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FINAL REPORT

PROBATE REFORM IN NOVA SCOTIA

Law Reform Commission of Nova Scotia
March 1999

The Law Reform Commission of Nova Scotia was established in 1991 by the Government of Nova Scotia under an *Act to Establish an Independent Law Reform Commission.*

The Commissioners are:

Gregory North, Q.C., Co-President
Dawn Russell, Co-President
David A. Cameron
Theresa Forgeron
Justice David MacAdam
Dale Sylliboy

William Charles, Q.C., is Acting Executive Director of the Commission. He is acting for Anne Jackman, LL.B., LL.M., who is on leave from the Commission until August 1999. William Laurence, LL.B., LL.M., M.L.I.S., is Legal Research Counsel to the Commission. Elizabeth Butt, LL.B., M.I.R., who was Legal Research Counsel to the Commission until August 1998, was involved in the earlier stages of this project.

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Law Reform Commission of Nova Scotia

To: The Honourable Robert S. Harrison
Minister of Justice

In accordance with section 12(3) of the *Law Reform Commission Act*, we are pleased to present the Commission's Final Report on Probate Reform in Nova Scotia.

Gregory North, Q.C.
Co-President

Dawn Russell
Co-President

David Cameron
Commissioner

Theresa Forgeron
Commissioner

Justice David MacAdam
Commissioner

Dale Sylliboy
Commissioner

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PROBATE REFORM IN NOVA SCOTIA

SUMMARY

In 1996, the Minister of Justice and Attorney General of Nova Scotia referred the matter of probate reform to the Law Reform Commission of Nova Scotia. The Commission was asked to make recommendations for the improvement, modernization and reform of the *Probate Act* and to consider suggestions made by lawyers for a simplified summary procedure for small or uncomplicated estates.

Probate generally

The probate process enables the transfer of property, known as the "estate", owned by deceased people, as well as the payment of their debts. A person who makes a will is known as a "testator", and if a person upon death leaves a valid will, they are said to have died "testate". The people or organizations to whom they leave property are known as "beneficiaries". People making a will usually name an "executor", who will handle an estate after the testator's death.

If a person has not left a will at the time of death, they are said to have died "intestate". Since they have not specified how their property should be distributed after they die, the law sets out how this will be done. The *Intestate Succession Act* lists the categories of "heirs", those people who, because of marriage or blood relationship, are entitled to receive the deceased's property. Since the deceased did not appoint an executor, an "administrator" must be appointed to handle the estate. The law sets out who is entitled to act as administrator.

Probate in Nova Scotia

To process an estate in Nova Scotia, executors and administrators are required to follow the procedure set out in the *Probate Act*. They apply for a "grant" from the Probate Court authorizing them to administer the deceased's estate. They must advertise the estate in an attempt to notify creditors owed money by the deceased. They must also prepare an "inventory", a list of all property owned by the deceased, and file it with the court. They then proceed to pay any money owing to creditors and, if necessary, to get the court's permission to sell the deceased's property to pay debts. They also distribute property to the beneficiaries and heirs, in accordance with the will or with the scheme set out in the *Intestate Succession Act*. They can then apply to the court to settle or "close" the estate. The court reviews how the assets were distributed, the claims that have been paid and the compensation paid to the executor or administrator, as well as to the estate's lawyer, if one assisted the executor or administrator. If all is satisfactory, the court issues a "Final Decree", and the estate is considered to be closed.

In Nova Scotia, however, many estates do not go through a formal probate process. Figures gathered by the Commission suggest that only 30% of estates follow the process set out in the *Probate Act*. It appears that many Nova Scotians are avoiding probate altogether. Of the 30% of estates that are formally processed under the *Probate Act*, statistics also indicate that just over one-third of these estates are formally closed. As a result, approximately 90% of all estates in Nova Scotia do not undergo an independent review by the court.

The Discussion Paper

In March 1998, the Commission released a Discussion Paper, *Probate Reform in Nova Scotia*. In the Discussion Paper, the Commission suggested that the law relating to the probate system in Nova Scotia be reformed, to create a simpler system that involves the court only when necessary. Registrars of probate, it was suggested, should continue to oversee and guide the probate process and should have the ability to refer disputes to a judge. The Commission also suggested that separate procedures should be developed to deal with contentious and non-contentious estates. Non-contentious estates would be handled by following a standard procedure with minimal court involvement. If a disagreement arose, people interested in the estate would follow a different procedure to have the matter heard by the court. Until the disagreement was resolved, the estate would be treated as contentious. Once the disagreement was resolved, the estate would be treated again as non-contentious, to continue along the standard procedure for such estates, where it left off before the disagreement arose.

Having taken into account all comments received concerning the Discussion Paper, the Commission has prepared this Final Report.

Recommendations for reform

- Separate procedures should be developed to handle non-contentious and contentious estates. Non-contentious estates are estates in which there are no disputes. These estates would be handled by following a standard procedure. If a dispute arose, those interested in the estate could follow a different procedure to have the matter heard by a judge or registrar of probate. The estate would then be treated as contentious. Once the dispute was resolved, the estate would again be treated as non-contentious and continue to follow the standard procedure for non-contentious estates.

- The executor or administrator should give notice of the application for a grant to all interested parties, namely all beneficiaries and heirs. Notice could be provided by means of registered mail, ordinary mail, fax, or electronic mail.

- It should be possible to make an affidavit proving a will at the time the will is executed, at any time after the will is executed, or at the time of the application for the grant. There should be a rebuttable presumption that a testator was competent to sign, rather than requiring an affidavit in proof of will to refer to the apparent state of the testator's competency.

- Formal proof of will applications should be initiated upon the filing of a notice which sets out the reasons for the application. "Proof in solemn form" and "proof in common form" should be renamed "formal proof of will" and "informal proof of will", respectively.

- If an interested party disputes the accuracy of the inventory, they may bring a contested application. The inventory, to be renamed "inventory of property and debts," should include property, encumbrances, and debts. Appraisals should not be mandatory, but available at the request of an interested party.

- There should be no formalized process for small or uncomplicated estates. Rather, an estate would either proceed through the probate system, as a contentious or non-contentious estate, or it would be entirely outside the probate system.

- Renunciation should continue to be available for all executors. If agreement cannot be reached on resignation or retirement by an executor, or if the will prevents the executor from resigning, then they should be required to apply to the registrar of probate for the ability to renounce. If there is disagreement with the registrar's decision, it could be appealed to the court.

- The surviving spouse should be first entitled to be appointed as administrator and the next of kin should be second entitled. Non-residents of Nova Scotia should be permitted to be appointed as administrators as long as they are bonded. The bonding requirement could be waived with the consent of all known interested parties if they are adults and mentally competent.

- "Spouse" should be defined in probate legislation to include common law spouses, whether of the same or opposite sex. The *Intestate Succession Act* should be amended to include common law spouses, whether of the same or opposite sex, in the scheme of distribution. Common law spouses should be entitled to appointment as administrator.

- Bonding should be required for all administrators with the right of interested parties to apply to the court to waive the requirement. The bonding requirement could be waived with the consent of all known interested parties if they are adults and mentally competent. Bonding should not be required for non-resident executors.

- The requirement to advertise in the *Royal Gazette* should be eliminated. A notice for claims of creditors should be placed in a widely read newspaper in an area where it is likely to come to the attention of interested persons. Notices should include the information currently contained in the *Royal Gazette*. The executor or administrator should continue to have responsibility for advertising.

- A form should be developed to be completed and filed in lieu of formal closings. It would indicate, among other things, the property that has been distributed, the property to be distributed, the debts paid from the estate, the compensation paid to the executor or administrator and the legal fees claimed. The form should be served on all interested parties and be reviewed by the registrar of probate.

- Only one probate fee should be charged, to be applied upon the opening of an estate, with no adjustment at the end of probate. There should be no change in the current commission structure ordinarily allowing executors or administrators a commission not exceeding 5% of the value of the estate. The testator and executor should, however, be able to agree to a commission of more than 5% of the value of the estate. Legal fees should be removed from the discretion of registrars of probate. If clients disagree with a legal bill, they could bring the matter to a taxing master.

- A new *Probate Act* should be created. Procedural elements should be removed from the *Probate Act* and contained, along with rules of probate and probate forms, in a probate manual apart from the statute. A probate committee should be formed to implement changes in the probate system, to maintain and update the probate manual and to make recommendations for changes to the probate system. The Civil Procedure Rules should continue to apply to probate matters except where probate rules are indicated to specifically apply.

REFORME DU DROIT DE L'HOMOLOGATION DES TESTAMENTS EN NOUVELLE-ECOSSE

SOMMAIRE*

En 1996, le Ministre de la Justice et Procureur Général de la Nouvelle-Ecosse a soumis la question de la réforme du droit de l'homologation des testaments à la Commission de réforme de la Nouvelle-Ecosse. On demanda à la Commission de faire des recommandations pour l'amélioration, la modernisation et la réforme de la *Loi sur l'homologation des testaments (Probate Act)* et d'étudier les suggestions faites par des juristes dans le but de simplifier la procédure dans le cas de successions simples et de moindre importance.

L'homologation des testaments en général

La procédure d'homologation des testaments permet la cession du patrimoine des personnes décédées, connu sous le nom de « succession », de même que le paiement de leurs dettes. La personne qui fait un testament s'appelle «testateur » et si une personne au jour de son décès avait fait un testament valide, elle est reconnue comme étant « décédée en laissant un testament ». Les personnes ou entités à qui cette personne laisse des biens sont des «bénéficiaires ». La personne qui a fait un testament nommera habituellement un « exécuteur testamentaire » qui sera chargé de sa succession suivant le décès.

Dans le cas où une personne ne laisserait pas de testament, elle est reconnue comme étant décédée « ab intestat ». Puisque cette personne n'a pas indiqué à qui ses biens doivent être dévolus suivant son décès, la loi en régit la distribution. La *Loi sur les successions ab intestat (Intestate Succession Act)* contient une liste des catégories « d'héritiers » qui en raison des liens du mariage ou de sang ont le droit de recevoir les biens de la personne décédée. Puisque la personne décédée n'a pas désigné « d'exécuteur testamentaire », un « administrateur » doit être nommé afin de gérer la succession. La loi détermine qui peut agir comme administrateur.

L'homologation des testaments en Nouvelle-Ecosse

Afin de pouvoir administrer une succession en Nouvelle-Ecosse, les exécuteurs testamentaires et les administrateurs doivent suivre les prescriptions de la *Loi sur l'homologation des testaments (Probate Act).* Ils doivent demander une « permission » du tribunal des successions (Probate Court) les autorisant à administrer les biens de la personne décédée. Ils doivent rendre publique la succession afin que les créanciers de la personne décédée soient informés.

Traduit de l'anglais par Me Nathalie Bernard, LL.B (Université Laval), LL.M (Dalhousie University), LL.B (Dalhousie University).

Ils doivent aussi dresser un « inventaire » de tous les biens appartenant à la personne décédée et

déposer cet « inventaire » auprès du tribunal. Ils doivent ensuite payer les créanciers et si nécessaire, obtenir la permission du tribunal afin de vendre les biens de la personne décédée pour payer ses dettes. Ils distribuent aussi les biens aux bénéficiaires et aux héritiers selon les instructions contenues dans le testament ou selon les prescriptions de la *Loi sur les successions ab intestat (Intestate Succession Act)*. Ils font ensuite une demande de disposition ou de « fermeture » de la succession. Le tribunal passe en revue la distribution des biens, les réclamations qui ont été payées et la rémunération payée à l'exécuteur testamentaire ou l'administrateur, de même qu'à l'avocat si ce professionnel a fournit des services à l'exécuteur ou à l'administrateur. Si le tribunal juge le tout satisfaisant, il octroie un « décret final » et la succession est considérée comme étant close.

Il reste qu'en Nouvelle-Ecosse, bon nombre de successions ne sont pas soumises au processus formel d'homologation. Les chiffres obtenus par la Commission suggèrent que seulement 30% des successions sont traitées dans le cadre de la procédure prévue par la *Loi sur l'homologation des testaments (Probate Act)*. Il semble que les Néo-Ecossais évitent cette procédure. Les statistiques démontrent qu'un peu plus du tiers des 30% de successions qui sont formellement traitées en vertu de la *Loi sur l'homologation des testaments (Probate Act*) sont officiellement fermées. Il en résulte qu'environ 90% de toutes les successions en Nouvelle-Ecosse ne sont pas soumises à un examen indépendant du tribunal.

Le Document de réflexion

Au mois de mars 1998, la Commission a publié un Document de réflexion, *Réforme du droit de l'homologation des testaments en Nouvelle-Ecosse*. Dans ce Document de réflexion, la Commission suggérait que le régime relatif à l'homologation des testaments en Nouvelle-Ecosse fasse l'objet d'une réforme dans le but de créer un système plus simple impliquant les tribunaux seulement lorsque nécessaire. Une des suggestions est que les régistraires des bureaux d'homologation des testaments continuent à administrer et à guider les utilisateurs du régime d'homologation des testaments mais qu'ils aient aussi le pouvoir de référer les litiges au tribunal. La Commission a aussi avancé l'idée de développer des procédures distinctes afin de traiter séparément les successions litigieuses et celles qui ne le sont pas. Les successions non litigieuses seraient traitées selon une procédure de base ayant peu recours au tribunal. Si un litige naissait, les personnes possédant un intérêt dans la succession suivraient une procédure différente afin qu'un tribunal juge de l'affaire. Jusqu'à ce que le litige soit réglé, la succession serait considérée comme litigieuse. Une fois le litige réglé, la succession serait à nouveau traitée comme non litigieuse afin de pouvoir poursuivre son traitement selon la procédure de base et à partir du point où le processus de base s'était arrêté avant le litige.

Sur la base de tous les commentaires reçus relativement au Document de réflexion, la Commission a préparé le présent Rapport final.

Recommandations de réforme

- Des procédures distinctes devraient être élaborées afin de traiter les successions litigieuses et celles qui ne le sont pas. Les successions non litigieuses n'ont pas donné naissance à un litige et elles seraient donc traitées selon une procédure de base. En cas de litige, les parties intéressées à la succession adopteraient une procédure différente afin que l'affaire soit entendue par le tribunal ou le régistraire. La succession serait donc considérée comme litigieuse. Une fois le litige réglé, la succession retourne à l'état de succession non litigieuse et continue d'être gérée suivant la procédure de base pour les successions non litigieuses.

- L'exécuteur testamentaire ou l'administrateur devrait donner avis de la demande de permission d'administrer à toutes les parties intéressées, c'est-à-dire tous les bénéficiares et héritiers. Cet avis pourrait être donné par voie de courrier enregistré, de courrier ordinaire, par télécopieur ou par courrier électronique.

- Il devrait être possible de dresser un affidavit prouvant un testament au moment où il a été signé, à tout moment après sa signature ou au moment de la demande de permission d'administrer. Une présomption réfutable que le testateur était capable de signer devrait exister au lieu de l'exigence qu'un affidavit prouvant le testament fasse état de l'aptitude du testateur à signer.

- Les demandes relatives à la preuve solennelle des testaments devraient commencer par le dépôt d'un avis contenant les motifs de la demande. Les expressions « preuve solennelle (proof in solemn form) » et « preuve ordinaire (proof in common form) » devraient être remplacées par «preuve formelle du testament (formal proof of will) » et par « preuve informelle du testament (informal proof of will) ».

- Dans le cas où une partie intéressée questionnerait l'exactitude de l'inventaire, elle pourra faire une requête en contestation. L'inventaire, renommé « Inventaire des biens et dettes » devrait inclure les biens, les charges et les dettes. Les évaluations ne devraient pas être obligatoires mais disponibles sur demande d'une partie intéressée.

- Aucune procédure formelle ne devrait exister pour les successions de moindre importance et simples. Une succession sera traitée soit dans le cadre du régime d'homologation des testaments pour les successions litigieuses ou non litigieuses ou pourrait échapper entièrement au régime d'homologation.

- La renonciation devrait continuer d'être ouverte à tous les exécuteurs. Si on ne peut arriver à une entente en cas de démission ou de retrait d'un exécuteur ou si le testament interdit à l'exécuteur de démissionner, l'exécuteur devrait avoir l'obligation de déposer une demande de renonciation auprès du régistraire. Si la décision du régistaire est contestée, il devrait être possible d'en appeler au tribunal.
- Le conjoint de la personne décédée devrait avoir le droit d'être nommé administrateur en premier lieu, suivi par le parent le plus proche. Les personnes ne résidant pas en Nouvelle-Ecosse devraient pouvoir agir à titre d'administrateur à condition qu'elles

donnent une caution. Toutes les parties intéressées majeures et capables peuvent renoncer à cette exigence.

- Le terme « conjoint(e) » dans la législation relative à l'homologation des testaments devrait comprendre conjoint(e) de fait, du même sexe ou du sexe opposé. La *Loi sur les successions ab intestat (Intestate Succession Act)* devrait être amendée afin d'inclure les conjoints de fait, du même sexe ou du sexe opposé dans la liste de ceux à qui les biens pourront être dévolus. Les conjoints de fait devraient pouvoir être nommés administrateur.

- La caution devrait être requise de tous les administrateurs mais les parties intéressées pourraient déposer une requête au tribunal afin de renoncer à cette exigence. Toutes les parties intéressées majeures et capables peuvent renoncer à l'exigence de la caution. Les exécuteurs non-résidents de la Nouvelle-Ecosse ne devraient pas avoir l'obligation de donner une caution.

- L'obligation de publier dans le *Journal Officiel (Royal Gazette)* devrait être abolie. Un avis aux créanciers devrait être publié dans un journal à grand tirage de la zone où il est susceptible d'être lu par les personnes intéressées. Les avis aux créanciers devraient comprendre l'information actuellement présentée dans le *Journal Officiel (Royal Gazette)*. L'exécuteur ou l'administrateur devrait continuer à être responsable pour la publication.

- Un formulaire à compléter devrait être élaboré et déposé en lieu et place de la disposition formelle. Ce formulaire devrait notamment dresser la liste des biens qui ont été distribués, ceux qui doivent l'être, les dettes éteintes par la succession, la rémunération payée à l'exécuteur testamentaire ou à l'administrateur de même que les honoraires juridiques réclamés. Ce formulaire devrait être signifié à toutes les parties intéressées et examiné par le régistraire de l'homologation des testaments.

- Seule une somme à titre de droits d'homologation des testaments devrait être perçue à l'ouverture de la succession sans ajustement lors de la fermeture. Le système actuel de commission des exécuteurs et administrateurs prévoyant le paiement d'une commission d'au plus 5% de la valeur de la succession, devrait être maintenu. Le testateur et l'exécuteur devraient néanmoins avoir le droit de s'entendre sur une commission de plus de 5% de la valeur de la succession. Les honoraires juridiques ne devraient plus être à la discrétion du régistraire. Si les clients contestent les honoraires, ils pourraient porter la contestation devant un juge taxateur.

- Une nouvelle *Loi sur l'homologation des testaments* devrait être adoptée. Les dispositions relatives à la procédure devraient être contenues, tout comme les règles et formulaires d'homologation, dans un manuel sur l'homologation des testaments, distinct de la Loi. Un comité sur l'homologation des testaments devrait être crée afin de mettre

en œuvre les changements au système de l'homologation des testaments, de conserver à jour le manuel sur l'homologation et de faire des recommandations d'amendement au système d'homologation des testaments. Les Règles de procédure civile (Civil Procedure Rules) devraient continuer à régir l'homologation des testaments sauf lorsque les règles relatives à l'homologation des testaments s'appliquent spécifiquement.

PROPATE SASEWA'TIMK NOPA SKO'SIA

SUMMARY*

1996 ek, Ministl ujit tetpa'ltimk aq Attorney General Nopa Sko'sia eli wsmu'kwesni Law Reform Kmisn ujit Nopa Sko'sia. We'ji mus Kmisn me' nqamasatunew Probate Act, aq ankaptminew ta'n lawyeraq kisi wi'kmitij. Tan me' nqamasiatew maliaptimik este'tl.

Tan Apjiw Plopate Te'litpiaq

Propateiktuk weji sapa'sik tan teli maliaptasik wtmotaqn wen nepk, aq apankitasin wtetuoqnml. Mimajuinu will kekkunk tel wi'tut "Testator" aq mimajuinu nepkiss toqo naqtik koqattek will, teluemk teli npt'qaq "testate". Mimajuinu kisna okanasesions tan naqtimuj koqowey, tel nenujik "peneficiariaq". Mimajuinu tan eltoq will apjiw ewi'tatl "executoral" tan maliaptmakutew wtmotaqn.

Jiptuk mu nqatmu will wen nepk, teluemk teli npiqaq "Intestate". Tan mu wen nepk nikan sutmuk tan tlitpiatew wtmotaqn, miamuj tplutaqniktuk weji ilsutasitew. Intestate Succession Ackiktuk uji wi'taten "Heirsik", tan wenl maliewitipnn, kisna tan mawi kijjakumaji. Executor mu nikan wi'tasik, na nuku ikalut "Administrator" tan maliaptitew koqowey. Tplutaqniktuk eywi'tasit tan wen kisi administoratorawitow.

Plopate ujit Nopa Sko'sia

Poqji maliaptmik estate Nopa Sko'sia, miamuj executoraq aq Administratoraq wije'wmitij tan tel wi'kasik Propate Actiktuk. Weji msnmi'tij "grant" Propate Kourtiktuk, asite'lmujik maliaptminew estate. Miamuj advertise'wa'tutij estate ujit nmitunew tanik tetujik. Miamuj kiskaja'tutij "Inventory" tan tesik koqoweyekalsutkek nepkaq, aq file'ewatutij kourtiktuk. Toqo tujiw tetuo'qnn apankitasikl aq, nuta'q, wuja'tunew asitetaqn kourtiktuk klaman kis ankuetaq wtmotaqn neplitl me tetuoqnn eskwiapankitasik, nekmo teli tpi'ketutij property, iknmuatiji peneficiaria aq heirsik, wije'wmitij tan will tel sutekek, kisna tan tel pukuik Intestate Succession Actiktuk. Na nuku kaqataqatijik, kourtiktuk wej saputasik teli "Kpijoqatumk" estate. Kourt iloqaptik tan kis tlatasik koqowey, tetuo'qnn kaqapankitasin, aq tan tel apankitusnik nujo'tmitij. Koqajaptik kourt keknute'tn kis tla'tasik koqowey, kourt messaqna'toq "Final Decree" aq estate etl kaqiaq. Ula Nopa Sko'sia, telia, pukwelkl estatetl mu wet saputetanukl propateiktuk. Kmisn wejitutij pasik 30% estatetl majukwatmitij Propate Act. Teli ankamkuk Nopa Sko'siewaq aminteskmi'tij propate. Panuwijqatmik wula 30% tan propate eywasik, mu msit saputi e'ywmitik propate act. Na muskasik, natami 90% estatetl Nopa Sko'sia mu wet saputetanukl kourtiktuk.

Mi'kmaw translation by Katherine Sorbey.

The Discussion Paper

1998 ek siwkewikuskek (March) kmisn muskateketoqsip Discussion Paper, Propate iljoqatasin Nopa Sko'sia. Discussion Paperiktuk, kmisn wejutkiss tplutaqn tan pema'toq propate Nopa Sko'sia ilpukuwa'tasin, me nqamasian teli ewmik, aq mu nuta'n kourtiktuk lian. Legistralaq ujit propate siawi maliaptminew propate pracess aq litasualanew jajal tan tujiw metue'k soqopsketeskmitij. Kmisn nespiw wejutkisnik, tepkisten tapu'kl procedures ujit tepkis maliaptimin contentious aq non-contentious estate. Non-contetious estatetl na tan mu wkayuti. Wijayminew standard procedure pasik kijka kourt ikalsik'. Katu wjintultitij mimajuinuk miamuj piluey wijewtaq awti misogo kaqiaq wkwayuti, na tujiw estate tli wsuaten nkute contentious. Newt ila'matultitij, estate tli wsuatasitew nkutew non-contentious, a siawi tl maliaptiten stikey kes mu oplamatultim'kek.

ki'sl maminu ankaptasi msit koqowey tan apoqnmat Discussion Paper, Kmisn wula kisi kiskajatoq Final Report.

Recommendations for Reform

- Tepkistakl procedural l'tasis maliaptiminew non-contentious aq contentious estatetl. Non-contenciouse'l estatetk na mu wetamatimital. Wula nekmowe'l majukwataq standard procedure. Katu a tanik wenjintultitij wula estate miamj tli e'tlmatultitaq jajjal kisna registraral. Estate na nuku tli wsua'ten contentious. Newt kaqintultimk estate na nuku non-contentious ewitewaq siaw wijew toq standard procedure wujit non-contentious estates.

- Tan wen nujo't tepawtis kinuatekess ujit wujo'tmin grant msit tan weni peneficiaries-aq heirs-aq. Kinuatuanes wikatikniktuk elkitmuj, kisna faxiktuk kisna E mailiktuk.

- Kis tlatasis na wikasin affadavit tan kis provewatoq tan tijiw will executewatasik, tan pas tijiw ki's will executewatasik, kisna tan tijiw application kwilutasik ujit grant. Klamsitasis na testator kejitoqip tan tela'tekej e'lto'q will, aq te'pi koqajatpup.

- Formal proof ujit will applicationsl tl tes kpqutakatasis tan tijiw file'ewin kinuataqn tan wiaqtekl koqowey ujit weji appliewin. "Proof in solemn form", and "Proof in Common form" il wi'tmines, tluwi'tmines "Formal proof of will" and "Informal proof of will".

- Tan wen mekt'k koqaten inventory, kis jukwatus contested application. Inventory minuwitasis "Inventory of Property and Debts" aq tltes. Wiaqten property, encumbrances, and debts. Mu nutanus appraisalsal, katu kiskates wen ktu nemitoq.

- Ktu pun lukutitij executoraq. Aq mu kis sapamuati'k menla'luksinew, kisna will tl tek mu mena'luksinew. Na ka'qn pana'tuanes li wsumukutinew registra-al klaman kisi punlukwetoq tan wen ketu punlukwet. Kikajiw me mu registrar wulte'tmu,

kourtiktuk kis lietew aq natel tl matntew tan tlitpietew.

- Siku's kisna sikuap tumk entitlewitis administeretor ewinew. Tapuewa'j tan mawi kikjakumata, tanik Nopa Sko'sia mu wikultikw asite'lmanes administoratorewultino teli pije'k Bondaplewultijik. Bonding mu kis nutanuk, kisi mawamatultitij eskwiejik aq n'situatpatitij.

- "Spouce" propate legislationiktuk wiaqa'lanes tqunasu'k tlia ki'tk epitewitij kisna ki'tk jinemuitij. Aq Intestate Succession Acitktuk, wijey tl'tes. Aq wikma'jl nplij, entitlewis kisi administratorewin nekem.

- Bonding tl'tes miamuj msit administratoraq te'pmitij, katu tan'nik mu welte'tmitik kourtiktuk appliewultitis ujit mu nuta'tn bonding. Kis tuaqtasis bonding requirement, msit heirs'sik tan tepipuna'tijik aq tepinsituoltijik msit wulte'tmitij. Bonding mu nutanus ujit mu tle'awultikw executoraq, tan etli tpiaq koqowey.

- Puni e'wasis Royal Gazette ujit advertizement. Awnaqa notice (kinuatoqn) ikatasis tan me wuli nemitasis tan mimajuinuk nmitaq. Kinuataqnn tan knuatakakle Royal Gazetteiktuk napuwikasis. Executor kisna administrator wtlukwanes neknow advertizeewinew.

- Wikatikn ltasiss aq koqatpij tuju filewatasis keskmaq formal closings. Msaqnwikasis tan kisi ktpigasik, tan getu pitasik property, tetuoqnn tan wetap pankitasikl estatetiktuk, tan telowtic apankitojij executor, administrator aq legal fees qwilutasikl. Wula form kisna wikateknn iknemuanes tan wen ketu nemitoql aq iloqaptes registrar of propate.

- Newt pas awtukewuksik propate fee, aq negani apankitmik panatumk estate mu nutanuk pilwawtin aq atawtin aq 5% tan pettepawtik estate. Testator aq executor nekmo kis tepki samatitaq me attawtik ktu aponkituaj. Legal fi'sl registra nekem tan teltet. Aq mu wul te'tmitik na nuku taxing master maliaptitoq.

- Piley propate act l'tasis. Jiklatasis procedural elements Propate Actiktuk, aq maw rules tan nastekl propateiktuk aq propate formiktuk, aq wiaqwikasis propate manueliktuk depkistet, aq tes statuteiktuk. Propatetey kmisn mawatunes tan maliaptikl pile'l propate systemiktuk, ujit tepjiknmin piluasi propate manuel aq ilsutminew sasewataqnn propate system. Civil Procedure Rules e'wasis propate matteriktuk pasik tan propate miamuj e'wasik.

I INTRODUCTION

1. The project

By letter dated July 23, 1996, the Minister of Justice and Attorney General of Nova Scotia formally referred the matter of probate reform to the Law Reform Commission of Nova Scotia. The Minister stated:

> *The purpose of this letter is to refer a matter to you pursuant to Section 8 of the Law Reform Commission Act. Specifically, I request that you examine the Probate Act, R.S.N.S. 1989, c. 359, and make recommendations for its improvement, modernization, and reform. In particular, I request that you consider suggestions made by practitioners for a simplified summary procedure for small or uncomplicated estates.*

2. Prior reform efforts

Attempts to reform Nova Scotia's *Probate Act*[1] have been longstanding. The Attorney General referred the issue of probate reform to the Law Reform Advisory Commission (LRAC)[2] in 1972. The LRAC did not have any research staff at the time, so the matter could not be pursued.[3] In 1975, the Attorney General appointed a practicing lawyer to study the *Probate Act* and probate procedures and report to the LRAC. Although the lawyer was unable to complete a report, he provided the LRAC with useful research material. In 1976, the deputy registrar of probate in Kentville was asked to complete a manual of probate procedures and make recommendations for a new *Probate Act*. He was unable to complete the task, because he had to take over the duties of the registrar of probate in Halifax.

In 1977, the matter was referred back to the LRAC. A probate committee was formed to make recommendations for consideration by the LRAC. In 1979, the LRAC produced a report, *Recommendations with Respect to the Probate Act of Nova Scotia*.[4] Shortly thereafter, the LRAC was dissolved.

In 1984, the Attorney General appointed another practicing lawyer to undertake a study of the *Probate Act* and to seek comments from members of the Nova Scotia Barristers' Society. Ten written submissions were received. A report and a draft *Probate Act* were provided to the

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[1] R.S.N.S. 1989, c. 359.

[2] The LRAC existed from 1972 to 1979. The current Law Reform Commission of Nova Scotia, created in 1991, is an independent Commission, unlike the LRAC. The two Commissions are not connected.

[3] Nova Scotia Law Reform Advisory Commission, *Recommendations with Respect to the Probate Act of Nova Scotia* (Halifax, 31 October 1979) [unpublished] at 7.

[4] Note 3, above.

Attorney General and a draft bill was prepared in 1986, though it was never introduced in the House of Assembly. In 1987, a new Attorney General was appointed, and a committee was formed to discuss probate reform. Another draft bill was prepared in 1988, but it too was never introduced in the legislature.

In 1994 and 1995, the Executive Director of the Courts and Registries Division of the Department of Justice prepared 2 memoranda inviting comment on probate reform. Several written responses were received.

As a result, over the past 20 years, there have been more than 50 submissions and proposals for probate reform made by lawyers, registrars of probate, county barristers' associations and others.

After receiving the reference from the Attorney General, this Commission formed an Advisory Group to advise on probate reform. The group, which included probate administrators, practicing lawyers, a judge, representatives of financial institutions, the Public Trustee, and a representative from a pensioners' organization, had considerable experience with the probate system. The group met throughout September and October 1997. In addition, the Commission prepared a survey which was completed by registrars of probate.[5] The purpose of the survey was to identify practices and procedures around the province, including any inconsistencies and areas requiring reform. The survey also solicited the registrars' views on various issues.

In March 1998, the Commission published a Discussion Paper, *Probate Reform in Nova Scotia*, which contained the Commission's suggestions for reform of the probate system. In the Discussion Paper, the Commission suggested that the law relating to the probate system in Nova Scotia be reformed to create a simpler system that involves the court only when necessary. Registrars of probate, it was suggested, should continue to oversee and guide the probate process and should have the ability to refer disputes to a judge. The Commission also suggested that separate procedures should be developed to deal with contentious and non-contentious estates. Non-contentious estates would be handled by following a standard procedure with minimal court involvement. If a disagreement arose, people interested in the estate would follow a different procedure to have the matter heard by the court. Until the disagreement was resolved, the estate would be treated as contentious. Once the disagreement was resolved, the estate would be treated again as non-contentious, to continue along the standard procedure for such estates, where it left off before the disagreement arose.

The Commission made a number of other suggestions in the Discussion Paper. In particular, the Commission suggested changes to the law relating to such aspects of the probate system as: jurisdiction concerning an estate; notice of an estate being opened; affidavits proving a will; the proof of will process; inventories and appraisals; the ability of executors to renounce their positions; the removal of executors and administrators; probate grants from outside Nova Scotia;

[5] A copy of the survey is attached as Appendix B to the Discussion Paper and a summary of the responses is attached to the Discussion Paper as Appendix C.

entitlement to be appointed as administrator; the vesting of estate property; bonding requirements for executors and administrators; advertising of estates; the effect of parentage on claims against estates; insolvent estates; the closing of estates; fees; the establishment of a wills depository; registration of wills; consistency within the probate system; and the removal of procedural elements from the *Probate Act*. A list of suggestions in the Discussion Paper is provided at Appendix A to this Final Report.

The Commission received 13 written responses to the Discussion Paper. In addition, comments on the Discussion Paper were provided by telephone and at a number of meetings held outside of Halifax. A list of those persons who commented on the Discussion Paper is found at Appendix B. The Commission is grateful for the feedback of those commentators. In general, commentators agreed that reforms to the probate system are long overdue, and overall, commentators responded favourably to the Commission's suggestions. Some commentators, however, disagreed with certain suggestions in the Discussion Paper. In other instances, though commentators agreed on the need for reform, they had concerns about the character that the reform initiative might assume.

Having taken into account all comments received, and where appropriate, having completed additional research, the Commission has prepared this Final Report.

3. Legal language

This Final Report attempts to present legal information as clearly as possible, so that people who do not have legal training can understand the Commission's recommendations. There are still some situations where the language relates to specific legal concepts, and the words used will not be familiar to everyone. This section provides definitions of some of the words used in this Final Report. Appendix C, which is a more complete list, contains these words, as well as additional legal words which commonly arise in discussing probate matters.

Act - Law made by elected members of government. Also referred to as "statute" or "legislation".

Administrator - A person named by the Probate Court to act as the deceased's personal representative when a person dies: (i) without a valid will; (ii) with a will which does not name an executor; or, (iii) with a will and a named executor who refuses to act or is unable to act because of death, incompetence or absence. An administrator has

the same duties as an executor. "Administratrix" is sometimes used to describe a woman who acts as administrator.

Affidavit - A written statement made by a person who signs and either swears to or affirms the truthfulness of the statements made.

Beneficiary - A person or organization to whom property is left by a will.

Bequest - A gift of personal property made in a will. Also known as a "legacy". See also "devise".

Common law - Law developed over the years by judges when making decisions in court. These decisions are relied upon by other judges in deciding other cases.

Common law - relationship A spousal-type relationship between two people who did not go through a legally recognized form of marriage.

Deed - A document which transfers title to land.

Devise - A gift of real property, or an interest in real property (such as a lease) made in a will. See also "bequest" and "legacy".

Estate - Everything a person owns at the time of their death.

Execute - The process of signing a will or other document.

Executor - A person or corporation named in a will to carry out the terms of the will and to act as the deceased person's personal representative. Duties include gathering assets, paying debts and distributing what remains in accordance with the will. "Executrix" is sometimes used to describe a woman who acts as executor.

Heir - Those who are designated by statute (because of a blood relationship or marriage), to inherit the property of one who dies without leaving a valid will (i.e., "intestate").

Intestate (intestacy) - When a person dies without leaving a valid will. The deceased's estate is then distributed by the rules set out in legislation. In Nova Scotia, the legislation is the *Intestate Succession Act*. Contrast with "testate". See also "partially intestate".

Issue - A person's lawful lineal descendants (such as children,

grandchildren, great-grandchildren, etc.).

Joint tenants (joint tenancy) - Two or more people who own property jointly. When one dies, the survivor(s) become(s) entitled to the whole property. A joint tenant's share of property cannot be left by will. See also "survivorship".

Legacy - A gift of personal property made in a will. Also known as a "bequest". See also"devise".

Legislation - Law made by elected members of government. Also referred to as "statute" or "act".

Litigation - The legal process that takes place when a person or corporation sues another person or corporation.

Partially intestate - When the deceased leaves a will which lacks something to make it complete. This occurs, for example, if the deceased fails to name an executor, if the named executor is unable or unwilling to act, or if the deceased fails to dispose of all their property. If the last example arises, the deceased's estate is distributed by the rules set out in the *Intestate Succession Act*.

Personal property - Property other than land, an interest in land or permanent buildings on the land. Includes chattels, jewellery, vehicles, money, stocks, etc. Also known as "personalty". Contrast with "real property".

Personal representative - The person who is appointed to administer the deceased's estate. Includes an executor and administrator.

Probate - The legal procedure for proving that a will is the last will of the deceased, that it is legally valid and that the person or corporation named as executor is entitled to act. Probate enables the payment of a deceased person's debts and the transfer of a deceased person's assets to their beneficiaries in accordance with the will and in a prompt and orderly manner. The estates of people who die without a will also go through probate.

Probate Court - The court which has jurisdiction over probate matters in Nova Scotia. Known in some other provinces as the Surrogate Court.

Proctor - A lawyer who acts for an estate on behalf of an executor or administrator.

Proof in common form - A procedure for proving a will. Used when there is no dispute as to the validity of the will. Contrast with "proof in solemn form".

Proof in solemn form - A procedure for proving a will. Used when there is a dispute as to the validity of the will, such as whether the deceased was mentally competent when the will was made. Contrast with "proof in common form".

Public Trustee - A government office that may be appointed to administer the estate of a deceased person when the person dies without leaving a valid will or when there is a valid will but the executors or next of kin cannot or will not act.

Real property - Land and permanent buildings on the land, such as a house. Also known as "realty". Contrast with "personal property".

Registrar of probate - An official who performs such duties as recording and preserving wills admitted to probate, issuing grants of probate, approving the accounts of executors and administrators, and acting as the clerk of the Probate Court. The registrar also can perform certain judicial duties (i.e., those of a judge).

Royal Gazette - The official newspaper published by the Nova Scotia Government. Contains various notices, including notices of estate openings to notify creditors who are owed money by the deceased.

Statute - Law made by elected members of government. Also referred to as "legislation" or "act".

Succession - The distribution to beneficiaries of the deceased's assets after payment of all debts, duties and expenses.

Survivorship - A right that arises when two or more people own property as joint tenants. By surviving the other joint tenant(s), the survivor(s) become entitled to the whole property.

Testate - When a person dies and leaves a valid will. Contrast with "intestate".

Testator - A person who makes a will. "Testatrix" is sometimes used to describe a woman who makes a will.

Will - The written statement by which a person instructs how their

property should be distributed after they die.

II GENERAL INFORMATION

1. The requirements for a valid will

A will is the written statement by which a person instructs how their property should be distributed after they die.[6] A person who makes a will is known as the "testator",[7] and if a person dies leaving a valid will, they are said to have died "testate".

The *Wills Act*[8] requires that a will, in order to be valid, must be in writing and signed by the testator. The testator must be at least 19 years of age[9] unless they are married (or have been married) or are in the military. The testator must sign the will in the presence of two or more witnesses, who must also be present at the same time and sign the will in the testator's presence. A witness or a witness's spouse cannot receive a gift under the will.[10]

In a will, a person leaves their property or "estate" to individuals or organizations known as "beneficiaries". Most testators name a person or company to act as "executor", who is given authority to act as the testator's personal representative after the testator dies.[11] The executor's duties include gathering assets, paying debts and distributing what remains to the beneficiaries according to the terms of the will.

2. When a will is not followed

A person making a will is free to leave their property to whomever they wish. This is known as the "freedom of testamentary disposition". In some circumstances, however, property may be distributed contrary to the wishes of the testator. This may occur because of certain common law rights or because of legislation. The common law is a body of law developed over the years by judges when making decisions in court. These decisions are relied upon by other judges in deciding other cases. Legislation is law made by elected members of government.

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[6] D.A. Dukelow & B. Nuse, *A Dictionary of Canadian Law* (Scarborough, Ont.: Carswell, 1991) at 1162.

[7] "Testatrix" is sometimes used to describe a woman who makes a will. "Testator" will be used in this Final Report to refer to people, whether male or female, who make a will.

[8] R.S.N.S. 1989, c. 505.

[9] The *Wills Act*, note 8, above, states that a will is not valid if it is made by a person "under the age of majority" (s. 4(1)). The age of majority in Nova Scotia is currently 19 years: *Age of Majority Act*, R.S.N.S. 1989, c. 4, s. 2(1). Upon reaching the age of 19 years, people in Nova Scotia cease to be "minors". In this Final Report, "adult" will be used to refer to people who are 19 years of age or older.

[10] Such a gift is void (i.e., invalid) unless there are two other witnesses who are not receiving gifts under the will. If a gift in a will is void, that does not make the entire will invalid (*Wills Act*, note 8, above, s. 12).

[11] "Executrix" is sometimes used to describe a woman who acts as executor. "Executor" will be used in this Final Report to refer to both male and female executors.

One common law right pertains to the law of trusts. A person may argue they have provided services to the deceased and are therefore entitled to a share of the deceased's property. Known in law as a constructive trust, this right frequently arises in family law cases involving common law couples.

Two provincial laws which allow property to be distributed contrary to the testator's wishes are the *Testators' Family Maintenance Act*[12] and the *Matrimonial Property Act*.[13] The *Testators' Family Maintenance Act* applies if a person has made a will which does not adequately provide for their dependants. The dependants may apply to court for maintenance and support to be paid from the deceased's estate. The *Act* defines "dependant" as the testator's widow, widower or child. Child includes both natural and adopted children as well as children not born at the date of the testator's death. It does not matter whether the child is born outside of marriage.[14] Although "widow" and "widower" are not defined in the *Act*, these terms will likely only include spouses who have gone through a legally recognized form of marriage, not common law spouses.[15] The *Act* lists factors to be considered by the court on an application for support, including the dependant's financial circumstances, the claims of any other dependants and the relationship of the dependant and testator at the time of the testator's death.[16]

The *Matrimonial Property Act* only applies to people who are legally married, and therefore it does not relate to common law spouses. It usually provides that where a spouse has died, the surviving spouse may apply to have matrimonial assets divided in shares, regardless of ownership.[17] This right is in addition to any other rights the spouse has as a result of the death of the other spouse. For example, the spouse may have rights as a dependant under the *Testators' Family Maintenance Act*. The spouse may also have rights under the will. Nova Scotia courts have held that a division of property under the *Matrimonial Property Act* takes place before the provisions of a will are applied.[18] As a result, a surviving spouse's share of property is deemed never to have been part of the deceased spouse's estate and is not available for distribution to the beneficiaries.

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[12] R.S.N.S. 1989, c. 465.

[13] R.S.N.S. 1989, c. 275.

[14] *Testators' Family Maintenance Act*, note 12, above, s. 2(a).

[15] R.J. Clarke, "Limits on Testamentary Freedom: Testators' Family Maintenance Act and Matrimonial Property Act Claims" (Paper presented to the Continuing Legal Education Society of Nova Scotia, 16 February 1996) [unpublished] at 2-3.

[16] *Testators' Family Maintenance Act*, note 12, above, s. 5.

[17] *Matrimonial Property Act,* note 13, above, s. 12(1)(d).

[18] See *e.g. Fraser* v. *Fraser Estate* (1981), 50 N.S.R. (2d) 55 (T.D.), and *Pulley* v. *Pulley Estate* (1996), 153 N.S.R. (2d) 143 (S.C.), overturned for other reasons (1997), 159 N.S.R. (2d) 79 (C.A.).

3. Dying without a valid will

If a person dies without leaving a valid will,[19] they are said to have died "intestate". Their property is then distributed to their "heirs" according to the rules set out in the *Intestate Succession Act*.[20] The *Act* lists the categories of heirs, those entitled to receive property, in order of priority.[21] For example, if the testator leaves a spouse and two or more children, and the estate is worth more than $50,000, the spouse is entitled to $50,000 and one-third of the balance of the estate. The children are entitled to divide the remaining two-thirds equally. The spouse may, however, elect to take the matrimonial home. If it is worth more than $50,000, the spouse takes the home in lieu of the $50,000 entitlement. If the home is worth less than $50,000, it is taken as part of the $50,000 entitlement.

The *Intestate Succession Act* does not apply to common law spouses. Furthermore, the *Act* does not permit spouses "living in adultery" at the time of the other's death to take any part of the deceased spouse's estate.[22] The *Act* states that an illegitimate child shall be treated as if the child were the legitimate child of the child's mother.[23] This used to mean that children born outside of marriage could inherit from their natural mother, but not from their natural father. The Nova Scotia Court of Appeal held that this violated the *Canadian Charter of Rights and Freedoms*.[24] As a result, children born outside of marriage are now entitled to claim as heirs to their natural father's estate.

If a person dies without leaving a valid will, there is no executor. The executor's duties still need to be performed, however, in that the assets must be gathered, the debts paid and the remainder of the estate distributed according to the *Intestate Succession Act*. The *Probate Act* provides for the court to appoint an "administrator" to act as the deceased's personal representative. The appointment is made according to the order of priority set out in the *Probate Act.*[25] The surviving spouse or next of kin is the first person entitled to be appointed as

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[19] A will may be found to be invalid if it was not made according to the requirements set out in the *Wills Act*, note 8, above. See Section II.1, above.

[20] R.S.N.S. 1989, c. 236. If a person dies leaving a will which does not fully dispose of their estate, they are said to have died "partially intestate". The portion which has not been disposed of is distributed according to s. 14 of the *Intestate Succession Act*.

[21] Those listed are entitled because they were married to or related to the deceased.

[22] *Intestate Succession Act*, note 20, above, s. 17.

[23] Note 20, above, s. 16.

[24] *Tighe* v. *McGillivray* (1994), 127 N.S.R. (2d) 313 (C.A.). See also *Surette et al.* v. *Harris Estate* (1989), 91 N.S.R. (2d) 418 (T.D.).

[25] *Probate Act,* note 1, above, s. 21.

administrator, followed by the Public Trustee, creditors or people having a cause of action (i.e., a claim in law) against the estate and finally, a trust company entitled to administer estates. Once appointed, the administrator acts as the deceased's personal representative, in the same manner and with the same duties and responsibilities as an executor.[26]

4. Probate

The law of probate deals with the administering of the estates of deceased persons, whether done by a named executor or an appointed administrator. One object is to ensure that the debts of a deceased person are paid. Another object is to transfer assets of a deceased person in a prompt and orderly manner. If there is a will, the transfer of assets is governed by the will. If there is no will, the transfer is governed by the *Intestate Succession Act*. The probate system oversees the work of executors and administrators, by ensuring that estate assets have been accounted for, and that the estate has been properly administered.

The next part of this Final Report examines Nova Scotia probate practice more closely. It begins with an historical overview and an outline of the probate procedure in Nova Scotia. This is followed by a discussion of the many estates that avoid probate by not going through the formal probate system. The results of the Commission's survey of registrars of probate are also outlined.

[26] Sometimes a person who leaves a valid will fails to name an executor or the named executor is unable to act (due, for example, to death, incompetence, absence or refusal). If no alternate executor was named by the testator, an administrator is appointed using the same procedure. The administrator must, as far as possible, carry out their duties in accordance with the terms of the will. This is known as "administration with will annexed".

III PROBATE IN NOVA SCOTIA

1. Historical development[27]

The Nova Scotia House of Assembly was established in 1758. One of the first statutes enacted was *An Act Relating to Wills, Legacies, and Executors, and for the Settlement and Distribution of the Estates of Intestates*.[28] The *Act* contained the requirements for making a will, the rules of intestate succession and the right of aggrieved persons to appeal to the Governor and Council. It was based partly on English common law and partly on the legislation of the older British colonies of North America, particularly Massachusetts. This occurred because English law had to be adapted to suit local circumstances and attitudes in the colony of Nova Scotia.

While various amendments were made to the *Act* in the next few decades, significant changes were not made until 1842. Because the probate procedure was so vague, many estates were not settled in the County Courts and were brought to the Court of Chancery in Halifax, which was expensive and inconvenient. The 1842 *Act* abolished the 1758 *Act* and established Probate Courts in every county.[29] It set out the court structure and the procedure to be followed in the courts. It also provided for the appointment of registrars of probate.[30] Registrars are officials who perform such duties as recording and preserving wills admitted to probate and acting as clerks of the Probate Court. They also can perform certain judicial duties.

After the 1842 *Act*, various amendments were made. In 1843, for example, the legislation was changed to allow any party to file their own papers in a Probate Court without hiring a lawyer (referred to as "proctor" in estate matters). In 1922, the legislation was amended to provide that a woman was eligible for appointment as a registrar or deputy registrar of probate. In 1970, the legislation was amended to permit land to be sold by private sale if the personal property of the estate was not sufficient to pay the estate's debts and legacies. In 1976, the legislation was amended to enable the Public Trustee to apply to act as administrator with will annexed, if there were no adult next of kin or adult residuary beneficiaries residing in the province, and if the executors had renounced their right to apply for probate.

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[27] Much of the information contained in this section was taken from the LRAC report, note 3, above. The LRAC report relied upon the work of Beamish Murdoch, a Nova Scotia lawyer and historian who wrote in the 19th century about the laws of Nova Scotia. See also Judge O'Hearn's historical review in *Re Trider's Estate* (1978), 41 N.S.R. (2d) 663 (Prob. Ct.).

[28] S.N.S. 1758, c. 11.

[29] The *Act* was titled *An Act relating to the Courts of Probate, and to the Settlement and Distribution of the Estates of Deceased Persons,* S.N.S. 1842, c. 22.

[30] Note 29, above, s. 41.

The current *Probate Act* is Chapter 359 of the 1989 Revised Statutes of Nova Scotia.[31]

2. Probate procedure

The *Probate Act* contains the procedure for administering an estate. Typically, the first step is to apply to the Probate Court for a "grant", which authorizes the executor or administrator to administer the deceased's estate. Because there are many different Probate Courts around the province, the executor or administrator must first decide in which Probate Court to make the application.

The province of Nova Scotia was previously divided into "probate districts" drawn along county lines. Each district had its own Probate Court. The *Court and Administrative Reform Act*[32] changed this so that probate districts now exist in "justice centres" established by the *Judicature Act*.[33] In deciding which probate district has jurisdiction over an estate, a residency test is used.[34] Residency means a place where the deceased had their "fixed place of abode" at the time of death.[35] If they had no fixed place of abode or lived outside Nova Scotia, jurisdiction is given to the probate district in which they had property at the time of death, as long as no other district had previously been given jurisdiction. In all other cases, jurisdiction can be given to any probate district in Nova Scotia.

If the person died testate (i.e., with a will), on an application for a grant, the court must be satisfied that the will is valid and that the party named as executor is entitled and willing to act. Determining whether a will is valid is known as "proving" the will. If there is no question as to the will's validity, it is proved through an application known as "proof in common form". This involves completing a number of forms and filing them with the Probate Court. If, however, there are questions about the validity of the will (such as whether the testator was mentally competent at the time of signing the will, or whether the testator was unduly influenced into signing the will), the party making these allegations may choose to request that the will be proved through an application known as "proof in solemn form". This usually involves a hearing in Probate Court with witnesses giving evidence. If either type of application is successful, and the will is proved, the court issues the grant, in the form of a document referred to as "letters probate" or "letters testamentary". This is the written permission for the executor to administer the deceased's estate. It is also considered conclusive evidence that the will is valid.

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[31] The *Probate Act* has been amended by: S.N.S. 1992, c.16, ss. 91-98; S.N.S. 1994, c. 28; S.N.S. 1994-95, c. 7, ss. 91, 150; S.N.S. 1996, c. 23, ss. 20-23.

[32] S.N.S. 1996, c. 23, s. 21.

[33] R.S.N.S. 1989, c. 240.

[34] *Probate Act*, note 1, above, s. 12.

[35] Note 1, above, s. 12.

If the person died intestate (i.e., without a will), as part of the application for a grant a number of forms must be completed and filed with the Probate Court, including the forms required to appoint an administrator. In Nova Scotia, administrators are required to post a bond as security for their performance. If the court is satisfied all the requirements have been met, it issues the grant in the form of a document referred to as "letters of administration" or a "grant of administration". This gives the administrator permission to administer the deceased's estate and is also considered conclusive evidence that the deceased died intestate.

Both executors and administrators must swear oaths in which they promise, among other things, to faithfully administer the deceased's estate. They also promise to render an account of their executorship or administration within eighteen months from the date the court issued the grant.

Once the grant has been obtained, the executor or administrator must advertise the estate in an attempt to notify creditors who may have unpaid claims against the deceased. The advertisements must run for one month if the estate is worth less than $800 and for six months in all other cases. Creditors have six months from the date of the advertisement to make their claims against the estate. If the executor or administrator disputes a claim, a creditor can be required to prove the claim before the Probate Court.

Within three months after the grant, every executor or administrator is required to file an "inventory", a detailed list of the real and personal property owned by the deceased at the time of death. Two or more disinterested persons must act as "appraisers" to estimate the value of the property. If more property is later discovered, a supplementary inventory must be filed.

Once the grant has been issued, the estate advertised and the inventory filed, the estate is ready to be "closed" or "settled" in the Probate Court. The executor or administrator must wait at least six months from the date of the grant before applying to the court to settle the estate. They must, however, make the application within 18 months.[36] The estate is settled by having the registrar of probate review the accounts, resolve any claims that have not been paid and order the balance to go to the executor or administrator to be distributed to beneficiaries or heirs.

First Nations people living in Nova Scotia may have to follow a different procedure for having their estates handled. The wills and estates sections of the federal *Indian Act* and the *Indian Estates Regulations*[39] apply to First Nations people who are registered or entitled to be registered

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[36] *Probate Act,* note 1, above, s. 70, and the executor's and administrator's oaths, discussed above. Estates in Nova Scotia are often not closed. The issue of closings, including whether they are necessary, is a source of debate which will be discussed further in Section IV.17, below.

[39] R.S.C. 1985, c. I-5, ss. 42-52; C.R.C., 1978, c. 954. See generally L. Kraft, "Wills and Estates Under the *Indian Act*" (Paper presented to the Continuing Legal Education Society of Nova Scotia, 16 February 1996) [unpublished]; D.F. English, "A Written Will - A Promise Kept" (Paper presented to the Canadian Bar Association - Nova Scotia, 30 January 1998) [unpublished].

as an "Indian" under the *Act*[40] and who "ordinarily reside" on reserve or Crown lands.[41] A person may be considered to ordinarily reside on reserve lands even if they are away, as long as they are only away temporarily (e.g., to attend school, to work or to stay in a health care facility).[42]

The formalities for such a will are much less stringent than those set out in the provincial *Wills Act*. The *Indian Act* states that any written instrument that is signed and in which a person indicates their intention regarding the disposition of their property may be accepted as a will.[43] As a result, witnesses are not required, and holograph wills[44] may be acceptable.

A problem may arise, however, if a First Nations person makes a will that would be accepted as a will under the *Indian Act,* and that person later moves off reserve. After they die, their family may attempt to process the estate in the provincial probate system. The will may not meet the provincial requirements and may be found to be invalid. The estate will then be considered intestate, and the testator's wishes may not be followed. This may explain why an information pamphlet prepared by the Confederacy of Mainland Micmacs advises there should be two witnesses to a will.[45]

Another difference in administering estates of First Nations people is that the Minister of the Department of Indian Affairs and Northern Development may exercise powers that would otherwise be exercised by the Probate Court. For example, the Minister may appoint or remove an executor or administrator, may accept and approve a will and may declare a will void. The Minister therefore exercises judicial powers (i.e., the powers of a judge) over estate administration for First Nations people living on reserve. As well, the Department has an administrative role in the estates of First Nations people. For example, policy indicates that the Department acts as an administrator of last resort, much like the Public Trustee in the provincial system. This means that the Minister will only appoint a Department employee to administer the estate if there is no executor or family member available.

This Final Report will not deal specifically with the administration of estates under the *Indian Act,* as that topic falls within federal jurisdiction and is therefore outside the realm of a provincial law reform commission. Reform would be more appropriately dealt with by the federal Law Commission of Canada.

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[40] *Indian Act*, note 39, above, ss. 5-7.

[41] *Indian Act,* note 39, above, s. 4(3).

[42] Kraft, note 39, above, at 1.

[43] *Indian Act*, note 39, above, s. 45(2).

[44] A will that is handwritten and signed but does not contain signatures of witnesses.

[45] *Written Wills* (Truro, N.S.: Confederacy of Mainland Micmacs, n.d.).

3. Avoiding probate

When one examines the number of estates opened in Nova Scotia each year, and compares it with the number of deaths, it becomes clear that many estates are dealt with informally, without going through the probate system. For example, in 1995-96, there were 7,682 deaths of people aged 19 and over in Nova Scotia, but only 2,402 estates were opened. This suggests that only 31% of estates were formally probated.[46] Similarly, in 1996-97, there were 7,780 adult deaths, but only 2,266 estates were opened. This suggests that only 29% of estates were formally probated that year. In 1997-98, 8,061 adult deaths occurred, with 2,313 estate openings, which represented 28% of all estates. Over the past three years, approximately 70% of Nova Scotia estates have been dealt with informally:

Period	Estates Opened	Deaths	Formal	Informal
1995 - 96[47]	2,402[48]	7,682[49]	31%	69%
1996 - 97	2,266	7,780	29%	71%
1997 - 98	2,313	8,061	28%	72%

These figures suggest that the majority of estates in Nova Scotia completely bypass the probate system.

Estates may not be probated for a number of reasons. In some cases, real property may have been held by spouses as joint tenants. When one spouse dies, the property automatically passes to the surviving spouse. As a result, the surviving spouse may choose not to formally probate the estate. Similarly, assets such as RRSPs and private pension plans may have designated beneficiaries. There may therefore be no need to formally probate the estate in order to pass title to these assets.

This raises the question of why the decision is made to formally probate an estate. One reason may be that an executor acting under a valid grant is protected if a later will is discovered, or if the will is later found to be invalid for some other reason. If the executor had acted under the will without getting the court's approval by applying for a grant, the executor could be personally liable to beneficiaries for the value of the estate. As well, obtaining a grant may make

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[46] The Commission recognizes that these figures are not statistically valid. They are, however, useful in illustrating that many estates in Nova Scotia avoid the probate process altogether.

[47] Covering the period April 1 to March 31 of each year.

[48] Figures obtained from the Nova Scotia Department of Justice (Financial and Statistical Service). Includes both grants of probate and grants of administration (i.e., both testate and intestate estates).

[49] Figures obtained from Nova Scotia Vital Statistics.

it easier to administer the estate, because many banks and trust companies will not release funds or transfer securities to beneficiaries without a grant. Finally, a grant may make it easier to deal with real property, since it would confirm the executor's right to transfer title to the property.[50] Nonetheless, numerous books and guides on avoiding probate have been published.[51]

4. Survey of registrars of probate

In November 1997, the Commission conducted a survey of registrars of probate in the province. The purpose of the survey was to obtain the registrars' views on various issues and to identify any differences in practice. All 10 registrars or acting registrars of probate responded to the survey.[52]

In 1979, the LRAC noted "serious complaints that there is a lack of uniformity with respect to the procedures in use in the various Probate Courts in this Province".[53] The present Commission's survey of the registrars of probate did not, however, reveal significant inconsistencies in practice. Only a few discrepancies were reported. For example, although it is generally accepted that out-of-province administrators are not permitted in Nova Scotia, one registrar grants administration to out-of-province administrators when proper bonding is provided.

The survey also showed that the 10 registrars of probate share many views on changes to the probate system. For instance, eight of the 10 registrars agreed there should be a separate procedure for handling small or uncomplicated estates.

In the next section of the Final Report, specific issues relating to probate reform are discussed. The first issue involves the difference between contentious and non-contentious estates. The remaining issues are considered in the order in which they would usually arise in the handling of an estate, commencing with the opening of the estate and ending with the closing of the estate. The Commission's recommendations are indicated at the end of each section.

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[50] M.E. Rintoul, *The Solicitor's Guide to Estate Practice in Ontario*, 2d ed. (Toronto: Butterworths, 1990) at 35-36.

[51] One of the most popular has been N.F. Dacey, *How to Avoid Probate! New Edition for the 1990's*, rev. ed. (New York: Macmillan, 1990).

[52] A copy of the survey is attached as Appendix B to the Discussion Paper. A summary of the survey results is attached to the Discussion Paper as Appendix C.

[53] Note 3, above, at 6.

IV RECOMMENDATIONS

1. A simpler system

In conducting its initial consultations on probate reform, the Commission became aware of significant differences of opinion on how the system should be changed. There appeared to be disagreement between some lawyers and those who administer the system on behalf of the government (such as registrars of probate). There was also significant diversity of opinion amongst lawyers.

On the one hand, administrators emphasized the supervisory role of the probate system in protecting the public. They felt the system should include many automatic safeguards to protect those who, for any number of reasons, cannot protect themselves. These administrators receive many inquiries from members of the public who are unfamiliar with the probate system. There are cases where people have not been protected by the system and have lost money as a result.

Many lawyers, on the other hand, favoured a simplified system with fewer automatic safeguards, but an ability to trigger safeguards, as necessary. These lawyers stated that the court should be available to resolve disputes as they arise, but should not be involved in the processing of estates. To support their position, they referred to the number of estates in Nova Scotia that are not formally closed under the *Probate Act*.[54] They also pointed to the existence of simple estates, such as those involving a spouse who is the only beneficiary or heir, and who is also acting as the estate's executor or administrator. They argued that such estates do not require many of the safeguards currently in place (such as bonding for spouses acting as administrators).[55]

Other lawyers stated that safeguards are necessary to protect members of the public who may find the probate system complicated and overwhelming. Many of these lawyers referred to estates which have been mismanaged by lawyers, executors or administrators. They argued that such mismanagement may not have occurred had the system included more safeguards and had the public been more aware of these safeguards.

The Advisory Group, formed by the Commission to advise on probate reform, also reflected these differences in opinion. Members of the group were, in some respects, polarized on certain issues and on their approach to reform.

Alberta is the province that has most substantially reformed its probate system in recent years,

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[54] Only 33% of estates that are opened are ever formally closed. See Section IV.17, below.

[55] See Section IV.12, below.

creating new probate rules and forms.[56] The new system distinguishes between two types of estates, non-contentious and contentious (that is, estates involving no disputes and estates in which there are disputes that need to be resolved). Most estates begin as non-contentious estates and follow a number of straightforward steps. These steps start from the date of death and end when the executor or administrator submit their final accounts and distribute the estate assets. If no dispute arises, the estate is handled as a non-contentious estate, and the court is only minimally involved. Should a dispute arise, however, the court becomes involved, and the estate is treated as contentious until the dispute is resolved. There is one standard procedure for bringing contentious applications before the court.[57] When the dispute is resolved, the matter returns to the non-contentious stream, and the processing of the estate continues where it left off.

A philosophy underlying reform in Alberta was that estate administration should be directed by executors and administrators, with court intervention only when necessary. There was a desire to have executors and administrators supervised by someone other than the court. As a result, some responsibility was given to beneficiaries and heirs to protect their interests. To do this, beneficiaries and heirs must have notice that they have an interest to protect. New notice requirements were therefore added, so that people such as the surviving spouse, beneficiaries and heirs would be notified of an estate being opened.

In Alberta, however, the probate system works differently than is the case in Nova Scotia, in that the court administrators (the clerks of the Surrogate Court) play a less significant role than the registrars who oversee the probate system in Nova Scotia. The clerks' duties are more administrative in nature and include maintaining records of all applications for grants, issuing grants once they are granted by a judge and providing copies of documents upon payment of the requested fee.[58] Registrars in Nova Scotia, on the other hand, perform certain judicial functions (i.e., the duties of a judge). The *Probate Act* states that the duties of the office of the judge of the Probate Court are to be discharged by the judge of the Supreme Court and by the registrar of the Probate Court.[59] The *Act* specifies the types of applications that must be heard by a judge,[60] and

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[56] Alberta Law Reform Institute & the Surrogate Rules Committee, *Revision of the Surrogate Rules* (Report For Discussion No. 10) (Edmonton: Alberta Law Reform Institute, 1991); Alberta Law Reform Institute & the Surrogate Rules Committee, *Revision of the Surrogate Rules* (Final Report: Report No. 73) (Edmonton: Alberta Law Reform Institute, 1996) [hereinafter *Alberta Report for Discussion* & *Alberta Final Report*, respectively].

[57] There are two exceptions to the standard method of application: the procedure for proving a will in solemn form and the accounting procedures. These two procedures were seen as sufficiently different to warrant procedures of their own.

[58] *Surrogate Court Act*, R.S.A. 1980, c. S-28, s. 6(2) & Alta. Reg. 130/95, rs. 44-49 [hereinafter *Alberta Surrogate Rules*].

[59] *Probate Act,* note 1, above, ss. 152-153.

[60] Applications to require an executor to give security, to remove and replace an executor, to prove a will in solemn form, and an application for a license to sell, mortgage or lease real property to pay claims (*Probate Act,* note 1, above, s. 153(1)).

those that can be heard by a judge or registrar, at the option of the person applying.[61] All other matters are to be heard by the registrar of probate. The *Act* also states that any application can be transferred from the registrar to the judge, or vice versa, by written consent of the parties.[62]

In the Discussion Paper, the Commission sought to encourage discussion on the role of registrars and judges in a reformed probate system. From its initial consultations, the Commission was not aware of any desire to significantly change the role of registrars of probate. Changing the role would place a greater burden on the court, which would cause the process to be even more expensive and time-consuming. Some lawyers have commented, however, that inconsistency in practice among various registrars has caused difficulty and unfairness.

In the Discussion Paper, the Commission suggested the development of a simpler system that proceeds with minimal court involvement except when necessary. Estates would be divided into non-contentious and contentious estates, with non-contentious estates following a standard procedure. There would be a procedure permitting those interested in the estate to refer disputes to a judge or registrar of probate. Registrars of probate would also have the ability to refer disputes to a judge, particularly if the dispute was complicated and required legal interpretation. The Discussion Paper also suggested that the system should retain and enhance the role of registrars of probate in overseeing and guiding the probate process.

Among the responses received on this issue, there was general agreement with the need for a simpler probate system, one which has separate procedures to deal with contentious and non-contentious estates. Some commentators, however, disagreed with the possibility of different levels of probate fees being applied, depending on the type of estate involved. There was also concern expressed that the new system, if it was more complicated than the current one, might mean increased work for executors. Without a corresponding increase in compensation, executors would have to do more work than is currently required, but for the same fees. Another commentator stated that a simplified system would mean fewer automatic safeguards, thereby placing a greater, unreasonable onus on beneficiaries and heirs to protect their interests. For example, that commentator suggested beneficiaries and heirs would have to spend greater time monitoring the actions of executors or administrators.

Having considered the comments received, the Commission recommends that the probate system should be reformed to create a simpler system that involves the court only when necessary. Registrars of probate should continue to oversee and guide the probate process and should have

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[61] Applications to adjudicate claims of creditors, to allow executor/administrator accounts, to distribute an estate among those entitled and to partition and sell real property (*Probate Act,* note 1, above, s. 153(2)). In the Commission's survey of registrars, registrars indicated there are three types of applications they will hear and decide: appointment of guardians, adjudication of claims of creditors, and show cause hearings. Most registrars will not hear proof in solemn form applications, applications for a licence to sell real property or to conduct a private sale of real property, applications to remove executors or administrators and applications requiring an executor to give security. Six of the 10 registrars will hear applications if all parties consent, and if the matter is not complicated. Complex matters requiring legal interpretations are referred to a judge.

[62] *Probate Act*, note 1, above, s. 153(4).

the ability to refer disputes to a judge. Separate procedures should be developed to handle non-contentious and contentious estates. Non-contentious estates, in which there are no disputes, would be handled by following a standard procedure. If a dispute arises, "interested parties", namely beneficiaries and heirs,[63] could follow a different procedure to have the matter heard by a judge or registrar of probate. The estate would then be treated as contentious. Once the dispute is resolved, the estate would again be treated as non-contentious and continue to follow the standard procedure for non-contentious estates.

Since the issuance of the Discussion Paper and upon further consideration, the Commission has agreed upon the merits of a uniform procedure for the resolution of certain disputes during the probate process. The Commission recommends that as far as possible, disputes should be heard by the registrar of probate, if all interested parties agree. If the interested parties do not agree to have the matter heard by the registrar, or if an interested party disputes the registrar's decision, then the matter could be heard by the court.

The Commission acknowledges that the proposed system places a greater onus on interested parties to protect their rights. Improvements in simplicity and efficiency should nonetheless outweigh any perceived drawback associated with interested parties having to exercise greater initiative. The Commission also notes that under the proposed simpler system, the court would be able, as is currently the case, to make an award of costs against a party who brings an unnecessary contested application.[64] This should serve as a deterrent for people who would otherwise attempt, without valid reasons, to bring an estate into the contentious stream.

[63] In this Final Report, creditors are not included as part of the term, "interested parties". Creditors will be specifically referred to where relevant.

[64] In any contested matter, the court has discretion to order that costs associated with the matter be paid by the party against whom the decision is given (*Probate Act*, note 1, above, s. 131 (1)).

The Commission recommends that:

- The probate system should be reformed to create a simpler system that involves the court only when necessary. Registrars of probate should continue to oversee and guide the probate process and should have the ability to refer disputes to a judge.

- Separate procedures should be developed to handle non-contentious and contentious estates. Non-contentious estates are estates in which there are no disputes. These estates would be handled by following a standard procedure. If a dispute arises, "interested parties", namely beneficiaries and heirs**,** could follow a different procedure to have the matter heard by a judge or registrar of probate. The estate would then be treated as contentious. Once the dispute is resolved, the estate would again be treated as non-contentious and continue to follow the standard procedure for non-contentious estates.

- As far as possible, disputes should be heard by the registrar of probate, if all interested parties agree. If the interested parties do not agree to have the matter heard by the registrar, or if an interested party disputes the registrar's decision, then the matter could be heard by the court.

OPENING ESTATES

2. Jurisdiction

In which probate district should an estate be opened?

Once a decision is made to probate an estate, the next step is to decide where to apply for a grant of probate or administration. Nova Scotia is currently divided into 11 justice centres.[65] Each justice centre is a probate district. The appropriate probate district in which to open an estate must be determined before an application for a grant can be made. This is the probate district that is said to have "jurisdiction" or authority over the estate.

Under the *Probate Act,* jurisdiction is determined according to the deceased person's "fixed place of abode" at the time of death.[66] If the deceased had no fixed place of abode in Nova Scotia or resided outside of Nova Scotia, jurisdiction is given to any probate district in which the

[65] See Section III.2, above. While the province is currently operating with 11 justice centres, the *Judicature Act*, note 33, above, lists only four. The 11 justice centres are: Amherst, Antigonish, Bridgewater, Digby/Annapolis, Halifax, Kentville, Pictou/New Glasgow, Port Hawkesbury, Sydney, Truro and Yarmouth.

[66] *Probate Act*, note 1, above, s. 12.

deceased had property at the time of death.[67] Estates are opened in the district of the deceased's fixed place of abode because creditors, assets and land holdings are normally located there. Determining the fixed place of abode can, however, be difficult.

In the Discussion Paper, the Commission suggested the fixed place of abode continue to serve as the primary test for determining the jurisdiction in which to open an estate. Fixed place of abode, the Commission suggested, is simple and easily understood. The majority of comments received on the Discussion Paper were in agreement. Some commentators, however, thought the term "fixed place of abode" was outmoded. Upon further consideration, the Commission agrees that though a test similar to the fixed place of abode test should be used, a change in language would be appropriate. Accordingly, the Commission recommends the primary test should be the deceased's "usual place of residence in the province at the time of death".[68]

As mentioned in the Discussion Paper, some people believe there should be an ability to apply to a registrar of probate to move the jurisdiction from the usual place of residence in the province at the time of death. Such an application could be granted, for example, if all the beneficiaries and heirs and others involved with the estate were located in another jurisdiction and moving the estate to that jurisdiction would make it easier to process the estate. To take into account this perceived need for flexibility in certain situations, the Commission also suggested in the Discussion Paper that parties should have the right to apply to open an estate elsewhere, using a "balance of convenience" test. If this test was used, a number of factors might be considered in determining which probate district is most convenient. Factors could include the deceased's usual place of residence, the length of time the deceased resided in their final residence, the location of land owned by the deceased, the location of beneficiaries and heirs, and the location of creditors. Other relevant factors could be considered, as required by the circumstances of each case. A majority of responses received by the Commission were in favour of this suggestion, which the Commission affirms as a recommendation.

In accordance with its earlier recommendation about decisions by registrars, the Commission recommends that an application to move the jurisdiction from the usual place of residence should be made to the registrar of probate, if all interested parties agree. If the interested parties do not agree to have the matter heard by the registrar, or if an interested party disputes the registrar's decision, then the matter could be heard by the court.

There is no central registry or computerized database containing a list of all estates opened in the province. As a result, claimants searching for estates need to know the deceased's usual place of residence in order to find the district in which the estate was opened. If they do not know the deceased's usual place of residence, they could be forced to search all 11 districts at significant

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[67] Provided a court in another probate district has not previously assumed jurisdiction by issuing a grant (*Probate Act,* note 1, above, s. 12(2)).

[68] For the rest of this section, "usual place of residence in the province at the time of death" or "usual place of residence" is used instead of "fixed place of abode".

expense and inconvenience. The same problem would arise if an estate could be opened in any district, regardless of the deceased's usual place of residence. Claimants may have difficulty locating estates, and creditors may lose claims by not finding estates and filing claims within the time required.[69]

In the Discussion Paper, the Commission suggested these problems would largely be solved by the introduction of a computerized system connecting each probate district. Documents filed in each district would be indexed. This would enable claimants and creditors to electronically search for an estate from any probate office in the province. Getting access to the full text of probate documents would still involve attendance at the relevant office. Although few commentators addressed the suggestion of electronically linking probate districts, those commentators who did were in favour. The Commission recommends that probate districts around the province should be electronically linked, and that documents filed in each district should be indexed to enable searches to be carried out from any probate district.

The Commission recommends that:

- The deceased's usual place of residence in the province at the time of death should be the primary test for determining the jurisdiction in which to open an estate.
- An application could be made to open an estate in a district other than the deceased's usual place of residence in the province at the time of death, using a balance of convenience test, based on a number of factors including:
    - the deceased's usual place of residence in the province at the time of death;
    - the length of time the deceased resided in their final residence;
    - the location of land owned by the deceased;
    - the location of beneficiaries and heirs;
    - the location of creditors.
- The application would be made to the registrar of probate, if all interested parties agree. If the interested parties do not agree to have the matter heard by the registrar, or if an interested party disputes the registrar's decision, then the matter could be heard by the court.
- Probate districts around the province should be electronically linked. Documents filed in each district should be indexed to enable searches to be carried out from any probate district.

[69] *Probate Act*, note 1, above, s. 43(1), requires creditors to file claims within six months. Under the present system, advertising is conducted to notify creditors of estates (see Section IV.14, below). As a result, the jurisdiction in which to open an estate is more of an issue for beneficiaries and heirs than for creditors.

3. Notice of estate being opened

Should interested parties be notified of an application being made to open an estate?

Currently, interested parties are not formally notified that an application is being made to open an estate. While some interested parties are aware of such an application, others may not become aware of it until much later, if at all. This can cause problems if an interested party contests the way the estate is being handled. Such complaints are best brought as early as possible in order for the executor or administrator to administer the estate efficiently and with some level of confidence. To meet these objectives, interested parties must have notice of an application to open an estate. Any notice should also contain time limits within which they must act. Providing notice to interested parties allows them to take responsibility for protecting their own interests.

In the Discussion Paper, the Commission suggested that executors and administrators give notice of an application for a grant of probate or administration to all beneficiaries and heirs, including those who may be entitled under the *Intestate Succession Act* and the *Testators' Family Maintenance Act*. This suggestion produced a mixed reaction among commentators. Some commentators were concerned that having to provide such notice might cause unnecessary delays. One commentator suggested that the class of beneficiaries requiring notice be better defined. Upon further consideration, the Commission recommends that the class of people entitled to receive notice be composed of all interested parties, namely all beneficiaries and heirs. The Commission believes any delays associated with this notice requirement would be more than offset by the benefit of helping to ensure that those persons with an interest in an estate are made aware of it having been opened.

The Discussion Paper also suggested notices of an application for a grant should be sent by registered mail. A number of commentators disagreed with this suggestion. It was noted, for example, that people often refuse to accept registered mail. Having reviewed these comments and considered the matter further, the Commission recommends that registered mail not be the sole means of providing notice. Rather, notice could equally be provided by means of ordinary mail, fax, or electronic mail. There was no disagreement among the commentators, however, with the Discussion Paper's suggestion that the executor or administrator file an affidavit with the Probate Court confirming that notice has been given and the parties to whom it was given. The Commission recommends that such an affidavit must be filed.

Another suggestion in the Discussion Paper was that any notice advise those interested in an estate they could object to the application for a grant because they disagreed with (1) the person making the application or (2) the district in which the application was being made (i.e., person or place). A time limit would also be inserted to require the recipient to file an objection within a certain time frame. The Commission suggested this be relatively short in order to expedite the opening of the estate. For discussion purposes, the Commission proposed an objection period of

14 days.[70] As this suggestion seemed to meet with general agreement among the commentators, the Commission affirms it as a recommendation and also recommends that the 14 day notice period begin to run from the time of sending the notice to an interested party.

In terms of the information to be attached to the notice, the Discussion Paper suggested that wills not be attached, as they would make the notice process more expensive and would provide information to some recipients who would not need it. Instead, the notice, it was suggested, should refer to the will and its location and availability for examination. A minority of commentators suggested a copy of the will should be attached to a notice, and in particular, to a notice destined to a residuary beneficiary. The Commission has not, however, changed its views on this suggestion, which it affirms as a recommendation.

Since issuing the Discussion Paper, the Commission has recognized there may be certain urgent situations where estate assets would be in danger of losing all or a large part of their value, prior to the 14 day notice period being satisfied. As a consequence, the Commission recommends that it be possible for an executor or administrator to apply to the registrar for an order pertaining to the disposal of certain assets. This order would be available on an *ex parte* basis, meaning that interested parties would not have to be notified.

[70] This appears to be less cumbersome than the system of "caveats" that exists in some provinces. A caveat is a formal notice, filed by someone interested in an estate and used to prevent temporarily a grant of probate or administration from proceeding. The person filing the caveat may be required to file an affidavit explaining the reasons for filing the caveat and confirming it is not being filed in bad faith. A caveat is usually valid for a period of three months and the application for a grant cannot proceed unless the caveat expires, is removed, or otherwise dealt with. See *e.g. Probate Court Act*, S.N.B. 1982, c. P-17.1, ss. 44-46 & N.B. Reg. 84-9, s. 3.01.

The Commissions recommends that:

- The class of people entitled to receive notice be composed of all interested parties, namely all beneficiaries and heirs.
- Registered mail not be the sole means of providing notice. Rather, notice could equally be provided by means of ordinary mail, fax, or electronic mail.
- An affidavit must be filed confirming that notice has been given and the parties to whom it was given.
- Notices should advise that any objection to (1) the person making the application or (2) the district in which the application is being made, must be made within 14 days from the time that the notice was sent.
- Wills should not be attached to any notice. The notice should refer to the location of the will and its availability for examination.
- It be possible for an executor or administrator to apply to the registrar for an order pertaining to the disposition of certain assets. This order would be available on an *ex parte* basis, meaning that interested parties would not have to be notified.

4. Affidavits proving a will

(a) When should affidavits proving a will be completed?

When a person dies and a will is found, it must first be determined if the will is valid. The *Wills Act* sets out the requirements for a valid will.[71] When a will is being probated, one of the two witnesses to the will must be found to prove the will, which means to establish its validity. This involves the witness making certain statements in an "affidavit of execution of will". Among other things, the witness must state that they knew the testator, that they and another witness saw the testator sign the will and that the testator was "then of sound and disposing mind, memory and understanding, and of the age of majority and upwards".[72] The witness is required to go to the office of the Probate Court to swear or affirm this affidavit before a registrar or deputy registrar of probate. The witness may appear before someone other than the registrar or deputy registrar only if the witness lives outside Nova Scotia or more than twenty miles away or is

[71] See Section II.1, above.

[72] This is the wording contained in paragraph three of the affidavit of execution of will, attached as form D in the Schedule to the *Probate Act,* note 1, above.

unable to appear due to age or illness.[73]

Many years often pass from the signing of a will and the death of the testator. Sometimes witnesses to the will are dead or cannot be located. Other measures then have to be taken to prove the will. This causes delay and added expense to the processing of the estate.

In the Discussion Paper, the Commission suggested the difficulties identified above concerning the proof of wills could be prevented by extending the period during which an affidavit in proof of will could be made. An affidavit proving a will could be made at the time the will is executed, at any time after the will is executed, or at the time of the application for the grant. Among the comments received by the Commission, there was general agreement with this suggestion. The Commission therefore recommends that an affidavit proving a will may be made at the time the will is executed, at any time after the will is executed, or at the time of the application for the grant.

The Commission recommends that:

- An affidavit proving a will may be made at the time the will is executed, at any time after the will is executed, or at the time of the application for the grant.

(b) What should be contained in the affidavit?

The affidavit of execution of will in Nova Scotia requires the witness to make a statement regarding the mental capacity of the testator at the time of making the will. Presumably, this is done to provide some evidence that the witness was mentally competent[74] to make a will.[75] Currently, the witness states that the testator was of "sound and disposing mind, memory and understanding". In the Discussion Paper, the Commission suggested this language is somewhat complicated and archaic. The Commission suggested it would be more appropriate for a witness to state that the testator "appeared competent to sign the will", since a witness can really only speak to what appeared to them to exist. Upon review of written comments received and upon further consideration, the Commission recommends that rather than requiring a witness to swear or affirm as to the apparent state of the testator's competency, a testator would be presumed competent to sign. This presumption exists at common law. The Commission notes

[73] The document sworn is known as a *dedimus* (*Probate Act*, note 1, above, s. 20).

[74] This document will use the terms "mental competence" or "incompetency" in order to reflect current legislative language, although "capacity" may be a less pejorative term to describe an adult not capable of decision-making. See *e.g.* Law Reform Commission of Nova Scotia, *Adult Guardianship in Nova Scotia: Suggestions for Reform of the Incompetent Persons Act* (Discussion Paper) (Halifax: Law Reform Commission of Nova Scotia, September 1993).

[75] This is distinct from the issue of a testator being free from "undue influence", meaning that they were not being manipulated, pressured, or coerced in relation to their will.

that a statement of apparent competency is not required for the execution of other documents such as deeds. This presumption would be rebuttable. It would not apply if a person who disagreed with it could point to enough facts to establish that the testator was not competent. The onus of proof, however, would be on a person seeking to rebut the presumption.[76] Instead of referring to the testator's state of competency, the affidavit in proof of will would state that the will was properly executed in compliance with the other requirements for a valid will, which are found in the *Wills Act.*[77]

The Commission recommends that:

- There is a rebuttable presumption that a testator was competent to sign, rather than requiring an affidavit in proof of will to refer to the apparent state of the testator's competency. The affidavit in proof of will would state that the will was properly executed in compliance with the other requirements for a valid will, which are found in the *Wills Act*.

(c) Who should take the affidavit?

To swear or affirm affidavits proving a will, witnesses are required to go to the office of the Probate Court and appear before a registrar or deputy registrar of probate who "takes", meaning administers, the affidavit. Sometimes witnesses are unwilling or unable to attend Probate Court. They may prefer to appear before someone else authorized to administer oaths in Nova Scotia, such as a lawyer or a commissioner of oaths. In the Discussion Paper, the Commission suggested the person taking the affidavit should have sufficient knowledge of probate in order to ask any necessary questions which might minimize the possibility of a will being challenged later. The Commission therefore suggested the right to take the affidavit be restricted to registrars, deputy registrars or lawyers in the province, as well as to notaries public of other provinces.

Having reviewed the comments received on the Discussion Paper, the Commission recommends that commissioners of oaths should also be included among the persons qualified to take an affidavit in proof of a will. In some rural areas, often a local commissioner is the only person available to take an affidavit. Also, the *Notaries and Commissioners Act*[78] allows specifically for the taking and receiving of affidavits by a commissioner of oaths.

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[76] A challenge to a testator's competency would take place as part of a proof in solemn form application. See Section IV.5, below.

[77] See Section II.1, above.

[78] R.S.N.S. 1989, c. 312, s. 6.

The Commission recommends that:

- A registrar of probate, a deputy registrar of probate, a barrister of the Supreme Court of Nova Scotia, a commissioner of oaths for Nova Scotia, or a notary public of any jurisdiction in Canada should be able to take an affidavit proving a will.

5. Proof of will

Does the procedure for proof in solemn form need revising?

A will may be proved in either common form or solemn form:

(1) Proof in common form is used when there is no dispute as to the validity of a will. It is accomplished by having one of the witnesses to the will make an affidavit known as an affidavit of execution of will.[79] Among other things, the witness states that they knew the testator, and that they saw the testator sign the will. The affidavit is filed with the Probate Court, and if no one disputes the affidavit, the will is considered "proven". The grant of probate (or of administration with will annexed) can then be issued.

(2) Proof in solemn form is used when there is a dispute as to the validity of the will. For example, there may be questions as to whether the will was actually signed by the testator, whether the witnesses saw the testator sign the will or whether the will is the last will of the testator. A hearing must then be held to prove the will in solemn form. The hearing includes oral evidence given by witnesses and is like a trial, possibly lasting several days.

There are currently two ways to initiate a proof in solemn form application:[80]

(1) the executor or administrator (with will annexed) may proceed directly to court to have the will proved in solemn form; or,

(2) any person "interested in the estate" may apply to require the executor or administrator (with will annexed) to "show cause", which means to establish, why they have not proven the will in solemn form. If they do not provide such cause, the court may require the executor or administrator to have the will proved in solemn form.

The difficulty is with the second procedure. If someone other than the executor or administrator (with will annexed) wishes to have the will proved in solemn form, they cannot initiate the

[79] Discussed in Section IV.4, above.

[80] *Probate Act*, note 1, above, ss. 36 - 37.

process without going before a registrar of probate. Once they bring the issue to a registrar, the registrar must require the executor or administrator to show why they have not proved the will in solemn form. Theoretically, the registrar must then decide whether the will should be so proved. In practice, registrars prefer not to make such decisions, because they involve technical, legal issues, and most registrars are not legally trained. As a result, most registrars forward such matters to a judge. It thus appears that an intermediate step is unnecessary and unduly complicated.

Under the general rules of court in Nova Scotia,[81] a party may initiate most contested applications by filing documents with the court and serving copies of the documents on the other parties four days before the date set for the hearing of the matter before a judge.[82] Usually, there is no intermediate step requiring a party to apply for the right to make the application.

In the Discussion Paper, the Commission suggested any interested party should be able to initiate a proof in solemn form application by filing a notice setting out the reasons for making the application. The Commission recognized this would make it easier to initiate such applications and might result in meaningless applications (generally known in law as "frivolous" or "vexatious" applications) being brought by parties who wish to meddle in an estate. While such applications should not be encouraged, the Commission noted that measures already exist to discourage such applications. For example, a court may make an award of costs against the party bringing a frivolous application, thereby requiring them to pay a portion of the other party's legal costs. The majority of comments received by the Commission were in agreement with this suggestion. The Commission therefore recommends that formal proof of will applications should be initiated upon the filing of a notice which sets out the reasons for the application.

The Commission also suggested the titles "proof in solemn form" and "proof in common form" have little or no meaning to those unfamiliar with the probate system. The Commission considered titles used in other provinces such as Alberta, which uses "formal proof of will" (for proof in solemn form applications) and "informal proof of will" (for proof in common form applications). The Commission suggested these titles be adopted in Nova Scotia in an attempt to modernize the language. Although the majority of commentators agreed that a change in language was in order, they did not all agree with the Commission's proposed titles. Upon consideration of the comments received, the Commission recommends that "formal proof of will" and "informal proof of will" be adopted, as best identifying the differences in the two procedures.

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[81] The Civil Procedure Rules are made by judges of the Nova Scotia Court of Appeal and the Supreme Court of Nova Scotia under the authority of the *Judicature Act*, note 33, above.

[82] Some applications, such as contempt applications or applications under the *Incompetent Persons Act* (R.S.N.S. 1989, c. 218) require that intermediate steps be taken before the application can be made.

The Commission recommends that:

- Formal proof of will applications should be initiated upon the filing of a notice which sets out the reasons for the application.
- "Proof in solemn form" and "proof in common form" should be renamed "formal proof of will" and "informal proof of will", respectively.

A proof in solemn form application can be brought at any time. It can even be brought after the will has been proved in common form, and if the proof in solemn form fails, the original grant will be revoked.[83] As a result, the estate is always subject to this type of application. It does not appear there is a time limit on when a proof in solemn form application must be made. Time limits already exist in probate legislation. For example, the *Matrimonial Property Act* and *Testators' Family Maintenance Act* require that spouses and dependants make any claims against the estate within six months after the grant of probate. Any time limits placed on proof in solemn form applications should not, however, apply in cases of fraud or bad faith on the part of the executor (or an administrator with will annexed).

It could be argued that such a time limit prejudices those who do not know of the estate (or the will) and only become aware when the time limit has expired. In the Discussion Paper, the Commission suggested this concern can be lessened, however, if interested parties receive notice of the estate being opened, as recommended above.[84] Interested parties would then have the information required to bring the application at an earlier stage. The notices could also include the date by which the interested party must make the application.

In the Discussion Paper, the Commission suggested any time limit must be consistent with limits contained in other legislation. In particular, the Commission suggested that as an application under either the *Matrimonial Property Act* or the *Testators' Family Maintenance Act* must be made within six months from the date of the grant, it may be appropriate to require applications for formal proof of will to be brought within the same period. The Commission, however, generally favoured shortening the overall time frame for processing estates and invited comment on whether such applications should be made within four months, as opposed to six months.

Since the issuance of the Discussion Paper, the Commission has determined there is no direct connection between the notice period for what is currently proof in solemn form and the notice periods under the *Testators' Family Maintenance Act* and the *Matrimonial Property Act*.

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[83] T.G. Feeney, *The Canadian Law of Wills*, vol. 1, 3d ed. (Toronto: Butterworths, 1987) at 177, 181-2.

[84] Discussed in Section IV.3, above. Admittedly, however, there may be unknown or unascertained parties who do not receive such notice and therefore remain unaware of the estate.

Commentators were divided as to whether the proof in solemn form notice period should be changed from six months to four months. Having taken the commentators' responses into account and considered the matter further, the Commission recommends, in the interest of speeding up and thereby improving, the probate process, that the current formal proof notice period should be reduced to four months. Given, however, the lack of a direct connection, the Commission no longer considers it necessary to recommend a corresponding reduction in the notice periods in the *Testators' Family Maintenance Act* and the *Matrimonial Property Act*. Reducing the proof in solemn form period to four months while retaining the six month period in the two statutes would not occasion any hardship for *Matrimonial Property Act* and *Testators' Family Maintenance Act* claimants.

The Commission recommends that:

- An application for formal proof of will should be required to be brought within four months from the date of the grant.

HANDLING ESTATES

6. Inventory and Appraisal

(a) Should the current inventory requirements be maintained?

When a Nova Scotia executor or administrator applies for a grant of probate or administration, they do not provide an itemized list of the property owned by the deceased at the time of death. Instead, they indicate the value of the personal property and real property and add them together to determine the total value of the estate. In order to calculate the probate fees to be paid to the court when the estate is opened,[85] the value of any mortgages or other encumbrances (such as arrears of property taxes) on the real property is deducted from the value of the real property. Probate fees are then charged based on the value of the personal property and the net value of the real property.[86]

Within three months of the date of the grant, the executor or administrator must file an "inventory", an itemized list of all real and personal property owned by the deceased at the time of death.[87] The value of each item must be indicated. If additional property is later found, a supplementary inventory must be filed within a reasonable time. If the value of the estate is found to be different from the value on which the probate fees were charged, an adjustment of

[85] Known as the "opening" probate fees. Opening and "closing" probate fees are discussed in Section IV.18(a), below.

[86] *Probate Act*, note 1, above, s. 130(2).

[87] See *Probate Act*, note 1, above, ss. 38 - 39 & sch., form P.

probate fees is made.[88]

A primary issue is whether an inventory should be automatically required or required only upon the request of an interested person. Those who believe it should always be required consider an inventory necessary to accurately calculate probate fees and executor's and administrator's commissions and to trace assets of an estate. Others believe an inventory should be available as a protective element, that is, available when people want it, but not required when they do not want it. An inventory may not be needed, for example, in an estate with one beneficiary who is also the executor (particularly if that person is the surviving spouse). Some people have pointed to privacy concerns, in that once an inventory is filed, it becomes a public record. These people ask why financial information regarding a deceased person should be available for public viewing when that information was never available during the person's lifetime. If inventories are to continue to be required, these people argue there should be restrictions on who can view them.

In the Discussion Paper, the Commission suggested the benefits of providing an inventory outweigh any perceived problems. The Commission proposed that an inventory continue to be required for all estates. If any interested parties dispute the accuracy of the inventory (because they believe items are missing or improperly valued), the Commission suggested, they should be permitted to challenge it by bringing a contested application. There was no disagreement among the commentators with this suggestion.

Consistent with its earlier recommendation for a uniform procedure for the resolution of disputes,[89] the Commission recommends that if an interested party disputes the accuracy of an inventory, they may bring the matter before the registrar of probate, if all interested parties agree. If the interested parties do not agree to have the registrar hear the matter, or if an interested party disputes the registrar's decision, then the matter could be heard by the court.

Another issue in the Discussion Paper involved the time period within which the inventory should be filed. Most other provinces require that an inventory be filed at the time of applying for the grant or at some time prior to the grant being issued.[90] In Nova Scotia, an inventory must be filed within three months of the grant. This may be preferred because all assets in the estate are not usually known until some time after the estate is opened. On the other hand, this delay further increases the time it takes to process an estate. In the Discussion Paper, the Commission invited comment on three possible options for filing the inventory:

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[88] Because probate fees are determined by dollar ranges, slight differences in value will not necessarily mean an adjustment in fees.

[89] See Section IV.1, above.

[90] Including Alberta, British Columbia, New Brunswick, Newfoundland, Prince Edward Island, and Saskatchewan.

1. File the inventory at the time of applying for the grant, in order to shorten the total time required to process an estate.

2. File the inventory after the grant is issued, but in some time period less than three months, with a right to apply to extend that time period.

3. File the inventory within three months of the date of the grant, as is currently required.

The majority of commentators on the Discussion Paper were in favour of retaining the current practice of having to file an inventory within three months of the date of the grant. The Commission recommends the current requirement to file an inventory within three months of the date of grant should be continued.

Currently, the inventory filed in Nova Scotia does not include debts of the estate. Therefore, the inventory does not indicate the "net" value of the estate (assets less liabilities) and is not a true indication of estate value. Following the practice in Alberta, [91] the Commission in its Discussion Paper therefore suggested that the inventory include property, encumbrances, and debts and be renamed "inventory of property and debts". There was general agreement with this suggestion among the commentators. The Commission recommends that the inventory should represent an estate's net value, including property, encumbrances, and debts and should be renamed "inventory of property and debts".

The Commission recommends that:

- If an interested party disputes the accuracy of the inventory, they may bring the matter before the registrar of probate, if all interested parties agree. If the interested parties do not agree to have the matter heard by the registrar, or if an interested party disputes the registrar's decision, then the matter could be heard by the court.
- The current requirement to file an inventory within three months of the date of grant should be continued.
- The inventory should represent an estate's net value, including property, encumbrances, and debts and should be renamed "inventory of property and debts".

(b) Should the appraisal requirements be maintained?

[91] *Alberta Surrogate Rules*, note 58, above, form NC 7. In Alberta, the net value of the estate is used to calculate the court (i.e., probate) fees: *Alberta Surrogate Rules*, note 58, above, sch. 2. In Nova Scotia, probate fees are calculated using the net value of real property, but using the total value of personal property: *Probate Act*, note 1, above, s. 130(2). Probate fees are discussed in Section IV.18(a), below.

On granting probate or administration, the court appoints two or more "disinterested persons" to act as appraisers to estimate and appraise the property in the estate. The appraisers must complete a "warrant of appraisement".[92]

Nova Scotia is the only province that requires an appraisal to be filed. Some people argue that appraisals are of little value because they are not prepared by professional appraisers and do not contain accurate assessments of property value. Other people believe there may be some merit in having the right to require an appraisal if those interested in the estate feel it is necessary. This may occur, for example, if they believe the assets have been overvalued in order to increase the amount of the commission to be paid to the executor or administrator (because it is based on the value of the estate), or undervalued to minimize the probate fees to be paid to the Probate Court.

In the Discussion Paper, the Commission suggested that appraisals no longer be mandatory, but that interested parties could request an appraisal be filed. If the executor or administrator does not believe an appraisal is necessary, and the interested parties insist it be provided, the matter could be heard by the court. Requiring interested parties to apply to the court, the Commission suggested, should minimize the number of frivolous applications that might be made. The Commission also suggested registrars of probate should have the discretion to require an appraisal if the circumstances warrant.

Most people who commented on this issue in the Discussion Paper agreed that though appraisals should not be mandatory, they should be available at the request of an interested party. A majority of commentators were not in favour, however, of providing registrars with the ability to require a formal appraisal.

Having taken into account the comments received and upon further consideration, the Commission recommends that appraisals not be mandatory, but available at the request of an interested party. The Commission also recommends registrars should not on their own initiative be able to require that an appraisal be filed. Rather, if an executor or administrator does not consent to provide an appraisal, the matter could be heard by the registrar of probate, if the interested parties agree. If the interested parties do not agree to have the matter heard by the registrar, or if an interested party disputes the registrar's decision, then the matter could be heard by the court. In this way, though registrars would not be entitled on their own initiative to order appraisals, they would still retain a role in the appraisal process.

[92] *Probate Act,* note 1, above, s. 42 & sch., form Q.

The Commission recommends that:

- Appraisals should not be mandatory, but available at the request of an interested party.
- Registrars should not on their own initiative be able to require that an appraisal be filed.
- If an executor or administrator does not consent to provide an appraisal, the matter could be heard by the registrar of probate, if the interested parties agree. If the interested parties do not agree to have the matter heard by the registrar, or if an interested party disputes the registrar's decision, then the matter could be heard by the court.

7. Foreign grants[93]

(a) Should the procedure for resealing and ancillary grants be the same?

Sometimes an estate is opened in another province, territory or country, but the deceased also owned property in Nova Scotia. In such cases, there must be a Nova Scotia executor or administrator to deal with the Nova Scotia property. The executor or administrator can then apply in Nova Scotia for:

(1) resealing - if the estate was originally opened in the "United Kingdom, or in any British province, territory or possession";[94] or

(2) foreign or ancillary probate or administration - if the estate was originally opened

[93] This section deals with the situation that arises when a grant is issued by another province, territory or country, but the deceased also had property in Nova Scotia. It does not deal with "international wills". International wills are used when a person owns assets in a number of countries and wishes to have one will to deal with all these assets. Disputes may arise, however, regarding the law that applies in interpreting the will (known as a "conflict of laws" issue). For details on how this problem is dealt with, see note 112 of the Discussion Paper.

[94] *Probate Act,* note 1, above, s. 34.

anywhere not listed in (1) above [95] (hereinafter referred to as "ancillary probate or administration").

The procedural requirements for ancillary probate or administration are much more complex than for resealing. Resealing simply requires that a copy of the grant issued by the other court (i.e., the court outside Nova Scotia) be filed with the Probate Court in Nova Scotia. The Nova Scotia court then places its "seal" (hence the name, resealing) on the grant and treats it as if it had been granted by a Nova Scotia court.[96] For ancillary probate or administration, the *Probate Act* states that the executor or administrator must have the matter formally heard by the court and the time and place of the hearing must be advertised in the *Royal Gazette*.

In practice, however, resealing and ancillary probate or administration are handled the same way in Nova Scotia. Despite the requirements set out in the *Probate Act*, neither a formal hearing nor advertising occurs for ancillary probate or administration. Instead, documents are filed with the court, as they are for resealing. The rules relating to the original granting of probate or administration in Nova Scotia apply, except that the foreign administrator has priority to be appointed over those otherwise entitled to act as administrator. The Discussion Paper, suggesting that the distinction between resealing and ancillary grants is unwarranted, proposed that all grants outside Nova Scotia be referred to as "foreign grants", and that the procedure for processing such grants be the same, to reflect actual practice.

The majority of comments received by the Commission on this issue were in agreement. Some commentators, however, disagreed with the use of the word "foreign" to describe these grants. In many cases, with grants being involved from other parts of Canada, "foreign grants" would not be an accurate term. The Commission agrees that a more appropriate term, one which does not involve inaccuracy, is "extra-provincial grants". The Commission recommends that the distinction between resealing and ancillary grants should be eliminated to reflect current practice, and the procedure for processing such grants should be the same. The Commission also recommends that all grants outside Nova Scotia should be called "extra-provincial grants".

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[95] *Probate Act,* note 1, above, s. 35. The headings used in the sections of the *Probate Act* do not accurately reflect the language used in Nova Scotia to describe these two procedures. Section 34 deals with resealing, but the heading for that section is "ancillary probate or letters". Section 35 deals with ancillary probate or administration, but the heading for that section is "foreign probate or letters". The word "ancillary" is, however, used in Nova Scotia to describe the probate or administration set out in s. 35.

[96] If the grant issued by the other court is a grant of administration, the Nova Scotia court must get a bond from the administrator, as is currently required in all administrations in the province. The Nova Scotia court may also require evidence regarding the residency of the deceased (*Probate Act*, note 1, above, s. 34).

The Commission recommends that:

- The distinction between resealing and ancillary grants should be eliminated to reflect current practice, and the procedure for processing such grants should be the same.

- All grants outside Nova Scotia should be called "extra-provincial grants".

(b) Should registrars of probate have the authority to decide whether grants from other jurisdictions will be accepted in Nova Scotia?

While recognizing that the probate procedure in other countries may differ from that of Nova Scotia, the Discussion Paper suggested greater flexibility is needed to accept or reject grants from other jurisdictions. This is especially true for grants from the United States, which are currently excluded from resealing (as not being part of the United Kingdom or any British province, territory or possession). The Discussion Paper suggested that the process would be simplified if registrars had greater discretion to review grants from other jurisdictions and to reject them if they did not meet Nova Scotia requirements. If grants from other jurisdictions are rejected, the executor or administrator would be required to apply for an original grant in Nova Scotia, following the same procedure for processing estates in the province, as if there had been no grant issued by a court outside Nova Scotia. Alternatively, the Commission suggested the executor or administrator could choose to appeal the registrar's decision to a judge. The majority of commentators who addressed this issue were in favour of the Commission's suggestions.

The Commission recommends that registrars of probate should have the authority to decide whether grants from outside the province will be accepted in Nova Scotia. If the grant is rejected, an application could be made for an original grant in Nova Scotia. If interested parties disagree with the registrar's decision, they could appeal it to a judge.

The Commission recommends that:

- Registrars of probate should have the authority to decide whether grants from outside the province will be accepted in Nova Scotia. If the grant is rejected, an application could be made for an original grant in Nova Scotia. If interested parties disagree with the registrar's decision, they could appeal it to a judge.

(c) Should there be a requirement that documents from foreign jurisdictions be translated into English?

Translation of estate documents from foreign jurisdictions is often problematic. Registrars of probate sometimes accept translations without any guarantee that the translations are accurate.

On some occasions, registrars have had difficulty getting the executor or administrator to translate all the necessary documents into English. If registrars are to consider whether grants from other jurisdictions should be accepted in Nova Scotia, they must have the power to require the necessary documents to be translated into English. In Alberta, if a will is written in a language other than English, the will must be translated into English, and an affidavit must be provided by the translator confirming the accuracy of the translation.[97] In the Discussion Paper, the Commission suggested this approach has merit and should be adopted in Nova Scotia. The Commission added that registrars should, however, have the discretion to require all necessary documents, not just the will, to be translated into English.

There was general agreement with the Commission's suggestion among those commentators who expressed an opinion. The Commission recommends that all necessary documents from the extra-provincial jurisdiction, including the will, should be translated into English and certified as a true and accurate English translation. Upon further consideration, the Commission also recommends registrars of probate should have the discretion to request the translation be provided in a language other than English. This would recognize the fact that though English is the *de facto* official language of Nova Scotia, other languages, such as French, are also used by significant numbers of people in the province, particularly in certain areas.

The Commission recommends that:

- All necessary documents from the extra-provincial jurisdiction, including the will, should be translated into English and certified as a true and accurate English translation. Registrars of probate should have the discretion to determine whether a translation into a language other than English might also be provided.

8. Simplified, summary procedure

Should there be a simplified summary procedure for small or uncomplicated estates?

The Minister of Justice and Attorney General, in formally referring probate reform to the Commission, requested that the Commission consider suggestions made by lawyers "for a simplified summary procedure for small or uncomplicated estates".

Over the past 20 years, there have been various suggestions for processing small or uncomplicated estates in Nova Scotia. Many people have suggested there be two different procedures, one for estates which fit certain criteria and therefore can be considered "small" or "uncomplicated", and one for all other estates. Suggestions vary as to the criteria for determining whether an estate is small or uncomplicated. There seems to be agreement that uncomplicated estates are those in which there are no disagreements, and in which all

[97] *Alberta Surrogate Rules*, note 58, above, r. 18 & form NC 10.

beneficiaries and heirs are adults who are mentally competent. While "small" may suggest a particular dollar amount, use of dollar values in legislation is undesirable, as dollar values quickly become out of date, and legislation is not frequently amended.[98] More importantly, dollar values may not accurately indicate whether an estate is simple. A very valuable estate may be quite simple and uncomplicated to administer, while an estate of low value may be complicated and contentious.

Many estates in Nova Scotia do not go through the probate system at all.[99] Comparing the number of deaths with the number of estates opened each year, it appears that only approximately 30% of Nova Scotia estates are formally probated.

Some provinces have legally recognized that many estates do not need to be formally probated. Manitoba, for example, provides for summary administration of small estates. Where the total value of the deceased's property does not exceed $10,000, the property may be distributed without obtaining a grant of probate or administration. Instead, the court may order that the personal property be used to pay funeral expenses and debts of the deceased and that the balance, if any, be paid to beneficiaries or heirs. The court may also order that the real property be vested (i.e., that possession be provided) in a particular person and that the proceeds be used to pay funeral expenses and debts of the deceased, with any balance going to beneficiaries or heirs. Certain sections of the legislation, such as those dealing with the grant, inventories and bonds of administration, do not apply to small estates.[100]

The Discussion Paper invited comment on whether probate legislation should authorize certain estates to be informally probated, that is, without the need to obtain a grant of probate or administration. The Commission also invited comment on how such estates should be defined.

The majority of comments received on this issue were not in favour of informally probating estates, in particular because of additional complications this might raise. Some commentators thought the possibility of informally probating estates, in addition to contentious and non-contentious estates, would result in the creation of a third type of estate. It was suggested this would make the probate system too complex. Certain commentators also called into question the usefulness of such a change. One commentator, for instance, suggested people would still not go through probate if a probate fee was involved. Moreover, some commentators pointed out that even under the current system, it may be possible to deal with assets without a grant of probate, in the case of certain small or uncomplicated estates.

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[98] Some provisions of the *Probate Act*, note 1, above, illustrate the difficulty with including dollar amounts in legislation. Section 43(1), for example, requires that an executor or administrator advertise an estate for one month if it is valued at less than $800, and for six months in all other cases. Clearly, there are very few estates in 1998 that would be valued at less than $800.

[99] See Section III.3, above.

[100] *The Court of Queen's Bench Surrogate Practice,* C.C.S.M. c. C290, s. 47.

Having reviewed the comments received and further considered the issue, the Commission recommends there should be no formalized, separate process for small or uncomplicated estates. Rather, an estate would either proceed through the probate system, as a contentious or non-contentious estate, or it would be entirely outside the probate system. The Commission agrees that it would be inadvisable to create what would be in effect a third category of estate, in addition to the contentious and non-contentious types.

The Commission recommends that:

- There should be no formalized process for small or uncomplicated estates. Rather, an estate would either proceed through the probate system, as a contentious or non-contentious estate, or it would be entirely outside the probate system.

EXECUTORS/ADMINISTRATORS

9. Renunciations

Should renunciations by executors be allowed?

An executor named in a will is under no obligation to take on the duties of executor. The executor may "renounce" or refuse to act as executor by filing a form with the court, called a "renunciation of probate".[101] By filing this form, the executor is no longer obliged to administer the estate. If no other executor is named in the will, an administrator must be appointed and the estate is handled as an "administration with will annexed". The administrator must administer the estate in accordance with the provisions of the will, even though they were not named in the will.

If an executor has not already started to act as executor, it appears to be accepted that they should not be forced to act. Forcing an unwanted duty on an executor would likely only ensure the job is not done properly.

There is a perception among some people that professional executors, if they believe the estate is not financially attractive or is too problematic, may renounce their executorship. If no other executor is named, this may cause hardship to beneficiaries, as an administrator would have to be appointed, and a bond purchased at the expense of the estate. This would reduce the value of the estate and the amount available for distribution to beneficiaries and creditors. As well, the

[101] *Probate Act*, note 1, above, sch., form I.

testator may have wanted the professional executor to act because of their expertise.

There may not, however, necessarily be bad faith on the part of professional executors wishing to renounce. A testator may, shortly before death, transfer all assets so they are jointly held with another person. These assets would then no longer part of the estate, which would significantly reduce the value of the estate to be administered and the compensation to be paid to the executor. In these circumstances, some people believe the professional executor should be able to renounce. A professional executor may also wish to renounce for other reasons. For example, property in an estate may contain hazardous or toxic waste. If a trust company acts as executor, it may become legally responsible for cleaning up this waste (known as "environmental liability").

Some people believe that individual executors should be treated differently than professional executors.[102] Individual executors may not have agreed to act and may not have been aware they were named as executor in a will. As well, individuals may wish to renounce for reasons unrelated to finances, such as age or illness.

In the Discussion Paper, the Commission did not make a recommendation on the issue of renunciations, but did invite comment on whether:

- renunciations should continue to be available;
- renunciations should continue to be available but with restrictions;
- any distinction should be made between the right of individual and corporate executors to renounce;
- an executor who renounces should be liable to the estate for any costs incurred as a result of the renunciation (e.g., the cost of a bond).

The majority of commentators who addressed this issue agreed there should be no distinction made between the right to renounce of individual and corporate executors. Some commentators pointed out the possibility that an executor, regardless of whether they are individuals or corporations, may not have agreed to assume the role of executor, or that circumstances may have changed greatly from the time the will was written until the date of death, thereby making it difficult to perform the executor's job in a satisfactory manner. A number of other commentators stated, however, it should generally be more difficult for a corporate executor to renounce, as for example, where a corporate executor had agreed to act, or had led the testator to believe they would act. Having considered all the comments received, the Commission recommends that renunciations should continue to be available for all executors, without any

[102] In the Commission's survey of registrars of probate, all registrars expressed the view that renunciations should continue to be available to executors. When asked if there should be any distinction between individual and corporate executors, three out of 10 registrars replied that there should be.

distinction being made between the right to renounce of individual and corporate executors.

The Discussion Paper also suggested it should be more difficult for an executor to renounce once they have assumed their duties. The Commission suggested that such an executor be required to apply to the registrar of probate for permission to renounce. If the executor was dissatisfied with the registrar's decision, they could appeal the decision to a judge.

One commentator stated that once an executor has assumed their duties, it is strictly no longer possible to renounce. Rather, an executor who has begun to act and wishes to terminate this role would have to do so by resigning,[103] which is also known as retiring.[104] The Commission agrees with this distinction in terminology.

It was also suggested by one commentator that once an executor has begun to act, they may be governed by the *Trustee Act*.[105]

Section 2(r) of the Nova Scotia *Trustee Act* provides that the definition of "trustee" includes "duties incident to the office of personal representative of a deceased person". The *Act* therefore seems to apply to executors.

Section 17 of the *Trustee Act* concerns the retirement of a trustee where there are more than two trustees. If one of them expresses a wish in writing to be discharged from the trust, and if the co-trustees as well as any person empowered to appoint trustees so agree and also consent to the trust property vesting in the remaining co-trustees alone, then the trustee seeking discharge shall be deemed to have retired from the trust. Retirement of a trustee in this situation must also not be contrary to the terms of the "trust instrument". Although not explicitly stated in the *Act*, an instrument appears to include a will whereby an executor was appointed. This seems to differ from the situation in Ontario, for instance, where there is no provision for the retirement of an estate trustee other than by way of court order.[106]

There do not appear to be any case decisions which interpret the meanings of the *Trustee Act* sections discussed above. In the Commission's opinion, the *Trustee Act* does govern executors. Not only to comply with the *Trustee Act*, but in all cases involving executors, where executors have commenced to fulfill their duties, but wish to resign or retire, the Commission recommends that they should have to abide first by the will. If the will disallows resignation or retirement, or if agreement could not otherwise be reached, then executors should be required to apply to the

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[103] D.W.M. Waters, *Law of Trusts in Canada* (Toronto: Carswell, 1974) at 580.

[104] R.S. Vasan, ed., *The Canadian Law Dictionary* (Toronto: Law and Business Publications, 1980) at 329, 331.

[105] R.S.N.S. 1989, c. 479.

[106] J. Frankovic *et al.*, eds., *Canadian Estate Administration Guide*, vol. 1 (North York, Ont.: CCH Canadian, 1997) at 17,027.

registrar of probate for the ability to resign or retire. If there is disagreement with the registrar's decision, it could be appealed to the court.

The Commission recommends that:

- Renunciation should continue to be available for all executors, without any distinction being made between the right to renounce of individual and corporate executors.

- Not only to comply with the *Trustee Act*, but in all cases involving executors, where executors have commenced to fulfill their duties, but wish to resign or retire, they should have to abide first by the will. If the will disallows resignation or retirement, or if agreement could not otherwise be reached, then executors should be required to apply to the registrar of probate for the ability to resign or retire. If there is disagreement with the registrar's decision, it could be appealed to the court.

10. Removal of executors and administrators

Should registrars of probate have the ability to remove and replace executors or administrators?

Once an executor or administrator has assumed their duties, they can be removed in certain circumstances, but only upon application to the court.[107] For example, if an executor is not properly managing estate assets and is allowing them to "waste" (i.e., deteriorate or lose value) an application can be made to require them to post security for the protection of the estate. If the executor or administrator fails to do this or neglects to administer the estate, an application may be made to the court, and the executor or administrator can be removed and replaced. Such an application must be heard by a judge, unless the parties consent, in writing, to having it heard by a registrar.[108]

The current procedure does not give registrars of probate any discretion to remove executors or administrators without the written consent of the parties. There may be straightforward cases, such as illness, where all interested parties agree to the removal and replacement of the executor or administrator. In the Discussion Paper, the Commission suggested that in such cases, the registrar of probate should have the discretion to act without the need for written consent or for the parties to appear before a judge. If, however, the issues were complex, the Commission suggested, the matter could be heard by a judge.

Although few comments were received on this issue, the majority of commentators who expressed an opinion were in favour of the Commission's suggestions. The Commission

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[107] *Probate Act*, note 1, above, ss. 31 - 33.

[108] *Probate Act*, note 1, above, ss. 153(1)(a), 153(4).

recommends that registrars of probate should have the discretion to remove executors or administrators. If the registrar considers the issues to be unduly complex, the matter could be heard by a judge.

One commentator, who agreed with the proposed discretion of registrars to remove executors or administrators, added that an executor or administrator removed by a registrar should be released from any liability relating to the balance of the estate administration. The Commission agrees with the fairness of this suggestion. Although an executor or administrator should be answerable for decisions made during the course of their estate administration, it would not be fair to make them liable for the consequences of decisions made after their removal and over which they had no control. Accordingly, the Commission recommends that an executor of administrator removed by a registrar should be released from any liability relating to the balance of the estate administration.

The Commission recommends that:

- Registrars of probate should have the discretion to remove executors or administrators. If the registrar considers the issues to be unduly complex, the matter could be heard by a judge. An executor or administrator removed by a registrar should be released from any liability relating to the balance of the estate administration.

11. Appointment as administrator

As discussed above, it is necessary to appoint an administrator when a person dies:

(1) without a valid will;
(2) with a valid will which does not name an executor; or
(3) with a valid will and a named executor who is unable or unwilling to act.

The following are entitled to be appointed administrator in order of priority, as follows:[109]

(1) the surviving spouse or next of kin, if resident in Nova Scotia;
(2) the Public Trustee;
(3) creditors or persons having a cause of action (i.e., a legal claim) against the estate;
(4) a trust company, if those above consent in writing.

(a) Should the surviving spouse have priority to be appointed as administrator over the next of kin?

[109] *Probate Act*, note 1, above, s. 21.

This first category, the surviving spouse or next of kin, is somewhat confusing. It appears the intent is to give the first opportunity to administer the estate to those with the closest relationship to the deceased. It is unclear, however, whether the surviving spouse has first priority, followed by the next of kin, or whether the surviving spouse and next of kin have equal priority. In the Discussion Paper, the Commission suggested the first category be clarified, to indicate the spouse is entitled to be first appointed as administrator, followed by the next of kin.[110]

The majority of commentators who provided feedback on the Commission's suggestion were in agreement. The Commission affirms it would be more convenient in most cases to base the first entitlement to estate administration on the closest existing bond to the deceased. The Commission therefore recommends that the surviving spouse should be first entitled to be appointed as administrator and the next of kin should be second entitled.

The Commission recommends that:

- The surviving spouse should be first entitled to be appointed as administrator and the next of kin should be second entitled.

(b) Should non-residents of Nova Scotia be entitled to be appointed administrators?

If the surviving spouse or next of kin wish to act as administrator, they must be residents of Nova Scotia. While residency in Nova Scotia is not stated to be a requirement for the other categories of administrators, non-residents are not generally appointed as administrators. This is largely due to the belief that their activities cannot be controlled because they are outside Nova Scotia.

Some people believe it is unfair to prevent the spouse or next of kin from acting as administrator simply because they are non-residents of Nova Scotia. In some cases, they may be the best person to administer the estate. One solution is to give first entitlement to act as administrator to those who inherit from the estate, regardless of residency. Advocates of this position believe a non-resident spouse or next of kin should have priority over the Public Trustee (who is second on the priority list, as outlined above). Others believe that non-resident administrators should only be appointed if all those inheriting from the estate agree. Some believe the residency requirement should be maintained to ensure adequate control over the actions of the administrator.

In the Discussion Paper, the Commission suggested it is no longer appropriate to prevent non-residents of Nova Scotia from acting as administrators. If the primary concern is the inability to exercise control, the Commission suggested, an administrator could be required to post a bond. The bond would therefore be available should the administrator place the estate assets at risk.

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[110] As will be discussed in Section IV.11(c), below, the Commission is also recommending that "spouse" be defined to include common law spouse, whether of the same or opposite sex.

The Commission also suggested, however, that the bonding requirement could be waived, with the consent of all known beneficiaries and heirs, if they are all adults and mentally competent. If there are any children or mentally incompetent people involved, the bonding requirement would not be waived. Among the comments received, there was general agreement with these suggestions of the Commission. The Commission recommends that non-residents of Nova Scotia should be permitted to be appointed as administrators as long as they are bonded. The bonding requirement could be waived with the consent of all known interested parties, if they are adults and mentally competent.

The Commission recommends that:

- Non-residents of Nova Scotia should be permitted to be appointed as administrators as long as they are bonded. The bonding requirement could be waived with the consent of all known interested parties, if they are adults and mentally competent.

(c) Should common law spouses be entitled to be appointed administrators?

Some provinces, such as Manitoba and Newfoundland, give the court discretion to issue grants of probate or administration to a person other than the person ordinarily entitled. In Ontario, married or common law spouses of the opposite sex are first entitled to be granted administration.[111] In Alberta, "a person who has an interest in the estate because of a relationship with the deceased"[112] is ninth in a list of eleven applicants entitled to administration.

In 1995, the Nova Scotia Court of Appeal interpreted "spouse" in the *Probate Act* as including only those persons who are legally married.[113] As a result, a common law spouse is not entitled to administer the deceased's estate even if that individual was most closely associated with the deceased. This is consistent with the exclusion of common law spouses in the *Intestate Succession Act* and the *Matrimonial Property Act* (and the likely exclusion of common law spouses in the *Testators' Family Maintenance Act*). In the Discussion Paper, the Commission respectfully did not agree with this approach.[114]

The Commission proposed instead that common law spouses, whether of the same or opposite sex, be entitled to appointment as administrator. The Discussion Paper suggested this is

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[111] *Estates Act*, R.S.O. 1990, c. E.21, s. 29.

[112] *Alberta Surrogate Rules*, note 58, above, r. 11(2)(i).

[113] *Forgeron* v. *Rideout* (1995), 140 N.S.R. (2d) 241 (C.A.).

[114] Some legislation in Nova Scotia provides for support obligations and pension division in cohabitating relationships. See *e.g. Family Maintenance Act*, R.S.N.S. 1989, c. 160, s. 2(m); *Pension Benefits Act*, R.S.N.S. 1989, c. 340, s. 2(aj).

consistent with the intent of the first category of entitlement, that is, to allow those with the closest relationship to the deceased to have the first opportunity to administer the estate. Some people believe common law spouses should not be entitled to administer an estate if they are not entitled to inherit under the *Intestate Succession Act*. The Commission also proposed in the Discussion Paper that the *Intestate Succession Act* be amended to include common law spouses as heirs, whether of the same or opposite sex.

The Commission suggested that spouse be defined in probate legislation as:

> *a person of the same or opposite sex with whom the person has lived for at least one year and with whom the person has a close personal relationship that is of primary importance to both of them*.[115]

The Discussion Paper noted that where common law spouses are entitled to be appointed administrator, situations may arise where there are two spouses. There may, for example, be a spouse to whom the deceased was legally married, as well as a common law spouse. The Discussion Paper stated that if there were multiple spouses and a dispute over entitlement to administration, the parties would be entitled to bring a contested application. In some provinces, if more than one person applies to be administrator, and they are equal in degree of kindred to the deceased, such as two daughters, the court determines who is best fit to be administrator.[116]

The Commission also proposed that "spouse" include common law spouse, whether of the same or opposite sex, not only in this particular area, but throughout any probate legislation. This would best be accomplished, it was suggested, by including it in the definition section of any new legislation.

The Commission received a number of detailed comments on this issue. The majority of commentators agreed in general with the merits of extending to common law spouses the right to be appointed as an administrator. Nonetheless, there was concern among some commentators that delays associated with implementing the suggestions in that section of the Discussion Paper might prevent other planned probate reforms from being effected. In particular, some commentators considered the Commission's proposed definition of spouse to be too broad or uncertain. Certain commentators also suggested, in the interest of legislative consistency, it would be preferable for a comprehensive review of all provincial legislation which contains a definition of "spouse" to be undertaken before the Commission's proposed definition was adopted. It was suggested, for instance, that to alter only the definition of "spouse" in probate

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[115] This is the definition of "partner" proposed by the Commission in its draft *Advance Health Care Directives Act*: *Reform of the Laws Dealing with Adult Guardianship and Personal Health Care Decisions* (Final Report) (Halifax: Law Reform Commission of Nova Scotia, November 1995) at 82.

[116] See *e.g. Estates Act,* R.S.O. 1990, c. E.21, s. 29(1)*; Probate Act*, R.S.P.E.I. 1988, c. P-21, s. 46(1).

legislation, without reference to other statutes, could lead to more than one legally recognized spouse at the time of death.

Some commentators also suggested this issue should be addressed independently of reforms to the *Probate Act*. One suggested option was to define eligibility for appointment as an administrator under the *Probate Act* by reference to entitlement under an amended *Intestate Succession Act*, which would include common law spouses. Another suggested option was to amend the *Intestate Succession Act* and the *Testators' Family Maintenance Act*, to make common law spouses eligible for appointment unless the parties had waived the right by contract.

After taking into account the comments received on this issue, the Commission affirms that "spouse" should be defined in probate legislation to include common law spouses, whether of the same or opposite sex. The Commission also recommends that the *Intestate Succession Act* should be amended to include common law spouses, whether of the same or opposite sex, in the scheme of distribution. Furthermore, the Commission recommends that common law spouses should be entitled to appointment as administrator. The Commission adds that should the Nova Scotia Government not consider these recommendations to be feasible, this should not prevent the rest of the Final Report's proposed probate reforms from being implemented. The Commission also recognizes that changing the definition of "spouse" in probate legislation would require amending other statutes in the interest of legislative consistency. It is more properly the role of the Legislative Counsel Office to identify these statutes and to draft the appropriate amendments.[117]

The Commission recommends that:

- "Spouse" should be defined in probate legislation to include common law spouses, whether of the same or opposite sex.
- The *Intestate Succession Act* should be amended to include common law spouses, whether of the same or opposite sex, in the scheme of distribution.
- Common law spouses should be entitled to appointment as administrator.

(d) How should next of kin be defined?

"Next of kin" is not defined in the *Probate Act*. It is questionable whether the courts would interpret next of kin to include children born outside of marriage. It appears there are no

[117] The recommendations being made in relation to this issue are not to be interpreted as suggesting the Commission's endorsement of the concept of same-sex marriages. The legal status of same-sex marriages did not form part of the discussions which led to the writing of the Discussion Paper or the Final Report, nor were comments solicited from the public on this matter.

reported cases in Nova Scotia dealing with this issue. As well, there is inconsistency in how next of kin is interpreted. Under a narrow interpretation of next of kin, if the spouse and children do not act, the Public Trustee may be next entitled under the current priority scheme. If other family members (such as brothers or sisters) wish to act, a renunciation may have to be sought from the Public Trustee. Family members may not understand why the Public Trustee is entitled to administration in priority to family members. Many Canadian provinces have provisions quite similar to those of Nova Scotia. They give priority to the spouse and/or next of kin, but provide no definition of these terms. It is helpful to make reference to the definition of next of kin contained in section 23(2) of the Nova Scotia *Public Trustee Act*:[118]

> *(a) the spouse and children of the deceased person; or*
>
> *(b) where there is no spouse or child, the persons who are entitled under the* Intestate Succession Act *to the estate of the deceased person*.[119]

In the Discussion Paper, the Commission proposed this definition be incorporated into the *Probate Act,* as it would give those with the greatest interest in the estate (i.e., those entitled to inherit), the right to administer the estate. This would ensure those inheriting are given priority over all others, including the Public Trustee, creditors, and those having a cause of action (i.e., a legal claim) against the estate.

The Commission recognized in the Discussion Paper there may be multiple people entitled to administration within each category of entitlement.[120] This already occurs, for example, when there are numerous children who are considered to be the next of kin. After the spouse, these children would all have equal entitlement to be appointed. The same issue would arise if siblings, nephews and nieces, etc. are entitled to administration. The Discussion Paper suggested that if the parties cannot agree on who should be administrator, they may bring a contested application.

There was general agreement among the comments received on this issue. The Commission recommends that the definition of "next of kin" in section 23(2) of the *Public Trustee Act* should be included in probate legislation. Upon further consideration, the Commission also recommends, consistent with an earlier recommendation in this Final Report concerning registrars, that if a disagreement arises among individuals with equal entitlement to appointment,

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[118] R.S.N.S. 1989, c. 379.

[119] The *Intestate Succession Act*, note 20, above, lists the following in order of priority as entitled to the deceased's estate: spouse, children, parents, siblings, nephews and nieces and other next of kin.

[120] As noted in Section IV.11(c), above, there can also be multiple spouses if common law spouses are recognized as entitled to administration.

the matter could be heard by the registrar of probate, if all interested parties agree. If the interested parties do not agree to have the matter heard by the registrar, or if an interested party disputes the registrar's decision, then the matter would be brought before the court.

The Commission recommends that:

- The definition of "next of kin" in section 23(2) of the *Public Trustee Act* should be included in probate legislation.
- If there are individuals within a category with equal entitlement to appointment as administrator and no agreement on who will be appointed, the matter could be heard by the registrar of probate, if all interested parties agree. If the interested parties do not agree to have the matter heard by the registrar, or if an interested party disputes the registrar's decision, then the matter could be brought before the court.

(e) How does the Public Trustee Act *affect who can be appointed as administrator?*

The *Public Trustee Act* indicates that the Public Trustee can be appointed as administrator in some circumstances.[121] These provisions are exceptions to the priority scheme set out in the *Probate Act*. The *Probate Act,* does not, however, refer to these exceptions. For example, if the Public Trustee is acting as guardian of a person's estate and the person dies, the Public Trustee can be appointed administrator in priority to the next of kin or any other interested person. The Public Trustee would not, of course, take priority over a named executor. Similarly, if the executor has renounced, and the next of kin or adult residuary beneficiary have renounced or live outside Nova Scotia, the Public Trustee is entitled to administration in priority to all other persons. Finally, the Public Trustee can apply for administration in priority to the next of kin or any interested person if the Public Trustee is administering the estate of one who is (1) a beneficiary or heir of an estate for whom there is no executor or administrator or is (2) the executor or administrator of an estate.

In the Discussion Paper, the Commission proposed that the sections regarding entitlement to be appointed as administrator in the *Public Trustee Act* be cross-referenced in probate legislation. Since section numbers of the *Public Trustee Act* may change, it would not be wise to refer to specific section numbers. The Commission therefore proposed that the relevant sections in probate legislation be "subject to the provisions of the *Public Trustee Act*".

There was some agreement with this suggestion among the commentators. Other commentators, though not disagreeing with the suggestion generally, suggested that the Public Trustee's ability to be appointed administrator should not be placed ahead of the right to administration of certain groups. For example, some commentators suggested an adult residuary beneficiary should be

[121] Note 118, above, ss. 15, 23, 24.

given priority to administration over the Public Trustee. Similarly, some commentators stated that as is the case in Ontario, heirs and beneficiaries who are unable or unwilling to act as administrators should be able to appoint their own nominee.[122]

Upon review of the comments received and upon further consideration, the Commission recommends that entitlement to appointment as administrator in probate legislation should be made subject to the provisions of the *Public Trustee Act*. The Commission also recommends that the priority scheme for administration in the *Probate Act* should be amended to allow interested parties, who are unable or unwilling to act as administrators, to appoint their own nominee, in priority to the Public Trustee.

The Commission recommends that:

- The section regarding entitlement to appointment as administrator in the *Probate Act* should explicitly be made subject to the provisions of the *Public Trustee Act*.
- The priority scheme for administration in the *Probate Act* should be amended to allow interested parties, who are unable or unwilling to act as administrators, to appoint their own nominee, in priority to the Public Trustee.

12. Bonds

Should bonds be required by administrators and non-resident executors?

A bond is a written document in which a party agrees to pay money should certain obligations not be fulfilled. In estate matters, a bond may have to be paid out, for example, if an administrator acts inappropriately in handling an estate. There are currently two types of bonds in Nova Scotia:

(1) a personal bond, where two individuals, known as "guarantors" or "sureties", sign a document promising to pay should the administrator act inappropriately; and

(2) a guaranteed bond from an insurance or surety company - for a fee the company promises to pay should the administrator act inappropriately.

In Nova Scotia, all administrators are required to file bonds, even if the administrator is the spouse or next of kin of the deceased. This is primarily because an administrator, unlike an executor, was not selected by the deceased. If an administrator does not properly carry out their duties and causes the estate to lose money, the party giving the bond may be required to pay out

[122] *Estates Act*, note 116, above, s. 29. This section also allows an Ontario court to exercise its discretion in making a decision about selection of an administrator.

the value of the bond. A bond therefore exists to protect those who may suffer financially as a result of an administrator's improper actions. This can include interested parties and creditors.

One issue is the burden placed upon the estate by having to incur the cost of a bond. Statistics in Nova Scotia show that the average value of testate estates (which usually have an executor and do not require a bond) is at least double the size of intestate estates.[123] As a result, the additional cost of bonding may be a burden for estates which are already low in value.

An issue which arises is whether interested parties should have the power to waive the bonding requirement. If interested parties were given this power, creditors may complain about having lost the protection of the bond without any participation in the decision. The issue is essentially one of balancing. While bonding may be important for interested parties, is it really important for creditors? If yes, bonding should also be required for executors because creditors exist in relation to both testate and intestate estates.

Most other provinces have more relaxed bonding requirements than Nova Scotia. For example, many provinces have a general requirement that an administrator post a bond, but they give the court discretion to dispense with it in situations where there are no debts; the estate is of a small value; the administrator is the beneficiary; or all beneficiaries consent in writing.[124] In the Discussion Paper, the Commission suggested that interested parties should have the right to apply to the court to waive the bonding requirement, but only with the consent of all known beneficiaries and heirs who are adults and mentally competent.

Executors in Nova Scotia are not required to file bonds even though they perform essentially the same duties as administrators. The main reason given for not requiring bonding of executors is that they were selected by the deceased and are therefore considered more reliable or trustworthy. A bond is not required even if the executor is a non-resident of the province. Some believe bonding should be added as a requirement for non-resident executors because of an inability to exercise control over them. In the Discussion Paper, the Commission did not, however, favour bonding for non-resident executors. Such a requirement, it was suggested, would only further add to the cost of probating estates, and it did not appear that this is a significant problem requiring reform.

The majority of comments received were in agreement with the Commission's suggestions. The Commission recommends that with respect to bonding, all administrators be treated equally, and therefore that bonding should be required for all administrators. This would represent a change in the law for out-of-province administrators, who are currently not able to be appointed. The

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[123] Statistics obtained from the Department of Justice (Financial and Statistical Services) for April 1, 1997 to March 31, 1998 show that the average value of grants of probate was $146,029 while the average value of grants of administration was $73,160.

[124] See *e.g.* Newfoundland Rules of the Supreme Court, 1986, r. 56.22; *Probate Act*, R.S.P.E.I. 1988, c. P-21, s. 46(5); *Estate Administration Act*, R.S.B.C. 1996, c. 122, s. 17; *Estates Act*, note 116, above, s. 37(2).

bonding requirement could be waived with the consent of all known interested parties if they are adults and mentally competent. The agreement to waive would have to be filed at the relevant probate registry.

The Commission also recommends that an application to have an administrator's bond waived could be heard by the registrar of probate, if the interested parties agree. If the interested parties do not agree to have the matter heard by the registrar, or if an interested party disputes the registrar's decision, then the matter would be heard by the court. Further, the Commission recommends that bonding should not be required for non-resident executors.

The Commission recommends that:

- Bonding should be required for all administrators with the right of interested parties to apply to the court to waive the requirement. This would represent a change in the law for out-of-province administrators, who are currently not able to be appointed. The bonding requirement could be waived with the consent of all known interested parties if they are adults and mentally competent. The agreement would have to be filed at the relevant probate registry.
- An application to have an administrator's bond waived could be heard by the registrar of probate, if the interested parties agree. If the interested parties do not agree to have the matter heard by the registrar, or if an interested party disputes the registrar's decision, then the matter would be heard by the court.
- Bonding should not be required for non-resident executors.

13. Vesting of property

Should real and personal property vest in executors and administrators?[125]

Real property includes land and any permanent buildings on the land. Personal property includes all other property. For example, personal property includes cars, furniture, jewellery, money and stocks and bonds. When a person dies, the common law treats real property and personal property quite differently.

At common law, personal property vests in the executor or administrator. This means that the executor or administrator receives possession of the property, in order to deal with it for the benefit of the estate. If the deceased left a will, the personal property vests in the executor at the date of the testator's death. The executor gets title from the will, and the grant of probate is not

[125] For an excellent discussion of this topic, see Ontario Law Reform Commission, *Report on Administration of Estates of Deceased Persons* (Toronto: Ontario Law Reform Commission, 1991) [hereinafter *Ontario Law Reform Commission Report*].

required to give the executor title to the personal property. If the deceased did not leave a will, personal property still vests in the administrator, but there is a problem in that the administrator does not get authority to act until appointed by the grant of administration. Obviously, the grant of administration is not obtained until after death. As a result, there is a gap between the date of death and the appointment of the administrator. The question arises as to who has title to the personal property during this period. There are two legal methods that may be used to fill this gap. By the first method, the personal property may be said to vest in the judge of the Probate Court or in some other government official and pass to the administrator when the grant is issued. British Columbia has specifically stated this in its legislation, in relation to personal property.[126] The second method, the "doctrine of relation back", may be used to state that once the administrator is appointed, their title in the property is deemed to relate back to the date of death. For example, if the administrator disposed of property before the grant of administration was issued, the doctrine of relation back can be used to confirm the disposition of the personal property as valid, if it was done for the benefit of the estate.[127] British Columbia appears to be the only province to have specifically inserted the doctrine of relation back in its legislation.[128]

The common law treats real property differently. If the deceased left a will, the real property passes according to the direction contained in the will. The will may direct that real property is to go to the beneficiaries or to the executor. If it is to go to the executor, the executor can deal with the property, as necessary, in carrying out their duties. If the property must be sold to pay estate debts the executor can sell it if permitted to do so by the will; otherwise, the executor may be required to get a "license to sell" from the court. If the deceased did not leave a will, the real property passes immediately to the heirs, as determined by the *Intestate Succession Act*. The real property vests in the heirs until an administrator is appointed. As a result, the heirs have the right to deal with the property, including the right to sell it. If the administrator later finds that real property must be sold to pay estate debts, problems arise if the heirs have already sold it. As well, real property must be maintained. If the real property passes to the heirs, it may be difficult to determine who has responsibility for maintaining the property and paying any associated expenses.

The common law problem of real property vesting in the heirs on intestacy has been corrected in many provinces. In some provinces, there is legislation which states that real property vests in the personal representative as a trustee for those beneficially entitled to the property. Real property therefore vests in the executor or administrator, in the same way that personal property

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[126] *Estate Administration Act*, R.S.B.C. 1996, c. 122, s. 3. A.H. Oosterhoff & W.B. Rayner, eds., *Anger and Honsberger: Law of Real Property*, vol. 2, 2d ed. (Aurora, Ontario: Canada Law Book, 1985) [hereinafter *Anger and Honsberger*] at 1456.

[127] *Ontario Law Reform Commission Report*, note 125, above, at 235.

[128] *Anger and Honsberger*, note 126, above, at 1458; *Estate Administration Act*, note 126, above, s. 5, which reads: "For the purposes of this Act, an administrator of the estate of a deceased person is deemed to be administrator as if there had been no interval of time between the death of the deceased and the grant of administration". The section does not appear to be limited to personal property.

vests at common law.[129] In some provinces, legislation also deems the personal representative to be an heir of the deceased with respect to real property.[130] As a result, the real property vests immediately in the personal representative. There is no such provision in Nova Scotia. If such a provision is to be introduced, it should also deal with the gap between death and the appointment of the administrator. As with personal property, it is possible real property also vests temporarily in the judge of the Probate Court.[131] As noted above, however, the doctrine of relation back can also be used to fill the gap, as has been done in British Columbia.

In the Discussion Paper, the Commission suggested that real and personal property vest in both executors and administrators, in order to simplify the handling of the estate and the ability to deal with estate assets. In particular, it was hoped this would correct many of the problems that now arise on intestacy in relation to real property, and to a lesser extent, personal property. The Commission acknowledged, however, that on intestacy there is a gap between death and the appointment of the administrator that needs to be filled. The Commission therefore suggested vesting be deemed to occur immediately upon death. Such vesting could occur in either of the two ways noted above (by vesting in a court official or by the doctrine of relation back).

The majority of commentators were in favour of the Commission's suggestions. More commentators seemed to prefer the doctrine of relation back to vesting in a court official. One commentator, however, disagreed with vesting in an executor. Rather, the commentator suggested, if a will made a direct devise to a beneficiary, this should be put into effect. The commentator explained this would respect the freedom of testamentary disposition and would be simpler, as it would preclude another deed from having to be drafted. Other commentators thought that vesting in an executor or administrator would require many more estates to be opened in rural areas. Given that land in rural areas often remains in the same family for many years, people do not necessarily bother with probate for transferring real property that forms part of an estate. Having taken into account the comments received, the Commission recommends that real and personal property should vest in both executors and administrators. The Commission recommends that vesting should be deemed to occur immediately upon death, and that on intestacy, the gap between the date of death and the administrator's appointment should be filled by the doctrine of relation back.

Another commentator pointed out that on occasion, in intestacy situations where the estate has not been probated, and where no administrator has been appointed, real property forming part of the estate might be discovered after the passage of some time, such as 12 months from the date of death. Rather than having to open probate and obtain an administrator, the commentator suggested that in such a scenario, the title to the real property be deemed to vest directly in the heirs. The gap in time between the intestate's death and vesting in the heirs would be filled by

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[129] See *e.g.*, *Devolution of Estates Act*, R.S.N.B. 1973, c. D-9, s. 3(1).

[130] See *e.g.*, note 129, above, s. 7.

[131] *Anger and Honsberger*, note 126, above, at 1457.

the doctrine of relation back. This would prevent gaps in the chain of title for the real property. As the value of property in such instances is often negligible, which may have contributed to it having been overlooked, it may not otherwise be considered worthwhile to open probate.

The Commission agrees this suggestion is appropriate to deal with a very particular situation. In the circumstances, there would be little to gain through the trouble and expense of opening probate. It has been suggested that this might be used to prevent creditors from making claims against real property. Creditors, however, would be able to apply for the administration of an estate, if they thought it would be to their advantage. Accordingly, the Commission recommends that in cases of intestacy, where at least 12 months have passed since the date of death, but the estate has not been probated, and no administrator has been appointed, title to any real property forming part of the estate should be deemed to vest directly in the heirs. The gap in time between the intestate's death and vesting in the heirs would be filled by the doctrine of relation back.

The Commission recommends that:

- Real and personal property should vest in both executors and administrators.
- Vesting should be deemed to occur immediately upon death. On intestacy, the gap between the date of death and the appointment of the administrator should be filled by the doctrine of relation back.
- In cases of intestacy, where at least 12 months have passed since the date of death, but the estate has not been probated, and no administrator has been appointed, title to any real property forming part of the estate should be deemed to vest directly in the heirs. The gap in time between the intestate's death and vesting in the heirs would be filled by the doctrine of relation back.

CLAIMS AGAINST ESTATES

14. Advertising

Is the present form of advertising for claims against an estate adequate?

The *Probate Act* requires that advertisements for claims against estates be placed in the *Royal Gazette*.[132] Advertisements must run for one month if the estate value is less than $800 and for six months in all other cases. Creditors have six months from the date of the advertisement to make their claims against the estate. If there is any dispute about the claim (such as the amount or whether the claim is valid), the Probate Court hears the dispute and makes a decision.

[132] The official newspaper published by the Nova Scotia Government.

Most Canadian provinces require advertisements to be placed in newspapers published in the area where the deceased person lived. In Alberta, for example, advertising is not mandatory, but if it is done, the advertisements must be placed in a newspaper that is published or circulated in an area where the deceased usually lived. If the deceased did not usually live in Alberta, the advertisement can be placed in a newspaper published or circulated in an area where a significant amount of the deceased's property is located. The advertisement must be placed once or twice, depending on the value of the estate. Creditors must make their claims within 30 days from the date of the last advertisement.[133]

The only province other than Nova Scotia which requires publication in an official government newspaper is Prince Edward Island. The length of time for these advertisements, and the form of the advertisement, are not specified in the legislation.[134] In some provinces, the legislation requires advertising but does not specify the type, length or form of the advertisement.[135]

The Commission suggested in its Discussion Paper that while advertising in the *Royal Gazette* is inexpensive and simple,[136] it should appear in a more widely read newspaper, in an area where it is likely to be seen by those interested. The Commission also suggested advertisements be placed twice and continue to contain the information currently in the *Royal Gazette*. The Commission therefore proposed that advertising in the *Royal Gazette* be discontinued.

The Commission further suggested that advertising should continue to be the responsibility of the executor or administrator, who would determine the appropriate newspaper in which the advertisement should be placed.

The majority of commentators who expressed an opinion on this issue were in agreement that advertising in the *Royal Gazette* should be replaced by ordinary newspaper advertising. A number of commentators indicated concern, however, about the potentially high cost of newspaper advertisements in comparison to the cost of placing a notice in the *Royal Gazette*.

Upon review of commentators' remarks and upon further consideration, the Commission recommends that though the advertising of estates should remain mandatory, compulsory advertising in the *Royal Gazette* should be eliminated. Given the lack of readership for the *Royal Gazette*, it would be more appropriate for an estate notice to be placed in a widely read

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[133] *Alberta Surrogate Rules*, note 58, above, rs. 38-39.

[134] *Probate Act*, R.S.P.E.I. 1988, c. P-21, s. 47.

[135] This is the case in Ontario which, according to the Ontario Law Reform Commission, has caused some confusion among Ontario estate lawyers. *(Ontario Law Reform Commission Report*, note 125, above, at 197-203.)

[136] The current cost of advertising an estate in the *Royal Gazette* for six months is $34.50. The process is relatively simple in that the *Royal Gazette* has a special section for estate notices that follows a standard format (name of deceased, date of probate or administration, name and address of executor or administrator, name and address of estate solicitor and the date the advertisement was first inserted).

newspaper in an area where the notice is likely to come to the attention of interested persons. Notices should be placed twice and should include the information currently contained in the *Royal Gazette* (the name of the deceased, the date of probate or administration, the names and addresses of the executor or administrator and the estate lawyer, the date of the first insertion of the advertisement and a notice that claims must be submitted within six months from that date). Advertising, the Commission recommends, should remain the responsibility of executors or administrators, as any potential liability for failing to properly administer an estate would fall on their shoulders.

The Commission recommends that:

- The requirement to advertise in the *Royal Gazette* should be eliminated.
- A notice for claims of creditors should be placed in a widely read newspaper in an area where it is likely to come to the attention of interested persons. Notices should be placed twice and should include the information currently contained in the *Royal Gazette* (the name of the deceased, the date of probate or administration, the names and addresses of the executor or administrator and the estate lawyer, the date of the first insertion of the advertisement and a notice that claims must be submitted within six months from that date).
- The executor or administrator should continue to have responsibility for advertising.

15. Parentage

(a) Should children born outside of marriage be entitled to inherit from their natural father's estate?

This issue arises when the deceased leaves no will and a child born outside of marriage makes a claim as a dependant under the *Intestate Succession Act*. Section 16 of the *Act* states that an illegitimate child shall be treated as if the child were the legitimate child of the child's mother. This used to mean a child born outside of marriage could inherit from their natural mother but not their natural father. The Nova Scotia Court of Appeal, in the case of *Tighe* v. *McGillivray*,[137] held that this violated the *Canadian Charter of Rights and Freedoms*. As a result, a child born outside of marriage is now also entitled to claim as an heir to their natural father's estate. The *Intestate Succession Act* has not, however, been formally amended to reflect this decision. In the Discussion Paper, the Commission suggested that the *Act* be amended to reflect the Court of Appeal decision. If this change is made, the Commission also suggested the natural father should have the right to inherit from the estate of his child (a right which the natural mother also

[137] Note 24, above.

has).[138] There was general agreement among the commentators with these suggestions. One commentator added that s. 2(b) of the *Intestate Succession Act*, which defines "issue" as "lawful lineal descendants", should be amended to "lineal descendants", so that biological children of unmarried parents would qualify.

Upon review of comments received, the Commission recommends that the *Intestate Succession Act* should be amended to allow children born outside of marriage to inherit from both their natural mother's estate and their natural father's estate. Correspondingly, the amended *Act* would also make it clear that a natural father can inherit from the estates of his children born outside of marriage. The Commission also recommends that section 2(b) of the *Intestate Succession Act*, which defines "issue" as "lawful lineal descendants", should be amended to "lineal descendants", so that biological children of unmarried parents wold be included in the definition.

The Commission recommends that:

- Section 16 of the *Intestate Succession Act* should be updated to reflect the Court of Appeal decision in *Tighe* v. *McGillivray* that children born outside of marriage can inherit from both their natural mother's and natural father's estates. It should also be clarified that the natural father can inherit from the estate of his children born outside of marriage.

- Section 2 (b) of the *Intestate Succession Act*, which defines "issue" as "lawful lineal descendants", should be amended to "lineal descendants", so that biological children of unmarried parents would be included in the definition.

(b) What proof of parentage should be required to establish the legitimacy of claims by children born outside of marriage?

Presumptions of parentage were recommended by the Commission in its Final Report, *The Legal Status of the Child Born Outside of Marriage in Nova Scotia*.[139] The Commission concluded that the legal relationship between parent and child should continue to be based on a biological connection.[140] Since the biological connection may not always be possible to determine, the Commission recommended the use of rules to determine parentage. These rules were based on rules found elsewhere, including the Uniform Law Conference of Canada's model *Uniform*

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[138] Under the *Intestate Succession Act*, note 20, above, parents are third in priority to inherit, after the spouse and children of the deceased.

[139] Law Reform Commission of Nova Scotia, *The Legal Status of the Child Born Outside of Marriage in Nova Scotia* (Final Report) (Halifax: Law Reform Commission of Nova Scotia, March 1995).

[140] With exceptions for adoption and assisted conception.

Child Status Act. The Commission's draft *Status of the Child Act*[141] contained a section indicating that a man would be presumed to be the father of a child if:

(a) he was married to or cohabiting with the mother of the child in a relationship of some permanence at the time of the child's birth or conception or where the child is born within 300 days or longer time as the court may allow after they ceased to cohabit;
(b) he and the mother of the child have filed a joint statutory declaration, under the *Vital Statistics Act* or a similar *Act* in another jurisdiction in Canada, or any other register, acknowledging that he is the father of the child;
(c) he and the mother acknowledge that he is the father; or
(d) he has been found or recognized in his lifetime by a court of competent jurisdiction to be the father of the child.

The Commission also noted that "child" is defined in the *Testators' Family Maintenance Act* as a child "of which the testator is the natural parent". The presumptions of parentage are not, however, contained within the *Testators' Family Maintenance Act*. In the Discussion Paper, the Commission suggested that these presumptions of parentage also be included in the *Testators' Family Maintenance Act*.

The Commission further suggested in the Discussion Paper that if parentage is contested and a hearing is necessary to resolve the dispute, the dispute be heard before a judge and not a registrar of probate. Such a hearing could involve substantial evidence, numerous witnesses and several days of hearings. Since most registrars are not legally trained, it would be appropriate to refer the matter to a judge. If, however, all parties agree that a claimant is a child of the deceased, the registrar should be entitled to make that determination and treat the claimant as an heir of the estate.

There is a concern that claims from children born outside of marriage should be limited to a particular period of time after the grant of probate or administration. Bringing such claims within six months would be consistent with time periods in the *Testators' Family Maintenance Act* and the *Matrimonial Property Act*. The effect of the *Trustee Act* is that after six months an executor or administrator is at liberty to distribute the assets of the estate and is not personally liable to claimants as long as they provided adequate notice to potential claimants. Any creditor or claimant can, however, follow the assets into the hands of those who received them (i.e., beneficiaries or heirs).[142] Children born outside of marriage therefore have some recourse should they not be aware of their potential claim until six months after the estate is opened. In the Discussion Paper, the Commission invited comments on whether a time limit should be placed on claims made by children born outside of marriage.

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[141] Note 139, above, at 34-35, App. A, s. 12(1).

[142] Note 105, above, s. 56.

Although this issue did not generate much feedback, the majority of comments received were in favour of the Commission's suggestions. Those commentators who expressed an opinion on the issue of a time limit for claims agreed that one should be applied, with the most frequently suggested time period being six months.

Having considered the comments received, the Commission affirms the suggestions in the Discussion Paper concerning proof of parentage. It also recommends that a time limit of six months would be appropriate to place on claims made against estates by children born outside of marriage.

The Commission recommends that:

- The presumptions of parentage contained in the Law Reform Commission's Final Report, *The Legal Status of the Child Born Outside of Marriage in Nova Scotia*, should be adopted to resolve any dispute regarding whether a man is the father of a child born outside of marriage. A man would be presumed to be the father of a child if:

  (a) he was married to or cohabiting with the mother of the child in a relationship of some permanence at the time of the child's birth or conception or where the child is born within 300 days or longer time as the court may allow after they ceased to cohabit;
  (b) he and the mother of the child have filed a joint statutory declaration, under the *Vital Statistics Act* or a similar *Act* in another jurisdiction in Canada, or any other register, acknowledging that he is the father of the child;
  (c) he and the mother acknowledge that he is the father; or
  (d) he has been found or recognized in his lifetime by a court of competent jurisdiction to be the father of the child.

  These presumptions should also be contained within the *Testators' Family Maintenance Act*.

- If a hearing is necessary to determine parentage, it should be heard by a judge. However, if all parties agree, a registrar of probate may make that determination.

- A time limit of six months should be placed on claims made against estates by children born outside of marriage.

(c) Should adoptees inherit from both their natural and adoptive families?

In the case of *Hart et al.* v. *Hart Estate,*[143] two adopted sons applied under the *Testators' Family Maintenance Act* for support from their natural father's estate. The court held that adoption did not prevent the adopted children from claiming maintenance and support from their natural father's estate under the *Testators' Family Maintenance Act*. This decision effectively permits double claims by adoptees in that on intestacy, they can inherit from both their natural and adoptive families. Many believe that on intestacy adoptees should inherit from their adoptive families only. In the Discussion Paper, the Commission agreed with this approach, pointing out this does not prevent natural families from naming adoptees as beneficiaries in wills. This issue did not generate much commentary, but those responses received by the Commission were in agreement. The Commission recommends that when a person dies without a valid will, adoptees should inherit from their adoptive families and not from their natural families. Natural families would still be free to name adoptees as beneficiaries in wills.

The Commission recommends that:

- When a person dies without a valid will, adoptees should inherit from their adoptive families and not from their natural families. Natural families would still be free to name adoptees as beneficiaries in wills.

16. Insolvent estates

In what priority should creditors be paid from insolvent estates?

An estate is insolvent when there is insufficient value in the assets to pay all debts, claims and other expenses of the estate. The executor or administrator can then apply to the court to have an estate declared insolvent. It must be shown that the claims and expenses to be charged against the estate exceed the estimated value of the estate. The issue then arises as to how to pay creditors out of the estate's very limited funds.

The *Probate Act* sets out three items which are to be paid from insolvent estates in priority to the claims of other creditors:[144]

- necessary medical and other attendance on the deceased during their last illness;
- funeral and gravestone; and
- expenses attendant on the settlement of the estate (includes probate fees, executors' or administrators' commissions and legal fees).

[143] (1993), 124 N.S.R. (2d) 333 (S.C.).

[144] *Probate Act*, note 1, above, ss. 105 - 107.

Revenue Canada is to be paid any outstanding income tax before these three items are paid.[145] In practice, Revenue Canada usually consents to funeral expenses being paid before taxes.

The first item listed as a priority claim, "necessary medical and other attendance on the deceased during his [or her] last illness", is somewhat unclear. It is not known what is considered "the last illness" of the deceased. Some people believe this category should not be a priority claim. Others believe medical expenses should remain as a priority claim, because of the tendency for more medical services to be excluded from coverage under provincial medical insurance plans (in Nova Scotia, Medical Services Insurance, or M.S.I.). In the Discussion Paper, the Commission suggested this item should be retained as a priority claim, but a time limit should be inserted to clarify any confusion. The Commission suggested that such expenses be limited to those incurred in the 90 days prior to death. Ninety days was seen as appropriate, giving a creditor enough time to have forwarded an invoice to receive payment for any services provided in the period prior to 90 days before death.

The second priority category of expenses is the funeral and gravestone. There are many who believe funeral expenses should form the first priority claim, because all citizens are entitled to a funeral, and because dealing with the body is a necessity and a priority from a public health perspective. Funeral expenses should, however, be proportionate to the value of the estate. One suggestion is that a dollar limit be placed on the funeral expenses to ensure they are a reasonable charge against the estate. Inserting dollar amounts in legislation is problematic, however, as they quickly become out of date. It may be more appropriate to permit "reasonable" funeral expenses to be paid. The Probate Court could monitor whether such expenses are in fact reasonable in the circumstances. In the Discussion Paper, the Commission therefore suggested that "reasonable" funeral expenses should be paid in full as a priority item.

Payment for the gravestone is included as a priority item in the current *Probate Act*. The Discussion Paper suggested this item be maintained as a priority item, but be paid after funeral, medical and testamentary expenses. It was suggested that this expense should, however, be paid in full, funds permitting.

The third priority category of expenses is those "attendant on the settlement of the estate". This includes probate fees, executors' and administrators' commissions, and legal fees, often referred to as "testamentary expenses". These expenses are necessary for the processing of the estate. In the Discussion Paper, the Commission proposed that these expenses be paid on a *pro rata* basis, that is, paid proportionately. If there are inadequate funds to pay all three categories in full, they would each be paid an amount proportionate to the amount they are owed.

In terms of priorities, the Discussion Paper suggested that reasonable funeral expenses be first, followed by medical expenses incurred in the 90 days prior to death, followed in turn by reasonable testamentary expenses on a *pro rata* basis and the reasonable cost of a gravestone.

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[145] *Crowther* v. *Attorney-General of Canada* (1959), 17 D.L.R. (2d) 437 (N.S.C.A.).

All other debts would be paid on a *pro rata* basis, funds permitting. Secured creditors would continue to be entitled to realize on their security and would be unsecured for any balance outstanding. If the balance outstanding did not fall within any of the first four priority items, it would fall within the fifth category with all other debts.

Amongst the comments received by the Commission on this issue, there was general agreement that reasonable funeral expenses should occupy the first rank of priority expenses. Commentators differed, however, about what should constitute reasonable funeral expenses. One commentator suggested reasonable funeral expenses should be qualified as commensurate with the deceased's station in life, another commentator proposed this concept include the reasonable cost of a gravestone in full, and a third commentator proposed a dollar limit be applied.

Opinion among commentators also appeared divided as to the ranking of medical expenses. Some commentators stated medical expenses should be treated as any other expenses, while other commentators suggested that medical expenses should be accorded some priority, given health care cuts and the use of such services as private nursing and home care.

Similarly, commentators did not seem to agree on the nature of ranking of the other items in the proposed priority scheme, though the majority of comments supported the payment of legal fees in full. There was a concern among some commentators that to not provide for the priority of legal fees would make lawyers reluctant to take on work relating to insolvent estates.

The number and divergence of comments received required the Commission to further consider this issue in detail. In accordance with its earlier suggestion, as well as the consensus among the commentators, the Commission recommends that reasonable funeral expenses should occupy the priority rank. What constitutes a funeral can take many forms. Some people, for example, prefer to be cremated and to have their remains scattered, rather than using a designated grave site. The Commission therefore recommends that the reasonable cost of a gravestone in full should be struck from the list of priority expenses. Probate fees, the commissions of executors or administrators, legal fees, and medical expenses are all significant items in relation to a deceased and their estate, and therefore warrant a priority claim. The Commission has decided, however, not to choose any priorities among these claims. Rather, the Commission recommends that executors' or administrators' commissions, probate fees, legal fees, and medical expenses incurred in the 90 days prior to death should, on a *pro rata* basis, occupy the second rank in the priority scheme. For the final level in the ranking scheme, the Commission recommends that it include all other debts, to be paid on a *pro rata* basis, except in accordance with any priorities as provided for by any other federal or provincial legislation.

The Commission recommends that:

- The following be paid as priority expenses from insolvent estates:

    1. Reasonable funeral expenses, in full.

    2. The following expenses on a *pro rata* basis:
        (i) probate fees;
        (ii) executors' or administrators' commissions;
        (iii) legal fees;
        (iv) medical expenses incurred in the 90 days prior to death.

    3. All other debts to be paid on a *pro rata* basis, except in accordance with any priorities as provided for by any other federal or provincial legislation.

CLOSING ESTATES

17. Closings

Should the existing method of closing an estate be changed? Should closings be mandatory?

Closing an estate involves preparing a number of documents[146] and appearing before the registrar of probate. The registrar reviews the accounts of the executor or administrator, sets the amount of the commission to be paid to the executor or administrator and reviews the lawyer's accounts. The registrar also charges the final portion of the probate fees (the first portion is charged on the opening of the estate). In addition, the registrar performs other duties such as reviewing the inventory to track the disposition of assets and ensuring advertising was conducted properly. If the registrar is satisfied the estate is in order, a "Final Decree" is issued.[147] The executor or administrator is then entitled to distribute the remaining estate assets and conclude the administration of the estate.

The *Probate Act* indicates that an estate must be closed within 18 months from the date of the

[146] Documents that must be filed with the court include the petition for citation to close the estate, the affidavit of the executor or administrator in support of the petition, the citation to close the estate, the final accounts of the executor or administrator, an affidavit verifying the final accounts, an affidavit of advertisement, the solicitor's affidavit (if applicable), an income tax clearance certificate, and a draft of the final decree.

[147] The final decree is a document issued by the Probate Court which indicates the court's approval of the handling of the estate (particularly the accounts) and authorizes the executor or administrator to distribute the remaining assets. In the case of an administration, the final decree also cancels the bond and discharges the sureties (as discussed in Section IV.12, above).

grant of probate or administration.[148] In addition, executors and administrators swear or affirm an oath to render a full account of their executorship or administration within 18 months.[149] Despite this, many estates in Nova Scotia are not closed.[150]

Instead of formally closing estates, some executors or administrators obtain "releases" from beneficiaries or heirs, in which all parties state that they agree not to go through a formal closing. The releases provide some protection to executors or administrators, because the beneficiaries or heirs promise to release the executors or administrators from any liability or responsibility in connection with the estate accounts.

Closings are a source of debate. Many lawyers think closings are unnecessary proceedings which only waste estate funds, particularly for simple estates (such as those involving a transfer of all assets to a surviving spouse who is also acting as executor or administrator). These lawyers feel that requiring formal closings would only continue to complicate the system when one of the aims of reform should be to simplify it. Other lawyers and many people working in the system on behalf of government believe closings are necessary to ensure all accounts are reviewed, and the estate was handled properly. Many people consider it inappropriate for a lawyer to advise an executor or administrator not to close an estate in light of the *Probate Act's* requirement to close an estate, as well as the oath taken by the executor or administrator. As well, if an estate is not closed, the lawyer's accounts are not reviewed by an outside party, and any bond which may have been posted remains undischarged. Some people also believe estates should be closed in order to clear up the chain of title to real property. However, it is unclear whether failure to close an estate actually causes problems with title to real property.[151] The main benefit of closing is that it provides some protection to the executor or administrator who is then free to distribute assets and conclude their obligations to the estate.

To balance these competing interests, the Commission, in the Discussion Paper, suggested that formal closings not be required, but that a form be filed with the court once an estate is concluded. The form would, among other things, indicate the property that has been distributed, the property remaining to be distributed, the debts paid from the estate, the compensation paid to

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[148] *Probate Act*, note 1, above, s. 70(1).

[149] Contained in forms J and K in the Schedule to the *Probate Act*, note 1, above. In form J (executor's oath), an executor promises that they "will... render a just and full account of [their] executorship within eighteen months...".

[150] Nova Scotia Department of Justice (Financial and Statistical Services). Over the past seven years an average of less than 33% of estates have been closed each year.

[151] Continuing Legal Education Society of Nova Scotia, *Nova Scotia Bar Admission Course: Qualification Materials 1994/95*, vol. 3 (Halifax: Continuing Legal Education Society of Nova Scotia, 1994)[hereinafter *Bar Admission Course*] at WE-2-21. See also Section IV.20, below, and Section IV.13, above, in relation to the vesting of real property. If the Commission's suggestions were adopted, much of the confusion regarding title to real property would be eliminated, because the executor or administrator could pass title to real property.

the executor or administrator and the legal fees claimed. The form would be served on all beneficiaries or heirs who have not yet received their gifts and on all creditors who have not yet had their debts paid from the estate. These parties would have 30 days in which to file an objection with the court and request a formal hearing. Legal fees would not be approved until the form was filed and the 30 day period had passed. The form would be reviewed by the registrar of probate who could request further information. This would eliminate the expense and time required in appearing before the registrar, but would ensure there are still checks and balances in the system to protect those who need it. The registrar would also have the ability to request that a formal closing take place.

The majority of commentators who expressed an opinion on this issue agreed a form should be developed to be completed. The majority of commentators also agreed that formal closings should not be mandatory. Some commentators were concerned, however, about potential extra work, complications and cost, about an increased discretionary role for registrars and about whom would be entitled to receive a copy of the form.

After reviewing comments received, the Commission recommends, in the interest of simplicity and efficiency, that a form should be developed to be completed and filed in lieu of formal closings. The form would be served on all interested parties, who would have 30 days in which to object. The form would also be served on all known and unpaid creditors.

Upon further consideration, the Commission does not consider it appropriate to delay the payment of legal fees if a form is not filed with the 30 day period, as the requirement to file a form would be the responsibility of an executor or administrator. The Commission recommends that the commissions payable to the executor or administrator[152] not be approved until the form is filed, and the 30 day objection period has passed.

Furthermore, the Commission recommends that upon filing, forms would be reviewed by the registrar of probate, who could also request further information or that a formal closing take place.

[152] Ordinarily, an executor or administrator is entitled to be paid a commission of not more than 5% of the value of the estate assets. Compensation agreements permit a higher rate of compensation. See Section IV.18(b), below.

The Commission recommends that:

- A form should be developed to be completed and filed in lieu of formal closings. It would indicate, among other things, the property that has been distributed, the property to be distributed, the debts paid from the estate, the compensation paid to the executor or administrator and the legal fees claimed.
- The form would be served on all interested parties. The form would also be served on all known and unpaid creditors. The parties served with the form would have 30 days to file an objection requesting a formal closing.
- Commissions for executors or administrators would not be approved until the form is filed and the 30 day objection period has passed.
- Upon filing, forms would be reviewed by the registrar of probate who could also request further information or that a formal closing take place.

18. Fees

(a) How should probate fees be determined?

Probate fees must be paid by all estates that go through the probate system. The fees are paid to the Probate Court and, among other things, cover the administrative cost of running the probate system.[153] They are set by "regulation" under the *Costs and Fees Act.*[154] Probate fees are divided into opening and closing fees, both determined by the value of the estate. Opening fees are somewhat more than closing fees. For example, for an estate worth more than $100,000 but less than $150,000, the opening fees would be $600, and the closing fees would be $250, for a total of $850.

Many estates are opened but not closed. As a result, only the opening fee is paid. While the closing fee may not be large, it is believed many estates are not closed in order to avoid incurring additional costs (primarily, probate and legal fees). In the Discussion Paper, the Commission suggested the system should not discourage people from closing estates and therefore proposed that only one probate fee be charged, upon the opening of an estate. Any required adjustments

[153] Figures obtained from the Department of Justice (Financial and Statistical Services) indicate that the total revenue of the provincial probate districts for the period April 1, 1997 to March 31, 1998 was $2,218,588. Grants of probate produced $1,583,551 of this amount, while grants of administration produced $113,753, and closings produced $374,128 (searches and "miscellaneous" accounted for the balance of the revenue).

[154] R.S.N.S. 1989, c. 104. A regulation is a rule or order issued by an official person or body in accordance with authority granted by a statute. A regulation tends to be more specific than a statute and often sets out procedures indicating how a statute's provisions are to be put into effect. Unlike a statute, though, a regulation is not directly created by elected members of government.

would be made once the closing document is filed (adjustments may be required, for example, if the initial inventory is later found to be inaccurate).[155] The Commission was of the view that it is not part of its reform mandate to comment on the amount of the probate fees to be charged. Rather, this would be decided by the Government.

This issue resulted in a difference of opinion amongst the comments received. The commentators who disagreed with the idea of a single fee wished to avoid any unnecessary increase in fees. There was a perception among those commentators that the Commission's suggestion would lead to an unnecessarily large fee upon opening an estate.

Since the issuance of the Discussion Paper, the Supreme Court of Canada has provided its decision in the case of *Re Eurig Estate*.[156] This case involved the constitutional validity of probate fees in Ontario. Among the Court's findings was that for a probate fee to qualify as a fee, rather than as a tax, there had to be some connection between the amount of the fee and the cost of the services for granting probate. Without the connection, the fee would be a tax, which could only originate in the form of a statute and not by means of a regulation. The Commission agrees that in order to comply with the Supreme Court's decision in *Re Eurig Estate*, if probate fees are to continue to be imposed in Nova Scotia by way of regulation, probate fees should not vary according to the value of the estate. The Commission recommends that the simplest way of accomplishing this would be through one probate fee, to be charged at the opening of probate with no adjustment at the end of probate.

The Commission recommends that:

- Only one probate fee should be charged and it should be charged upon the opening of an estate, with no adjustment at the end of probate.

(b) How should the commission of executors and administrators be determined?

An executor or administrator is entitled to be paid a commission for their services. They are currently entitled to be paid up to 5% of the value of the estate assets.[157]

Registrars determine the amount of commission when the estate is being closed. Since many estates in Nova Scotia are not closed, it is presumed that a commission is either not paid or is paid without being determined by the court.

Compensation agreements are agreements in which the testator sets out the amount of

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[155] Discussed in Section IV.17, above.

[156] (1998), 165 D.L.R. (4th) 1 (S.C.C.).

[157] *Probate Act*, note 1, above, s. 76.

commission to be paid to the executor. They are usually used by professional executors, such as trust companies. In the Discussion Paper, the Commission invited comment on this point and on whether compensation agreements are a significant issue that should be examined in this reform effort.

It has been argued that in some situations an executor or administrator receives an unnecessarily large commission for an easily administered but very valuable estate. Presumably, however, such cases are reviewed by registrars of probate and adjustments made based on the actual time spent and responsibility assumed. There appears to be support for maintaining the current maximum 5% commission as it is easily understood and applied. While it may result in overpayment in some cases, it may result in underpayment in others. In the Discussion Paper, the Commission did not suggest any change in the current commission structure, nor the adoption of a factor-based system such as that in use in Alberta. Comment was, however, invited on whether such a system should be considered.

Among the comments which addressed the issue, there did not seem to be much support for altering the current system for determining the compensation of executors or administrators. The majority of commentators also agreed that with the exception of obviously unfair transactions, parties should be able to execute agreements which permit a commission of more than 5%.

Upon review of the comments received, the Commission recommends that the commission of executors and administrators should ordinarily remain a maximum of 5% of estate value,[158] with the registrar of probate retaining the discretion to determine the amount. As estates vary in terms of the work required of an executor or administrator, it is important to allow for some flexibility in the amount of commissions. The Commission also recommends that compensation agreements, and in particular those which provide a commission exceeding 5% of estate value, are a matter of contract between the testator and executor and should not be restricted, unless an obviously unfair transaction was involved.

The Commission recommends that:

- There should be no change in the current commission structure ordinarily allowing executors or administrators a commission not exceeding 5% of estate value, with the registrar of probate retaining the discretion to determine the amount.
- Compensation agreements are a matter of contract. Unless an obviously unfair transaction was involved, the testator and executor should be able to agree to a commission of more than 5% of the value of the estate.

(c) How should legal fees be determined?

[158] In accordance with an earlier recommendation, the estate value would be net value, including not only property, but also encumbrances and debts. See Section IV.6, above.

There appears to be inconsistency in determining legal fees to be charged to an estate.[159] It has been questioned whether this item should be a subject of legislation. Legal fees for most transactions are charged at market rates. If a client does not agree with the amounts charged, they can have the account reviewed by the taxing officer.[160] If an estate is formally closed, the registrar performs this function by reviewing the accounts and either approving or adjusting them. Since most estates in Nova Scotia are not closed, the accounts are not reviewed, but presumably are simply paid by the executor or administrator. There appears to be some debate whether the payment of such accounts should be supervised by the court. Some people strongly feel that such accounts should always be reviewed, as there is greater potential for abuse in estate matters. Others feel estate accounts should be treated no differently than other legal accounts (i.e., they should be forwarded to the client, who can choose whether to require a review by the taxing officer).

In Alberta, legislation states that lawyers may charge fees for two categories of legal services in probate matters: core legal services and non-core legal services. The legislation lists the services included in each category.[161] In addition, if a lawyer is to carry out any executor's or administrator's duties, the lawyer and the executor or administrator must agree to the categories of service the lawyer will perform and to an arrangement for fees to be paid for each category. If a lawyer is appointed as the executor or administrator, the lawyer may charge additional fees for any core and non-core legal services performed by the lawyer as a lawyer.[162]

In the Discussion Paper, the Commission suggested accounts for legal services should always be filed with the Probate Court for review by the registrar of probate upon closing.[163] The Commission did not make any suggestion in relation to the actual amount of legal fees to be charged, nor did the Commission suggest adoption of a system such as that in use in Alberta. Comment was, however, invited on whether such a system should be considered.

The majority of commentators took the position that legal fees should not be reviewed by the registrar of probate, but rather by a taxing master. A taxing master is assigned the task of deciding whether a lawyer's bill for services is reasonable in the circumstances. According to those commentators, an estate legal account should be treated no differently than other legal

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[159]See Discussion Paper at 74.

[160] The taxing officer (often referred to as the "taxing master") is a lawyer appointed to review accounts for legal fees when there is a dispute regarding the amount charged. The process is often referred to as a "taxation". See Nova Scotia Civil Procedure Rules, r. 63, Part III.

[161] *Alberta Surrogate Rules*, note 58, above, sch. 1, Part 2, tables 1-2. There are also ten factors to be considered when determining legal fees. See Discussion Paper at 75. For lists of the legal services, see note 198 of the Discussion Paper.

[162] *Alberta Surrogate Rules*, note 58, above, sch. 1, Part 2, ss. 3-4.

[163] As recommended under Section IV.17, above.

accounts. Amongst those commentators who did not object to the review of fees by a registrar, there was mixed reaction to the use of fee scales. The argument against scales was that registrars are aware of the hourly rates charged by lawyers. Registrars could keep these rates in mind when determining whether the work was necessary, and whether it was done in a timely fashion. The benefit of a province-wide scale would be its consistency.

Having reviewed the comments received, the Commission recommends that legal fees should be removed from the discretion of registrars of probate. If clients disagree with a legal bill, they could bring the matter to a taxing master. With no need for probate fee scales, they should be eliminated.

The Commission recommends that:

- Legal fees should be removed from the discretion of registrars of probate. If clients disagree with a legal bill, they could bring the matter to a taxing master. With no need for probate fee scales, they should be eliminated.

OTHER

19. Depository for wills

Should the Government provide a depository for members of the public to file wills for safekeeping and storage?

Storage of wills is sometimes problematic in that wills get lost, and much time and energy is spent attempting to locate them. Sometimes it is not known whether other wills exist or if the will that has been found is the "last" will. Some provinces, such as Manitoba, Saskatchewan and Ontario, have a depository for the wills of living people.[164] Members of the public are permitted to place their wills in the depository for safekeeping. The depository is usually contained in the registrar of probate's office, and a fee is charged for the storage service. Rules are developed

[164] Manitoba, Court of Queen's Bench Rules, r. 74.13; *The Queen's Bench Act*, R.S.S. 1978, c. Q-1, s. 142; Saskatchewan Rules of Court, rs. 695-696; *Estates Act*, note 116, above, s. 2 and Ontario Rules of Civil Procedure, r. 74.02.

regarding how wills are to be deposited. In Ontario, for example, wills must be enclosed in an envelope, which is sealed in the presence of the depositor. A number of things must be written on the envelope, such as the date of deposit, the name and address of the depositor, the testator's and estate trustee's name, the date of birth of the testator and the date of the will. The rules also specify who can deposit a will. For example, wills can be deposited by the testator, a person authorized by the testator, a lawyer who held the will at the time of retirement or the representative of a trust company when it ceases to do business in Ontario.

Nova Scotia Government departments sometimes receive requests from members of the public to store their wills. While it appears there may be some demand for such a service,[165] registrars of probate do not want responsibility for storing wills and do not want to become involved in disputes regarding the existence of multiple wills. Providing such a service would require more staff time and more office space. As well, policies and procedures would have to be developed to minimize the risk of wills being lost or misplaced.

In the Discussion Paper, comments were invited on whether the Nova Scotia Government should provide a depository for members of the public to file wills for safekeeping and storage.

There was a division of opinion among the comments received by the Commission on this issue. Some commentators, including the Canadian Bar Association Wills & Trusts Section, Nova Scotia Branch, stated that a depository, so long as it could be operated in a cost-effective fashion, would be worthwhile. Other commentators suggested that keeping wills was the testators' responsibility, and confidentiality of a will's contents could not be guaranteed in a depository.

Having taken into account the comments received, and in particular certain difficulties involved in the establishment and maintenance of a depository, the Commission recommends that the Government of Nova Scotia should not establish and maintain a public depository for wills in Nova Scotia.

The Commission recommends that:

- The Government of Nova Scotia should not establish and maintain a public wills depository.

20. Registering wills

Should unprobated wills be registered at the Registry of Deeds?

[165] A recent survey found that the majority of Canadian lawyers (64%) kept original wills on their premises. The figure for Nova Scotia lawyers was only 27%. Rather, the majority of Nova Scotia lawyers (71%) who responded to the survey indicated that it was their practice to return original wills to clients. Most lawyers (94% for Canada as a whole and 78% for Nova Scotia) maintain storage facilities for wills. See Decision Resources Inc., *National Wills & Trusts Section Survey Report* (Canadian Bar Association, 1998) [unpublished].

Documents dealing with land are registered at the Registry of Deeds office in the area of Nova Scotia where the land is located. These documents can include mortgages, deeds, liens and wills. The issue is whether it is appropriate to register wills at the Registry of Deeds. This is important because a will may direct that land be left to specific people. If a will is registered at the Registry of Deeds, this may suggest that the land has actually been conveyed to those named. This may not be the case if, for example, the land had to be sold to pay estate debts or if the will was challenged and the gift of land was overturned. The will may therefore not reflect what actually happened to the land.

This issue largely arises because of section 144(1) of the *Probate Act* and its use of the word "proved". The section states that when an original will is "proved", a certified copy is to be registered at the Registry of Deeds. The issue is whether "proved" requires that the will be "probated" before it can be registered. The difference lies in the meaning of "proved" versus "probated". "Proving a will" means taking the necessary steps to satisfy the court that the will is valid.[166] "Probating a will", on the other hand, comes after the proving of the will. It confirms the validity of the will and the authority of the executor to act. It includes the grant of probate and ends when the estate is closed and the court issues the Final Decree.[167]

In *Boyer* v. *Throop*,[168] the court held that a will must be probated in order to be proved within the meaning of the *Probate Act*. The court reasoned that unless the will is probated, title of the property is clouded because there is no guarantee the will is the "last" will. In the Discussion Paper, the Commission agreed with this approach.

This issue generated little commentary, with the majority of commentators in agreement. One commentator, however, took the position that the case decision upon which the Commission based its suggestion was in error. Upon further consideration, the Commission agrees.

With respect, the court in *Boyer* v. *Throop* failed to explain what aspect of probating a will, as distinguished from proving it, provides a guarantee that a will is indeed the last will. The Court also failed to acknowledge that the issue of a probate grant does not preclude the later discovery and production of a more recent will prior to closing. Apart from the affidavit (Form A of the Schedule to the *Probate Act*), whereby an executor states that "the deceased made the last will and testament" bearing a certain date, there does not appear to be any requirement that an executor at any point in the probate process attest that a will is the last one. Indeed, to require such an affirmation of an executor who may not have detailed knowledge of the testator's affairs would in many cases place an undue onus on an executor. Section 79 of the *Probate Act*, which refers to final settlement of the estate as being conclusive evidence involving estate accounts, does not mention title to real property. Accordingly, it was recently suggested that the probate

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[166] See Sections III.2 and IV.5, above.

[167] V.P. Allen, *Nova Scotia Probate Law & Procedure* (Halifax: self-published, 1993) at 14.

[168] (1993), 129 N.S.R. (2d) 60 (S.C.).

process does not affect title to real property:[169]

> *There are those who hold the view that where real property is involved (except in the case of joint tenancy where the property passes by operation of law) an estate should be closed in order to "clear up" the chain of real property. However, it is not clear that an "unclosed estate" is a cloud on title to real property and furthermore, an examination of Section 79 leads one to conclude that closing an estate has no effect at all on the title to the property. However, as a matter of practice, purchasers may require the estate to be closed and vendors are often willing to accede to this request.*

If the interpretation adopted in *Boyer* is a correct one, then the Nova Scotia approach would appear to differ from that in other jurisdictions. In *The Canadian Law of Wills*,[170] Thomas G. Feeney commented:

> *In most provinces it is not necessary to apply for a grant of probate when the only asset is real estate that has been devised by a will. Title may be transferred to the devisee by registering the will in the registry of deeds, and probate and the cost of probate are thus entirely avoided.*

In New Brunswick, for example, s. 25(1) of the *Registry Act*[171] provides for the registration of "a will of which probate has not been granted". In addition to the original will or a copy thereof, one deposits an affidavit from one of the attesting witnesses and an affidavit of the testator's death. The *Canadian Estate Administration Guide*[172] described a similar practice in Ontario:

> *Land registered in the registry system may be transferred either before it vests in the beneficiaries or after, with or without obtaining letters probate, if the original will, a notarial copy of the will or letters probate is registered together with the affidavit referred to in clause 53(1)(a)(i) and (ii) [affidavit of attesting witness and affidavit stating testator's death] of the* Registry Act.

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[169] *Bar Admission Course*, note 151, above, at WE 2 - 21.

[170] Vol. 1 (Toronto: Butterworths, 1982) at 141.

[171] R.S.N.B. 1973, c. R-6.

[172] Vol. 1 (North York: CCH, 1997) at 28,036.

In reaching its decision, the court in *Boyer* v. *Throop* seemed to take into account *Rumble* v. *Simmons*,[173] an Ontario decision. In a subsequent Ontario case, *Prinsen* v. *Balkwill*, which was decided prior to *Boyer* v. *Throop*, the *Rumble* decision was held to have been decided "contrary to authority".[174] Rather, the proper line of authority in Ontario concerning the issue of whether only a probated and registered will precludes clouds on title, is to be found in the reasoning in *Re Hollwey and Adams*.[175] The principle to extract from *Hollwey,* contrary to the impression which might be left in *Boyer*, is that it is not necessary in Ontario to have a will, prior to its registration, probated as the last one, in order to prevent a chain of title problem.

Since going through probate does not guarantee that a will is in fact the "last" one, as well as the lack of authority for the result in *Boyer* v. *Throop*, the Commission recommends that there should be no change to s. 144(1) of the *Probate Act.*

The Commission recommends that:

- The word "proved" should remain unchanged in section 144(1) of the *Probate Act*.

21. Consistency

How can probate practices and procedures be made consistent throughout the province?

Any inconsistency in probate practices and procedures in different probate districts in Nova Scotia may cause problems for lawyers working in the system, as well as for members of the public who may already find the system to be complex. In an attempt to address this problem, a manual was developed for the registrars and deputy registrars of probate around the province. It is currently being maintained by the Director of Probate for the province and by the Registrar of Probate for Halifax. It is not available for public distribution, and there is no formal system for updating and maintaining it. In Alberta, a manual, *Alberta Surrogate Forms*, is published by the Legal Education Society of Alberta and is available for purchase. The manual contains a copy of the probate rules and forms, as well as completion instructions, user notes, and an index. It also contains electronic forms on disk. The Legal Education Society of Alberta conducted educational seminars when the manual was introduced, for the benefit of lawyers, judges and others interested in the system. In the Discussion Paper, the Commission suggested that a comprehensive probate manual also be developed in Nova Scotia. The manual would contain probate rules, forms and procedures. The forms would be available on disk.

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[173] (1985), 38 R.P.R. 29 (Ont. Dist. Ct.).

[174] (1991), 2 O.R. (3d) 281 at 282 (Ont. Gen. Div.).

[175] (1926), 58 O.L.R. 507 (App. Div.).

Both New Brunswick and Alberta[176] have rules committees to oversee probate and to make recommendations for change. The Commission suggested in the Discussion Paper that a similar committee is required in Nova Scotia. The committee would, among other things, facilitate any changes made to the system as a result of this reform effort. The committee would continue to exist to maintain and update the system. Members of the committee would, at the very least, include the Director of Probate, a registrar of probate, a judge, a representative from the Barristers' Society and a non-lawyer.

Under the *Probate Act,*[177] the rules of practice of the Supreme Court apply to probate matters unless there are specific probate rules dealing with that matter. In the Discussion Paper, the Commission agreed with this approach and suggested that it be continued.

Comments received on these suggestions were generally in favour, though one commentator was concerned about the appropriateness of making changes to the probate system through a committee.

The Commission recommends that a probate manual should be developed and should contain probate rules, forms and procedures; a probate committee should be formed to implement changes in the probate system, to maintain and update the probate manual and to make recommendations for changes to the probate system; and the Civil Procedure Rules should continue to apply to probate matters except where probate rules are indicated to specifically apply.

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[176] *Probate Court Act*, S.N.B. 1982, c. P-17.1, s. 76. The Rules Committee in New Brunswick is to inquire into and examine, among other things, the administration and functioning of the probate court, the *Probate Court Act*, the rules and regulations under the *Probate Court Act*, and the procedure of the court. It may make recommendations to the Lieutenant-Governor in Council (cabinet). The Surrogate Rules Committee in Alberta was formed by the Attorney General to review concerns relating to probate rules, practice and procedure as raised from time to time by members of the legal profession. The Committee makes recommendations for reform to the Attorney General, as appropriate. See *Alberta Report for Discussion*, note 56, above, at 3.

[177] *Probate Act*, note 1, above, s. 128. Section 133 of the *Probate Act* authorizes judges of the Supreme Court to make rules regarding probate procedure and practice.

The Commission recommends that:

- A probate manual should be developed and should contain probate rules, forms and procedures.
- A probate committee should be formed to implement changes in the probate system, to maintain and update the probate manual and to make recommendations for changes to the probate system.
- The Civil Procedure Rules should continue to apply to probate matters except where probate rules are indicated to specifically apply.

22. Type of reform

What form should reform take?

In Alberta, the philosophy governing probate reform was that the relevant statutes should be concerned with substantive law, namely duties, rights, and obligations involving succession to property, while rules, placed in a separate probate manual, should contain all the procedures necessary to complete an estate administration. As a result, the first step was to separate substance from procedure and amend the statutes to reflect that distinction. Specifically, the process in Alberta was to:

- identify the procedural parts of all the relevant statutes;
- remove the procedural parts and substitute for them a reference in the statute which explains that the procedures are contained in the rules; and
- place all procedures in the rules.[178]

In the Discussion Paper, the Commission agreed that rules of procedure need to be developed for probate. Since much of the current *Probate Act* is procedural, this will require removal of procedural elements from the *Probate Act* and development of separate rules of probate. This will require that the current *Probate Act* be abolished and replaced with a new *Probate Act*, in addition to separate rules in a manual, an entity apart from the statute.

The majority of comments received were in favour of the Commission's suggestions. The Commission recommends that procedural elements should be removed from the *Probate Act*, and separate rules of probate should be developed. If the procedural elements are separated from the *Probate Act*, this will necessitate abolishing the current *Act* and replacing it with a new *Probate Act*, in addition to separate rules in a manual, as an entity apart from the statute.

[178] *Alberta Final Report*, note 56, above, at 5.

The Commission recommends that:

- Procedural elements should be removed from the *Probate Act*, and separate rules of probate should be developed.

- If the procedural elements are separated from the *Probate Act*, this will necessitate abolishing the current *Act* and replacing it with a new *Probate Act* in addition to separate rules in a manual, as an entity apart from the statute.

23. Other concerns raised

In addition to proposals for reform of the *Probate Act*, as part of the feedback on the Discussion Paper, the Commission received a number of comments which suggested how certain other related statutes, in particular the *Wills Act*, could be amended. Although the Commission is grateful for these thoughtful submissions, it chose not to discuss them in this Final Report. The mandate provided to the Commission in the reference from the Attorney General was confined to the *Probate Act*. For the most part, other statutes were not made part of the discussions which led to the Discussion Paper and to this Final Report. Members of the public had not therefore been invited to comment on the advisability of amending those other statutes. Without the possibility for full public feedback on the advisability of amending the related statutes, the Commission determined that it would not be appropriate to incorporate in the Final Report concerns about those other statutes. The Commission has summarized those concerns in Appendix D to this Report.

V SUMMARY OF RECOMMENDATIONS

The Commission recommended that:

1. A simpler system [pages 19 - 23]

- The probate system should be reformed to create a simpler system that involves the court only when necessary. Registrars of probate should continue to oversee and guide the probate process and should have the ability to refer disputes to a judge.

- Separate procedures should be developed to handle non-contentious and contentious estates. Non-contentious estates are estates in which there are no disputes. These estates would be handled by following a standard procedure. If a dispute arises, "interested parties", namely beneficiaries and heirs**,** could follow a different procedure to have the matter heard by a judge or registrar of probate. The estate would then be treated as contentious. Once the dispute is resolved, the estate would again be treated as non-contentious and continue to follow the standard procedure for non-contentious estates.

- As far as possible, disputes should be heard by the registrar of probate, if all interested parties agree. If the interested parties do not agree to have the matter heard by the registrar, or if an interested party disputes the registrar's decision, then the matter could be heard by the court.

2. Jurisdiction [pages 23 - 26]

- The deceased's usual place of residence in the province at the time of death should be the primary test for determining the jurisdiction in which to open an estate.

- An application could be made to open an estate in a district other than the deceased's usual place of residence in the province at the time of death, using a balance of convenience test, based on a number of factors including:

    - the deceased's usual place of residence in the province at the time of death;
    - the length of time the deceased resided in their final residence;
    - the location of land owned by the deceased;
    - the location of beneficiaries and heirs;
    - the location of creditors.

- The application would be made to the registrar of probate, if all interested parties agree. If the interested parties do not agree to have the matter heard by the registrar, or if an interested party disputes the registrar's decision, then the matter could be heard by the

court.

- Probate districts around the province should be electronically linked. Documents filed in each district should be indexed to enable searches to be carried out from any probate district.

3. Notice of estate being opened [pages 26- 28]

- The class of people entitled to receive notice be composed of all interested parties, namely all beneficiaries and heirs.

- Registered mail not be the sole means of providing notice. Rather, notice could equally be provided by means of ordinary mail, fax, or electronic mail.

- An affidavit must be filed confirming that notice has been given and the parties to whom it was given.

- Notices should advise that any objection to (1) the person making the application or (2) the district in which the application is being made, must be made within 14 days from the time that the notice was sent.

- Wills should not be attached to any notice. The notice should refer to the location of the will and its availability for examination.

- It be possible for an executor or administrator to apply to the registrar for an order pertaining to the disposition of certain assets. This order would be available on an *ex parte* basis, meaning that interested parties would not have to be notified.

4. Affidavits proving a will [pages 28 - 31]

- An affidavit proving a will may be made at the time the will is executed, at any time after the will is executed, or at the time of the application for the grant.

- There is a rebuttable presumption that a testator was competent to sign, rather than requiring an affidavit in proof of will to refer to the apparent state of the testator's competency. The affidavit in proof of will would state that the will was properly executed in compliance with the other requirements for a valid will, which are found in the *Wills Act*.

- A registrar of probate, a deputy registrar of probate, a barrister of the Supreme Court of Nova Scotia, a commissioner of oaths for Nova Scotia, or a notary public of any jurisdiction in Canada should be able to take an affidavit proving a will.

5. Proof of will [pages 31 - 34]

- Formal proof of will applications should be initiated upon the filing of a notice which sets out the reasons for the application.

- "Proof in solemn form" and "proof in common form" should be renamed "formal proof of will" and "informal proof of will", respectively.

- An application for formal proof of will should be required to be brought within four months from the date of the grant.

6. Inventory and Appraisal [pages 35 - 38]

- If an interested party disputes the accuracy of the inventory, they may bring the matter before the registrar of probate, if all interested parties agree. If the interested parties do not agree to have the matter heard by the registrar, or if an interested party disputes the registrar's decision, then the matter could be heard by the court.

- The current requirement to file an inventory within three months of the date of grant should be continued.

- The inventory should represent an estate's net value, including property, encumbrances, and debts and should be renamed "inventory of property and debts".

- Appraisals should not be mandatory, but available at the request of an interested party.

- Registrars should not on their own initiative be able to require that an appraisal be filed.

- If an executor or administrator does not consent to provide an appraisal, the matter could be heard by the registrar of probate, if the interested parties agree. If the interested parties do not agree to have the matter heard by the registrar, or if an interested party disputes the registrar's decision, then the matter could be heard by the court.

7. Foreign grants [pages 39 - 42]

- The distinction between resealing and ancillary grants should be eliminated to reflect current practice, and the procedure for processing such grants should be the same.

- All grants outside Nova Scotia should be called "extra-provincial grants".

- Registrars of probate should have the authority to decide whether grants from outside the province will be accepted in Nova Scotia. If the grant is rejected, an application could be made for an original grant in Nova Scotia. If interested parties disagree with the registrar's decision, they could appeal it to a judge.

- All necessary documents from the extra-provincial jurisdiction, including the will, should be translated into English and certified as a true and accurate English translation. Registrars of probate should have the discretion to determine whether a translation into a language other than English might also be provided.

8. Simplified, summary procedure [pages 42 - 43]

- There should be no formalized process for small or uncomplicated estates. Rather, an estate would either proceed through the probate system, as a contentious or non-contentious estate, or it would be entirely outside the probate system.

9. Renunciations [pages 44 - 47]

- Renunciation should continue to be available for all executors, without any distinction being made between the right to renounce of individual and corporate executors.

- Not only to comply with the *Trustee Act*, but in all cases involving executors, where executors have commenced to fulfill their duties, but wish to resign or retire, they should have to abide first by the will. If the will disallows resignation or retirement, or if agreement could not otherwise be reached, then executors should be required to apply to the registrar of probate for the ability to resign or retire. If there is disagreement with the registrar's decision, it could be appealed to the court.

10. Removal of executors and administrators [pages 47 - 48]

- Registrars of probate should have the discretion to remove executors or administrators. If the registrar considers the issues to be unduly complex, the matter could be heard by a judge. An executor or administrator removed by a registrar should be released from any liability relating to the balance of the estate administration.

11. Appointment as administrator [pages 48 - 55]

- The surviving spouse should be first entitled to be appointed as administrator and the next of kin should be second entitled.

- Non-residents of Nova Scotia should be permitted to be appointed as administrators as long as they are bonded. The bonding requirement could be waived with the consent of all known interested parties, if they are adults and mentally competent.

- "Spouse" should be defined in probate legislation to include common law spouses, whether of the same or opposite sex.

- The *Intestate Succession Act* should be amended to include common law spouses,

whether of the same or opposite sex, in the scheme of distribution.

- Common law spouses should be entitled to appointment as administrator.

- The definition of "next of kin" in section 23(2) of the *Public Trustee Act* should be included in probate legislation.

- If there are individuals within a category with equal entitlement to appointment as administrator and no agreement on who will be appointed, the matter could be heard by the registrar of probate, if all interested parties agree. If the interested parties do not agree to have the matter heard by the registrar, or if an interested party disputes the registrar's decision, then the matter could be brought before the court.

- The section regarding entitlement to appointment as administrator in the *Probate Act* should explicitly be made subject to the provisions of the *Public Trustee Act*.

- The priority scheme for administration in the *Probate Act* should be amended to allow interested parties, who are unable or unwilling to act as administrators, to appoint their own nominee, in priority to the Public Trustee.

12. Bonds [pages 56 - 58]

- Bonding should be required for all administrators with the right of interested parties to apply to the court to waive the requirement. This would represent a change in the law for out-of-province administrators, who are currently not able to be appointed. The bonding requirement could be waived with the consent of all known interested parties if they are adults and mentally competent. The agreement would have to be filed at the relevant probate registry.

- An application to have an administrator's bond waived could be heard by the registrar of probate, if the interested parties agree. If the interested parties do not agree to have the matter heard by the registrar, or if an interested party disputes the registrar's decision, then the matter would be heard by the court.

- Bonding should not be required for non-resident executors.

13. Vesting of property [pages 58 - 61]

- Real and personal property should vest in both executors and administrators.

- Vesting should be deemed to occur immediately upon death. On intestacy, the gap between the date of death and the appointment of the administrator should be filled by the doctrine of relation back.

- In cases of intestacy, where at least 12 months have passed since the date of death, but the estate has not been probated, and no administrator has been appointed, title to any real property forming part of the estate should be deemed to vest directly in the heirs. The gap in time between the intestate's death and vesting in the heirs would be filled by the doctrine of relation back.

14. Advertising [pages 61 - 63]

- The requirement to advertise in the *Royal Gazette* should be eliminated.

- A notice for claims of creditors should be placed in a widely read newspaper in an area where it is likely to come to the attention of interested persons. Notices should be placed twice and should include the information currently contained in the *Royal Gazette* (the name of the deceased, the date of probate or administration, the names and addresses of the executor or administrator and the estate lawyer, the date of the first insertion of the advertisement and a notice that claims must be submitted within six months from that date).

- The executor or administrator should continue to have responsibility for advertising.

15. Parentage [pages 63 - 68]

- Section 16 of the *Intestate Succession Act* should be updated to reflect the Court of Appeal decision in *Tighe* v. *McGillivray* that children born outside of marriage can inherit from both their natural mother's and natural father's estates. It should also be clarified that the natural father can inherit from the estate of his children born outside of marriage.

- Section 2 (b) of the *Intestate Succession Act*, which defines "issue" as "lawful lineal descendants", should be amended to "lineal descendants", so that biological children of unmarried parents would be included in the definition.

- The presumptions of parentage contained in the Law Reform Commission's Final Report, *The Legal Status of the Child Born Outside of Marriage in Nova Scotia*, should be adopted to resolve any dispute regarding whether a man is the father of a child born outside of marriage. A man would be presumed to be the father of a child if:

  (a) he was married to or cohabiting with the mother of the child in a relationship of some permanence at the time of the child's birth or conception or where the child is born within 300 days or longer time as the court may allow after they ceased to cohabit;

(b) he and the mother of the child have filed a joint statutory declaration, under the *Vital Statistics Act* or a similar *Act* in another jurisdiction in Canada, or any other register, acknowledging that he is the father of the child;
(c) he and the mother acknowledge that he is the father; or
(d) he has been found or recognized in his lifetime by a court of competent jurisdiction to be the father of the child.

These presumptions should also be contained within the *Testators' Family Maintenance Act*.

- If a hearing is necessary to determine parentage, it should be heard by a judge. However, if all parties agree, a registrar of probate may make that determination.

- A time limit of six months should be placed on claims made against estates by children born outside of marriage.

- When a person dies without a valid will, adoptees should inherit from their adoptive families and not from their natural families. Natural families would still be free to name adoptees as beneficiaries in wills.

16. Insolvent estates [pages 68 - 71]

- The following be paid as priority expenses from insolvent estates:

1. Reasonable funeral expenses, in full.

2. The following expenses on a *pro rata* basis:
   (i) probate fees;
   (ii) executors' or administrators' commissions;
   (iii) legal fees;
   (iv) medical expenses incurred in the 90 days prior to death.

3. All other debts to be paid on a *pro rata* basis, except in accordance with any priorities as provided for by any other federal or provincial legislation.

17. Closings [pages 71 - 74]

- A form should be developed to be completed and filed in lieu of formal closings. It would indicate, among other things, the property that has been distributed, the property to be distributed, the debts paid from the estate, the compensation paid to the executor or administrator and the legal fees claimed.

- The form would be served on all interested parties. The form would also be served on all known and unpaid creditors. The parties served with the form would have 30 days to file

an objection requesting a formal closing.

- Commissions for executors or administrators would not be approved until the form is filed and the 30 day objection period has passed.

- Upon filing, forms would be reviewed by the registrar of probate who could also request further information or that a formal closing take place.

18. Fees [pages 74 - 78]

- Only one probate fee should be charged and it should be charged upon the opening of an estate, with no adjustment at the end of probate.

- There should be no change in the current commission structure ordinarily allowing executors or administrators a commission not exceeding 5% of estate value, with the registrar of probate retaining the discretion to determine the amount.

- Compensation agreements are a matter of contract. Unless an obviously unfair transaction was involved, the testator and executor should be able to agree to a commission of more than 5% of the value of the estate.

- Legal fees should be removed from the discretion of registrars of probate. If clients disagree with a legal bill, they could bring the matter to a taxing master. With no need for probate fee scales, they should be eliminated.

19. Depository for wills [pages 78 - 79]

- The Government of Nova Scotia should not establish and maintain a public wills depository.

20. Registering wills [pages 80 - 82]

- The word "proved" should remain unchanged in section 144(1) of the *Probate Act*.

21. Consistency [pages 82 - 84]

- A probate manual should be developed and should contain probate rules, forms and procedures.

- A probate committee should be formed to implement changes in the probate system, to maintain and update the probate manual and to make recommendations for changes to the probate system.

- The Civil Procedure Rules should continue to apply to probate matters except where probate rules are indicated to specifically apply.

22. Type of reform [pages 84 - 85]

- Procedural elements should be removed from the *Probate Act,* and separate rules of probate should be developed.

- If the procedural elements are separated from the *Probate Act*, this will necessitate abolishing the current *Act* and replacing it with a new *Probate Act* in addition to separate rules in a manual, as an entity apart from the statute.