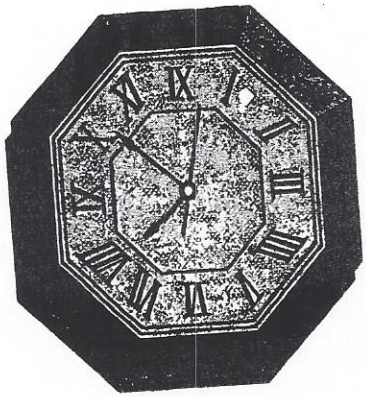
MORE EXCITEMENT - THE NEW PROBATE RULES

The Renaissance of Probate Practice



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THE RENAISSANCE OF PROBATE PRACTICE

" Change is not made without inconvenience, even from worse to better" **– A Dictionary of the English Language" (1755)– Samuel Johnson** (1709-84), English poet, critic and lexicographer.

INTRODUCTION

1. After presenting **"The Exciting World of Probate Practice"** (hereafter called **"the first paper"**) at a Jamaican Bar Association seminar on the north coast in June, 2002 it never occurred to me that I would have been reprising that role so quickly. The surprising (and in some instances prolonged !!) laughter which greeted the title for the paper also did not encourage an ***encore*** to say the least, especially coming from such an august gathering ! I have to confess, however, that I was very thrilled on learning late last year that the probate rules were to be overhauled or updated. I mused to myself **"more excitement"**.

2. The new probate rules which came into effect very recently as part of the **Civil Procedure Rules 2002** (hereafter called the **"CPR" – I call them the 2003 Rules !**) have ushered in a **"wind of change"** (apologies to PM Harold MacMillan), a veritable ***renaissance*** in the area of probate practice. Banished to memory are the provisions in **Part III of the General Rules and Orders of the Supreme Court,** which dealt with Probate and Administration. The purpose of this paper is to dissect and subject the most important changes introduced by the new rules to microscopic examination for the benefit of

students and practitioners (and the writer's as well). Where appropriate, I have repeated some parts of the **first paper**.

PROBATE PRACTICE

3. What is **"Probate Practice?"** For purposes of expediency, the expression "Probate Practice" will be used to refer to that aspect of a legal practice which concerns itself with the law of succession. What is the **Law of Succession?** It is that area of law which deals with the transmission of property owned by, or vested in, an individual **("the deceased")** at the date of his death to other individuals whether pursuant to the terms of the deceased's Will **(testate succession)** or ***via*** the laws of intestacy **(intestate succession)**. It would be remiss of me not to make the point that probate practice also governs partial testacy (or, depending on your palate, partial intestacy) which is, of course, a hybrid of the two types of succession mentioned in the previous note.

PROBATE APPLICATION

4. Having made and left a valid Will, after the death of the testator the Will has to be probated before effect can be given to its terms. ***Vide*** the **first paper** for the suggested step-by-step synopsis of the procedure necessary to obtain the grant of representation. **Part 68** of the **"CPR"?)** deals with **Probate.**

MAJOR CHANGE

5. **Rule 68.7** of the CPR, in essence, provides that the documents to be filed to obtain probate of a will are the **Oath of Executor(s)** (see form P.1 of Appendix A), the will **duly marked** (see form p.11 for precedent of "marking") and the **"draft grant"** (form P.2) plus Kalamazoo copy. **It is now possible to obtain probate upon filing only three documents** !!!!. Someone please

pinch me ! This is a radical amendment and improvement when one considers that prior to the amendment the following **seven (7)** additional documents were filed: Affidavit in Proof of death, Affidavit of Attesting Witness, Affidavit of Value, Inventory (plus Kalamazoo copy), declaration of Counting Probate, Declaration of Counting Inventory and Will Bond. **These are no longer required.**

6. That having been said, the number of documents can be greater if an **Affidavit of Delay** (required where the application is made for the first time more than three years after the death of the deceased – ***vide* Rule 68.22**), **Affidavit of Due Execution (Rule 68.13) and Affidavit in Proof of Death (Rule 68.10 (b) - where no death certificate available)** have to be filed.

7. It should be noted that proof of death may be proved by "**filing a ....death certificate with the Oath**". This I respectfully construe as meaning that the death certificate should be exhibited to the Oath. One should also observe that the Oath has been expanded to supply information which was normally provided in the Affidavit of Value and/or the Inventory.

AFFIDAVIT OF DUE EXECUTION – TO BE OR NOT TO BE ?

8. **Rule 68.13** provides as follows:-

(1) "Paragraph (2) of this rule applies where –

(a) a will contains no attestation clause;

(b) the attestation clause is insufficient; or

(c) it appears to the registrar that there is doubt about the due execution of the will.

(2) The registrar may require –

(a) an affidavit of due execution from-

(i) one or more of the attesting witnesses in form 11; or

(ii) (if no attesting witness is conveniently available) from any other person who was present when the will was made; or

(b) if no evidence under paragraph (a) can be obtained, the registrar may accept –

(i) evidence on affidavit in form P.8 showing that the will is in the handwriting of the deceased; or

(ii) evidence on affidavit of any matter which may raise a presumption in favour of due execution of the will,

and may require that notice of the application be given to any person who may be prejudiced by the will.

(3) Where a will is undated the registrar may require a search to be made for subsequent wills and evidence to be supplied in form P.9."

9. One may conclude, therefore, that once the will contains a proper **attestation clause** there is no need for an Affidavit of Due Execution. An example of a "sufficient" attestation clause is –

"Signed by the testator(trix) on the above-mentioned date (or on the __ day of _____, 2003) at _____in the parish of_____as his last will and testament in the joint presence of us both being present at the same time who at his/her request and in his/her presence and in the presence of each other thereafter signed the said will as witnesses."

10. The above attestation clause is just a guide and should be amended to suit each occasion. For example, if the testator is blind or illiterate the clause should contain words to the effect that the will was read over to him (stating by whom) in the joint presence of both witnesses and that he indicated that he fully understood the contents of same before signing in the joint presence

of the witnesses who thereafter signed in his presence and that this too was brought to his attention.

"MARKING" THE WILL

11. **Rule 68.16 (1)** of the CPR states –

"The general rule is that every will for which an application for grant is made must be marked by the signatures of the applicant and one of the attesting witnesses to the will in accordance with form P. 11."

12. The required marking by an attesting witness in Form P. 11 reads as follows:

> ***"This is the paper writing referred to in the [affidavit][affirmation] of (full names of attesting witness) [sworn][affirmed] the day of 20 (full names) as containing the true and original last Will and Testament [and codicil] of (name of deceased) late of (address) in the parish of (name) (occupation of deceased) bearing date the day of 19/20 and as being marked "A" for identification.***
>
> ***Signed (deponent) Signed***
> ***Justice of the Peace"***

13. This provision clearly provides for the "involvement" of an attesting witness. Additionally, the will cannot be "marked" by the attesting witness unless the witness swears an affidavit. Does **Rule 68.16 (1)** conflict with Rule **68.13** ? **It is respectfully submitted that the only way that the respective provisions can be read harmoniously is to conclude that the marking by an attesting witness is not required if the registrar does not require an Affidavit of Due Execution. For the avoidance of any doubt and**

barring an amending the rules, a practice direction should probably be issued to this effect.

RENUNCIATION OF PROBATE

14. **Rule 68.33 of the CPR** states that an executor must renounce ***via*** form P.14 in accordance with the **Executors (Renunciation) Act**. This provision makes it eminently clear that A deed of Renunciation is done and not an "ordinary" document filed in the registry. After the Deed has been signed and stamped, it should be registered in the Island Records Office and then exhibited to the Oath of Administrator in order to account for or **"clear off"** the executor who renounced.

LETTERS OF ADMINISTRATION WITH THE WILL ANNEXED

15. Grants of Letters of Administration with the Will annexed are made in respect of Wills and/or codicils where no executor was appointed therein or where prevailing circumstances make it impossible for the executed appointed to obtain a grant. The grant may also be obtained (more particularly) where:
    a) the court exercises its discretion and "passes over" or removes an executor;
    b) The executor appointed is out of the jurisdiction and a grant is to be made to his duly appointed agent/attorney.
    c) The executor has predeceased the testator or has survived the testator and died without proving the Will, or
    d) The executor has renounced.

16. **Rule 68.8** of the CPR lists the documents to be filed. These are:
    a) an Oath of Administrator (with Will annexed) (**form P. 3**) (***c.f.*** Oath of Executor);

b) The Will to be "marked" (as aforesaid) by an administrator (the applicant) not an executor;

c) The draft Grant **(form P.4)** (plus Kalamazoo copy);

d) Affidavit in proof of Advertising pursuant to **Rule 68.35 (1) (b)** (NOTE:- **This was erroneously referred to as Rule 68.36(1) in Rule 68.8(1)(e)**, and

e) The Administrator-General's Certificate pursuant to Rule 68.19 **(this document will be dealt with fully below)**.

17. The following **five** documents are no longer necessary: Administration Bond; Affidavit of Value, Inventory (plus Kalamazoo copy), Declaration of Counting of Inventory, Declaration of Counting of Letters of Administration (With the Will Annexed). **Please note, however, that an Affidavit of Due Execution (Rule 68.13) and an Affidavit of Delay (Rule 68.22) might also be required.**

18. **Rule 68.8(2)** emphasizes that any named executors (who would be persons entitled in priority to the applicant) should be accounted for in the Oath. One should also take cognizance of the fact that **Rule 68.11** adumbrates the order or priority of applicants where the deceased left a will.

INTESTACY

19. Intestacy describes the situation where the deceased died without leaving a Will (***a la*** the well-travelled example of **estate Robert Nesta Marley**, dec'd) or, alternatively, where the deceased left a Will but it does not dispose of his property at all. This is **"total intestacy"**. **"Partial Intestacy"** (or conversely

"partial testacy") speaks to the instance where the deceased left a Will which disposes of only a part of his property and estate.

20. Whenever any kind of intestacy occurs, the estate affected is distributed pursuant to the laws of intestacy; in other words, as provided in sections 3 and 4 of the **Intestates' Estates and Property Charges Act (IEPCA)**.

21. The Administrator-General's Act and the IEPCA, govern applications for a grant of Letters of Administration. Of course, such a grant must be obtained before property passing on intestacy can be distributed.

22. **The general rule is that** the right to apply for a grant follows the right to property. In other words, only persons entitled to benefit on intestacy can approach the court to be appointed administrators.

APPLICATION FOR LETTERS OF ADMINISTRATION

23. **Rule 68.9** of the CPR provides essentially that the following documents are the minimum required in an application for letters of administration :

a) An Oath of Administrator (see **form P. 5**) (***c.f.*** Oath of Executor);
b) Draft grant (see **form P. 6**) plus Kalamazoo copy, and
c) Proof that the application has been advertised pursuant to **Rule 68.35(1). NOTE: This rule was erroneously referred to as "rule 68.36 (1) in Rule 68.9 (d).**

24. **Again, the grant can be obtained upon filing only three documents, including only two initially** !!!! No longer required are the following six documents - Administration Bond, Surety, Affidavit of Value, Inventory (plus Kalamazoo copy), Declaration of Counting of Inventory and Declaration of Counting of Letters of Administration.

25. If a death certificate is available it should be exhibited to the Oath. If there is none, An Affidavit in Proof of death will be required pursuant to **Rule 68.10**. An Affidavit of Delay might also be required pursuant to **Rule 68.22**. A **Notice of the application** and **Affidavit of Service** proving compliance may also be required from an applicant to a beneficiary entitled in the same degree (**Rule 68.21).**

26. **MAJOR CHANGE**: **Rule 68.18** gives the order of priority in relation to potential applicants for a grant of representation where there is an intestacy and the Administrator-General is not applying for the grant. This salutary provision has rendered redundant the perennial debate as to whether a consent is required from a beneficiary of a lower degree (for example,a child) if a beneficiary of a higher degree (for example, a spouse) is applying. It should be noted, however, that the consent of a person entitled in the same degree as that of the applicant is no longer necessary provided notice of the application is given to the beneficiary. See **Rule 68.21.**

ADMINISTRATOR-GENERAL'S CERTIFICATE

27. **Rule 68.19** provides as follows:

> ***(1) "This rule applies where under the terms of the Administrator-General's Act, section 12 or the Intestates' Estates and Property Charges Act, section 12 of the Administrator-General is under a duty to apply for Letters of***

administration and where no minor is entitled to any share of the estate.

(2) Before applying for a grant of administration, the applicant must file with the Administrator-General –

(a) a declaration setting out

(i) details of the estate of the deceased;

(ii) details of all persons who are or who would have been, had they not died before the deceased, entitled to a grant; and

(iii) in the case of those persons who would have been entitled to apply in priority to the applicant, the reasons why those persons cannot apply;

(b) a copy of the oath.

(3)Where the Administrator-General is satisfied that the applicant is entitled to a grant he may, without prejudice to his right to apply for a grant himself, issue a certificate consenting to the making of a grant to him or her."

28. **Rule 68.19** establishes crucial pre-conditions to be met before an Applicant for a grant of Letters of Administration can apply to the court. These are the filing of a **declaration** giving details of the estate and possible beneficiaries or

applicants (this is akin to the form of particulars currently filed with the Administrator-General) and the issuance of the **certificate**.

29. The thinking behind **Rule 68.19** might be better appreciated after a perusal of the two sections mentioned therein. Section 12 of the **Intestates' Estates and Property Charges Act** (hereafter called the **"IEPCA"**) provides:

> ***"Notwithstanding anything contained in the Administrator-General's Act, or any enactment amending or substituted for the same, where the residuary estate of the intestate does not exceed One Thousand Dollars, or where it exceeds that sum and a minor is entitled to a share thereof, of where a testator does not appoint an executor or where the executor has died before the testator or renounces, it shall be the duty of the Administrator-General to apply for Letters of Administration to the estate and, unless the Court is satisfied that it would be for the benefit of the estate that Letters of Administration ought to be granted to some other person, Letters of Administration to such estate shall be granted to the Administrator-General."***

30. Section 12 of the **Administrator-General's Act** states that –

> ***"The Administrator-General shall be entitled to, and it shall be his duty to apply for, letters of administration to the estates of all persons who shall die intestate without leaving a widower, widow, brother, sister, or any lineal ancestor or descendant, or leaving any such relative if no such relative shall take out letters of administration three months, or within such longer or shorter time as the Court to which application for administration is made, or the Judge thereof may direct; and also to the estates of all persons***

who shall die leaving a will but leaving no executor, or no executor who will act, if no such relative as aforesaid of such deceased shall, within the time aforesaid, take out letters of administration to his estate. The Administrator-General shall be entitled to such letters of administration in all cases in which, if this Act had not been passed, letters of administration to the estates of such persons might have been granted to any administrator:

Provided that this section shall not apply to the estates of deceased persons for the administration of whose estates provision is made by law, nor to estates where the total value of the personal property does not exceed five thousand dollars, but it shall be lawful to appoint the Administrator-General, with his consent, administrator of any estate, notwithstanding that the total value of the personal property does not exceed five thousand dollars."

31. Taking into account the statutory responsibilities of the Administrator-General, **Rule 68.19** has imposed a requirement that all applicants for a grant of letters of administration must obtain the certificate. This is necessary even in cases where there are only adult beneficiaries. Prior to the passage of the CPR the practice was that there was no requirement for the Administrator-General to give any consent or have anything to do with any intestate estate where there were only adult beneficiaries and the estate was over a minimal statutory sum.

32. Rule 68.18 (4) of the CPR states that –

"Where –

(a) a minor is entitled to a share in the estate; and

(b) under the terms of the Intestates' Estates and Property Charges Act, section 12, the Administrator General is under a duty to apply for a grant,

any other person wishing to apply for a grant must apply to the court for an order permitting him to do so."

33. The effect of this provision is that once there is an intestacy and a minor is a beneficiary then, unless a court rules otherwise, no one but the Administrator-General can apply for the grant. ***Arguendo***, the current practice whereby the Administrator-General gives her written Consent (not by letter but in a sworn document) for someone (for example an adult beneficiary) to apply for the grant seems preferable as it is less onerous on the estate, particularly if (as the writer suggested in the "**first paper**") the grant of letters of administration is acknowledged to be a court order.

34. The drawback in Rule 68.18(4) is that it causes the applicant to incur the cost of court proceedings even before he can apply for the grant.

35. Although the writer concedes that the above-mentioned practices prior to the **CPR** (whether or not there were any infant beneficiaries) condescended to expediency and are arguably preferable, perhaps the prudent course to adopt to restore and/or legitimize those practices is to amend the Administrator-General's Act and the IEPCA.

PRECEDENT OF CERTIFICATE

36. For a suggested precedent of the Administrator-General's Certificate see the Appendix at the end of this paper.

37. In 1999 the Administrator-General's Act was amended in several respects. A very useful provision is S. 53A which allows the Administrator-General to administer estates "not exceeding One Hundred Thousand Dollars ($100,000) or such higher amount as the Minister may by order prescribe", without a grant of Letters of Administration as if he/she had obtained such a grant.

THE WAY FORWARD

The IEPCA should also be amended so that "issue" will include children "***en ventre sa mere***".

38. Establish more guidelines for ascertaining or selecting the common law "spouse" where, on the facts, more than one person seems to have equal claim.

39. Expand the categories of "other eligible relatives" **(Item 4 of S. 4(1) of the IEPCA)** to include other relatives (such as **"cousins"**) before the estate escheats or passes "***bona vacantia***" to the Crown. **NOTE: A practice direction should be provided as soon as possible regarding the procedure for petitioning for the waiver of crown rights where an intestate's estate has passed *bona vacantia* to the crown/government.**

RE-SEALING

40. Resealing describes the procedure whereby a grant of representation issued by a Court (Registry) from a commonwealth (or colonial) jurisdiction is sealed with the seal of the local court and rendered as effective as if, originally, the grant had been obtained locally. The governing statute is the **Probates (Re-Sealing) Act**. The application was traditionally made to a judge in chambers but he Registrar of the Supreme Court can hear the application if it is unopposed. ***Vide*** the **Judicature (Supreme Court) Additional Powers of Registrar Act**.

41. **Rule 68.26** of the CPR essentially provides that the following documents are necessary to have grant resealed:
    - **(a)** An Application on Oath (**form P. 13**) exhibiting a certified copy of the original grant with will, and ;
    - **(b)** Affidavit of Advertising (proving that the application has been advertised ***a la*** **form P.12**).

42. There is no need for the following **nine** documents/items: Affidavit in Proof of Death, Affidavit of Due Execution, Marking of the Will, Affidavit of Value, Bond,

Surety, Inventory (re local property), Declaration of Counting of Inventory and Declaration of Counting of the resealed grant.

43. It must be reiterated that re-sealing is a commonwealth concept and does not extend to non-commonwealth nations. A grant, therefore, from the U.S.A. cannot be re-sealed in Jamaica. **It is respectfully submitted that this should not be the case and legislation should be passed effecting the change.**

44. **One should always carefully check for provisions in statutes or treaties between the respective countries, especially in respect of double-taxation relief**.

OTHER IMPORTANT CHANGES

45. There are specific provisions germane to a number of applications which are not uncommon in probate practice. These include applications to admit to proof oral or copy wills **(Rule 68.17)**; amendment and revocation of grants (Rule 68.37); creating the **"caution" (in lieu of "caveat" – *vide* Rule 68.38)**; **citation proceedings** (see **Rules 68.41, 68.42 and 68.43**, respectively); applications for a witness summons to bring in a will **(Rule 68.45)**, for emergency grants (including grants ***ad colligenda bona* – *Rule 68.46***), for leave to swear death **(Rule 68.47)**. Potentially, a very potent provision is **Rule 68.48** which recognizes the Registrar's authority to make orders in respect of certain applications. ***Semble***, this will have to be read in conjunction with the **Judicature (Supreme Court) Additional Powers of Registrar Act.**

COURT RULES REGARDING PRACTICE AND PROCEDURE (INCLUDING CONTENTIOUS PROBATE MATTERS)

46. **Section two of Part 68 of the CPR deals with Contentious Probate Proceedings.** This is very important as prior to the CPR there was a woeful dearth of rules to assist legal practitioners and litigants in respect of "administrative" applications to the Court and contentious probate matters.

47. The (Contentious) Probate Proceedings must be begun by the issuance of a fixed date claim form (see **Rule 68.50 and form P.2**) which would state, ***inter alia***:

> *"The nature of the interest of the claimant and of the defendant in the estate of the dead person to which the claim relates."*
> **Rule 68.50(3)**

48. The new Rules, ***via*** **Rule 68.52,** make much better and/or clearer provision regarding the requirement of lodging testamentary documents in the registry and filing an affidavit of testamentary scripts.

49. **Rule 68.53** provides for the lodgment of a grant in proceedings to revoke the grant within seven (7) days after the issue of the claim. This provision seems to render redundant the practice for a citation to bring in the grant. ***Cf***, for example, ***Re Jolley, Jolley*** v ***Jarvis*** [1964] P. 262.

ADMINISTRATION CLAIMS

50. **Part 67 of the CPR** deals with "Administration Claims" and covers, ***inter alia***, the "determination of any question arising in the administration of the estate of a dead person" **(Rule 67.4(2)(a)** and provides for various relief **(Rule 67.4 (3)** including an order:

"a) Requiring an executor, administrator or trustee to furnish and verify accounts;

b) Directing a person to do or abstain from doing a particular act in the capacity as executor, administrator or trustee; and

d) *Approving any sale, purchase, compromise or other transaction by a person in the capacity as executor, administrator or trustee."*

GENERAL COMMENTS

51. The fee payable on applications for grant is $2,000.00 See the **Rules of the Supreme Court (Fees) 2002** which were gazetted on the 7th January, 2003 and scheduled to come into effect on the 21st January, 2003.

52. Special rules should be enacted to govern the procedures in the Resident Magistrates' Courts.

CONCLUSION

53. Some might have the audacity or temerity to say that the changes in the rules governing probate practice are revolutionary in nature. Others might contend that they are principally cosmetic. Many persons might like and embrace them and many might not. It is the writer's respectful opinion that although the new rules are **"a work in progress"**, they have provided a solid foundation for improved practice in this arena of inevitability.

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2003 FEBRUARY 22

CERTIFICATE OF THE ADMINISTRATOR-GENERAL

(Pursuant to Rule 68:19 of the Civil Procedure Rules 2002)

IN THE ESTATE of _____

Late of _____

of _____

deceased, intestate

I **LONA MILLICENT BROWN** Administrator-General for Jamaica having been credibly informed of the death of A.B., late of _____ who died on

AND having examined the Declaration of C.D., the copy Oath of Administrator and Consent of Beneficiary(ies) files therewith

AND being satisfied that C.D is entitled to a Grant Administration;

DO HEREBY CONSENT to the making of a Grant to C.D.

Dated this _____ day of _____ ,200

_____

LONA MILLICENT BROWN
Administrator-General for Jamaica

BIBLIOGRAPHY

1. Tristram and Coote's Probate Practice (27th edn.)
2. Hay, Beresford: "An Introduction to the Law of Succession" (1994)
3. Nunez-Tesheira, Karen: "Non-Contentious Probate Practice in the English-speaking Caribbean" (2002)
4. Harrison's Law Notes and Materials (2000)
5. Parry and Clark: "The Law of Succession" (9th edn.)
6. Mellows: "The Law of Succession" (5th edn.)
7. Borkowski, Andrew: "Textbook on Succession"
8. Sawyer, Caroline: "Principles of Succession, Wills and Probate" (1998)
9. Ross, Sidney: "Inheritance Act Claims Law and Practice" (2000)
10. Mennell, Robert: "Wills and Trusts in a Nutshell" (1986)
11. Tyler's Family Provision (2nd edn.) (1984)
12. Jarman: "A Treatise on Wills" (8th edn.) (1986)
13. Sherrin and Bonehill: "The Law and Practice of Intestate Succession" (1987)
14. Garrow and Alton's Law of Wills and Administration (1984)
15. Dobbie's Probate and Administration Practice (1986)
16. Williams, Mortimer and Sunnucks on Executors, Administrators and Probate (16th edn. of "Williams on Exeuctors" and the 4th end. of Mortimer on Probate")
17. Chambers, Hugh V.T.: "Practice Directions"