Final Report 6

December 2016


Thomas Dorling

The last Will and Testament of me Thomas Dorling of Bury Saint Edmunds in the County of Suffolk Baker made this fifteenth Day of December in the Year of our Lord one thousand seven hundred and fifty three as follows to wit I give and devise all that Messuage or Tenement wherein I now dwell together with the Tenements thereto adjoining in the Occupation of Thomas Clarke Constable and Henry Thorpe or their Assigns with their and every of their Appurtenances unto William, Thomas, Charles, Jane and Frances the five Children of my Son Thomas Dorling their Heirs & Assigns for ever as Tenants in Common and not as joint Tenants to be equally divided between them share and share alike from and after the Death of Frances my Dear and well beloved Wife to whom I give the aforesaid Premises for and during the Term of her natural Life as also all other my Messuages Lands and Tenements whatsoever and wheresoever during her natural Life as aforesaid Also I give and devise to my Daughter

South Australian Law Reform Institute

Administration of Small Deceased Estates and Resolution of Minor Succession Law Disputes

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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SALRI publications, including this Report and the Issues Paper that preceded it, are available to download free of charge from the SALRI webpage under *Publications: Reports and Papers.*

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 recommend reforms. The Institute identified a number of topics for review. This Report, the third in the Institute's review of succession law, examines the law relating to the administration of small deceased estates and the resolution of minor succession disputes.

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Acknowledgements

This Final Report was written by Mark Jordan and Robert Park with research assistance from Dr David Plater, Madeleine Harland, Sylvia Villios and Dianne Gray. The Institute acknowledges the outstanding work done on the Issues Paper that preceded this Report by the late Helen Wighton, the immediate past Deputy Director of the Institute.

The Institute would also like to acknowledge the contribution of the students in the 2016 Law Reform course to this Report.

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Abbreviations

BCLI Final Report	British Columbia Law Institute, *Wills, Estates and Succession: A Modern Legal Framework*, Report No 45 (June 2006)
BCLI Interim Report	British Columbia Law Institute, *Interim Report on Summary Administration of Small Estates*, Report No 40 (December 2005)
Issues Paper	South Australian Law Reform Institute, *Small Fry: Administration of Small Deceased Estates and Resolution of Minor Succession Disputes*, Issues Paper 5 (January 2014)
National Committee Report	Queensland Law Reform Commission, *Administration of Estates of Deceased Persons: Report of the National Committee for Uniform Succession Laws to the Standing Committee of Attorneys General*, Report No 65 (April 2009)
VLRC Consultation Paper	Victorian Law Reform Commission, *Succession Laws: Small Estates*, Consultation Paper No 16 (December 2012)
VLRC Final Report	*Victorian Law Reform Commission, Succession Laws*, Final Report (15 October 2013)

Summary of Recommendations

Administration of small deceased estates

1. The Institute recommends that the deemed grant model be introduced and implemented in South Australia.

2. The Institute recommends that the features of the deemed grant model, as identified and recommended by the Victorian Law Reform Commission, be implemented subject to the following refinements:

    a. A threshold dollar value of estates that may be administered under the scheme to estates with a gross asset value of $100 000 indexed to reflect changes in the consumer price index.
    b. Inserting a second safety net value, expressed as a percentage of the threshold figure, above which administrators would need to apply for a full grant, to accommodate any underestimation of the value of the estate at the time of filing.
    c. Adding a requirement to file the will, if there is one, which would alert the Probate Office to the expedited grant with legislative clarification needed, to ensure that the Probate office would not be required to review any wills submitted as part of an expedited process.
    d. Replacing the requirement to advertise in a newspaper with a requirement to advertise on the Court's website, thereby creating a searchable record.
    e. It should specifically discharge from liability third parties who deal in good faith with the administrator.
    f. It should require the administrator to keep accounts of the administration for a set period, to be available for inspection by anyone with an interest in the distribution of the estate, or otherwise by order of the Supreme Court

3. In any event, the Institute does not recommend the simplified procedures without a grant for lay administrators referred to in the Issues Paper (ie: summary administration by collection affidavit, court-approved summary administration, verified summary administration or summary administration by declaration).

4. The Institute recommends that the Supreme Court retains its existing exclusive role in the administration of small estates.

5. The Institute recommends the amendment of ss 71 and 72 of the *Administration and Probate Act 1919* (SA) along the lines of the model provision in relation to protecting certain payments by third parties, with an appropriate CPI adjusted monetary limit, to allow payments of greater amounts, in a wider range of circumstances, to a wider range of survivors and with less formality. The Institute considers that a maximum amount of $25 000, annually adjusted for CPI, seems a reasonable monetary limit.

6. The Institute recommends that a provision for expedited dealings with land belonging to a deceased person, based on the Queensland model (*Land Title Act 1994* (Qld) ss 111-112), not be introduced in South Australia.

Resolution of minor succession disputes

7. There is a need for reform in some categories of succession law dispute in which the estate is considered 'small'. Those categories include claims for further provision pursuant to the *Inheritance (Family Provision) Act 1972* (SA) and the validity and construction of wills.

8. The Institute recommends that all succession law disputes should at this stage continue to be determined by the Supreme Court not only because of the Court's jurisdiction in relation to Probate matters conferred by statute, but also as a result of the particular knowledge and expertise of Supreme Court Judges, Masters and court staff in such a specialised area as succession law and practice.

9. The Institute recommends that procedures be modified in the Supreme Court to further improve time and cost efficiency when dealing with disputes in small estates. In particular, compelling parties at an early stage to mediate the matter and requiring that Masters become more involved and pro-active in such a process in order to impress upon the parties the desirability of resolving the matter without going to trial.

10. The Institute recommends that specific Court Rules be developed to limit costs that can be claimed by the parties to the matter to minimise the effects of litigation on the net value of a small estate, with the ability to depart from the standard position in appropriate cases.

Part 1 – Introduction

1.1.1 In 2011, the Attorney General of South Australia, the Hon John Rau MP, invited the South Australian Law Reform Institute (hereafter, the 'Institute') to identify the areas of succession law that were most in need of review, to conduct a review of each of those areas and to recommend any suitable reforms. The Institute's Advisory Board identified several topics for review and established a Succession Law Reference Group to assist.

1.1.2 One of those topics was to examine ways to simplify the administration of small deceased estates and the resolution of minor succession law disputes.

1.1.3 To date, the Institute, as part of its succession reference has published reports into Sureties Guarantees for Letters of Administration[1] and the introduction of a Wills Register.[2] The Institute has released an Issues Paper in relation to intestacy law,[3] and its Final Report should be released in early 2017. In the first half of 2017, as a follow up to its Intestacy project, the Institute will be examining the role and operation of the *Inheritance (Family Provision) Act 1972* (SA). As a further project, the Institute intends, in due course, to examine funeral instructions and the disposal of remains and the resolution of disputes that may arise.

1.1.4 In its reviews, the Institute especially considers the modernisation of the law, the elimination of defects in the law, the consolidation of any laws, the repeal of laws that are obsolete or unnecessary and, where desirable, uniformity between the laws of the Commonwealth and other States and Territories. It is significant that the succession laws of all Australian jurisdictions differ and uniformity only broadly exists between NSW and Tasmania in relation to the intestacy portion of succession law.

1.1.5 The Institute's consultation in relation to this Report began with the release of an Issues Paper in January 2014, titled *Small Fry: Administration of Small Deceased Estates and Resolution of Minor Succession Disputes*, and an accompanying Questionnaire, both posted on the Institute's website.[4]

1.1.6 The Issues Paper examined two succession law reform questions. The first (in Part 1) was whether the administration of small estates should be simplified in South Australia, and, if so, how. The second (in Part 2) was whether minor disputes about succession matters could be dealt with in a different and less expensive way than more serious disputes, and, if so, how. The underlying concern is that the administration of an estate (and especially the resolution of any disputes) 'can be complex, and will cost money and take time [and] any cost or difficulty may be disproportionate in an estate with few assets.'[5]

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1 South Australian Law Reform Institute, *Sureties' Guarantees for Letters of Administration*, Report (August 2013).

2 South Australian Law Reform Institute, *State Schemes for Storing and Locating Wills*, Final Report No 5 (2016).

3 South Australian Law Reform Institute, *Cutting the Cake: South Australian Rules of Intestacy* (December 2015).

4 South Australian Law Reform Institute, *Small Fry: Administration of Small Deceased Estates and Resolution of Minor Succession Disputes*, Issues Paper 5 (January 2014) <http://www.law.adelaide.edu.au/research/law-reform-institute/> ('Issues Paper').

5 Victorian Law Reform Commission, *Succession Laws: Small Estates,* Consultation Paper No 16 (October 2012) 17, [2.3] <http://www.lawreform.vic.gov.au/projects/succession-law/succession-law-consultation-paper-small-estates> ('VLRC Consultation Paper').

1.1.7 The Issues Paper relied upon, and referred to, four contemporary reports that dealt with these topics in other jurisdictions.[6] The Issues Paper also referred to the statutory sources of succession law in South Australia,[7] which have been refined by a body of case law and also interact with laws about real property, guardianship, agency, companies, superannuation and taxation, as well as laws that determine the legal status of relationships.

1.1.8 After reflecting on the approaches taken in other jurisdictions, including other Australian jurisdictions and proposed model laws, the Issues Paper presented a range of options for consideration. Finally, it asked a series of questions about the need for reform and approaches to reform in respect of both the law reform questions considered.

1.1.9 Invitations for submissions were sent to South Australian succession lawyers, the South Australian judiciary, the Law Society of South Australia, South Australian community legal centres and the Legal Services Commission, the Public Trustee, leaders of the Independent Parliamentary parties and the Shadow Attorney-General, as well as to other community groups. The Issues Paper was sent to the South Australian Attorney-General.

1.1.10 The Institute received submissions from several law firms, the Law Society of South Australia, the Public Trustee, the Royal Association of Justices of South Australia and the Registrar General of Land Services Group, as well as an individual submission.

1.1.11 As might be expected, the submissions varied in their views on the need for reform, as well as focusing on different aspects of the law seen as problematic.

1.1.12 Although the Issues Paper was widely circulated to the legal profession, other relevant interested parties and the general public, the overall response was somewhat disappointing. There was, for example, no engagement from the courts. The Law Society's response was equivocal. Its most

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6 Queensland Law Reform Commission, *Administration of Estates of Deceased Persons: Report of the National Committee for Uniform Succession Laws to the Standing Committee of Attorneys General*, Report No 65 (April 2009) <http://www.qlrc.qld.gov.au/Publications.htm#1> ('National Committee Report'). See, in particular, Volume 3, Chapter 29: Mechanisms to facilitate administration and to minimise the need to obtain a grant. It is significant that only NSW and Tasmania have adopted (and then only partly) the National Committee Report; British Columbia Law Institute, *Interim Report on Summary Administration of Small Estates*, Report No 40 (December, 2005) ('BCLI Interim Report') <http://www.bcli.org/bclrg/publications/40-interim-report-summary-administration-small-estates>; British Columbia Law Institute, *Wills, Estates and Succession: A Modern Legal Framework*, Report No 45 (June 2006) ('BCLI Final Report') <http://www.bcli.org/sites/default/files/Wills_Estates_and_Succession_Report.pdf>. See, in particular, Part 1, Chapter V, B.7 (Summary Administration of Small Estates) and Part 2 (Wills, Estates and Succession Act); VLRC Consultation Paper, above n 5; Victorian Law Reform Commission, *Succession Laws: Final Report* (15 October 2013) <http://www.lawreform.vic.gov.au/content/succession-laws-final-report-html#overlay-context=projects/succession-laws/succession-laws-final-report> ('VLRC Final Report').

7 *Supreme Court Act 1935* (SA), in that it establishes a testamentary causes jurisdiction in the Supreme Court and the *Supreme Court Civil Rules 2006* (SA), the *Wills Act 1936* (SA), which sets out how wills are to be made and used, the *Administration and Probate Act 1919* (SA), and the *Probate Rules 2004* (SA) made under that Act, which govern the administration and distribution of a person's property after death and specify the powers of executors, administrators and others involved in finalising the deceased person's financial affairs and the procedures they should follow, the *Trustee Act 1936* (SA), which governs the duties and liabilities of trustees, including personal representatives for deceased estates, the *Public Trustee Act 1995* (SA), to the extent that it governs the role of the Public Trustee as a trustee, executor of a will or administrator of a deceased estate and the *Inheritance (Family Provision) Act 1972* (SA), under which the court may make orders to provide, from a deceased estate, for the support of family members for whom no, or not enough, provision has been made from the estate by the deceased and/or by operation of the laws of intestacy.

relevant committee, the Succession Law Committee, did not directly engage with the questions set out at the end of the Issues Paper. In addition, no Adelaide-based law firm responded.[8]

1.1.13 Therefore, before the Institute made any final recommendations, it considered it was both necessary and appropriate to go back to key interested parties to further define the issues, and to see to what extent there might be agreement about the need for any change. In particular, the Institute sought a more detailed response from succession lawyers, the Probate Registry of the Supreme Court and the Public Trustee.

1.1.14 To this end, the Institute prepared a Further Consultation Paper further refining the issues and asking a series of specific questions. The Further Consultation Paper is available on the Institute's website.[9] The Institute has now had the opportunity to discuss the relevant issues with both the Probate Registry of the Supreme Court and the Office of the Public Trustee, and is grateful for their contribution. The Institute is also grateful for the comments of the Chief Justice of the Supreme Court of South Australia. The Institute has also had the benefit of discussing some of the issues with succession lawyers and practitioners in consultation sessions held at Mount Gambier, Adelaide, Port Lincoln, Berri and Naracoorte on 27 June 2016, 1 August 2016, 17 August 2016, 12 October 2016 and 9 November 2016 respectively, and with staff at the Office of the Public Trustee on 12 September 2016.

This Final Report completes the Institute's review of the administration of small deceased estates and the resolution of minor succession disputes. The Report does not repeat the detail given in the Issues Paper. Instead, it summarises the relevant law in South Australia and the problems that have been raised about it, evaluates the reform models put forward in the Issues Paper in the light of the submissions to that Paper, and in some cases, recommends specific reforms.

[8] The Registrar of Probates suggested that the low public and professional response might indicate that there is not a great need for change in this area of the law.

[9] South Australian Law Reform Institute, *Administration of Small Deceased Estates and Resolution of Minor Succession Disputes,* Further Consultation Paper (November 2015) <https://law.adelaide.edu.au/research/law-reform-institute/documents/small-estates-further-consultation-paper.pdf> ('Further Consultation Paper').

Part 2 – Administration of small deceased estates

2.1 Current law

2.1.1 When a person dies, someone has to assume responsibility for collecting and protecting their assets and property, paying estate debts, and distributing what remains of the estate to the beneficiaries. The deceased may have appointed someone to do this in his or her will (an 'executor'). In certain other circumstances, an 'administrator' is appointed by the court and given a similar authority to that of an executor. That authority, whether given by a testator or by the court, can be given official confirmation by the Supreme Court as a grant of representation. Grants of representation to executors are called grants of probate, and grants to court-appointed administrators are called grants of letters of administration.

2.1.2 In South Australia, there is no legal requirement for a grant of representation before an estate may be administered. There is no threshold monetary value above which a grant of representation is required, and no overall obligation on parties dealing with assets of the deceased estate to require the production of a grant before dealing with those assets. Other than dealings with real property, the need as to whether a grant of representation is required is determined by the institution holding a deceased person's assets. In short, each institution will have its own internal policies and procedures as to the maximum monetary value of the asset they will hand over to an executor or person administering an estate before insisting upon the protection of a grant of representation from the Supreme Court.

2.1.3 For assets valued under their internal thresholds, such institutions will often transfer the assets to the executor or person administering the deceased's estate after that person has provided the institution with a number of documents usually including a death certificate, statutory declaration confirming that they are the person entitled to administer the deceased's estate, that no grant of representation is being applied for and that the person to whom the institution will be transferring the asset provides an indemnity to the institution. The last of these requirements is designed to provide the institution with some form of protection so that they may recover the value of the asset if it turns out that the person to whom the asset was transferred was not entitled to receive the deceased's asset. Each institution sets their thresholds individually with some requiring the protection of a grant of representation for amounts exceeding $20 000 (including smaller institutions such as credit unions) and others at higher amounts $50 000 to $80 000 (including larger banks and financial institutions). This appears to indicate that, generally, larger institutions accept greater risk without requiring a grant of representation as, presumably, they are more able to absorb any loss resulting from paying out the deceased's assets to the wrong person.

2.1.4 An estate that is administered without a grant of representation is said to be administered 'informally'. Deceased estates may be administered informally if those transacting with the deceased's representatives are happy to do so without the protection afforded by specific court authorisation to administer. A disincentive for formal administration is the formality and expense of obtaining a grant of representation through the Supreme Court. The current South Australian legislation provides no real alternative to this.

2.1.5 In most Australian jurisdictions, including South Australia, deceased estates that include real property cannot be informally administered because a grant of representation is necessary for any dealings with land registered in the name of the deceased.

2.1.6 Informal administration is most likely to occur when the estate is small. With that informality comes an increased risk of poor administration—for example, inaccurate identification of what the estate comprises or incompetent or even dishonest distribution.

2.1.7 Methods for obtaining authority to administer small estates with something less than a grant of representation or for simplifying and reducing the cost of the grant process itself have developed in many common law jurisdictions. These alternative methods have evolved because the cost and formality of obtaining a grant are often disproportionate to the value of a small estate and are an incentive to the alternative of informal administration, an alternative that is often seen as undesirable.

2.1.8 It should be noted that any improvement to the administration of small estates is likely to combine both operational and legal changes. As the VLRC notes, 'There is no comprehensive suite of measures to assist in the administration of small estates.'[10]

Recent important changes

2.1.9 For many years in South Australia, the time between lodging an application for a grant of representation and the making of the grant varied greatly. It was not uncommon to wait between six to eight weeks for a grant to be issued even on a standard application. For a period, the time for a grant to be issued from lodgement was verging on 12 weeks.

2.1.10 To combat the timing issues, the Probate Registry changed its internal procedures and its staff began screening all applications as they were lodged with any obvious procedural defect being noted upon a cursory examination. This would then lead to the application being refused and returned to the practitioner with the issuing of a 'Rule 10' notice outlining the issues that needed to be attended to before the Registry would accept the application. This meant that all documents (and the filing fee) were returned to the lodging party with no record maintained at the Registry. As a result of this system being implemented, staff at the Probate Registry were able to focus their attention on applications that had been properly made and grants on standard applications which follow the Probate Rules and forms without defect are currently being issued in approximately two weeks from the date of lodgement. As such, where no defects are apparent, grants are now being made, in most cases, quickly and efficiently.

2.1.11 The Probate Rules and forms (with the latter now being contained in the *Supplementary Rules*) were updated in 2015. In so doing, some aspects of the rules and forms were updated to simplify the documentation required for a grant of representation. In particular, some of the forms were simplified and some confusing and somewhat outdated references and peculiarities were removed from the Rules. This recent change has contributed to the simplification of the process of applying for a grant and made it easier for personal applicants to apply without the need for legal assistance, thereby reducing the costs associated with the process.

2.1.12 On 28 February 2016, the *Supreme Court Regulations (Probate Variations) 2016* came into effect and the filing fee to be paid for a grant of representation in South Australia was changed from a standard 'one size fits all' fee to a tiered fee structure. This change had the effect of changing the Probate filing fee from $1114 which applied regardless of the value of the estate to the following fees:

(a) $750 where the gross estate is valued up to $200 000;

(b) $1500 where the gross estate exceeded $200 000 up to $500 000;

[10] VLRC Final Report, above n 6, 188 [9.4].

(c) $2000 where the gross estate exceeded $500 000 up to $1 million;

(d) $3000 where the gross estate exceeded $1 million.

2.1.13 The above changes had the effect of reducing the Probate filing fee for a grant of representation on estates with a gross value of less than $200 000 (ie a 'small estate'). It should be noted that the filing fee increased for estates with a gross value between $200 000 and $500 000 which, as will be seen at later points in this Report, appears to still be considered a 'small estate' in most people's mind.

2.1.14 The Registrar of Probates and Masters of the Supreme Court report that there have been a number of reforms to succession procedures over recent years (including the tiered filing fees) and small estate matters are dealt with 'quickly and cheaply' under the present system.[11] The Probate Registry has eight staff and issues about 7000 grants a year and a straightforward unopposed grant is currently issued within about seven days of the application being lodged.[12]

2.2 Review criteria

2.2.1 The Issues Paper presented models for a simplified administration process for small deceased estates. In evaluating those models and any others put forward in submissions to the Issues Paper, the Institute has addressed these questions:

- Who should be entitled to administer the estate?
- Which estates were suitable to be administered this way?
- To what extent should the court be involved?
- What notice should be given of an intention to administer this way, and to whom?
- What official records of administration should be maintained?
- To what extent and to whom is the executor or administrator to be held accountable for administering the estate?
- How are the interests of third parties protected?
- How cost effective is this method of administration?

Entitlement to administer the estate

2.2.2 If a summary procedure were available in South Australia when should it be available to the Public Trustee? Taking into account the notion of competitive neutrality, should there be a role for other relevant professionals? Should a beneficiary be able to administer the estate without the authority of the court?

[11] Letter from Chief Justice to South Australian Law Reform Institute dated 29 September 2016.

[12] Ibid.

Which estates should be administered under an authority that is less than a grant?

2.2.3 Should this be defined by a monetary limit? What would be the effect on family provision claims under the *Inheritance (Family Provision) Act 1972* (SA)? Other jurisdictions have defined a 'small estate' for the purposes of such procedures in relation to its monetary value (whether 'gross' or 'net'). There are other possible criteria, for example, what the estate comprises, or the number of beneficiaries. A defining feature might be whether or not the estate includes real property. There is also the question of making thresholds adjustable to allow a margin of error in the initial estimate of the value of an estate.

Court involvement

2.2.4 The extent to which a model requires the court to be involved in authorising or sanctioning who is to administer the estate, what is to be done with it, and in expecting an account of the administration is of great importance. The greater the court's involvement, the greater the formality and expense and the less value the simplification has. However, the involvement of the court has distinct advantages.

Notice requirements

2.2.5 Some alternative methods have a requirement that public or personal notice be given of the intention to administer the estate without a grant. Formal notice in a newspaper or the *Government Gazette* may be expensive and ineffective—for example, it seems that fewer and fewer people read newspapers, let alone the public notices they may contain. The National Committee recommended against any form of notification when considering its preferred model, being the election to administer, for reasons of cost.[13] The VLRC's final position retained the need to give notice, but recommended that it be done by online posting on the Supreme Court website.[14]

Third party protection

2.2.6 The viability of any alternative administration model may depend on whether it includes a specific statutory release from liability for third parties who rely in good faith on a person's apparent authority.

Accountability for administration

2.2.7 What protection will any alternative method of administration give to the administrator? What is the degree of protection to the interests of beneficiaries and creditors in the event of fraud or incompetence? Reporting requirements in relation to assets are really only effective if the accounts or reports can be compared with an original inventory of the estate. This requirement of an initial inventory has been discarded in some alternative methods of administration. Instead, some establish a personal liability in the person distributing the estate for any loss caused to the beneficiaries. However, personal liability is worthless without the person in question owning sufficient assets to cover any such loss.

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[13] National Committee Report, above n 6, see further in Volume 3, Chapter 29, especially 115 [29.100].

[14] VLRC Final Report, above n 6, 208, Recommendation 76.

Searchable official records of administration

2.2.8 Some simplified alternatives for the administration of small estates do not provide for the keeping of an official public record allowing searches to be performed to determine who has assumed responsibility for the administration of the assets comprising the estate. In contrast, grants of representation and elections to administer record all relevant information on the Court record, and may be searched. The VLRC Final Report recommended the filing of the will, as one of the suggested changes to its deemed grant procedure.[15]

Cost effectiveness

2.2.9 A decision to introduce an alternative method of administering small estates will not only depend on the extent to which it makes the procedure simpler. It will also be judged on the extent to which it can make the cost of administering the estate proportional to its size. A reduction in fees, however achieved, would encourage formal administration, but of course would not help simplify the administration process in itself.

2.3 Reform options

A. Essentially riskless procedures

2.3.1 This group of procedures comprises the existing grant procedure (about which nothing needs to be said), assisted grants of the types discussed in the Issues Paper and the 'expedited grant' as suggested as a possibility by the Institute.

2.3.2 The Issues Paper suggested a range of reform options, presenting models used in other parts of Australia, in Canada and the United States, as well as suggesting certain other alternatives not currently in use elsewhere.

2.3.3 It began by looking at two simplified procedures for administering small estates by means of a grant of representation. Each was designed for lay administrators. One simplified the process of obtaining a grant of representation (an 'assisted grant') while the other simplified both that process and the grant itself (an 'expedited grant').

Model 1 – Assisted grant

2.3.4 Some jurisdictions allow the Probate Registry to assist lay personal representatives to apply for a grant of representation from the court.[16] This does not relax the requirement for a grant, but rather acknowledges that some people will try to apply for a grant without legal assistance, and that it may be of mutual benefit to the applicant and the court to help them understand the steps that need to be taken. Moreover, making the application process simpler may reduce the incidence of informal administration, seen as a desirable goal.

2.3.5 In Australia, this kind of assistance is available only to the public and then only with respect to very small estates, ranging in value from $10 000-$50 000. It has been described as a form of legal aid.[17] The VLRC Consultation Paper noted that the 'assisted grant' option was not often used in

[15] Ibid 209, Recommendation 79. See further at 209 [9.166]-[9.169].

[16] See, for example, the Victoria practice. See further, VLRC Final Report, above n 6, 190-191 [9.14]-[9.26].

[17] VLRC Consultation Paper, above n 6, 21 [2.25].

Victoria. It noted concerns about potential conflict in the Registry both assisting an application and then granting it, and about the problems and inappropriateness of Registry staff providing what might well be perceived to be legal advice.[18] The Institute's Issues Paper noted the need to provide reliable, timely, helpful and simple information to those seeking to administer an estate.[19] The VLRC suggested that this be provided in a general way, rather than individually and contemplated the provision of free downloadable online information and kits.[20]

2.3.6 Notably though, the VLRC Final Report recommended the retention of this service because it offered a means of avoiding informal administration by providing an essential alternative route for those not using the services of a solicitor or trustee company, as well as those unable to navigate the grants process without assistance. The VLRC noted that the 'vast majority' of the interested parties it had consulted 'expressed a high degree of trust in, and satisfaction with, the service provided.'[21] The VLRC in its Final Report recommended an increase in the maximum value of an eligible estate to $100 000, CPI adjusted.[22]

2.3.7 Canada has a procedure whereby a registrar, rather than the court, may issue a grant of representation if the gross value of the estate is below C$25 000. Two Canadian provinces, Alberta and Saskatchewan, permit such applications to be prepared by court registry officials in estates below a certain size at the option of the applicant.[23]

2.3.8 Probate registries in Australia generally approve most grant applications, with only those that are complex or disputed being determined by the Supreme Court. In South Australia, court rules permit Probate Registry staff to assist applicants but, under the *Probate Rules*,[24] that assistance is limited, to avoid compromising the court's independence in determining each grant application. However, note that it is a lesser form of assistance than is given under the legislated assisted grant schemes in other Australian jurisdictions (such as the one in Victoria).

2.3.9 Other possible models fall under the rubric of 'assisted grant'. For example, the VLRC Final Report, while recommending the retention and expansion of a formal Probate Registry assistance service, also recommended that the Victorian Supreme Court, with Victoria Legal Aid, the Law Institute of Victoria and Victorian community legal centres,[25] develop and make available on the court's website, in various languages, a package of information for those seeking a grant without the benefit of professional assistance.[26]

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[18] Ibid 22 [2.38]-[2.40]. See also VLRC Final Report, above n 6, 190 [9.21].

[19] Issues Paper, above n 4, 24-25 [78].

[20] VLRC Final Report, above n 6, 195, Recommendation 65.

[21] Ibid 191 [9.24].

[22] Ibid 193, Recommendation 67.

[23] See further, BCLI Interim Report, above n 6, 18.

[24] Probate Rules 2015 (SA) r 7.

[25] The role of community legal centres is significant. The VLRC reported that community legal centres reported to it 'that they field a large number of inquiries, both in person and over the phone, for this type of assistance. Some clients seek a community legal centre solicitor to take them through the process, while others are looking for resources and information to complete the process themselves' (VLRC Final Report, above n 6, 194 [9.53]). Community legal centre representatives also noted to the Institute at its Mount Gambier consultation session that they regularly receive succession queries, including about obtaining grants of administration.

[26] VLRC Final Report, above n 6, 195, Recommendation 65.

2.3.10 The Institute's Issues Paper also mentioned the options of funding the deployment of trained and supervised paralegal staff to work from the Probate Registry and community legal centres to help people with their grant applications; and providing generalised, rather than individual, assistance in the form of a downloadable application kit.[27]

Submissions

2.3.11 The first question on this model that was posed in the Issues Paper (Question 1.8 a) asked:

> Do you think lay administrators and executors should be given subsidised assistance, short of legal representation, in applying for a grant of representation or in administering a deceased estate under a grant of representation or both?

2.3.12 The Institute received five answers to that question. One private legal firm responded twice to the questionnaire—first suggesting that lawyers could be subsidised to provide assistance as required for a nominal fee, and then suggesting that there was a fine line between providing assistance with documents and providing legal advice. Paralegals might be inundated with people who were ineligible but who did not want to seek and pay for legal advice. Therefore, any such proposal would need to be carefully managed.

2.3.13 The other private legal firm 'partially' agreed with the proposition in the question, considering that such assistance could be provided by way of financial assistance to community legal services.

2.3.14 The one community legal service that responded to the questionnaire did not answer this question.

2.3.15 The Public Trustee disagreed with the suggestion, considering it unreasonable to preserve the estate for the benefit of creditors and beneficiaries at the expense of the wider community where the estate had capacity to cover those expenses.

2.3.16 The Law Society of South Australia's response showed a difference of views between the Society's Succession Law Committee and its Justice Access Committee, but neither committee directly addressed Question 1.8 a.

2.3.17 The next question on this topic posed in the Issues Paper (Question 1.8 b) asked:

> If so, who should provide that assistance and what form should take?

2.3.18 The private law firm that responded twice said on the one hand that lawyers who were experts in the field could provide assistance as required, and on the other that perhaps community legal centres could offer the required service. It explained that they were staffed by solicitors who were meant to assist with matters which did not attract a grant of legal aid funding and to assist people who could not afford legal representation.

2.3.19 The other private legal firm suggested assistance in the form of information workshops by community legal services.

2.3.20 The response from the community legal centre did not address this question.

2.3.21 The Public Trustee did not express a view, considering it inapplicable, having answered in the negative to the first question.

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[27] Issues Paper, above n 4, 26-27 [86].

2.3.22 The response of the Law Society did not address this question.

The Institute's view

2.3.23 As will be seen later, while the Institute is recommending a simplified procedure, available as an alternative to a grant of representation in the case of small estates, this procedure is not one which would be available to lay executors or administrators.

2.3.24 Nevertheless, the Institute believes that there should be assistance to lay representatives in relation to some small estates (the issue of definition of 'small estate' is addressed below). Initially, generalised assistance in the form of a downloadable kit for applying for a grant of representation would be of great benefit to lay representatives, and, in the Institute's view, would reduce the number of estates administered informally.[28]

2.3.25 The efficacy of such a kit should be monitored to quantify the take-up rate and for other purposes. At a later point, after the kit has been available for a suitable period of time (dependent upon uptake), the State Government could establish a guided online lodgement process, available for both lay applicants and professional representatives.

Model 2 – Expedited grant

2.3.26 In the Issues Paper it was suggested that an expedited grant for certain kinds of small estates be considered as an alternative to a full grant. This model has no precedent in Australia.

2.3.27 The rationale for this less exacting yet still official formal grant is that, if it were quicker and cheaper to obtain than a full grant, families might be more willing to seek authority to administer. That authority would give them protection from liability and be a more satisfactory option for third parties dealing with the assets of the estate than running the risk of releasing those assets informally. It might reduce the likelihood of improper or incompetent estate administration, and possible consequent litigation.

2.3.28 The model envisages that the grant application requirements for estates below a certain value would be simpler, the fees would be lower than for ordinary grants and the application would be processed more quickly and less formally. This form of grant would be available to both lay and professional administrators for eligible estates. Eligibility might be based on estate value, absence of real property, or a combination of factors. Specific features of this process might include:

- Determination within a short time by specialist Probate Registry staff;
- A reduction of the evidence required to support the application so that it need only evidence the will, certification of death, eligibility of the applicant as administrator and eligibility of the estate for this kind of grant;
- With the consent of all beneficiaries, priority in processing;
- A fee less than for the current lowest grant application;
- Lower lawyers' fees (because application forms would be simpler).

[28] See also VLRC Final Report, above n 6, 193-195 [9.44]-[9.68].

2.3.29 To implement such an expedited grant in South Australia, there would need to be additional specialist staff in the Probate Registry. They might be funded by an increase in budget allocation or hypothecation of Probate Registry fee revenue.

2.3.30 However, a reduction in filing fees and legal costs should not be considered the main benefit. The purpose of this form of grant is to speed up the distribution of small uncomplicated estates and bring their administration within the oversight of the court to some extent. In this way creditors and third parties would be assured of the administrator's authority and beneficiaries would have greater protection.

Submissions

2.3.31 The first question on expedited grants (Question 1.1a) asked:

> What are your views on permitting some small deceased estates to be determined under the authority of a grant for which there are less stringent and cheaper application requirements than for a standard grant?

2.3.32 It should be noted that the changes outlined above to the Probate Rules and forms and, in particular, the changes to the tiered filing fee structure, has gone some way to addressing this question posed in the Institute's Issues Paper in 2014. In any event, the responses and recommendations to this question are set out for completeness.

2.3.33 The private law firm that responded twice stated in one response that such a relaxation of the current requirements would be a welcome alternative to the existing system, and should apply where the value of the estate was under $250 000 and involved no real estate. In its other response, it considered the suggestion sensible, because the filing fee and cost of preparing probate documents could on occasion form a significant percentage of a small deceased estate.

2.3.34 The other private legal firm supported the proposition as long as the fees were much reduced and the forms could be written in plain English rather than 'probate jargon'.

2.3.35 The response of the community legal centre appeared to support the proposition. It considered that the required current procedures were disproportionate to the value of the (small) estate. While the protection provided to the estate, the beneficiaries and the administrator by a (traditional) grant was highly desirable, the complexity and expense of the grant process was 'difficult to justify'.

2.3.36 In its response, the Public Trustee considered that any regime requiring court involvement to permit the administration of informal estates was of limited benefit. Indeed, it considered that any change, including the introduction of an online notification of intention to act database would impose greater costs for limited benefit. The Public Trustee also said it assumed that an estate value of $20 000 would be classed as being of small value.

2.3.37 The Law Society responded to this question through its Justice Access Committee. Its answer (and, in fact, all answers in the Justice Access Committee's submission) was in the same terms as that received from the community legal centre.

2.3.38 The next question (Question 1.1b) asked:

> What are your views on permitting some small estates to be administered under an authority less stringent than a grant that may not involve court approval?

2.3.39 The law firm that responded twice answered this question firstly by saying that its opinion depended on the authority and the rules governing such approval, and suggesting a court–issued 'small

estate' probate under 'estate specialist certification'. Its second response highlighted the risk that the protection of the court would not extend to those involved in the administration of the estate. It pointed out that suspicion could abound between beneficiaries throughout the process, irrespective of the size of the estate.

2.3.40 The other private law firm opposed the proposition.

2.3.41 The community legal centre argued that this model would make the process of obtaining a grant more accessible and less daunting to the lay person. It pointed out that strict measures would be required to ensure adequate protection for all parties involved, as well as for the proper administration of the estate. While it considered that such measures were often best performed by a court, it pointed out that government agencies such as the Lands Titles Office and Revenue SA had served such functions in the past and suggested that a similar body could be established. The community legal centre considered it important that a single repository be maintained for grants of all types, as having grants registered in more than one place would make processes such as those under the *Inheritance (Family Provision) Act 1972* (SA) 'even more complicated and inefficient'. This theme was also expressed to the Institute at the Mount Gambier and Adelaide consultation sessions.

2.3.42 The Public Trustee responded that it currently administered estates informally without court involvement, and would prefer no change to the current processes.

2.3.43 The Law Society's response touched upon this question only within the response of its Justice Access Committee. As mentioned, this response was in the same terms as the response of the community legal centre.

The Institute's view

2.3.44 It is important to remember that an assisted grant or an expedited grant of the type envisaged by this Report would benefit not only professional administrators (in particular, the Public Trustee) but would also be available to lay representatives. In South Australia, a person administering an estate without a grant has no special statutory protection against liability for dealing with the estate assets. The situation is otherwise in jurisdictions such as Victoria, the ACT and Queensland.[29]

2.3.45 The procedure suggested for an 'expedited grant' is set out in the Issues Paper.[30] As indicated there, it would require additional specialist staff in the Probate Registry, but for the reasons stated may be revenue neutral, or possibly better.

2.3.46 South Australia currently lags behind other Australian jurisdictions in allowing for the simpler administration of small estates. Numerous reforms have been instituted or proposed in Australia, but these largely focus on the 'election to administer' or 'deemed grant' procedures. These are procedures to be exercised only by the Public Trustee, or on occasion by a small class of professional administrators.

2.3.47 For reasons of natural caution, as well as for Australia-wide consistency, the Institute does not recommend the adoption of a type of 'expedited grant'. The Institute notes that the expedited grant model does not exist in any Australian jurisdiction and the alternative models, notably the deemed grant model recommended in this Report,[31] are preferable. The Institute also notes that the rationale

[29] See also VLRC Consultation Paper, above n 6, 37-39 [2.134]-[2.145].

[30] Issues Paper, above n 4, 28 [93].

[31] See below [2.3.92].

of lower costs as supporting the expedited grant model has been diminished in South Australia following the *Supreme Court Regulations (Probate Variations) 2016* and the adoption of the new tiered model of probate fees, especially the new filing fee of $750 to be paid for a grant of representation in South Australia where the gross estate is valued up to $200 000 (that is a 'small estate'). Nonetheless, the advantages of the expedited grant model have been identified and it should not be entirely dismissed from consideration at a later date.

B. Less formal, but potentially less protective procedures

2.3.48 The Issues paper identified the 'election to administer' and the 'deemed grant', as procedures that are less formal, but are therefore potentially less protective.[32] These procedures are seen to work satisfactorily elsewhere, especially in Australian jurisdictions and have been discussed at length by the National Committee and the Victorian Law Reform Commission. However, the one significant drawback they have in terms of making a simpler, cheaper procedure available to everyone is that they have been largely, if not exclusively, reserved for the Public Trustees (in the Northern Territory, trustee companies and legal practitioners may use the procedure of election as well); these procedures are not available to the public.

2.3.49 As noted in the Issues Paper, the existing Australian and Canadian models of administration without a grant are designed for professional administrators. They usually involve advertising the intention to administer and then, upon the expiry of a prescribed period after the advertisement, either –

(A) filing a notice of intention to administer with the court, along with inventory, and advertising that intention (this is the procedure for an election to administer); or

(B) (without filing any documents with the court) complying with statutory administration requirements (a deemed grant).

2.3.50 Having fulfilled these requirements, the professional administrator is deemed to have the equivalent of a grant, and to have responsibilities and liabilities that are equivalent to that of personal representatives under a grant.

Model 3 – Election to administer

2.3.51 This model was discussed at some length in the Issues Paper.[33] It is available in some Australian jurisdictions and involves the written and advertised notice of the election. When then filed in the Court Registry, the procedure allows a Public Trustee or a trustee company to administer an estate below a certain gross or net value, without taking out a grant in the normal manner.

2.3.52 This model allows for a less formal kind of authority to administer than a grant of representation, but both have similar effect. The National Committee Report distinguished it from an 'election to administer' in that it is simply filed in a court registry and, unlike a grant, is not an order issued under the seal of the court.[34]

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[32] Issues Paper, above n 4, 29-32 [98]-[109] (election to administer) and 32-36 [110]-[120].

[33] Ibid 29-32 [98]-[109].

[34] National Committee Report, above n 6, 115 [29.99]-[29.100].

2.3.53 Under this method, authority to administer the estate is achieved by the filing of a notice of election together with an inventory of the estate with the court, along with the giving of public notice (whether by publication in a newspaper or in the *Government Gazette*).

2.3.54 As was discussed in the Issues Paper,[35] the threshold value of an estate that may be administered in this way ranges quite widely, with variations of up to $150 000 between Australian jurisdictions. There may be some allowance made if the actual value of an estate turns out to be higher than anticipated.

2.3.55 The VLRC Consultation Paper reported that, although available in Victoria, election was rarely used.[36] Trustee companies had little financial incentive to manage small estates and the State Trustee (Victoria's Public Trustee) preferred to use the alternative deemed grant process whenever an estate was within the monetary thresholds, regarding it as a cheaper and easier method, involving less formality. The VLRC noted that the State Trustee would voluntarily file the will with the court when using the deemed grant procedure even though there was no requirement to do so as this afforded a means to trace any developments concerning the estate.

2.3.56 Notably, the National Committee, while acknowledging the current practice in Victoria, did not support the use of deemed grants and instead recommended an expanded form of election to administer for its model law. It considered this the cheapest and most convenient method for professional administrators to establish authority to administer estates of relatively low value without a grant of representation. It concluded that any advantages of deemed grants would be accommodated in the expanded form of its recommended election to administer. The National Committee noted that, in particular, an election to administer had the advantage over a deemed grant of enabling people to ascertain, by registry search, whether a particular estate was being administered.[37]

2.3.57 The Model Bill is based on the Northern Territory law, which allows an election to be filed not only by the Public Trustee or a trustee company, but also by a legal practitioner.

2.3.58 The Institute's Issues Paper sets out in more detail the discussion of the National Committee's recommendation.[38] The National Committee recommended, in part, a maximum net value of a 'small estate' of $100 000, indexed by CPI, with some allowance for error in estimation of the value. In addition, it recommended a cap on fees for administration by election, to keep such costs lower than by grant of representation. Further, it did not require the giving of public notice, that measure being included on the basis of cost.[39]

2.3.59 In contrast, the VLRC Final Report, having considered the National Committee's recommendations, took a different approach, recommending the repeal of elections to administer in Victoria and the retention of a refined version of the deemed grant procedure (as to which see discussion below).[40]

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35 Issues Paper, above n 4, 30 [103].

36 VLRC Consultation Paper, above n 5, 25 [2.57].

37 National Committee Report, above n 6, 133 [29.180].

38 This is attached as Appendix 2 to the Issues Paper; see Issues Paper, above n 4, 66-71.

39 National Committee Report, above n 6, 105 [29.62]-[29.63], 115 [29.99]-[29.100], 133 [29.179].

40 VLRC Final Report, above n 6, 205 [9.146]-[9.147].

Submissions

2.3.60 In relation to each of the specific models for a small estate process less formal than a grant of representation the Institute received quite limited feedback, both in the initial time period allowed for comments and also as a result of its additional request for response to its Further Consultation Paper.

2.3.61 No city-based or metropolitan solicitors responded. One of the country-based firm respondents opposed such a notion, whether an election to administer, or a deemed grant. The other country-based firm of solicitors was not so clearly opposed, but expressed concern that there were risks involved, in that the lack of involvement of the court would mean that no protection was afforded to those involved in the administration of the estate. The firm noted that, throughout the current process, there was often suspicion between beneficiaries and that a less formal procedure could exacerbate such suspicions.

2.3.62 The Public Trustee, the organisation most affected by possible changes, stated that it currently informally administered without court involvement in relation to small estates and would prefer no change to the current process. It considered its fees and charges related to informal administrations relatively small in comparison to the Supreme Court lodgement fee, and that there was little evidence of dissatisfaction with the service or the costs applied.

2.3.63 The Public Trustee considered that the system currently in place is not dissimilar to a deemed grant, and works well for small value estates.

2.3.64 It was explained that the Public Trustee obtained an indemnity from the beneficiaries for any actions initiated against it for not applying for a grant of administration. Generally, asset holders were willing to accept an indemnity by the executor or beneficiary to release funds without a grant where the asset value was $20 000 or less.

2.3.65 Additionally, the Public Trustee provided an education role, it said, which included assistance provided to laypersons regarding the administration of small value estates.

2.3.66 The Public Trustee stated that any regime that required court involvement to permit the administration of informal estates was of limited benefit. Any such change, including the introduction of an online notification of intention to act database, would impose greater costs for limited benefit.

2.3.67 In its response to the Institute's Further Consultation Paper, the Public Trustee addressed the question of the need and impetus for change. It repeated that the Public Trustee had not experienced any significant issues with the current practice of administering small deceased estates. As well, given the new fee structure for grant applications in the Probate Registry early in 2016, the costs in relation to obtaining a grant for a small estate was likely to be less prohibitive for lay administrators.

2.3.68 The Public Trustee indicated that it had well-established procedures for handling such small value estates, including advertising, that were acceptable to the asset holders and accordingly, it saw no need for change. It commented that the lack of response to the Issues Paper might be an indication of the level of perceived need for change, and might also be indicative of the lack of exposure by most legal practitioners to small value estates. It considered that most legal practitioners and private executors would be disinclined to manage a small value estate, as it might not be economically viable. Legal practitioners or private executors might simply be instructed to prepare the grant application for clients who then may well prefer to administer the estate themselves. In addition, both often referred small value estates to the Public Trustee.

2.3.69 The Public Trustee surmised that, rather than introduce new court procedures (with their associated costs and obligations), an extension of the provisions under ss 71 and 72 of the *Administration and Probate Act 1919* (SA) would certainly assist lay administrators. While acknowledging that a reduced application fee for small value estates was introduced in 2016, the Public Trustee considered it might be appropriate to further reduce the fees for estates under $200 000 to say, 0.375 per cent of the value of the estate, rather than a flat fee. It considered this would represent a more equitable cost structure for small value estates that require a grant of probate.

2.3.70 The Registrar of Probates suggested that the low public and professional response might indicate that there was not a great need for change in this area of the law. Nonetheless, he thought that the election to administer should be of interest to the Public Trustee.

2.3.71 The Registrar also made the point that the new tiered filing system would mean a reduction in filing fees for probate in small estates, namely those under $200 000. The new scale came into operation in March 2016 and had had the effect of reducing the fees for estates under the value of $200 000 from $1114 to $750.

2.3.72 In discussion, the Registrar also seemed to consider that, for practical purposes, 'small estate' needed to be defined in monetary terms rather than in relation to its character. He made the point that for estates under the value of about $30 000, the Public Trustee was in effect the agency dealing with such matters, apart from lay administrators.

The Institute's view

2.3.73 Clearly, processes such as the election to administer have only ever been considered appropriate for professional administrators within Australian jurisdictions. The Institute considers that there are good reasons why this should be so. To make such a process available for lay administrators would leave open the possibility of maladministration or dishonesty, without any security in such a case.

2.3.74 The election to administer process has found favour within Australia, although the VLRC recommended its abolition in favour of the deemed grant process, which it suggested be modified in line with the recommendations in its report.

2.3.75 The Institute found little support in the responses it has received to legislate for such a process for professional administrators in South Australia. Significantly, the Public Trustee has not asked for any such powers and considers that its present procedures are meeting the needs of its clients and the public more generally.

2.3.76 Nonetheless, the Institute considers that there is a gap within present processes compared with other Australian jurisdictions and that, if not all professional administrators, the Public Trustee at the least, should have available a process that is informal, but traceable by those interested in the management of the estate.

2.3.77 In South Australia, this issue is largely within the area of operation of the Public Trustee, and therefore the Institute does not believe it necessary to be prescriptive as to the exact process to be made available in South Australia (though its preference is for the deemed grant model suggested by the VLRC). With the modifications to the election to administer process recommended by the National Committee, and those improvements suggested to the deemed grant by the VLRC, the two processes have many similarities and both provide traceability and accountability.

2.3.78 If either of these procedures were available within South Australia, it need not be mandatory for the Public Trustee to use them. Rather, for estates that might fall within the value range from, say $30 000 to, say $100 000, indexed for CPI, the Public Trustee could administer the estate safely and transparently for all concerned by utilising such a process.

2.3.79 During the initial stages of consultation, officers from the Public Trustee showed interest in the concept of a more informal grant in cases where they were unable to administer an estate informally but where the costs of obtaining a grant were difficult to justify. Experience in Victoria suggests that a more informal grant would be utilised by the Public Trustee in appropriate cases, if available.

2.3.80 The Institute accepts that the election to administer model is a sound practical option but it considers that the deemed grant model examined in this Report has distinct benefits and is the preferable model.[41]

Model 4 – Deemed grant

2.3.81 A 'deemed grant' procedure is available to the Public Trustee in some Australian and Canadian jurisdictions, but there is no equivalent in the United States. The Australian jurisdictions that offer a deemed grant procedure permit it to be used by the Public Trustee when that Office is otherwise eligible to apply for a grant of representation or to elect to administer a deceased estate which fits within the statutory values defining small estates within that jurisdiction, and when no application for a grant of representation has been made. In all relevant Australian jurisdictions except the Northern Territory, this option is restricted to the Public Trustee. In the Northern Territory, in addition to the Public Trustee, this option is also available to trustee companies and legal practitioners.

2.3.82 Administration by deemed grant is achieved by advertising an intention to administer the estate and then proceeding to administer within a prescribed time of advertising that intention. Collection of the estate is achieved by presentation of a letter stating that the Public Trustee is acting under the relevant statutory authority. There is no grant of representation, and no requirement to file any notices of intention or documents with the court. In contrast to an election to administer, the relevant court is not involved at all and there is effectively no court record (the Probate Registry, being the obvious source for those searching for information about an estate). The relevant legislation in Australian jurisdictions simply deems that jurisdiction's Public Trustee or equivalent to have been granted probate or administration once the statutory notice period has expired.

2.3.83 As noted, points of difference between the deemed grant procedure and an election to administer include:

- that for deemed grants there is no filing of any notice with the court and no requirement to file the will or an inventory of the estate, or to search for caveats, deposited wills or prior applications, as there are for elections to administer; and
- that the court has no record of the fact that the Public Trustee is administering a deceased estate if by means of a deemed grant, while it will have a record of that administration if the estate is being administered by election.

2.3.84 As discussed in the Institute's Issues Paper,[42] the threshold value under which an estate may be administered by deemed grant varies greatly between the jurisdictions that permit this procedure.

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41 See further below [2.3.81]-[2.3.92].

42 See generally, Issues Paper, above n 4, 32-37 [110]-[124].

The upper value of a small deceased estate varies within a range up to $100 000, may be gross or net of any liabilities to the estate and may have built-in a small allowance for an incorrect initial estimate of the value.

2.3.85 Fees chargeable to the estate by the Public Trustee for a deemed grant vary. For example, in New South Wales, the same fees are chargeable for a deemed grant as for a grant of probate or administration, whereas fees are reduced in some other jurisdictions.

2.3.86 The VLRC favoured the deemed grant procedure over elections to administer. It recommended a refined version of the existing Victorian procedure, already used routinely by the State Trustee for small estates. The recommended refinements would, among other things, ensure that there was a searchable official record of the fact that the estate was being administered this way, and simplify the public notice process.[43]

2.3.87 The VLRC Final Report summarised its recommended refinements to the deemed grant process as follows:

- Raising the threshold dollar value of estates that may be administered under the scheme to $100 000.
- Indexing this value to reflect changes in the consumer price index, thereby ensuring that the figure remains up to date.
- Inserting a second safety net value, expressed as a percentage of the threshold figure, above which State Trustees would need to apply for a full grant, to accommodate any underestimation of the value of the estate at the time of filing.
- Adding a requirement to file the will, if there is one, which would alert the Probate Office to the expedited grant.
- Replacing the requirement to advertise in a newspaper with a requirement to advertise on the Court's website, thereby creating a searchable record.[44]

2.3.88 In the Institute's Issues Paper, this refined version of the deemed grant is referred to as the 'VLRC model deemed grant'.[45]

Submissions

2.3.89 It follows from what has been said above that there was little direct feedback from responses received about the deemed grant process or its desirability. The Public Trustee, in initial discussions, showed some enthusiasm for the process as it had been outlined in the VLRC recommendations. In later communication with the Institute however, it opted to retain the status quo, arguing that its, and the public's, needs were currently effectively met under the present regime.

2.3.90 The Registrar of Probates did not directly support any new process or see a need for one, but thought that the Public Trustee might see such a process as desirable, suggesting it might prefer the election to administer.

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43 VLRC Final Report, above n 6, 209 [9.146]-[9.149].

44 Ibid 206 [9.149], 208 [9.159]-[9.165].

45 Issues Paper, above n 4, 35 [118].

2.3.91 The small number of other respondents did not comment directly on this model or option.

The Institute's view

2.3.92 Consistent with the above discussion, the Institute considers it desirable that a deemed grant process be available to professional administrators in South Australia, most importantly, the Public Trustee. The Institute recommends that the deemed grant model be introduced and implemented in South Australia. The Institute's Issues Paper outlined in some detail this process, as modified by the VLRC's recommendations.[46] The Institute recommends that the features as identified and recommended by the VLRC should be incorporated into the South Australian regime, with some refinement, including:

- A threshold dollar value of estates that may be administered under the scheme to estates with a gross asset value of $100 000 indexed to reflect changes in the consumer price index.
- Inserting a second safety net value, expressed as a percentage of the threshold figure, above which administrators would need to apply for a full grant, to accommodate any underestimation of the value of the estate at the time of filing.
- Adding a requirement to file the will, if there is one, which would alert the Probate Office to the expedited grant with legislative clarification needed to ensure that the Probate Office would not be required to review any wills submitted as part of the expedited process.
- Replacing the requirement to advertise in a newspaper with a requirement to advertise on the Court's website, thereby creating a searchable record.
- It should specifically discharge from liability third parties who deal in good faith with the administrator.
- It should require the administrator to keep accounts of the administration for a set period, to be available for inspection by anyone with an interest in the distribution of the estate, or otherwise by order of the Supreme Court.

C. More speculative models

2.3.93 The Institute's Issues Paper identified certain procedures that could be instituted either by affidavit or a statutory declaration. These models came from North American jurisdictions. Some require court involvement, but others only involve lodgement and the ability to search the documents involved. Such procedures are largely designed for lay potential administrators (although if adopted, they could be made available to the Public Trustee and other specified bodies). The Issues Paper examined these types of procedures in some detail.[47] These models, predominantly for lay administrators without a grant are generally designed for executors named in the will, or beneficiaries.

2.3.94 The Issues Paper briefly discussed various United States models, which may be described respectively as summary administration by collection affidavit, court-approved summary administration and verified summary administration.[48]

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[46] Ibid 32-37 [110]-[124].

[47] Ibid 37-39 [127]-137].

[48] Ibid 37 [128]-[129].

2.3.95 Given that South Australia is currently in the position of having no alternatives to a full grant, and on the basis that it might be useful to at least consider beneficiary administration models that encourage proper administration of estates that might otherwise be administered informally, the Institute's Issues Paper[49] examined in some detail the model of beneficiary administration recommended by the BCLI's Interim Report. The BCLI recommended this as a simple and swift means of initiating administration without the need for court appointment.[50]

2.3.96 There is no precedent for summary administration by named executors or beneficiaries in Australia. Neither the National Committee nor the VLRC recommended any such procedure for beneficiary administration. Indeed, each of those reform agencies effectively recommended a reduction in the number of methods of professional administration without a grant. The Institute notes these recommendations.

2.3.97 Given the nature of the options in other Australian jurisdictions and the apparent lack of support for any fundamental change, it seems prudent that, if South Australia is to make a change, it should be a moderate one that is in line with other Australian jurisdictions, unless there is a convincing case established otherwise.

2.3.98 The Institute therefore recommends that, as a cheaper, simpler alternative to a full grant of representation in the case of estates of small value, South Australia should opt for the deemed grant procedure (or in the alternative, an election to administer procedure). In any event, the Institute does not recommend the simplified procedures without a grant for lay administrators referred to in the Issues Paper (ie: summary administration by collection affidavit, court-approved summary administration, verified summary administration or summary administration by declaration).

Informal administration

2.3.99 In Australia, a large number of deceased estates are administered informally, that is, without a grant of representation, an election to administer or a deemed grant.[51]

2.3.100 Therefore, it is important for informal administrators and third parties to understand their potential liability and its limits. The Issues Paper reviewed provisions aimed at:

- identifying and protecting the liability of informal administrators;
- protecting third parties making specific payments to survivors of the deceased; and
- protecting certain dealings in land without a grant.[52]

Limiting liability of informal administrators

2.3.101 The National Committee recommended a model provision to both declare and limit the liability of those who administer a deceased estate without formal authority.[53] The recommendation

[49] Ibid 28-29 [133]-[137].

[50] BCLI Interim Report, above n 6, 26-27 and see further ibid 26-44; Issues Paper, above n 4, 74, Appendix 4.

[51] VLRC Final Report, above n 6, 195 [9.70].

[52] Issues Paper, above n 4, 42-48 [147]-[176].

[53] National Committee Report, above n 6, 156 [29.274]-[29.282].

was endorsed by the VLRC in its Final Report.[54] Both bodies urged that this particular provision be expressed as simply as possible so that lay people can understand it.

2.3.102 Regarding liability, the model provision makes it clear that the informal administrator is liable to account for all of the estate that he or she obtains, receives or holds and any debt of the estate that he or she might release. Regarding protection, the model provision legitimises transactions that would otherwise be proper, if carried out by a personal representative under the authority of a grant of representation.

2.3.103 Clause 435 of the Model Bill states these principles in clear and simple language.[55]

Protecting certain payments by third parties

2.3.104 Some third parties are currently protected from liability for paying assets of the deceased directly to beneficiaries whether or not they have a grant of representation. Most Australian jurisdictions, including South Australia, permit the payment of wages and small sums held for a deceased person directly to specified classes of relatives or others in some circumstances, under the protection of the complete discharge of liability. The South Australian provisions are set out in ss 71 and 72 of the *Administration and Probate Act 1919*.[56] These provisions apply to any deceased estate. These provisions, and similar laws in other jurisdictions, exist to help ensure that small amounts of monies belonging or owing to the deceased can be promptly released before the estate is finalised.

2.3.105 In South Australia, the payment is restricted to particular entities and limited to extremely small amounts payable to a narrow class of eligible persons. There are three separate provisions:

(1) The Treasurer may direct payment to a spouse or domestic partner of the deceased (and, at his or her discretion, to any other person who appears to be entitled to it) of up to $2 000 in wages or other money, owing to a deceased government employee: s 71(a);

(2) The Treasurer may direct payment of money or delivery of property held by a public hospital for a person who died there up to $2 000 to the surviving spouse or domestic partner or to any other person who is, in the opinion of the Treasurer, entitled to it: s 71(b);

(3) Authorised Deposit-taking Institutions (ADIs) may pay to the spouse or domestic partner of the deceased up to $2 000 standing to the deceased's credit if probate or letters of administration are not produced within three months of the death; s 72.[57]

2.3.106 In considering such provisions, the National Committee thought they might be very helpful in carrying out the informal administration of estates, were it not for their limited and specific nature and scope. It proposed a more general provision for its model laws, rather than one applying only to particular categories of persons holding money or other property of the deceased.[58] The National Committee's model provision is based on a now repealed and replaced section of the *Administration and Probate Act 1958* (Vic). It would expand the group of persons to whom money or property held for the

[54] VLRC Final Report, above n 6, 201, Recommendation 71.

[55] This is reproduced in Appendix 2 to the Issues Paper; see Issues Paper, above n 4, 71.

[56] The South Australian legislation is set out in Appendix 1 of the Issues Paper. See ibid 59-65.

[57] Though see further below n 59.

[58] National Committee Report, above n 6, 165-166 [29.313]-[29.320], 172, Recommendation 29.9.

deceased may be paid or delivered from spouses and children to any other person who appears to be entitled to the property of the deceased.

2.3.107 The National Committee's suggested provision permits payment of amounts up to $15 000. The VLRC considered this issue[59] and its Final Report noted that this amount had been recommended in 2009. It recommended that the figure for funds or property be raised to $25 000, adjusted quarterly for CPI.[60] This recommendation was accepted and from 1 January 2015, the *Administration and Probate Act 1958* (Vic) allows *any* person who holds money or personal property for a deceased person up to a value of $25 000 (adjusted annually) to pay or deliver it to *any* person who appears to be entitled to it. The adjustment is made each 1 July (not quarterly as suggested by the VLRC) by the 'all groups consumer price for Melbourne'.[61] A person who pays money or delivers property in good faith in accordance with this provision is protected from liability.[62]

2.3.108 In comparison with the National Committee's model and the new Victorian provisions, the South Australian third-party payment provisions look very limited in scope. They are limited to ADIs, South Australian government employers and government hospitals. Hospitals can hand over property, but government employers and ADIs are limited to money and not personal effects.

2.3.109 The South Australian limit is a very modest $2 000. This amount was set in 1975 by the *Administration and Probate Act Amendment Act 1975 (No 2)* (SA) and has never been updated. The amount of $2 000 is obviously inadequate taking into account the changes in money value in the last 41 years and in comparison with the National Committee's recommendation of $15 000 and the Victorian figure of $25 000 (this highlights the problem in leaving such amounts to be updated by Parliament as opposed to providing some means of automatic adjustment). In addition, those provisions do not require ADIs to defer payment for three months from the death in order to attract the statutory protection from liability.

2.3.110 Further, the South Australian provision permits release to the surviving spouse or domestic partner only, except in the case of government employees or hospital patients where the Treasurer has a wider discretion to authorise payments out.

2.3.111 Finally, the model provision involves less formality in the authorisation process for the release of moneys.

2.3.112 The Institute considers there is merit in amending the South Australian provisions along the lines of the model provision, with an appropriate annual CPI adjusted monetary limit, to allow payments of greater amounts, in a wider range of circumstances, to a wider range of apparently entitled persons and with less formality. The Institute further accepts that the amount of $2 000

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[59] See VLRC Final Report, above n 6, 198-2000 [9.88]-[9.108]. Section 69B of the *Banking Act 1959* (Cth), in contrast, allows an Authorised Deposit-taking Institution (ADI) to pay an amount not exceeding $15 000 held by the ADI without production of probate or letters of administration. Any constitutional implications of fixing a different amount for certain of these payments under State laws was not raised or considered by the VLRC. See VLRC Final Report, above n 6, 198-2000 [9.88]-[9.108]. The Victorian statutory model uses a different amount to the *Banking Act 1959* (Cth). The Institute notes that it is possible to comply with both the State and Commonwealth provisions in this context concurrently if the payments under the Commonwealth Act are to funeral expenses and not to the survivng spouse or domestic partner. The constitutional implications may merit further consideration.

[60] VLRC Final Report, above n 6, 201, Recommendation 71.

[61] *Administration and Probate Act 1958* (Vic) s 31B.

[62] The *Justice Legislation Amendment (Succession and Surrogacy) Act 2014* (Vic) repaled the old provision and added ss 31A to 31D to the Act with effect from 1 January 2015.

(as was also noted to the Institute in its consultation) is plainly inadequate for 2016. The Institute considers that, drawing on the Victorian model, a maximum amount of $25 000 with provision for annual adjustment for CPI, seems reasonable.[63] The Institute suggests that a model similar to s 33(7) of the *Defamation Act 2005* (SA)[64] be used for ease of reference and to avoid awkward amounts. The Institute recommends that the various changes set out in this paragraph should be made to ss 71 and 72 of the *Administration and Probate Act 1919* (SA).

2.3.113 It is critical to any such provision that it protects from liability those who release money in accordance with its requirements to the estate, and that it does not preclude the entitlement of beneficiaries of the estate to recover monies so paid from those who received it. These are features of both the recommended model and the current South Australian provision.

Expediting dealings with land

2.3.114 The Issues Paper summarises the position in Australian jurisdictions with respect to dealing with land belonging to a deceased person.[65] Except in Queensland, land cannot be transferred without a grant of representation (or in some jurisdictions, an election to administer or a deemed grant). Once the title to the land has been vested with a personal representative, he or she must then deal with it in accordance with the will or the rules of intestacy. If the process of obtaining a grant takes a long time, dealings with the deceased's land are correspondingly held up often at some inconvenience and cost.

2.3.115 The Queensland provisions[66] allow the Registrar to register land of which the deceased is the registered proprietor in a person's name, without a grant. This can happen where there is a will and the person concerned is entitled under the will to be the personal representative or the Registrar considers the person would likely succeed in an application for a grant of representation. These provisions are available whatever the value of the deceased estate—they are not confined to small estates.

2.3.116 These provisions also apply where the deceased landowner died intestate and the estate is valued at no more than $300 000 gross at death. In such a case, the Registrar may register the land in the person's name if the Registrar considers the person would likely succeed in an application for a grant of representation.

2.3.117 Under these provisions, a personal representative in whose name the deceased's land is registered in this way has the same rights, powers and liabilities in relation to that land as if he or she had a grant of representation.

2.3.118 The Queensland provisions, importantly, also permit direct registration of land or an interest in land in the name of a beneficiary under the will, with the consent of the personal representative or a person who, in the Registrar's opinion, would succeed in an application for a grant.

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[63] The Institute notes that there are different means to update such amounts (see, for example, *Defamation Act* 2005 (SA) s 33). One alternative or additional means to provide flexibility would be for the relevant Minister to have the power to set a figure in advance of the usual 1 July automatic adjustment date for CPI.

[64] 'In adjusting an amount to be declared for the purposes of subsection (1), the amount determined in accordance with subsection (4) is to be rounded to the nearest $500.'

[65] Issues Paper, above n 4, 45-47 [160]-[170].

[66] *Land Title Act 1994* (Qld) ss 111-112.

2.3.119 The effect of the Queensland provisions is that in appropriate circumstances the delay and cost of a transmission application transferring the property into the name of the representative may be avoided.

2.3.120 In the Issues Paper, the Institute suggested that there was much to be said for the Queensland approach in simplifying and reducing the costs of the administration of deceased estates that include real property.[67] Where a grant would not otherwise be needed, the provision would obviate the need for a grant at all when the estate included real property. Where there was no dispute as to the beneficial entitlement to the land it would remove the registration cost of having to transmit the land first to the personal representative before transmitting it to beneficiaries.

2.3.121 The National Committee recommended that all Australian jurisdictions should consider enacting provisions along the lines of those in Queensland.[68] It suggested that the appropriate place for such provisions would be in State and Territory real property legislation. The *Real Property Act 1886* (SA) contains no such scheme.

2.3.122 The Institute recommends against adopting such provisions in South Australia for two primary reasons:

- without a formal grant (of any kind), land (often being the largest assets contained in a deceased estate) could be effectively transferred and dealt with by the Registrar General when, on his/her assessment, it is considered that the person would 'likely succeed' in an application for a grant of representation. This is effectively conferring the jurisdiction of probate from the Supreme Court to the Lands Titles Office (LTO) which could be fraught with danger, not to mention the further costs and training required for the Registrar General and LTO examiners.
- such provisions, by obviating the need for a grant, have the possibility of leading to the unintended consequence of encouraging or permitting avoidance of family provision claims under the *Inheritance (Family Provision) Act 1972* (SA).

2.4 Summary of options and recommendations

2.4.1 It is evident that the problems faced by those administering small estates in South Australia, and by third parties transacting with them, are capable of resolution in several ways.

2.4.2 The Institute has received only very limited support for any suggestion in its consultation to transfer the inherent and long established jurisdiction of the Supreme Court for the administration of small estates. Frustration was widely expressed to the Institute in its consultation by succession lawyers and staff at the Public Trustee's Office at the perceived rigidity of some of the present practices in the Supreme Court in the administration of small estates.[69] However, it was still widely felt that any changes to existing procedures in the administration of small estates should be retained within the rules and procedures of the Supreme Court in light of its specialised role, resources and expertise. The Chief

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[67] Issues Paper, above n 4, 46 [166].

[68] National Committee Report, above n 6, 142 [29.219]-[29.221].

[69] One issue, for example, that was raised to the Institute by some country lawyers was the need for electronic service of probate documents to be recognised by the Probate Registry. It was noted that the delays in country postal services raise problems. The Institute sees the sense, reflecting technological developments, to recognise electronic service of probate documents, especially for country succession lawyers. Country lawyers noted communication with Adelaide based lawyers and court registries can be expensive, time consuming and slow.

Justice of the Supreme Court also relayed to the Institute his view that the administration of small estates should be retained within the rules and procedures of the Supreme Court given its specialised role, resources and expertise. This view was also relayed by the Chief Magistrate and the Law Society's Succession Law Committee. The Institute supports this approach.[70] The Institute recommends that the Supreme Court retains its existing exclusive role in the administration of small estates.

2.4.3 Given the limited responses to the Institute's Issues Paper, and the current state of the law in South Australia, as well as the reaction of the major participants in this area of law, the Institute considers it would be unhelpful and counter-productive to have too many alternative methods of administration. Further, too great a departure from the current practice elsewhere in Australia may well make administration more difficult where a South Australian estate comprises property in other jurisdictions (a not uncommon situation, given the increasing mobility of modern families).[71]

2.4.4 It is possible, for example, to alleviate these problems without adding alternatives to grants to representation. The tiered scale of probate fees introduced in 2016 has gone some way to achieving this goal. Offering assistance to apply for a grant with free or subsidised information, or a guided online application lodgement system would further assist.

2.4.5 The Institute has opted for a further approach, in addition to such measures. It has recommended that the deemed grant, in the form recommended by the VLRC should be adopted and be available at least to the Public Trustee. The Institute does not recommend a process of summary administration by declaration.

[70] See further below [3.4.10]-[3.4.12], [3.5.8]-[3.5.8].

[71] The Institute was informed at its Mount Gambier consultation session that many farming families own property in both Victoria and South Australia.

Part 3: Resolution of minor succession law disputes

3.1.1 The importance of addressing legal costs and supporting and promoting access to justice for all parties in the resolution of small estate disputes, is obvious.

3.1.2 The authority in succession law remains exclusively vested with the Supreme Court of the various Australian jurisdictions, reflecting the established view that these are serious matters for families and individuals, regardless of their monetary value. Accordingly, any reform in this area needs to be carefully considered with these fundamental principles in mind. Despite the low monetary value of many estates, one view is that it is not appropriate for such estate issues to be dealt with in a less formal or less rigorously tested manner. If this were to be done, the primary hallmark of protection afforded to the making of one's will would be lost. A 'watering down' of judicial determination of estate disputes runs the risk of impacting on society's views of the importance and seriousness of the act of making a will.

3.1.3 It should also be noted that the strong view that was expressed in the consultation process is that the size or value of an estate does not necessarily denote its complexity or the likelihood of litigation. Indeed, it was pointed out to the Institute at the Mount Gambier, Adelaide, Port Lincoln, Berri and Public Trustee consultation sessions that some of the most difficult estates to administer and intractable succession disputes that arise are not in relation to large estates, but small estates. This theme also emerges from wider research.[72] As one study notes, '[t]o a large degree, the data indicates that smaller estates generate at least as much, if not more, controversy than large estates.'[73]

3.1.4 The Supreme Court of South Australia is vested with the exclusive jurisdiction to determine disputes about deceased estates,[74] regardless of the value and complexity of the estate. However, not all disputes involve large sums of money or are particularly complex. In appropriate cases, alternative methods of resolution which are more informal, simple, swift and cost effective than a Supreme Court hearing may be more appropriate to resolve minor succession disputes.

3.1.5 Further, estate disputes in the Supreme Court are heard in both the Civil Jurisdiction of the Court and the Testamentary Causes Jurisdiction. Matters arising under the Testamentary Causes Jurisdiction are those actions governed under the Probate Rules which include some statutory actions.[75] Civil actions comprise claims for further provision under the *Inheritance (Family Provision) Act 1972* (SA) and actions for the proof and validity of a will in solemn form (ie often used where there is a dispute over the validity of the will and an application for a Grant of Probate in 'common form' is not appropriate). Matters in the Testamentary Causes Jurisdiction of the Court are filed at the Probate Registry (and not the Civil Registry) and are considered by the Registrar of Probates at first instance

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[72] See, for example, Jeffrey Schoenblum, 'Will Contests: an Empirical Study' (1987) 22 *Real Property, Probate and Trust Journal* 607; Prue Vines, Bleak House Revisited? Disproportionality in Family Provision Estate Litigation in New South Wales and Victoria (Australasian Institute of Judicial Administration, 2011); Cheryl Tilse, Jill Wilson, Ben White, Linda Rosenman and Rachel Feeney, Having the Last Word? Will Making and Contestation in Australia (University of Queensland, 2015) 17; Shane Rodgers, 'Today, where there's a will, there's a way to fight over it', 10 April 2015, *The Australian* (online), <http://www.theaustralian.com.au/business/legal-affairs/today-where-theres-a-will-theres-a-way-to-fight-over-it/news-story/759dd1c335c4fe78ab068bc930a990a2>.

[73] Schoenblum, above n 72, 615.

[74] *Supreme Court Act 1935* (SA) s 18.

[75] For example, actions under s 7 or s 12(2) of the *Wills Act 1936* (SA).

and, depending on the matter type, the Registrar can determine the matter him or herself, or may choose to (or be required to, under the Rules) refer the matter to a Justice or Judge of the Court.

3.2 Estate Disputes

3.2.1 The first question involves a brief overview of what constitutes an 'estate dispute'. In reality, estate disputes are wide and varied. For simplicity, they can be broken down into four broad categories:

- Claims for provision from an estate pursuant to the *Inheritance (Family Provision) Act 1972* (SA), commonly referred to as 'inheritance claims';[76]
- Disputes concerning the validity of a will or testamentary instrument;
- Construction of wills including interpretation of words and clauses in a will; and
- Disputes concerning the administration of estates including the conduct of an executor/administrator.

3.2.2 Each of the above have their own procedure, whether governed in the *Supreme Court Civil Rules 2006* (SA), the *Supreme Court Probate Supplementary Rules 2015* (SA) or the *Supreme Court Probate Rules 2015* (SA). In particular, recent changes to the Rules have effectively led to 'small estates' being dealt with for two of the four categories above.

3.2.3 First, for inheritance claims, Rule 316 provides that if 'there are reasonable grounds on which to conclude that the net estate of the deceased that will be available for distribution will be less than $500 000' and 'it is in the interests of justice to do so', the Supreme Court may determine an inheritance claim 'summarily', meaning the action can be determined by a Master of the Court on the basis of evidence that does not conform with the rules of evidence, with the primary object being the minimisation of costs and an expeditious, but just, resolution of the action. There are costs ramifications for parties where the action should have been, but was not, dealt with summarily, whereby the plaintiff may be ordered to bear any costs that might have been avoided if the matter had proceeded summarily.[77]

3.2.4 Secondly, for applications under s 69 of the *Administration and Probate Act 1919* (SA) or s 91 of the *Trustee Act 1936* (SA) by any trustee, executor, or administrator for advice or direction from the Court as to matters connected with the administration of any estate, or the construction of any will, deed, or document when in difficulty or doubt, recent changes to the *Probate Rules 2015*[78] provide that where the net value of the whole estate, trust or fund or any share in such estate, trust or fund in respect of which approval, advice, power or direction is sought does not exceed $500 000, the application to the Court may be made without notice to any other party. There is no filing fee where the estate is under $500 000.

3.2.5 Accordingly, the above recent changes have largely simplified and streamlined these types of disputes for estate under $500 000 and, as such, reform has already been implemented in these areas. A review of these reforms is appropriate in due course to establish whether they:

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[76] The Institute will be examining the role and operation of the *Inheritance (Family Provision) Act 1972* (SA) as a follow up project in 2017.

[77] *Supreme Court Civil Rules 2006* (SA) r 316(3).

[78] *Probate Rules 2015* (SA) r 80.

(a) are being utilised by parties to actions; and

(b) whether they have had the intended consequence of lowering the cost of such disputes and making the process swifter and more efficient for the parties involved.

3.3 What is a small estate?

3.3.1 As with the issues surrounding any reforms aimed to simplify the administration of a 'small' estate, the question needs to be resolved about when is an estate considered 'small' for dispute purposes. This is not a simple issue. Various Australian jurisdictions provide very different amounts as to what constitutes a 'small' estate for varying succession purposes.[79]

3.3.2 By its very nature, the question of what is a small estate can only be objectively determined by reference to a monetary amount. The monetary amount would need to be based on the size of the estate, rather than the amount of the claim itself because, in most estate disputes, it is impossible to properly quantify a 'small claim' as many estate disputes do not require the parties to quantify their claim. In some cases, as with the validity of a will, the quantum of the claim will depend upon which will (or version of the will) is valid and there may be many outcomes each with a differing quantum for each party. As a practical example, in the case of a claim for provision under the *Inheritance (Family Provision) Act 1972* (SA), it is rare for a plaintiff to quantify their claim formally at the commencement of the action or, indeed, at any stage other than in without prejudice settlement discussions or during closing submissions at the conclusion of a trial. The usual practice is to simply seek 'such provision (or further provision) that the Honourable Court deems appropriate'. The primary reason for this is, at the commencement of the action, it is rarely known what the competing beneficiaries' circumstances are leading to the inability of a plaintiff to realistically assess quantum and in light of the subjective nature of the Court's decision making process. In other cases, such as will validity, construction or questions touching upon the administration of estates, the 'claim' itself is not usually based on any monetary figure, but rather on the veracity or interpretation of a will from which the parties' various rights will then flow.

3.3.3 The questions are then: up to what monetary value is a 'small estate' and should the value be based on the 'net' value of the estate or its 'gross' value. Take, for example, the concept of a small estate being a net value of up to $500 000 as appears to have been adopted by the Court as a small estate threshold amount and discussed earlier in this Report. A $5 million dollar estate (comprising mainly real estate) would be viewed as a large estate in South Australia but if the estate also had $4.6 million dollars worth of mortgages/debt, the net value would be only $400 000, meaning that the adoption of a threshold of $500 000 of the net value of the estate would have the effect of the estate being defined as a 'small estate'. On the other hand, in the same scenario, if the gross value were adopted, the estate would not be treated as a 'small estate' even though the real value being disputed as between the parties is only $400 000. The questions being determined may well question the validity of such debts disclosed, which further complicates the question as to whether the estate is small or not.

3.3.4 Similarly, an example cited by the Registrar of Probates involved an estate that had additional assets disclosed following the making of a grant of representation of $9 665 257. At first instance, prior

[79] VLRC Consultation Paper, above n 6, 19 [2.16]-[2.18].

to the disclosure of the additional asset, the process of progressing an estate dispute may well alter, depending on the value disclosed at the relevant time.

3.3.5 The notion of a 'small estate' can be misleading. The usual rule is that assets such as jointly held property, superannuation and assets in family trusts do not count towards the value of an estate for succession purposes. Yet the value of such assets may be considerable, whilst the value of the estate may be small. One example cited to the Institute in its consultation concerned an estate valued at $20 million where the assets relating to the family business were held in a family trust and the estate was only valued at $20 000. This would strictly amount to a small estate.

3.3.6 Finally, the question of the average value of estates may differ depending upon whether the estate is based in the greater Adelaide region or whether it is rural (either a small country town or a farming property). The main asset of many estates for which disputes arise is the ownership by the deceased of real property in the form of a main residence. Average values of residential property differ greatly depending upon the location of the property making it very difficult to create a threshold that would apply fairly across the board to all South Australian estates. The difficulty of defining what is a 'small' estate was an issue that troubled the Registrar of Probates and the succession lawyers who attended the Mount Gambier, Adelaide and Port Lincoln consultation sessions. No clear view emerged. It was especially pointed out to the Institute that what might be seen as a small estate in Mt Gambier would not be seen as a small estate in eastern Adelaide or Port Lincoln. It was noted that whilst a decent house might be purchased in a farming village near Mount Gambier for as little as $80 000 (or even less), a similar property would cost about $350 000 in Port Lincoln.[80]

3.3.7 The Institute recognises the inherent difficulties with adopting a monetary figure based on the size of the estate and whether such value is based on the 'net' or 'gross' value of the estate. The 'net' value of the estate appears to be adopted for the $500 000 threshold for inheritance claims to be determined summarily in Rule 316 of the *Supreme Court Civil Rules 2006* (SA) and pursuant to applications for advice and direction under Rule 80 of the *Probate Rules 2015* (SA). As such, the Institute recommends that, to avoid confusion, the same threshold should be adopted in a uniform way when determining the threshold value of an estate for an estate dispute although such a threshold should be reviewed periodically and indexed to CPI to ensure that the value does not fall behind over future years. The Institute accepts that such a value is somewhat arbitrary (and may lead to awkward values as the original figure is indexed each year for inflation), but is still the preferable and consistent approach. The Institute also notes the option of rounding the amount to the nearest $500 as set out in s 33(7) of the *Defamation Act 2005* (SA). The Institute notes that unless the thresholds under the relevant Court Rules are also indexed and adjusted in the same way, the amounts would soon be out of kilter.

3.4 Reform options

3.4.1 The Issues Paper presented two primary reform options for simplifying and shortening contentious succession claims, namely (1) extending succession law jurisdiction to other courts or tribunals; and/or (2) modifying procedures in the Supreme Court to improve time and cost efficiency.

3.4.2 The Registrar of Probates and Masters of the Supreme Court report that there have been a number of reforms to succession procedures over recent years (including the tiered probate filing fees) and small estate matters such as applications for probate (both opposed and unopposed), claims under

[80] The Public Trustee informed the Institute that the average value of houses it had sold was $310 000 (2015-16 Financial Year).

the *Inheritance (Family Provision Act) 1972* (SA) and applications for advice and directions are dealt with swiftly and efficiently under the present system.[81]

Extending succession law jurisdiction to others courts or tribunals

3.4.3 The option of investing a court or tribunal other than the Supreme Court with the power to hear and determine succession law disputes was canvassed in both the Issues Paper[82] and the Further Consultation Paper[83] as a possible option for reform. However, it should be noted that this option is without precedent in any other Australian jurisdiction.

3.4.4 In July 2013, the jurisdiction of the South Australian Magistrates Court for 'general civil claims' was raised to $100 000 (increasing from $40 000). This presented the opportunity for the resolution of some disputes involving questions of succession law below that monetary value by the Magistrates Court. An example of this includes actions by executors or administrators to chase estate debts but not any actions dealing with the validity or otherwise of any testamentary instrument or those that go to the heart of testamentary giving.

3.4.5 In March 2015, the South Australian Civil and Administrative Tribunal (SACAT) commenced operation. The jurisdiction of SACAT extends to matters within administrative and civil law, and is specifically conferred by legislation.[84] Although SACAT does not presently have jurisdiction in relation to succession law, SACAT will continue to take on additional areas of responsibility over the coming years. As such, it is possible for such a jurisdiction to be conferred on SACAT in the future. The main objectives of SACAT include the promotion of accessible, quick, cost effective, straightforward and flexible resolution of disputes.[85] Given that access and expense are common factors which frustrate the resolution of succession disputes, SACAT's objectives could be seen to be well-suited to the resolution of minor succession disputes.

3.4.6 The Issues Paper also considered the potential criteria for a succession law dispute to be resolved other than by a hearing in the Supreme Court. The proposed criteria included:

- *value*: either of the estate or of the claim (whether of itself or as the proportion it represents of the value of the estate); or
- *complexity, regardless of value*: only complex questions to go directly to the Supreme Court, regardless of the amount of the claim or how much of the total value of the estate it represents; or
- a combination of both.

3.4.7 The practical implementation of these criteria was then considered. It was proposed that there could be a process of vetting all claims, with the default presumptions being:

- that the value of most claims would not represent a sufficient percentage of the value of the estate to warrant it being heard at first instance by the Supreme Court; and

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81 Letter from Chief Justice to South Australian Law Reform Institute dated 29 September 2016.

82 Issues Paper, above n 4, 53-57 [190]-[208].

83 Further Consultation Paper, above n 9, 5-10 [16]-[33].

84 *South Australian Civil and Administrative Tribunal Act 2013* (SA) s 31. For a summary of the relevant Act see: <http://www.sacat.sa.gov.au/about-sacat/legislation/sacat-jurisdictions>.

85 *South Australian Civil and Administrative Tribunal Act 2013* (SA) s 8.

- that the claim was not complex enough to warrant first instance resolution by the Supreme Court.[86]

3.4.8 It was further suggested that these presumptions could be rebutted by affidavit evidence from counsel as to complexity and from a solicitor as to value. If neither of these presumptions was rebutted the matter would automatically be heard at first instance in some other way than in the Supreme Court. If only one of these presumptions was rebutted, it was raised whether there should be a discretion as to where the dispute should be heard at first instance.

3.4.9 The Registrar of Probates was put forward as the most suitable person to identify which claims ought to be heard at first instance by the Supreme Court. In regional disputes, it was suggested that such power could be exercised by District Registrars.[87]

3.4.10 It is significant that in its consultation (including at the consultation sessions held in Mount Gambier, Adelaide, Port Lincoln, Berri and Naracoorte), very limited support was expressed to the Institute for removing the existing role of the Supreme Court in either the administration of small disputes and/or the resolution of any disputes. It was considered that the Supreme Court has the role, resources and specialised expertise that would not lend itself to any alternative body such as SACAT or the Magistrates Court. This view was shared by the Chief Magistrate and the Law Society's Succession Law Committee. Indeed, the Chief Justice of the Supreme Court of South Australia strongly opposed the extension of the testamentary causes jurisdiction to the Magistrates Court (or any other court) on the basis that expertise will be diluted, appeals will proliferate and the overall costs burden will increase.[88]

3.4.11 The Registrar of Probates and the Masters of the Supreme Court jointly submitted that they thought that small estates were already dealt with quickly and cheaply under the present system, especially with the recent changes outlined earlier in this Report having been specifically aimed at dealing with small estates more efficiently. It was also submitted that the number of disputes dealt with by the Probate Judges and Masters is sufficient for them to have expertise in the area and sufficient for a level of consistency of decisions. Fewer matters would make that more difficult. Conversely, other Courts would need sufficient flow of work to ensure that Registry staff and judicial officers (or other decision makers) could achieve and maintain appropriate levels of expertise and consistency. That would have consequences for the existing heavy workloads. Finally, there would also be inefficiencies and duplications in record keeping, facilities and administration.[89]

3.4.12 The Institute considers that any changes to existing succession procedures, whether in either the administration of small disputes and/or the resolution of any disputes, should be retained within the rules and procedures of the Supreme Court. An alternative view was expressed to the Institute by the staff of the Public Trustee's office. It was noted that there is a need in relation to small estates for greater flexibility, agility and informality than is provided by the current procedures through the Supreme Court. The cost and formality of existing procedures within the Supreme Court was noted.

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86 Issues Paper, above n 4, 52 [187].

87 Ibid 52 [189]. Although currently unused, and in need of jurisdictional updating, there is a power in Part 3 of the *Administration and Probate Act 1919* (SA) to appoint District Registrars of the Supreme Court to deal with small estates.

88 Letter from Chief Justice to South Australian Law Reform Institute dated 29 September 2016.

89 Ibid.

The potential for an alternative tribunal or body to handle disputes in relation to small estates (whether by value or election) was raised by the staff of the Public Trustee's office.

Modifying procedures in the Supreme Court

3.4.13 The view might be taken that particularly contentious issues, such as, for example, lost or informal wills and questions of testamentary ability or capacity, might continue to require determination by the Supreme Court. However, even if minor succession disputes were to remain within the Supreme Court's jurisdiction, there may be scope for procedural changes to accommodate such claims.

3.4.14 There is already precedent within the Supreme Court's civil jurisdiction for the simplification of dispute resolution processes for estates under a certain value, or the mandating of alternative paths of dispute resolution for these kinds of disputes. For example, for disputes under the *Inheritance (Family Provision) Act 1972* (SA) where the net value of the estate that is available for distribution is estimated to be under $500 000, the dispute may be determined by a Master of the Supreme Court summarily on the available evidence, whether or not that evidence is in a form that complies with the usual rules of evidence.[90]

3.4.15 There may be scope within the Supreme Court's existing jurisdiction for minor succession disputes (not just those involving family provision) to be arbitrated by Supreme Court Masters. A vetting process could be implemented to ensure that only more serious disputes or major issues (such as testamentary capacity) are heard by the Supreme Court at first instance. As noted above, it is suggested that the Registrar of Probates would be the most suitable person to carry out this vetting process.

3.4.16 The benefit of active and early judicial mediation in succession disputes, especially those involving small estates, was raised to the Institute by succession lawyers and the Law Society's Succession Law Committee. The importance and benefits of active judicial mediation in modern civil litigation have been widely noted.[91] Professor Vines has addressed the importance of mediation in

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[90] *Supreme Court Civil Rules 2006* (SA) r 316.

[91] See, for example, Tania Sourdin, *Mediation in the Supreme and County Courts of Victoria,* Report prepared for the Department of Justice, Victoria, Australia, April 2009 (2009); Chief Justice Marilyn Warren, 'Should Judges be Mediators' (2010) 21 *Australian Dispute Resolution Journal* 77; Chief Justice Tom Bathurst, 'The Role of the Courts in the Changing Dispute Resolution' (2012) 35 *University of New South Wales Law Journal* 870, 874-879. NSW Chief Justice Spigelman was an advocate of court-referred mediation and described successful mediation as measured in more than savings in money and time: 'The opportunity of achieving participant satisfaction, early resolution and just outcomes are relevant and important reasons for referring matters to mediation': Chief Justice James Spigelman, 'Address to the LEADR Dinner' (Speech delivered at LEADR Dinner, Sydney, 9 November 2000) <http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/vwPrint1/SCO_speech_spigelman_091100>. NSW Chief Justice Bathurst has also acknowledged that the emphasis placed on mediation has encouraged a more holistic approach to dispute resolution, whereby clients are informed of out-of-court non-litigious dispute resolution options as a matter of course: Chief Justice Tom Bathurst, 'Arbitration and International Arbitration' (Speech delivered at the Continuing Professional Development Seminar, Sydney, 21 September 2011) http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/vwFiles/Bathurst210911.pdf/$file/Bathurst210911.pdf.

resolving succession disputes.[92] Indeed, it is significant that the 'vast majority' of succession disputes such as those relating to family inheritance claims are resolved and never proceed to trial.[93]

3.4.17 Both Judges and Masters in South Australia are already actively involved in mediation and seeking to resolve succession disputes, especially in small estates.[94] The Masters of the Supreme Court encourage settlement of small claims under the *Inheritance (Family Provision) Act 1972* (SA) and assists parties to achieve settlement. The Masters conduct many mediations in small estates disputes and such mediation is swiftly available and have very high success rate.[95]

3.4.18 Building on this theme, other procedural changes that might facilitate the cost effective and timely resolution of minor succession law disputes could include:

- Introducing the streaming of civil disputes between courts, by which a judge hearing a case could, at any stage of the litigation, transfer it for hearing to a forum that was more appropriate in terms of the complexity and expense of the proceedings.
- Increased use of alternative dispute resolution procedures already available in the Supreme Court,[96] such as:
    - Referral by the court of the action or any issue arising from it to mediation, conciliation and arbitration;[97]
    - Referral by the court of any question to an expert referee for investigation and report;[98]
    - Appointment by the court of expert specially qualified assessors to assist the court in determining all or part of a dispute;[99]

3.4.19 Transposing informal procedures from other courts to the Supreme Court, such as the following family dispute resolution procedures used in the Family Court:

- Encouraging parties to resolve disputed issues before the commencement of litigation and ordering parties to attend family dispute resolution before the commencement of litigation;
- Requiring a certificate from an accredited family dispute resolution practitioner showing that the parties have made genuine efforts to resolve their dispute before the commencement of litigation.

3.4.20 Such procedures could be adopted for all succession disputes or only for those where the claim, of itself or relative to the size of the estate, was of a certain size or type.

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92 Vines, above n 72, 32-32, 35.

93 VLRC Final Report, above n 6, 99 [6.7]. This point was repeated to the Institute by succession lawyers in its consultation.

94 See further below [3.5.3]-[3.5.8].

95 Letter from Chief Justice to South Australian Law Reform Institute dated 29 September 2016.

96 Similarly, the Federal Court routinely considers whether the parties may be assisted in resolving some or all of the issues in their commercial dispute by a referral to assisted dispute resolution (ADR) including mediation (whether the parties want this or not), arbitration or a conference of experts.

97 *Supreme Court Act 1935* (SA) ss 65, 66; *Supreme Court Civil Rules 2006* (SA) ch 10 (Alternative Dispute Resolution); *District Court Act 1991* (SA) ss 32-34; *District Court Rules 2006* (SA) ch 10 (Alternative Dispute Resolution).

98 *Supreme Court Act 1935* (SA) s 67; *District Court Act 1991* (SA) s 34.

99 *Supreme Court Act 1935* (SA) s 71.

3.4.21 The need to address high legal costs and develop more flexible, efficient and effective ways to progress and resolve civil disputes, in South Australia and elsewhere, has been widely raised by, amongst others,[100] the South Australian subcommittee of the Australasian Institute of Judicial Administration.[101] There have been particular concerns (including those voiced by the Public Trustee's office and some succession lawyers in consultation to the Institute) about the potentially high and disproportionate costs in resolving succession disputes.[102] The importance of supporting and promoting access to justice for all parties, notably in a small estate succession context, is obvious.

3.4.22 Before proceeding with final recommendations, it is apparent that a number of threshold issues still need to be determined. In particular, the overriding considerations are whether a new simplified dispute resolution process would be swifter and cheaper for the parties than the current one,[103] the extent to which it would usefully remove work from the Supreme Court and the extent to which an alternative forum would be capable of resolving the dispute authoritatively.

3.4.23 Further, the potential criteria for a succession law dispute to be resolved other than by a hearing in the Supreme Court, and the practical implementation of these criteria, will need to be determined. It is critical that these criteria are capable of determination accurately and easily for any new simplified dispute resolution process to work.

3.4.24 The Institute therefore recommends:

There is a need for reform in some categories of succession law dispute in which the estate is considered 'small'. Those categories include:

- Claims for further provision pursuant to the *Inheritance (Family Provision) Act 1972* (SA);
- Validity and construction of wills.

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[100] See, for example, Chief Justice Tom Bathurst, 'Opening Address' (Speech delivered at the 2011 Advanced Alternative Dispute Resolution Workshop, Sydney, 13 August 2011) <http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/vwFiles/Bathurst130811.pdf/$file/Bathurst130811.pdf>; Chris Merritt, 'Middle Australia excluded as court costs put "justice out of reach"', *The Australian* (online), 18 May 2012 <http://www.theaustralian.com.au/business/legal-affairs/middle-australia-excluded-as-court-costs-put-justice-out-of-reach/story-e6frg97x-1226359315208>; Candice Keller, 'Justice beyond the Mean of Most as Legal Costs Double', *The Advertiser* (online), 15 July 2012, <http://www.adelaidenow.com.au/news/south-australia/justice-beyond-the-means-of-most-as-legal-costs-double/story-e6frea83-1226426669650>; Community Law Australia, *Unaffordable and Out of Reach; the Problem of Access to Justice* (Community Law Australia, 2012); Miles Kemp, 'DIY Justice as South Australian Legal Costs too much of many', *The Advertiser* (online), 21 October 2013, <http://www.adelaidenow.com.au/news/south-australia/diy-justice-as-south-australian-legal-costs-too-much-for-many/story-fni6uo1m-1226743505317>.

[101] Issues Paper, above n 4, 52 [184], 54 [196]. See generally, Sir Anthony Mason, 'The Future of Adversarial Justice' (Paper presented at 17th AIJA Annual Conference, Adelaide, 6-8 August 1999); Victorian Law Reform Commission, *Civil Justice Review,* Final Report (2008).

[102] See, for example, Vines, above n 72; Justice Bergin, 'Executors/Trustees and Mandatory Mediations' (Paper presented at the proceedings of the Society of Trust and Estate Practitioners in the Banco Court of the NSW Supreme Court, 25 November 2009, [6]-[9], <http://www.supremecourt.justice.nsw.gov.au/Documents/Speeches/Pre-2015%20Speeches/Bergin/bergin251109.pdf>; Renee Viellaris, 'Kids Fight for Your Cash as Legal Squabbles among Families Eat into Estates', *The Courier Mail* (online), 13 April 2013, <http://www.couriermail.com.au/news/queensland/kids-fight-for-your-cash-as-legal-squabbles-among-families-eat-into-estates/story-e6freoof-1226619468014>.

[103] Efficiency changes to improve court procedures and reduce costs, can ironically produce the opposite result. See Pete Sallmann, 'The Growth of Civil Justice Reform' in Brian Opeskin and David Weisbrot (eds), *The Promise of Law Reform* (Federation Press, 2005) 337.

3.5 RECOMMENDATIONS

Claims under the Inheritance (Family Provision) Act 1972

3.5.1 Despite the introduction of r 316 in the *Supreme Court Rules 2006*, there is scope for further reform to provide a more efficient and cost effective procedure for resolving family inheritance claims.[104] First, one of the major issues with claims in small estates are the disproportionate costs relative to the size of the estate being litigated.[105] It is not uncommon for the costs involved in such estates to severely impact upon the funds available for distribution between the parties at the conclusion of a matter. To combat this, one possibility is for the *Supreme Court Rules* to be amended to include restrictions when dealing with small estates as to the amount of costs that a party can claim. This could be structured in a similar way to the recent *Fast Track Rules*[106] introduced into the Supreme and District Court rules or in a more simplified approach whereby the maximum amount of costs that can be awarded by the Court equate to a percentage of the net value of the estate, say, 15 per cent. This would have the effect of limiting costs to $45 000 on a $300 000 estate.

3.5.2 By implementing such a change, the impetus of parties to continue litigating on the basis that the estate will be able to cover costs of the parties would be reduced with the potential being a diminution of any award or benefit that they may eventually receive from the estate of the difference in their actual costs and the costs they were able to recover from the estate. Indeed, such a reform could extend to larger estates (with an example being the same maximum of 15 per cent leading to $150 000 costs limit from the estate on an estate with a net value of $1 million. Of course, to negate issues surrounding cases whereby the interests of justice require a departure from the limitation of costs to be awarded from an estate, the Court should have the discretion to vary the maximum percentage of costs that can be claimed from an estate on application.

3.5.3 Further, despite the *Supreme Court Civil Rules* providing for parties to engage in a settlement conference in which the parties and their solicitors/counsel are required to explore the possibility of reaching a settlement of the action and, if there is no immediate prospect of settlement, to explore the appropriateness of referring the action or certain aspects of it for alternative dispute resolution,[107] such conferences are often run by the parties without any involvement or intervention by the Master or Judge. There is serious scope for the Court procedures to be changed, especially in small estates, to require that the Master or Judge handling the action during its pre-trial stages to refer the action to another Master or Judge for them to take a more active role in such a conference. In effect, the Court can offer a quasi 'mediator' role to the parties to assist them to resolve the matter. Such a procedure is already adopted from time to time by the Court when requested by the parties. This procedure has dual benefit. First, it can minimise costs to the parties as the Court is, in effect, offering a mediator role at no cost to the parties who are already gathered, as required by pre-trial procedures, to undertake such a conference. Secondly, it has the added gravitas of the parties being confronted in a formal environment by a judicial officer often providing the parties with serious, even blunt, advice about the

[104] The Institute, it will be recalled, will be examining the role and wider operation of the *Inheritance (Family Provision) Act 1972* (SA) as a follow up project in 2017.

[105] See, for example, Tilse et al, above n 72, 17-18; Vines, above n 72; VLRC, *Succession Laws: Family Provision Consultation Paper* (2012) 28-29 [2.61]-2.68]; VLRC Final Report, above n 6, 101-102 [6.17]-[6.20].

[106] *Supreme Court Fast Track Rules 2014* (SA).

[107] *Supreme Court Civil Rules 2006* (SA) r 130.

costs and lack of control the parties will have should the matter proceed to trial. The benefits of this approach were highlighted in consultation by succession lawyers.

3.5.4 The Law Society's Succession Law Committee raised the appointment of designated Masters who would deal exclusively with small estates and small claims and in certain estates (say under $100 000), 'could be given inquisitorial powers so that these matters could be dealt with quickly and more cheaply.'[108] A similar suggestion was raised in consultation by other succession lawyers.[109]

Validity and construction of wills in small estates

3.5.5 Despite the concerns expressed relating to the need to properly and vigorously test such issues to ensure the will-maker's testamentary intentions are properly protected, it is recommended that a 'vetting' procedure be implemented to determine whether an action involving a small estate should, at first instance, proceed to be heard by a Master of the Supreme Court, to be undertaken by the Registrar of Probates. Small estates, unless considered extremely complex should be referred to the Masters' list of the Supreme Court for them to be efficiently and swiftly prepared for hearing by a Master in the usual way including the involvement of a Master or Judge of the Court presiding over and running settlement conferences or, where appropriate, Court run mediations.

3.5.6 The Institute does not, at this stage, recommend any change to refer either the administration of small estates or the resolution of any such disputes to another jurisdiction such as the Magistrates Court or to a tribunal such as SACAT. The primary reason for this is that, due to the specialised nature and broad range of estates disputes that exist, there would need to be considerable training of potential decision makers and/or the employment of a number of specialised decision makers for which there would need to be increased administrative costs. The Institute also notes that, as highlighted by the Chief Justice, the Law Society's Succession Committee and others in consultation, the particular resources, knowledge and expertise required by Supreme Court Judges, Masters and court staff in such a specialised area as succession would be difficult and costly to replicate in other courts or tribunals. Referring off different types of disputes and/or separating out disputes based on an arbitrary monetary amount would be likely to only lead to the fragmentation of the decision making process and confusion for both the public and practitioners. The Institute also notes that very limited support was expressed in its consultation to transfer the succession role of the Supreme Court. The Institute concludes that, whilst it may be appropriate at some future stage to reconsider this issue, there should be no change to the existing role of the Supreme Court in either the administration of small estates or the resolution of any such disputes.

3.5.7 It should be noted that, aside from cost issues, the current system appears to be largely working well for estate disputes and the vast majority of disputes that have become litigious resolve before the matter is required to be determined by the Court. As such, the Institute does not recommend wholesale changes. In relation to the cost of estate disputes, there is a reality that, with smaller estates, the commerciality of pursuing a matter by way of litigation is, by its very nature, questionable. This, itself, may also be a driving force for matters to resolve at an early stage as fear of costs severely diminishing

[108] Law Society letter to Institute dated 16 May 2014, 'Administration of Small Deceased Estates and Resolution of Minor Succession Disputes', https://www.lawsocietysa.asn.au/submissions/140516_Administration_of_Small_Deceased_Estates_and_Resolution_of_Minor_Succession_Disputes.pdf, 2.

[109] The Institute will be examining in more detail the role and importance of judicial mediation in the resolution of family inheritance projects in its forthcoming review of the *Inheritance (Family Provision) Act 1972* (SA).

the commerciality of running a dispute for any length of time often play a large factor in the parties reaching a compromise[110] (as noted to the Institute at its Mount Gambier, Adelaide, Port Lincoln, Berri and Naracoorte consultation sessions). Even without cost pressures, 'litigation fatigue' is often observed by lawyers whereby the sheer length of time a matter takes to resolve, often accompanied by the emotional stresses of the action, often lead to the parties resolving the dispute on their own terms without the need for the Court to determine the matter.[111] With any reform designed to simplify the process and the fear of cost pressures, it is possible that more parties will pursue litigation in the first instance and more matters may be heard to conclusion.

3.5.8 The Institute recommends the following:

- All succession law disputes should at this stage continue to be determined by the Supreme Court not only because of the Court's jurisdiction in relation to Probate matters conferred by statute but also as a result of the particular knowledge and expertise of Supreme Court Judges and Masters in such a specialised area as succession law and practice.
- Procedures be modified in the Supreme Court to further improve time and cost efficiency when dealing with small estates. In particular, compelling parties at an early stage to mediate the matter and requiring that Masters become more involved and pro-active in such a process in order to impress upon the parties the desirability of resolving the matter without going to trial; and
- Specific Court Rules be developed to limit costs that can be claimed by the parties to the matter to minimise the effects of litigation on the net value of a small estate, with the ability to depart from the standard position in appropriate cases.

[110] See, for example, Tilse et al, above n 72, 17-18; VLRC Final Report, above n 6, 99 [6.8], [6.13]-[6.20].

[111] See, for example, Tilse et al, above n 72, 17-18; VLRC Final Report, above n 6, 102-103 [6.23]-[6.24]; Myles McGregor-Lowndes and Frances Hannah, 'Reforming Australian Inheritance Law: Tyrannical Testators vs Greying Heirs?' (2009) 17 *Australian Property Law Journal* 62, 63.