

PROBATE AND ADMINISTRATION NOTES

DIFFERENT TYPES OF LIMITED GRANT

A limited grant is a grant that does not give the personal representative authority to act with respect to the whole estate in all respects until the administration is completed. It is a restricted grant. The grant may be limited as to special purpose, property or time or it may be one of the special types.

The main feature of limited grants is that there is no requirement for advertisement. See section 67 (1) of the succession act which reads,

"No grant of representation other than a limited grant for collection and preservation of assets shall be made until there has been published notice of the application for the grant inviting objections thereto to be made known to the court within a specified period of not less than thirty days from the date of publication and the period so specified has expired."

It has been argued by some practitioners that only limited grant ad colligenda bona is permitted to be issued without advertisement, but in practice all limited grants are exempted save for grant de bonis non.

Grant ad colligenda bona de functi

Under the Law of Succession Act, this grant can be issued by the High Court sitting in Nairobi, Mombasa, Kisumu, Nakuru, Nyeri and Machakos (rule 36(3) of the Probate and Administration Rules. Legal Notice No.143 of 2002 amended this rule to increase the number of registries where this grant can be issued. Kisii, Kakamega, Meru, Eldoret and Bungoma can now issue this grant. This type of grant is meant to give the administrator power only to collect and preserve the grant estate pending the making of a full grant. The two words which make up the name of this grant have the following meaning;

- Ad colligenda means collecting
- Ad colligenda bona defuncti means for collecting the goods of the deceased

Rule 36 (1) explains what this grant is. It says

"where owing to special circumstances the urgency of the matter is so great that it would not be possible for the court to make a full grant of representation to the person who would by law be entitled thereto in sufficient time to meet the necessities of the case, any person may apply to the

court for the making of a grant of administration ad colligenda bona defuncti of the estate of the deceased"

An illustration of some of the duties an administrator with this grant would do include renewing lease of business premise of the deceased, payment of debts of the deceased.

The applicant for the limited grant will fill form P&A 85 which is the petition and form P&A 19 which is the affidavit. Details which should be included are:

- Name and address of the petitioner
- Domicile of the deceased
- Date of death of deceased
- Relationship of the petitioner with the deceased
- Assets and liabilities of the deceased
- Names and ages of other dependants
- Consent of other beneficiaries
- Letter from the chief clearly highlighting beneficiaries of the deceased
- Certified copy of the death certificate but in very urgent cases discretion is given to the court to accept a death certificate

Once the petition is filed the deputy registrar goes through the documents and if they are in order the file is placed before the Judge for issuance of the grant. There is no need for the petitioner to appear before the Judge.

Grant ad litem

It is a grant which enables the representative of the estate to sue on behalf of the estate, or defend a suit where the estate has been sued. The form that is used is P&A 90B and 19 in addition the following will have to be provided

- A death certificate
- Letter from the chief highlighting beneficiaries of the deceased
- Consents from other beneficiaries
- The name of the person to be sued should be clearly stated
- Where possible evidence of the cause of action should be provided
- Name and address of the petitioner
- Domicile of the deceased
- Date of death of deceased
- Relationship of the petitioner with the deceased

Once again the petition is filed, the deputy registrar goes through the documents and if they are in order the file is placed before the Judge for issuance of the grant. There is no need for the petitioner to appear before the Judge.

Grant of administration pendente lite

This is a grant given to a person appointed by the court simply to administer the estate during litigation. For instance if the will of the deceased is being contested the court may appoint a petitioner pendente lite to administer the estate so that it is not wasted. The holder has no power to distribute the estate and the grant is terminated upon conclusion of the pending proceedings. To apply for this grant form 90 is used with form 19 as an affidavit. In this type of grant the petitioner might be required to appear before the Judge.

Grant de bonis non administratis

This is granted where the personal representative has not completed the administration of the estate either because he has died or for some other reason has left part of the estate unadministered. A grant limited to the purpose of administering the administered part may be issued. In this instance form 86 and 87 are used accompanied by an affidavit. Form 86 is used in instances where the deceased died intestate while 87 is used where deceased died testate. Details required include:

- Name of petitioner
- Date of death of deceased
- Domicile of deceased
- Date letters of administration issued
- Name of the administrator sought to be replaced
- Consent of other beneficiaries

Once the papers are filed the deputy registrar goes through the documents and the matter then proceeds for gazette. If no objection is filed the letters of administration are issued.

Special limited grant

This type of limited grant is provided for under the amendment to the fifth schedule which was made by legal notice number 39 of 2002. The limited grant is made in special circumstances where the urgency of the matter is so great that it would not be possible for the court to make a full grant to meet the necessities of the estate. The petition to court is by way of form 85 accompanied by an affidavit. The petition should clearly state the special circumstances. Evidence of the special circumstances should be provided in the affidavit. It should also be

evident which necessities of the estate are to be covered by issuance of the grant. In addition the petition should be accompanied by the following

- A death certificate/ death permit
- A letter from the chief
- Consent of other beneficiaries
- Name and address of the petitioner
- Domicile of the deceased
- Date of death of deceased
- Relationship of the petitioner with the deceased
- Assets and liabilities of the deceased
- Names and ages of other dependants

For special limited grants the applicants must appear before the judge.

Other limited grants

The court may make other limited grants provided by section 54 of the act. These grants are:

- Grants limited in duration such as is the case when a personal representative is out of the country.
- Where the deceased had made a will, but the same is misplaced or lost a limited grant may be given until the original grant or authentic copy is availed. Form 94 is used for this petition

There could be instances where there are no prescribed forms for a limited grant which is required. In this instance Rule 70 of the first schedule can be invoked. The rule provides that

".....that the forms in this schedule, with such adaptations, additions and amendments as may be necessary, shall when appropriate be used in all proceedings under the rules with the proviso that the chief justice may by notice in the gazette vary the forms and prescribe such other or additional forms as he thinks fit "

The supporting affidavit in all cases must provide evidence to support the petition.

THE PROCESS OF APPLYING FOR A GRANT

ELIGIBILITY

The following persons are entitled to apply for a grant;

- Executor or executors named in a will
- Any adult person of sound mind who is not bankrupt. With regard to a deceased who has died intestate the court has wide discretion on whom to appoint as administrator. However the court will be guided by section 66 of the succession act which gives order of preference. This is :
 - Spouse (s)
 - Child /children
 - Father
 - Mother
 - Brothers and sisters and any child of deceased brothers or sisters
 - Relatives who are in the nearest degree of consanguinity upto and including the 6th degree in equal shares
 - The public trustee
 - Creditors

In the event of a deceased who has died intestate the law allows a maximum of four applicants. In cases where the deceased had minor children there must be two applicants. Depending on whether died testate or intestate, the applicants will fill the necessary forms to file the petition. The applicants will be required to give details as requested in the forms. As a general guide the information required will be as follows;

- Full names , date and place of death of deceased
- Deceased last place of residence
- Deceased domicile at time of death
- Full names and postal addresses of the applicants
- Original will and codicil if any
- Two copies of will
- True and complete record of oral will
- Full inventory of assets and liabilities of the deceased at the time of death
- Estimate value of assets and liabilities of the deceased
- Names and present addresses of executors named in the will

- Death certificate original or certified copy. If it is a case of presumption of death the an order of the court must be attached
- Names, ages, addresses, description and marital status of all surviving spouses(s) or children or of any person who would succeed where no spouse or children have survived the deceased
- Relationship of the applicant to the deceased
- Consents from other beneficiaries
- Renunciation
- Evidence that citation has been served and no action taken

RENUNCIATION

Both executors and administrators may renounce their right to apply for a grant. The renunciation should be in writing signed by the person entitled to the grant or declared orally in court. A renunciation order can be made before or after the grant has been issued. Once renunciation has been made it can only be retracted by an order of the court. Renunciation cannot be made by one who has intermeddled in the estate of the deceased.

CONSENTS

A person who has equal or superior entitlement to apply for a grant has to give consent in writing to a person of equal or inferior application to apply for the grant. Failure to obtain this consent envisaged by rule 26 of the Probate and Administration Rules would be a ground for revocation of any grant issued.

CITATIONS

A citation is a command to a person entitled to apply for a grant ordering him to act within a specified period to apply for the grant. The applicant swears an affidavit asking the registry to issue the citation. If there are good grounds the registrar signs the citation which is then served on the person cited in the manner directed by the registrar. The person cited must enter an appearance within 15 days of service. If the time given to the citee to appear expires the citor may petition the court to make the grant to him or her. Examples of instances where citation may be issued include

- Where a person either in intestacy or testate who has an entitlement to a grant prior to the citor delays or declines to apply for a grant he or she may be cited to accept or refuse a grant
- Where a person with equal priority has refused to give his/ her consent to the taking of a grant by another with equal priority
- Where a beneficiary has refused to give his consent to the mode of distribution of an estate

- Where a purchaser or creditor is owed money by the estate

NOTICES

Section 67 of the Law of Succession Act reads

"No grant of representation other than a limited grant for collection and preservation of assets shall be made until there has been published notice of the application for the grant inviting objections thereto to be made known to the court within a specified period of not less than thirty days from the date of publication and the period so specified has expired"

The clear interpretation of this section is that all grants except for limited grants must be advertised. The requirement for advertisement is applicable to all other grants including grants of probate, grants of letters of administration intestate, and resealing of foreign grant. Under rule 7(4) of the rules the registrar or the magistrate is required to cause publication of the application for grant in the Kenya Gazette. The notice should also be exhibited in a conspicuous place in the court house. The notice informs the general public of the death of the deceased and also identifies the name of the person seeking representation to the estate.

OBJECTIONS

Once publication is done a person who has not applied for a grant may lodge an objection within thirty days of the matter appearing in the Kenya Gazette. The court upon receipt of the objection notifies the applicant of the filing of the objection. Another notice is sent to the objector requiring him to file an answer to the petition for grant together with a petition by way of cross application. An objector may at any time prior to filing his answer and cross application withdraw his objection by filing in the registry a notice of withdrawal of the objection and serve the same upon the petitioner. In that event the objection shall cease to have effect and the objector shall be liable for any costs or expenses which he may have occasioned the applicant.

Thereafter directions are taken and the matter fixed for hearing. The objection proceedings are meant to deal with preliminary issues such as whether the applicant is the correct person to apply for the grant. Such was the case in the matter of the estate of Aggrey Makanga Wamira succession cause number 89 of 1996 where the father of the deceased argued that the petitioners as administrators as his daughter in law was young and inexperienced. He also said she was likely to remarry. He further argued that his granddaughter was just a minor. Hon Justice Waki overruled him and said the widow was suited to be appointed as an administrator and the daughter also of age. Another instance when objections may be made include where the existence of a will is in serious



... / 8

dispute. The court makes a finding on the preliminary issue. Thereafter the administration of the estate proceeds in the normal manner.

CAVEATS

A caveat is a restriction placed on a matter by party who wishes to ensure that he shall receive notice of any application either for the making of a grant or the confirming of a grant of representation. The caveat is lodged by way of filling form 28. Once this is lodged the registrar will send notice to the caveator informing him of the application for grant or confirmation

GRANT

After publication in the gazette or upon conclusion of objection proceedings and subsequent publication, the court will issue a grant after 30 days. A grant simply means a grant of representation whether testate or intestate. Once the grant is issued and signed by the Judge the holder of the grant is henceforth the personal representative.

CONFIRMATION OF A GRANT

After the expiry of six months the holder of the grant should apply to the court for confirmation of the grant. Confirmation of the grant will empower the distribution of capital assets.

- i. Where a grant has been issued for a will, form 108 (application) and form (8) affidavit are used
- ii. Where a grant has been issued for letters of administration with will annexed form 108 and 8 are used for confirmation of grants
- iii. Where a grant has been issued for letters of administration intestate form 108 and 9 are used

Before confirmation of the grant Rule 40 states that close relatives of the deceased he supported must be mentioned in the application. In addition the assets of the deceased must be shown. The mode of distribution of the estate must also be outlined. All beneficiaries should give consent to the mode of distribution. Once the documents are filed and found to be in order the registrar will send form 111 to a caveator warning him of the application for confirmation of grant. This will enable the caveator to take appropriate action.

In the event that there was no caveat the registrar will give a hearing date for the application for confirmation on which date the Judge on being satisfied with the application would confirm the grant

In contested cases, such as where there is a caveator or where one of the beneficiaries has refused to consent to the application he/she will be required to file an affidavit of protest detailing the grounds for objection. Upon the filing of the affidavit of protest the matter will proceed for hearing during which the applicant seeking confirmation, the protester and any other interested party will

be heard. Angawa J in in the matter of the estate of Mary Gachuru Kabogo (deceased) Nairobi Succession Cause number 2830 of 2001 set out the procedure for disposing of protest to confirmation hearings. She further clarified that if the dispute is only over certain properties then the undisputed properties should be confirmed and the disputed properties go full hearing

RECTIFICATION

A party may wish to amend his application before a grant is issued. He or she will do this by giving notice to the registrar by way of P&A 62. No affidavit is required. If it is a simple and minor amendment the registrar will amend without notice to the parties. If it is complicated then notice may be given

Rule 43 of the Probate and Administration Rules provides for the rectification of grant and its procedure

"where the holder of a grant seeks pursuant to the provisions of section 74 of the Act rectification of an error in the grant as to the names or description of any person or thing or as to time or place of death of the deceased or in the case of a limited grant the purpose for which the grant was made, he shall apply by summons in Form 110 for such rectification through the registry and in the cause in which the grant was issued"

Errors that may be rectified

- 1) Error in the grant concerning the deceased
 - The name of the deceased might have been misspelled
 - The status of the deceased misstated
 - The date of death or place of death misstated

Tristram and Cootes's probate and practice argues that if the surname or first name of the deceased is wrong then the grant should be revoked. However if the spelling is wrong then the amendment may be allowed.

- 2) Errors in the grant
 - Limited grants may have a wrong description of the property to be administered
- 3) Errors as to testators
 - Alteration and descriptions in names can be made in regard to executors and administrators
- 4) Others
 - Official errors
 - Errors in description or character in which a person applied for a grant

The errors envisaged by section 74 are errors of a minor nature. Rectification cannot thus be used for fundamental errors such as to alter a mode of distribution of the estate. See High Court Succession cause no 2668 of 1997 in the


.../10

matter of the estate of Muniu Karugo (deceased) in which Honorable Lady Justice Koome declined to allow an application seeking to substantively alter the mode of distribution of an estate

However in practice courts have relied on Order 44 of the Civil Procedure Rules to compliment rule 43. This has enabled them to exercise their discretion as provided by rule 73 of the Probate and Administration rules to order for rectification of grant in situations not fully provided for by rule 43

Procedure for rectification of grant

The applicant will first apply by summons using form 110. The summons must be filed with an affidavit in form P&A 13. The registrar may dispense with filing of the affidavit. If he does not the affidavit must contain such information as to enable the court deal with the matter. The affidavit should be sworn by the applicant. The registrar is thereafter to cause the summons and the affidavit (if any) to be placed before the court without delay. The court may either grant the application without the attendance of any person or direct that the application be set down for hearing on notice to the applicant and to such other person as the court may direct.

REVOCAION OF GRANTS

A grant of representation may be revoked or annulled at any time by the court of its own motion or on application by any interested party under section 76 of the Law of Succession Act. It is important to note that after a grant has been issued no objections may be received it can only be revoked. Grounds for which a grant may be revoked include

- ❖ Proceedings were defective in substance for instance where the will was obtained by fraud or undue influence
- ❖ Where the grant was obtained by the making of a false statement or untrue allegation of fact
- ❖ Where there has been concealment of material fact to the court for instance deliberating omitting some beneficiaries from the petition
- ❖ Where the person to whom the grant has made has failed to confirm it within a year
- ❖ When there has been lack of diligence in administration of the estate such as failure to provide accounts

Procedure

The applicant would fill form 107 and 14 in the High Court. On receipt of the application the registry sends form 68 to the administrator notifying him of the revocation application, and inviting him to file an affidavit to oppose the application. Similarly form 70 is sent to the applicant informing him to appear

before the Judge for directions. The directions are then given after which the matter proceeds for hearing

A court may of its own motion revoke a grant. Where it does so, it must give notice by way of form 69 and serve it on all persons concerned.

ADMINISTRATION OF ESTATES

Section 44-95 of the Succession Act deals mainly with procedural matters relating to the administration of estates

POWERS AND DUTIES OF ADMINISTRATORS / EXECUTORS AND THE PUBLIC TRUSTEE

Under Section 79 subject to any limitations imposed by the grant, the executor or administrator to whom representation has been granted shall have full powers over the property of the deceased whose case he is handling. Personal representatives are not strictly speaking trustees. However by virtue of his position the personal representative often acts as a trustee in that he is in a fiduciary position with regard to property which has come into his possession. He acts a trustee for beneficiaries and creditors. Where there is a continuing trust, such as where there are minor children, the surviving spouse is deemed to be a trustee for the children. It due to this overlap in the roles of a trustee and personal representative that some provisions of the Trustee Act cap 167 become relevant in Succession matters

The Act, under section 80 has distinguished the powers of the personal representative as follows:

- a) A grant of probate, regardless of when issued shall take effect from the date of the death of the deceased. This means that all acts done before the issue will be valid so long as done by the person named as executor in the will.
- b) A grant of letter of administration however shall only validate acts done after the issue. This means that any attempt to deal with the estate or assets of the deceased before the grant will be dangerous as such acts may be offences under section 45 of the Act

Section 82 of the Succession Act lays down the powers of a personal representative. These are

- I. To pursue all causes of action which survive the deceased. This power is only effective once the grant is issued; hence a suit filed before the grant is issued would be incompetent. Where the deceased is survived by minors the person seeking to file suit on behalf of the estate must comply with the provisions of section 58 of the Law of



Succession Act by applying for the grant whether fully or limited jointly with another person. Under order XXIII rule 3(1) of the Civil Procedure Rules where a plaintiff dies and the cause of action survives him the court upon application, should cause the legal representative to be made a part to the suit. Under order XXI rule 18 where a decree is obtained against a personal representative the personal representative shall be liable only to the extent of the property of the deceased

- II. To collect and preserve the assets of the deceased. The personal representative has a duty to use all reasonable means to collect all assets of the deceased. It is an offence under section 95 to fail willfully and recklessly neglect to get in any assets belonging to the deceased. In the course of collecting the assets the representative should commence legal action against the debtors of the deceased. Valuables of the deceased should be removed for safe keeping. Assets which do not vest upon the personal representative include
 - Property held by the deceased as a joint tenant
 - Money payable under a discretionary pension scheme
 - Assets the subject of a nomination to a specified person such as cooperative savings
 - Insurance policies expressly in trust

- III. The personal representative has power to sell, mortgage or lease any property of the deceased. In case of intestacy the personal representative during confirmation facilitates the distribution of shares to the beneficiaries. No immovable property may be sold before the confirmation of the grant. He has powers under section 82(b) to liquidate any assets so as to settle any debts and liabilities the deceased may have had. The mode of sale chosen by the personal representative will be the one that is to the best advantage of the estate. In the case of testate succession the executor will exercise a power of sale in accordance to the terms of the will. However in the event that it is not clear whether there is authority of sale the executor will exercise the statutory power of sale or apply to court for an order of sale. Section 12 (1) of the Public Trustee Act empowers the Public Trustee to convert into money movable property of an estate which he administers. However leave of the court is required to sell immoveable property.

- IV. A personal representative has the power to delegate their duties. As such a representative who does not have the time or expertise to administer an estate may delegate some of his duties. The extent to which the delegation can be done is the same as for trustees and is governed by section 24 of the Trustee Act. The delegation can be to advocates, banks or to an estate agent to sell land belonging to the estate. The decision making power of the estate remains with the personal representative. In instances of the creation of a power of attorney there is a delegation of decision making power. The personal representative is liable for acts of agents appointed under section 24 if he allows money, valuable consideration and or property to remain in the hands of the agent for longer than is reasonable.

- V. Wills usually give personal representatives wide powers of investment. In cases of intestacy, the personal representative can only exercise statutory powers. As a trustee a personal representative may under provisions of section 4 of the Trustee Act, invest trust funds in his possession in accordance to the provisions thereof. The powers of investment will be limited to those outlined in the Act. Under rule 6 of the Public Trustee Rules the Public Trustee is allowed to make authorized investments such as investments in a first mortgage or charge and deposits in any bank or financial institution

- VI. The personal representative has the power of appropriation over the estate. As such he/she has power to assign shares of the estate to individual beneficiaries. Appropriation can only be done after confirmation of grant.

- VII. In testate succession an executor can continue to carry on the deceased's business in accordance with the wishes of the deceased. In intestacy the personal representative may carry on business in the name of the deceased but only so as to be able to sell it as a going concern. If the deceased was a partner his share of the business should be sold. If the representative chooses to carry on business whether or not he has authority he shall be liable an all debts and contracts.



DUTIES OF PERSONAL REPRESENTATIVES

Section 83 of the Succession Act highlights the duties of personal representatives. They are;

- I. To pay for a reasonable funeral for the deceased. Funeral expense take priority over any other death and a reimbursement is claimable after the event. In Kenyan practice many families opt to pull together to meet the funeral expenses.
- II. To collect all the free property of the deceased and debts owing to him
- III. To pay out of the estate of the deceased all the costs of administering the estate. These include the fees payable to experts who assist in administering the estate. Under section 13 of the Public Trustee Act fees payable to the Public Trustees Act and court fees and other administration expenses are payable second after payment of funeral expenses.
- IV. To ascertain and pay all the debts of the deceased. The duty to settle the deceased debts is absolute and does not depend on the representative's knowledge of the existence of a certain debt. In the case of the Public Trustee it is a requirement of section 12 that a notice be placed in the Kenya Gazette calling for creditors to prove debts within a specified time. If the estate is insolvent all the debtors will be paid and beneficiaries will receive nothing. Bequests made in a will shall have no effect in such instances.
- V. The representative has a duty to produce a full and accurate inventory of the assets and liabilities of the deceased within a period of six months from the date of issue of the grant.
- VI. The representative is required to distribute the assets of the estate remaining after payment of the expenses and debts. The distribution is according to the terms of the will, or in case of intestacy in accordance to respective beneficial interests of survivors. The personal representative has a duty to ensure only correct beneficiaries benefit from the estate and that no beneficiary is left out. Definition of children includes adopted and illegitimate children. It might thus be difficult for a personal representative to ascertain the deceased children. Yet they are supposed to be provided for. This poses a challenge and is a problem often grappled with in court.
- VII. The representative has a duty to apply for confirmation of grant within a period of one year. Failure to do this can be a ground for the court of its own motion to revoke the grant.

VIII. At all times the personal representative should if called upon be in a position to produce to the court an accurate inventory of the assets and liabilities of the deceased and the dealings related thereto

THE PUBLIC TRUSTEE

- a) Under section 46 a police officer in the area where the deceased has died is required to report the death to the assistant chief of the area where the deceased had his last residence.
- b) The assistant chief shall move to the house of the deceased and take steps to safeguard the free property of the deceased and take note of the people surviving him. He shall the report to the office of the public trustee who shall decide whether to take up administration. The public trustee shall take up administration in the following instances;
 - The deceased died intestate and there is no one willing or capable to take up administration
 - The person named as executor is dead or has renounced probate
 - The deceased has appointed the public Trustee administrator

In such instances the Public Trustee may apply to be appointed administrator and shall in such instance have the same powers and duties as outlined in section 82 and 83 of the Succession Act. The Public Trustee also exercises any additional powers granted by the Public Trustee Act

Other special powers of the Public Trustee under this Act include:

- Where an estate does not exceed the gross value of Kshs. 75000, the Public Trustee under section 11 of the Public Trustee Act, may administer an estate as a summary case. In this event the Public Trustee shall have the duty of deciding all disputes and claims regarding the estate. He shall also make all orders as he deems fit regarding the collection, sale, investment or administration of the estate
- Where immoveable property does not exceed Kshs. 100000 the Public Trustee may convert into money the property without consent of the court so long as all the parties interested in the property give their consent. In the event that the parties do not give their consent the consent of the court shall have to be sought.

- The public trustee has power to levy fees for his charges. The fees are outlined in the schedule to the Public Trustee Act

PRINCIPLES REGARDING DISTRIBUTION OF AN ESTATE

After payment of the funeral expenses and the debts, the personal representative shall have a duty to distribute the estate to the beneficiaries whom he shall have ascertained before the confirmation.

In testate succession the estate of the deceased shall be distributed in accordance to the wishes of the deceased. In case of intestacy, the personal representative shall be guided by the provisions of section 35 to section 41 of the Law of Succession Act

Where a deceased has left one spouse and a child or children the spouse shall be entitled to the following

- ✓ Personal and household effects of the deceased
- ✓ Life interest in the whole residue of the net intestate estate that is the estate after payment of funeral expenses, debts and liabilities

The surviving spouse shall during the life interest have the power to appoint by way of gift any part of the net intestate estate to the surviving children or child of the deceased. The gift should take immediate effect not be part of a will or take effect at some future date

The surviving spouse can with the consent of adult children or co trustees sell moveable property for his own maintenance during the life interest. However the consent of the court shall have to be sought for the sale of immoveable property.

If the deceased is a man and had several wives under a system of law permitting polygamy, (section 3(5) each house shall be entitled to his personal belongings and a portion of the net intestate estate depending on the number of children in each house.

Where the deceased has left a surviving spouse and no children the property devolves thus;

- ✓ Personal and household effects of the deceased absolutely
- ✓ The first twenty thousand shillings out of the estate or 20% depending on whichever is greater
- ✓ A life interest in the whole of the remainder

It is important to note that upon determination of the life interest the property shall devolve by order of priority

Where the intestate has left no spouse, but a child or children, the net intestate estate shall devolve to the surviving child if he is one or to the children in equal shares provided that the following shall be considered:

- ✓ Property to minor children shall be held in trust
- ✓ Previous gifts to a child or beneficiary shall be considered in distributing the net intestate estate
- ✓ Where a child predeceases an intestate, his children shall be entitled to his share of the estate which he would have inherited

Where the deceased has left no child or spouse the net intestate estate shall devolve in the following order of priority

- Father
- Mother
- Brothers and sisters and their children
- Half brothers and half sisters and their children
- Other relatives

OFFENCES BY PERSONAL REPRESENTATIVES

Section 95 of the Succession Act defines offences by personal representatives thus

- Willfully or recklessly failing to collect assets of the deceased
- Wasting the assets of an estate
- Subjects the estate to loss or damage
- Fails to produce an inventory of the assets of an estate and or accounts as provided by section 83 of the Act
- Produces an inventory and account which is false
- Continues to administer an insolvent estate without petitioning for bankruptcy
- Being the sole surviving administrator in an estate where there is a minor child fails to petition the court to appoint a co administrator within three months

RIGHTS OF BENEFICIARIES

Beneficiaries have a right to certain expectations

- That the personal representative shall complete administration of the deceased estate within the shortest possible time. Indeed it is a requirement that the personal representative do move to confirm the grant within a period of one year

- They are entitled to protection of their interests by the personal representative. They should thus ensure that the estate is properly administered
 - In the event that specific gifts had been made to beneficiaries, they will be entitled to income and profits accruing from the gifts up to the date of distribution. The principles relating to validity of gifts are outlined in section 31 of the Succession Act thus:
 - ✓ The gift was made in contemplation of death
 - ✓ The person gives moveable property
 - ✓ There is delivery to the intended beneficiary means of possession of the property
 - ✓ The person making the gift dies from any other cause of death apart from the contemplated cause of death
 - ✓ The intended beneficiary survives the person making the gift
- No gift shall be valid if the person making the gift commits suicide.

APPLICATION BY DEPENDANTS

Section 29 of the Succession Act defines a dependant thus

- Wife, wives, former wife or wives and children of the deceased. It is irrelevant whether or not the deceased was maintaining them before his death
- Deceased's parents, step-parents, grandparents, grandchildren, step-children. Children the deceased had accepted, brothers, sisters, half-brothers, half-sisters. In this category the deceased should have been maintaining the relatives prior to his death for them to qualify as dependants. This provision caters for the traditional African practice of providing for relatives other than immediate relatives
- Husband of a deceased woman who was being maintained by her prior to her death.

Dependants may move the court under special provisions of the Law of Succession Act.

Applications under section 26

A dependant not properly provided for by a will of the deceased or the laws of intestacy may move a court under this section seeking for reasonable provision. The application shall be by way of form 106 if a grant has been made and not confirmed. It shall be by way of form 96 if no grant has been

applied for. The application shall be supported by an affidavit which shall contain the facts of the case. In this application the applicant will be seeking provision out of the estate.

The affidavit in support of the application should contain the following relevant facts (rule 45)

- The date of death of the deceased and whether he died testate or intestate
- The relationship of the applicant to the deceased and the grounds upon which the applicant claims to have been a dependant
- The name and address of every other dependant of the deceased
- Whether the deceased had made any gift in contemplation of death and if so, the nature and amount
- Whether a grant in respect of the estate has been issued and if so to whom and on which date
- The nature and situation of the deceased's property and value of the his estate
- Any past, present and future capital or income of the applicant
- The existing and future needs of the applicant
- Whether the deceased had made any gift in contemplation of death to the applicant
- The conduct of the applicant in relation to the deceased
- The situation and circumstances of the deceased's other dependants
- The general circumstances of the case including the deceased's reasons for not making provision for the applicant

Applications under section 35(3)

A child can apply to court seeking to have his share of the estate apportioned to him by a surviving spouse if he feels that the same has unreasonably been withheld from him. This application is made after confirmation of the grant and is done by way of form 105 and 17. The application is made in the cause in which the grant was confirmed and the applicant shall be seeking for such share of the deceased's estate as the court deems fit.

The affidavit in support of the application should contain the following relevant facts (rule 4)

- Whether the deceased was married more than once under a system of law permitting polygamy and if so giving details



- Whether any spouse if a widow has remarried
- The nature, situation of deceased's property and the value of the estate
- Whether the surviving spouse has made any appointment of the estate in accordance with section 35(2) and the details thereof
- The name, age sex and last known address of every child surviving the deceased
- Particulars of the existing and future needs of the applicant and the surviving spouse
- Particulars of past, present and future capital and income of the applicant and the surviving spouse
- Whether the deceased had made any gift to the applicant in his life time
- The situation and circumstance of any other person who has an interest in the net estate
- The general circumstances of the case including the reasons for withholding or exercising by the surviving spouse the power of appointment conferred by section 35(2) of the Act

The summons and the supporting affidavit shall be served on the surviving spouse, children of the deceased and such other person as the court may direct. The court will then give directions as to the mode of hearing

APPLICATIONS UNDER ORDER XXXVI OF THE CIVIL PROCEDURE RULES

Under Order XXXVI of the Civil Procedure Rules beneficiaries and creditors may move the court by way of originating summons seeking the following

- Determination of any question affecting their interests or rights
- The furnishing of accounts by the personal representative. If at any time the beneficiaries or creditors feel that the personal representative is wasting the estate they may seek for accounts. The court will consider the application and thereafter make an order for accounts if necessary. Once the accounts and inquiries have been completed the court will order payment of any debts, distribution of assets to the beneficiaries and other relevant orders
- The payment into court of any money in the hands of the administrator

- Directing the personal representative to refrain from doing any particular act
- The determination of any question directly arising from the administration of the estate
- The administration of the estate of the deceased. Any person interested in the estate of the deceased may seek orders for the administration of the estate by the court. the order may be for administration of the real or personal estate of the deceased
- Determination of any question regarding the construction of a will

A personal representative can by the same provision move the court seeking the following orders

- For the ascertainment of any class of heirs, creditors. Under rule 41(3) where a question arises as to the identity or share of any person claiming to be interested in the estate the court may before confirming the grant await the outcome of an application under order XXXVI. In this application the personal representative will be the applicant while the person claiming to be beneficially interested shall be the respondent
- For the approval of a sale, purchase, compromise or other transaction

All parties likely to be affected by any order made should be served with the originating summons. The court will give directions on the mode of hearing and make such orders as are necessary for the ends of justice (rule 73)

APPLICATIONS UNDER SECTION 61 OR 75 OF THE ACT

In certain cases, a codicil may be discovered after a grant of probate or grant of letters administration with will annexed. In such instances an application may be made to court following the procedure outlined in rule 47(1) of the probate and administration rules.

The application shall be by way of summons supported by an affidavit of the applicant stating the reasons for the initial omission of the codicil and giving any other facts necessary for the courts consideration.

Where the applicant is not the holder of the first grant he shall be required to serve the holder of the grant and the beneficiaries of the deceased with the summons and the affidavit

Section 61(2) of the succession act envisages situations where after a grant of probate is issued, a codicil is discovered which appoints different executors. Rule 48 provides that applications shall be by way of form 97 in the same cause in

which the probate was granted. The codicil shall be lodged together with the petition supported by an affidavit in form 14 A identifying the codicil and stating reasons for its omission

Every executor shall be named as a respondent and shall be required to file an affidavit

GENERAL REGULATIONS

These are provided for in part XI and XII of the probate and administration rules.

They include

- Every application shall be headed " in the matter of the estate of.....name (deceased)
- Unless specifically stated otherwise applications to court shall be by way of petition, caveat or summons\the applications are to be heard in chambers in the presence of the parties advocates or any other person expressly permitted by the court to be present
- In case of a pending proceeding the registrar may of his own motion or upon the request of the parties set a case for mention without a formal application
- Every petition must be signed by the petitioner in the presence of the advocate OR two witnesses
- Summons shall be by way of forms provided in 104 to 110
- Every interested person who wishes to be heard or oppose any application shall enter appearance in form 26 giving his address and may file such affidavit as he considers necessary
- The court is given discretion to enlarge the time fixed for carrying out any act.
- Costs of all proceedings shall be in the discretion of the court
- Fees to be paid in proceedings are as set out in the third schedule of the act
- The forms set out in the first schedule of the Act will be applicable with such adaptations as may be necessary
- If any question arises as to the application of the Act it may be referred to the registrar or court for determination
- Rule 73 gives the court inherent power to make any orders as may be necessary for the ends of justice or to prevent the abuse of the process of the court
- Any application not provided for under the rules are to be made by way of summons under rule 49

ACCOUNTS

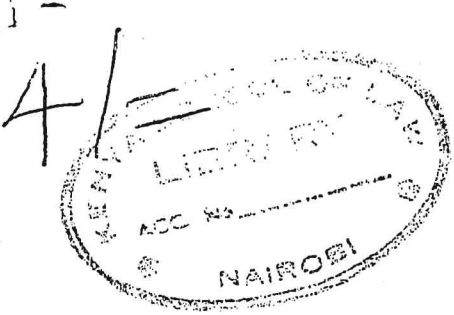
Rule 41(5) provides that the court while confirming a matter is to give a date of not more than six months ahead during which completed accounts should be filed. On the date of accounts any interested person may be heard before the accounts are approved

The approval may be dispensed with if all persons sign consent that accounts are approved

The accounts should contain the following

- An inventory of all assets owned by the deceased
- A list of all assets owing to the deceased
- An account of the deceased's funeral and testamentary expenses
- Particulars of all receipts
- Particulars of all payments
- Particulars of transfer of assets
- Particulars of all assets vested in and held by the personal representative
- Particulars of all outstanding liabilities





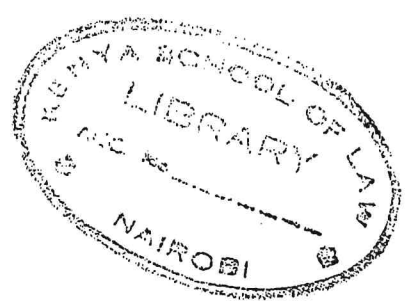
CHECK LIST

1. LETTERS OF ADMINISTRATION INTESTATE (Where there is no will)

FORMS:

- P&A 80 - Be signed by petitioners against their names
- P&A 5 - Be signed by petitioners against their names
- P&A 12 - Be signed by petitioners against their names
- P&A 11 - Be signed by sureties against their names
- P&A 57 - Be signed by sureties against their names
- Certified copy of death certificate marked and endorsed.
- Introduction letter from the chief.
- Consent where there are adult children of the deceased (Form 38)
- Money order to be attached or Bankers Cheque of Kshs.2,735/- for publication in the Kenya Gazette.

2. Where minor children survive the deceased the grant to be issued to at least two persons up to a maximum of 4 persons.
3. Widow whose children are adults can apply for a grant alone provided the adult children have given their consent(s) and in the event she is exempted from providing sureties, i.e. filing P&A 57 and 11.



REQUIREMENTS FOR GRANT OF PROBATE TESTATE

(Where there is a will)

- Forms P&A 78 and P&A 3 to be signed by the petitioners against their names
- A certified copy of the death certificate marked and endorsed
- An executor or all of them who are appointed in the will of the deceased to apply or if one of them has filed a renunciation by way of form P&A 101.
- Money order to be attached or Bankers. Cheque of Kshs.2,735/- for publication in the Kenya Gazette

REQUIREMENT FOR LIMITED GRANT OF LETTERS OF ADMINISTRATION AD LITEM (for purpose of filing suit, inter alia)

- Form P&A 90B
- Supporting affidavit
- Police Abstract - *if the person died thro, accident,*
- Consent if any
- Death Certificate, Certified and endorsed
- Introduction letter from*- the Chief, i.e. where the widower or widow is the petitioner.
- Clear indication of name or person to be sued.

REQUIREMENT FOR LIMITED GRANT AD COLLIGENDA BONA

- Form P&A 85
- Supporting Affidavit P&A 19
- Consent if any
- Death Certificate, certified and endorsed
- Introduction letter from the chief.

