COMMON ERRORS IN ESTATE APPLICATIONS

General

1. Documents Generally
    a. Originating Documents – i.e. Oath incorrectly and incompletely titled.
    b. Failing to state the Domicile of the Deceased.
    c. Not including footnote with particulars of Attorney or person making the application
    d. Failing to include an Email Address in the footnote of the documents – Please note that a practised direction was issued by the Registrars of the Supreme Court in 2015, which mandated that documents being filed in the Supreme Court should include an email address in the footnote.
    e. Not filing original documents or filing documents certified by a Justice of the Peace or Notary – particularly Death Certificates.
    f. Referring to exhibits in documents being filed and not filing the said exhibits.
    g. Not filing County Clerk Certificates or verification of the Notary's Commission in circumstances where the documents are witnessed in non-commonwealth countries. **Please note that section 22(4) of the Judicature (Supreme Court) Act, which deals with the witnessing of documents filed in the Supreme Court was not amended or repealed by the wholesale amendments made to different legislations in 2015. As a consequence, such verification continues to be required by the Court.**
    h. Disregarding the use of correct pronouns when describing the deceased and or the applicants themselves, particularly, in respect of the paragraph that deals with Settled Land in the Oaths and the paragraphs which require the applicants to commit to gathering and administering the estate of the deceased; Disregarding the use of the correct reference in relation to the paragraph that requires the applicant to render a just and true account of their administering of the estate – applications for Probate -"my/our executorship", all other applications – "my/our administration"
    i. Persons swearing and affirming in the same document or swearing in the Preamble but affirming in the jurat or vice versa.
    j. Amendments made to documents are not properly initialled.
    k. General filing of unnecessary documents – i.e. Affidavits of Delay when same is not necessary.

2. **Names of Applicants and Deceased**
    a. The general rule is that the Grant is to be sought in the true and complete name of the applicant and the deceased. **Initials are not accepted.**
    b. Unless, there is evidence to suggest that the name stated in the document filed is not the true and correct of either the applicant or the deceased, no requisition will be issued mandating that the Grant be sought in any other name apart from that stated in the documents.
    c. Where there are discrepancies with the names of either the applicants or the deceased, such discrepancies are to be explained or accounted for in the Oath.
3. **Affidavit of Alias**
    a. If it becomes necessary, the applicant may seek the Grant in more than one name of the deceased. An Affidavit of Alias must be filed where this is being done.
    b. The Affidavit of Alias must be sworn to by the applicant(s) marking the application for the Grant.
    c. It should be stated in the Affidavit, which of the names is the deceased's true and correct name.
    d. The affiant(s) should account for the different names by stating the part of the estate which is held in the different names and the reason for including the additional names.
    e. The names appearing in the heading of the affidavit of alias, heading of the Oath and the Grant must correspond.
    f. Ensure that what is being requested in the Affidavit of Alias is consistent with that stated in the heading of the Oath- i.e. you cannot ask that the Grant be issued in the deceased's true and complete name only in the Affidavit of Alias and then in the heading of the said Affidavit and Oath, additional names are represented.
4. **Addresses of Applicants and Deceased**
    a. In respect of applications involving a Will, where the deceased died at an address which differs from that stated in the Will, in the heading it should state that the deceased was ***"formerly of ..... but late of ....."***
    b. In respect of applications involving a Will, where the applicant's address has changed, this should be accounted for in the Oath.
    c. Where there are discrepancies in the address stated for the deceased or applicant in the Oath and the death certificate, such discrepancies must be addressed in the Oath.

5. Death Certificate

a. Where the original death certificate is not filed, its unavailability should be explained in the Oath as well as the steps that have been taken to obtain same. It should also be explained in the Oath that an Affidavit in Proof of Death is being filed in lieu of the death certificate.

b. The information relating to the particulars of the death (date of death and place of death) as stated in the Oath should be consistent with the information provided in the Affidavit in Proof of Death.

6. Jurat

a. Jurats not being completed particularly with respect to place and parish (for locally sworn documents).

b. Jurat cannot appear on a page by itself.

7. Estate Values

a. Not stating whether the person died of any Personalty AND Realty

b. Improper representation of Estate Values, which ought to be represented as "*Gross Personal Estate, Net Personal Estate, Gross Real Estate, Net Real Estate, Gross Annual Value*".

c. Misunderstanding of the calculations of Estate Values – for example, Net Values are not calculated as 10% of the Gross Value. The Net Personal or Net Real Estate value is the value remaining after deducting liabilities such as funeral expenses. In the absence of any liabilities, the Gross and the Net Values should be the same. Gross Annual value is calculated as 10% of the Gross Real Estate.

d. There is often a disconnect between the values as stated in words and how it is represented numerically. There is no requirement to state the values in words and in numbers and it would be more economical to state the figures in numbers.

e. For those estates where the overall net value of the estate is "Nil", but the Grant is being sought for another purpose, such as, pursing a claim, an explanation should be provided, as the Court will not issue a Grant in vain.

8. Affidavit of Delay

a. Must be sworn to by the applicant(s) making the application and is only required where the application is being made for the first time three (3) years or more after the death of the deceased.

b. An Affidavit of Delay is not required for applications where the Court has already issued a Grant and a subsequent application is

made for another Grant in the same estate unless specifically required by the Rules.

9. Affidavit of Plight and Condition

a. Ensure that the matters being addressed by the person swearing to this Affidavit are within the person's knowledge. Often times, it is found that persons are swearing to issues which occurred at the execution of the Will and the person was either not present or there is no indication in the Affidavit that the said person was present at the time the will was being duly executed.

b. Improper use of the phrase – "**Save and except as stated above**". The use of the phrase – "save and except as stated above" has the potential to lead to incorrect conclusions and inconsistencies within the Affidavit.

c. **No need to file Affidavit of Plight and Condition to explain Staple Holes or account for Creases and Folds in the Will.**

d. Where Affidavit of Plight and Condition is addressing amendments (not properly witnessed) made to the will, it is important that it be stated whether the amendments were made before or after execution of the will.

10. Power of Attorneys

a. Where a Power of Attorney is being given to someone to apply for a Grant in an Estate, specific reference should be made in the Power of Attorney to that person applying for the Grant or a Grant in respect of the deceased's person estate.

b. Power of Attorney should be recorded at the Island's Records Office and the date of the Power of Attorney as well as the Folio and Liber New Series should be included in the Oath.

11. Deed of Renunciation (Executorship)

a. Where an Executor is Renouncing his/her executorship, the Deed of Renunciation must be recorded at the Island's Records Office. The date of the Deed of Renunciation as well as the Liber New Series and Folio of the Deed should be stated in the Oath.

12. The requisite copies of the Grant and Will (where applicable) should accompany the documents at the filing of the documents.

13. The Grant should be stamped for the correct Stamp Duty – see the Judicature Rules of Supreme Court (fees), 2011 for the correct amounts to be paid when stamping Grants.

Probate Applications

14. Where the Will appoints more than one executor, there is a tendency among applicants to not clear off or account for the other executors.

a. Where this is applicable, the applicant should ensure that proper account is given for the other executors – either by

Reserving Power, exhibiting a properly recorded Deed of Renunciation where the Executor has renounced or filing the original death certificate where the executor is deceased.

b. Please note however that where Power is being reserved to an Executor, notice must also be given to that Executor that the application is being made. This must be stated in the Oath. a copy of the notice sent should be exhibited along with proof that the said notice was given.

c. In some cases, the Will may appoint a primary executor and/or substitute or alternate executors. The terms of the Will must be read carefully to determine whether the condition precedent set forth in the will has been fulfilled. Please note that where the substitute or alternate executor(s) is making the application, an account must be given for the primary executor(s).

15. Marking Clause

a. Rules require that the Will is to be marked with reference to the Oath and Affidavit of Due Execution (where one is filed) – 68.16.

b. Form P.11 of the CPR, gives the text of the Marking Clause

c. Marking Clause is to be completed with respect to the date the Oath or Affidavit of Due Execution is sworn AND must be witnessed by the same Justice of the Peace/Notary/Official who had witnessed the documents in question.

d. Marking Clause is not to be placed on the Instruction Page (Standard Will form), Backing and Cover Page, separate sheets of paper or in the body of the will. It is to be placed either on the face of the Will or at the end of back of the will. **The clause can be written**.

16. Affidavit of Due Execution

68.13 (1) of the Civil Procedure Rules sets out the circumstances where an Affidavit of Due Execution is required. These include:

i. Where the Will has no Attestation Clause
ii. Where the Attestation Clause is not sufficiently drafted
iii. Where it appears to the Registrar that there is doubt about the Due Execution of the Will. On several occasions, Wills are presented and there are obvious and glaring irregularities, discrepancies or alterations of a substantive nature on the will, which brings the due execution of the will in doubt. In these circumstances, the Registrar will request that an Affidavit of Due Execution be filed by one of the attesting witnesses or any other person present during the execution of the will so as to satisfy herself that the Will was duly executed within the provisions of the Wills Act. The following are examples of

the circumstances where the Registrar will request such an Affidavit: -

a. Double Execution of the Will
b. Where different parts of the Will appear to have been written by different persons.
c. Where there is no consistency with respect to writing of the will – i.e. one part of the will appears in one colour, another part of the will in another colour.
d. Where the Testator executed the will by way of a mark or the Will appears to have been executed by someone else under the direction of the Testator.
e. Signature of the Testator is illegible, weak, feeble or shaky

17. Affidavit of Knowledge and Acceptance

68.35(6) of the Civil Procedure Rules states that the Registrar may require an Affidavit of Knowledge and Acceptance, where the testator is blind, illiterate or the will has been signed at the direction of the testator in his presence and in other circumstances where it appears to the Registrar that there is doubt that the testator has such knowledge (i.e. where the testator's signature is weak/feeble and where the will has been executed by way of a mark)

Letters of Administration

18. Where persons have died intestate, **68.18** of the Civil Procedure Rules sets out the Order of Priority as it relates to who can apply for a Grant.

19. Common Law Spouses must first obtain a Court Order if they are to apply for the Grant as the spouse of the deceased.

20. Grandchildren, Nieces, Nephews and Cousins **do not have** an automatic right to apply for a Grant of Administration in respect of a deceased's estate, unless they fall within the narrow exceptions of 68.18.

21. The Applicant(s) must properly state his/her relationship to the deceased in the Oath.

22. If the Applicant is entitled in priority – i.e. the spouse of the deceased, there is no need for account to be given of persons who are entitled in a lower degree.

23. Where there are persons who are entitled in priority to the applicant to apply for the Grant, the applicant must obtain the **CONSENT** of those persons.

24. Where there are other persons who are entitled on the same level (same degree) as the applicant to apply for the Grant, the applicant must give those persons **NOTICE** of the application. This should be stated in the Oath. A copy of the Notice sent along with proof that same is sent should be given. Please note that where notice is given by Registered post, the original certificate of posting should be filed.

25. Where a person who would have been entitled to apply for a Grant, subsequently dies, their personal representative or beneficiaries ought to be notified of this application.

26. Proper care should be taken when drafting the paragraph that deals with priority, especially the use of the words, "save and except". For example, if a child of the deceased is applying for the Grant and there are other children, since those other children are entitled in the same degree as the applicant to apply for the Grant, the paragraph dealing with priority would simply state that there is no other person entitled in priority to the applicant to apply for the Grant by virtue of any enactment.

27. The Personal Representative of any of the persons mentioned in the Order of Priority can apply for a Grant and is treated in the same way as if the person themselves was making the application, however the personal representative of a spouse who died before taking out the Grant is ranked below all the persons mentioned in the Order of Priority. It therefore means that if such a person was applying, the person would have to clear off all the persons mentioned in the Order of Priority.

28. Once a Minor is entitled to share of the estate, the matter is to be referred to the Administrator-General's Department, who is mandated by law to administer those estates. In respect of the Administrator General's Certificate, given the amendments to the Administrator-General's Act and Intestate, Estate and Property Charges Act, the Court no longer requires the Certificate for certain categories of applicants namely – spouse, children, parent and siblings of the deceased.

Letters of Administration with the Will Annexed

29. Persons should be made aware of the circumstances, where this application is made: This includes and is not limited to:

a. Where the Will appoints no Executor
b. Where an Executor dies without obtaining Probate of the Will
c. Where an Executor has renounced Probate
d. Where an Executor has been cited and refuses to accept Probate of the Will.

e. Where an Executor gives Power of Attorney to someone else to apply for the Grant on his/her behalf.
f. By way of Order of the Court.

30. There appears to be some misunderstanding as it relates to who can apply for this Grant. Please note that entitlement to the Grant is **not based** on the person's relationship to the deceased but on whether the person is a named beneficiary under the will. Please see 68.11 of the CPR in respect of the Order of Priority.

31. Please note that the issues in respect of CONSENT and NOTICES discussed under the heading of Letters of Administration are applicable here as well.

32. The Will must be marked in relation to the Oath of Administrator with the Will Annexed and Affidavit of Due Execution (where applicable).

RE-SEALING APPLICATIONS

33. Please note that all Re-Sealing Applications are to be commenced by way of filing a Notice of Advertisement.

34. The Application for Re-Sealing is to be Stamped for the prescribed $5,000.00

35. The Grant and Will/Codicil where applicable, for which Re-Sealing is being sought, ought to bear the **SEAL OF THE COURT** or be certified by **AN OFFICIAL OF THE COURT** which issued same.

36. The Application for Re-Sealing is to be made in the name of the deceased and applicant as represented on the GRANT, with the proviso that where the names as represented therein includes an initial, the complete name should be stated along with the name as stated on the GRANT.

37. There is no requirement to file an Affidavit of Alias

38. An Affidavit of Delay is required by 68.26(3) (d), where the Application for Re-Sealing is being made more than three (3) years after the death of the deceased.

39. Where the Grant for which Re-Sealing is sought is subjected to limitations, such a Grant will not be Re-Sealed, unless the Registrar is satisfied that Re-Sealing the Grant will not offend the Limitations in question.

40. Given that the Probate (Re-Sealing) Act was amended by the Administrator-Generals (Amendment) Act of 2015 to allow for Grants issued in any jurisdiction to be re-sealed in Jamaica, **the onus is on the applicant through his Attorney to ensure that what is being re-sealed is an actual GRANT**. It may mean that Attorneys would have to become conversant with the laws, practise and procedure of the

jurisdictions from which these grants are being filed. Please note that the Court retains the right to require evidence of foreign law in these circumstances, to satisfy itself that the document being presented can be Re-Sealed.

De Bonis Non and Grants by Representation

41. It is very important that persons appreciate the circumstances where either Grant is to be sought. The purpose of both Grant is the same, both Grants are sought in circumstances, where a Grant has been issued and the person to whom the Grant was issued died without completing the administration of the estate and there is now need for a Grant to complete that administration.

42. In respect of the Grant of Administration De Bonis Non or Grant of Administration De Bonis Non-with the Will Annexed, that Grant is sought where the Chain of Executorship has been broken. The Chain of Executorship is broken where the **sole or last surviving executor**, to whom a Grant of Probate was issued dies **Intestate**. In cases where the person dies intestate, the issue of chain of representation does not arise. Priority is usually determined by whether the deceased died testate or intestate – 68.11 or 68.18.

43. In respect of the Grant of Probate by Representation, that Grant is sought where there is a Chain of Executorship. The Chain of Executorship arises where the sole or last surviving executor, dies testate and the executors of the former executor's will applies for and obtains Probate. Once the former executors obtain Probate, they are duty bound to complete the winding up of the original testator's estate. They cannot obtain probate in the former's executor's estate and seek to renounce probate of the original testator's estate.

44. Please see Part 68.48 (in respect of De Bonis Non Applications) and Part 68.49 (in respect of Grant by Representation) for the correct procedure and documents for applying for the said Grants.