Whereas A.B. late of [address and occupation] deceased ("the deceased") died at . . . . . on the . . . . day of . . . . . 20.. and C.D. of [address and occupation] ("the administrator") is the intended ***administrator of the deceased's estate.***

Now therefore:

1 I/E.F. of [address and occupation] or [We E.F. of (address and occupation) and G.H. of (address and occupation)] ***hereby [jointly and severally] guarantee*** *that I/we will, when lawfully required to do so,* ***make good any loss*** *which any person interested in the administration of the estate of the* ***deceased may suffer in consequence of the breach*** *by the administrator of his [her] duty to –*

*(a) collect, get in, and administer according to the law the estate of the deceased *[left unadministered by. . . . .];*

(b) ***deliver at the office of the Public Trustee*** *of the State of South Australia within 6 calendar months from the date of administration* ***a statement and account verified by his [her] declaration*** *of all the estate of the deceased and of his [her] administration of the estate;*

(c) deliver to the Public Trustee, when required to do so by the Supreme Court of South Australia ("the Court"), an account of his [her] ***administration of the estate verified*** *by his [her] declaration;*

(d) ***perform all acts and things*** *required by the Administration and Probate Act, 1919, to be performed by administrators;*

(e) deliver up the grant of administration to the Court when required to do so by the Court or the Registrar.

2 The giving of time to the administrator or ***any other forbearance or indulgence*** *shall not in any way affect my [our] liability under this guarantee.*

3 ***The liability under this guarantee*** *shall subject to **section 31 (8) of the Administration and Probate Act, 1919 be continuing and* ***shall be for the whole amount of the loss*** *mentioned in paragraph 1 above, but my [our aggregate] total liability shall not in any event exceed the sum of (ii)$. . . . . .*

Issues Paper 2
December 2012

South Australian Law Reform Institute

Dead Cert

Sureties' guarantees for letters of administration

The **South Australian Law Reform Institute** was established in December 2010 by agreement between the Attorney-General of South Australia, the University of Adelaide and the Law Society of South Australia. It is based at the Adelaide University Law School.

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If you are sending a submission to SALRI on this Issues Paper, please note:

- the closing date for submissions is Friday **8 March 2013;**
- to make it easier to respond to the questions asked in the paper, there is a questionnaire in downloadable form at www.law.adelaide.edu.au/reform/publications/
- we would prefer you to send your submission by email;
- we may publish responses to this paper on our webpage with the Final Report. If you do not wish your submission to be published in this way, or if you wish it to be published anonymously, please let us know in writing with your submission.

THE UNIVERSITY of ADELAIDE

Government of South Australia
Attorney-General's Department

THE LAW SOCIETY OF SOUTH AUSTRALIA

Contents

Terms of reference

The Attorney-General of South Australia, the Hon. John Rau MP, invited the Institute to identify the areas of succession law that were most in need of review in South Australia, to review each area and to recommend reforms. The Institute has identified seven topics for review, and will prepare and release an Issues Paper for each, followed by a Final Report.

This Issues Paper on sureties' guarantees is the first in the Institute's review of succession law in South Australia.

Acknowledgments

The Institute would like to acknowledge the generous support of the **Law Foundation of South Australia** in providing funds for research and community consultation for the Institute's review of succession law.

The Institute would also like to acknowledge its reliance, in this Issues Paper, on the work of the **Queensland Law Reform Commission** in its *Administration of Estates of Deceased Persons: Report of the National Committee for Uniform Succession Laws to the Standing Committee of Attorneys-General*, Report 65, April 2009, including some of its glossary definitions which are used in the glossary to this Issues Paper.

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Abbreviations

The National Committee –The National Committee for Uniform Succession Laws, established by the Standing Committee of Attorneys-General

National Committee's Report - *Administration of Estates of Deceased Persons: Report of the National Committee for Uniform Succession Laws to the Standing Committee of Attorneys-General*, Report 65, Queensland Law Reform Commission, April 2009

SCAG - Standing Committee of Attorneys-General

The Act - *Administration and Probate Act 1919* (SA)

Overview

This paper reviews the need for sureties' guarantees to be provided before an intestate estate can be administered in South Australia. It suggests a range of approaches to reform of the South Australian law, including the approach recommended for uniform laws on this topic by the National Committee for Uniform Succession Laws.

The paper seeks the views of the public, legal and financial professionals on these issues, asking a series of questions on page 27. There is a glossary in Appendix 5 and the questions are available in a downloadable word document on the Institute's webpage http://www.law.adelaide.edu.au/reform/publications/

In a nutshell, the problem is this.

> When a person dies without leaving a will, or leaves a will that is invalid, or appoints a person as executor under a valid will but that person is unable or unwilling to act as executor, there is no one with authority to gather in and distribute their property (the estate).
>
> So that the estate can be distributed, members of the deceased's family can apply to the court for permission to administer the estate.
>
> Usually the court will have no problem giving the applicant permission. It does this by granting the applicant 'letters of administration' (where there is no will) or 'letters of administration with the will annexed' (where there is a will). But sometimes the applicant is also required, first, to arrange for someone else to guarantee that the estate will be administered properly.
>
> The person who gives the guarantee is called a 'surety'. The surety is usually another member of the deceased's family or a family friend who has been asked to do this to help the family finalise the estate.
>
> In signing the guarantee, the surety agrees to pay for loss caused when the administrator does something wrong – for example, by not distributing part of the estate to someone who is entitled to it. The guarantee is to make good this loss. In South Australia, the limit on the amount that the surety must pay under the guarantee is an amount equal to the full value of the estate.

South Australian law requires a surety's guarantee to be given in these circumstances:

- whenever the person applying to be the administrator doesn't live in South Australia; or
- whenever the person applying to be the administrator has a personal claim against the deceased's estate because of something the deceased still owed the applicant at the time of their death; or
- whenever someone who is not capable of making their own decisions (such as a child or a mentally-impaired person) is entitled to some of the deceased's estate.

These are circumstances where there may be a greater risk of the estate being wrongly administered. But the court can also require a surety's guarantee if it thinks there needs to be one, even if none of these circumstances exists.

The requirement for a third person, or surety, to compensate for loss caused by an administrator is designed as a safeguard for innocent beneficiaries when the administrator does not have enough money to reimburse their loss (due perhaps to dishonesty or incompetence).

It should be noted, by contrast, that if a person dies leaving a valid will, the executor named in the will is assumed to be someone who the testator thought would administer the estate properly, and the law does not require any form of guarantee against the risk of maladministration.

Even a small estate may be worth many tens of thousands of dollars – a large sum for most private guarantors. People who stand as sureties may not always understand that their guarantee will be strictly enforced (whatever hardship that might cause) and that they cannot get the money paid out under the guarantee back.

Banks and insurance companies have been increasingly unwilling to back up sureties' guarantees unless on terms that most people cannot afford.

Recognising this, the law lets courts reduce the amount of the guarantee or decide not to require one (to dispense with it). In fact, in almost all cases where the law would require a surety's guarantee, courts either dispense with the requirement altogether or reduce the amount of the guarantee.

There is no evidence that in South Australia anyone has suffered loss from an administrator acting wrongly or that anyone has enforced a surety's guarantee. The requirement for a surety's guarantee seems to result in an unnecessary commitment of private and State resources, because no-one seems to gain anything from it.

This raises the question of whether South Australian law should continue to require sureties' guarantees for deceased estates.

Background

A review of the South Australian requirement for sureties' guarantees requires an understanding of who may be appointed as an administrator and of the full range of remedies available to beneficiaries or creditors who suffer loss when an administrator defaults.

Who may be appointed as administrator?

When a person dies without leaving a will or dies leaving a valid will naming an executor but this person does not want to or cannot take on that responsibility, the court may be asked to appoint a personal representative of the deceased to take responsibility for administering the estate.

Where there is no will, the person is said to have died 'intestate'. Then, the court appoints a personal representative by an order granting 'letters of administration'. Where there is a will, but the executor is unwilling or unable to act, the person is said to have died 'partially intestate'. In that case, the court appoints a personal representative by an order granting 'letters of administration with the will annexed'.

In Australia, the people who are eligible to administer an intestate estate are those who are entitled to a share in it under the rules of intestacy.[1] Those rules govern how intestate estates are to be distributed, and to whom. The people entitled to a distribution under those rules are, broadly, the spouse or domestic partner, the children, the grandchildren, the parents, the brothers and sisters, the grandparents and the uncles and aunts of the deceased, roughly in that order, depending on who survives the deceased and whether, if they did not survive the deceased, they have living children or grandchildren.[2]

In some Australian jurisdictions, the court may decide which of these family members is to be appointed as administrator.

In others, including South Australia, the statute sets out the order of priority, drawn from this pool of family members, which governs who may be appointed to administer the estate.[3]

---

[1] In South Australia, the Act is the *Administration and Probate Act 1919*. Part 3A of that Act deals with distribution of a deceased estate upon intestacy. The rules about who may administer an intestate estate are the *Probate Rules 2004* (SA), r 32.

[2] For the purposes of these rules, it does not matter whether the relationship is full or half blood, adoptive or natural – see *Probate Rules 2004* (SA), r 32.05.

[3] Rule 32 of the *Probate Rules 2004* (SA) sets out the order of priority for appointment as an administrator of an intestate estate from those who are entitled to distribution of the estate upon an intestacy as follows:

(i) Where the spouse [or the domestic partner] of the deceased has survived the deceased for 28 days, the surviving spouse [or the domestic partner];
(ii) The children of the deceased, or the issue of any such child who died before the deceased;
(iii) The father or mother of the deceased;
(iv) Brothers and sisters of the deceased, or the issue of any deceased brother or sister who died before the deceased;
(v) Grandparents of the deceased;
(vi) Uncles and aunts of the deceased and the issue of any deceased uncle or aunt who died before the deceased.

If no-one from this priority list is available or willing to take on the task, the court may appoint instead either a creditor of the estate or a person who, while not now a potential beneficiary, may become one by

The entitlement to a grant of letters of administration with a will annexed is governed by a different order of priority than the one that is used when there is no will. The first priority is the executor named in the will, followed by beneficiaries of the estate, by category.[4]

Legislation in most Australian jurisdictions also permits courts, in certain circumstances, to make orders authorising the Public Trustee to administer the estates of people who died leaving property in the jurisdiction.[5] An administration order has effect as if the Public Trustee had been granted letters of administration.

Duties of administrators

It is not the purpose of this paper to examine or recommend what an administrator's duties should be. However, because the questions asked concern remedies for loss caused by breach of such duties, and because one of the suggested reform models (Model 3) contemplates the statutory expression of the principal duties of an administrator, a brief outline will be given here.

In simple terms, the primary duties of a personal representative in respect of a deceased estate are to collect and protect the estate's assets and distribute them, after paying estate debts, to the deceased's heirs according to the will or the rules of intestacy, whichever is the case, and to do so in a proper manner.

Some Australian jurisdictions have expressed these general duties in legislation.[6] Others, including South Australia, are content for them to remain as equitable or common law duties, giving statutory expression only to some specific duties, such as those requiring administrators to disclose estate assets.

The National Committee examined the duties of personal representatives,[7] recommending that the general duties of administrators and executors be expressed in the model law, chiefly to 'inform lay personal representatives of their duties'.[8]

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accretion (as when, for example, a potential beneficiary dies, fails to meet some condition or rejects the inheritance - *Probate Rules 2004* (SA) r 32.03). If no-one has a beneficial interest in the estate, it is treated as unclaimed and must be administered by the Crown *(Probate Rules 2004* (SA) r 32.02).

[4] The categories are: residuary devisees or legatees in trust for other persons, then residuary devisees or legatees for life, and lastly the universal or residuary legatees (*Probate Rules 2004* (SA) r 31). Within these categories, priority is given to those with vested rather than contingent interests.

[5] See, for example, *Public Trustee Act 1995* (SA), s 9, *Administration and Probate Act 1929* (ACT) s 88, s 92; *Public Trustee Act 1913* (NSW) s 23; *Public Trustee Act 1978* (Qld) s 29, s 31; *Public Trustee Act 1941* (WA) s 10(1). The process is summarised in *Uniform Succession Laws: Recognition of interstate and foreign grants of probate and letters of administration - Issues Paper* [2002] NSWLRCIP 21 [5.44]-[5.47]. Examples of circumstances in which an administration order may be made in South Australia include where:

- the deceased died intestate;
- the deceased left a will, but there is no executor resident in South Australia who is willing and capable of acting;
- no application for probate or administration is made, or probate or administration is not obtained within a specified time after the death of the deceased.

[6] For example, Western Australia (*Administration Act 1903* s 43(1); Queensland (*Succession Act 1981* s52).

[7] See *National Committee's Report*, Chapter 11: *Rights and duties of a personal representative.*

[8] Ibid [11.19].

Compensation for loss arising from maladministration

There are ways of forestalling or preventing maladministration that might cause loss. Beneficiaries and creditors can bring administration proceedings to have the court examine the administration and if necessary make an order with which the administrator must comply, on pain of a monetary penalty or contempt. Likewise, an administrator can seek the advice or direction of the court about something that is proposed to be done in administering the estate.[9]

Beneficiaries and creditors of the estate who suffer loss as a result of maladministration have civil remedies to pursue at common law and under statute, and may also be compensated under the criminal law if the default constitutes an offence and the administrator is successfully prosecuted.

Civil action for damages

The main civil remedies for damages for loss caused by the maladministration of a deceased estate are:

- a common law action for damages against the administrator for breach of his or her duties;
- an action for damages against the administrator for breach of trust;[10] and
- an action for damages against the administrator in *devastavit.*[11]

An action in *devastavit* against an administrator can succeed only upon proof of wilful default.

Compensation through statutory administration security

Actions for damages against an administrator will be futile where the administrator has absconded or is poor. The remedy of enforcing a security entered into as a condition of granting letters of administration is designed to overcome this problem.

In most Australian jurisdictions, and in New Zealand, an order granting letters of administration cannot be made unless the applicant has arranged to provide some form of security to the court or to the Public Trustee. The security is against the risk that the applicant may administer the estate in such a way that a potential beneficiary or creditor of the estate suffers loss.

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[9] See *Administration and Probate Act 1919* (SA) Division 3 Part 3.

[10] An action against the administrator for breach of trust is available at common law or under statute. In South Australia, the *Trustee Act 1936* provides that an administrator of a deceased estate is a trustee for the purposes of that Act.

[11] *Devastavit* is both a common law tort (through which one can seek damages) and an action in equity (through which one can seek an injunction to stop the administrator doing something or an order requiring the administrator to do something in particular). 'In an administration suit in equity a creditor or legatee may bring an application for account on a wilful default basis against the executors for parting with, or failing to get in, estate assets. ... On the other hand at common law the position was different and it was accepted that a creditor or legatee could recover from executors who parted with, or failed to get in, estate assets without any fault being demonstrated on their parts.' (*Bovaird v The Trustee of the Bankrupt Estate of Frost* [2010] FCA 1159, Perram J [19]). All Australian jurisdictions provide that where there is a variance or conflict between the rules of equity and the rules of common law, the rules of equity will prevail. See, for example, *Supreme Court Act 1935* (SA), s 28—Rules of equity to prevail where in conflict with common law.

The security required is generally by way of either:

- a personal bond from the administrator (known as an **administration bond**). Generally, the maximum amount that can be protected by the bond is the sworn actual or estimated gross value of the estate within the jurisdiction. The bond may be required with or without sureties (third parties, usually banks or insurers, who, at a premium, guarantee to pay the penalty should the administrator default on payment); or
- a guarantee by one or more third party sureties (known as a **surety's guarantee** or an **administration guarantee**) with no administration bond. This kind of security is generally required in jurisdictions that do not require an administration bond.[12] It is a guarantee by a third party (either private or commercial) to compensate loss caused by maladministration of the estate, usually to the extent of the sworn actual or estimated gross value of the estate. The guarantee is intended to be called up where recourse against the administrator fails or would be fruitless.

Some jurisdictions require administration security (whether by administration bond or a surety's guarantee) in every case and this has been described as a general requirement.[13]

Others require it only in particular circumstances,[14] sometimes also giving the court discretion to require it in any other circumstance.[15]

Still others merely give the court discretion to require security without making it mandatory in any particular circumstance.[16] Some jurisdictions simply leave it to the court to decide whether or not to require security.

The laws requiring security for grants of letters of administration originated in times when there was less clarity about the rules of intestacy and there was a greater danger of the estate being distributed to people who were not entitled to it than there is now.[17]

Their origin as a source of compensation for loss caused by maladministration of intestate estates explains in part why, traditionally, security has not been required for

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[12] But not in Queensland, which has abolished all forms of administration security (see later discussion).
[13] This is the position in Ireland (*Succession Act 1965(Ireland)* s 34(1)) and Scotland (*Confirmation of Executors (Scotland) Act 1823* s 2).
[14] These are usually circumstances that might give rise to a heightened risk of maladministration.
[15] This is the position in South Australia (*Administration and Probate Act 1919* (SA) s 31(1)(d)).
[16] In Western Australia, for example, there is no general requirement, and no particular circumstances in which security must be provided, but the court has discretion to require sureties *(Administration Act 1903* (WA) s 26; see also *Non-contentious Probate Rules 1967* (WA) r 27(1)). This is also the position in England and Wales, where the general requirement for a guarantee by sureties was abolished in 1972. The relevant provision is *Senior Courts Act 1981* (UK) s 120.
[17] This was the view of Legoe J in *Re the Estate of Sopru* (1992) 165 LSJS 132. The Law Reform Commission of New South Wales, in its Working Paper 18 (1978) *Administration Bonds*, explained its more distant history in this way:

> It is of little importance today, except as showing that some of the reasons for adoption of the bond are not reasons for its retention today. It seems likely that the bond was adopted so as
>
> (a) to give a better remedy than that given by the ecclesiastical courts, or to give a remedy where the ecclesiastical courts gave no remedy;
> (b) to enlarge the jurisdiction of the King's courts at the expense of the ecclesiastical courts; and
> (c) perhaps to enlarge the jurisdiction of the courts of common law at the expense of the Court of Chancery.

grants of probate (where the deceased left a valid will appointing an executor who he or she is assumed to have trusted to administer his or her deceased estate properly).

Nowadays, the security of an administrator's bond supported by guarantees[18] or of sureties' guarantees without a bond[19] is a remedy where it is ineffective or impossible to sue the administrator – for example where the defaulting administrator becomes insolvent or disappears. Instead, the aggrieved beneficiary or creditor can sue the third party guarantor.

An applicant for a grant of letters of administration must provide information about nature and extent of the estate to the court. Some jurisdictions, like South Australia, require the applicant to supply an inventory of the assets and liabilities of the estate.[20] This information can assist the court's determination of the potential for maladministration, at least in terms of the size and nature of the estate and the ability of the person seeking to administer it.[21]

Administration security in South Australia

In South Australia, the requirement for an administration bond was removed by amendments to the *Administration and Probate Act 1919* in 2003.[22]

The original requirement for an administration bond was reviewed by the South Australian Law Reform Committee in 1972.[23] A copy of the Committee's report is in Appendix 1 to this paper.

The Committee's recommendations led to amendments in 1978[24] to limit the occasions on which a bond was required and provide for sureties.

The report noted that:

> In Australia and England the administration bond achieves four purposes:—
>
> (a) It repeats, albeit in vague and general terms, the duties of the administrator;
>
> (b) It affords an aggrieved creditor or beneficiary an additional remedy against a defaulting administrator;
>
> (c) Where there are sureties it affords an aggrieved creditor or beneficiary a remedy against the sureties in the event of default by the administrator;
>
> (d) In the case of a grant to a creditor as such it is used as a device to exclude the administrator's rights of retainer and preference.

---

[18] This is still the form of security required in New South Wales, the Northern Territory and Tasmania.
[19] This is the form of security required in South Australia, which no longer requires administrators to enter into a bond.
[20] *Administration and Probate Act 1919* (SA) s 121A.
[21] Note, however, that the National Committee has proposed abandoning this requirement, given its cost, and replacing it with one that requires the administrator to file an inventory only when required by the court to do so (rather than in every case).
[22] The amending Act was the *Administration and Probate (Administration Guarantees) Amendment Act 2003* (SA).
[23] Twenty-second report of the Law Reform Committee South Australia to the Attorney-General: *Relating to administration bonds and to the rights of retainer and preference of personal representatives of deceased persons*, 1972.
[24] See *Administration and Probate Act Amendment Act 1978* No. 80 of 1978 (assented to 16 November 1978).

Under the amended Act, an administration bond was required of an administrator when:

> (a) he is not resident in this State; or
>
> (b) he has any legal or equitable claim against, or interest in, the estate of the deceased arising from a liability incurred by the deceased before his death; or
>
> (c) any person who is not *sui juris* is entitled to participate in the distribution of the estate; or
>
> (d) the Court is of the opinion that in the circumstances of the case an administration bond should be required.[25]

After the requirement for an administration bond was removed in 2003, these criteria were retained for the substituted requirement for one or more third party sureties to give an administration guarantee.

The amendments also gave the court discretion to require a guarantee in any other circumstances,[26] and, conversely, to dispense with the requirement for a surety where satisfied that it is 'beneficial or expedient to do so'.[27]

For dispensation,

> the important consideration is the due and proper administration of the estate. If the particular circumstances of the case suggest that there is a reduced risk of maladministration or less difficulty is likely to be encountered in recovering loss and damage, should there be maladministration, and there are disadvantages or detriments associated with the provision of a guarantee, then the court may form the view that it is beneficial or expedient to dispense with the requirement of a guarantee.[28]

Once an administration guarantee is provided, the court may at any later time require a further or additional guarantee on application by an interested party and may revoke the grant of administration if one is not provided.[29]

The surety is liable to make good any loss caused to a person with an interest in the administration of the estate by the administrator's breach of his duties.[30] The limit of the surety's guarantee is the sworn gross value of the South Australian estate or such lesser amount as the court determines.[31] In fact, the general rule is for there to be two sureties, except where the administrator is the widow, widower, domestic partner or personal representative of the deceased, or where the surety is a corporation.[32]

The South Australian administration guarantee has been described thus:

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[25] *Administration and Probate Act 1919* (SA) s 31(2) (as it was after the 1978 amendments and before the Act was amended in 2003).
[26] *Administration and Probate Act 1919* (SA) s 31(1).
[27] Ibid s 31(10).
[28] *Estate of Freebairn (Deceased)* [2005] SASC 497, Besanko J [25].
[29] *Administration and Probate Act 1919* (SA) s 31(4).
[30] Ibid s 31(2).
[31] Ibid s 31(3).
[32] *Probate Rules 2004* (SA) r 49.02(a).

> The guarantee is in effect a guarantee against the maladministration of the estate in South Australia. It is a guarantee against a breach by the administrator of his or her duties in administering the estate. The cases in which a guarantee is required are cases where the estate is vulnerable in the sense that there is an increased risk of maladministration or an increased difficulty in recovery should there be maladministration. The guarantee provides an additional assurance of the due and proper administration of the estate and an additional remedy should there be maladministration.[33]

As noted here, an administration guarantee is not required in every case. It is required only in particular circumstances (which can be characterised as presenting a heightened risk of maladministration and which are the same as the prerequisites for an administration bond under the 1978 law):[34]

- when the administrator or a person seeking appointment as an administrator does not reside in South Australia;
- when the administrator or a person seeking appointment as an administrator has a legal or equitable claim against, or interest in, the deceased estate arising from a liability incurred by the deceased before his or her death; or
- when a person who is not competent to manage their own affairs is entitled to participate in the distribution of the estate.[35]

An administration guarantee is not required when the administrator is the Public Trustee, any other agency or instrumentality of the Crown, or a trustee company,[36] because there is little risk of maladministration when the estate is managed by professional or corporate administrators who are already subject to statutory controls.

There are also exceptions for estates of little value,[37] for slightly larger estates[38] where all beneficiaries are legally competent to manage their own affairs (*sui juris*), and for people seeking administration for the limited purpose of prosecuting or defending legal action.[39]

Section 31(8) gives some protection to private sureties, in allowing them to apply to the court for relief when they fear the South Australian estate is being wasted or is in danger of being wasted, or when they fear the administrator is acting (or not acting) in a way that could prejudice the surety, or when they wish to be relieved from further liability. The court may give such relief as it thinks fit.[40]

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[33] *In the Estate of Freebairn, Deceased* [2005] SASC 497, Besanko J [22].
[34] See earlier discussion.
[35] *Administration and Probate Act 1919* (SA) s 31(1). Rule 49 of the *Probate Rules 2004* (SA) elaborates on these requirements and establishes procedures and conditions for surety's guarantees.
[36] *Administration and Probate Act 1919* (SA) s 31(9). When authorised to administer a deceased estate by an administration order under s 9 of the *Public Trustee Act 1995* (SA), the Public Trustee is not required to enter into a bond or provide any kind of security (s 10).
[37] Estates valued at up to $100,000: *Probate Rules 2004* (SA) r 49.07 (a).
[38] Estates valued at up to $250,000: (*Probate Rules 2004* (SA) r 49.07(b).
[39] *Probate Rules 2004* (SA) r 49.07(c).
[40] *Administration and Probate Act 1919* (SA) s 31(8).

The sureties' guarantee requirements in South Australia apply also to applications to reseal grants of administration made in other States or the United Kingdom or by a foreign court.[41]

Administration security in Australia generally

The security prerequisites for grants of letters of administration differ across Australian jurisdictions. They may be summarised broadly, from most onerous to least, as follows:

- *A bond by the administrator covering the sworn value of the estate, supported by one or more sureties.* In Tasmania[42] all administrators must provide a bond with sureties. In New South Wales[43] all administrators must provide a bond with one or more sureties, but the court has the power to dispense with the bond, dispense with one or both sureties, or reduce the amount covered by the bond. In the Northern Territory,[44] providing an administration bond with sureties is at the discretion of the Registrar, and is not necessary in every case; the court has similar dispensation and bond reduction powers to those of courts in New South Wales.
- *No administration bond but a guarantee by one or more sureties covering the sworn value of the estate.* In Western Australia,[45] Victoria[46] and the Australian Capital Territory,[47] the court may choose whether to require sureties' guarantees, whereas in South Australia[48] sureties' guarantees are required in certain kinds of cases. All these jurisdictions also give the court power to reduce the amount to be guaranteed, and all except Western Australia give the court power to dispense with the requirement for a surety's guarantee.
- *No administrator's bond or surety's guarantee.* Queensland has abolished the requirement for an administration bond or sureties' guarantees.[49] The uniform model law recommended by the National Committee adopts the Queensland approach.

The main reasons for some jurisdictions abolishing administration bonds were that they were seen generally too onerous,[50] and, in cases where no insurance company would provide a bond, often impossible to meet.

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[41] Ibid Part 2, Division 5.

[42] *Administration and Probate Act 1935* (Tas) s 25(1).

[43] *Probate and Administration Act 1898* (NSW) s 64(1).

[44] *Administration and Probate Act* (NT) s 23.

[45] Section 26 of the *Administration Act 1903* (WA) requires guarantees from sureties before a grant may be made, but does not require a bond from the administrator. This section was inserted by the *Administration Act Amendment Act 1976* (WA) s 14.

[46] The *Administration and Probate Act 1958* (Vic), s 57, gives the court an unfettered discretion to require sureties' guarantees before making a grant. This section was inserted by the *Administration and Probate (Amendment) Act 1977* (Vic) s 4.

[47] *Court Procedures Rules 2006* (ACT), rr 3045, 3046; *Supreme Court Amendment Rules 2004 (No 1)* (ACT) r 30. These rules are made by authority of the *Court Procedures Act 2004* (ACT) s 21.

[48] *Administration and Probate Act 1919* (SA), s 31 requires sureties' guarantees in certain defined circumstances before a grant can be made. This version of s 31 was substituted by the *Administration and Probate (Administration Guarantees) Amendment Act 2003* (SA) s 6.

[49] *Succession Act 1981* (Qld) s 51:

> *Abolition of administration bond and sureties*
> As from the commencement of this Act neither an administration bond nor sureties in support of an administration bond shall be required of any administrator.

Note that the Act, including this section, commenced in January 1982.

All jurisdictions in Australia either require sureties or some form of 'adequate security' before an interstate or overseas grant of administration is resealed. Some[51] but not all of these give the court a discretion to dispense with the requirement; some give the court discretion to require security on application.[52]

Administration security in New Zealand and the United Kingdom

The approaches taken in New Zealand and the United Kingdom are described below for comparison.

In New Zealand, the court may make a grant of letters of administration conditional on the administrator providing such security as the court thinks fit for:

> the due collection, getting in, and administration of the estate of the deceased.[53]

The court may not impose this security requirement unless satisfied that it would be expedient having regard to:

> The value of the estate;
>
> The financial position of the proposed administrator;
>
> The extent of his interest (if any) in the estate;
>
> Whether or not he is a creditor in the estate;
>
> Whether or not there are any minor beneficiaries or beneficiaries under any other disability;
>
> Such other matters as the Court thinks relevant.[54]

As already noted, there is no general requirement for administration security in England and Wales, but the court has an unlimited discretion to require sureties.[55]

By contrast, there is a general requirement for an administration bond in both Ireland and Scotland. In Ireland, the penalty of the bond is double the estate unless the court determines otherwise.[56] In Scotland, an administration bond is called, eloquently, 'a bond of caution',[57] a third party surety is called 'a cautioner' and an administrator 'an executor-dative'.[58]

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[50] An example of the difficulties in providing sureties for an administration bond is given by Williams J in *Estate J Deceased* [1999] SASC 364 [17]. This was a very large estate, and at the time the South Australian law required an administrator's bond.

> In the present case a Bank is acting as surety upon existing bond at an annual fee of $34,000. The Bank has also required a company in a group associated with the estate to maintain minimum cash deposits with the Bank in the sum of $6,800,000 [the sworn value of the estate]. Therefore, not only is there the direct annual cost of the bond but there is an indirect cost in lost opportunities for investment by reason of cash funds being tied up. The administrator has made numerous enquiries within Australia and overseas but has been unable to secure a surety upon better terms. The premium apparently reflects a "going rate". There is nothing in the circumstances of the estate to suggest that the risk is in any way out of the ordinary.

[51] For example, South Australia.

[52] In Queensland, this kind of discretion is given in respect of both executors and administrators.

[53] *Administration Act 1969* (NZ) s 7(5).

[54] Ibid s 7(6).

[55] *Senior Courts Act 1981* (UK) s 120.

[56] *Succession Act 1965* (Ireland) s 34 (2)(a).

[57] Pronounced 'kayshun'.

[58] See *Confirmation of Executors (Scotland) Act 1823* s 2.

Other sources of compensation

Under criminal law

Compensation may be paid to beneficiaries who suffer loss resulting from an administrator's default if the administrator is successfully prosecuted for an offence related to that default.

In South Australia there are summary offences that arise from a breach of an administrator's duties: failing to comply with statutory requirements for disclosure of assets[59] and dealing with undisclosed assets.[60] Deliberate fraud in the administration of an estate may constitute an indictable offence of dishonesty.

A sentence for any of these offences may include an order for restitution or compensation for those who have suffered loss as a result of it.[61] While there is no limit on the amount of compensation that a superior court may award by sentence order, the Magistrates Court limit for compensation is $20,000.[62]

This source of compensation is of limited value. Not every kind of default by an administrator that causes loss to beneficiaries will be an offence or will be conduct that authorities think worth prosecuting. If the offence is proved, the amount of compensation awarded as part of sentence will reflect amounts already awarded in any civil action, and vice versa. As with a civil action, this remedy will work only if the administrator has the means to pay.

The National Committee recommended against including a version of the South Australian non-disclosure offence in the model law.[63] The discussion that informed this view, did not, however, take into account the potential for compensation through sentence orders.

Awards of damages for breach of statutory liability

In Queensland, the legislation[64] sets out the duties of administrators, including a statutory liability for neglect or failure to perform these duties and a power in the court to make such order as it thinks fit by way of relief, including an order for damages.[65]

The National Committee recommended this approach for the model law[66]

There is no such law in South Australia.

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[59] *Administration and Probate Act 1919* (SA) s 121A.
[60] Ibid s 44. The maximum penalty for the offence is a fine of $2000.
[61] *Criminal Law (Sentencing) Act 1988* (SA) ss 52, 53.
[62] Ibid s 53(5)(c).
[63] The National Committee consulted specifically on whether the model laws should include criminal sanctions of the kind imposed by s121A, and most respondents were against it. Their reasons were that this approach was too heavy-handed, because an administrator is liable even if there is no resulting loss; that loss caused by inadvertent error is better dealt with by civil action for damages; and that deliberate fraud should be dealt with by prosecution for indictable dishonesty offences under the general criminal law. The National Committee then recommended against having such an offence in the national model law.
[64] *Succession Act 1981* (Qld) s 52.
[65] Ibid s 52(2).
[66] *National Committee's Report* [14.1].

The need for reform

The need for reform of laws requiring administration security has been identified by the National Committee for Uniform Succession Laws, appointed by the Standing Committee of Attorneys-General (SCAG) in 1991 to undertake a project to achieve consistency of succession laws across Australia and modernise outdated aspects of those laws. The National Committee comprised representatives from every Australian jurisdiction except South Australia.[67] Although the Uniform Succession Law Project did not achieve its aim of uniformity, it stimulated several States and Territories to examine their laws more closely in the light of its recommendations, and, sometimes, to enact selected reforms along the lines of the recommended model.[68]

The National Committee reported to SCAG in 2009,[69] recommending, among other things, that the model succession laws it proposed should no longer require an administrator or a person applying for letters of administration to provide an administration bond, sureties' guarantees, or any other form of security[70] and that no such requirement should be made of a person seeking to reseal[71] a grant of administration.[72]

The National Committee suggested that:

> If there is a serious question about a person's suitability to act as an administrator, the more appropriate course is for the court to appoint another person as administrator.[73]

Despite the meticulous work of the National Committee, succession laws, including laws about security for the administration of estates, are not yet uniform in Australia.[74]

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[67] The National Committee noted that 'Although South Australia does not have a representative on the National Committee, an officer of the South Australian Attorney-General's Department holds a watching brief in relation to the project.' See *National Committee's Report* Vol 1, footnote 1.

[68] A description of the project may be found in this article by Professor Rosalind Croucher 'Towards Uniform Succession in Australia' (2009) 83(11) ALJ 728. Professor Croucher is President of the Australian Law Reform Commission:

[69] 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*, April 2009, Report 65. The four volume report concluded the fourth and final stage of the Uniform Succession Laws Project. It contains the National Committee's analysis of and recommendations about the administration of deceased estates, including, relevantly, Chapter 9: Administration bonds and sureties, Chapter 10: Rights and duties of a personal representative, and Chapter 14: The liability of a personal representative.

[70] *National Committee's Report* Recommendation 9-1.

[71] When the deceased's estate includes property that is outside the jurisdiction in which the grant of probate or letters of administration relating to the estate is made, that property cannot usually be administered unless a fresh grant is made in that other jurisdiction or, if the law of that jurisdiction allows it, the original grant is 'resealed' in the other jurisdiction.

[72] Ibid Recommendation 9-2. Recommendations 9-1 and 9-1 are set out in Appendix 2 to this paper.

[73] *National Committee's Report* [9.87].

[74] Updates on the implementation of the National Committee's Report may be found in the following papers by Professor Rosalind Croucher (President of the Australian Law Reform Commission): a paper given to the Succession Law Conference held by the Law Society of South Australia in Adelaide: 'Succession Law Reform in Australia—the Uniform Project update', 16 November 2010; a paper given to the Succession Law Conference, Blue Mountains Annual Law Conference: 'Succession Law Reform in NSW - 2011 update', 17 September 2011 <http://www.alrc.gov.au/publications/succession-law-reform-nsw-2011-update>.

This Issues Paper puts arguments for and against reform of the South Australian requirements for sureties' guarantees for grants of letters of administration and related requirements for resealing interstate grants.[75] In doing so it relies on the research and recommendations for model laws by the National Committee. For a comprehensive presentation of the history and analysis of arguments for and against reform in Australia we refer readers to Chapter 9 of the National Committee's Report.

Applications for grants of letters of administration

For reform

The main argument for reforming the law to remove or limit the requirement for sureties' guarantees[76] is that this law is redundant.

Cases of applications to enforce sureties' guarantees are extremely rare in Australia.[77] Indeed, senior probate practitioners and the Registrar of Probates in South Australia say they do not know of any such application having been made in South Australia. With little evidence of even occasional maladministration of intestate estates or of sureties' guarantees being enforced,[78] the extraordinary remedy of a third party guarantee is heavy handed and unnecessary.

As evidence of this, South Australian courts frequently dispense with the requirement or reduce the penalty because private individuals find providing a guarantee too onerous. One of the reasons for this is that financial institutions and insurers continue to be reluctant to provide cover, despite the demonstrated lack of risk. They will do so only at high premiums and under exacting conditions that together effectively negate any real transfer of risk.[79]

The law should not require third parties to guarantee a financial risk that is so remote but that commercial operators are nevertheless not prepared to underwrite,[80] especially when

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[75] See *Administration and Probate Act 1919* (SA) Part 2 Division 5.

[76] The National Committee has summarised the arguments in favour of the abolition of sureties as:

- the fact that they are required only when an administrator is appointed [and not for grants of probate];
- the cost involved;
- the difficulty in obtaining a surety;
- the fact that there is only infrequent recourse to sureties; and
- the degree of protection afforded.

(*National Committee's Report*, [9.41] (footnotes omitted)).

[77] See *National Committee's Report,* [9.47]–[9.51], citing findings from jurisdictions around Australia.

[78] The National Committee noted that it is extremely rare for recourse to be made against sureties (see *National Committee's Report*, [9.47]-[9.51). The reasons may include that loss caused by maladministration of deceased estates is insignificant and can be dealt with by agreement or that there is a very low incidence of maladministration or both.

[79] See, for example, *Estate of J Deceased* [1999] SASC 364.

[80] It is interesting to note here the view of the Law Reform Committee of South Australia on the laws of general contracts of suretyship, which could as well be applied to administration guarantees:

> A contract of suretyship is in fact not a simple contract at all, as most people blithely think when they are entering into one ... the only way to ensure that a man knows what he is entering into and does not go blindfold into something which may bankrupt him is to have the contract properly explained to him by obtaining independent legal advice before the contract is entered into at all.

Acknowledging that the cost of obtaining independent legal advice may not be warranted in every case, the Committee recommended that independent legal advice be required by law for general contracts of suretyship over a certain value, and that for contacts for lesser amounts a

this law does not require the third parties to have independent legal advice or to be given standard forms of written advice about their liability under the guarantee.

The National Committee and the Western Australian Law Reform Commission recommended the abolition of any requirement for security for local grants of letters of administration or for resealing grants made outside of the jurisdiction, having examined the successful abolition of any such requirement by Queensland.

The court and the parties should instead rely on existing opportunities to prevent maladministration[81] and existing remedies against the administrator (see earlier discussion).

Checks and balances against maladministration that already exist include:

- an administrator's appointment being, in theory at least, subject to the scrutiny by the court;
- an administrator's obligation to submit periodic accounts to the Public Trustee;[82]
- the ability of beneficiaries or creditors or the Public Trustee to compel account when an administrator defaults on this obligation;[83]
- the obligation of administrators or executors holding property belonging to a person who is not *sui juris* or not resident in the State to pay or deliver the property to the Public Trustee one year after the death of the intestate or testator or within six months after the property has been sold or realised.[84]

Save for the third example, there are no corresponding checks and balances against maladministration by executors, and no requirement for executors to provide third party security against their maladministration.

The pre-requisite for security against incompetent or dishonest dealing with a deceased estate applies only in cases of intestacy and not also to deceased estates for which there is a grant of probate. It has traditionally been assumed that in appointing an executor, a testator has shown confidence in their competence and honesty, but there can be no such confidence when the appointment is by the State (through its courts).[85] Hence, for

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standard form of advice should be given to the surety before entering into the guarantee as a condition of the enforceability of the guarantee. *Thirty-ninth Report of the Law Reform Committee of South Australia relating to the Reform of the Law of Suretyship,* 1976, 8 [7].

[81] See *National Committee's Report*, [9.87]. Other possible courses of action include the court appointing an additional administrator at the outset, or, after the grant has been made, the beneficiaries taking administration proceedings to achieve the removal and replacement of an administrator who turns out to be incompetent or dishonest. In South Australia, the court may appoint more than one administrator - *Administration and Probate Act 1919* (SA) s 23. However, it has no express power to pass over an applicant and appoint someone further on in the statutory order of priority for administrators. Rule 32 of the *Probate Rules 2004* (SA) merely identifies who may be appointed in default should the members of the eligible pool it described be cleared off.

[82] *Administration and Probate Act 1919* (SA) s 56.

[83] Ibid s 58.

[84] *Administration and Probate Act 1919* (SA) s 65.

[85] The National Committee challenged this reasoning in Volume 1 of its Report:

> 9.81 Bonds and sureties have never been required of executors, and, with the exception of arguments based on the general desirability of assimilating the roles of executors and administrators, there has never been any real movement to subject executors to such a requirement.

grants of letters of administration, there are safeguards, in the form of security requirements, against loss caused by maladministration, and for grants of probate there are none.

However, in modern times there is no evidence that administrators breach their duties more often or more seriously than executors, and no evidence that executors are any more qualified than court-approved administrators to do the job. In these circumstances, it is hard to justify why beneficiaries and creditors of intestate estates should have an additional remedy of recourse against third parties that is not thought necessary for, and indeed is denied to, beneficiaries and creditors of testate estates.

Against reform

Laws about the administration and distribution of deceased estates contemplate that people given this responsibility may often be private individuals with little or no relevant experience. The risk of maladministration is therefore relatively high and the law should ensure that those who suffer loss as a result have a failsafe method of obtaining compensation for that loss.

If the option of recovery against a third party were removed, there would be almost no effective remedy, let alone a failsafe one. Their only recourse would be against the administrator as trustee or by way of a common law claim of *devastavit* for loss caused by wilful default and, if the administrator had acted fraudulently and was successfully prosecuted for an offence of dishonesty, the possibility of recompense through sentence orders for restitution of property[86] or compensation.[87]

The risk and expense of bringing civil actions for compensation may be prohibitive, especially if the deceased estate is bankrupt or the administrator cannot afford to make good the loss personally. In addition, an administrator, as trustee of the deceased's estate, has a right of indemnity out of trust assets in respect of legal costs which are properly incurred in administering the estate. Hence a suit, if properly defended, may simply diminish the amount available in the estate for compensating the plaintiff's loss.[88]

9.82 The National Committee considers that there is no reason to suppose that an estate that is being administered by an administrator is at any greater risk of maladministration than an estate that is being administered by an executor. On the contrary, given the order of priority for letters of administration which largely follows the order of the intestacy beneficiaries' interest in the estate, an administrator will have at least the same, and possibly a greater, interest in the proper administration of an estate than an executor, who will not necessarily be a beneficiary under the deceased's will. Further, at least in a contentious case, the court is able to scrutinise the applicant's suitability at the time a grant is being sought.

[86] *Criminal Law (Sentencing) Act 1988* (SA) s 52.

[87] Ibid s 53.

[88] Although see *Frost v Bovaird* [2012] FCAFC 60 which supports the view that the estate should not indemnify the administrator for costs incurred in defending a beneficiaries' dispute. This was an appeal by the executors of a bankrupt deceased estate against directions of the Federal Court that included the extent to which the trustee in bankruptcy should indemnify the executors for the costs of defending an action in *devastavit* brought by the only creditors of the estate (who were also the beneficiaries). The creditors (a sister of the deceased and her son) successfully sued the executors (the deceased's children and estranged wife) for family provision for the aged care and accommodation expenses of the sister and to enforce a promise to lend her son a large sum for 10 years. When the estate did not have enough money to pay them under this order, the executors obtained orders to place the estate in the hands of a trustee in bankruptcy. The creditors then sued the executors in the Supreme Court in *devastavit* in relation to sums of money paid to third parties, including one of the executors, and this action was one of the proceedings in contention by the trustee in bankruptcy before the Federal Court. On the question of whether the

The attractions of recourse to a fund separate from the estate in the form of an administrator's bond or surety's guarantee are that recovery does not depend on proof of wilful default and that compensation for default may be achieved without the risk that this may correspondingly deplete the estate. Although it is possible to take preventative action by bringing administration proceedings,[89] this may be beyond the resources of potential beneficiaries or creditors and may or may not be effective in preventing or limiting their loss.

Applications to reseal interstate grants

For reform

In South Australia, the requirement for a surety's guarantee before an interstate grant of letters of administration can be resealed arises in the same circumstances as for a local grant (i.e. in the specific circumstances identified in the Act).[90] The amount secured is the sworn gross value of the property within South Australia or such lesser amount as a court may require.[91]

Arguments for removing this requirement include all those pertaining to local grants. The rarity of cases of maladministration or enforcement of guarantees and the difficulty in finding companies or individuals to guarantee the administration of estates are phenomena throughout Australia.

Another argument is that the risk of maladministration in relation to property within South Australia that is subject to a grant made outside the State is no greater than it would be if the grant relating to that property was made in South Australia. If the law of the jurisdiction in which the original grant was made does not require security, or, if it did but the court to which the original application was made dispensed with the requirement in this case, there is no reason for a resealing court to require it. The resealing has nothing to do with protecting the interests of South Australian beneficiaries (that is, those whom the South Australian law requiring sureties seeks to protect) but rather to approve the authority of the administrator to deal with the South Australian property identified in the resealing application.

It should also be noted that the National Committee has proposed that all Australian jurisdictions abolish their requirements for grants made in other Australian jurisdictions to be resealed.[92] If that were to happen in South Australia, there would be no need for separate requirements for security for such grants. (The South Australian Law Reform

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executors' costs in defending that claim should come from the estate, the Full Court held that 'it was open to the primary judge in the exercise of his discretion, to give effect to the general position ... in respect of the incidence of a trustee's legal costs incurred in defending a beneficiaries dispute, namely, that the costs do not come out of the estate'.

[89] Administration proceedings are discussed briefly earlier in this paper under *Compensation for loss arising from maladministration.*

[90] *Administration and Probate Act 1919* (SA) s 18, referring to s 31.

[91] Ibid s 18.

[92] See for example, *Recognition of Interstate and Foreign Grants Discussion Paper* (2001), Queensland Law Reform Commission on behalf of the National Committee (QLRC WP 55, December 2001) and *National Committee's Report*, Chapters 31-39.

Institute will be reviewing the need to reseal grants made outside South Australia as part of its succession law reform project).

Against reform

The argument against this model and its application to the resealing of grants of administration made outside the State is that although the administrator under a resealed grant is subject to the same obligations and liabilities as an administrator under a local grant,[93] a South Australian court has little real control over the administration of a grant made elsewhere. For this reason the law should require a surety to protect the interests of potential beneficiaries in respect of property that is located in South Australia.[94]

Some reform models

Set out below is a range of models for reforming the laws about sureties' guarantees. The models do not include leaving the law as it is or requiring an administrator's bond.

Model 1 would remove the requirement for sureties' guarantees or indeed any other form of security for the administration of a deceased estate.

Model 2, would do the same as Model 1, but would also change the way in which administrators are appointed, so that appointment is by the consent of the beneficiaries.

Model 3, would do the same as Model 1, but would also put in place additional measures to reduce the likelihood of and remediate the effects of maladministration.

Model 4 would come into play if security were no longer to be required for the administration of deceased estates (for example under Models 1, 2, and 3). It would give beneficiaries an avenue of last resort for covering their loss through access to a compensation fund.

Model 5 would give the court discretion to require sureties' guarantees in certain defined circumstances or when it thought it appropriate.

Model 6 would do the same as Model 5 but also put in place additional measures to reduce the likelihood of maladministration.

Model 1

Security requirement removed

The effect of this Model, which would remove any requirement for administration security, would be:

- to assume that a person to whom the court grants letters of administration is competent to administer the estate (much in the same way that an executor appointed by the testator is assumed to be competent, as to which see earlier discussion);

[93] *Administration and Probate Act 1919* (SA) s 17.
[94] Ibid s 18.

- to rely on existing measures to prevent maladministration (see earlier discussion); and
- to deny those who suffer loss as a result of maladministration the opportunity to recover compensation under a guarantee put up by a third party.

Model 2

Security requirement removed but administrators are appointed by consent

Under this model, any requirement for administration security would be removed and instead the responsibility for promoting the proper administration of the deceased estate would fall upon the beneficiaries, in that an administrator could not be appointed without their consent or, at least, agreed lack of objection.

For beneficiaries who were not *sui juris* (competent to make their own decisions), the consent decision would be made by their attorney or administrator (for adults) or by their parent or guardian (for infants).

Each consent or indication of lack of objection would be annexed to the applicant's oath.[95]

If there were no consensus (in the terms just described), the remaining options would be:

- for the beneficiaries to reach consensus on a different administrator;
- failing such consensus, for the court, with the consent of the parties, to appoint a legal practitioner with experience in administration as co-administrator with the originally proposed or any other eligible administrator;
- as a last resort, for the court to appoint an experienced legal practitioner or the Public Trustee or a trustee company as sole administrator.

For this model to work, an applicant without the necessary consents or lack of objection would be treated as having renounced his or her entitlement to letters of administration.

A problem with this model is that a parent or guardian of an infant beneficiary or an adult beneficiary who is not *sui juris* may be in a position of conflict of interest or duty. One possible way to overcome this might be to give the court power to appoint a co-administrator in doubtful cases.

This model would treat beneficiaries of intestate estates differently from beneficiaries under a valid will. Under the current law, beneficiaries under a will have no collective say in the choice of executor (who is nominated by the testator), and neither do beneficiaries of intestate estates, where the choice of administrator is governed by a statutory order of priority. This model would give beneficiaries of intestate estates, collectively, a part to play in choosing who will administer the estate.

There is a risk that, under this model, beneficiaries' choices as to whether to consent or object to an application may be uninformed or purely subjective, and so defeat the aim of promoting the proper and prompt administration of deceased estates.

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[95] *Probate Rules 2004* (SA) r 11.01: Every application for a grant must be supported by an oath in the form applicable to the circumstances of the case, which must be contained in an affidavit sworn by the applicant, and by such other papers as the Registrar may require.

A remedy, if one were needed, would be for beneficiaries to be provided with a standard written explanation of the duties of administrators to guide their assessment of the suitability of an applicant. However, the experience of legal practitioners in this field is that, mostly, beneficiaries are only too conscious of whether an applicant is suitable.

Model 3

Security requirement removed and there are additional measures aimed at preventing and relieving the effects of maladministration

This model would forbid any requirement for administration security but would amend the Act to

- give statutory expression to the duties of administrators and executors, with a statutory liability for neglect of duty or failure to perform a duty and a wide powers of relief, including awarding damages;
- give the court an express power, before granting letters of administration or at any time during the administration of the estate, to require undertakings to report regularly in complicated estates; and
- give the court express powers, before granting letters of administration or at any time during the administration of the estate, to substitute a person other than the applicant or administrator as administrator or require an application to be by joint administrators or by a corporate administrator.

Statutory expression of duties of administrators and executors

As the National Committee pointed out in recommending this for the model legislation:

> Although professional personal representatives should be aware of these duties, the statutory expression of these duties emphasises their importance, as well as serving to inform lay personal representatives of their duties.[96]

The National Committee recommended a model law along the lines of a provision in Queensland.[97] The statutory expression of these duties would be accompanied by a statutory liability for neglect of or failure to perform a duty (including but not limited to the legislated duties) and a power in the court to grant relief in any way it saw fit, including awarding damages.[98]

The argument for such statutory expression, especially where the remedy of calling in a surety's guarantee has been removed, is that it reduces the risk of maladministration.

The risk reduction is arguably greater when the statutory expression of an administrator's duties is accompanied by powers in the court to control who administers the estate and to require periodic accounting for it, and to award damages in the event of breach of those duties.

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[96] *National Committee's Report* [11.19].
[97] *Succession Act 1981* (Qld) s 52.
[98] See *National Committee's Report,* Recommendation 14-1. The model law would be a version of *Succession Act 1981* (Qld) s 52(2), modified to include a failure to perform as well as neglect and to make the liability refer to any duty, not just the legislated ones.

Arguments against the statutory expression of an administrator's duties include that it cannot be exhaustive and is therefore of little use to administrators in difficult or unexpected situations.

Arguments against a statutory power to award damages for breach of duty are that it offers no more than what is already available at common law.

Power to require undertakings

Before granting letters of administration, or at any time during the administration of the estate, the court would have a statutory power to require an undertaking from the administrator to engage an investigating accountant to provide regular and accurate reports to the Court and the Public Trustee, and an undertaking from the accountant in similar terms.

This was the strategy used by Williams J in *Estate of J Deceased*[99] after the applicant administrator had demonstrated the prohibitive cost of engaging a surety for this very large deceased estate. It enabled him to replace the existing bond with surety with a new bond (for the same amount of penalty) without surety.

This proposal should not be confused with the separate current requirement for prospective administrators to file an inventory of assets and liabilities before the grant is made and to update it with any other assets or liabilities that become known after the grant is made.

Under this proposal, the legislation would give the court the ability to enforce these orders in such a way that anyone who suffered direct or indirect loss as a result of a breach of the undertaking would be compensated by the person breaching the undertaking so that this person must repay to the estate any financial benefit that is attributable to the breach.[100]

Although the court can use its inherent powers to require such undertakings, this option would give it a specific statutory discretion and statutory means of enforcing its order.

The question then is the extent to which the statutory discretion should limit, correspond with or replace the court's existing power.

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[99] *Estate of J* [1999] SASC 364. In this case the estate was extremely large and, there being no other commercial alternative within Australia or overseas, a bank had agreed to stand as surety only upon payment of substantial fees and agreement to onerous conditions. The real issue was more the size of the estate to be administered than a risk of maladministration. The judge dispensed with a surety on condition that the administrator undertook to engage independent investigative accountants to provide periodic reports to the Court and the Public Trustee, and the accountant also made a similar undertaking.

[100] Examples may be found in Commonwealth Acts that permit a regulatory body to require undertakings: for example the *SPAM Act 2003* (Cth) s 29, and the *Competition and Consumer Act 2010* (Cth) s 87b. Applied to courts granting letters of administration, they could be adapted to permit a court, on finding a breach of an undertaking (for example by failure to report or providing reports that are not accurate), to make any or all of these kinds of orders: directing the person to comply with the undertaking, directing the person to pay into the estate an amount up to the amount of any financial benefit that the person has obtained directly or indirectly that is reasonably attributable to the breach, directing the person to compensate any other person who has suffered loss or damage as a result of the breach, or any other order the Court considers appropriate.

If the discretion is to come into play notwithstanding any inherent power and without limiting that power, then, logically, it should do so only in specific circumstances. Examples might include where the size of the estate is very large, or where the distribution of the estate is complicated, or where the grant will need to be resealed in other jurisdictions to gather in all the estate.

The order requiring an undertaking could be enforced by the court on its own motion or on application by the Public Trustee or a person with an interest in the administration of the estate.

Alternative powers to substitute an administrator or joint administrators or to require the application to be by joint administrators or by a corporate administrator

A statutory discretion to require undertakings is not a solution for situations where there is doubt about the ability of the person seeking to administer the estate, given its nature and potential difficulties in distribution.

In these circumstances one way of reducing the risk of maladministration may be to give the court two additional powers:

(a) to 'pass over' the applicant and make the grant to another person, or, if the grant has already been made, to revoke the grant before appointing a different administrator or different joint administrators; or

(b) to require the application to be by joint administrators (the original applicant and another person) or, failing that, by a corporate administrator, or if the grant has already been made, to revoke it and appoint joint administrators or a corporate administrator.

The first of these powers, insofar as it would allow the substitution of one candidate by another, is the one proposed by the National Committee. The Committee preferred this approach to requiring the application to be by joint administrators (on the ground of difficulty) or a corporate administrator (owing to the expense).[101]

Model 3 would give both these options to the court when it anticipates difficulties with a particular person fulfilling the duties of an administrator or discerns this person having difficulties after the grant is made.

Note that although there is a power in the Act to appoint more than one administrator, it is a general power that is not addressed at these particular circumstances.

Model 4

Compensation fund should sureties' guarantees no longer be available

This is the only model that offers a remedy outside those available at common law for beneficiaries who suffer loss as a result of maladministration.

The model is designed to come into play if the law is changed to remove any requirement for sureties' guarantees.

[101] *National Committee's Report* [4.306].

It would establish a fund to provide last resort compensation to beneficiaries where recourse to all other sources of compensation had failed to cover their loss.

The sources of income available to the fund would be:

- (new) levies on applications for letters of administration or letters of administration with the will annexed;
- any monies lawfully paid into the fund; and
- interest or other income accruing from investment of the money in the fund.

Broadly, successful applicants would need to satisfy these criteria:

(a) that they had suffered loss as a result of maladministration of the estate;

(b) that they had pursued all available avenues to recover that loss (for example, suing the administrator (as to which, see further discussion below)); and

(c) that despite these efforts, their loss was not fully compensated.

If possible, successful claimants' costs should be paid from the fund.

Also, it may be possible to allow a claim even when proceedings have not been brought against the defaulting administrator, if it would be futile to do so owing to the administrator's lack of means or absconding from the jurisdiction etc. This would go some way to ensuring the scheme itself did not encourage waste of court resources or force claimants to expend time and money on fruitless litigation.

An award of compensation from the fund would be reduced to the extent of any compensation received from other sources by a claimant.

The fund may not be able to fully compensate a claimant. The level of compensation would depend on the size of the fund and the number of claims made.

Claims could be dealt with annually. At the end of each financial year the fund manager could identify the number of eligible claims and then determine the amount available for them, using a formula along these lines: F – X (where F is the total amount of the fund and X is a statutory amount or percentage that must be retained in the fund). The available amount could then be allotted to the various claims and if the claims exceeded the available amount, they would be paid rateably.

Considerations relevant to this model include:

(1) *Whether a statutory compensation fund is warranted*, given the rarity of surety guarantee enforcement litigation.[102] The degree of unmet need in South Australia for financial assistance to compensate for loss caused by administrators' default has not been officially identified and would probably be insignificant.

(2) *Whether such a fund would be economically viable.* The start up costs (if an initial grant from Parliament is thought necessary), the costs to Government of preparing and

[102] See previous discussion in this paper and *National Committee's Report* [9.47]-[9.51].

enacting legislation and raising public awareness about the scheme and the costs of establishing and maintaining a claims handling and appeal procedure.[103]

(3) *Whether such a fund would provide a viable remedy for those who suffer loss at the hands of defaulting administrators?* Making a successful claim may not be easy and may be expensive if the claimant needs legal representation.

Model 5

Court may sometimes require sureties' guarantees

This model is based on the approach taken in Western Australia[104] and Victoria[105], where the requirement for a surety guarantee has been abolished but the court has power to require one in particular circumstances and has specific power to require joint administrators or trustee company administrators in some circumstances.

The same arguments for abolishing the requirement for administration security support a model in which requiring a security is discretionary rather than mandatory.

However, having a discretionary requirement makes the outcome of an application for a grant of letters of administration less certain than having a mandatory requirement or no requirement, and uncertainty may necessitate or encourage litigation.

The National Committee noted that the Western Australian Law Reform Commission had recommended against retaining this discretion and recommended removing any requirement for security against the maladministration of intestate estates.[106]

Model 6

Court may sometimes require sureties' guarantees and there are additional measures aimed at preventing maladministration

Under this model, the court would have power to require a surety's guarantee in limited circumstances of heightened risk, but the requirement would not be mandated in those circumstances; and the Act would be amended to put in place the same preventative and remedial measures contemplated in Model 3. A variant of this model is one where the discretion to require a surety's guarantee is at large.

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[103] By way of example, claims on the South Australian victims of crime compensation fund are made to the Crown Solicitor, and if not resolved at that level, by application to the Criminal Injures Division of the District Court, with appeal to the Supreme Court.

[104] *Administration Act 1903* (WA) s 26.

[105] *Administration and Probate Act 1958* (Vic) s 57.

[106] It cites the Law Reform Commission of Western Australia, *The Administration Act 1903,* Report, Project No 88 (1990) [3.10]–[3.13]. Note that the recommendation has not been implemented.

Questions

1. Should a person other than the administrator of a deceased estate be required, by guarantee, to pay for loss arising from the administrator's breach of duty? Please give reasons for your views.
2. If the law were to be changed so that a third party is **not** to be required to pay for loss arising from an administrator's breach of duty,
   (a) should there be any other changes to the law, for example, measures designed to
      i. encourage competent administration of estates?
      ii. enable the detection and prevention of maladministration before loss is caused?
      iii. minimise the costs of administration to deceased estates?
      iv. reduce delays in distribution of deceased estates caused by problems of administration?
      v. remediate loss caused by breach of an administrator's duties to those entitled to a share in the estate? (See, for example, *Model 3*)
      vi. other(please specify)? (See, for example, *Models 2* and *4*)
   (b) should any such measures apply also to executors?
3. If the law were to continue to require a third party to pay for loss arising from an administrator's breach of duty,
   (a) should a third party guarantee be
      i. required in every case?
      ii. required whenever circumstances identified in the legislation as indicating a heightened risk of maladministration exist (this is the current South Australian law)?
      iii. required whenever the court thinks it necessary in circumstances identified in the legislation as indicating a heightened risk of maladministration? (See, for example, *Model 5*)
      iv. required whenever the court thinks it necessary?
      v. other (please specify)?
   (b) should there be legislated considerations to which the court must have regard in dispensing with a guarantee or changing the amount guaranteed, such as
      i. the size and complexity of the estate?
      ii. the assets and income of the proposed private surety?

iii. the expense for this surety of obtaining a guarantee from a bank or insurance company?

iv. other (please specify)?

4. In relation to intestate estates, and for the purposes of reducing the risk of maladministration, should the court have

   (a) an express power to reject an eligible applicant for letters of administration and appoint someone else?

   (b) an express power to remove an administrator and substitute another person as administrator? (See, for example, *Models 5* and *6*)

   and, if so, in what circumstances should such a power be exercised?

5. Should the court have similar powers in respect of testate estates?

6. What are your views on the reform models suggested in this Issues Paper? Have you any other suggestions?

Please note that you may download these questions from www.law.adelaide.edu.au/reform/publications/

Appendices

22nd Report of the Law Reform Committee of South Australia relating to administration bonds and to the rights of retainer and preference of personal representatives of deceased persons, 1972

The Honourable L. J. King, Q.C., M.P.,
Attorney-General for South Australia.

Sir,

In consequence of your referring to us for consideration the Thirty-First Report of the English Law Commission on this subject we have the honour to report to you as follows.

In South Australia Section 31 of the *Administration and Probate Act, 1919-1960* is as follows:-

> "31. Every person to whom administration is granted shall give bond to the Public Trustee, with one or more surety or sureties, conditioned for-
>
> (a) duly getting in and administering the estate of the deceased;
>
> (b) the delivery by such person at the office of the Public Trustee, within six months from the date of the administration or such extended time as the Public Trustee upon application by the administrator shall allow, of a statement and account, verified by his declaration of all the estate of the deceased, and of his administration thereof;
>
> (c) the delivery by such person to the Public Trustee of an account of his administration of such estate, verified by his declaration, whenever ordered by the Court so to do; and
>
> (d) the performance by him of all acts and things by this Act required to be performed by administrators."

This Section extends not only to persons dying intestate but also to persons to whom Letters of Administration are granted with the Will annexed. The section is further extended to the resealing of grants of Letters of Administration made by Courts of competent jurisdiction outside South Australia by the terms of Section 18 of the Act.

The general provision as to the amount of the penalty of the bond is Section 32 of the Act which reads as follows:-

> "32 Such bond shall be in a penalty of the amount under which the estate of the deceased is sworn; but the Court may reduce the amount of such penalty in any case, and may also order that more bonds than one be given, so as to limit the liability of any surety to such amount as to the Court seems reasonable."

Our Section 32 differs from the English practice which normally requires the bond to be in a penalty of double the amount of the estate.

The penalty of the bond in this State is the gross amount of the estate of the deceased.

There is no power under the ecclesiastical law to dispense with a bond altogether: see *In re The King of Siam* 29 T.L.R. 40**.** By Section 91 of our Act Public Trustee is exempted from the necessity of entering into such a bond and indeed it would be impossible for him to do so as the bond is given in favour of Public Trustee and by Section 33 of the Act a Judge of the Supreme Court may upon being satisfied by affidavit that it is beneficial or expedient so to do order that administration issue without any administration bond being given. On enquiry from the Deputy Registrar it appears that such orders are rarely made.

The forms of bond are contained in rules made by the Judges of the Supreme Court under Section 122 of the Act. The rules relating to administration bonds are contained in Rules 22-26 which read as follows:-

> "22. The administration bond shall be attested by the Registrar or by a Commissioner or other person now or hereafter to be authorized to administer oaths. Every person attesting a bond shall express the time when and the place where he attests the same. Each separate sheet of any bond shall be signed by each of the obligors and by the person attesting the bond. In no case shall the bond be attested by the solicitor or agent of the party who executes it.
>
> 23. (1) Except in a case to which paragraph (2) of this rule applies or where a Judge otherwise orders there shall be two sureties to every administration bond: Provided that only one surety shall be required if the administrator is the husband or wife of the deceased or his or her representative, or the bond is given by a guarantee company approved by the Registrar.
>
> (2) No surety shall be required on an application for a grant of administration if-
>
> (a) the gross value of the estate does not exceed $200,
>
> (b) the application is limited to the prosecution or defence of an action.
>
> (3) The bond shall be in a penalty of the amount under which the estate of the deceased is sworn and the alleged value of such estate shall be verified by affidavit if required by the Registrar.
>
> 24. In all cases of limited or special administration, the administration bond shall be approved by the Registrar.
>
> 25. The Registrar shall so far as possible satisfy himself that every surety to an administration bond is a responsible person.
>
> 26. When any person takes administration in default of the appearance of persons cited, but not personally served with a citation, and when any person takes administration for the use and benefit of a lunatic or person of unsound mind, the sureties to the administration shall justify. This Rule shall also apply to every other grant of administration made to any person for the use and benefit of any other person, except a grant for the use and benefit of minors or infants, falling under Rule 19 hereof."

The forms of the bond are forms 6, 9, 22 and 23 under those Rules.

In Australia as in England the administration bond achieves four purposes:

(a) It repeats, albeit in vague and general terms, the duties of the administrator.

(b) It affords an aggrieved creditor or beneficiary an additional remedy against a defaulting administrator.

(c) Where there are sureties it affords an aggrieved creditor or beneficiary a remedy against the sureties in the event of default by the administrator.

(d) In the case of a grant to a creditor as such it is used as a device to exclude the administrator's rights of retainer and preference.

As far as the statutory duties of an administrator are concerned, these are at present covered by Sections 31 and 56 of the Act. We think that these duties should remain but that they should not be conditioned upon the filing of an administration bond except in certain specific circumstances to which we shall advert later. We agree with the English Report that the general duties of personal representatives are as follows: -

(a) Well and truly to administer the estate according to law.

(b) To make or cause to be made a true and perfect inventory when lawfully called on to do so and to exhibit the same to the Probate Registry when required by law to do so.

(c) To make a true and just account of the administration, whenever required by law to do so.

(d) If the grant is to be obtained on the basis that the deceased died intestate, to deliver up the grant if a will is discovered and proof of it is sought.

With the exception of (c) which is referred to in Section 31 of the Act, the other duties are covered either by the oath which can be enforced by the appropriate proceedings in the Court or by general rules of common law and equity.

The second purpose referred to in the English report, that of affording an aggrieved creditor or beneficiary an additional remedy against a defaulting administrator, seems to us, as it does to the English commentators, to be quite unnecessary because the remedy is always pursued against the sureties and in any case as the English report points out the present practice deprives the Court of the power which it otherwise has under Section 56 of the *Trustee Act 1936* to relieve from liability a trustee who has acted honestly and reasonably and ought fairly to be excused for a breach of trust or omitting to obtain the directions of the Court in that matter.

The third of the four purposes is the real value of the bond at the moment, that is to afford a remedy against the sureties where the administrator has made default or defalcation. It is frequently difficult to get private persons to act as sureties for obvious reasons and in many cases an insurance company acts as surety. The premiums on the policy are by no means insignificant and the policy has to be renewed and a fresh premium paid for each year or part of a year that the administration continues.

In our experience there are very few cases in which it is necessary to enforce the bond against the sureties and in any case of course executors have never been subject to such a liability.

We agree with the English recommendation 14, that the Act should be amended to give the Court a discretionary power to require a bond and sureties in proper cases but that a bond should not be required as of course and that the bond should not as at present be required to be assigned in order to be enforceable (see Section 57 of the Act) but should

automatically enure for the benefit of every person interested in the estate either as creditors, claimants under the *Testator's Family Maintenance Act* or beneficiaries.

We agree with the English recommendation that sureties should be required only in the following cases:-

(a) a creditor as such,

(b) a person taking a grant to the use and benefit of a minor or of someone incapable of managing his own affairs,

(c) a person taking a grant who appears to the Registrar to be resident outside South Australia or where the Registrar considers that there are special circumstances making it desirable to require sureties.

There should be an exemption as in the present English Non-Contentious Probate Rules when the person taking the grant is a practitioner of this Court holding a current practising certificate.

We think it is a matter for government policy whether a surety or sureties ought to be required in very large estates-say those over $100,000.

To compensate for these alterations and to protect beneficiaries from defaulting administrators we recommend the following amendments to the present law-

(1) That Public Trustee be given *locus standi* to move for attachment of an administrator defaulting in any of his undertakings contained in the oath of administrator;

(2) That where administrators are in default in their duties towards Public Trustee either under Section 56 or Section 65 of the *Administration and Probate Act 1919-1970* that Public Trustee have powers equivalent to those in Sections 223 and 225 of the *Income Tax Assessment Act* inserted in the *Administration and Probate Act*. Those powers would provide in substance that any person who failed to comply with Sections 56 or 65 or either of them without lawful justification after notice from Public Trustee commits an offence and that the Court hearing the prosecution may in addition to any penalty imposed order the administrator to do within a time to be specified in the order the act which he has failed neglected or refused to do and that the Crown Law Office act for Public Trustee in the carrying out of this part of his duties.

In any event Public Trustee, the Executor Companies and the Crown or any servant of the Crown or instrumentality of the Crown acting in his or their official capacity should be exempt from any requirements to give a bond or to find sureties.

The only remaining matter is the question of the personal representatives' rights of retainer and preference which at present apply equally to executors and administrators except as a matter of practice where a grant of Letters of Administration is obtained by a creditor in his capacity as creditor. See *Davies* v. *Parry* 1899 1 *Ch.* 602. We see no reason why today an executor or administrator should be able to prefer the debt of one creditor to that of any other creditor of the same class.

There appears to be no such right if the estate of a deceased person is or is to be administered in bankruptcy: see Sections 248, 108 and 109 of the *Bankruptcy Act 1966* and Section 29 of our *Trustee Act 1936-1968* would not protect an executor in such a. case-

and we see no reason why it should apply in cases where the estate is solvent. As far as retainer is concerned a sole executor cannot sue himself and judgment debts still enjoy in this State a preference in payment. It is therefore possible for other creditors of the same class to gain preference over the executor or administrator by bringing action and obtaining judgment. Accordingly in our opinion the right of retainer should not be abolished as has been done in England by the *Administration of Estates Act 1971* Section 10 but should continue to exist in this State.

We recommend that the existing right of preference be abolished both as to executors and as to administrators.

We acknowledge with pleasure the assistance we have received in comments from the Honourable the Chief Justice (Dr. Bray) and Miss Jean Gilmore and the careful scrutiny which the Public Trustee (Mr. Croft) has given to our proposals in relation to administration bonds. We have also been much assisted with statistics and other information furnished by successive Masters of the Court-the now Mr. Justice Forster and Mr. Boehm and the Deputy Registrar of Probates Mr. Ferrett.

We have the honour to be

HOWARD ZELLING

R. G. MATHESON

JOHN KEELER

KEVIN LYNCH

B. R. COX

The Law Reform Committee of South Australia

National Committee Recommendations 9-1 and 9-2[107]

9-1 The model legislation should provide that neither an administration bond nor sureties may be required of an administrator or a person who applies for letters of administration.

See *Administration of Estates Bill 2009* cl 617(1):

> **617 Abolition of administration bond and sureties**
>
> (1) An administrator of a deceased person's estate cannot be required to provide an administration bond or a surety for an administration bond in relation to the grant of representation.

9-2 The model legislation should provide that neither an administration bond nor sureties, nor any other form of security, may be required of a person who applies for the resealing of a grant.

See *Administration of Estates Bill 2009* cl 617(2):

> **617 Abolition of administration bond and sureties**
>
> (2) The holder of a foreign grant of representation[108] or another person applying to reseal a foreign grant of representation cannot be required to provide an administration bond or a surety for an administration bond for the resealing of the foreign grant of representation.

[107] *National Committee's Report*, Vol 4, Chapter 9 and Model Administration Legislation.
[108] For the purposes of these recommendations, the National Committee defines a 'foreign grant of representation' to include grants of probate or letters of administration made in an interstate jurisdiction, or in an overseas jurisdiction prescribed under a regulation.

South Australian legislation

Administration and Probate Act 1919 (SA), ss 31, 17-20, 56, 56A, 58, 65-67, 69

Probate Rules 2004 (SA), rr 49, 32, 33, 34, 36

Administration and Probate Act 1919

Part 2

Division 5—Sealing of grants made outside this State

17—Probate and administration granted in other States or the United Kingdom or by foreign Court to be of like force as if granted in South Australia, on being re-sealed

When any probate or administration granted by any Court of competent jurisdiction in any of the Australasian States or in the United Kingdom, or any probate or administration granted by a foreign court, is produced to and a copy thereof deposited with the Registrar, such probate or administration may be sealed with the seal of the Supreme Court, and thereupon shall have the like force and effect and the same operation in this State, and every executor and administrator thereunder shall, subject to subsection (4) of section 65 of this Act, have the same rights and powers, perform the same duties, and be subject to the same liabilities, as if such probate or administration had been originally granted by the Supreme Court.

18—Administration guarantees may be required before administration sealed

(1) A surety must be provided in accordance with this section before the sealing of administration under section 17 if a surety would be required under section 31 on the granting of such administration.

(2) The surety must guarantee to make good, subject to this section, any loss that a person interested in the administration of the South Australian estate of the deceased may suffer in consequence of a breach by the administrator of his or her duties in administering the South Australian estate.

(3) The maximum liability of a surety under a guarantee given for the purposes of this section is—

(a) the amount under which the South Australian estate of the deceased is sworn; or

(b) if the Court, on application, orders a lesser amount, the lesser amount.

(4) If a guarantee is given for the purposes of this section, the Court may, at any time, on the application of a person interested in the administration of the South Australian estate—

(a) require that there be a further or additional guarantee; or

(b) order that the maximum liability of a surety under the guarantee is reduced to an amount that the Court thinks reasonable.

(5) If a further or additional guarantee is not given as required under subsection (4)(a), the Court may cancel the seal of the administration.

(6) A guarantee required under this section operates for the benefit of every person interested in the administration of the South Australian estate as if the guarantee were contained in a deed to which the surety and every such person are parties (and, where there are two or more sureties, as if they had bound themselves jointly and severally).

(7) A proceeding may only be brought on a guarantee with the permission of the Court and on such terms and conditions as the Court thinks fit.

(8) If, on the application of a surety, it appears to the Court that—

(a) the South Australian estate is being wasted, or is in danger of being wasted; or

(b) the surety is being in any way prejudiced, or is in danger of being prejudiced, by the act or default of the administrator; or

(c) a surety desires to be relieved from further liability,

the Court may grant such relief as it thinks fit.

(9) This section does not apply to—

(a) the Public Trustee; or

(b) any other agency or instrumentality of the Crown; or

(c) a trustee company.

(10) The Court may, if satisfied that it is beneficial or expedient to do so, dispense with the requirement to provide a surety.

(11) An order under subsection (10) may be obtained without notice to any other interested person on the application of the person who would be the administrator on the sealing of the administration.

(12) If a surety dies or ceases to be *sui juris*, the administrator must, as soon as reasonably practicable, apply to the Court for directions.

Maximum penalty: $2 000.

(13) In this section—

South Australian estate, in relation to the estate of a deceased person, means the property of the person's estate situated in South Australia at the date of the person's death.

19—As to foreign probate or administration

(1) In section 17—

probate or administration granted by a foreign Court means any document as to which the Registrar is satisfied that it was issued out of a court of competent jurisdiction in a foreign country other than an Australasian State, or the United Kingdom, and that in such country it corresponds to a probate of a will or to an administration in this State.

(2) In order to satisfy himself, as mentioned in subsection (1) of this section, the Registrar may accept a certificate from a consul or consular agent in this State of the foreign country, or such other evidence as appears to him sufficient.

20—Definitions

In this Division—

administration includes ***exemplification of letters of administration***, or such other formal evidence of letters of administration purporting to be under the seal of a court of competent jurisdiction as, in the opinion of the Registrar, is sufficient;

Australasian States means all the States of the Commonwealth of Australia other than the State of South Australia, and includes the Dominion of New Zealand and the colony of Fiji, and any other British colonies or possessions in Australasia now existing or hereafter to be created, which the Governor may from time to time by proclamation declare to be Australasian States within the meaning of section 17;

probate includes ***exemplification of probate***, or any other formal document purporting to be under the seal of a court of competent jurisdiction, which, in the opinion of the Registrar, is sufficient;

United Kingdom means Great Britain and Ireland and includes the Channel Islands.

Part 2

Division 6—General provisions relating to granting and revoking of probate and administration

31—Administration guarantees

(1) A person to whom administration is granted must provide a surety in accordance with this section if—

(a) the person is not resident in this State; or

(b) the person has any legal or equitable claim against, or interest in, the estate of the deceased arising from a liability incurred by the deceased before his or her death; or

(c) any person who is not *sui juris* is entitled to participate in the distribution of the estate; or

(d) the Court is of the opinion that in the circumstances of the case a surety is required.

(2) The surety must guarantee to make good, subject to this section, any loss that a person interested in the administration of the South Australian estate of the deceased may suffer in consequence of a breach by the administrator of his or her duties in administering the South Australian estate.

(3) The maximum liability of a surety under a guarantee given for the purposes of this section is—

(a) the amount under which the South Australian estate of the deceased is sworn; or

(b) if the Court, on application, orders a lesser amount, the lesser amount.

(4) If a guarantee is given for the purposes of this section, the Court may, at any time, on the application of a person interested in the administration of the South Australian estate—

(a) require that there be a further or additional guarantee; or

(b) order that the maximum liability of a surety under the guarantee is reduced to an amount that the Court thinks reasonable.

(5) If a further or additional guarantee is not given as required under subsection (4)(a), the Court may revoke the administration.

(6) A guarantee required under this section operates for the benefit of every person interested in the administration of the South Australian estate as if the guarantee were contained in a deed to which the surety and every such person are parties (and, where there are two or more sureties, as if they had bound themselves jointly and severally).

(7) A proceeding may only be brought on a guarantee with the permission of the Court and on such terms and conditions as the Court thinks fit.

(8) If, on the application of a surety, it appears to the Court that—

(a) the South Australian estate is being wasted, or is in danger of being wasted; or

(b) the surety is being in any way prejudiced, or is in danger of being prejudiced, by the act or default of the administrator; or

(c) a surety desires to be relieved from further liability,

the Court may grant such relief as it thinks fit.

(9) This section does not apply to—

(a) the Public Trustee; or

(b) any other agency or instrumentality of the Crown; or

(c) a trustee company.

(10) The Court may, if satisfied that it is beneficial or expedient to do so, dispense with the requirement to provide a surety.

(11) An order under subsection (10) may be obtained without notice to any other interested person on the application of the person entitled to obtain administration.

(12) Without limiting the effect of subsection (10), the Court may, if administration is granted to two or more persons and the Court is satisfied that it is beneficial or expedient to do so, dispense with the requirement to provide a surety.

(13) If—

(a) a surety dies or ceases to be *sui juris*; or

(b) after the grant of administration to two or more persons, an administrator dies or ceases to be *sui juris* or refuses or fails to carry out the duties of an administrator,

the administrator, or the other administrator, as the case may be, must, as soon as reasonably practicable, apply to the Court for directions.

Maximum penalty: $2 000.

(14) In this section—

South Australian estate, in relation to the estate of a deceased person, means the property of the person's estate situated in South Australia at the date of the person's death.

Part 3

Division 3—General provisions relating to administration of estates

56—Statement and account to be delivered

(1) Every administrator shall, within six months from the date of the administration, or within such extended time as the Public Trustee upon application by the administrator shall allow, deliver at the office of the Public Trustee a statement and account, verified by his declaration, of all the estate of the deceased and of his administration thereof.

(2) This section shall not apply in any case where the administrator is a limited company incorporated or taken to be incorporated under the Corporations Act 2001 of the Commonwealth and is acting as administrator in pursuance of any powers granted to it by any Act.

56A—Court may order delivery of statement and account

The Court may at any time, upon the application of the Public Trustee or any person interested in the estate of a deceased person, or on its own initiative, order an administrator to deliver at the office of the Public Trustee a statement and account, verified by the administrator's declaration, of all the estate of the deceased, and of his administration thereof.

58—Proceedings to compel account

(1) If at any time any administrator—

(a) makes default in compliance with section 56; or

(b) being ordered to deliver an account of his administration as mentioned in section 56A, neglects to deliver the same verified as aforesaid for one month after the date appointed for that purpose,

the Public Trustee or any person interested may cause the administrator to be summoned before a Judge to show cause why he should not deliver such account forthwith.

(2) In case the administrator, being duly served with such summons, does not attend before the Judge at the time and place mentioned therein, or does not show any reasonable cause to the contrary, the Judge may from time to time order the administrator to deliver the statement and account, or the account, verified as aforesaid, either forthwith or within such further time as the Judge thinks fit to allow.

(3) On default in compliance with any order under subsection (2), a Judge may order the administrator in default to pay to the Public Trustee or person so applying any sum not exceeding one thousand dollars for every such default.

(4) The fact that proceedings have been or are being taken under this section does not prevent an action from being brought on a guarantee given under section 18 or 31.

(5) All costs and expenses of and incidental to the summoning of any administrator pursuant to this section shall either be chargeable to or paid out of the estate in respect of which such administrator is summoned, or shall be paid by such administrator, as the Judge orders.

65—Administrator to pay over money and deliver property to Public Trustee

(1) Every administrator who is possessed of or entitled to any property within this State, whether personal or real, belonging to any person who—

(a) is not *sui juris*, or

(b) is not resident in this State, and has no duly authorised agent or attorney therein:

shall deliver, convey, or transfer such property to the Public Trustee immediately after the expiration of one year from the date of the death of the intestate or testator, or within six months after such sooner time as the same or such portion thereof as is available for that purpose, has been sold, realised, collected, or got in.

(2) The Public Trustee shall then administer such property according to law, and in accordance with any will affecting such property.

(2a) The Public Trustee may, in his discretion, (but subject to the provisions of any will or instrument of trust) realise, or postpone the realisation of, any real or personal property delivered, conveyed or transferred to him under subsection (1) of this section.

(3) This section shall not apply in any case where the administrator is a limited company incorporated or taken to be incorporated under the *Corporations Act 2001* of the Commonwealth, and is acting as administrator in pursuance of any powers granted to it by any Act.

(4) This section shall not apply to an administrator acting under any probate or administration not granted by the Supreme Court but sealed with the seal of the Supreme Court in pursuance of the provisions of section 17 of this Act.

(5) Subject to the provisions of any will or instrument of trust, the Public Trustee may, if he is satisfied that it will be advantageous to the beneficiaries, authorise the sale of any trust property, not exceeding four thousand dollars in value, to the administrator, or to the administrator conjointly with any other person, notwithstanding that the property has not been offered for sale by public auction or otherwise.

66—Effect of delivery etc to Public Trustee

The delivery, conveyance or transfer of property to the Public Trustee under section 65 has the effect of discharging the administrator and any surety from further responsibility in respect of the property.

67—Judge may dispense wholly or partially with compliance with section 65

(1) A Judge may, on being satisfied by affidavit that it is beneficial or expedient so to do, order—

(a) that any administrator, or proposed administrator, shall not be bound by section 65; or

(b) that any administrator, or proposed administrator, shall not be bound by the said section 65 until after a certain time to be mentioned in the order.

(2) The time mentioned in any order made under subdivision (b) of subsection (1) may be extended by a subsequent order.

(3) Any order under subsection (1) or (2) may be obtained without notice to any interested party on the application of the administrator or proposed administrator.

(4) An order under subdivision (a) of subsection (1) may be granted notwithstanding that an order has already been made under subdivision (b) of subsection (1).

(5) If the Court so directs, an order under this section has the effect of discharging the administrator and any surety from further responsibility in respect of the property to which the order relates.

(6) The Public Trustee, or any person interested, may issue a summons requiring the administrator, or proposed administrator, to appear before a Judge to show cause why any order made under this section should not be set aside, and the Judge may set aside such order, or vary the same, or make such other order as seems to him best.

69—Public Trustee and other persons may obtain judicial advice or direction

(1) The Public Trustee shall, and any trustee, executor, or administrator may, when in difficulty or doubt, apply to a Judge for advice or direction as to matters connected with the administration of any estate, or the construction of any will, deed, or document.

(2) Such application may be made either without notice to or upon summons served upon any of the parties interested.

(3) Any person interested in any estate, who is dissatisfied with the conduct of the Public Trustee in any matter connected with the management or administration thereof, may apply to a Judge by summons to be served upon the Public Trustee to review such conduct.

(4) A Judge may, upon the hearing of an application under this section, make any order, declaratory or otherwise, that he sees fit as to the administration of the estate, or the construction of the will, deed, or document, which is the subject of the application, and also as to the costs of the application.

(5) Any such order made in the absence of an interested party shall have the same effect, or be of the same force or validity, so far as regards protection to the Public Trustee, or other trustee, or the executor, or administrator, as if the same had been a decree or order made in an action where all parties concerned were represented.

(6) The Judge may refer any question of law arising on an application under this section for the opinion of the Supreme Court, or may direct an issue to be tried by, or an action to be instituted in, the Supreme Court.

Probate Rules 2004 (SA)

Order of priority for grant in case of intestacy

32.01 Where the deceased died on or after the 29th January 1976, wholly intestate, the persons entitled in distribution under Part IIIA of the Act shall be entitled to a grant of administration in the following order of priority, namely -

(i) Where the spouse [or the domestic partner] of the deceased has survived the deceased for 28 days, the surviving spouse [or the domestic partner];

(ii) The children of the deceased, or the issue of any such child who died before the deceased;

(iii) The father or mother of the deceased;

(iv) Brothers and sisters of the deceased, or the issue of any deceased brother or sister who died before the deceased;

(v) Grandparents of the deceased;

(vi) Uncles and aunts of the deceased and the issue of any deceased uncle or aunt who died before the deceased.

32.02 In default of any person having a beneficial interest in the estate, administration shall be granted to the Attorney-General if the Attorney-General claims bona vacantia on behalf of the Crown.

32.03 If all persons entitled to a grant under Rule 32.01 have been cleared off, a grant may be made to a creditor of the deceased or to any person who, notwithstanding that he or she has no immediate beneficial interest in the estate, may have a beneficial interest in the event of an accretion thereto:

Provided that the Registrar may give permission to a creditor to take a grant if the persons entitled in Rule 32.01(i) have been cleared off and if the Registrar is satisfied that in the circumstances of the case it is just or expedient to do so.

32.04 Subject to Rule 35.03, the personal representative of a person in any of the classes mentioned in Rule 32.01 or the personal representative of a creditor shall have the same right to a grant as the person whom he or she represents:

Provided that the persons mentioned in Rule 32.01(ii) shall be preferred to the personal representative of a spouse [or a domestic partner] who has died without taking a beneficial interest in the whole estate of the deceased as ascertained at the time of the application for the grant.

32.05 For the purposes of this Rule it is immaterial whether a relationship is of the whole blood or the half blood and references to "children of the deceased" include references to the deceased's natural or adopted children and "father or mother of the deceased" shall be construed accordingly.

Right of assignee to a grant

33.01 Where all the persons entitled to the estate of the deceased (whether under a will or an intestacy) have assigned their whole interest in the estate to one or more persons, the assignee or assignees shall, with the permission of the Registrar replace, in the order of priority for a grant of administration, the assignor or, if there are two or more assignors, the assignor with the highest priority.

33.02 Where there are two or more assignees, administration may be granted with the consent of the others to any one or more (not exceeding three) of them.

33.03 In any case where administration is applied for by an assignee, the instrument of assignment must be lodged in the Registry together with the renunciation and consent of all persons entitled to a general grant.

Joint grants of administration

34.01 An application for a joint grant of administration by two or more persons entitled in the same order of priority must be supported by an affidavit setting out the grounds upon which the joint administration is sought:

Provided that where representation is sought by more than three persons the Registrar's order must be obtained.

34.02 An application to join with a person entitled to a grant of administration a person entitled in distribution but in a lower order of priority must be supported by an affidavit by the person entitled to the grant acknowledging the right to take administration solely, the consent of the person to be joined as administrator and the renunciation of all persons entitled in priority to such last mentioned person:

Provided that in default of the renunciation of all such persons entitled in priority the Registrar's order must be obtained.

(...)

Exceptions to Rules as to priority

36.01 Nothing in Rules 31 or 32 shall operate to prevent a grant being made to any person to whom a grant may or may require to be made under any enactment.

36.02 Neither Rule 31 nor Rule 32 shall apply where the deceased died domiciled outside the State of South Australia, except in a case to which the proviso to Rule 40.01 applies.

Surety's Guarantee

49.01 Subject to these Rules a guarantee must be provided as a condition of granting administration where –

(a) a guarantee is required under sections 18 and 31(1) of the Act;

(b) it is proposed to grant administration –

(i) under Rule 31(v) or Rules 32.03 or 32.04 to a creditor or the personal representative of a creditor or to a person who has no immediate beneficial interest in the estate of the deceased but may have such an interest in the event of an accretion to the estate;

(ii) under Rule 31(vi) to a person having no interest under the will of the deceased but who would have been entitled to a grant if the deceased had died wholly intestate;

(iii) under Rule 37 to a person or some of the persons who would, if the person beneficially entitled to the whole of the estate died intestate, be entitled to his or her estate;

(iv) under Rules 41.01 and 41.02 to the attorney of a person entitled to a grant;

(v) under Rule 42 for the use and benefit of a minor;

(vi) under Rule 44 for the use and benefit of a person who is by reason of mental or physical incapacity incapable of managing his or her affairs;

(vii) under Rule 63; or

(viii) under Rule 70 to an administrator *pendente lite*.

(c) the Registrar considers that there are special circumstances making it desirable to require a guarantee.

49.02 Unless the Registrar or the Rules otherwise direct -

(a) a guarantee shall be given by two sureties: Provided that only one surety shall be required if the administrator is the widower or widow or domestic partner of the deceased or his or her personal representative or where the surety is a corporation;

(b) no person shall be accepted as a surety unless he or she is resident in South Australia;

(c) The limit of the liability of the surety or sureties under a guarantee given for the purposes of sections 18 or 31 of the Act shall be the gross amount of the South Australian estate as sworn in the Oath.

(d) Every surety, other than a corporation, must justify the guarantee given by affidavit in the Form No 5.

49.03 Where the Registrar has directed that a person who is resident outside South Australia may be accepted as a surety he or she must submit to the jurisdiction of the Supreme Court of South Australia to determine any liability of such surety under the law of South Australia.

49.04 Except where the surety is a corporation the signature of the surety on every such guarantee shall be attested by a person authorised by law to administer an oath.

49.05 Each separate sheet of the guarantee must be signed by each of the sureties and by the person attesting the guarantee.

49.06 Where the surety is a corporation an affidavit must be filed by its proper officer in the Form No.8 to the effect that the corporation has power to act as surety and has executed the guarantee in accordance with section 127 of the Corporations Act, 2001 and containing sufficient information of the financial position of the corporation to satisfy the Registrar that it has sufficient assets to meet any claim under the guarantee:

Provided that the Registrar may accept an affidavit from a corporation once in every two years instead of requiring an affidavit in every case in which that corporation is a surety

together with an undertaking by the corporation to notify the Registrar forthwith in the event of any alteration in its constitution or its financial position affecting its power to become a surety.

49.07 Unless the Registrar otherwise directs no guarantee shall be required on an application for a grant of administration or the re-sealing of a grant of administration if -

(a) the gross value of the South Australian estate does not exceed $100,000;

(b) the person or persons beneficially entitled to the South Australian estate are sui juris and the gross value of the South Australian estate does not exceed $250,000; or

(c) the application is limited to the prosecution or defence of an action.

49.08 The Registrar may, upon being satisfied by affidavit that it is beneficial or expedient to do so –

(a) dispense with the requirement to provide a guarantee;

(b) reduce the liability of a surety under a guarantee;

(c) require as a condition of dispensing with the requirement of a guarantee or reducing the liability of a surety under a guarantee that administration be granted to not less than two individuals:

Provided that the Registrar may impose such other conditions as the Registrar may see fit.

49.09 (1) An application for directions under sections 18 (12) and 31(13) of the Act shall be made to the Registrar by summons supported by an affidavit by the applicant setting out the facts of the case and such other evidence as the Registrar may require.

(2) Where a grant of administration has been made to two or more persons under Rule 49.08(c) and an administrator dies or is no longer sui juris the Registrar may appoint a substituted administrator.

(3) On the appointment of a substituted administrator the Registrar may direct that a note shall be made on the original grant of such appointment or the Registrar may impound or revoke the grant or make such other order as the circumstances of the case may require.

49.10 An application for permission to sue on a guarantee given for the purposes of sections 18 and 31 of the Act shall, unless the Registrar otherwise directs, be made by summons to the Registrar, and notice of the application must be served on the administrator, the surety and any co-surety.

49.11 Where a guarantee is not required under Rule 49.01 the proposed administrator must lodge an affidavit in the Form No. 6 with the application for administration disclosing

(a) that the proposed administrator is resident in the State of South Australia;

(b) that the proposed administrator has no legal or equitable claim or interest in the estate of the deceased arising from a liability incurred by the deceased before death, and is not contemplating a claim against the estate under the Inheritance (Family Provision) Act, 1972;

(c) that all persons entitled to participate in the distribution of the estate are *sui juris*: Provided that if there is any person who is not *sui juris*, and who may in the event of an accretion to the estate become entitled in distribution, the proposed administrator must give an undertaking that in such a case he or she will forthwith provide a guarantee;

(d) that all persons referred to in Rule 49.11(c) are resident in the State of South Australia, or if any such person is not so resident that such person has for the purposes of section 65(1)(b) of the Act appointed an agent or attorney within the State in the Form No. 6B;

(e) details of all liabilities of the estate and that there are sufficient assets in the estate for payment of such liabilities.

49.12 Where a guarantee is required under Rule 49.01(a) or (b) but in the circumstances of the case Rule 49.07(a) or (b) applies the proposed administrator must lodge an affidavit in the Form No. 6A with the application disclosing –

(a) the place of residence of the proposed administrator;

(b) whether the proposed administrator has a legal or equitable claim or interest in the estate of the deceased arising from a liability incurred by the deceased before death;

(c) whether the proposed administrator is contemplating a claim against the estate under the Inheritance (Family Provision) Act, 1972;

(d) whether all persons entitled to participate in the distribution of the estate are sui juris and where any person so entitled is not sui juris then the date of birth of such person must be disclosed in the affidavit; Provided that if there is any person who is not sui juris, and who may in the event of an accretion to the estate become entitled to participate in distribution, the proposed administrator must give an undertaking that in such a case he or she will forthwith provide a guarantee or make an application to the Registrar to dispense with a guarantee;

(e) that all persons entitled to participate in the distribution of the estate are resident in South Australia, or if any such person is not so resident that such person has for the purposes of section 65(1)(b) of the Act appointed an agent or attorney within the State in the Form No. 6B;

(f) details of all liabilities of the estate and whether there are sufficient assets in the estate for payment of such liabilities.

49.13 Upon receiving the affidavit referred to in either Rule 49.11 or Rule 49.12 the Registrar may allow the grant to issue without a guarantee unless in the circumstances of the case the Registrar is of the opinion that a guarantee should be provided.

Legislation cited

Australian Capital Territory
Administration and Probate Act 1929, ss 88, 92
Court Procedures Act 2004, s 21
Court Procedures Rules 2006, rr 3045, 3046
Supreme Court Amendment Rules 2004 (No 1), r 30

Commonwealth of Australia
Competition and Consumer Act 2010, s 87b
SPAM Act 2003, s 29

New South Wales
Probate and Administration Act 1898, s 64(1)
Public Trustee Act 1913, s 23

New Zealand
Administration Act 1969, ss 6(1), 6(6), 7(5), 7(6)

Northern Territory
Administration and Probate Act, s 23

Queensland
Public Trustee Act 1978, ss 29, 31
Succession Act 1981, ss 6(3), 51, 52

South Australia
Administration and Probate Act 1919, ss 17, 18, 23, 31, 44, 56, 58, 65, 69, 121A
Administration and Probate Act Amendment Act 1978
Administration and Probate (Administration Guarantees) Amendment Act 2003, s 6
Criminal Law (Sentencing) Act 1988, ss 52 and 53
Probate Rules 2004, rr 11.01, 31, 32, 49.02(a), 49.07
Public Trustee Act 1995, s 9
Supreme Court Act 1935, s 28
Trustee Act 1936

Tasmania
Administration and Probate Act 1935, s 25(1)

United Kingdom
Confirmation of Executors (Scotland) Act 1823, s 2
Senior Courts Act 1981 (UK), s 120
Succession Act 1965(Ireland) ss 34(1), 34(2)(a)

Victoria
Administration and Probate Act 1958, s 57

Western Australia
Administration Act 1903, ss 26, 43(1)
Administration Act Amendment Act 1976, s 14
Non-contentious Probate Rules 1967, r 27(1)
Public Trustee Act 1941, s 10(1)

Glossary[109]

Administration security - Security against the risk that the *administrator* of a deceased's *estate* may administer it in such a way that a potential *beneficiary* or creditor of the estate suffers loss. Administration security may take the form of a personal bond by the administrator (called an administration bond or an *administrator's bond*), a guarantee from a third party (a *surety*) or both.[110] In South Australian, administration security is solely by sureties' guarantees[111].

Administration guarantee – A surety guarantee under the *Administration and Probate Act 1919* (SA).

Administrator - A person appointed by the court to act as a person's *personal representative,* usually when the person has died (i) without a valid *will*; (ii) with a will which does not name an *executor*; or, (iii) with a will and a named executor who refuses to act or is unable to act because of death, incompetence or absence.

Administrator's bond - An amount of money that an *administrator* of a deceased's *estate* must forfeit to the estate if he or she is found not to have honestly and competently discharged his or her duties and a *beneficiary* has suffered loss as a result. These bonds are no longer required in South Australia.

Beneficiary - A person or organisation to whom property is left by a *will* or on an *intestacy*.

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

Contingent interest - (under a will) An interest in the deceased's *estate* which is uncertain because, according to the *will*, it can only be received if and when a certain event or circumstance occurs (for example, when the *beneficiary* attains the age of 21), at which point the interest *vests*. See *vested interest*.

Devise - A gift of land under a *will*. A **devisee** is a person to whom such a gift is made. See also *residuary devisee*.

Equity - The legal principles that are used to prevent laws operating unfairly.

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

Executor - A person or corporation named in a *will* to carry out the terms of the will and to act as the deceased person's *personal representative*. Duties include gathering assets, paying debts and distributing what remains in accordance with the will.

Grant (of representation) - The official recognition by the court (i) of the right of the *personal representative* named in the grant to administer the *estate* of a deceased person; and (ii) of the vesting in the personal representative of the title to the deceased's assets. There are three common kinds of grants of representation: a grant of *probate*, a grant of *letters of administration*, and a grant of *letters of administration with will annexed*.

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[109] Words in italics are defined elsewhere in the glossary. This glossary is adapted from glossaries published by the Law Reform Commission of Nova Scotia (*Probate Reform in Nova Scotia*, 1999 and *Reform of the Nova Scotia Wills Act*, 2003). We are most grateful to the Nova Scotia Law Reform Commission for its kind permission to do this.

[110] The differences between these forms of administration security are discussed in this paper under the heading *Remedies for loss arising from maladministration/Administration security.*

[111] See s 31 *Administration and Probate Act 1919* (SA). Although the Act calls them 'administration guarantees', this paper refers to them as sureties' guarantees, because that is the usual terminology in Australia.

Guarantee - (for the administration of deceased estates) A legally binding promise to compensate for loss caused to *beneficiaries* or creditors of a deceased's *estate* by a failure of the *administrator* to perform their duties properly. The maximum amount of the guarantee (called the penalty) is usually the sworn gross value of the *estate*. A person who makes such a promise is called a *surety*.

Intestate - A person who dies without leaving a *will* or leaving a will that does not dispose effectively of all or part of their *estate;* thereby creating a situation of **intestacy**. The estate is then distributed to next of kin according to rules of intestacy that are set out in legislation. In South Australia, the legislation is the *Administration and Probate Act 1919*, Part 3A (Distribution on intestacy) and the court rules are *The Probate Rules 2004*, rule 32. Contrast with *testate*. See also *partially intestate*.

Legacy - A gift of money under a *will*. A gift of money may also be called a bequest, but a bequest can also refer to a gift of *personal property* other than money. A person who is entitled to receive a legacy is called a **legatee**. See also *residuary legatee*.

Legislation - Law made by Parliament. This kind of law can also be called a *statute* or act.

Letters of administration - The *grant* of representation made by a court when a person dies *intestate*.

Letters of administration with will annexed - The *grant* of representation made by a court when a person dies leaving a *will* where there is no *executor* willing or able to act.

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

Maladministration - (of a deceased's *estate*) Dishonest or incompetent management of the estate by the deceased's *personal representative*.

Partially intestate - A person who dies leaving a *will* which lacks something to make it complete. This occurs, for example, if the deceased did not dispose of all their property in the will. If this arises, the part of the deceased's *estate* which is not disposed of by the will is distributed by the rules set out in the *Administration and Probate Act 1919*, Part 3A (Distribution on intestacy) and *The Probate Rules 2004*, rule 32.

Personal property - Anything capable of ownership that is not *real property*.

Personal representative - The person or corporation who is appointed to administer the deceased's *estate*. A personal representative may be an *executor* (appointed by the *testator* by *will*) or an *administrator* (appointed by the court).

Probate - The legal procedure for proving that a *will* is the last will of the deceased, that it is legally valid and that the person or corporation it names as *executor* is entitled to act.

Probate Registry - in South Australia, a registry of the Supreme Court which is responsible for determining, on an application for a *grant* of representation, what document or documents constitute the last *will* of the deceased and/or who is entitled to be the *personal representative* of the deceased. When these determinations have been made, the Registrar will issue a grant of *probate* to the *executor* or *letters of administration* to the *administrator* of the *estate* of the deceased person. See *Registrar of Probate.*

Public Trustee - A government office that may be appointed to administer the *estate* of a deceased person when the person dies without leaving a valid *will* or when there is a valid will but the *executors* or next of kin cannot or will not act. The Public Trustee may also be appointed as an executor by testators in their wills, and in some cases a named executor can request the Public Trustee to act.

Real property - Land, buildings attached to land, as well as permanent fixtures or improvements to land. Contrast with *personal property*.

Registrar of Probates - An official of the Supreme Court who performs such duties as recording and preserving *wills* admitted to *probate*, issuing *grant*s of probate and *letters of administration*, and approving the accounts of *executors* and *administrators*. The Registrar also can perform some judicial duties.

Residuary devisee - The person named in a *will* who takes the *testator*'s *real property* that remains after the other *devises* and after all debts and expenses have been paid.

Residuary legatee - The person to whom a testator's *personal property* is left after specific *legacies* or bequests have been made and after all debts and expenses have been paid.

Statute - Law made by Parliament. Also referred to as *legislation* or act.

Succession - The right to succeed to an inheritance. **Succession laws** govern such rights.

Sui juris - Legally competent to make one's own decisions. A child or a mentally-impaired person is not *sui juris*.

Surety - (for the administration of deceased estates) A person who *guarantees* to compensate for loss caused to *beneficiaries* or creditors of the deceased's *estate* by a failure of the *administrator* to perform their duties properly and in the event that the administrator cannot compensate for such maladministration. See *guarantee*.

Testate - A person is testate when they die leaving a valid *will*. Contrast with *intestate*.

Testator - A person who makes a *will*.

Vested interest - (under a will) An interest in the deceased's *estate* which has vested according to the *will*. The usual rule is that a *beneficiary*'s interest in a deceased's estate becomes vested as at the date of death. If, however, the will provides for something to happen before the beneficiary may receive the interest (such as the beneficiary attaining the age of 21 years), then that interest is contingent until it happens (in this example, while the beneficiary is under 21 years of age) and becomes vested when it does happen (in this example, when the beneficiary turns 21). See *contingent interest*.

Will - The written statement by which a person instructs how his or her property should be distributed when that person dies.