entire intestate estate if:
 - (A) No descendant or parent of the decedent survives the decedent; or
 - (B) All of the decedent's surviving descendants are also descendants of the surviving spouse or reciprocal beneficiary and there is no other descendant of the surviving spouse or reciprocal beneficiary who survives the decedent;
- (2) The first \$200,000, plus three-fourths of any balance of the intestate estate, if no descendant of the decedent survives the decedent, but a parent of the decedent survives the decedent;
- (3) The first \$150,000, plus one-half of any balance of the intestate estate, if all of the decedent's surviving descendants are also descendants of the surviving spouse or reciprocal beneficiary and the surviving spouse or reciprocal beneficiary has one or

more surviving descendants who are not descendants of the decedent; or

- (4) The first \$100,000, plus one-half of any balance of the intestate estate, if one or more of the decedent's surviving descendants are not descendants of the surviving spouse or reciprocal beneficiary. [L 1996, c 288, pt of §1; am L 1997, c 383, §19]

" **§560:2-103 Share of heirs other than surviving spouse or reciprocal beneficiary.** Any part of the intestate estate not passing to the decedent's surviving spouse or reciprocal beneficiary under section 560:2-102, or the entire intestate estate if there is no surviving spouse or reciprocal beneficiary, passes in the following order to the individuals designated below who survive the decedent:

- (1) To the decedent's descendants by representation;
- (2) If there is no surviving descendant, to the decedent's parents equally if both survive, or to the surviving parent; provided, however, if the decedent is a minor, and if it is shown by clear and convincing evidence that any parent has:
 - (A) Deserted the child without affording means of identification for a period of at least ninety days;
 - (B) Failed to communicate with the child when able to do so for a period of at least one year when the child is in the custody of another; or
 - (C) Failed to provide for care and support of the child when able to do so for a period of at least one year when the child is in the custody of another despite a child support order requiring such support;such parent shall be deemed to have predeceased the decedent;
- (3) If there is no surviving descendant or parent entitled to inherit, to the descendants of the decedent's parents or either of them by representation; and
- (4) If there is no surviving descendant, parent entitled to take, or descendant of a parent, but the decedent is survived by one or more grandparents or descendants of grandparents, half of the estate passes to the decedent's paternal grandparents equally if both survive, or to the surviving paternal grandparent, or to the descendants of the decedent's paternal grandparents or either of them if both are deceased, the descendants taking by representation; and the other half passes to the decedent's maternal relatives

in the same manner; but if there is no surviving grandparent or descendant of a grandparent on either the paternal or the maternal side, the entire estate passes to the decedent's relatives on the other side in the same manner as the half. [L 1996, c 288, pt of §1; am L 1997, c 244, §15 and c 383, §19]

Rules of Court

Determination of heirs, see HPR rule 73.

" **§560:2-104 Requirement that heir survive decedent for one hundred twenty hours.** An individual who fails to survive the decedent by one hundred twenty hours is deemed to have predeceased the decedent for purposes of homestead allowance, exempt property, and intestate succession, and the decedent's heirs are determined accordingly. If it is not established by clear and convincing evidence that an individual who would otherwise be an heir survived the decedent by one hundred twenty hours, it is deemed that the individual failed to survive for the required period. This section is not to be applied if its application would result in a taking of intestate estate by the State under section 560:2-105. [L 1996, c 288, pt of §1]

" **§560:2-105 No taker.** If there is no taker under the provisions of this article, the intestate estate passes to the State. [L 1996, c 288, pt of §1]

" **§560:2-105.5 Escheat of kuleana lands.** Any provision of law to the contrary notwithstanding, if the owner of an inheritable interest in kuleana land dies intestate, or dies partially intestate and that partial intestacy includes the decedent's interest in the kuleana land, and if there is no taker under article II, such inheritable interest shall pass to the department of land and natural resources to be held in trust until the office of Hawaiian affairs develops a land management plan for the use and management of such kuleana properties, and such plan is approved by the department of land and natural resources. Upon approval, the department of land and natural resources shall transfer such kuleana properties to the office of Hawaiian affairs. For the purposes of this section, "kuleana lands" means those lands granted to native tenants pursuant to L. 1850, p. 202, entitled "An Act Confirming Certain Resolutions of the King and Privy Council Passed on the 21st Day of December, A.D. 1849, Granting to the Common People Allodial Titles for Their Own Lands and House Lots, and Certain Other

Privileges", as originally enacted and as amended. [L 1996, c 288, pt of §1]

" **§560:2-106 Representation.** (a) Definitions. In this section:

"Deceased descendant", "deceased parent", or "deceased grandparent" means a descendant, parent, or grandparent who either predeceased the decedent or is deemed to have predeceased the decedent under section 560:2-104.

"Surviving descendant" means a descendant who neither predeceased the decedent nor is deemed to have predeceased the decedent under section 560:2-104.

(b) Decedent's descendants. If, under section 560:2-103(1), a decedent's intestate estate or a part thereof passes "by representation" to the decedent's descendants, the estate or part thereof is divided into as many equal shares as there are:

- (1) Surviving descendants in the generation nearest to the decedent which contains one or more surviving descendants; and
- (2) Deceased descendants in the same generation who left surviving descendants, if any.

Each surviving descendant in the nearest generation is allocated one share. The remaining shares, if any, are combined and then divided in the same manner among the surviving descendants of the deceased descendants as if the surviving descendants who were allocated a share and their surviving descendants had predeceased the decedent.

(c) Descendants of parents or grandparents. If, under section 560:2-103(3) or (4), a decedent's intestate estate or a part thereof passes "by representation" to the descendants of the decedent's deceased parents or either of them or to the descendants of the decedent's deceased paternal or maternal grandparents or either of them, the estate or part thereof is divided into as many equal shares as there are:

- (1) Surviving descendants in the generation nearest the deceased parents or either of them, or the deceased grandparents or either of them, that contains one or more surviving descendants; and
- (2) Deceased descendants in the same generation who left surviving descendants, if any.

Each surviving descendant in the nearest generation is allocated one share. The remaining shares, if any, are combined and then divided in the same manner among the surviving descendants of the deceased descendants as if the surviving descendants who were allocated a share and their surviving descendants had predeceased the decedent. [L 1996, c 288, pt of §1]

" **§560:2-107 Kindred of half blood.** Relatives of the half blood inherit the same share they would inherit if they were of the whole blood. [L 1996, c 288, pt of §1]

" **§560:2-108 Afterborn heirs.** An individual in gestation at a particular time is treated as living at that time if the individual lives one hundred twenty hours or more after birth. [L 1996, c 288, pt of §1]

" **§560:2-109 Advancements.** (a) If an individual dies intestate as to all or a portion of the individual's estate, property the decedent gave during the decedent's lifetime to an individual who, at the decedent's death, is an heir is treated as an advancement against the heir's intestate share only if:

- (1) The decedent declared in a contemporaneous writing or the heir acknowledged in writing that the gift is an advancement; or
- (2) The decedent's contemporaneous writing or the heir's written acknowledgment otherwise indicates that the gift is to be taken into account in computing the division and distribution of the decedent's intestate estate.

(b) For purposes of subsection (a), property advanced is valued as of the time the heir came into possession or enjoyment of the property or as of the time of the decedent's death, whichever first occurs.

(c) If the recipient of the property fails to survive the decedent, the property is not taken into account in computing the division and distribution of the decedent's intestate estate, unless the decedent's contemporaneous writing provides otherwise. [L 1996, c 288, pt of §1]

" **§560:2-110 Debts to decedent.** A debt owed to a decedent is not charged against the intestate share of any individual except the debtor. If the debtor fails to survive the decedent, the debt is not taken into account in computing the intestate share of the debtor's descendants. [L 1996, c 288, pt of §1]

" **§560:2-111 Alienage.** No individual is disqualified to take as an heir because the individual or an individual through whom the individual claims is or has been an alien. [L 1996, c 288, pt of §1]

" **§560:2-112 Dower and curtesy abolished.** The estates of dower and curtesy are abolished. [L 1996, c 288, pt of §1]

" **§560:2-113 Individuals related to decedent through two lines.** An individual who is related to the decedent through two lines of relationship is entitled to only a single share based on the relationship that would entitle the individual to the larger share. [L 1996, c 288, pt of §1]

" **§560:2-114 Parent and child relationship.** (a) Except as provided in subsections (b) and (c), for purposes of intestate succession by, through, or from a person, an individual is the child of the child's natural parents, regardless of their marital status. The parent and child relationship may be established under chapter 584.

(b) An adopted individual is the child of the child's adopting parent or parents and not of the child's natural parents, except that:

- (1) Adoption of a child by the spouse or reciprocal beneficiary of either natural parent has no effect on:
 - (A) The relationship between the child and that natural parent; or
 - (B) The right of the child or a descendant of the child to inherit from or through the other natural parent; and

- (2) Adoption of a child during such child's minority by the spouse or reciprocal beneficiary of a natural parent of the child, by a natural grandparent, aunt, uncle, or sibling of the child or the spouse or reciprocal beneficiary of a natural grandparent, aunt, uncle, or sibling of the child has no effect on the relationship between the child and either natural parent, for the limited purpose of interpretation or construction of a disposition in any will, trust, or other lifetime instrument, whether executed before or after the order of adoption, and for the purposes of determining the heirs at law of a natural family member of the child.

(c) Inheritance from or through a child by either natural parent or the parent's kindred is precluded unless that natural parent has openly treated the child as the natural parent's, and has not refused to support the child.

(d) For the purposes of this section, if a person has been adopted more than once, the term "natural parent" includes an adopting parent by an earlier adoption. [L 1996, c 288, pt of §1; am L 1997, c 383, §19]

The term "may", as set forth in subsection (a), is permissive, and, for purposes of intestate succession, a purported heir may establish his or her parent-child relationship with the decedent by any means permitted by statute, including, but not limited to, chapter 584. 103 H. 275, 81 P.3d 1190.

Trial court did not err in failing to apply this section as it did not apply to either the testamentary trust or the life insurance trust for purposes of determining whether daughter was the "issue" of natural father. 105 H. 284, 96 P.3d 1098.

"PART 2. ELECTIVE SHARE OF SURVIVING SPOUSE

Cross References

Applies only to the estates of decedents dying after January 1, 1997; for other effect and transition provisions, see §560:8-201.

§560:2-201 Definitions. In this part:

As used in sections other than section 560:2-205, "decedent's nonprobate transfers to others" means the amounts that are included in the augmented estate under section 560:2-205.

"Fractional interest in property held in joint tenancy with the right of survivorship", whether the fractional interest is unilaterally severable or not, means the fraction, the numerator of which is one and the denominator of which, if the decedent was a joint tenant, is one plus the number of joint tenants who survive the decedent and which, if the decedent was not a joint tenant, is the number of joint tenants.

"Marriage", as it relates to a transfer by the decedent during marriage, means any marriage of the decedent to the decedent's surviving spouse.

"Nonadverse party" means a person who does not have a substantial beneficial interest in the trust or other property arrangement that would be adversely affected by the exercise or nonexercise of the power that the person possesses respecting the trust or other property arrangement. A person having a general power of appointment over property is deemed to have a beneficial interest in the property.

"Power" or "power of appointment" includes a power to designate the beneficiary of a beneficiary designation.

"Presently exercisable general power of appointment" means a power of appointment under which, at the time in question, the decedent, whether or not the decedent then had the capacity to exercise the power, held a power to create a present or future interest in the decedent's self, the decedent's creditors, the

decedent's estate, or creditors of the decedent's estate, and includes a power to revoke or invade the principal of a trust or other property arrangement.

"Probate estate" means property that would pass by intestate succession if the decedent died without a valid will.

"Property" includes values subject to a beneficiary designation.

"Reciprocal beneficiary" means an adult who is a party to a registered reciprocal beneficiary relationship in accordance with chapter 572C, and has a valid certificate of reciprocal beneficiary relationship that has not been terminated.

"Reciprocal beneficiary relationship" is the registered status of two adults defined in chapter 572C.

"Right to income" includes a right to payments under a commercial or private annuity, an annuity trust, a unitrust, or a similar arrangement.

"Transfer", as it relates to a transfer by or of the decedent, includes:

- (1) An exercise or release of a presently exercisable general power of appointment held by the decedent;
- (2) A lapse at death of a presently exercisable general power of appointment held by the decedent; and
- (3) An exercise, release, or lapse of a general power of appointment that the decedent created in the decedent's self of a power described in section 560:2-205(2)(B) that the decedent conferred on a nonadverse party. [L 1996, c 288, pt of §1; am L 1997, c 383, §11]

" **§560:2-202 Elective share.** (a) Elective-share amount. The surviving spouse or reciprocal beneficiary of a decedent who dies domiciled in this State has a right of election, under the limitations and conditions stated in this part, to take an elective-share amount equal to the value of the elective-share percentage of the augmented estate, determined by the length of time the spouse and the decedent were married to each other, or the reciprocal beneficiary and the decedent were in a reciprocal beneficiary relationship, in accordance with the following schedule:

If the decedent and the spouse were married to each other, or the decedent and the reciprocal beneficiary were in a relationship:	The elective-share percentage is:
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Less than 1 year	Supplemental amount only.
1 year but less than 2 years	3% of the augmented estate.
2 years but less than 3 years	6% of the augmented estate.
3 years but less than 4 years	9% of the augmented estate.
4 years but less than 5 years	12% of the augmented estate.
5 years but less than 6 years	15% of the augmented estate.
6 years but less than 7 years	18% of the augmented estate.
7 years but less than 8 years	21% of the augmented estate.
8 years but less than 9 years	24% of the augmented estate.
9 years but less than 10 years	27% of the augmented estate.
10 years but less than 11 years	30% of the augmented estate.
11 years but less than 12 years	34% of the augmented estate.
12 years but less than 13 years	38% of the augmented estate.
13 years but less than 14 years	42% of the augmented estate.
14 years but less than 15 years	46% of the augmented estate.
15 years or more	50% of the augmented estate;

provided, however, the surviving spouse or reciprocal beneficiary may elect to take a share smaller than that to which the surviving spouse or reciprocal beneficiary is entitled hereunder.

(b) Supplemental elective-share amount. If the sum of the amounts described in sections 560:2-207, 560:2-209(a)(1), and that part of the elective-share amount payable from the decedent's probate estate and nonprobate transfers to others under section 560:2-209(b) and (c) is less than \$50,000, the surviving spouse or reciprocal beneficiary is entitled to a supplemental elective-share amount equal to \$50,000 minus the sum of the amounts described in those sections. The supplemental elective-share amount is payable from the decedent's probate estate and from recipients of the decedent's nonprobate transfers to others in the order of priority set forth in section 560:2-209(b) and (c).

(c) Effect of election on statutory benefits. If the right of election is exercised by or on behalf of the surviving spouse or reciprocal beneficiary, the surviving spouse's or reciprocal beneficiary's homestead allowance, exempt property, and family allowance, if any, are not charged against but are in addition to the elective-share and supplemental elective-share amounts.

(d) Non-domiciliary. The right, if any, of the surviving spouse or reciprocal beneficiary of a decedent who dies domiciled outside this State to take an elective share in property in this State is governed by the law of the decedent's domicile at death. [L 1996, c 288, pt of §1; am L 1997, c 383, §12]

Rules of Court

Distribution, see HPR rule 90(c).

" **§560:2-203 Composition of the augmented estate.** Subject to section 560:2-208, the value of the augmented estate, to the extent provided in sections 560:2-204, 560:2-205, 560:2-206, and 560:2-207, consists of the sum of the values of all property, whether real or personal; movable or immovable, tangible or intangible, wherever situated, that constitute the decedent's net probate estate, the decedent's nonprobate transfers to others, the decedent's nonprobate transfers to the surviving spouse or reciprocal beneficiary, and the surviving spouse's or reciprocal beneficiary's property and nonprobate transfers to others. [L 1996, c 288, pt of §1; am L 1997, c 383, §19]

" **§560:2-204 Decedent's net probate estate.** The value of the augmented estate includes the value of the decedent's probate estate, reduced by funeral and administration expenses, homestead allowance, family allowances, exempt property, and enforceable claims. [L 1996, c 288, pt of §1]

" **§560:2-205 Decedent's nonprobate transfers to others.** The value of the augmented estate includes the value of the decedent's nonprobate transfers to others, not included under section 560:2-204, of any of the following types, in the amount provided respectively for each type of transfer:

(1) Property owned or owned in substance by the decedent immediately before death that passed outside probate at the decedent's death. Probate included under this category consists of:

(A) Property over which the decedent alone, immediately before death, held a presently exercisable general power of appointment. The amount included is the value of the property subject to the power, to the extent the property passed at the decedent's death, by exercise, release, lapse, in default, or otherwise, to or for the benefit of any person other than the decedent's estate or surviving spouse or reciprocal beneficiary;

(B) The decedent's fractional interest in property held by the decedent in joint tenancy with the right of survivorship. The amount included is the value of the decedent's fractional interest, to the extent the fractional interest passed by right of survivorship at the decedent's death to a surviving joint tenant other than the

- decedent's surviving spouse or reciprocal beneficiary;
- (C) The decedent's ownership interest in property or accounts held in POD, TOD, or co-ownership registration with the right of survivorship. The amount included is the value of the decedent's ownership interest, to the extent the decedent's ownership interest passed at the decedent's death to or for the benefit of any person other than the decedent's estate or surviving spouse or reciprocal beneficiary. As used herein, "ownership interest" is determined by dividing (i) the sum of all the decedent's deposits to the account, including deposit life insurance proceeds added to the account on account of the decedent's death, less all withdrawals made by or for the benefit of the decedent, by (ii) the sum of all deposits to the account;
 - (D) Proceeds of insurance, including accidental death benefits, on the life of the decedent, if the decedent owned the insurance policy immediately before death or if and to the extent the decedent alone and immediately before death held a presently exercisable general power of appointment over the policy or its proceeds. The amount included is the value of the proceeds, to the extent they were payable at the decedent's death to or for the benefit of any person other than the decedent's estate or surviving spouse or reciprocal beneficiary;
- (2) Property transferred in any of the following forms by the decedent during marriage:
- (A) Any irrevocable transfer in which the decedent retained the right to the possession or enjoyment of, or to the income from, the property if and to the extent the decedent's right terminated at or continued beyond the decedent's death. The amount included is the value of the fraction of the property to which the decedent's right related, to the extent the fraction of the property passed outside probate to or for the benefit of any person other than the decedent's estate or surviving spouse or reciprocal beneficiary;
 - (B) Any transfer in which the decedent created a power over income or property, exercisable by the decedent alone or in conjunction with any other

person, or exercisable by a nonadverse party, to or for the benefit of the decedent, creditors of the decedent, the decedent's estate, or creditors of the decedent's estate. The amount included with respect to a power over property is the value of the property subject to the power, and the amount included with respect to a power over income is the value of the property that produces or produced the income, to the extent the power in either case was exercisable at the decedent's death to or for the benefit of any person other than the decedent's surviving spouse or reciprocal beneficiary or to the extent the property passed at the decedent's death, by exercise, release, lapse, in default, or otherwise, to or for the benefit of any person other than the decedent's estate or surviving spouse or reciprocal beneficiary. If the power is a power over both income and property and the preceding sentence produces different amounts, the amount included is the greater amount;

(3) Property that passed during marriage and during the two-year period next preceding the decedent's death as a result of a transfer by the decedent if the transfer was of any of the following types:

(A) Any property that passed as a result of the termination of a right or interest in, or power over, property that would have been included in the augmented estate under paragraph (1)(A), (B), or (C), or under paragraph (2), if the right, interest, or power had not terminated until the decedent's death. The amount included is the value of the property that would have been included under those paragraphs if the property were valued at the time the right, interest, or power terminated, and is included only to the extent the property passed upon termination to or for the benefit of any person other than the decedent or the decedent's estate, spouse or reciprocal beneficiary, or surviving spouse or reciprocal beneficiary. As used in this subparagraph, "termination", with respect to a right or interest in property, occurs when the right or interest terminated by the terms of the governing instrument or the decedent transferred or relinquished the right or interest, and, with respect to a power over property, occurs when the

power terminated by exercise, release, lapse, default, or otherwise, but, with respect to a power described in paragraph (1)(A), "termination" occurs when the power terminated by exercise or release, but not otherwise;

- (B) Any transfer of or relating to an insurance policy on the life of the decedent if the proceeds would have been included in the augmented estate under paragraph (1)(D) had the transfer not occurred. The amount included is the value of the insurance proceeds to the extent the proceeds were payable at the decedent's death to or for the benefit of any person other than the decedent's estate or surviving spouse or reciprocal beneficiary;
- (C) Any transfer of property, to the extent not otherwise included in the augmented estate, made to or for the benefit of a person other than the decedent's surviving spouse or reciprocal beneficiary. The amount included is the value of the transferred property to the extent the aggregate transfers to any one donee in either of the two years exceeded \$20,000. [L 1996, c 288, pt of §1; am L 1997, c 244, §1 and c 383, §19]

" **§560:2-206 Decedent's nonprobate transfers to the surviving spouse or reciprocal beneficiary.** Excluding property passing to the surviving spouse or reciprocal beneficiary under the federal social security system, the value of the augmented estate includes the value of the decedent's nonprobate transfers to the decedent's surviving spouse or reciprocal beneficiary, which consist of all property that passed outside probate at the decedent's death from the decedent to the surviving spouse or reciprocal beneficiary by reason of the decedent's death, including:

- (1) The decedent's fractional interest in property held as a joint tenant with the right of survivorship, to the extent that the decedent's fractional interest passed to the surviving spouse or reciprocal beneficiary as surviving joint tenant;
- (2) The decedent's ownership interest in property or accounts held in co-ownership registration with the right of survivorship, to the extent the decedent's ownership interest passed to the surviving spouse or reciprocal beneficiary as surviving co-owner; and
- (3) All other property that would have been included in the augmented estate under section 560:2-205(1) or (2)

had it passed to or for the benefit of a person other than the decedent's spouse or reciprocal beneficiary, surviving spouse or reciprocal beneficiary, the decedent, or the decedent's creditors, estate or estate creditors. [L 1996, c 288, pt of §1; am L 1997, c 383, §19]

" **§560:2-207 Surviving spouse's or reciprocal beneficiary's property and nonprobate transfers to others.** (a) Included property. Except to the extent included in the augmented estate under section 560:2-204 or 560:2-206, the value of the augmented estate includes the value of:

- (1) Property that was owned by the decedent's surviving spouse or reciprocal beneficiary at the decedent's death, including:
 - (A) The surviving spouse's or reciprocal beneficiary's fractional interest in property held in joint tenancy with the right of survivorship;
 - (B) The surviving spouse's or reciprocal beneficiary's ownership interest in property or accounts held in co-ownership registration with the right of survivorship; and
 - (C) Property that passed to the surviving spouse or reciprocal beneficiary by reason of the decedent's death, but not including the spouse's or reciprocal beneficiary's right to homestead allowance, family allowance, exempt property, or payments under the federal social security system; and
- (2) Property that would have been included in the surviving spouse's or reciprocal beneficiary's nonprobate transfers to others, other than the spouse's or reciprocal beneficiary's fractional and ownership interest included under subsection (a)(1)(A) or (B), had the spouse or reciprocal beneficiary been the decedent.

(b) Time of valuation. Property included under this section is valued at the decedent's death, taking the fact that the decedent predeceased the spouse or reciprocal beneficiary into account, but, for purposes of subsection (a)(1)(A) and (B), the values of the spouse's or reciprocal beneficiary's fractional and ownership interests are determined immediately before the decedent's death if the decedent was then a joint tenant or a co-owner of the property or accounts. For purposes of subsection (a)(2), proceeds of insurance that would have been included in the spouse's or reciprocal beneficiary's nonprobate

transfers to others under section 560:2-205(1)(D) are not valued as if the spouse or reciprocal beneficiary were deceased.

(c) Reduction for enforceable claims. The value of property included under this section is reduced by enforceable claims against the surviving spouse or reciprocal beneficiary. [L 1996, c 288, pt of §1; am L 1997, c 383, §19]

" **§560:2-208 Exclusions, valuation, and overlapping application.** (a) Exclusions:

- (1) The value of any property is excluded from the decedent's nonprobate transfers to others:
 - (A) To the extent the decedent received adequate and full consideration in money or money's worth for a transfer of the property; or
 - (B) If the property was transferred with the written joinder of, or if the transfer was consented to in writing by, the surviving spouse or reciprocal beneficiary.
- (2) The augmented estate shall not include the value of any property that either:
 - (A) Is held in a trust created and funded by any party other than the decedent, the surviving spouse, or the reciprocal beneficiary; or
 - (B) Was received by either spouse during marriage or either reciprocal beneficiary during a reciprocal beneficiary relationship, by gift, devise, inheritance or distribution from a trust created and funded by any party other than the decedent, the surviving spouse, or the reciprocal beneficiary; provided that such property was kept segregated from property includible in the augmented estate.
- (b) Valuation. The value of property:
 - (1) Included in the augmented estate under section 560:2-205, 560:2-206, or 560:2-207 is reduced in each category by enforceable claims against the included property; and
 - (2) Includes the commuted value of any present or future interest and the commuted value of amounts payable under any trust, life insurance settlement option, annuity contract, public or private pension, disability compensation, death benefit or retirement plan, or any similar arrangement, exclusive of the federal social security system.

(c) Overlapping application; no double inclusion. In case of overlapping application to the same property of the paragraphs or subparagraphs of section 560:2-205, 560:2-206, or

560:2-207, the property is included in the augmented estate under the provision yielding the greatest value, and under only one overlapping provision if they all yield the same value. [L 1996, c 288, pt of §1; am L 1997, c 383, §13]

" **§560:2-209 Sources from which elective share payable.** (a) In a proceeding for an elective share, the following are applied first to satisfy the elective-share amount and to reduce or eliminate any contributions due from the decedent's probate estate and recipients of the decedent's nonprobate transfers to others:

- (1) Amounts included in the augmented estate under section 560:2-204 which pass or have passed to the surviving spouse or reciprocal beneficiary by testate or intestate succession and amounts included in the augmented estate under section 560:2-206; and
- (2) Amounts included in the augmented estate under section 560:2-207 up to the applicable percentage thereof. For the purposes of this subsection, the "applicable percentage" is twice the elective-share percentage set forth in the schedule in section 560:2-202(a) appropriate to the length of time:
 - (A) The spouse and the decedent were married to each other; or
 - (B) The reciprocal beneficiary and the decedent were in a reciprocal beneficiary relationship.

(b) If, after the application of subsection (a), the elective-share amount is not fully satisfied or the surviving spouse or reciprocal beneficiary is entitled to a supplemental elective-share amount, amounts included in the decedent's probate estate and in the decedent's nonprobate transfers to others, other than amounts included under section 560:2-205(3)(A) or (C), are applied first to satisfy the unsatisfied balance of the elective-share amount or the supplemental elective-share amount. The decedent's probate estate and that portion of the decedent's nonprobate transfers to others are so applied that liability for the unsatisfied balance of the elective-share amount or for the supplemental elective-share amount is equitably apportioned among the recipients of the decedent's probate estate and of that portion of the decedent's nonprobate transfers to others in proportion to the value of their interests therein.

(c) If, after the application of subsections (a) and (b), the elective-share or supplemental elective-share amount is not fully satisfied, the remaining portion of the decedent's nonprobate transfers to others is so applied that liability for the unsatisfied balance of the elective-share or supplemental

elective-share amount is equitably apportioned among the recipients of the remaining portion of the decedent's nonprobate transfers to others in proportion to the value of their interests therein. [L 1996, c 288, pt of §1; am L 1997, c 383, §14]

" **§560:2-210 Personal liability of recipients.** (a) Only original recipients of the decedent's nonprobate transfers to others, and the donees of the recipients of the decedent's nonprobate transfers to others, to the extent the donees have the property or its proceeds, are liable to make a proportional contribution toward satisfaction of the surviving spouse's or reciprocal beneficiary's elective-share or supplemental elective-share amount. A person liable to make contribution may choose to give up the proportional part of the decedent's nonprobate transfers to the person or to pay the value of the amount for which he or she is liable.

(b) If any section or part of any section of this part is preempted by federal law with respect to a payment, an item of property, or any other benefit included in the decedent's nonprobate transfers to others, a person who, not for value, receives the payment, item of property, or any other benefit is obligated to return the payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of that item of property or benefit, as provided in section 560:2-209, to the person who would have been entitled to it were that section or part of that section not preempted. [L 1996, c 288, pt of §1; am L 1997, c 383, §19]

" **§560:2-211 Proceeding for elective share; time limit.** (a) Except as provided in subsection (b), the election must be made by filing in the court and mailing or delivering to the personal representative, if any, a petition for the elective share within nine months after the date of the decedent's death, or within six months after the probate of the decedent's will, whichever limitation later expires. Except as provided in subsection (b), the decedent's nonprobate transfers to others are not included within the augmented estate for the purpose of computing the elective-share, if the petition is filed more than nine months after the decedent's death.

(b) Within nine months after the decedent's death, the surviving spouse or reciprocal beneficiary may petition the court for an extension of time for making an election. If, within nine months after the decedent's death, the spouse or reciprocal beneficiary gives notice of the petition to all persons interested in the decedent's nonprobate transfers to others, the court for cause shown by the surviving spouse or

reciprocal beneficiary may extend the time for election. If the court grants the spouse's or reciprocal beneficiary's petition for an extension, the decedent's nonprobate transfers to others are not excluded from the augmented estate for the purpose of computing the elective-share and supplemental elective-share amounts, if the spouse or reciprocal beneficiary makes an election by filing in the court and mailing or delivering to the personal representative, if any, a petition for the elective share within the time allowed by the extension.

(c) The surviving spouse or reciprocal beneficiary must give notice of the time and place set for hearing to persons interested in the estate and to the distributees and recipients of portions of the augmented estate whose interests will be adversely affected by the taking of the elective share.

(d) The surviving spouse or reciprocal beneficiary may withdraw the spouse's or reciprocal beneficiary's demand for an elective share at any time before entry of a final determination by the court.

(e) After notice and hearing, the court shall determine the elective-share and supplemental elective-share amounts, and shall order its payment from the assets of the augmented estate or by contribution as appears appropriate under sections 560:2-209 and 560:2-210. If it appears that a fund or property included in the augmented estate has not come into the possession of the personal representative, or has been distributed by the personal representative, the court nevertheless shall fix the liability of any person who has any interest in the fund or property or who has possession thereof, whether as trustee or otherwise. The proceeding may be maintained against fewer than all persons against whom relief could be sought, but no person is subject to contribution in any greater amount than the person would have been under sections 560:2-209 and 560:2-210 had relief been secured against all persons subject to contribution.

(f) An order or judgment of the court may be enforced as necessary in suit for contribution or payment in other courts of this State or other jurisdictions. [L 1996, c 288, pt of §1; am L 1997, c 383, §19]

" **§560:2-212 Right of election personal to surviving spouse or reciprocal beneficiary; incapacitated surviving spouse or reciprocal beneficiary.** (a) Surviving spouse or reciprocal beneficiary must be living at time of election. The right of election may be exercised only by a surviving spouse or reciprocal beneficiary who is living when the petition for the elective share is filed in the court under section 560:2-211(a). If the election is not exercised by the surviving spouse or

reciprocal beneficiary personally, it may be exercised on the surviving spouse's or reciprocal beneficiary's behalf by the spouse's or reciprocal beneficiary's conservator, guardian, or agent under the authority of a power of attorney.

(b) Incapacitated surviving spouse or reciprocal beneficiary. If the election is exercised on behalf of a surviving spouse or reciprocal beneficiary who is an incapacitated person, that portion of the elective-share and supplemental elective-share amounts due from the decedent's probate estate and recipients of the decedent's nonprobate transfers to others under section 560:2-209(b) and (c) must be placed in a custodial trust for the benefit of the surviving spouse or reciprocal beneficiary under chapter 554B, except as modified below. For the purposes of this subsection, an election on behalf of a surviving spouse or reciprocal beneficiary by an agent under a durable power of attorney is presumed to be on behalf of a surviving spouse or reciprocal beneficiary who is an incapacitated person. For purposes of the custodial trust established by this subsection:

- (1) The electing guardian, conservator, or agent is the custodial trustee;
- (2) The surviving spouse or reciprocal beneficiary is the beneficiary; and
- (3) The custodial trust is deemed to have been created by the decedent spouse or reciprocal beneficiary by written transfer that takes effect at the decedent spouse's or reciprocal beneficiary's death and that directs the custodial trustee to administer the custodial trust as one created for the benefit of an incapacitated beneficiary.

(c) Custodial trust. For purposes of subsection (b), chapter 554B must be applied as if section 554B-6(b) thereof were repealed and sections 554B-2(e), 554B-9(b), and 554B-17(a) were amended to read as follows:

- (1) Neither an incapacitated beneficiary nor anyone acting on behalf of an incapacitated beneficiary has a power to terminate the custodial trust; but if the beneficiary regains capacity, the beneficiary then acquires the power to terminate the custodial trust by delivering to the custodial trustee a writing signed by the beneficiary declaring the termination. If not previously terminated, the custodial trust terminates on the death of the beneficiary;
- (2) If the beneficiary is incapacitated, the custodial trustee shall expend so much or all of the custodial trust property as the custodial trustee considers advisable for the health, education, maintenance and

support of the beneficiary and individuals who are legally entitled to support by the beneficiary. Expenditures may be made in the manner, when, and to the extent that the custodial trustee determines suitable and proper, without court order but with regard to other support, income, and property of the beneficiary and benefits of medical or other forms of assistance from any state or federal government or governmental agency for which the beneficiary must qualify on the basis of need; provided that the custodial trustee shall not make any distributions of the principal of the custodial trust unless the custodial trustee determines, in the trustee's discretion, that the remaining assets of the surviving spouse or reciprocal beneficiary cannot or should not be first used instead for the spouse's or reciprocal beneficiary's benefit. The custodial trustee may make such a determination when, for example, the sole remaining asset of the surviving spouse or reciprocal beneficiary is the spouse's or reciprocal beneficiary's residence, or similar factors would exist that would make use or liquidation of the surviving spouse's or reciprocal beneficiary's own assets inappropriate;

- (3) Upon the beneficiary's death, the custodial trustee shall transfer the unexpended custodial trust property in the following order:
 - (A) Under the residuary clause, if any, of the will of the beneficiary's predeceased spouse or reciprocal beneficiary against whom the elective share was taken, as if that predeceased spouse or reciprocal beneficiary died immediately after the beneficiary; or
 - (B) To that predeceased spouse's or reciprocal beneficiary's heirs under section 560:2-711. [L 1996, c 288, pt of §1; am L 1997, c 383, §19]

" **§560:2-213 Waiver of right to elect and of other rights.**

(a) The right of election of a surviving spouse or reciprocal beneficiary and the rights of the surviving spouse or reciprocal beneficiary to homestead allowance, exempt property, and family allowance, or any of them, may be waived, wholly or partially, before or after marriage, by a written contract, agreement, or waiver signed by the surviving spouse or reciprocal beneficiary.

(b) A surviving spouse's or reciprocal beneficiary's waiver is not enforceable if the surviving spouse or reciprocal beneficiary proves that:

- (1) The surviving spouse or reciprocal beneficiary did not execute the waiver voluntarily; or
- (2) The waiver was unconscionable when it was executed and, before execution of the waiver, the surviving spouse or reciprocal beneficiary:
 - (A) Was not provided a fair and reasonable disclosure of the property or financial obligations of the decedent;
 - (B) Did not voluntarily and expressly waive, in writing, any right to disclosure of the property or financial obligations of the decedent beyond the disclosure provided; and
 - (C) Did not have, or reasonably could not have had, an adequate knowledge of the property or financial obligations of the decedent.

(c) An issue of unconscionability of a waiver is for decision by the court as a matter of law.

(d) Unless it provides to the contrary, a waiver of "all rights", or equivalent language, in the property or estate of a present or prospective spouse or reciprocal beneficiary or a complete property settlement entered into after or in anticipation of separation or divorce is a waiver of all rights of elective share, homestead allowance, exempt property, and family allowance by each spouse or reciprocal beneficiary in the property of the other and a renunciation by each of all benefits that would otherwise pass to the spouse or reciprocal beneficiary from the other by intestate succession or by virtue of any will executed before the waiver or property settlement. [L 1996, c 288, pt of §1; am L 1997, c 383, §19]

" **§560:2-214 Protection of payors and other third parties.**

(a) Although under section 560:2-205 a payment, item of property, or other benefit is included in the decedent's nonprobate transfers to others, a payor or other third party is not liable for having made a payment or transferred an item of property or other benefit to a beneficiary designated in a governing instrument, or for having taken any other action in good faith reliance on the validity of a governing instrument, upon request and satisfactory proof of the decedent's death, before the payor or other third party received written notice from the surviving spouse or reciprocal beneficiary or spouse's or reciprocal beneficiary's representative of an intention to file a petition for the elective share or that a petition for the elective share has been filed. A payor or other third party is liable for payments made or other actions taken after the payor or other third party received written notice of an

intention to file a petition for the elective share or that a petition for the elective share has been filed.

(b) A written notice of intention to file a petition for the elective share or that a petition for the elective share has been filed must be mailed to the payor's or other third party's main office or home by registered or certified mail, return receipt requested, or served upon the payor or other third party in the same manner as a summons in a civil action. Upon receipt of written notice of intention to file a petition for the elective share or that a petition for the elective share has been filed, a payor or other third party may pay any amount owed or transfer or deposit any item of property held by it to or with the court having jurisdiction of the probate proceedings relating to the decedent's estate, or if no proceedings have been commenced, to or with the court having jurisdiction of probate proceedings relating to decedents' estates located in the judicial circuit of the decedent's residence. The court shall hold the funds or item of property, and, upon its determination under section 560:2-211(d), shall order disbursement in accordance with the determination. If no petition is filed in the court within the specified time under section 560:2-211(a) or, if filed, the demand for an elective share is withdrawn under section 560:2-211(d), the court shall order disbursement to the designated beneficiary. Payments or transfers to the court or deposits made into court discharge the payor or other third party from all claims for amounts so paid or the value of property so transferred or deposited.

(c) Upon petition to the probate court by the beneficiary designated in a governing instrument, the court may order that all or part of the property be paid to the beneficiary in an amount and subject to conditions consistent with this part. [L 1996, c 288, pt of §1; am L 1997, c 383, §19]

"PART 3. SPOUSE AND CHILDREN UNPROVIDED FOR IN WILLS

§560:2-301 Entitlement of spouse or reciprocal beneficiary; premarital will. (a) If a testator's surviving spouse married the testator, or the testator's reciprocal beneficiary entered into a reciprocal beneficiary relationship with the testator, after the testator executed the testator's will, the surviving spouse or reciprocal beneficiary is entitled to receive, as an intestate share, no less than the value of the share of the estate the spouse or reciprocal beneficiary would have received if the testator had died intestate as to that portion of the testator's estate, if any, that neither is devised to a child of the testator who was born before the testator married the surviving spouse or entered into a

reciprocal beneficiary relationship with the surviving reciprocal beneficiary and who is not a child of the surviving spouse or reciprocal beneficiary, nor is devised to a descendant of such a child or passes under section 560:2-603 or 560:2-604 to such a child or to a descendant of such a child, unless:

- (1) It appears from the will or other evidence that the will was made in contemplation of:
 - (A) The testator's marriage to the surviving spouse;
or
 - (B) The testator's entering into a reciprocal beneficiary relationship with the reciprocal beneficiary;
- (2) The will expresses the intention that it is to be effective notwithstanding any subsequent marriage, or reciprocal beneficiary relationship; or
- (3) The testator provided for the spouse or reciprocal beneficiary by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by the testator's statements or is reasonably inferred from the amount of the transfer or other evidence.

(b) In satisfying the share provided by this section, devises made by the will to the testator's surviving spouse, or reciprocal beneficiary, if any, are applied first, and other devises, other than a devise to a child of the testator who was born before the testator married the surviving spouse, or entered a reciprocal beneficiary relationship with the reciprocal beneficiary, and who is not a child of the surviving spouse or reciprocal beneficiary, or a devise or substitute gift under section 560:2-603 or 560:2-604 to a descendant of such a child, abate as provided in section 560:3-902. [L 1996, c 288, pt of §1; am L 1997, c 383, §15]

" **§560:2-302 Omitted children.** (a) Except as provided in subsection (b), if a testator fails to provide in the testator's will for any of the testator's children born or adopted after the execution of the will, the omitted after-born or after-adopted child receives a share in the estate as follows:

- (1) If the testator had no child living when the testator executed the will, an omitted after-born or after-adopted child receives a share in the estate equal in value to that which the child would have received had the testator died intestate, unless the will devised all or substantially all of the estate to the other parent of the omitted child and that other parent survives the testator and is entitled to take under the will;

- (2) If the testator had one or more children living when the testator executed the will, and the will devised property or an interest in property to one or more of the then-living children, an omitted after-born or after-adopted child is entitled to share in the testator's estate as follows:
- (A) The portion of the testator's estate in which the omitted after-born or after-adopted child is entitled to share is limited to devises made to the testator's then-living children under the will;
 - (B) The omitted after-born or after-adopted child is entitled to receive the share of the testator's estate, as limited in subparagraph (A), that the child would have received had the testator included all omitted after-born and after-adopted children with the children to whom devises were made under the will and had given an equal share of the estate to each child;
 - (C) To the extent feasible, the interest granted an omitted after-born or after-adopted child under this section must be of the same character, whether equitable or legal, present or future, as that devised to the testator's then-living children under the will;
 - (D) In satisfying a share provided by this paragraph, devises to the testator's children who were living when the will was executed abate ratably. In abating the devises of the then-living children, the court shall preserve to the maximum extent possible the character of the testamentary plan adopted by the testator.

(b) Neither subsection (a)(1) nor subsection (a)(2) applies if:

- (1) It appears from the will that the omission was intentional; or
- (2) The testator provided for the omitted after-born or after-adopted child by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by the testator's statements or is reasonably inferred from the amount of the transfer or other evidence.

(c) If at the time of execution of the will the testator fails to provide in the testator's will for a living child solely because the testator believes the child to be dead, the child is entitled to share in the estate as if the child were an omitted after-born or after-adopted child.

(d) In satisfying a share provided by subsection (a)(1), devises made by the will abate under section 560:3-902. [L 1996, c 288, pt of §1]

"PART 4. EXEMPT PROPERTY AND ALLOWANCES

§560:2-401 Applicable law. This part applies to the estate of a decedent who dies domiciled in this State. Rights to homestead allowance, exempt property, and family allowance for a decedent who dies not domiciled in this State are governed by the law of the decedent's domicile at death. [L 1996, c 288, pt of §1]

" **§560:2-402 Homestead allowance.** A decedent's surviving spouse or reciprocal beneficiary is entitled to a homestead allowance of \$15,000. If there is no surviving spouse or reciprocal beneficiary, each minor child and each dependent child of the decedent is entitled to a homestead allowance amounting to \$15,000 divided by the number of minor and dependent children of the decedent. The homestead allowance is exempt from and has priority over all claims against the estate. Homestead allowance is in addition to any share passing to the surviving spouse or reciprocal beneficiary or minor or dependent child by the will of the decedent, unless otherwise provided, by intestate succession, or by way of elective share. [L 1996, c 288, pt of §1; am L 1997, c 383, §19]

Rules of Court

Distribution, see HPR rule 90(a).

" **§560:2-403 Exempt property.** In addition to the homestead allowance, the decedent's surviving spouse or reciprocal beneficiary is entitled from the estate to a value, not exceeding \$10,000 in excess of any security interests therein, in household furniture, automobiles, furnishings, appliances, and personal effects. If there is no surviving spouse or reciprocal beneficiary, the decedent's children are entitled jointly to the same value. If encumbered chattels are selected and the value in excess of security interests, plus that of other exempt property, is less than \$10,000 or if there is not \$10,000 worth of exempt property in the estate, the spouse, reciprocal beneficiary, or children are entitled to other assets of the estate, if any, to the extent necessary to make up the \$10,000 value. Rights to exempt property and assets needed to make up a deficiency of exempt property have priority over all claims against the estate, but the right to any assets to make

up a deficiency of exempt property abates as necessary to permit earlier payment of homestead allowance and family allowance. These rights are in addition to any benefit or share passing to the surviving spouse, reciprocal beneficiary, or children by the decedent's will, unless otherwise provided, by intestate succession, or by way of elective share. [L 1996, c 288, pt of §1; am L 1997, c 383, §19]

Rules of Court

Distribution, see HPR rule 90(a).

" **§560:2-404 Family allowance.** (a) In addition to the right to homestead allowance and exempt property, the decedent's surviving spouse or reciprocal beneficiary and minor children whom the decedent was obligated to support and children who were in fact being supported by the decedent are entitled to a reasonable allowance in money out of the estate for their maintenance during the period of administration, which allowance may not continue for longer than one year if the estate is inadequate to discharge allowed claims. The allowance may be paid as a lump sum or in periodic installments. It is payable to the surviving spouse or reciprocal beneficiary, if living, for the use of the surviving spouse or reciprocal beneficiary and minor and dependent children; otherwise to the children, or persons having their care and custody. If a minor child or dependent child is not living with the surviving spouse or reciprocal beneficiary, the allowance may be made partially to the child or the child's guardian or other person having the child's care and custody, and partially to the spouse or reciprocal beneficiary, as their needs may appear. The family allowance is exempt from and has priority over all claims except the homestead allowance.

(b) The family allowance is not chargeable against any benefit or share passing to the surviving spouse, reciprocal beneficiary, or children by the will of the decedent, unless otherwise provided, by intestate succession, or by way of elective share. The death of any person entitled to family allowance terminates the right to allowances not yet paid. [L 1996, c 288, pt of §1; am L 1997, c 383, §19]

Rules of Court

Distribution, see HPR rule 90(b).

" **§560:2-405 Source, determination, and documentation.** (a) If the estate is otherwise sufficient, property specifically

devised may not be used to satisfy rights to homestead allowance or exempt property. Subject to this restriction, the surviving spouse or reciprocal beneficiary, guardians of minor children, or children who are adults may select property of the estate as homestead allowance and exempt property. The personal representative may make those selections if the surviving spouse or reciprocal beneficiary, the children, or the guardians of the minor children are unable or fail to do so within a reasonable time or there is no guardian of a minor child. The personal representative may execute an instrument or deed of distribution to establish the ownership of property taken as homestead allowance or exempt property. The personal representative may determine the family allowance in a lump sum not exceeding \$18,000 or periodic installments not exceeding \$1,500 per month for one year, and may disburse funds of the estate in payment of the family allowance and any part of the homestead allowance payable in cash. The personal representative or an interested person aggrieved by any selection, determination, payment, proposed payment, or failure to act under this section may petition the court for appropriate relief, which may include a family allowance other than that which the personal representative determined or could have determined.

(b) If the right to an elective share is exercised on behalf of a surviving spouse or reciprocal beneficiary who is an incapacitated person, the personal representative may add any unexpended portions payable under the homestead allowance, exempt property, and family allowance to the trust established under section 560:2-212(b). [L 1996, c 288, pt of §1; am L 1997, c 383, §19]

"PART 5. WILLS, WILL CONTRACTS, AND CUSTODY AND DEPOSIT OF WILLS

§560:2-501 Who may make will. An individual eighteen or more years of age who is of sound mind may make a will. [L 1996, c 288, pt of §1]

" **§560:2-502 Execution; witnessed wills; holographic wills.**

(a) Except as provided in subsection (b) and in sections 560:2-503, 560:2-506, and 560:2-513, a will must be:

- (1) In writing;
- (2) Signed by the testator or in the testator's name by some other individual in the testator's conscious presence and by the testator's direction; and
- (3) Signed by at least two individuals, each of whom signed within a reasonable time after the individual witnessed either the signing of the will as described

in paragraph (2) or the testator's acknowledgment of that signature or acknowledgment of the will.

(b) A will that does not comply with subsection (a) is valid as a holographic will, whether or not witnessed, if the signature and material portions of the document are in the testator's handwriting.

(c) Intent that the document constitute the testator's will can be established by extrinsic evidence, including, for holographic wills, portions of the document that are not in the testator's handwriting. [L 1996, c 288, pt of §1]

Case Notes

Decedent's alleged testamentary gift of loan forgiveness must be in writing in order to be operative as required by this section and §656-1; no exception to the writing requirement for testamentary gifts. 731 F. Supp. 2d 1000 (2010).

" **§560:2-503 Writings intended as wills, etc.** Although a document or writing added upon a document was not executed in compliance with section 560:2-502, the document or writing is treated as if it had been executed in compliance with that section if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute:

- (1) The decedent's will;
- (2) A partial or complete revocation of the will;
- (3) An addition to or an alteration of the will; or
- (4) A partial or complete revival of the decedent's formerly revoked will or of a formerly revoked portion of the will. [L 1996, c 288, pt of §1]

" **§560:2-504 Self-proved will.** (a) A will may be simultaneously executed, attested, and made self-proved, by acknowledgment thereof by the testator and affidavits of the witnesses, each made before an officer authorized to administer oaths under the laws of the state in which execution occurs and evidenced by the officer's certificate, under official seal, in substantially the following form:

I, _____, the testator, sign my name to this instrument this ____ day of _____, and being first duly sworn, do hereby declare to the undersigned authority that I sign and execute this instrument as my will and that I sign it willingly (or willingly direct another to sign for me), that I execute it as my free and voluntary act for

the purposes therein expressed, and that I am eighteen years of age or older, of sound mind, and under no constraint or undue influence.

Testator

We, _____, _____, the witnesses, sign our names to this instrument, being first duly sworn, and do hereby declare to the undersigned authority that the testator signs and executes this instrument as the testator's will and that the testator signs it willingly (or willingly directs another to sign for the testator), and that each of us, in the presence and hearing of the testator, hereby signs this will as witness to the testator's signing, and that to the best of our knowledge the testator is eighteen years of age or older, of sound mind, and under no constraint or undue influence.

Witness

Witness

The State of _____
County of _____

Subscribed, sworn to and acknowledged before me by _____, the testator, and subscribed and sworn to before me by _____, and _____, witness, this ____ day of _____.

(Seal)

(Signed) _____

(Official capacity of officer)

(b) An attested will may be made self-proved at any time after its execution by the acknowledgment thereof by the testator and the affidavits of the witnesses, each made before an officer authorized to administer oaths under the laws of the state in which the acknowledgment occurs and evidenced by the officer's certificate, under the official seal, attached or annexed to the will in substantially the following form:

The State of _____

County of _____

We, _____, _____, and _____, the testator and the witnesses, respectively, whose names are signed to the attached or foregoing instrument, being first duly sworn, do hereby declare to the undersigned authority that the testator signed and executed the instrument as the testator's will and that the testator had signed willingly (or willingly directed another to sign for the testator), and that the testator executed it as the testator's free and voluntary act for the purposes therein expressed, and that each of the witnesses, in the presence and hearing of the testator, signed the will as witness and that to the best of the witness' knowledge the testator was at that time eighteen years of age or older, of sound mind, and under no constraint or undue influence.

Testator

Witness

Witness

Subscribed, sworn to and acknowledged before me by _____, the testator, and subscribed and sworn to before me by _____, and _____, witnesses, this ____ day of _____.

(Seal)

(Signed) _____

(Official capacity of officer)

(c) A signature affixed to a self-proving affidavit attached to a will is considered a signature affixed to the will, if necessary to prove the will's due execution. [L 1996, c 288, pt of §1]

" **§560:2-505 Who may witness.** (a) An individual generally competent to be a witness may act as a witness to a will.

(b) The signing of a will by an interested witness does not invalidate the will or any provision of it, including any gift to or appointment of the witness. [L 1996, c 288, pt of §1]

" **§560:2-506 Choice of law as to execution.** A written will is valid if executed in compliance with section 560:2-502 or 560:2-503 or if its execution complies with the law at the time of execution of the place where the will is executed, or of the law of the place where at the time of execution or at the time of death the testator is domiciled, has a place of abode, or is a national. [L 1996, c 288, pt of §1]

" **§560:2-507 Revocation by writing or by act.** (a) A will or any part thereof is revoked by:

- (1) Executing a subsequent will that revokes the previous will or part expressly or by inconsistency; or
- (2) Performing a revocatory act on the will, if the testator performed the act with the intent and for the purpose of revoking the will or part or if another individual performed the act in the testator's conscious presence and by the testator's direction. For purposes of this paragraph, "revocatory act on the will" includes burning, tearing, canceling, obliterating, or destroying the will or any part of it. A burning, tearing, or canceling is a "revocatory act on the will", whether or not the burn, tear, or cancellation touched any of the words on the will.

(b) If a subsequent will does not expressly revoke a previous will, the execution of the subsequent will wholly revokes the previous will by inconsistency if the testator intended the subsequent will to replace rather than supplement the previous will.

(c) The testator is presumed to have intended a subsequent will to replace rather than supplement a previous will if the subsequent will makes a complete disposition of the testator's estate. If this presumption arises and is not rebutted by clear and convincing evidence, the previous will is revoked; only the subsequent will is operative on the testator's death.

(d) The testator is presumed to have intended a subsequent will to supplement rather than replace a previous will if the subsequent will does not make a complete disposition of the testator's estate. If this presumption arises and is not rebutted by clear and convincing evidence, the subsequent will revokes the previous will only to the extent the subsequent will is inconsistent with the previous will; each will is fully operative on the testator's death to the extent they are not inconsistent. [L 1996, c 288, pt of §1]

" **§560:2-508 Revocation by change of circumstances.** Except as provided in sections 560:2-803 and 560:2-804, a change of circumstances does not revoke a will or any part of it. [L 1996, c 288, pt of §1]

" **§560:2-509 Revival of revoked will.** (a) If a subsequent will that wholly revoked a previous will is thereafter revoked by a revocatory act under section 560:2-507(a)(2), the previous will remains revoked unless it is revived. The previous will is revived if it is evident from the circumstances of the revocation of the subsequent will or from the testator's contemporary or subsequent declarations that the testator intended the previous will to take effect as executed.

(b) If a subsequent will that partly revoked a previous will is thereafter revoked by a revocatory act under section 560:2-507(a)(2), a revoked part of the previous will is revived unless it is evident from the circumstances of the revocation of the subsequent will or from the testator's contemporary or subsequent declarations that the testator did not intend the revoked part to take effect as executed.

(c) If a subsequent will that revoked a previous will in whole or in part is thereafter revoked by another, later, will, the previous will remains revoked in whole or in part, unless it or its revoked part is revived. The previous will or its revoked part is revived to the extent it appears from the terms of the later will that the testator intended the previous will to take effect. [L 1996, c 288, pt of §1]

" **§560:2-510 Incorporation by reference.** A writing in existence when a will is executed may be incorporated by reference if the language of the will manifests this intent and describes the writing sufficiently to permit its identification. [L 1996, c 288, pt of §1]

" **§560:2-511 Testamentary additions to trusts.** (a) A will may validly devise property to the trustee of a trust established or to be established:

- (1) During the testator's lifetime by the testator, by the testator and some other person, or by some other person, including a funded or unfunded life insurance trust, although the settlor has reserved any or all rights of ownership of the insurance contracts; or
- (2) At the testator's death by the testator's devise to the trustee, if the trust is identified in the testator's will and its terms are set forth in a written instrument, other than a will, executed

before, concurrently with, or after the execution of the testator's will or in another individual's will if that other individual has predeceased the testator, regardless of the existence, size, or character of the corpus of the trust.

The devise is not invalid because the trust is amendable or revocable, or because the trust was amended after the execution of the will or the testator's death.

(b) Unless the testator's will provides otherwise, property devised to a trust described in subsection (a) is not held under a testamentary trust of the testator, but it becomes a part of the trust to which it is devised, and must be administered and disposed of in accordance with the provisions of the governing instrument setting forth the terms of the trust, including any amendments thereto made before or after the testator's death.

(c) Unless the testator's will provides otherwise, a revocation or termination of the trust before the testator's death causes the devise to lapse. [L 1996, c 288, pt of §1]

" **§560:2-512 Events of independent significance.** A will may dispose of property by reference to acts and events that have significance apart from their effect upon the dispositions made by the will, whether they occur before or after the execution of the will or before or after the testator's death. The execution or revocation of another individual's will is such an event. [L 1996, c 288, pt of §1]

" **§560:2-513 Separate writing identifying devise of certain types of tangible personal property.** Whether or not the provisions relating to holographic wills apply, a will may refer to a written statement or list to dispose of items of tangible personal property not otherwise specifically disposed of by the will, other than money. To be admissible under this section as evidence of the intended disposition, the writing must be signed by the testator and must describe the items and the devisees with reasonable certainty. The writing may be referred to as one to be in existence at the time of the testator's death; it may be prepared before or after the execution of the will; it may be altered by the testator after its preparation; and it may be a writing that has no significance apart from its effect on the dispositions made by the will. [L 1996, c 288, pt of §1]

" **§560:2-514 Contracts concerning succession.** A contract to make a will or devise, or not to revoke a will or devise, or to die intestate, if executed after January 1, 1997, may be established only by:

- (1) Provisions of a will stating material provisions of the contract;
- (2) An express reference in a will to a contract and extrinsic evidence proving the terms of the contract; or
- (3) A writing signed by the decedent evidencing the contract.

The execution of a joint will or mutual wills does not create a presumption of a contract not to revoke the will or wills. [L 1996, c 288, pt of §1]

Revision Note

"January 1, 1997" substituted for "the effective date of this article".

" **§560:2-515 Reserved.**

" **§560:2-516 Duty of custodian of will; liability.** After the death of a testator and on request of an interested person, a person having custody of a will of the testator shall either deliver it with reasonable promptness to a person able to secure its probate or if none is known, deposit it with an appropriate court. A person who knowingly and wilfully fails to so deliver or deposit a will is liable to any person aggrieved for any damages that may be sustained by the failure, and the court may award treble damages. A person who wilfully refuses to deliver a will after being ordered by the court in a proceeding brought for the purpose of compelling delivery is subject to penalty for contempt of court. Proceedings under this section shall be brought in the probate proceeding relating to the will. [L 1996, c 288, pt of §1]

Rules of Court

Deposit of will without probate, see HPR rules 74, 75.

" **§560:2-517 Penalty clause for contest.** A provision in a will purporting to penalize an interested person for contesting the will or instituting other proceedings relating to the estate is unenforceable if probable cause exists for instituting proceedings. [L 1996, c 288, pt of §1]

"PART 6. RULES OF CONSTRUCTION APPLICABLE ONLY TO WILLS

§560:2-601 Scope. In the absence of a finding of a contrary intention, the rules of construction in this part control the construction of a will. [L 1996, c 288, pt of §1]

" **§560:2-602 Will may pass all property and after-acquired property.** A will may provide for the passage of all property the testator owns at death and all property acquired by the estate after the testator's death. [L 1996, c 288, pt of §1]

" **§560:2-603 Antilapse; deceased devisee; class gifts. (a) Definitions.** In this section:

"Alternative devise" means a devise that is expressly created by the will and, under the terms of the will, can take effect instead of another devise on the happening of one or more events, including survival of the testator or failure to survive the testator, whether an event is expressed in condition-precedent, condition-subsequent, or any other form. A residuary clause constitutes an alternative devise with respect to a nonresiduary devise only if the will specifically provides that, upon lapse or failure, the nonresiduary devise, or nonresiduary devises in general, pass under the residuary clause.

"Class member" includes an individual who fails to survive the testator but who would have taken under a devise in the form of a class gift had he or she survived the testator.

"Devise" includes an alternative devise, a devise in the form of a class gift, and an exercise of a power of appointment.

"Devisee" includes:

- (1) A class member if the devise is in the form of a class gift;
- (2) An individual or class member who was deceased at the time the testator executed the testator's will as well as an individual or class member who was then living but who failed to survive the testator; and
- (3) An appointee under a power of appointment exercised by the testator's will.

"Stepchild" means a child of the surviving, deceased, or former spouse of the testator or of the donor of a power of appointment, and not of the testator or donor.

"Surviving devisee" or "surviving descendant" means a devisee or a descendant who neither predeceased the testator nor is deemed to have predeceased the testator under section 560:2-702.

"Testator" includes the donee of a power of appointment if the power is exercised in the testator's will.

(b) Substitute gift. If a devisee fails to survive the testator and is a grandparent, a descendant of a grandparent, or a stepchild of either the testator or the donor of a power of

appointment exercised by the testator's will, the following apply:

- (1) Except as provided in paragraph (4), if the devise is not in the form of a class gift and the deceased devisee leaves surviving descendants, a substitute gift is created in the devisee's surviving descendants. They take by representation the property to which the devisee would have been entitled had the devisee survived the testator;
- (2) Except as provided in paragraph (4), if the devise is in the form of a class gift, other than a devise to "issue", "descendants", "heirs of the body", "heirs", "next of kin", "relatives", or "family", or a class described by language of similar import, a substitute gift is created in the surviving descendants of any deceased devisee. The property to which the devisees would have been entitled had all of them survived the testator passes to the surviving devisees and the surviving descendants of the deceased devisees. Each surviving devisee takes the share to which he or she would have been entitled had the deceased devisees survived the testator. Each deceased devisee's surviving descendants who are substituted for the deceased devisee take by representation the share to which the deceased devisee would have been entitled had the deceased devisee survived the testator. For the purposes of this paragraph, "deceased devisee" means a class member who failed to survive the testator and left one or more surviving descendants;
- (3) For the purposes of section 560:2-601, words of survivorship, such as in a devise to an individual "if he survives me", or in a devise to "my surviving children", are not, in the absence of additional evidence, a sufficient indication of an intent contrary to the application of this section;
- (4) If the will creates an alternative devise with respect to a devise for which a substitute gift is created by paragraph (1) or (2), the substitute gift is superseded by the alternative devise only if an expressly designated devisee of the alternative devise is entitled to take under the will;
- (5) Unless the language creating a power of appointment expressly excludes the substitution of the descendants of an appointee for the appointee, a surviving descendant of a deceased appointee of a power of appointment can be substituted for the appointee under

this section, whether or not the descendant is an object of the power.

(c) More than one substitute gift; which one takes. If, under subsection (b), substitute gifts are created and not superseded with respect to more than one devise and the devises are alternative devises, one to the other, the determination of which of the substitute gifts takes effect is resolved as follows:

- (1) Except as provided in paragraph (2), the devised property passes under the primary substitute gift;
- (2) If there is a younger-generation devise, the devised property passes under the younger-generation substitute gift and not under the primary substitute gift;
- (3) In this subsection:

"Primary devise" means the devise that would have taken effect had all the deceased devisees of the alternative devises who left surviving descendants survived the testator.

"Primary substitute gift" means the substitute gift created with respect to the primary devise.

"Younger-generation devise" means a devise that:

- (A) Is to a descendant of a devisee of the primary devise;
- (B) Is an alternative devise with respect to the primary devise;
- (C) Is a devise for which a substitute gift is created; and
- (D) Would have taken effect had all the deceased devisees who left surviving descendants survived the testator except the deceased devisee or devisees of the primary devise.

"Younger-generation substitute gift" means the substitute gift created with respect to the younger-generation devise. [L 1996, c 288, pt of §1]

" **§560:2-604 Failure of testamentary provision.** (a) Except as provided in section 560:2-603, a devise, other than a residuary devise, that fails for any reason becomes a part of the residue.

(b) Except as provided in section 560:2-603, if the residue is devised to two or more persons, the share of a residuary devisee that fails for any reason passes to the other residuary devisee, or to other residuary devisees in proportion to the interest of each in the remaining part of the residue. [L 1996, c 288, pt of §1]

" **§560:2-605 Increase in securities; accessions.** (a) If a testator executes a will that devises securities and the testator then owned securities that meet the description in the will, the devise includes additional securities owned by the testator at death to the extent the additional securities were acquired by the testator after the will was executed as a result of the testator's ownership of the described securities and are securities of any of the following types:

- (1) Securities of the same organization acquired by reason of action initiated by the organization or any successor, related, or acquiring organization, excluding any acquired by exercise of purchase options;
- (2) Securities of another organization acquired as a result of a merger, consolidation, reorganization, or other distribution by the organization or any successor, related, or acquiring organization; or
- (3) Securities of the same organization acquired as a result of a plan of reinvestment.

(b) Distributions in cash before death with respect to a described security are not part of the devise. [L 1996, c 288, pt of §1]

" **§560:2-606 Nonademption of specific devises; unpaid proceeds of sale, condemnation, or insurance; sale by conservator or agent.** (a) A specific devisee has a right to the specifically devised property in the testator's estate at death and:

- (1) Any balance of the purchase price, together with any security agreement, owing from a purchaser to the testator at death by reason of sale of the property;
- (2) Any amount of a condemnation award for the taking of the property unpaid at death;
- (3) Any proceeds unpaid at death on fire or casualty insurance on or other recovery for injury to the property; and
- (4) Property owned by the testator at death and acquired as a result of foreclosure, or obtained in lieu of foreclosure, of the security interest for a specifically devised obligation.

(b) If specifically devised property is sold or mortgaged by a conservator or by an agent acting within the authority of a durable power of attorney for an incapacitated principal, or if a condemnation award, insurance proceeds, or recovery for injury to the property are paid to a conservator or to an agent acting within the authority of a durable power of attorney for an incapacitated principal, the specific devisee has the right to a

general pecuniary devise equal to the net sale price, the amount of the unpaid loan, the condemnation award, the insurance proceeds, or the recovery.

(c) The right of a specific devisee under subsection (b) is reduced by any right the devisee has under subsection (a).

(d) For the purposes of the references in subsection (b) to a conservator, subsection (b) does not apply if after the sale, mortgage, condemnation, casualty, or recovery, it was adjudicated that the testator's incapacity ceased and the testator survived the adjudication by one year.

(e) For the purposes of the references in subsection (b) to an agent acting within the authority of a durable power of attorney for an incapacitated principal:

- (1) "Incapacitated principal" means a principal who is an incapacitated person;
- (2) No adjudication of incapacity before death is necessary; and
- (3) The acts of an agent within the authority of a durable power of attorney are presumed to be for an incapacitated principal. [L 1996, c 288, pt of §1]

" **§560:2-607 Nonexoneration.** A specific devise passes subject to any mortgage interest existing at the date of death, without right of exoneration, regardless of a general directive in the will to pay debts. [L 1996, c 288, pt of §1]

" **§560:2-608 Exercise of power of appointment.** In the absence of a requirement that a power of appointment be exercised by a reference, or by an express or specific reference, to the power, a general residuary clause in a will, or a will making general disposition of all of the testator's property, expresses an intention to exercise a power of appointment held by the testator only if:

- (1) The power is a general power and the creating instrument does not contain a gift if the power is not exercised; or
- (2) The testator's will manifests an intention to include the property subject to the power. [L 1996, c 288, pt of §1]

" **§560:2-609 Ademption by satisfaction.** (a) Property a testator gave in the testator's lifetime to a person is treated as a satisfaction of a devise in whole or in part, only if:

- (1) The will provides for deduction of the gift;
- (2) The testator declared in a contemporaneous writing that the gift is in satisfaction of the devise or that

its value is to be deducted from the value of the devise; or

- (3) The devisee acknowledged in writing that the gift is in satisfaction of the devise or that its value is to be deducted from the value of the devise.

(b) For purposes of partial satisfaction, property given during lifetime is valued as of the time the devisee came into possession or enjoyment of the property or at the testator's death, whichever occurs first.

(c) If the devisee fails to survive the testator, the gift is treated as a full or partial satisfaction of the devise, as appropriate, in applying sections 560:2-603 and 560:2-604, unless the testator's contemporaneous writing provides otherwise. [L 1996, c 288, pt of §1]

"PART 7. RULES OF CONSTRUCTION APPLICABLE TO WILLS AND OTHER GOVERNING INSTRUMENTS

§560:2-701 Scope. In the absence of a finding of a contrary intention, the rules of construction in this part control the construction of a governing instrument. The rules of construction in this part apply to a governing instrument of any type, except as the application of a particular section is limited by its terms to a specific type or types of provision or governing instrument. [L 1996, c 288, pt of §1]

" **§560:2-702 Requirement of survival by one hundred twenty hours.** (a) Requirement of survival by one hundred twenty hours under probate code. For the purposes of this chapter, except as provided in subsection (d), an individual who is not established by clear and convincing evidence to have survived an event, including the death of another individual, by one hundred twenty hours is deemed to have predeceased the event.

(b) Requirement of survival by one hundred twenty hours under governing instrument. Except as provided in subsection (d), for purposes of a provision of a governing instrument that relates to an individual surviving an event, including the death of another individual, an individual who is not established by clear and convincing evidence to have survived the event by one hundred twenty hours is deemed to have predeceased the event.

(c) Co-owners with right of survivorship; requirement of survival by one hundred twenty hours. Except as provided in subsection (d), if:

- (1) It is not established by clear and convincing evidence that one of two co-owners with right of survivorship survived the other co-owner by one hundred twenty hours, one-half of the property passes as if one had

survived by one hundred twenty hours and one-half as if the other had survived by one hundred twenty hours; and

- (2) There are more than two co-owners and it is not established by clear and convincing evidence that at least one of them survived the others by one hundred twenty hours, the property passes in the proportion that one bears to the whole number of co-owners.

For the purposes of this subsection, "co-owners with right of survivorship" includes joint tenants, tenants by the entirety, and other co-owners of property or accounts held under circumstances that entitles one or more to the whole of the property or account on the death of the other or others.

(d) Exceptions. Survival by one hundred twenty hours is not required if:

- (1) The governing instrument contains language dealing explicitly with simultaneous deaths or deaths in a common disaster and that language is operable under the facts of the case;
 - (2) The governing instrument expressly indicates that an individual is not required to survive an event, including the death of another individual, by any specified period or expressly requires the individual to survive the event by a specified period; but survival must be established by clear and convincing evidence;
 - (3) The imposition of a one hundred twenty-hour requirement of survival would cause a nonvested property interest or a power of appointment to fail to qualify for validity under section 560:2-901(a)(1), (b)(1), or (c)(1) or to become invalid under section 525-1(a)(2), (b)(2), or (c)(2); but survival must be established by clear and convincing evidence; or
 - (4) The application of a one hundred twenty-hour requirement of survival to multiple governing instruments would result in an unintended failure or duplication of a disposition; but survival must be established by clear and convincing evidence.
- (e) Protection of payors and other third parties.
- (1) A payor or other third party is not liable for having made a payment or transferred an item of property or any other benefit to a beneficiary designated in a governing instrument who, under this section, is not entitled to the payment or item of property, or for having taken any other action in good faith reliance on the beneficiary's apparent entitlement under the terms of the governing instrument, before the payor or

other third party received written notice of a claimed lack of entitlement under this section. A payor or other third party is liable for a payment made or other action taken after the payor or other third party received written notice of a claimed lack of entitlement under this section;

- (2) Written notice of a claimed lack of entitlement under paragraph (1) must be mailed to the payor's or other third party's main office or home by registered or certified mail, return receipt requested, or served upon the payor or other third party in the same manner as a summons in a civil action. Upon receipt of written notice of a claimed lack of entitlement under this section, a payor or other third party may pay any amount owed or transfer or deposit any item of property held by it to or with the court having jurisdiction of the probate proceedings relating to the decedent's estate, or if no proceedings have been commenced, to or with the court having jurisdiction of probate proceedings relating to decedents' estates located in the judicial circuit of the decedent's residence. The court shall hold the funds or item of property and, upon its determination under this section, shall order disbursement in accordance with the determination. Payments, transfers, or deposits made to or with the court discharge the payor or other third party from all claims for the value of amounts paid to or items of property transferred to or deposited with the court.

(f) Protection of bona fide purchasers; personal liability of recipient.

- (1) A person who purchases property for value and without notice, or who receives a payment or other item of property in partial or full satisfaction of a legally enforceable obligation, is neither obligated under this section to return the payment, item of property, or benefit nor is liable under this section for the amount of the payment or the value of the item of property or benefit. But a person who, not for value, receives a payment, item of property, or any other benefit to which the person is not entitled under this section is obligated to return the payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who is entitled to it under this section; and

- (2) If this section or any part of this section is preempted by federal law with respect to a payment, an item of property, or any other benefit covered by this section, a person who, not for value, receives the payment, item of property, or any other benefit to which the person is not entitled under this section is obligated to return the payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who would have been entitled to it were this section or part of this section not preempted. [L 1996, c 288, pt of §1; am L 1997, c 244, §2]

Note

Reference to §560:2-901 in subsection (d)(3) is to a reserved section number under part 9, statutory rule against perpetuities; honorary trusts. Current provision on rule against perpetuities is chapter 525.

" **§560:2-703 Choice of law as to meaning and effect of governing instrument.** The meaning and legal effect of a governing instrument is determined by the local law of the state selected in the governing instrument, unless the application of that law is contrary to the provisions relating to the elective share described in part 2, the provisions relating to exempt property and allowances described in part 4, the provisions relating to the burden of proof in section 560:3-407, or any other public policy of this State otherwise applicable to the disposition. [L 1996, c 288, pt of §1]

" **§560:2-704 Power of appointment; meaning of specific reference requirement.** If a governing instrument creating a power of appointment expressly requires that the power be exercised by a reference, an express reference, or a specific reference, to the power or its source, it is presumed that the donor's intention, in requiring that the donee exercise the power by making reference to the particular power or to the creating instrument, was to prevent an inadvertent exercise of the power. [L 1996, c 288, pt of §1]

" **§560:2-705 Class gifts construed to accord with intestate succession.** (a) Adopted individuals and individuals born out of wedlock, and their respective descendants if appropriate to the class, are included in class gifts and other terms of relationship in accordance with the rules for intestate

succession. Terms of relationship that do not differentiate relationships by blood from those by affinity, such as "uncles", "aunts", "nieces", or "nephews", are construed to exclude relatives by affinity. Terms of relationship that do not differentiate relationships by the half blood from those by the whole blood, such as "brothers", "sisters", "nieces", or "nephews", are construed to include both types of relationships.

(b) In addition to the requirements of subsection (a), in construing a dispositive provision of a transferor who is not the natural parent, an individual born to the natural parent is not considered the child of that parent unless the individual lived while a minor as a regular member of the household of that natural parent or of that parent's parent, brother, sister, spouse or reciprocal beneficiary, or surviving spouse or reciprocal beneficiary.

(c) In addition to the requirements of subsection (a), in construing a dispositive provision of a transferor who is not the adopting parent, an adopted individual is not considered the child of the adopting parent unless the adopted individual lived while a minor, either before or after the adoption, as a regular member of the household of the adopting parent. [L 1996, c 288, pt of §1; am L 1997, c 383, §19]

" **§560:2-706 Life insurance; retirement plan; transfer-on-death registration; deceased beneficiary.** (a) Definitions. In this section:

"Alternative beneficiary designation" means a beneficiary designation that is expressly created by the governing instrument and, under the terms of the governing instrument, can take effect instead of another beneficiary designation on the happening of one or more events, including survival of the decedent or failure to survive the decedent, whether an event is expressed in condition-precedent, condition-subsequent, or any other form.

"Beneficiary" means the beneficiary of a beneficiary designation under which the beneficiary must survive the decedent and includes:

- (1) A class member if the beneficiary designation is in the form of a class gift; and
- (2) An individual or class member who was deceased at the time the beneficiary designation was executed as well as an individual or class member who was then living but who failed to survive the decedent, but excludes a joint tenant of a joint tenancy with the right of survivorship and a party to a joint and survivorship account.

"Beneficiary designation" includes an alternative beneficiary designation and a beneficiary designation in the form of a class gift.

"Class member" includes an individual who fails to survive the decedent but who would have taken under a beneficiary designation in the form of a class gift had the individual survived the decedent.

"Stepchild" means a child of the decedent's surviving, deceased, or former spouse, and not of the decedent.

"Surviving beneficiary" or "surviving descendant" means a beneficiary or a descendant who neither predeceased the decedent nor is deemed to have predeceased the decedent under section 560:2-702.

(b) Substitute gift. If a beneficiary fails to survive the decedent and is a grandparent, a descendant of a grandparent, or a stepchild of the decedent, the following apply:

- (1) Except as provided in paragraph (4), if the beneficiary designation is not in the form of a class gift and the deceased beneficiary leaves surviving descendants, a substitute gift is created in the beneficiary's surviving descendants. They take by representation the property to which the beneficiary would have been entitled had the beneficiary survived the decedent;
- (2) Except as provided in paragraph (4), if the beneficiary designation is in the form of a class gift, other than a beneficiary designation to "issue", "descendants", "heirs of the body", "heirs", "next of kin", "relatives", or "family", or a class described by language of similar import, a substitute gift is created in the surviving descendants of any deceased beneficiary. The property to which the beneficiaries would have been entitled had all of them survived the decedent passes to the surviving beneficiaries and the surviving descendants of the deceased beneficiaries. Each surviving beneficiary takes the share to which the surviving beneficiary would have been entitled had the deceased beneficiaries survived the decedent. Each deceased beneficiary's surviving descendants who are substituted for the deceased beneficiary take by representation the share to which the deceased beneficiary would have been entitled had the deceased beneficiary survived the decedent. For the purposes of this paragraph, "deceased beneficiary" means a class member who failed to survive the decedent and left one or more surviving descendants;

- (3) For the purposes of section 560:2-701, words of survivorship, such as in a beneficiary designation to an individual "if he survives me", or in a beneficiary designation to "my surviving children", are not, in the absence of additional evidence, a sufficient indication of an intent contrary to the application of this section; and
- (4) If a governing instrument creates an alternative beneficiary designation with respect to a beneficiary designation for which a substitute gift is created by paragraph (1) or (2), the substitute gift is superseded by the alternative beneficiary designation only if an expressly designated beneficiary of the alternative beneficiary designation is entitled to take.

(c) More than one substitute gift; which one takes. If, under subsection (b), substitute gifts are created and not superseded with respect to more than one beneficiary designation and the beneficiary designations are alternative beneficiary designations, one to the other, the determination of which of the substitute gifts takes effect is resolved as follows:

- (1) Except as provided in paragraph (2), the property passes under the primary substitute gift;
- (2) If there is a younger-generation beneficiary designation, the property passes under the younger-generation substitute gift and not under the primary substitute gift;
- (3) In this subsection:

"Primary beneficiary designation" means the beneficiary designation that would have taken effect had all the deceased beneficiaries of the alternative beneficiary designations who left surviving descendants survived the decedent.

"Primary substitute gift" means the substitute gift created with respect to the primary beneficiary designation.

"Younger-generation beneficiary designation" means a beneficiary designation that:

- (A) Is to a descendant of a beneficiary of the primary beneficiary designation;
- (B) Is an alternative beneficiary designation with respect to the primary beneficiary designation;
- (C) Is a beneficiary designation for which a substitute gift is created; and
- (D) Would have taken effect had all the deceased beneficiaries who left surviving descendants

survived the decedent except the deceased beneficiary or beneficiaries of the primary beneficiary designation.

"Younger-generation substitute gift" means the substitute gift created with respect to the younger-generation beneficiary designation.

- (d) Protection of payors.
 - (1) A payor is protected from liability in making payments under the terms of the beneficiary designation until the payor has received written notice of a claim to a substitute gift under this section. Payment made before the receipt of written notice of a claim to a substitute gift under this section discharges the payor, but not the recipient, from all claims for the amounts paid. A payor is liable for a payment made after the payor has received written notice of the claim. A recipient is liable for a payment received, whether or not written notice of the claim is given;
 - (2) The written notice of the claim shall be mailed to the payor's main office or home by registered or certified mail, return receipt requested, or served upon the payor in the same manner as a summons in a civil action. Upon receipt of written notice of the claim, a payor may pay any amount owed by it to the court having jurisdiction of the probate proceedings relating to the decedent's estate or, if no proceedings have been commenced, to the court having jurisdiction of probate proceedings relating to decedents' estates located in the judicial circuit of the decedent's residence. The court shall hold the funds and, upon its determination under this section, shall order disbursement in accordance with the determination. Payment made to the court discharges the payor from all claims for the amounts paid.
- (e) Protection of bona fide purchasers; personal liability of recipient.
 - (1) A person who purchases property for value and without notice, or who receives a payment or other item of property in partial or full satisfaction of a legally enforceable obligation, is neither obligated under this section to return the payment, item of property, or benefit nor is liable under this section for the amount of the payment or the value of the item of property or benefit. But a person who, not for value, receives a payment, item of property, or any other benefit to which the person is not entitled under this section is obligated to return the payment, item of

property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who is entitled to it under this section;

- (2) If this section or any part of this section is preempted by federal law with respect to a payment, an item of property, or any other benefit covered by this section, a person who, not for value, receives the payment, item of property, or any other benefit to which the person is not entitled under this section is obligated to return the payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who would have been entitled to it were this section or part of this section not preempted.

(f) This section shall not apply to payable-on-death accounts established at a financial institution. The payment of payable-on-death accounts shall be governed by section 560:6-110. [L 1996, c 288, pt of §1; am L 2008, c 39, §1]

" **§560:2-707 Survivorship with respect to future interests under terms of trust; substitute takers.** (a) Definitions. In this section:

"Alternative future interest" means an expressly created future interest that can take effect in possession or enjoyment instead of another future interest on the happening of one or more events, including survival of an event or failure to survive an event, whether an event is expressed in condition-precedent, condition-subsequent, or any other form. A residuary clause in a will does not create an alternative future interest with respect to a future interest created in a nonresiduary devise in the will, whether or not the will specifically provides that lapsed or failed devises are to pass under the residuary clause.

"Beneficiary" means the beneficiary of a future interest and includes a class member if the future interest is in the form of a class gift.

"Class member" includes an individual who fails to survive the distribution date but who would have taken under a future interest in the form of a class gift had the individual survived the distribution date.

"Distribution date", with respect to a future interest, means the time when the future interest is to take effect in possession or enjoyment. The distribution date need not occur

at the beginning or end of a calendar day, but can occur at a time during the course of a day.

"Future interest" includes an alternative future interest and a future interest in the form of a class gift.

"Future interest under the terms of a trust" means a future interest that was created by a transfer creating a trust or to an existing trust or by an exercise of a power of appointment to an existing trust, directing the continuance of an existing trust, designating a beneficiary of an existing trust, or creating a trust.

"Surviving beneficiary" or "surviving descendant" means a beneficiary or a descendant who neither predeceased the distribution date nor is deemed to have predeceased the distribution date under section 560:2-702.

(b) Survivorship required; substitute gift. A future interest under the terms of a trust executed after January 1, 1997 is contingent on the beneficiary's surviving the distribution date. If a beneficiary of a future interest under the terms of a trust fails to survive the distribution date, the following apply:

- (1) Except as provided in paragraph (4), if the future interest is not in the form of a class gift and the deceased beneficiary leaves surviving descendants, a substitute gift is created in the beneficiary's surviving descendants. They take by representation the property to which the beneficiary would have been entitled had the beneficiary survived the distribution date;
- (2) Except as provided in paragraph (4), if the future interest is in the form of a class gift, other than a future interest to "issue", "descendants", "heirs of the body", "heirs", "next of kin", "relatives", or "family", or a class described by language of similar import, a substitute gift is created in the surviving descendants of any deceased beneficiary. The property to which the beneficiaries would have been entitled had all of them survived the distribution date passes to the surviving beneficiaries and the surviving descendants of the deceased beneficiaries. Each surviving beneficiary takes the share to which the surviving beneficiary would have been entitled had the deceased beneficiaries survived the distribution date. Each deceased beneficiary's surviving descendants who are substituted for the deceased beneficiary take by representation the share to which the deceased beneficiary would have been entitled had the deceased beneficiary survived the distribution date. For the

purposes of this paragraph, "deceased beneficiary" means a class member who failed to survive the distribution date and left one or more surviving descendants;

- (3) For the purposes of section 560:2-701, words of survivorship attached to a future interest are not, in the absence of additional evidence, a sufficient indication of an intent contrary to the application of this section. Words of survivorship include words of survivorship that relate to the distribution date or to an earlier or an unspecified time, whether those words of survivorship are expressed in condition-precedent, condition-subsequent, or any other form;
- (4) If a governing instrument creates an alternative future interest with respect to a future interest for which a substitute gift is created by paragraph (1) or (2), the substitute gift is superseded by the alternative future interest only if an expressly designated beneficiary of the alternative future interest is entitled to take in possession or enjoyment.

(c) More than one substitute gift; which one takes. If, under subsection (b), substitute gifts are created and not superseded with respect to more than one future interest and the future interests are alternative future interests, one to the other, the determination of which of the substitute gifts takes effect is resolved as follows:

- (1) Except as provided in paragraph (2), the property passes under the primary substitute gift;
- (2) If there is a younger-generation future interest, the property passes under the younger-generation substitute gift and not under the primary substitute gift;
- (3) In this subsection:

"Primary future interest" means the future interest that would have taken effect had all the deceased beneficiaries of the alternative future interests who left surviving descendants survived the distribution date.

"Primary substitute gift" means the substitute gift created with respect to the primary future interest.

"Younger-generation future interest" means a future interest that:

- (A) Is to a descendant of a beneficiary of the primary future interest;

- (B) Is an alternative future interest with respect to the primary future interest;
- (C) Is a future interest for which a substitute gift is created; and
- (D) Would have taken effect had all the deceased beneficiaries who left surviving descendants survived the distribution date except the deceased beneficiary or beneficiaries of the primary future interest.

"Younger-generation substitute gift" means the substitute gift created with respect to the younger-generation future interest.

(d) If no other takers, property passes under residuary clause or to transferor's heirs. Except as provided in subsection (e), if, after the application of subsections (b) and (c), there is no surviving taker, the property passes in the following order:

- (1) If the trust was created in a nonresiduary devise in the transferor's will or in a codicil to the transferor's will, the property passes under the residuary clause in the transferor's will; for purposes of this section, the residuary clause is treated as creating a future interest under the terms of a trust;
- (2) If no taker is produced by the application of paragraph (1), the property passes to the transferor's heirs under section 560:2-711.

(e) If no other takers and if future interest created by exercise of power of appointment. If, after the application of subsections (b) and (c), there is no surviving taker and if the future interest was created by the exercise of a power of appointment:

- (1) The property passes under the donor's gift-in-default clause, if any, which clause is treated as creating a future interest under the terms of a trust; and
- (2) If no taker is produced by the application of paragraph (1), the property passes as provided in subsection (d). For purposes of subsection (d), "transferor" means the donor if the power was a nongeneral power and means the donee if the power was a general power.

(f) Notwithstanding the foregoing, if a revocable inter vivos trust terminates on the death of the settlor of the trust and all the assets are to be distributed outright, sections 560:2-603 and 560:2-604 shall determine whether a gift has lapsed and who shall receive the property. [L 1996, c 288, pt of §1; am L 2000, c 48, §2]

" **§560:2-708 Class gifts to "descendants", "issue", or "heirs of the body"; form of distribution if none specified.** If a class gift in favor of "descendants", "issue", or "heirs of the body" does not specify the manner in which the property is to be distributed among the class members, the property is distributed among the class members who are living when the interest is to take effect in possession or enjoyment, in such shares as they would receive, under the applicable law of intestate succession, if the designated ancestor had then died intestate owning the subject matter of the class gift. [L 1996, c 288, pt of §1]

" **§560:2-709 Representation; per capita at each generation; per stirpes.** (a) Definitions. In this section:

"Deceased child" or "deceased descendant" means a child or a descendant who either predeceased the distribution date or is deemed to have predeceased the distribution date under section 560:2-702.

"Distribution date", with respect to an interest, means the time when the interest is to take effect in possession or enjoyment. The distribution date need not occur at the beginning or end of a calendar day, but can occur at a time during the course of a day.

"Surviving ancestor", "surviving child", or "surviving descendant" means an ancestor, a child, or a descendant who neither predeceased the distribution date nor is deemed to have predeceased the distribution date under section 560:2-702.

(b) Representation; per capita at each generation. If an applicable statute or a governing instrument executed after January 1, 1997 calls for property to be distributed "by representation" or "per capita at each generation", the property is divided into as many equal shares as there are:

- (1) Surviving descendants in the generation nearest to the designated ancestor which contains one or more surviving descendants; and
- (2) Deceased descendants in the same generation who left surviving descendants, if any.

Each surviving descendant in the nearest generation is allocated one share. The remaining shares, if any, are combined and then divided in the same manner among the surviving descendants of the deceased descendants as if the surviving descendants who were allocated a share and their surviving descendants had predeceased the distribution date.

(c) Per stirpes. If a governing instrument executed after January 1, 1997 calls for property to be distributed "per

stirpes", the property is divided into as many equal shares as there are:

- (1) Surviving children of the designated ancestor; and
- (2) Deceased children who left surviving descendants.

Each surviving child, if any, is allocated one share. The share of each deceased child with surviving descendants is divided in the same manner, with subdivision repeating at each succeeding generation until the property is fully allocated among surviving descendants.

(d) Deceased descendant with no surviving descendant disregarded. For the purposes of subsections (b) and (c), an individual who is deceased and left no surviving descendant is disregarded, and an individual who leaves a surviving ancestor who is a descendant of the designated ancestor is not entitled to a share. [L 1996, c 288, pt of §1]

Revision Note

In subsections (b) and (c), "January 1, 1997" substituted for "the effective date of this section".

Cross References

Uniform transfer-on-death (TOD) security registration act, see chapter 539.

" **§560:2-710 Worthier-title doctrine abolished.** The doctrine of worthier title is abolished as a rule of law and as a rule of construction. Language in a governing instrument describing the beneficiaries of a disposition as the transferor's "heirs", "heirs at law", "next of kin", "distributees", "relatives", or "family", or language of similar import, does not create or presumptively create a reversionary interest in the transferor. [L 1996, c 288, pt of §1]

" **§560:2-711 Interest in "heirs" and like.** If an applicable statute or a governing instrument calls for a present or future distribution to or creates a present or future interest in a designated individual's "heirs", "heirs at law", "next of kin", "relatives", or "family", or language of similar import, the property passes to those persons, including the State, and in such shares as would succeed to the designated individual's intestate estate under the intestate succession law of the designated individual's domicile if the designated individual died when the disposition is to take effect in possession or enjoyment. If the designated individual's surviving spouse or reciprocal beneficiary is living but is remarried or has

terminated the reciprocal beneficiary relationship at the time the disposition is to take effect in possession or enjoyment, the surviving spouse or reciprocal beneficiary is not an heir of the designated individual. [L 1996, c 288, pt of §1; am L 1997, c 383, §16]

Cross References

Effect and transition of L 1996, c 288 amendments, see §560:8-201.

Rules of Court

Determination of heirs, see HPR rule 73.

"PART 8. GENERAL PROVISIONS CONCERNING PROBATE AND NONPROBATE TRANSFERS

§560:2-801 REPEALED. L 2000, c 43, §3.

Cross References

Uniform disclaimer of property interests act, see chapter 526.

" **§560:2-802 Effect of divorce, annulment, decree of separation, and termination of reciprocal beneficiary relationship.** (a) An individual who is divorced from the decedent or whose marriage to the decedent has been annulled is not a surviving spouse unless, by virtue of a subsequent marriage, the individual is married to the decedent at the time of death. A decree of separation that does not terminate the status of husband and wife is not a divorce for purposes of this section. An individual who has terminated a reciprocal beneficiary relationship with the decedent is not deemed a surviving reciprocal beneficiary unless, by virtue of a subsequent registration as a reciprocal beneficiary, the individual is the reciprocal beneficiary of the decedent at the time of death.

(b) For purposes of parts 1, 2, 3, and 4 of this article, and of section 560:3-203, a surviving spouse or reciprocal beneficiary does not include:

- (1) An individual who obtains or consents to a final decree or judgment of divorce from the decedent or an annulment of their marriage, which decree or judgment is not recognized as valid in this State, unless subsequently they participate in a marriage ceremony

- purporting to marry each to the other or live together as husband and wife;
- (2) An individual who, following an invalid decree or judgment of divorce or annulment obtained by the decedent, participates in a marriage ceremony with a third individual;
 - (3) An individual who was a party to a valid proceeding concluded by an order purporting to terminate all marital property rights; or
 - (4) An individual who does not have a certificate of reciprocal beneficiary relationship declaring the decedent as their reciprocal beneficiary or the relationship has been terminated under chapter 572C or otherwise. [L 1996, c 288, pt of §1; am L 1997, c 383, §17]

" **§560:2-803 Effect of homicide on intestate succession, wills, trusts, joint assets, life insurance, and beneficiary designations.** (a) Definitions. In this section:

"Disposition or appointment of property" includes a transfer of an item of property or any other benefit to a beneficiary designated in a governing instrument.

"Governing instrument" means a governing instrument executed by the decedent.

"Revocable", with respect to a disposition, appointment, provision, or nomination, means one under which the decedent, at the time of or immediately before death, was alone empowered, by law or under the governing instrument, to cancel the designation in favor of the killer, whether or not the decedent was then empowered to designate the decedent's self in place of the decedent's killer and whether or not the decedent then had capacity to exercise the power.

(b) Forfeiture of statutory benefits. An individual who feloniously and intentionally kills the decedent forfeits all benefits under this article with respect to the decedent's estate, including an intestate share, an elective share, an omitted spouse's, reciprocal beneficiary's, or child's share, a homestead allowance, exempt property, and a family allowance. If the decedent died intestate, the decedent's intestate estate passes as if the killer disclaimed the killer's intestate share.

(c) Revocation of benefits under governing instruments. The felonious and intentional killing of the decedent:

- (1) Revokes any revocable:
 - (A) Disposition or appointment of property made by the decedent to the killer in a governing instrument;

- (B) Provision in a governing instrument conferring a general or nongeneral power of appointment on the killer; and
 - (C) Nomination of the killer in a governing instrument, nominating or appointing the killer to serve in any fiduciary or representative capacity, including a personal representative, executor, trustee, or agent; and
- (2) Severs the interests of the decedent and killer in property held by them at the time of the killing as joint tenants with the right of survivorship, transforming the interests of the decedent and killer into tenancies in common.

(d) Effect of severance. A severance under subsection (c)(2) does not affect any third-party interest in property acquired for value and in good faith reliance on an apparent title by survivorship in the killer unless a writing declaring the severance has been noted, registered, filed, or recorded in records appropriate to the kind and location of the property which are relied upon, in the ordinary course of transactions involving such property, as evidence of ownership.

(e) Effect of revocation. Provisions of a governing instrument are given effect as if the killer disclaimed all provisions revoked by this section or, in the case of a revoked nomination in a fiduciary or representative capacity, as if the killer predeceased the decedent.

(f) Wrongful acquisition of property. A wrongful acquisition of property or interest by a killer not covered by this section must be treated in accordance with the principle that a killer cannot profit from the killer's wrong.

(g) Felonious and intentional killing; how determined. After all right to appeal has been exhausted, a judgment of conviction establishing criminal accountability for the felonious and intentional killing of the decedent conclusively establishes the convicted individual as the decedent's killer for purposes of this section. In the absence of a conviction, the court, upon the petition of an interested person, must determine whether, under the preponderance of evidence standard, the individual would be found criminally accountable for the felonious and intentional killing of the decedent. If the court determines that, under that standard, the individual would be found criminally accountable for the felonious and intentional killing of the decedent, the determination conclusively establishes that individual as the decedent's killer for purposes of this section.

(h) Protection of payors and other third parties.

- (1) A payor or other third party is not liable for having made a payment or transferred an item of property or any other benefit to a beneficiary designated in a governing instrument affected by an intentional and felonious killing, or for having taken any other action in good faith reliance on the validity of the governing instrument, upon request and satisfactory proof of the decedent's death, before the payor or other third party received written notice of a claimed forfeiture or revocation under this section. A payor or other third party is liable for a payment made or other action taken after the payor or other third party received written notice of a claimed forfeiture or revocation under this section;
- (2) Written notice of a claimed forfeiture or revocation under paragraph (1) must be mailed to the payor's or other third party's main office or home by registered or certified mail, return receipt requested, or served upon the payor or other third party in the same manner as a summons in a civil action. Upon receipt of written notice of a claimed forfeiture or revocation under this section, a payor or other third party may pay any amount owed or transfer or deposit any item of property held by it to or with the court having jurisdiction of the probate proceedings relating to the decedent's estate, or if no proceedings have been commenced, to or with the court having jurisdiction of probate proceedings relating to decedents' estates located in the judicial circuit of the decedent's residence. The court shall hold the funds or item of property and, upon its determination under this section, shall order disbursement in accordance with the determination. Payments, transfers, or deposits made to or with the court discharge the payor or other third party from all claims for the value of amounts paid to or items of property transferred to or deposited with the court.
 - (i) Protection of bona fide purchasers; personal liability of recipient.
 - (1) A person who purchases property for value and without notice, or who receives a payment or other item of property in partial or full satisfaction of a legally enforceable obligation, is neither obligated under this section to return the payment, item of property, or benefit nor is liable under this section for the amount of the payment or the value of the item of property or benefit. But a person who, not for value,

receives a payment, item of property, or any other benefit to which the person is not entitled under this section is obligated to return the payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who is entitled to it under this section;

- (2) If this section or any part of this section is preempted by federal law with respect to a payment, an item of property, or any other benefit covered by this section, a person who, not for value, receives the payment, item of property, or any other benefit to which the person is not entitled under this section is obligated to return the payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who would have been entitled to it were this section or part of this section not preempted. [L 1996, c 288, pt of §1; am L 1997, c 383, §19]

" §560:2-804 Revocation of probate and nonprobate transfers by divorce or termination of reciprocal beneficiary relationship; no revocation by other changes of circumstances.

(a) Definitions. In this section:

"Disposition or appointment of property" includes a transfer of an item of property or any other benefit to a beneficiary designated in a governing instrument.

"Divorce or annulment" means any divorce or annulment, or any dissolution or declaration of invalidity of a marriage, that would exclude the spouse as a surviving spouse within the meaning of section 560:2-802. A decree of separation that does not terminate the status of husband and wife is not a divorce for purposes of this section.

"Divorced individual" includes an individual whose marriage has been annulled.

"Governing instrument" means a governing instrument executed by:

- (1) A divorced individual before the divorce or annulment of the individual's marriage to the individual's former spouse; or
- (2) An individual who is a former reciprocal beneficiary before the termination of the reciprocal beneficiary relationship with the individual's former reciprocal beneficiary.

"Relative of the divorced individual's former spouse" means an individual who is related to the divorced individual's former

spouse by blood, or affinity and who, after the divorce or annulment, is not related to the divorced individual by blood, adoption, or affinity.

"Revocable", with respect to a disposition, appointment, provision, or nomination, means one under which:

- (1) The divorced individual, at the time of the divorce or annulment, was alone empowered, by law or under the governing instrument, to cancel the designation in favor of the individual's former spouse or former spouse's relative, whether or not the divorced individual was then empowered to designate the individual's self in place of the individual's former spouse or in place of the individual's former spouse's relative and whether or not the divorced individual then had the capacity to exercise the power; or
- (2) An individual who is a former reciprocal beneficiary, at the time of the termination, was alone empowered, by law or under the governing instrument, to cancel the designation in favor of the individual's former partner or former partner's relative, whether or not the individual was then empowered to designate the individual's self in place of the individual's former partner or in place of the individual's former partner's relative and whether or not the individual who is the former reciprocal beneficiary then had the capacity to exercise the power.

"Termination" means the dissolution of a reciprocal beneficiary relationship under chapter 572C between two adults.

(b) Revocation upon divorce or termination. Except as provided by the express terms of a governing instrument, a court order, or a contract relating to the division of the estate made between the divorced individuals before or after the marriage, divorce, annulment, between two former reciprocal beneficiaries before the termination of a reciprocal beneficiary relationship, the divorce or annulment of a marriage or the termination of a reciprocal beneficiary relationship:

- (1) Revokes any revocable:
 - (A) Disposition or appointment of property made by a divorced individual or a former reciprocal beneficiary to the individual's former spouse or reciprocal beneficiary in a governing instrument and any disposition or appointment created by law or in a governing instrument to a relative of the divorced individual's former spouse or reciprocal beneficiary;
 - (B) Provision in a governing instrument conferring a general or nongeneral power of appointment on the

divorced individual's former spouse or an individual's former reciprocal beneficiary or on a relative of the divorced individual's former spouse or an individual's former reciprocal beneficiary; and

(C) Nomination in a governing instrument, nominating a divorced individual's former spouse or a relative of the divorced individual's former spouse or an individual's former reciprocal beneficiary or a relative of the former reciprocal beneficiary to serve in any fiduciary or representative capacity, including a personal representative, executor, trustee, conservator, agent, or guardian; and

(2) Severs the interests of the former spouses or reciprocal beneficiaries in property held by them at the time of the divorce, annulment, or termination, as joint tenants with the right of survivorship or as community property with the right of survivorship, transforming the interests of the former spouses or reciprocal beneficiaries into tenancies in common.

(c) Effect of severance. A severance under subsection (b)(2) does not affect any third-party interest in property acquired for value and in good faith reliance on an apparent title by survivorship in the survivor of the former spouses or reciprocal beneficiaries unless a writing declaring the severance has been noted, registered, filed, or recorded in records appropriate to the kind and location of the property which are relied upon, in the ordinary course of transactions involving such property, as evidence of ownership.

(d) Effect of revocation. Provisions of a governing instrument are given effect as if the former spouse or reciprocal beneficiary and relatives of the former spouse or reciprocal beneficiary disclaimed all provisions revoked by this section or, in the case of a revoked nomination in a fiduciary or representative capacity, as if the former spouse or reciprocal beneficiary and relatives of the former spouse or reciprocal beneficiary died immediately before the divorce, annulment, or termination.

(e) Revival if divorce nullified or reciprocal beneficiary relationship re-registered. Provisions revoked solely by this section are revived by the divorced individual's remarriage to the former spouse or by a nullification of the divorce or annulment.

Provisions revoked solely by this section are revived by an individual's re-registering a reciprocal beneficiary relationship to the former reciprocal beneficiary.

(f) No revocation for other change of circumstances. No change of circumstances other than as described in this section and in section 560:2-803 effects a revocation.

(g) Protection of payors and other third parties.

(1) A payor or other third party is not liable for having made a payment or transferred an item of property or any other benefit to a beneficiary designated in a governing instrument affected by a divorce, annulment, remarriage, termination, or re-registration of a reciprocal beneficiary relationship, or for having taken any other action in good faith reliance on the validity of the governing instrument, before the payor or other third party received written notice of the divorce, annulment, remarriage, termination, or re-registration of a reciprocal beneficiary relationship. A payor or other third party is liable for a payment made or other action taken after the payor or other third party received written notice of a claimed forfeiture or revocation under this section;

(2) Written notice of the divorce, annulment, remarriage, termination, or re-registration of a reciprocal beneficiary relationship under this subsection must be mailed to the payor's or other third party's main office or home by registered or certified mail, return receipt requested, or served upon the payor or other third party in the same manner as a summons in a civil action. Upon receipt of written notice of the divorce, annulment, remarriage, termination, or re-registration of a reciprocal beneficiary relationship, a payor or other third party may pay any amount owed or transfer or deposit any item of property held by it to or with the court having jurisdiction of the probate proceedings relating to the decedent's estate or, if no proceedings have been commenced, to or with the court having jurisdiction of probate proceedings relating to decedents' estates located in the judicial circuit of the decedent's residence. The court shall hold the funds or item of property and, upon its determination under this section, shall order disbursement or transfer in accordance with the determination. Payments, transfers, or deposits made to or with the court discharge the payor or other third party from all claims for the value of amounts paid to or items of property transferred to or deposited with the court.

(h) Protection of bona fide purchasers; personal liability of recipient.

- (1) A person who purchases property from a former spouse, former reciprocal beneficiary, relative of a former spouse or reciprocal beneficiary, or any other person for value and without notice, or who receives from a former spouse, a former reciprocal beneficiary, relative of a former spouse or reciprocal beneficiary, or any other person a payment or other item of property in partial or full satisfaction of a legally enforceable obligation, is neither obligated under this section to return the payment, item of property, or benefit nor is liable under this section for the amount of the payment or the value of the item of property or benefit. But a former spouse, former reciprocal beneficiary, relative of a former spouse or reciprocal beneficiary, or other person who, not for value, received a payment, item of property, or any other benefit to which that person is not entitled under this section is obligated to return the payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who is entitled to it under this section;
- (2) If this section or any part of this section is preempted by federal law with respect to a payment, an item of property, or any other benefit covered by this section, a former spouse, former reciprocal beneficiary, relative of the former spouse or reciprocal beneficiary, or any other person who, not for value, received a payment, item of property, or any other benefit to which that person is not entitled under this section is obligated to return that payment, item of property, or benefit, or is personally liable for the amount of the payment or the value of the item of property or benefit, to the person who would have been entitled to it were this section or part of this section not preempted. [L 1996, c 288, pt of §1; am L 1997, c 383, §18]

"PART 9. STATUTORY RULE AGAINST PERPETUITIES; HONORARY TRUSTS

Cross References

Statutory rule against perpetuities, see chapter 525.

§§560:2-901 to 560:2-907 Reserved.

"PART 10. UNIFORM INTERNATIONAL WILLS ACT

§§560:2-1001 to 560:2-1010 Reserved.

**"ARTICLE II [OLD]
INTESTATE SUCCESSION AND WILLS**

§§560:2-101 to 560:2-902 REPEALED. L 1996, c 288, pt of §6.

**"ARTICLE III [OLD]
PROBATE OF WILLS AND ADMINISTRATION**

§§560:3-101 to 560:3-1215 REPEALED. L 1996, c 288, pt of §6.

**ARTICLE III
PROBATE OF WILLS AND ADMINISTRATION**

Cross References

Effect and transition of L 1996, c 288 amendments, see §560:8-201.

PART 1. GENERAL PROVISIONS

§560:3-101 Devolution of estate at death; restrictions.

The power of a person to leave property by will, and the rights of creditors, devisees, and heirs to the decedent's property are subject to the restrictions and limitations contained in this chapter to facilitate the prompt settlement of estates. Upon the death of a person, the decedent's real and personal property devolves to the persons to whom it is devised by the decedent's last will or to those indicated as substitutes for them in cases involving lapse, renunciation, or other circumstances affecting the devolution of testate estates, or in the absence of testamentary disposition, to the decedent's heirs, or to those indicated as substitutes for them in cases involving renunciation or other circumstances affecting devolution of intestate estates, subject to homestead allowance, exempt property and family allowance, to rights of creditors, elective share of the surviving spouse, and to administration. [L 1996, c 288, pt of §1]

" **§560:3-102 Necessity of order of probate for will.** Except as provided in section 560:3-1201, to be effective to prove the transfer of any property or to nominate an executor, a will must

be declared to be valid by an order of informal probate by the registrar, or an adjudication of probate by the court. [L 1996, c 288, pt of §1]

Case Notes

Decisions under prior law.

Section barred defendant from using unprobated will to defeat plaintiffs' complaint for determination and declaration of heirs and to partition. 77 H. 251 (App.), 883 P.2d 673.

" **§560:3-103 Necessity of appointment for administration.** Except as otherwise provided in article IV, to acquire the powers and undertake the duties and liabilities of a personal representative of a decedent, a person must be appointed by order of the court or registrar, qualify and be issued letters. Administration of an estate is commenced by the issuance of letters. [L 1996, c 288, pt of §1]

" **§560:3-104 Claims against decedent; necessity of administration.** No proceeding to enforce a claim against the estate of a decedent or the decedent's successors may be revived or commenced before the appointment of a personal representative. After the appointment and until distribution, all proceedings and actions to enforce a claim against the estate are governed by the procedure prescribed by this article. After distribution, a creditor whose claim has not been barred may recover from the distributees as provided in section 560:3-1004 or from a former personal representative individually liable as provided in section 560:3-1005. This section has no application to a proceeding by a secured creditor of the decedent to enforce the creditor's right to the creditor's security except as to any deficiency judgment which might be sought therein. [L 1996, c 288, pt of §1]

" **§560:3-105 Proceedings affecting devolution and administration; jurisdiction of subject matter.** Persons interested in decedents' estates may apply to the registrar for determination in the informal proceedings provided in this article, and may petition the court for orders in formal proceedings within the court's jurisdiction including but not limited to those described in this article. The court has exclusive jurisdiction of formal proceedings to determine how decedents' estates, subject to the laws of this State, are to be administered, expended, and distributed. The court has concurrent jurisdiction of any other action or proceeding concerning a succession or to which an estate, through a

personal representative, may be a party, including actions to determine title to property alleged to belong to the estate, and of any action or proceeding in which property distributed by a personal representative or its value is sought to be subjected to rights of creditors or successors of the decedent. [L 1996, c 288, pt of §1]

" **§560:3-106 Proceedings within the exclusive jurisdiction of court; service; jurisdiction over persons.** In proceedings within the exclusive jurisdiction of the court where notice is required by this chapter or by rule, and in proceedings to construe probated wills or determine heirs which concern estates that have not been and cannot now be open for administration, interested persons may be bound by the orders of the court in respect to property in or subject to the laws of this State by notice in conformity with section 560:1-401. An order is binding as to all who are given notice of the proceeding though less than all interested persons are notified. [L 1996, c 288, pt of §1]

" **§560:3-107 Scope of proceedings; proceedings independent; exception.** Unless supervised administration as described in article III, part 5, is involved:

- (1) Each proceeding before the court or registrar is independent of any other proceeding involving the same estate;
- (2) Petitions for formal orders of the court may combine various requests for relief in a single proceeding if the orders sought may be finally granted without delay. Except as required for proceedings which are particularly described by other sections of this article, no petition is defective because it fails to embrace all matters which might then be the subject of a final order;
- (3) Proceedings for probate of wills or adjudications of no will may be combined with proceedings for appointment of personal representatives; and
- (4) A proceeding for appointment of a personal representative is concluded by an order making or declining the appointment. [L 1996, c 288, pt of §1]

" **§560:3-108 Probate, testacy and appointment proceedings; ultimate time limit.** (a) No informal probate or appointment proceeding or formal testacy or appointment proceeding, other than a proceeding to probate a will previously probated at the testator's domicile and appointment proceedings relating to an estate in which there has been a prior appointment, may be

commenced more than five years after the decedent's death, except:

- (1) If a previous proceeding was dismissed because of doubt about the fact of the decedent's death, appropriate probate, appointment, or testacy proceedings may be maintained at any time thereafter upon a finding that the decedent's death occurred before the initiation of the previous proceeding and the applicant or petitioner has not delayed unduly in initiating the subsequent proceeding;
- (2) Appropriate probate, appointment, or testacy proceedings may be maintained in relation to the estate of an absent, disappeared or missing person for whose estate a conservator has been appointed, at any time within three years after the conservator becomes able to establish the death of the protected person;
- (3) A proceeding to contest an informally probated will and to secure appointment of the person with legal priority for appointment if the contest is successful, may be commenced within:
 - (A) Ninety days after receiving notice of an informal proceeding pursuant to section 560:3-306;
 - (B) Twelve months from the date the will was informally admitted to probate; or
 - (C) Thirty days from the entry of a formal order approving the accounts and settlement of the estate by an informally appointed personal representative,whichever time period expires first. If an informal proceeding is closed informally, the court in its discretion may allow a will contest to proceed after the limitations period has expired if it determines that notice of the informal probate proceedings was not provided pursuant to section 560:3-306 and not more than five years has elapsed since the decedent's death;
- (4) An informal appointment or a formal testacy or appointment proceeding may be commenced thereafter if no proceedings concerning the succession or estate administration have occurred within the five year period after decedent's death, but the personal representative has no right to possess estate assets as provided in section 560:3-709 beyond that necessary to confirm title thereto in the successors to the estate and claims other than expenses of administration may not be presented against the estate; and

(5) A formal testacy proceeding may be commenced at any time after five years from the decedent's death if, in the discretion of the court it would be equitable to do so, for the purpose of establishing an instrument to direct or control the ownership of property passing or distributable after the decedent's death from one other than the decedent when the property is to be appointed by the terms of the decedent's will or is to pass or be distributed as a part of the decedent's estate or its transfer is otherwise to be controlled by the terms of the decedent's will.

(b) These limitations do not apply to proceedings to construe probated wills or determine heirs of an intestate.

(c) In cases under subsection (a)(1) or (2) the date on which a testacy or appointment proceeding is properly commenced shall be deemed to be the date of the decedent's death for purposes of other limitations provisions of this chapter which relate to the date of death. [L 1996, c 288, pt of §1; am L 2002, c 82, §1]

Case Notes

Decisions under prior law.

Defendant barred from probating will, where defendant had a maximum of five years from decedent's death to commence probate proceeding to establish will. 77 H. 251 (App.), 883 P.2d 673.

" **§560:3-109 Statutes of limitation on decedent's cause of action.** No statute of limitation running on a cause of action belonging to a decedent which had not been barred as of the date of the decedent's death, shall apply to bar a cause of action surviving the decedent's death sooner than four months after death. A cause of action which, but for this section, would have been barred less than four months after death, is barred after four months unless tolled. [L 1996, c 288, pt of §1]

"PART 2. VENUE FOR PROBATE AND ADMINISTRATION; PRIORITY TO ADMINISTER; DEMAND FOR NOTICE

§560:3-201 Venue for first and subsequent estate proceedings; location of property. (a) Venue for the first informal or formal testacy or appointment proceedings after a decedent's death is:

(1) In the judicial circuit where the decedent had the decedent's domicile at the time of the decedent's death; or

(2) If the decedent was not domiciled in this State, in any judicial circuit where property of the decedent was located at the time of the decedent's death.

(b) Venue for all subsequent proceedings within the exclusive jurisdiction of the court is in the place where the initial proceeding occurred, unless the initial proceeding has been transferred as provided in section 560:1-303 or subsection (c).

(c) If the first proceeding was informal, on application of an interested person and after notice to the proponent in the first proceeding, the court, upon finding that venue is elsewhere, may transfer the proceeding and the file to the other court.

(d) For the purpose of aiding determinations concerning location of assets which may be relevant in cases involving non-domiciliaries, a debt, other than one evidenced by investment or commercial paper or other instrument in favor of a non-domiciliary is located where the debtor resides or, if the debtor is a person other than an individual, at the place where it has its principal office. Commercial paper, investment paper, and other instruments are located where the instrument is. An interest in property held in trust is located where the trustee may be sued. [L 1996, c 288, pt of §1]

" **§560:3-202 Appointment or testacy proceedings; conflicting claim of domicile in another state.** If conflicting claims as to the domicile of a decedent are made in a formal testacy or appointment proceeding commenced in this State, and in a testacy or appointment proceeding after notice pending at the same time in another state, the court of this State must stay, dismiss, or permit suitable amendment in, the proceeding here unless it is determined that the local proceeding was commenced before the proceeding elsewhere. The determination of domicile in the proceeding first commenced must be accepted as determinative in the proceeding in this State. [L 1996, c 288, pt of §1]

" **§560:3-203 Priority among persons seeking appointment as personal representative.** (a) Whether the proceedings are formal or informal, persons who are not disqualified have priority for appointment in the following order:

- (1) The person with priority as determined by a probated will including a person nominated by a power conferred in a will;
- (2) The surviving spouse or reciprocal beneficiary of the decedent who is a devisee of the decedent;
- (3) Other devisees of the decedent;

- (4) The surviving spouse or reciprocal beneficiary of the decedent;
- (5) Other heirs of the decedent; and
- (6) Forty-five days after the death of the decedent, any creditor.

(b) An objection to an appointment can be made only in formal proceedings. In case of objection the priorities stated in subsection (a) apply except that:

- (1) If the estate appears to be more than adequate to meet exemptions and costs of administration but inadequate to discharge anticipated unsecured claims, the court, on petition of creditors, may appoint any qualified person;
- (2) In case of objection to appointment of a person other than one whose priority is determined by will by an heir or devisee appearing to have a substantial interest in the estate, the court may appoint a person who is acceptable to heirs and devisees whose interests in the estate appear to be worth in total more than half of the probable distributable value, or, in default of this accord any suitable person.

(c) A person entitled to letters under subsection (a)(2) to (5) may nominate a qualified person to act as personal representative. Any person aged eighteen and over may renounce the person's right to nominate or to an appointment by appropriate writing filed with the court. When two or more persons share a priority, those of them who do not renounce shall concur in nominating another to act for them, or in applying for appointment.

(d) Conservators or guardians of the estates of protected persons, or if there is no conservator, any guardian except a guardian ad litem of a minor or incapacitated person, may exercise the same right to nominate, to object to another's appointment, or to participate in determining the preference of a majority in interest of the heirs and devisees that the protected person or ward would have if qualified for appointment.

(e) Appointment of one who does not have priority, including priority resulting from renunciation or nomination determined pursuant to this section, may be made only in formal proceedings. Before appointing one without priority, the court must determine that those having priority, although given notice of the proceedings, have failed to request appointment or to nominate another for appointment, and that administration is necessary.

(f) No person is qualified to serve as a personal representative who is:

- (1) An individual under the age of eighteen; or
- (2) A person whom the court finds unsuitable in formal proceedings.

(g) A personal representative appointed by a court of the decedent's domicile has priority over all other persons except where the decedent's will nominates different persons to be personal representative in this State and in the state of domicile. The domiciliary personal representative may nominate another, who shall have the same priority as the domiciliary personal representative.

(h) This section governs priority for appointment of a successor personal representative but does not apply to the selection of a special administrator. [L 1996, c 288, pt of §1; am L 1997, c 244, §3 and c 383, §19; am L 2000, c 116, §1]

" **§560:3-204 Demand for notice of order or filing concerning decedent's estate.** Any person desiring notice of any order or filing pertaining to a decedent's estate in which the person has a financial or property interest, may file a demand for notice with the court at any time after the death of the decedent stating the name of the decedent, the nature of the person's interest in the estate, and the demandant's address or that of the demandant's attorney. The clerk shall mail a copy of the demand to the personal representative if one has been appointed. After filing of a demand, no order or filing to which the demand relates shall be made or accepted without notice as prescribed in section 560:1-401 to the demandant or the demandant's attorney. The validity of an order which is issued or filing which is accepted without compliance with this requirement shall not be affected by the error, but the petitioner receiving the order or the person making the filing may be liable for any damage caused by the absence of notice. The requirement of notice arising from a demand under this provision may be waived in writing by the demandant and shall cease upon the termination of the demandant's interest in the estate. [L 1996, c 288, pt of §1]

Rules of Court

Demand for notice, see HPR rule 88.

"PART 3. INFORMAL PROBATE AND APPOINTMENT PROCEEDINGS

§560:3-301 Informal probate or appointment proceedings; application; contents. (a) Applications for informal probate or informal appointment shall be directed to the registrar, and verified by the applicant to be accurate and complete to the

best of the applicant's knowledge and belief as to the following information:

- (1) Every application for informal probate of a will or for informal appointment of a personal representative, other than a special or successor representative, shall contain the following:
 - (A) A statement of the interest of the applicant, together with the name, address, and telephone number of the applicant;
 - (B) The name, and date of death of the decedent, the decedent's age, and the county and state of the decedent's domicile at the time of death, and the names and addresses of the spouse or reciprocal beneficiary, children, heirs, and devisees and the ages of any who are minors so far as known or ascertainable with reasonable diligence by the applicant;
 - (C) If the decedent was not domiciled in the State at the time of the decedent's death, a statement showing venue;
 - (D) A statement identifying and indicating the address of any personal representative of the decedent appointed in this State or elsewhere whose appointment has not been terminated;
 - (E) A statement indicating whether the applicant has received a demand for notice, or is aware of any demand for notice of any probate or appointment proceeding concerning the decedent that may have been filed in this State or elsewhere; and
 - (F) That the time limit for informal probate or appointment as provided in this article has not expired either because five years or less have passed since the decedent's death, or, if more than five years from death have passed, circumstances as described by section 560:3-108 authorizing tardy probate or appointment have occurred;
- (2) An application for informal probate of a will shall state the following in addition to the statements required by paragraph (1):
 - (A) That the original of the decedent's last will is in the possession of the court, or accompanies the application, or that an authenticated copy of a will probated in another jurisdiction accompanies the application;

- (B) That the applicant, to the best of applicant's knowledge, believes the will to have been validly executed; and
 - (C) That after the exercise of reasonable diligence, the applicant is unaware of any instrument revoking the will, and that the applicant believes that the instrument which is the subject of the application is the decedent's last will;
- (3) An application for informal appointment of a personal representative to administer an estate under a will shall describe the will by date of execution and state the time and place of probate or the pending application or petition for probate. The application for appointment shall adopt the statements in the application or petition for probate and state the name, address, and priority for appointment of the person whose appointment is sought;
- (4) An application for informal appointment of an administrator in intestacy shall state in addition to the statements required by paragraph (1):
 - (A) That after the exercise of reasonable diligence, the applicant is unaware of any unrevoked testamentary instrument relating to property having a situs in this State under section 560:1-301, or, a statement why any such instrument of which the applicant may be aware is not being probated; and
 - (B) The priority of the person whose appointment is sought and the names of any other persons having a prior or equal right to the appointment under section 560:3-203;
- (5) An application for appointment of a personal representative to succeed a personal representative appointed under a different testacy status shall refer to the order in the most recent testacy proceeding, state the name and address of the person whose appointment is sought and of the person whose appointment will be terminated if the application is granted, and describe the priority of the applicant;
- (6) An application for appointment of a personal representative to succeed a personal representative who has tendered a resignation as provided in section 560:3-610(c), or whose appointment has been terminated by death or removal, shall adopt the statements in the application or petition which led to the appointment of the person being succeeded except as specifically changed or corrected, state the name and address of

the person who seeks appointment as successor, and describe the priority of the applicant.

(b) By verifying an application for informal probate, or informal appointment, the applicant submits personally to the jurisdiction of the court in any proceeding for relief from fraud relating to the application, or for perjury, that may be instituted against the applicant. [L 1996, c 288, pt of §1; am L 1997, c 383, §19]

Rules of Court

Pleadings, see Hawaii Probate Rules, part A(II); HPR rules 17, 50.

" **§560:3-302 Informal probate; duty of registrar; effect of informal probate.** (a) Upon receipt of an application requesting informal probate of a will filed by a corporate fiduciary, by a parent, spouse, or reciprocal beneficiary of the decedent, or by a descendant of a parent of the decedent, the registrar, upon making the findings required by section 560:3-303, shall issue a written statement of informal probate appointing a personal representative subject to qualification and acceptance, if at least one hundred twenty hours have elapsed since the decedent's death.

(b) Upon receipt of an application requesting informal probate of a will filed by someone other than as enumerated in subsection (a), the registrar shall set a date which shall be the earliest by which the registrar will decide the application. On or after such date, upon making the findings required by section 560:3-303, the registrar shall issue a written statement of informal probate appointing a personal representative subject to qualification and acceptance if at least fourteen days have passed after the last mailing or other delivery of the advance notice required by section 560:3-306, if proof that such notice has been given is filed with the registrar and if no petition for formal testacy proceedings has been filed.

(c) Informal probate is conclusive as to all persons until superseded by an order in a formal testacy proceeding. No defect in the application or procedure relating thereto which leads to informal probate of a will renders the probate void. [L 1996, c 288, pt of §1; am L 1997, c 244, §4 and c 383, §19]

" **§560:3-303 Informal probate; proof and findings required.**

(a) In an informal proceeding for original probate of a will, the registrar shall determine whether:

(1) The application is complete;

- (2) The applicant has made an oath or affirmation that the statements contained in the application are true to the best of the applicant's knowledge and belief;
- (3) The applicant appears from the application to be an interested person as defined in section 560:1-201;
- (4) On the basis of the statements in the application, venue is proper;
- (5) An original, duly executed and apparently unrevoked will is in the registrar's possession;
- (6) Any notice required by sections 560:3-204 and 560:3-306 has been given and that the application is not within section 560:3-304; and
- (7) It appears from the application that the time limit for original probate has not expired.

(b) The application shall be denied if it indicates that a personal representative has been appointed in another judicial circuit of this State or except as provided in subsection (d), if it appears that this or another will of the decedent has been the subject of a previous probate order.

(c) A will which appears to have the required signatures and which contains an attestation clause showing that requirements of execution under section 560:2-502, 560:2-503, or 560:2-506 have been met shall be probated without further proof. In other cases, the registrar may assume execution if the will appears to have been properly executed, or the registrar may accept a sworn statement or affidavit of any person having knowledge of the circumstances of execution, whether or not the person was a witness to the will.

(d) Informal probate of a will which has been previously probated elsewhere may be granted at any time upon written application by any interested person, together with deposit of an authenticated copy of the will and of the statement probating it from the office or court where it was first probated.

(e) A will from a place which does not provide for probate of a will after death and which is not eligible for probate under subsection (a), may be probated in this State upon receipt by the registrar of a duly authenticated copy of the will and a duly authenticated certificate of its legal custodian that the copy filed is a true copy and that the will has become operative under the law of the other place. [L 1996, c 288, pt of §1]

" **§560:3-304 Informal probate; unavailable in certain cases.** Applications for informal probate which relate to one or more of a known series of testamentary instruments (other than a will and one or more codicils thereto), the latest of which does not expressly revoke the earlier, shall be declined. [L 1996, c 288, pt of §1]

" **§560:3-305 Informal probate; registrar not satisfied.** If the registrar is not satisfied that a will is entitled to be probated in informal proceedings because of failure to meet the requirements of sections 560:3-303 and 560:3-304 or any other reason, the registrar may decline the application. A declination of informal probate is not an adjudication and does not preclude formal probate proceedings. [L 1996, c 288, pt of §1]

" **§560:3-306 Informal probate; notice requirements.** (a) The moving party must give notice as described by section 560:1-401 of the party's application for informal probate to any person demanding it pursuant to section 560:3-204 and to any personal representative of the decedent whose appointment has not been terminated. No other notice of informal probate is required.

(b) In addition, for any application for informal probate under section 560:3-302(b), the moving party shall mail an advance notice to the heirs and devisees informing them of the party's application. The advance notice shall include the name and address of the applicant, the name and location of the court in which the application has been filed for informal probate, a copy of the application, a copy of any will and codicil being submitted for probate, and the date on or after which the registrar will act on the application. The advance notice shall be delivered or sent by ordinary mail to each of the heirs and devisees whose address is reasonably available to the applicant.

(c) If an informal probate is granted, within thirty days thereafter the applicant shall give written information of the probate to the heirs and devisees. The information shall include the name and address of the applicant, the name and location of the court granting the informal probate, and the date of the probate and, if not already delivered with any advance notice, a copy of the application, a copy of any will and codicil submitted for probate, and notice that attorney fees incurred on behalf of the estate will be reviewed by the probate court only if an interested person requests such a review. The information shall be delivered or sent by ordinary mail to each of the heirs and devisees whose address is reasonably available to the applicant. No duty to give information is incurred if a personal representative is appointed who is required to give the written information required by section 560:3-705. An applicant's failure to give information as required by this section is a breach of the applicant's duty to the heirs and devisees but does not affect the validity of the probate. [L 1996, c 288, pt of §1; am L 1997, c 244, §5]

Rules of Court

Notice, see Hawaii Probate Rules, part A(III); HPR rule 51.

" **§560:3-307 Informal appointment proceedings; delay in order; duty of registrar; effect of appointment.** (a) Upon receipt of an application for informal appointment of a personal representative other than a special administrator as provided in section 560:3-614, if at least one hundred twenty hours have elapsed since the decedent's death, and after the registrar has made the findings required by section 560:3-308, the registrar shall appoint the applicant subject to qualification and acceptance; provided that if the decedent was a non-resident, the registrar shall delay the appointment until thirty days have elapsed since death unless the personal representative appointed at the decedent's domicile is the applicant, or unless the decedent's will directs that the decedent's estate be subject to the laws of this State.

(b) The status of personal representative and the powers and duties pertaining to the office are fully established by informal appointment. An appointment, and the office of personal representative created thereby, is subject to termination as provided in sections 560:3-608 to 560:3-612, but is not subject to retroactive vacation. [L 1996, c 288, pt of §1; am L 1997, c 244, §6]

" **§560:3-308 Informal appointment proceedings; proof and findings required.** (a) In informal appointment proceedings, the registrar must determine whether:

- (1) The application for informal appointment of a personal representative is complete;
- (2) The applicant has made an oath or affirmation that the statements contained in the application are true to the best of the applicant's knowledge and belief;
- (3) The applicant appears from the application to be an interested person as defined in section 560:1-201;
- (4) On the basis of the statements in the application, venue is proper;
- (5) Any will to which the requested appointment relates has been formally or informally probated; but this requirement does not apply to the appointment of a special administrator;
- (6) Any notice required by section 560:3-204 has been given; and

(7) From the statements in the application, the person whose appointment is sought has priority entitling the person to the appointment.

(b) Unless section 560:3-612 controls, the application must be denied if it indicates that a personal representative who has not filed a written statement of resignation as provided in section 560:3-610(c) has been appointed in this or another judicial circuit of this State, that (unless the applicant is the domiciliary personal representative or the domiciliary personal representative's nominee) the decedent was not domiciled in this State and that a personal representative whose appointment has not been terminated has been appointed by a court in the state of domicile, or that other requirements of this section have not been met. [L 1996, c 288, pt of §1]

" **§560:3-309 Informal appointment proceedings; registrar not satisfied.** If the registrar is not satisfied that a requested informal appointment of a personal representative should be made because of failure to meet the requirements of sections 560:3-307 and 560:3-308, or for any other reason, the registrar may decline the application. A declination of informal appointment is not an adjudication and does not preclude appointment in formal proceedings. [L 1996, c 288, pt of §1]

" **§560:3-310 Informal appointment proceedings; notice requirements.** The moving party must give notice as described by section 560:1-401 of the moving party's intention to seek an appointment informally:

- (1) To any person demanding it pursuant to section 560:3-204; and
- (2) To any person having a prior or equal right to appointment not waived in writing and filed with the court.

No other notice of an informal appointment proceeding is required. [L 1996, c 288, pt of §1]

" **§560:3-311 Informal appointment unavailable in certain cases.** If an application for informal appointment indicates the existence of a possible unrevoked testamentary instrument which may relate to property subject to the laws of this State, and which is not filed for probate in this court, the registrar shall decline the application. [L 1996, c 288, pt of §1]

" **§§560:3-312 to 560:3-322 Reserved.**

"PART 4. FORMAL TESTACY AND APPOINTMENT PROCEEDINGS

§560:3-401 Formal testacy proceedings; nature; when commenced. (a) A formal testacy proceeding is litigation to determine whether a decedent left a valid will. A formal testacy proceeding may be commenced by an interested person filing a petition as described in section 560:3-402(a) in which the person requests that the court, after notice and hearing, enter an order probating a will, or a petition to set aside an informal probate of a will or to prevent informal probate of a will which is the subject of a pending application, or a petition in accordance with section 560:3-402(b) for an order that the decedent died intestate.

(b) A petition may seek formal probate of a will without regard to whether the same or a conflicting will has been informally probated. A formal testacy proceeding may, but need not, involve a request for appointment of a personal representative.

(c) During the pendency of a formal testacy proceeding, the registrar shall not act upon any application for informal probate of any will of the decedent or any application for informal appointment of a personal representative of the decedent.

(d) Unless a petition in a formal testacy proceeding also requests confirmation of the previous informal appointment, a previously appointed personal representative, after receipt of notice of the commencement of a formal probate proceeding, must refrain from exercising the personal representative's power to make any further distribution of the estate during the pendency of the formal proceeding. A petitioner who seeks the appointment of a different personal representative in a formal proceeding also may request an order restraining the acting personal representative from exercising any of the powers of the personal representative's office and requesting the appointment of a special administrator. In the absence of a request, or if the request is denied, the commencement of a formal proceeding has no effect on the powers and duties of a previously appointed personal representative other than those relating to distribution. [L 1996, c 288, pt of §1]

Rules of Court

Contested matters, see Hawaii Probate Rules, part A(V).

" **§560:3-402 Formal testacy or appointment proceedings; petition; contents.** (a) Petitions for formal probate of a will, or for adjudication of intestacy with or without request for appointment of a personal representative, must be directed to the court, request a judicial order after notice and hearing

and contain further statements as indicated in this section. A petition for formal probate of a will:

- (1) Requests an order as to the testacy of the decedent in relation to a particular instrument which may or may not have been informally probated and determining the heirs;
- (2) Contains the statements required for informal applications as stated in the six subparagraphs under section 560:3-301(a)(1), the statements required by subparagraphs (B) and (C) of section 560:3-301(a)(2); and
- (3) States whether the original of the last will of the decedent is in the possession of the court or accompanies the petition.

If the original will is neither in the possession of the court nor accompanies the petition and no authenticated copy of a will probated in another jurisdiction accompanies the petition, the petition also must state the contents of the will, and indicate that it is lost, destroyed, or otherwise unavailable.

(b) A petition for adjudication of intestacy and appointment of an administrator in intestacy must request a judicial finding and order that the decedent left no will and determining the heirs, contain the statements required by section 560:3-301(a)(1) and (4) and indicate whether supervised administration is sought. A petition may request an order determining intestacy and heirs without requesting the appointment of an administrator, in which case, the statements required by section 560:3-301(a)(4)(B) may be omitted. [L 1996, c 288, pt of §1; am L 1997, c 244, §7]

Rules of Court

Pleadings, see Hawaii Probate Rules, part A(II); HPR rules 17, 50.

" **§560:3-403 Formal testacy proceedings; notice of hearing on petition.** (a) Upon commencement of a formal testacy proceeding, the court shall fix a time and place of hearing. Notice shall be given in the manner prescribed by section 560:1-401 by the petitioner to the persons herein enumerated and to any additional person who has filed a demand for notice under section 560:3-204. The notice shall include the name and address of the applicant, the name and location of the court hearing the petition, and the date of the hearing.

(b) Notice shall be given to the following persons: the surviving spouse or reciprocal beneficiary, children, and other

heirs of the decedent, the devisees and executors named in any will that is being, or has been, probated, or offered for informal or formal probate in the judicial circuit or that is known by the petitioner to have been probated, or offered for informal or formal probate elsewhere, and any personal representative of the decedent whose appointment has not been terminated. Notice may be given to other persons. In addition, the petitioner shall give notice by publication to all unknown persons and to all known persons whose addresses are unknown who have any interest in the matters being litigated.

(c) If it appears by the petition or otherwise that the fact of the death of the alleged decedent may be in doubt, or on the written demand of any interested person, a copy of the notice of the hearing on the petition shall be sent by registered or certified mail to the alleged decedent at the alleged decedent's last known address. The court shall direct the petitioner to report the results of, or make and report back concerning, a reasonably diligent search for the alleged decedent in any manner that may seem advisable, including any or all of the following methods:

- (1) By inserting in one or more suitable periodicals a notice requesting information from any person having knowledge of the whereabouts of the alleged decedent;
- (2) By notifying law enforcement officials and public welfare agencies in appropriate locations of the disappearance of the alleged decedent; or
- (3) By engaging the services of an investigator.

The costs of any search so directed shall be paid by the petitioner if there is no administration or by the estate of the decedent in case there is administration. [L 1996, c 288, pt of §1; am L 1997, c 383, §19]

Rules of Court

Notice, see Hawaii Probate Rules, part A(III); HPR rule 51.
Determination of death, see Hawaii Probate Rules, part F.

" **§560:3-404 Formal testacy proceedings; written objections to probate.** Any party to a formal proceeding who opposes the probate of a will for any reason shall state in the party's pleadings the party's objections to probate of the will. [L 1996, c 288, pt of §1]

" **§560:3-405 Formal testacy proceedings; uncontested cases; hearings and proof.** If a petition in a testacy proceeding is unopposed, the court may order probate or intestacy on the strength of the pleadings if satisfied that the conditions of

section 560:3-409 have been met, or conduct a hearing in open court and require proof of the matters necessary to support the order sought. If evidence concerning execution of the will is necessary, the affidavit or testimony of one of any attesting witnesses to the instrument is sufficient. If the affidavit or testimony of an attesting witness is not available, execution of the will may be proved by other evidence or affidavit. [L 1996, c 288, pt of §1]

" **§560:3-406 Formal testacy proceedings; contested cases; testimony of attesting witnesses.** (a) If evidence concerning execution of an attested will which is not self-proved is necessary in contested cases, the testimony of at least one of the attesting witnesses, if within the State, competent and able to testify, is required. Due execution of an attested or unattested will may be proved by other evidence.

(b) If the will is self-proved, compliance with signature requirements for execution is conclusively presumed and other requirements of execution are presumed subject to rebuttal without the testimony of any witness upon filing the will and the acknowledgment and affidavits annexed or attached thereto, unless there is proof of fraud or forgery affecting the acknowledgment or affidavit. [L 1996, c 288, pt of §1]

Rules of Court

Subpoenas, see HPR rule 22.

" **§560:3-407 Formal testacy proceedings; burdens in contested cases.** In contested cases, petitioners who seek to establish intestacy have the burden of establishing prima facie proof of death, venue, and heirship. Proponents of a will have the burden of establishing prima facie proof of due execution in all cases, and, if they are also petitioners, prima facie proof of death and venue. Contestants of a will have the burden of establishing lack of testamentary intent or capacity, undue influence, fraud, duress, mistake, or revocation. Unless the burden of proof is changed by other provisions of law, parties have the ultimate burden of persuasion as to matters with respect to which they have the initial burden of proof. If a will is opposed by the petition for probate of a later will revoking the former, it shall be determined first whether the later will is entitled to probate, and if a will is opposed by a petition for a declaration of intestacy, it shall be determined first whether the will is entitled to probate. [L 1996, c 288, pt of §1]

" **§560:3-408 Formal testacy proceedings; will construction; effect of final order in another jurisdiction.** A final order of a court of another state determining testacy, the validity or construction of a will, made in a proceeding involving notice to and an opportunity for contest by all interested persons must be accepted as determinative by the courts of this State if it includes, or is based upon, a finding that the decedent was domiciled at the decedent's death in the state where the order was made. [L 1996, c 288, pt of §1]

" **§560:3-409 Formal testacy proceedings; order; foreign will.** After the time required for any notice has expired, upon proof of notice, and after any hearing that may be necessary, if the court finds that the testator is dead, venue is proper and that the proceeding was commenced within the limitation prescribed by section 560:3-108, it shall determine the decedent's domicile at death, the decedent's heirs and the decedent's state of testacy. Any will found to be valid and unrevoked shall be formally probated. Termination of any previous informal appointment of a personal representative, which may be appropriate in view of the relief requested and findings, is governed by section 560:3-612. The petition shall be dismissed or appropriate amendment allowed if the court is not satisfied that the alleged decedent is dead. A will from a place which does not provide for probate of a will after death, may be proved for probate in this State by a duly authenticated certificate of its legal custodian that the copy introduced is a true copy and that the will has become effective under the law of the other place. [L 1996, c 288, pt of §1]

Rules of Court

Proof of official record, see HPR rule 15.

" **§560:3-410 Formal testacy proceedings; probate of more than one instrument.** If two or more instruments are offered for probate before a final order is entered in a formal testacy proceeding, more than one instrument may be probated if neither expressly revokes the other or contains provisions which work a total revocation by implication. If more than one instrument is probated, the order shall indicate what provisions control in respect to the nomination of an executor, if any. The order may, but need not, indicate how any provisions of a particular instrument are affected by the other instrument. After a final order in a testacy proceeding has been entered, no petition for probate of any other instrument of the decedent may be entertained, except incident to a petition to vacate or modify a

previous probate order and subject to the time limits of section 560:3-412. [L 1996, c 288, pt of §1]

" **§560:3-411 Formal testacy proceedings; partial intestacy.** If it becomes evident in the course of a formal testacy proceeding that, though one or more instruments are entitled to be probated, the decedent's estate is or may be partially intestate, the court shall enter an order to that effect. [L 1996, c 288, pt of §1]

" **§560:3-412 Formal testacy proceedings; effect of order; vacation.** Subject to appeal and subject to vacation as provided in this section and in section 560:3-413, a formal testacy order under sections 560:3-409 to 560:3-411, including an order that the decedent left no valid will and determining heirs, is final as to all persons with respect to all issues concerning the decedent's estate that the court considered or might have considered incident to its rendition relevant to the question of whether the decedent left a valid will, and to the determination of heirs, except that:

- (1) The court shall entertain a petition for modification or vacation of its order and probate of another will of the decedent if it is shown that the proponents of the later-offered will:
 - (A) Were unaware of its existence at the time of the earlier proceeding; or
 - (B) Were unaware of the earlier proceeding and were given no notice thereof, except by publication;
- (2) If intestacy of all or part of the estate has been ordered, the determination of heirs of the decedent may be reconsidered if it is shown that one or more persons were omitted from the determination and it is also shown that the persons were unaware of their relationship to the decedent, were unaware of the decedent's death or were given no notice of any proceeding concerning the decedent's estate, except by publication;
- (3) A petition for vacation under paragraph (1) or (2) must be filed prior to the earlier of the following time limits:
 - (A) If a personal representative has been appointed for the estate, the time of entry of any order approving final distribution of the estate, or, if the estate is closed by statement, six months after the filing of the closing statement;
 - (B) Whether or not a personal representative has been appointed for the estate of the decedent, the

- time prescribed by section 560:3-108 when it is no longer possible to initiate an original proceeding to probate a will of the decedent; or
- (C) Twelve months after the entry of the order sought to be vacated;
- (4) The order originally rendered in the testacy proceeding may be modified or vacated, if appropriate under the circumstances, by the order of probate of the later- offered will or the order redetermining heirs;
- (5) The finding of the fact of death is conclusive as to the alleged decedent only if notice of the hearing on the petition in the formal testacy proceeding was sent by registered or certified mail addressed to the alleged decedent at the decedent's last known address and the court finds that a search under section 560:3-403(b) was made.

If the alleged decedent is not dead, even if notice was sent and search was made, the alleged decedent may recover estate assets in the hands of the personal representative. In addition to any remedies available to the alleged decedent by reason of any fraud or intentional wrongdoing, the alleged decedent may recover any estate or its proceeds from distributees that is in their hands, or the value of distributions received by them, to the extent that any recovery from distributees is equitable in view of all of the circumstances. [L 1996, c 288, pt of §1]

Rules of Court

Entry of order, appeals, see HPR rule 34.

" **§560:3-413 Formal testacy proceedings; vacation of order for other cause.** For good cause shown, an order in a formal testacy proceeding may be modified or vacated within the time allowed for appeal. [L 1996, c 288, pt of §1]

" **§560:3-414 Formal proceedings concerning appointment of personal representative.** (a) A formal proceeding for adjudication regarding the priority or qualification of one who is an applicant for appointment as personal representative, or of one who previously has been appointed personal representative in informal proceedings, if an issue concerning the testacy of the decedent is or may be involved, is governed by section 560:3-402, as well as by this section. In other cases, the petition shall contain or adopt the statements required by section 560:3-301(a)(1) and describe the question relating to

priority or qualification of the personal representative which is to be resolved. If the proceeding precedes any appointment of a personal representative, it shall stay any pending informal appointment proceedings as well as any commenced thereafter. If the proceeding is commenced after appointment, the previously appointed personal representative, after receipt of notice thereof, shall refrain from exercising any power of administration except as necessary to preserve the estate or unless the court orders otherwise.

(b) After notice to interested persons, including all persons interested in the administration of the estate as successors under the applicable assumption concerning testacy, any previously appointed personal representative and any person having or claiming priority for appointment as personal representative, the court shall determine who is entitled to appointment under section 560:3-203, make a proper appointment and, if appropriate, terminate any prior appointment found to have been improper as provided in cases of removal under section 560:3-611. [L 1996, c 288, pt of §1]

"PART 5. SUPERVISED ADMINISTRATION

§560:3-501 Supervised administration; nature of proceeding. Supervised administration is a single in rem proceeding to secure complete administration and settlement of a decedent's estate under the continuing authority of the court which extends until entry of an order approving distribution of the estate and discharging the personal representative or other order terminating the proceeding. A supervised personal representative is responsible to the court, as well as to the interested parties, and is subject to directions concerning the estate made by the court on its own motion or on the motion of any interested party. Except as otherwise provided in this part, or as otherwise ordered by the court, a supervised personal representative has the same duties and powers as a personal representative who is not supervised. [L 1996, c 288, pt of §1]

" **§560:3-502 Supervised administration; petition; order.** A petition for supervised administration may be filed by any interested person or by a personal representative at any time or the prayer for supervised administration may be joined with a petition in a testacy or appointment proceeding. If the testacy of the decedent and the priority and qualification of any personal representative have not been adjudicated previously, the petition for supervised administration shall include the matters required of a petition in a formal testacy proceeding

and the notice requirements and procedures applicable to a formal testacy proceeding apply. If not previously adjudicated, the court shall adjudicate the testacy of the decedent and questions relating to the priority and qualifications of the personal representative in any case involving a request for supervised administration, even though the request for supervised administration may be denied. After notice to interested persons, the court shall order supervised administration of a decedent's estate:

- (1) If the decedent's will directs supervised administration, it shall be ordered unless the court finds that circumstances bearing on the need for supervised administration have changed since the execution of the will and that there is no necessity for supervised administration;
- (2) If the decedent's will directs unsupervised administration, supervised administration shall be ordered only upon a finding that it is necessary for protection of persons interested in the estate; or
- (3) In other cases if the court finds that supervised administration is necessary under the circumstances. [L 1996, c 288, pt of §1]

" **§560:3-503 Supervised administration; effect on other proceedings.** (a) The pendency of a proceeding for supervised administration of a decedent's estate stays action on any informal application then pending or thereafter filed.

(b) If a will has been previously probated in informal proceedings, the effect of the filing of a petition for supervised administration is as provided for formal testacy proceedings by section 560:3-401.

(c) After the personal representative has received notice of the filing of a petition for supervised administration, a personal representative who has been appointed previously shall not exercise the personal representative's power to distribute any estate. The filing of the petition does not affect the personal representative's other powers and duties unless the court restricts the exercise of any of them pending full hearing on the petition. [L 1996, c 288, pt of §1]

" **§560:3-504 Supervised administration; powers of personal representative.** Unless restricted by the court, a supervised personal representative has, without interim orders approving exercise of a power, all powers of personal representatives under this chapter, but the personal representative shall not exercise the personal representative's power to make any distribution of the estate without prior order of the court.

Any other restriction on the power of a personal representative which may be ordered by the court must be endorsed on the personal representative's letters of appointment and, unless so endorsed, is ineffective as to persons dealing in good faith with the personal representative. [L 1996, c 288, pt of §1]

" **§560:3-505 Supervised administration; interim orders; distribution and closing orders.** Unless otherwise ordered by the court, supervised administration is terminated by order in accordance with time restrictions, notices and contents of orders prescribed for proceedings under section 560:3-1001. Interim orders approving or directing partial distributions or granting other relief may be issued by the court at any time during the pendency of a supervised administration on the application of the personal representative or any interested person. [L 1996, c 288, pt of §1]

"PART 6. PERSONAL REPRESENTATIVE; APPOINTMENT, CONTROL, AND TERMINATION OF AUTHORITY

§560:3-601 Qualification. Prior to receiving letters, a personal representative shall qualify by filing with the appointing court any required bond and a statement of acceptance of the duties of the office. [L 1996, c 288, pt of §1]

Rules of Court

Bond, see HPR rule 46.

" **§560:3-602 Acceptance of appointment; consent to jurisdiction.** By accepting appointment, a personal representative submits personally to the jurisdiction of the court in any proceeding relating to the estate that may be instituted by any interested person. Notice of any proceeding shall be delivered to the personal representative, or mailed to the personal representative by ordinary first class mail at the personal representative's address as listed in the application or petition for appointment or as thereafter reported to the court and to the personal representative's address as then known to the petitioner. [L 1996, c 288, pt of §1]

" **§560:3-603 Bond not required without court order, exceptions.** (a) No bond is required of a personal representative appointed in informal proceedings, except:
(1) Upon the appointment of a special administrator where bond has been requested by an interested party and the court is satisfied that it is desirable;

(2) When an executor or other personal representative is appointed to administer an estate under a will containing an express requirement of bond; or

(3) When bond is required under section 560:3-605.

(b) Bond may be required by court order at the time of appointment of a personal representative appointed in any formal proceeding except that bond is not required of a personal representative appointed in formal proceedings if the will relieves the personal representative of bond, unless bond has been requested by an interested party and the court is satisfied that it is desirable. Bond required by any will may be dispensed with in formal proceedings upon determination by the court that it is not necessary. No bond is required of any personal representative who, pursuant to statute, has deposited cash or collateral with an agency of this State to secure performance of the personal representative's duties. [L 1996, c 288, pt of §1; am L 1997, c 244, §8]

" **§560:3-604 Bond amount; security; procedure; reduction.**

If bond is required and the provisions of the will or order do not specify the amount, unless stated in the person's application or petition, the person qualifying shall file a statement under oath with the registrar indicating the person's best estimate of the value of the personal estate of the decedent and of the income expected from the personal and real estate during the next year, and the person shall execute and file a bond with the registrar, or give other suitable security, in an amount not less than the estimate. The registrar shall determine that the bond is duly executed by a corporate surety, or one or more individual sureties whose performance is secured by pledge of personal property, mortgage on real property, or other adequate security. The registrar may permit the amount of the bond to be reduced by the value of assets of the estate deposited with a domestic financial institution (as defined in section 560:6-101) in a manner that prevents their unauthorized disposition. On petition of the personal representative or another interested person the court may excuse a requirement of bond, increase or reduce the amount of the bond, release sureties, or permit the substitution of another bond with the same or different sureties. [L 1996, c 288, pt of §1]

" **§560:3-605 Demand for bond by interested person.** Any person apparently having an interest in the estate worth in excess of \$1000, or any creditor having a claim in excess of \$1000, may make a written demand that a personal representative give bond. The demand shall be filed with the court and a copy mailed to the personal representative, if appointment and

qualification have occurred. Thereupon, if ordered by the court, bond is required, but the requirement ceases if the person demanding bond ceases to be interested in the estate, or if bond is excused as provided in section 560:3-603 or 560:3-604. After the personal representative has received notice and until the filing of the bond or cessation of the requirement of bond, the personal representative shall refrain from exercising any powers of the office except as necessary to preserve the estate. Failure of the personal representative to meet a requirement of bond by giving suitable bond within thirty days after receipt of notice is cause of the personal representative's removal and appointment of a successor personal representative. [L 1996, c 288, pt of §1; am L 1997, c 244, §9]

" **§560:3-606 Terms and conditions of bonds.** (a) The following requirements and provisions apply to any bond required by this part:

- (1) Bonds shall name the presiding judge and the judge's successors as obligee for the benefit of the persons interested in the estate and shall be conditioned upon the faithful discharge by the fiduciary of all duties according to law;
- (2) Unless otherwise provided by the terms of the approved bond, sureties are jointly and severally liable with the personal representative and with each other. The address of sureties shall be stated in the bond;
- (3) By executing an approved bond of a personal representative, the surety consents to the jurisdiction of the probate court which issued letters to the primary obligor in any proceedings pertaining to the fiduciary duties of the personal representative and naming the surety as a party. Notice of any proceeding shall be delivered to the surety or mailed to the surety by registered or certified mail at the surety's address as listed with the court where the bond is filed and to the surety's address as then known to the petitioner;
- (4) On petition of a successor personal representative, any other personal representative of the same decedent, or any interested person, a proceeding in the court may be initiated against a surety for breach of the obligation of the bond of the personal representative;
- (5) The bond of the personal representative is not void after the first recovery but may be proceeded against from time to time until the whole penalty is exhausted;

(6) No bond hereunder shall be conditioned so as to relieve the surety from liability either on account of any breach by the personal representative of the personal representative's duties to the court, the registrar, the estate or interested persons, or on account of a failure by the personal representative to perform the acts or duties required of the personal representative by this chapter, and any provision of a bond which seeks to so limit the surety's liability shall be void and of no effect.

(b) No action or proceeding may be commenced against the surety on any matter as to which an action or proceeding against the primary obligor is barred by adjudication or limitation. [L 1996, c 288, pt of §1]

" **§560:3-607 Order restraining personal representative.** (a) On petition of any person who appears to have an interest in the estate, the court by temporary order may restrain a personal representative from performing specified acts of administration, disbursement, or distribution, or exercise of any powers or discharge of any duties of office, or make any other order to secure proper performance of the personal representative's duty, if it appears to the court that the personal representative otherwise may take some action which would jeopardize unreasonably the interest of the applicant or of some other interested person. Persons with whom the personal representative may transact business may be made parties.

(b) The matter shall be set for hearing within ten days unless the parties otherwise agree. Notice as the court directs shall be given to the personal representative and the personal representative's attorney of record, if any, and to any other parties named defendant in the petition. [L 1996, c 288, pt of §1]

" **§560:3-608 Termination of appointment; general.** Termination of appointment of a personal representative occurs as indicated in sections 560:3-609 to 560:3-612. Termination ends the right and power pertaining to the office of personal representative as conferred by this chapter or any will, except that a personal representative, at any time prior to distribution or until restrained or enjoined by court order, may perform acts necessary to protect the estate and may deliver the assets to a successor representative. Termination does not discharge a personal representative from liability for transactions or omissions occurring before termination, or relieve the personal representative of the duty to preserve assets subject to the personal representative's control, to

account therefor and to deliver the assets. Termination does not affect the jurisdiction of the court over the personal representative, but terminates the personal representative's authority to represent the estate in any pending or future proceeding. [L 1996, c 288, pt of §1]

" **§560:3-609 Termination of appointment; death or disability.** The death of a personal representative or the appointment of a conservator for the estate of a personal representative, terminates the personal representative's appointment. Until appointment and qualification of a successor or special representative to replace the deceased or protected representative, the representative of the estate of the deceased or protected personal representative, if any, has the duty to protect the estate possessed and being administered by the decedent or ward at the time the appointment terminates, has the power to perform acts necessary for protection and shall account for and deliver the estate assets to a successor or special personal representative upon appointment and qualification. [L 1996, c 288, pt of §1]

" **§560:3-610 Termination of appointment; voluntary.** (a) An appointment of a personal representative terminates as provided in section 560:3-1003, one year after the filing of a closing statement.

(b) An order closing an estate as provided in section 560:3-1001 or 560:3-1002 terminates an appointment of a personal representative.

(c) A personal representative may resign the position by filing a written statement of resignation with the registrar after the personal representative has given at least fifteen days written notice to the persons known to be interested in the estate. If no one applies or petitions for appointment of a successor representative within the time indicated in the notice, the filed statement of resignation is ineffective as a termination of appointment and in any event is effective only upon the appointment and qualification of a successor representative and delivery of the assets to that representative. [L 1996, c 288, pt of §1]

" **§560:3-611 Termination of appointment by removal; cause; procedure.** (a) A person interested in the estate may petition for removal of a personal representative for cause at any time. Upon filing of the petition, the court shall fix a time and place for hearing. Notice shall be given by the petitioner to the personal representative, and to other persons as the court may order. Except as otherwise ordered as provided in section

560:3-607, after receipt of notice of removal proceedings, the personal representative shall not act except to account, to correct maladministration, or to preserve the estate. If removal is ordered, the court also shall direct by order the disposition of the assets remaining in the name of, or under the control of, the personal representative being removed.

(b) Cause for removal exists when removal would be in the best interests of the estate, or if it is shown that a personal representative or the person seeking the personal representative's appointment intentionally misrepresented material facts in the proceedings leading to the appointment, or that the personal representative has disregarded an order of the court, has become incapable of discharging the duties of the office, or has mismanaged the estate or failed to perform any duty pertaining to the office. Unless the decedent's will directs otherwise, a personal representative appointed at the decedent's domicile, incident to securing appointment of the personal representative's self or a nominee as ancillary personal representative, may obtain removal of another who was appointed personal representative in this State to administer local assets. [L 1996, c 288, pt of §1]

Case Notes

As an interlocutory order, denial of petition for court order removing personal representatives was not appealable under either collateral order exception or irreparable injury exception. 83 H. 412 (App.), 927 P.2d 420.

" **§560:3-612 Termination of appointment; change of testacy status.** Except as otherwise ordered in formal proceedings, the probate of a will subsequent to the appointment of a personal representative in intestacy or under a will which is superseded by formal probate of another will, or the vacation of an informal probate of a will subsequent to the appointment of the personal representative thereunder, does not terminate the appointment of the personal representative although the personal representative's powers may be reduced as provided in section 560:3-401. Termination occurs upon appointment in informal or formal appointment proceedings of a person entitled to appointment under the later assumption concerning testacy. If no request for new appointment is made within thirty days after expiration of time for appeal from the order in formal testacy proceedings, or from the informal probate, changing the assumption concerning testacy, the previously appointed personal representative upon request may be appointed personal

representative under the subsequently probated will, or as in intestacy as the case may be. [L 1996, c 288, pt of §1]

" **§560:3-613 Successor personal representative.** Parts 3 and 4 of this article govern proceedings for appointment of a personal representative to succeed one whose appointment has been terminated. After appointment and qualification, a successor personal representative may be substituted in all actions and proceedings to which the former personal representative was a party, and no notice, process or claim which was given or served upon the former personal representative need be given to or served upon the successor in order to preserve any position or right the person giving the notice or filing the claim may thereby have obtained or preserved with reference to the former personal representative. Except as otherwise ordered by the court, the successor personal representative has the powers and duties in respect to the continued administration which the former personal representative would have had if the appointment had not been terminated. [L 1996, c 288, pt of §1]

" **§560:3-614 Special administrator; appointment.** A special administrator may be appointed:

- (1) Informally by the registrar on the application of any interested person when necessary to protect the estate of a decedent prior to the appointment of a general personal representative or if a prior appointment has been terminated as provided in section 560:3-609; and
- (2) In a formal proceeding by order of the court on the petition of any interested person and finding, after notice and hearing, that appointment is necessary to preserve the estate or to secure its proper administration including its administration in circumstances where a general personal representative cannot or should not act. If it appears to the court that an emergency exists, appointment may be ordered without notice. [L 1996, c 288, pt of §1]

Rules of Court

Special administration, see HPR rule 56.

Case Notes

Circuit court properly denied appellant's petition for appointment as special administrator where appellant was not an "interested person", as defined in §560:1-201, who could

petition the court under this section; appellant had no familial relationship to decedent's family, did not have a property right or claim against decedent's estate, and did not have priority under §560:3-203 to be appointed as personal representative of decedent's estate. 88 H. 148, 963 P.2d 1124.

" **§560:3-615 Special administrator; who may be appointed.**

(a) If a special administrator is to be appointed pending the probate of a will which is the subject of a pending application or petition for probate, the person named executor in the will shall be appointed if available, and qualified.

(b) In other cases, any proper person may be appointed special administrator. [L 1996, c 288, pt of §1]

" **§560:3-616 Special administrator; appointed informally; powers and duties.** A special administrator appointed by the registrar in informal proceedings pursuant to section 560:3-614(1) has the duty to collect and manage the assets of the estate, to preserve them, to account therefor, and to deliver them to the general personal representative upon qualification. The special administrator has the power of a personal representative under this chapter necessary to perform the special administrator's duties. [L 1996, c 288, pt of §1]

" **§560:3-617 Special administrator; formal proceedings; power and duties.** A special administrator appointed by order of the court in any formal proceeding has the power of a general personal representative except as limited in the appointment and duties as prescribed in the order. The appointment may be for a specified time, to perform particular acts or on other terms as the court may direct. [L 1996, c 288, pt of §1]

" **§560:3-618 Termination of appointment; special administrator.** The appointment of a special administrator terminates in accordance with the provisions of the order of appointment or on the appointment of a general personal representative. In other cases, the appointment of a special administrator is subject to termination as provided in sections 560:3-608 through 560:3-611. [L 1996, c 288, pt of §1]

Rules of Court

Special administration, see HPR rules 57, 58.

"PART 7. DUTIES AND POWERS OF PERSONAL REPRESENTATIVES

§560:3-701 Time of accrual of duties and powers. The duties and powers of a personal representative commence upon appointment. The powers of a personal representative relate back in time to give acts by the person appointed which are beneficial to the estate occurring prior to the person's appointment the same effect as those occurring thereafter. Prior to the person's appointment, a person named executor in a will may carry out written instructions of the decedent relating to the decedent's body, funeral, and burial arrangements. A personal representative may ratify and accept acts on behalf of the estate done by others where the acts would have been proper for a personal representative. [L 1996, c 288, pt of §1]

" **§560:3-702 Priority among different letters.** A person to whom general letters are issued first has exclusive authority under the letters until the person's appointment is terminated or modified. If, through error, general letters are afterwards issued to another, the first appointed representative may recover any property of the estate in the hands of the representative subsequently appointed, but the acts of the latter done in good faith before notice of the first letters are not void for want of validity of appointment. [L 1996, c 288, pt of §1]

" **§560:3-703 General duties; relation and liability to persons interested in estate; standing to sue.** (a) A personal representative is a fiduciary who shall observe the standards of care applicable to trustees as described by section 560:7-302. A personal representative is under a duty to settle and distribute the estate of the decedent in accordance with the terms of any probated and effective will and this chapter, and as expeditiously and efficiently as is consistent with the best interests of the estate. The personal representative shall use the authority conferred upon the personal representative by this chapter, the terms of the will, if any, and any order in proceedings to which the personal representative is party for the best interests of successors to the estate.

(b) A personal representative shall not be surcharged for acts of administration or distribution if the conduct in question was authorized at the time. Subject to other obligations of administration, an informally probated will is authority to administer and distribute the estate according to its terms. An order of appointment of a personal representative, whether issued in informal or formal proceedings, is authority to distribute apparently intestate assets to the heirs of the decedent if, at the time of distribution, the personal representative is not aware of a

pending testacy proceeding, a proceeding to vacate an order entered in an earlier testacy proceeding, a formal proceeding questioning the personal representative's appointment or fitness to continue, or a supervised administration proceeding. Nothing in this section affects the duty of the personal representative to administer and distribute the estate in accordance with the rights of claimants, the surviving spouse or reciprocal beneficiary, any minor and dependent children and any pretermitted child of the decedent as described elsewhere in this chapter.

(c) Except as to proceedings which do not survive the death of the decedent, a personal representative of a decedent domiciled in this State at the decedent's death has the same standing to sue and be sued in the courts of this State and the courts of any other jurisdiction as the decedent had immediately prior to death. [L 1996, c 288, pt of §1; am L 1997, c 383, §19]

" **§560:3-704 Personal representative to proceed without court order; exception.** A personal representative shall proceed expeditiously with the settlement and distribution of a decedent's estate and, except as otherwise specified or ordered in regard to a supervised personal representative, do so without adjudication, order, or direction of the court, but the personal representative may invoke the jurisdiction of the court, in proceedings authorized by this chapter, to resolve questions concerning the estate or its administration. [L 1996, c 288, pt of §1]

" **§560:3-705 Duty of personal representative; information to heirs and devisees.** Not later than thirty days after the appointment every personal representative, except any special administrator, shall give information of the personal representative's appointment to the heirs and devisees, including, if there has been no formal testacy proceeding and if the personal representative was appointed on the assumption that the decedent died intestate, the devisees in any will mentioned in the application for appointment of a personal representative. The information shall be delivered or sent by ordinary mail to each of the heirs and devisees whose address is reasonably available to the personal representative. The duty does not extend to require information to persons who have been adjudicated in a prior formal testacy proceeding to have no interest in the estate. The information shall include the name and address of the personal representative, indicate that it is being sent to persons who have or may have some interest in the estate being administered, indicate whether bond has been filed, and describe the court where papers relating to the estate are

on file. The information shall state that the estate is being administered by the personal representative under the Hawaii probate code without supervision by the court but that recipients are entitled to information regarding the administration from the personal representative and can petition the court in any matter relating to the estate, including distribution of assets and expenses of administration. The personal representative's failure to give this information is a breach of duty to the persons concerned but does not affect the validity of the personal representative's appointment, powers, or other duties. A personal representative may inform other persons of appointment by delivery or ordinary first class mail. [L 1996, c 288, pt of §1]

" **§560:3-706 Duty of personal representative; inventory and appraisalment.** Within three months after the appointment, a personal representative, who is not a special administrator or a successor to another representative who has previously discharged this duty, shall prepare and file or mail an inventory of property owned by the decedent at the time of death, listing it with reasonable detail, and indicating as to each listed item, its fair market value as of the date of the decedent's death, and the type and amount of any encumbrance that may exist with reference to any item.

The personal representative shall send a copy of the inventory to interested persons who request it. The personal representative may also file the original of the inventory with the court. [L 1996, c 288, pt of §1]

Rules of Court

Inventory, see HPR rules 60, 61.

" **§560:3-707 Employment of appraisers.** The personal representative may employ a qualified and disinterested appraiser to assist in ascertaining the fair market value as of the date of the decedent's death of any asset the value of which may be subject to reasonable doubt. Different persons may be employed to appraise different kinds of assets included in the estate. The names and addresses of any appraiser shall be indicated on the inventory with the item or items appraised. [L 1996, c 288, pt of §1]

" **§560:3-708 Duty of personal representative; supplementary inventory.** If any property not included in the original inventory comes to the knowledge of a personal representative or if the personal representative learns that the value or

description indicated in the original inventory for any item is erroneous or misleading, the personal representative shall make a supplementary inventory or appraisal showing the market value as of the date of the decedent's death of the new item or the revised market value or descriptions, and the appraisers or other data relied upon, if any, and file it with the court if the original inventory was filed, or furnish copies thereof or information thereof to interested persons who request it or who requested a copy of the original inventory. [L 1996, c 288, pt of §1; am L 2008, c 39, §2]

Rules of Court

Inventory, see HPR rules 60, 61.

" **§560:3-709 Duty of personal representative; possession of estate.** Except as otherwise provided by a decedent's will, every personal representative has a right to, and shall take possession or control of, the decedent's property, except that any real property or tangible personal property may be left with or surrendered to the person presumptively entitled thereto unless or until, in the judgment of the personal representative, possession of the property will be necessary for purposes of administration. The request by a personal representative for delivery of any property possessed by an heir or devisee is conclusive evidence, in any action against the heir or devisee for possession thereof, that the possession of the property by the personal representative is necessary for purposes of administration. The personal representative shall pay taxes on, and take all steps reasonably necessary for the management, protection, and preservation of, the estate in the personal representative's possession. The personal representative may maintain an action to recover possession of property or to determine the title thereto. [L 1996, c 288, pt of §1]

" **§560:3-710 Power to avoid transfers.** The property liable for the payment of unsecured debts of a decedent includes all property transferred by the decedent by any means which is in law void or voidable as against the decedent's creditors, and subject to prior liens, the right to recover this property, so far as necessary for the payment of unsecured debts of the decedent, is exclusively in the personal representative. [L 1996, c 288, pt of §1]

" **§560:3-711 Powers of personal representatives; in general.** Until termination of appointment a personal representative has the same power over the title to property of the estate that an

absolute owner would have, in trust however, for the benefit of the creditors and others interested in the estate. This power may be exercised without notice, hearing, or order of court. [L 1996, c 288, pt of §1]

Rules of Court

Sale of real property, see Hawaii Probate Rules, part B(VI).

" **§560:3-712 Improper exercise of power; breach of fiduciary duty.** If the exercise of power concerning the estate is improper, the personal representative is liable to interested persons for damage or loss resulting from breach of fiduciary duty to the same extent as a trustee of an express trust. The rights of purchasers and others dealing with a personal representative shall be determined as provided in sections 560:3-713 and 560:3-714. [L 1996, c 288, pt of §1]

" **§560:3-713 Sale, encumbrance, or transaction involving conflict of interest; voidable; exceptions.** Any sale or encumbrance to the personal representative, the personal representative's spouse or reciprocal beneficiary, agent, or attorney, or any corporation or trust in which the personal representative has a substantial beneficial interest, or any transaction which is affected by a substantial conflict of interest on the part of the personal representative, is voidable by any person interested in the estate except one who has consented after fair disclosure, unless:

- (1) The will or a contract entered into by the decedent expressly authorized the transaction; or
- (2) The transaction is approved by the court after notice to interested persons. [L 1996, c 288, pt of §1; am L 1997, c 383, §19]

" **§560:3-714 Persons dealing with personal representative; protection.** A person who in good faith either assists a personal representative or deals with the personal representative for value is protected as if the personal representative properly exercised the personal representative's power. The fact that a person knowingly deals with a personal representative does not alone require the person to inquire into the existence of a power or the propriety of its exercise. Except for restrictions on powers of supervised personal representatives which are endorsed on letters as provided in section 560:3-504, no provision in any will or order of court purporting to limit the power of a personal representative is effective except as to persons with actual knowledge thereof. A

person is not bound to see to the proper application of estate assets paid or delivered to a personal representative. The protection here expressed extends to instances in which some procedural irregularity or jurisdictional defect occurred in proceedings leading to the issuance of letters, including a case in which the alleged decedent is found to be alive. The protection here expressed is not by substitution for that provided by comparable provisions of the laws relating to commercial transactions and laws simplifying transfers of securities by fiduciaries. [L 1996, c 288, pt of §1]

" **§560:3-715 Transactions authorized for personal representatives; exceptions.** Except as restricted or otherwise provided by the will or by an order in a formal proceeding or by sections 531-28.5 and 531-29, and subject to the priorities stated in section 560:3-902, a personal representative, acting reasonably for the benefit of the interested persons, may properly:

- (1) Retain assets owned by the decedent pending distribution or liquidation including those in which the representative is personally interested or which are otherwise improper for trust investment;
- (2) Receive assets from fiduciaries, or other sources;
- (3) Perform, compromise, or refuse performance of the decedent's contracts that continue as obligations of the estate, as the personal representative may determine under the circumstances. In performing enforceable contracts by the decedent to convey or lease land, the personal representative, among other possible courses of action, may:
 - (A) Execute and deliver a deed of conveyance for cash payment of all sums remaining due or the purchaser's note for the sum remaining due secured by a mortgage or deed of trust on the land; or
 - (B) Deliver a deed in escrow with directions that the proceeds, when paid in accordance with the escrow agreement, be paid to the successors of the decedent, as designated in the escrow agreement;
- (4) Satisfy written charitable pledges of the decedent irrespective of whether the pledges constituted binding obligations of the decedent or were properly presented as claims, if in the judgment of the personal representative the decedent would have wanted the pledges completed under the circumstances;
- (5) If funds are not needed to meet debts and expenses currently payable and are not immediately

- distributable, deposit or invest liquid assets of the estate, including moneys received from the sale of other assets, in federally insured interest-bearing accounts, readily marketable secured loan arrangements, or other prudent investments which would be reasonable for use by trustees generally;
- (6) Acquire or dispose of an asset, including land in this or another state, for cash or on credit, at public or private sale; and manage, develop, improve, exchange, partition, change the character of, or abandon an estate asset;
 - (7) Make ordinary or extraordinary repairs or alterations in buildings or other structures, demolish any improvements, raze existing or erect new party walls or buildings;
 - (8) Subdivide, develop, or dedicate land to public use; make or obtain the vacation of plats and adjust boundaries; or adjust differences in valuation on exchange or partition by giving or receiving considerations; or dedicate easements to public use without consideration;
 - (9) Enter for any purpose into a lease as lessor or lessee, with or without option to purchase or renew, for a term within or extending beyond the period of administration;
 - (10) Enter into a lease or arrangement for exploration and removal of minerals or other natural resources or enter into a pooling or unitization agreement;
 - (11) Abandon property when, in the opinion of the personal representative, it is valueless, or is so encumbered, or is in condition that it is of no benefit to the State;
 - (12) Vote stocks or other securities in person or by general or limited proxy;
 - (13) Pay calls, assessments, and other sums chargeable or accruing against or on account of securities, unless barred by the provisions relating to claims;
 - (14) Hold a security in the name of a nominee or in other form without disclosure of the interest of the estate but the personal representative is liable for any act of the nominee in connection with the security so held;
 - (15) Insure the assets of the estate against damage, loss and liability and the personal representative's against liability as to third persons;

- (16) Borrow money with or without security to be repaid from the estate assets or otherwise; and advance money for the protection of the estate;
- (17) Effect a fair and reasonable compromise with any debtor or obligor, or extend, renew, or in any manner modify the terms of any obligation owing to the estate. If the personal representative holds a mortgage, pledge, or other lien upon property of another person, the personal representative, in lieu of foreclosure, may accept a conveyance or transfer of encumbered assets from the owner thereof in satisfaction of the indebtedness secured by lien;
- (18) Pay taxes, assessments, compensation of the personal representative, and other expenses incident to the administration of the estate;
- (19) Sell or exercise stock subscription or conversion rights; consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise;
- (20) Allocate items of income or expense to either estate income or principal, as permitted or provided by law;
- (21) Employ persons, including attorneys, auditors, investment advisors, or agents, even if they are associated with the personal representative, to advise or assist the personal representative in the performance of administrative duties; act without independent investigation upon their recommendations; and instead of acting personally, employ one or more agents to perform any act of administration, whether or not discretionary;
- (22) Prosecute or defend claims, or proceedings in any jurisdiction for the protection of the estate and of the personal representative in the performance of duties;
- (23) Sell, mortgage, or lease any real or personal property of the estate or any interest therein for cash, credit, or for part cash and part credit, and with or without security for unpaid balances;
- (24) Continue any unincorporated business or venture in which the decedent was engaged at the time of the decedent's death:
 - (A) In the same business form for a period of not more than four months from the date of appointment of a general personal representative if continuation is a reasonable means of

- preserving the value of the business including good will;
- (B) In the same business form for any additional period of time that may be approved by order of the court in a formal proceeding to which the persons interested in the estate are parties; or
 - (C) Throughout the period of administration if the business is incorporated by the personal representative and if none of the probable distributees of the business who are competent adults object to its incorporation and retention in the estate;
- (25) Incorporate any business or venture in which the decedent was engaged at the time of the decedent's death;
 - (26) Provide for exoneration of the personal representative from personal liability in any contract entered into on behalf of the estate;
 - (27) Satisfy and settle claims and distribute the estate as provided in this chapter. [L 1996, c 288, pt of §1]

" **§560:3-716 Powers and duties of successor personal representative.** A successor personal representative has the same power and duty as the original personal representative to complete the administration and distribution of the estate, as expeditiously as possible, but the successor personal representative shall not exercise any power expressly made personal to the executor named in the will. [L 1996, c 288, pt of §1]

" **§560:3-717 Co-representatives; when joint action required.** If two or more persons are appointed co-representatives and unless the will provides otherwise, the concurrence of all is required on all acts connected with the administration and distribution of the estate. This restriction does not apply when any co-representative receives and receipts for property due the estate, when the concurrence of all cannot readily be obtained in the time reasonably available for emergency action necessary to preserve the estate, or when a co-representative has been delegated to act for the others. Persons dealing with a co-representative if actually unaware that another has been appointed to serve or if advised by the personal representative with whom they deal that the personal representative has authority to act alone for any of the reasons mentioned herein, are as fully protected as if the person with whom they dealt had been the sole personal representative. [L 1996, c 288, pt of §1]

" **§560:3-718 Powers of surviving personal representative.** Unless the terms of the will otherwise provide, every power exercisable by personal co-representatives may be exercised by the one or more remaining after the appointment of one or more is terminated, and if one of two or more nominated as co-executors is not appointed, those appointed may exercise all the powers incident to the office. [L 1996, c 288, pt of §1]

" **§560:3-719 Compensation of personal representative.** A personal representative is entitled to reasonable compensation for the personal representative's services. If a will provides for compensation of the personal representative and there is no contract with the decedent regarding compensation, the personal representative may renounce the provision before qualifying and be entitled to reasonable compensation. A personal representative also may renounce the personal representative's right to all or any part of the compensation. A written renunciation of fee may be filed with the court. [L 1996, c 288, pt of §1]

" **§560:3-720 Expenses in estate litigation.** If any personal representative or person nominated as personal representative defends or prosecutes any proceeding in good faith, whether successful or not that person is entitled to receive from the estate that person's necessary expenses and disbursements including reasonable attorneys' fees incurred. [L 1996, c 288, pt of §1]

Case Notes

A finding of undue influence on the part of the personal representative, who was also the proponent of the rejected will, precludes a finding that he or she defended or prosecuted the will contest in good faith; personal representative's request for attorneys' fees and expenses under this section thus denied. 91 H. 107, 979 P.2d 1133.

" **§560:3-721 Proceedings for review of employment of agents and compensation of personal representatives and employees of estate.** After notice to all interested persons or on petition of an interested person or on appropriate motion if administration is supervised, the propriety of employment of any person by a personal representative including any attorney, auditor, investment advisor or other specialized agent or assistant, the reasonableness of the compensation of any person so employed, or the reasonableness of the compensation determined by the personal representative for the personal

representative's own services, may be reviewed by the court. Any person who has received excessive compensation from an estate for services rendered may be ordered to make appropriate refunds. [L 1996, c 288, pt of §1]

"PART 8. CREDITORS' CLAIMS

§560:3-801 Notice to creditors. (a) Unless notice has already been given under this section, a person applying or petitioning for appointment of a personal representative or probate of a will or declaration of an intestacy may publish a notice to creditors once a week for three successive weeks in a newspaper of general circulation in the judicial circuit in which the application or petition is filed announcing the person's application or petition and the name and address of the person nominated as personal representative, if any, and notifying creditors of the estate to present their claims no later than four months after the date of the first publication of the notice or be forever barred. The notice may be combined with any published notice of the pendency of the probate proceedings.

(b) After appointment the personal representative may give written notice by mail or other delivery to each known creditor, notifying the creditor to present that creditor's claim within four months after the published notice, if given as provided in subsection (a), or within sixty days after the mailing or other delivery of the notice, whichever is later, or be forever barred. Written notice must be the notice described in subsection (a) above or a similar notice.

(c) The personal representative shall undertake reasonable review of the decedent's records to ascertain the decedent's creditors.

(d) The personal representative is not liable to a creditor or to a successor of the decedent for giving or failing to give notice under this section.

(e) If a person other than the original nominee is appointed personal representative, the original nominee or any other person receiving claims shall promptly deliver all claims to the person who is appointed. Failure to deliver by the original nominee shall render the original nominee liable for any damages suffered by the claimants.

(f) The trustee or successor trustee of any trust created by the decedent may publish a notice to creditors once a week for three successive weeks in a newspaper of general circulation in the judicial circuit in which either:

(1) The decedent was domiciled; or

- (2) An application or petition for appointment of personal representative is filed announcing the trustee's name and address, and notifying creditors of the decedent to present their claims to the trustee within four months after the date of the first publication of the notice or be forever barred.

The notice may be combined with the published notice of the pendency of any probate or appointment proceedings. [L 1996, c 288, pt of §1]

" **§560:3-802 Statutes of limitations.** (a) Unless an estate is insolvent, the personal representative, with the consent of all successors whose interests would be affected, may waive any defense of limitations available to the estate. If the defense is not waived, no claim barred by a statute of limitations at the time of the decedent's death may be allowed or paid.

(b) The running of a statute of limitations measured from an event other than death or the giving of notice to creditors is suspended for four months after the decedent's death, but resumes thereafter as to claims not barred by other sections.

(c) For purposes of a statute of limitations, the presentation of a claim pursuant to section 560:3-804 is equivalent to commencement of a proceeding on the claim. [L 1996, c 288, pt of §1]

" **§560:3-803 Limitations on presentation of claims.** (a) All claims against either a decedent or a decedent's estate which arose before the death of the decedent, including claims of the State and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, if not barred earlier by another statute of limitations or non-claim statute, are barred against the estate, the personal representative, the decedent's trustee and the heirs and devisees of the decedent, unless presented within the earlier of the following:

- (1) No later than:
 - (A) Four months after the date of the first publication of notice to creditors if notice is given in compliance with section 560:3-801(a); or
 - (B) Sixty days after the mailing or other delivery of written notice, as provided in section 560:3-801(b); whichever period (A) or (B) expires later; or
- (2) Within eighteen months after the decedent's death, if notice to creditors has not been published as provided in section 560:3-801(a) or delivered as provided in section 560:3-801(b).

(b) A claim described in subsection (a) which is barred by the non-claim statute of the decedent's domicile before the giving of notice to creditors in this State is barred in this State.

(c) All claims against a decedent's estate which arise at or after the death of the decedent, including claims of the State and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, are barred against the estate, the personal representative, the decedent's trustee, and the heirs and devisees of the decedent, unless presented as follows:

- (1) A claim based on a contract with the personal representative or trustee, within four months after performance by the personal representative or trustee is due; or
 - (2) Any other claim, within the later of four months after it arises, or the time specified in subsection (a)(2).
- (d) Nothing in this section affects or prevents:
- (1) Any proceeding to enforce any mortgage, pledge, or other lien upon property of the estate;
 - (2) To the limits of the insurance protection only, any proceeding to establish liability of the decedent or the personal representative or the decedent's trustee for which the personal representative or the trustee is protected by liability insurance; or
 - (3) Collection of compensation for services rendered and reimbursement for expenses advanced by the personal representative or trustee or by the attorney or accountant for the personal representative of the estate or the decedent's trustee. [L 1996, c 288, pt of §1; am L 1997, c 244, §10]

" **§560:3-804 Manner of presentation of claims.** Claims against a decedent's estate may be presented as follows:

- (1) The claimant may deliver or mail to the personal representative a written statement of the claim indicating its basis, the name and address of the claimant, and the amount claimed, or may file a written statement of the claim, in the form prescribed by rule, with the clerk of the court. The claim is deemed presented on the first to occur of receipt of the written statement of claim by the personal representative, or the filing of the claim with the court. If a claim is not yet due, the date when it will become due shall be stated. If the claim is contingent or unliquidated, the nature of the

uncertainty shall be stated. If the claim is secured, the security shall be described. Failure to describe correctly the security, the nature of any uncertainty, and the due date of a claim not yet due does not invalidate the presentation made;

- (2) The claimant may commence a proceeding against the personal representative in any court where the personal representative may be subjected to jurisdiction, to obtain payment of the claimant's claim against the estate, but the commencement of the proceeding must occur within the time limited for presenting the claim. No presentation of claim is required in regard to matters claimed in proceedings against the decedent which were pending at the time of the decedent's death;
- (3) If a claim is presented under [paragraph] (1), no proceeding thereon may be commenced more than sixty days after the personal representative has [mailed] a notice of disallowance; but, in the case of a claim which is not presently due or which is contingent or unliquidated, the personal representative may consent to an extension of the sixty-day period, or to avoid injustice the court, on petition, may order an extension of the sixty-day period, but in no event shall the extension run beyond the applicable statute of limitations. [L 1996, c 288, pt of §1]

Rules of Court

Presenting claims, see HPR rule 63.

" **§560:3-805 Classification of claims.** (a) If the applicable assets of the estate are insufficient to pay all claims in full, the personal representative shall make payment in the following order:

- (1) Costs and expenses of administration;
- (2) Reasonable funeral expenses including any claim by the department of human services pursuant to section 346-15;
- (3) Debts and taxes with preference under federal law;
- (4) Reasonable and necessary medical and hospital expenses of the last illness of the decedent, including compensation of persons attending the decedent and any claim by the department of human services pursuant to section 346-37 for expenses of the last illness of the decedent;

- (5) Debts and taxes with preference under other laws of this State;
- (6) Any other claim against the estate pursuant to section 346-37; and
- (7) All other claims.

(b) No preference shall be given in the payment of any claim over any other claim of the same class, and a claim due and payable shall not be entitled to a preference over claims not due. [L 1996, c 288, pt of §1; am L 2000, c 102, §2]

" **§560:3-806 Allowance of claims.** (a) As to claims presented in the manner described in section 560:3-804 within the time limit prescribed in section 560:3-803, the personal representative may mail a notice to any claimant stating that the claim has been disallowed. If, after allowing or disallowing a claim, the personal representative changes the decision concerning the claim, the personal representative shall notify the claimant. The personal representative may not change a disallowance of a claim after the time for the claimant to file a petition for allowance or to commence a proceeding on the claim has run and the claim has been barred. Every claim which is disallowed in whole or in part by the personal representative is barred so far as not allowed unless the claimant files a petition for allowance in the court or commences a proceeding against the personal representative not later than sixty days after the mailing of the notice of disallowance or partial allowance if the notice warns the claimant of the impending bar. If the notice does not warn the claimant of the impending sixty-day bar, then the claim shall be barred if no petition for allowance or other proceeding on the claim has been brought within eighteen months of the date of the decedent's death. Failure of the personal representative to mail notice to a claimant of action on the claimant's claim for sixty days after the time for original presentation of the claim has expired has the effect of a notice of allowance.

(b) After allowing or disallowing a claim the personal representative may change the allowance or disallowance as hereafter provided. The personal representative may prior to payment change the allowance to a disallowance in whole or in part, but not after allowance by a court order or judgment or an order directing payment of the claim. The personal representative shall notify the claimant of the change to disallowance, and the disallowed claim is then subject to bar as provided in subsection (a). The personal representative may change a disallowance to an allowance, in whole or in part, until it is barred under subsection (a); after it is barred, it

may be allowed and paid only if the estate is solvent and all successors whose interests would be affected consent.

(c) Upon the petition of the personal representative or of a claimant in a proceeding for the purpose, the court may allow in whole or in part any claim or claims presented to the personal representative or filed with the clerk of the court in due time and not barred by subsection (a). Notice in this proceeding shall be given to the claimant, the personal representative and those other persons interested in the estate as the court may direct by order entered at the time the proceeding is commenced.

(d) A judgment in a proceeding in another court against a personal representative to enforce a claim against a decedent's estate is an allowance of the claim.

(e) Unless otherwise provided in any judgment in another court entered against the personal representative, allowed claims bear interest at the legal rate for the period commencing sixty days after the time for original presentation of the claim has expired unless based on a contract making a provision for interest, in which case they bear interest in accordance with that provision. [L 1996, c 288, pt of §1; am L 2002, c 82, §2]

" **§560:3-807 Payment of claims.** (a) Upon the expiration of the earlier of the time limitations provided in section 560:3-803 for the presentation of claims, the personal representative shall proceed to pay the claims allowed against the estate in the order of priority prescribed, after making provision for homestead, family and support allowances, for claims already presented that have not yet been allowed or whose allowance has been appealed, and for unbarred claims that may yet be presented, including costs and expenses of administration. By petition to the court in a proceeding for the purpose, or by appropriate motion if the administration is supervised, a claimant whose claim has been allowed but not paid may secure an order directing the personal representative to pay the claim to the extent funds of the estate are available to pay it.

(b) The personal representative at any time may pay any just claim that has not been barred, with or without formal presentation, but is personally liable to any other claimant whose claim is allowed and who is injured by its payment if:

- (1) Payment was made before the expiration of the time limit stated in subsection (a) and the personal representative failed to require the payee to give adequate security for the refund of any of the payment necessary to pay other claimants; or
- (2) Payment was made, due to negligence or wilful fault of the personal representative, in such manner as to

deprive the injured claimant of priority. [L 1996, c 288, pt of §1]

" **§560:3-808 Individual liability of personal representative.** (a) Unless otherwise provided in the contract, a personal representative is not individually liable on a contract properly entered into in the personal representative's fiduciary capacity in the course of administration of the estate unless the personal representative fails to reveal the representative's capacity and identify the estate in the contract.

(b) A personal representative is individually liable for obligations arising from ownership or control of the estate or for torts committed in the course of administration of the estate only if the personal representative is personally at fault.

(c) Claims based on contracts entered into by a personal representative in the personal representative's fiduciary capacity, on obligations arising from ownership or control of the estate or on torts committed in the course of estate administration may be asserted against the estate by proceeding against the personal representative in the personal representative's fiduciary capacity, whether or not the personal representative is individually liable therefor.

(d) Issues of liability as between the estate and the personal representative individually may be determined in a proceeding for accounting, surcharge or indemnification or other appropriate proceeding. [L 1996, c 288, pt of §1]

" **§560:3-809 Secured claims.** Payment of a secured claim is upon the basis of the amount allowed if the creditor surrenders the creditor's security; otherwise payment is upon the basis of one of the following:

- (1) If the creditor exhausts the creditor's security before receiving payment, unless precluded by other law upon the amount of the claim allowed less the fair value of the security; or
- (2) If the creditor does not have the right to exhaust the security or has not done so, upon the amount of the claim allowed less the value of the security determined by converting it into money according to the terms of the agreement pursuant to which the security was delivered to the creditor, or by the creditor and personal representative by agreement, arbitration, compromise or litigation. [L 1996, c 288, pt of §1]

" **§560:3-810 Claims not due and contingent or unliquidated claims.** (a) If a claim which will become due at a future time or a contingent or unliquidated claim becomes due or certain before the distribution of the estate, and if the claim has been allowed or established by a proceeding, it is paid in the same manner as presently due and absolute claims of the same class.

(b) In other cases the personal representative or, on petition of the personal representative or the claimant in a special proceeding for the purpose, the court may provide for payment as follows:

- (1) If the claimant consents, the claimant may be paid the present or agreed value of the claim, taking any uncertainty into account; and
- (2) Arrangement for future payment, or possible payment, on the happening of the contingency or on liquidation may be made by creating a trust, giving a mortgage, obtaining a bond or security from a distributee, or otherwise. [L 1996, c 288, pt of §1]

Rules of Court

Closing estates, arrangements, see HPR rule 64.

" **§560:3-811 Counterclaims.** In allowing a claim the personal representative may deduct any counterclaim which the estate has against the claimant. In determining a claim against an estate a court shall reduce the amount allowed by the amount of any counterclaims and, if the counterclaims exceed the claim, render a judgment against the claimant in the amount of the excess. A counterclaim, liquidated or unliquidated, may arise from a transaction other than that upon which the claim is based. A counterclaim may give rise to relief exceeding in amount or different in kind from that sought in the claim. [L 1996, c 288, pt of §1]

" **§560:3-812 Execution and levies prohibited.** No execution may issue upon nor may any levy be made against any property of the estate under any judgment against a decedent or a personal representative, but this section shall not be construed to prevent the enforcement of mortgages, pledges or liens upon real or personal property in an appropriate proceeding. [L 1996, c 288, pt of §1]

" **§560:3-813 Compromise of claims.** When a claim against the estate has been presented in any manner, the personal representative, if it appears for the best interest of the estate, may compromise the claim, whether due or not due,

absolute or contingent, liquidated or unliquidated. [L 1996, c 288, pt of §1]

" **§560:3-814 Encumbered assets.** If any assets of the estate are encumbered by mortgage, pledge, lien, or other security interest, the personal representative may pay the encumbrance or any part thereof, renew or extend any obligation secured by the encumbrance or convey or transfer the assets to the creditor in satisfaction of the creditor's lien, in whole or in part, whether or not the holder of the encumbrance has presented a claim, if it appears to be for the best interest of the estate. Payment of an encumbrance does not increase the share of the distributee entitled to the encumbered assets unless the distributee is entitled to exoneration. [L 1996, c 288, pt of §1]

" **§560:3-815 Administration in more than one state; duty of personal representative.** (a) All assets of estates being administered in this State are subject to all claims, allowances and charges existing or established against the personal representative wherever appointed.

(b) If the estate either in this State or as a whole is insufficient to cover all family exemptions and allowances determined by the law of the decedent's domicile, prior charges and claims, after satisfaction of the exemptions, allowances and charges, each claimant whose claim has been allowed either in this State or elsewhere in administrations of which the personal representative is aware, is entitled to receive payment of an equal proportion of that claimant's claim. If a preference or security in regard to a claim is allowed in another jurisdiction but not in this State, the creditor so benefitted is to receive dividends from local assets only upon the balance of the creditor's claim after deducting the amount of the benefit.

(c) In case the family exemptions and allowances, prior charges and claims of the entire estate exceed the total value of the portions of the estate being administered separately and this State is not the state of the decedent's last domicile, the claims allowed in this State shall be paid their proportion if local assets are adequate for the purpose, and the balance of local assets shall be transferred to the domiciliary personal representative. If local assets are not sufficient to pay all claims allowed in this State the amount to which they are entitled, local assets shall be marshalled so that each claim allowed in this State is paid its proportion as far as possible, after taking into account all dividends on claims allowed in this State from assets in other jurisdictions. [L 1996, c 288, pt of §1]

" **§560:3-816 Final distribution to domiciliary representative.** The estate of a non-resident decedent being administered by a personal representative appointed in this State, if there is a personal representative of the decedent's domicile willing to receive it, shall be distributed to the domiciliary personal representative for the benefit of the successors of the decedent unless:

- (1) By virtue of the decedent's will, if any, and applicable choice of law rules, the successors are identified pursuant to the local law of this State without reference to the local law of the decedent's domicile;
- (2) The personal representative of this State, after reasonable inquiry, is unaware of the existence or identity of a domiciliary personal representative; or
- (3) The court orders otherwise in a proceeding for a closing order under section 560:3-1001 or incident to the closing of a supervised administration.

In other cases, distribution of the estate of a decedent shall be made in accordance with the other parts of this article. [L 1996, c 288, pt of §1]

"PART 9. SPECIAL PROVISIONS RELATING TO DISTRIBUTION

§560:3-901 Successors' rights if no administration. In the absence of administration, the heirs and devisees are entitled to the estate in accordance with the terms of a probated will or the laws of intestate succession. Devisees may establish title by the probated will to devised property. Persons entitled to property by homestead allowance, exemption or intestacy may establish title thereto by proof of the decedent's ownership, decedent's death, and their relationship to the decedent. Successors take subject to all charges incident to administration, including the claims of creditors and allowances of surviving spouse or reciprocal beneficiary and dependent children, and subject to the rights of others resulting from abatement, retainer, advancement, and ademption. [L 1996, c 288, pt of §1; am L 1997, c 383, §19]

" **§560:3-902 Distribution; order in which assets appropriated; abatement.** (a) Except as provided in subsection (b) and except as may otherwise be provided in connection with the share of the surviving spouse or reciprocal beneficiary who elects to take an elective share, shares of distributees abate, without any preference or priority as between real and personal property, in the following order:

- (1) Property not disposed of by the will;
- (2) Residuary devises;
- (3) General devises;
- (4) Specific devises.

For purposes of abatement, a general devise charged on any specific property or fund is a specific devise to the extent of the value of the property on which it is charged, and upon the failure or insufficiency of the property on which it is charged, a general devise to the extent of the failure or insufficiency. Abatement within each classification is in proportion to the amounts of property each of the beneficiaries would have received if full distribution of the property had been made in accordance with the terms of the will.

(b) If the will expresses an order of abatement, or if the testamentary plan or the express or implied purpose of the devise would be defeated by the order of abatement stated in subsection (a), the shares of the distributees abate as may be found necessary to give effect to the intention of the testator.

(c) If the subject of a preferred devise is sold or used incident to administration, abatement shall be achieved by appropriate adjustments in, or contribution from, other interests in the remaining assets. [L 1996, c 288, pt of §1; am L 1997, c 383, §19]

" **§560:3-903 Right of retainer.** The amount of a non-contingent indebtedness of a successor to the estate if due, or its present value if not due, shall be offset against the successor's interest; but the successor has the benefit of any defense which would be available to the successor in a direct proceeding for recovery of the debt. [L 1996, c 288, pt of §1]

" **§560:3-904 Interest on general pecuniary devise.** General pecuniary devises bear interest at the legal rate beginning one year after the first appointment of a personal representative until payment, unless a contrary intent is indicated by the will. [L 1996, c 288, pt of §1]

" **§560:3-905 Penalty clause for contest.** A provision in a will or trust purporting to penalize any interested person for contesting the will or trust or instituting other proceedings relating to the probate or trust estate is unenforceable if probable cause exists for instituting proceedings. [L 1996, c 288, pt of §1; am L 2000, c 48, §3]

" **§560:3-906 Distribution in kind; valuation; method.** (a) Unless a contrary intention is indicated by the will, the distributable assets of a decedent's estate shall be distributed

in kind to the extent possible through application of the following provisions:

- (1) A specific devisee is entitled to distribution of the thing devised to that person, and a spouse, reciprocal beneficiary, or child who has selected particular assets of an estate as provided in section 560:2-402 shall receive the items selected;
- (2) Any homestead or family allowance or devise of a stated sum of money may be satisfied in kind provided:
 - (A) The person entitled to the payment has not demanded payment in cash;
 - (B) The property distributed in kind is valued at fair market value as of the date of its distribution; and
 - (C) No residuary devisee has requested that the asset in question remain a part of the residue of the estate;
- (3) For the purpose of valuation under paragraph (2) securities regularly traded on recognized exchanges, if distributed in kind, are valued at the price for the last sale of like securities traded on the business day prior to distribution, or if there was no sale on that day, at the median between amounts bid and offered at the close of that day. Assets consisting of sums owed the decedent or the estate by solvent debtors as to which there is no known dispute or defense are valued at the sum due with accrued interest or discounted to the date of distribution. For assets which do not have readily ascertainable values, a valuation as of a date not more than thirty days prior to the date of distribution, if otherwise reasonable, controls. For purposes of facilitating distribution, the personal representative may ascertain the value of the assets as of the time of the proposed distribution in any reasonable way, including the employment of qualified appraisers, even if the assets may have been previously appraised;
- (4) The residuary estate shall be distributed in any equitable manner.
 - (b) After the probable charges against the estate are known, the personal representative may mail or deliver a proposal for distribution to all persons who have a right to object to the proposed distribution. The right of any distributee to object to the proposed distribution on the basis of the kind or value of asset the distributee is to receive, if not waived earlier in writing, terminates if the distributee fails to object in writing received by the personal

representative within thirty days after mailing or delivery of the proposal. [L 1996, c 288, pt of §1; am L 1997, c 383, §19]

" **§560:3-907 Distribution in kind; evidence.** If distribution in kind is made, the personal representative shall execute an instrument or deed of distribution assigning, transferring or releasing the assets to the distributee as evidence of the distributee's title to the property. [L 1996, c 288, pt of §1]

" **§560:3-908 Distribution; right or title of distributee.** Proof that a distributee has received an instrument or deed of distribution of assets in kind, or payment in distribution, from a personal representative, is conclusive evidence that the distributee has succeeded to the interest of the estate in the distributed assets, as against all persons interested in the estate, except that the personal representative may recover the assets or their value if the distribution was improper. [L 1996, c 288, pt of §1]

" **§560:3-909 Improper distribution; liability of distributee.** Unless the distribution or payment no longer can be questioned because of adjudication, estoppel, or limitation, a distributee of property improperly distributed or paid, or a claimant who was improperly paid, is liable to return the property improperly received and its income since distribution if the distributee or claimant has the property. If the distributee or claimant does not have the property, then the distributee or claimant is liable to return the value as of the date of disposition of the property improperly received and its income and gain received by that person. [L 1996, c 288, pt of §1]

" **§560:3-910 Purchasers from distributees protected.** If property distributed in kind or a security interest therein is acquired for value by a purchaser from or lender to a distributee who has received an instrument or deed of distribution from the personal representative, or is so acquired by a purchaser from or lender to a transferee from such distributee, the purchaser or lender takes title free of rights of any interested person in the estate and incurs no personal liability to the estate, or to any interested person, whether or not the distribution was proper or supported by court order or the authority of the personal representative was terminated before execution of the instrument or deed. This section protects a purchaser from or lender to a distributee who, as personal representative, has executed a deed of distribution to

the distributee's self, as well as a purchaser from or lender to any other distributee or the distributee's transferee. To be protected under this provision, a purchaser or lender need not inquire whether a personal representative acted properly in making the distribution in kind, even if the personal representative and the distributee are the same person, or whether the authority of the personal representative had terminated before the distribution. Any recorded instrument described in this section on which a state documentary fee is noted pursuant to chapter 247 shall be prima facie evidence that such transfer was made for value. [L 1996, c 288, pt of §1]

" **§560:3-911 Partition for purpose of distribution.** When two or more heirs or devisees are entitled to distribution of undivided interests in any real or personal property of the estate, the personal representative or one or more of the heirs or devisees may petition the court prior to the formal or informal closing of the estate, to make partition. After notice to the interested heirs or devisees, the court shall partition the property in the same manner as provided by the law for civil actions of partition. The court may direct the personal representative to sell any property which cannot be partitioned without prejudice to the owners and which cannot conveniently be allotted to any one party. [L 1996, c 288, pt of §1]

" **§560:3-912 Private agreements among successors to decedent binding on personal representative.** Subject to the rights of creditors and taxing authorities, competent successors may agree among themselves to alter the interests, shares, or amounts to which they are entitled under the will of the decedent, or under the laws of intestacy, in any way that they provide in a written contract executed by all who are affected by its provisions. The personal representative shall abide by the terms of the agreement subject to the personal representative's obligation to administer the estate for the benefit of creditors, to pay all taxes and costs of administration, and to carry out the responsibilities of the personal representative's office for the benefit of any successors of the decedent who are not parties. Personal representatives of decedents' estates are not required to see to the performance of trusts if the trustee thereof is another person who is willing to accept the trust. Accordingly, trustees of a testamentary trust are successors for the purposes of this section. Nothing herein relieves trustees of any duties owed to beneficiaries of trusts. [L 1996, c 288, pt of §1]

" **§560:3-913 Distributions to trustee.** (a) Before distributing to a trustee, the personal representative may

require that the trust be registered if the State in which it is to be administered provides for registration and that the trustee inform the beneficiaries as provided in section 560:7-303.

(b) If the trust instrument does not excuse the trustee from giving bond, the personal representative may petition the appropriate court to require that the trustee post bond if the personal representative apprehends that distribution might jeopardize the interests of persons who are not able to protect themselves, and the personal representative may withhold distribution until the court has acted.

(c) No inference of negligence on the part of the personal representative shall be drawn from the personal representative's failure to exercise the authority conferred by subsections (a) and (b). [L 1996, c 288, pt of §1]

" **§560:3-914 Disposition of unclaimed assets.** When any real or personal property remains in the hands of the personal representative or trustee, after payment in the order specified in section 560:3-805, and no heirs, devisees, or claimants of the decedent, or beneficiaries of a trust, entitled to the property, can be located after reasonable search and inquiry, the personal representative or trustee, at the filing of the petition for final accounts, or termination of the trust, shall report the fact to the court, which shall forthwith enter an order authorizing the transfer of the property to the state director of finance, and the personal representative or trustee shall immediately transfer the property to the director of finance for disposition as provided in chapters 523A and 665, whichever is appropriate. The state director of finance, at any time, may authorize the payment out of the general funds of any amount so forwarded to any person who establishes to the satisfaction of the director of finance that the person is legally entitled as an heir, devisee, or claimant of the decedent, or a beneficiary of a trust, and the person shall be entitled to receive the amount out of any moneys in the general revenues of the State not otherwise appropriated, upon warrant drawn by the state comptroller. [L 1996, c 288, pt of §1; am L 1997, c 244, §11; am L 2000, c 48, §4]

Rules of Court

Distribution to missing persons, see HPR rule 85.

" **§560:3-915 Distribution to person under disability.** (a) A personal representative may discharge the obligation to

distribute to any person under legal disability by distributing in a manner expressly provided in the will.

(b) Unless contrary to an express provision in the will, the personal representative may discharge the obligation to distribute to a minor or person under other disability as authorized by section 560:5-104 or any other statute. If the personal representative knows that a conservator has been appointed or that a proceeding for appointment of a conservator is pending, the personal representative is authorized to distribute only to the conservator.

(c) If the heir or devisee is under disability other than minority, the personal representative is authorized to distribute to:

- (1) An attorney in fact who has authority under a power of attorney to receive property for that person; or
- (2) The spouse or reciprocal beneficiary, parent, or other close relative with whom the person under disability resides if the distribution is of amounts not exceeding \$10,000 a year, or property not exceeding \$10,000 in value, unless the court authorizes a larger amount or greater value.

Persons receiving money or property for the disabled person are obligated to apply the money or property to the support of that person, but may not pay themselves except by way of reimbursement for out-of-pocket expenses for goods and services necessary for the support of the disabled person. Excess sums must be preserved for future support of the disabled person. The personal representative is not responsible for the proper application of money or property distributed pursuant to this subsection. [L 1996, c 288, pt of §1; am L 1997, c 383, §19; am L 2004, c 161, §26]

" **§560:3-916 Apportionment of estate taxes.** (a) For purposes of this section:

"Estate" means the gross estate of a decedent as determined for the purpose of federal estate tax and the estate tax payable to this State.

"Fiduciary" means personal representative or trustee.

"Person" means any individual, partnership, association, joint stock company, corporation, government, political subdivision, governmental agency, or local governmental agency.

"Person interested in the estate" means any person entitled to receive, or who has received, from a decedent or by reason of the death of a decedent any property or interest therein included in the decedent's estate. It includes a personal representative, conservator, and trustee.

"State" means any state, territory, or possession of the United States, the District of Columbia, and the Commonwealth of Puerto Rico.

"Tax" means the federal estate tax and the additional inheritance tax imposed by Hawaii and interest and penalties imposed in addition to the tax.

(b) Except as provided in subsection (j) and, unless the will otherwise provides, the tax shall be apportioned among all persons interested in the estate. The apportionment is to be made in the proportion that the value of the interest of each person interested in the estate bears to the total value of the interests of all persons interested in the estate. The values used in determining the tax are to be used for that purpose. If the decedent's will directs a method of apportionment of tax different from the method described in this chapter, the method described in the will controls.

(c) The expenses reasonably incurred by any fiduciary and by other persons interested in the estate in connection with the determination of the amount and apportionment of the tax shall be apportioned as provided in subsection (b) and charged and collected as a part of the tax apportioned. If the court finds it is inequitable to apportion the expenses as provided in subsection (b), it may direct apportionment equitably.

- (d) (1) The court in which venue lies for the administration of the estate of a decedent, on petition for the purpose may determine the apportionment of the tax;
- (2) If the court finds that it is inequitable to apportion interest and penalties in the manner provided in subsection (b), because of special circumstances, it may direct apportionment thereof in the manner it finds equitable;
- (3) If the court finds that the assessment of penalties and interest assessed in relation to the tax is due to delay caused by the negligence of the fiduciary, the court may charge the fiduciary with the amount of the assessed penalties and interest;
- (4) In any action to recover from any person interested in the estate the amount of the tax apportioned to the person in accordance with this chapter the determination of the court in respect thereto shall be prima facie correct.
- (e) (1) The personal representative or other person in possession of the property of the decedent required to pay the tax may withhold from any property distributable to any person interested in the estate, upon its distribution to that person, the amount of

tax attributable to that person's interest. If the property in possession of the personal representative or other person required to pay the tax and distributable to any person interested in the estate is insufficient to satisfy the proportionate amount of the tax determined to be due from the person, the personal representative or other person required to pay the tax may recover the deficiency from the person interested in the estate. If the property is not in the possession of the personal representative or the other person required to pay the tax, the personal representative or the other person required to pay the tax may recover from any person interested in the estate the amount of the tax apportioned to the person in accordance with this chapter;

- (2) If property held by the personal representative is distributed prior to final apportionment of the tax, the distributee shall provide a bond or other security for the apportionment liability in the form and amount prescribed by the personal representative.
- (f)
 - (1) In making an apportionment, allowances shall be made for any exemptions granted, any classification made of persons interested in the estate and for any deductions and credits allowed by the law imposing the tax;
 - (2) Any exemption or deduction allowed by reason of the relationship of any person to the decedent or by reason of the purposes of the gift inures to the benefit of the person bearing such relationship or receiving the gift; but if an interest is subject to a prior present interest which is not allowable as a deduction, the tax apportionable against the present interest shall be paid from principal;
 - (3) Any deduction for property previously taxed and any credit for gift taxes or death taxes of a foreign country paid by the decedent or the decedent's estate inures to the proportionate benefit of all persons liable to apportionment;
 - (4) Any credit for inheritance, succession or estate taxes or taxes in the nature thereof applicable to property or interests includable in the estate, inures to the benefit of the persons or interests chargeable with the payment thereof to the extent proportionately that the credit reduces the tax;
 - (5) To the extent that property passing to or in trust for a surviving spouse or reciprocal beneficiary or any charitable, public or similar purpose is not an

allowable deduction for purposes of the tax solely by reason of an inheritance tax or other death tax imposed upon and deductible from the property, the property is not included in the computation provided for in subsection (b), and to that extent no apportionment is made against the property. The sentence immediately preceding does not apply to any case if the result would be to deprive the estate of a deduction otherwise allowable under section 2053(d) of the Internal Revenue Code of 1986, as amended, of the United States, relating to deduction for state death taxes on transfers for public, charitable, or religious uses.

(g) No interest in income and no estate for years or for life or other temporary interest in any property or fund is subject to apportionment as between the temporary interest and the remainder. The tax on the temporary interest and the tax, if any, on the remainder is chargeable against the corpus of the property or funds subject to the temporary interest and remainder.

(h) Neither the personal representative nor other person required to pay the tax is under any duty to institute any action to recover from any person interested in the estate the amount of the tax apportioned to the person until the expiration of the three months next following final determination of the tax. A personal representative or other person required to pay the tax who institutes the action within a reasonable time after the three-month period is not subject to any liability or surcharge because any portion of the tax apportioned to any person interested in the estate was collectible at a time following the death of the decedent but thereafter became uncollectible. If the personal representative or other person required to pay the tax cannot collect from any person interested in the estate the amount of the tax apportioned to the person, the amount not recoverable shall be equitably apportioned among the other persons interested in the estate who are subject to apportionment.

(i) A personal representative acting in another state or a person required to pay the tax domiciled in another state may institute an action in the courts of this State and may recover a proportionate amount of the federal estate tax, of an estate tax payable to another state or of a death duty due by a decedent's estate to another state, from a person interested in the estate who is either domiciled in this State or who owns property in this State subject to attachment or execution. For the purposes of the action the determination of apportionment by

the court having jurisdiction of the administration of the decedent's estate in the other state is prima facie correct.

(j) If the liabilities of persons interested in the estate as prescribed by this chapter differ from those which result under the federal estate tax law, the liabilities imposed by the federal law will control and the balance of this section shall apply as if the resulting liabilities had been prescribed herein. [L 1996, c 288, pt of §1; am L 1997, c 383, §19; am L 2000, c 48, §5]

"PART 10. CLOSING ESTATES

§560:3-1001 Formal proceedings terminating administration; testate or intestate; order of general protection. (a) A personal representative or any interested person may petition for an order of complete settlement of the estate. The personal representative may petition at any time, and any other interested person may petition after one year from the appointment of the original personal representative except that no petition under this section may be entertained until the time for presenting claims which arose prior to the death of the decedent has expired. The petition may request the court to determine testacy, if not previously determined, to consider the final account or compel or approve an accounting and distribution, to construe any will or determine heirs and adjudicate the final settlement and distribution of the estate. After notice to all interested persons and hearing the court may enter an order or orders, on appropriate conditions, determining the persons entitled to distribution of the estate, and, as circumstances require, approving settlement and directing or approving distribution of the estate and discharging the personal representative from further claim or demand of any interested person.

(b) If one or more heirs or devisees were omitted as parties in, or were not given notice of, a previous formal testacy proceeding, the court, on proper petition for an order of complete settlement of the estate under this section, and after notice to the omitted or unnotified persons and other interested parties determined to be interested on the assumption that the previous order concerning testacy is conclusive as to those given notice of the earlier proceeding, may determine testacy as it affects the omitted persons and confirm or alter the previous order of testacy as it affects all interested persons as appropriate in the light of the new proofs. In the absence of objection by an omitted or unnotified person, evidence received in the original testacy proceeding shall constitute prima facie proof of due execution of any will

previously admitted to probate, or of the fact that the decedent left no valid will if the prior proceedings determined this fact. [L 1996, c 288, pt of §1]

Rules of Court

Final accounting, notice, see HPR rule 54.

" **§560:3-1002 Formal proceedings terminating testate administration; order construing will without adjudicating testacy.** A personal representative administering an estate under an informally probated will or any devisee under an informally probated will may petition for an order of settlement of the estate which will not adjudicate the testacy status of the decedent. The personal representative may petition at any time, and a devisee may petition after one year, from the appointment of the original personal representative, except that no petition under this section may be entertained until the time for presenting claims which arose prior to the death of the decedent has expired. The petition may request the court to consider the final account or compel or approve an accounting and distribution, to construe the will and adjudicate final settlement and distribution of the estate. After notice to all devisees and the personal representative and hearing, the court may enter an order or orders, on appropriate conditions, determining the persons entitled to distribution of the estate under the will, and, as circumstances require, approving settlement and directing or approving distribution of the estate and discharging the personal representative from further claim or demand of any devisee who is a party to the proceeding and those the devisee represents. If it appears that a part of the estate is intestate, the proceedings shall be dismissed or amendments made to meet the provisions of section 560:3-1001. [L 1996, c 288, pt of §1]

" **§560:3-1003 Closing estates; by sworn statement of personal representative.** (a) Unless prohibited by order of the court and except for estates being administered in supervised administration proceedings, a personal representative may close an estate by filing with the court no earlier than six months after the date of original appointment of a general personal representative for the estate, a verified statement stating that the personal representatives or a previous personal representative, has:

- (1) Determined that the time limited for presentation of creditors' claims has expired;

- (2) Fully administered the estate of the decedent by making payment, settlement, or other disposition of all claims that were presented, expenses of administration and estate, inheritance and other death taxes, except as specified in the statement, and that the assets of the estate have been distributed to the persons entitled. If any claims remain undischarged, the statement must state whether the personal representative has distributed the estate subject to possible liability with the agreement of the distributees or state in detail other arrangements that have been made to accommodate outstanding liabilities; and
- (3) Sent a copy of the statement to all distributees of the estate and to all creditors or other claimants of whom the personal representative is aware whose claims are neither paid nor barred and has furnished a full account in writing of the personal representative's administration to the distributees whose interests are affected thereby.

(b) If no proceedings involving the personal representative are pending in the court one year after the closing statement is filed, the appointment of the personal representative terminates. [L 1996, c 288, pt of §1]

" **§560:3-1004 Liability of distributees to claimants.** After assets of an estate have been distributed and subject to section 560:3-1006, an undischarged claim not barred may be prosecuted in a proceeding against one or more distributees. No distributee shall be liable to claimants for amounts received as exempt property, homestead or family allowances, or for amounts in excess of the value of that person's distribution as of the time of distribution. As between distributees, each shall bear the cost of satisfaction of unbarred claims as if the claim had been satisfied in the course of administration. Any distributee who shall have failed to notify other distributees of the demand made upon that distributee by the claimant in sufficient time to permit them to join in any proceeding in which the claim was asserted against that distributee loses the right of contribution against other distributees. [L 1996, c 288, pt of §1]

" **§560:3-1005 Limitations on proceedings against personal representative.** Unless previously barred by adjudication and except as provided in the closing statement, the rights of successors and of creditors whose claims have not otherwise been barred against the personal representative for breach of

fiduciary duty are barred unless a proceeding to assert the same is commenced within six months after the filing of the closing statement. The rights thus barred do not include rights to recover from a personal representative for fraud, misrepresentation, or inadequate disclosure related to the settlement of the decedent's estate. [L 1996, c 288, pt of §1]

" **§560:3-1006 Limitations on actions and proceedings against distributees.** Unless previously adjudicated in a formal testacy proceeding or in a proceeding settling the accounts of a personal representative or otherwise barred, the claim of a claimant to recover from a distributee who is liable to pay the claim, and the right of an heir or devisee, or of a successor personal representative acting in their behalf, to recover property improperly distributed or its value from any distributee is forever barred at the later of three years after the decedent's death or one year after the time of its distribution thereof, but all claims of creditors of the decedent, are barred as set forth in section 560:3-803. This section does not bar an action to recover property or value received as a result of fraud. [L 1996, c 288, pt of §1; am L 1997, c 244, §12]

" **§560:3-1007 Certificate discharging liens securing fiduciary performance.** After the appointment has terminated, the personal representative, the personal representative's sureties, or any successor of either, upon the filing of a verified application showing, so far as is known by the applicant, that no action concerning the estate is pending in any court, is entitled to receive a certificate from the registrar that the personal representative appears to have fully administered the estate in question. The certificate evidences discharge of any lien on any property given to secure the obligation of the personal representative in lieu of bond or any surety, but does not preclude action against the personal representative or the surety. [L 1996, c 288, pt of §1]

" **§560:3-1008 Subsequent administration.** If other property of the estate is discovered after an estate has been settled and the personal representative discharged or after one year after a closing statement has been filed, the court upon petition of any interested person and upon notice as it directs may appoint the same or a successor personal representative to administer the subsequently discovered estate. If a new appointment is made, unless the court orders otherwise, the provisions of this chapter apply as appropriate; but no claim previously barred may

be asserted in the subsequent administration. [L 1996, c 288, pt of §1]

Rules of Court

Newly discovered assets, see HPR rule 86.

"PART 11. COMPROMISE OF CONTROVERSIES

§560:3-1101 Effect of approval of agreements involving trusts, inalienable interests, or interests of third persons. A compromise of any controversy as to admission to probate of any instrument offered for formal probate as the will of a decedent, the construction, validity, or effect of any governing instrument, the rights or interests in the estate of the decedent, of any successor, or the administration of the estate, if approved in a formal proceeding in the court for that purpose, is binding on all the parties thereto including those unborn, unascertained or who could not be located. An approved compromise is binding even though it may affect a trust or an inalienable interest. A compromise does not impair the rights of creditors or of taxing authorities who are not parties to it. [L 1996, c 288, pt of §1]

Rules of Court

Mediation, see HPR rule 2.1.

Hearing on compromise, see HPR rule 17(b).

" **§560:3-1102 Procedure for securing court approval of compromise.** The procedure for securing court approval of a compromise is as follows:

- (1) The terms of the compromise shall be set forth in an agreement in writing which shall be executed by all competent persons and parents acting for any minor child having beneficial interests or having claims which will or may be affected by the compromise. Execution is not required by any person whose identity cannot be ascertained or whose whereabouts is unknown and cannot reasonably be ascertained;
- (2) Any interested person, including the personal representative, if any, or a trustee, then may submit the agreement to the court for its approval and for execution by the personal representative, the trustee of every affected testamentary trust, and other fiduciaries and representatives;

- (3) After notice to all interested persons or their representatives, including the personal representative of any estate and all affected trustees of trusts, the court, if it finds that the contest or controversy is in good faith and that the effect of the agreement upon the interests of persons represented by fiduciaries or other representatives is just and reasonable, shall make an order approving the agreement and directing all fiduciaries subject to its jurisdiction to execute the agreement. Minor children represented only by their parents may be bound only if their parents join with other competent persons in execution of the compromise. Upon the making of the order and the execution of the agreement, all further disposition of the estate is in accordance with the terms of the agreement. [L 1996, c 288, pt of §1]

**"PART 12. COLLECTION OF PERSONAL PROPERTY BY AFFIDAVIT AND
SUMMARY ADMINISTRATION PROCEDURE FOR SMALL ESTATES**

§560:3-1201 Collection of personal property by affidavit.

(a) Any person indebted to the decedent or having possession of tangible personal property or an instrument evidencing a debt, obligation, stock, chose in action, or other intangible personal property belonging to the decedent shall make payment of the indebtedness or deliver the tangible personal property or an instrument evidencing the debt, obligation, stock, chose in action, or other intangible personal property to a person or persons claimed to be the successor or successors of the decedent or to the department of human services where the department has a claim against the estate pursuant to section 346-15 or 346-37, upon being presented a death certificate for the decedent and an affidavit made by or on behalf of the claimed successor or successors or the department of human services stating that:

- (1) The gross value of the decedent's estate in this State does not exceed \$100,000; except that any motor vehicles registered in the decedent's name may be transferred regardless of value pursuant to this section;
- (2) No application or petition for the appointment of a personal representative is pending or has been granted in this State; and
- (3) (A) The claimed successor or successors are entitled to the property and explaining the relationship of the claimed successor or successors to the decedent; or

- (B) The department of human services has a claim against the estate pursuant to section 346-15 or 346-37.

The affidavit of the department of human services shall have priority over any other claim presented pursuant to this section.

(b) Upon presentation of an affidavit meeting the requirements of subsection (a), any person having legal authority to issue a certificate or other evidence of ownership of tangible personal property or a debt, obligation, stock, chose in action, or other intangible personal property belonging to the decedent shall change the registered ownership of the decedent's interest in the property from the decedent to the decedent's claimed successor or successors and shall issue a certificate or other document evidencing the ownership of the property by the decedent's claimed successor or successors. [L 1996, c 288, pt of §1; am L 2000, c 48, §6 and c 102, §3]

" **§560:3-1202 Effect of affidavit.** The person paying, delivering, transferring, or issuing personal property or the evidence thereof pursuant to affidavit is discharged and released to the same extent as if that person dealt with a personal representative of the decedent. That person is not required to see to the application of the personal property or evidence thereof or to inquire into the truth of any statement in the affidavit. If any person to whom an affidavit is delivered refuses to pay, deliver, transfer, or issue any personal property or evidence thereof, it may be recovered or its payment, delivery, transfer, or issuance compelled upon proof of their right in a proceeding brought for the purpose by or on behalf of the persons entitled thereto. Any person to whom payment, delivery, transfer or issuance is made is answerable and accountable therefor to any personal representative of the estate or to any other person having a superior right. [L 1996, c 288, pt of §1]

" **§560:3-1203 Small estates; summary administration procedure.** If it appears from the inventory and appraisal that the value of the entire estate, less liens and encumbrances, does not exceed homestead allowance, exempt property, family allowance, costs and expenses of administration, reasonable funeral expenses, and reasonable and necessary medical and hospital expenses of the last illness of the decedent, the personal representative, without giving notice to creditors, may immediately disburse and distribute the estate to the persons entitled thereto and file a closing statement as provided in section 560:3-1204. [L 1996, c 288, pt of §1]

" **§560:3-1204 Small estates; closing by sworn statement of personal representative.** (a) Unless prohibited by order of the court and except for estates being administered by supervised

personal representatives, a personal representative may close an estate administered under the summary procedures of section 560:3-1203 by filing with the court, at any time after disbursement and distribution of the estate, a verified statement stating that:

- (1) To the best knowledge of the personal representative, the value of the entire estate, less liens and encumbrances, did not exceed homestead allowance, exempt property, family allowance, costs and expenses of administration, reasonable funeral expenses, and reasonable, necessary medical and hospital expenses of the last illness of the decedent;
- (2) The personal representative has fully administered the estate by disbursing and distributing it to the persons entitled thereto; and
- (3) The personal representative has sent a copy of the closing statement to all distributees of the estate and to all creditors or other claimants of whom the personal representative is aware whose claims are neither paid nor barred and has furnished a full account in writing of the administration to the distributees whose interests are affected.

(b) If no actions or proceedings involving the personal representative are pending in the court one year after the closing statement is filed, the appointment of the personal representative terminates.

(c) A closing statement filed under this section has the same effect as one filed under section 560:3-1003. [L 1996, c 288, pt of §1]

" **§560:3-1205 Estates of \$100,000 or less; clerk of court to administer.** If a person dies leaving property in this State of a total value not exceeding \$100,000, and a personal representative of the estate has not been appointed in the State, the clerk of the court of the judicial circuit in which the decedent was residing or domiciled at the time of the decedent's death or left property may, upon the verified petition of the clerk or of any interested person, obtain an order authorizing the clerk to administer the estate, and, as the personal representative, the clerk shall collect and receive the property and administer the same. The order may be made without notice or hearing, at the discretion of the court. Except as otherwise specifically required or authorized by law or where the clerk may be interested as an heir, or devisee, no clerk of any court shall act as personal representative of any estate where the value of the same is in excess of \$100,000. No

fees shall be allowed the clerk, except as set forth in section 560:3-1211. [L 1996, c 288, pt of §1; am L 2000, c 48, §7]

" **§560:3-1206 Publication by clerk of appointment as personal representative; notice to creditors, heirs, etc.** (a) If the estate has a total value of \$10,000 or less, upon such appointment the clerk shall publish the fact by posting a notice thereof at the front entrance of the court house of the judicial circuit and by advertising the notice in the English language at least once in a newspaper of general circulation in the judicial circuit, the notice to state briefly that all creditors of the deceased must file with the clerk duly verified claims within sixty days from the date of publication, and that all persons claiming to be heirs of the estate are requested to file with the clerk notice of such claims within the period. The court may direct that the advertising of the notice in a newspaper need not be made if it deems the same unnecessary.

(b) If the estate has a total value in excess of \$10,000, the content and method of giving notice, both of the pendency of the action and of all other acts for which notice is required, shall be as provided for informal probates in article III, part 3. [L 1996, c 288, pt of §1]

Rules of Court

Notice, see Hawaii Probate Rules, part A(III); HPR rule 51.

" **§560:3-1207 Presentation of claims of creditors.** All creditors of the decedent shall present their claims, duly verified under oath, to the clerk within the time specified in the notice. [L 1996, c 288, pt of §1]

" **§560:3-1208 Claims barred when.** All claims of creditors not filed within the prescribed period from the date of the first publication are forever barred. [L 1996, c 288, pt of §1]

" **§560:3-1209 Duties of clerk and distribution.** The clerk shall make diligent effort to ascertain the names and whereabouts of the heirs, or the whereabouts of the devisees of the decedent and present evidence relating thereto to the court having jurisdiction of the proceedings. After the expiration of four months, in the case of an estate valued in excess of \$10,000, or sixty days, in the case of an estate valued at \$10,000 or less, after the first publication, the clerk shall pay or distribute the money, funds, or property of the estate in the order specified in section 560:3-805, including any allowances and exempt property under part 4 of article II

authorized by the court, and the excess, if any, to or among such persons as may be found by the court to be persons entitled thereto as distributees. [L 1996, c 288, pt of §1]

" **§560:3-1210 Undistributed proceeds or balances, disposition.** When any balance remains in the hands of the clerk, after payment in the order specified in section 560:3-805, and if no heirs or devisees of the decedent entitled to the balance can be located after reasonable search and inquiry, the clerk, after the expiration of one year after the first publication, shall report the fact to the court. The court shall forthwith enter an order forwarding the property to the state director of finance, and the clerk thereupon shall immediately deposit the money or funds, or any balance, with the director for disposition as provided in chapter 523A. The director at any time may authorize the payment out of the unclaimed property trust fund under section 523A-26 any amount so forwarded to any person who establishes to the satisfaction of the director that the person is legally entitled thereto as an heir or devisee of the decedent, and the person shall be entitled to receive the amount thereof out of any moneys in the treasury not otherwise appropriated, upon warrant drawn by the state comptroller. [L 1996, c 288, pt of §1; am L 2012, c 229, §3]

" **§560:3-1211 Exemption from costs.** All proceedings under this part shall be free from all costs of court, except that the clerk may charge the actual expenses for advertising the notice specified in section 560:3-1206, the advertising, posting, or service fees required in carrying out any order of the court, including orders relating to the sale of real or personal property, and any expenses reasonably necessary for the preservation, disposal, distribution, and administration of the estate, together with a fee of three per cent of the market value of the first \$100,000 in the gross estate, the fee to be paid into the treasury of the State as a government realization from any available assets of the estate; provided that if the administration is completed by another personal representative on account of the size of the estate or for any other reason, no fee shall be charged by the clerk. [L 1996, c 288, pt of §1; am L 2000, c 48, §8]

" **§560:3-1212 Estates of persons leaving no known relatives.** Every coroner or medical examiner who is called to investigate the death of any person leaving no known spouse or reciprocal beneficiary, issue, parent, grandparent, or issue of

grandparents over the age of majority in the State, shall take immediate charge of the decedent's personal effects and if in the discretion of the coroner the value of such personal effects is in excess of \$2,500, forthwith deliver them to the clerk of the court of the judicial circuit in which such decedent died.

If after ten days no person appears, competent to initiate appropriate probate proceedings, the clerk shall administer the estate pursuant to the provisions of this part; provided that if the decedent's estate is of a value exceeding \$100,000, the clerk shall notify the judge of the circuit having charge of the probate calendar, and shall petition for the appointment of a personal representative of such estate other than the clerk. In the meantime the clerk may take such steps as may be appropriate to preserve and conserve the real and personal property of the decedent. All expenses in connection with the taking possession, care, and conservation of the property and with such proceedings shall be proper charges against the estate of the decedent. The corporation counsel or county attorney of each county shall advise, assist, and represent as far as necessary any of such officers in the performance of any act or the institution or prosecution of any proceeding required by this section. If the decedent's estate is of a value not exceeding \$2,500 and the decedent has no known relatives or whose relatives have failed to indicate any means of disposition of the estate, then the coroner or medical examiner having custody of the property shall dispose of the property in an appropriate manner, which may be any one of the following or a combination thereof:

- (1) Where the estate consists only of money and is not in excess of \$2,500 and expenditures have been made in connection with such death, to reimburse the appropriate city and/or county office that made the disbursement to defray said expenses;
- (2) Where the estate consists of cash or personal belongings of monetary value, or both, not exceeding \$2,500, to liquidate the personal belongings and apply the proceeds, together with the cash, if the total does not exceed \$2,500, in accordance with paragraph (1);
- (3) Where the assets in the estate are of no monetary value (unsalable) and in the best judgment and discretion of the coroner or medical examiner can be used by some charitable institution, to donate the assets to whatever charitable institution is willing and able to pick up the assets in question;
- (4) Where the assets have no value whatsoever or are in such condition that, in the best judgment and

discretion of the coroner or medical examiner, a charitable institution cannot use the properties, or will not receive the properties, to destroy the same in any manner the coroner or medical examiner sees fit; and

- (5) If under paragraphs (1) and (2), there are assets remaining, then the coroner or medical examiner shall forthwith forward the same to the state director of finance for disposition as provided in chapter 523A. [L 1996, c 288, pt of §1; am L 1997, c 383, §19; am L 2000, c 48, §9]

" **§560:3-1213 Reserved.**

" **§560:3-1214 Annual audit of accounts of clerk.** Any other law to the contrary notwithstanding, the comptroller of the State shall audit not less frequently than annually the accounts and transactions of the clerks of the courts in their official capacity as conservators or as personal representatives of small estates, and report the results of the audit to the judges of the respective courts. [L 1996, c 288, pt of §1; am L 2004, c 161, §27]

" **§560:3-1215 Prohibition on the private practice of law by attorneys for small estates.** No person who, pursuant to sections 560:3-1205 to 560:3-1214, or any of them, performs any services as or for the clerk of the first circuit court, for which the person is compensated from public funds, shall engage in the private practice of law, provided that the person shall be entitled to accept fees or other compensation in connection with masterships. [L 1996, c 288, pt of §1]

**"ARTICLE IV [OLD]
FOREIGN PERSONAL REPRESENTATIVES;
ANCILLARY ADMINISTRATION**

§§560:4-101 to 560:4-401 REPEALED. L 1996, c 288, pt of §6.

**ARTICLE IV
FOREIGN PERSONAL REPRESENTATIVES; ANCILLARY ADMINISTRATION**

PART 1. DEFINITIONS

§560:4-101 Definitions. In this article:

"Local administration" means administration by a personal representative appointed in this State pursuant to appointment proceedings described in article III.

"Local personal representative" includes any personal representative appointed in this State pursuant to appointment proceedings described in article III and excludes foreign personal representatives who acquire the power of a local personal representative pursuant to section 560:4-205.

"Resident creditor" means a person domiciled in, or doing business in this State, who is, or could be, a claimant against an estate of a non-resident decedent. [L 1996, c 288, pt of §1]

Cross References

Effect and transition of L 1996, c 288 amendments, see §560:8-201.

"PART 2. POWERS OF FOREIGN PERSONAL REPRESENTATIVES

§560:4-201 Payment of debt and delivery of property to domiciliary foreign personal representative without local administration. At any time after the expiration of sixty days from the death of a nonresident decedent, any person indebted to the estate of the nonresident decedent or having possession or control of personal property, or of an instrument evidencing a debt, obligation, stock or chose in action belonging to the estate of the nonresident decedent may pay the debt, deliver the personal property, or the instrument evidencing the debt, obligation, stock or chose in action, to the domiciliary foreign personal representative of the nonresident decedent upon being presented with proof of appointment and an affidavit made by or on behalf of the representative stating:

- (1) The date of the death of the nonresident decedent;
- (2) That no local administration, or application or petition therefor, is pending in this State; and
- (3) That the domiciliary foreign personal representative is entitled to payment or delivery. [L 1996, c 288, pt of §1]

" **§560:4-202 Payment or delivery discharges.** Payment or delivery made in good faith on the basis of the proof of authority and affidavit releases the debtor or person having possession of the personal property to the same extent as if payment or delivery had been made to a local personal representative. [L 1996, c 288, pt of §1]

" **§560:4-203 Resident creditor notice.** Payment or delivery under section 560:4-201 may not be made if a resident creditor of the nonresident decedent has notified the debtor of the nonresident decedent or the person having possession of the personal property belonging to the nonresident decedent that the debt should not be paid nor the property delivered to the domiciliary foreign personal representative. [L 1996, c 288, pt of §1]

" **§560:4-204 Proof of authority-bond.** If no local administration or application or petition therefor is pending in this State, a domiciliary foreign personal representative may file with a court in this State in a judicial circuit in which property belonging to the decedent is located, authenticated copies of the representative's appointment and of any official bond the representative has given. [L 1996, c 288, pt of §1]

Rules of Court

Filing documents, see HPR rule 76.

" **§560:4-205 Powers.** A domiciliary foreign personal representative who has complied with section 560:4-204 may exercise as to assets in this State all powers of a local personal representative and may maintain actions and proceedings in this State subject to any conditions imposed upon nonresident parties generally. [L 1996, c 288, pt of §1]

Rules of Court

Notice, see HPR rule 79.

Signing documents, see HPR rule 80.

" **§560:4-206 Power of representatives in transition.** The power of a domiciliary foreign personal representative under section 560:4-201 or 560:4-205 shall be exercised only if there is no administration or application therefor pending in this State. An application or petition for local administration of the estate terminates the power of the foreign personal representative to act under section 560:4-205, but the local court may allow the foreign personal representative to exercise limited powers to preserve the estate. No person who, before receiving actual notice of a pending local administration, has changed the person's position in reliance upon the powers of a foreign personal representative shall be prejudiced by reason of the application or petition for, or grant of, local administration. The local personal representative is subject to

all duties and obligations which have accrued by virtue of the exercise of the powers by the foreign personal representative and may be substituted for that person in any action or proceedings in this State. [L 1996, c 288, pt of §1]

" **§560:4-207 Ancillary and other local administrations; provisions governing.** In respect to a nonresident decedent, the provisions of article III of this chapter govern:

- (1) Proceedings, if any, in a court of this State for probate of the will, appointment, removal, supervision, and discharge of the local personal representative, and any other order concerning the estate; and
- (2) The status, powers, duties, and liabilities of any local personal representative and the rights of claimants, purchasers, distributees, and others in regard to a local administration. [L 1996, c 288, pt of §1]

Rules of Court

Notice, see HPR rule 79.

"PART 3. JURISDICTION OVER FOREIGN REPRESENTATIVES

§560:4-301 Jurisdiction by act of foreign personal representative. A foreign personal representative submits personally to the jurisdiction of the courts of this State in any proceeding relating to the estate by:

- (1) Filing authenticated copies of the foreign personal representative's appointment as provided in section 560:4-204;
- (2) Receiving payment of money or taking delivery of personal property under section 560:4-201; or
- (3) Doing any act as a personal representative in this State which would have given the State jurisdiction over that foreign personal representative as an individual.

Jurisdiction under paragraph (2) is limited to the money or value of personal property collected. [L 1996, c 288, pt of §1]

Rules of Court

Submission to jurisdiction, see HPR rule 87.

" **§560:4-302 Jurisdiction by act of decedent.** In addition to jurisdiction conferred by section 560:4-301, a foreign

personal representative is subject to the jurisdiction of the courts of this State to the same extent that the decedent was subject to jurisdiction immediately prior to death. [L 1996, c 288, pt of §1]

" **§560:4-303 Service on foreign personal representative.**

(a) Service of process may be made upon the foreign personal representative by registered or certified mail, addressed to the foreign personal representative's last reasonably ascertainable address, requesting a return receipt signed by addressee only. Notice by ordinary first class mail is sufficient if registered or certified mail service to the addressee is unavailable. Service may be made upon a foreign personal representative in the manner in which service could have been made under other laws of this State on either the foreign personal representative or the decedent immediately prior to death.

(b) If service is made upon a foreign personal representative as provided in subsection (a), the foreign personal representative shall be allowed at least thirty days within which to appear or respond. [L 1996, c 288, pt of §1]

Rules of Court

Service, see HPR rule 87.

"PART 4. JUDGMENTS AND PERSONAL REPRESENTATIVE

§560:4-401 Effect of adjudication for or against personal representative. An adjudication rendered in any jurisdiction in favor of or against any personal representative of the estate is as binding on the local personal representative as if the local personal representative were a party to the adjudication. [L 1996, c 288, pt of §1]

"ARTICLE V [OLD]

**PROTECTION OF PERSONS UNDER DISABILITY AND
THEIR PROPERTY--REPEALED**

PART 1. [OLD] GENERAL PROVISIONS--REPEALED

§§560:5-101 to 560:5-105 REPEALED. L 2004, c 161, §37.

"ARTICLE V

GUARDIANSHIP AND PROTECTIVE PROCEEDINGS

Note

Article heading amended by L 2004, c 161, §24.

PART 1. GENERAL PROVISIONS

§560:5-101 Short title. Parts 1 through 4 of this article may be cited as the Uniform Guardianship and Protective Proceedings Act. [L 2004, c 161, pt of §1]

" **§560:5-102 Definitions.** In parts 1 through 4 of this article:

"Conservator" means a person who is appointed by a court to manage the estate of a protected person. The term includes a limited conservator.

"Court" means either a circuit court in this State having jurisdiction in matters relating to the affairs of decedents or the family court, depending on which court has subject matter jurisdiction under section 560:5-106.

"Guardian" means a person who has qualified as a guardian of a minor or incapacitated person pursuant to appointment by a parent, spouse, reciprocal beneficiary, or by the court. The term includes a limited, emergency, and temporary substitute guardian but not a guardian ad litem.

"Incapacitated person" means an individual who, for reasons other than being a minor, is unable to receive and evaluate information or make or communicate decisions to such an extent that the individual lacks the ability to meet essential requirements for physical health, safety, or self-care, even with appropriate and reasonably available technological assistance.

"Kokua kanawai" means an individual appointed by a court who has the role and authority granted under rule 113 of the Hawaii probate rules.

"Legal representative" includes an attorney, a representative payee, a guardian or conservator acting for a respondent in this State or elsewhere, a trustee or custodian of a trust or custodianship of which the respondent is a beneficiary, and an agent designated under a power of attorney, whether for health care or property, in which the respondent is identified as the principal.

"Minor" means an unemancipated individual who has not attained eighteen years of age.

"Parent" means a parent whose parental rights have not been terminated.

"Protected person" means a minor or other individual for whom a conservator has been appointed or other protective order has been made.

"Respondent" means an individual for whom the appointment of a guardian or conservator or other protective order is sought.

"Ward" means an individual for whom a guardian has been appointed. [L 2004, c 161, pt of §1]

Case Notes

Where judge, at the time judge entered the family court orders purporting to void the estate documents, was a district judge appointed under §571-8, not a circuit judge sitting by designation in family court under §571-4, the judge lacked original jurisdiction over guardianships of the property under this section as it stood prior to the 1996 amendments to the Hawaii uniform probate code. 110 H. 8, 129 P.3d 511.

Decisions under prior law.

Where definition of "incapacitated person" in §560:5-101 (2003), when read as a whole, sufficiently apprised ward of the bases on which the court would review the guardianship petition and any ambiguity in the statute did not render it "substantially incomprehensible", so as to overcome the "presumption of constitutionality", definition was not unconstitutionally vague. 113 H. 236, 151 P.3d 717 (2007).

" **§560:5-103 RESERVED.**

" **§560:5-104 Facility of transfer.** (a) Unless a person required to transfer money or personal property to a minor knows that a conservator has been appointed or that a proceeding for appointment of a conservator of the estate of the minor is pending, the person may do so, as to an amount or value not exceeding \$10,000 a year, by transferring it to:

- (1) A person who has the care and custody of the minor and with whom the minor resides;
- (2) A guardian of the minor;
- (3) A custodian under chapter 553A, the Uniform Transfers To Minors Act or custodial trustee under chapter 554B, the Uniform Custodial Trust Act; or
- (4) A federally-insured financial institution as a deposit in an interest-bearing account or certificate in the sole name of the minor and giving notice of the deposit to the minor.

(b) A person who transfers money or property in compliance with this section is not responsible for its proper application.

(c) A guardian or other person who receives money or property for a minor under subsection (a)(1) or (2) shall only apply it to the support, care, education, health, and welfare of the minor, and may not derive a personal financial benefit except for reimbursement for necessary expenses. Any excess shall be preserved for the future support, care, education, health, and welfare of the minor, and any balance shall be transferred to the minor upon emancipation or attaining majority. [L 2004, c 161, pt of §1]

" **§560:5-105 Delegation of power by parent or guardian.** A parent or guardian of a minor or incapacitated person, by a power of attorney, may delegate to another person for a period not exceeding one year, which time limit shall be expressly stated in the document, any power regarding the care, custody, or property of the minor or ward, except the power to consent to marriage or adoption. [L 2004, c 161, pt of §1]

" **§560:5-106 Subject matter jurisdiction.** This article applies to, and the court has jurisdiction over, guardianship and related proceedings for individuals domiciled or present in this State, protective proceedings for individuals domiciled in or having property located in this State, and property coming into the control of a guardian or conservator who is subject to the laws of this State.

- (1) Circuit court jurisdiction. The circuit court shall have concurrent jurisdiction over guardianships and related proceedings concerning incapacitated adults. The circuit court shall not have jurisdiction over guardianships and related proceedings concerning minors. The circuit court shall have exclusive jurisdiction over conservatorship proceedings and those proceedings under part 4 of this article, for both adults and minors;
- (2) Family court jurisdiction. The family court shall have exclusive jurisdiction over guardianships and related proceedings concerning minors and concurrent jurisdiction over guardianship and related proceedings concerning incapacitated adults. The family court shall have exclusive jurisdiction over guardianship proceedings concerning minors, regardless of whether the proceeding is based upon the minor's age or the minor's status as an incapacitated person; and
- (3) Consolidation of proceedings regarding same person. Where protective and guardianship proceedings relating

to the same person have been initiated, they may be consolidated in the court as the court in the exercise of its discretion shall determine. [L 2004, c 161, pt of §1]

Cross References

Effect of L 2004, c 161 amendments, see §560:8-301.

Case Notes

Family court had subject matter jurisdiction to issue temporary restraining order under paragraphs (2) and (3) and §§571-8.5 and 560:1-302(b), where resolution of ward's capacity was required to be resolved, and an apparent threat of ward's removal from the court's jurisdiction was alleged. 113 H. 211, 151 P.3d 692 (2007).

" **§560:5-107 Transfer of jurisdiction.** (a) After the appointment of a guardian or conservator or entry of any other protective order, the court making the appointment or entering the order may transfer the proceeding to a court in another circuit in this State or to another state if the court is satisfied that a transfer will serve the best interest of the ward or protected person.

(b) If a guardianship or protective proceeding is pending in another state or a foreign country and a petition for guardianship or protective proceeding is filed in a court in this State, the court in this State shall notify the original court and, after consultation with the original court, assume or decline jurisdiction, whichever is in the best interest of the ward or protected person.

(c) A guardian, conservator, or like fiduciary appointed in another state may petition the court for appointment as a guardian or conservator in this State if venue in this State is or will be established. The appointment may be made upon proof of appointment in the other state and presentation of a certified copy of the portion of the court record in the other state specified by the court in this State. Notice of hearing on the petition, together with a copy of the petition, shall be given to the ward or protected person, if the ward or protected person has attained fourteen years of age, and to the persons who would be entitled to notice if the regular procedures for appointment of a guardian or conservator under this article were applicable. The court shall make the appointment in this State unless it concludes that the appointment would not be in the

best interest of the ward or protected person. Upon the filing of an acceptance of office and any required bond, the court shall issue appropriate letters of guardianship or conservatorship. Within fourteen days after an appointment, the guardian or conservator shall send or deliver a copy of the order of appointment to the ward or protected person, if the ward or protected person has attained fourteen years of age, and to all persons given notice of the hearing on the petition. [L 2004, c 161, pt of §1]

" **§560:5-108 Venue.** (a) Venue for a guardianship proceeding for a minor is in the circuit of this State in which the minor resides or is present at the time the proceeding is commenced.

(b) Venue for a guardianship proceeding for an incapacitated person:

- (1) Is in the circuit of this State in which the respondent resides; or
- (2) If the respondent has been admitted to an institution by order of a court of competent jurisdiction, is in the circuit in which the court is located.

Venue for the appointment of an emergency or a temporary substitute guardian of an incapacitated person is also in the circuit in which the respondent is present.

(c) Venue for a protective proceeding is in the circuit of this State in which the respondent resides, whether or not a guardian has been appointed in another place or, if the respondent does not reside in this State, in any circuit of this State in which property of the respondent is located.

(d) If a proceeding under this article is brought in more than one circuit in this State, the court of the circuit in which the proceeding is first brought shall have the exclusive right to proceed unless that court determines that venue is properly in another court or that the interests of justice otherwise require that the proceeding be transferred. [L 2004, c 161, pt of §1]

" **§560:5-109 Practice in court.** (a) Except as otherwise provided in this article:

- (1) Guardianship proceedings under this article pending in the family court are governed by the Hawaii family court rules including the rules concerning appellate review; and
- (2) Guardianship and protective proceedings under this article pending in the court are governed by the

Hawaii probate rules, including rules concerning appellate review.

(b) If guardianship and protective proceedings as to the same individual are commenced or pending in the same circuit, the proceedings may be consolidated. [L 2004, c 161, pt of §1]

" **§560:5-110 Letters of office.** Upon the guardian's filing of an acceptance of office, the court shall issue appropriate letters of guardianship. Upon the conservator's filing of an acceptance of office and any required bond, the court shall issue appropriate letters of conservatorship. Letters of guardianship shall indicate whether the guardian was appointed by the court, a parent, or the spouse or reciprocal beneficiary. Any limitation on the powers of a guardian or conservator or of the assets subject to a conservatorship shall be endorsed on the guardian's or conservator's letters. [L 2004, c 161, pt of §1]

" **§560:5-111 Effect of acceptance of appointment.** By accepting appointment, a guardian or conservator submits personally to the jurisdiction of the court in any proceeding relating to the guardianship or conservatorship. The petitioner shall send or deliver notice of any proceeding to the guardian or conservator at the guardian's or conservator's address shown in the court records and at any other address then known to the petitioner. [L 2004, c 161, pt of §1]

" **§560:5-112 Termination of or change in guardian's or conservator's appointment.** (a) The appointment of a guardian or conservator terminates upon the death, resignation, or removal of the guardian or conservator or upon termination of the guardianship or conservatorship. A resignation of a guardian or conservator is effective when approved by the applicable court. An appointment by a parent, spouse, or reciprocal beneficiary as guardian under an informally probated will terminates if the will is later denied probate in a formal proceeding. Termination of the appointment of a guardian or conservator does not affect the liability of either for previous acts or the obligation to account for money and other assets of the ward or protected person.

(b) A ward, protected person, person interested in the welfare of a ward or protected person, or governmental agency may petition for removal of a guardian or conservator on the ground that removal would be in the best interest of the ward or protected person or for other good cause. A guardian or

conservator may petition for permission to resign. A petition for removal or permission to resign may include a request for appointment of a successor guardian or conservator.

(c) The court may appoint an additional guardian or conservator at any time, to serve immediately or upon some other designated event, and may appoint a successor guardian or conservator in the event of a vacancy or make the appointment in contemplation of a vacancy, to serve if a vacancy occurs. An additional or successor guardian or conservator may file an acceptance of appointment at any time after the appointment, but not later than thirty days after the occurrence of the vacancy or other designated event. The additional or successor guardian or conservator becomes eligible to act on the occurrence of the vacancy or designated event, or the filing of the acceptance of appointment, whichever last occurs. A successor guardian or conservator succeeds to the predecessor's powers, and a successor conservator succeeds to the predecessor's title to the protected person's assets.

(d) Notwithstanding section 560:1-401, the court, without a hearing, may remove or accept the resignation of a guardian and appoint the public guardian under chapter 551A as a temporary or successor guardian upon the filing of a petition with notice by regular mail to the last known address of those persons entitled to notice in section 560:5-309 and upon such instructions as the court deems necessary. [L 2004, c 161, pt of §1]

" **§560:5-113 Notice.** (a) Except as otherwise ordered or waived by the court for good cause, if notice of a hearing on a petition is required, other than a notice for which specific requirements are otherwise provided, the petitioner shall give notice of the time and place of the hearing to the person to be notified. Notice shall be given in compliance with section 560:1-401, at least fourteen days before the hearing.

(b) Proof of notice shall be made before or at the hearing and filed in the proceeding. [L 2004, c 161, pt of §1]

" **§560:5-114 Waiver of notice.** A person may waive notice, in writing, signed by the person or the person's attorney and filed in the proceeding. However, a respondent, ward, or protected person may not waive notice. [L 2004, c 161, pt of §1]

" **§560:5-115 Guardian ad litem.** At any stage of a proceeding, the court or the family court may appoint a guardian

ad litem if the court or the family court determines that representation of the interest otherwise would be inadequate. If not precluded by a conflict of interest, a guardian ad litem may be appointed to represent several individuals or interests. The court or the family court shall state on the record the duties of the guardian ad litem and its reasons for the appointment. Persons appointed by the court or the family court, as applicable, to serve as guardians ad litem or to perform any other duties that may be requested by the court in guardianship and protective proceedings shall be compensated in the amounts, if any, that the court deems appropriate and reasonable. Any such compensation shall be paid from the respondent's assets or other source under the jurisdiction of the court or the family court as it shall order. [L 2004, c 161, pt of §1]

" **§560:5-116 Request for notice; interested persons.** An interested person not otherwise entitled to notice who desires to be notified before any order is made in a guardianship proceeding, including a proceeding after the appointment of a guardian, or in a protective proceeding, may file a request for notice with the clerk of the court in which the proceeding is pending. The clerk shall send or deliver a copy of the request to the guardian and to the conservator, if one has been appointed. A request is not effective unless it contains a statement showing the interest of the person making it and the address of that person or a lawyer to whom notice is to be given. The request is effective only as to proceedings conducted after its filing. A governmental agency paying or planning to pay benefits, or providing services, to the respondent or protected person is an interested person in a protective proceeding. [L 2004, c 161, pt of §1]

" **§560:5-117 Multiple appointments or nominations.** If a respondent or other person makes more than one written appointment or nomination of a guardian or a conservator, the most recent controls. [L 2004, c 161, pt of §1]

"PART 2. [OLD] GUARDIANS OF THE PERSON OF MINORS--REPEALED

§§560:5-201 to 560:5-212 REPEALED. L 2004, c 161, §37.

"PART 2. GUARDIANSHIP OF MINOR

Law Journals and Reviews

Consent for Testing and Treatment of Minors in Hawaii. 13 HBJ, no. 13, at 165 (2009).

§560:5-201 Appointment and status of guardian. A person becomes a guardian of a minor by parental appointment or upon appointment by the court. The guardianship continues until terminated, without regard to the location of the guardian or minor ward. [L 2004, c 161, pt of §1]

" **§560:5-202 Parental appointment of guardian.** (a) A guardian may be appointed by will or other signed writing by a parent for any minor child the parent has or may have in the future. The appointment may specify the desired limitations on the powers to be given to the guardian. The appointing parent may revoke or amend the appointment before confirmation by the court.

(b) Before the appointment becomes effective, the court may confirm the parent's selection of a guardian and terminate the rights of others to object upon:

- (1) Petition of an appointing parent;
- (2) A finding that the appointing parent will likely become unable to care for the child within two years; and
- (3) Notice as provided in section 560:5-205(a).

(c) Subject to section 560:5-203, the appointment of a guardian becomes effective upon:

- (1) The appointing parent's death;
- (2) An adjudication that the parent is an incapacitated person; or
- (3) A written determination by a physician who has examined the parent that the parent is no longer able to care for the child,

whichever first occurs.

(d) The guardian becomes eligible to act upon the filing of an acceptance of appointment. An acceptance of appointment shall be filed within thirty days after the guardian's appointment becomes effective. The guardian shall:

- (1) File the acceptance of appointment and a copy of the will with the court of the circuit in which the will was or could be probated or, in the case of another appointing instrument, file the acceptance of appointment and the appointing instrument with the

court of the circuit in which the minor resides or is present; and

- (2) Give written notice of the acceptance of appointment to the appointing parent, if living, the minor, if the minor has attained fourteen years of age, and a person other than the parent having care and custody of the minor.

(e) Unless the appointment was previously confirmed by the court, the notice given under subsection (d)(2) shall include a statement of the right of those notified to terminate the appointment by filing a written objection in the court as provided in section 560:5-203.

(f) Unless the appointment was previously confirmed by the court, within thirty days after filing the notice and the appointing instrument, a guardian shall petition the court for confirmation of the appointment, giving notice in the manner provided in section 560:5-205(a).

(g) The appointment of a guardian by a parent does not supersede the parental rights of either parent. If both parents are dead or have been adjudged incapacitated persons, an appointment by the last parent who died or was adjudged incapacitated has priority. An appointment by a parent which is effected by filing the guardian's acceptance under a will probated in the state of the testator's domicile is effective in this State.

(h) The powers of a guardian who timely complies with the requirements of subsections (d) and (f) relate back to give acts by the guardian, which are of benefit to the minor and occurred on or after the date the appointment became effective, the same effect as those that occurred after the filing of the acceptance of the appointment.

(i) The authority of a guardian appointed under this section terminates upon the appointment of a guardian by the court or the giving of written notice to the guardian of the filing of an objection pursuant to section 560:5-203, whichever occurs first. [L 2004, c 161, pt of §1]

" **§560:5-203 Objection by minor or others to parental appointment.** Until the court has confirmed an appointee under section 560:5-202, a minor who is the subject of an appointment by a parent and who has attained fourteen years of age, the other parent, or a person other than a parent or guardian having care or custody of the minor, may prevent or terminate the appointment at any time by filing a written objection in the court in which the appointing instrument is filed and giving notice of the objection to the guardian and any other persons

entitled to notice of the acceptance of the appointment. An objection may be withdrawn, and if withdrawn, is of no effect. The objection shall not preclude judicial appointment of the person selected by the parent. The court may treat the filing of an objection as a petition for the appointment of an emergency or a temporary guardian under section 560:5-204, and proceed accordingly. [L 2004, c 161, pt of §1]

" **§560:5-204 Judicial appointment of guardian; conditions for appointment.** (a) A minor or a person interested in the welfare of a minor may petition for appointment of a guardian.

(b) The court may appoint a guardian for a minor if the court finds the appointment is in the minor's best interest, and:

- (1) The parents consent;
- (2) All parental rights have been terminated; or
- (3) The parents are unwilling or unable to exercise their parental rights.

(c) If a guardian is appointed by a parent pursuant to section 560:5-202 and the appointment has not been prevented or terminated under section 560:5-203, that appointee has priority for appointment. However, the court may proceed with another appointment upon a finding that the appointee under section 560:5-202 has failed to accept the appointment within thirty days after notice of the guardianship proceeding.

(d) If necessary and on petition or motion and whether or not the conditions of subsection (b) have been established, the court may appoint a temporary guardian for a minor upon a showing that an immediate need exists and that the appointment would be in the best interest of the minor. Notice in the manner provided in section 560:5-113 shall be given to the parents and to a minor who has attained fourteen years of age. Except as otherwise ordered by the court, the temporary guardian has the authority of an unlimited guardian, but the duration of the temporary guardianship shall not exceed twelve months. Within five days after the appointment, the temporary guardian shall send or deliver a copy of the order to all individuals who would be entitled to notice of hearing under section 560:5-205.

(e) If the court finds that following the procedures of this part will likely result in substantial harm to a minor's health or safety and that no other person appears to have authority to act under the circumstances, the court, on appropriate petition, may appoint an emergency guardian for the minor. The duration of the guardian's authority may not exceed thirty days and the guardian may exercise only the powers specified in the order. Reasonable notice of the time and place

of a hearing on the petition for appointment of an emergency guardian shall be given to:

- (1) The minor, if the minor has attained fourteen years of age;
- (2) Each living parent of the minor; and
- (3) A person having care or custody of the minor, if other than a parent.

The court may dispense with the notice if it finds from affidavit or testimony that the minor will be substantially harmed before a hearing can be held on the petition. If the guardian is appointed without notice, notice of the appointment shall be given within forty-eight hours after the appointment and a hearing on the appropriateness of the appointment held within five days after the appointment. [L 2004, c 161, pt of §1; am L 2009, c 6, §1]

" **§560:5-205 Judicial appointment of guardian; procedure.**

(a) After a petition for appointment of a guardian is filed, the court shall schedule a hearing, and the petitioner shall give notice of the time and place of the hearing, together with a copy of the petition, to:

- (1) The minor, if the minor has attained fourteen years of age and is not the petitioner;
- (2) Any person alleged to have had the primary care and custody of the minor during the sixty days before the filing of the petition;
- (3) Each living legal parent of the minor whose parental rights have not been terminated pursuant to chapter 571 or 587 or if one parent is deceased, the adult nearest in kinship to the deceased parent that can be found. If both parents are deceased, notice shall be given to each adult sibling of the minor who can be found or, if none, each adult nearest in kinship to each deceased parent that can be found. For good cause, the court may waive notice to the nearest in kinship upon showing that all reasonable efforts have been made to ascertain the identity and address of the person or to effect notice, that the efforts were unsuccessful, and that further efforts should not be required because that person has not demonstrated a reasonable degree of interest in or concern about the minor;
- (4) Any person nominated as guardian by the minor if the minor has attained fourteen years of age;

- (5) Any appointee of a parent whose appointment has not been prevented or terminated under section 560:5-203; and
- (6) Any guardian or conservator currently acting for the minor in this State or elsewhere.

(b) The court, upon hearing, shall make the appointment if it finds that a qualified person seeks appointment, venue is proper, the required notices have been given, the conditions of section 560:5-204(b) have been met, and the best interest of the minor will be served by the appointment. In other cases, the court may dismiss the proceeding or make any other disposition of the matter that will serve the best interest of the minor.

(c) If the court determines at any stage of the proceeding, before or after appointment, that the interests of the minor are or may be inadequately represented, it may appoint a lawyer to represent the minor, giving consideration to the choice of the minor if the minor has attained fourteen years of age. [L 2004, c 161, pt of §1]

" **§560:5-206 Judicial appointment of guardian; priority of minor's nominee; limited guardianship.** (a) The court shall appoint as guardian a person whose appointment will be in the best interest of the minor. The court shall appoint a person nominated by the minor, if the minor has attained fourteen years of age, unless the court finds the appointment will be contrary to the best interest of the minor.

(b) In the interest of developing self-reliance of a ward or for other good cause, the court, at the time of appointment or later, on its own motion or on motion of the minor ward or other interested person, may limit the powers of a guardian otherwise granted by this part and thereby create a limited guardianship, except where a guardian was appointed subsequent to parental rights terminated under chapter 571 or 587. Following the same procedure, the court may grant additional powers or withdraw powers previously granted. [L 2004, c 161, pt of §1]

" **§560:5-207 Duties of guardian.** (a) Except as otherwise limited by the court, a guardian of a minor ward has the duties and responsibilities of a parent regarding the ward's support, care, education, health, and welfare. A guardian shall act at all times in the ward's best interest and exercise reasonable care, diligence, and prudence.

(b) A guardian shall:

- (1) Become or remain personally acquainted with the ward and maintain sufficient contact with the ward to know of the ward's capacities, limitations, needs, opportunities, and physical and mental health;
- (2) Take reasonable care of the ward's personal effects and bring a protective proceeding if necessary to protect other property of the ward;
- (3) Expend money of the ward that has been received by the guardian, for the ward's current needs for support, care, education, health, and welfare;
- (4) Conserve any excess money of the ward for the ward's future needs; provided that if a conservator has been appointed for the estate of the ward, the guardian shall pay the money at least quarterly to the conservator to be conserved for the ward's future needs;
- (5) Report the condition of the ward and account for money and other assets in the guardian's possession or subject to the guardian's control, as ordered by the court on application of any person interested in the ward's welfare or as required by court rule; and
- (6) Inform the court of any change in the ward's custodial dwelling or address. [L 2004, c 161, pt of §1]

" **§560:5-208 Powers of guardian.** (a) Except as otherwise limited by the court, a guardian of a minor ward has the powers of a parent regarding the ward's support, care, education, health, and welfare.

(b) A guardian may:

- (1) Apply for and receive money for the support of the ward otherwise payable to the ward's parent, guardian, or custodian under the terms of any statutory system of benefits or insurance or any private contract, devise, trust, conservatorship, or custodianship;
- (2) If otherwise consistent with the terms of any order by a court of competent jurisdiction relating to custody of the ward, take custody of the ward and establish the ward's place of custodial dwelling; provided that a guardian may only establish or move the ward's custodial dwelling outside the State upon express authorization of the court;
- (3) If a conservator for the estate of a ward has not been appointed with existing authority, commence a proceeding, including an administrative proceeding, or take other appropriate action to compel a person to

support the ward or to pay money for the benefit of the ward;

- (4) Consent to medical or other care, treatment, or service for the ward;
- (5) Consent to the marriage of the ward; and
- (6) If reasonable under all of the circumstances, delegate to the ward certain responsibilities for decisions affecting the ward's well-being.

(c) The court may specifically authorize the guardian to consent to the adoption of the ward. [L 2004, c 161, pt of §1]

" **§560:5-209 Rights and immunities of guardian.** (a) A guardian shall be entitled to such reasonable compensation from the ward's estate for services as guardian and to reimbursement for room, board, and clothing provided by the guardian to the ward, but only as is approved by the court.

- (b) A guardian is not:
 - (1) Legally obligated to use the guardian's personal funds for the ward's expenses;
 - (2) Unless otherwise provided in the contract, individually liable on a contract properly entered into in the guardian's representative capacity in the exercise of the duties and powers as guardian unless the guardian fails to reveal the guardian's capacity and the identity of the ward in the contract;
 - (3) Personally liable to a third person for acts of the ward solely by reason of the guardianship; and
 - (4) Personally liable for injury to the ward resulting from the negligence or act of a third person providing medical or other care, treatment, or service to the ward except to the extent that a parent would be liable under the circumstances. [L 2004, c 161, pt of §1]

" **§560:5-210 Termination of guardianship; other proceedings after appointment.** (a) A guardianship of a minor terminates upon the minor's death, adoption, emancipation or attainment of majority, or as ordered by the court.

(b) A ward or a person interested in the welfare of a ward may petition for any order that is in the best interest of the ward. The petitioner shall give notice of the hearing on the petition to the ward, if the ward has attained fourteen years of age and is not the petitioner, the guardian, and any other person as ordered by the court. [L 2004, c 161, pt of §1]

**"PART 3. [OLD] GUARDIANS OF THE PERSON OF
INCAPACITATED PERSONS--REPEALED**

§560:5-301 to 560:5-313 REPEALED. L 2004, c 161, §37.

"PART 3. GUARDIANSHIP OF INCAPACITATED PERSON

§560:5-301 Appointment and status of guardian. A person becomes a guardian of an incapacitated person by an appointment by a parent, spouse, or reciprocal beneficiary or upon appointment by the court. The guardianship continues until terminated, without regard to the location of the guardian or ward. [L 2004, c 161, pt of §1]

" **§560:5-302 Appointment of guardian by will or other writing.** (a) A parent, by will or other signed writing, may appoint a guardian for an unmarried child who the parent believes is an incapacitated person, specify desired limitations on the powers to be given to the guardian, and revoke or amend the appointment before confirmation by the court.

(b) An individual, by will or other signed writing, may appoint a guardian for the individual's spouse or reciprocal beneficiary who the appointing spouse or reciprocal beneficiary believes is an incapacitated person, specify desired limitations on the powers to be given to the guardian, and revoke or amend the appointment before confirmation by the court.

(c) The incapacitated person, the person having care or custody of the incapacitated person, if other than the appointing parent, spouse, or reciprocal beneficiary, or the adult nearest in kinship to the incapacitated person, may file a written objection to an appointment, unless the court has confirmed the appointment under subsection (d). The filing of the written objection terminates the appointment. An objection may be withdrawn and, if withdrawn, is of no effect. The objection shall not preclude judicial appointment of the person selected by the parent, spouse, or reciprocal beneficiary. Notice of the objection shall be given to the guardian and any other person entitled to notice of the acceptance of the appointment. The court may treat the filing of an objection as a petition for the appointment of an emergency guardian under section 560:5-312 or for the appointment of a limited or unlimited guardian under section 560:5-304 and proceed accordingly.

(d) Before the appointment becomes effective, that court may confirm the appointing parent's, spouse's, or reciprocal beneficiary's selection of a guardian and terminate the rights of others to object upon:

- (1) Petition of the appointing parent, spouse, or reciprocal beneficiary;
- (2) A finding that the appointing parent, spouse, or reciprocal beneficiary will likely become unable to care for the incapacitated person within two years; and
- (3) Notice as provided in this section. [L 2004, c 161, pt of §1]

" **§560:5-303 Appointment of guardian by will or other writing; effectiveness; acceptance; confirmation.** (a) The appointment of a guardian under section 560:5-302 becomes effective upon:

- (1) The death of the appointing parent, spouse, or reciprocal beneficiary;
- (2) The adjudication of incapacity of the appointing parent, spouse, or reciprocal beneficiary; or
- (3) A written determination by a physician who has examined the appointing parent, spouse, or reciprocal beneficiary that the appointing parent, spouse, or reciprocal beneficiary is no longer able to care for the incapacitated person,

whichever first occurs.

(b) Unless a person having priority under section 560:5-310 has filed an acceptance of appointment, a guardian appointed under section 560:5-302 becomes eligible to act upon the filing of an acceptance of appointment, which shall be filed within thirty days after the guardian's appointment becomes effective. The guardian shall:

- (1) File the notice of acceptance of appointment and a copy of the will with the court of the circuit in which the will was or could be probated or, in the case of another appointing instrument, file the acceptance of appointment and the appointing instrument with the court in the circuit in which the incapacitated person resides or is present; and
- (2) Give written notice of the acceptance of appointment to the appointing parent, spouse, or reciprocal beneficiary if living, the incapacitated person, a person having care or custody of the incapacitated person other than the appointing parent, spouse, or

reciprocal beneficiary, and the adult nearest in kinship.

(c) Unless the appointment was previously confirmed by the court, the notice given under subsection (b)(2) shall include a statement of the right of those notified to terminate the appointment by filing a written objection as provided in section 560:5-302.

(d) An appointment effected by filing the guardian's acceptance under a will probated in the state of the testator's domicile is effective in this State.

(e) Unless the appointment was previously confirmed by the court, within thirty days after filing the notice and the appointing instrument, a guardian appointed under section 560:5-302 shall file a petition in the court for confirmation of the appointment. The petition shall include the information required under section 560:5-304 and detail the special circumstances of the appointment by a parent, spouse, or reciprocal beneficiary. Notice of the filing shall be given in the manner provided in section 560:5-309.

(f) The authority of a guardian appointed under section 560:5-302 terminates upon the appointment of a guardian by the court or the giving of written notice to the guardian of the filing of an objection pursuant to section 560:5-302, whichever first occurs.

(g) The appointment of a guardian under this section is not a determination of incapacity.

(h) The powers of a guardian who timely complies with the requirements of subsections (b) and (e) relate back to give acts by the guardian, which are of benefit to the incapacitated person and occurred on or after the date the appointment became effective, the same effect as those that occurred after the filing of the acceptance of appointment. [L 2004, c 161, pt of §1]

Case Notes

Under subsection (b), family court did not err in maintaining the appointment of a temporary guardian ad litem in view of the allegations of potential abuse and undue influence, as part of its continuing duty to protect the interest of the ward before the issues of the ward's capacity were resolved. 113 H. 211, 151 P.3d 692 (2007).

" §560:5-304 Judicial appointment of guardian; petition.

(a) An individual or a person interested in the individual's welfare may petition for a determination of incapacity, in whole

or in part, and for the appointment of a limited or unlimited guardian for the individual.

(b) The petition shall set forth the petitioner's name, residence, current address if different, relationship to the respondent, and interest in the appointment and, to the extent known, state or contain the following with respect to the respondent and the relief requested:

- (1) The respondent's name, age, principal residence, current street address, and, if different, the address of the dwelling in which it is proposed that the respondent will reside if the appointment is made;
- (2) The name and address of the respondent's:
 - (A) Spouse or reciprocal beneficiary, or if the respondent has none, an adult with whom the respondent has resided for more than six months before the filing of the petition; and
 - (B) Adult children or, if the respondent has none, the respondent's parents and adult siblings, or if the respondent has none, at least one of the adults nearest in kinship to the respondent who can be found;
- (3) The name and address of any person responsible for care or custody of the respondent;
- (4) The name and address of any legal representative of the respondent;
- (5) The name and address of any person nominated as guardian by the respondent;
- (6) The name and address of any agent appointed by the respondent under any medical directive, mental health care directive, or health care power of attorney, or, if none, any designated surrogate under section 327E-5(f);
- (7) The name and address of any proposed guardian and the reason why the proposed guardian should be selected;
- (8) The reason why guardianship is necessary, including a brief description of the nature and extent of the respondent's alleged incapacity;
- (9) If an unlimited guardianship is requested, the reason why limited guardianship is inappropriate and, if a limited guardianship is requested, the powers to be granted to the limited guardian; and
- (10) A general statement of the respondent's property with an estimate of its value, including any insurance or pension, and the source and amount of any other anticipated income or receipts. [L 2004, c 161, pt of §1 as amended by c 224, §4]

" **§560:5-305 Judicial appointment of guardian; preliminaries to hearing.** (a) Upon receipt of a petition to establish a guardianship, the applicable court shall set a date and time for hearing the petition and may appoint a kokua kanawai. The duties and reporting requirements of the kokua kanawai shall be limited to the relief requested in the petition. The kokua kanawai shall be an individual having the training or experience that the court deems appropriate.

(b) The court shall appoint a lawyer to represent the respondent in the proceeding if:

- (1) Requested by the respondent;
- (2) Recommended by the kokua kanawai; or
- (3) The court determines that the respondent needs representation.

(c) Unless otherwise ordered by the court for good cause shown, the kokua kanawai shall interview the respondent in person and, to the extent that the respondent is able to understand:

- (1) Explain to the respondent the substance of the petition, the nature, purpose, and effect of the proceeding, the respondent's rights at the hearing, and the general powers and duties of a guardian;
- (2) Determine the respondent's views about the proposed guardian, the proposed guardian's powers and duties, and the scope and duration of the proposed guardianship;
- (3) Inform the respondent of the right to employ and consult with a lawyer at the respondent's own expense and the right to request a court-appointed lawyer; and
- (4) Inform the respondent that all costs and expenses of the proceeding, including respondent's attorney's fees, will be paid from the respondent's estate.

(d) In addition to the duties imposed by subsection (c), the kokua kanawai shall:

- (1) Interview the petitioner and the proposed guardian;
- (2) Visit the respondent's present dwelling, unless otherwise ordered by the court for good cause shown, and visit any dwelling in which the respondent will live if the appointment is made;
- (3) Obtain information from any physician or other person who is known to have treated, advised, or assessed the respondent's relevant physical or mental condition; and
- (4) Make any other investigation the court directs.

(e) The kokua kanawai shall promptly file a report in writing with the court, which shall include:

- (1) A recommendation as to whether a lawyer should be appointed to represent the respondent;
- (2) A summary of daily functions the respondent can manage without assistance, could manage with the assistance of supportive services or benefits, including use of appropriate technological assistance, and cannot manage;
- (3) Recommendations regarding the appropriateness of guardianship, including as to whether less restrictive means of intervention are available, the type of guardianship, and, if a limited guardianship, the powers to be granted to the limited guardian;
- (4) A statement of the qualifications of the proposed guardian, together with a statement as to whether the respondent approves or disapproves of the proposed guardian, and the powers and duties proposed or the scope of the guardianship;
- (5) A statement as to whether the proposed dwelling meets the respondent's individual needs;
- (6) A recommendation as to whether a professional evaluation or further evaluation is necessary; and
- (7) Any other matters the court directs. [L 2004, c 161, pt of §1; am L 2008, c 39, §3]

" **§560:5-306 Judicial appointment of guardian; professional evaluation.** At or before a hearing under this part, the court may order a professional evaluation of the respondent and shall order the evaluation if the respondent so demands. If the court orders the evaluation, the respondent shall be examined by a physician, psychologist, or other individual appointed by the court who is qualified to evaluate the respondent's alleged impairment. The examiner shall promptly file a written report with the court. Unless otherwise directed by the court, the report shall contain:

- (1) A description of the nature, type, and extent of the respondent's specific cognitive and functional limitations;
- (2) An evaluation of the respondent's mental and physical condition and, if appropriate, educational potential, adaptive behavior, and social skills;
- (3) A prognosis for improvement and a recommendation as to the appropriate treatment or habilitation plan; and
- (4) The date of any assessment or examination upon which the report is based. [L 2004, c 161, pt of §1]

" **§560:5-307 Confidentiality of records.** The written report of a kokua kanawai and any professional evaluation are confidential and shall be sealed upon filing, but are available to:

- (1) The court;
- (2) The respondent without limitation as to use;
- (3) The petitioner, the kokua kanawai, any nominated guardian, and the petitioner's, nominated guardian's, and respondent's lawyers, for purposes of the proceeding; and
- (4) Other persons for any purposes that the court may order for good cause. [L 2004, c 161, pt of §1; am L 2008, c 39, §4]

Rules of Court

Confidentiality of records, see HPR rule 113.1

" **§560:5-308 Judicial appointment of guardian; presence and rights at hearing.** (a) Unless excused by the court for good cause, the proposed guardian shall attend the hearing. The respondent shall attend and participate in the hearing, unless excused by the court for good cause. The respondent may present evidence and subpoena witnesses and documents, examine witnesses, including any court-appointed physician, psychologist, or other individual qualified to evaluate the alleged impairment, and the kokua kanawai, and otherwise participate in the hearing. The hearing may be held in a location convenient to the respondent and may be closed upon the request of the respondent and a showing of good cause.

(b) Any person may request permission to participate in the proceeding. The court may grant the request, with or without hearing, upon determining that the best interest of the respondent will be served. The court may attach appropriate conditions to the participation. [L 2004, c 161, pt of §1]

" **§560:5-309 Notice.** (a) A copy of a petition for guardianship and notice of the hearing on the petition shall be served personally on the respondent. The notice shall include a statement that the respondent must be physically present unless excused by the court, inform the respondent of the respondent's rights at the hearing, and include a description of the nature, purpose, and consequences of an appointment. A failure to serve the respondent with a notice substantially complying with this subsection shall preclude the court from granting the petition.

(b) In a proceeding to establish a guardianship, notice of the hearing shall be given to the persons listed in the petition. For good cause, the court may waive notice to any person listed in the petition other than the respondent, upon a showing that all reasonable efforts have been made to ascertain the identity and address of the person or to effect notice, that the efforts were unsuccessful, and that further efforts should not be required because that person has not demonstrated a reasonable degree of interest in or concern about the respondent. Failure to give notice under this subsection shall not preclude the appointment of a guardian or the making of a protective order.

(c) Notice of the hearing on a petition for an order after appointment of a guardian, together with a copy of the petition, shall be given to the ward, the guardian, and any other person the court directs.

(d) A guardian shall give notice of the filing of the guardian's report, together with a copy of the report, to the ward and any other person the court directs. The notice shall be delivered or sent within fourteen days after the filing of the report. [L 2004, c 161, pt of §1]

" **§560:5-310 Who may be guardian; priorities.** (a) Subject to subsection (c), the court in appointing a guardian shall consider persons otherwise qualified in the following order of priority:

- (1) A guardian, other than a temporary or emergency guardian, currently acting for the respondent in this State or elsewhere;
- (2) A person nominated as guardian by the respondent, including the respondent's most recent nomination made in a durable power of attorney, if at the time of the nomination the respondent had sufficient capacity to express a preference;
- (3) An agent appointed by the respondent under any medical directive or health care power of attorney or, if none, any designated surrogate under section 327E-5(f);
- (4) The spouse or reciprocal beneficiary of the respondent or a person nominated by will or other signed writing of a deceased spouse or reciprocal beneficiary;
- (5) An adult child of the respondent;
- (6) A parent of the respondent, or an individual nominated by will or other signed writing of a parent; and
- (7) An adult with whom the respondent has resided for more than six months before the filing of the petition.

(b) With respect to persons having equal priority, the court shall select the one it considers best qualified. The court, acting in the best interest of the respondent, may decline to appoint a person having priority and appoint a person having a lower priority or no priority.

(c) An owner, operator, or employee of a long-term care institution or other care settings at which the respondent is receiving care may not be appointed as guardian unless related to the respondent by blood, marriage, or adoption, or otherwise ordered by the court. [L 2004, c 161, pt of §1]

" **§560:5-311 Findings; order of appointment.** (a) The court may:

- (1) Appoint a limited or unlimited guardian for a respondent only if it finds by clear and convincing evidence that:
 - (A) The respondent is an incapacitated person; and
 - (B) The respondent's identified needs cannot be met by less restrictive means, including use of appropriate and reasonably available technological assistance; or
- (2) With appropriate findings, treat the petition as one for a protective order under section 560:5-401, enter any other appropriate order, or dismiss the proceeding.

(b) The court, whenever feasible, shall grant to a guardian only those powers necessitated by the ward's limitations and demonstrated needs and make appointive and other orders that will encourage the development of the ward's maximum self-reliance and independence.

(c) Within fourteen days after an appointment, a guardian shall send or deliver to the ward and to all other persons given notice of the hearing on the petition a copy of the order of appointment, together with a notice of the right to request termination or modification; provided that, for good cause shown, the court may extend time for the order and notice to be sent or delivered to the ward, or otherwise modify or waive that requirement.

(d) *[Subsection effective January 1, 2017.]* The court shall forward to the Hawaii criminal justice data center all orders of appointment or information from all orders of appointment as requested by the Hawaii criminal justice data center, which in turn shall forward the information to the Federal Bureau of Investigation, or its successor agency, for inclusion in the National Instant Criminal Background Check System database. The orders of appointment or information shall

also be maintained by the Hawaii criminal justice data center for disclosure to and use by law enforcement officials for the purpose of firearms permitting or registration pursuant to chapter 134. This subsection shall apply to all orders appointing a guardian of an incapacitated person without regard to the date of the appointment. [L 2004, c 161, pt of §1; am L 2008, c 39, §5; am L 2016, c 19, §2]

" **§560:5-312 Emergency guardian.** (a) If the court finds that compliance with the procedures of this part will likely result in substantial harm to the respondent's health, safety, or welfare, and that no other person appears to have authority and willingness to act in the circumstances, the court, on petition by a person interested in the respondent's welfare, may appoint an emergency guardian whose authority may not exceed ninety days and who may exercise only the powers specified in the order. Immediately upon appointment of an emergency guardian, the court may appoint a lawyer to represent the respondent throughout the emergency guardianship. Except as otherwise provided in subsection (b), reasonable notice of the time and place of a hearing on the petition shall be given to the respondent and any other persons as the court directs.

(b) An emergency guardian may be appointed without notice to the respondent and the respondent's lawyer only if the court finds from affidavit or testimony that the respondent will be substantially harmed before a hearing on the appointment can be held. If the court appoints an emergency guardian without notice to the respondent, the respondent shall be given notice of the appointment within forty-eight hours after the appointment. The court shall hold a hearing on the appropriateness of the appointment within ten days after the appointment unless extended by order of the court.

(c) Appointment of an emergency guardian, with or without notice, shall not be deemed a determination of the respondent's incapacity.

(d) The court may remove an emergency guardian or modify the powers granted at any time. An emergency guardian shall make any report the court requires. In other respects, the provisions of this article concerning guardians apply to an emergency guardian. [L 2004, c 161, pt of §1]

" **§560:5-313 Temporary substitute guardian.** (a) If the court finds that a guardian is not effectively performing the guardian's duties and that the welfare of the ward requires immediate action, it may appoint a temporary substitute guardian

for the ward for a specified period not exceeding six months. Except as otherwise ordered by the court, a temporary substitute guardian so appointed has the powers set forth in the previous order of appointment. The authority of any unlimited or limited guardian previously appointed by the court is suspended as long as a temporary substitute guardian has authority. If an appointment is made without previous notice to the ward or the affected guardian and other interested persons, then the temporary substitute guardian, within five days after the appointment, shall inform them of the appointment.

(b) The court may remove a temporary substitute guardian or modify the powers granted at any time. A temporary substitute guardian shall make any report the court requires. In other respects, the provisions of this article concerning guardians apply to a temporary substitute guardian. [L 2004, c 161, pt of §1]

" **§560:5-314 Duties of guardian.** (a) Except as otherwise limited by the court, a guardian shall make decisions regarding the ward's support, care, education, health, and welfare. A guardian shall exercise authority only as necessitated by the ward's limitations and, to the extent possible, shall encourage the ward to participate in decisions, act on the ward's own behalf, and develop or regain the capacity to manage the ward's personal affairs. A guardian, in making decisions, shall consider the expressed desires and personal values of the ward to the extent known to the guardian. A guardian at all times shall act in the ward's best interest and exercise reasonable care, diligence, and prudence.

(b) A guardian shall:

- (1) Become or remain personally acquainted with the ward and maintain sufficient contact with the ward to know of the ward's capacities, limitations, needs, opportunities, and physical and mental health;
- (2) Take reasonable care of the ward's personal effects and bring protective proceedings if necessary to protect the property of the ward;
- (3) Expend money of the ward that has been received by the guardian, for the ward's current needs for support, care, education, health, and welfare;
- (4) Conserve any excess money of the ward for the ward's future needs; provided that if a conservator has been appointed for the estate of the ward, the guardian shall pay the money to the conservator, at least quarterly, to be conserved for the ward's future needs;

- (5) Immediately notify the court if the ward's condition has changed so that the ward is capable of exercising rights previously removed; and
- (6) Inform the court of any change in the ward's custodial dwelling or address. [L 2004, c 161, pt of §1]

" **§560:5-315 Powers of guardian.** (a) Except as otherwise limited by the court, a guardian may:

- (1) Apply for and receive money payable to the ward or the ward's guardian or custodian for the support of the ward under the terms of any statutory system of benefits or insurance or any private contract, devise, trust, conservatorship, or custodianship;
- (2) If otherwise consistent with the terms of any order by a court of competent jurisdiction relating to custody of the ward, take custody of the ward and establish the ward's place of custodial dwelling; provided that a guardian may only establish or move the ward's place of dwelling outside this State upon express authorization of the court;
- (3) If a conservator for the estate of the ward has not been appointed with existing authority, commence a proceeding, including an administrative proceeding, or take other appropriate action to compel a person to support the ward or to pay money for the benefit of the ward;
- (4) Consent to medical or other care, treatment, or service for the ward;
- (5) Consent to the marriage or divorce of the ward; and
- (6) If reasonable under all of the circumstances, delegate to the ward certain responsibilities for decisions affecting the ward's well being.

(b) The court may specifically authorize the guardian to consent to the adoption of the ward. [L 2004, c 161, pt of §1]

" **§560:5-316 Rights and immunities of guardian; limitations.**

(a) A guardian shall be entitled to such reasonable compensation from the ward's estate for services as guardian and to reimbursement for room, board, and clothing provided to the ward, as is approved by order of the court.

(b) A guardian is not:

- (1) Legally obligated to use the guardian's personal funds for the ward's expenses;
- (2) Unless otherwise provided in the contract, individually liable on a contract properly entered

into in the guardian's representative capacity in the exercise of the duties and powers as guardian unless the guardian fails to reveal the guardian's capacity and the identity of the ward in the contract;

- (3) Personally liable to a third person for acts of the ward solely by reason of the relationship; and
 - (4) Liable for injury to the ward resulting from the wrongful conduct of a third party that provides medical or other care, treatment, or service to the ward, if the guardian exercised reasonable care in choosing the third party.
- (c) A guardian, without authorization of the court, shall

not:

- (1) Revoke any health care directions set forth in any medical directive or health care power of attorney of which the ward is the principal; provided that the appointment of a guardian shall automatically terminate the authority of any agent designated in the medical directive or health care power of attorney; or
- (2) Restrict the personal communication rights of the ward, including the right to receive visitors, telephone calls, and personal mail, unless deemed by the guardian to pose a risk to the safety or well-being of the ward.

(d) A guardian shall not initiate the commitment of a ward to a mental health-care institution except in accordance with the State's procedure for involuntary civil commitment. [L 2004, c 161, pt of §1; am L 2016, c 89, §1]

" **§560:5-317 Reports; monitoring of guardianship.** (a) Within thirty days after appointment, a guardian shall report to the court in writing on the condition of the ward and account for money and other assets in the guardian's possession or subject to the guardian's control. A guardian shall report at least annually thereafter and whenever ordered by the court. The report shall state or contain:

- (1) The current mental, physical, and social condition of the ward;
- (2) The living arrangements for all addresses of the ward during the reporting period;
- (3) The medical, educational, vocational, and other services provided to the ward and the guardian's opinion as to the adequacy of the ward's care;
- (4) A summary of the guardian's visits with the ward and activities on the ward's behalf and the extent to which the ward has participated in decision-making;

- (5) If the ward is institutionalized, whether the guardian considers the current plan for care, treatment, or habilitation to be in the ward's best interest;
- (6) Plans for future care; and
- (7) A recommendation as to the need for continued guardianship and any recommended changes in the scope of the guardianship.

(b) The court may appoint a kokua kanawai to review a report, interview the ward or guardian, and make any other investigation the court directs.

(c) The court shall establish a system for monitoring guardianships, including the filing and review of annual reports. [L 2004, c 161, pt of §1]

" **§560:5-318 Termination or modification of guardianship.**

(a) A guardianship terminates upon the death of the ward or upon order of the court.

(b) On petition of a ward, a guardian, or another person interested in the ward's welfare, the court may terminate a guardianship if the ward no longer needs the assistance or protection of a guardian. The court may modify the type of appointment or powers granted to the guardian if the extent of protection or assistance previously granted is currently excessive or insufficient or the ward's capacity to provide for support, care, education, health, and welfare has so changed as to warrant that action.

(c) Except as otherwise ordered by the court for good cause, the court, before terminating a guardianship, shall follow the same procedures to safeguard the rights of the ward that apply to a petition for guardianship. Upon presentation by the petitioner of evidence establishing a prima facie case for termination, the court shall order the termination unless it is proven by clear and convincing evidence that continuation of the guardianship is in the best interest of the ward. [L 2004, c 161, pt of §1]

"PART 4. [OLD] PROTECTION OF PROPERTY OF PERSONS UNDER DISABILITY AND MINORS--REPEALED

§§560:5-401 to 560:5-432 REPEALED. L 2004, c 161, §37.

"PART 4. PROTECTION OF PROPERTY OF PROTECTED PERSON

§560:5-401 Protective proceeding. Upon petition and after notice and hearing, the court may appoint a limited or unlimited conservator or make any other protective order provided in this part in relation to the estate and affairs of:

- (1) A minor, if the court determines that:
 - (A) The minor owns money or property requiring management or protection that cannot otherwise be provided;
 - (B) The minor has, or may have, business affairs that may be put at risk or prevented because of the minor's age; or
 - (C) Money is needed for support and education and that protection is necessary or desirable to obtain or provide money; or
- (2) Any individual, including a minor, if the court determines that, for reasons other than age:
 - (A) By clear and convincing evidence, the individual is unable to manage property and business affairs effectively because of an impairment in the ability to receive and evaluate information or to make or communicate decisions, even with the use of appropriate and reasonably available technological assistance or because of another physical, mental, or health impairment, or because the individual is missing, detained, or unable to return to the United States; and
 - (B) By a preponderance of evidence, the individual has property that will be wasted or dissipated unless management is provided or money is needed for the support, care, education, health, and welfare of the individual or of individuals who are entitled to the individual's support and that protection is necessary or desirable to obtain or provide money. [L 2004, c 161, pt of §1; am L 2009, c 21, §1]

" **§560:5-402 Jurisdiction over business affairs of protected person.** After the service of notice in a proceeding seeking a conservatorship or other protective order and until termination of the proceeding, the court in which the petition is filed has:

- (1) Exclusive jurisdiction to determine the need for a conservatorship or other protective order;
- (2) Exclusive jurisdiction to determine how the estate of the protected person, that is subject to the laws of this State, shall be managed, expended, or distributed to or for the use of the protected person, individuals

who are in fact dependent upon the protected person, or other claimants; and

- (3) Concurrent jurisdiction to determine the validity of claims against the person or estate of the protected person and questions of title concerning assets of the estate. [L 2004, c 161, pt of §1]

" **§560:5-403 Original petition for appointment or protective order.** (a) The following persons may petition for the appointment of a conservator or for any other appropriate protective order:

- (1) The person to be protected;
- (2) An individual interested in the estate, affairs, or welfare of the person to be protected, including a parent, guardian, or custodian; or
- (3) A person who would be adversely affected by lack of effective management of the property and business affairs of the person to be protected.

(b) The petition under subsection (a) shall set forth the petitioner's name, residence, current address if different, relationship to the respondent, and interest in the appointment or other protective order, and, to the extent known, state or contain the following with respect to the respondent and the relief requested:

- (1) The respondent's name, age, principal residence, current street address, and, if different, the address of the dwelling where it is proposed that the respondent will reside if the appointment is made;
- (2) If the petition alleges impairment in the respondent's ability to receive and evaluate information or alleges another physical, mental, or health impairment, a brief description of the nature and extent of the respondent's alleged impairment;
- (3) If the petition alleges that the respondent is missing, detained, or unable to return to the United States, a statement of the relevant circumstances, including the time and nature of the disappearance or detention and a description of any search or inquiry concerning the respondent's whereabouts;
- (4) The name and address of the respondent's:
 - (A) Spouse or reciprocal beneficiary or, if the respondent has none, an adult with whom the respondent has resided for more than six months before the filing of the petition; and
 - (B) Adult children or, if the respondent has none, the respondent's parents and adult siblings or,

if the respondent has none, at least one of the adults nearest in kinship to the respondent who can be found with reasonable efforts;

- (5) The name and address of the person responsible for care or custody of the respondent;
 - (6) The name and address of any legal representative of the respondent;
 - (7) A general statement of the respondent's property with an estimate of its value, including any insurance or pension, and the source and amount of other anticipated income or receipts;
 - (8) The reason why a conservatorship or other protective order is in the best interest of the respondent; and
 - (9) A proposed itemized budget of income and expenditures.
- (c) If a conservatorship is requested, the petition shall also set forth to the extent known:
- (1) The name and address of any proposed conservator and the reason why the proposed conservator should be selected;
 - (2) The name and address of any person nominated as conservator by the respondent if the respondent has attained fourteen years of age; and
 - (3) The type of conservatorship requested and, if an unlimited conservatorship, the reason why limited conservatorship is inappropriate or, if a limited conservatorship, the property to be placed under the conservator's control and any limitation on the conservator's powers and duties. [L 2004, c 161, pt of §1; am L 2009, c 21, §2]

" **§560:5-404 Notice.** (a) A copy of the petition and the notice of hearing on a petition for conservatorship or other protective order shall be served personally on the respondent if the respondent has attained fourteen years of age, but if the respondent's whereabouts is unknown or personal service cannot be made, service on the respondent shall be made by certified or registered mail or by publication pursuant to section 560:1-401(a)(3). The notice shall include a statement that the respondent must be physically present unless excused by the court, inform the respondent of the respondent's rights at the hearing, and, if the appointment of a conservator is requested, include a description of the nature, purpose, and consequences of an appointment. A failure to serve the respondent with a notice substantially complying with this subsection precludes the court from granting the petition.

(b) In a proceeding to establish a conservatorship or for another protective order, notice of the hearing shall be given to the persons listed in the petition. Failure to give notice under this subsection does not preclude the appointment of a conservator or the making of another protective order.

(c) Notice of the hearing on a petition for an order after appointment of a conservator or making of another protective order, together with a copy of the petition, shall be given to the protected person, if the protected person has attained fourteen years of age and is not missing, detained, or unable to return to the United States, any conservator of the protected person's estate, and any other person as ordered by the court.

(d) A conservator shall give notice of the filing of the conservator's inventory or report, together with a copy of the inventory or report to the protected person and any other person the court directs. The notice shall be delivered or sent within fourteen days after the filing of the inventory or report. [L 2004, c 161, pt of §1]

" **§560:5-405 Original petition; minors; preliminaries to hearing.** (a) Upon the filing of a petition to establish a conservatorship or for another protective order for the reason that the respondent is a minor, the court shall set a date for hearing. If the court determines at any stage of the proceeding that the interests of the minor are or may be inadequately represented, it may appoint a lawyer to represent the minor, giving consideration to the choice of the minor if the minor has attained fourteen years of age.

(b) While a petition to establish a conservatorship or for another protective order is pending, after preliminary hearing and without notice to others, the court may make orders to preserve and apply the property of the minor as may be required for the support of the minor or individuals who are in fact dependent upon the minor. The court may appoint a special conservator to assist in that task. [L 2004, c 161, pt of §1]

" **§560:5-406 Original petition; preliminaries to hearing.** (a) Upon the filing of a petition for a conservatorship or other protective order for a respondent for reasons other than being a minor, the court shall set a date for hearing. The court may appoint a kokua kanawai. The duties and reporting requirements of the kokua kanawai shall be limited to the relief requested in the petition. The kokua kanawai shall be an individual having such training or experience that the court deems appropriate.

(b) The court shall appoint a lawyer to represent the respondent in the proceeding if:

- (1) Requested by the respondent;
- (2) Recommended by the kokua kanawai; or
- (3) The court determines that the respondent needs representation.

(c) Unless otherwise ordered by the court for good cause shown, the kokua kanawai shall interview the respondent in person and, to the extent that the respondent is able to understand:

- (1) Explain to the respondent the substance of the petition and the nature, purpose, and effect of the proceeding;
- (2) If the appointment of a conservator is requested, inform the respondent of the general powers and duties of a conservator and determine the respondent's views regarding the proposed conservator, the proposed conservator's powers and duties, and the scope and duration of the proposed conservatorship;
- (3) Inform the respondent of the respondent's rights, including the right to employ or request that the court appoint a lawyer to consult with a lawyer at the respondent's own expense; and
- (4) Inform the respondent that all costs and expenses of the proceeding, including respondent's attorney's fees, will be paid from the respondent's estate unless the court otherwise directs.

(d) In addition to the duties imposed by subsection (c), the kokua kanawai shall:

- (1) Interview the petitioner and the proposed conservator, if any; and
- (2) Make any other investigation the court directs.

(e) The kokua kanawai shall promptly file a report with the court, which shall include:

- (1) A recommendation as to whether a lawyer should be appointed to represent the respondent;
- (2) Recommendations regarding the appropriateness of a conservatorship, including whether less restrictive means of intervention are available, the type of conservatorship, and, if a limited conservatorship, the powers and duties to be granted the limited conservator, and the assets over which the conservator should be granted authority;
- (3) A statement of the qualifications of the proposed conservator, together with a statement as to whether the respondent approves or disapproves of the proposed

conservator, and a statement of the powers and duties proposed or the scope of the conservatorship;

- (4) A recommendation as to whether a professional evaluation or further evaluation is necessary; and
- (5) Any other matters the court directs.

(f) The court may also appoint a physician, psychologist, or other individual qualified to evaluate the alleged impairment to conduct an examination of the respondent.

(g) While a petition to establish a conservatorship or for another protective order is pending, after preliminary hearing and without notice to others, the court may issue orders to preserve and apply the property of the respondent as may be required for the support of the respondent or individuals who are in fact dependent upon the respondent. The court may appoint a special conservator to assist in that task. [L 2004, c 161, pt of §1; am L 2008, c 39, §6]

" **§560:5-407 Confidentiality of records.** The written report of a kokua kanawai and any professional evaluation are confidential and shall be sealed upon filing, but shall be available to:

- (1) The court;
- (2) The respondent without limitation as to use;
- (3) The petitioner, the kokua kanawai, any nominated conservator, and the petitioner's, nominated conservator's, and respondent's lawyers, for purposes of the proceeding; and
- (4) Other persons for any purposes that the court may order for good cause. [L 2004, c 161, pt of §1; am L 2008, c 39, §7]

Rules of Court

Confidentiality of records, see HPR rule 113.1.

" **§560:5-408 Original petition; procedure at hearing.** (a) Unless excused by the court for good cause, a proposed conservator shall attend the hearing. The respondent shall attend the hearing, unless excused by the court for good cause. The respondent may present evidence and subpoena witnesses and documents, examine witnesses, including any court-appointed physician, psychologist, or other individual qualified to evaluate the alleged impairment, and the kokua kanawai, and otherwise participate in the hearing. The hearing may be held

in a location convenient to the respondent and may be closed upon a showing of good cause.

(b) Any person may request permission to participate in the proceeding. The court may grant the request, with or without hearing, upon determining that the best interest of the respondent will be served. The court may attach appropriate conditions to the participation. [L 2004, c 161, pt of §1]

" **§560:5-409 Original petition; orders.** (a) If a proceeding is brought for the reason that the respondent is a minor, after a hearing on the petition, upon finding that the appointment of a conservator or other protective order is in the best interest of the minor, the court shall make an appointment or other appropriate protective order.

(b) If a proceeding is brought for reasons other than that the respondent is a minor, after a hearing on the petition, upon finding that a basis exists for a conservatorship or other protective order, the court shall make the least restrictive order consistent with its findings. The court shall make orders necessitated by the protected person's limitations and demonstrated needs, including appointive and other orders that will encourage the development of maximum self-reliance and independence of the protected person.

(c) Within fourteen days after entry of the order of appointment, the conservator shall deliver or send a copy of the order of appointment, together with a statement of the right to seek termination or modification, to the protected person, if the protected person has attained fourteen years of age and is not missing, detained, or unable to return to the United States, and to all other persons given notice of the petition; provided that, for good cause shown, the court may extend time for the order and statement to be sent or delivered to the protected person, or otherwise modify or waive that requirement.

(d) The appointment of a conservator or the entry of another protective order shall not be deemed a determination of incapacity of the protected person under part 3. [L 2004, c 161, pt of §1; am L 2005, c 22, §37; am L 2008, c 39, §8]

" **§560:5-410 Powers of court.** (a) After hearing and upon determining that a basis for a conservatorship or other protective order exists, the court shall have the following powers which may be exercised directly or through a conservator:

- (1) With respect to a minor for reasons of age, all the powers over the estate and business affairs of the minor which may be necessary for the best interest of

the minor and members of the minor's immediate family;
and

- (2) With respect to an adult, or to a minor for reasons other than age, for the benefit of the protected person and individuals who are in fact dependent on the protected person for support, all the powers over the estate and business affairs of the protected person that the person could exercise if the person were an adult, present, and not under conservatorship or other protective order.

(b) Subject to section 560:5-110 requiring endorsement of limitations on the letters of office, the court may limit at any time the powers of a conservator otherwise conferred and may remove or modify any limitation. [L 2004, c 161, pt of §1]

" **§560:5-411 Required court approval.** (a) After notice to interested persons and upon express authorization of the court, a conservator may:

- (1) Make gifts, except as otherwise provided in section 560:5-427(b);
- (2) Convey, release, or disclaim contingent and expectant interests in property, including marital property rights and any right of survivorship incident to joint tenancy or tenancy by the entireties;
- (3) Exercise or release a power of appointment;
- (4) Create a revocable or irrevocable trust of property of the estate, whether or not the trust extends beyond the duration of the conservatorship, or revoke or amend a trust revocable by the protected person;
- (5) Exercise rights to elect options and change beneficiaries under retirement plans, insurance policies and annuities, or surrender the policies and annuities for their cash value;
- (6) Exercise any right to an elective share in the estate of the protected person's deceased spouse or reciprocal beneficiary and to renounce or disclaim any interest by testate or intestate succession or by transfer inter vivos; and
- (7) Make, amend, or revoke the protected person's will.

(b) A conservator, in making, amending, or revoking the protected person's will, shall comply with state laws for executing wills.

(c) The court, in exercising or in approving a conservator's exercise of the powers listed in subsection (a), shall consider primarily the decision that the protected person

would have made, to the extent that the decision can be ascertained. The court shall also consider:

- (1) The financial needs of the protected person and the needs of individuals who are in fact dependent on the protected person for support and the interest of creditors;
- (2) Possible reduction of income, estate, inheritance, or other tax liabilities;
- (3) Eligibility for governmental assistance;
- (4) The protected person's previous pattern of giving or level of support;
- (5) The existing estate plan;
- (6) The protected person's life expectancy and the probability that the conservatorship will terminate before the protected person's death; and
- (7) Any other factors the court considers relevant. [L 2004, c 161, pt of §1]

" **§560:5-412 Protective arrangements and single transactions.** (a) If a basis is established for a protective order with respect to an individual, the court, without appointing a conservator, may:

- (1) Authorize, direct, or ratify any transaction necessary or desirable to achieve any arrangement for security, service, or care meeting the foreseeable needs of the protected person, including:
 - (A) Payment, delivery, deposit, or retention of funds or property;
 - (B) Sale, mortgage, lease, or other transfer of property;
 - (C) Purchase of an annuity;
 - (D) Making a contract for life care, deposit contract, or contract for training and education; or
 - (E) Addition to or establishment of a suitable trust, including a trust created under chapter 554B; and
- (2) Authorize, direct, or ratify any other contract, trust, will, or transaction relating to the protected person's property and business affairs, including a settlement of a claim, upon determining that it is in the best interest of the protected person.

(b) In deciding whether to approve a protective arrangement or other transaction under this section, the court shall consider the factors described in section 560:5-411(c).

(c) The court may appoint a special conservator to assist in the accomplishment of any protective arrangement or other

transaction authorized under this section. The special conservator shall have the authority conferred by the order and shall serve until discharged by order after reporting to the court. [L 2004, c 161, pt of §1]

" **§560:5-413 Who may be conservator; priorities.** (a)

Except as otherwise provided in subsection (d), the court, in appointing a conservator, shall consider persons otherwise qualified in the following order of priority:

- (1) A conservator, guardian of the estate, or other like fiduciary appointed or recognized by an appropriate court of any other jurisdiction in which the protected person resides;
- (2) A person nominated as conservator by the respondent, including the respondent's most recent nomination made in a durable power of attorney, if the respondent has attained fourteen years of age and at the time of the nomination had sufficient capacity to express a preference;
- (3) An agent appointed by the respondent to manage the respondent's property under a durable power of attorney;
- (4) The spouse or reciprocal beneficiary of the respondent;
- (5) An adult child of the respondent;
- (6) A parent of the respondent; and
- (7) An adult with whom the respondent has resided for more than six months before the filing of the petition.

(b) A person having priority under subsection (a)(1), (4), (5), or (6) may designate in writing a substitute to serve instead and thereby transfer the priority to the substitute.

(c) With respect to persons having equal priority, the court shall select the one it considers best qualified. The court, acting in the best interest of the protected person, may decline to appoint a person having priority and appoint a person having a lower priority or no priority.

(d) An owner, operator, or employee of a long-term care institution at which the respondent is receiving care shall not be appointed as conservator unless related to the respondent by blood, marriage, adoption, or otherwise ordered by the court. [L 2004, c 161, pt of §1]

" **§560:5-414 Petition for order subsequent to appointment.**

(a) A protected person or a person interested in the welfare of

a protected person may file a petition in the appointing court for an order:

- (1) Requiring bond or collateral or additional bond or collateral, or reducing bond or collateral;
- (2) Requiring an accounting for the administration of the protected person's estate;
- (3) Directing distribution;
- (4) Removing the conservator and appointing a temporary or successor conservator;
- (5) Modifying the type of appointment or powers granted to the conservator if the extent of protection or management previously granted is currently excessive or insufficient or the protected person's ability to manage the estate and business affairs has so changed as to warrant the action; or
- (6) Granting other appropriate relief.

(b) A conservator may petition the appointing court for instructions concerning fiduciary responsibility.

(c) Upon notice and hearing the petition, the court may give appropriate instructions and make any appropriate order. [L 2004, c 161, pt of §1]

" **§560:5-415 Bond.** The court may require a conservator to furnish a bond conditioned upon faithful discharge of all duties of the conservatorship according to law, with sureties as it may specify. Unless otherwise directed by the court, the cost of the bond shall be charged to the protected person's estate and the bond shall be in the amount of the aggregate capital value of the property of the estate in the conservator's control, plus one year's estimated income, and minus the value of assets deposited under arrangements requiring an order of the court for their removal and the value of any real property that the fiduciary, by express limitation, lacks power to sell or convey without court authorization. The court, in place of sureties on a bond, may accept collateral for the performance of the bond, including a pledge of securities or a mortgage of real property. [L 2004, c 161, pt of §1]

" **§560:5-416 Terms and requirements of bond.** (a) The following rules apply to any bond required:

- (1) Sureties and the conservator are jointly and severally liable;
- (2) By executing the bond of a conservator, a surety submits to the jurisdiction of the court that issued letters to the primary obligor in any proceeding

pertaining to the fiduciary duties of the conservator in which the surety is named as a party. Notice of any proceeding shall be sent or delivered to the surety at the address shown in the court records at the place where the bond is filed and to any other address then known to the petitioner;

(3) On petition of a successor conservator or any interested person, a proceeding may be brought against a surety for breach of the obligation of the bond of the conservator; and

(4) The bond of the conservator may be proceeded against until liability under the bond is exhausted.

(b) A proceeding may not be brought against a surety on any matter as to which an action or proceeding against the primary obligor is barred. [L 2004, c 161, pt of §1]

" **§560:5-417 Compensation and expenses.** If not otherwise compensated for services rendered, a guardian, conservator, physician, lawyer for the respondent, lawyer whose services resulted in a protective order or in an order beneficial to a protected person's estate, or any person appointed by the court is entitled to reasonable compensation from the estate, even if no guardian or conservator is appointed. Compensation may be paid and expenses reimbursed without court order. If the court or the family court determines that the compensation is excessive or the expenses are inappropriate, the excessive or inappropriate amount shall be repaid to the estate. [L 2004, c 161, pt of §1]

" **§560:5-418 General duties of conservator.** (a) A conservator, in relation to powers conferred by this article or implicit in the title acquired by virtue of the proceeding, shall be a fiduciary and shall observe the standards of care applicable to a trustee.

(b) A conservator may exercise authority only as necessitated by the limitations of the protected person, and to the extent possible, shall encourage the person to participate in decisions, act in the person's own behalf, and develop or regain the ability to manage the person's estate and business affairs.

(c) In investing an estate, selecting assets of the estate for distribution, and invoking powers of revocation or withdrawal available for the use and benefit of the protected person and exercisable by the conservator, a conservator shall take into account any estate plan of the person known to the

conservator and may examine the will and any other donative, nominative, or other appointive instrument of the person. [L 2004, c 161, pt of §1]

" **§560:5-419 Inventory; records.** (a) Within sixty days after entry of the order of appointment, a conservator shall prepare and file with the appointing court a detailed inventory of the estate subject to the conservatorship, together with an oath or affirmation that the inventory is believed to be complete and accurate as far as information permits.

(b) A conservator shall keep records of the administration of the estate and make them available for examination and copying on reasonable request of an interested person. [L 2004, c 161, pt of §1]

" **§560:5-420 Reports; appointment of kokua kanawai.** (a) A conservator shall file a petition for approval of accounts and report to the court for administration of the estate annually unless the court otherwise directs, upon resignation or removal, upon termination of the conservatorship, and at other times as the court directs. An order allowing an intermediate report of a conservator adjudicates liabilities concerning the matters adequately disclosed in the accounting. An order allowing a final report adjudicates all previously unsettled liabilities relating to the conservatorship, and, subject to appeal and subject to vacation, is final as to all persons with respect to all issues concerning the estate that the court considered or might have considered.

(b) A report shall include:

- (1) A list of the assets of the estate under the conservator's control and a list of the receipts, disbursements, and distributions during the period for which the report is made;
- (2) A list of the services provided to the protected person; and
- (3) Any recommended changes in the budget for the conservatorship as well as a recommendation as to the continued need for conservatorship and any recommended changes in the scope of the conservatorship.

(c) The court may appoint a kokua kanawai to review a report or budget, interview the protected person or conservator, and make any other investigation the court directs. In connection with a report, the court may order a conservator to submit the assets of the estate to an appropriate examination to be made in a manner the court directs. [L 2004, c 161, pt of §1]

" **§560:5-421 Title by appointment.** (a) The appointment of a conservator vests title in the conservator as trustee to all property of the protected person, or to the part thereof specified in the order, held at the time of appointment or thereafter acquired, including title to any property held for the protected person by custodians or attorneys-in-fact. An order vesting title in the conservator to only a part of the property of the protected person creates a conservatorship limited to assets specified in the order.

(b) Letters of conservatorship are evidence of vesting title of the protected person's assets in the conservator. An order terminating a conservatorship transfers title to assets remaining subject to the conservatorship, including any described in the order, to the formerly protected person or the person's successors.

(c) Subject to the requirements of other laws governing the filing or recordation of documents of title to land or other property, letters of conservatorship and orders terminating conservatorships may be filed or recorded to give notice of title as between the conservator and the protected person.

(d) Except as limited in the appointing order, a conservator has the authority to continue, modify, or revoke any financial power of attorney previously created by the protected person.

(e) Upon notice of the appointment of a conservator, all agents acting under a previously created power of attorney by the protected person shall:

- (1) Take no further actions without the direct written authorization of the conservator;
- (2) Promptly report to the conservator as to any action taken under the power of attorney; and
- (3) Promptly account to the conservator for all actions taken under the power of attorney.

(f) Nothing in this section shall be construed to affect previously created medical decision-making authority. Any agent violating this section shall be liable to the protected person's estate for all costs incurred in attempting to obtain compliance, including, but not limited to reasonable conservator and attorney fees and costs. [L 2004, c 161, pt of §1]

" **§560:5-422 Protected person's interest inalienable.** (a) Except as otherwise provided in subsections (c) and (d), the interest of a protected person in property vested in a conservator is not transferable or assignable by the protected

person. An attempted transfer or assignment by the protected person, although ineffective to affect property rights, may give rise to a claim against the protected person for restitution or damages which, subject to presentation and allowance, may be satisfied as provided in section 560:5-429.

(b) Property vested in a conservator by appointment and the interest of the protected person in that property are not subject to levy, garnishment, or similar process for claims against the protected person unless allowed under section 560:5-429.

(c) A person without knowledge of the conservatorship who in good faith and for security or substantially equivalent value receives delivery from a protected person of tangible personal property of a type normally transferred by delivery of possession, is protected as if the protected person or transferee had valid title.

(d) A third party who deals with the protected person with respect to property vested in a conservator is entitled to any protection provided in other law. [L 2004, c 161, pt of §1]

" **§560:5-423 Sale, encumbrance, or other transaction involving conflict of interest.** Any transaction involving the conservatorship estate that is affected by a substantial conflict between the conservator's fiduciary and personal interests is voidable unless the transaction is expressly authorized by the court after notice to interested persons. A transaction affected by a substantial conflict between personal and fiduciary interests includes any sale, encumbrance, or other transaction involving the conservatorship estate entered into by the conservator, the spouse or reciprocal beneficiary, descendant, agent, or lawyer of a conservator, or a corporation or other enterprise in which the conservator has a substantial beneficial interest. [L 2004, c 161, pt of §1]

" **§560:5-424 Protection of person dealing with conservator.**
(a) A person who assists or deals with a conservator in good faith and for value in any transaction other than one requiring a court order under section 560:5-410 or 560:5-411 is protected as though the conservator properly exercised the power. That a person knowingly deals with a conservator does not alone require the person to inquire into the existence of a power or the propriety of the exercise, but restrictions on powers of conservators that are endorsed on letters as provided in section 560:5-110 are effective as to third persons. A person who pays

or delivers assets to a conservator is not responsible for their proper application.

(b) Protection provided by this section extends to any procedural irregularity or jurisdictional defect that occurred in proceedings leading to the issuance of letters and is not a substitute for protection provided to persons assisting or dealing with a conservator by comparable provisions in other law relating to commercial transactions or to simplifying transfers of securities by fiduciaries. [L 2004, c 161, pt of §1]

" **§560:5-425 Powers of conservator in administration.** (a) Except as otherwise qualified or limited by the court in its order of appointment and endorsed on the letters, a conservator has all of the powers granted in this section and any additional powers granted by law to a trustee in this State.

(b) A conservator, acting reasonably and in an effort to accomplish the purpose of the appointment, and without further court authorization or confirmation, may:

- (1) Collect, hold, and retain assets of the estate, including assets in which the conservator has a personal interest and real property in another state, until the conservator considers that disposition of an asset should be made;
- (2) Receive additions to the estate;
- (3) Continue or participate in the operation of any business or other enterprise;
- (4) Acquire an undivided interest in an asset of the estate in which the conservator, in any fiduciary capacity, holds an undivided interest;
- (5) Invest assets of the estate as though the conservator were a trustee;
- (6) Deposit money of the estate in a financial institution, including one operated by the conservator;
- (7) Acquire or dispose of an asset of the estate, including real property in another state, for cash or on credit, at public or private sale, and manage, develop, improve, exchange, partition, change the character of, or abandon an asset of the estate; provided that any sale of real property in the State shall be subject to confirmation pursuant to section 531-29;
- (8) Make ordinary or extraordinary repairs or alterations in buildings or other structures, demolish any improvements, and raze existing or erect new party walls or buildings;

- (9) Subdivide, develop, or dedicate land to public use, make or obtain the vacation of plats and adjust boundaries, adjust differences in valuation or exchange or partition by giving or receiving considerations, and dedicate easements to public use without consideration;
- (10) Enter for any purpose into a lease as lessor or lessee, with or without option to purchase or renew, for a term within or extending beyond the term of the conservatorship;
- (11) Enter into a lease or arrangement for exploration and removal of minerals or other natural resources or enter into a pooling or unitization agreement;
- (12) Grant an option involving disposition of an asset of the estate and take an option for the acquisition of any asset;
- (13) Vote a security, in person or by general or limited proxy;
- (14) Pay calls, assessments, and any other sums chargeable or accruing against or on account of securities;
- (15) Sell or exercise stock subscription or conversion rights;
- (16) Consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise;
- (17) Hold a security in the name of a nominee or in other form without disclosure of the conservatorship so that title to the security may pass by delivery;
- (18) Insure the assets of the estate against damage or loss and the conservator against liability with respect to a third person;
- (19) Borrow money, with or without security, to be repaid from the estate or otherwise and advance money for the protection of the estate or the protected person and for all expenses, losses, and liability sustained in the administration of the estate or because of the holding or ownership of any assets, for which the conservator has a lien on the estate as against the protected person for advances so made;
- (20) Pay or contest any claim, settle a claim by or against the estate or the protected person by compromise, arbitration, or otherwise, and release, in whole or in part, any claim belonging to the estate to the extent the claim is uncollectible;
- (21) Pay taxes, assessments, compensation of the conservator and any guardian, and other expenses

- incurred in the collection, care, administration, and protection of the estate;
- (22) Allocate items of income or expense to income or principal of the estate, as provided by other law, including creation of reserves out of income for depreciation, obsolescence, or amortization or for depletion of minerals or other natural resources;
 - (23) Pay any sum distributable to a protected person or individual who is in fact dependent on the protected person by paying the sum to the distributee or by paying the sum for the use of the distributee:
 - (A) To the guardian of the distributee;
 - (B) To a distributee's custodian under chapter 553A or custodial trustee under chapter 554B; or
 - (C) If there is no guardian, custodian, or custodial trustee, to a relative or other person having physical custody of the distributee;
 - (24) Prosecute or defend actions, claims, or proceedings in any jurisdiction for the protection of assets of the estate and of the conservator in the performance of fiduciary duties; and
 - (25) Execute and deliver all instruments that will accomplish or facilitate the exercise of the powers vested in the conservator.

(c) In investing the estate, and in selecting assets of the estate for distribution under section 560:5-427, in utilizing powers of revocation or withdrawal available for the support of the protected person and exercisable by the conservator or the court, and in exercising any other power vested in them, the conservator and the court shall take into account any known estate plan of the protected person, including the protected person's will, any revocable trust of which the protected person is settlor, and any contract, transfer, or joint ownership arrangement with provisions for payment or transfer of benefits or interests at the protected person's death to another or others which the protected person may have originated. The conservator may examine the will of the protected person. [L 2004, c 161, pt of §1]

" **§560:5-426 Delegation.** (a) A conservator shall not delegate to an agent or another conservator the entire administration of the estate, but a conservator may otherwise delegate the performance of functions that a prudent trustee of comparable skills may delegate under similar circumstances.

(b) The conservator shall exercise reasonable care, skill, and caution in:

- (1) Selecting an agent;
- (2) Establishing the scope and terms of a delegation, consistent with the purposes and terms of the conservatorship;
- (3) Periodically reviewing an agent's overall performance and compliance with the terms of the delegation; and
- (4) Redressing an action or decision of an agent that would constitute a breach of trust if performed by the conservator.

(c) A conservator who complies with subsections (a) and (b) is not liable to the protected person or to the estate or to the protected person's successors for the decisions or actions of the agent to whom a function was delegated.

(d) In performing a delegated function, an agent shall exercise reasonable care to comply with the terms of the delegation.

(e) By accepting a delegation from a conservator subject to the laws of this State, an agent submits to the jurisdiction of the courts of this State. [L 2004, c 161, pt of §1]

" **§560:5-427 Principles of distribution by conservator.** (a) Unless otherwise specified in the order of appointment and endorsed on the letters of appointment, a conservator may expend or distribute income or principal of the estate of the protected person without further court authorization or confirmation for the support, care, education, health, and welfare of the protected person and individuals who are in fact dependent on the protected person, including the payment of child or spousal support, in accordance with the following rules:

- (1) A conservator shall consider recommendations relating to the appropriate standard of support, care, education, health, and welfare for the protected person or an individual who is in fact dependent on the protected person made by a guardian, if any, and, if the protected person is a minor, the conservator shall consider recommendations made by a parent;
- (2) A conservator may not be surcharged for money paid to persons furnishing support, care, education, or benefit to a protected person, or an individual who is in fact dependent on the protected person, in accordance with the recommendations of a parent or guardian of the protected person unless the conservator knows that the parent or guardian derives personal financial benefit therefrom, including relief from any personal duty of support, or the

recommendations are not in the best interest of the protected person;

- (3) In making distributions under this subsection, the conservator shall consider:
 - (A) The size of the estate, the estimated duration of the conservatorship, and the likelihood that the protected person, at some future time, may be fully self-sufficient and able to manage the protected person's own business affairs and the estate;
 - (B) The accustomed standard of living of the protected person and individuals who are in fact dependent on the protected person; and
 - (C) Other money or sources used for the support of the protected person; and
- (4) Money expended under this subsection may be paid by the conservator to any person, including the protected person, as reimbursement for expenditures that the conservator may have made, or in advance for services to be rendered to the protected person if it is reasonable to expect the services will be performed and advance payments are customary or reasonably necessary under the circumstances.

(b) If an estate is ample to provide for the distributions authorized by subsection (a), a conservator for a protected person other than a minor may make gifts that the protected person may have been expected to make, in amounts that do not exceed, in the aggregate, for any calendar year twenty per cent of the income of the estate in that year. [L 2004, c 161, pt of §1]

" **§560:5-428 Death of protected person.** If a protected person dies, the conservator, with reasonable promptness shall deliver any will of the protected person that may have come into the conservator's possession to a person able to secure its probate or, if none is known, deposit the will with an appropriate court. The conservator shall inform the personal representative or beneficiary named in the will of the delivery, and retain the estate for delivery to the personal representative of the decedent or to another person entitled to it. A person who knowingly and wilfully fails to so deliver or deposit a will is liable to any person aggrieved for any damages that may be sustained by the failure, and the court may award treble damages. A person who wilfully refuses to deliver a will after being ordered by the court in a proceeding brought for the purpose of compelling delivery is subject to penalty for

contempt of court. Proceedings under this section shall be brought in the probate proceeding relating to the will. [L 2004, c 161, pt of §1]

" **§560:5-429 Presentation and allowance of claims.** (a) A conservator may pay, or secure by encumbering assets of the estate, claims against the estate or against the protected person arising before or during the conservatorship upon their presentation and allowance in accordance with the priorities stated in subsection (d). A claimant may present a claim by:

- (1) Sending or delivering to the conservator a written statement of the claim, indicating its basis, the name and address of the claimant, and the amount claimed; or
- (2) Filing a written statement of the claim, in a form acceptable to the court, with the clerk of court and sending or delivering a copy of the statement to the conservator.

(b) A claim is deemed presented on receipt of the written statement of claim by the conservator or the filing of the claim with the court, whichever first occurs. A presented claim is allowed if it is not disallowed by written statement sent or delivered by the conservator to the claimant within sixty days after its presentation. The conservator, before payment, may change an allowance to a disallowance in whole or in part, but not after allowance under a court order or judgment or an order directing payment of the claim. The presentation of a claim tolls the running of any statute of limitations relating to the claim until thirty days after its disallowance.

(c) A claimant whose claim has not been paid may petition the court for determination of the claim at any time before it is barred by a statute of limitations and, upon due proof, procure an order for its allowance, payment, or security by encumbering assets of the estate. If a proceeding is pending against a protected person at the time of appointment of a conservator or is initiated against the protected person thereafter, the moving party shall give to the conservator notice of any proceeding that could result in creating a claim against the estate.

(d) If it appears that the estate is likely to be exhausted before all existing claims are paid, the conservator shall distribute the estate in money or in kind in payment of claims in the following order:

- (1) Costs and expenses of administration;
- (2) Claims of the federal or state government having priority under other law;

- (3) Claims incurred by the conservator for support, care, education, health, and welfare previously provided to the protected person or individuals who are in fact dependent on the protected person;
- (4) Claims arising before the conservatorship; and
- (5) All other claims.

(e) Preference shall not be given in the payment of a claim over any other claim of the same class, and a claim due and payable shall not be preferred over a claim not due.

(f) If assets of the conservatorship are adequate to meet all existing claims, the court, acting in the best interest of the protected person, may order the conservator to grant a security interest in the conservatorship estate for the payment of any or all claims at a future date.

(g) Nothing in this section affects or prevents:

- (1) Any proceeding to enforce any mortgage, pledge, or other lien upon property of the estate; or
- (2) To the limits of the insurance protection only, any proceeding to establish liability of the protected person for which the protected person is protected by liability insurance. [L 2004, c 161, pt of §1]

" **§560:5-430 Personal liability of conservator.** (a) Unless otherwise provided in the contract, a conservator is not personally liable on a contract properly entered into in a fiduciary capacity in the course of administration of the estate unless the conservator fails to reveal in the contract the representative capacity and identify the estate.

(b) A conservator is personally liable for obligations arising from ownership or control of property of the estate or for other acts or omissions occurring in the course of administration of the estate only if personally at fault.

(c) Claims based on contracts entered into by a conservator in a fiduciary capacity, obligations arising from ownership or control of the estate, and claims based on torts committed in the course of administration of the estate may be asserted against the estate by proceeding against the conservator in a fiduciary capacity, whether or not the conservator is personally liable therefor.

(d) A question of liability between the estate and the conservator personally may be determined in a proceeding for accounting, surcharge, or indemnification, or in another appropriate proceeding or action.

(e) A conservator is not personally liable for any environmental condition on or injury resulting from any environmental condition on land solely by reason of an

acquisition of title under section 560:5-421. [L 2004, c 161, pt of §1]

" **§560:5-431 Termination of proceedings.** (a) A conservatorship terminates upon the death of the protected person or upon order of the court. Unless created for reasons other than that the protected person is a minor, a conservatorship created for a minor also terminates when the protected person attains majority or is emancipated.

(b) Within sixty days of the death of the protected person, the attainment of majority by a minor, or upon order of the court, the conservator shall file a final report and petition for discharge.

(c) On petition of a protected person, a conservator, or another person interested in a protected person's welfare, the court may terminate the conservatorship if the protected person no longer needs the assistance or protection of a conservator. Termination of the conservatorship does not affect a conservator's liability for previous acts or the obligation to account for funds and assets of the protected person.

(d) Except as otherwise ordered by the court for good cause, before terminating a conservatorship, the court shall follow the same procedures to safeguard the rights of the protected person that apply to a petition for conservatorship. Upon the establishment of a prima facie case for termination, the court shall order termination unless it is proved that continuation of the conservatorship is in the best interest of the protected person.

(e) Upon termination of a conservatorship and whether or not formally distributed by the conservator, title to assets of the estate passes to the formerly protected person or the person's successors. The order of termination shall provide for expenses of administration and direct the conservator to execute appropriate instruments to evidence the transfer of title or confirm a distribution previously made and to file a final report and a petition for discharge upon approval of the final report.

(f) The court shall enter a final order of discharge upon the approval of the final report and satisfaction by the conservator of any other conditions placed by the court on the conservator's discharge. [L 2004, c 161, pt of §1]

" **§560:5-432 Payment of debt and delivery of property to foreign conservator without local proceeding.** (a) A person who is indebted to, or has the possession of tangible or intangible

property of a protected person, may pay the debt or deliver the property to a foreign conservator, guardian of the estate, or other court-appointed fiduciary of the state of residence of the protected person. Payment or delivery shall be made only upon proof of appointment and presentation of an affidavit made by or on behalf of the fiduciary stating that a protective proceeding relating to the protected person is not pending in this State and the foreign fiduciary is entitled to payment or to receive delivery.

(b) Payment or delivery in accordance with subsection (a) discharges the debtor or possessor, absent knowledge of any protective proceeding pending in this State. [L 2004, c 161, pt of §1]

" **§560:5-433 Foreign conservator; proof of authority; bond; powers.** If a conservator has not been appointed in this State and a petition in a protective proceeding is not pending in this State, a conservator appointed in the state in which the protected person resides may file in a court of this State, in a circuit in which property belonging to the protected person is located, authenticated copies of letters of appointment and of any bond. Thereafter, the conservator may exercise all powers of a conservator appointed in this State as to property in this State and may maintain actions and proceedings in this State subject to any conditions otherwise imposed upon nonresident parties. [L 2004, c 161, pt of §1]

"PART 5. POWERS OF ATTORNEY

§§560:5-501, 502 REPEALED. L 1989, c 270, §2.

Cross References

Uniform durable power of attorney act, see chapter 551D.

"[PART 6.] INCAPACITATED PERSONS STERILIZATION RIGHTS

§560:5-601 Definitions. As used in this part:

"Adult" means an individual who has attained the age of eighteen years.

"Court" means any duly constituted court.

"Incapacitated person" means a person as defined in section 560:5-102.

"Informed assent" means a process by which a ward who lacks the legal capacity to consent to sterilization is given a fair

opportunity to acknowledge the nature, risks, and consequences of the procedure and, insofar as the ward is able to, indicates willingness and choice to undergo sterilization.

"Interested person" means an interested, responsible adult, including but not limited to a public official, the legal guardian, spouse or reciprocal beneficiary, parent, legal counsel, adult child, or next of kin of a person allegedly mentally ill, mentally deficient, or as otherwise provided in this chapter.

"Judge" means any judge of the family court or per diem judge appointed by the chief justice as provided in section 604-2.

"Licensed physician" means any person who is licensed to practice medicine or osteopathic medicine in Hawaii under chapter 453.

"Records" include, but is not limited to, all written clinical information, observations and reports, or fiscal documents relating to a ward who has undergone or is about to undergo sterilization and which is related to the sterilization.

"Sterilization" means any medical or surgical operation or procedure which can be expected to result in a patient's permanent inability to reproduce.

"Ward" means an incapacitated person for whom a guardian has been appointed and who, because of the terms of the appointment of the guardian, lacks the legal power to consent to sterilization. [L 1986, c 81, pt of §2; am L 1989, c 130, §3; am L 1997, c 383, §19; am L 2004, c 161, §28; am L 2005, c 22, §38; am L 2009, c 11, §66]

Revision Note

In definition of "judge", "604-2" substituted for "604-1".

Note

The 2009 amendment is retroactive to April 3, 2008. L 2009, c 11, §76(2).

" **[\$560:5-602] Sterilization of wards.** Persons who are wards and who have attained the age of eighteen years have the legal right to be sterilized when at least thirty days, but not more than one hundred eighty days, have passed following the entry of an order providing for sterilization. In no event, however, shall wards be sterilized without court approval in accordance with this Part unless sterilization occurs as part of emergency medical treatment. [L 1986, c 81, pt of §2]

" **[\$560:5-603] Initiation of proceeding.** The ward or any interested person may file a petition with the family court, in the circuit in which the ward resides, alleging that the ward meets the requirements for sterilization. [L 1986, c 81, pt of §2]

" **[\$560:5-604] Appointment of guardian ad litem.** The court, upon receipt of the petition, shall appoint a guardian ad litem to represent the ward. [L 1986, c 81, pt of §2]

" **[\$560:5-605] Notice.** The court shall order that the petition be served personally upon the ward, the guardian, and the guardian ad litem for the ward, and such other persons as the court may designate. [L 1986, c 81, pt of §2]

" **[\$560:5-606] Referral to reproductive rights [protection] committee.** The court shall refer the petition to the reproductive rights [protection] committee for review and recommendation. [L 1986, c 81, pt of §2]

" **[\$560:5-607] Hearing.** (a) The court shall set a hearing on the petition upon receipt of the recommendations of the reproductive rights [protection] committee and shall order that notice of the time and place of hearing be provided to the ward, the guardian, and the guardian ad litem for the ward and such other persons as the court may designate.

(b) The ward is entitled to be present at the hearing, and to see and hear all evidence bearing on the petition. The ward is entitled to be represented by an attorney, in addition to the court-appointed guardian ad litem, to present evidence, to cross examine witnesses including any person submitting a report, and members of the reproductive rights [protection] committee. The ward may be absent from the hearing if the ward is unwilling or is unable to participate. [L 1986, c 81, pt of §2]

" **[\$560:5-608] Criteria.** (a) The ward may be sterilized if the court finds by clear and convincing evidence that the ward is functionally capable of giving and withholding informed assent to the proposed sterilization and has given informed assent to the proposed sterilization, or that the ward is functionally incapable of giving or withholding informed assent but sterilization is in the best interests of the ward.

(b) The ward assents to sterilization if the ward manifests an uncoerced willingness to undergo sterilization after being fully informed of the nature, risks, consequences, and alternatives to the procedure. A ward who lacks the

capacity to understand the nature, risks, consequences, and alternatives to the procedure, or who lacks the capacity to manifest an uncoerced willingness or unwillingness to sterilization cannot assent to the procedure. To determine whether the ward is capable of giving informed assent, the court shall consider whether the ward understands and appreciates:

- (1) The causal relationship between sexual intercourse and pregnancy or parenthood;
- (2) The causal relationship between sterilization and the impossibility of pregnancy or parenthood;
- (3) The nature of the sterilization operation including the pain, discomfort, and risks of the procedure;
- (4) The probable permanency and irreversibility of the sterilization procedure;
- (5) All medically approved alternatives to sterilization;
- (6) The consequences of initiating pregnancy or becoming pregnant, mothering or fathering a child, and becoming a parent; and
- (7) The power to change one's mind about being sterilized at any time before the procedure is performed.

To assure the adequacy of the ward's informed assent, evidence shall be presented showing that the ward received appropriate counseling from the physician who will perform the sterilization and at least one other qualified independent counselor such as a social worker with a master's degree, a clinical nurse specialist, or a licensed psychologist or psychiatrist. The counseling shall cover the benefits or advantages to sterilization and conversely the losses and disadvantages of sterilization including the feelings, values, and lifestyle changes attendant with sterilization.

Persons who attest in court as to the soundness of informed assent shall comment on and assess the ward's understanding of each issue and shall comment on and assess the degree to which the prospective patient expresses an uncoerced willingness to accept each risk and consequence. Any reservations or resistance expressed or otherwise evidenced by the prospective patient shall be disclosed to the court.

(c) The ward may be sterilized if the court finds by clear and convincing evidence that:

- (1) The ward is functionally incapable of giving or withholding informed assent and that the incapacity is not likely to change in the foreseeable future; and
 - (2) Sterilization is in the best interest of the ward.
- (d) To determine whether sterilization is in the best interest of the ward the court shall consider:
- (1) Whether the ward is likely to be fertile. Fertility may be presumed if the medical evidence indicates

normal development of the sexual organs, and the evidence does not otherwise raise doubts about fertility;

- (2) Whether the ward will suffer severe physical or psychological harm if the ward were to parent a child and, conversely, whether the ward will suffer severe physical or psychological harm from the sterilization;
- (3) The likelihood that the ward will engage in sexual intercourse;
- (4) The feasibility and medical advisability of less restrictive alternatives to sterilization both at the present time and under foreseeable future circumstances;
- (5) Whether scientific or medical advances may occur within the foreseeable future which will make possible the improvement of the ward's condition or result in less drastic contraceptive measures; and
- (6) Whether the petitioners are seeking sterilization in good faith, their primary concern being for the best interest of the ward rather than their own or the public's convenience. [L 1986, c 81, pt of §2]

" **[§560:5-609] Appeals.** Upon entry of the decree the court shall stay the effect of a decision allowing sterilization until the expiration of time within which to file an appeal pursuant to the Hawaii Rules of Civil Procedure. [L 1986, c 81, pt of §2]

" **§560:5-610 Reproductive rights protection committee.** (a) There is established the reproductive rights protection committee within the department of health for administrative purposes. The committee shall consist of not fewer than five nor more than seven persons appointed, with the consent of the senate, by the governor for staggered terms as provided in section 26-34. The state council on developmental disabilities shall provide the governor with a list of nominees. The governor shall not be limited to the nominees provided in appointing the members of the committee. The committee shall include a person with a disability or the parent or guardian of such a person and persons from at least the following disciplines:

- (1) Law;
- (2) Medicine;
- (3) Theological or philosophical ethics;
- (4) Social work; and
- (5) Psychology or psychiatry.

(b) The committee shall review and make recommendations to the court on all petitions for sterilization. In making its

recommendation to the court, the committee shall investigate and determine whether the ward is capable of giving informed assent and, if not, whether sterilization is in the best interests of the ward. The committee shall consider the criteria set forth in section 560:5-608, in determining whether the ward is capable of providing informed assent or whether sterilization is in the best interest of the ward.

(c) The committee or designated members of the committee may interview or request written statements from the ward, physicians, relatives, concerned individuals, and others who, in the committee members' judgment, possess relevant information concerning the petition for sterilization. Conversely, the ward, the guardian ad litem, the petitioner, or any other person may request to speak to the committee or submit a written statement to the committee concerning the proposed sterilization.

(d) The committee shall submit a report in writing to the court containing its recommendation together with supporting documentation. Committee members who do not concur with the majority recommendation also shall submit a report in writing to the court detailing the basis for their dissent.

(e) The members of the committee shall serve without pay but shall be reimbursed for their actual and necessary expenses, including travel expenses incurred in carrying out their duties. [L 1986, c 81, pt of §2; am L 1991, c 298, §1; am L 1996, c 126, §1; am L 2001, c 175, §9]

" **[\$560:5-611] Confidentiality of and access to records.**

(a) All wards affected by this Part shall be informed of their right to and be entitled to copies of all portions of any records relating to the sterilization or proposed sterilization.

(b) All records relating to sterilization or proposed sterilization of the ward shall be confidential and shall not be released to third parties except in the following circumstances:

- (1) When the ward or guardian of the ward has signed a written release for the specific information; or
- (2) When the ward or guardian designates a third party as either a payer or copayer for the sterilization and consents to release information which is necessary to establish reimbursement eligibility.

(c) A charge, not to exceed the actual cost of duplication, may be assessed for copies of any records that need to be reproduced.

(d) When records are released to a third party, it shall be unlawful for the party to disclose any part of the record that contains personally identifiable information without the written consent of the person who is the subject of the record.

The release of the record to the third party shall be accompanied by the following statement: "This information has been disclosed to you from records whose confidentiality is protected by the state law which limits disclosure of personally identifiable information to additional parties without the express written consent of the subject of the record".

(e) Violations of this section shall be subject to action under section 571-81. [L 1986, c 81, pt of §2]

" **[§560:5-612] No liability arising from sterilization; exception.** No physician, hospital, members of the reproductive rights [protection] committee, the State or its agents, nor any other person acting in accordance with this Part shall be liable to anyone, either civilly or criminally, for having performed or authorized the performance of the individual sterilization, except for liability of the hospital or physician caused by the negligent performance of the sterilization, in accordance with laws covering such negligence. [L 1986, c 81, pt of §2]

"ARTICLE VI NONPROBATE TRANSFERS

PART 1. MULTIPLE-PARTY ACCOUNTS

§560:6-101 Definitions. In this Part, unless the context otherwise requires:

"Account" means a contract of deposit of funds between a depositor and a financial institution, and includes a checking account, savings account, certificate of deposit, share account and other like arrangement;

"Beneficiary" means a person named in a trust account as one for whom a party to the account is named as trustee;

"Financial institution" means any organization authorized to do business under state or federal laws relating to financial institutions, including, without limitation, banks, savings banks, savings and loan companies or associations, financial services loan companies, and credit unions;

"Joint account" means an account payable on request presently or in the future to one or more of two or more parties whether or not mention is made of any right of survivorship;

A "multiple-party account" is any of the following types of account: (1) a joint account, (2) a payable-on-death account, or (3) a trust account. It does not include accounts established for deposit of funds of a partnership, joint venture, or other association for business purposes, or accounts controlled by one or more persons as the duly authorized agent or trustee for a corporation, unincorporated association,

charitable or civic organization or a regular fiduciary or trust account where the relationship is established other than by deposit agreement;

"Net contribution" of a party to a joint account as of any given time is the sum of all deposits thereto made by or for the party, less all withdrawals made by or for the party which have not been paid to or applied to the use of any other party, plus a pro rata share of any interest or dividends included in the current balance. The term includes, in addition, any proceeds of deposit life insurance added to the account by reason of the death of the party whose net contribution is in question;

"Party" means a person who, by the terms of the account, has a present right, subject to request, to payment from a multiple-party account. A payable-on-death payee or beneficiary of a trust account is a party only after the account becomes payable to the payable-on-death payee or beneficiary by reason of the payable-on-death payee's or beneficiary's surviving the original payee or trustee. Unless the context otherwise requires, it includes a guardian, conservator, personal representative, or assignee, of a party. It also includes a person identified as a trustee of an account for another whether or not a beneficiary is named, but it does not include any named beneficiary unless the beneficiary has a present right of withdrawal;

"Payment" of sums on deposit includes withdrawal, payment on check or other directive of a party, and any pledge of sums on deposit by a party and any set-off, or reduction or other disposition of all or part of an account pursuant to a pledge;

"P.O.D. account" ("payable on death") means an account payable on request to one person during lifetime and on the person's death to one or more payable-on-death payees, or to one or more persons during their lifetimes and on the death of all of them to one or more payable-on-death payees;

"P.O.D. payee" means a person designated on a payable-on-death account as one to whom the account is payable on request after the death of one or more persons;

"Proof of death" includes a death certificate or record or report which is prima facie proof of death under section 560:1-107;

"Request" means a proper request for withdrawal, or a check or order for payment, which complies with all conditions of the account, including special requirements concerning necessary signatures and regulations of the financial institution; but if the financial institution conditions withdrawal or payment on advance notice, for purposes of this Part the request for withdrawal or payment is treated as immediately effective and a

notice of intent to withdraw is treated as a request for withdrawal;

"Sums on deposit" means the balance payable on a multiple-party account including interest, dividends, and in addition any deposit life insurance proceeds added to the account by reason of the death of a party;

"Trust account" means an account in the name of one or more parties as trustee for one or more beneficiaries where the relationship is established by the form of the account and the deposit agreement with the financial institution and there is no subject of the trust other than the sums on deposit in the account; it is not essential that payment to the beneficiary be mentioned in the deposit agreement. A trust account does not include a regular trust account under a testamentary trust or a trust agreement which has significance apart from the account, or a fiduciary account arising from a fiduciary relation such as attorney-client;

"Withdrawal" includes payment to a third person pursuant to check or other directive of a party. [L 1976, c 200, pt of §1; gen ch 1985; am L 1989, c 266, §3; am L 2005, c 22, §39]

Cross References

Effect and transition of L 1996, c 288 amendments, see §560:8-201.

" **§560:6-102 Ownership as between parties, and others; protection of financial institutions.** The provisions of sections 560:6-103 to 560:6-105 concerning beneficial ownership as between parties and payable-on-death payees, or as between parties or beneficiaries of multiple-party accounts, are relevant only to controversies between these persons and their creditors and other successors, and have no bearing on the power of withdrawal of these persons as determined by the terms of account contracts. The provisions of sections 560:6-108 to 560:6-113 govern the liability of financial institutions who make payments pursuant thereto, and their setoff rights. [L 1976, c 200, pt of §1]

" **§560:6-103 Ownership during lifetime.** (a) A joint account belongs, during the lifetime of all parties, to the parties in proportion to the net contributions by each to the sums on deposit, unless there is clear and convincing evidence of a different intent.

(b) A payable-on-death account belongs to the original payee during the payee's lifetime and not to the payable-on-death payee or payees; if two or more parties are named as original payees, during their lifetimes rights as between them are governed by subsection (a) of this section.

(c) Unless a contrary intent is manifested by the terms of the account or the deposit agreement or there is other clear and convincing evidence of an irrevocable trust, a trust account

belongs beneficially to the trustee during the trustee's lifetime, and if two or more parties are named as trustee on the account, during their lifetimes beneficial rights as between them are governed by subsection (a) of this section. If there is an irrevocable trust, the account belongs beneficially to the beneficiary. [L 1976, c 200, pt of §1; gen ch 1985]

" **§560:6-104 Right of survivorship.** (a) Sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties as against the estate of the decedent unless there is clear and convincing evidence of a different intention at the time the account is created. If there are two or more surviving parties, their respective ownerships during lifetime shall be in proportion to their previous ownership interests under section 560:6-103 augmented by an equal share for each survivor of any interest the decedent may have owned in the account immediately before the decedent's death; and the right of survivorship continues between the surviving parties.

(b) If the account is a payable-on-death account,

(1) On death of one of two or more original payees the rights to any sums remaining on deposit are governed by subsection (a) of this section.

(2) On death of the sole original payee or of the survivor of two or more original payees, any sums remaining on deposit belong to the payable-on-death payee or payees if surviving, or to the survivor of them if one or more die before the original payee; if two or more payable-on-death payees survive, there is a right of survivorship in the event of death of a payable-on-death payee thereafter.

(c) If the account is a trust account,

(1) On death of one of two or more trustees, the rights to any sums remaining on deposit are governed by subsection (a) of this section, and

(2) On death of the sole trustee or the survivor of two or more trustees, any sums remaining on deposit belong to the person or persons named as beneficiaries, if surviving, or to the survivor of them if one or more die before the trustee, unless there is clear evidence of a contrary intent; if two or more beneficiaries survive, there is a right of survivorship in event of death of any beneficiary thereafter.

(d) In other cases, the death of any party to a multiple-party account has no effect on beneficial ownership of the account other than to transfer the rights of the decedent as part of the decedent's estate.

(e) A right of survivorship arising from the express terms of the account or under this section, or a beneficiary designation in a trust account, or a payable-on-death payee designation, cannot be changed by will. [L 1976, c 200, pt of §1; gen ch 1985]

" **§560:6-105 Effect of written notice to financial institution.** The provisions of section 560:6-104 as to rights of survivorship are determined by the form of the account at the death of a party. This form may be altered by written order given by all parties to the financial institution to change the form of the account or to stop or vary payment under the terms of the account. The order or request must be signed by all parties, received by the financial institution during the parties' lifetime, and not countermanded by other written order of the parties during their lifetime. [L 1976, c 200, pt of §1]

" **§560:6-106 Accounts and transfers nontestamentary.** Any transfers resulting from the application of section 560:6-104 are effective by reason of the account contracts involved and this statute and are not to be considered as testamentary or subject to Articles I to IV of this chapter except as provided in section 560:6-107. [L 1976, c 200, pt of §1]

" **§560:6-107 Rights against multiple-party accounts.** A transfer to a survivor of a multiple-party account can be set aside, to the extent described below, in the event the assets in the hands of the personal representative of the deceased party are insufficient to pay taxes, expenses of administration, and homestead and family allowances under sections 560:2-402 and 560:2-404. A surviving party, payable-on-death payee, or beneficiary who receives payment from a multiple-party account after the death of a deceased party may, on application of the personal representative of the deceased party's estate, the surviving spouse or reciprocal beneficiary of the deceased party, or one acting for a dependent or minor child of the deceased party, be required to account to said personal representative for the deceased party's net contribution to the account to the extent necessary to discharge the insufficiency described above. No proceeding to assert this right shall be commenced later than two years following the death of the deceased party. Sums recovered hereunder shall be administered as part of the decedent's estate. This section shall not affect the right of a financial institution to make payment on multiple-party accounts according to the terms thereof, or make it liable to the estate of a deceased party unless before payment either the institution has been served with process in a

proceeding by the personal representative or the institution has actual knowledge that making payment will jeopardize the payment of the taxes, expenses and allowances above mentioned. [L 1976, c 200, pt of §1; am L 1977, c 144, §51; am L 1996, c 288, §4; am L 1997, c 383, §19]

" **§560:6-108 Financial institution protection; payment on signature of one party.** Financial institutions may enter into multiple-party accounts to the same extent that they may enter into single-party accounts. Subject to the provision of sections 236D-12 and 560:6-107, any multiple-party account may be paid, on request and according to its terms, to any one or more of the parties. A financial institution shall not be required to inquire as to the source of funds received for deposit to a multiple-party account, or to inquire as to the proposed application of any sum withdrawn from an account. [L 1976, c 200, pt of §1; am L 1983, c 217, §8]

" **§560:6-109 Financial institution protection; payment after death or disability; joint account.** Subject to the provisions of sections 236D-12 and 560:6-107 any sums in a joint account may be paid, on request and according to its terms, to any party without regard to whether any other party is incapacitated or deceased at the time the payment is demanded; but payment may not be made to the personal representative or heirs of a deceased party unless proofs of death are presented to the financial institution showing that the decedent was the last surviving party or unless there is no right of survivorship under section 560:6-104. [L 1976, c 200, pt of §1; am L 1983, c 217, §9]

" **§560:6-110 Financial institution protection; payment of payable-on-death account.** Any payable-on-death account may be paid, on request, to any original party to the account. Payment may be made, on request, to the payable-on-death payee or to the personal representative or heirs of a deceased payable-on-death payee upon presentation to the financial institution of proof of death showing that the payable-on-death payee survived all persons named as original payees. Payment may be made to the personal representative or heirs of a deceased original payee if proof of death is presented to the financial institution showing that his decedent was the survivor of all other persons named on the account either as an original payee or as payable-on-death payee. [L 1976, c 200, pt of §1]

" **§560:6-111 Financial institution protection; payment of trust account.** Subject to the provisions of section 560:6-107,

any trust account may be paid, on request and according to its terms, to any trustee. Unless the financial institution has received written notice or has actual knowledge that the beneficiary has a vested interest not dependent upon the beneficiary's surviving the trustee, payment may be made to the personal representative or heirs of a deceased trustee if proof of death is presented to the financial institution showing that the deceased trustee was the survivor of all other persons named on the account either as trustee or beneficiary. A trust account may be paid, on request and according to its terms, to the beneficiary upon presentation to the financial institution of proof of death showing that the beneficiary or beneficiaries survived all persons named as trustees. [L 1976, c 200, pt of §1; gen ch 1985]

" **§560:6-112 Financial institution protection; discharge.**

Payment made pursuant to section 560:6-108, 560:6-109, 560:6-110, or 560:6-111 discharges the financial institution from all claims for amounts so paid whether or not the payment is consistent with the beneficial ownership of the account as between parties, payable-on-death payees, or beneficiaries, or their successors. The protection here given does not extend to payments made after a financial institution has received written notice from any party or has actual knowledge that withdrawals in accordance with the terms of the account should not be permitted. Unless the notice is withdrawn by the person giving it, the successor of any deceased party must concur in any demand for withdrawal if the financial institution is to be protected under this section. No other notice or any other information shown to have been available to a financial institution shall affect its right to the protection provided here. The protection here provided shall have no bearing on the rights of parties in disputes between themselves or their successors concerning the beneficial ownership of funds in, or withdrawn from, multiple-party accounts. [L 1976, c 200, pt of §1]

" **§560:6-113 Financial institution protection; set-off.**

Without qualifying any other statutory right to set-off or lien and subject to any contractual provision, if a party to a multiple-party account is indebted to a financial institution, the financial institution has a right to set-off against the account in which the party has or had immediately before the party's death a present right of withdrawal. The amount of the account subject to set-off is the deceased party's net contribution to the account, and in the absence of proof of net contributions, to an equal share with all parties having present

rights of withdrawal. [L 1976, c 200, pt of §1; am L 1977, c 144, §52; gen ch 1985]

"PART 2. [RESERVED]

§560:6-201 [Reserved]

**"ARTICLE VII
TRUST ADMINISTRATION**

Cross References

Effect and transition of L 1996, c 288 amendments, see §560:8-201.

Rules of Court

Trust proceedings generally, see Hawaii Probate Rules, part D.

PART 1. TRUST REGISTRATION

§560:7-101 Duty to register trusts. The trustee of a trust having its principal place of administration in this State who is required to register the trust under section 560:1-108 shall register the trust in the court in the judicial circuit either of the principal place of administration of the trust, or, in the case of a trust relating only to land, of the place where the land is located. Unless otherwise designated in the trust instrument, the principal place of administration of a trust is the trustee's usual place of business where the records pertaining to the trust are kept, or at the trustee's residence if the trustee has no such place of business. In the case of cotrustees, the principal place of administration, if not otherwise designated in the trust instrument, is (1) the usual place of business of the corporate trustee if there is but one corporate cotrustee, or (2) the usual place of business or residence of the individual trustee who is a professional fiduciary if there is but one such person and no corporate cotrustee, and otherwise (3) the usual place of business or residence of any of the cotrustees as agreed upon by them. The duty to register under this Part does not apply to the trustee of a trust if registration would be inconsistent with the retained jurisdiction of a foreign court from which the trustee cannot obtain release. [L 1976, c 200, pt of §1; am L 1977, c 144, §53; gen ch 1985]

Cross References

Land trusts, see chapter 558.

" **§560:7-102 Registration procedures.** Registration shall be accomplished by filing a statement indicating the name and address of the trustee in which it acknowledges the trusteeship. The statement shall indicate whether the trust has been registered elsewhere. The statement shall identify the trust:

- (1) In the case of a testamentary trust, by the name of the testator and the date and place of domiciliary probate;
- (2) In the case of a written inter vivos trust, by the name of each settlor and the original trustee and the date of the trust instrument.

If a trust has been registered elsewhere, registration in this State is ineffective until the earlier registration is released by order of the court where prior registration occurred, or an instrument executed by the trustee and all beneficiaries, filed with the registration in this State. [L 1976, c 200, pt of §1]

" **§560:7-103 Effect of registration.** (a) By registering a trust, or accepting the trusteeship of a registered trust, the trustee submits personally to the jurisdiction of the court in any proceeding under section 560:7-201 of this chapter relating to the trust that may be initiated by any interested person while the trust remains registered. Notice of any proceeding shall be delivered to the trustee in the manner required for the service of process by rule of court or, in the absence of any such rule, by mailing it to the trustee by ordinary first class mail at the trustee's address as listed in the registration or as thereafter reported to the court and to the trustee's address as then known to the petitioner.

(b) To the extent of their interests in the trust, all beneficiaries of a trust properly registered in this State are subject to the jurisdiction of the court of registration for the purposes of proceedings under section 560:7-201, provided notice is given pursuant to section 560:1-401. [L 1976, c 200, pt of §1; gen ch 1985]

" **§560:7-104 Effect of failure to register.** A trustee who fails to register a trust in a proper court as required by this Part, for purposes of any proceedings initiated by a beneficiary of the trust prior to registration, is subject to the personal jurisdiction of any court in which the trust could have been registered. In addition, any trustee who, within thirty days after receipt of a written demand by a settlor or beneficiary of the trust, fails to register a trust as required by this Part is

subject to removal and denial of compensation or to surcharge as the court may direct. Except as provided in section 560:1-108, a provision in the terms of the trust purporting to excuse the trustee from the duty to register, or directing that the trust or trustee shall not be subject to the jurisdiction of the court, is ineffective. [L 1976, c 200, pt of §1]

" **§560:7-105 [Reserved]**

" **§560:7-106 Release of registration.** Upon the termination and distribution of a registered trust, the trustee shall notify the court in which it is registered of such termination and distribution, whereupon the court may remove the record of the trust from its current registry of trusts. [L 1976, c 200, pt of §1]

"PART 2. JURISDICTION OF COURT CONCERNING TRUSTS

§560:7-201 Court; jurisdiction of trusts. (a) The court has jurisdiction of proceedings initiated by trustees and interested persons concerning the internal affairs of trusts. Proceedings which may be maintained under this section are those concerning the administration and distribution of trusts, the declaration of rights and the determination of other matters involving trustees and beneficiaries of trusts. These include, but are not limited to, proceedings to:

- (1) Appoint or remove a trustee;
- (2) Review trustees' fees and to review and settle interim or final accounts;
- (3) Ascertain beneficiaries, to determine any question arising in the administration or distribution of any trust including questions of construction of trust instruments, to instruct trustees, and to determine the existence or nonexistence of any immunity, power, privilege, duty or right; and
- (4) Release registration of a trust.

(b) Neither registration of a trust nor a proceeding under this section result in continuing supervisory proceedings. The management and distribution of a trust estate, submission of accounts and reports to beneficiaries, payment of trustees' fees and other obligations of a trust, acceptance and change of trusteeship, and other aspects of the administration of a trust shall proceed expeditiously consistent with the terms of the trust, free of judicial intervention and without order, approval or other action of any court, subject to the jurisdiction of the court as invoked by interested persons or as otherwise exercised pursuant to law. [L 1976, c 200, pt of §1]

" **§560:7-202 Trust proceedings; venue.** Venue for proceedings involving registered trusts is in the judicial circuit which is the place of registration. Venue for proceedings involving trusts not registered in this State is any place where the trust properly could have been registered, and as otherwise provided by the Hawaii Rules of Civil Procedure. [L 1976, c 200, pt of §1]

" **§560:7-203 Trust proceedings; dismissal of matters relating to foreign trusts.** The court will not, over the objection of a party, entertain proceedings concerning the internal affairs of a trust registered or having its principal place of administration in another state, unless (1) all appropriate parties could not be bound by litigation in the courts of the state where the trust is registered or has its principal place of administration or (2) the interests of justice otherwise would seriously be impaired. The court may condition a stay or dismissal of a proceeding under this section on the consent of any party to jurisdiction of the state in which the trust is registered or has its principal place of business, or the court may grant a continuance or enter any other appropriate order. [L 1976, c 200, pt of §1]

" **§560:7-204 Court; concurrent jurisdiction of litigation involving trusts and third parties.** The court of the judicial circuit in which the trust is required to be registered has concurrent jurisdiction with other courts of this State of actions and proceedings to determine the existence or nonexistence of trusts created other than by will, of actions by or against creditors or debtors of trusts, and of other actions and proceedings involving trustees and third parties. Venue is determined by the rules generally applicable to civil actions. [L 1976, c 200, pt of §1]

" **§560:7-205 Proceedings for review of employment of agents and review of compensation of trustee and employees of trust.** On petition of an interested person, after notice to all interested persons, the court may review the propriety of employment of any person by a trustee including any attorney, auditor, investment advisor or other specialized agent or assistant, the reasonableness of the compensation of any person so employed, the reasonableness of the determination of trust estate value or income made by the trustee for the purpose of computing the fee allowed by sections 607-18 and 607-20, and the reasonableness of any additional compensation for special services under sections 607-18 and 607-20. Any person who has

received excessive compensation from a trust may be ordered to make appropriate refunds. [L 1976, c 200, pt of §1]

Law Journals and Reviews

Trustee Fees Under the Hawaii Probate Code: Can the Court Approve Trustee Fee Schedules? 10 HBJ 121 (2007).

Case Notes

Based on the plain language of and legislative history underlying this section, courts may review the reasonableness of a trustee's determination as to what constitutes "income"; trustee's determination that property tax payments were "income" was reasonable. 104 H. 267, 88 P.3d 202.

" **§560:7-206 Trust proceedings; initiation by notice; necessary parties.** Proceedings under section 560:7-201 are initiated by filing a petition in the court and giving notice pursuant to section 560:1-401 to interested persons. The court may order notification of additional persons. A decree is valid as to all who are given notice of the proceeding though fewer than all interested persons are notified. [L 1976, c 200, pt of §1]

Case Notes

Term "decree" includes the term "order"; section not mutually exclusive with section 560:1-403; applicable to section 560:1-106. 7 H. App. 640, 791 P.2d 398.

"PART 3. DUTIES AND LIABILITIES OF TRUSTEES

§560:7-301 General duties not limited. Except as specifically provided, the general duty of the trustee to administer a trust expeditiously for the benefit of the beneficiaries is not altered by this chapter. [L 1976, c 200, pt of §1]

" **§560:7-302 Trustee's standard of care and performance.** Except as otherwise provided by the terms of the trust, the trustee shall observe the standards in dealing with the trust assets that would be observed by a prudent person dealing with the property of another, and if the trustee has special skills or is named trustee on the basis of representations of special

skills or expertise, the trustee is under a duty to use those skills. [L 1976, c 200, pt of §1; gen ch 1985, 1993]

Attorney General Opinions

Standard of care governing investment policy of board of regents of University of Hawaii. Att. Gen. Op. 85-26.

Standard of care governing investment policy of trustees of retirement system. Att. Gen. Op. 87-2.

" **§560:7-303 Duty to inform and account to beneficiaries.**

The trustee shall keep the beneficiaries of the trust reasonably informed of the trust and its administration; provided, however, during the life of the settlor, the trustee of a revocable inter vivos trust shall not be required to register the trust, reveal the terms to beneficiaries, or account to beneficiaries, unless otherwise directed by the settlor. In addition:

- (1) Within thirty days after the trustee's acceptance of the trust, the trustee shall inform in writing the persons currently entitled to benefits from the trust, and if possible, one or more persons who under section 560:1-403 may represent beneficiaries with future interests, of the court in which the trust is registered and of the trustee's name and address.
- (2) Upon reasonable request, the trustee shall provide the beneficiary with a copy of the terms of the trust which describe or affect the beneficiary's interest and with information about the assets of the trust and the particulars relating to the administration.
- (3) Upon reasonable request, a beneficiary is entitled to a statement of the accounts of the trust annually and on termination of the trust or change of the trustee.
[L 1976, c 200, pt of §1; gen ch 1985; am L 1997, c 244, §13]

Rules of Court

Accountings, see Hawaii Probate Rules, part A(VII); trustee's accounts HPR rule 126(d).

" **§560:7-304 Duty to provide bond.** A trustee need not provide bond to secure performance of the trustee's duties unless required by the terms of the trust, reasonably requested by a beneficiary or found by the court to be necessary to protect the interests of the beneficiaries who are not able to protect themselves and whose interests otherwise are not adequately represented. On petition of the trustee or other

interested person the court may excuse a requirement of bond, reduce the amount of the bond, release the surety, or permit the substitution of another bond with the same or different sureties. If bond is required, it shall be filed in the court of registration or other appropriate court in amounts and with sureties and liabilities as provided in sections 560:3-604 and 560:3-606 relating to bonds of personal representatives. [L 1976, c 200, pt of §1; gen ch 1993]

Cross References

Bonds, see §78-20.

" **§560:7-305 Trustee's duties; appropriate place of administration; deviation.** A trustee is under a continuing duty to administer the trust at a place appropriate to the purposes of the trust and to its sound, efficient management. If the principal place of administration becomes inappropriate the court may for good cause enter any order furthering efficient administration and the interests of beneficiaries, including, if appropriate, release of registration, removal of the trustee, designation of administration in another state, and appointment of a trustee in another state. Trust provisions relating to the place of administration and to changes in the place of administration or of trustee control unless compliance would be contrary to efficient administration or the purposes of the trust. Views of adult beneficiaries shall be given weight pursuant to section 554-2, in determining the suitability of the trustee and the place of administration. [L 1976, c 200, pt of §1]

" **§560:7-306 Personal liability of trustee to third parties.**
(a) Unless otherwise provided in the contract, a trustee is not personally liable on contracts entered into in the trustee's fiduciary capacity in the course of administration of the trust estate, unless the trustee fails to disclose the trustee's representative capacity and identify the trust estate in the contract.

(b) A trustee is personally liable for obligations arising from ownership or control of property of the trust estate or for torts committed in the course of administration of the trust estate only if the trustee is personally at fault.

(c) Claims based on contracts entered into by a trustee in the trustee's fiduciary capacity, on obligations arising from ownership or control of the trust estate, or on torts committed in the course of trust administration may be asserted against the trust estate by proceeding against the trustee in the

trustee's fiduciary capacity, whether or not the trustee is personally liable therefor.

(d) Any judgment obtained against the trustee in the trustee's fiduciary capacity may be collected against the trust estate. The question of liability as between the trust estate and the trustee individually may be determined in a proceeding for accounting, surcharge or indemnification or other appropriate proceeding. [L 1976, c 200, pt of §1; gen ch 1985; am L 2009, c 22, §1]

Hawaii Legal Reporter Citations

Trustees' discretion in purchase of real estate. 82-2 HLR 820643.

" **§560:7-307 Limitations on proceedings against trustees after final account.** Unless previously barred by adjudication, consent or limitation, any claim against a trustee for breach of trust is barred as to any beneficiary who has received a final account or other statement fully disclosing the matter and showing termination of the trust relationship between the trustee and the beneficiary unless a proceeding to assert the claim is commenced within two years after receipt of the final account or statement. In any event and notwithstanding lack of full disclosure a trustee who has issued a final account or statement received by the beneficiary and has informed the beneficiary of the location and availability of records for the beneficiary's examination is protected after three years. A beneficiary is deemed to have received a final account or statement if accorded notice pursuant to section 560:1-401. [L 1976, c 200, pt of §1; gen ch 1985]

"PART 4. POWERS OF TRUSTEES

§560:7-401 Powers of trustees. Trustees shall have, in addition to the powers set out in the trust agreement, the powers as provided in chapter 554 and otherwise as provided by law. [L 1976, c 200, pt of §1]

Case Notes

Power in a trustee to sell trust property held to include power to convey property free from pre-existing quasi-easement. 57 H. 577, 561 P.2d 1281.

"[PART 5. TRUSTS FOR ANIMALS]

[§560:7-501] Trusts for domestic or pet animals. (a) A trust for the care of one or more designated domestic or pet animals shall be valid. The trust terminates when no living animal is covered by the trust. A governing instrument shall be liberally construed to bring the transfer within this section, to presume against the precatory or honorary nature of its disposition, and to carry out the general intent of the transferor. Extrinsic evidence shall be admissible in determining the transferor's intent.

(b) A trust for the care of one or more designated domestic or pet animals shall be subject to the following provisions:

- (1) Except as expressly provided otherwise in the instrument creating the trust, and notwithstanding section 554A-3, no portion of the principal or income of the trust may be converted to the use of the trustee or to a use contrary to the trust's purposes or for the benefit of a covered animal;
- (2) Upon termination, the trustee shall transfer the unexpended trust property in the following order:
 - (A) As directed in the trust instrument;
 - (B) If there is no such direction in the trust instrument and if the trust was created in a non-residuary clause in the transferor's will, then under the residuary clause in the transferor's will; and
 - (C) If no taker is produced by the application of subparagraph (A) or (B), then to the transferor's heirs, determined according to section 560:2-711;
- (3) The intended use of the principal or income may be enforced by an individual designated for that purpose in the trust instrument or, if none, by an individual appointed by a court having jurisdiction over the matter and parties, upon petition by an individual;
- (4) Except as ordered by the court or required by the trust instrument, no filing, report, registration, periodic accounting, separate maintenance of funds, appointment, or fee shall be required by reason of the existence of the fiduciary relationship of the trustee;
- (5) The court may reduce the amount of the property transferred if it determines that the amount substantially exceeds the amount required for the intended use and the court finds that there will be no substantial adverse impact in the care, maintenance, health, or appearance of the designated domestic or

pet animal. The amount of the reduction, if any, shall pass as unexpended trust property under paragraph (2);

- (6) If a trustee is not designated or no designated trustee is willing and able to serve, the court shall name a trustee. The court may order the transfer of the property to another trustee if the transfer is necessary to ensure that the intended use is carried out and if a successor is not designated in the trust instrument or if no designated successor trustee agrees to serve and is able to serve. The court may also make other orders and determinations as are advisable to carry out the intent of the transferor and the purpose of this section; and
- (7) The trust is exempt from the operation of chapter 525, the Uniform Statutory Rule Against Perpetuities Act. [L 2005, c 160, §1]

**"ARTICLE VIII
EFFECTIVE DATE AND REPEALER**

[PART 1. EFFECT OF ACT 200, SESSION LAWS OF HAWAII 1976]

Revision Note

Sections 560:8-101 and 560:8-102 designated as Part 1 in view of addition of Part 2.

§560:8-101 Time of taking effect; provisions for transition. (a) This chapter takes effect on July 1, 1976, except that the provisions of Articles II, III and IV and the Hawaii Revised Statutes sections amended or repealed in this Article VIII on account of Articles II, III and IV take effect on July 1, 1977.

(b) Except as provided elsewhere in this chapter, on the effective date of this chapter:

- (1) The chapter applies to any wills of decedents dying thereafter;
- (2) The chapter applies to any proceedings in court then pending or thereafter commenced regardless of the time of the death of decedent except to the extent that in the opinion of the court the former procedure should be made applicable in a particular case in the interest of justice or because of infeasibility of application of the procedure of this chapter;
- (3) Every executor of a will admitted to a probate prior to July 1, 1977 in this State and every administrator

appointed prior to July 1, 1977 by a court of this State shall be a supervised personal representative with respect to the estate, and every guardian of the property appointed prior to July 1, 1976 by a court of this State shall be a guardian of the property, with only the powers conferred by this chapter and subject to the duties imposed by this chapter with respect to any act occurring or done thereafter. Every guardian of a person holding an appointment on that date continues to hold the appointment but has only the powers conferred by this chapter and is subject to the duties imposed by this chapter with respect to any act occurring or done thereafter;

- (4) The consequences of an act done before the applicable effective date in any proceeding and any accrued right is not impaired by this chapter. If a right is acquired, extinguished, or barred upon the expiration of a prescribed period of time which has commenced to run by the provisions of any statute before July 1, 1977, the provisions of such statute shall remain in force with respect to that right;
- (5) Any rule of construction or presumption provided in this chapter applies to instruments executed and multiple-party accounts opened before July 1, 1976 unless there is a clear indication of a contrary intent;
- (6) Notwithstanding any of the above, this chapter shall not affect any property or other rights accrued under the case and statutory law of this State, including but not limited to the law relating to intestacy, dower and curtesy (chapters 532 and 533), which became vested prior to July 1, 1977;
- (7) Section 560:7-501 applies to governing instruments executed on or after June 24, 2005. [L 1976, c 200, pt of §1; am L 2005, c 160, §2]

Revision Note

"June 24, 2005" substituted for "the effective date of Act".

Case Notes

Vested equitable interest in personal property which heirs acquired upon decedent's death satisfied "vested rights" provision of subsection (b)(6). 65 H. 394, 652 P.2d 1137.

" **§560:8-102 Specific repealer and amendments.** [Omitted as functus].

"[PART 2. **EFFECT OF ACT 288, SESSION LAWS OF HAWAII 1996**]

§560:8-201 Effect and transition. (a) The amendments made by [Act 288, Session Laws of Hawaii 1996, hereinafter referred to as this Act,] shall take effect on January 1, 1997.

(b) Except as provided elsewhere in this Act, on January 1, 1997:

- (1) The amendments made by this Act apply to any governing instruments executed by decedents dying thereafter;
- (2) The amendments made by this Act apply to any proceedings in court then pending or thereafter commenced regardless of the time of the death of decedent except:
 - (A) Parts 1 and 2 of Article II (relating to intestate succession and elective share) shall apply only to the estates of decedents dying after January 1, 1997; and
 - (B) To the extent that in the opinion of the court the former procedure should be made applicable in a particular case in the interest of justice or because of infeasibility of application of the procedure of this Act;
- (3) Every personal representative including a person administering an estate of a minor or incompetent holding an appointment on that date, continues to hold the appointment but has only the powers conferred by this Act and is subject to the duties imposed with respect to any act occurring or done thereafter;
- (4) An act done before the effective date in any proceeding and any accrued right is not impaired by this Act. If a right is acquired, extinguished, or barred upon the expiration of a prescribed period of time which has commenced to run by the provisions of any statute before the effective date, the provisions shall remain in force with respect to that right; and
- (5) Any rule of construction or presumption provided in this Act applies to instruments executed before the effective date unless there is a clear indication of a contrary intent. [L 1996, c 288, §5; am L 1997, c 244, §16]

Revision Note

Part added by revisor.