ACCESS TO JUSTICE
& LAW REFORM
INSTITUTE
OF
NOVA SCOTIA

Simplifying Probate & Administration

Discussion Paper - December 2025

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Access to Justice & Law Reform Institute of Nova Scotia
December 2025

WHAT DO YOU THINK?

The Access to Justice & Law Reform Institute of Nova Scotia is interested in what you think about the proposals and questions in this Discussion Paper.

This Discussion Paper does not represent the final views of the Institute. It is intended to encourage discussion and public participation in the work of the Institute, and in the reform and improvement of the law. Your comments will assist us in preparing a Final Report to the Government of Nova Scotia. The Final Report will make recommendations on how the law of parentage should be introduced to better serve the needs of Nova Scotians.
If you would like to comment on the Discussion Paper, you may:

- Send an email to us at: admin@lawreform.ns.ca
- Write to the Access to Justice & Law Reform Institute at the following address:

  Access to Justice & Law Reform Institute of Nova Scotia
  PO Box 15000
  Halifax, Nova Scotia B3H 4R2

In order for us to fully consider your comments before we prepare our Final Report, please submit your comments to us by:

27 March 2026

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 Institute will assume that respondents agree to the Institute quoting from or referring to comments given. Respondents should be aware that the Nova Scotia *Freedom of Information and Protection of Privacy Act* may require the Institute to release information, including personal 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 Commission restructured as the Access to Justice & Law Reform Institute, an incorporated non-profit, in January 2019.

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Contents

Executive Summary

Probate and administration are important legal processes that are used to manage and distribute a person's money, property and other belongings (their estate) after they die. If the deceased had a will, probate helps protect their wishes and assures interested persons that the will accurately represents those wishes. Where there is no will, administration ensures that an estate is distributed according to the *Intestate Succession Act*, and that interested parties are protected as the estate is settled.[1] In all cases, probate and administration protect beneficiaries, heirs and creditors from loss resulting from fraud or improper dealings.

Probate and administration are often, however, accused of being slow, expensive and cumbersome. The costs and complexity involved in these processes are not always proportional to the value of the estate – a situation which can lead to the estate's undue depletion or abandonment. Forms and processes may seem to some to be designed for lawyers, not the general public. The administration process is particularly rigid: it mandates onerous protections to benefit people who may not want or need them, and non-responsive heirs can hold up the process for long periods. While these protections are well intended, they may also impose barriers to justice on lower income and other marginalized communities (both of whom are more likely to die intestate) which can span multiple generations.[2] All of this speaks more broadly to a system whose processes should be updated in order to better meet the needs of Nova Scotians.

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[1] *Intestate Succession Act*, RSNS 1989, c 236 [ISA].

[2] Angus Reid Institute, "Lacking the Will: Half of Canadians say they don't have a last will and testament, including one-in-five aged 55+" (6 March 2023) online: https://angusreid.org/canada-will-testament-intestate-dying-without-will/#:~:text=Half%20of%20Canadians%20say%20they%20do%20not%20have%20a%20will,not%20have%20a%20will%20written. ("Canadians in lower income households are less likely than those in higher income ones to say they have a will. Approaching two-thirds (63%) of those living in the lowest income households say they do not have a will").

Data from the United States indicates that Black and other racialized communities are less likely to have a will (Jeffrey Jones, Majority in US do not have a will, *Gallup* (8 May 2016, online: https://news.gallup.com/poll/191651/majority-not.aspx (in its dataset 51% of white persons polled had a will, and this number was 28% for non-white persons polled). Studies have identified a lack of estate planning as an issue perpetuating the multi-generational wealth gaps among white and non-white families (Jean-Pierre Aubry et al, "How Much Could Will-Writing Reduce the Racial Wealth Gap?" (2024) Working Paper, Chestnut Hill, MA: Center for Retirement Research at Boston College).

While data specific to the Canadian experience does not exist, Statistics Canada has recognized that there is a need for data which identifies racialized and Indigenous communities (Statistics, Canada, Canadian Statistics Advisory Council Annual Report, *Strengthening the foundation of our National Statistical System* (2021) online: (https://www.statcan.gc.ca/en/about/relevant/CSAC/report/annual2021summ) at 34-35. For more, see: Chantelle Ohrling, "Narrowing the racial wealth gap: Planned giving as a tool for economic justice" *The Philanthropist Journal* (7 April 2025) online: https://thephilanthropist.ca/2025/04/narrowing-the-racial-wealth-gap-planned-giving-as-a-tool-for-economic-justice/?utm_source=chatgpt.com.

In this Discussion Paper, we consider how to simplify probate and administration to better meet the needs of Nova Scotians. To this end, the Paper is divided into four parts. Part One provides relevant background, including a history of the project, our proposed principles of reform, and an overview of existing legal processes to handle property on death. Part Two evaluates the existing probate and administration processes with a view to reform. As explored in more detail below, in this part we propose several reforms for discussion to make probate and administration more flexible and accessible to Nova Scotians. For example, we propose that a majority of heirs to an intestate estate be able to waive bonding; that the formal court-based passing of accounts be the exception rather than the rule; and that outstanding renunciations can be bypassed on notice. We also propose eliminating probate taxes for estates under $50,000, and a legislated a path for a probate tax reduction for estates in excess of this size. Lastly, we propose reforms which will encourage banks to deal with more modest estates informally (i.e. without opening probate).

Part three focuses on redressing the problems encountered when there are successive unadministered estates that must be settled - a situation we refer to as 'multi-generational intestacies' (hereinafter, "MGIs"). As explored below, MGIs are procedurally complex – they require that separate administrations be conducted at each generation. In addition, renunciation rules can create insurmountable hurdles for MGIs. This section proposes novel legislative reforms to remedy these barriers: (1) a standardized substituted service process to handle renunciations, and (2) a consolidation application for MGIs. These proposals for discussion are meant to make it easier to get MGIs settled and redress the cumulative barriers to justice that may have compounded over multiple generations.

Lastly, part four puts forward a variety of "access to justice innovations" which are proposed to help update probate and administration. Among other things, this section proposes a number of reforms for discussion to better harness technology (including virtual witnessing; electronic service of documents); changes to probate forms (plain language forms, guided pathways and online filing); education initiatives for the public and lawyers; and changes to how Probate Court functions (such as a dedicated probate court for chambers). All of these goals, and others, seek to make probate and administration more accessible, open and reflective of how Nova Scotians live.

This Discussion Paper sets out these proposals, and others, in more detail below. It is our hope that these proposals serve as a launch point for further comment on how to improve probate and administration in Nova Scotia. We look forward to continuing this important discussion.

Proposals for Discussion

The following Principles of Reform should guide this project:

Accessibility
Efficiency
Protection
Striking a Balance
Deceased's Intentions
Substantive Equality

Heirs to an intestate estate should be able to waive bonding.

A majority of heirs should be able to waive bonding.

A majority of heirs should be defined by reference to the percentage of their respective interests in the estate.

Estates with minor or incapacitated heirs should not be excluded from the rules on waiving security.

Persons residing outside of Nova Scotia, but in Canada, should be able to act as personal sureties.

The affidavit sworn by out-of-province personal sureties should include specific language indicating they attorn to the jurisdiction of Nova Scotia courts, inclusive of Probate Court.

A court supervised formal passing of accounts should only be required where a party with an interest in the estate demands it.

The *Probate Act* should affirm that personal representatives have a duty to keep accurate records and account to beneficiaries.

Nova Scotia should eliminate probate taxes for estates valued under $50,000.

The *Probate Act* should authorize the Minister (via the Registrar) to modify probate taxes based on contextual factors such as the personal representative's income; and/or the type of assets in the estate.

Probate Court should allow for probate taxes to be paid by credit card.

Probate Court should create an invoice-styled document specifying probate taxes payable that a personal representative can present to the deceased's financial institution.

If the *Matrimonial Property Act* and the *Intestate Succession Act* are reformed to recognize common law partners, they should also be included in the priority list for administering an intestate estate.

The Public Trustee's priority to act as administrator should be lower than non-resident heirs.

Where signed renunciations have been sought but have not been provided, a would-be administrator may proceed with their application after providing one months' notice of their intention to all those who have failed to provide a signed renunciation.

The Probate Regulations should permit notice of a grant to be served via email.

Email service should be acceptable so long as some evidence demonstrating the email address is valid and likely to be seen by the recipient is provided.

On death of a "depositor", the federal *Bank Act* should relieve banks from liability for giving money under a prescribed amount to persons who, having regard to the rules of inheritance, appear to be entitled to it.

For the sake of clarity, the rules on inheritance should be listed in the *Bank Act*.

The prescribed amount ought to be set at $20,000.

A standardized substituted service procedure should be legislated for multi-generational intestacies.

The standardized substituted service procedure should mandate that notice be advertised for 3-4 weeks.

Registrars should be given the authority to determine whether the standardized substituted service rule has been satisfied.

When an administrator relies on the standardized substituted service rule to dispose with renunciations, they are also entitled to serve notice of the grant on the same heirs by the same substituted procedure.

The *Probate Act* should permit the consolidation of multi-generational intestacies in order to administer property common to the estates.

Multi-generational intestacies should be defined as situations where "an intestate to an unadministered estate is the issue of another unadministered estate".

Probate forms should be able to be witnessed using virtual technology.

Renunciations should be able to be signed via a secure electronic signature form, such as Docusign.

Probate Forms should be updated and use plain language.

Probate Forms should be fillable online and utilize guided pathways.

Probate Forms should be able to be filed online.

There should be a dedicated judicial Chambers to hear probate matters.

There should be investment in public legal education on the probate process and the importance of having a will public legal education on the probate process and the importance of having a will.

There ought to be clear and readily available materials for lawyers to provide guidance on common pitfalls, such as providing notice to persons with a claim under the *Testators' Family Maintenance Act* and/or to contingent beneficiaries.

There ought to be a Central Registrar to provide guidance and consistency to the Provincial Registrars of Probate.

Questions for Discussion:

Should a majority of beneficiaries to a testate estate be able to waive bonding?

Should the *Probate Act* or Regulations stipulate that personal representatives must obtain releases from heirs after accounting to them?

Should the *Probate Act* or Regulations stipulate that personal representatives ought to file releases obtained by heirs?

Should separated spouses be excluded from having priority to act as an administrator?

If so, how should we define a separated spouse?

Should estranged family members be excluded from having priority to act as an administrator?

If so, how should we define an estranged family member?

Which forms of evidence (ex: read receipt, delivery receipt, response back) should be required to prove service via email?

Should the *Probate Act* / Probate Regulations allow notice of a formal accounting to be served via email?

Where should a standardized substituted service order mandate that notice be advertised?

Should a consolidation application for multi-generational intestacies be limited to unadministered estates among 'issue' (direct lineal descendants)?

Should a consolidation application for multi-generational intestacies require notice to all heirs?

Should it be possible to bring a consolidation application for multi-generational intestacies before an administrator is appointed? If so, how?

Should consolidation applications for multi-generational intestacies be limited to settling real property common to the estates? Should it extend to all property common to both estates?

Are there any other concerns we ought to consider before proposing a consolidation proceeding to deal with multi-generational intestacies?

Which parameters should the *Probate Act* adopt to protect the integrity of video witnessing (for example: ensuring a lawyer is one of the signatories and/or present in the room with another witness)?

Part I: Background

History of the Project

The Law Reform Commission of Nova Scotia last reviewed the *Probate Act* in 1999.[3] At that time, the Commission made a number of recommendations to simplify the probate system, and most of these recommendations were implemented in the current *Probate Act*.[4]

The Institute has chosen to revisit the *Probate Act* for several reasons. First, it has now been 25 years since the Law Reform Commission of Nova Scotia made its recommendations. Since that time, legal and technological developments justify revisiting the issue. Since 1999 there has, for example, been developments in the online delivery of services which could impact how users interact with the probate system. There have also been demographic shifts in Nova Scotia's population.[5] Many older Nova Scotians have adult children or other family members who work and live in other Canadian provinces. There is value in re-evaluating the probate system to ensure it is equipped to handle the needs of all Nova Scotians.

We also have consistently heard that probate remains a time consuming and expensive process. This project is focused on ensuring greater access to justice, such that Nova Scotians are able to pass down intergenerational wealth without having an estate's value unduly depleted by overly burdensome processes. To this end, there are procedural differences between the processes for testate and intestate estates which perpetuate barriers to justice. Data consistently indicates that at least half of adult Canadians do not have a will.[6] Financial status, marginalization and historical injustice are a part of this story. People who make less money are significantly less likely to have a will and are more likely to state that cost is a barrier to getting one.[7] In addition, a lack of wills is also embedded within the legacy of lasting historical injustice experienced in African Nova Scotian communities.[8]

Despite these barriers to getting a will, the process for settling an intestate estate is more onerous, slow, and expensive than its counterpart. As such, the current system imposes cost and creates barriers to justice for already marginalized communities and/or on the estates that are the least able to financially absorb it. The practical output of this reality is that some of these estates are simply abandoned or go unadministered for several generations. In the latter case, the resulting

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[3] Law Reform Commission of Nova Scotia, *Probate Reform in Nova Scotia* (Halifax: LRCNS, 1999) online: https://lawreform.ns.ca/wp-content/uploads/2020/04/probate-reform-final-report.pdf.
[4] *Probate Act*, SNS 2000, c 31.
[5] Nova Scotia Department of Seniors, *Shift: Nova Scotia's Action Plan for an Aging Population* (Halifax: Province of Nova Scotia, 2017) at 2 online: https://novascotia.ca/shift/shift-action-plan.pdf.
[6] *Supra* note 2; see also: Angela Simmonds, *This Land is Our Land: African Nova Scotian voices from the Preston Area speak up*, (2014) online: https://nsbs.org/wp-content/uploads/2020/11/This-land-is-our-land.pdf.
[7] *Ibid*.
[8] See eg: Aya Al-Hakim, "'Prepare people for the future': Halifax group offers free will drafting service to Black community" (28 June 2021) *Global News* online: https://globalnews.ca/news/7985997/halifax-group-african-families-wills-gamechangers/,

scenario creates a procedurally complex situation which we dub "multi-generational intestacies" or MGIs.

All of this speaks to a need to revisit the probate system in Nova Scotia. By updating our probate and administration laws, it is our goal to better align the system with the needs of the people for whom it is meant to serve.

Principles of Reform

Over the past two decades, several law reform bodies in Canada and abroad have looked at how to make probate and administration less complicated and more affordable.[9] Most of these efforts have been driven by two fundamental principles: increasing **accessibility** while maintaining adequate legal **protections**. The challenge lies in finding the right balance between them. Making the system more accessible usually involves loosening some protections, while a focus on protections usually involves making the system more cumbersome. Reform, therefore, is focused on finding the right equilibrium. Each of these principles, and a few others, are set out in more detail below.

A. Accessibility

Accessibility speaks to the overarching goal of increasing access to justice. There are several prongs to this principle. First, it can be understood in financial terms. Even for modest estates, probate and administration can cost several thousand dollars: purchasing an insurance bond costs over $1,000 for a $50,000 estate;[10] probate taxes are over $1,000 for an estate valued between $50,000-$100,000; and legal fees can start at several thousands of dollars (and go upwards from there), even for uncomplicated estates. All told, it can cost several thousand dollars to administer estates without much money, property or other assets in them. This problem is exacerbated by the fact that smaller estates tend to be intestate, and settling an intestate estate is often more costly than a testate one. In other words, smaller estates without a will are more difficult and costly to settle than a large estate with a will. If lawyers accurately billed for these smaller estates, it would cost more than the estate is worth.

Accessibility also speaks to institutional barriers, of which there are many. Probate Court is designed to be used by lawyers. Court forms assume its users possess a significant level of legal

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[9] See, for example, Law Commission of Ontario, *Simplified Procedures for Small Estates: Final Report* (Toronto: LCO, 2015) at 69 [LCO], online: <https://www.lco-cdo.org/wp-content/uploads/2019/09/Small-Estates-Final-Report-EN.pdf; Manitoba Law Reform Commission, *Updating the Administration of Small Estates in Manitoba: Final Report* (Winnipeg: MLRC, 2018) [MLRC], online: <http://www.manitobalawreform.ca/pubs/pdf/135-full_report.pdf>; BCLI, Small Estates Subcommittee, *Interim Report on Summary Administration of Small Estates* (Vancouver: BCLI, 2005) [BCLI Small Estates Subcommittee], online: <https://www.bcli.org/sites/default/files/Summary_Administration_Small_Estates_Interim_Rep.pdf>.

[10] At the time of writing, the bond premium for a $50,000 estate would be approximately $1,125 ($375/3 years).

expertise and there are limited tools to assist unrepresented parties. Anecdotally, we have been told that at least 1/3 of potential or appointed personal representatives in Probate Court are self-represented. These parties often end up relying on the province's Registrars of Probate and/or opting not to complete the legal requirements of the probate and administration process. At a certain point, the cost and complexity of obtaining probate/administration outweighs the value of the estate, potentially resulting in the estate's abandonment or reducing important transfers of intergenerational wealth. Making probate and administration more user-centred (and including self-represented personal representatives in this understanding) may result in more estates being administered at a lesser cost, less assets being abandoned and greater access to justice.

There are also technological accessibility issues. Probate Court processes have not been modernized to reflect the technological advances over the past 25 years. Forms must be printed out and filed in person at the courthouse. There are no guided online pathways to assist in filling out these forms. Payment of probate taxes must be made up-front by cheque. Documents that must be served have to be done so personally or by registered mail (i.e. not by email) and Probate Court requires original signed documents (no scanned or electronic signatures).

We must also be cognizant of the fact that barriers to justice are not equally distributed across society. The justice system – including Probate Court – has erected barriers to justice for historically marginalized communities. One notable example in this regard pertains to African Nova Scotian communities. Historically, Nova Scotia relied on racist laws which expressly denied black settlers legal title to land.[11] African Nova Scotian families are still untangling this legacy and its impact on wills and estates in their communities.[12] In the area of probate and administration, some of the consequences of this are that: (1) locating clear title to real property can be a challenge in some African Nova Scotian communities, (2) intestacy can be more prevalent in these communities, and (3) these intestacies are more likely to go back multiple generations (what we are referring to as "multi-generational intestacies" or MGIs).

Institutional barriers also extend beyond the courthouse. We have been told that banks and other financial institutions are becoming increasingly rigid and unwilling to deal with surviving family members informally. In the past, we have been told that financial institutions would give family members access to modest assets (i.e. bank accounts with relatively small sums of money) without requiring them to open probate or administration. We have been told that this flexibility is more difficult to find. Families are much more likely to be told they must open probate or administration to deal with bank accounts, even where that account is the only asset in the estate, and the money in it is less than probate will cost.

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[11] See discussion in Melisa Marsman, "Good Deeds? A Critical Race Analysis of the Nova Scotia *Land Titles Clarification Act*" (2024) 47:2 Dal LJ 620; See also: *Beals v Nova Scotia (Attorney General)*, 2020 NSSC 60 at paras 22-28; *Downey v Nova Scotia (Attorney General)*, 2020 NSSC 201 at para 4.
[12] *Ibid*.

B. Efficiency

Another principle to consider when thinking about wills and estates reform — related to access to justice — is that of efficiency. One oft-cited complaint when it comes to the probate and administration system is that it is not only expensive, but complex and time consuming. The regular probate process can take anywhere between several months to several years to complete. A redesigned process that allows for the quick or immediate distribution of assets could encourage more people to access the probate process and thus benefit from the legal protections involved. However, the question remains as to whether a less costly and time-consuming procedural mechanism, in light of its reduced processes, would retain the ability to deliver just, accurate outcomes.[13]

C. Maintaining Legal Protections

While the cost and complexity of probate may be prohibitive for some estates, court-supervised estate administration prevents fraud, theft and mismanagement of assets. Beneficiaries, heirs, personal representatives, and creditors are all protected by probate and administration. Appointing an estate representative ensures that the estate is wholly accounted for. It validates the testator's wishes, ensures estates are distributed according to law, and, through various filing requirements, helps ensure personal representatives are on track and fulfilling their duties. It provides a record of the estate for interested persons, educates representatives on their responsibilities, and relays a sense of duty and formality to those involved. Court oversight also protects personal representatives by relieving them from liability when the estate is closed.

While legal protections are important, however, there are limited mechanisms to tailor or avoid them in cases where they are either not needed or are excessive in relation to the value of the estate. For example, bonds are required for the vast majority of administrations, even where all heirs agree it is not needed.[14] The system can be rigid and one-size-fits all.

D. Striking a Balance

A legal system rich in procedure often disproportionately benefits those who are wealthy, since the wealthy are the most likely to be able to access its full range of protections. On the other hand, dispensing with protective procedures may leave the process open to abuse, resulting in more harm than good for parties. In the context of probate and administration, simplified procedures may increase the risk of complications in administering the estate. For example, if a formal passing of accounts is no longer always required, there may be deficiencies in those accounts that are only realized after assets have been distributed (if at all).

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[13] LCO, *supra* note 9 at 63.

[14] Unless all heirs are also administrators. *Probate Act*, *supra* note 4, s 40(1).

The legal protection afforded by probate and administration processes are directly related to the thoroughness of the application process and the breadth of the resulting grant. However, the cost of navigating a more demanding process creates a barrier for some estates and may prevent them from accessing probate altogether.[15] Therefore, these goals of access, efficiency and legal protection must be balanced so that the burden of administration involved in applying for probate is proportional to the value of the estate.

E. Deceased's Intentions

At the heart of most existing succession regimes is the desire to give effect to the intention or presumed intention of the deceased testator or intestate. Jurisprudence on succession has generally acknowledged that this is the paramount consideration in deciding how estates should be distributed.[16] Therefore, in considering how to best facilitate access to justice while balancing the principles of accessibility and legal protections, it is important to keep in mind the underlying function of Nova Scotia's probate system, which is to ensure that estate administration accords with the deceased's intentions.

F. Substantive Equality

It is also important to consider the impact of the system on substantive equality. In deciding how to simplify the administration and probate of estates, we must be cognizant of the fact that accessibility barriers are borne more acutely in marginalized communities. This issue was touched on under the accessibility heading above as it pertains to African Nova Scotian communities. In brief, as a result of racist laws and attitudes, African Nova Scotian persons have been historically more likely to die intestate and encounter multi-generational intestacies. While MGIs are not limited to African Nova Scotian communities the fact that they are more concentrated in these communities is relevant as we pursue reform.

Failing to provide for the efficient and effective transfer of intergenerational wealth may be a human rights issue especially when we take into consideration the long history of the denial of rights to property experienced by members of the African Nova Scotian and Indigenous communities, in particular.

Proposal for Discussion:

The following Principles of Reform should guide this project:

[15] LCO, *supra* note 9 at 3.
[16] See, for example, *Prevost Estate v Prevost Estate*, 2023 NSCA 20; *Rossu v Taylor*, 1998 ABCA 193, (1999) 68 Alta LR (3d) 21. Nova Scotia's intestate succession legislation distributes the estate in line with the reasonable expectations of intestates by prioritizing the rights of surviving spouses over all others followed by the issue of the intestate. The *Wills Act,* RSNS 1989, c 505 similarly prioritizes the apparent testamentary intentions of the deceased notwithstanding any deficiencies in the will.

Accessibility
Efficiency
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Substantive Equality

Overview of Procedures to Deal with Property on Death in Nova Scotia

In Nova Scotia there are several different paths that exist to deal with a person's assets and/or property after they have died. Below, we explain five of these systems: (1) probate/ administration; (2) informal administration; (3) the public trustee's election; (4) land titles clarification; and (5) administration under the *Indian Act*.

A. Probate and Administration

Probate and administration are different terms to describe the process based on whether or not the deceased had a will. [17] If the deceased had a will, the estate is testate, the process is called *probate* and the personal representative appointed to deal with the estate is called an *executor*. If the deceased did not have a will, the estate is intestate, the process is called *administration* and the personal representative is called an *administrator*.

When a person dies in Nova Scotia with real and/or personal property in their estate, a representative will have to be appointed to determine who rightfully owns it. This means that probate and administration are only required if there is money, property or other assets in the deceased person's estate. There are a number of legal ways a person can ensure nothing falls into their estate when they die (for example, via designated certain benefits like life insurance policies, pensions and RRSP to beneficiaries, the use of *inter vivos* trusts, and holding property with others as joint tenants). Note however, that mechanisms to avoid probate and administration require significant pre-planning (and often money) to organize. So while there are paths to avoid probate and administration, for many Nova Scotians it will be necessary.

Probate and administration are similar, but not identical. The following paragraphs describe how administration works and then compares it to probate.

[17] In Nova Scotia, this process is also divided between contentious and non-contentious matters. Non-contentious matters follow a standard procedure and, for the most part, deal with the Registrar of Probate rather than a judge. If a disagreement or dispute arises, the matter is treated as contentious. A different procedure is followed until the disagreement is resolved. This Discussion Paper is focused on non-contentious matters.

a. Administration (Settling Intestate Estates)

The first step in settling an intestate estate is appointing a personal representative (administrator). Personal representatives are often listed in a will. When a person dies without a will (or has will that fails to name a personal representative who can act) the *Probate Act* provides guidance on what person can be appointed as administrator to fill this role. The *Probate Act* provides a list, in order of priority, for persons who are entitled to act as administrators for these estates.[18] Where the applicant's priority is lower than or equal to any other person, they must obtain and file witnessed, signed renunciations from everyone else who has an equal or better priority to act as administrator.[19]

The person applying to be the administrator must obtain security that is worth 1.5 times the value of the estate. Security can come in one of two forms: (1) a bond or policy of guarantee issued by an insurance company, or (2) a personal bond.[20] Personal bonds come from a person or persons (sureties) who are resident in the province, are not the personal representative or their spouse, and have real or personal property that is equal to 1.5 times the value of the estate.[21] Security must be evidenced and filed with Probate Court.[22]

They must also complete an application for a Grant of Administration. This requires filling out forms detailing: a list of the deceased's family members, both living and deceased, entitled by law to share in the estate; the date the deceased died; and the fair market value of the deceased's assets.

Next, the person applying to be an administrator must arrange for an appointment with the Probate Court located in the probate district of the deceased's last place of residence, and bring to the appointment: the completed application for a Grant of Administration; the death certificate; security, along with completed forms respecting the surety(ies); if the estate contains real property, a form signed by a lawyer to register the Grant of Administration in the land registry where the property is located; and a cheque paying the applicable probate tax.

If the Registrar of Probate is satisfied all the requirements have been met, it will issue a Grant of Administration (also known as "letters of administration") and the applicant officially has the title of administrator. The Grant of Administration gives the administrator permission to deal with the deceased's estate. It is also considered conclusive evidence that the deceased died intestate.

After the Grant of Administration is issued, the administrator must do the following:

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[18] *Probate Act supra* note 4, s 32(1).
[19] Probate Court Practice, Procedure and Forms Regulations, NS Reg 119/2001, s 34, Form 13 [Probate Regulations].
[20] Probate Regulations, *ibid*, s 42 (1). Note that the Probate Rules provide a third option: letters of credit from a financial institution. Anecdotally, we have been told that this option is not used or accepted by Registrars.
[21] Probate Regulations, *ibid*, s 42 (2)-(5).
[22] Probate Regulations, *ibid*, s 42 (1), Form 18, Form 19.

- Serve notices of the Grant to each person entitled to share in the distribution of the estate within 30 days. Service can be done by registered mail, personal service or by service on a lawyer authorized to accept service on behalf of the person to be served.[23]
- File Affidavits of Service for everyone who has received the Notice of Grant within 60 days of the Grant was issued.[24]
- Advertise the estate for creditors in the *Royal Gazette* for six months.
- File an inventory of the property of the estate within 90 days after the grant was issued.[25] The inventory includes: valuations of the real property, minus mortgages and encumbrances, as of the intestate's death; assets the deceased was entitled to on death including last OAS and CPP cheques, death benefits and any refunds from pre-paid services.
- File an income tax return for the deceased for the year of death (or for previous years that the deceased person did not file). Obtain a tax clearance certificate — a certificate issued by the Canada Revenue Agency showing all of the deceased's taxes have been paid off — and file it with the court.
- Collect debts and property owed to the deceased, sell property and make disbursements to heirs.
- Pass the final accounting.[26] This requires the administrator to: compile final accounts showing all assets coming into the hands of the administrator, all income and expenses, bequests made, interim distributions and the balance after distributions; file an application to pass accounts at Probate Court containing the final account, the schedule for distribution, a draft order and a statement from the personal representative containing a statement of activities; serve any persons interested in the estate (e.g., beneficiaries, unpaid creditors, etc.) at least 30 days before the date on which the accounts will be examined; and complete the Affidavit of the Personal Representative — Passing Accounts that addresses any notices of objection and send this to the Probate Court a minimum of 10 days before the schedule date for examining the accounts.

When an estate is formally closed by the Probate Court, the administrator is discharged from their duties and the sureties are released.

As a summary, the process for administering a non-contentious estate is as follows:

(1) Determine Priority to Act
(2) Obtain Renunciations
(3) Obtain security
(4) Obtain Grant of Administration

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[23] Probate Regulations, *ibid*, s 44.
[24] Probate Regulations, *ibid*, s 44(2).
[25] Probate Regulations, *ibid*, s 45. This can require professional valuations and appraisals in some cases.
[26] Probate Regulations, *ibid*, s 53-62.

(5) Serve Grant of Administration
(6) Submit Inventory
(7) Advertise to Creditors
(8) Distribute Estate
(9) Pass the Final Accounts

b. Probate (Settling a Testate Estate)

If the deceased had a will, the steps involved to appoint a personal representative can usually be avoided (because most wills name an executor). This is not always the case – some wills either do not appoint an executor or have not named an executor is able and willing to act. In these situations, the steps to appoint an administrator outlined above must be followed.[27]

Once they are either appointed or recognized, the personal representative can apply for a Grant of Probate.[28] Obtaining a Grant of Probate involves many of the same steps as the Grant of Administration, with the following adjustments:

- The application for a grant of probate includes the requirement to "prove" the will (i.e. to say the will was filled out and signed in accordance with the law). There are two methods of proving a will. The simple method is completed as part of an application for a grant, and involves filing Affidavits which were completed by persons who witnessed the will being signed (called Affidavits of Execution).
- Security is not needed if (a) the will says so, (b) at least one executor lives in the Province, or (c) if the heirs and beneficiaries can (i.e., have capacity and are not minors) and do consent to it being removed.
- The executor will not have to undertake a formal closing if all beneficiaries are able (i.e., they have capacity and are not minors), and consent to dispense with a formal accounting.

Therefore, the non-contentious probate process for an estate with an executor who is willing and able to act, and with only beneficiaries with legal capacity who agree to forego certain protections is as follows:

(1) Apply for Grant
(2) Serve Grant
(3) Submit Inventory
(4) Advertise to Creditors

[27] *Probate Act*, *supra* note 4, s 22.
[28] There are several types of grants. For example: Where there is no executor, a beneficiary may apply for a Grant of Administration with Will Annexed (*Probate Act*, *ibid*, s 22). Where the deceased resided outside of the jurisdiction and a grant was issued in that jurisdiction the representative will apply for an extra-provincial grant of probate (*Probate Act*, *ibid*, s 37). Where there is pending litigation, the representative may apply for a pendente lite grant (*Probate Act*, *ibid*, s 24). There is also a path to issue a temporary grant where the representative is temporarily out of the province or there are perishable assets (*Probate Act*, *ibid*, ss 21, 23). Here, we describe the most common Grant of Probate.

(5) Distribute Estate

If complications arise (for example, if the executor listed on the will is unable or unwilling to act) some of the mandatory steps for administration will be imported into the probate process.

At any stage of probate or administration, the process can be stalled (for example, if the proposed administrator cannot find everyone from whom they need to obtain a renunciation). In those situations, a court application will have to be made. The process can also be diverted if matters become contentious. For example, if someone argues that the deceased's will was signed when they lacked capacity, the will cannot be proved by the simple process. The process becomes contentious, and a court hearing is needed to resolve that dispute before it can proceed along the probate process.

B. Informal Administration

Given the cost and complexity of probate and administration, people often try to avoid these processes after their loved one has died. For example, a family member may try to deal with the estate without a grant of probate, by simply asking institutions (like banks or credit unions) to give them access to the deceased's assets. This can be done for testate or intestate estates.

Some institutions may comply with these requests and deal with assets informally. For example, where a person dies without a will, the *Motor Vehicle Act* permits the Department of Public Works (acting through its duly authorized agents at Access Nova Scotia) to transfer ownership of a vehicle to a person who would be entitled to act as representative per the *Probate Act*, or to other persons as it sees fit.[29] Nova Scotia's *Credit Union Act* relieves a Credit Union from liability for releasing money under a prescribed amount (currently set at $20,000) to a person who provides an affidavit or other proof of death and "who appears to be entitled to the amount of the deceased member's interest."[30] In addition, some publicly funded corporations will allow for the transfer

[29] *Motor Vehicle Act,* RSNS 1989, c 293, s 23(7) Immediately upon the death of a registered owner, the vehicle is deemed to be registered in the name of the estate of the deceased registered owner for a period of sixty days unless an application for other registration of the vehicle is sooner made. (7A) Where a registered owner dies intestate or dies leaving an estate that is not subject to a grant of probate, the Department may determine and recognize a person as the personal representative of the deceased registered owner, and the priorities prescribed by clauses (a) to (e) of subsection (1) of Section 32 of the Probate Act apply mutatis mutandis to the determination. (7B) Where the Department is unable to determine and recognize a personal representative of a deceased registered owner under subsection (7A), the Department may recognize as the personal representative of the deceased registered owner any person that the Department considers fit to act as the personal representative.

[30] *Credit Union Act*, SNS 1994, c 4, s 44(3) Where a member of a credit union dies and there is no executor of a will of the deceased member or administrator of the estate of the deceased member, the credit union may, upon receipt of an affidavit or such other proof of death or proof of claim as may be required by the credit union, pay a prescribed amount out of moneys standing to the credit of the deceased member to the person who appears to be entitled to the amount of the deceased member's interest and pay-ment made pursuant to this Section releases the credit union from any further liabil-ity with respect to the moneys so paid. Credit Union Regulations, NS Reg 45/95, s 14.

of stocks from the name of the deceased to that of the executor where the executor provides a bond valued at approximately 2% of the value of the shares being transferred.[31] It must be kept in mind, however, that if this informally appointed "executor" chooses to transfer stocks in this manner, they will not be relieved of liability for any loss to the estate should a more recent will be found, for example, that appoints someone else as executor. In practice, we have been told the use and implementation of these rules is inconsistent.

By contrast, banks are only legislatively permitted to release funds when presented with a grant of probate or administration,[32] and they reserve the right to require even more evidence if they desire. We have been told that in the past banks would be willing to deal with a deceased's bank account informally, particularly where the amount was relatively small and/or it was the only asset in the estate. However, we have been told that in recent years banks are increasingly rigid in requiring formal probate documents. Any remaining discretion banks have to deal with assets informally are not being used in situations where the assets or estate are small.[33]

There are valid reasons for banks to be cautious in this regard. They have a duty to safeguard assets and can be found liable where they fail to live up to this standard.[34] They can face demands from family members and creditors to release assets and may be presented with a variety of documents to do so. To navigate this duty, banks often have internal policies and checklists to follow.[35] At the same time, however, these policies and checklists can make it financially more onerous to get money out of a bank account. Where the value of the money in the bank account is less than it would be open probate, heirs may decide to walk away without accessing these funds.

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[31] Ray Adlington, Atlantic Canada, *Estate Administration Manual* (Thomson Reuters Canada Limited, 2016) at 6.4 – Cost and Risk of Avoiding Probate (as available on Westlaw: accessed on July 26, 2024).

[32] *Bank Act*, SC 1991, c 46, s 460 (1) Where the transmission of a debt owing by a bank by reason of a deposit, of property held by a bank as security or for safe-keeping or of rights with respect to a safety deposit box and property deposited therein takes place because of the death of a person, the delivery to the bank of (a) an affidavit or declaration in writing in form satisfactory to the bank signed by or on behalf of a person claiming by virtue of the transmission stating the nature and effect of the transmission, and (b) one of the following documents, namely, (i) when the claim is based on a will or other testamentary instrument or on a grant of probate thereof or on such a grant and letters testamentary or other document of like import or on a grant of letters of administration or other document of like import, purporting to be issued by any court or authority in Canada or elsewhere, an authenticated copy or certificate thereof under the seal of the court or authority without proof of the authenticity of the seal or other proof, or (ii) when the claim is based on a notarial will, an authenticated copy thereof, is sufficient justification and authority for giving effect to the transmission in accordance with the claim. (2) Nothing in subsection (1) shall be construed to prevent a bank from refusing to give effect to a transmission until there has been delivered to the bank such documentary or other evidence of or in connection with the transmission as it may deem requisite.

[33] For more discussion of informal administration, see: LCO, *supra* note 9 at 49-52.

[34] See eg: *Monteiro v The Toronto Dominion Bank*, 2008 ONCA 137.

[35] LCO, *supra* note 9 at 49-52.

C. The Public Trustee's Election

Nova Scotia has a simplified "election" procedure for the Public Trustee to administer small estates. Per the *Public Trustee Act*, the Public Trustee may elect to administer an estate that is valued at or under $25,000 (gross) where (1) no person has taken out letters of administration, and where all parties have renounced their right to administer and nominate the public trustee;[36] or (2) without nomination, where the person entitled to administer the estate has not yet taken out letters of administration,[37] so long as the Public Trustee gives notice to the person entitled to administer. In the latter case, if a person with priority applies to administer the estate within one month of receiving the notice,[38] the Public Trustee can only administer the estate if the person's application is refused.[39]

Using the election procedure, the Public Trustee may distribute personal property, sell property including real property, pay debts and "do all things necessary to complete administration of the estate" without having to file an inventory or obtain letters of administration from the court.[40] The election procedure streamlines many elements of administration, including:

- Probate taxes are $1.00.[41]
- The election does not include a full inventory of the estate but rather just the "extent of the person's estate".[42]
- Potential heirs of the estate do not have to be officially served.
- Advertising in the *Royal Gazette* for claims against is required for only one month.[43]
- The Public Trustee must file an account of the administration verified on oath when they have finished administering the estate.[44]
- If the Public Trustee discovers an asset that brings the total value of the estate above $25,000 during the administration, they have to notify the court and start all over again by applying for a Grant of Administration and taking the estate through the regular process.[45]

[36] *Public Trustee Act*, RSNS, c 379, s 16 [*Public Trustee Act*].
[37] *Ibid*, s 22A(2).
[38] *Ibid*, s 22A(3).
[39] *Ibid*, s 22A(4).
[40] *Ibid*, ss 16(1), 22A(5).
[41] *Ibid*, ss 16(5), 22A(9).
[42] *Ibid*.
[43] *Ibid*, s 17(1).
[44] *Ibid*, ss 16(6), 22A(10).
[45] *Ibid*, ss 21(1).

D. Land Titles Clarification

Nova Scotia's *Land Titles Clarification Act* (the "*LTCA*") creates a simplified and less expensive path to clarify title to land in select designated communities where there is confusion about its ownership.[46] In essence, it allows people to clarify land title without having to proceed through traditional legal processes (such as quieting of titles or completing an MGI).[47]

The *LTCA* is remedial legislation, in that it was created to rectify lasting historical racism in African Nova Scotian communities.[48] African Nova Scotian families have, for generations, been denied clear legal title to land as a result of discriminatory policies applied to the lands promised to early Black settlers.[49] Without title, African Nova Scotian families could not legally pass property to descendants on death – a situation that can persist over several generations and which can be legally complex to rectify.[50]

The *LTCA* was created to fix this. [51] While passed in the 1960s, problems of unclear title persist.[52] In recent years, the Act was amended to create the Land Titles Initiative (the "LTI") to accelerate the land clarification process for a subset of five designated communities.[53] For properties in these five communities, the LTI has resources to help residents get clear title to their land, migrate property, and conduct estate administration.[54]

While the *LTCA* and the LTI's processes can be undertaken at any time (i.e. they are not necessarily initiated on death), ambiguities in land ownership often arise on death. From the perspective of probate and administration, it is noteworthy that properties falling within the scope of the *LTCA* and/or LTI are able to bypass any outstanding administrations on the land in question. By following the land titles clarification process, title to real property can be vested in a person without having to retroactively correct a chain of ownership through a family tree via settling an MGI.[55]

There are, however, two important qualifications to this statement. First, for various reasons, some properties falling within either the *LTCA* or the LTI complete administration rather than follow the clarification process. These cases will be settled by way of a multi-generational intestacy

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[46] *Land Titles Clarification Act*, RSNS 1989, c 250 [*LTCA*]; Marsman, *supra* note 11 at 631. There are 13 designated communities (*Beals, supra* note 11 at para 42).
[47] Marsman, *supra* note 11 at 631.
[48] While the *LTCA* does not reference race, this is the context within which it was passed. See: Marsman, *ibid* at 629.
[49] *Beals, supra* note 11 at paras 22-28.
[50] *Ibid.*
[51] Marsman, *supra* note 11 at 633.
[52] Marsman, *ibid* at 624.
[53] *LTCA*, *supra* note 46 at s 8B: Cherry Brook; East Preston; Lincolnville; New Road Settlement (North Preston); and Sunnyville. Nova Scotia, Land Titles Initiative, online: https://novascotia.ca/land-titles/; Marsman, *ibid* at 633.
[54] Land Titles Initiative, *ibid.*
[55] Land Titles Initiative, *ibid.*

(MGI). Second, both the *LTCA* and the LTI are geographically limited, meaning they only apply to designated communities. Properties with unclear title located outside of this scope must rely on traditional legal processes to clarify title (quieting of titles or administering an MGI).[56]

E. Administration under the *Indian Act*

The wills and estates sections of the federal *Indian Act* establishes rules for making wills and administering estates that apply to all people who are registered or entitled to be registered as "Indian" under the Act (also known as "Status Indians")[57] and who are ordinarily resident on reserve or Crown lands.[58] If the deceased was a Status Indian and was ordinarily resident on reserve, the federal department of Indigenous Services Canada (ISC) will have jurisdiction over the estate, instead of the province.[59] However, the ISC can, at its discretion, decide to transfer responsibility for the estate to the provincial Probate Court if, for example, the estate is involved in court proceedings, there is a challenge to the will, the deceased owned property off reserve or the deceased's family has made a written request to transfer the jurisdiction to the Probate Court.[60] When the jurisdiction of an estate is transferred to the Probate Court, the Court administers the deceased's property located on reserve according to the *Indian Act*. However, any property located off reserve is administered according to provincial laws.

Given this legal landscape, this paper will not deal specifically with the administration of estates under the *Indian Act* as that topic falls within federal jurisdiction and is therefore outside the realm of provincial law reform.

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[56] *Ibid.*
[57] A "Status Indian" is a legislated term for a person who is registered, in accordance with the *Indian Act*, RSC 1985 c I-5 in the Indian registry system that is maintained by Indigenous Services Canada.
[58] For an explanation of ordinarily resident, see Indigenous Services Canada, "Estate services for First Nations" (22 December 2023) online: <https://www.sac-isc.gc.ca/eng/1100100032357/1581866877231>.
[59] The Confederacy of Mainland Mi'kmaq, "Mi'kmaw Wills & Estates: A Guide for Nova Scotia Mi'kmaq, Book Two: How to Settle an Estate" (March 2012) at 3, online: <https://cmmns.com/wp-content/uploads/2023/06/Wills-Estates-Kit-Book-Two.pdf>.
[60] *Ibid* at 4; *Indian Act*, *supra* note 57, s 44(2).

Part II: Reforming Probate and Administration Processes in Nova Scotia

This section sets out the elements of the probate and administration process in Nova Scotia for which the Institute has proposed reforms for discussion. It focuses on six elements of the process: (a) security; (b) passing accounts; (c) probate taxes; (d) renunciations; (e) notice; and (f) informal administration. In our view, these elements create challenges that can be reduced by tailored reforms.

A. Security

Security (also known as bonding) is essentially an insurance policy that protects heirs, beneficiaries and/or creditors who may suffer financially if a personal representative mismanages the estate.

In Nova Scotia, the vast majority of intestate estates must provide security, while most testate estates do not. Security is required for all intestate estates unless the personal representative(s) is/are the sole beneficiaries.[61] For testate estates, security is only required if the executor does not reside in the Province,[62] but even then, the bond is not required if (1) the will says so; (2) the executor is the sole beneficiary, (3) all adult beneficiaries have consented in writing,[63] or (3) there is a co-executor who resides in the province.[64]

The rationale for treating testate and intestate estates differently relates to protection and trustworthiness. Where there is a will that names an executor, the assumption is that the deceased has vouched for an executor's trustworthiness. Where there is no will, the court has appointed the administrator, and as such, must take extra steps to ensure the administrator does not misappropriate funds.

Per the Probate Regulations, there are three ways to secure a bond: (1) personal sureties (i.e. having friends or family with adequate unencumbered assets agree to act as a surety); (2) a "bond or policy of guarantee" (typically an insurance company) from whom security can be purchased;[65] or (3) "letters of credit from a financial institution acceptable to the registrar". In practice, we have heard also that the third "letters of credit" option is defunct. While the Probate Regulations give the Registrar the power to accept another form of security, we have not heard of this being used.[66] All this to say that, as a practical matter, Nova Scotians have two ways to provide security

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[61] *Probate Act, supra* note 4 at s 40.
[62] *Ibid.*
[63] *Ibid*, s 40(2), (3).
[64] *Ibid*, s 40(4)(c).
[65] Probate Regulations, *supra* note 19, s 42(1).
[66] *Ibid*, s 42(1): The security required under the Act shall be (a) a bond or policy of guarantee of a guarantee company as defined in the *Sureties Act,* in Form 18; (b) a personal bond and affidavit of justification in Form 19; or (c) letters of credit from a financial institution acceptable to the registrar, or other security satisfactory to the registrar [emphasis added].

(institutional or personal sureties). In both cases, the bond must be 1.5 times the value of the estate.[67]

Each of the institutional and personal surety options have their own benefits and drawbacks. Personal sureties are individuals who (1) are not personal representative or their spouse, (2) are resident in the province, and (3) can demonstrate they have unencumbered assets which value at least 1.5 times the value of the estate.[68] Many people cannot locate persons who satisfy these criteria and are willing to act.

By contrast, institutional bonds are more widely available, but also more expensive. At the time of writing, the insurance bond premium for an estate worth $50,000 is $1,125 ($375 per year for a mandatory 3-year period). While it is possible to get any unused portion of a bond returned if the estate is closed within 2 years, we have been told this usually does not happen.

a. Waiving Bonding

In its 1999 Final Report, the Law Reform Commission of Nova Scotia recommended that bonding should be required for administrators, but that interested parties should be able to waive this requirement.[69] It also recommended removing the bonding requirement for non-resident executors. In the report, it was emphasized that Nova Scotia has more rigid bonding rules than most Canadian jurisdictions.[70] These recommendations were not implemented.

Since the Law Reform Commission's 1999 Final Report was released, several jurisdictions have further relaxed their bonding requirements. British Columbia has eliminated mandatory bonding for intestate estates unless there are minor or incapable adults interested in the estate.[71] The government noted that, among other things, the security requirement "adds complexity and delay, increasing the overall cost of an administration."[72] Alberta, New Brunswick and Northwest Territories only require bonding for out-of-province personal representatives,[73] and in Prince Edward Island, bonds are only required for ancillary administrations.[74]

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[67] *Ibid*, s 42(2).
[68] *Probate Act, supra* note 4 at s 42(5)(b).
[69] Final Report, *supra* note 3 at 55.
[70] *Ibid* at 54.
[71] *Wills, Estates and Succession Act*, SBC 2009, c 13, s 128 [*WESA*].
[72] B.C. Ministry of the Attorney General, "Information about British Columbia's new Wills, Estates and Succession Act (WESA) – Part 6 Administration of Estates" online: <https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/legislation-policy/wesa/part6.pdf>.
[73] Surrogate Rules, Alta Reg 130/1995, s 28 [Alta Surr Rules]; *Probate Court Act*, SNB 1982, c P-17.1, s 57 [NB *Probate Act*]; Estate Administration Rules, NWT Reg 123-2016, r 30(2)-33 Form 17, Form 33, Form 39 [NWT Estate Administration Rules] (bonding for non-residents but may be dispensed with on consent).
[74] Prince Edward Island Rules of Civil Procedure, Rule 65.18 [PEI CPR].

Saskatchewan, Manitoba, Nunavut, Yukon, and the Northwest Territories permit judges to dispense bonding on consent.[75] Small estate processes in Manitoba, Saskatchewan, and Northwest Territories relax or remove bonding entirely.[76] In Ontario, small estates only require a bond if there are minors or vulnerable heirs.[77] Bonds are also not required where the estate value is less than the value of preferential share and the spouse is the administrator.[78] In all cases, a judge may dispense with the bond.[79] By contrast, some jurisdictions (including Newfoundland and Labrador) have security rules that are similar to Nova Scotia.[80]

Under some of the American Uniform Probate Code's (the "UPC") less formalized procedures, a bond is only required if one is demanded by a creditor or person entitled to inherit the estate. If demanded, the bond must either be paid or the process forced into a more formal stream. This provision is meant to protect heirs and creditors by allowing them to force the estate into administration if a demand for bond is not met.[81]

The Institute has been told that bonding rules are a significant barrier to justice. Many lower income families and/or families whose assets are tied up in real property are not able to be bonded: they cannot afford to purchase a bond and have no parties who can act as personal sureties. We have also been told that lawyers are developing different legal workarounds to handle this situation.[82] While innovative, these workarounds are largely only available to people who can afford legal counsel and/or have families in which there is a significant degree of trust and comfort with the legal system.

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[75] *The Administration of Estates Act*, SS 1998, c A-4.1, s 9(1) s 20 (bond for administrators but can be eliminated on consent) [Sask *Administration of Estates Act*]; NWT Estate Administration Rules, *supra* note 73 at r 30(2)-33 Form 17, Form 33, Form 39); *The Court of King's Bench Surrogate Practice Act*, CCSM c C290, s 47 ss 25, 26, 49 [Man *Surrogate Practice Act*] (bond for administrators and out-of-province executors reducible or dispensable on consent). The Probate and Administration Rules of the Nunavut Court of Justice (originally recorded as SOR/79-515, as amended by R Nu R-004-2005) [Nunavut Probate Rules]; *Estate Administration Act*, RSY 2002, c 77 s 17(1)(b).

[76] Sask *Administration of Estates Act*, *ibid* s 9(1), 20(4)(a) (bonding is usually required for administrations, but judges can dispense with it for small estates); NWT Estate Administration Rules, *ibid*, Rule 10(4)(c) (rules that apply to administrations and probate do not apply unless judge so orders); Man *Surrogate Practice Act*, *ibid* at s 47; Manitoba Court of King's Bench Rules, Man Reg 553/88, Form 74GG [Man KB Rules].

[77] *Estates Act,* RSO 1990, c E.21, s s 36(3) [Ont *Estates Act*].

[78] *Ibid,* s 36(2)

[79] *Ibid,* s 37(2)

[80] *Judicature Act*, RSNL 1990, c J-4

[81] National Conference of Commissioners on Uniform State Laws, *Uniform Probate Code* (2019) [UPC], online: <https://www.uniformlaws.org/committees/community-home?CommunityKey=35a4e3e3-de91-4527-aeec-26b1fc41b1c3>, s 3-322.

[82] For example, other than turning to the Public Trustee (who is too overburdened to take on these cases), lawyers sometimes have all heirs aside from the administrator sign documents waiving their substantive right to an inheritance. This makes the administrator the sole heir and therefore permits the estate to avoid bonding. Side agreements between the administrator and heirs are then signed under which the administrator agrees to divide the deceased's property after the estate is closed.

While bonds are a significant barrier to justice, we have also been told that they are very rarely acted upon. While bonds may still be appropriate in some cases, as a general matter bonds are an expensive barrier to justice whose protections are rarely, if ever, called into action.

Given these concerns, the Institute proposes for discussion that bonding be able to be waived by heirs to intestate estates. Bonding adds a layer of complexity and expense to administration which makes it slower, less efficient and creates barriers to justice. While flexibility is built into the process where there is a will, this flexibility is not available for intestate estates. If a bond primarily exists to protect heirs, they should be able to waive that protection.

On the other hand, mandatory bonding provides an added layer of protection for interested parties, including creditors. Heirs should not be able to waive the bond on behalf of creditors and/or other interested parties who may benefit from it.

Based on the foregoing, the Institute proposes for discussion that heirs to an intestate estate be able to waive bonding. While protective features of bonding serve an important function, given that these protections exist primarily to benefit heirs, it is only fair that should be able to decide whether it is needed. More importantly, given that the vast majority of bonds are never acted upon, it is inappropriate for them to create a hurdle to estate administration.

Proposal for Discussion:

Heirs to an intestate estate should be able to waive the bonding requirement.

b. Majority vs Unanimous Waiver

The notion that heirs to an intestate estate can waive bonding leads to the next question, namely, how many of them must agree to do so. On the one hand, it may be argued that bonding should be able to be waived where there is *unanimous* consent from heirs. The arguments in favor of a unanimous consent threshold relate to harmonization and protection. This approach more closely harmonizes the treatment of testate and intestate estates. Right now, while most testate estates do not need to be bonded, in the cases when they do, adult and competent beneficiaries can collectively come together and unanimously decide to remove it. In addition, the other Canadian jurisdictions that permit heirs to waive the bond require unanimous consent to do so. [83]

On the issue of protection, a unanimous consent requirement better protects heirs by demanding everyone's consent before the requirement is removed. The prospect that certain heirs will be overruled or bullied by other family members is minimized using a unanimous consent threshold.

[83] NS *Probate Act, supra* note 4 s 40(1),(3); Sask *Admin of Estates Act*, *supra* note 75, s 20(4)(c); Rules of Civil Procedure, RRO 1990, Reg 194, Rule 74.11(5) [Ontario CPR,]; Man *Surrogate Practice Act, supra* note 75, s 25(4); UPC, *supra* note 81 at §3-603 & §3-605.

On the other hand, it may be argued that *a majority* of heirs to an intestate estate should be able to waive bonding. The arguments in favor of a majority waiver rule relates to accessibility, efficiency, and access to justice. A majority threshold enhances accessibility and efficiency because it prevents one heir 'holding an estate hostage' to the detriment of everyone. While family disagreements are a part of this story, some estates may not be able to get unanimous consent because there are a large number of heirs, some of whom are transient, non-responsive, or their whereabouts are unknown. These families will not be able to waive bonding based on a unanimous consent threshold. This is particularly true for MGIs. Given the number of heirs and their likely dispersion, MGIs are very unlikely to be able to satisfy a unanimous consent threshold.

While both options have merits and drawbacks, the Institute proposes for discussion that a majority of heirs should be able to waive security in an intestate estate. Unanimity is not possible for many families (based on family size, unlocated heirs, and/or family dynamics). A majority stance does a better job of moving the dial towards access to justice. This is particularly true for MGIs. While the majority rule arguably offers less protection than a unanimous waiver rule, we emphasize that the vast majority of bonds are never acted upon. It should not be difficult to waive an element of the administration process that is a notable barrier but is rarely ever called into action.

Insofar as there is value in harmonizing the security rules for testate and intestate estates, we ask whether a majority of beneficiaries to a testate estate should also be able to waive bonding. Most testate estates do not require bonding. However, when they do, the bond can only be waived unanimously. On the one hand, the reasons we adopted in relation to intestate estates are equally applicable here: bonds are rarely acted upon and a majority rule increases accessibility and efficiency.

On the other hand, however, there are arguably different considerations at play for testate estates. First, testators can choose to waive bonding in the will. The fact that they haven't done so may speak to a heightened threshold for its removal. In addition, the beneficiaries to a testate estate may or may not be family members. Rather than going to a designated pool of family members, the beneficiaries of a testate estate may not be family, or even persons (it may go to a trust, charity etc.). All of this renders the prospect of majority waiver more complex. Therefore, we ask the question as to whether a majority of beneficiaries to a testate estate should also be able to waive bonding.

Proposal for Discussion:

A majority of heirs to an intestate estate should be able to waive bonding.

Question for Discussion:

Should a majority of beneficiaries to a testate estate be able to waive bonding?

c. How to Define a Majority

If we recommend a majority of heirs to waive bonding, we must consider how best to define a majority. In this respect, there are two options: (1) define a majority by reference the total number of heirs (ex: 3 of 5 heirs are a majority), or (2) define to a majority by reference to their interest in the estate (ex: heirs who are collectively entitled to at least 51% of the estate).

The rationale in favour of the first approach is more closely tied to consensus building and preventing one heir alone from essentially making the decision for all. The rationale in favour of the second approach is tied to the actual risk that an heir is exposed to. One person entitled to most of the estate should not be able to be overruled by a numerical majority that are entitled to share only a small amount. It is arguably only fair that the person who has the most financially at stake be given control over the bonding requirement. Additionally, the second approach is more protective of a surviving spouse's say in this decision. Given that the *Intestate Succession Act* is weighted towards giving most of an estate to any surviving spouse,[84] a definition tied to the percentage of the interest at stake would better ensure that a surviving spouse retains control over whether a bond is required.

The Institute proposes for discussion that a majority of heirs be defined by reference to the interests at stake in the estate. If a bond exists to protect the value of the estate, it is only fair for those who have the most interest in that value should be able to waive security.

Proposal for Discussion:

A majority of heirs should be defined by reference to the percentage of their respective interests in the estate.

d. Estates with Minor and/or Incapacitated Heirs

If a majority of heirs are able to waive bonding, we must consider if and how this rule should operate in estates with minor or incapacitated heirs.

On the one hand, it can be argued that the rules on waiving security should not be available to estates with minor or incapacitated heirs. The policy in favor of this stance is focused on protection. Because they cannot be expected to protect themselves, minor or incapacitated heirs need additional protection in order to ensure that their interests are safeguarded. A majority of heirs with capacity should not be able to waive the rights of a minority-interest incapacitated heir. On this view, the bond should not be negotiable for these estates.

On the other hand, accessibility and efficiency arguments point towards making the waiver rules equally available to estates with minor or incapacitated heirs. Minor or incapacitated heirs are

[84] *ISA, supra* note 1 at s 4.

already required to have either a solicitor, court-appointed guardian, attorney or the public trustee appointed to represent them.[85] That representative is there to ensure their interests are protected, and they should be able to provide consent on their behalf. It is unfair to deprive estates with incapacitated heirs (who have guardians appointed) to avail themselves of choices that will make administration proceed more smoothly.

The Institute is proposing for discussion that the rules on waiving security should be equally available to estates with minor or incapacitated heirs. This is based on the following reasons: (1) bonds are rarely if ever acted upon; (2) in testate estates, bonding can be waived even when there are minor or incapacitated heirs (by will); and (3) the *Probate Act* has a simplified system to ensure incapacitated heirs have guardians/representatives appointed. We emphasize that in the vast majority of cases, the bond is largely an illusory protection – it is never actually called into action. As such, we should be wary to exclude certain estates from being able to waive a requirement that is expensive and cumbersome. A minor or incapacitated heir can form part of this majority interest through their representative. If their interest is not needed to form part of the majority, their representative remains positioned to monitor the estate's management.

Proposal for Discussion:

Estates with minor or incapacitated heirs should not be excluded from the rules on waiving security.

e. New Paths for Providing Security

Lastly, the Institute considered whether Nova Scotia ought to expand the options for providing security. Recall that, at present, there are only two paths for providing security: personal sureties and insurance bond. Some families are not able to be bonded because they cannot satisfy either path (there is no person willing and able to act as personal surety, and they cannot afford to pay the premium on an insurance bond).

The Institute considered two options for expanding the bond. First, we could allow personal representatives to use their real property to secure the bond. This would allow a personal representative to provide a concrete form of security without having to pay out-of-pocket, or find another person who had adequate assets. As such, this may provide a more affordable option that does not compromise on the protection.

On the other hand, this path would only be available for personal representatives who had real property that was either (1) unencumbered, or (2) encumbered, but with a mortgagor willing to

[85] Probate Regulations, *supra* note 19, s 16(2) Where a person interested in an estate is under a disability, that person shall be represented by a solicitor, court appointed guardian under the *Incompetent Persons Act* or the *Guardianship Act*, attorney appointed under the *Powers of Attorney Act*, the Public Trustee, where the Public Trustee consents, or a *guardian ad litem* appointed by the court in Form 4.

place a new interest on the property. From an access to justice perspective, there is a concern that this path would not help lower income families who are less likely to own unencumbered real property. In addition, from an enforcement perspective, unless Probate Court could force the personal representative to sell their property, wronged parties could not get any money until a property put up as the bond was sold. Lastly, this option would not help with any real properties whose title is in need of clarification.

As a second option, we could permit out-of-province sureties. By expanding the net of friends or family a personal representative could turn to, this path would make it easier to satisfy security requirements without having to pay out-of-pocket. On the other hand, relaxing residency rules would make it more difficult for Probate Court to enforce the bond. In order for it to have meaning, the bond must be enforceable. This is weakened where the surety lives outside Nova Scotia.

The Institute proposes for discussion that personal sureties should be permitted from other Canadian provinces and territories. The barriers to enforcement across Canadian jurisdictions have decreased over the last several decades.[86] We have been told that it is not that much more difficult to get an order enforced against persons living in other Canadian jurisdictions. However, in order to avoid any difficulty in the case of enforcement, we also propose that the affidavit sworn by the out-of-province personal surety specifically provides that the surety attorns to the jurisdiction of Nova Scotia courts. For example, the affidavit could say: "By agreeing to act as a surety in the matter, the surety further agrees to submit to the jurisdiction of Nova Scotia inclusive of Probate Court." With attornment handled, the jurisdictional issue is already decided and it is just a matter of getting the order enforced in another court.

Lastly, while we are proposing that Nova Scotia allow out-of-province sureties, we caution that this proposal is limited to sureties residing in Canada. Enforcement will become much more difficult if sureties live in other countries.

Proposals for Discussion:

Persons residing outside of Nova Scotia, but in Canada should be able to act as personal sureties.

The affidavit sworn by out-of-province personal sureties should include specific language indicting they attorn to the jurisdiction of Nova Scotia courts, inclusive of Probate Court.

[86] See eg: *Reciprocal Enforcement of Judgments Act,* RSNS 1989, c 388 (amended in 2002, while the *Probate Act* was last amended in 2001).

B. Passing of Accounts

After estate assets have been distributed and debts paid, the personal representative may have to submit a formal accounting to the Registrar of Probate (also called passing accounts). This requires the personal representative to submit a detailed financial record of all property going into and out of the estate since death, including the assets and liabilities of the estate at death, any property or income received since death, any changes in property value, all distributions made and debts paid, any assets still on hand, any proposed commission for the personal representatives, the solicitor's proposed bill of costs, and proposed distributions.[87] If accounts are approved ('passed'), the personal representative is discharged from liability.

The rationale for the accounting is protective, and rooted in the fiduciary relationship between a personal representative and those who are who are beneficially interested in the property under their control.[88] As fiduciaries, personal representatives owe a duty of loyalty to those parties, and the duty to account is central to this relationship.[89] As such, even when legislation does not specifically require an accounting, personal representatives have a duty to keep accurate records, and beneficiaries have the right to inspect the estate accounts.[90]

In Nova Scotia, the common law duty to account to beneficiaries is fused with court oversight, in that legislation has detailed rules requiring personal representatives to provide the formal accounting to all heirs/beneficiaries and submit their accounts to the court for examination and approval.[91]

As in the context of security, however, in Nova Scotia the rules on when a formal passing of accounts is needed differs as between testate and intestate estates. The formal accounting can be avoided when: (1) the deceased died with a will, (2) all unpaid beneficiaries are adults and have capacity, and (3) all unpaid beneficiaries and any surety agree in writing that it is not required.[92] Based on these rules, a formal accounting can be avoided for most testate estates (via consent), but it is always required for intestate estates. The rationale for this distinction is protective. Intestate estates are administered by persons chosen by the court. Because the court cannot

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[87] Probate Regulations, *supra* note 19 at s 57.
[88] Adlington, *supra* note 31 at 5.1.
[89] Donovan WM Waters, Mark R. Gillen and Lionel D. Smith, *Waters' Law of Trusts in Canada*, 5th ed (Toronto: Thomson Reuters Canada, 2021) at 3.I.A "The fiduciary's obligations have been defined in a number of ways by the courts and commentators, but essentially it means the duty to account to another, who is the person with the right of enjoyment over the property in question, for all that one does with the property and in the office of trustee."
[90] Waters, *ibid;* See also: *Widdifield on Executors and Trustees,* 6th Ed (Thomson Reuters Canada Ltd, 2002, loose-leaf) online: Westlaw Canada at § 13.1-3 "It is the duty of a trustee, or other accounting party, at all reasonable times, at the request of the *cestui que trust*, or other beneficiary, to give full and accurate information as to the amount and state of the trust property; and permit him, or his solicitor, to inspect the accounts and vouchers and other documents relating to the estate…"
[91] *Probate Act*, *supra* note 4 at s 69.
[92] *Ibid*, s 69(3).

independently vouch for that person's trustworthiness, it takes on the responsibility to monitor the actions taken by this party. The mandatory formal accounting is a critical part of this oversight.

In terms of its process, the rules on accounting are detailed. The formal accounting has to occur within 18 months of the grant being issued, but the registrar may extend this time.[93] There are two procedures to choose from: one with a hearing, and one without a hearing.[94] In both cases, the process starts by setting a date with the Registrar at least 45 days prior to the scheduled closing date. At least 30 days before the proposed closing date, the personal representative must serve a copy of the application to pass accounts on all "interested parties", which includes:[95]

> (a) residuary beneficiary;
> (b) unpaid non-residuary beneficiary;
> (c) person entitled to share in the distribution of the estate on an intestacy;
> (d) life tenant;
> (e) trustee, guardian, court-appointed guardian or attorney appointed under the *Powers of Attorney Act* for a person under a disability;
> (f) trustee, guardian, court-appointed guardian or attorney appointed under the *Powers of Attorney Act* for a missing person or unascertained person;
> (g) the Public Trustee, where the *Public Trustee Act* applies;
> (h) unpaid claimant or creditor who has filed a claim in accordance with Section 48;
> (i) unreleased security; and
> (j) personal representative.

Service may be effected personally, via registered mail, or via a lawyer authorized to receive service.[96] Proof of service must be filed with the registrar.[97] A notice of objection must be served along with the application.[98] If an interested party files a notice of objection at least 10 days prior to the closing date, there will be a hearing (regardless of which option was originally chosen).

In terms of content, the accounting itself is a record of all property going into and out of the estate since death. It is a detailed record of the assets and liabilities of the estate at death, any property or income received since death, any changes in property value, all distributions made and debts paid, any assets still on hand, any proposed commission for the personal representatives, the solicitor's proposed bill of costs, and proposed distributions.[99]

Despite the legislative requirement and detailed rules for its execution, we have been told that in practice many (or most) estates are never formally closed. Given the work involved, many executors and administrators make a calculation of the risk that they take on by not formally

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[93] *Ibid*, s 69; Probate Regulations, *supra* note 19 at s 53.
[94] Probate Regulations, *ibid*, Form 39 and Form 40.
[95] *Ibid*, s 52.
[96] *Ibid*, s 22.
[97] *Ibid*, s 55(3).
[98] *Ibid*, 55(3)(c).
[99] *Ibid*, s 57.

closing, and choose to assume that risk and walk away from the estate. Strictly speaking, this means that they are always vulnerable to a claim in relation to their handling of the estate. Personal representatives mitigate this risk, however, by obtaining signed releases from beneficiaries or heirs, in which the beneficiaries or heirs promise to release the executors or administrators from any liability or responsibility in connection with the estate accounts. These releases are usually obtained after a copy of the accounts are sent to all heirs.

Estates being administered under the LTI cannot simply walk away from the formal accounting by issuing releases. LTI administrations are bonded by the province, and bonds cannot be released until the formal accounting is completed. The difficulties associated with completing accounts means that most of these funds remain earmarked by the Province in perpetuity.

a. Reforming the Passing of Accounts

In Canada, two general approaches to passing accounts exists. On one approach, formal passing of accounts is presumptively required by legislation, but exceptions are created based on consent from interested parties. Nova Scotia falls within this grouping. However, unlike Nova Scotia, several jurisdictions do not distinguish between testate and intestate estates. In British Columbia, for example, the option to bypass a formal accounting on consent is equally available to testate and intestate estates.[100] Similarly, in Saskatchewan, the formal passing of accounts is presumptively required, but executors or administrators can apply to be discharged without a formal closing if they file consents from all beneficiaries, and proof that all debts have been paid.[101] Northwest Territories deploys an approach similar to Saskatchewan.[102] In Nunavut, the formal passing of accounts is presumptively required but it can be avoided where there is consent from all heirs or beneficiaries (including the Public Trustee where there are infant beneficiaries) and it is apparent that advertising to creditors has been completed.[103]

Under the second approach, a formal passing of accounts is presumptively not required, but interested parties can demand it.[104] In Ontario, for example, estate trustees must keep accurate records of estate assets and transactions,[105] and they must fulfill their common law duty to keep

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[100] Supreme Court Civil Rules, BC Reg 168/2009, r 25-13(1) [BC Civil Procedure Rules]. Presumptively all estates must pass accounts, but exceptions are carved out for cases where: (1) all beneficiaries have approved of the accounts, (2) all beneficiaries have consented in writing that it is not needed (including situations where the personal representative is the only beneficiary), (3) if the court directs that it is not needed, or (4) if the Public Trustee is the personal representative. The option to bypass a formal accounting on consent appears to be equally available to testate and intestate estates. *Trustee Act*, RSBC 1996, c 464, s 99. See also: Yukon's *Trustee Act*, RSY 2002, c 223 at s 55.
[101] Sask *Administration of Estates Act*, *supra* note 75 at ss 35, 36, s 47.
[102] NWT Estate Administration Rules, *supra* note 75 ss 96-100.
[103] Nunavut Probate Rules, *supra* note 75 at s 32.
[104] Quebec follows an approach that more closely follows this one, although it uses different terminology. Civil Code of Québec, CQLR c CCQ-1991, Art 819-823 [Que *Civ Code*].
[105] Ont CPR, *supra* note at Rule 74.17, 74.15(1)(h); Anne E P Armstrong, *Estate Administration: A Solicitor's Reference Manual* (Toronto: Thompson Reuters Canada, 1988) loose-leaf 4.1-4.2: "Passing of accounts".

accurate records and account to heirs.[106] They are not, however, obligated to formally pass accounts with Probate Court unless they choose to do so voluntarily, or a person with a financial interest in the estate interest (such as an heir, beneficiary, creditor, surety) requests it.[107] Manitoba, PEI, Alberta, and the United Kingdom take a similar approach to Ontario.[108] Under their respective rules, an executor or administrator must fulfill their duty to account to all heirs and beneficiaries, but they are only required to formally pass accounts if it is requested by the court, or at the instance of an interested party.

There are strong arguments in favour of reforming the law on passing accounts. The current system serves an important protective function, but it is so onerous that personal representatives are choosing to assume an ongoing personal risk rather than follow its procedures. This undermines the protective function it is meant to serve. In addition, for LTI-administered intestacies, can be difficult for them to satisfy the rules for formal passing of accounts. Money set aside by the Province for bonding purposes remains earmarked in perpetuity because, for some of these complex MGIs, completing the formal accounting is a practical impossibility. A regime that is so onerous that most people either cannot or choose to assume the risk of not following it has failed to achieve an appropriate balance between protection and accessibility.

In terms of the form of that change, there are views in favour of both Canadian approaches. A path which extends Nova Scotia's current testate rules to intestate estates (i.e. the formal accounting is presumptively required but can be avoided on consent) offers consistency and protection. On this view, if beneficiaries to a testate estate can collectively agree to waive formal accounting, heirs should be able to do so on the same basis. Excluding intestate estates from this consent-based bypass is arguably unfair and arbitrary. By relying on consent to opt-out of the accounting, we empower the heirs to decide what protections they need.

On the other hand, there are reasons not to extend the current regime for testate estates to intestate ones. The accounting rules for testate estates are often not followed (in that executors often do not pass formal accounts even when they are required to). In addition, the unanimous consent threshold will set an unattainable goal for many estates, and especially MGIs. Under this

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[106] Ont CPR, *supra* note 83 at Rule 74.17; Armstrong, *ibid:* 4.1: "There is a fundamental duty at common law and by statute for an estate trustee, executor, administrator or guardian to keep a complete and accurate set of accounts of the assets of the deceased under administration. With reasonable notice, a beneficiary is entitled to inspect the accounts and any of the supporting vouchers.... These common law principles are codified in Rule 74.17 of the *Rules of Civil Procedure* which provides that estate trustees shall keep accurate records of the assets and transactions in the estate." See also: *supra* note 89, 90.

[107] Ont *Estates Act*, *supra* note 77 at s 50(1); See also: Armstrong, *ibid* at 4.2, and 1:80 for discussion of who qualifies as a person with a financial interest in the estate. This is true for all Ontario estates, not just the small estate process. *Wall v Shaw,* 2018 ONCA 929 (CanLII) at para 23.

[108] Man *Surrogate Practice Act*, *supra* note 75 at s 44; Alta Surrogate Rules, *supra* note 73 at s 103 – 106; *Probate Act*, RSPEI 1988, c P-21, s 53 [PEI *Probate Act*] see also, PEI Rules of Court, Rule 65.38; *Administration of Estates Act*, 1925, s 25(b) (UK): The personal representative of a deceased person shall be under a duty to (b) when required to do so by the court, exhibit on oath in the court a full inventory of the estate and when so required render an account of the administration of the estate to the court;

view, one unresponsive heir should not – by their inaction - be able to stymie efforts to legally avoid the formal passing of accounts.

The Ontario model (in which the formal court-based accounting is only required when requested) can remedy this problem. Under it, heirs can opt-in to a formal accounting, but it is not required by default. Without mandatory court involvement, the personal representative's common law duty to account to heirs persists, but it is satisfied directly by accounting to heirs. This shifts the burden of acting onto the interested parties who believe account mismanagement has happened, which will save courts and personal representatives time and money. However, it also creates risk of mismanagement, as some heirs and beneficiaries lack the knowledge or tools to proactively raise concerns about how an estate is managed.

The Institute proposes for discussion that Nova Scotia adopt the Ontario approach to passing accounts for both testate and intestate estates. Under it, the duty of a personal representative to account directly to heirs is affirmed, but the necessity for a court-monitored accounting is only triggered when someone with a financial interest in the estate demands it. Our proposal stems from the argument that the opt-in model strikes a better balance between the goals of protection and accessibility. The court-based passing of accounts is very complicated and effectively impossible to do without a lawyer. Extending the existing system for testate estates to all estates will not fix the underlying problems with this regime, and will leave out too many estates (including MGIs). Instead of requiring every estate to go through this process unless everyone agrees otherwise, it better advances access to justice if the formal court-based process is not an automatic requirement. The opt-in Ontario model better aligns the law with existing practice while increasing efficiency. Most personal representatives provide a final account to the heirs and beneficiaries and obtain releases from them. They often choose not to do a formal accounting unless they are being forced into it. This proposal simply codifies this dominant practice.

Some may view this proposal as unfairly compromising the protections needed for estates with minor or incapacitated heirs. On this view, the formal passing of accounts is the only way to ensure that an estate was managed properly. Given their inherent vulnerability, the court based formal accounting should be mandatory for at least this subset of estates. We have two responses to this important concern. First, we emphasize that the formal passing of accounts is the law now, and it is not being complied with. We have no indication that making this rule mandatory for a subclass of estates will increase compliance. Second, we emphasize that (1) personal representatives must still account directly to heirs, (2) minor or incapacitated heirs must have guardians appointed for them in probate and administration matters, and (3) these guardians can demand a formal accounting. These features provide an accessible way for vulnerable heirs to demand an accounting where it is needed. Forcing all estates with vulnerable heirs to follow a cumbersome and expensive process is unfair, and creates barriers to the efficient settling of estates.

We note that, while we have heard that releases are often obtained, and can be filed with Probate Court, we are not at this time proposing that either obtaining or filing releases from heirs be made mandatory. Obtaining releases is a best practice that personal representatives follow to protect

themselves. Despite this benefit, it is not clear whether this step should be mandatory. However, it may be argued that making releases mandatory may provide helpful guidance to self-represented personal representatives that will protect them from liability. In terms of filing, filing a release is generally not required (it is a private protection for the personal representative). However, it could act as a formal closing document, demonstrating that the estate is closed for all intents and purposes.

In order to clarify that this proposal does not undermine the common law duty to account, we also propose that the *Probate Act* should make clear that personal representatives must account to heirs directly, and heirs must be made aware that they can demand a formal passing of accounts.

Proposals for Discussion:

A court supervised formal passing of accounts should only be required where a party with an interest in the estate demands it.

The *Probate Act* should affirm that personal representatives have a duty to keep accurate records and account to beneficiaries.

Questions for Discussion:

Should the *Probate Act* or Regulations stipulate that personal representatives must obtain releases from heirs or beneficiaries after accounting to them?

Should the *Probate Act* or Regulations stipulate that personal representatives ought to file releases obtained by heirs and beneficiaries?

C. Probate Taxes

In Nova Scotia, probate taxes are paid up-front by cheque when applying for a Grant of Probate or Administration. The tax payable varies based on the size of the estate: $85.60 for estates under $10,000; $215.20 for estates valued between $10,000-$25,000; $358.15 for estates valued between $25,000-$50,000; $1,002.65 for estates valued between $50,000-$100,000; and $1,002.65 plus $16.95 for every $1,000 or portion thereof in excess of $100,000.[109]

Comparatively speaking, Nova Scotia's probate taxes are more expensive than other Canadian jurisdictions.[110] For example, in Ontario, there are no probate taxes for estates valued at under

[109] *Costs and Fees Act*, RSNS 1989, c 104, Fees and Allowances Under Part I and II of the Act, NS Reg 91/2009. New fees for court services relating to the Costs and fee Act Regulations, Courts of Probate (1 April 2015) online: https://www.courts.ns.ca/sites/default/files/editor-uploads/Probate_Court_Costs_and_Fees_Table_16_08.pdf

[110] Rudy Mezetta,"Facing high probate tax, Nova Scotians can't use dual wills to escape" *Investment*

$50,000.[111] For estates with a total gross value over $50,000, the probate tax payable is $15 for each $1,000 (or part thereof) of the value of the estate. In British Columbia probate fees are not required for estates valued at under $25,000.[112] For estates with a total value between $25,000 and $50,000, the tax is $6 for each $1,000 (or part thereof). For estates with a total value over $50,000, the probate tax payable is $14 for each $1,000 or part thereof. Manitoba eliminated all probate taxes regardless of the size of the estate in 2020.[113] The Northwest Territories continues to require probate tax: $30 for estates under $10,000, $110 for estate valued between $10,000 and $25,000 and $215 for estates worth between $25,000 and $125,000.[114] Nunavut's probate taxes are $25 for estates under $10,000, $100 for estates under $25,000 and $200 for estates valued between $25,000 and $125,000.[115]

a. Reforming the Amount of Probate Tax

The rationales for reducing Nova Scotia's probate fees relate to accessibility and access to justice. Probate and administration can be expensive, especially for small estates. Relatively modest taxes, when combined with other fees (hiring lawyers, obtaining a bond etc.) add up, and collectively create challenges, or even lead to estate abandonment. We have been told this burden is especially problematic for estates where the only asset in the estate is real property. There is no liquid money in these estates. Many families cannot afford to pay probate taxes out-of-pocket with essentially no path or expectation that the estate will ever reimburse them.

On the other hand, probate taxes are arguably not unduly onerous in Nova Scotia. For estates valued under $50,000, the maximum fee payable is $358.15. This is arguably a fairly modest amount, and a source of income for a Province. On this view, the amount of probate tax is not a significant barrier to our probate system. Efforts to simplify probate ought to focus on other issues rather than eliminating relatively modest taxes.

The Institute proposes for discussion that Nova Scotia eliminate probate taxes for estates valued under $50,000. Nova Scotia's taxes are higher than other jurisdictions. As such, there is a harmonization argument to be made that Nova Scotia should also lower its taxes. Eliminating probate taxes also advances access to justice, in that it eliminates a barrier preventing people from moving forward with probate or administration and realizing the intergenerational transfer of wealth. For estates where the only asset is real property, the $50,000 threshold will capture small estates where the only asset is rural properties/tracts of land.

Executive (11 December 2023) online: https://www.investmentexecutive.com/newspaper_/comment-insight/facing-high-probate-tax-nova-scotians-cant-use-dual-wills-to-escape/.

[111] *Estate Administration Tax Act, 1998*, SO 1998, c 34, Sched, s 2(2)(b).

[112] *Probate Fee Act*, SBC 1999, c 4, s 2(2).

[113] *Budget Implementation and Tax Statutes Amendment Act, 2020*, SM 2020, c 21, Part 5.

[114] *Court Services Fees Regulations*, NWT Reg 120-93, Part 2.

[115] For a chart of probate taxes in Canada by province and territory, see: TD Wealth "Provincial/Territorial Probate Fees" online: https://advisors.td.com/dao.le/mediahandler/media/262173/Probate%20Fees-FINAL.pdf.

Estates greater than $50,000 present a different set of concerns. On the one hand, there are many estates over $50,000 where the only asset is real property. Personal representatives may not have the liquidity to pay these taxes. On the other hand, for many estates over $50,000 probate taxes are not a significant burden.

The Institute proposes for discussion that, for estates valued over $50,000, the *Probate Act* should legislatively authorize the Minister (via the Registrar) to waive or reduce probate taxes based on enumerated factors (such as the fact that the personal representative is lower income; the estate only consists of real property; and/or the real property will be used by heirs). This approach could be modeled on an approach used under s 207.06 of the *Income Tax Act*.[116] We emphasize that, in order to be valid, the authority to modify probate taxes must be embedded in the *Probate Act* itself, and not the Probate Regulations.[117]

Proposals for Discussion:

Nova Scotia should eliminate probate taxes for estates valued under $50,000.

The *Probate Act* should authorize the Minister (via the Registrar) to modify probate taxes based on contextual factors such as the personal representative's income; and/or the type of assets in the estate).

b. Reforming How Probate Taxes are Paid

The Institute has been told that there are significant challenges with how probate taxes are paid. Probate taxes must be paid up-front by cheque. This creates problems for lower income personal representatives who cannot afford to pay this money out-of-pocket. In the past, probate taxes were due 30 days after obtaining a grant. This old system worked better for personal representatives, who were able to take the Grant to the deceased's bank and use money from their account to pay probate tax. However, we have been told that the Probate Court changed this policy because they were not being paid.

The Institute considered different paths to fix this problem. Given the problems encountered at Probate Court, reinstating the old system does not appear to be a viable option. There are, however, other ways to create flexibility while ensuring Probate Court gets paid. For example, we propose that probate taxes be payable by credit card. While allowing credit card payments is not a comprehensive solution, it provides a practical option that alleviates short-term cashflow concerns.

[116] *Income Tax Act*, RSC 1985, c 1 (5th Supp), (Gives the Minister discretion to waive or cancel tax payable for enumerated reasons).
[117] *Re Eurig Estate*, [1998] 2 SCR 565.

We also propose a solution which allows Probate Court and financial institutions to better communicate with each other. In this regard, we have been told that banks or other financial institutions will release funds from a deceased's bank account to pay probate tax so long as they have an invoice. The problem, however, is that Probate Court does not issue invoices. To remedy this problem, some law firms issue an 'invoice' of sorts for the personal representative to give to the financial institution. Building on this solution, the Institute proposes for discussion that Probate Court create an invoice-styled document setting out probate tax payable that can be given to banks. This would allow the financial institution to release funds from the deceased's account without requiring the administrator to pay their own money first. It would also guarantee that Probate Court would be paid.

Proposals for Discussion:

Probate Court should allow for probate taxes to be paid by credit card.

Probate Court should create an invoice-styled document specifying probate taxes payable that a personal representative can present to the deceased's financial institution.

D. Renunciations

When a person dies wholly or partially intestate, or when an executor is unwilling or unable to act, the *Probate Act* provides a list of persons who are entitled to administer the estate.[118] This list is given in order of priority: (1) the deceased's spouse and children resident in the Province; (2) heirs resident in the Province; (3) the Public Trustee; (4) heirs non-resident in the Province; (5) a creditor.

In order to be appointed as an administrator, a person must file original signed renunciations from everyone who sits in equal or higher priority to them. For example, if a surviving spouse wished to act as administrator (priority 1), they must have signed administrations from all the intestate's children (others who sit in priority 1). If a non-resident heir wants to act (priority 4), they must have signed renunciations from everyone sitting in positions 4, 3, 2 and 1.

[118] *Probate Act, supra* note 4 at s 32: Subject to Sections 15, 23 and 24 of the Public Trustee Act, administration of the estate of an intestate or of an estate partly or wholly unadministered owing to the death or removal of a personal representative shall be granted to one or more of the following persons, if they are competent and suitable for the discharge of the trust and willing to undertake the administration of the estate unless the court thinks it proper to appoint some other person, according to the following priorities: (a) first – the spouse of the intestate if the spouse resides in the Province and those children of the intestate who reside in the Province; (b) second – those persons who reside in the Province and who are entitled to share in the distribution of the estate by reason of the Intestate Succession Act or by reason of being adult residuary beneficiaries; (c) third – the Public Trustee; (d) fourth – those persons who do not reside in the Province and who are entitled to share in the distribution of the estate by reason of the Intestate Succession Act or by reason of being adult residuary beneficiaries; (e) fifth – a creditor or a person having a cause of action against the estate. See also: s 20 for situations with wills but no executor.

Obtaining renunciations can significantly slow down the opening of administration. There are different reasons for this, including family dynamics (such as estrangements), non-responsive or transient parties, or institutional delays (if a renunciation from the Public Trustees office is needed).

This section considers how to streamline the process for obtaining renunciations. These proposals fall into two categories. First, we consider how shifting this priority list can streamline the process for obtaining renunciations. Second, we consider an alternative path to move forward when renunciations cannot be obtained from non-responsive heirs.

a. Shifting the Priority List

There are several ways shifting the priority rules could streamline renunciations, including: (1) lowering the public trustee's priority (2) removing residency restrictions; and (3) excluding estranged family members from acting. Each of these issues are discussed below. Before doing so, however, we briefly comment on the treatment of common law partners under this priority list.

1. *Administration by Common Law Partners*

Common law partners have no priority to administer their deceased partner's estate. The word "spouse" in s 32(1)(a) does not include common law partners.[119] Most reformed Canadian jurisdictions, including British Columbia, Ontario, Saskatchewan, Manitoba, Northwest Territories, and Prince Edward Island give common law partners the same priority to administer an intestate estate as married spouses.[120] By contrast, several other Canadian jurisdictions – including Alberta and New Brunswick – appear to exclude common law partners from priority to

[119] In 1995, this issue was addressed by the Court of Appeal in *Re: Rideout Estate*, 1995 CanLII 4351 (NS CA). There, the court adopted the rationale that, without clear legislative intent indicating otherwise, the word "spouse" only included married partners.

[120] British Columbia gives persons living together in a marriage-like relationship for at least two years the same right to administer an estate as married spouses. (*WESA, supra* note 71 at s 2(1)); Ontario treats married persons on the same basis as a person living in a conjugal relationship with the deceased at the time of death Ont *Estates Act*, *supra* note 77, s 29: 29; Saskatchewan courts have defined "spouse" in the Province's probate legislation as being defined by reference to the province's intestacy legislation, which includes common law partners. *Pratt v Kay*, 2016 SKQB 105, referring to *Intestate Succession Act, 1996*, SS 1996, c I-13.1. See also: *Ferguson v Armbrust,* 2001 SKCA 122; In Manitoba, administration is granted to any next of kin for small estates. For all other estates, married and common law partners are placed on equal footing in terms of priority: Public Guardian and Trustee Manitoba, "Deceased Estate Handbook" (PGTM: Winnipeg, 2017) online: <https://www.gov.mb.ca/publictrustee/pdf/deceased_estate_handbook.en.pdf> at 15; In Northwest Territories, a spouse under the Estate Administration Rules includes a person living common law with the deceased for at least two years, or a lesser period if they have a child together. NWT Estate Administration Rules, *supra* note 75, s 12(2); *Family Law Act,* SNWT 1997, c 18, s 1(1) "spouse". Separately, while not recently reformed, in Prince Edward Island, while the *Probate Act* states that a "spouse" has priority to administer an estate – the *Interpretation Act* would indicate that common law spouses be included in this definition.

act as administrator.[121] Still other jurisdictions, such as Nunavut, are ambiguous on this point.[122] Outside of Canada, the American UPC leaves this question to individual states.[123] In California, for example, a "spouse" includes only married partners and registered domestic partners.[124]

In its 1999 Final Report, the Nova Scotia Law Reform Commission recommended that common law spouses be included on the same basis as "spouses" under the *Probate Act*. The Commission reached this conclusion because it was "consistent with the of the first category of entitlement, that is, to allow those with the closest relationship to the deceased to have the first opportunity to administer the estate."[125] It noted, however, that this change should be accompanied by a corresponding reform to the *Intestate Succession Act*. In the Commission's view, a common law partner should not be entitled to priority over administration if they were not entitled to receive any inheritance. While the Commission was cognizant of concerns that this would add complexity to administration, it reasoned that disputes over this priority would be handled as a contentious matter. In that context, a judge should have discretion to appoint the most appropriate administrator.

The rationales in favour of including common law partners as administrators relate to intention, accessibility, equality, and access to justice. Ideally, administration is meant to be performed by persons who were closest to the deceased. In many cases, this will be their surviving common law partner. On the basis of equality, it is arguably unfair to exclude people from administering their partner's estate because of their choice not to marry. Many people choose not to be married for religious, social, or other reasons which do not speak to the nature of their relationship, their level of commitment, or the appropriateness of the surviving partner to act as administrator. In addition, because common law partners are treated as legal strangers when their partner dies, they are left vulnerable to other administrators/family members who take possession of the deceased's property to which the common law partner may have a valid claim. Lastly, on the points of accessibility and access to justice, common law relationships tend to be more prevalent for lower income families. If we exclude common law partners from acting as administrators, we are effectively creating a barrier for poor families.

On the other hand, there are several arguments founded on intention and access to justice which point against the inclusion of common law partners as administrators under the *Probate Act*.

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[121] Alberta takes an approach similar to Nova Scotia - a "spouse" includes only married partners and a registered adult interdependent partner (*Estate Administration Act*, SA 2014, c E-12.5 s 13(1)(b)). New Brunswick's legislation permits a spouse or next of kin to apply to be administrator. It does not mention common law spouses (*Probate Court Act*, *supra* note 73, s 53).

[122] Nunavut's Probate Rules give priority to a 'spouse' with no clarity as to whether that would include a common law spouse (Nunavut Probate Rules, *supra* note 75 at s 7). However, a 'spouse' under Nunavut's *Intestate Succession Act*, RSNWT (Nu) 1988, c I-10, s 1 does include a common law partner, raising an argument that this definition should apply to administration.

[123] UPC, *supra* note 81 at 2-802, 3-203. This matter is left to individual states. In California, a "spouse" includes only married partners and registered domestic partners. Lisa Fialco, How to Probate an Estate in California, 26th Ed, (USA: NOLO, 2023) at 15 [Fialco]; Cal Prob Code §72.

[124] Fialco, *ibid* at 15; Cal Prob Code §72.

[125] Final Report, *supra* note 3 at 49.

Some may not marry because they wish to keep their property and legal affairs separate, and this would extend to administration on death. In addition, including common law partners will likely lead to more litigation, as judges will have to sort through the nature of relationship in determining who has the right to administer the estate (for example: as between an alleged common law partner and adult children of the deceased).

On a more fundamental level, however, there is a concern that including common law partners as administrators under the *Probate Act*, without more, creates a disconnect in the Province's wider property division schemes. The basic principle underpinning the priority list is that those who are beneficially interested in the estate should have the right to administer it. Common law spouses do not have any beneficial interest in the estate (neither the *Intestate Succession Act* nor the *Matrimonial Property Act* recognize them as having a statutory right to property on death). If and when those property division schemes are extended to common law partners, so too should their right to administer. Until that time, however, it is difficult to argue that common law partners should be given the procedural right to administer an estate while they lack any substantive entitlement to the property in it. We therefore propose for discussion that, if the Province reforms the *Matrimonial Property Act* and other property division schemes such as the *Intestate Succession Act* to include common law partners, they should also be included in the priority list for administering an intestate estate.

Proposal for Discussion:

If the Province reforms the *Matrimonial Property Act* and the *Intestate Succession Act* to recognize common law partners, they should also be included in the priority list for administering an intestate estate.[126]

2. *The Public Trustee's Priority*

At present, the Public Trustee sits in the third of five priority positions to act as administrator (below resident heirs but above non-resident heirs and creditors). We have been told that the public trustee lacks the resources to step in and administer estates where there are other capable administrators who live out-of-province. In practice, unless there are other considerations at play (such as minors or incapacitated heirs), the public trustee invariably will renounce in these cases. Requiring the Public Trustee to provide a renunciation in cases where there is a non-resident heir willing to act unnecessarily slows administration down and burdens the Public Trustee's office.

As such, we propose for discussion that the Public Trustee be moved to the fourth of five positions (i.e. above creditors, but below all resident and non-resident heirs).

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[126] Wendy Martin, "N.S. overhauling Matrimonial Property Act to give common-law couples more rights" *CBC News* (9 Feb 2020) online: <https://www.cbc.ca/news/canada/nova-scotia/nova-scotia-matrimonial-property-act-overhaul-common-law-couples-1.5456098>.

On the other hand, a Nova Scotia court cannot directly exercise its jurisdiction over non-resident administrators. Even if the Public Trustee's office chooses to renounce their priority to act as administrator in some of these cases, their choice to do so should not be eliminated. Even in the case of renunciation, it is important for the Public Trustee's office to review the file and provide a renunciation rather than letting all of these administrations proceed without their knowledge or involvement. Under this rationale, a non-resident administrator should only be used as a last resort.

Proposal for Discussion:

The Public Trustee's priority to act as administrator should be lower than non-resident heirs.

3. Non-resident Administrators

Subsection 32(1) of the *Probate Act* prioritizes potential administrators based on their residency in the Province.[127] As a reminder, the priority states:

> First - the spouse of the intestate if the spouse resides in the Province and those children of the intestate who reside in the Province;
>
> Second – those persons who reside in the Province and who are entitled to share in the distribution of the estate by reason of the *Intestate Succession Act* or by reason of being adult residuary beneficiaries;
>
> Third – the Public Trustee;
>
> Fourth – those persons who do not reside in the Province and who are entitled to share in the distribution of the estate by reason of the *Intestate Succession Act* or by reason of being adult residuary beneficiaries;
>
> Fifth – a creditor or a person having a cause of action against the estate [emphasis added].[128]

The Act thus prioritizes the spouse and children of the intestate and other persons entitled to share in the distribution of the estate who reside in the province over all other persons.

[127] *Probate Act, supra* note 4.
[128] The court may also appoint some other person if it thinks proper, *Probate Act, ibid,* s 32(2)-(5).

Across Canada, jurisdictions are split on this residency requirement. Ontario,[129] Manitoba,[130] and Newfoundland and Labrador[131] require that administrators be resident of the province.[132] Other provinces, including British Columbia, Prince Edward Island, and New Brunswick do not distinguish priority based on residency.[133] and New Brunswick.[134] Lastly, Alberta and Saskatchewan take an approach similar to Nova Scotia, in that residents are given preference to be appointed.[135]

The current approach was justified on the basis that it is difficult for Probate Court to enforce orders against non-resident administrators (whose jurisdiction is confined to Nova Scotia).[136] In the time since this approach was developed however, interjurisdictional comity between Canadian jurisdictions have increased. It is arguably easier for Probate Court to have its orders enforced against administrators living in other Canadian provinces. On this argument, the residency restriction arguably offers no benefit. By applying to act as administrator, non-residents attorn to the jurisdiction of Nova Scotia Probate Court. At least with regards to Canadian residents, the concern that non-residents are more difficult to enforce against may be overblown. There are also access to justice concerns to flag. Under the current system, for example, a spouse who lives in New Brunswick sits in equal priority all other non-resident heirs. This arguably does not accurately reflect the intentions of a spousal relationship.

At the same time, however, it is arguable that removing the preference for resident administrators does not make administration any easier or more accessible. If anything, imposing a distinction between resident and non-resident heirs makes it easier for families to select an administrator. On this view, removing this distinction would cause more disagreement among next-of-kin who – if jurisdictional limits are removed – will now sit on equal footing. Moreover, if Nova Scotia removed the preference for resident administrators, it would still need to maintain a distinction between administrators who are resident in Canada versus international administrators. While it may be easy to enforce against an administrator who lives in another Canadian jurisdiction, it is still significantly more difficult for a Nova Scotia court to exercise its jurisdiction over someone who resides outside the country.

Based on the discussion above, the Institute does not propose making changes to the preference for resident administrators. While the underlying logic that it is difficult to enforce against non-

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[129] Ont *Estates Act*, *supra* note 77 at s 5.
[130] Man *Surrogate Practice Act*, *supra* note 75, s 7.
[131] *Rules of the Supreme Court*, 1986, SNL 1986, c. 42, Sch D, r 56.03.
[132] Note, however, that courts have pushed back against this restriction. See eg: *Re Estate William Armstrong* 2010 ONSC 2275.
[133] *WESA, supra* note 71 at s 130. In the face of dispute, BC Courts have appointed non-resident administrators over residents of otherwise equal status. See eg: *Raye v Philip Estate* 2021 BCSC 387; PEI *Probate Act*, *supra* note 108, s 46; NB *Probate Court Act*, *supra* note 73, ss 53, 57.
[134] In New Brunswick, non-resident administrators are required to give security (NB *Probate Court Act, ibid,* ss 53, 57).
[135] *Estate Administration Act*, *supra* note 121, s 13(2)(a); The King's Bench Rules, Sask Gaz December 27, 2013, 2684, R 16-25(3) [Sask KB Rules].
[136] *Final Report*, *supra* note 3 at 47, 48.

resident administrators may be less forceful than it was in the past, this rule is not causing problems. Non-resident administrators are still able to act, albeit in a lower priority. Therefore, there is no meaningful gain to be had from removing this requirement.

Proposal for Discussion:

Nova Scotia should not remove the distinction between resident and non-resident administrators.

4. Separated Spouses and Family Estrangement

We have been told that family estrangement is a significant barrier to obtaining signed renunciations. Family estrangements are relatively common and can take many forms, including family members who (for example): are transient or lack stable housing; struggle with significant addiction issues and/or mental health challenges; spouses who abandoned the family years earlier; or family rifts which result in families refusing to communicate with one another.

In these families, the process of obtaining renunciations can cause significant delay because (1) estranged family members are often hard to find/non-responsive, and (2) would-be administrators often do not want to reach out to them. Given this reality, we could arguably enhance access to justice by excluding separated spouses and/or estranged family members from having priority to act as administrator.

The rationale for their exclusion is two-fold. First, estranged family members are arguably ill-suited to act as administrators. While the law assumes that next of kin are often closest to the deceased and have the most at stake, this assumption is unfounded with estranged family members. Because they are estranged, these family members are more likely to cause delay because they are not familiar with the deceased's affairs and the estrangement may mark a level of conflict between the estranged family member and heirs that might make them a poor choice for personal representative. Second, removing the priority of an estranged family member to act as a personal representative does not interfere with their substantive right to an inheritance. While the notion of excluding an estranged family from substantive right to receive an inheritance raises difficult moral questions (such as the reasons or justification for the estrangement), here we are only saying that their estranged status only speaks to their suitability to act as administrator.

On the other hand, there are several arguments that mitigate against excluding estranged family members from having priority to act. First, priority rules usually mirror the right to inherit on intestacy. This is based on the rationale that the administrator should be the person with the most (financially) at stake.[137] On this view, the fact of being estranged from a deceased is not necessarily relevant to the question of whether they are a suitable administrator.[138]

[137] Adlington, *supra* note 31 at 5.4; *Re Logan Estate*, 2020 ABQB 63; *Curtis v Johnson*, 2016 ABQB 616.
[138] Curtis, *ibid.* On this point, however, it is noteworthy that the link between the right to inherit and the

A second argument focuses on predictability. Under this view, having predictable rules around who will administer an estate reduces conflict.[139] If we exclude estranged family members from having priority to act, we will arguably increase uncertainty and cause conflict in families. Lastly, it may not be possible to craft a workable definition of estrangement. Different family dynamics, living arrangements, and communication patterns exist in families, and as such, it may not be possible to craft an adequate definition of estrangement. On this view, it will be impossible for us to fairly separate estranged from non-estranged family members in legislation.

Answering this final critique requires us to distinguish between estranged spouses and estranged family members. Right now, so long as they haven't addressed this in a separation agreement or other formal document, a separated spouse sits in the highest priority to act along with the deceased's children.[140] They also have the highest claim to an inheritance under the *Intestate Succession Act*.[141]

Some Canadian jurisdictions do not give separated spouses priority to act as administrators.[142] For example, British Columbia's definition of 'spouse' excludes a person who has executed a formal separation agreement with the deceased.[143] Alberta's definition excludes a spouse who executed a formal separation agreement from the definition, as well as a person who had been living separate and apart from the deceased for at least 2 years before death.[144] It bears

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priority to act as the administrator is not set in stone. In Ontario and Manitoba, for example, a separated spouse can administer an estate, but cannot inherit (Ontario *Succession Law Reform Act* RSO 1990, c S.26 43.1 (1); Ont *Estates Act, supra* note 77 at s 29; See also: *Prelorentzos v Havaris*, 2015 ONSC 2844; Man KB Rules, *supra* note 76 Rule 74.04; Man *Surrogate Practice Act*, *supra* note 75, s 1 ("next of kin"); Man *Intestate Succession Act*, CCSM c I85, s 3(1).) In our case, we would be advancing the opposite approach (spouses/next of kin can still inherit but not be the administer.

[139] *Re Logan Estate, supra* note 137 at para 19, quoting *Curtis, ibid* at para 29.

[140] *Probate Act, supra* note 4, s 32(1)(a).

[141] *ISA, supra* note 1 at s 4.

[142] It is also arguable (but less clear) that separated spouses do not have priority to administer an estate in Saskatchewan. Saskatchewan's probate legislation defines ''spouse" by reference to the province's intestacy legislation (Sask *Admin Estates Act, supra* note 75, *Pratt v Kay*, 2016 SKQB 105. See also: *Ferguson v Armbrust,* 2001 SKCA 122.) Saskatchewan's intestacy legislation defines a spouse as including a person who was legally married, or in a common law relationship with the deceased (*The Intestate Succession Act*, 2019, SS 2019, c I-13.2, s 2). However, s 15 of the intestacy legislation excludes a separated spouse from taking "any part of the estate". Therefore, it could be argued that s 15 excludes a separated spouse as someone who is entitled to administer and estate.

[143] *WESA*, *supra* note 71: s 2(2) Two persons cease being spouses of each other for the purposes of this Act if, (a) in the case of a marriage, an event occurs that causes an interest in family property, as defined in Part 5 [*Property Division*] of the *Family Law Act*, to arise, …, section 130(a), (g).

[144] Alberta *Wills and Succession Act*, SA 2010, c W-12.2, s 63(1): For the purposes of this Part [right to inherit] and section 13(1)(b)(i) of the *Estate Administration Act* [determining priority to act], the surviving spouse of an intestate is deemed to have predeceased the intestate if the intestate and the surviving spouse (a) had been living separate and apart for more than 2 years at the time of the intestate's death, (b) are parties to a declaration of irreconcilability under the *Family Law Act*, or (c) are parties to an agreement or order in respect of their property or other marital or family issues which appears to have been intended by one or both of them to separate and finalize their affairs in recognition of their marital break-up. (2) Subsection (1) does not apply to a surviving spouse who reconciled with the intestate if the

mentioning that these provisions do not preclude separated spouses from being appointed by a judge on other grounds (such as having an interest in the estate or being otherwise appropriate), but they do eliminate a separated spouse's priority vis-à-vis other would-be administrators.[145]

There is an argument to be made that separated spouses should not have priority to act as an administrator. To the extent that definitional uncertainty is a concern, we could exclude separated spouses from having priority where there was some concrete document demonstrating their intent to live separate and apart, such as a separation agreement, court order or to be tied to a matrimonial property definition. This would close the uncertainty, but would exclude spouses who had long separated but never formalized the separation.

On the other hand, given that they still have a right to inherit, it is arguable that separated spouses should still have a right to administer the estate. In addition, many separated spouses already deal with this matter in separation agreements. Parties who do not want their separated spouse to have spousal rights after separation are free to clarify this in those agreements. On this view, we need not intervene in a matter that is already being dealt with clearly by parties to separation agreements.

When the issue is extended to excluding estranged family members from administering more generally (i.e. children, siblings, parents etc.) definitional questions become more complicated. No probate legislation in Canada excludes estranged next-of-kin from having priority to act as an administrator. However, Nova Scotia's *Personal Directives Act* has a framework for determining who has priority to make decisions on behalf of a person lacking capacity.[146] That Act states that a person's closest relative is entitled to make decisions on behalf of a person who lacks capacity, but only if they have been in contact with the person lacking capacity within the last 12 months.[147] Similarly, the *Probate Act* could stipulate that, in order to have priority to act as administrator, a family member must have been in contact with the deceased over the preceding 12 months (or other period).

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reconciliation was subsisting at the time of the intestate's death;...

[145] For example: *WESA*, *supra* note 71 at 130 (g) "any other person the court considers appropriate to appoint"; Alta *Estate Administration Act*, SA 2014, c E-12.5, s 13(1)(b)(ix) "a person who has an interest in the estate because of a relationship with the deceased person" or s 13(4) a person nominated by someone with priority to act.

[146] *Personal Directives Act,* SNS 2008, c 8.

[147] *Ibid* at s 14: (1) ... [W]here a person who lacks capacity to make decisions .... and does not have a guardian with authority to make such decisions...a decision to accept an offer of placement in a continuing-care home and home-care services decisions may be made on behalf of the person by ....(d) the nearest relative who has capacity and is willing to make the decision; ....
(2) A nearest relative shall not exercise the authority given by subsection (1) unless the nearest relative (a) excepting a spouse, has been in personal contact with the person over the preceding twelve-month period or has been granted a court order to shorten or waive the twelve-month period; (b) is willing to assume the responsibility for making the decision; (c) knows of no person of a higher rank in priority who is able and willing to make the decision; and (d) makes a statement in writing certifying the relationship to the person and the facts and beliefs set out in clauses (a) to (c).

The benefits of this approach relate to accessibility, intention and efficiency. We have been told that estrangements are a big issue for Nova Scotian families. On that basis, we can make the system work better for families if they do not have to track down long lost family members before opening administration. In addition, a person who has not been in contact with deceased is arguably not someone the deceased would intend to be their administrator. This approach also speeds up administration and likely prioritizes more suitable family members to act as administrators. Finally, concerns that we are unfairly excluding estranged family members (who may have very good reasons for being estranged) are minimized by the fact that we are not eliminating anyone's substantive rights. Estranged family members are still entitled to inherit the estate, we are simply removing their priority to oversee the administration process.

On the other hand, excluding estranged family members will make things more uncertain and complex. It is likely to cause litigation as parties seek to prove the existence (or lack thereof) of certain relationships where one party to that relationship is dead. It may also create evidentiary issues as parties argue over the nature of relationship and points of contact with the deceased. Lastly, it may create accessibility problems insofar as there may be cases where no one meets the definition of a qualifying non-estranged family member.

Given the different policy issues surrounding this issue, we do not have a proposal for discussion. Instead, we invite commentary on the question of whether estranged spouses and/or family members should be excluded from having priority to act as administrator.

Questions for Discussion:

Should separated spouses be excluded from having priority to act as an administrator?

If so, how should we define a separated spouse?

Should estranged family members be excluded from having priority to act as an administrator?

If so, how should we define an estranged family member?

b. Bypassing renunciations

Right now, if an heir with equal or better priority does not provide a signed renunciation form, a would-be personal representative must make a court application to dispense with the need for their renunciation. These applications occur on notice, they take time and money, and are a disincentive for administrators to move forward with administration. The Institute considered whether it was possible to create an easier path to move forward despite not receiving signed renunciations from non-responsive heirs.

In this regard, the *Public Trustee Act's* election process provides a blueprint.[148] Under that Act, when the Public Trustee elects to administer an estate under $25,000, they may proceed without receiving renunciations by issuing 1-months' notice of their intention to proceed to all those entitled to renounce.[149] If a person who receives this notice successfully applies for administration within this window 1-month window, the public trustee cannot proceed. Otherwise, the public trustee may proceed as administrator.

This approach, if extended beyond the public trustee's election, could speed up the appointment of administrations for the general public. In other words, so long as adequate notice is sent, a would-be administrator should be able to proceed with their application for a grant.

The rationale in support of this approach is that passive persons sitting in priority should not hold up estate administration indefinitely. Some heirs do not respond to renunciation requests and/or refuse to sign renunciation forms. In the face of this inaction, prospective administrators should be able to move forward in a way that does not involve making a court application. In addition, this approach can be defended on the basis that it does not remove any substantive entitlement. All it does is provide a way to move forward with an administrator who is willing to act. So long as adequate notice is provided, a would-be administrator should be able to move forward.

In addition, it could be argued that this approach provides a more manageable path for handling family estrangements. Above, we flagged the difficulty of defining estrangement as a barrier to excluding potential administrators from having priority to act. This model avoids that problem. Under this path, estranged family members may choose not to sign renunciation forms or engage with surviving family members. However, after being given notice, they cannot hold up estate administration indefinitely.

On the other hand, it could be argued that signed renunciations must be actively provided to ensure that heirs fully understand that heirs are giving up the right to act as an administrator. It also could be argued that the new path will overtake the process of obtaining signed renunciations, such that people will use the notice route instead of actually attempting to obtain signed renunciations.

The Institute proposes for discussion that if signed renunciations have not been provided, a would-be administrator can proceed after providing 1-months' notice of their intention to be appointed as administrator to all those who have not renounced. In order to ensure that this exception does not overtake the rule, we propose that the one-month bypass only be available after attempts to obtain signed renunciations have been unsuccessful. To this end, the form submitted to the registrar ought to require the applicant to state that they have attempted to obtain signed renunciations, but those attempts were not successful.

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[148] *Supra* note 36 at S 22A.
[149] *Ibid.*

Proposal for Discussion:

Where signed renunciations have been sought but have not been provided, a would-be administrator may proceed with their application after providing one months' notice of their intention to all those who have failed to provide a signed renunciation.

E. Serving Official Documents

In Nova Scotia, once a personal representative has been appointed, they must, within 30 days, serve notice of the grant to "each person who is or may be entitled to share in the distribution of the estate".[150] Service must be completed personally, by registered mail, or via an authorized lawyer,[151] and proof of service must be filed within 60 days of the grant being issued.[152]

Notice is an essential element of probate and administration processes – in order for heirs and beneficiaries to protect their interests, they must know that a proceeding is ongoing. However, the rules for effecting service can be rigid and outdated. In recognition of this, some jurisdictions have simplified the rules on how to provide notice.

For example, in Ontario, Small Estate Certificate rules require an applicant to "send or give" (rather than "serve") a copy of the application for a grant to all known persons entitled to share in the distribution of the estate at least 30 days before filing the application with the court.[153] This distinction speaks to the issue of proof. "Serving" a document requires proof of service – i.e. a filed affidavit of service, whereas "sending or giving" a document does not. Thus, Ontario's small estate rule indicates that a personal representative must send or give copies of the certificate on relevant parties, and they must indicate this on their application form, but they do not have to file affidavits of service with Probate Court.[154]

In addition, several jurisdictions now expressly accept email service. For example, in Ontario, documents can be served via email, to the last email address for service provided by the person or, if no such email address has been provided, to the person's last known email address.[155] In British Columbia, notice may be effected by email only if the applicant receives a written acknowledgment of service, retains a copy of this acknowledgment until discharged, and swears to this on the application.[156] Alberta does not officially recognize email service, but provides that

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[150] Probate Regulations, *supra* note 19 at s 44(1); see also *Probate Act, supra* note 4 at s 43.
[151] Probate Regulations, *ibid,* s 22.
[152] *Ibid,* s 44(2).
[153] Ontario CPR, *supra* note 83 at 74.1.03(3).
[154] LCO, *supra* note 9 at page 82-84.
[155] Ontario CPR, *supra* note 83 at 74.04(7) Documents to be served on a person under this rule shall be served by, (a) personal service; (b) email, to the last email address for service provided by the person or, if no such email address has been provided, to the person's last known email address; or (c) mail or courier, to the person's last known address.
[156] BC Civil Procedure Rules, *supra* note 100, Rule 25-2(7).

any method of service that is acknowledged in writing by the recipient will be accepted.[157] Other jurisdictions, including Manitoba and PEI, do not expressly permit email service,[158] whereas jurisdictions including Saskatchewan only recognize email service if an enactment expressly provides for it (and probate rules do not).[159]

In the United States, the UPC's summary and informal procedures have similar notice rules to Nova Scotia. Notice must be given to all heirs and beneficiaries within 30 days of the appointment.[160] The UPC does, however, include an optional notice provision to give notice to anyone who has made a demand for notice or to any existing personal representative whose appointment has not yet been terminated.[161]

The Institute considered whether Nova Scotia could simplify the notice and service elements of probate and administration by permitting notice of a grant to be served by email. The arguments in favour of this view focus on accessibility and efficiency. Email is a quicker method of communication that more closely aligns with the way people actually connect with one another. The arguments against permitting email service relate to protection. Email can be unreliable. Emails may be sent to the wrong address, or may go to spam folders. Some people may have email addresses and not use them. In order to minimize these concerns, it is arguable that email service ought to be buttressed by some safeguard.

There are several options to make email service more reliable. First, we could recommend that email should be acceptable so long as a written reply to that email is given. As explored above, this reflects the British Columbia approach.[162] Short of that acknowledgment, however, there are other methods that we have been told are already in use. For example, we have been told that some lawyers rely on "Read Receipts" to demonstrate service has been effected. Others rely on "Delivery Receipts" which demonstrates that the email address is valid, but does not depend on the recipient's decision to acknowledge it. Still others relied on evidence that the email address used for service had been active (sending or receiving other emails) in days prior. While none of these options are perfect, we note that each of the "Delivery Receipt" or active email approaches are equally as reliable as registered mail as a form of service. While there is a valid concern that the email address actually belongs to someone else or the email is not seen, the same problem exists with registered mail (registered mail often doesn't even get signatures anymore, and even when they do, the Registrar of Probate would not know if the signature is valid).

On the other hand, questions about valid service and the reliability of email service are more easily addressed when we are dealing with lawyers as officers of the court. When a self-represented person is relying on email service, there may be heightened concerns from the registrar's office

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[157] Alberta Surrogate Rules, *supra* note 73 at 26(3), (3.1).
[158] Man KB Rules, *supra* note 76, Rule 16.03; PEI Rules of Court, *supra* note 108, Rule 65.37, 16.01.
[159] Sask KB Rules, *supra* note 135 at Rule 12-3, 12-4.
[160] UPC, *supra* note 81 at s 3-306.
[161] UPC, *supra* note 81 at 3-204.
[162] BC Civil Procedure Rules, *supra* note 100, Rule 25-2(7).

about its validity or sufficiency. On this view, email service should only be available where signature is confirmed using a secure online form such as Docusign.

The Institute proposes for discussion that service of official documents be permitted by email so long as some evidence is provided (whether it be written acknowledgment, read receipt, delivery receipt, or active email) which demonstrates the email address is valid, increasing the likelihood that the recipient has received it. We ask for further comment on the specific form of evidence that ought to be acceptable.

We also ask for feedback on whether email service ought to be valid for serving all official documents, or whether it should only extend to service of the grant. On the one hand, if email is adequate at the outset of the proceeding it should be allowed to effect service for all elements of the process. On the other, however, later in proceedings (such as the accounting) the personal representative should have everyone's contact information, and so email service should no longer be necessary.

Proposals for Discussion:

The Probate Regulations should permit notice of a grant to be served via email.

Email service should be acceptable so long as some evidence demonstrating the email address is valid and likely to be seen by the recipient is provided.

Questions for Discussion:

Which forms of evidence (ex: read receipt, delivery receipt, response back) should be required to prove service via email?

Should Nova Scotia permit notice of a formal accounting be served via email?

F. Informal Administration of Bank Accounts

Sometimes, people try to avoid the cost and complexity of probate and administration by dealing with their loved one's estate informally (i.e. without opening probate or administration). For example, a person may try to deal with the estate without a grant of probate by asking institutions (like banks) to release the money in a deceased's bank account to them. This can be done for testate or intestate estates. Often, this informal approach is attractive when the estate is modest, or where the bank account or other item is the only asset in the estate. Some pieces of legislation, such as Nova Scotia's *Motor Vehicle Act* and the *Credit Union Act*, expressly provide for this discretion.[163]

[163] *Motor Vehicle Act, supra* note 29, s 23(7A). Where a registered owner dies intestate or dies leaving an

In the past, we have been told that banks would deal with a deceased's bank account informally, particularly where it was the amount was relatively small and/or it was the only asset in the estate. In recent years, however, we have been told that banks will not do this. Banks have a duty to safeguard the funds they hold, and have been held liable for transferring the contents of a bank account to unauthorized family members on death.[164] In the face of this liability, we have heard that banks are increasingly relying on internal policies which significantly reduce any discretion to release funds without probate or administration being opened. This can make it financially impractical to access the funds in a bank account (where, for example, probate would cost more than the money in the account). This can lead to surviving family members abandoning the bank account.

Legislatively, banks are only permitted to release funds when presented with a grant of probate or administration,[165] and they reserve the right to require even more evidence if they desire. This stance may be contrasted with that taken under Nova Scotia's *Credit Union Act*. The *Credit Union Act* permits a Credit Union to pay out money under a prescribed amount (currently set at $20,000) to a person who provides an affidavit or other proof of death and "who appears to be entitled to the amount of the deceased member's interest."[166] The Act releases the Credit Union

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estate that is not subject to a grant of probate, the Department may determine and recognize a person as the personal representative of the deceased registered owner, and the priorities prescribed by clauses (a) to (e) of subsection (1) of Section 32 of the Probate Act apply mutatis mutandis to the determination. (7B) Where the Department is unable to determine and recognize a personal representative of a deceased registered owner under subsection (7A), the Department may recognize as the personal representative of the deceased registered owner any person that the Department considers fit to act as the personal representative.

Credit Union Act, *supra* note 30, s 44(3) Where a member of a credit union dies and there is no executor of a will of the deceased member or administrator of the estate of the deceased member, the credit union may, upon receipt of an affidavit or such other proof of death or proof of claim as may be required by the credit union, pay a prescribed amount out of moneys standing to the credit of the deceased member to the person who appears to be entitled to the amount of the deceased member's interest and pay-ment made pursuant to this Section releases the credit union from any further liabil-ity with respect to the moneys so paid. Credit Union Regulations, NS Reg 45/95, s 14.

[164] See eg: *Monteiro v The Toronto Dominion Bank*, 2008 ONCA 137.

[165] *Bank Act*, *supra* note 32, s 460 (1) Where the transmission of a debt owing by a bank by reason of a deposit, of property held by a bank as security or for safe-keeping or of rights with respect to a safety deposit box and property deposited therein takes place because of the death of a person, the delivery to the bank of (a) an affidavit or declaration in writing in form satisfactory to the bank signed by or on behalf of a person claiming by virtue of the transmission stating the nature and effect of the transmission, and (b) one of the following documents, namely, (i) when the claim is based on a will or other testamentary instrument or on a grant of probate thereof or on such a grant and letters testamentary or other document of like import or on a grant of letters of administration or other document of like import, purporting to be issued by any court or authority in Canada or elsewhere, an authenticated copy or certificate thereof under the seal of the court or authority without proof of the authenticity of the seal or other proof, or (ii) when the claim is based on a notarial will, an authenticated copy thereof, is sufficient justification and authority for giving effect to the transmission in accordance with the claim. (2) Nothing in subsection (1) shall be construed to prevent a bank from refusing to give effect to a transmission until there has been delivered to the bank such documentary or other evidence of or in connection with the transmission as it may deem requisite.

[166] *Credit Union Act*, *supra* note 30, s 44(3).

from liability for doing so.[167]

New Zealand, Australia and the United Kingdom have adopted a similar legislative stance to Nova Scotia's *Credit Union Act*. In those jurisdictions, certain institutions such as banks are released from liability if they pay out certain assets after a client's death without requiring formal probate or administration to be opened.[168] In terms of guidance on who can access these funds, legislation either refers to (1) the rules of probate, or (2) sets out a list which mirrors intestacy legislation. New Zealand's legislation, for example, provides that up to $30,000 NZD can be paid out to a spouse, child, or other person who appears entitled to open administration.[169] Australia's legislation indicates that, on death of a depositor, up to $15,000 AUD can be paid out "to anyone else who is, in the [bank]'s opinion, entitled to the amount, having regard to the laws of probate and accepted practice for the administration of deceased estates."[170]

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[167] *Ibid.*

[168] *Administration Act 1969*, No 52 (NZ); *Administration of Estates (Small Payments) Act 1965*, 1965, c 32 (UK); *Banking Act*, 1959 (Aus). Note that in the United Kingdom banks are not on the list of institutions who may release funds without probate documents.

[169] *Administration Act 1969*, *ibid,* ss 64-65; 65Payment without administration (2) In the event of the death of any person to whom any sum of money not exceeding [$30,000 NZD] is payable by the trustees of a superannuation fund, a society, a bank, an employer of the deceased person at or within 6 months before the date of his or her death, a local authority, a trustee corporation,..., the Accident Compensation Corporation, the chief executive of the department for the time being responsible for the administration of the Social Security Act 2018, or the Crown respectively, whether the death occurred before or after the commencement of this section, it shall be lawful for [the entity], without requiring administration of the estate of that deceased person to be obtained in New Zealand, and on receiving such evidence as it considers satisfactory that the person has died and that administration of his or her estate has not been obtained in New Zealand, to pay the sum or any part thereof to any of the following persons:
(a) the widow, widower, surviving civil union partner, or children of the deceased person: (aa) a surviving de facto partner of the deceased person: (b) the persons beneficially entitled to the estate of the deceased person under the will or on the intestacy of that person: (c) any person appearing to be entitled to obtain administration of the estate of the deceased person in New Zealand: (d) any person related by blood or marriage or civil union to the deceased person who undertakes to maintain the children of that person who are minors or any of them: (e) any person who has and is exercising the role of providing day-to-day care for any of the children of the deceased person who are minors: provided that no payment shall be made to any person unless he or she applies for or consents to receive that payment.
...
(6) Any payment made in good faith pursuant to this section to a person to whom the maker of the payment has reasonable grounds to believe that payment may be made under this section shall be valid against all persons whomsoever, and the maker of the payment shall be absolutely discharged from all liability in respect of money paid by him or her under this section.
(7) Every person to whom money is paid pursuant to this section shall be liable to apply the money in due course of administration, and the maker of the payment may, if he or she thinks fit, without being liable to see to the application of the money, require any such person to give sufficient undertakings, by bond or otherwise, that the money ... will be so applied.

[170] *Banking Act* (Aus) *supra* note 168, s 69B (1) If a depositor of a [bank] dies, the [bank] may apply an amount not exceeding $15,000 held by the [bank] that was deposited or paid up on a withdrawable share by the deceased person: (a) in payment of the deceased person's funeral expenses or debts; or (b) in payment to the executor of the deceased person's will; or (c) in payment to anyone else who is, in the [bank]'s opinion, entitled to the amount, having regard to the laws of probate and accepted practice for the administration of deceased estates.
The amount may be applied without production of probate, of the will or letters of administration of the

The rationale for this approach is focused on efficiency. By legislating that financial institutions are not liable if they release funds in a bank account under a certain value to family members after death, we encourage banks to act more flexibly with regards to smaller estates. We have been told this flexibility is missing and needed, particularly in situations where the bank account is the only asset in the estate, and opening probate costs more than the value of funds in the account. This approach also would standardize a pre-existing procedure that currently lacks formality and places banks in precarious legal situations.

On the other hand, this approach could create a 'race to the bank' by family members after death. This approach offers no concrete protections to the estate. If the funds are wrongfully released to someone who is not entitled to them, that loss is borne by the estate. (They could presumably pursue the recipient, but the feasibility of this would depend on the facts of the case). In addition, banks are not obligated to change their practices based on this legislative change. A provision releasing them from liability for releasing money without probate documents encourages banks to act in a certain way, but does not force them to change their policies.

We propose for discussion that the federal *Bank Act* be amended to relieve banks of liability if they release funds under a prescribed amount to persons they reasonably believe are entitled to it without formal probate documents. While there are valid concerns about a 'race to the bank', we note that similar provisions exist in other commonwealth jurisdictions - and in Nova Scotia's *Credit Union Act* - largely without incident. This risk can be minimized by specifying that the *Bank Act* set out a priority list mirroring intestacy legislation (similar to that in New Zealand). A provision like this minimizes opportunity for people to steal from an estate, while also making life easier for loved ones in cases where estate value doesn't justify opening probate.

In terms of the amount, we propose for discussion that the figure be set at $20,000. In this regard, there is value in having consistency, and Nova Scotia's current *Credit Union Act* has a prescribed limit of $20,000. It is also arguable that $20,000 sets the right balance between easing access and avoiding a race to the bank.

Proposals for Discussion:

On death of a "depositor", the federal *Bank Act* should relieve banks from liability for giving money under a prescribed amount to persons who, having regard to the rules of inheritance, appear to be entitled to it.

For the sake of clarity, the rules on inheritance should be listed in the *Bank Act*.

The prescribed amount ought to be set at $20,000.

estate. (2) No action lies against a [bank] for acting, or failing to act, under subsection (1).

Part III: Multi-Generational Intestacies

Multi-generational intestacies (MGIs) refer to situations where an intestate's property has not been administered for one (or more) generations prior. Therefore, in order to figure out who owns the intestate's property, a chain of administrations moving up through a family tree must be completed.

MGIs most commonly occur in relation to real property. Imagine, for example, a great-grandparent owned land, but they died without a will and administration was never opened. The family simply continued using the land. Eventually, this lapse in ownership will be revealed when one of their descendants die and/or one of their family members wants to sell or deal with that property. In those cases, a backlog of administrations must be cleared in order to determine who currently owns the property.

MGIs are not necessarily tied to one specific community – as a general matter, they are most likely linked to poverty and/or lack of access to lawyers.[171] With that said, as a result systemic racism, MGIs can be concentrated in African Nova Scotian communities. If a property with unclear title is located in one of the 13 *LTCA* designated communities, title can be clarified under that Act without requiring administering all estates in the MGI. Indeed, if the property is located in one of the five communities eligible for the LTI, that office can manage the clarification process.

For our purposes, however, there are two points that must bear emphasis here. First, even though some properties are eligible for a simplified clarification process, for various reasons sometimes title to these properties is more appropriately handled via administering the estates in the MGI. Second, many MGIs fall outside the scope of the *LTCA* entirely. For these families, administering the estates in the MGI is often the only viable path to determine ownership of property.

MGIs can be difficult to administer because, given the time lapse between death and administration, there are likely to be a lot of heirs sitting in equal priority (great-grandchildren, for example), and at least some of these heirs are likely to be unknown and/or difficult to locate. Even when located, obtaining consensus from a large group is inherently more difficult to achieve. Some of our proposed reforms above (particularly those related to security and accounting) will help administration of MGIs to proceed even with these difficulties. However, other problems with administering MGIs remain, and may require bespoke legislative solutions.

There appears to be two main challenges with MGIs when it comes to administration: (1) the difficulties associated with getting renunciations from heirs; and (2) the procedural complexity that comes from having to do multiple administrations for one property. Each of these problems, and our proposed solutions, are discussed below.

[171] *Supra* note 2.

A. The Renunciation Problem

As set out at above, in order to be appointed as an administrator an applicant must obtain renunciations from all those who sit in equal or higher priority to act as them.[172] For MGIs, this is likely to require a large number of renunciations from at least people whose identity or whereabouts may be unknown. At present, the *Probate Act* has a process to dispense with renunciations via application.[173] This application, however, requires notice to all heirs.[174] As a matter of practice then, administration of many MGIs cannot be opened without first obtaining substituted service orders to dispense with renunciations and to serve notice of the grant once it is issued.

We have been told that obtaining substituted service orders for MGIs is time consuming, expensive and uncertain. Substituted service must be effected for remote heirs and there are differing levels of knowledge about their whereabouts and it may take some time to get before a judge. As such, significant time and money can be spent trying to get an administrator appointed for MGIs.

In order to improve efficiency, the Institute considered whether it would be possible to create a provision that makes it easier to deal with renunciations for administering MGIs.[175] To this end, the Institute drafted a proposed provision which standardizes the steps an MGI must follow to effect substituted service on heirs who cannot be found after a reasonable search. This provision would, in effect, provide a standard substituted service order for MGIs to follow:

> After a reasonable search (borrowing from the language on substituted service in 31.10 CPR)[176] where a would-be administrator cannot locate an heir or heirs who needs to renounce, they may provide an affidavit attesting to their reasonable search to the Registrar of Probate, at which point they must advertise for a designated period on a designated platform(s). Once completed, the Registrar will dispense with the need for a renunciation from that heir or heirs, and permit those heirs to be served notice of the issued grant by the same substituted procedure.

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[172] *Probate Act*, *supra* note 4, s 32(1).
[173] Probate Regulations, *supra* note 19 at s 34(5)(b).
[174] Probate Regulations, *ibid,* s 22(2).
[175] We note that the general proposal regarding renunciations set out above (bypassing renunciations with one month's notice) doesn't resolve the issue presented by MGIs. That solution solves the problem of non-responsive heirs (i.e. you know where an heir is, but they won't sign a renunciation). The problem here is different – we can't find the people to whom we need to send the renunciation.
[176] Nova Scotia Civil Procedure Rule 31.10 (2) The following are examples of efforts to locate a party that, if proved, may establish that an order for substitute notification is to be granted on the basis that the party cannot be located: (a) making inquiries of persons at the other party's places of recent residence or work; (b) making inquiries of acquaintances of the other party; (c) searching the records of the party who makes the motion to locate information about recent residences, places of work, and acquaintances of the party to be notified; (d) engaging a trace service; (e) performing searches on the internet; (f) searching records of other actions against the party to be notified; (g) engaging the services of a local process server, lawyer, detective, or other person to advise on locating a party who resides in an unfamiliar place.

There are several trade-offs with this proposal. The primary drawback relates to protection and workability. It may simply be impossible to create a standardized substituted service process. There is no one-size-fits-all substituted service order. It is arguable that the nature of these orders must be individualized in order to increase the likelihood that the notices will be seen by the relevant heirs. While it may take time, substituted service applications must be individually evaluated and approved.

The benefits of this framework are focused on accessibility and efficiency. A standard path would add clarity and save time when administering MGIs. While it is difficult to create a standardized path, these hurdles can arguably be mitigated by (1) spelling out in detail what reasonable efforts are required before the provision could be used; and (2) legislating multiple platforms for advertising service.

On the first point, CPR 31.10 stipulates the following steps which are indicative of reasonable efforts to locate someone:

> (a) making inquiries of persons at the other party's places of recent residence or work;
> (b) making inquiries of acquaintances of the other party;
> (c) searching the records of the party who makes the motion to locate information about recent residences, places of work, and acquaintances of the party to be notified;
> (d) engaging a trace service;
> (e) performing searches on the internet;
> (f) searching records of other actions against the party to be notified;
> (g) engaging the services of a local process server, lawyer, detective, or other person to advise on locating a party who resides in an unfamiliar place.

These steps could be built into the new rule to ensure that substituted service is only pursued where all other reasonable paths to contact heirs have not been effective.

On the second point, while there is no single perfect platform for advertising substituted service, multiple platforms can be used to increase the likelihood that the notice will effective (i.e. will be viewed by relevant parties). The LTI, for example, effects substituted service by advertising in the Royal Gazette, the province's social media platforms, all neighboring properties, and the newspaper in the municipality in which real property is located. Similar methods (albeit likely a personal social media rather than the province's) could be used to provided substituted service to heirs in an MGI.

In terms of proposed duration of the advertising window, there are different options. We considered a 6-month window, a 60-day window (which aligns with the advertising period under

the *Land Titles Clarification Act*),[177] or a shortened 3-4 week window. In our view, the 3-4 week notification period is a sufficient length of time that would meaningfully expedite getting an administrator appointed. In this regard, we are not convinced that a longer window would end up saving any time.

The Institute proposes for discussion that a standardized substituted service provision be created for MGIs. While it is true that substituted service is individualized, we are of the view that these concerns can be minimized by making the standard process dependent on meeting several criteria demonstrating reasonable efforts, and by advertising in multiple locations. On this last point, we ask for input on which advertising platforms would be the most effective.

To ensure this process is efficient, we propose that Registrars be given the authority to determine whether the parameters of this standardized substituted service rule have been satisfied. We also propose that, where this rule has been satisfied, administrators may serve notice of the subsequently issued grant on those same heirs by the same substituted means. These proposals speak to the point of efficiency. Having to go to a judge to approve a would-be administrator's reliance on this rule would significantly slow opening administration. Similarly, it would be redundant to allow a would-be administrator to rely on these standardized rules to dispose with renunciations, only to immediately require then to go to a judge to get a substituted service order to serve notice of the issued grant on the same heirs.

Proposals For Discussion:

A standardized substituted service procedure should be legislated for multi-generational intestacies.

The standardized substituted service procedure should mandate that notice be advertised for 3-4 weeks.

Registrars should be able to receive and decide that the standardized substituted service rule has been satisfied.

When an administrator relies on the standardized substituted service rule to dispose with renunciations, they are also entitled to serve notice of the grant on the same heirs by the same substituted procedure.

Question for Discussion:

Where should a standardized substituted service order mandate that notice be advertised?

[177] *LTCA*, *supra* note 46 at s 7.

B. Procedural Complexity

MGIs can be very inefficient to settle because each estate must be administered separately. For example, if dealing with one piece of land, the great-grandparent's estate must be administered (with appointment, notices, inventory, accounting etc.), followed by the grandparent's and parent's respective estates. Many of these administrations may be dealing with the same piece of property that will ultimately be vested in the same heirs.

Given this inefficiency, the Institute considered whether it would be possible for MGIs to be consolidated into one process. In order for such a provision to be workable and valuable, it must protect the rights of all heirs while making some stages of the process more efficient.

As a starting point for discussion, the Institute has drafted a proposed provision:

> Where an intestate to an unadministered estate is the issue[178] of another unadministered estate, an administrator may apply to consolidate these proceedings so as to administer property common to the estates. A copy of this consolidation application must be served on all heirs, and the consent of the other administrators, if any, is required. A copy of this consolidation application must be served on all heirs, and the consent of the other administrators, if any, is required.

Four elements of this proposal require clarity. First, the word 'issue' refers to direct lineal descendants (i.e. grandparents → parents → children → grandchildren etc.).[179] This narrows the range of proceedings that are eligible for consolidation and increases the likelihood that the heirs between these estates overlap. So, for example, consolidation would be available when administering the estates of a parent, child, and grandchild. In each of these cases, pursuant to the *Intestate Succession Act*, each estate will be divided between any spouse (which will not overlap) and issue (which will overlap).[180] It would not, however, allow consolidation of estates between more distant relatives, or where an earlier generation died without issue (in which case that person's estate would go to more remote heirs – such as parents, siblings or nieces/nephews). This is based on the view that, without being linked through 'issue', the heirs will be too different to benefit from consolidation.

In proposing this limitation, we understand that consolidation may operate more smoothly for "traditional" (i.e. non-blended) nuclear families. This is because the issue will tend to be common across generations - thus keeping the unadministered property in one family pool. For example, imagine a family with two married parents and two children born of that relationship. When one parent dies intestate, their spouse receives a portion of the estate with the remainder going to the deceased's two children. Because the parents have the same issue, if the survivor later dies intestate, their inherited property will ultimately fall to the same two children. In blended

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[178] *ISA, supra* note 1 at s 2(b)… "issue" includes all lawful lineal descendants of the ancestor.
[179] *Ibid.*
[180] *Ibid,* s 4(1).

families, this is not necessarily the case (the parents' estates will go to their respective issue). All this to say that consolidation may not offer a practical benefit for some families. We note, however, does not mean that this provision has no benefit. We emphasize that consolidation remains a discretionary provision – it is not forced on estates that don't want it.

Second, our proposed consolidation is only available where there is notice to all heirs. This allows us to proceed without first obtaining consent from all heirs (a process which is very difficult to obtain with MGIs) while at the same time giving heirs an opportunity to object to the consolidation.

Third, our proposed consolidation provision is only allowed to be brought by an administrator with the consent of any other administrator. This means that (1) the application for consolidation cannot happen before an administrator is appointed, and (2) the consolidation cannot happen over the objection of another administrator. In our view, it is not possible consolidate estates before an administrator is appointed because at that pre-appointment stage, there is nothing to consolidate. This means that the steps to get appointed (renunciations) will have to be duplicated, but once opened, other steps are not duplicated. We note that in many MGIs, the same administrator is appointed to handle each level of administration. In those cases, obtaining consent will not be a problem. However, in the event that there are different administrators appointed for different intestacies, the consolidation can only occur if they are in agreement.

Fourth, the proposed consolidation extends to "property common to the estates". As a matter of practice, most MGIs deal with real property only. Any personal property from generations back is usually long gone, and the only reason for the administration relates to the need for clear title to land/family homestead. However, it is possible that there may be other lingering assets, like bank accounts or stocks, that also were never administered. In those cases, it would be unfortunate if the consolidation could handle the real property common to the estates, but separate administrations had to be opened to deal with the other remaining assets. As such, we deliberately chose to leave the door open to other property. We invite commentary on the implications of this choice.

Given that this is novel, there is a valid concern that consolidation may have unintended consequences. We invite further discussion on this proposal.

Proposal for Discussion:

The *Probate Act* should permit the consolidation of multi-generational intestacies in order to administer property common to the estates.

Questions for Discussion:

Should a consolidation application for multi-generational intestacies be limited to unadministered estates among 'issue' (direct lineal descendants)?

Should a consolidation application for multi-generational intestacies require notice to all heirs?

Should it be possible to bring a consolidation application for multi-generational intestacies before an administrator is appointed? If so, how?

Should consolidation applications for multi-generational intestacies be limited to settling real property common to the estates? Should it extend to all property common to both estates?

Are there any other concerns we ought to consider before proposing a consolidation proceeding to deal with multi-generational intestacies?

C. Defining a Multi-Generational Intestacy

If we recommend that provisions specific to MGIs be created, we will need to define the term. A variety of options were considered, including tying the term directly to communities designated under either the *LTCA* or LTI,[181] defining it by reference to intestacies that have to be completed under prior versions of the *Probate Act*, or developing our own definition.

We propose for discussion that MGIs should be defined on terms similar to those set out above, namely, situations "where an intestate to an unadministered estate is the issue of another unadministered estate". We have reached this conclusion for several reasons. First, tying the MGI provisions to communities designated under either the *LTCA* or LTI is difficult because those designations may themselves be underinclusive. In this regard, we note that while there are 13 communities designated under the *LTCA* (5 of which are also designated under the LTI), there are 52 historic African Nova Scotian communities in Nova Scotia.[182] In addition, while MGIs may be more concentrated in African Nova Scotian communities, they are not so limited either geographically or culturally. Second, while many MGIs require using prior versions of the *Probate Act*, the issue transcends time and will continue in the future. There is nothing inherent about MGIs that depends on which version of the *Probate Act* is used to administer. A definition tied to prior versions of the *Probate Act* will render the consolidation provision obsolete as years pass.

This leaves us in the position of crafting a definition. While imperfect, we propose a definition which encapsulates its core feature (successive unadministered estates) provides enough clarity to give meaning to MGIs. We invite discussion on this or other terminology that can be used to define a multi-generational intestacy.

[181] *LTCA, supra* note 46 at s 8B; *Beals, supra* note 11 at para 42.
[182] Council on African Canadian Education, "Black/African Nova Scotian Communities" online: https://www.ednet.ns.ca/cace/black_ans_communities.

Proposal for Discussion:

Multi-generational intestacies should be defined as situations where "an intestate to an unadministered estate is the issue of another unadministered estate".

Part IV: Access to Justice

Several of the proposals outlined above will make probate and administration more accessible to Nova Scotians. For example, the proposal to eliminate probate taxes for certain estates will make the system more financially feasible for lower income families, and the proposal to allow taxes to be paid by credit card will help heirs or beneficiaries navigate lack of short-term liquidity issues. Separately, our proposals to make the formal accounting the exception rather than the rule, and to permit a majority of heirs to waive security, will help heirs or beneficiaries tailor the probate process to their own needs and avoid expensive barriers.

This section outlines additional access to justice innovations that we are proposing for discussion. We have organized these proposals under four headings: (a) better harnessing technology, (b) modifying probate forms, (c) education, and (d) probate court.

A. Better Harnessing Technology

a. Video Witnessing

During the Covid-19 pandemic, lawyers and courts were forced to rely on virtual technologies to meet with clients, sign documents, and even conduct hearings. In more recent years, the practice has waned. There is an argument to be made that we can advance access to justice by legalizing and embedding some virtual technologies for lawyers and clients. On that basis, we have considered whether virtual witnessing of probate documents (i.e. witnessing signatures for legal documents on Teams or Zoom etc.) is a proposal worth advancing.

The arguments in favour of virtual witnessing focus on efficiency and accessibility. In-person witnessing of documents takes time and money. People may have to arrange to meet with lawyers and travel for relatively short and uncomplicated meetings. People with limited mobility or living in rural areas face a greater burden in this regard.

There is also a harmonization argument to be made. Outside of Nova Scotia, reliance on virtual technologies is being increasingly introduced in legislation. While no other jurisdictions we have found have rules specifically allowing probate forms to be witnessed electronically, a number of Canadian jurisdictions (Alberta, Ontario, Manitoba, Saskatchewan, New Brunswick, Newfoundland and Labrador and British Columbia) allow wills and other documents[183] to be

[183] Such as powers of attorney, personal directives, land registration documents, notarization, and some

signed, witnessed and/or notarized electronically.[184] In each of these cases, witnessing requirements can be satisfied by using an electronic method of communication that allows participants to see, hear and communicate with one another in real time. In all but British Columbia, video signing and witnessing is only permitted in situations where a provincially certified lawyer is either representing the testator,[185] is one of the witnesses, [186] or a lawyer and at least one other witnesses are physically present together.[187] Relatedly, Ontario has a regulation permitting documents to be notarized virtually.[188] All of this indicates that Canadian jurisdictions are moving towards acceptance and implementation of virtual technologies as valid tools that can be used to satisfy legal requirements. For our purposes, this means that certain best practices are developing that we can use in Nova Scotia.

Video witnessing does, however, involve some trade-offs. For example, it may be more difficult to assess a person's capacity virtually. This risk, while not insignificant, can arguably be mitigated by best practices, such as requiring a lawyer meet with a client at least once in person. In this regard, we can rely on the practices developed in other jurisdictions. Given that this project is focused on signing probate documents virtually, the practices developed in other jurisdictions to satisfy the relatively more onerous standard of will signing should arguably be adequate here.

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affidavits.

[184] See eg, Alberta: *Wills and Succession Act*, SA 2010, c W-12.2, s 19.1(1): Subject to subsection (2), persons are deemed to be in each other's presence for the purposes of sections 15 and 19(1) while the persons are connected to each other by an electronic method of communication in which they are able to see, hear and communicate with each other in real time. (2) Subsection (1) applies only if a lawyer who is an active member as defined in the *Legal Profession Act* is providing the testator with legal advice and services respecting the making, signing and witnessing of the will. …. See also: *Succession Law Reform Act*, *supra* note 138, s 4(3); *WESA*, *supra* note 71, s 35.1; Manitoba: Remote Witnessing Regulation, Man Reg 81/2021; *The Wills Act* , 1996, SS 1996, c W-14.1, ss 2, 7(3); *Wills Act,* RSNB 1973, c W-9, s 4.1; *Wills Act*, RSNL 1990, c W-10, s 2.

[185] Alberta *Wills and Succession Act*, *ibid,* s 19.1(2).

[186] Ontario: *Succession Law Reform Act*, *supra* note 138, s 4(3); Saskatchewan: *The Wills Act*, *supra* note 184, ss 2, 7(3); New Brunswick: *Wills Act*, *supra* note 184, s 4.1 Newfoundland and Labrador: *Wills Act*, *supra* note 184, s 2.

[187] Manitoba: Remote Witnessing Regulation, *supra* note 184.

[188] O. Reg. 431/20: Remote administering of oath, declaration permitted
An oath or declaration may be taken by a deponent or declarant without being in the physical presence of the person administering the oath or declaration, if the following conditions are met:
1. The oath or declaration is being administered by an electronic method of communication in which the person administering the oath or declaration and the deponent or declarant are able to see, hear and communicate with each other in real time throughout the entire transaction.
2. The person administering the oath or declaration confirms the identity of the deponent or declarant.
3. A modified version of the jurat or declaration is used that indicates,
i. that the oath or declaration was administered in accordance with this Regulation, and
ii. the location of the person administering the oath or declaration and of the deponent or declarant at the time of the administering.
4. In the case of a commissioner to whom section 5 of the Act applies, the information on the stamp required to be used under that section appears on or in the document being signed.
5. The person administering the oath or declaration takes reasonable precautions in the execution of the person's duties, including ensuring that the deponent or declarant understands what is being signed.

Video witnessing may also make it more difficult to confirm that a person's signature is not subject to improper influence (such as someone else in the room during signing). Again, however, practical best practices can minimize this risk (such as having clients pick up their computer and turn it around and/or use earphones to allow clients to answer freely if there are other persons within earshot).[189]

Given the above, we propose for discussion that probate forms should be able to be witnessed using virtual technology. In this regard, we propose adopting the language employed in other Canadian jurisdictions to define virtual technology, that is, "an electronic method of communication in which [the signor and witness] are able to see, hear and communicate with each other in real time".[190] We invite discussion on which best practice to be adopted to minimize the protective trade-offs raised by video witnessing.

Proposal for Discussion:

Probate forms should be able to be witnessed using virtual technology.

Question for Discussion:

Which parameters should the *Probate Act* adopt to protect the integrity of video witnessing (for example: ensuring a lawyer is one of the signatories and/or present in the room with another witness)?

b. Secure E-Signatures

Right now, the Registrar requires original signed documents, such as renunciations, to be filed with Probate Court. In other words, scanned or photocopies are not accepted. The logistics involved in getting originals filed can cause delay and cost money, especially when signatories don't live nearby (as documents must be mailed back and forth). However, there are concerns that simply relying on regular email and scanned signatures renders the probate system vulnerable to fraud.

In order to alleviate this logistical burden without rendering the process less secure, we are proposing for discussion that renunciations and similar documents should be able to be signed by secure electronic forms, such as Docusign. Doing so would make matters proceed quicker without compromising the important protective function that signatures provide. In this regard, we note that many important legal documents, such as real estate transactions, accept Docusign. The protections it offers are arguably more than enough to meet the concerns regarding signing of

[189] *Ibid,* in which the Ontario regulation stipulates that a document may be notarized remotely only if "The person administering the oath or declaration takes reasonable precautions in the execution of the person's duties…."

[190] Alberta *Wills and Succession Act*, *supra* note 185, s 19.1(1). Other definitions at *supra* note 184.

renunciations. In addition to its logistical benefits, Docusign also arguably improves access to justice for members of the disability community. Some of Docusign's features, for example, assist persons with visual disabilities to sign and understand documents without (or with less) external assistance.

Proposal for Discussion:

Renunciations should be able to be signed via a secure electronic signature form, such as Docusign.

B. Probate Forms

Probate in Nova Scotia involves filling out and filing multiple court forms. Last updated in 2001, these forms may be difficult for members of the public to understand at parts. This is evident in several respects. First, there is a considerable amount of legal jargon in the forms. For example, "Form 9: Application for a Grant of Administration" requires an applicant to fill out the names of the deceased heirs.[191] It does not, however, indicate what an 'heir' is, or how they may be located. A user would have to already know that heirs are the lawful lineal descendent that are listed in the *Intestate Succession Act*.

Second, forms rely on fairly outdated technology. Right now, probate forms are downloadable Microsoft Word documents that can be filled in on a computer before being printed off, signed and submitted. They are not clickable and do not provide lists or prompts for users. Third, forms must be submitted in person during court hours. The unstated assumption built into this process is that lawyers do this filing. In fact, many family members are taking time out of their days / time off work to physically file documents at the courthouse.

We have anecdotally heard that approximately 1/3 of applicants for probate and administration are now self-represented. Several jurisdictions have prioritized making forms accessible to laypersons as part of their reform efforts. It's a relatively straightforward way to make the legal system more accessible and to decrease barriers to justice. In Ontario, for example, probate forms for both the small estate and standard process have been amended to be in (relatively) plain language and preformatted.[192] Applications and supporting documents may be filed electronically with the court by email.[193] In British Columbia, probate forms are PDFs that are fillable online, and they have guided pathways (i.e. drop-down menus) that prompt users what information they need to provide. There is also an online portal for submitting court forms online (although it is

[191] Probate Regulations, *supra* note 19, Form 9.
[192] Ontario CPR, *supra* note 83, Form 74.1A.
[193] Ontario, Filing Electronic Documents in Probate Proceedings (Non-contentious Estates Proceedings) online: <https://ontariocourtforms.on.ca/en/filing-electronic-documents-in-probate-proceedings-non-contentious-estates-proceedings/>.

not clear if this is available or widely used by the general public or just lawyers).[194] The BCLI Small Estates Subcommittee recommended simplifying the contents of its proposed small estate forms to what was functionally necessary, or in other words, "information that the declarant, beneficiaries, and third parties dealing with the declarant during the administration of the estate would need to know."[195]

In the United States, New York has a small estates affidavit procedure that is clearly designed and accessible through an interactive online plain language tool which guides applicants through the process of filling out the necessary affidavit.[196] The webpage has a clear description of the eligibility requirements for the program and a checklist of information needed for completion.[197] Guidance is offered at each stop with simply worded pop-up bubbles. As the questions are answered, the user appears to get closer to a courthouse visible in the distance. Upon finishing the program, the user can print technical instructions as well as the completed affidavit.[198]

This review reveals various ways to make probate court forms more accessible. We have focused on three such efforts: making forms plain language, using guided pathways to fill out forms; and digitizing the filing of forms.

First, by making forms plain language, we will make the probate process more understandable to the general public. This enhances access to justice, and will also arguably will enhance efficiency, as the Registrar of Probate will have fewer rejected forms and have to field fewer questions about their content.

On the other hand, probate and administration are, by their nature, legally complex matters. No matter how the language on the forms is changed, it is a relatively sophisticated process that has serious implications for personal representatives, and that inevitably engages expert knowledge. In short, it is arguable that a plain language form will not actually make probate any simpler. Lawyers will still often need to be engaged. In addition, changing legal forms can be an onerous and cumbersome process for governments. Before embarking on an effort like this, government would want to be sure that the change is more than just window dressing.

Second, by making forms fillable online and using guided pathways, we can enhance access to justice by harnessing the technology developed over the past 25 years. Drop down menus and prompts can help guide users – it is an easy way to provide valuable legal information without crossing into legal advice. For example, on Form 9, after asking which heirs are able to inherit the

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[194] British Columbia, "Court Services Online" online: < https://justice.gov.bc.ca/cso/index.do>.
[195] BCLI Small Estates Subcommittee, *supra* note 9 at 32.
[196] *New York Surrogate's Court Procedure*, NY SCP, Art 13, §§ 1301, 1302.
[197] New York Surrogate's Court, "Surrogate's Court Small Estate Affidavit Program" online: <http://www.nycourthelp.gov/diy/smallestate.html>.
[198] Law Commission of Ontario, *Simplified Procedures for Small Estates in Ontario: Consultation Paper* (Toronto: LCO, 2014) at 52, 53, online: <https://www.lco-cdo.org/wp-content/uploads/2014/09/small-estates-consultation-paper.pdf> [LCO, *Consultation Paper*].

estate, a digitized form could have a drop-down box setting out next of kin, and/or directing applicants to the *Intestate Succession Act*.

On the other hand, technology has its downsides. The British Columbia probate court forms, for example, only work on certain computer systems. Updates and incompatibility issues can frustrate efforts to make forms more accessible. In this regard, Ontario offers Microsoft word and PDF documents (for some forms).

Lastly, online filing of probate forms would save users time, and bring probate in line with the way that people interact in modern times. It would make the process more efficient and enhance access to justice in that self-represented individuals will not be forced to take time out of their jobs or day to come to probate court for filing. On the other hand, online filing may be a much wider project for Nova Scotia courts. Probate Court may not have the capacity or ability to begin accepting online filing.

We propose for discussion each of these proposed updates: making forms plain language, making forms fillable online, and making forms fileable online. We agree that none of these options are perfect, and that some - like making court forms fileable online - are part of a much larger project. However, for most Nova Scotians, their primary interface with Probate Court is through these forms. Anything we can do to make them more user-friendly to the public will meaningfully enhance access to justice.

Proposals for Discussion:

Probate Forms should be updated and use plain language.

Probate Forms should be fillable online and utilize guided pathways.

Probate Forms should be able to be filed online.

C. Education and Consistency

Misinformation repeatedly emerged as a significant barrier to probate/administration for the public. A few examples we have heard include: (1) family members sometimes refuse to sign renunciations because they do not understand (or trust) that the form will not result in their disinheritance; (2) people may move their property around in order to avoid probate taxes (joint ownership etc.), without realizing that the risks that come with that choice; (3) people do not understand why they need a will.

Public education is a necessary part of any project to make probate/administration more efficient and accessible. In order to address public misinformation, there is a need for heightened and sustained public education on, for example, the importance of having a will and the process for

settling an estate after death. There is also a need for updated user-friendly materials setting out how to proceed with probate and administration.

The need for education also extends to lawyers. Probate and administration are specialized legal systems with their own rules and procedures. For lawyers who are entering this space, or only act in it intermittently, it is easy to miss important steps. For example, we have been told that there is inconsistency and/or confusion regarding whether notice of a grant must be sent to persons entitled to make a claim under the *Testators' Family Maintenance Act*, or to contingent beneficiaries. Clear and easily accessible legal education on the probate and administration system will help clear up the confusion regarding these practices, and update lawyers on the new reforms.

Proposals for Discussion:

There should be investment in public legal education on the probate process and the importance of having a will.

There ought to be clear and readily available materials for lawyers to provide guidance on common pitfalls, such as providing notice to persons with a claim under the *Testators' Family Maintenance Act* and/or to contingent beneficiaries.

D. Probate Court

We have also heard that certain processes at Probate Court could be made more efficient. For example, lawyers have told us that settling an estate can become significantly delayed when they need a judge to deal with relatively discrete and non-complicated legal issues that the Registrar either cannot decide, or requires guidance on. It has been suggested to us that a dedicated judicial Chambers for Probate matters could more quickly resolve these issues and help develop a level of expertise and consistency that is needed. While there may be budgetary, staff and financial constraints associated with developing a dedicated judicial Chambers for probate, we nonetheless believe that it is an option that merits further discussion, and propose it on that basis.

We have also been heard that efficiency may be improved with greater consistency and coordination among the different provincial Registrars of Probate. We have heard that accepted practices vary informally among different probate districts, and this inconsistency can cause problems, cost money, and delay matters. In the past, we have been told that there was a central registrar to whom all registrars could lean on to provide guidance. We propose for discussion that this role be reintroduced as a way to enhance consistency amongst different provincial registrars.

Proposals for Discussion:

There should be a dedicated judicial Chambers to hear probate matters.

There ought to be a Central Registrar to provide guidance and consistency to the Provincial Registrars of Probate.

Appendix A: Probate and Administration in Other Canadian Jurisdictions

In developing our proposals for reform, the Institute conducted research on how a deceased person's estate is settled in other Canadian jurisdictions. These practices and processes fed into our discussions about how best to reform probate and administration in Nova Scotia.

A sampling of this research, and the approaches taken in other jurisdictions, are set out below. It is divided into five sections (a) probate and administration processes in recently reformed Canadian jurisdictions (b) summary processes that avoid probate and administration; (c) public trustee processes; (d) court assistance to applicants for a formal grant; and (e) issuance of letters of probate or administration by Registrars.

A. Probate and Administration Processes in Reformed Canadian Jurisdictions

Ontario

In Ontario, executors and administrators are called "estate trustees".[199] Ontario has a standard process for probate and administration, and a "small estate certificate" process – which is an option for estates valued at $150,000 or less.[200] Under both streams, efforts have been made to make forms simpler and easier to fill out. Forms are written in accessible language, are preformatted, and fillable online. The application, along with supporting documents, may be filed electronically via email to the Superior Court of Justice. Where email is used to file documents, probate certificates are electronically issued and delivered by email to the applicant's email address.

The following section details the standard probate process in Ontario. It then describes the Small Estate Certificate process.

Ontario's Standard Probate and Administration Process

In general, Ontario's standard process for handling estates follows the same steps as Nova Scotia. However, there are some differences in how each step operates. A step-by-step comparison is outlined below:

> **(1) Determining Priority: Who can apply to act as an Estate Trustee when a person dies without a will?** Like Nova Scotia, Ontario's legislation provides a list of persons who can act as a personal representative when a person dies without a will, or where a named executor cannot act. The contents of this list differs from Nova Scotia. This

[199] Ontario CPR, *supra* note 83, Rule 74.01.
[200] Small Estates, O Reg 110/21.

list includes the deceased's spouse, common law spouse, and next of kin.[201] In addition, unlike Nova Scotia, this list is not a statement of priority as between each other. Discretion rests with a judge to select anyone named on the list.[202]

(2) Obtaining Renunciations: Like Nova Scotia, signed renunciations and consents must be obtained from all persons equally entitled to act as an estate trustees.[203]

(3) Obtaining Security: Bonding is required for intestate estates and testate estates if the executor is not an Ontario resident.[204] An exception is carved out for situations where the intestate's surviving spouse is the estate trustee, and the estate is worth less than the preferential share.[205] (By way of comparison, in Nova Scotia an exception is carved out where the personal representative is the sole beneficiary).[206]

(4) Application for Grant: In Ontario, applicants fill out an Application of Certificate of Appointment of Estate Trustee.[207] Unlike Nova Scotia, they fill out the same form whether the estate is testate or intestate – the form itself has boxes which are checked to indicate if there is a will.

The application asks question about the deceased, their family, beneficiaries and estate. It requires a statement of assets which lists the total value of real and personal property in the estate. It also includes declarations about the obligations of an Estate Trustee and the applicant's agreement to manage the estate in accordance with the law. Applicants can file their applications electronically. Estate Administration Taxes (probate tax) must be provided in person or sent by mail or courier to the court office. Filing fees, if any, may be paid by mail, courier, or secure credit card transaction over the phone.[208]

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[201] Ont *Estates Act supra* note 77 at s 29 (1) Subject to subsection (3), where a person dies intestate or the executor named in the will refuses to prove the will, administration of the property of the deceased may be committed by the Superior Court of Justice to, (a) the person to whom the deceased was married immediately before the death of the deceased or person with whom the deceased was living in a conjugal relationship outside marriage immediately before the death; (b) the next of kin of the deceased; or (c) the person mentioned in clause (a) and the next of kin, as in the discretion of the court seems best, and, where more persons than one claim the administration as next of kin who are equal in degree of kindred to the deceased, or where only one desires the administration as next of kin where there are more persons than one of equal kindred, the administration may be committed to such one or more of such next of kin as the court thinks fit.

[202] *Ibid,* s 29 as interpreted by *Mohammed v Heera*, 2008 CanLII 54317 (ON SC); *Lagrandeur Estate (Re),* 2021 ONSC 3447 (CanLII).

[203] *Ibid*; Ontario CPR, *supra* note 83 at Rule 74.04, Form 74G.

[204] Ont *Estates Act*, *ibid,* ss 6, 35, Ontario CPR, *ibid,* Rule 74.11.

[205] Ont *Estates Act*, *ibid,* ss 35, 36(2)

[206] *Probate Act*, *supra* note 4 at s 40.

[207] Ontario CPR, *supra* note 83 at 74.04.

[208] *Ibid;* Ontario, "Filing Electronic Documents in Probate Proceedings (Non-contentious Estates Proceedings)" online: https://ontariocourtforms.on.ca/en/filing-electronic-documents-in-probate-proceedings-non-contentious-estates-proceedings/.

(5) Notice of Application: In Ontario, notice of an application to be appointed as an estate trustee must be served on each person entitled to a share of the estate before the application is filed with the court.[209] The notice contains standard language explaining why the beneficiary is receiving the application, advises them of their right to object to the application and explains the potential outcomes where they do not oppose the application.[210]

Service may be done personally, by registered mail, or by email.[211] This differs from Nova Scotia in two ways. First, in Nova Scotia formal service is not required to be given to heirs or beneficiaries until after the grant of probate or administration has been issued. Second, Nova Scotia does not permit service via email.

(6) Inventory: Ontario's version of an inventory is called an Estate Information Return (EIR).[212] Like the Inventory, an EIR provides a detailed list of all the deceased's assets. Unlike Nova Scotia, this form is filed directly with the Ontario Minister of Finance. Estate Trustees are given 180 days to file the EIR (versus three months in Nova Scotia) and it is can be filed online.

(7) Advertising to Creditors: Unlike Nova Scotia, advertising to creditors is not mandatory in Ontario. However, it is incentivized. Per the Ontario *Trustee Act*, if a trustee adequately advertises to creditors, they are protected from liability from claims against them.[213] If they do not do so, presumably they are vulnerable to claims from creditors.

(8) Accounting: Estate trustees have a duty to keep records of the estate and its distribution, and to keep interested parties apprised of this information.[214] This can be done by an informal accounting or a formal accounting. Informal accounting is the most common method – it can take the form of a letter sent directly to heirs and / or beneficiaries. Estate Trustees may obtain a release from liability at the time of the informal accounting.

A formal accounting (in which the estate trustee has to pass accounts before the court) is triggered in one of two ways: (1) a beneficiary, heir or other person with financial interest demands it; or (2) the estate trustee voluntarily applies to pass accounts.[215]

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[209] Ontario CPR, *ibid*, Rule 74.04(2).
[210] *Ibid*, Form 74A.
[211] *Ibid,* Rule 74.04(7).
[212] Ont *Estates Act*, *supra* note 77 at s 32; *Estate Administration Tax Act, 1998,* SO 1998, c 34, Sch; Ontario, Central Forms Repository, "Estate Information Return", online: https://forms.mgcs.gov.on.ca/dataset/0b2647cd-52c1-4d3b-a7f0-7e2d3b3f01ca/resource/aae987c1-6a16-4dbf-a2d6-2871079adf40/download/9955e_guide.pdf
[213] *Trustee Act*, RSO 1990, c T.23, s 53.
[214] *Estate Administration Tax Act, 1998, supra* note 212, s 4.9; Ontario CPR, *supra* note 83 at Rule 74.17, Form 74A.
[215] Ontario CPR, *ibid,* Rule 74.15(h), 74.16-76.18. See also: Armstrong, *supra* note 105 at § 4:1.

Probate Taxes: Ontario has removed probate taxes on estates valued under $50,000.[216] For estates with a total gross value over $50,000, the probate tax payable is $15 for each $1,000 (or part thereof) of the value of the estate (or 1.5% of the estate's gross value over $50,000).

Ontario's Small Estate Certificate

Ontario's small estate procedure applies to estates that are valued at $150,000 or less.[217] Estates can have real or personal property and be eligible for the small estate process. Applicants under this stream apply for a "Small Estate Certificate" rather than the "Certificate of Appointment of Estate Trustee." The two certificates provide the same powers with one exception - the Small Estate Certificate only covers the assets listed in the application/certificate. In this way, the small estate certificate is more limited than the standard certificate.

The process involved under the small estate process modifies some of the steps outlined above, but does not remove them entirely. Specifically:

- **Renunciations Are Simplified:** Instead of applicants having to file signed renunciations from all other parties who would be entitled to act as estate trustee, the applicant checks a box on the application form indicating that they have obtained renunciations from all relevant parties, and lists the names of all persons who were entitled to act. In other words, the applicant makes a declaration that these persons renounced, rather than having to provide the actual signed renunciations.[218]

- **Service Rules are Simplified**: Instead of having to file an Affidavit of Service proving that interested parties were served a copy of the application, the applicant checks a box on the form affirming that they will "send or give" a copy of the application to all interested parties.[219] This simplifies the process in two ways: affidavits of service are not required, and formal service rules do not need to be followed. Under the Small Estate Certificate Rules, it is specified that 30 days must pass between sending or giving the application to all interested parties before filing the application.[220]

  The Rules provide that an applicant must send a copy of the application to all known persons entitled to share in the distribution of the estate along with a copy of the will, if one exists, at least 30 days before filing the application with the court.[221]

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[216] *Estate Administration Tax Act, supra* note 212, s 2(2)(b).
[217] *Small Estates* Regulation, *supra* note 200.
[218] Ontario's Regulatory Registry, "Reg. 194 under the Courts of Justice Act (Rules of Civil Procedure)", Proposal Number 21-MAG006, online: <https://www.ontariocanada.com/registry/view.do?postingId=36307&language=en>.
[219] Ontario CPR, *supra* note 83, Form 74.1A.
[220] *Ibid,* Form 74.1A.
[221] *Ibid,* Rules 74.11.74.1.03(3) to (7).

- **The Statement of Assets in the Application is more Detailed:** Under the Small Estate application form, the applicant must specifically list the assets over which they will be dealing with the Small Estate Certificate. This differs from the standard process, in which the only the total value of real and personal property must be listed.

  The reason for this difference is that, under a Small Estate Certificate, the estate trustee's authority is limited to the specific assets listed on the Certificate. This is in contrast to an estate trustee appointed through the traditional process, who is authorized to receive and administer all of the assets of the deceased. So this step is actually more onerous under the Small Estate procedure than the standard procedure.

  If, after the Small Estate Certificate has been issued, additional assets of the estate are discovered which together with the known assets keeps the value at or under $150,000, the estate trustee named on the certificate may seek to obtain an Amended Small Estate Certificate. However, if after a Small Estate Certificate or an Amended Small Estate Certificate has been issued, the estate trustee discovers additional assets that puts the value of the estate over $150,000, the estate trustee would have to apply for a standard certificate and convert the process to the regular probate process. As such, some lawyers advise persons not to use the small certificate process where it is possible subsequent assets will take it over the $150,000 threshold.

- **Bonding Requirements are more limited:** In addition to the limitations outlined above, bonding is not required under the small estate procedure unless there are minors or incapable interested parties.[222]

Some commentators have noted that the small estate procedure makes probate more accessible to people without a legal background, allowing them to go through the probate process without the assistance of a lawyer and save money on legal fees.[223] Others have commented that $150,000 limit seems arbitrary and may be prohibitive for people who live in big cities, where a small estate will still exceed the $150,000 threshold due to the higher cost of living.[224] They have also raised questions about the difficulties associated with having a certificate limited to listed assets, and the inefficiencies created by having to start over if new assets exceeding the $150,000 are discovered.

British Columbia

[222] Ont *Estates Act, supra* note 77 at s 36(3).
[223] Rudy Mezzetta, "Ontario's new probate process for small estates is easier," Advisor's Edge (11 May 2021) online: <https://www.advisor.ca/magazine-archives /advisors-edge /ontarios-new-probate-process-for-small-estates-is-easier/>.
[224] Melissa Shin and Rudy Mezzetta, "Ontario raises small estate limit to $150,000," Investment Executive (12 February 2021) online: <Ontario raises small estate limit to $150,000 | Investment Executive>; Kim Gale and Malvin Seto, "Big Changes for Small Estates," Gale Law Blog (23 April 2021) online: <Big changes for small estates - Gale Law Professional Corporation>.

British Columbia reformed its succession regime in 2014 via the *Wills Estates and Succession Act* [*WESA*].[225] The forms are preformatted and fillable online.

British Columbia came very close to implementing a simplified regime for small per the recommendations of the British Columbia Law Institute – to the point that provisions creating this stream were included in the draft legislation. Ultimately, however, the B.C. Ministry of the Attorney General determined that the general amendments rendered a small estate stream unnecessary. The following paragraphs outline British Columbia's standard probate process, followed by a description of the small estate recommendations that were not brought into force.

BC's Standard Procedure

(1) Determining Priority: Like Nova Scotia, British Columbia has a list of priority for who is entitled to act as an administrator if a person dies without a will. However, BC's priority list differs from Nova Scotia. First, priority goes to the deceased's spouse or someone nominated by that spouse. Next, priority goes to a child of the deceased who has the support of the majority of other deceased's children, or that person's nominee. Then, priority goes to a child of the deceased who does not have consent from a majority of the deceased's other children. After that, priority goes to an intestate successor other than the spouse or child who has support of the other intestate successors who are entitled to a majority of the estate. From there, priority goes to an intestate successor who does not have the support from the majority of other intestate successors. If the estate is subject to *Escheat Act*, priority goes to a government nominee. Lastly, any other person the court considers appropriate may be appointed subject to the Public Trustees approval.[226] The rules differ in the case of an administration with a will annexed.[227] In special circumstances, the Court may appoint an administrator out of this priority.[228]

(2) Notice of an Application: Unlike Nova Scotia (but similar to Ontario) in British Columbia notice of one's intention to be appointed as an administrator or executor must be sent before the application is filed. The application may not be submitted to Probate Court until 21 days after all

[225] *WESA*, *supra* note 71.
[226] *Ibid,* ss 130, 131
[227] *Ibid,* ss 131: Priority of applicants — administration with will annexed 131 If a person dies leaving a will, and the executor named in the will renounces executorship or is unable or unwilling to apply for a grant of probate, or if no executor is named in the will, the court may grant administration with will annexed to one or more of the following persons in the following order of priority: (a)a beneficiary who applies having the consent of the beneficiaries representing a majority in interest of the estate, including the applicant; (a.1)a person nominated by a beneficiary if that person has the consent of the beneficiaries representing a majority in interest of the estate, including the beneficiary who nominated the person to apply for a grant of administration with will annexed; (b)a beneficiary who applies not having the consent of the beneficiaries representing a majority in interest of the estate; (c)any other person the court considers appropriate to appoint, including, without limitation, and subject to the Public Guardian and Trustee's consent, the Public Guardian and Trustee.
[228] *Ibid,* ss 132(1): Despite sections 130 and 131, the court may appoint as administrator of an estate any person the court considers appropriate if, because of special circumstances, the court considers it appropriate to do so (2) The appointment of an administrator under subsection (1) may be (a)conditional or unconditional, and (b)made for general, special or limited purposes.

interested parties have been given notice. This 21 days is meant to provide time for recipients to file a Notice of Objection. The rules carve out an exception to normal rules on notice, and state that documents are deemed to have been served on the day they were mailed.[229]

Service is permitted by email or fax where there is an acknowledgment of receipt. If not, it can be completed by personal service or registered mail.[230] There are special rules for providing notice to minors or incapacitated persons.[231]

(3) Application for Grant: WESA has two options for filing an application for estate grant where there is a will: a short-form affidavit for simple estates and a long-form affidavit for more complex estates.[232] Applicants are entitled to use the short form if there are no issues with the will, and application meets a list of criteria indicating that the estate is a "simple" one.[233] The value of the estate is not relevant to the choice between the short-form and long-form affidavit.

Where there is no will, applicants do not have a choice between a short and long form affidavit. The affidavits are meant to be user-friendly, in that they use simple questions and check boxes to draw the applicant's attention to the information that must be provided. While there may be multiple applicants for a grant, only one is required to complete a detailed affidavit. Others can fill out a supporting affidavit.

(4) File an Inventory: In British Columbia, the Inventory is called an Affidavit of Assets and Liabilities. It is filed along with the application for a grant, and it must be filed before a grant is issued.[234] However, if the deceased's assets and liabilities are not known at that time of filing, they can submit all the other documentation for the grant and receive from the Court a document called an Authorization to Obtain Estate Information.[235] This gives applicants the authority to obtain information from third parties (usually financial institutions) which they need to fill out the forms, notwithstanding not having a grant. Third parties are required to provide information to the person listed on the Authorization to obtain Estate information.

(5) Bonding*:* British Columbia has removed the requirement for security in an administration except in cases where the estate has minor or incapacitated beneficiaries, or it is ordered by the Court.[236] Even in cases where security is required, the Court has the discretion to accept any form

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[229] British Columbia, Explanation of the new Supreme Court Civil Rules (Probate) online: <https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/about-bc-justice-system/legislation-policy/wesa/sc_probaterules_part25.pdf>
[230] BC Civil Procedure Rules, *supra* note 100, Rule 25-2(5)-(7).
[231] *Ibid,* Rule 25-2(8).
[232] See B.C., "Supreme Court Civil Rules – probate forms", Form P3 and Form P4, online: <https://www2.gov.bc.ca/gov/content/justice/courthouse-services/documents-forms-records/court-forms/probate-forms>.
[233] BC Civil Procedure Rules, *supra* note 100, Rule 25-3(6).
[234] *Ibid,* Rule 25-3(2)(g).
[235] *Supra* note 229.
[236] *WESA, supra* note 71 at s 128.

or amount of security, or restrict the powers of the administrator to do certain things without prior approval of the court or the Public Guardian and Trustee.[237]

(6) Advertising to Creditors: An administrator or executor "may" publish a notice in the Canada Gazette to notify creditors of the estate. While this language is permissive and not mandatory, by publishing in the Canada Gazette the personal representative protects themselves from liability from creditors.[238] This is similar to Ontario's method.

(7) Accounting:[239] Executors and administrators are required to pass accounts unless all beneficiaries and heirs consent to dispensing with this, or the court orders is it not necessary. Consent to dispense with the need to pass accounts is possible for testate and intestate estates – in both cases, the consent is given by the beneficiaries or successors on intestacy. If there are minor or incapacitated beneficiaries/successors, their guardian may provide this consent, but it also must be approved by a court.

(8) Probate tax: Applicants do not have to pay any probate fees for estates worth less than $25,000.[240] For estates with a total value between $25,000 and $50,000, the probate tax payable is $6 for each $1,000 (or part thereof) (or 0.6% of the estate's value where it exceeds $25,000 but is not more than $50,000). For estates with a total value over $50,000, the probate tax payable is $14 for each $1,000 (or part thereof) (or 1.4% of the estate's value where it exceeds $50,000).

B. Summary Processes That Avoid Probate / Administration

Three jurisdictions in Canada — Saskatchewan, Manitoba and the Northwest Territories — have specialized processes that authorize personal representatives to deal with estates under a certain value, without issuing a grant of probate or administration. In addition, British Columbia came close to implementing this procedure, but ultimately did not. Each of these existing or proposed procedures are explored below.

Saskatchewan

Saskatchewan's *Administration of Estates Act* and its regulations provide for a simplified procedure for estates valued at or under $25,000 and consisting only of personal property.[241] The Act allows a person with interest in the estate to apply on an *ex parte* basis to the Court of King's Bench for an order allowing for the distribution of the personal property of the deceased, whether the person died testate or intestate, without having to obtain letters of probate or administration. There is no requirement to give notice to beneficiaries or creditors.[242] The application requires

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[237] *Ibid.*
[238] *Ibid,* s 154.
[239] *Ibid,* s 157. See also *Trustee Act*, RSBC 1996, c 464.
[240] *Probate Fee Act*, SBC 1999, c 4, s 2(2).
[241] Sask *Administration of Estates Act*, *supra* note 81 at s 9(1); *The Administration of Estates Regulation, 2020*, RRS c A-4.1, Reg 2, s 7.
[242] The Law Commission of Ontario in its *Final Report: Simplified Procedure for Small Estates* states that

information as to who is to share in the estate, information on creditors and their claims and details about funeral expenses.[243] The application further requires the applicant to file receipts with the court as to how the estate is distributed.[244] The process can be done without legal counsel and the cost for an application is set at $100.[245] The applicant is not required to obtain a bond of administration.

Unlike a grant of probate or administration, the order applies only to the particular assets listed in the application and supporting affidavit. The representative named in the order is liable to pay out of the personal property of the deceased the reasonable funeral expenses and debts and to distribute the remainder to the beneficiaries or next of kin. The order authorizes persons or organizations to release assets to the representative and protects them from the risk of liability. The representative is not required to render an accounting of the administration of the estate.

Some reports of the simplified procedure for small estates used in Saskatchewan indicate that the procedure is perhaps only used two or three times per month in some areas, and offers "negligible benefits over the usual probate process."[246] A court official in Saskatchewan commented that the simplified procedure "is not all that much easier than the usual application and it can be limiting since it does not result in a grant which would provide the estate representative with authority to open an estate bank account or receive subsequently discovered estate assets."[247]

Manitoba

In Manitoba, *The Court of King's Bench Surrogate Practice Act* (the "*Surrogate Practice Act*") provides a summary procedure for administering estates valued at $10,000 or less (including real and personal property).[248] This simplified process, known as the summary administration of small estates, was first implemented in the province in 1938 and was designed to be much simpler and less costly than the regular procedure.[249] The value of $10,000 was introduced into legislation in 1996 when the monetary limit was raised from $5,000.[250]

"[al]though the Rules expressly provide that the application may be brought without notice to the beneficiaries, in practice, the court requires that notice of the application be served to heirs where there is no will." See LCO, *supra* note 9 at 74.

[243] Sask KB Rules, *supra* note 135, Rule 16-36, Form 16-36, "Application in Small Estates – Memorandum to the Judge", online: <https://publications.saskatchewan.ca/#/products/85078>.

[244] *Ibid*.

[245] Saskatchewan Courts, "Tariff of Costs", online: <https://sasklawcourts.ca/wp-content/uploads/2021/04/QB_TariffofCosts.pdf>; Government of Saskatchewan, "Estates Not Exceeding $25,000", online: <https://www.saskatchewan.ca/residents/births-deaths-marriages-and-divorces/dealing-with-death/administering-the-estate-of-someone-whos-died/estates-not-exceeding-25000>.

[246] LCO, *supra* note 9 at 74.

[247] *Ibid*.

[248] *Surrogate Practice Act*, *supra* note 75, s 47.

[249] *The Surrogate Courts Act*, SM 1937-38, c 11. The original monetary limit was $300 and the process only applied to personal property. MLRC, *supra* note 9 at 1, 6.

[250] *The Court of Queen's Bench Surrogate Practice Amendment Act*, SM 1996, c 17, s 2.

Similar to the procedure in place in Saskatchewan, the Act allows a court to issue an order for the distribution of an estate valued at $10,000 or less, whether there is a will or not, without the need for probate or administration.[251] The procedure requires the person wishing to administer to swear an affidavit stating their relationship to the deceased, providing information on the deceased's next of kin and declaring the value of the estate. The applicant must declare that they will faithfully administer the property, pay the debts and funeral expenses, distribute any residue to heirs and beneficiaries and render a full accounting of the administration if required to do so.[252] The process can be done without legal counsel and the cost of the application is only $70.[253] Applications are reviewed for compliance by the Deputy Registrar and forwarded to the Court of King's Bench where it will either be granted or rejected by the court.[254] The rules in the Act respecting inventories, bonds of administration and notice do not apply to the summary administration procedure.[255]

According to a Manitoba court staff member, "this process is used reasonably often, perhaps 10 times per month, mostly by unrepresented people who are dealing with small assets including bank accounts, mineral rights or vehicles."[256]

In a 2018 report, the Manitoba Law Reform Commission recommended increasing the monetary limit to allow a greater number of estates to be captured under the simplified process. Rather than making any sweeping changes to the process, the Commission concluded that the "procedure is simply in need of updating to reflect the rising value of estates in the province since the Act was last amended."[257]

Northwest Territories

The Northwest Territories' *Estate Administration Rules* regulation, made under the *Judicature Act*, provides for a simplified procedure for estates with a net value under $35,000 (including real and personal property).[258] A person may apply to Supreme Court of the Northwest Territories *ex parte* for a declaration that an estate is a small estate. The applicant must submit an application and supporting affidavit listing all of the property of the deceased; the value of the property and the names and addresses of the persons who may be in possession of the property; the names, addresses and ages of persons who may be entitled to share in the estate; and the debts of the deceased.[259] There is no requirement for notice to creditors or beneficiaries. The rules that would normally apply in probate applications respecting notice, accounting and bonds of administration do not apply.

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[251] *Supra* note 75, s 47(1).
[252] Man KB Rules, *supra* note 76, ss 74, 75; Man KB Forms, *supra* note 76 Form 74FF.
[253] *The Law Fees and Probate Charge Act*, CCSM c L80, schedule.
[254] MLRC, *supra* note 9 at 7, 8.
[255] *Supra* note 75, s 47(3).
[256] LCO, *supra* note 9 at 74.
[257] MLRC, *supra* note 9 at vi.
[258] NWT Estate Administration Rules, *supra* note 75, s 10.
[259] *Ibid*, Form 2, Form 3.

If the court orders the declaration, then the applicant may administer the estate and use any of the property in the estate to pay the reasonable funeral expenses of the deceased, pay off the debts of the deceased and pay any remaining balance to those entitled under a will, or if there is no will, heirs entitled under the *Intestate Succession Act*, without having to obtain a formal grant of probate or administration.[260] Additionally, if such an order is made by the court, the order allows the applicant to act as the personal representative of the estate under the *Land Titles Act* for dispensing with any real property of the estate.[261]

BC's Proposed (But Unimplemented) Small Estate Procedure

The BCLI's Small Estates Subcommittee[262] recommended a process by which a limited class of declarants would be able to assume responsibility to administer a small estate by completing a statutory declaration in a prescribed form. The procedure would be available for estates consisting only of personal property with a value not more than $50,000, before deduction of liabilities. The Subcommittee viewed this amount as representing "a reasonable estimate of the value of a typical small estate in which the assets might consist of a motor vehicle, a modest bank account, and some personal property of relatively negligible value."[263] The Subcommittee recommended that the limit be set by regulation so that "it may be more easily varied in response to changing economic conditions."[264] Estates containing real property would be excluded from the procedure since, under B.C.'s *Land Title Act*, the transfer of real estate on death requires proof of probate. The Subcommittee suggested that this exclusion should be revisited if the *Land Title Act* were amended to give the land title registrar some discretion in this requirement.[265]

The class of potential declarants would be limited to the executor or beneficiaries under a will, a spouse or another entitled in an intestacy, another person with the consent of all persons entitled to a share of the estate, or the official administrator.[266] Copies of the declaration would have to be sent to persons interested in the estate and, in some circumstances, the Public Trustee at least 10 days before filing the declaration. After at least 21 days following the death of the deceased, the declarant would be able to file the declaration with the court registry. There would be no scrutiny of the declaration by court officials and the declarant would not be required to furnish security.[267]

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[260] *Ibid*, s 10(4).
[261] *Ibid*, s 10(7).
[262] BCLI's Succession Law Reform Project (British Columbia Law Institute, *Wills, Estates and Succession: A Modern Legal Framework* (Vancouver: BCLI, 2006), online: <https://www.bcli.org/sites/default/files/Wills_Estates_and_Succession_Report.pdf>) was carried out by five topical subcommittees composed of wills and estates practitioners and legal academics. One of the five subcommittees was devoted exclusively to small estates.
[263] BCLI, Small Estates Subcommittee, *supra* note 9 at 27, 28.
[264] *Ibid* at 28.
[265] *Ibid* at 28, 29.
[266] *Ibid* at 33–35.
[267] *Ibid* at 46, 47.

On the filing of the small estate declaration, the declarant would acquire the powers of a personal representative to administer and distribute the estate. No grant of probate or administration would be issued. There would be a statutory release from liability for anyone transferring or delivering assets of the estate in reliance on the declaration. The declarant would not have to file a formal passing of accounts following the distribution of the estate, but a beneficiary or intestate successor would be entitled to apply for an order requiring the passing of accounts if the declarant's disclosure or account-keeping was unsatisfactory.[268]

In summary, the proposed small estates procedure had the following elements:

- The procedure would be available for estates consisting only of personal property with a value not more than $50,000, before deduction of liabilities (motor vehicle, a modest bank account, and some personal property of relatively negligible value).[269]
- The monetary limit would be set by regulation so that it could be continually updated.
- Estates containing real property would be excluded from the procedure unless the *Land Title Act* were amended to give the land title registrar some discretion in this requirement.[270]
- The class of potential declarants would be limited to the executor or beneficiaries under a will, a spouse or another entitled in an intestacy, another person with the consent of all persons entitled to a share of the estate or the official administrator.
- The declaration would include various questions about the estate, including facts about the deceased, the basis for the declarant's entitlement to act, a listing of the assets and unpaid debts, the value of the estate and the list of persons interested in the estate.[271]
- Copies of the declaration would have to be sent to persons interested in the estate and, in some circumstances, the Public Trustee at least 10 days before filing the declaration.
- After at least 21 days following the death of the deceased, the declarant would be able to file the declaration with the court registry.
- There would be no scrutiny of the declaration by court officials and the declarant would not be required to furnish security.[272]
- There would be a statutory release from liability for anyone transferring or delivering assets of the estate in reliance on the declaration.
- The declarant would not have to file a formal passing of accounts following the distribution of the estate, but a beneficiary or intestate successor would be entitled to apply for an order requiring the passing of accounts if the declarant's disclosure or account-keeping was unsatisfactory.[273]

[268] *Ibid* at 47.
[269] *Ibid* at 27, 28.
[270] *Ibid* at 28, 29.
[271] *Ibid* at 33–35.
[272] *Ibid* at 46, 47.
[273] *Ibid* at 47.

Part 6, Division 2 of the draft version of WESA — "Small Estate Administration" —would have created a small estate stream, but were not brought into force. [274] The following differences we could see between the BCLI recommended approach and that introduced in the *WESA*:

- Before filing the declaration, a declarant must give notice of the proposed filing "in accordance with the Rules of Court."[275]

- A declarant is prohibited from filing a small estate declaration if the declarant does not know the whereabouts or addresses of the persons to whom notice must be given.[276]

- Further prohibitions on the filing of a small estate declaration include:
    - if a grant of probate or administration has been issued and not revoked,
    - if a small estate declaration has already been filed and
    - if the issue of a representation grant has been opposed and a record of the opposition has been filed.[277]

- With certain exceptions, *WESA* required a declarant to file with the registrar a supplementary declaration if the declarant becomes aware that the original declaration was inaccurate or deficient.[278] The authority of a declarant to administer a small estate ends if
    - land is found to be part of the estate;
    - personal property is discovered to be part of the estate and its value results in the estate being a value greater than the prescribed amount; or
    - the fair market value of the personal property disclosed in the declaration is found to be greater than the amount prescribed.[279]

- The court may also terminate the authority of the declarant on application by a person interested in a small estate or by the Public Guardian and Trustee on the same grounds as those specified in Section 158 of the Act (application to remove or pass over personal property).[280]

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[274] *WESA, supra* note 71 at ss 109(1)(b), 110(1)(b). The BCLI suggested a number of documents that would be required to be filed with the declaration, including the original will, a certificate of death of the deceased, the renunciations of any executors and the consents of those who would be entitled to inherit. See, BCLI, *Report on New Probate Rules* (Vancouver: BCLI, 2010) at 39–41, online: <https://www.bcli.org/sites/default/files/probate_rules_report_FINAL.pdf>.
[275] WESA, *supra* note 71 at ss 109(1)(a), 110(1)(a). In the BCLI's *Report on New Probate Rules*, the BCLI proposed that a new subrule 21-4(2) of the *Supreme Court Civil Rules* require that the proposed declarant give notice to the spouse of the deceased, the children of the deceased, beneficiaries (if there is a will) and each intestate successor (if there is no will) by leaving a copy of the notice with the recipient, by ordinary mail or email. See: BCLI, Small Estates Subcommittee, *supra* note 9 at 37, 38.
[276] *WESA, ibid,* s 112(2).
[277] *Ibid*, s 112(1)(c)-(f).
[278] *Ibid*, s 114.
[279] *Ibid*, s 115.
[280] *Ibid*, s 116.

C. The Public Trustee's Processes

Similar to the case in Nova Scotia in several jurisdictions (Alberta, Saskatchewan, New Brunswick, the Northwest Territories, Newfoundland and Labrador and Nunavut) the public trustee is entitled to assume the administration of small estates where no other person is able to do so. In each jurisdiction, public trustee's decision to step in and administer is discretionary.

Alberta's *Public Trustee Act* provides that if a person dies with an estate consisting only of personal property valued at $10,000 or less, and no person has been granted probate or administration, the Public Trustee may take possession and administer the estate. The Public Trustee simply has to complete a prescribed form advising that the Public Trustee is administering the estate of a deceased person.[281] That Act also creates an election procedure similar to what exists in Nova Scotia. The Public Trustee may elect to administer estates valued at not greater than $75,000 (gross) where no grant of probate or administration has been issued.[282] Under this option, the Public Trustee must file an election and affidavit with the court setting out certain information about the deceased and the beneficiaries of the estate.[283] On completion of the administration, the Public Trustee must file an account of the administration.

The Northwest Territories' *Public Trustee Act* similarly has two options, allowing the Public Trustee to (1) administer estates not exceeding $35,000 in value (containing only personal property), without obtaining a grant of administration, where no person has been granted probate or administration; and (2) elect to administer the estate of a deceased person without applying for a grant of administration if the value of the estate does not exceed $75,000 and no grant of probate or administration has been issued. Under the election option, the Public Trustee becomes the administrator of the estate and must file an accounting upon completion.[284]

In Saskatchewan, the *Public Guardian and Trustee Act* and regulations allows the Public Guardian and Trustee to administer an estate valued at not more than $25,000 without having to apply for grant of administration where no person has been granted letters of probate or administration (or such letters have been revoked).[285]

In New Brunswick, if no person has been granted probate or administration, the *Probate Court Act* allows the public trustee to administer an estate valued at $3,000 or less on filing an affidavit with the Registrar.[286] Similar provisions exist in Newfoundland and Labrador with a maximum

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[281] *Public Trustee Act*, SA 2004, c P-44.1, s 13; *Public Trustee General Regulation*, Alta Reg 201/2015, s 2.
[282] Alta *Public Trustee Act*, *ibid,* s 16; Alta *Public Trustee General Regulation*, *ibid*, s 3.
[283] If the Public Trustee discovers after filing an election that the gross value of the estate exceeds more than 20% of the $75,000 monetary limit, the Public Trustee would have to file a memorandum with the clerk of the court and proceed in the ordinary manner to obtain a grant of administration.
[284] *Public Trustee Act*, RSNWT 1988, c P-19, ss 23.1, 26.
[285] *Public Guardian and Trustee Act*, SS 1983, c P-36.3, s 40.47; *Public Guardian and Trustee Regulations*, RRS c P-36.3 Reg 1, s 27.1.
[286] NB *Probate Court Act*, *supra* note 73, s 20.

value set at $10,000.[287] In Nunavut, where an estate is valued at no more than $10,000 (consisting of only personal property) and no letters of probate or administration have been issued, the Public Trustee may give or distribute "wearing apparel and articles of personal use" to family and relatives of the deceased, sell property and apply the proceeds towards the burial of the deceased, and "do all things necessary to complete the administration of the estate".[288]

D. Court Assistance to Applicants for Formal Grant

In Saskatchewan the *Administration of Estates Act* provides that, for estates that are below a certain monetary limit (currently set at $15,000),[289] the local registrar will prepare the necessary papers leading to a grant of probate or administration.[290] This applies to estates with real or personal property. In other words, in this process a personal representative still requires a grant of letters probate or administration to deal with the deceased's property, and must still meet all of the same evidentiary and procedural requirements for obtaining probate or administration However, the registrar prepares the application documents.[291]

E. Issuance of Letters of Probate or Administration by Registrar

In the Yukon Territory, for estates valued at not greater than $25,000, the registrar of the Supreme Court may issue letters of administration with or without will annexed. In these cases, it is not necessary for the Public Guardian and Trustee or another person to be appointed as administrator of the estate. The registrar is given the authority to dispense with an administration bond if the estate has no debts and persons with interest in the estate consent in writing. If a bond is required, the registrar may direct that it be obtained "with the sureties the registrar thinks fit." The procedure is available to both private applicants and the Public Guardian and Trustee.[292]

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[287] *Public Trustee Act*, 2009, SNL 2009, c P-46.1, s 13.
[288] *Public Trustee Act*, RSNWT (Nu) 1988, c P-19, s 26.
[289] *The Administration of Estates Regulation*, *supra* note 241 , s 6(1).
[290] *The Administration of Estates Act*, *supra* note 47, s 7(1).
[291] MLRC, *supra* note 9 at 10, online:
<http://www.manitobalawreform.ca/pubs/pdf/additional/consultation_report_sept2017.pdf>.
[292] *Estate Administration Act*, *supra* note 75, s 20.

Appendix B: Select International Jurisdictions with a Focus on Small Estates

In developing our proposals for reform, the Institute also reviewed how probate and administration are handled for smaller estates in select international jurisdictions. Below, we have set out how a deceased person's estate is settled in the United States, United Kingdom, Australia, New Zealand, and commonwealth Caribbean nations.

United States: Uniform Probate Code

In the United States, the National Conference of Commissioners on Uniform State Laws introduced the Uniform Probate Code (UPC)[293] in 1969 to simplify and streamline the settlement of estates.

Entitled the "Flexible System of Administration of Decedents' Estates", Article III of the UPC addresses succession. The Flexible System is an acknowledgment that no one form of succession fits all estates. It was designed to respond to both the routine estate needing minimal administration and to larger, more complex, or more controversial estates where judicial oversight might be needed.[294] To ensure the greatest flexibility, a variety of procedures and options are available, all with varying degrees of notice requirements and court involvement. Unless an interested party seeks a more formal process, informal procedures can be used. In other words, the level of formality is determined by the concerns of the interested parties, not by the size of the estate.

Article III of the UPC provides four "simplified" procedures, two of which skip probate altogether:

1. Transfer of Small Estates by Affidavit, without a Personal Representative
2. Succession without Administration (Universal Succession)

and two which created a simplified stream of probate:

3. Informal Procedures
4. Summary Administration (Simplified Probate)

Not all states have introduced all procedures from the UPC. As well, while some states have introduced these simplified procedures, some have modified them in their state legislation.[295]

We cover each of these procedures below.

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[293] UPC, *supra* note 81.
[294] Sarajane Love, "Estate Creditors, the Constitution, and the Uniform Probate Code" (1996) 30 U Rich L Rev 411 at 421.
[295] As of 2022, 18 states have adopted the UPC in whole or in part.

Transfer of Small Estates by Affidavit, without a Personal Representative

The UPC contains an affidavit procedure which is meant to be an abbreviated process for heirs and beneficiaries to get title to property.[296] It is popular and has been widely adopted in state legislation. Access to this stream is subject to a monetary limit that varies widely by jurisdiction (outlined below).[297] Some jurisdictions confine it to personal property, while others include real property. It is available to testate and intestate estates.

This procedure allows successor(s)[298] of the deceased to ask an entity indebted to the deceased or having possession of "tangible personal property or an instrument evidencing a debt, obligation, stock or chose in action belonging to the [deceased]" for payment of the indebtedness or the delivery of personal property of the deceased simply by presenting an affidavit.[299] Some jurisdictions specify that the affidavit can be tailored to a specific piece of property (for example, a bank account), or it can list all the deceased's property.[300]

The process is based on consent of all successors. All successors must sign the affidavit to ensure there are no disputes. If there are minor or incapacitated successors, this process is not available unless they have a guardian appointed. The successors have to wait 30 days after the death of the testator/intestate and they must prepare an affidavit providing for the following:

- the value of the estate, less liens and encumbrances, does not exceed the prescribed amount;
- 30 days has elapsed since the death of the testator/intestate;
- no personal representative has been appointed, nor is there an application or petition pending for the appointment of a personal representative;
- the successor(s) are entitled to the property or payment; and
- They have attached relevant documentation (for example: death certificate, proof of identification of successor, proof of deceased's ownership of property etc).[301]

Essentially, under this method all successors agree to take possession of the estate assets. Proper distribution is supervised informally by all the successors together. Because this path does not move through probate, the successors take on, and remain, liable for the deceased's debts and other obligations. Successors take responsibility via the affidavit to pay all debts and taxes, and to

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[296] UPC, *supra* note 81 at s 3-1201; John H Martin, "Non-Judicial Estate Settlement" (2012) 45 U Mich J L Reform 965 at 970.
[297] The value of property that can be distributed under this Section was increased from $5,000 to $25,000 through a 2010 amendment to the Code to account for inflation that has occurred since the UPC was originally approved in 1969. Fialco, *supra* note 123 at 156-167. Cal Prob Code §§ 13100-13116; Cal Prob Code §§ 13200-13210; Cal Prob Code §§ 13150-13158.
[298] The UPC defines successor as "persons, other than creditors, who are entitled to property of a decedent under the decedent's will or [the UPC]." UPC, *supra* note 81 at 1-201 (49).
[299] *Ibid*, s 3-1201 (a).
[300] See eg: Fialco, *supra* note 123 at 159.
[301] UPC, *supra* note 81 at s 3-1201.

distribute the estate per the will or per law (in the case of intestate estates). As there is no probate process or closing, this liability follows the successors (it does not end at a certain point unless legislation states otherwise or a stipulated limitation period expires).

The process relieves persons or entities who pay over property or money of any liability for doing so.[302] These payors are not responsible for reviewing any application for probate or administration nor are they responsible for "inquir[ing] into the truth of any statement in the affidavit."[303] On the other hand, if a person refuses to pay over money or property to a successor, the successor may sue for delivery of the property or debt.

The availability and effectiveness of the affidavit procedure depends on the location of the tangible personal property, not the deceased's domicile. The tangible personal property must be located in a jurisdiction that has enacted the UPC.[304]

Some states have enacted procedures which differ from the UPC in some significant ways. Some states include the following alterations in their summary or simplified procedures:

- In some states, the threshold amount for invoking the affidavit process has been increased to amounts as high as $275,000 (Oregon),[305] $166,250 (California)[306] and $100,000 (Nevada).[307] In Michigan, the affidavit procedure is limited to personal property not exceeding $15,000 in value.[308] Pennsylvania offers a small estate petition usable only for personal property up to $50,000 in value.[309] Likewise, Wisconsin's small estate affidavit procedure is limited to property valued at no more than $50,000.[310]
- North Carolina allows for the collection of property by affidavit when the deceased dies intestate leaving personal property not exceeding $20,000, but this value limit increases to $30,000 where the spouse is the sole beneficiary.[311]
- Florida has a 2-year limitation period for all creditors. Two years after the death of the deceased, the estate valued up to $75,000 can be administered by summary procedure once all creditors are statute-barred.[312]

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[302] *Ibid*, s 3-1202
[303] *Ibid*.
[304] Karen K Sneddon, "Beyond the Personal Representative: The Potential of Succession without Administration" (2009) 50 S Tex L Rev 449 at 475.
[305] ORS § 114.515.
[306] CA Prob Code § 13100.
[307] NRS § 146.080. In Nevada, this threshold is only available if the claimant is the surviving spouse of the decedent; for all other claimants, the amount is $25,000. The procedure in Nevada is only available for personal property.
[308] *Estates and Protected Individuals Code,* MCL §§ 700.3983, 700.1210.
[309] *Probate, Estates and Fiduciaries Code*, 20 Pa CSA § 3102.
[310] Wis Stat Ann § 867.03.
[311] NC Gen Stat § 28A-25-1.
[312] Fla Stat Ann §§ 733.710, 735.201.

- In Nevada, an individual may petition the court to use summary administration if the gross value of the entire probate estate does not exceed $300,000.[313] Using this procedure shortens the period to allow creditor's claims from 90 days to 60 days. Upon the court granting this procedure "all regular proceedings and further notices required" are waived.[314]

- In some states, the affidavit procedure is only available for intestate estates.[315]

Florida's disposition without administration allows an interested person (usually a spouse or child of the deceased) to file an informal application in court (e.g., an affidavit or a letter) to have the personal property of the decedent paid, transferred or disposed to the persons entitled to such property.[316] To qualify for this process, the deceased must not have left behind any real estate, and the personal property in the estate can't exceed the following:

- exempt property (e.g., furniture and household items up to $20,000 in value, as well as two vehicles);[317]
- personal property that is exempt from creditors' claims (up to $1,000);
- reasonable funeral expenses not exceeding $6,000; and
- reasonable and necessary medical expenses of the decedent's last illness, incurred up to 60 days before the decedent's death.

Upon receipt of the application, and if it is satisfied that the statutory requirements are met, the court, by letter or other writing "under the seal of the court," may authorize the distribution of the property. Essentially, this process allows an estate to be settled very quickly without the need for notice to creditors.

Succession without administration (Universal Succession)

Succession without administration (also known as universal succession) is a civil law concept that allows beneficiaries or heirs to bypass the appointment of a personal representative and become universal successors to the estate by agreement. It is similar to the affidavit procedure just described, but possesses some notable differences which are highlighted below.

Under this process, successors apply to court for an order allowing them to accept the estate property on the basis that they assume all the responsibilities that are usually performed by a personal representative. Where undertaken, the successors receive the property of the estate and assume personal liability for taxes, debts, claims against the deceased or the deceased's estate and distributions due to individuals entitled to the deceased's property.[318] There is no embedded monetary limit within this process.

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[313] Nev Rev Stat Ann § 145.040.
[314] *Ibid*, § 145.010.
[315] See, for example, Tex Est Code § 205.001.
[316] Fla Stat Ann § 735.301.
[317] *Ibid*, § 732.402.
[318] UPC, *supra* note 81 at s 3-312.

Succession without administration requires all the competent, adult successors to consent. While minors, incapacitated persons and unascertained persons are excluded, the other successors are responsible to them. In addition, minors and incapacitated successors are provided some protections by having the ability to request bond and to force the estate into probate or administration.

An application to become universal successors must be directed to the registrar and signed by each applicant. The application requires information respecting the estate and the applicants, including a general description of the estate's assets, whether letters of administration are outstanding, statements that the applicants waive their right to seek appointment of a personal representative and statements that the applicants accept responsibility for the estate and assume all personal liability.[319]

If the application is complete and other statutory requirements have been satisfied, the registrar will grant the application.[320] However, the application will be denied if either letters of administration have been issued or any creditor, heir or beneficiary qualified to demand bond files an objection.[321] When the application is granted, a written statement of universal succession is issued that the applicants have assumed liability for the deceased's obligations and "have acquired the powers and liabilities of universal successors."[322]

The written statement of universal succession serves as evidence of the successors' title to the assets. The statement gives the successors the full powers of ownership and the authority to deal with the estate, as letters probate or administration would vest powers in the personal representative. Successors have the same powers as a personal representative's distributees, and third parties are consequently likewise protected when dealing with the successors.

Once a statement is issued, successors have 30 days to provide notice to heirs or devisees not included in the application. The failure of a universal successor to give this information is a breach of duty to the persons concerned but does not affect the validity of the approval of succession without administration or the powers or liabilities of the universal successor.[323]

Some states have adopted some form of succession without administration. In Louisiana, succession without administration (referred to as "Simple Putting in Possession") allows estates to be managed without an administrator or executor being appointed to carry out the succession. For intestate estates, succession without administration is available if the estate is "relatively free of debt" and all required parties request that the succession be without administration.[324]

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[319] *Ibid*, s 3-313.
[320] *Ibid*, s 3-314.
[321] *Ibid,* s 3-314(b) and (c).
[322] *Ibid*, s 3-315.
[323] *Ibid*, s 3-319.
[324] LA CCP art 3001.

- Creditor claims subject to regular statute of limitations
- Creditors can demand a bond from universal successors, if not put forward, force estate into administration

The BCLI subcommittee considered this process when it was looking to simplify BC's process. In their view, this model was not readily transferable to British Columbia, even though some American jurisdictions have created similar versions. In the subcommittee's' view, it would be complex to have two distinct legal theories of succession to apply, depending on the size of an estate. The public and lawyers are familiar with probate and administration. In their view, the public and legal practitioners would be unfamiliar with a system in which the successors collectively become directly liable to creditors of the estate.

Summary Administration (Simplified Probate)

The UPC allows for a summary procedure for testate and intestate small estates.[325] Unlike the first two UPC streams described above, this process does not skip probate. The personal representative still has to be appointed by applying to the court and an inventory must still be submitted. However, the summary procedure promotes efficient distribution because the representative does not have to notify creditors or wait for statutory timelines.

Summary administration processes are often tied to a state's "exempt property" rules. In several states, certain property is carved out of a deceased person's estate for the benefit of their spouse, where there is no spouse, their minor or dependent children. There are three classes of exempt property:

- **Homestead allowance**: A specified maximum value of the home. The homestead allowance can vary greatly by state. The amount listed in the UPC is $22.5K. In California, it covers the family home, no matter its value, but only until the surviving spouse dies, or the children reach the age of majority.[326]
- **Personal property allowance**: The surviving spouse is also entitled to exempt property of up to $15,000 "in excess of any security interest" in furniture, appliances, cars and personal effects. If there is no surviving spouse then this exempt property allowance goes to the children in equal amounts.[327] However, if there is not $15,000 worth of furniture, appliances, cars and personal effects then the surviving spouse or children can take other assets from the estate in addition to these items to make up the

[325] UPC, *supra* note 81 at 3-1203.
[326] *Ibid*, s 2-402; Cal Prob Code §6520-6528.
[327] UPC, *ibid*, s 2-403.

difference up to the value of $15,000.[328] These amounts are in addition to any gifts under the will or the elective share under intestate succession legislation.[329]

- **Family allowance:** The deceased's surviving spouse and dependent children are entitled to a "reasonable allowance" from the estate for their maintenance, for no longer than one year, while the estate is being administered.[330] The term "reasonable allowance" is to be determined in reference to the family's "previous standard of living and the nature of other resources available to the family to meet current living expenses until the estate can be administered and assets distributed."[331] The UPC provides that a personal representative may not provide a family allowance of more than a lump sum of $27,000, or $2,250 per month for one year, without permission of the court.[332]

If, after an inventory is submitted, the estate is valued less than the total of:

- exempt property;[333]
- reasonable funeral and administration expenses; and
- necessary medical and hospital expenses of the decedent's last illness,

they are entitled to summary administration.

This means that the personal representative can immediately distribute the estate without advertising to creditors. This summary procedure is available where the successors are entitled to the whole of the estate because of their statutory rights. In other words, once the personal representative distributes "exempt property" to the successors there is nothing left to distribute to any other potential heirs and/or unsecured creditors. As such, there is little need for the personal representative to go to court and therefore they may immediately distribute property without any other procedure such as providing notice to creditors.

After distribution of the estate, the personal representative closes the estate by filing a sworn statement stating that

- to the best of the personal representative's knowledge, the value of the estate did not exceed the three obligations outlined above;
- the personal representative distributed the property to the persons entitled to the property; and

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[328] *Ibid*. It is important to note that this section establishes a priority between these exempt amounts and states that "Rights to exempt property and assets needed to make up a deficiency of exempt property abates as necessary to permit earlier payment of homestead allowance and family allowance."
[329] *Ibid*.
[330] *Ibid*, s 2-404.
[331] *Ibid* at drafter's comment after s 2-404.
[332] *Ibid*, s 2-405.
[333] *Ibid*, ss 2-402 –2-404.

- the personal representative has sent a copy of the verified statement to all of the distributees and known unpaid creditors and provided a written account of the administration to the distributees.

If no claims are pending one year after the filing, the personal representative's appointment terminates. The personal representative may pay the bills and quickly distribute the remainder of the decedent's estate to the appropriate persons in satisfaction of the family protections and exemptions. Thus, "this procedure is limited to small estates with solvency problems and continues to make the personal representative a central figure in the process."[334]

Informal Procedures

Informal procedures under the UPC roughly map onto the non-contentious proceedings in Nova Scotia. Like Nova Scotia, informal procedures require appointment of a personal representative,[335] but most official oversight is performed by the registrar.[336] As compared to Nova Scotia's non-contentious proceedings, the UPC's informal procedures have reduced notice and bonding requirements, and simplify the closing of estates.

Registrars may both probate the will and appoint a personal representative without prior notice to interested parties.[337] In intestacy, the UPC requires notice, before appointment, to anyone who has statutory priority over the person applying and has not waived his or her priority.[338] Like Nova Scotia, within 30 days of an informal probate being granted, the personal representative must give written information of the appointment to the heirs and the devisees.[339] The notice informs the recipients of their right to seek further court involvement.

The informally appointed personal representative is not required to post bond unless the will requires it or an interested person makes a written demand to the registrar that bond be required.[340] In those cases, bond will be required before the personal representative can proceed, unless the personal representative seeks to be excused from the bond through a court action.[341] To request that a bond be set, the person requesting bond must have at least a $5,000 interest in the estate. This includes creditors who have at least a $5,000 interest.[342] The mechanism for compelling bond is designed to function without unnecessary judicial involvement.[343]

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[334] Sneddon, *supra* note 304 at 476, 477.
[335] UPC, *supra* note 81 at 3-102; 3-301(a).
[336] Martin, *supra* note 296 at 972.
[337] UPC, *supra* note 81 at ss 3-306, 3-307, 3-310.
[338] *Ibid*, s 3-310
[339] *Ibid*, s 3-705.
[340] *Ibid*, s 3-603.
[341] *Ibid*, ss 3-603, 3-604. The amount of the bond required in these cases will be "the best estimate" of the value of the estate and the income expected from the personal and real estate during the year after the deceased's death. The bond must be executed by a corporate surety or one or more individual sureties.
[342] *Ibid*, s 3-605. Section 3-606 lists the requirements and provisions that apply to any bond.
[343] *Ibid,* at drafter's comment after s 3-605.

The UPC obligates the personal representative to prepare and transmit an inventory of the deceased's assets.[344] The inventory must be prepared within three months of the personal representative's appointment, and must include reasonable detail, indicating each item's fair market value.

Whether the informally appointed personal representative must advertise to creditors depends on which UPC provision a particular state adopts. One alternative requires notice only to creditors who have filed a demand for notice. The other requires a general publication notice.[345] If no general notice is given, claims are not barred until one year after death of the deceased.[346] For those notified directly, the limit is the later of 60 days after direct notice or four months after publication.[347]

Once a personal representative has determined what is owed to whom, they may begin distributing property and paying off debts.[348] The estate can be closed informally by filing a statement no earlier than six months after the date of original appointment of a general personal representative for the estate.[349] The statement must state that the time for presentation of creditors' claims has expired and that the personal representative has fully administered the estate of the deceased, providing a "full account[ing] to distributees."[350]

United Kingdom

In England, a number of enactments allow certain public authorities and institutions to pay a deceased person's successors small amounts of money owed to them without the need for a grant of probate or administration. The rules apply "to a miscellany of assets, including National Savings certificates, Government stock, building society funds, trade union, industrial, provident or friendly society funds, and certain pension and other payments to some public sector workers," and are available to both testate and intestate estates.[351] The statutes under which payments may be made are listed in a Schedule under the *Administration of Estates (Small Payments) Act 1965*, which currently sets the maximum amount payable at £5,000.[352]

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[344] *Ibid*, s 3-706.
[345] *Ibid*, s 3-801 allows a state to choose whether the personal representative "shall" or "may" publish "a notice to creditors once a week for three successive weeks in a newspaper … announcing the appointment … and notifying creditors of the estate to present their claims within four months after the date of the first publication of the notice or be forever barred." If a state chooses "may" rather than "shall" in this section, the only requirement would be to notify the creditors who have filed a demand for notice under s 3-204.
[346] *Ibid*, s 3-803(a)(1).
[347] *Ibid*, s 3-801(b).
[348] Ann Bradford Stevens, "Uniform Probate Code Procedures: Time for Wyoming to Reconsider" (2002) 2 Wyo Law Rev 2, Art 2 at 322.
[349] UPC, *supra* note 81 at s 3-1003(a).
[350] *Ibid*.
[351] Law Commission, *Intestacy and Family Provision Report*, Law Com No 331 (London: The Stationary Office, 2011) at 95.
[352] *Administration of Estates (Small Payments) Act 1965*, *supra* note 168, s 1(1). This figure was originally £500 and was substituted with £5,000 by way of the *Administration of Estates (Small Payments) (Increase of Limit) Order 1984*, SI 1984/539.

Despite the Act clearly setting the threshold for probate at £5,000, it is silent on the release of funds from bank accounts. As a result, financial institutions have been free to choose their own limits. Each bank has its own probate threshold, which can vary between limits of £5,000 to £50,000.[353]

Similar legislation is in place in Northern Ireland. Under the *Administration of Estates (Small Payments) Act (Northern Ireland) 1967*, the maximum amount payable under the Acts listed, without need for a grant of probate or letters of administration, is £20,000.[354]

In Scotland, under the *Small Testate Estates (Scotland) 1876 Act*, where an estate's value does not exceed £36,000, an applicant for confirmation (the Scottish equivalent to a grant of probate or administration) may apply to the sheriff's clerk to prepare the documentation and expedite confirmation. If a will was left, the applicant for the confirmation must provide the will, the death certificate, the personal details of the deceased and his or her family and an inventory of the estate and its value as of the date of death. The sheriff's clerk will take the applicant's oath, prepare the necessary court forms and issue the confirmation. In an intestacy, the procedure is similar except that a "bond of caution" may also be required, similar to an administration bond. It ensures against losses in the handling of the estate.[355]

In addition to the small payments provision, in the UK under the *Public Trustee Act 1906*, the Public Trustee is empowered to administer "estates of small value."[356] The term "small value" is not defined in the Act. Further, under subsection 3(1) of that Act, where an estate is valued at less than £1,000, a person who would otherwise be entitled to apply to the court for an order of administration may instead apply to the Public Trustee to take over the administration of the estate. Where such application is made and it appears to the Public Trustee that "the persons beneficially entitled are persons of small means," the Public Trustee is obligated to administer the estate unless there is good reason not to do so. Moreover, under subsection 3(5) of that Act, where an estate of small value is before the court and the court is of the opinion that it could be more expeditiously administered by the Public Trustee, the court may order that the Public Trustee administer the estate.

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353 Anglia Research Services Ltd., "Lawyers Losing Out: the UK's Hidden Estates," Lexology (18 August 2021), online: <https://www.lexology.com/library/detail.aspx?g=cbfb5eb6-9278-4523-8aa3-b1434ea4737e>; Co-op Legal Services, "Bank Limits for Probate" (11 March 2020), online: <https://www.co-oplegalservices.co.uk/media-centre/articles-may-aug-2018/bank-limits-for-probate/>.

354 *Administration of Estates (Small Payments) Act (Northern Ireland) 1967*, 1967, c 5, s 1; *Administration of Estates (Small Payments) (Increase of Limit) Order (Northern Ireland) 2020*, Northern Ireland Statutory Rules, 2020, No 280, Art 2.

355 *Small Testate Estates (Scotland) Act 1876*, 39 & 40 Vict, c 22, s 3; Scottish Government, *What to do after a death in Scotland: Practical Advice for Times of Bereavement*, "Small Estates" (16 November 2016), online: <https://www.gov.scot/publications/death-scotland-practical-advice-times-bereavement-revised-11th-edition-2016-9781786522726/pages/13/>.

356 *Public Trustee Act 1906*, 6 Edw 7, c 55, s 2(1)(a) (UK).

Australia

While small estate procedures in Australia vary from state to state, most states have adopted similar characteristics. For example, New South Wales, Western Australia and the Northern Territory allow registrars of court (or probate offices) to assist estate representatives obtain a grant for small estates. In these instances, grants for probate or administration may be issued by the registrar rather than a judge when the value of the estate does not exceed a certain value (ranging from AU$10,000 to AU$20,000).[357]

In Victoria, the threshold for application to the registrar for a grant is adjusted quarterly in accordance with the consumer price index (set at AU$125,080 for between July 1, 2023 and June 30, 2024).[358] For a fee of AU$235.50, the Probate Office will prepare the paperwork and apply for a grant of representation on the applicant's behalf. The small estates procedure is available to "those entitled to probate of the will or to letters of administration of the deceased's estate" (generally the executor named in a person's will or the next of kin entitled on intestacy). Subsection 72(1) of Victoria's *Administration and Probate Act 1958* further provides that under the small estates procedure "[n]o affidavit as to caveats or searches in the office of the registrar of probates on an application … is required."

Several Australian states also empower the public trustee or other approved representative ("trustee companies" or "state trustees") to file an election to administer an estate below a certain amount without the need for a grant. The election to administer option is seen as a means of avoiding the cost that would be incurred by relatively small estates if a grant were necessary.[359] In the Australian Capital Territory (ACT), New South Wales, Queensland, Tasmania, the Northern Territory and Western Australia, legislation provides that, if a person has died leaving property in that jurisdiction, the gross value of which does not exceed a prescribed amount, and a grant has not already been made to any person, the public trustee may file in the court registry an election

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[357] NSW, *Probate and Administration Act 1898*, No 13, s 101 (Aust) (AU$15,000); W.A., *Administration Act 1903*, 3 Edw VII No 13, s 55 (Aust) (AU$10,000); N.T., *Administration and Probate Act, 1969*, ss 106-108 and *Administration and Probate Regulations*, s 2A (Aust) (AU$20,000).

[358] Vic, *Administration and Probate Act 1958*, No 6191, s 71 (Aust); Prior to 2014, the threshold was set at AU$50,000 and the beneficiaries were limited to the deceased's partner, children or a sole surviving parent. Where other beneficiaries were entitled to a share of the estate, the threshold was dropped to AU$25,000. In 2014, the *Justice Legislation Amendment (Succession and Surrogacy Act)*, No 80, implemented several recommendations of the Victorian Law Reform Commission's Succession Report, including the recommendation of eliminating the dual threshold and choosing a single, higher threshold. It recommended a figure of AU$100,000, noting that estates worth less than AU$100,000 "are unlikely to include real estate or be subject to a family provision claim, and therefore 'rarely involve administrative complexity'." See, Victorian Law Reform Commission (VLRC), *Succession Laws: Report* (Victoria: VLRC, 2013) [VLRC Report], online: <https://www.lawreform.vic.gov.au/publication/succession-laws-report/>.

[359] LCO Consultation Paper, *supra* note 198 at 37; Queensland Law Reform Commission, *Administration of Estates of Deceased Persons: Report of the National Committee for Uniform Succession Laws to the Standing Committee of Attorneys General*, Report 65, volume 3 (Queensland: Queensland Law Reform Commission, 2009) at 97, [QLRC Report] online: <https://www.qlrc.qld.gov.au/__data/assets/pdf_file/0011/372467/QLRC-Report-65-Volume-3.pdf>.

to administer the estate. Generally, the effect of filing an election to administer is that the public trustee is deemed to be the executor or administrator of the estate.[360]

In the Northern Territory, an election to administer may be filed not only by the public trustee, but also by a trustee company and by a legal practitioner. No other Australian jurisdiction provides for the filing of an election to administer by a legal practitioner.[361]

The value ceiling on the size of the estate where an election to administer is permitted is AU$50,000 in Western Australia, AU$80,000 in Tasmania, AU$100,000 in New South Wales and Queensland, AU$130,000 in the Northern Territory and AU$150,000 in the ACT.[362]

In addition to making the election to administer, several states provide an additional summary administration procedure available to the public trustee in the case of small estates. In New South Wales, after giving notice in accordance with the regulations, the NSW Trustee and Guardian may liquidate an estate, pay its liabilities and distribute the residue without either grant or written election if the estate is below AU$20,000 in value and the Trustee has no knowledge of any application for grant having been made. Under the non-grant, non-election procedure, the only document that needs to be filed with the court is the will, if there is one.[363]

Queensland also allows its public trustee to administer personal property belonging to an estate without grant or election if the value of the estate is less than AU$75,000.[364] In the ACT, the public trustee and guardian may administer an estate in this manner if the value of the estate is not more than AU$30,000.[365] In Victoria, where "State Trustees," a corporate equivalent of a public trustee, are authorized to administer an estate, State Trustees may simply publish a notice of intention to administer "in accordance with the Rules" and file the will with the registrar of probates. After the expiry of 14 days after the publication of notice, the State Trustee is deemed to have been granted probate or administration.[366]

New Zealand

In New Zealand, pursuant to the *Administration Act 1969*, certain banks, other financial institutions and government entities can transfer or pay to a person entitled to a deceased person's

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[360] QLRC Report, *ibid* at 90.
[361] NT, *Administration and Probate Act, 1969*, ss 6(1), 110B (Aust). See also a discussion of the Northern Territory system in the QLRC Report, *supra* note 359 at 90-94.
[362] WA, *Trustee Companies Act 1987,* No 111, s 10 (Aust); *Trustee Companies Regulations 1988*, s 4; NSW, *NSW Trustee and Guardian Act 2009*, No 49, s 26(1)(a) (Aust) and *NSW Trustee and Guardian Regulation 2017*, s 36(b); Qld, *Trustee Companies Act 1968*, s 12 (Aust); ACT, *Administration and Probate Act 1929*, s 87C(1) (Aust); Tas, *Trustee Companies Act 1953,* s 10A and *Trustee Companies Regulations 2016*, s 4(1); NT, *Administration and Probate Act, 1969*, s 110B(6) (Aust).
[363] *NSW Trustee and Guardian Act 2009*, s 31 (Aust) and *NSW Trustee and Guardian Regulation 2017*, s 36(a) (Aust).
[364] Qld, *Public Trustee Act 1978*, s 35 (Aust).
[365] ACT, *Administration and Probate Act 1929*, No 28, s 87B (Aust).
[366] Vic, *Administration and Probate Act 1958*, No 6191, s 79 (Aust).

estate (either under a will or on intestacy) an amount not greater than NZ$30,000 that was held by the deceased in a bank account, shares or debentures, life insurance policies or government stocks without the need for probate or letters of administration.[367]

Additionally, the New Zealand *Public Trust Act 2001* allows the Public Trust (an entity similar to a public trustee in Canadian jurisdictions) to elect to administer the estate of a deceased person where the person dies leaving property in New Zealand (whether the person died testate or intestate) with a gross value not exceeding NZ$120,000 and no person has obtained a grant to administer the estate. The election to administer must be filed in the registry of the High Court and must contain information about the deceased, a description of the property and, if the deceased died testate, a copy of the will. On the election being filed, Public Trust is to be treated in all respects as the executor of the will or the administrator of the estate as if administration had been granted to the Public Trust.[368]

Commonwealth Caribbean

A number of commonwealth countries and territories in the Caribbean have adopted a similar small estates administration regime.

In Antigua and Barbuda, the *Administration of Small Estates Act, 2004* allows persons entitled to probate of a will or to letters of administration of a deceased person's estate to apply to the Registrar of the High Court for grant where the property in the estate, real and personal, does not exceed XCD$25,000. With respect to an intestate estate, an application to the Registrar may not be made earlier than one month after the death of the person. If a will was left, the applicant for grant of probate must provide the will and an affidavit verifying the due execution of the will.

Upon receipt of an application, the Registrar must notify the public of the application by posting notice in certain places for up to 14 days. Following the notice period, the Registrar must investigate the application, prepare a report and "lay the report before a judge and the Judge shall, if satisfied that the application ought to be granted, give a direction accordingly."[369]

The small estate regime under Dominica's *Administration of Small Estates Act* is very similar, except that in Dominica

- the small estate limit is set at XCD$5,000;
- the Registrar does not have to give notice; and
- the Act explicitly states that the Registrar may not require any bond, any declaration on oath as to the value of the estate or any administrator's or executor's oath.[370]

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[367] *Administration Act 1969*, *supra* note 168, ss 64-65; *Administration (Prescribed Amounts) Regulations 2009*, s 4 (NZ)
[368] *Public Trust Act 2001*, No 100, s 93 (NZ).
[369] *Administration of Small Estates Act, 2004*, No 12, s 6(3) (Antigua and Barbuda).
[370] *Administration of Small Estates Act*, 1958, No 26 (Dom).

In the British Territory Montserrat, the small estate limit is set at XCD$20,000.[371] In St. Kitts and Nevis, the limit is XCD$25,000.[372]

In the Bahamas, the small estate limit is BSD$10,000.[373] Under the Bahama's *Probate and Administration of Estate Rules*, an executor or administrator who is entitled to obtain a grant of representation in respect of a small estate must, within 12 months of the death of the deceased, file with the Registrar (1) a petition; (2) evidence of the death of the deceased; (3) an oath stating various information respecting the deceased; and (4) an affidavit evidencing the result of a search for any prior grant of representation. Upon receipt of the application, the Registrar must interview the applicant and ascertain any additional documents that must be filed. If the court grants an application in a small estate, the Registrar must notify the applicant that the grant was issued.[374]

In Barbados, the Public Trustee is empowered to administer estates of small value. Under the *Public Trustee Act*, a person entitled to apply to the High Court of an order for the administration by the High Court of an estate, the value of which being less than BBD$15,000, may apply to the Public Trustee to administer the estate, and "where any such application is made and it appears to the Public Trustee that the persons beneficially entitled are persons of small means, the Public Trustee shall administer the estate, unless he sees good reason for refusing to do so.[375]

[371] *Administration of Small Estates Act*, Cap 3.06; *Administration of Small Estates (Amendment) Act, 2021*, No 7 (Mons).
[372] *Administration of Small Estates Act*, Cap 5.02 (St. Kitts).
[373] *Probate and Administration of Estates Act, 2011*, s 42 (Bah).
[374] *Ibid*, Rule 13.
[375] *Public Trustee Act*, Cap 248, s 5 (Barbados).