



The Judiciary, State of Hawai'i

Testimony to the Thirty-Second Legislature 2024 Regular Session

House Committee on Judiciary and Hawaiian Affairs
Representative David A. Tarnas, Chair
Representative Gregg Takayama, Vice Chair

Wednesday, January 31, 2024 at 2:00 p.m.
State Capitol, Conference Room 325 & Videoconference

WRITTEN TESTIMONY ONLY

by:

Jeannette H. Castagnetti
Chief Judge of the First Circuit
Chair, Committee on the Uniform Probate Code and Probate Court Practices Committee

Bill No. and Title: House Bill 1915, Relating to the Uniform Probate Code.

Purpose: Update the Uniform Probate Code.

Judiciary's Position:

The Honorable Jeannette H. Castagnetti, Chair of the Committee on the Uniform Probate Code and Probate Court Practices Committee (the "Probate Committee")¹ submits this testimony in favor of House Bill 1915 to correct an oversight in Act 158, Session Laws of Hawai'i 2023, which updated articles I through IV of the Uniform Probate Code ("UPC") in the State of Hawai'i. Members of the Probate Committee reviewed the recently adopted Act 158 and noted an oversight in that the changes to the publication requirements applicable to estates were not similarly made for purposes of a successor trustee as was intended.

¹ The Probate Committee is chaired by the Honorable Jeannette H. Castagnetti of the First Circuit Court and comprised of judges for each of the other circuits (the Honorable Randal G. B. Valenciano, the Honorable Peter T. Cahill, and the Honorable Henry T. Nakamoto) and attorney members Colin Goo, Rhonda Griswold, Frank Kanemitsu, Joy Miyasaki, Jeffrey Niebling, Raymond Okada, Rosemarie Sam, Douglas Smith, Carroll Taylor, Eric Young and Summer Shelverton.



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The UPC is a codification of the law of probate, bringing together common law principles, restatement of law concepts, and various pre-existing statutes.

Background & Discussion:

In Act 158, Session Laws of Hawai'i 2023, articles I through IV of the Uniform Probate Code were updated to adjust for inflation, clarify provisions, resolve issues that have arisen in probate practice, and address societal changes in familial relations. One of the updates in Act 158 was to reduce the number of required publications of a notice to creditors by a personal representative to once a week for two successive weeks. The intent of the Probate Committee was that the publication requirements were also to be made applicable to successor trustees. This act corrects that oversight and amends 560:3-108(f) to similarly reduce the number of required publications of a notice to creditors by a trustee to once a week for two successive weeks, consistent with amendments made by Act 158, SLH 2023. Having consistent provisions applicable to estates and trusts is necessary for the efficiency of the probate and trust administration process.

The Judiciary respectfully asks this Committee to vote in favor of House Bill No.1915.

Thank you for the opportunity to testify on this measure.

House Committee on Judiciary and Hawaiian Affairs
Representative David A. Tarnas, Chair
Representative Gregg Takayama, Vice Chair
Wednesday, January 31, 2024
2:00 P.M.
Conference Room 325

LATE

Testimony by Carolyn Nicol

Bill No. and Title:

H.B. No. 1915, Relating to the Uniform Probate Code

Position: **Support, with Amendments**

Chair Tarnas, Vice Chair Takayama and Members of the Judiciary and Hawaiian Affairs Committee:

My name is Carolyn Nicol. I am a retired attorney and a current member of the Elder Law section and Probate and Estate Planning section of the Hawaii State Bar Association, testifying in my individual capacity, concerning HRS §560:3-801 and other provisions in Article III, chapter 560 affected by Act 158, Haw. Sess. L. 2023.

A draft revision ("**H.B. No. 1915, Proposed H.D. 1**") is attached, showing changes consistent with testimony submitted last year on the bill that became Act 158:

1) March 15, 2023 written testimony of Carolyn Nicol to the House Committee on Judiciary and Hawaiian Affairs on S.B. No. 483, S.D. 1, Relating to the Uniform Probate Code, in

https://www.capitol.hawaii.gov/sessions/Session2023/Testimony/SB483_SD1_TESTIMONY_JHA_03-15-23_.PDF

and

2) April 3, 2023 written testimony of Carolyn Nicol to the House Committee on Finance Judiciary and Hawaiian Affairs on S.B. No. 483, S.D. 1, H.D. 1, Relating to the Uniform Probate Code, in

https://www.capitol.hawaii.gov/sessions/Session2023/Testimony/SB483_HD1_TESTIMONY_FIN_04-03-23_.PDF

The attached H.B. No. 1915, Proposed H.D. 1 renumbers Sections 2, 3 and 4 of 2024 H.B. No. 1915 as Sections 7, 8, and 9, respectively; adds new Sections 2, 3, 4, 5, and 6, described below; rewords Section 1 (purpose) to reflect the proposed changes; and revises the Bill Description.

Sections **2**, **3** and part of Section **4** of H.B. No. 1915, **Proposed H.D. 1** pertain to **time limits** after which probate proceedings may not be commenced.

Act 158 added a definition of "probate proceeding" that runs counter to its meaning under the Uniform Law Commission's Uniform Probate Code. Section 2 deletes that definition from HRS §560:1-201, which applies throughout Chapter 560. Instead, Section 3 adds definitions of "formal testacy or appointment proceeding" and "informal probate or appointment proceeding" in a new subsection (f) within HRS §560:3-108 to clarify the meaning of terms used in that specific section.

Section 3 restores terminology properly used in prior (pre-Act 158) HRS §560:3-108, consistent with language in the Uniform Law Commission's Section 3-108, but retains substantive changes proposed by the Judiciary's Committee on the Uniform Probate Code and Probate Court Practices Act and adopted by Act 158.

Section 4 restores terminology ("informal probate or appointment" instead of "informal probate") properly used in prior (pre-Act 158) HRS §560:3-301(a)(f), consistent with language in the Uniform Law Commission's Section 3-301, and with changes proposed in Section 3 of this proposed H.D. 1.

Section 5 and part of Section 4 of H.B. No. 1915, **Proposed H.D. 1** affect issuance of letters testamentary to personal representatives *without* advance notice to interested persons (informal probate and appointment proceedings) as opposed to issuance of letters testamentary following a hearing *with* advance notice to interested persons (formal probate and appointment proceedings) in cases where the decedent's original will is not available.

My familiarity with informal proceedings reflects past experience at First Circuit Court, where as registrar for several years, I reviewed applications for informal probate of wills and informal appointment of personal representatives. In my view, the original will requirement for informal probate proceedings helps safeguard against inappropriate issuance of letters testamentary, which give personal representatives broad powers to deal with assets in decedents' estates.

Act 158 added a provision allowing the registrar to admit a copy of a will to probate, if the purported original will was filed (or lodged or deposited) in a court elsewhere, and the other court's clerk certifies the copy to be a true and correct copy of the original on file there. The purported original will,

notarizations, and signatures would not be available at the courthouse in Hawai'i for the registrar, court staff, judge, or even interested parties concerned about the validity of the will to inspect for signs of authenticity.

Section 4 restores terminology ("a will probated in another jurisdiction" instead of "an original will probated, filed, deposited or lodged in another jurisdiction") properly used in prior (pre-Act 158) HRS §560:3-301(2)(A), consistent with language in the Uniform Law Commission's Section 3-301, and with changes proposed in Section 5 of this proposed H.D. 1.

Section 6 of H.B. No. 1915, **Proposed H.D. 1** pertains to attorney's fees, and restores prior (pre-Act 158) HRS §560:3-720 consistent with the Uniform Law Commission's Section 3-720:

§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, the personal representative or nominee shall be entitled to receive from the estate necessary expenses and disbursements, including reasonable attorneys' fees incurred.

Prior (pre-Act 158) HRS §560:3-720 entitled a personal representative to reimbursement for litigation expenses out of assets in the decedent's estate. Act 158 adopted a revision of §560:3-720 proposed by the Judiciary's Committee on the Uniform Probate Code and Probate Practices that bears little resemblance to drafts by the Uniform Law Commissioners. Under HRS §560:3-720 as amended by Act 158, any heir who, in good faith, engages in will challenge litigation "shall be entitled to" (not "may be awarded") attorney's fees, even if the litigation was unsuccessful and the attorney was hired on a contingency fee basis. HRS §560:3-720 as amended by Act 158 no longer entitles personal representatives to reimbursement for litigation expenses aside from litigation "regarding the validity of a will."

I support Section 7 of H.B. No. 1915, **Proposed H.D. 1** (numbered Section 2 in H.B. 1915) concerning publication of notice. My March 15, 2023 testimony before this Committee proposed the same language last year. https://www.capitol.hawaii.gov/sessions/Session2023/Testimony/SB483_SD1_TESTIMONY_JHA_03-15-23_.PDF (page 10 of testimony, page 19 of pdf file).

Thank you for the opportunity to testify.

H.B. No. 1915, Proposed H.D. 1

Description:

Updates the Uniform Probate Code to modify amendments to Article III of Chapter 560 made by Act 158, SLH 2023.

A BILL FOR AN ACT RELATING TO THE UNIFORM PROBATE CODE.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF HAWAII:

SECTION 1. The purpose of this Act is to modify amendments adopted by Act 158, Session Laws of Hawaii 2023, which sought to update articles I through IV of the Uniform Probate Code to adjust for inflation, clarify provisions, resolve issues that have arisen in probate practice, and address societal changes in familial relations. Specifically, this Act revisits changes Act 158 made to Article III of Chapter 560 regarding time limits for commencing proceedings; authority to issue letters testamentary to a personal representative when an original will is unavailable; and expenses in estate litigation. In addition, this Act corrects an oversight by reducing the number of required publications of a notice to creditors by a trustee to once a week for two successive weeks, consistent with the amendments Act 158 made to publication requirements applicable to probate matters generally.

SECTION 2: Section 560:1-201, Hawaii Revised Statutes, is amended by deleting the definition of "probate proceeding".

~~["Probate proceeding" means a formal or informal proceeding to probate a will, formal or informal proceeding to appoint a personal representative, or formal proceeding to adjudicate intestacy."]~~

SECTION 3: Section 560:3-108, Hawaii Revised Statutes, is amended to read as follows:

"§560:3-108 Probate, testacy and appointment proceedings; ultimate time limit. (a) No informal probate or appointment proceeding or formal testacy or ~~[to establish a will and related]~~ appointment proceeding, other than a [an ancillary] proceeding[7] 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, shall be commenced more than five years after the decedent's death; provided that:

(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

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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 [~~formal probate~~] 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; and

(4) A formal testacy proceeding may be commenced at any time after five years from the decedent's death if:

(A) 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;

(B) The terms of the decedent's will provide for a distribution to the decedent's revocable living trust;

(C) Newly discovered assets of the decedent require administration; or

(D) All interested parties who are entitled by statute to notice of the petition join in the petition.

(b) A proceeding seeking an adjudication of intestacy and related appointment proceeding may be commenced at any time unless there has been a prior informal probate or appointment proceeding or a prior formal testacy or appointment proceeding concerning the decedent's estate [~~. If there has been a prior probate proceeding~~], in which case, a formal proceeding seeking

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an adjudication of intestacy may be commenced only under the conditions and circumstances set forth in section 560:3-412.

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

(d) In cases under subsection (a) (1) or (2), the date on which a probate 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 that relate to the date of death.

(e) As used in this section:

"Formal testacy or appointment proceeding" means a proceeding held pursuant to part 4 of article III.

"Informal probate or appointment proceeding" means a proceeding held pursuant to part 3 of article III."

SECTION 4. Section 560:3-301, Hawaii Revised Statutes, is amended by amending subsection (a) as follows:

"(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; residence, business, or mailing address; and telephone number of the applicant;

(B) The name and date of death of the decedent, the decedent's age, 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,

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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 a [~~an original~~] will probated[~~7~~ filed, deposited, or lodged] 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 that 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 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; and

(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

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adopt the statements in the application or petition that 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."

SECTION 5. Section 560:3-303, Hawaii Revised Statutes, is amended to read as follows:

"§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 that appears to have the required signatures and 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, regardless of whether the person was a witness to the will.

(d) Informal probate of a will that 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 that does not provide for probate

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of a will after death and that 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.

~~[(f) A will that has been filed, deposited, or lodged in another jurisdiction, but not probated, may be probated in this State upon receipt by the registrar of a duly authenticated copy of the will or a copy of the will and a statement from its legal custodian that the copy filed is a full, true, and correct copy of the original.]"~~

SECTION 6. Section 560:3-720, Hawaii Revised Statutes, is amended to read as follows:

"§560:3-720 Expenses in estate litigation. If any personal representative or person nominated as personal representative~~[7 or an heir or beneficiary if a personal representative or person nominated as a personal representative refuses to act,]~~ defends or prosecutes any proceeding ~~[regarding the validity of a will]~~ in good faith, whether successful or not, ~~[that person]~~ the personal representative or nominee shall be entitled to receive from the estate necessary ~~[reasonable costs,]~~ expenses~~[7]~~ and disbursements, including reasonable attorneys' fees incurred.~~[7 regardless of whether counsel has been retained on a contingency fee basis.]"~~

SECTION 7. Section 560:3-801, Hawaii Revised Statutes, is amended by amending subsection (f) to read as follows:

"(f) The trustee or successor trustee of any trust created by the decedent may publish a notice to creditors once a week for ~~[three]~~ two 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."

SECTION 8. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 9. This Act shall take effect upon its approval.

**TESTIMONY OF THE
COMMISSION TO PROMOTE UNIFORM LEGISLATION**

ON HB1915

RELATING TO THE UNIFORM PROBATE CODE

BEFORE THE HOUSE COMMITTEE ON JUDICIARY & HAWAIIAN AFFAIRS

DATE: Wednesday, January 31, 2024, at 2:00 P.M.
Conference Room 325, State Capitol

PERSON TESTIFYING: Lani Ewart
Commission to Promote Uniform Legislation

Chair Tarnas, Vice Chair Takayama and Members of the Committee:

My name is Lani Ewart, and I am a Commissioner of the Commission to Promote Uniform Legislation (CPUL), established in chapter 3, Hawaii Revised Statutes.

This bill updates certain notice requirements in the Uniform Probate Code. The Uniform Probate Code, which is Chapter 560 of the Hawaii Revised Statutes, was a product of the national Uniform Law Commission, members of which include the CPUL Commissioners. In consultation with the Uniform Law Commission, the CPUL has no objection to this bill.

We respectfully ask the Committee to pass this bill.