

**Probate Special Master’s Findings and Recommendation Re Probate Plan and Qualified
Settlement Trust (“QST”)
Analysis and Questions re Status Conference
June 9, 2023 at 2:00 p.m.**

Summary of Questions:

1. Regarding closed probates: Why is it appropriate to distribute assets to a closed estate instead of having a petition to reopen that estate? Why is it appropriate to circumvent a duly appointed Personal Representative whose letters have expired and order distribution straight to the heirs/beneficiaries? Will there be a potential, negative impact on that estate’s administration?
2. Regarding Special Administrations: A majority of the Special Administration cases in this Court involves foreclosures. The Special Administrators are appointed for a very limited purpose to represent the estate in that foreclosure action and to locate and secure assets. However, these Special Administrators are not given the right to distribute assets. Why is it proper to allow the settlement proceeds to go to these Special Administrators?
3. Regarding Affidavits of Collection: Does this Court still need to determine heirs or beneficiaries for these estates? If yes, why is this proper?
4. Regarding Ancillary Probates: Why is it proper to bypass a Personal Representative appointed in another state and distribute the settlement proceeds directly to the heirs/beneficiaries, especially if the administration of that estate is still ongoing in another state?
5. Regarding Determinations of Intestacy: Why it is appropriate to determine intestacy in a Trust proceeding as compared to a probate proceeding, especially when it will affect hundreds of estates?
 - a. How does determining intestacy in the Trust proceeding affect any potential, future probate proceeding for that estate?
6. The probate plan does not address estates that have left a will. What is the plan for those estates?
7. The Probate Plan states that the Petitions will comply with all statutes or case law, while the QST states that the heirs/beneficiaries must be established by clear and convincing evidence. Is there a difference between the standards you are seeking? Is a further clarification necessary?

The QST and the proposed Probate Plan provide as follows:

- **General:** The Probate Special Counsel (referred to as “Special Administrator”) will file a series of *Petitions for Instructions*, each of which will address groups of Deceased Class Members, seeking this Court’s determination of the proper heirs and devisees and the appropriate percentage of settlement distribution for each heir and devisee.

- At this time, it appears that these *Petitions for Instructions* are intended to relate to the Trust proceeding, NOT to a special probate proceeding. The following analysis proceeds on that assumption.
 - Please note: The reason the Probate Plan and QST are being closely scrutinized is because the Trust is being created for the purpose of distributing assets to deceased beneficiaries. In other words, the QST seeks to avoid opening probate for all deceased class members and to instead provide a mechanism where the settlement proceeds can be distributed pursuant to a Court's determination of heirs/beneficiaries.
 - If a special probate proceeding is contemplated instead of a Trust proceeding, some of the issues and questions identified below may be irrelevant.
 - Please also note: Case law was not utilized in this analysis.
- **A. Closed Probates**
 - Probate Plan Summary: *The Special Administrator shall seek the Court's authorization and direction to distribute settlement proceeds to the legally adjudicated heirs and/or devisees of an estate that has been closed, or in which the Personal Representative's Letters have expired.*
 - This provision results in two main concerns:
 - (1) Generally, when additional assets are discovered, an interested party must petition this Court to reopen probate. It is unclear what law justifies circumventing the probate process and allowing the assets to go straight to the heirs/beneficiaries.
 - (2) If there is a duly appointed Personal Representative whose *Letters of Administration* or *Letters Testamentary* have expired, it is unclear why it is appropriate to circumvent the duly appointed Personal Representative and allow the assets to go straight to the heirs. It is also unclear how this would affect the Personal Representative's administration of the estate.
 - **Thus, further clarification may be necessary regarding closed probates.**
- **B. Special Administrations**
 - Probate Plan Summary: *The Special Administrator shall seek the Court's authorization and direction to distribute settlement proceeds to the Special Administrator for the estate, or in a manner consistent with the order appointing said Special Administrator*
 - This may pose a problem for one main reason: A majority of our Special Administrators are appointed for the sole purpose of representing the estate in a mortgage foreclosure action. While they may be given the power to locate and secure assets, these Special Administrators are not given the right to distribute assets since no determination of testacy has been made.
 - **Thus, this provision may cause unintended problems.** For example, the Court may now see an influx of Petitions from the appointed Special Administrators asking for instructions on what to do with the settlement proceeds.

- **C. Affidavit of Collection**
 - Probate Plan Summary: *The Special Administrator shall seek the Court’s authorization and direction to distribute settlement proceeds to individual(s) holding a validly executed affidavit of collection pursuant to HRS Section 560:3-1205.*
 - By distributing the settlement proceeds to a person who holds a valid affidavit of collection, there is still a question of whether this Court will have to determine heirs or beneficiaries.
 - **Thus, further clarification may be necessary regarding the Affidavit of Collection process.**
- **D. Ancillary Probates**
 - Probate Plan Summary: *The Special Administrator shall seek the Court’s authorization and direction to distribute settlement proceeds to the legally appointed Personal Representative where another state has previously adjudicated intestacy or accepted a will for probate, or pursuant to the laws of intestacy or terms of a Will, where another state has previously adjudicated intestacy or accepted a will for probate...*
 - While there appears to be no problem with distributing the settlement proceeds to a legally appointed Personal Representative in another state, it is unclear whether this Court should be able to authorize distribution of the settlement proceeds to certain heirs and devisees. In other words – it is unclear whether it is appropriate to order distribution to heirs and devisees if there is a legally appointed Personal Representative in another state and/or an ongoing proceeding in another state.
 - **Thus, further clarification may be necessary regarding Ancillary Probates.**
- **E. Intestacy**
 - Probate Plan Summary: *When a Deceased Class Member died without a will, and there have been no prior probate proceedings, the Special Administrator shall seek the Court’s authorization and direction to distribute settlement proceeds to the rightful heirs in accordance with HRS Section 560:2-101... All of the Petitions must comply with all requirements established by statute or case law, unless waived by the Court...*
 - This provision adopts “all requirements established by statute or case law” to determine intestacy, but such determination is being made in a Trust “*Petition for Instructions*” and NOT an actual probate petition.
 - At this time, it is unclear whether this Court should make a determination of intestacy in a Trust proceeding instead of having the Special Administrator open a (special) probate proceeding for multiple Decedents. The Probate Plan could result in hundreds of estates that are being administered due to a decision made in a Trust proceeding. It is also unclear how this would affect any subsequent probate proceeding, if any, since a decision is being made based upon a Trust that was drafted by the Probate Master and Special Administrator.
 - Further, the proposed plan does not address estates with Wills.

- **Thus, further clarification may be necessary regarding Intestacy. In particular, there may need to be a distinction between the determination of testacy in this Trust proceeding and separate probate proceedings.**
- **F. Standard of Proof**
 - *Probate Plan Summary: All of the Petitions must comply with all requirements established by statute or case law, unless waived by the Court, including but not limited to, acceptable means of proof of death, proof of familial relationship, percentage of settlement funds.*
 - ***QST Trust:** If the Estate of the deceased Class Member has not previously been probated and is not currently subject to probate administration, the Trustee shall distribute the share of such deceased Class Member to the heirs/devisees of the deceased Class Member as established by clear and convincing evidence as ordered by the Probate Court... and following service of appropriate notice... ”*
 - The QST generally states that a Trustee shall distribute the share of a deceased Class Member to the heirs/devisees as established by clear and convincing evidence and following service of appropriate notice. The Probate Plan states that all Petitions shall comply with all requirements established by statute or case law.
 - **Thus, a further clarification may be necessary regarding the correct standard being adopted.**