

**5. PROBATE RULES  
(SEE ALSO CRC TITLE SEVEN)**

**ORGANIZATION - ADMINISTRATION - PROCEDURE**

**5.1 CITATION**

These probate rules should be cited as "Marin County Rule, Probate" or "MCR Prob" followed by the rule number (e.g., Marin County Rule, Probate 5.1 or MCR Prob 5.1).

*[Rule 5.1 adopted effective 5/1/98]*

**5.2 CASE ASSIGNMENT FOR ALL PURPOSES**

All probate, guardianship and conservatorship cases filed in the Court will be assigned a single judge for all purposes at the time of the filing of the action.

*[Rule 5.2 adopted effective 7/1/15]*

**5.3 COURT HEARING PROCEDURE GENERALLY AND ORDERS**

**A. "Ready" and "Not Ready" Matters.** A matter is considered "ready" when all required documents *and the proposed order* are in the file *at least five (5) court days* preceding the hearing, no opposition has been received, and the Court is prepared to grant the relief requested. Approved orders signed by the Court will be available in the Clerk's Office shortly after the hearing.

If no appearance is made on a matter which is *not "ready,"* it will be continued at least two weeks. Information on continuances may be obtained by calling the Probate Examiner at (415) 444-7315.

**B. Order of Calendar Call and Witnesses.** Matters are heard in the following order: ready matters and continuances, uncontested matters with defects to be corrected, other matters estimated to take five minutes or less, sales, and contested matters with a hearing time of 20 minutes or less. If a contested matter will take in excess of 20 minutes, it will be heard at the end of the calendar, if time allows, or may be specially set. If witnesses are to be called, contact the Probate Examiner to ascertain if the matter will be heard or must be specially set for another date.

**C. Oral Objection.** If an oral objection to the granting of a matter is made, and the attorney for the estate has not appeared, the matter will be continued for at least two weeks for the filing of objections and any response to the objections. Any previously signed order will be set aside.

**D. Orders.** Orders on "ready" matters will be signed and filed. Conformed copies and related papers will be placed in "Will Call" in the Clerk's Office. No documents will be mailed unless a self-addressed, stamped envelope is provided.

**E. File Review Prior to Hearing; Telephone for Probate Recording.** All files are reviewed by the Probate Examiner prior to the day of hearing. Tentative rulings may be obtained online ([http://www.marincourt.org/tentative\\_landing.htm](http://www.marincourt.org/tentative_landing.htm)).

**F. Appearance Not Required.** Matters on the probate calendar which are "ready matters" (see above) do not require an appearance.

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**G. Appearance Required.** Personal appearance by counsel will be required in the following cases:

1. *Contested Matters.* Counsel are required to appear in all contested matters. If the matter will take longer than 20 minutes to be heard, counsel should appear to have the matter set for hearing; all interested counsel must be present for such setting.

2. *Uncontested Matters Where Court's Tentative Ruling Differs From Relief Requested.* In uncontested matters where the judicial officer recommends relief different from that sought. If no appearance is made, the order will be signed in the form recommended by the judicial officer.

3. *Confirmation of Sales.* Hearings on petitions for court confirmation of sales of real property.

4. *Appointment of Conservator/Guardian.* On applications for appointment of guardian or conservator, an appearance by proposed conservatee is required unless an adequate doctor's declaration is on file or the Court Investigator's Report indicates that the proposed conservatee has been advised of his/her rights, is in agreement with the conservatorship and does not wish to attend the hearing or the appearance is excused by the Court.

5. *Other Matters.* Any matter which by law requires the personal appearance of any person or any matter which the Court may in its discretion require an appearance.

*[Rule 5.3 adopted effective 5/1/98; amended 1/1/18]*

### 5.4 CONTINUANCES

**A. Renote Requirements on Continuances and Off-Calendar Matters.** Generally, no further notice is required when a properly noticed probate matter is continued to a specified date. Where a matter has been ordered off calendar, new notice will be required if the matter is later reset on calendar. Any matter requiring publication which is taken off calendar will require new publication.

**B. Continuance Requested by Counsel.** Unless formal objections have been filed, or an appearance has been requested by the Court, the moving party may request a continuance by telephone to the Probate Examiner's Office no later than noon of the court day preceding the hearing. A continuance will not be granted if there is opposing counsel unless the request is made in open court or by stipulation of all counsel. In addition:

1. *Special Sets.* If a matter has been specially set, it may not be continued or advanced without the written stipulation of all counsel and the approval of the judicial officer scheduled to hear the matter.

2. *Probate Sales.* Probate sales cannot be taken off calendar or continued except for good cause. Appearance by counsel is required at the time set for sale.

*[Rule 5.4 adopted effective 5/1/98; amended 7/1/08]*

### 5.5 EX PARTE MATTERS

**A. Contents of Petition.** A petition for an ex parte order must be verified and must contain sufficient evidentiary facts to justify issuing the order. Evidence to support such nonappearance matters should be contained in the verified petition and/or declarations under

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penalty of perjury timely filed before the hearing date; oral evidence is available only in accordance with the California Rules of Court governing Law and Motion matters. Conclusions or statements of ultimate facts are not sufficient to support such ex parte petitions and a foundation should be shown for the petitioner's personal knowledge.

**B. Notice Allegation.** All petitions for ex parte orders must contain a notice. The statement shall list the interested parties entitled to notice (to include those who have filed for special notice). Such parties shall receive notice no later than 10:00 a.m. the court day before the ex parte application.

**C. Presentation of Petition.** Ex parte petitions will be heard between 8:30 a.m. and 9:00 a.m. by appointment. Please call the Probate Examiner at (415) 444-7315 to schedule a date and time.

The ex parte application filing fee shall be paid in the Clerk's Office prior to the hearing in a department. If a department hears ex parte applications at 8:30 a.m. and the applicant cannot submit papers to the Clerk's Office prior to the hearing in the department, the filing fee shall be remitted to the courtroom clerk prior to the hearing. The courtroom clerk can only accept cash or checks.

**D. Separate Order Must Accompany Petition.** Except where a Judicial Council form is used, a petition for ex parte order must be accompanied by a separate order complete in itself.

*[Rule 5.5 adopted effective 5/1/98; amended 7/1/15]*

**5.6 QUESTIONS OF PROCEDURE**

Should counsel encounter procedural problems that cannot be resolved by reference to the Probate Code, Rules of Court, these Local Rules, or legal research, such matters may be presented to the Court informally. Initially, such matters should be presented to the Court by letter or directly to the Probate Examiner so that proper consideration can be given to the problem.

*[Rule 5.6 adopted effective 5/1/98; amended 7/1/08]*

**5.7 SETTLEMENT CONFERENCES**

**A. Mandatory Settlement Conference.** A mandatory settlement conference shall be held in all cases where a trial or evidentiary hearing has been demanded. The date for the settlement conference shall be assigned at a status conference.

**B. Settlement Conference Statement.** Counsel shall lodge an original plus two copies of a settlement conference statement in the Calendar Department (Room 113) ten (10) court days before the settlement conference so that the statements can be distributed to the settlement panelists. The court will impose sanctions of \$49 per day for statements lodged less than five (5) court days before the settlement conference. The date and time of the settlement conference and trial/evidentiary hearing shall be typed on the face sheet of the statement. The settlement conference statement shall include the following, where applicable:

1. A brief statement of the case;
2. A statement of facts including: (a) factual and legal contentions in dispute; and (b) citations of authorities which support legal propositions;
3. The current offer or demand of party filing statement;

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4. The date when the last face-to-face settlement discussion was held;
5. Presentation of any special barriers to settlement.

**C. Required Attendance.** Attendance at settlement conferences by counsel completely familiar with the case is required. Counsel must be accompanied by his/her client. *Exceptions to this rule require advance written approval by the Court.*

**D. Sanctions.** Failure of an attorney and/or party to prepare for, appear at, or participate in a settlement conference, unless good cause is shown for any such failure, is an unlawful interference with the proceedings of the Court, and the Court may impose sanctions, including, but not limited to, any or all of the following: monetary sanctions to be paid to the Clerk of the Court; monetary sanctions to be paid to the other parties which may include, among other things, costs, actual expenses and counsel fees; and the Court may order an appropriate change in the calendar status of the action.

*[Rule 5.7 adopted effective 5/1/98; amended 1/1/17]*

## **PLEADINGS, ORDERS AND NOTICE**

### **5.8 CONFORMED COPIES**

If a conformed copy is desired, an additional copy must be submitted. The Court will conform a maximum of two copies of any pleading at the time of filing. Parties requesting that the Clerk's Office mail them conformed copies of their filings must provide a self-addressed stamped envelope of proper size and with sufficient postage. If no envelope is provided, the conformed copy will be placed in the Will Call cabinet in the Clerk's Office in Room 113 for a maximum of sixty (60) days. If the envelope provided or the postage is insufficient to mail the entire conformed copy, only the face copy of the pleading will be mailed and the conformed copy will be placed in the Will Call cabinet for a maximum of sixty (60) days.

*[Rule 5.8 adopted effective 1/1/10]*

### **5.9 FORMS APPROVED BY JUDICIAL COUNCIL**

For matters for which a printed form has been adopted for mandatory use by the Judicial Council, such form shall be used. All pertinent items must be checked. If a form approved or adopted by the Judicial Council or a Marin County local rule form is inadequate for a given circumstance, an addendum may be attached. No printed forms other than those so approved or adopted may be used.

*[Rule 5.9 adopted effective 5/1/98; amended 7/1/08]*

### **5.10 DECLARATIONS**

A declaration may be used in lieu of an affidavit pursuant to Code of Civil Procedure § 2015.5.

*[Rule 5.10 adopted effective 5/1/98; amended 1/1/04]*

### **5.11 CONTENT OF PROBATE ORDERS**

An order must be complete and must set forth with particularity all matters actually passed on by the Court, the date of hearing, necessary findings, the relief granted, and the names of persons and legal descriptions of property or amounts of money affected. A probate

order should be drawn so that its general effect may be determined without reference to the petition on which it is based.

*[Rule 5.11 adopted effective 5/1/98; amended 7/1/15]*

**5.12 ORDERS FOR CONTINUING PAYMENTS MUST HAVE TIME LIMITS**

All orders for continuing payments must provide that payments shall begin as of a fixed date and continue for a fixed period not to exceed one year. The Court ordinarily will not make orders for continuing payments to run until further order of the Court.

*[Rule 5.12 adopted effective 5/1/98]*

**5.13 NOTICES (SEE ALSO CRC 7.51)**

**A. Generally.**

1. *Service.* When notice of hearing is required -- whether by personal service, mailing, publication or posting -- petitioner must give such notice or cause it to be given, and file the necessary proof of service.

2. *Content.* Notices must specify *all* the relief sought. Failure to specify all relief sought will result in renoticing the petition.

3. *Amended Petitions.* Statutory notice requirements apply to all amended petitions, even though the prior petition has already been noticed for hearing.

4. *Continued Dates and Off Calendars.* Generally, no further notice is required when a properly noticed probate matter is continued to a specified date. Where a matter has been ordered off calendar, new notice will be required. Any matter requiring publication which is taken off calendar will require new publication.

5. *Additional Notice.* The Court may require *additional notice in any matter.* Ordinarily, such notice will be required whenever it appears that the interests of any person may be adversely affected by the determination of the issues raised by the pleadings, such as when the status of property is to be determined or substantial compensation for extraordinary services are requested. The Court may require notice in such cases to include not only the time and place of hearing but also a summary of the matters to be determined, or that a copy of the petition be served with the notice.

**B. Notices to Minors.** When a minor, who is over the age of 12, is entitled to notice, the giving of notice to a parent is insufficient. The Court requires notice to a minor to be addressed to the minor and mailed individually and directly to the minor. Notice in care of a parent is insufficient although a copy shall also be sent to the parents.

**C. Direct Notice Required.** Notice in care of an attorney will be accepted only if a Request for Special Notice is on file or an appearance has been made.

**D. Notice to Guardians, Conservators, Conservatees.** In Guardianship and Conservatorship proceedings, direct notice shall be mailed to the conservatee or minor and to their attorney if they are represented. Notice to a conservatee must be accompanied by a copy of the petition. When a guardian or conservator has been appointed for the person entitled to notice in a non-conservatorship or guardianship matter (i.e., a civil matter, etc.), the Court requires that notice be given directly to the conservator or guardian.

**E. Notice to Heirs and Devisees Without Known Addresses.** If the address of an heir or devisee is unknown, Petitioner must file a declaration describing efforts made to locate that person before the Court will prescribe an alternate form of notice or dispense with notice. The declaration must state the name of the person whose address is unknown, the last known address of the person, the approximate date when the person was last known to reside there, the efforts made to locate the person, and any facts that explain why the person's address cannot be obtained. The declaration must include a description of the attempts to learn of the person's business and residence addresses by: (1) inquiry of the relatives, friends, acquaintances, and employers of the person entitled to notice and of the person who is the subject of the proceeding; (2) review of appropriate city telephone directories and directory assistance; and (3) search of the real and personal property indexes in the recorder's and assessor's offices for the county where the person was last known or believed to reside. (See CRC 7.52(a).)

**F. Notice to Trust Beneficiaries.** If a personal representative presents an account or petition that affects the interest of a beneficiary of a trust and the representative is either named to act or is acting as the sole trustee, then the Court will require notice to beneficiaries as required by Probate Code § 1208. In appropriate circumstances the Court may require the appointment of and notice to the guardian ad litem for potential beneficiaries if their interest may diverge significantly from those of the beneficiaries in being. This notice requirement applies to both testamentary trusts and pour over wills to an intervivos trust. The Court requires that a copy of the trust document be lodged with the court to verify the persons requiring notice or a declaration by the attorney be filed stating the trust beneficiaries entitled to notice.

**G. Notice on Termination of Guardianships and Conservatorships.** Notice must be given to a *former* minor or conservatee on the settlement of a final account. Notice must also be given to the personal representative of a deceased minor or conservatee. If the representative of the estate is the same person as the guardian or conservator presenting the account, notice must also be given to the heirs and devisees of the deceased minor or conservatee.

**H. Notice to Heirs and/or Beneficiaries of a Deceased Beneficiary.** If an heir or beneficiary whose interest has vested dies during administration of a probate estate, notice is required to be given to the personal representative of the beneficiary's estate, or if none, to the heirs and/or beneficiaries of the will of the deceased beneficiary.

**I. Posted Notice.** In all cases where posted notice of hearing is required, the Probate Clerk will prepare and post the notice. The clerk is not responsible for publications or mailings. Other notices will be posted upon request.

*[Rule 5.13 adopted effective 5/1/98; amended 1/1/14]*

## **SPOUSAL PROPERTY PETITION AND ELECTION**

### **5.14 FILING AND CONTENTS OF SPOUSAL PROPERTY PETITION**

If a spousal property petition is filed with a petition for probate of will or for Letters, the spousal property petition must be filed as a separate petition. (CRC 7.301)

*[Rule 5.14 adopted effective 5/1/98; amended 1/1/04]*

### 5.15 REQUIRED ALLEGATIONS

**A. Source of Property.** In petitions where the decedent died *intestate*, the petition must contain the date of marriage and a precise identification of the property community, quasi community, or separate property. The declaration must state facts supporting the character of the property as community, quasi community, or separate property. A copy of the latest deed for any real property should be attached to the petition. If any property is claimed to be community but was acquired by gift, devise, descent, joint tenancy survivorship, or similar means, the petition must state with particularity the way in which the property was converted to community property. For all transmutations of title to real or personal property made after January 1, 1985, there must be an express written declaration that is made, joined in, consented to or accepted by the spouse whose interest in the property is adversely affected. If the decedent died *testate*, generally attachment of the Will to the petition will suffice.

**B. Claims Based on Documents.** If the community or quasi-community property claim is based on any document, a copy of the document showing signatures, when feasible, must be attached to the petition. However, if the document is lengthy and only portions of it are relevant to the claim, only the relevant portions need be attached. If it is believed that disclosure of the document would be detrimental, the document or the relevant portions may be paraphrased in the petition accompanied by a statement that a copy of the document itself will be made available to the Court.

*[Rule 5.15 adopted effective 5/1/98; amended 7/1/00]*

### 5.16 ELECTION OF SURVIVING SPOUSE TO ADMINISTER

If the surviving spouse elects under Probate Code § 13502 to administer property, the surviving spouse must file an election and state he or she has been fully informed regarding the reasons for the election, including the potential delay and increased compensation. If the surviving spouse files the election to transfer one-half of the community property to a trustee (see Probate Code § 13503), the surviving spouse's one-half shall not be included in the basis for statutory compensation.

*[Rule 5.16 adopted effective 5/1/98]*

## **APPOINTMENT OF EXECUTORS AND ADMINISTRATORS: PROOF OF WILLS**

### 5.17 SPECIAL LETTERS OF ADMINISTRATION

The verified petition for a special administrator must be personally presented to the Judge. Such petitions ordinarily will not be granted without 24 hours' notice to the surviving spouse, the nominated executor, and any other person who, in the opinion of the Judge, appears to be entitled to notice. The petition should include the *specific* reason indicating the necessity of the appointment. Except in a will contest, Letters of Special Administration will issue for only a specified period of time. Although preference is given to the person entitled to Letters Testamentary or of Administration if it appears that a bona fide contest exists, the Court will consider appointing a neutral person or corporate fiduciary.

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A special administrator cannot be granted powers under the Independent Administration of Estates Act (IAEA) unless proper publication and notice has been completed.

*[Rule 5.17 adopted effective 1/1/14]*

### **5.18 PETITION FOR PROBATE OF WILL AND LETTERS OF ADMINISTRATION**

**A. Holographic Will and Foreign Language Will.** When a holographic instrument is offered for probate, all copies presented must be accompanied by a typewritten copy. Where an instrument written in a foreign language is offered, it must be accompanied by a copy translated into English by an official translator approved by the Court.

**B. Attachments.** Copies of all instruments offered for probate must be attached to the petition.

#### **C. Listing Devisees and Heirs.**

1. Even though a decedent died testate, the petition must contain the names and relationships of all the heirs of the decedent. An heir is any person who would be entitled to distribution of a part of the decedent's estate including those who would be heirs if the decedent had a predeceased spouse or if the decedent had died intestate. When second generation heirs are listed, the deceased ancestor through whom they take shall be named, along with the ancestor's relationship to decedent.

2. All heirs or devisees, or other persons named in the will and each person named as executor or alternate executor who is not petitioning must be listed in the petition. In addition, if the interest of the devisee is contingent as of the date of the petition or the happening of an event, such as survivorship for a specific period, then the contingent devisee must also be listed. Also to be listed in the petition is each person provided for in the original will whose bequest has been revoked in a subsequent codicil.

3. If a named devisee predeceased the decedent or did not survive for the designated survival period, that fact must be stated together with the approximate date of death.

4. If an heir or devisee died after the decedent, that person should be listed with the notation that he or she is deceased and the date of death. If a personal representative has been appointed, the deceased heir or devisee should be listed in care of the name and address of his or her personal representative. If no personal representative has been appointed, that fact should be alleged.

**D. Value of Estate.** If the value of the estate is under \$150,000, the petition must be accompanied by a declaration showing why the estate is being probated, rather than passing by summary proceedings.

*[Rule 5.18 adopted effective 5/1/98; amended 7/1/13]*

### **5.19 NOTICE REQUIREMENTS OBTAINING LETTERS IN DECEDENT'S ESTATES**

**A. Letters Testamentary and Letters of Administration.** The attorney is responsible for obtaining Letters, including notice and publication. Notice must be given to the Attorney General and foreign consulate as required by the Probate Code.

**B. Methods of Giving Various Notices.** See MCR Prob 5.13. Notice must be given to all living individuals or entities identified in the petition for probate.

**C. Requirement of Publication of Notice to Administer Estate.** The publication of Notice of Petition to Administer Estate under Probate Code § 8120 is sufficient to include all instruments which are offered for probate, filed with and specifically referred to in the petition for which notice is given. Any other wills or codicils not specifically mentioned in the petition must be presented to the Court in an amended petition and a new Notice of Petition to Administer Estate must be published and mailed. It is the responsibility of the attorney to arrange for publication; the Clerk does not have this responsibility.

Publication must take place in one of the newspapers adjudicated for publication in Marin County which are: Ark Newspaper; Marin Independent Journal; Marin Scope (Mill Valley Herald; Novato Advance; Ross Valley Reporter; San Rafael News Pointer; Sausalito Marin Scope; Twin Cities Times); Pacific Sun; The Point Reyes Light.

Publication must conform to law. Currently, the law requires publication fifteen (15) days in advance of the hearing date. Three publications in a newspaper published once a week or more often with at least five (5) days between the first and last publication dates (not counting the publication dates), are sufficient.

**D. Defective Notice.**

1. *Defective mailing.* If the publication is correct but the mailing defective, the hearing normally will be continued to allow enough time for the required new mailing.

2. *Defective publication.* If the mailing is correct but the publication defective, the matter must be taken off calendar and a new notice must be given by publication and mailing.

*[Rule 5.19 adopted effective 5/1/98; amended 1/1/19]*

**5.20 PROOF OF WILLS**

In uncontested matters, both witnessed and holographic wills may be proved by declaration without the need of testimony in open Court. There is a preference for a non-beneficiary to prove a holographic will. Where more than one testamentary instrument is offered for probate, each instrument must be proved by a separate declaration.

*[Rule 5.20 adopted effective 5/1/98]*

**5.21 LOST OR DESTROYED WILLS**

The petition for probate shall include a written statement of the testamentary words or their substance. Evidence will be required to overcome the presumption of revocation. A copy of the will admitted to probate, if available, shall be attached to the order for probate.

*[Rule 5.21 adopted effective 5/1/98; amended 1/1/04]*

**5.22 WILL WITH DELETIONS OR INTERLINEATIONS**

Where the will offered for probate contains alterations by interlineation or deletion on the face, the petition for probate should contain allegations to explain the alteration and support petitioner's position in the matter. The petition should request that the interlined portion be admitted or not admitted; that the deletions take effect or be disregarded; or make

such other request as petitioner finds to be appropriate. The petition should set forth in an attachment, statements of all relevant facts regarding the alteration, for example, whether the will was in possession of decedent, and should include a statement of applicable law.

*[Rule 5.22 adopted effective 5/1/98]*

## **BOND**

### **5.23 APPLICATION OF BOND SECTION**

These guidelines (MCR Prob 5.24 to 5.28) apply to guardians, conservators and trustees, as well as to personal representatives.

*[Rule 5.23 adopted effective 5/1/98]*

### **5.24 REQUIREMENT OF BOND/WAIVER OF BOND (SEE CRC 7.201)**

**A. Personal Representatives in Probate Estate.** Even if the Will waives bond, or if the Court directs no bond be filed, or be filed in a reduced sum, the Court on its own motion, or on petition of any person interested in the estate may, for good cause, require the bond be given or amount increased, either before or any time after issuance of letters.

1. *No Bond Required.* Ordinarily, no bond will be required of the personal representative in the following circumstances: (a) where the Will waives bond of the nominated personal representative; (b) where the petitioner is the sole beneficiary under the Will, or (c) all beneficiaries of the estate waive bond. Where appropriate, counsel should file a declaration to assist the Court. The Court, in its discretion, may require a bond.

2. *Bond Required.* In all other circumstances, except for those set forth above, the Court will require a bond. If the personal representative has full IAEA powers, a bond for both personal and the equity in real property must be obtained. If the personal representative has limited IAEA powers, a bond shall be obtained for all of the property, excluding the real property.

**B. Conservatorships/Guardianships.** Ordinarily, bond will not be waived in conservatorships or guardianships.

*[Rule 5.24 adopted effective 5/1/98; amended 1/1/04]*

### **5.25 REDUCING BOND THROUGH USE OF DEPOSITORY FOR BLOCKED ACCOUNT**

**A. Before Issuance of Letters.** The receipt and agreement of depository required by the Probate Code must be filed prior to the issuance of Letters.

**B. After Appointment.** Bonds may be reduced at any time after appointment by a petition and order reducing bond, together with a receipt of a depository showing assets in the amount of the requested reduction have been so deposited. Such a petition must set forth the assets remaining in the estate, after excluding those held by the depository, and it must appear that the reduced bond adequately covers the amount to be protected.

**C. Direct Transmittal to Depository.** If the assets to be deposited are in the possession of a bank, savings and loan association or trust company other than the named depository, the order should direct the entity in possession to deliver such assets directly to the

named depository and further direct the depository, on receiving such assets, to issue its receipt and agreement to the fiduciary. (Financial Code § 765)

**D. Withdrawals or Releases From Depository.** An order authorizing release from a blocked account may be obtained ex parte. The petition should set forth the approximate bond, and the purpose for which the withdrawal is being made. The order may provide for funds to be paid directly to a taxing authority or beneficiary or other person entitled thereto.

**E. Letters.** Any Letters issued where accounts have been blocked should include the statement: "Account located at (institution name) has been blocked and receipts for the blocked account have been filed with the Court."

*[Rule 5.25 adopted effective 5/1/98]*

## **5.26 BOND MODIFICATION**

**A. Duty and Application.** It is the duty of the fiduciary or the fiduciary's attorney, upon becoming aware that the bond is insufficient (e.g., on filing of an inventory or submitting an accounting), to apply immediately for an order increasing the bond. Such application may be made ex parte.

**B. Bond Increase.** When the bond of a fiduciary must be increased, the Court favors filing of an additional bond rather than a substitute bond. Where assets will be coming into or passing through the hands of the fiduciary so as to require an increase of bond, the fiduciary must set forth the information necessary to enable the Court to determine the amount of the increase.

**C. Bond Decrease.** When the fiduciary's bond should be decreased, the Court favors using an order reducing the liability on the existing bond rather than a substitute bond. Where a decrease in bond is sought because distribution has been made, copies of receipts evidencing the distribution should be presented with the petition.

*[Rule 5.26 adopted effective 5/1/98]*

## **5.27 NONRESIDENT EXECUTORS**

A nonresident nominated to serve as executor without bond will usually be required to post bond.

*[Rule 5.27 adopted effective 5/1/98; amended 7/1/08]*

## **5.28 BOND OF SPECIAL ADMINISTRATORS**

In the case of ex parte appointments of special administrators, the Court will usually require a bond even if the Will waives the bond and the beneficiaries waive bond.

*[Rule 5.28 adopted effective 5/1/98]*

# **INVENTORY AND APPRAISAL**

## **5.29 PREPARING INVENTORY AND APPRAISAL**

**A. Preparation.** The California Probate Referees' Association has published a pamphlet, *Probate Referees' Procedures Guide*, describing the suggested form for listing various inventory assets as well as its opinion as to whether particular assets should be listed on Attachment 1 or 2. Although not an official publication, this pamphlet is a good reference.

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Copies are available from the California Probate Referees' Association, 465 California Street, Suite 702, San Francisco, CA 94104. Please refer to this pamphlet for specific information on completing an inventory and appraisal.

**B. Due Date.** The inventory and appraisal for a decedent's estate is due within four months from appointment of a personal representative.

*[Rule 5.29 adopted effective 5/1/98; amended 1/1/04]*

### **5.30 APPOINTMENT OF REFEREE**

**A. Procedure for Request.** To obtain appointment of a Probate Referee, the appropriate box on the Order for Probate should be checked. The Clerk will return the Order with a Referee appointed. If a Referee has not been assigned on the Order for Probate, an Order Appointing Probate Referee should be submitted to the Court.

**B. Request for Particular Referee.** Requests for the appointment or nonappointment of a certain Referee will generally be denied and are discouraged.

**C. Waiver of Appointment of Referee.** The appointment of a Probate Referee may be waived for "good cause" under Probate Code § 8903, et seq. The decision whether good cause exists will be made by the Court on the basis of the facts set forth in the petition. The petition, including a copy of the proposed inventory and appraisal, and notice of hearing shall be served on all persons who are entitled to notice pursuant to Probate Code § 8903. The petition shall state the source of the values included in the inventory and appraisal. Waivers of appointment are not routinely granted.

*[Rule 5.30 adopted effective 5/1/98]*

### **5.31 SUFFICIENCY OF BOND**

If there is a bond in force, the inventory and appraisal must disclose on its face, at the place on the form above the attorney's signature, whether the amount thereof is sufficient or insufficient. See MCR Prob 5.27 regarding bond modification.

*[Rule 5.31 adopted effective 5/1/98]*

### **5.32 OBJECTION TO APPRAISED VALUE OF ASSETS**

Prior to the filing of the inventory and appraisal, counsel are encouraged to engage in informal discussion with the Probate Referee to resolve disagreements over the value of particular assets. After the filing of the inventory and appraisal and before a hearing on the Petition for Final Distribution, the personal representative or an interested person may file a written objection to the value of assets on the appraisal.

*[Rule 5.32 adopted effective 5/1/98; amended 7/1/0]*

## **CLAIMS**

### **5.33 CLAIMS PROCEDURES**

All claims in probate proceedings must conform to the provisions of Probate Code § 9000 et seq.

*[Rule 5.33 adopted effective 5/1/98]*

### 5.34 NOTICE TO CREDITORS

Notice to creditors must be given as provided in the Probate Code. A showing that affirmative efforts to locate and notify creditors, both known and reasonably ascertainable, is required under the Probate Code and must be set forth in the final report.

*[Rule 5.34 adopted effective 5/1/98]*

## SALES OF ESTATE PROPERTY

### 5.35 GENERAL INFORMATION

**A. Judicial Approval.** For estates being administered with full authority under IAEA, judicial approval of sales or exchanges of real or personal property is no longer required; otherwise confirmation of sales is still required.

**B. Notice.** Notice shall be given to the devisee of specifically devised property and to all residuary beneficiaries. The original purchasers of the property whose bid is being returned to Court for confirmation shall also be noticed.

**C. Exclusive Listings for Sale of Property.** A personal representative acting under IAEA has authority to enter into an exclusive agreement to sell real property without prior Court approval. If Court confirmation is sought, either because of limited IAEA or pursuant to the Agreement of Sale, at the hearing on confirmation of sale, the Court may determine the total commission without regard to the terms of the exclusive agreement.

**D. Purchase of Estate Property by Personal Representative.** Although the purchase of estate property by the personal representative is generally prohibited, such purchase may be allowed under limited circumstances subject to Court approval.

*[Rule 5.35 adopted effective 5/1/98; amended 7/1/08]*

### 5.36 SALES OF PERSONAL PROPERTY

#### **A. Tangible Personal Property.**

1. *Necessity for Appraisal.* In all cases other than those administered with full IAEA, the sale of tangible personal property will ordinarily not be approved unless the property has been appraised. For this purpose, a partial inventory and appraisal may be filed or a letter appraisal may be obtained from the appointed Probate Referee.

2. *Commissions.* Commissions on sales of tangible personal property will be allowed only to individuals holding a license authorizing them to deal in the type of property involved. A commission will be allowed on the original bid only when the commission is requested in the return of sale. When there is an overbid in Court, a commission may be allowed to the successful broker, and, if the original bid was subject to a commission, apportionment between the brokers will be made according to the same rules as prescribed for real estate sales. The amount of the commission is within the Court's discretion and will ordinarily conform to the amounts found below.

**B. Securities.** The petition for authority to sell securities must set forth a minimum sales price as to all securities except those listed on an established exchange. The minimum price must be a recent market quotation from the New York Stock Exchange, American Exchange or an over the counter market. If there is no recent market quotation available or the

securities are "closely held," the petition must set forth the basis for fixing the minimum sales price.

**C. Condominiums, Community or Cooperative Apartments.** A condominium or cooperative apartment is an interest in real property and must be sold as such, unless it is held as a limited partnership. (Civil Code § 783) The sale of a cooperative apartment will not be confirmed subject to the original (returned) purchaser later obtaining the acceptance of a Board of Directors or other governing body. If there is an overbid, the Court, at the request of the personal representative, will then continue the matter for the purpose of obtaining acceptance. If the personal representative does not wish to continue the matter for this purpose, the Court will not accept the overbid.

*[Rule 5.36 adopted effective 5/1/98; amended 7/1/08]*

### **5.37 RETURN OF SALE OF REAL PROPERTY**

**A. Publication of Notice of Intention to Sell Real Property.** Notice of Intention to Sell Real Property must be published in decedents' estates (except for estates in which there is a power of sale in the will or estates being administered under full IAEA) and in all conservatorships/guardianships unless the Court has granted the conservator/guardian power to sell. Publication must be in a newspaper published in the county in which the real property lies.

If an executor having power of sale in the Will publishes a notice of sale of the real property and proceeds with the sale and a technical defect appears, the defect cannot be cured by exercising the executor's power of sale. The executor must publish a new notice.

**B. Contents of Notice and Purpose of Notice.** The notice should include the date and place of sale, *not* the date of the confirmation hearings. The published notice is a solicitation for offers. No offer can be accepted until the date on or after the time for making bids expires. In addition to a legal description of the property, the notice should contain the street address or other common designation of the property, when available, and should also state the following, where applicable:

1. If an exclusive listing has been given, the notice should so state.
2. If the property is to be sold subject to an encumbrance, the notice should so state.
3. If the property is to be sold for cash only, the notice must so state.
4. If the estate would prefer all cash but will accept part cash and part credit, the notice should include the following language: "All cash, or part cash and part credit, the terms and conditions of credit as acceptable to the fiduciary and the Court."

**C. Effect of Notice.** Any offer accepted and returned to Court for confirmation must conform to the terms of sale contained in the notice.

*[Rule 5.37 adopted effective 5/1/98]*

### **5.38 RETURN OF PRIVATE SALE FOR COURT CONFIRMATION**

**A. Appraisal and Reappraisal.** In order for a private sale to be confirmed, there must be on file an appraisal by the Probate Referee of the property and, if required, a reappraisal by the Probate Referee if the decedent's date of death or guardian's or conservator's

appointment occurred more than one year before the date of the confirmation hearing. The appraisal and reappraisal should be on file prior to the hearing date on the return of sale but counsel may bring the reappraisal to the court hearing.

**B. Market Exposure of Property.** Whenever it is brought to the attention of the Court that the fiduciary has denied bona fide prospective buyers or their brokers a reasonable opportunity to inspect the property, or the property has not had maximum market exposure, the returned sale will not be confirmed, and the sale will be continued to allow inspection and further exposure to the market.

**C. Second Deeds of Trust.** The Court will approve the taking of a promissory note secured by a junior deed of trust upon a showing that it serves the best interests of the estate.

**D. Hearing on Return of Sale and Overbids.** Counsel must be prepared to state the minimum necessary overbid price. Counsel should give notice to the original purchaser or his agent of the time and place of hearing and advise that they be in Court for the hearing.

**E. Earnest Money Deposit by Overbidder.** When a sale is confirmed to an overbidder, the overbidder, *at the request of the personal representative*, must submit at the time of hearing a certified or cashier's check in the amount of 10 percent of the entire amount of the bid, but not to exceed the amount of the cash down payment.

**F. Bond.** The petition for confirmation of sale of real estate should set forth the amount of the bond in force at the time of sale. If no additional bond is required, or if bond is waived, that fact should be alleged. If additional bond is required after confirmation of sale of real property, the petitioner should provide sufficient information to the Court to determine the net proceeds of sale and the amount of the required additional bond. If proceeds are to be placed in a blocked account, the matter will be placed on the following week's probate calendar for verification that a receipt for the blocked account is on file. If additional bond is required in the confirmation order, the Court will not enter the order until the additional bond is filed. (CRC 7.206)

**G. Absence of Attorney for Estate at Confirmation Hearing.** If someone is present who wishes to overbid and the estate's attorney is absent, the hearing will be continued, except where the fiduciary is present and requests that the sale proceed without the attorney.

**H. Partial Interest.** Where the estate has a partial interest in real property, all information in the petition should refer ONLY to the partial interest, including the overbid amount. If the additional interest is also being sold outside of Court, the total bid necessary should be announced in open court.

*[Rule 5.38 adopted effective 5/1/98; amended 7/1/08]*

### **5.39 BROKER'S COMMISSIONS**

**A. Improved Real Property.** The Court will ordinarily allow a broker's commission not to exceed 6% of the first \$100,000 and 5% of any excess over \$100,000. It is understood that commissions are negotiable and the parties may agree to a lesser percentage.

**B. Unimproved Real Property.** The Court will ordinarily allow a broker's commission not to exceed 10% of the first \$20,000, 8% of the next \$30,000, and 5% of the balance of the sale price. In the Court's discretion, a flat 10% may be allowed. In each instance, the Court will determine what is "unimproved" real property.

**C. Commission Rates at Real Property Situs Will Apply.** When the real property is not located in Marin County, the Court will allow commissions based on the Marin Probate Court schedules unless it is shown that a larger commission would be allowed based on the schedule in effect in the Probate Court of the County in which the property is located.

1. *Commissions in Excess of Schedule.* A commission exceeding the normal schedule will be allowed only if it is reasonable in the opinion of the Court. The written agreement of the affected beneficiaries to the allowance of such commission should be obtained.

**D. Broker Bidding for Own Account Not Entitled to a Commission.** A broker bidding for his own account is not entitled to receive or share in a commission.

**E. Broker's Commissions in Overbid Situations.** The broker's commission in overbid situations depends upon who is represented by a broker.

1. *Only original bidder represented by broker.* When the original bidder is represented by a broker and the successful overbidder is not, the original broker is allowed a full commission on the amount of the original bid returned.

2. *Where overbidder represented by broker.* The overbidder's broker receives a full commission on the overbid price confirmed by the Court, reduced by one-half (1/2) the commission on the original bid, which latter commission will be split equally between the original bidder's broker and any listing broker involved in the sale. Overbidder's commission is limited by Probate Code § 10162 to half the difference between the successful overbid and the returned bid if the original bidder is not represented by a broker. If the brokers have an agreement regarding the splitting of the commissions, it must be signed by all brokers. Reference to the multiple listing is not sufficient to alter the statutory requirements for the splitting of broker's commissions.

**F. Order Must Allocate Commission.** The order confirming sale must show the total commissions allowed and any allocation agreed on between brokers.

*[Rule 5.39 adopted effective 5/1/98; amended 7/1/09]*

## **ACCOUNTS**

### **5.40 IN GENERAL**

All accounts filed in probate proceedings, including guardianship, conservatorship, and trust accounts, must be typewritten and must conform to the provisions of the Probate Code. The provisions relating to accounting can be found in Probate Code §§ 1061 et seq. The summary of account must be in carry value (not market value). An additional schedule must be provided showing the market value of assets at the end of the accounting period per Probate Code § 1063(a). The account must state the period covered by the account. A personal representative's account must begin with the date of death of the decedent. Accounts not conforming to the Probate Code will not be approved. When a future accounting is required, the following language shall be included in the last paragraph of the proposed order for approval of an intermediate accounting: "The [First/Second/Third etc.] Account and Report covering the accounting period from <insert applicable date> to <insert applicable date> shall be filed by \_\_\_\_\_."

*[Rule 5.40 adopted effective 5/1/98; amended 7/1/10]*

**5.41 BONDS**

In any account where bond has been posted, allegations must be included as to the total bond(s) posted, the fair market value of personal property on hand at the close of the account period plus the estimated annual gross income from the real and personal property, and any additional bond required.

*[Rule 5.41 adopted effective 5/1/98]*

**5.42 TRUSTEE'S FIRST ACCOUNT**

The starting balance of a testamentary trustee's first account must conform to the trustee's receipt(s) filed on distribution of the assets of the decedent's probate estate. The petition for settlement of a trustee's account must include the names of beneficiaries and remainderpersons and set forth the trust provisions for distribution of principal and income.

*[Rule 5.42 adopted effective 5/1/98]*

**5.43 WAIVER OF ACCOUNT**

**A. By All Interested Parties.** Waiver of accounting is permitted when each person entitled to distribution files either a written waiver of accounting or a written acknowledgment that the distributee has already received that to which he/she is entitled. A beneficiary of a specific cash bequest or non-income producing assets ordinarily need not execute a waiver of the accounting.

**B. Effect of Waiver.** If an account is waived under Probate Code section 10954, the details of receipts and disbursements need not be listed in the report. However, the report must list the information required by law, including information as to creditors' claims, sales, purchases or exchanges of assets, changes in the form of assets, assets on hand, whether the estate is solvent, detailed schedules of receipts and gains or losses on sale (where an amount other than the amount of the Inventory and Appraisal is used as a basis for calculating fees or commissions), costs of administration (if reimbursement of these costs is requested), the amount of any fees or commissions paid or to be paid, and the calculation of such fees or commissions as described in CRC 7.705.

**C. Waiver by Trustee.** A trustee who is also the personal representative may not waive an accounting of himself/herself. The waiver may be executed by a co-trustee or by all trust beneficiaries presently entitled to distribution. This applies to testamentary trusts and to pourover wills into intervivos trusts. A testamentary trustee who waives the accounting of the personal representative must have filed a consent to act as trustee.

*[Rule 5.43 adopted effective 5/1/98]*

**DISTRIBUTION OF PROBATE ESTATE**

**5.44 NOTICE REQUIREMENTS ON PETITIONS FOR DISTRIBUTION**

**A. Basic Notice Requirements.** Unless the Court has ordered that notice be dispensed with, at least fifteen (15) days before the time set for the hearing of a petition for partial, preliminary or final distribution, the petitioner shall cause notice of the time and place of hearing to be served on the following:

1. Each non-petitioning personal representative or non-petitioning personal co-representative.

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2. The devisees/heirs whose interest in the estate is affected by such petition.
3. The heirs of the decedent in intestate or partially intestate estates.
4. The State of California if any portion of the estate is to escheat to it.
5. The persons who have filed a Request for Special Notice.
6. The persons (or to their attorney, if they have appeared by attorney) who have given notice of appearance in the estate in person or by attorney.
7. If the personal representative is also the trustee, the income beneficiaries of the trust *must* be noticed.
8. In an insolvent estate all creditors having filed creditors' claims must be noticed.

**B. Notice to Prior Representative and Attorney.** If there has been a change of personal representative or a substitution of counsel, notice of hearing on any petition for distribution must be given to such prior representative and any substituted counsel unless:

1. A waiver of notice is executed by the prior representative or counsel is on file or included with the petition; or
2. An agreement on the allocation of compensation is on file or included with the petition; or
3. The file and petition demonstrate that the commissions the prior personal representative or the fees of the substituted counsel have been previously provided for and allowed by the Court.

**C. Proof of Notice.** Proof of the giving of notice shall be filed prior to the hearing and, if it appears to the satisfaction of the Court that the notice has been regularly given, the Court will so find in its Order.

**D. Additional Notices.** Whenever the Court deems that the notice which has been given is insufficient, it may require such further and additional notices to be given as it deems proper.

*[Rule 5.44 adopted effective 5/1/98]*

### 5.45 PRELIMINARY DISTRIBUTION

**A. Preliminary Distribution Under Probate Code § 11620.** In addition to any other requirements, a petition for preliminary distribution must state the approximate value of the property remaining in the estate after the proposed distribution, an estimate of the total amount of unpaid taxes, unpaid claims and other liabilities, a statement of why final distribution cannot be made and when it will be made. An inventory and appraisal which includes the property to be distributed should be on file.

**B. Ex Parte Petition for Preliminary Distribution.** Absent an emergency, preliminary distributions should be set for noticed hearing. The Probate Code provides for an ex parte petition for preliminary distribution. The urgency justifying such ex parte application must be set forth.

*[Rule 5.45 adopted effective 5/1/98]*

**5.46 FINAL DISTRIBUTION IN GENERAL**

**A. List of Assets and Description of Property Required.** A petition for final distribution, whether or not an account is waived, must list assets on hand and list and describe the property to be distributed, either in the body of the petition, or by a schedule in the accounting, or in a separate exhibit incorporated in the petition by reference. Description by reference to the inventory is insufficient. In the Order for Final Distribution real property must be described by legal description and include the parcel number.

**B. Specific Statement How Estate to be Distributed.** The petition for final distribution must state specifically how the estate is to be distributed. A general allegation that distribution is "in accordance with the terms of the Will" or "in accordance with the laws of intestate succession" is insufficient.

**C. Non-Prorata Distribution.** When the petition seeks a non-prorata distribution, it must show the computation on which the proposed distribution is based. Consents of interested beneficiaries must be filed.

**D. Decree of Distribution.** Whether or not an accounting has been waived, the decree of distribution must set forth specifically the manner in which the estate is to be distributed by showing the distributee's name and a description of the property, including the legal description of real property, and the amount of cash (as of a date certain) to be distributed. This must be in the body of the decree. Mere reference to allegations in the petition is insufficient and not acceptable to the Court.

1. *Blocked Funds.* The decree should provide that the savings institutions or other depository holding blocked funds belonging to the estate draw checks payable to named distributees. Funds held in blocked accounts in lieu of bond will not be released to the personal representative for distribution.

**E. Preliminary Distribution Receipts.** Receipts for any preliminary distribution must be on file prior to the final distribution.

*[Rule 5.46 adopted effective 5/1/98]*

**5.47 ADDITIONAL REQUIREMENTS RE: PETITION FOR FINAL DISTRIBUTION**

**A. Allegations Relating to Creditor's Claims.** In addition to the allegation that all reasonably ascertainable creditors have been notified, the petition for final distribution whether or not on waiver of accounting and whether or not the personal representative is acting under the IAEA, must describe all creditors' claims presented to the personal representative (even if not filed with the Court) and indicate the disposition of each claim. If a claim has been rejected, the date of service of notice of rejection must be stated, as well as its disposition, whether by suit or otherwise. This information must be set forth in the petition for final distribution even though it may have been presented to the Court in whole or in part in prior accountings or petitions for distribution.

**B. Allegations Relating to Independent Acts.** The petition for final distribution must list and describe all independent acts taken without prior Court approval and must contain an allegation that the notice period for the advice of proposed action was met or waived and that no objections were received. The originals of the advice of proposed action with attached declarations of mailing must be available but need not be filed with the Court.

**C. Allegations Relating to Character of Property.** In all cases where the character of the property may affect distribution, whether the decedent died testate or intestate, the petition for distribution must contain an allegation as to the separate or community character of the property.

**D. Community and Quasi Community Property Elections.** If a spousal election has been made, the date of the filing of the documents exercising such election and the nature of the election should be set forth in the petition.

**E. Change of Ownership.** If real property is or was an asset of the estate, any petition for distribution of real property should allege that the change of ownership report was filed with the County Recorder or assessor of each county in which any real property included in the inventory is located.

**F. Payment of Taxes.** The petition for final distribution must address the question of the source of the payment of the federal estate tax and California estate tax, if any. If the Will has a clause directing the payment of the taxes out of the residue of the estate, this should be alleged. If there is no tax clause or there is a tax clause which does not direct the source of payment, the amounts required to be prorated or charged must be stated. The final account must show the computation and the order of final distribution must show the proration.

**G. Retention of a Reserve.** The decree of final distribution must specifically set forth the use that may be made of retained funds (e.g. income taxes, closing costs, property tax reassessment, etc.). The reserve shall generally not exceed 10% of the assets on hand. The petition for final discharge must show the disposition of all amounts held in reserve and vouchers, if requested by the Court, must be filed for any distributions unless account is waived.

*[Rule 5.47 adopted effective 5/1/98; amended 7/1/15]*

#### **5.48 AGREEMENTS FOR DISTRIBUTION; ASSIGNMENTS; DISCLAIMERS**

**A. Agreements.** If the distributees agree to distribution in a manner other than that provided by the Will or by the laws of intestate succession, such agreement must be in writing, signed and acknowledged by all parties affected by the distribution, and filed in the probate proceeding.

**B. Assignments.** The Probate Court will distribute directly to the assignee of an heir or devisee only when a duly acknowledged assignment is on file.

**C. Disclaimers.** If a disclaimer has been filed, the Petition for Distribution should set forth the date of filing, the person disclaiming, the property of the estate affected and the person or persons entitled to receive distribution of the property disclaimed.

*[Rule 5.48 adopted effective 5/1/98]*

#### **5.49 DISTRIBUTION TO PERSONS UNDER CONSERVATORSHIP OR GUARDIANSHIP**

The decree should provide for distribution of the property to the minor or the conservatee rather than to the guardian or conservator, but must provide that actual payment or delivery be made to the guardian or conservator.

*[Rule 5.49 adopted effective 5/1/98]*

**5.50 DISTRIBUTION TO MINORS**

**A. Delivery to Parent.** Where delivery of the assets is to be made to the minor's parent, the declaration by the parent complying with the provisions of Probate Code § 3401 must be on file before the hearing date.

**B. Depository.** Where a depository is to be used, the receipt and agreement of the depository must be filed as required under Probate Code § 2328 and the decree of distribution shall so provide. The decree shall direct distribution of the minor's funds to a specific depository, including its location, in the name of the minor and shall state that the funds cannot be withdrawn without Court order.

*[Rule 5.50 adopted effective 5/1/98]*

**5.51 DISTRIBUTIONS TO TRUSTEES**

If distribution is to a trustee who is not the personal representative, the consent of the nominated trustee to act must be on file prior to the hearing on the petition for distribution to the trustee. A written declination should be filed by or on behalf of the trustee who does not choose to act. The decree must contain the terms of the testamentary trust.

*[Rule 5.51 adopted effective 5/1/98]*

**5.52 DISTRIBUTION TO REPRESENTATIVE OF DECEASED HEIR OR BENEFICIARY**

When a beneficiary dies during the administration of an estate and survives any survival period stated in the Will, the decree should provide for distribution to the named personal representative of the estate of the beneficiary or where applicable, to the person(s) entitled thereto under Probate Code § 13100. Counsel must file a certified copy of Letters Testamentary or the original affidavit required by Probate Code § 13101 before the hearing date.

*[Rule 5.52 adopted effective 5/1/98]*

**5.53 DISTRIBUTION TO INTESTATE HEIRS**

Heirs who take by virtue of intestacy must be sufficiently described to permit the Court to determine if the laws of intestate succession have been properly applied. If an heir takes by right of representation, the Petition must indicate his parentage, and the approximate date of the parent's death.

*[Rule 5.53 adopted effective 5/1/98]*

**5.54 DISTRIBUTION TO "MISSING" HEIR**

When distribution is to be made to the State of California because there are no known heirs or there is an heir or devisee whose whereabouts is unknown, the notification requirements of the Probate Code must be followed. In addition, alternative distributees must be set forth. (Probate Code § 11603(c))

*[Rule 5.54 adopted effective 5/1/98; amended 1/1/04]*

**5.55 INTEREST ON GENERAL PECUNIARY LEGACIES**

The Court will strictly enforce the policy regarding interest on general pecuniary legacies set forth in the Probate Code and will order payment of interest at the statutory rate on

all general pecuniary bequests not paid within one year from the date of decedent's death unless payment of interest is waived in the Will.

*[Rule 5.55 adopted effective 5/1/98]*

## **MISCELLANEOUS PETITIONS AND ORDERS**

### **5.56 FAMILY ALLOWANCE**

**A. Necessary Allegations of Petition.** All petitions for family allowance must show that the allowance is necessary and reasonable, including:

1. The nature and separate and community character of the probate estate and whether or not it is solvent;
2. Whether others are entitled to family allowance;
3. The approximate needs of the applicant, with reference to his or her standard of living; and
4. The applicant's income from other sources.
5. The petitioner shall file an income and expense declaration prior to the hearing. (Judicial Council Form FL-150)

**B. Duration of Family Allowance.** All orders will limit family allowance to a definite period of time. If the order is on an ex parte petition, family allowance will normally not be granted for a period exceeding six months.

**C. Before Inventory Filed.** Before an inventory is filed an order for a family allowance may be made or modified ex parte or on noticed hearing.

**D. After Inventory Filed.** After an inventory has been filed an order for a family allowance may be made or modified only on noticed hearing.

*[Rule 5.56 adopted effective 5/1/98; amended 7/1/08]*

### **5.57 STATUS REPORTS**

The statutory requirements for filing of status reports annually in lieu of accountings are taken seriously by the Court. Attorneys failing to comply with the statutory requirements may expect to have their statutory compensation reduced. All status reports must explain why the case has not been closed and when the attorney expects to file a petition for final distribution. The Order must require the filing of an additional status report on or before the date fixed for the Petition for Final Distribution if the petition is not to be filed by that date.

*[Rule 5.57 adopted effective 5/1/98; amended 7/1/15]*

### **5.58 OBTAINING FINAL DISCHARGE**

An Ex Parte Petition for Final Discharge and Order shall include a copy of the Judgment for Final Distribution and a receipt or other satisfactory evidence from each distributee. The receipt of distribution should match the distribution found on the Judgment for Final Distribution. The distribution of any reserve may be included on the primary receipt or may be filed as a separate receipt. The Court may excuse the filing of a receipt on a showing that the personal representative is unable, after reasonable effort, to obtain a receipt

that the property has been delivered to or is in the possession of the distributee. In the case of real property, the personal representative shall file a statement that identifies the date and place or location of the recording of the judgment of final distribution or other appropriate recording information. If funds have been retained as a reserve, the application for final discharge shall contain the disposition of all funds and all receipts. The Court in its discretion may require a supplemental account for the reserve.

*[Rule 5.58 adopted effective 5/1/98; amended 7/1/15]*

#### **5.59 PROCEEDINGS TO ESTABLISH FACT OF DEATH**

**A. Filing Under Decedent's Name.** A petition to establish the fact of death must be filed in the name of the deceased person whose interest is to be terminated.

**B. Separate Petition Preferred.** Although the Probate Code authorizes a petition to establish the fact of death to be included in a verified petition for probate of Will or for Letters of Administration for convenience of administration, attorneys are encouraged to file a separate petition.

**C. Property Description.** If real property is affected, a copy of the document showing the decedent's interest must be attached to the petition and incorporated therein, or the verified petition must set forth the entire instrument vesting title, including the recordation data. If personal property is affected, the location and description of the property and the decedent's interest therein must be set forth with particularity.

**D. Death Certificate.** A certified copy of the death certificate shall be filed with the petition.

**E. Attorneys' Fees.** There is no provision in the Probate Code for allowance of set attorneys' fees in proceedings to establish the fact of death and the Court will not fix such fees. The attorney should make fee arrangements directly with the client. However, if a surviving joint tenant failed during his or her lifetime to establish the fact of death of a previously deceased joint tenant, compensation for extraordinary services may be awarded in the probate proceeding involving the surviving joint tenant for those services performed after the death of the surviving joint tenant.

*[Rule 5.59 adopted effective 5/1/98]*

#### **5.60 PETITION TO ESTABLISH IDENTITY OF HEIRS**

A Petition to Establish Identity of Heirs may be filed when title to real or personal property vests in heirs, heirs of the body, issue, or children of the decedent without other specific identification. Like the proceeding to establish death, only the fact of identity is determined and the resulting judgment does not determine the legal right to the property involved.

*[Rule 5.60 adopted effective 5/1/98]*

#### **5.61 TRANSFER OF ESTATE PLANNING DOCUMENTS TO CLERK**

Only estate planning documents held by an attorney for safekeeping may be transferred to the Clerk of the Court under Probate Code § 732. Guidelines and the form to be presented to the Clerk (local form PR014) are available in the Clerk's Office and online at [www.marincourt.org](http://www.marincourt.org).

*[Rule 5.61 adopted effective 1/1/14]*

## **GUARDIANSHIPS AND CONSERVATORSHIPS**

### **5.62 TEMPORARY GUARDIANSHIPS AND CONSERVATORSHIPS**

**A. Good Cause Required.** A temporary guardianship or conservatorship will not be granted without a showing of good cause. The petition should set forth facts showing the emergency or urgent nature of the request.

**B. Presenting Petition.** The petition for temporary guardianship or conservatorship must be filed in the Clerk's Office (Room 113). A hearing for the appointment of temporary *conservator* will be set by the Court Investigator. A hearing for the appointment of a temporary *guardian* will be set by the Probate Examiner. Judicial Council Form GC-330 (Order Appointing Court Investigator) must accompany the petition. A copy of the petition, all supporting documents, and the Probate Contact Information Form (Local Form PR015) must be provided immediately to the Court Investigator so the report required by Probate Code §2250.6 can be prepared prior to the hearing.

**C. Bond.** A full bond will normally be imposed upon a non-corporate temporary guardian or conservator of the estate; if a lesser amount is requested, good cause must be shown in the petition. The Court may in certain cases require a bond of a temporary conservator or guardian of the person.

**D. Notice.** Notice must be given to the persons listed in Probate Code §§ 1510, 1511, 1821 and 1822. If the petition requests that notice be dispensed with to any persons required to receive notice, the Judicial Council Form GC-112 must be filed with the petition for appointment of a temporary conservator. The fact that a proposed conservatee may not understand the proceeding or be unable to attend is not a reason for dispensing with notice.

**E. Powers of Temporary Guardians and Conservators.** Temporary guardians or conservators have the same powers as permanent guardians or conservators with the following exceptions:

1. *Sales.* Temporary guardians or conservators may not sell any property including securities, vehicles, personal property, or real property.

2. *Change of Residence Under a Temporary Conservatorship.*

a. *Hearing.* The court is required to hold a hearing within seven (7) days after a petition is filed. (Probate Code § 2253(c)) The proposed conservatee is required to attend the hearing unless he/she is unable or unwilling to attend the hearing and does not object. The proposed conservatee has the right to legal counsel, the right to confront any witnesses presented by or on behalf of the temporary conservator, and to present evidence on his/her own behalf. The court, in granting the petition, must make a finding that the change of residence is required to prevent irreparable harm and that no means less restrictive of the proposed conservatee's liberty will be sufficient to prevent such harm.

b. *Order.* The order shall specify the specific place where the placement is authorized. The court may not authorize removal from the state without an additional showing of necessity. A conservator who "willfully" removes a temporary conservatee from the state without a court order is guilty of a felony. (Probate Code § 2253(g))

c. *Investigation by Court Investigator.* If directed by the court, the Court Investigator does the following: (i) personally interview the proposed conservatee; (ii) inform the proposed conservatee about the proceedings and his/her rights; (iii) determine if the proposed conservatee objects, wishes to exercise his/her legal rights, is able and willing to attend the hearing, if legal counsel should be appointed, and whether the change of residence is required to prevent irreparable harm and no less restrictive means will suffice to prevent harm. The Court Investigator's report must be filed at least two (2) days before the hearing. The contents of the report must mirror the determinations above. (See Probate Code § 2253(b)(8))

**F. Special Powers.** Good cause must be shown for special powers to be granted without a hearing. If special powers or other special orders are sought, they must be specified in the petition and supported by factual allegations. Specific written explanations must be submitted for each power requested under Probate Code § 2590. In any case involving a special medically related power, a physician's declaration should be presented with the petition. Except in cases of emergency, no power of sale of real property will be granted without a noticed hearing.

**G. Length of Appointment.** A temporary conservator will be appointed only pending the hearing on the petition for appointment of the conservator.

*[Rule 5.62 adopted effective 5/1/98; amended 7/1/09]*

## **5.63 GUARDIANSHIP AND CONSERVATORSHIP ACCOUNTING STATEMENTS**

Original financial accounting, billing and/or escrow statements lodged with the Court shall also be accompanied by a self-addressed envelope of sufficient size and with sufficient postage for the return of the statements after the determination of the account becomes final.

*[Rule 5.63 adopted effective 1/1/19]*

## **5.64 GUARDIANSHIPS**

**A. Notice of Petition for Appointment of Guardian.** Notice of petition must comply with Probate Code §§ 1510-1511. Note that these sections require *personal service* on specified persons. In situations where an order dispensing with notice is sought on the ground that a relative within the second degree cannot be found with reasonable diligence and no other notice is required, the Court requires a declaration stating specifically what efforts were made to locate the relative.

**B. Proposed Ward's Appearance at Hearing for Appointment of Guardian.** The requirement of an appearance is within the discretion of the Court and will be decided on an individual case basis. Where the proposed ward is the natural child of the proposed guardian of the estate, an appearance by the proposed ward is not required.

**C. Investigative Reports.** Unless waived by the Court, an investigative report must be given to the Court prior to appointment of a guardian of the person and/or estate.

1. *Non-Relative Petitioner.* In all cases where a non-relative petitions to be appointed guardian, the Department of Social Services will perform an investigation and make a report to the Court prior to the hearing date.

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2. *Relative Petitioner.* When the proposed guardian is a relative, the court investigator will interview all parties at the time of the hearing and report to the Court.

**D. Required Documents.** The following documents must be filed with the petition:

1. *Guardian Information Form.* The Court requires that a Guardianship Information Form (local form PR007) in support of the petition for guardianship of the person be filed with the petition by the proposed guardian. The Guardianship Information Form will become part of the confidential court file. A copy should be provided to the Court Investigator within five (5) days after filing the Petition for Appointment of Guardian. The declaration shall include the following:

a. The need for guardianship including the specific reasons why the parents are unable to care for the proposed ward, and whether they consent to the guardianship.

b. A statement concerning the development of the minor, indicating with whom the minor has resided since birth, and any special emotional, psychological, educational or physical needs of the minor and the guardian's ability to provide for such needs.

c. Any arrest record of the guardian and each person who will reside in the guardian's home, including the nature of the offense, the date, place and disposition.

d. Any pending or prior proceedings in Juvenile Court involving the minor or any other persons who will be residing in the guardian's home including the date, place, and disposition.

e. Any prior contact by the minor, the guardian, and any persons who will reside in the guardian's home with Child and Family Services of the Department of Social Services.

f. A statement regarding the necessity for a visitation order. Any information regarding visitation orders which are currently in effect and any information concerning visitation issues between any of the parties. If visitation is an issue, a statement as to how often the parents visit.

2. *Declaration Under UCCJEA.* A declaration under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) shall be filed with the petition and at any time there is a change of address of the ward.

3. *Confidential Guardian Screening* (Judicial Council Form GC-212).

4. *Duties of Guardian and Viewing of Film.* Before Letters of Guardianship are issued, each proposed guardian of the person or estate must sign and file the Duties of Guardian form (Judicial Council Form GC-248). The proposed guardian must also view the guardianship film, available on the Court's website at [www.marincourt.org](http://www.marincourt.org) or shown in Room 116 and file the Declaration of Proposed Guardian's Viewing of Film (Local Form FL033/PR033).

**E. Inventory and Appraisal.** At the hearing to appoint a guardian of the estate, a compliance hearing will be set in approximately 120 days to ensure the Inventory and Appraisal (I&A) has been filed as required by law. If the I&A has been filed, bond is

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sufficient, receipts for blocked accounts have been filed, and the notice required by law has been provided, the hearing will be dropped. If the requirements of this rule and the law have not been met, an appearance by the attorney and the fiduciary will be required.

**F. Accounts and Reports.** The report accompanying each accounting should contain a statement of the age, health and whereabouts of the ward. In addition, the report should contain an allegation concerning the amount of bond currently in effect and should address the question of the adequacy thereof.

1. *Conflicts of Interest.* The report accompanying an account shall include a disclosure of any actual or potential conflicts of interest as required by law. If no disclosures are required, the guardian shall include an allegation that no disclosures are required pursuant to Probate Code §§ 2111.5, 2351(d), 2401(c), and 2403(c)(2).

2. *Waivers of Accounts.* Waivers of interim accounts will not be accepted. Waivers of final accounts on termination are not favored and the Court may require the ward to be present at the hearing.

**G. Guardianship Status Report.** A confidential guardianship status report is due annually on the Judicial Council form.

**H. Discharges.** Discharge of the guardian will not be made in the order settling final account. A separate declaration for final discharge must be submitted, together with the receipt executed by the former ward and a copy of the order settling the final account and ordering delivery of the assets to the former ward. The declaration must state the date on which the ward reached majority.

**I. Copies.** All filings regarding guardianships must be accompanied by a copy designated for the Court Investigator.

**J. Current Address.** All attorneys and guardians are required to keep the Court informed of their current addresses and phone numbers as well as the current address and phone number of the ward.

**K. Use of Minor's Assets for Support.** In guardianship cases, if a minor has a living parent who receives or is entitled to support for the minor from another source, prior Court approval must be obtained before using guardianship assets for the minor's support, maintenance or education. The petition must set forth the parents' financial inability or other circumstances which would justify use of the guardianship assets. Such petition may be included in a petition for the appointment of a guardian. An order granting the petition should normally be for a limited period of time, usually not to exceed 6 months, or for a specific and limited purpose.

1. *Funds in Blocked Accounts.* A request for withdrawal of amounts necessary for the minor's support may normally be made ex parte if accompanied by a sufficient showing of the need. However, where the minor has a living parent, the petition must contain the allegations referred to above; in such cases the Court may require the obtaining of an order prescribing notice and a calendared hearing.

[Rule 5.64 adopted effective 5/1/98; amended 7/1/15]

**5.65 ORDERS FOR WITHDRAWALS OF FUNDS IN BLOCKED ACCOUNTS**

Withdrawals are handled informally by the Court upon ex parte petition by the guardian. Normally an attorney need not be involved. Where withdrawal is sought because

the minor has reached majority, the order establishing the blocked account is not self-executing, a certified copy of the minor's birth certificate or other convincing evidence of the minor's age must be presented with the petition for withdrawal. The order must provide for the payment of the funds only to the former minor. Where withdrawal is sought prior to majority, the purpose of the withdrawal must be fully disclosed. Withdrawals are disfavored except in cases of medical emergencies or unusual needs which a parent is unable to meet.

In the case of guardianship estates consisting solely of blocked accounts established after settlement of litigation, orders establishing such accounts should provide for direct payment to the minor upon reaching the age of majority. Withdrawals prior to that time may be made by the guardian without assistance of counsel. Withdrawals may be sought by completing forms of petitions and orders provided by the Clerk. The purpose of the withdrawals must be disclosed in full to the Court. Withdrawals are disfavored by the Court except in the case of medical emergencies and unusual needs when parents cannot afford to pay.

*[Rule 5.65 adopted effective 5/1/98; amended 1/1/10]*

#### **5.66 DISPOSITION OF MINOR'S FUNDS (PROBATE CODE § 3410)**

**A. Contents of Petition.** A petition under these sections must set forth jurisdictional facts, state the amount to be paid and by whom, the amount of fees and reimbursement of costs requested, the relief requested, and a statement of the reasons that the requested relief will best serve the interests of the minor.

**B. Notice.** The petition may be presented ex parte if the only relief sought other than reimbursement for filing fee and award of reasonable attorneys' fees is to deposit funds in a blocked account and the amount involved does not exceed \$20,000. Otherwise, the petition must be noticed.

**C. Order.** Where the minor's funds are to be deposited in a blocked account, the order must provide that the person holding funds shall disburse the ordered amount of fees and costs, if any, directly to the person(s) entitled thereto and disburse the balance to the selected depository, whose name and address must be specified. The order must also provide that the receipt by the depository of the funds and a copy of the order must be filed forthwith upon the deposit of the funds.

The receipt must acknowledge that the funds may be withdrawn only on Court order.

*[Rule 5.66 adopted effective 5/1/98]*

#### **5.67 CONSERVATORSHIPS**

**A. Special Requirements.** In all conservatorship proceedings:

1. *Judicial Council Forms.* Adopted forms must be used and approved forms may be used.

2. *Copies.* An extra copy of all conservatorship filings must be given to the Clerk of the Court designated for the Court Investigator.

3. *Change of Address.* Whenever the address of the conservatee is changed, the conservator must file a Pre-Move Notice of Change of Residence (Judicial Council Form GC-079) or a Post-Move Notice of Change of Residence (Judicial Council Form GC-080) within the timeframe required by law. Any changes to the address or phone

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number of the conservator or attorney must be promptly filed with the Court. Copies of all changes of address or telephone number must be provided to the Court Investigator.

### **B. Appointment of Conservator.**

1. *Order Appointing Court Investigator.* An order appointing Court investigator must be signed and filed with the petition for appointment of conservator.

2. *Confidential Supplemental Information.* All petitions for conservatorship must be accompanied by the Judicial Council form Confidential Supplemental Information.

3. *Confidential Conservator Screening* (Judicial Council Form GC-314).

4. *Handbook For Conservators and Viewing Of Film.* Before Letters of Conservatorship are issued, each conservator of the person or estate must: (a) obtain and file the Duties of Conservator indicating receipt of the Handbook for Conservators, and (b) view the conservatorship film, available on the Court's website or shown in Room 116 and file the Court's form PR034 entitled "Acknowledgment of Proposed Conservator's Viewing of Film."

**C. Additional Powers of Conservator.** The Court may, on the petition of the conservator either at the time of appointment or later, grant additional powers to the conservator as authorized by the Probate Code. The Court does not favor the granting of Special Powers absent a showing of good cause. Any additional powers will be tailored to the specific circumstances of each case. Ordinarily, the Court will not grant the power to sell real property.

**D. No Attorneys' Fees in Order Appointing Conservator.** The Court does not grant attorney fees in the Order Appointing Conservator.

**E. Doctor's Declaration.** A doctor's declaration on the Judicial Council Form is required stating not only that the proposed conservatee suffers from a deficit, but how that deficit prevents the proposed conservatee from functioning.

**F. Professional Conservators.** When seeking appointment, private *professional* conservators must include a statement that he/she is licensed under the Professional Fiduciaries Act of the Business and Professions Code, along with the license number and expiration date. All professional fiduciaries who are exempt from the definition of professional fiduciary under Business and Professions Code § 6501, or who are exempt from the licensing requirement of § 6530, must provide information about his/her exemption.

**G. Limited Conservatorships.** Counsel or the self-represented petitioner should prepare an order appointing the Public Defender as counsel for the proposed conservatee. Counsel or the self-represented petitioner should prepare an order directing the Golden Gate Regional Center to prepare a report on the powers requested by the proposed limited conservator.

**H. Petition for Substituted Judgment.** Prior Court approval is required for any action specified in Probate Code § 2580, et seq. The petition must comply with the requirements of Probate Code § 2583. If the petition requests authorization to establish a trust, the trust document must comply with the requirements of CRC 7.903. Ordinarily if the conservatee is unrepresented the Court will appoint counsel for the conservatee as Guardian

Ad Litem from its Probate Panel for the limited purpose of reviewing the petition and representing the interests of the conservatee.

**I. General Plan and Determination of Conservatee's Appropriate Level of Care.**

A General Plan for the care, custody and control of the conservatee must be filed within sixty (60) days of appointment of a conservator. The local General Plan form is available in the Clerk's Office or online at [www.marincourt.org](http://www.marincourt.org). The requirement of a General Plan is in addition to the requirement to prepare and file Judicial Council Form GC-355 *Determination of Conservatee's Appropriate Level of Care*.

*[Rule 5.67 adopted effective 5/1/98; amended 7/1/15]*

**5.68 NOTICE IN CONSERVATORSHIP PROCEEDINGS**

Unless dispensed for good cause, notice of the hearing and a copy of the petition must be served on the conservatee as well as any attorney for the conservatee in all conservatorship proceedings. Notice of hearing shall be given in accordance with the Probate Code.

**A. On Petition for Appointment of Conservator.** There is no statutory basis for shortening the time of notice or for dispensing with notice on a petition for the appointment of a conservator.

**B. Power of Attorney.** If the proposed conservatee has executed a power of attorney, the attorney-in-fact should receive notice of the petition for conservatorship. This information should also be included in the petition for conservatorship.

**C. On Final Accounts.** On final accounts where the conservatorship has been terminated by death of the conservatee, the Court will usually require that notice of the hearing on the settlement of the final account be given to the personal representative of the probate estate, if one has been appointed or if none, to the personal representative named in the conservatee's will, or if none, to any beneficiary of the conservatee so far as is known to the conservator. If the personal representative is the same as the conservator, the devisees and heirs must be notified.

On final accounts where the conservatee is living, the conservatee must be served. In such cases, the proof of notice must clearly indicate that the conservatee received a copy of the notice and the petition.

**D. Exclusive Broker Listings.** A petition for authorization to grant an exclusive listing will be considered *ex parte*, but *only after prior authority to sell has been obtained on a noticed petition*. The petitions may be combined as a noticed petition. *All conservatorship sales will be subject to Court confirmation notwithstanding Probate Code provisions to the contrary*. It is not the policy of the Court to grant a conservator special power of sale of real property in conservatorships. However if granted, the conservator must notify the Court if the personal residence is to be sold and that the sale has been discussed with the conservatee.

*[Rule 5.68 adopted effective 5/1/98]*

**5.69 MEDICAL AUTHORIZATION FOR CONSERVATORS**

**A. Medical Consent Authority.** All conservators of the person have the power to consent to medical treatment of the conservatee so long as the conservatee does not object. In emergencies, the conservator may require the conservatee to receive medical treatment even though the conservatee does not consent. (Probate Code § 2354)

**B. Exclusive Medical Consent Authority.** If the conservatee has been adjudicated to lack the capacity to give informed consent for medical treatment pursuant to the Probate Code, the conservator has the exclusive authority to give such consent and may give such consent over the objection of the conservatee. The Court does not favor the granting of such exclusive authority and absent the express agreement of the conservatee will require a showing in accordance with Probate Code § 812 that the conservatee lacks the capacity to give informed consent to any medical treatment. Such authority will only be granted if the following conditions are satisfied:

1. *Court Investigator Report.* It clearly appears from the Court file that a Court Investigator has advised the conservatee of the effect of granting such authority and of the conservatee's rights in regard to such request.

2. *Physician's Declaration.* A physician's declaration on the Judicial Council Form is filed stating a medical opinion that the proposed conservatee lacks the capacity to give informed consent to any medical treatment and that the proposed conservator should be granted the exclusive authority to give such consent and to consent over the objection of the proposed conservatee. Such declaration must state the factual basis for the opinion and the nature and extent of the physician's examination and investigation. Such declaration must also conform to the requirements of Probate Code § 812.

3. *Conservatee Regains Capacity.* If a conservatee regains sufficient capacity to give informed consent to any form of medical treatment, the conservator shall promptly petition pursuant to the Probate Code to revoke any previous order granting the conservator exclusive authority to consent to medical treatment.

*[Rule 5.69 adopted effective 5/1/98; amended 1/1/06]*

## **5.70 ACCOUNTS AND REPORTS IN CONSERVATORSHIP PROCEEDINGS**

In addition to the requirements set forth in the Probate Code, counsel are reminded and further advised of the following:

**A. Inventory and Appraisal.** The Inventory and Appraisal (I&A) is due ninety (90) days from appointment.

**B. Account and Report.** The report accompanying an account shall include a disclosure of any actual or potential conflicts of interest as required by law. If no disclosures are required, the conservator shall include an allegation that no disclosures are required pursuant to Probate Code §§ 2111.5, 2351(d), 2359(c)(2), and 2403(c)(2). The account shall be filed within sixty (60) days of the conclusion of the accounting period.

**C. Waivers of Account.** Waivers of Account will be accepted in the Court's discretion only in the following instances:

1. When the proceeding is terminated by Court order and the conservatee thereafter waives an account;

2. When the proceeding is terminated by death of the conservatee and (a) there is no Will and a written waiver is obtained from all of the conservatee's heirs, or (b) there is a Will and a written waiver is obtained from the personal representative and the beneficiaries under the Will after the order admitting the Will has become final. Waivers will be accepted only from heirs or beneficiaries who are competent adults.

**D. Assessment Fees of Court Investigator.** The fees of the court investigator must be paid before the accounting will be approved. A receipt for the fees should be on file. If the conservator believes these fees should be deferred, the conservator shall file a petition (Judicial Council Form FW-001) requesting deferral of fees and serve a copy of the petition on the investigator.

*[Rule 5.70 adopted effective 5/1/98; amended 7/1/13]*

#### **5.71 SALE OF RESIDENCE BY CONSERVATOR**

If the conservator petitions to sell the conservatee's residence, the petition must allege that the conservatee is unable to return to the residence or, if able, that the conservatee agrees to the sale, or that the sale is necessary to generate cash to support the conservatee. The petition shall include the information that the sale has been discussed with the conservatee pursuant to the Probate Code. The report shall include the responses of the conservatee. Where the sale of the conservatee's residence is sought, a copy of the petition must be provided to the Court Investigator at the time of filing the petition.

*[Rule 5.71 adopted effective 5/1/98]*

#### **5.72 TERMINATION OF CONSERVATOR**

**A. Resignation of Conservator.** Conservators who wish to resign must formally propose a competent successor and file a final accounting, subject to Court approval.

**B. Petitions for Appointment of Successor Conservator.** Petitions for appointment of successor conservators must be accompanied by a Notification to Court of Address of Conservatee and Conservator and a Confidential Supplemental Information Form.

**C. Distribution of Assets.** The order distributing assets must contain the name of the successor conservator, or, in the event the conservatee is deceased, the name of the personal representative and a list of the assets.

*[Rule 5.72 adopted effective 5/1/98]*

#### **5.73 COURT APPOINTED ATTORNEYS FOR (PROPOSED) CONSERVATEE**

If necessary, the Court will appoint an attorney to represent a (proposed) conservatee. Attorneys who wish to be considered for appointment may write a letter to the Probate Judge outlining experience and interests that are related to Probate Conservatorship law. Compensation for court appointed attorneys is set by the Probate Court. Compensation will be paid from the estate of the conservatee. If there is no estate or the estate qualifies as a small estate under Probate Code § 2628 then compensation will be paid by the Court.

Upon appointment, attorneys will be furnished with a Court Order. Court appointed attorneys are expected to do the following:

1. *Court Investigator.* Remain in close communication with the Court Investigator.
2. *Personal Visit.* Personally visit the person they have been appointed to represent and to interview other individuals as the case may merit.
3. *Representation As To Conservatorship Only.* Represent the (proposed) conservatee only on the issue of conservatorship. Other legal work, such as wills,

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real estate transactions, estate transactions, estate planning, tenant disputes, must be approved separately by the Court.

4. *Keep Court Informed.* Inform the Court of the wishes, desires, concerns, and objections, of the (proposed) conservatee as well as provide the Court with an independent assessment of the situation.

5. *Disclose Potential Conflicts of Interest.* If the court appointed attorney requests an independent professional fiduciary be appointed, court appointed counsel must disclose if he or she currently represents that professional fiduciary in any other proceeding. This disclosure must be in the form of a declaration filed with the Court. A copy of the declaration must be mailed to persons entitled to notice of the proceedings.

6. *Discharge.* Court appointed attorneys are expected to request discharge from the case at a time deemed appropriate by them and the Probate Court. At that time, the court appointed attorney will petition for discharge and for compensation. A declaration as to the nature and hours of work performed must be included with any petition for compensation. A Court appearance may not be necessary if all parties agree that discharge is appropriate. The matter may be handled ex parte with notice to the conservator and, if conservatee is not deceased, to the conservatee.

*[Rule 5.73 adopted effective 5/1/98; amended 1/1/14]*

## **TRUSTS**

### **5.74 FILING OF ACTIONS CONCERNING TRUSTS**

Generally, an action between a trustee and a trust beneficiary should be filed in the Probate Court.

**A. Filed in Probate Court.** In the following instances an action concerning a trust should be filed and placed on the probate calendar:

1. Petition is filed in an existing probate action;
2. Petition cites the Probate Code as cause of action;
3. Petition involves creditors' claims against the trust or involves the construction of trust or other internal matters of the trust.

**B. Filed as a Civil Action.** In the following instances an action concerning a trust should be filed as a civil action.

1. Complaint is in an existing civil action;
2. Complaint cites a code other than the Probate Code.

*[Rule 5.74 adopted effective 5/1/98]*

### **5.75 NOTICE REQUIREMENTS CONCERNING TRUSTS**

**A. Notice Generally.** Trust matters brought under sections of the Probate Code applicable to trust (Probate Code §§ 15000-19403) require thirty (30) days notice.

**B. Notice to Trust Beneficiaries.** If a personal representative presents an account or petition that affects the interest of a beneficiary of a trust and the representative is either named

to act or is acting as the sole trustee, then the Court will require notice to beneficiaries as required by Probate Code § 1208. In appropriate circumstances the Court may require the appointment of and notice to the guardian ad litem for potential beneficiaries if their interest may diverge significantly from those of the beneficiaries in being. This notice requirement applies to both testamentary trusts and pourover wills to an intervivos trust. The Court requires that a copy of the trust document be lodged with the Court to verify the persons requiring notice or a declaration by the attorney be filed stating the trust beneficiaries entitled to notice.

On termination of a conservatorship if the conservator and the personal representative or trustee are the same person, notice should be given to the trust beneficiaries.

*[Rule 5.75 adopted effective 5/1/98]*

#### **5.76 PETITIONS FOR TRANSFER OF PROPERTY TO TRUST (“HEGGSTAD PETITIONS”)**

**A. Jurisdiction.** Petitions should include an allegation of jurisdiction under Probate Code §§ 17000 et seq. If the trust is administered by a representative of the trustee, then sufficient proof must be provided such as notice by trustee of place of administration under Probate Code § 16061.7.

**B. Notice Requirements.** Petitions should include an allegation of those entitled to notice.

**C. Proof of Ownership.** If the assets to be transferred to the trust are not specifically identified in the estate planning documents, then the petition should provide substantiation that the property was owned by the decedent. For transfer of real property, the deed showing ownership by the decedent must be provided. For accounts or investments, a statement by the financial institution identifying the account number and decedent’s name should be provided.

*[Rule 5.76 adopted effective 7/1/10]*

#### **5.77 WAIVER OF ACCOUNT BY TRUSTEE**

A trustee who is also the personal representative may not waive an accounting of himself/herself. The waiver may be executed by a co-trustee or by all trust beneficiaries presently entitled to distribution. This applies to testamentary trusts and to pourover wills to intervivos trusts. A testamentary trustee who waives the accounting of the personal representative must have filed a consent to act as trustee. Even though there is a waiver of accounting by the trustee, if the net probate income is to be paid over by the trustee to trust beneficiaries, the net probate income must be specified.

*[Rule 5.77 adopted effective 5/1/98]*

#### **5.78 TRUSTEE'S FIRST ACCOUNT**

The starting balance of a testamentary trustee's first account must conform to the trustee's receipt(s) filed on distribution of the assets of the decedent's probate estate. The petition for settlement of a trustee's account must include the names of beneficiaries and remainderpersons and set forth the trust provisions for distribution of principal and income.

*[Rule 5.78 adopted effective 5/1/98]*

**5.79 DISTRIBUTIONS TO TRUSTEE**

If distribution is to a trustee who is not the personal representative, the consent of the nominated trustee to act must be on file prior to the hearing on the petition for distribution to the trustee. A written declination should be filed by or on behalf of the trustee who does not choose to act. The decree must contain the terms of the testamentary trust.

*[Rule 5.79 adopted effective 5/1/98]*

**5.80 SUBSTITUTED JUDGMENT**

If a trust is established pursuant to the substituted judgment statutes for a conservatee, the Court will require bi-annual accountings of all trust assets and the trust shall remain under the jurisdiction of the Probate Court.

*[Rule 5.80 adopted effective 5/1/98]*

**COMPENSATION**

**5.81 STATUTORY COMPENSATION IN DECEDENT'S ESTATE**

**A. Calculation Must Be Shown.** All petitions requesting payment of statutory compensation -- even if accompanied by a waiver of accounting -- must show the calculation of the compensation requested in accordance with CRC 7.705(a).

**B. Basis for Computing Statutory Compensation on Waiver of Accounting.** As an alternative to basing statutory compensation on the inventory values alone, where the petition for final distribution so requests, the Court will allow such compensation to be based on the inventory values plus income, plus gains on sales, less losses on sales, provided these figures are set forth clearly in the verified petition in accordance with CRC 7.705(b).

**C. Expenses of Tax Related Services, Accounting and Bookkeeping.** The personal representative may employ tax counsel, tax auditors, accountants or other tax experts for the preparation of tax returns and for other tax related services, and pay from the funds of the estate for such services. The Court may deduct from the personal representative's statutory compensation any sums paid from estate funds for performance of the representative's ordinary duties such as ordinary accounting and bookkeeping services, including the preparation of schedules for court accountings.

**D. Executor/Attorney Compensation on Sale of Real Property.** Where the attorney or personal representative is also a licensed real estate agent or broker, the attorney or personal representative may collect the statutory fee as well as the commission on the sale of real property subject to prior Court approval, however, no extraordinary fees shall be awarded.

**E. Reimbursement of Costs.**

1. *Allowed Reimbursements.* Allowable reimbursement costs include:

- a. Court Clerk's fees;
- b. Newspaper publication fees;
- c. Surety bond premium;
- d. Appraisal fees.

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2. *Absorbed as Part of Fee.* The following costs are absorbed as part of the fee:

- a. Photocopies and postage;
- b. Secretarial and word processing time;
- c. Paralegal time for ordinary services;
- d. Computer time;
- e. Local telephone calls;
- f. Local travel, mileage and parking.

3. *Reimbursed Only in Court's Discretion.* The following costs may be reimbursed in the Court's discretion:

- a. Substitutes for U.S. Postal Service (Federal Express, UPS, etc.);
- b. Long distance telephone;
- c. Long distance travel.

*[Rule 5.81 adopted effective 5/1/98; amended 1/1/14]*

### **5.82 EXTRAORDINARY COMPENSATION IN DECEDENT'S ESTATES**

**A. Factors.** The following factors will guide the attorney and the Court in determining whether and in what amount attorneys' compensation for extraordinary services will be awarded:

1. The time required for the services.
2. Results obtained.
3. Benefits accruing to the estate and to beneficiaries.
4. Nature of services performed by personal representatives.
5. Amount of statutory compensation.

**B. Declaration.** Requests for extraordinary attorneys' compensation must contain detailed descriptions of the work performed, the hours spent on the work performed, the average hourly rate requested, the total amount requested and special circumstances related to the request. The declaration should include a statement which sets forth the number of hours spent on ordinary services and the total dollar value of services performed for statutory services.

**C. Paralegal Services.** Extraordinary attorney's services may include services of a paralegal acting under the direction and supervision of an attorney. The petition must set forth the hours spent, the qualifications of the paralegal, the work performed and the hourly rate. In addition, the petition should provide the court with assurance that the amount requested for extraordinary services of the attorney and paralegal combined do not exceed the amount appropriate if the attorney provided the services without the paralegal's assistance.

**D. Examples of Services.** Compensation may be awarded for extraordinary services, including but not limited to the following:

## MARIN COUNTY SUPERIOR COURT - UNIFORM LOCAL RULES

1. Sales, leases, exchanges, financing or foreclosure of real or personal property.
2. Contested or litigated claims against the estate.
3. Preparation of income, sales, withholding, gift or estate tax returns and handling of audits or litigation connected with tax liabilities.
4. Carrying on the decedent's business.
5. Will contest.

**E. Litigation Connected With Estate.** Extraordinary compensation for representing the estate in litigation outside the regular administration of the estate whether by the attorney for the representative or outside counsel should be requested in advance and will ordinarily be allowed upon a properly noticed petition estimating the cost of litigation. Upon proper showing the Court may authorize progress payments prior to completion.

**F. Proposed Order for Extraordinary Compensation in Decedent's Estates.** When extraordinary compensation is requested, the amount requested should be inserted in the proposed order, even though the fees have not yet been allowed by the Court. If the Court allows a fee other than that requested, counsel may revise the order or have the Court change and initial the amount allowed.

*[Rule 5.82 adopted effective 5/1/98; amended 1/1/14]*

### **5.83 PARTIAL ALLOWANCE OF COMPENSATION**

**A. Statutory Compensation.** Partial allowance of statutory compensation will not be allowed on account before the filing of an inventory or the time for creditors' claims has run. Such allowance will be made in accordance with the work actually performed, but where no accounting is filed, the allowance may not exceed 50% of the statutory compensation computed upon the total value appearing in the inventories filed to that time. Where an accounting is filed, the allowance may not exceed 75% of the statutory compensation so computed.

**B. Apportionment.** Except in a case in which there is an agreement in writing on apportionment, where the personal representative has been represented by successive attorneys, compensation will not ordinarily be apportioned to a prior attorney for the personal representative until the final accounting has been approved.

**C. Extraordinary Compensation.** Extraordinary compensation will be allowed before final distribution only when it appears likely that the estate will remain in probate for an unusually long time, whether due to litigation or other cause, or on a showing that present payment will benefit the beneficiaries of the estate.

*[Rule 5.83 adopted effective 5/1/98]*

### **5.84 COMPENSATION FOR TRUSTEES AND THEIR ATTORNEYS**

**A. Criteria.** All requests for compensation for trustees and their attorneys shall be supported by a declaration that addresses the criteria set forth in *Estate of Nazro* (1971) 15 Cal.App.3d 218 [93 Cal.Rptr. 116] and CRC 7.776. Each request will be considered on its individual merits. The petitioner has the burden to show the fee requested is reasonable and timesheets alone are not sufficient to show this. Local forms, *Attorney Fee Declaration*

(PR035) and *Fiduciary Fee Declaration* (PR036), are available in the Clerk's Office or online at [www.marincourt.org](http://www.marincourt.org).

**B. Compensation of Trustees.**

1. *Corporate Trustee - Percentage Guideline.* Where a corporate trustee is actively managing an income producing trust, a reasonable fee should usually not exceed 8/10ths of 1% of the principal of the trust per annum at the carry value at the close of the accounting period. When all or a portion of the income-producing trust is actively managed real property, a fee of 1% of that portion of the carry value of the corpus attributable to the real property will normally be considered reasonable. Good cause must be shown to depart from the standard fee. [Corporate trustee includes **only** banks and financial institutions. All professional trustees must request fees under other sections of these rules.]

2. *Noncorporate Trustee - Percentage Guidelines Normally Inapplicable.* The noncorporate or individual trustee shall ordinarily be compensated on a quantum meruit basis according to work actually performed under the principles described above. The noncorporate trustee must submit an itemized fee declaration. If the compensation requested is at or above the level of a corporate trustee, it shall be the burden of the applicant to demonstrate the facts for justification; and in justifying guideline computations, the applicant shall include the cost of services of professional assistants including accountants, investment counselors, property managers and others.

**C. When Will or Trust Instrument Sets Trustee's Fees.** If the will or trust instrument contains provisions for a trustee's compensation, the trustee is entitled to compensation as provided therein. On a proper showing, the Court may allow a greater compensation when (1) the trustee's services are substantially greater than those contemplated by the testator or settlor at the time the will was signed or the trust was created, (2) the compensation provided in the will or trust is so unreasonably low that a competent trustee would not agree to administer the trust, or (3) there are extraordinary circumstances.

**D. Attorneys' Compensation.** Attorneys' compensation is allowed according to the work actually performed and must be supported by a declaration under penalty of perjury. The declaration must include the average hourly rate, results accomplished, and benefit to the estate. Fees requested for time billed by a paralegal must be supported by the attorney's declaration regarding the paralegal's compliance with Business & Professions Code § 6450. A local form, *Attorney Fee Declaration* (PR035), is available in the Clerk's Office or online at [www.marincourt.org](http://www.marincourt.org).

The attorney may not charge for making entries on timesheets. The attorney may not charge the estate if required to clarify or explain billing entries to the Court.

*[Rule 5.84 adopted effective 5/1/98; amended 1/1/14]*

**5.85 COMPENSATION TO CONSERVATORS AND GUARDIANS AND THEIR ATTORNEYS**

**A. Criteria.** All requests for compensation shall be supported by a declaration that includes a discussion of the factors in CRC 7.756. Each request will be considered on its individual merits. The petitioner has the burden to show the fee requested is reasonable and timesheets alone are not sufficient to show this. Local forms, *Attorney Fee Declaration*

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(PR035) and *Fiduciary Fee Declaration* (PR036), are available in the Clerk's Office or online at [www.marincourt.org](http://www.marincourt.org).

**B. Expenses That May Not Be Reimbursed.** Absent extraordinary circumstances, the fee request may not include expenses that are part of overhead such as clerical support, postage, photocopies, local mileage and parking, local telephone calls, or facsimile transmissions.

**C. Professional Licensed Fiduciary.** Professional fiduciaries must submit requests for compensation in a manner that allows the Court to evaluate whether the fee requested is reasonable. The fiduciary must distinguish "routine, non-professional services" from those that require professional skill, experience, risk and responsibility. "Routine, non-professional services" rendered by the fiduciary and his or her staff include filing, opening mail, paying routine bills, picking up medications, banking, shopping and accompanying conservatees to routine, non-medical appointments.

Professional fiduciaries must disclose whether their fee request includes travel time.

The fiduciary may not charge the estate for making entries on timesheets. The fiduciary may not charge the estate if required to clarify or explain billing entries to the Court.

**D. Corporate Conservator/Guardian – Percentage Guideline.** Where a corporate conservator or guardian actively managing an income-producing estate asset seeks fees premised upon a fee schedule, the fiduciary must submit for court approval a declaration that sets forth the institution's published fee schedule at the close of the accounting period, the compensation paid to the fiduciary, and the dates of such payment. The fair market value of the principal of the trust shall be the basis used to determine the fee request. [Corporate conservator or guardian includes **only** banks and financial institutions. All professional conservators and guardians and other conservators and guardians must request fees as outlined in rule 5.86.]

**E. Non-Professional Conservators/Guardians.** Non-professional conservators and guardians must provide the basis for calculating the hourly rate requested. If the hourly rate is based on their employment and similar experience they must clarify whether their duties required them to take time away from work or how their skills benefited the conservatee.

If a non-professional conservator or guardian employs someone to assist with their duties, such employment and the fee arrangement must be disclosed.

**F. Attorneys' Compensation.** Attorneys' compensation is allowed according to the work actually performed and must be supported by a declaration under penalty of perjury. The declaration must include the average hourly rate, results accomplished, and benefit to the conservatee or child under guardianship. Fees requested for time billed by a paralegal must be supported by the attorney's declaration regarding the paralegal's compliance with Business & Professions Code § 6450. A local form, *Attorney Fee Declaration* (PR035), is available in the Clerk's Office or online at [www.marincourt.org](http://www.marincourt.org).

The attorney may not charge the estate for making entries on timesheets. The attorney may not charge the estate if required to clarify or explain billing entries to the Court.

**G. Compensation of Conservator or Conservator's Attorney From Trust or Other Source.** When a conservator is petitioning for fees, any compensation received or available from any collateral source, including a trust, must be disclosed.

*[Rule 5.85 adopted effective 1/1/17]*

**5.86 PROCEDURE FOR OBTAINING COMPENSATION**

**A. Form of Application for Compensation.** An application for compensation may be included in a petition for settlement of account, in a petition for distribution, or in a separate petition. The application should request a specific amount and not merely "reasonable fees." Compensation should be requested for work performed and costs incurred during the period of the accounting.

**B. Notice.** Notice will be required to a non-petitioning personal representative or fiduciary and when appropriate, to the residuary beneficiaries, or in an insolvent estate, to the major creditors.

**C. Notice to Prior Representative or Attorney.** If there has been a change of personal representative or fiduciary or a substitution of counsel, notice of hearing must be given to such prior representative, fiduciary or counsel of any petition in which compensation is requested by the present personal representative, fiduciary or counsel unless:

1. A waiver of notice executed by the prior personal representative, fiduciary or counsel is on file;
2. An agreement on the allocation of compensation is on file or included in the petition; or
3. The file and the petition demonstrate that the compensation of the prior personal representative, fiduciary or counsel have been previously provided for and allowed by the Court.

*[Rule 5.86 adopted effective 1/1/14; amended 1/1/17]*

**LANTERMAN-PETRIS-SHORT (LPS) CONSERVATORSHIPS**

**5.87 NOTICE OF EX PARTE APPLICATION FOR TEMPORARY CONSERVATORSHIP**

Unless the Court for good cause otherwise orders, not less than five (5) days before the appointment of a temporary conservator, the Public Guardian shall personally serve notice of the proposed ex parte application for appointment on the Public Defender.

*[Rule 5.87 adopted effective 1/1/13]*