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DISCUSSION PAPER

PROBATE REFORM IN NOVA SCOTIA

Law Reform Commission of Nova Scotia
March 1998

WHAT DO YOU THINK?

The Law Reform Commission is very interested in knowing what you think about the issues raised in the Discussion Paper, *Probate Reform in Nova Scotia.*

We have attempted, as much as possible, to describe the law and the problems with the present system in a way that can be understood by people who are not lawyers and who are not familiar with the legal system. This Discussion Paper does not represent the final views of the Commission. It is designed to encourage discussion and public participation in the work of the Commission. Your comments will assist us in preparing a Final Report for the Minister of Justice. The Final Report will contain recommendations on how the probate system in Nova Scotia should be reformed.

If you would like to comment on the Discussion Paper, you may:

- Fax a letter to the Commission at (902) 423-0222
- Send an e-mail to lawrefns@fox.nstn.ca
- Telephone the Commission at (902) 423-2633
- Write to the Commission at the following address:

  Probate Project
  Law Reform Commission of Nova Scotia
  2nd Floor, 1484 Carlton Street
  Halifax, Nova Scotia
  B3H 3B7

In order for us to fully consider your comments before we prepare our Final Report, please contact us by **September 15, 1998**.

Please note that the Final Report will list the names of individuals and groups who make comments or submissions on this Discussion Paper. Unless comments are marked confidential, the Commission will assume respondents agree to the Commission's quoting from or referring to comments made. Respondents should be aware that the Nova Scotia *Freedom of Information and Protection of Privacy Act* may require the Commission to release information contained in submissions.

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
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Anne Jackman, LL.B., LL.M. is Executive Director of the Commission. Elizabeth Butt, LL.B., M.I.R. is Legal Research Counsel. Lora MacEachern, LL.B. was Legal Research Counsel during the earlier stages of the project.

The Commission's work is available on the Internet through the Chebucto Community Net at http://www.chebucto.ns.ca/Law/LRC or on the Government of Nova Scotia Web Site (http://www.gov.ns.ca/) under Government Agencies.

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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. He asked that the Commission make recommendations for the improvement, modernization and reform of the *Probate Act* and consider suggestions made by lawyers for a simplified summary procedure for small or uncomplicated estates.

Probate generally

The law of probate deals with the handling of property that was owned by deceased people (referred to as their "estate"). One object of probate is to transfer property owned by deceased people and to pay any debts owed by the deceased. Some people leave a will. A person making a will is known as the "testator". If a person 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 indicate who they wish to handle their estate after they die. This person is known as an "executor".

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

Probate in Nova Scotia

To handle 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 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 a list of all property owned by the deceased (known as an "inventory") and file it with the Probate Court. They then proceed to pay any money owing to creditors and, if necessary, 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 and the lawyer. If all is satisfactory, the court issues a "Final Decree" and the estate is considered to be closed.

Avoiding probate

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 are handled using the process set out in the *Probate Act*, as outlined above. It appears that many Nova Scotians are avoiding probate altogether. This may occur, for example, in cases where all property is going to the deceased's spouse who does not see any need to follow the steps set out in the *Probate Act*. It may also occur because people believe the present system is complicated, expensive and time consuming.

Of the 30% of estates that are formally handled under the *Probate Act*, statistics indicate that just over one-third of these estates are formally closed. As a result, approximately 90% of all estates in Nova Scotia are handled without an independent review by the court.

Reforming the probate system

In conducting initial consultations on probate reform, the Commission learned that there are significant differences of opinion on how the probate system should be changed. Some people believe the system should include many automatic safeguards to protect members of the public who may be unfamiliar with the system. They suggest, for example, that all executors and administrators be required to formally "close" an estate so that the accounts and distribution of property are reviewed by an independent party. Other people favour a more simplified system with fewer automatic safeguards but an ability to trigger those safeguards as needed. This places more responsibility on those interested in an estate (such as beneficiaries and heirs) to monitor the actions of the executor or administrator and request that the court become involved if they feel the estate is not being handled properly. These people believe there are many simple estates that do not require all the protections of the system (such as estates in which all property is going to the deceased's spouse).

Preliminary suggestions for reform

The Commission seeks public commentary to assist it in developing recommendations for reforming the *Probate Act*. In particular, the Commission invites comment on its preliminary suggestions, including the following:

- Separate procedures should be developed to deal with non-contentious and contentious estates. Non-contentious estates would be handled by following a standard procedure with minimal court involvement. If a disagreement arises, people interested in the estate would follow a different procedure to have the matter heard by the court. Until the disagreement is resolved, the estate would be treated as contentious. Once the disagreement is resolved, the estate is treated as non-contentious again and it continues to follow the standard procedure for such estates, where it left off before the disagreement arose.
- 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 other probate district in the province. The district in which to open an estate should continue to be based on the deceased's fixed place of abode. There should, however, be the right to apply to open an estate in another district using a "balance of convenience" test.

- Witnesses to a will are required to complete an affidavit confirming, among other things, that they saw the testator sign the will. Presently, the affidavit is completed at the time of applying for the grant, after the testator dies. Witnesses should be able to complete the affidavit at the time the will is executed, at any time after the will is executed or at the time of applying for the grant.

- An inventory should include both property and debts and should be renamed "Inventory of Property and Debts". The Commission invites comment on whether an inventory should be filed at the time of applying for the grant, within three months of the date of the grant, or within some shorter time period and the right to apply to extend that time period.

- Appraisals should not be mandatory but may be requested by an interested person. If the executor or administrator does not agree to provide an appraisal, the disagreement could be heard by the court. Registrars of probate should also have the ability to require that an appraisal be filed.

- The deceased's surviving spouse should be entitled to be appointed as administrator first, followed by the next of kin. "Spouse" should include common law spouse, 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 list of those entitled to receive the deceased's property. "Next of kin" should be defined as the spouse or children of the deceased or, where there is no spouse or children, those entitled to inherit the deceased's property under the *Intestate Succession Act*. Non-residents of Nova Scotia should be entitled to be administrators as long as they post a bond. The bonding requirement could be waived with the consent of all known beneficiaries and heirs who are mentally competent and of the age of majority (currently 19 years of age).

- Real and personal property should vest in executors and administrators. In order to fill the gap between the date of death and the date of the appointment of the executor or administrator, the Commission proposes that property either vest in the court or be deemed to vest in the executor or administrator immediately upon death. The Commission invites comment on this point.

- Notices for claims of creditors should no longer be required to be in the *Royal Gazette*. Instead, such notices should be placed twice in a widely read newspaper in an area where it is likely to come to the attention of interested persons. The Commission invites comment on discontinuing advertising in the *Royal Gazette*.

- The *Intestate Succession Act* should be amended to indicate that children born outside of marriage can inherit from both their natural mother's and natural father's estates. The *Status of the Child Act*, contained in the Commission's March 1995 Final Report, *The Legal Status of the Child Born Outside of Marriage in Nova Scotia*, should be adopted and its presumptions of parentage used to resolve any dispute regarding whether a man is the father of a child 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.

- A form should be developed to be completed and filed in lieu of formal closings. Among other things, the form would indicate 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.

- Only one probate fee should be charged by the court, as opposed to the two probate fees now charged (opening and closing fees). The probate fee should be charged upon the opening of an estate.

- 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 and to maintain and update the probate manual. A training program should be designed for registrars of probate. Procedural elements should be removed from the *Probate Act* and rules of probate should be developed.

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 ont soumis la question de la réforme du droit de l'homologation des testaments à la Commission de réforme de la Nouvelle-Ecosse. Il a demandé 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

Le droit de l'homologation des testaments régit les transactions sur les biens qui étaient détenus par des personnes décédées (communément appelé leur " succession"). Un des objectifs de l'homologation est le transfert des biens détenus par les personnes décédées et le paiement de toute somme dûe par ces personnes. Certains font un testament. La personne qui fait un testament s'appelle "testateur". Si une personne 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 indiquera habituellement le nom de la personne qui sera chargée de sa succession suivant le décès. Cette personne s'appelle un "exécuteur testamentaire".

Dans le cas où une personne ne laisse pas de testament, elle est reconnue comme étant décédée "ab intestat". Puisque ces personnes n'ont pas indiqué à qui leurs biens doivent être dévolus suivant leur décès, la loi en régit la distribution. La *Loi sur les successions ab intestat (Intestate Succession Act)* contient une liste des personnes qui en raison des liens du mariage ou de sang ont le droit de recevoir les biens de la personne décédée. Ces personnes sont les "héritiers". Puisque la personne décédée n'a pas désigné d'exécuteur testamentaire, une personne doit être nommée afin de gérer la succession. Cette personne c'est "l'administrateur". La loi détermine qui peut agir comme administrateur.

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

L'homologation des testaments en Nouvelle-Ecosse

Afin de pouvoir gérer 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" ("grant") du tribunal 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. Ils doivent aussi dresser la liste de tous les biens appartenant à la personne décédée ("l'inventaire") et déposer cette liste auprès du tribunal des successions (Probate Court). 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 à leurs 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 et à l'avocat. Si le tribunal juge le tout satisfaisant, il octroie un "décret final" et la succession est considérée comme étant close.

Eviter l'homologation des testaments

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)* telle que décrite ci-dessus. Il semble que les Néo-Ecossais évitent cette procédure. Cela se produit par exemple, dans le cas où le conjoint ou la conjointe de la personne décédée hérite de tous les biens; il n'y donc pas lieu pour le conjoint ou la conjointe de suivre la procédure prévue par *la Loi sur l'homologation des testaments (Probate Act)*. Les Néo-Ecossais évitent peut-être aussi ce système car ils sont d'avis qu'il est compliqué, onéreux et demande trop de temps.

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 sont gérées sans l'oeil objectif du tribunal.

La réforme de la procédure d'homologation des testaments

Lors de consultations préliminaires sur la réforme du droit de l'homologation, la Commission a découvert l'existence de courants d'opinions variés sur la façon dont le système devrait être changé. Certains croient que le système devrait comprendre plusieurs mécanismes automatiques de protection afin de protéger les membres du public qui ne connaîtraient pas le système. Ils suggèrent par exemple que tous les exécuteurs testamentaires et les administrateurs aient l'obligation de disposer de la succession afin que les comptes et la distribution des biens soient revus par un tiers de façon objective. D'autres préconisent un système simplifié avec moins de mécanismes automatiques de protection mais prévoyant plutôt des mécanismes de protection disponibles selon les besoins. La responsabilité de surveiller les actions de l'exécuteur testamentaire ou de

l'administrateur et de demander l'intervention du tribunal dans le cas où des doutes existeraient quant à la façon dont la succession est gérée, repose donc sur les personnes ayant un intérêt dans la succession (tels les héritiers et les ayants droit). Ceux qui préconisent ce système croient qu'il existe bon nombre de successions simples qui ne requièrent pas toutes les protections du système (par exemple les successions selon lesquelles tous les biens sont dévolus au conjoint de la personne décédée).

Suggestions préliminaires de réforme

La Commission invite le public à lui faire parvenir ses commentaires afin de l'aider à élaborer des recommandations de réforme de la *Loi sur l'homologation des testaments (Probate Act)*. Plus particulièrment, la Commission aimerait recevoir des commentaires sur ses suggestions préliminaires dont les suivantes :

- Des procédures distinctes devraient être développées afin de traiter les successions litigieuses et celles qui ne le sont pas. Les successions non litigieuses seraient traitées selon une procédure de base prévoyant une implication minimale du tribunal. Dans le cas d'un litige, les parties intéressées à la succession adopteraient une procédure différente afin que l'affaire soit entendue par le tribunal. Jusqu'à ce que le litige ait été réglé, la succession serait 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 à partir de l'endroit où cette procédure fut interrompue en raison du litige.

- Les districts d'homologation des testaments à la grandeur de la province devraient être reliés électroniquement. Les documents déposés dans chaque district devraient être compilés de façon à faciliter les recherches à partir de n'importe quel autre district dans la province. Le domicile de la personne décédée devrait continuer à servir à déterminer le district dans lequel la succession doit être ouverte. Néanmoins, le droit de demander l'ouverture d'une succession dans un district autre, sur la base de la "balance des inconvénients" devrait être prévu.

- Les témoins d'un testament doivent signer un affidavit affirmant, entre autres choses, qu'ils ont vu le testateur signer le testament. Actuellement, l'affidavit est signé au moment où la permission (grant) autorisant à administrer les biens de la personne décédée est demandée, après la mort du testateur. Les témoins devraient pouvoir signer l'affidavit au moment où le testament est signé, à tout moment après la signaturedu testament ou au moment de la demande de permission.

- L'inventaire devrait inclure tant les biens que les dettes et devrait porter le nom "d'inventaire des biens et des dettes". La Commission invite le public à lui faire part de ses commentaires concernant le moment du dépot de l'inventaire qui pourrait être soit lors de la demande de permission autorisant à administrer les biens de la personne

décédée, soit dans les trois mois de cette permission, ou dans un délai plus court lequel pourrait comprendre le droit de demander une prolongation du délai.

- Les évaluations ne devraient pas être obligatoires mais pourraient être effectuées à la demande d'une personne intéressée. Dans le cas où l'exécuteur testamentaire ou l'administrateur n'est pas d'accord à ce qu'une évaluation soit effectuée, le litige pourrait être tranché par le tribunal. Les régistraires des bureaux d'homologation des testaments devraient aussi pouvoir demander qu'un rapport d'évaluation soit déposé.

- Le conjoint de la personne décédée devrait avoir le droit d'être nommé administrateur en premier lieu, suivi par le parent le plus proche. "Conjoint(e)" 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 de la personne décédée pourront être dévolus. "Parent le plus proche" devrait signifier le conjoint ou les enfants de la personne décédée, ou s'il n'y en a pas, les personnes ayant le droit d'hériter des biens en vertu de la *Loi sur les successions ab intestat (Intestate Succession Act)*. Les personnes ne résidant pas en Nouvelle-Ecosse devraient pouvoir agir à titre d'administrateur à condition qu'elles donnent une caution. Les bénéficiaires et héritiers majeurs (majorité actuellement fixée à 19 ans) et capables peuvent renoncer à cette exigence.

- Les biens meubles et immeubles devraient être assignés aux exécuteurs testamentaires et aux administrateurs. Afin de combler le vide entre la date du décès et celle de la nomination de l'exécuteur testamentaire ou de l'administrateur, la Commission propose que ces biens soient assignés au tribunal ou présumés assignés à l'exécuteur testamentaire ou à l'administrateur au jour du décès. La Commission invite le public à lui faire parvenir ses commentaires sur ce point.

- Les avis aux créanciers ne devraient plus avoir à être publiés dans *le Journal Officiel (Royal Gazette)*. Ces avis devraient plutôt être publiés à deux reprises dans un journal à grand tirage dans une région où il est probable que les personnes intéressées pourront les voir. La Commission invite le public à lui faire parvenir ses commentaires sur ce point.

- La *Loi sur les successions ab intestat (Intestate Succession Act*) devrait être amendée afin de prévoir que les enfants nés en dehors des liens du mariage pourront hériter des biens formant la succession de leurs parents biologiques. La *Loi sur le statut légal de l'enfant (Status of the Child Act)* présentée dans le Rapport Final de mars 1995 de la Commission sur *Le statut légal de l'enfant né(e) en dehors des liens du mariage en Nouvelle-Ecosse (The Legal Status of the Child Born Outside of Marriage in Nova Scotia)* devrait être adoptée ainsi que ses présomptions concernant les liens de naissance utilisées pour déterminer si un homme est le père d'un enfant né en dehors des liens du mariage. Lorsqu'une personne décède sans testament valide, les enfants adoptés devraient hériter de leur famille adoptive et non de leur famille biologique.

- Un formulaire à compléter devrait être élaboré et déposé en lieu et place de la dsposition 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.

- Seule une somme à titre de droits d'homologation des testaments devrait être perçue ontrairement aux deux sommes actuellement perçues (frais d'ouverture et de fermeture). Les droits d'homologation des testaments devraient être perçus au moment de l'ouverture de la succession.

- Un manuel sur l'homologation des testaments devrait être élaboré et devrait contenir les ègles d'homologation, les formulaires et la procédure. Un comité sur l'homologation des testaments devrait être formé afin de mettre en oeuvre les changements au système de l'homologation des testaments et de conserver à jour le manuel sur l'homologation. Un programme de formation devrait être crée pour les Régistraires des bureaux d'homologation des testaments. Les dispositions relatives à la procédure devraient être retranchées de la *Loi sur l'homologation des testaments (Probate Act)* et des règles relatives à l'homologation des testaments devraient être élaborées.

PROBATE SASEWA'TIMK NOPA SKO'SIA

SUMMARY*

1996 ek, Ministl ujit Tetpa'ltimk aq Attorney General Nopa Sko'sia el wsmu'kwesni Law Reform Kamism, ujit sa'se'watunew Probate Act kulaman me'wuli nqamasiatew teli nsɨtasimk tela'sik koqowey tan tijw nepk wen, tan wutmotaqn tli't piatew.

Probate Apjiw Te'lɨtpiaq

Tplutaqn ujit probate maliaptɨ'k koqowey tan wen ne'pk naqtɨk (telui'tmɨk "estate"). Newte'taqouey kisa'tn probate na a mu nugu eskwi tetuelnin tan wenl kisi mpelitl. Eykik mimajuinu'k naqtɨmi'tij will. Mimajuin eltoq will tel nennut "testator". Mimajuin naqtik koqatek will, na telu'emk a etlimpɨkaq "testate". Wula mimajuinu kisna okanisàtions tan naqtɨmuj koqouey a tel nenujik a "beneficiaries" mimajuinu'k tanik will kisitutij apjiw ewi'ta'tl tan wenl pewalatl maliaptɨmilin koqowey kisi mpɨkk. Wula skwijinu tel nenut "executor".

Mimajuin ne'pkk toqo mu natɨmuk will na teluemk teli mpɨka'q "intestate" mu e'wi'taqsipnaq wena ujit maliaptimakun wutmotaqnek. Na tujiw tplutaqn ilsut tan tlitpiatew wutmotaqn. Intestate Succession Act weljiaji tan wetakut kisi npɨkk, na nekmo iknmuj tan naqtasik. Wula mimajuinu'k tel nenuji "heirs". Muta mu ewi'tasik tan wen nujotew koqowey miamuj na'tuen nigan puqua'lut, aq ula natuen tel nenut "administrator" tplutaqniktuk wet puqua'lut ula "administrator".

Probate Ula Nopa Sko'sia

Wikultitij Nopa Sko'sia wula tanik executoraq aqq administratoraq miamuj majukwatmitij tan tel mesqnwikasɨk Probate Act. Miamuj wejo'tmitij msnminow asite'taqn kisi naganpuguwutminow tan telit pi'ketaq wutmotaqnl wenl neplij. Miamuj kekinwataqatijik klaman nutma'titoq tanik tetujik. Miamuj muska'tutij tan tesɨk koqoweyek alsutkɨsnek tan nepkaq (tel nenasik "inventory") aq wikatiknatasik Probate Court iktuk. Na nuku apankitmitijl tetuo'qnn, aq nutaq me suliewey, miamuj courtiktuk weji wulte'tasik kisanku'usin koqowey ujit tan tlapankitasitew me tan tetuek. Aq nespiw amuj tepi'ajik beneficiari aq heir-aq, majukwat tan will teliwikasik kisna tan Intestate Succession Act teluek. Na kaqi tla'tekej tan tel pewaluj, na tujiw apaja'sit courtiktuk wujit tl kaqian koqowey. Courtiktuk iloqaptasik tan tesɨk koqowey koqaji maliaptasin, aq kisapankɨtuksinew executoraq kisna administratoraq aq lawyer. Wulaptasik tan kistlitpiaq na nuku court iknmuetutow "final decree" aq na etl kaqiaq nate'l.

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* Mi'kmaw translation by Katherine Sorbey.

Wesmuktɨmik Probate

Nopa Sko'sia to'qq pasɨk 30% e'wmi'tij Probate Act. Pukwelkik Nopa Sko'siewaq wesmuktɨmitij probate. Ki's kejitasik tan tlit piatew koqowey mu nutanuk majukwatasin probate act. Aq pukwelk wen mintui mtuite'tk lien Probate Court, muta mintui sɨka'taj aq mawi kpkije'ut wen.

Wula tan 30% weji maliaptasikl probate actiktuk, tel muskasik 1/3 pasɨk menaqaj iltatasikl. Na telitpiaq teluemk a 90% Nopa Sko'sia estatel mu nemitasitnukl courtiktuk.

Sase'watimk Probate System

Amskwes kamisn wesku'tɨmitijek taqkoqoey nuta'q sa'sewatasin muskasiksip pukwelk wen milite'tk tan tl sa'sewatnes. Eykik mimajuinu'k teli ktlamsɨtasultijik i'tɨs natko'qowey tan apoqnmuataq tani mu wel nsɨitmitik system. Kutey nikey msit executoraq aqq administratoraq miamuj courtiktuk uji kpkijoqa'tunew estate. Klaman natuenik pilue'k kisi minui eloqaptɨtaq koqowey tan kistlatasik. Ktɨkik mimajuinu'k elkwetajik tan me' koqowey naqmase'k, katu wiaqten mu wen opla'luksin. Asite'lmuksin tanik beneficiariaq aqq heiraq kis jikeywanew executoral kisna admiinistratoral tan telatekelij, aqq mu wulaptɨmuk tan teliaq, courtiktuk li smu'kwen. Wula nespiw mimajuinu'k ketlamsɨtmitij mu nuta'tn system. (Kutey nikey ji'nem gisna e'pit nepk toqo naqtɨmuaj wikumajl wutmotaqn).

Preliminary Suggestions ujit Sa'sewataqn

- Kmisn kwiluaji mimajuinu ika'lsultinen tan tl sa'sewi'kɨten Probate Act. Apj me tan kmisn ki's kisi negansut, kmsisn wulte's me piltuey koqowey mimajuinu'k piskwakitminew.

- Maliaptasin tepkisten tan mu wejintimitl aq ta'nl wejintimkl. T'anl mu wejintimitl pasɨk majukwatminew tan tel wikasɨk courtiktuk. Aq tan wejintimkl majukwatminew piluey awti aq courtiktuk tl maliaptasin misoqo court tepite'tk kaqian wkwayuti, na nuku siawi tla'tasin koqowey tan tel pmiaqɨp ke'sk mu oplamatimɨtek.

- Wtanjijl tan probatetl etekl Nopa Sko'sia tepawtis na mawa'tasin electranikali. Wikatiknn tan e'tasiw wtan kekunkl, kisi nqamasi msnasin, aq ilamko'tasin klaman kisi panwijqaten tampastet Nopa Sko'sia. Wtan tan wen tleawij kis tli pquji maliaptasis wutmotaqn tan tɨjiw ne'pkk. Pas katu a asite'lmanes wen kis pana'tun se'kk wtank, , e'wasin "balance of convenience" test.

- Mimajuin tan witnessewalatl ktɨkl will eltulij miamuj wju'wi'kɨmin wikatikn elui'tmasit kiaskiw taqowey kisi asamaptik. Nikey tan tel pukuik a, elui'tmasin tan tɨjiw wejo'temin asite'lmuksin kis pana'tun koqowey, ki's kisi npɨkaqq wenaq. Witnessaq tepawtis kis lwi'tmasultinew-a wijey nakwek will pana'tasɨk.

- Wiaqi mawkijjasis kiktk tan wen alsutkis and tan tetue'ss, aqq tlui'tasis "inventory of property and debts" ("kis kitasikl alsutaqn aqq tetuo'qnn"). Kmisn wiku'tk asitemuksin

wen wulte'tmin kisna mu wulte'tmin tqwa'tun kiskitasikl tujiw ne'wsinew wtɨteskkamin asite'taqn, weja'tekemk ne'sijik depknusetk mesnminek asite'taqn, kisna me aji tqwaji'jtn tan teli skman kisna iknemuksin meap aji kpkije'k.

- Teltepawtikewe'l mu nutanuk kjijitasin, katu kisi wjikesis tan wen ketui kjijitoq. Mu ktu muskatutik executoraq kisna administratoraq tan teltepawtik koqowey, tan wen mu welte'tmuk kis li wsmukwetow courtikuk. Registraraq ujit probate asite'lmanes kisi kwilutminow tan teltepawtikewe'l wikatikna'tasin.

- Siku'skaq kisna sikuapaq tepawtis mawmiltam ikaluksinew administratorewultinew, wtejk wjita'new kikjakutmu'tite'wk, aq nespiw newte' tleuksinew tqunasu'kk. Mu tepjike'nuk kitkk e'pitewi'tij, kisna kitkk jinemui'tij, ula Intestate Succession Act sase'watasis kulaman asite'lmas msit ktqunasu nasi wikasultinew kisi jukuwaqamultinew elt nekmo tan na'qtasik. "Next of kin" tepawtis menaqaj tluen siku'sk kisna sikuap kisna wnijanuaq, aq tan wen mu tepqatmuk, kisna mu wnijjanik, na nuku pasɨk tan wetakut lian wtmotaqn, e'wasin Intestate Succession Act. Ta'nik mu wikulti'kw Nopa Sko'sia asite'lmuksinew administratorewultinew, pas tepawtukutititj bondel. Mu kisi nuta'nuk bondewa'luksin wen pasɨk wulte'tmitij eskwi e'jik msɨt tan nestuo'ltijik aq tepipuna'tijik (nikey amuj 19 te'sipunqakl tetuje'in).

- Maqamikew tan wenjikuom etek aqq piluey kutmo'taqn alsutmin tepawtis executoraq aq administratoraq, ankotɨminew weja'ekemk npuaqn nakwek mi'soqo kisi ika'uj nikan pukuwit, kmisn wulte'ss amkmi'kaluj wenl simtuk tan tujiw wen nepkk. Kmisn ksa'ss me wen piluey tan telte't wula kisi wsku'tasɨk.

- Kinua'taqn ujit tan netutma'tite'wk mu nutanuk wikasin Royal Gazette. A'wnaqa kinua'taqn ta'pu wikasin pilue'l wikatiknn tan nqamasi nmitasital klaman mikuaptɨtal tan wen te'tut. Kmisn wulte'ss weni pilue'y tan telte'tmitij puni e'wasittn Royal Gazette.

- Intestate Sucession Act sase'wasittn klaman tan mijjua'jijk wsitqamua'lupnik alsutaqane'jk kisi jukuaqamultinow wnki'kkua wutmotaqnnmuwow. Na a Status of the Child Actiktuk etek, kmisn's siwkewiku'sek 1995 ek final report, the Legal Status of the Child Born outside of marriage in Nova Scotia, tepawtiss e'wasin aq tan teluek ujit tan tɨjɨw mektasɨk jinem kias'kiw wnijanin.

- Aslutaqanejjl. Tan tijiw wen nepkk toqo mu.

- Mu iapjiwsutaqninuk, aqno'tasultitewk wwji'kisitunew tani aqneakwi'tiji mu wja'tunew koqowey menaqa wnkikkua.

- Kiskajj wi'kmines wikatikn tan wju'wikɨss wen. Mesqnnowikasis tan kisi tpi'kasɨk koqowey, tan eskwi tpi'kasɨk, tetuo'qnn tan wetapanititasikl wutmo'taqnek, apankituowey pe'tepawtik iknmu'p executoraq kisna administratoraq aq tplutaqqne'l teltepawtik.

- Pas newt apankitmu'k probate tan te'lmask court mu tapu elapank‡tmin kutey nekey miamuj (pana'teken aqq kepjoqa'teken a'wtukowukksin). Plo'pe'tt telawtik apankitmut tan tijiw pana'teken.

- Probatey wikatikn wi'kminess aq te'ss probete'l tplutaqnn aq tan a majukwatesin. Probete'l, kamiti l'pukua'tness, klaman pas tl lukwetew maliapt‡k probatey system aq kelo't‡min aq nekow tepjiknmin probatey wikatikn. Kina'masuti i't‡ttn ujit registraraq ujit probate. Tel mila'tekemk jijla'tas‡tn probate actiktuk aq tplutaqne'l probate'l ilite'tasis.

I INTRODUCTION

1. The project

By letter dated July 23, 1996, the Minister of Justice and Attorney General 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.*

The Minister advised that the Director of Probate in the Courts and Registries Division of the Department of Justice, was available to assist the Commission. He noted that the Director's practical knowledge would be of use to the Commission and would assist the Department of Justice in assessing recommendations and implementing new policies.

2. Prior reform efforts

Attempts to reform Nova Scotia's *Probate Act*[1] began in the early 1970s. 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 and the matter was held in abeyance.[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 full LRAC. In 1979, the LRAC produced a report, *Recommendations with Respect to the Probate Act of Nova Scotia*.[4] Shortly thereafter, the Commission was dissolved.

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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 was created in 1990 and 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, Nova Scotia, 31 October 1979) at 7 [unpublished].

[4] *Ibid*.

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 Attorney General and a draft bill was prepared in 1986. 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 was never introduced in the House of Assembly.

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

Over the past twenty years, there have been more than fifty 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, the Commission formed an Advisory Group to advise on probate reform. The group met throughout September and October, 1997. In addition, the Commission prepared a survey which was completed by registrars of probate around the province.[5] The purpose of the survey was to identify practices and procedures around the province, including any inconsistencies and areas requiring reform. It also solicited the registrars' views on various issues.

3. Legal language

This Discussion Paper attempts to present legal information as clearly as possible so that people who do not have legal training can understand and comment on the Commission's suggestions for reform. There are still some situations where the language relates to specific legal and technical concepts and the words used will not be familiar to everyone. This section provides definitions of some of the words used in this Discussion Paper. Appendix A contains these words as well as more technical or legal words which commonly arise in discussing probate matters.

Act - Law made by elected members of government. Also referred to as "statutes" or "legislation" and includes regulations.

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

[5] A copy of the survey is attached as Appendix B and a summary of the responses is attached as Appendix C. The survey will be discussed further in Section III. 4., below.

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 belongings made in a will. See also "devise" and "legacy".

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. A will must be signed by the testator and two witnesses. All three parties must be present at the same time and must sign in the presence of each other.

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 real 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 (if there is a will, it is governed by the will). 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 a specific sum of money made in a will. See also "bequest" and "devise".
Legislation	-	Law made by elected members of government. Also referred to as "statutes" or "acts" and includes regulations.
Litigation	-	The process that takes place when a person or corporation sues another person or corporation.
Matrimonial assets	-	Under the *Matrimonial Property Act*, those assets which are to be divided equally between a couple upon the termination of a marital relationship by divorce or death.
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 handles the deceased's estate. Includes an executor and administrator.
Power of Attorney	-	A legal document in which a person (known as the "donor") gives authority to a person or company (known as the "attorney") to act on the donor's behalf. The attorney is usually given authority to deal with or dispose of the donor's property.
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. The object of probate is to transfer assets of a deceased person 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".

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 "acts" and includes regulations.

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] The person making a will is known as the "testator".[7] If a person dies leaving a valid will, they are said to have died "testate".

In order to be valid, the *Wills Act*[8] requires that a will 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. The witnesses must be present at the same time and must sign the will in the testator's presence. A witness or a witnesses' 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". The executor is given authority to act as the testator's personal representative after they die.[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 his or her 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, on the other hand, is law made by government.

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

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

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

[9] The *Wills Act, ibid*. 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 Paper, "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 will invalid (s. 12, *Wills Act*, *supra* note 8).

[11] "Executrix" is sometimes used to describe a woman who acts as executor. "Executor" will be used in this Paper 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. This is known in law as a constructive trust. It frequently arises in matrimonial 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 dependents. The dependents may apply to court for maintenance and support to be paid from the deceased's estate. The *Act* defines dependent 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 or widower" are not defined in the *Act*, they 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 dependent's financial circumstances, the claims of any other dependents and the relationship of the dependent and testator at the time of the testator's death.[16]

The *Matrimonial Property Act* provides that where a spouse has died, the surviving spouse may apply to have matrimonial assets divided in equal 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 dependent under the *Testators' Family Maintenance Act*. The spouse may also have rights under the will. Nova Scotia courts have held that a division of matrimonial 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 matrimonial property

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

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

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

[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 at a seminar on wills and estates administration, 16 February 1996) at 2-3 [unpublished].

[16] Section 5, *Testators' Family Maintenance Act*, *supra* note 12.

[17] Section 12(1)(d), *Matrimonial Property Act supra* note 13. The *Matrimonial Property Act* does not apply to common law spouses.

[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.). See also *Donkin* v. *Bugoy*, [1985] 2 S.C.R. 85 which considered similar legislation in Saskatchewan. The court stated that where a surviving spouse applied for a division of matrimonial property, the first step was to carry out the division of property between the surviving spouse and the deceased spouse's estate. Only when that has been done can the size of the deceased's estate be determined. The ordinary rules of testate or intestate succession can then be applied to whatever assets

is deemed never to have been part of the deceased spouse's estate and is not available for distribution to the beneficiaries. A spouse therefore has only half of the matrimonial property to dispose of by will.[19]

3. Dying without a valid will

If a person dies without leaving a valid will,[20] 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*.[21] The *Act* lists those entitled to receive property, in order of priority.[22] For example, if the testator dies leaving a spouse and no children, grandchildren, great-grandchildren, etc., the entire estate goes to the spouse. 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.[23] The *Act* states that an illegitimate child shall be treated as if the child were the legitimate child of the child's mother.[24] 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*.[25] As a result, children born outside of marriage are now entitled to claim as heirs to their natural father's estate.

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remain in the deceased's estate.

[19] See also the recommendations in Law Reform Commission of Nova Scotia, *Reform of the Law Dealing with Matrimonial Property in Nova Scotia*, Final Report (Halifax: Law Reform Commission of Nova Scotia, March 1997).

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

[21] 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 the *Intestate Succession Act* (s. 14).

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

[23] Section 17, *Intestate Succession Act*, *supra* note 21.

[24] Section 16, *Intestate Succession Act*, *supra* note 21.

[25] *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.).

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 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*[26]. The surviving spouse or next of kin are the first persons entitled to be appointed as 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.[27]

4. Probate

The law of probate deals with the handling of the estates of deceased persons, whether done by a named executor or an appointed administrator. One object of probate 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 in ensuring that estate assets have been accounted for and the estate has been properly administered.

The next part of this Paper 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. Finally, the results of the Commission's survey of registrars of probate are outlined.

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[26] Section 21, *Probate Act, supra* note 1.

[27] 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[28]

The Nova Scotia House of Assembly was established in 1758. One of the first Bills enacted was *An Act Relating to Wills, Legacies, and Executors, and for the Settlement and Distribution of the Estates of Intestates*.[29] 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 colonies of North America, particularly Massachusetts. This occurred because English law had to be adapted to suit the colony of Nova Scotia. For example, in England the heir, usually the oldest son, was entitled to the real property while the personal property was shared among the other children. This was contrary to the democratic principles of the New England colonies where it was believed the inheritance should be divided among all the children of an intestate. The 1758 Nova Scotia *Act*, however, still favoured the oldest son in that it entitled him to two shares of the estate.

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. The *Act* was titled *An Act relating to the Courts of Probate, and to the Settlement and Distribution of the Estates of Deceased Persons*.[30] It set out the court structure and the procedure to be followed in the courts. It also provided for registrars to be appointed to be "Registrars of Wills, Administrations, Accounts, and all other writings which shall be made, granted, or decreed upon by the Judges of Probate in their respective Counties."[31] In 1851, the Statutes of Nova Scotia were revised. By this time there were three separate statutes dealing with estates, *Of Wills of Real and Personal Estate, Of the Descent of Real and Personal Estate, and Of the Probate Court*.[32]

After the 1842 *Act*, various amendments were made. In 1843, for example, the legislation was

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[28] Much of the information contained in this section was taken from the report of the Nova Scotia Law Reform Advisory Commission, *supra* note 3. The LRAC relied upon the work of Beamish Murdock, a Nova Scotia historian who wrote, in 1832, 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.).

[29] S.N.S. 1758, c. XI.

[30] S.N.S. 1842, c. XXII.

[31] *Ibid.* s. XLI.

[32] R.S.N.S. 1851, cs. 114, 115 and 130.

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 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 the executors had renounced their right to apply for probate.

The current *Probate Act* is Chapter 359 of the 1989 Revised Statutes of Nova Scotia, as amended.[33]

2. Probate procedure

The *Probate Act* contains the procedure for handling an estate. Typically, the first step is for the executor or administrator to apply to the court for a "grant". The application is made in the Probate Court. 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*[34] changed this so that probate districts now exist in "justice centres" established by the *Judicature Act*.[35] In deciding which probate district has jurisdiction over an estate, a residency test is used.[36] Residency means a place where the deceased had their "fixed place of abode" at the time of death. 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), an application is made for a "grant of probate". On this application, the court must be satisfied that the will is valid and that the party named as executor is entitled and willing to act. To determine whether a will is valid, it must be "proved". 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

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

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

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

[36] Section 12, *Probate Act*, *supra* note 1.

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 by a document referred to as "Letters Probate" or "Letters Testamentary". This is the written permission for the executor to handle the deceased's estate. It is also considered conclusive evidence that the will is valid.

If the person died intestate (i.e., without a will), an application is made for a "grant of letters of administration". A number of forms must be completed and filed with the Probate Court, including the forms required to appoint an administrator. In Nova Scotia, an administrator is 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 by a document referred to as "Letters of Administration" or a "Grant of Administration". This gives the administrator permission to handle the deceased's estate. It 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 their claim before the Probate Court.

Within three months after the grant, every executor or administrator is required to file a detailed list of the real and personal property owned by the deceased at the time of death (known as an "inventory"). 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 has been 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 eighteen months.[37] 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.

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[37] Section 70, *Probate Act, supra* note 1, 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.

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*[38] apply to First Nations people who are registered or entitled to be registered as an "Indian" under the *Act*[39] and who "ordinarily reside" on reserve or Crown lands.[40] 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).[41]

The formalities for 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.[42] As a result, witnesses are not required and holograph wills[43] 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 that there should be two witnesses to a will.[44]

Another difference in handling 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 handling estates of First Nations people. The Department indicates that its

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[38] 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 at a seminar on wills and estates administration, 16 February 1996) [unpublished]; D.F. English, "A Written Will - A Promise Kept" (Paper presented to The Canadian Bar Association (Nova Scotia Branch) at a Professional Development Conference, Halifax, Nova Scotia, 30 January 1998) [unpublished].

[39] Sections 5-7, *Indian Act, ibid*.

[40] Section 4(3), *Indian Act, ibid*.

[41] Kraft, *supra* note 38 at 1.

[42] Section 45(2), *Indian Act*, *supra* note 38.

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

[44] The Confederacy of Mainland Micmacs, *Written Wills* (Truro, Nova Scotia).

goal is to normalize the estate administration by respecting the private nature of the process.[45] For example, policy indicates that the department acts as the "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 Paper will not deal specifically with the administration of estates under the *Indian Act* as it 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.

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 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 deaths but only 2,266 estates were opened. This suggests that only 29% of estates were formally probated that year. Over the past two 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%

These figures show that the vast majority of estates in Nova Scotia completely bypass the probate system. The Department of Justice in New Brunswick has estimated that 85% of estates are handled informally in that province.[50]

Estates may not be probated for a number of reasons. In some cases, real property may have

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[45] Kraft, *supra* note 38 at 2.

[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 for deaths in Nova Scotia for people aged 19 and over.

[50] New Brunswick Department of Justice, "Administration of Estates" (November 1995) 5 Law Reform Notes 3.

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. Some reasons are outlined in *The Solicitor's Guide to Estate Practice in Ontario*[51]. One reason is 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 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 because it would confirm the executor's right to transfer title to the property.

Numerous books and guides on avoiding probate have also been published. One of the most popular is *How to Avoid Probate*, first published in 1965.[52] The book explains probate and provides a do-it-yourself guide to probate avoidance. The author is an American estate planner who recommends that people place their property in trust to ensure it passes to their beneficiaries without having to have a will probated or pay legal fees. The book contains dozens of detachable forms which the reader can use without having to consult a lawyer. The book has been reprinted numerous times, most recently in 1990 as *How to Avoid Probate! New Edition for the 1990's*.[53] The publisher claims to have sold 1.5 million copies.[54] The book is also sold in Canada and contains some references to Canadian provinces.[55]

4. Survey of registrars of probate

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

[52] N.F. Dacey, *How to Avoid Probate* (New York: Crown Publishers [c. 1965]).

[53] N.F. Dacey, *How to Avoid Probate! New Edition for the 1990's*, rev. ed. (New York: Macmillan, 1990).

[54] As indicated on the cover of the book.

[55] The Nova Scotia Law Reform Advisory Commission, *supra* note 3, refers to other publications designed to advise the public on how to avoid probate including a 1966 Reader's Digest article entitled "The Mess in Our Probate Courts" and a 1974 Chatelaine Magazine "cope-kit" which explained "how to settle an estate yourself" in all provinces except New Brunswick and Newfoundland.

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 around the province. All 10 registrars or acting registrars of probate responded to the survey. A copy of the survey is attached as Appendix B. A summary of the survey results is attached as Appendix C.

In 1979, the Nova Scotia Law Reform Advisory Commission 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"[56]. This Commission's survey of the registrars of probate did not, however, reveal significant inconsistencies in practice. Only a few discrepancies were reported. For example, one registrar grants administration to out of province administrators when proper bonding is provided. None of the other registrars permit out of province administrators and it is generally accepted that such administrators are not permitted in Nova Scotia.

Another area of difference is the manner of determining legal fees to be charged to an estate. Nine of the 10 registrars use a scale to determine legal fees (although five of these registrars also consider other factors). Six of the registrars provided a copy of the scale used. There were four different scales. While three of the scales yielded similar fees, the fourth was substantially higher.

Another area of difference is the handling of expenses incurred in caring for real property on an administration (i.e., on intestacy). Real property on intestacy goes directly to the heirs.[57] As a result, there is an issue as to whether expenses for caring for real property should be charged against the estate. Five of the 10 registrars indicated they allow such expenses to be charged against the estate while the other five do not.

The survey also showed that the registrars share many views on changes to the probate system. Three of the 10 registrars feel bonding should be required for out of province executors. Such bonding is not currently required. Nine of the 10 registrars feel bonding should continue to be required for administrators although only six registrars feel it should be required for all administrators. None of the registrars indicated bonding should be required for a surviving spouse who is acting as administrator.

Another area of similarity of opinion is in the area of renunciations. All 10 registrars feel renunciations should continue to be available to executors although three registrars feel there should be a distinction between individual and corporate executors.[58]

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[56] *Supra* note 3 at 6.

[57] To be discussed further in Section IV.13., below.

[58] Because they feel corporate executors are in a greater position of trust and should not be able to renounce simply because the value of the estate is low.

Eight of the 10 registrars feel there should be a separate procedure for handling small or uncomplicated estates. They believe a separate procedure should exist if the estate involves only the surviving spouse who receives all assets of the estate. While they had various suggestions as to how a small or uncomplicated estate should be handled, there appears to be consensus that a simpler procedure is required for surviving spouses who are receiving all assets of the estate.

In the next section of the Paper, specific issues relating to probate reform are discussed. There is an initial discussion of the ongoing debate regarding different approaches to reforming probate in Nova Scotia. The remaining issues are then 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 suggestions for reform are indicated at the end of each section.

IV SUGGESTIONS FOR REFORM

1. The ongoing debate

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 appears to be some disagreement between lawyers and those who administer the system on behalf of the government (such as registrars of probate). There is also significant diversity of opinion amongst lawyers.

On the one hand, administrators emphasize the supervisory role of the probate system in protecting the public. They feel 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. These administrators have various suggestions for reforming the system. One suggestion is that all estates be required to go through a formal closing so that all accounts are reviewed by an independent party.[59] Another suggestion is that bonds be required for executors who do not reside in Nova Scotia (referred to as non-resident executors).[60]

Many lawyers, on the other hand, favour a more simplified system with fewer automatic safeguards but an ability to trigger safeguards, as necessary. These lawyers feel the court should be available to resolve disputes as they arise, but should otherwise be uninvolved in the processing of estates. To support their position, they refer to the number of estates in Nova Scotia that are not formally closed under the *Probate Act*.[61] They also point 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 executor or administrator of the estate. They argue that such estates do not require many of the safeguards currently in place (such as bonding for spouses acting as administrators[62]).

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

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[59] Of the estates in Nova Scotia that are handled under the system set out in the *Probate Act*, *supra* note 1, just over 30% are formally closed by a hearing before the Probate Court. See Section IV.17., below.

[60] Bonds are not currently required for executors, whether they reside in Nova Scotia or not. Bonds are required for administrators although non-residents of Nova Scotia are not entitled to act as administrators. See Section IV.12., below.

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

[62] See Section IV.12., below.

public been more aware of these safeguards. Some of their suggestions are similar to those made by the administrators, as noted above.

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.

The province that has made the most substantial reform to its probate system is Alberta. For five years, the Alberta Law Reform Institute (ALRI) and the Surrogate Rules Committee studied and reformed the province's probate system.[63] They created a system which included new probate rules and forms. The new system distinguished 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 submits their final accounts and distributes 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.[64] When the dispute is resolved, the matter returns to the non-contentious stream and the processing of the estate continues where it left off.

In Alberta, a philosophy underlying reform 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 interested parties (such as the surviving spouse, beneficiaries and heirs) would be notified that an estate was being opened.

In Alberta, however, the probate system works differently 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

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[63] The Alberta Law Reform Institute and The Surrogate Rules Committee, *Revision of the Surrogate Rules*, *Report For Discussion No. 10* (Edmonton: Alberta Law Reform Institute, 1991); The Albert Law Reform Institute and 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* and *Alberta Final Report*].

[64] 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.

and providing copies of documents upon payment of the requested fee.[65] Registrars in Nova Scotia, on the other hand, perform 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.[66] The *Act* specifies the types of applications that must be heard by a judge[67] and those that can be heard by a judge or registrar, at the option of the person applying.[68] All other matters are to be heard by the registrar. 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.[69]

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.

The Commission wishes to encourage discussion on the role of registrars and judges in a reformed probate system. From its initial consultations, the Commission is not aware of any desire to significantly change the role of registrars. Changing the role would place 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 principle, the Commission favours the development of a simpler system that proceeds with minimal court involvement except when necessary. Estates should be divided into non-contentious and contentious estates with non-contentious estates following a standard procedure. There should be a procedure permitting those interested in the estate to refer disputes to a judge or registrar. Registrars of probate should also have the ability to refer disputes to a judge, particularly if the dispute is complicated and requires legal interpretation. The system should also retain and enhance the role of registrars of probate in overseeing and guiding the probate process.

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

[66] Sections 152-3, *Probate Act, supra* note 1.

[67] 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 (s. 153(1), *Probate Act, supra* note 1).

[68] 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 (s. 153(2) *Probate Act, supra* note 1).

[69] Section 153(4), *Probate Act*, *supra* note 1.

The Commission suggests:

- 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, those interested in the estate (such as the surviving spouse, beneficiaries, heirs and creditors) could follow a different procedure to have the matter heard by a judge or registrar. The estate is then treated as contentious. Once the dispute is resolved, the estate again becomes non-contentious and continues to follow the standard procedure for non-contentious estates.

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.[70] Each justice centre is a probate district. The 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.[71] 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

[70] *Supra* notes 34 and 35. See Section III.2., above. While the province is currently operating with 11 justice centres, the *Judicature Act*, *supra* note 35, lists only four. An amendment is expected shortly. The 11 justice centres are: Amherst, Antigonish, Bridgewater, Digby/Annapolis, Halifax, Kentville, Pictou/New Glasgow, Port Hawkesbury, Sydney, Truro and Yarmouth.

[71] Section 12, *Probate Act*, *supra* note 1.

deceased had property at the time of death.[72] Estates are opened in the district of the deceased's fixed place of abode because creditors, assets and land holdings are normally located there. The Supreme Court of Nova Scotia has stated that creditors should not have to travel from the probate district in which they reside and normally dealt with the deceased, to another probate district in order to make their claim against the estate.[73]

Determining the fixed place of abode can be difficult. Confusion often arises in the cases of senior citizens who move from their lifelong home to a senior citizens' residence in another district shortly before death. The question arises as to whether their estate should be handled in the district where they had their lifelong residence or the district where the senior citizens' residence is located. This problem appears to be solved in some provinces. In New Brunswick and Alberta, for example, estates are opened in the district where the deceased resided at the time of death. Otherwise, estates may be opened in the district where the deceased had property.[74]

Difficulties also arise because 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 fixed place of abode in order to find the district in which the estate was opened. If they do not know the deceased's fixed place of abode, they could be forced to search all 11 districts at significant expense and inconvenience. The same problem would arise if an estate could be opened in any district, regardless of the deceased's fixed place of abode. Claimants may have difficulty locating estates and creditors may lose claims by not finding estates and filing claims within the time required.[75]

These problems would largely be solved with the introduction of a computerized system that would connect each probate district. This would enable claimants and creditors to electronically search for an estate from any probate office in the province. The Government of Nova Scotia has already begun exploring this option through its involvement with the Nova Scotia Barristers' Society and the Real Estate Lawyers Association in the Registry 2000 Initiative. This project is attempting to, among other things, identify steps necessary to introduce electronic registries (including probate) early in the twenty-first century.[76] Alternatively, the problem could be solved by having a central registry in the province. In Newfoundland, for example, a central

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

[73] *Re Fraser Estate* (1997), 158 N.S.R. (2d) 238 (S.C.) at 239.

[74] *Probate Court Act*, S.N.B. 1982, c. P-17.1, s. 29; *Alberta Surrogate Rules*, *supra* note 65, r. 6.

[75] Section 43(1) of the *Probate Act, supra* note 1, requires creditors to file claims with 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 claimants (such as beneficiaries and heirs) than for creditors.

[76] As outlined in materials distributed at a conference held in Halifax on October 16, 1997, called "Registry 2000: Setting a Vision for the Twenty-first Century".

registry is located in St. John's. All grants issued at a judicial centre other than St. John's must be sent to the central registry which maintains an index of all grants issued in the province. In other provinces, such as Ontario and Manitoba, registrars must forward a list of all grants to the provincial registrar, on a monthly basis.[77]

Some people wish to make it easier to move an estate from the fixed place of abode to another district. There is a concern, however, that allowing easier transfers would result in the system becoming more concentrated in Halifax Regional Municipality due to the location of trust company head offices and large law firms. Others believe this should not be a concern as the probate process exists for the efficient administration and protection of estates and not to allocate or distribute work and resources.

It appears the fixed place of abode test is valued for its simplicity and the ease with which it is understood. On the other hand, greater flexibility is also sought. Some people believe there should be an ability to apply to a registrar of probate to move the jurisdiction from the fixed place of abode. Such an application could be granted, for example, if all the 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. This would in essence be a "balance of convenience test". If such a test was to be used, a number of factors would have to be considered in determining which probate district is most convenient. Factors could include the deceased's fixed place of abode, 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.

The Commission therefore recommends that the fixed place of abode test continue to be the primary test for determining the jurisdiction in which to open an estate. Parties should have the right, however, to apply to open an estate elsewhere, using a balance of convenience test. Since this may result in some estates being opened in a district other than the deceased's fixed place of abode, the Commission also recommends that probate districts around the province be linked electronically and that documents filed in each district be indexed to enable searches to be undertaken from any probate district.

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[77] *Judicature* Act, R.S.N. 1990, c. J-4, s. 109; *Estates Act*, R.S.O. 1990, c. E.21, s. 4; *The Court of Queen's Bench Surrogate Practice Act*, C.C.S.M. c. C290, s. 4.

The Commission suggests:

- The deceased's fixed place of abode should continue to 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 fixed place of abode using a balance of convenience test, based on a number of factors including:
  - the deceased's fixed place of abode;
  - 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.
- 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

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

Currently, beneficiaries, heirs and other 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 the 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 handle 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. The Alberta Law Reform Institute (ALRI)[78] noted that the probate system, although supervised by the court, is driven by the executor or administrator. Beneficiaries and heirs should, however, also take some responsibility for protecting their interests. In order to do this, they must have notice that they have an interest to protect. The ALRI was concerned, however, that additional notice requirements not overburden executors and administrators and not encourage claims and complaints that would not otherwise be brought. The ALRI referred to the

[78] *Alberta Report for Discussion*, *supra* note 63 at 5, 12; *Alberta Final Report*, *supra* note 63 at 7, 13.

British Columbia experience where the burden was not seen to be particularly onerous and did not encourage additional claims: "[t]his procedure strikes a compromise between those extremes but accomplishes the principle that a knowledgeable beneficiary bears responsibility for monitoring the personal representative's actions".[79] In Ontario, notices must be sent to all persons entitled to share in the distribution of the estate.[80]

Interested parties would require different information depending on their status and relation to the estate. The ALRI developed six notice forms which contain the information to be sent to each category of interested party, as follows:

- notice to beneficiaries - residuary;
- notice to beneficiaries - non-residuary;
- notice to beneficiaries - intestacy;
- notice to spouse of deceased - *Matrimonial Property Act*;
- notice to spouse of deceased - *Family Relief Act* (comparable to the Nova Scotia *Testators' Family Maintenance Act*);
- notice to a dependent child of a deceased - *Family Relief Act*.

This Commission suggests that executors and administrators give notice of an application for a grant of probate or administration to all beneficiaries and heirs including those that may be entitled under the *Intestate Succession Act* and the *Testators' Family Maintenance Act*. Notice should be sent by registered mail.[81] Obviously, notice can only be given to those beneficiaries and heirs that are known or can reasonably be ascertained or located. Executors and administrators would have to be protected from claims brought by beneficiaries and heirs who could not have been reasonably ascertained. In Ontario, for example, personal representatives are not liable for failing to distribute property to a person born outside of marriage if the personal representative made reasonable inquiries and searched any parentage records of the Registrar General. The person born outside of marriage may, however, follow the property into the hands of those who received it.[82] Under the federal *Indian Estates Regulations*, if heirs are missing or absent, the money or assets to which they might be entitled are held for seven years. If the missing heirs do not appear by that time, they are presumed dead and the property is distributed to the remaining heirs.[83]

The Commission suggests that any notice advise those interested in an estate that they could

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[79] *Alberta Report for Discussion*, *supra* note 63 at 12.

[80] Ontario, Rules of Civil Procedure, rs. 74.04, 74.05.

[81] In Alberta, notice may be by single registered mail. Staff at the Surrogate office in Edmonton advise that postal receipts do not have to be attached to the affidavit of service filed with the court. This avoids unnecessary delay.

[82] Subject to certain restrictions. See *Estates Administration Act*, R.S.O. 1990, c. E. 22, s. 24.

[83] *Supra* note 38, s. 13.

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 should also be inserted to require the recipient to file an objection within a certain time frame. The Commission suggests this be relatively short in order to expedite the opening of the estate. For discussion purposes, the Commission proposes an objection period of 14 days.[84]

In terms of the information to be attached to the notice, the Commission proposes 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.[85] Instead, the notice would refer to the will and its location and availability for examination. Finally, the Commission proposes 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 Commissions suggests:

- The executor or administrator should give notice of the application for a grant to all beneficiaries and heirs who are known or can be reasonably ascertained or located, including those that may be entitled under the *Intestate Succession Act* and the *Testators' Family Maintenance Act*. Notices should be sent by registered mail.
- 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.
- Wills should not be attached to any notice. The notice should refer to the location of the will and its availability for examination.
- An affidavit must be filed confirming that notice has been given and the parties to whom it was given.

[84] This appears to be less cumbersome than the system of "caveats" that exists in some provinces. Caveats may be lodged against the granting of probate or administration. 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 and N.B. Reg. 84-9, s. 3.01; *Probate Act*, R.S.P.E.I. 1988, c. P-21, ss. 39-40; Estates Act, R.S.O. 1990, c. E.21, ss. 21-22; *The Queen's Bench Act*, R.S.S. 1978, c. Q-1, ss. 123-4.

[85] In Alberta, the documents attached to the Notice differ depending on the recipient. Residuary beneficiaries receive a copy of the application for the grant of probate, including a copy of the will and a list of estate property and debts. Non-residuary beneficiaries are simply advised of the gift left to them in the will. Beneficiaries in an intestacy are given a copy of the application for a grant of administration, including a list of estate property and debts. In Ontario, residuary beneficiaries receive a copy of the will while non-residuary beneficiaries receive an extract of the part of the will relating to their gift.

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.[86] When a will is being probated, one of the two witnesses to the will must be found to "prove" the will. 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".[87] 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 unable to appear due to age or illness.[88]

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 Alberta, witnesses are permitted to make the affidavits at the time the will is signed.[89] Such an affidavit is accepted as proof that the required formalities were observed, unless there is an apparent change in the will that the witness has not satisfactorily explained in the affidavit (such as the addition of handwritten notes on a typed will). This ensures that no changes are made to the will after the testator signs it. In New Brunswick, the affidavits can be made "either before or after the death of a testator".[90] In both provinces, the affidavit can be taken by a Commissioner for Oaths[91] and the witness does not have to appear before an official of the Probate Court.

Some people prefer to make their own wills, without the assistance of a lawyer. If witnesses were required to make the affidavit at the time of making the will, testators could argue they

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[86] See Section II.1., above.

[87] This is the wording contained in paragraph 3 of the Affidavit of Execution of Will, attached as Form D in the Schedule to the *Probate Act, supra* note 1.

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

[89] *Alberta Surrogate Rules*, *supra* note 65, r. 16.

[90] N.B. Reg. 84-9, s. 2.02(5).

[91] A person authorized by the government to take oaths.

have been prejudiced because of the need to have a lawyer (or someone authorized to take oaths) take the affidavit. If witnesses do not have to make an affidavit at the time of making the will, there is no requirement that a lawyer be used. Having two options therefore allows people to continue to make their wills without a lawyer. The testator could simply choose to leave the affidavits to be completed after they die.

In addition, a person who has already made a will should be able to have the witnesses make an affidavit at any time after the will is executed. This would be especially useful for people who have made a will before this change is introduced.

The Commission suggests:

- 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[92] to make a will. Currently, the witness states that the testator was of "sound and disposing mind, memory and understanding". This language is somewhat complicated and archaic. If some statement of capacity is to be retained, more simple wording should be used.[93] Various wording has been suggested including that the testator was of "apparent sound mind" or that the testator "appeared to be of sound mind". This language is still somewhat archaic. In Alberta, a witness states that the testator "was competent to sign the will". The Commission believes it is 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.

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[92] 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).

[93] The Affidavits of Execution in Ontario, New Brunswick and Saskatchewan do not, however, contain any statement regarding the testator's mental capacity unless the testator was blind or signed the will by making a mark (i.e., as opposed to a signature). In those cases, witnesses have to state that the testator appeared to understand the contents of the will.

The Commission suggests:

- In an affidavit proving a will, the witness should state that the testator "appeared competent to sign the will".

(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" 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 for Oaths. There is concern, however, with allowing others to take such affidavits as they may not possess the knowledge needed to question exactly what is being sworn to. 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). For example, there may be handwritten additions to a typed will which are not explained in the affidavit. These additions may later be challenged as not having been inserted by the testator. Significant costs are associated with such challenges.

It may be sufficient if the right to take the affidavit is restricted to registrars, deputy registrars or lawyers in the province. Affidavits sworn by Notary Publics of other provinces could also be accepted.

The Commission suggests:

- An affidavit proving a will should be taken by a registrar of probate, a deputy registrar of probate, a Barrister of the Supreme Court of Nova Scotia or a Notary Public of any jurisdiction in Canada.

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.[94] 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 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:[95]

(1) the executor or administrator (with will annexed) may proceed directly to court by taking out a "citation" to have the will proved in solemn form; or,

(2) beneficiaries or other interested parties may apply to require the executor or administrator (with will annexed) to "show cause" why they have not proven the will in solemn form. If they do not provide such cause, the court may require them to take out a citation 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 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. The Commission's survey of registrars revealed that only one of the current registrars will hear a proof in solemn form application (and only after obtaining the written consent of all parties). 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,[96] a party may initiate most contested applications by filing documents with the court and serving copies of the documents on the other

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

[95] Sections 36-37, *Probate Act*, *supra* note 1.

[96] 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*, *supra* note 35.

parties four days before the date set for the hearing of the matter before a judge.[97] Usually, there is no intermediate step requiring a party to apply for the right to make the application.

The Commission proposes that any interested party be able to initiate a proof in solemn form application by filing a notice setting out the reasons for making the application. The Commission recognizes that this would make it easier to initiate such applications and may result in meaningless applications (generally known in law as "frivolous" or "vexatious" applications) being brought by parties who wish to meddle in the estate. While such applications should not be encouraged, the Commission believes 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 Commission suggests:

- "Proof in solemn form" and "proof in common form" should be renamed to "formal proof of will" and "informal proof of will".
- 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 believes 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 proposes that these titles be adopted in Nova Scotia in an attempt to modernize the language.

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.[98] As a result, the estate is always subject to this type of application. Some executors choose to prove a will in solemn form, even in ordinary circumstances, because once a will is proved in solemn form, it cannot be set aside later (except in cases of fraud).[99] It does not appear that there is a time limit on when a proof in solemn form application must be made.[100] It has been suggested that a time limit be inserted by legislation so there is a definite end to the time within which such applications must be brought. Time limits already exist in probate

[97] Some applications, such as contempt or applications under the *Incompetent Persons Act*, require that intermediate steps be taken before the application can be made.

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

[99] *Ibid*. at 181.

[100] Although Feeney, *ibid*. at 181, note 37, speculates that the time limit may exceed thirty years.

legislation. For example, the *Matrimonial Property Act* and *Testators' Family Maintenance Act* require that spouses and dependents make any claims against the estate within six months. 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 acting as 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. The Commission feels this concern can be lessened, however, if interested parties receive notice of the estate being opened, as recommended above.[101] 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.

Any time limit must be consistent with limits contained in other legislation. Because an application under the *Matrimonial Property Act* and the *Testators' Family Maintenance Act* must be made within six months from the date of the grant, it may be appropriate to require that applications for formal proof of will be brought within the same period. The Commission, however, favours shortening the overall time frame for processing estates and invites comment on whether such applications should be made within four months, as opposed to six. If such a reduction is made, it will also be necessary to amend the six month limits contained in the *Matrimonial Property Act* and the *Testators' Family Maintenance Act*.

The Commission suggests:

- An application for formal proof of will should be required to be brought within six months from the date of the grant. The Commission is seeking input on whether this time period should be reduced to four months, recognizing that such a change will make it necessary to amend the time limits contained in the *Matrimonial Property Act* and the *Testators' Family Maintenance Act*.

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

[101] 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.

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,[102] 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.[103]

Within three months of the date of the grant, the executor or administrator must file an itemized list of all real and personal property owned by the deceased at the time of death. The value of each item must be indicated. This list is known as an "inventory".[104] 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 probate fees is made.[105] In the Commission's survey of registrars, all 10 registrars indicated that once inventories are filed, they review them to determine if the probate fees need to be adjusted. Two registrars indicated that refunds are not credited to the estate until it is closed. Most estates in Nova Scotia, however, are never formally closed.[106]

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 argue that completing an inventory is not too difficult a task and it should be provided in all cases. They 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 inventories 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). There are also privacy concerns in that once an inventory is filed, it becomes public record. Some people believe that financial information regarding a deceased person should not be available for public viewing when that information was never available during the person's lifetime. If inventories are to continue to be required, they argue that there should be restrictions on who can view them.[107]

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

[103] Section 130(2), *Probate Act*, *supra* note 1.

[104] See sections 38-39 and Form P in the Schedule to the *Probate Act*, *supra* note 1.

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

[106] As discussed in Section IV.17., below.

[107] It has been suggested that the surviving spouse, beneficiaries, heirs and creditors with unpaid claims should have the right to view the inventory. There may, however, be other parties who wish to view the inventory, such as people who were disinherited or those with a cause of action (i.e., a claim in law) against the estate. Some people believe such parties should be required to apply to view an inventory by filing an affidavit with the registrar, setting

On balance, the Commission believes the benefits of providing an inventory outweigh any perceived problems. The Commission is therefore suggesting 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), they should be permitted to challenge it by bringing a contested application. Information could then be presented to support or dispute the inventory.

Another issue is 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.[108] 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. The Commission is therefore inviting comment on three possible options for filing the inventory:

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.

Currently, the inventory filed in Nova Scotia does not include debts of the estate. The "net" value of the estate (assets less liabilities) is therefore unknown. The inventory is thus not a true indication of estate value. In Alberta, the inventory is known as the "Inventory of property and debts". The Alberta form provides for all debts and encumbrances to be deducted from the value of real and personal property to determine the net value of the estate.[109] The Commission therefore suggests that the inventory include both property and debts and be renamed to reflect this change, as "Inventory of Property and Debts".

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out their relationship to the deceased and the reason they wish to examine the inventory. The Commission is interested in any comments on this point.

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

[109] *Surrogate Court Act*, R.S.A. 1980, c. S-28, Form NC7. In Alberta, the net value of the estate is used to calculate the court (i.e., probate) fees: *Alberta Surrogate Rules*, *supra* note 65, Sch. 2. In Nova Scotia, probate fees are calculated using the net value of real property but the total value of personal property: s. 130(2), *Probate Act*, *supra* note 1. Probate fees are discussed in Section IV.18(a), below.

The Commission invites comment on three possible options for filing an inventory:

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 Commission suggests:

- If an interested party disputes the accuracy of the inventory, they may bring a contested application.

- The inventory should include both property and debts and should be renamed "Inventory of Property and Debts".

(b) Should the appraisal requirements be maintained?

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".[110] There is a perception that those acting as appraisers do not have a knowledge of asset value and that the Warrant of Appraisement may be meaningless. In the Commission's survey of registrars, however, 80% of registrars indicated that they believe most appraisers have a knowledge of asset value. They also indicated that business associates (of the deceased, the executor or administrator) most often act as appraisers although it is also quite common to have neighbours or professional appraisers act. Furthermore, all registrars indicated that they assess whether appraisers are "disinterested persons" by inquiring as to whether they are family members or have an interest in or are benefitting from the estate. If so, they are not permitted to act as appraisers.

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. Some people recognize 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

[110] Section 42 and Form Q in the Schedule to the *Probate Act, supra* note 1.

the value of the estate) or undervalued to minimize the probate fees to be paid to the Probate Court.

The Commission proposes that appraisals no longer be mandatory but that interested parties may request that an appraisal be filed.[111] 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 should minimize the number of frivolous applications that might be made. Registrars of probate should also have the discretion to require an appraisal if the circumstances warrant.

The Commission suggests:

- Appraisals should not be mandatory but may be requested by an interested person. If the executor or administrator does not agree to provide an appraisal, the matter could be heard by the court. Registrars of probate should also have the ability to require that an appraisal be filed.

[111] If an appraisal is to be filed, presumably it should be completed by a professional appraiser. The cost of such an appraisal would likely have to be paid by the estate. The Commission invites comment on these points.

7. Foreign grants[112]

(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";[113] or

(2) foreign or ancillary probate or administration - if the estate was originally opened anywhere not listed in (1) above [114] (hereinafter referred to as "ancillary probate or administration").

The procedural requirements for ancillary probate or administration are much more complex

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[112] 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 various other 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 "conflicts of law" issue). To deal with the problem, a Convention Providing a Uniform Law on the Form of an International Will was adopted by the Diplomatic Conference on Wills held in Washington, D.C., in October 1973. The Convention establishes an international form of will which is to be recognized as valid by all states which agree to become signatories to the Convention (known as "Contracting States"). The following twelve states are Contracting States: Canada, Belgium, Bosnia-Herzegovina, Cyprus, Ecuador, France, Italy, Libya, Niger, Portugal, Yugoslavia and Slovenia. The United States and the United Kingdom have signed but not yet ratified the Convention. Seven Canadian provinces have implemented the Convention (although the New Brunswick *International Wills Act*, S.N.B. 1997, c. I-12.4, has not yet been proclaimed in force). Three provinces (Nova Scotia, British Columbia and Quebec) and the two territories have yet to adopt the Convention.

The Convention provides that a will is valid, regardless of where it is made, where the assets are located or the nationality or residence of the testator, if it is made in the form of an international will which complies with the provisions set out in the Annex to the Convention. Once an international will is made, a person authorized to act in connection with international wills completes a Certificate confirming that the obligations of the Convention have been complied with. In the absence of evidence to the contrary, the Certificate of the authorized person is conclusive of the validity of the document as a will in all of the Contracting States. See *e.g. Wills Act,* R.S.N. 1990 c. W-10 ss. 30-43*; Succession Law Reform Act,* R.S.O. 1990, c. S.26, s.42*; Probate Act,* R.S.P.E.I. 1988, c. P-21, ss. 120-130.

[113] Section 34, *Probate Act, supra* note 1.

[114] Section 35, *Probate Act, supra* note 1. 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.

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 was granted by a Nova Scotia court.[115] 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 advertized 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.

It appears that the distinction between resealing and ancillary grants is unwarranted.[116] The Commission suggests 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 Commission suggests:

- The distinction between resealing and ancillary grants should be eliminated to reflect current practice. All grants outside Nova Scotia should be called "foreign grants".

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

[115] 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 (s. 34, *Probate Act*, *supra* note 1).

[116] In some provinces, distinctions are made based on whether the property in the province is real or personal property. Resealing and ancillary grants usually only extend to personal property. Real property will not pass unless the will was executed consistent with the requirements of the provincial wills legislation. Sections 34 and 35 of the Nova Scotia *Probate Act*, however, *supra* note 1, appear to apply to both real property and personal property. If the ancillary grant was based on intestacy, the foreign administrator is usually required to nominate a resident of the province to act as administrator. In Nova Scotia, however, the foreign administrator has priority to be appointed as administrator (s. 35(3), *Probate Act*). See generally Feeney, *supra* note 98 at 188-191.

Problems that may be experienced when grants are issued in other countries are illustrated in the case of *Re Creighton Estate*.[117] The deceased lived in Nova Scotia but died in England. His will named English executors to administer his English assets and a Canadian executor to administer his Canadian assets. Probate of the will was granted in England to the English executors. The Nova Scotia registrar refused to reseal the grant in Nova Scotia because the Canadian executor had not been named in the original grant in England. The registrar was concerned that there would be two separate and original grants on the same will. The registrar felt the appropriate procedure would be for the English court to add the Canadian executor as a supplementary executor or to revoke the original grant and issue a new one to both the English and Canadian executors. The Nova Scotia Probate Court disagreed and granted probate to the named Canadian executor, limited to the assets in Nova Scotia. This, however, was after considerable expense and inconvenience to the estate.

While it is recognized that the probate procedure in other countries may differ from that of Nova Scotia, 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). It is believed the process would be simplified if registrars of probate had greater discretion to review grants from other jurisdictions and 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 executor or administrator could choose to appeal the registrar's decision to a judge.

The Commission suggests:

- Registrars of probate should have the authority to decide whether grants from outside Nova Scotia 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?

[117] (1987), 80 N.S.R. (2d) 233 (Prob. Ct.).

Translation of estate documents from foreign jurisdictions is often problematic. Registrars sometimes accept translations without any guarantee that the translations are accurate. On some occasions, registrars of probate 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 that the necessary documents 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.[118] The Commission believes this approach has merit and is recommending that it be adopted in Nova Scotia. Registrars should, however, have the discretion to require that all necessary documents be translated into English, not just the will.

The Commission suggests:

- All necessary documents from the foreign jurisdiction, including the will, should be translated into English and certified as a true and accurate English translation.

8. Simplified, summary procedure

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

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

Over the past twenty years, there have been various suggestions for processing small or uncomplicated estates in Nova Scotia. Many people have suggested that there be two different procedures, one for estates which fit certain criteria and can therefore 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 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.[119] More importantly, dollar values may not accurately indicate whether an estate is simple. A very valuable estate may be

[118] *Alberta Surrogate Rules*, *supra* note 65, r. 18; *Surrogate Court Act*, R.S.A. 1980, c. S-28, Form NC 10.

[119] Some provisions of the *Probate Act*, *supra* note 1, 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.

quite simple and uncomplicated to administer while an estate of low value may be rather complicated and contentious.

Some provinces, including Alberta, Ontario and British Columbia, divide probate matters into contentious and non-contentious matters.[120] If no issues arise in the handling of an estate, it proceeds as a non-contentious estate requiring the filing of documents with no court involvement. If disputes arise, the estate is treated as contentious and the matter is referred to the court. Once the matter is resolved, the estate returns to the non-contentious process, where it left off. As a result, the court is not involved unless an interested party requests that it become involved. While executors and administrators have responsibility to handle the estate, responsibility is placed on those interested in the estate (such as beneficiaries and heirs) to monitor the estate and protect their own interests.

Some aspects of the systems in other provinces may not, however, be desired in Nova Scotia. For example, registrars of probate in Alberta do not perform any judicial functions but have signing or administrative authority only. Registrars in Nova Scotia perform judicial functions[121] and this seems to simplify the system and places less burden on the courts. The Commission believes registrars should have the ability to move a matter into the contentious realm, without the involvement of the beneficiaries or heirs, if they feel it is so warranted. This would provide extra protection for the estate if the registrar felt it was necessary.

Many estates in Nova Scotia do not go through the probate system at all.[122] 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. Estates may not be probated for a number of reasons. For example, real property may have been held by two spouses as joint tenants. When one spouse dies, the property automatically passes to the surviving spouse. As a result, the estate may not be formally probated. Similarly, assets such as RRSPs and 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. Probate may also be avoided to prevent having to pay probate fees.[123] Privacy concerns may also lead to an avoidance of probate. Some people may not want the deceased's assets to become public record.[124]

Some provinces have formally recognized that many estates do not need to be formally probated.

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[120] See Section IV.1, above.

[121] Sections 152-3, *Probate Act, supra* note 1. See also Section IV.1., above.

[122] See Section III.3, above.

[123] See Section IV.18(a), below.

[124] See Section IV.6(a), above.

Manitoba,[125] for example, provides for summary administration for 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 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.

In Saskatchewan,[126] property can be disposed of without a grant of probate or letters of administration if the deceased owned no real property in Saskatchewan that would pass through the estate and the value of any personal property did not exceed $5,000. The personal property is paid or delivered to a person named by the court. They must pay funeral expenses and debts of the deceased with any balance going to beneficiaries or heirs. As in Manitoba, certain sections of the legislation, such as those dealing with the grant and bonds of administration, do not apply to such estates.

The Commission invites 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 invites comment on how such estates should be defined.

The Commission invites comment on:

- Whether probate legislation should authorize that certain estates be informally probated (i.e., without the need to obtain a grant or probate or administration). If so, the Commission invites comment on how to define such estates.

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

[126] *The Queen's Bench Act*, R.S.S. 1978, c. Q-1, s. 105.

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".[127] By filing this form, the executor is no longer obliged to handle 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 handle 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. This issue was considered by the Ontario Law Reform Commission (OLRC).[128] The OLRC acknowledged problems in relation to "professional trustees" (i.e., lawyers, accountants or trust companies acting as executors) who may have persuaded the testator to use their services on the understanding that the professional trustee would act as executor after the testator dies. Even in situations where the testator was induced to appoint an executor on the understanding they would later act as executor, the OLRC concluded it would not be in the estate's best interest to force them to act. If, however, the professional executor had intermeddled in the estate to its detriment, the OLRC felt the executor should be liable for any loss it caused.

There is a perception that professional executors may renounce executorship of an estate if they believe the estate is not financially attractive or is too problematic. If no other executor is named, this may cause hardship to beneficiaries in that an administrator will have to be appointed and a bond purchased at the expense of the estate (thereby reducing the value of the estate and the amount available for distribution to beneficiaries and creditors). As well, the 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 are then no longer part of the estate. This significantly reduces 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

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[127] Form I in the Schedule to the *Probate Act*, *supra* note 1.

[128] Ontario Law Reform Commission, *Report on Administration of Estates of Deceased Persons* (Toronto: Ontario Law Reform Commission, 1991) at 28-31 [hereinafter *Ontario Law Reform Commission Report*].

legally responsible for cleaning up this waste (known as "environmental liability"). Many people believe a professional executor should not be forced to act in such cases.

When preparing a will, a testator may not realize that the professional executor may decide, after the testator dies, not to act as executor. One suggestion is that professional executors be required to state, in any agreement with the testator, that they reserve the right not to act as executor. This would ensure that testators understand that the executor may not be able or willing to act after they die. The testator is then informed and can choose to name alternate executors to act in place of the professional executor.

The primary hardship when an executor renounces is the cost of a bond if no alternate executor was named and an administrator has to be appointed. One option is to require the party renouncing to pay the cost of the bond. If, however, the executor has good reason to renounce, requiring them to pay the cost of the bond may not be appropriate. Another suggestion has been to introduce "show cause" provisions requiring executors to show cause why they should be permitted to renounce. Others suggest that renunciations be permitted only if they cause no hardship to the estate or where there is another acceptable person to act as executor or administrator.

Some people believe that individual executors should be treated differently than professional executors.[129] 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.

The Commission is not making a recommendation on the issue of renunciations but is inviting 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 situation is different, however, once an executor has assumed their duties. It is believed it

[129] 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 ten registrars replied that there should be. One registrar stated that corporate executors should not be able to renounce simply because the value of the estate is low. Another felt they should not be able to renounce because they are in a greater position of trust.

should be more difficult to renounce once the executor has started to act. The Commission proposes that such executors be required to apply to the registrar of probate for permission to renounce. If the executor is dissatisfied with the registrar's decision, they can appeal the decision to a judge.

The Commission invites 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 Commission suggests:

- Once an executor assumes their duties, they should be required to apply to the registrar of probate for permission to renounce. If they disagree with the registrar's decision, they can appeal the decision to a judge.

10. Removal of executors and administrators

Should registrars 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.[130] 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 requiring 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.[131] In the Commission's survey of registrars, seven out of nine registrars indicated they do not hear applications to remove executors or administrators. One registrar expressed the view that such an application must be heard by a judge.

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

[130] Sections 31-33, *Probate Act*, *supra* note 1.

[131] Sections 153(1)(a) and 153(4), *Probate Act*, *supra* note 1.

or administrator. In such cases, the Commission proposes that the registrar of probate have the discretion to act without the need for written consent or for the parties to appear before a judge. There may be other cases where all those involved agree to the removal except the executor or administrator. It may, however, be appropriate for the registrar to hear the matter. If, however, the issues were complex, the matter could be heard by a judge.

The Commission suggests:

- Registrars of probate should have the discretion to remove executors or administrators. If the issues are complex, the matter could be heard by a judge.

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:[132]

(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?

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 past, there was inconsistency because at least one registrar treated the surviving spouse and next

[132] Section 21, *Probate Act*, *supra* note 1.

of kin as having equal priority. As a result, if the spouse was going to apply to act as administrator, renunciations were required from each of the next of kin. In the Commission's survey of registrars, all registrars indicated that they treat the surviving spouse as having priority over the next of kin for appointment as administrator. As a result, they do not require renunciations from the next of kin if the spouse wishes to act. The Commission feels this is consistent with the intent of the legislation. The legislation is, however, unclear and the Commission proposes that it be clarified to indicate that the spouse is entitled to be first appointed as administrator, followed by the next of kin.[133]

The Commission suggests:

- 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. In the Commission's survey of registrars, however, one registrar indicated that they permit the appointment of non-resident administrators when proper bonding is provided. Non-resident executors are permitted in Nova Scotia, the rationale being that the deceased named them specifically. The fact that they reside outside the province does not prevent them from being appointed, even though the same issues of control exist.

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 to 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. Others believe the residency requirement should be maintained to ensure adequate control over the actions of the administrator.

The practice in other provinces varies. Some provinces, such as Ontario, Manitoba and

[133] 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.

Newfoundland require that administrators be resident in the province.[134] Other provinces, such as Prince Edward Island and New Brunswick allow out of province administrators to be appointed.[135] Saskatchewan and Alberta grant administration to residents of the province in preference to those having an equal right to be appointed but whom reside outside the province. The court still has the discretion, however, to order otherwise.[136]

The Commission believes 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, they could be required to post a bond. The bond would therefore be available should the administrator place the estate assets at risk. The Commission also proposes, 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 could not be waived.

The Commission suggests:

- 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 beneficiaries and heirs if they are all 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 grant letters 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.[137] In Alberta, "a person who has an interest in the estate because of a

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[134] *Estates Act*, R.S.O. 1990, c. E.21, s.5; Newfoundland, Rules of the Supreme Court, 1986, r. 56.03; *The Court of Queen's Bench Surrogate Practice Act*, C.C.S.M. c. C290, s. 7.

[135] *Probate Act*, R.S.P.E.I. 1988, c. P-21, s.46; *Probate Court Act*, S.N.B. 1982, c. P-17.1, ss. 28, 57.

[136] Saskatchewan Rules of Court, s. 713(3); *Alberta Surrogate Rules*, *supra* note 65, r. 11(3).

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

relationship with the deceased"[138] is ninth in a list of eleven applicants entitled to administration. This reflects a proposal of the Alberta Law Reform Institute (ALRI) which initially suggested a category be added for those "concerned for the welfare of the person" because of their relationship to the deceased. According to the ALRI, this category was meant to cover more than just cohabitants and presumably could cover relationships where there was no sexual or blood relationship.[139]

In 1995, the Nova Scotia Court of Appeal interpreted "spouse" in the *Probate Act* as including only those persons who are legally married.[140] 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*). The Commission, with respect, does not agree with this approach.[141]

In the Commission's survey of registrars, two of the 10 registrars raised the issue of common law spouses. They suggested that common law relationships be recognized by the *Probate Act*. They stated that common law relationships are very common and the legislation should be updated to reflect social changes. One registrar explained how difficult it is for common law spouses who are told they are unable to act as administrator and are not entitled to inherit because their spouse did not leave a will.

The Commission proposes that common law spouses, whether of the same of opposite sex, be entitled to appointment as administrator. This is consistent with the intent of the first category of entitlement, that is, to allow those with the closest relationship to the deceased 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 proposes that the *Intestate Succession Act* be amended to include common law spouses as heirs, whether of the same or opposite sex.

While various definitions of spouse have been proposed, the Commission suggests 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

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[138] *Alberta Surrogate Rules*, *supra* note 65, r. 11(2)(i).

[139] *Alberta Report for Discussion*, *supra* note 63 at 8.

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

[141] 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).

> personal relationship that is of primary importance to both of them".[142]

If 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. In any event, 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, the court determines who is best fit to be administrator.[143]

The Commission also proposes 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 by including it in the definition section of any new legislation.

The Commission suggests:

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

(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 reported cases in Nova Scotia dealing with this issue. As well, there is inconsistency in how "next of kin" is interpreted. The Commission's survey of registrars of probate showed that registrars generally interpret it very broadly so that if the spouse or children do not act, grandchildren and then parents are next entitled.[144] 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

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[142] 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.

[143] *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).

[144] One registrar, however, considered brothers and sisters (not children) to be entitled to act after the spouse, followed by parents and nieces/nephews.

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 Nova Scotia's. 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*:[145]

> *(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*.[146]

The Commission proposes that 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 recognizes that there may be multiple people entitled to administration within each category of entitlement.[147] This already occurs 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 will arise if siblings, nephews and nieces, etc. are entitled to administration. If the parties cannot agree on who should be administrator, they may bring a contested application.

The Commission suggests:

- 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, those interested may bring a contested application.

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

[146] The *Intestate Succession Act*, *supra* note 21, 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.

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

(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.[148] 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.

The Commission proposes 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 proposes that the relevant sections in probate legislation be "subject to the provisions of the *Public Trustee Act*".

The Commission suggests:

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

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

[148] *Supra* note 145, ss. 15, 23, 24.

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.[149] 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 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 heirs 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.[150] As a result, the additional cost of bonding may be a burden for estates which are already lower in value.

An issue which arises is whether beneficiaries or heirs should have the power to waive the bonding requirement. If they were given this power, creditors may complain they have 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 beneficiaries and heirs, is it really important for creditors? If yes, bonding should also be required for executors because creditors exist in both testate and intestate estates.

Most other provinces have more relaxed bonding requirements than Nova Scotia. 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.[151] In New Brunswick, bonding is required for administrators who are creditors or non-residents of the province[152] (Nova Scotia does not permit non-resident administrators to be appointed although the Commission is recommending that this be changed to allow non-residents to be appointed as administrators, as long as they are bonded).[153] New Brunswick courts also have the discretion to dispense with bonding unless it is felt necessary to secure the proper administration of the estate.

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[149] In Ontario, a spouse acting as administrator does not have to file a bond when the net value of the estate does not exceed the preferential share under the *Succession Law Reform Act*, R.S.O. 1990, c. S.26, (currently $200,000) and an affidavit is filed setting out the debts of the estate: *Estates Act*, R.S.O. 1990, c. E.21, s. 36(2).

[150] Statistics obtained from the Department of Justice (Financial and Statistical Services) for April 1, 1995 to March 31, 1996 show that the average value of grants of probate was $132,030 while the average value of grants of administration was $67,098. The figures for the same period in 1996 to 1997 were $147,741 and $61,595, respectively.

[151] 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*, R.S.O. 1990, c. E.21, s. 37(2).

[152] *Probate Court Act*, S.N.B. 1982, c. P-17.1, s. 57.

[153] See Section IV.11(b), above.

The Commission proposes that interested parties have the right to apply to the court to waive the bonding requirement. It should only be waived with the consent of all known beneficiaries and heirs, all of whom are adults and mentally competent.

In Alberta, bonding is required for non-residents, whether executors or administrators. The Alberta Law Reform Institute (ALRI) studied the issue and commented that although the majority of executors and administrators were not fraudulent, requiring bonds for administrators assumes that they are less honest or need insurance because they were not named by the deceased. The ALRI felt such bonding requirements discouraged suitable individuals from becoming administrators. As a result, they recommended that no bonds be required by either executors or administrators living in the province. They recommended that non-resident executors and administrators be required to post bonds because of the inability of the court to supervise them. The court would still have the authority to dispense with bonds if requested.[154] These recommendations were recently implemented in Alberta.[155]

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 Commission's survey of registrars of probate, three out of ten registrars indicated they felt bonding should be required for non-resident executors. Another registrar felt there should be an ability to require bonding for non-resident executors if the circumstances warranted. The Commission does not, however, favour bonding for non-resident executors. Inserting such a requirement would only further add to the cost of probating estates and it does not appear that this is a significant problem requiring reform. As noted above, the Commission is suggesting that non-residents be entitled to be appointed as administrators, as long as proper bonding is provided.

The Commission suggests:

- Bonding should be required for non-resident 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 heirs if they are adults and mentally competent.

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

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[154] *Alberta Report for Discussion, supra* note 63 at 12-14; *Alberta Final Report*, *supra* note 63 at 14.

[155] *Alberta Surrogate Rules*, *supra* note 65, rs. 28-31.

13. Vesting of property[156]

Should real and personal property vest in executors and administrators?[157]

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. 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 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. In 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.[158] The second method, the "doctrine of relation back", may be used to state that once the administrator is appointed, their title "relates 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.[159] A leading text speculates that in Canada, at common law the personal property would vest in the judge of the Probate Court and pass to the administrator when the grant is issued.[160] British Columbia appears to be the only province to have specifically inserted the doctrine of relation back in its legislation.[161]

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[156] This section of the Paper is technical and somewhat complex. While an effort has been made to simplify the issues as much as possible, people without legal training may find it difficult to read.

[157] For an excellent discussion of this topic, see *Ontario Law Reform Commission Report*, *supra* note 128 at 234-255.

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

[159] *Ontario Law Reform Commission Report*, *supra* note 128 at 235.

[160] *Anger and Honsberger*, *supra* note 158 at 1456.

[161] *Anger and Honsberger*, *supra* note 158 at 1458; *Estate Administration Act*, R.S.B.C. 1996, c. 122, s. 5. Section 5 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

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 common law treatment of real property is problematic when there is no will because the real property then vests in the heirs. 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.[162]

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 vests at common law.[163] In some provinces, legislation also deems the personal representative to be an heir of the deceased with respect to real property.[164] 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.[165] As noted above, however, the doctrine of relation back can also be used to fill the gap, as has been done in British Columbia.

Some provinces also permit the executor or administrator to sell real property to pay estate debts, without having to get the court's permission. If the real property is being sold in order to

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administration". The section does not appear to be limited to personal property.

[162] This is a source of some confusion. In the Commission's survey of registrars, registrars were asked whether they allow expenses for caring for real property to be charged to an estate on an administration. The registrars were evenly split, with five indicating they allow such expenses to be charged to the estate and five indicating they do not.

[163] *Estates Administration Act*, R.S.O. 1990, c. E.22, s. 2(1); *The Devolution of Real Property Act*, R.S.S. 1978, c. D-27, s. 4; *Probate Act*, R.S.P.E.I. 1988, c. P-21, s. 103; *Devolution of Estates Act*, R.S.N.B. 1973, c. D-9, s. 3(1); *Estate Administration Act*, R.S.B.C. 1996, c. 122, ss. 77-8. (One must be cautious in following the Ontario *Estates Administration Act*. The Ontario Law Reform Commission referred to it as "a statute of extraordinary complexity that is bereft of a unifying rationale" *supra* note 128 at 241, note 40.)

[164] *Estates Administration Act*, R.S.O. 1990, c. E.22, s. 6; *The Devolution of Real Property Act*, R.S.S. 1978, c. D-27, s. 9; *Probate Act*, R.S.P.E.I. 1988, c. P-21, s. 107; *Devolution of Estates Act*, R.S.N.B. 1973, c. D-9, s. 7.

[165] *Anger and Honsberger*, *supra* note 158 at 1457.

distribute estate assets to those entitled in the will or on intestacy, the executor or administrator must get the agreement of those beneficially entitled to the property.[166] As a result, the executor or administrator does not have complete authority to deal with the real property. In Prince Edward Island, an executor or administrator who gives a deed must, in every deed they give, include recitals showing that they received title from the deceased.[167] This is to avoid confusion when tracing the chain of title to real property.

The Commission proposes that real and personal property vest in both executors and administrators. This would simplify the handling of the estate and the ability to deal with estate assets. In particular, it 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 acknowledges, however, that on intestacy there is a gap between death and the appointment of the administrator that needs to be filled. The Commission therefore recommends that 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). Comments are invited on this point.

The Commission suggests:

- 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. The Commission invites comment on whether the gap should be filled by having property vest in a court official or 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*

[166] *Estates Administration Act*, R.S.O. 1990, c. E.22, ss. 16, 17(1) ; *The Devolution of Real Property Act*, R.S.S. 1978, c. D-27, s. 11; *Probate Act*, R.S.P.E.I. 1988, c. P-21, s. 109(1); *Devolution of Estates Act*, R.S.N.B. 1973, c. D-9, s. 9. The Ontario Law Reform Commission, *supra* note 128 at 256-257 indicated that this distinction was unjustified. It recommended that estate trustees have a general power to sell estate property, subject to some minor qualifications.

[167] *Probate Act*, R.S.P.E.I. 1988, c. P-21, s. 109(2).

Gazette.[168] 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.

Most Canadian provinces require advertisements to be placed in newspapers published in the area where the deceased person lived. In Alberta, advertising is not mandatory but if it is done,[169] 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 thirty days from the date of the last advertisement.[170]

The only province other than Nova Scotia which requires publication in the *Gazette* is Prince Edward Island. The length of time for these advertisements, and the form of the advertisement is not specified in the legislation.[171] In some provinces, the legislation requires advertising but does not specify the type, length or form of the advertisement. This is the case in Ontario which, according to the Ontario Law Reform Commission (OLRC), caused some confusion among Ontario estate practitioners.[172] The OLRC considered requiring that notices be published in the *Ontario Gazette*, a province-wide publication relatively accessible to those in the business of granting credit. While the cost of advertising would be substantially lower than commercial newspapers, the OLRC concluded that advertisements in the *Ontario Gazette* would be less likely to come to the attention of individual or small business creditors (it was noted that this may not be a concern given that such creditors are likely to have a closer relationship with their debtors). The OLRC proposed that the necessity of advertising be left within the discretion of the executor or administrator. When advertising is carried out, however, the OLRC recommended that the advertisements be published twice in a newspaper with general circulation

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

[169] While this may at first seem surprising, it is not unique to Alberta. Ontario, for example, also leaves advertising to the discretion of the personal representative. There is, however, incentive for a personal representative to advertise in that the *Trustee Act*, R.S.O. 1990, c. T-23, s. 53, protects a personal representative from personal liability for claims of creditors if the personal representative had adequately advertised for creditors. A similar provision is contained in Nova Scotia's *Trustee Act*, R.S.N.S. 1989, c. 479, s. 56. This section provides that if an executor or administrator has given adequate notice to creditors and others to submit their claims, the executor or administrator is free to distribute the assets and will not be personally liable to claimants for claims they did not know about. Claimants or creditors can, however, follow the assets into the hands of those who received them (i.e., the beneficiaries or heirs).

[170] *Alberta Surrogate Rules*, *supra* note 65, rs. 38-39.

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

[172] *Ontario Law Reform Commission Report*, *supra* note 128 at 197-203.

in the area where the deceased resided, worked and carried on business. It does not appear that these recommendations were adopted.

While advertising in the *Royal Gazette* is inexpensive and simple,[173] the Commission believes advertising should appear in a more widely read newspaper in an area where it is likely to be seen by those interested. The Commission suggests that advertisements be placed twice and continue to contain the information currently in the *Royal Gazette*. The Commission therefore proposes that advertising in the *Royal Gazette* be discontinued but invites comment on this issue.

The Commission believes 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 Commission suggests:

- Notices 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 requirement to advertise in the *Royal Gazette* should be discontinued.
- 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 dependent 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 its natural mother but not

[173] 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).

its natural father. The Nova Scotia Court of Appeal, in *Tighe* v. *McGillivray*,[174] 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 his or her natural father's estate. The *Intestate Succession Act* has not, however, been formally amended to reflect this decision. The Commission suggests that the *Act* be amended to reflect the Court of Appeal decision. If this change is made, it follows that the natural father should also have the right to inherit from the estate of his child (a right which the natural mother also has).[175]

A practical problem may arise in that it may not be known whether the child really is the child of the deceased. The child may not have come forward during the deceased's lifetime and may not have been known to exist. If the child's existence was known, the deceased may have denied being the child's father. As a result, there may be a need to resort to presumptions of parentage. This will be discussed in the next section of this Paper.

The Commission suggests:

- 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.

(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*.[176] The Commission concluded that the legal relationship between parent and child should continue to be based on a biological connection.[177] 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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[174] *Supra* note 25.

[175] Under the *Intestate Succession Act*, *supra* note 21, parents are third in priority to inherit, after the spouse and children of the deceased.

[176] 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).

[177] With exceptions for adoption and assisted conception.

Child Status Act. The Commission's draft *Status of the Child Act*[178] 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 notes 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*. The Commission proposes that these presumptions of parentage also be included in the *Testators' Family Maintenance Act*.

If parentage is contested and a hearing is necessary to resolve the dispute, the Commission suggests that 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. It has been suggested that such claims should be brought within six months in order to be consistent with time periods in the *Testators' Family Maintenance Act* and the *Matrimonial Property Act*. The *Trustee Act* states that after six months an executor or administrator is at liberty to distribute the assets of the estate and are 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). 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. The Commission invites comments on whether a time limit should be placed on claims made by children born outside of marriage.

[178] *Supra* note 176 at 34-35, Appendix A, s. 12(1).

The Commission suggests:

- 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. 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. Otherwise, if all parties agree, a registrar of probate may make that determination.

The Commission invites comment on:

- Whether a time limit 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,*[179] 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 dipping" 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. The Commission agrees with this approach. This does not prevent natural families from naming adoptees as beneficiaries in wills.

The Commission suggests:

- 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

[179] (1993), 124 N.S.R. (2d) 333 (S.C.).

In what priority should creditors be paid from insolvent estates?

An estate is insolvent when there is not sufficient 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:[180]

- 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).

Revenue Canada is to be paid any outstanding income tax before these three items are paid.[181] In practice, Revenue Canada usually consents to funeral expenses being paid before taxes. In the Commission's survey of registrars of probate, however, some registrars indicated that they do not require such consent before paying these expenses. There thus appears to be some inconsistency in practice.

The first item listed as a priority creditor, "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. For example, does the period run for the last few weeks, months or years of the illness that leads to death? If the medical services were provided sometime prior to death, or for an illness not leading to death, is it still payable as a priority creditor? Some people believe this category should not be a priority creditor. Others believe medical expenses should remain as a priority creditor 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.). The Commission believes this item should be retained as a priority creditor but a time limit should be inserted to clarify any confusion. The Commission proposes that such expenses be limited to those incurred in the 90 days prior to death. Ninety days is seen as appropriate because a creditor would have had an opportunity to forward an invoice and receive payment for 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 be the first priority creditor because all citizens are entitled to a dignified 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

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[180] Sections 105-107, *Probate Act*, *supra* note 1.

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

estate. One suggestion is that a limit be placed on the funeral expenses to ensure they are a reasonable charge against the estate. In Prince Edward Island, there is a limit of $2500.[182] 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. The Commission therefore proposes 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 Commission proposes that this item be maintained as a priority item but be paid after funeral, medical and testamentary expenses. 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". Since these expenses are necessary for the processing of the estate, there appears to be support for maintaining them as priority items. The Commission proposes, however, that these expenses be paid on a *pro rata* basis. That is, that they be paid proportionately, based on the funds available. 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 Commission proposes that reasonable funeral expenses be first, followed by medical expenses incurred in the 90 days prior to death, followed by reasonable testamentary expenses on a *pro rata* basis and the reasonable cost of a gravestone. All other debts should 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.

The Commission suggests:

- The following be paid as priority expenses from insolvent estates

    1. Reasonable funeral expenses, in full.
    2. Medical expenses incurred in the 90 days prior to death.
    3. Testamentary expenses on a *pro rata* basis:
        (i) probate fees;
        (ii) executors' or administrators' commissions;
        (iii) legal fees.
    4. Reasonable cost of a grave stone, in full.
    5. All other debts on a *pro rata* basis.

[182] *Probate Act, supra* note 1, s. 19(b).

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[183] 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.[184] 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 grant of probate or administration.[185] In addition, executors and administrators swear or affirm an oath in which they indicate they will render a full account of their executorship or administration within 18 months.[186] Despite this, many estates in Nova Scotia are not closed. As the following table shows, over the past six years an average of less than 33% of estates have been closed each year.[187]

Year	Estates Opened	Estates Closed	% of Closings to Openings
1991/92	2,451	846	34.5%

[183] 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.

[184] 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).

[185] Section 70(1), *Probate Act*, *supra* note 1.

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

[187] Nova Scotia Department of Justice (Financial and Statistical Services). Statistics are for the period April 1 to March 31 of each year.

Year	Estates Opened	Estates Closed	% of Closings to Openings
1992/93	2,363	828	35.0%
1993/94	2,513	754	30.0%
1994/95	2,361	768	32.5%
1995/96	2,402	715	29.8%
1996/97	2,266	774	34.2%
Total	14,356	4,685	32.6%

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.

Statistics also show that the number of estates closed varies from district to district. As the following table shows, probate districts with the highest number of closings over the past two years are Pictou, Kentville and Lunenburg. The probate districts with the lowest number of closings over the past two years are Amherst, Port Hawkesbury and Yarmouth. The reasons for these disparities are unknown.

Probate District	Rank 1995/96	% of closing to openings	Rank 1996/97	% of closing to openings
Pictou	1	50.3%	2	55.6%
Kentville	2	42.4%	3	40.0%
Lunenburg	3	41.7%	1	61.6%
Sydney	4	34.4%	5	35.2%
Truro	5	30.7%	4	37.4%
Annapolis	6	26.4%	8	24.8%
Halifax	7	25.3%	6	29.8%
Antigonish/Guysborough	8	20.0%	7	28.0%
Yarmouth	9	17.7%	9	16.8%

Probate District	Rank 1995/96	% of closing to openings	Rank 1996/97	% of closing to openings
Port Hawkesbury	10	16.7%	11	12.6%
Amherst	11	5.9%	10	14.9%

Closings are a source of debate. Many lawyers feel 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 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 feel closings are necessary to ensure all accounts are reviewed and the estate was handled properly. Many people feel it is inappropriate for a lawyer to advise an executor or administrator not to close an estate in light of the *Probate Act* and oath. 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.[188] 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 suggests formal closings not be required but that a form be filed with the court once an estate is concluded. Among other things, the form would indicate the property that has been distributed, the property remaining 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 (such as beneficiaries, heirs and creditors) who have not yet received their gifts or 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.

[188] Nova Scotia Barristers' Society, Bar Admission Course, Wills and Estates 1995/96 at WE-2-21. See 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 will be eliminated because the executor or administrator could pass title to real property.

The Commission suggests:

- 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 such as beneficiaries, heirs and creditors who have not yet been paid. The interested parties would have 30 days to file an objection requesting a formal closing.
- Legal fees would not be approved until the form was filed and the 30 day objection period had 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.[189] They are set by regulation under the *Costs and Fees Act*[190]. 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). The Commission believes the system should not discourage people from closing estates. The Commission therefore recommends that only one probate fee be charged, and that it be charged upon the opening of an estate. Any required

[189] 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, 1995 to March 31, 1996, was $2,032,180. Grants of probate produced $1,428,727 of this amount while grants of administration produced $127,209 and closings produced $377,161 (searches and "miscellaneous" accounted for the balance of the revenue). The figures for the same period in 1996 to 1997 were $1,908,940, $1,348,876, $104,463, and $355,171 respectively.

[190] R.S.N.S. 1989, c. 104.

adjustments should be made once the closing document is filed (adjustments may be required, for example, if the initial inventory is later found to be inaccurate).[191]

The Commission believes it is not part of its reform mandate to comment on the amount of the probate fees to be charged.[192] This is to be decided by the Government.

The Commission suggests:

- Only one probate fee should be charged and it should be charged upon the opening of an estate. Any necessary adjustments to the probate fee should be made upon filing of the closing document.

(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.[193] In the Commission's survey of registrars of probate, all 10 registrars indicated that they determine commission by evaluating the work done and responsibility assumed.[194]

Registrars determine that amount of commission when the estate is being closed. In the Commission's survey of registrars, all registrars indicated that this is their practice. Since many estates in Nova Scotia are not closed, it is presumed that 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 commission to be paid to the executor. They are usually used by professional executors, such as

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

[192] In Ontario, a challenge is being made to a 1992 increase in probate fees to 1.5 percent of the value of the estate, the highest rate in Canada: *Re Eurig Estate* (1997), 31 O.R. (3d) 777 (Ont. C.A.), on appeal to the Supreme Court of Canada. See C.S. Thériault, "Clients seek ways to minimize skyrocketing probate fees" *The Lawyers Weekly* (13 February 1998) 11.

[193] Section 76, *Probate Act*, *supra* note 1.

[194] This is consistent with the court's direction in *Re Forbes Estate* (1991), 110 N.S.R. (2d) 361 (Prob. Ct.). The court held that the responsibility assumed is the most significant factor in determining commission although in complex estates, the time spent may be the dominant factor. The court stated that "responsibility assumed" means the broader responsibility for the overall administration of the estate and the carrying out of the testator's wishes as expressed in the will.

trust companies. Anecdotal evidence suggests that such agreements are becoming more common and that they often provide for commission of more than 5%. In the Commission's survey of registrars of probate, six of 10 registrars indicated they have seen such agreements. Three of these registrars have seen agreements providing for commission of more than 5%. The registrars differed on how they handled such cases. One registrar would not allow commission of more than 5% while another would allow it if it was specified in the will. Another registrar said it would be allowed if the residuary beneficiaries agreed in writing. If a commission of more than 5% is agreed to be paid, the Commission believes the testator should be informed that the legislation authorizes a maximum commission of 5%. The Commission invites comment on this point and on whether Compensation Agreements are a significant issue that should be examined in this reform effort.

In Alberta, legislation provides for compensation of personal representatives. The legislation contains a table which lists the tasks normally required to be performed by a personal representative.[195] As well, six factors are to be considered when determining compensation to be paid to an executor or administrator:

> *(a) the gross value of the estate;*
> *(b) the amount of revenue receipts and disbursements;*
> *(c) the complexity of the work involved and whether any difficult or unusual questions were raised;*
> *(d) the amount of skill, labour, responsibility, technological support and specialized knowledge required;*
> *(e) the time expended;*
> *(f) the number and complexity of tasks delegated to others;*
> *(g) the number of personal representatives appointed in the will, if any.*[196]

It has been argued that the payment of commission leads to "unjust enrichment" in some situations where an executor or administrator receives a large commission for an easily administered but very valuable estate. Presumably, such cases are reviewed by registrars and adjustments made based on the actual time spent and responsibility assumed. There appears to be support for maintaining the 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. The Commission is not recommending any change in the current commission structure, nor is the Commission recommending adoption of a system such as that in use in Alberta. Comment is, however, invited on whether such a system should be considered.

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[195] *Alberta Surrogate Rules*, *supra* note 65, Sch. 1, Part 1, Table 1. Twenty tasks are listed, including: making arrangements for the disposition of the body and for a funeral or memorial service; determining the names and addresses of those beneficially entitled to estate property and notifying them of their interests; protecting or securing the safety of any estate property; retaining a lawyer; and, arranging for payment of debts and expenses owed by the deceased and the estate.

[196] *Alberta Surrogate Rules*, *supra* note 65, Sch. 1, Part 1, s. 2.

The Commission suggests:

- There should be no change in the current commission structure allowing executors or administrators a commission not exceeding 5% of the value of the estate.
- The Commission invites comment on whether Compensation Agreements are a significant issue that should be examined in this reform effort. In particular, the Commission invites comment on whether the parties 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?

There appears to be inconsistency in determining legal fees to be charged to an estate. In the Commission's survey of registrars, nine of the 10 registrars indicated they use a scale to determine legal fees. Six of the registrars provided a copy of the scale used. There were four different scales. Three registrars use a scale from Lunenburg County (effective March 1, 1989), one uses a scale from Kings County (dated April 1986), one uses a scale from Ontario (undated) and another uses a scale from the Western Counties Barristers' Society (May 1987, revised October 1991). All four scales include a percentage formula which differs slightly, with the Ontario scale yielding the highest fees. Applied to estate values of $100,000, $200,000 and $500,000 the scales yield the following legal fees:

Scale	$100,000	$200,000	$500,000
Kings County	$1425	$1925	$3425
Western County	$1425	$1925	$3425
Lunenburg County	$1475	$1975	$3475
Ontario	$2100	$3600	$5600

Five of the 10 registrars indicated they also consider other factors in determining legal fees such as the hourly rate of the lawyer, whether the work was legitimate, whether the lawyer performed some executor functions and the size of the estate in relation to the lawyer's account. One registrar uses the scale for normal lawyer's work and the hourly rate of the lawyer for additional work. Seven of the registrars indicated that lawyers provide them with detailed descriptions of the legal work done to explain the fees being charged. Three registrars said a detailed account is not always provided.

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.[197] 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 over 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 contains tables which list the services included in each category.[198] As well, ten factors are to be considered when determining legal fees:

> *(a) the complexity of the work involved and whether any difficult or novel questions were raised;*
> *(b) the amount of skill, labour, responsibility and specialized knowledge required;*
> *(c) the lawyer's experience in estate administration;*
> *(d) the number and importance of documents prepared or perused;*
> *(e) whether the lawyer performed services away from the lawyer's usual place of business or in unusual circumstances;*
> *(f) the value of the estate;*
> *(g) the amount of work performed in connection with jointly held or designated assets;*
> *(h) the results obtained;*
> *(i) the time expended;*
> *(j) whether or not the lawyer and the personal representative concluded an*

[197] 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.

[198] *Alberta Surrogate Rules*, *supra* note 65, Sch. 1, Part 2, Tables 1-2. There are fifteen core legal services listed, including: receiving instructions from the personal representative; reviewing the will or provisions of the *Intestate Succession Act* with the personal representative; obtaining details of all the property and debts of the deceased for the purposes of an application to the court; preparing documents to advertise for claimants, arranging for advertising and obtaining the affidavit of publication; confirming receipt of clearance certificates from Revenue Canada; and, generally advising the personal representatives on all matters referred to in the Table. There are fourteen non-core legal services listed including: acting as conveyancing lawyer on any sale of land; preparing personal representatives' financial statements for submission to residuary beneficiaries; preparing all documents and acting for the personal representatives in any court proceedings including formal proof of will, formal passing of accounts and all other contentious matters; dealing with any claims by claimants; and, identifying and dealing with property not forming part of the estate but passing by survivorship or passing directly to a named beneficiary outside the will.

agreement and whether the agreement is reasonable in all the circumstances.[199]

In addition, if a lawyer is to carry out any personal representative's duties, the lawyer and the personal representative 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 personal representative, the lawyer may charge additional fees for any core and non-core legal services performed by the lawyer as a lawyer.[200]

The Commission suggests that accounts for legal services should always be filed with the Probate Court for review by the registrar of probate upon closing.[201] The Commission is not making any recommendation in relation to the actual amount of legal fees to be charged, nor is the Commission recommending adoption of a system such as that in use in Alberta. Comment is, however, invited on whether such a system should be considered.

The Commission suggests:

- Accounts for legal services should be filed with the Probate Court for review by the registrar of probate upon closing.

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.[202] Members of the public are permitted to place their wills in the depository for safe keeping. The depository is usually contained in the registrar of probate's office and a fee is charged for the storage service. Rules are developed regarding how wills are to be deposited. In Ontario, for example, wills must be enclosed in an

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[199] *Alberta Surrogate Rules*, *supra* note 65, Sch. 1, Part 2, s. 5.

[200] *Alberta Surrogate Rules*, *supra* note 65, Sch. 1, Part 2, ss. 3-4.

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

[202] Manitoba, Court of Queen's Bench Rules, r. 74.13; *The Queen's Bench Act*, R.S.S. 1978, c. Q-1, s. 142 and Saskatchewan Rules of Court, rs. 695-696; *Estates Act*, R.S.O. 1990, c. E.21, s. 2 and Ontario Rules of Civil Procedure, r. 74.02.

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.

The National Wills and Trusts Section of the Canadian Bar Association is currently conducting a survey entitled "Storage and Destruction of Wills". The purpose of the survey is to study practice variations and to share information. It asks lawyers whether they keep original wills in their own safekeeping facilities or return them to the client. It also asks what happens to an original will when a client makes a new will. The results of this survey will not be available until late spring, 1998. In a recent survey of lawyers in New Brunswick, 54% of respondents indicated that they retain the original will in their office.[203]

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, 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.

Comments are invited on:

- Whether the Nova Scotia Government should provide a depository for members of the public to file wills for safekeeping and storage.

20. Registering wills

Should unprobated wills be registered at the Registry of Deeds?

Documents dealing with land are registered at the Registry of Deeds office in the area of Nova Scotia where the land is located. Such 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.

[203] B.D. Munro, "New Brunswick survey reveals lawyers less frequently named as executors" *The Lawyers Weekly* (13 February 1998) 13.

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 was signed in accordance with the requirements of the *Wills Act*. This means proving that the will was signed by the testator and two witnesses, all being present at the same time and signing in the presence of each other. "Probating a will", on the other hand, comes after the proving of the will. It starts with confirming 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.[204]

Many lawyers feel probate is not necessary and they have been simply registering wills at the Registry of Deeds without obtaining grants of probate. In the Commission's survey of registrars of probate, however, all 10 registrars indicated they do not certify unprobated wills for filing in the Registry of Deeds.

In *Boyer* v. *Throop*,[205] 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. The Commission agrees with this approach.

The Commission suggests:

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

21. Consistency

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

Concerns have been raised about inconsistency in probate practices and procedures in different probate districts around the province.[206] Any inconsistency may cause problems for lawyers working in the system as well as 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

[204] V.P. Allen, *Nova Scotia Probate Law & Procedure* (Halifax, Nova Scotia: 1993) at 14, 24-25.

[205] (1993), 129 N.S.R. (2d) 60 (S.C.).

[206] As noted in Section III.4., above, the Commission's survey of registrars of probate did not, however, reveal significant inconsistencies in practice.

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 has been developed titled Alberta Surrogate Forms. Published by the Legal Education Society of Alberta, 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 manual is available for sale for $175. The Legal Education Society of Alberta conducted educational seminars when the manual was introduced for lawyers, judges and others interested in the system. The Commission suggests that a comprehensive probate manual also be developed in Nova Scotia. The manual should contain probate rules, forms and procedures. The forms should be available on disk.

Both New Brunswick and Alberta[207] have Rules Committees to oversee probate and to make recommendations for change. The Commission believes 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 should continue to exist to maintain and update the system. Members of the committee should, 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,*[208] the rules of practice of the Supreme Court apply to probate matters unless there are specific probate rules dealing with that matter. The Commission agrees with this approach and suggests that it be continued.

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[207] *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 Act*, the rules and regulations under the *Probate Act*, and the procedure of the court. It may make recommendations to the Lieutenant-Governor in Council. 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*, *supra* note 63 at 3.

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

The Commission suggests:

- 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?

The changes proposed in this Discussion Paper are substantial. The Commission recognizes, however, that there are many more issues that have yet to be canvassed. The Commission anticipates that the publication of this Paper will encourage lawyers, registrars of probate, judges and others to provide guidance and direction on the type of reform desired in Nova Scotia. In Alberta, the philosophy governing probate reform was that statutes should contain substantive law governing succession to property and rules 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 was:

- identify the procedural parts of all the relevant statutes;
- remove the procedural provisions and substitute them with a reference to the procedure in the rules; and
- place all procedures in the rules.[209]

This Commission agrees that rules of procedure need to be developed for probate. Since much of the current *Probate Act* is procedural, new legislation will likely be needed. This will require removal of procedural elements from the *Probate Act* and development of specific rules of probate. This will likely require that the current *Probate Act* be abolished and replaced with a new *Probate Act*, complete with rules of procedure.

[209] *Albert Final Report*, *supra* note 63 at 5.

The Commission suggests:

- Procedural elements should be removed from the *Probate Act* and 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*.

V SUMMARY OF SUGGESTIONS

1. The ongoing debate [pages 19-22]

- 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, those interested in the estate (such as the surviving spouse, beneficiaries, heirs and creditors) could follow a different procedure to have the matter heard by a judge or registrar. The estate is then treated as contentious. Once the dispute is resolved, the estate again becomes non-contentious and continues to follow the standard procedure for non-contentious estates.

OPENING ESTATES

2. Jurisdiction [pages 22-25]

- The deceased's fixed place of abode should continue to 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 fixed place of abode using a balance of convenience test, based on a number of factors including:
    - the deceased's fixed place of abode;
    - 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.

- 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 25-28]

- The executor or administrator should give notice of the application for a grant to all

beneficiaries and heirs who are known or can be reasonably ascertained or located, including those that may be entitled under the *Intestate Succession Act* and the *Testators' Family Maintenance Act*. Notices should be sent by registered mail.

- 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.

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

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

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.

- In an affidavit proving a will, the witness should state that the testator "appeared competent to sign the will".

- An affidavit proving a will should be taken by a registrar of probate, a deputy registrar of probate, a Barrister of the Supreme Court of Nova Scotia or a Notary Public of any jurisdiction in Canada.

5. Proof of will [pages 31-34]

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

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

- An application for formal proof of will should be required to be brought within six months from the date of the grant. The Commission is seeking input on whether this time period should be reduced to four months, recognizing that such a change will make it necessary to amend the time limits contained in the *Matrimonial Property Act* and the *Testators' Family Maintenance Act*.

HANDLING ESTATES

6. Inventory and Appraisal [pages 34-37]

- The Commission invites comment on three possible options for filing an inventory:

    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.

- If an interested party disputes the accuracy of the inventory, they may bring a contested application.

- The inventory should include both property and debts and should be renamed "Inventory of Property and Debts".

- Appraisals should not be mandatory but may be requested by an interested person. If the executor or administrator does not agree to provide an appraisal, the matter could be heard by the court. Registrars of probate should also have the ability to require that an appraisal be filed.

7. Foreign grants [pages 39-42]

- The distinction between resealing and ancillary grants should be eliminated to reflect current practice. All grants outside Nova Scotia should be called "foreign grants".

- Registrars of probate should have the authority to decide whether grants from outside Nova Scotia 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 foreign jurisdiction, including the will, should be translated into English and certified as a true and accurate English translation.

8. Simplified, summary procedure [pages 42-44]

- The Commission refers to the suggestions under item 1, above.

- The Commission invites comment on whether probate legislation should authorize that certain estates be informally probated (i.e., without the need to obtain a grant or probate or administration). If so, the Commission invites comment on how to define such estates.

EXECUTORS/ADMINISTRATORS

9. Renunciations [pages 45-47]

- The Commission invites 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).

- Once an executor assumes their duties, they should be required to apply to the registrar of probate for permission to renounce. If they disagree with the registrar's decision, they can appeal the decision to a judge.

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

- Registrars of probate should have the discretion to remove executors or administrators. If the issues are complex, the matter could be heard by a judge.

11. Appointment as administrator [pages 48-54]

- 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 beneficiaries and heirs if they are all adults and mentally competent.

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

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

- The *Intestate Succession Act* should be amended to include common law spouses, whether of the same or opposite sex, in the scheme of distribution.

- 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, those interested may bring a contested application.

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

12. Bonds [pages 55-57]

- Bonding should be required for non-resident 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 heirs if they are adults and mentally competent.

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

13. Vesting of property [pages 57-60]

- 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. The Commission invites comment on whether the gap should be filled by having property vest in a court official or by the doctrine of relation back.

CLAIMS AGAINST ESTATES

14. Advertising [pages 60-62]

- Notices 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 requirement to advertise in the *Royal Gazette* should be discontinued.

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

15. Parentage [pages 62-65]

- 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.

- 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. 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. Otherwise, if all parties agree, a registrar of probate may make that determination.

- The Commission invites comment on whether a time limit 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 66-68]

- The following be paid as priority expenses from insolvent estates
    1. Reasonable funeral expenses, in full.
    2. Medical expenses incurred in the 90 days prior to death.
    3. Testamentary expenses on a *pro rata* basis:
        (i) probate fees;
        (ii) executors' or administrators' commissions;
        (iii) legal fees.
    4. Reasonable cost of a grave stone, in full.
    5. All other debts on a *pro rata* basis.

CLOSING ESTATES

17. Closings [pages 68-71]

- 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 such as beneficiaries, heirs and creditors who have not yet been paid. The interested parties would have 30 days to file an objection requesting a formal closing.

- Legal fees would not be approved until the form was filed and the 30 day objection period had 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 71-77]

- Only one probate fee should be charged and it should be charged upon the opening of an estate. Any necessary adjustments to the probate fee should be made upon filing of the closing document.

- There should be no change in the current commission structure allowing executors or administrators a commission not exceeding 5% of the value of the estate.

- The Commission invites comment on whether Compensation Agreements are a significant issue that should be examined in this reform effort. In particular, the Commission invites comment on whether the parties should be able to agree to a commission of more than 5% of the value of the estate.

- Accounts for legal services should be filed with the Probate Court for review by the registrar of probate upon closing.

OTHER

19. Depository for wills [pages 77-78]

- Comments are invited on whether the Nova Scotia Government should provide a depository for members of the public to file wills for safekeeping and storage.

20. Registering wills [pages 78-79]

- The word “probated” should replace the word “proved” in section 144(1) of the *Probate Act*.

21. Consistency [pages 79-80]

- 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 [page 81]

- Procedural elements should be removed from the *Probate Act* and 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*.