

**Hon. Timothy P. McElduff, Jr.**  
Surrogate, Orange County

Individual Part Rules  
Revised February 10, 2021

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**Status updates will not be provided. Please do not call or e-mail the Clerk's Office or Chambers requesting a status update. Pending matters are reviewed in the order that they are received.**

**Surrogate's Court Procedure Act, Estates Powers and Trusts Law and Part 207 of the Uniform Rules:** Parties are directed to familiarize themselves with the Surrogate's Court Procedure Act, Estates Powers and Trusts Law and the Uniform Rules for Surrogate's Court found at 22 NYCRR § 207. Lack of familiarity with procedure will not be deemed a valid excuse for failure to comply. Official forms in fillable versions are available on the New York courts website at [www.nycourts.gov](http://www.nycourts.gov) and are preferred to all other online forms.

**E-Filing:** As of February 16, 2021, E-filing in Orange County Surrogate's Court is mandatory. The Court requires "working copies" of electronically filed documents in all contested matters and in all accounting proceedings. Working copies must include a copy of the NYSCEF confirmation notice affixed to the front of the submission.

**I. COMMUNICATIONS WITH THE COURT**

- A. Requests for status updates and questions regarding procedure. Status updates will not be provided. Please do not call or e-mail requesting a status update. Pending matters are reviewed in the order that they are received. In addition, counsel and *pro se* litigants should not call to discuss the substance of pending cases or seek legal advice. The Court staff cannot provide legal advice. Questions about procedure should be researched by counsel prior to calling the Clerk's office.
- B. Telephone calls. Calls to Court staff delay the review of pending matters. Telephone calls should be limited to situations requiring immediate attention that cannot be resolved with research and due diligence. E-mails are always preferable whenever possible.

- C. Written correspondence. Letters to the Court shall be e-mailed to Chambers, copied to all parties, and should include the Surrogate's File Number. Correspondence between attorneys and/or *pro se* litigants shall not be copied to the Court or Clerk unless otherwise directed by the Court. For E-Filed cases correspondence to the Court must also be electronically filed.
- D. Faxes. The Court will not accept faxed copies of papers that must otherwise be filed in original form (such as objections, petitions, proofs of service, motions, opposition to motions, replies, proposed Orders and documents to be "So Ordered"). All faxes must be faxed simultaneously to all other parties. Faxed correspondence shall not exceed three (3) pages in length.
- E. Ex parte communications. *Ex parte* communications are prohibited, except where authorized by law or with the prior consent of the Court and all parties.

## II. PROOF OF SERVICE

Pursuant to 22 N.Y.C.R.R. § 207-7(c), original affidavits of service must be filed with the Court at least two (2) days prior to the return date. Failure to do so could result in the denial of jurisdiction for failure to complete service. Late filing of proof of service will result in adjournment of the return date and delay of issuance of decisions and decrees.

## III. ADJOURNMENTS

Adjournment requests are discouraged. If necessary, an adjournment request must be in writing, copied to all parties, e-mailed to [VirtualOrangeSurrogatesCourt@nycourts.gov](mailto:VirtualOrangeSurrogatesCourt@nycourts.gov) at least 48 hours in advanced of the scheduled date and state:

1. The currently scheduled date,
2. Good cause why the adjournment is being sought,
3. Whether the other parties consent or object to the request, and
4. If possible, suggest a date certain to which the conference, etc., should be adjourned.

**Adjournment requests, even on consent, should not be considered effective unless and until approved by the Court.**

## IV. GUARDIAN AD LITEM REPORTS

Guardian ad Litem reports must be filed and served at least two (2) days prior to the return date. Late filings will result in adjournments and delays in the issuance of decrees and orders.

## V. MOTION PRACTICE

- A. Return dates and format. Motions shall be made returnable before the Court on Wednesdays at 1:30 pm. Appearances are not required on motions unless directed by the

Court or unless oral argument is requested in writing and granted. All papers submitted in connection with motions shall bear page numbers. Exhibits annexed to all motions are to be separated by external tabs to permit easy identification of the exhibit. Courtesy copies of motion papers are not necessary.

- B. Working copies. For E-Filed motions, working copies of the motion papers with exhibits tabs must be delivered to chambers by the motion return date, along with a copy of the NYSCEF filing confirmation notice.
- C. Appearances. While appearances are not required on the return date of motion, the filing of a motion does not automatically relieve any party from attending a previously scheduled appearance in matters with multiple proceedings pending, regardless of the nature of the relief sought in the motion. When an appearance is scheduled while a fully submitted motion is pending before the Court, the parties shall contact the Court in writing at least forty-eight (48) hours in advance to confirm if appearances are required.
- D. Sur-replies. Sur-Replies will not be considered.
- E. Withdrawal of motions. If a motion has been resolved and the parties no longer require a decision from the Court, counsel are directed to immediately notify the Court in writing. Failure to do so may result in sanctions.
- F. Discovery motions. Counsel must confer with one another in a good faith effort to resolve all discovery disputes. It is the policy of this Court to make itself available to facilitate resolution of any discovery disputes without formal motion practice. In the event of a discovery dispute, the aggrieved party shall organize a conference call with counsel for all parties and the Court Attorney. If the dispute cannot be resolved in that conference call, the parties will be provided with a prompt appearance date to address any unresolved discovery disputes with the Court. A motion related to disclosure is not to be made by any party, in any type of proceeding, unless authorized by the Court after conferencing fails.
- G. CPLR § 3214(b). Discovery is not stayed during the pendency of any dismissal or summary judgment motion, unless the Court orders otherwise.

## **VI. SUBMISSION OF ORDERS, JUDGMENTS AND DECREES**

A proposed order/judgment/decree shall be submitted on all unopposed motions. For contested motions, proposed orders/judgment/decrees shall be submitted in accordance with 22 NYCRR 207.37.

A conformed copy of an order/judgment/decree will be mailed back to the submitting party only when it is accompanied by a sufficiently stamped, self-addressed envelope.

## VII. COURT CONFERENCES AND CALENDAR CALLS

- A. Appearances. Only an attorney thoroughly familiar with the action and authorized to act on behalf of a party shall appear.
- B. Virtual Appearances. All conferences and calendar calls on citation return dates shall be conducted virtually via Microsoft Teams unless otherwise directed by the Court.
1. Chambers will e-mail the Microsoft Teams link for virtual court appearances to the petitioner and all parties who have appeared prior to the Court date. All other parties or members of the public who wish to attend or appear virtually must e-mail a request to Chambers prior to the Court date. Failure to receive the Teams link prior to the appearance does not excuse the obligation to appear and counsel/*pro se* parties are expected to contact the Court in such circumstances to obtain the link.
  2. If you cannot access Microsoft Teams, the link provided by the Court will include dial-in information to appear telephonically.
  3. If extenuating circumstances prevent you from appearing via video conference or telephonically, please contact the Court prior to the scheduled date for further direction.
  4. Virtual appearances do not obviate the need to file and serve papers and pay all applicable filing fees, as required by statute and/or these Part Rules.
  5. Any party or counsel requesting a live appearance must submit the request in writing at least three (3) days prior to the scheduled date.
- C. 22 NYCRR 202.27. At any scheduled call of a calendar or at any conference, if all parties do not appear and proceed or announce their readiness to proceed immediately or subject to the engagement of counsel, the judge may note the default on the record and enter an order as provide by Uniform Rule 202.27.
- D. Part 130. Pursuant to §130-2.1 of the Rules of the Chief Administrator of the Courts, the Court may impose financial sanctions and award costs and reasonable attorney's fee against any attorney who, without good cause, fails to appear at a time and place scheduled for an appearance in any action or proceeding.
- E. Accommodations. The Surrogate's Court is open to all and the Court will make every effort to accommodate anyone who needs assistance in appearing in Court. If an attorney, party or witness requires the services of an interpreter of a foreign language, services for the hearing impaired or other reasonable accommodation in order to meaningfully participate in a proceeding, please notify the Court so the appropriate arrangements can be made.
- F. Substitution/Withdrawal. Substitutions of counsel must be in writing and comply with CPLR § 321. In any matter where an attorney seeks to be relieved and discharged and

there is no proposed incoming attorney, a motion for that relief must be made by Order to Show Cause on notice to the client and all other parties.

### VIII. PARTICULAR PROCEEDINGS

- A. Accounting Proceedings. Whenever a citation is served in an Accounting proceeding, a copy of the accounting shall be served on all parties with the citation. The citation and affidavit of service shall recite that a copy of the accounting was served with the citation. See 22 NYCRR § 207.40(e).
- B. Probate Proceedings.
1. Objections to the probate of a Will must be in writing and filed on or before the return date of the petition for probate or on a subsequent day as directed by the Court. See SCPA § 1410.
  2. All examinations of attesting witnesses, accountants and adverse parties or witnesses should be conducted on reasonable notice to all attorneys, guardians *ad litem* and parties entitled under SCPA 302(3). Unless the court permits, such examinations shall not be conducted until jurisdiction has been obtained over all necessary parties to the proceeding and, where necessary, guardians *ad litem* have been appointed and qualified. See 22 NYCRR 207.28.
  3. If a beneficiary, attorney or draftsman has a fiduciary or confidential relationship with the testator/testatrix, a *Putnam* affidavit explaining the circumstances of the making the bequest and the drafting of the Will must be filed with the petition.
  4. Unless service is by publication, a copy of the will shall be attached to all citations served and the affidavits of service of citation shall recite that a copy of the will was served as per 22 NYCRR § 207.19(b)(1).
- C. Wrongful Death Compromises. All petitions to compromise wrongful death and/or pain and suffering actions must include a proposed decree. If the Clerk notifies the petitioner that the petition requires amendments, a corrected decree should be submitted when the amended petition is filed. Failure to include a decree that reflects the latest amended petition will result in a decision that prohibits distributions and payments until such decree is received and signed by the Court.

### IX. PRETRIAL CONFERENCES

At the pretrial conference, the Court shall schedule a date certain for trial of all outstanding issues. The Court will explore limitation of issues for trial, including any application that counsel anticipates making to limit or preclude testimony or other evidentiary matters. If an evidentiary issue cannot be resolved by the Court at the pretrial conference, a motion *in limine* briefing schedule shall be established. The intent of this rule is to avoid *in limine* applications on the eve

of, or during, trial of a matter. Failure to bring an *in limine* application before the Court in a timely manner may result in summary denial of the application.

The Court will also explore settlement and/or referring the case to mediation, if appropriate. Therefore, counsel should be prepared to discuss settlement and should have full authority from their respective clients.

## **X. TRIALS AND HEARINGS**

- A. Scheduling. Once scheduled, all trial and hearing dates shall be deemed firm. Accordingly, it is expected that clients, witnesses, experts and others will be timely advised of scheduled dates to avoid last minutes claims of unavailability.
- B. Trial Binders. Unless otherwise ordered by the Court, no later than two (2) weeks prior to the scheduled trial or hearing date, each party shall each provide to all other parties and to the Court a binder consisting of:
1. Pretrial memorandum of law addressing any known disputed legal issues that must be determined by the Court.
  2. A list of all potential witnesses, other than an impeachment or rebuttal witness, along with a brief statement of proof. A witness not identified in the witness list, other than an impeachment or rebuttal witness, may not be permitted to testify unless an adequate explanation is provided for the failure to identify such witness prior to trial.
  3. Copies of all exhibits to be offered into evidence at trial along with a brief description of the purpose of each exhibit (if not obvious). Any exhibit not identified in the exhibit list, other than an exhibit offered for the purpose of impeachment or rebuttal, may not be admitted into evidence unless an adequate explanation is provided for the failure to identify such exhibit prior to trial.
  4. For all trials or hearings being conducted virtually, copies of the foregoing shall also be e-mailed to Chambers in “.pdf” format.
- C. Trial Counsel. If a matter is to be tried by an attorney other than the attorney of record, a Notice of Appearance, served on all parties, shall be filed with the Court with an Affidavit of Service of same, no later than fifteen (15) days prior to the date of trial.
- D. Bench Trials. Unless the Court directs otherwise, the parties shall obtain (at their expense) a copy of the trial transcript. Following the close of evidence and receipt of the trial transcript, counsel shall also present the Court with proposed findings of fact and proposed conclusions of law. Each party may submit a post-trial brief with respect to the issues raised at the trial, setting forth specific references to the relevant portions of the transcript and the documents in evidence and citing the applicable law.

E. Jury Trials. The Court will conduct a preliminary charge conference at 9:00 am on the morning of the first day of jury selection. In complex matters, the Court reserves the right to schedule the preliminary charge conference for a date prior to trial. At the preliminary charge conference, each party shall provide the Court with:

1. A complete list of suggested jury charges. The charges will be drawn from the Pattern Jury Instructions (PJI). Unless counsel seeks a deviation from or an addition to the pattern charge, only the PJI numbers need be submitted. Where deviations or additions are requested, the full text of such requests must be submitted, together with any supporting legal precedents. Upon request, counsel shall promptly submit the proposed revision or addition to the pattern charge to the Court in an electronic format convertible to Word. Amendments to the suggested jury charges will be permitted at the final charge conference following the close of evidence;
2. A proposed verdict sheet. The proposed verdict sheet shall be jointly prepared by counsel and presented to the Court in a typical final form for presentation to the jury. If agreement cannot be reached, then each side shall present a proposed verdict sheet. Upon request, counsel shall promptly submit the proposed verdict sheet to the Court in an electronic format convertible to Word; and
3. Counsel shall also be prepared to: (a) stipulate to undisputed facts and the admissibility of clearly admissible documents and records, (b) discuss scheduling as well as the number of witnesses to be called at trial, and the estimated length of the trial, and (c) alert the Court as to any anticipated problems regarding the attendance at trial of parties, attorneys or essential witnesses, and any other practical problems which the Court should consider in scheduling.

## **XI. SETTLED AND DISCONTINUED CASES**

The parties shall immediately provide the Court with written notice whenever a case has been settled or otherwise disposed. Any stipulation of settlement or settlement agreement to be “so ordered” must state either that all issues between the parties have been resolved and all contested proceedings are being discontinued, or set forth with specificity any matters that remain unresolved. Stipulations of settlement and settlement agreements shall not provide that the Court shall retain jurisdiction over the agreement without prior approval of the Court.

## **XII. ALTERNATIVE DISPUTE RESOLUTION**

It is the policy of this Court to encourage early and expedient resolution of all disputes. To that end the Surrogate’s Court shall always be available to assist the parties in resolving disputes and will refer appropriate matters to the Ninth Judicial District’s Alternative Dispute Resolution program: <http://ww2.nycourts.gov/alternative-dispute-resolution>.