



The Probate Process Step by Step

One of the most common questions asked of an attorney is how I deal with what Jamaicans colloquially refer to as 'dead lef' or inherited property left under a will. In an attempt to demystify the process the steps involved in winding up the estate follows, with the responsible person stated in brackets and a brief note on what this entails:

i. Gathering the deceased's documents and property, including the original will, any bank books or statements, Titles to land and share certificates (Executor) -

Before the client comes into the office (provided he is not a walk in client), you should inform him of the essential documents needed to begin the process which are the above.

ii. Approaching an Attorney to begin drafting the documents for court, the Oath of Executor and the Grant of Probate (Executor) - When approached by the executor the first order of business is to inspect the documents, most importantly the will. Key among the several clauses, aside from the all important formalities for the will, in the will shall be who the executors are and whether there is a residuary clause. Ascertain from the executor where the other executor is if one is named in the will and the nature of his relationship with and the amenability of the beneficiaries so named in the will.

iii. Drafting the Oath of Executor and Grant of Probate (ATTORNEY) - This is normally not a difficult affair as the CPR makes provision for a standard form. Now I say it is not normally because the Supreme Court Registrar in my experience gives great weight to the details in the form. So for instance if the address of the executor in the will is not one and the same as the one he gives in the Oath then you are likely to face a requisition which in my experience pushes back the process anywhere from 1-3 months.

iv. Delivering the Will, Death Certificate, Share Certificates and Title to land to the Attorney (Executor) - These should all be original documents. In the case of lost share certificates an indemnity will have to be executed between the executor and the share registrar and a lost title application in the case of a lost title to land.

v. Executing Oath of Executor and Marking the Will and Death Certificate Relative to the Oath (Executor) - If the client is based overseas please ensure the formalities for the Notary Public and/or the Jamaican Ambassador/Consul is observed, that is that their seal is affixed to the document. A special note should be made that for Canadian based and UK based clients the Notary need only affix his seal. This is also the case with the Jamaican Ambassador/ Consul, wherever they be. However, if the client is getting a Notary to witness the document from certain States in the USA they will require a Notary Public Certificate of Term of Office from the Secretary of State for that particular state (Florida, Pennsylvania and California come readily to mind). In other states such as New York you need only get certification of the Notary's term of office from the local county court. In Jamaica of course such execution of documents should be witnessed by a Justice of the Peace. Our office is blessed to have at least three that I know of.

iv. Stamping the Oath and Grant with the requisite Stamp Duty (ATTORNEY) - The Stamp Duty on the Oath is \$2,000.00. The Stamp Duty on the Grant is \$52,000.00 on the value of the first \$2,500,000.00 and 3% of the value of every remaining dollar value of the estate. You may stamp the grant with \$2,000.00 so that you can file it initially however before the Registrar is ready to sign off on the grant she will issue a requisition that the Grant be upstamped to the full amount. The value is the gross value of the entire estate as at the date of death of the testator and includes his real estate and personal estate. My experience has been that the best course of action is to have the Grant fully stamped from the beginning, thereby saving you and the client 3-6 months of further court delays.

v. Submitting the Oath, Grant of Probate, Death Certificate and Will to the Court (ATTORNEY) - Ensure that you give your bearer a receipt for the Registry to stamp so as to acknowledge receipt of the documents. Keep photocopies of all the documents submitted to court as you never know when the Registry will 'misplace' your file and you will have to rebuild it up.

vi. Drafting letters to the various share registrars to give permission to the attorney to obtain written information as to the quantum and value of the shares held by the testator as at the date of her death as well as her history of shareholding (Executor)

vii. Drafting letter to the various share registrars to obtain written information as to the quantum and value of the shares held by the testator as well as information regarding the history of the shareholding of the testator (ATTORNEY) - Where the estate consists of shares these two processes are critical. The letter you will receive in response to your letter will form the basis of the Stamp Office's assessment of the transfer tax liability of the estate for these shares.

viii. Valuation of Real Estate (Executor) - This step maybe taken before all the others, however I have included it here as we get closer to dealing with the tax liability of the estate. A valuation from a reputable realtor can go a long way in not only determining your fees but also in preparing the documents necessary to settle the tax burden on the estate. It also has the double benefit of expediting your matter through the Stamp Office when it comes time for assessment as they rarely question a proper valuation. Indeed this can cut out anywhere from 2-4 weeks from the time it normally takes for an assessment to be produced.

ix. Drafting the Revenue Affidavit to obtain an assessment of the Transfer Tax on Death payable (ATTORNEY) - Great care must go into the drafting of this document. You will need to ensure that the value given to the part of the estate which attracts transfer tax, namely the real estate and shareholding in companies, is properly enumerated. Further local funeral expenses should be enumerated as the transfer tax is assessed on the market value of the estate as at the date of death of the testator less reasonable funeral expenses. Transfer tax is currently 5% of the market value of the transferrable burdened estate for those passing away after January 2009. For those who passed away between May 2008 and December 2008 the rate of tax is 6% For those who died between July 2005 and May 2008 the rate of tax is 7.5%. For those who died before the rate of tax is 15%. There is the executor's year within which the estate can deal with the tax burden and not face interest accruing on the outstanding tax. Therefore if the tax liability is not settled within a year of the passing of the individual interest will accrue on the transfer tax at the rate of 6% per annum and it is calculated on a per diem basis until the date it is settled.

x. Executing the Revenue Affidavit (Executor) - the same formalities that apply to the executing the Oath, apply here as well.

xi. Submitting the Revenue Affidavit to the Tax Office (ATTORNEY) - If there is a proper valuation of realty and letters from share registrars you are looking at 2 weeks for the assessment. If there is none expect to wait 1 to 3 months for an assessment from the Stamp Office.

xii. Obtaining the Transfer Tax Assessment from the Tax Office (ATTORNEY) - Once received it must be immediately communicated to the client, especially where interest is accruing on the tax. If there is any issue with the assessment my experience has been that the Stamp Office officials are reasonable and you can make proper representations to them to seek to have it revised. However if they do decide to hold a hard position on it you may have to appeal the decision to the Commissioner of Taxpayer Appeals in the first instance and from there to the Revenue Court. I understand the procedure is generally for the tax to be paid into the Stamp Office and

then to ask that the funds be remitted if your appeal is successful.

xiii. Paying the Transfer Tax (Executor) - The executor can either put up the money for the tax himself, can seek the assistance of the ultimate beneficiaries to front the money or he can present the Stamp Office with an agreement for the sale of the property and he, along with the attorney representing the estate, can give an undertaking to the Stamp Office to remit the transfer tax owing out of the proceeds of sale.

xiv. Obtaining the Transfer Tax Certificate from the Tax Office (ATTORNEY) - The Transfer Tax Certificate, styled the Form 8 in relation to real estate, is a critical step in the process as without it the property cannot be properly transferred (hence the term transfer tax). You will have to present the Form 8 along with a properly executed Transmission Application and/or Assent to Devise (in the case of realty) for the latter to be cross-stamped with the payment of taxes. That is to say that the actual Titles Office application will be affixed with a certification by the Stamp Commissioner that no taxes are owing for the property to be transferred.

xv. Obtaining the Grant of Probate from the court and advertising for creditors (ATTORNEY) - An inspection of the Grant should take place upon receipt. You will notice more often than not that the date you receive the Grant is months after it is actually dated. To my mind this is unfortunate as clients tend to believe that the delay in relaying the message is due to your error. Nevertheless, the next step is to have an advertisement placed in the newspaper for creditors of the deceased to come forth and claim against the estate before the assets are distributed according to the terms of the will. The absence of this advertisement can form the basis of a challenge against the executor personally for dereliction of duty by a creditor and if the assets are distributed in the absence of the advertisement for creditors there will always be the spectre of court action hanging over the estate.

xvi. Transferring Title to the property to the beneficiaries (ATTORNEY) - This is done by way of a Transmission Application which will register the executor on the title to the property. At this stage the executor could, legally at least, sell the property under the terms of the Real Property Representative Act. If the intention is to transfer to the beneficiaries then he will have to execute an Assent to Devise.

xvii. Finding Stock Broker to Transfer Shares (Executor) - This is only the case if the shares are for publicly listed stocks.

xviii. Obtaining the Transfer of Shares Form for the share certificates (Stock Broker).

xix. Providing the Transfer Tax Certificate, the executed Transfer of Shares Form and the original share certificates to the stock broker (ATTORNEY) - So that he can effect the transfer to the beneficiaries or conduct the sale of the shares.

xx. Transferring the shares into the estate or selling the shares (Stock Broker).

xxi. Payment to the Executor of his Commission - Under the terms of the Trustees, Attorneys and Executors (Accounts and General) Act the executor is entitled to, in the absence of express provision in the will, to the same fee that the Administrator General is entitled to as if he would have been appointed to administer the estate. That currently stands at 6% on all payments made by him in respect of debts, liabilities, cost of management, and other similar charges, and on all payments in respect of dividends, interests, rents, or other produce, or receipts of any estate or trust, and also on all property, real and personal, conveyed, assigned, or distributed by him, including the final transfer of the corpus of any trust fund, or of any part thereof (in other words 6% of the gross value of the entire estate dealt with by him).

xxii. Enjoying ownership of the land (rent) and shares (dividends) or the proceeds of sale of either assets (Beneficiaries).

The executor, to keep himself as harmless as possible from a future action from beneficiaries and creditors should at this juncture file an account with the Court. This account will then be sent to parties who should have notice of same, namely the beneficiaries but also creditors if necessary. The Registrar will then sit with the persons so notified and shall hear evidence from them if they have a dispute with the accounting. Once the Registrar makes a determination as to the authenticity then her decision is final and the parties so notified of the sealing of the accounts.

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