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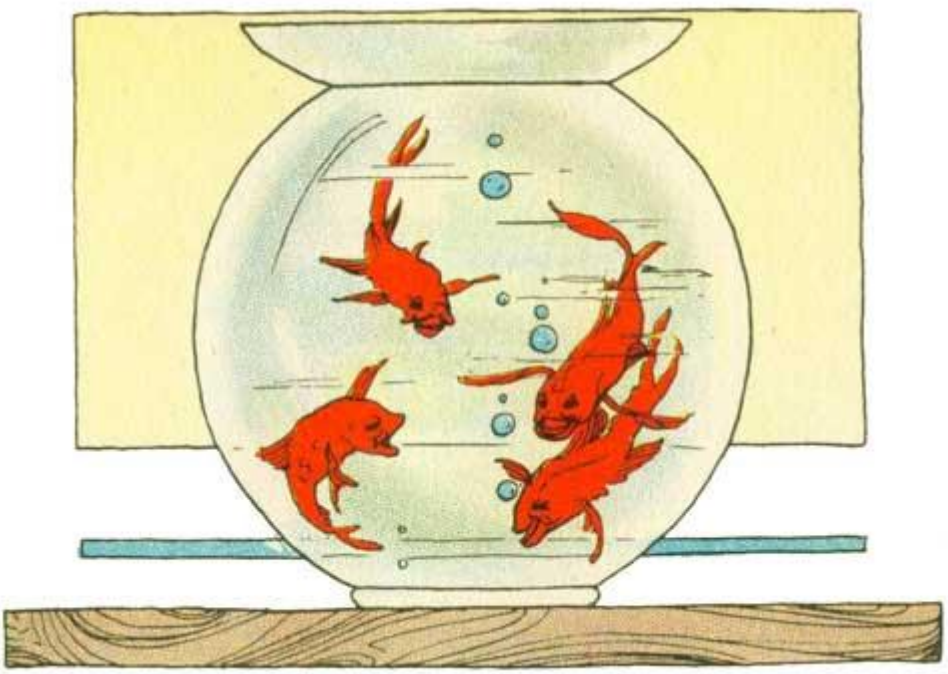

South Australian Law Reform Institute

Small fry

Administration of small deceased estates and resolution of minor succession 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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THE UNIVERSITY of ADELAIDE

Government of South Australia
Attorney-General's Department

THE LAW SOCIETY OF SOUTH AUSTRALIA

Contents

Terms of reference

The Attorney-General of South Australia, the Hon. John Rau MP, invited the Institute to identify the areas of succession law that were most in need of review in South Australia, to review each area and to recommend reforms. The Institute has identified seven topics for review. This Issues Paper, the second in the Institute's review of succession law, examines ways to simplify the administration of small deceased estates and the resolution of minor succession law disputes.

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The Institute would like to acknowledge the generous support of the **Law Foundation of South Australia** in providing funds for research and community consultation for the Institute's review of succession law. The Institute would also like to acknowledge its reliance, in this Issues Paper, on the work of the Queensland Law Reform Commission, the Victorian Law Reform Commission and the British Columbia Law Institute in their reports on this topic.

Disclaimer

This paper deals with the law as it was on 12 December 2013 and may not necessarily represent the current law.

Abbreviations

BCLI—British Columbia Law Institute

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)

Model Bill—The model administration legislation proposed by the National Committee for Uniform Succession Laws: 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) vol 4, 103 (Administration of Estates Bill 2009)

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

National Committee's 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)

SCAG—Standing Committee of Attorneys-General

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

VLRC—Victorian Law Reform Commission

VLRC Consultation Paper—Victorian Law Reform Commission, *Succession Laws: Consultation Paper—Small Estates,* Consultation Paper No 16 (December 2012)

VLRC Final Report—Victorian Law Reform Commission, *Succession Laws: Final Report* (15 October 2013) ch 9

Background

1. A framework for the orderly disposition of the property of a deceased person, to be found in the laws of succession, is a feature of every legal system recognising the concept of private property. The importance of orderly disposition does not diminish with the size of the estate.

2. This Issues Paper examines two succession law reform questions. The first (in Part 1) is whether the administration of small estates should be simplified in South Australia, and, if so, how. The second (in Part 2) is 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.

3. Having reflected on approaches taken in other jurisdictions and in other parts of Australia, including proposed model laws, the paper presents a range of options for consideration.

4. The Institute seeks the views of the public and legal and financial professionals on these issues, asking a series of questions. The questions are available as a downloadable word document on the Institute's webpage http://law.adelaide.edu.au/research/law-reform-institute/.

5. To assist with some of the technical terms there is a glossary in *Appendix 5*. For convenience, relevant extracts from the *Administration and Probate Act 1919* (SA), *The Probate Rules 2004* (SA), the *Supreme Court Civil Rules 2006* (SA) and the *Public Trustee Act 1995* (SA) are reproduced in *Appendix 1.*

6. The Paper relies on and refers to four contemporary reports that deal with these topics in other jurisdictional contexts. They are:

   - The Queensland Law Reform Committee's 2009 report, prepared on behalf of **National Committee for Uniform Succession Law** (the National Committee). The report, entitled *Administration of Estates of Deceased Persons*[1] was prepared as part of a project of the Standing Committee of Attorneys-General (SCAG) to recommend model succession laws for Australia. Relevant extracts from the National Committee's recommendations and its draft model administration legislation are reproduced in *Appendix 2*.

[1] 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> (hereafter the *National Committee's Report*). See in particular Volume 3, Chapter 29: Mechanisms to facilitate administration and to minimise the need to obtain a grant.

- The work of the **British Columbia Law Institute** on its Succession Law Reform Project, and in particular its 2005 *Interim Report on Summary Administration of Small Estates*[2] and its 2006 Final Report *Wills, Estates and Succession: A Modern Legal Framework*.[3] The Interim Report took an overview of small estate legislation in Canadian and selected foreign jurisdictions. It found that, for the most part, Australian state legislation concerning the administration of small estates closely resembled the legislation in effect in various Canadian provinces. It discussed the model of court assistance to lay applicants[4] for grants and the three principal models in Canadian jurisdictions for the administration of small estates under a lesser authority than a court grant of representation: summary administration without a grant and an election to administer (each for professional administrators) and a grant of representation issued by the probate registry rather than the court itself (for professional and lay administrators). It examined the counterparts of these models in Australia and models available in the USA. The Final Report summarised the recommendations made in the Interim Report and offered draft legislation. The recommendations are reproduced in *Appendix 4* to this paper.
- The **Victorian Law Reform Commission's** 2012 Consultation Paper examining small estate procedures in Victoria with a view to simplifying them and reducing their cost.[5] The simplified mechanisms discussed in the *VLRC Consultation Paper* can be categorised as those that help people obtain a grant of representation (such as an assisted grant), and those that let professional administrators acquire authority to administer small deceased estates more simply than by grant (for example, by an election to administer or a less formal 'deemed grant').[6]

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2 British Columbia Law Institute, *Interim Report on Summary Administration of Small Estates*, Report No 40 (December, 2005) (hereafter the *BCLI Interim Report*) <http://www.bcli.org/bclrg/publications/40-interim-report-summary-administration-small-estates>

3 British Columbia Law Institute, *Wills, Estates and Succession: A Modern Legal Framework,* Report No 45 (June 2006) (hereafter the *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).

4 For these purposes, a lay applicant is a person who is not a professional administrator of deceased estates (examples of which are the Public Trustee and private trustee companies). The terms 'lay administrator' and 'professional administrator' are defined in the glossary in *Appendix 5* to this paper.

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

6 This is a term coined by the Victorian Law Reform Commission to describe a method by which the Victorian State Trustees may administer a small estate without a grant or an election to administer: (*Administration and Probate Act 1958* (Vic) ss 3(1) (definition of 'small estate'), 71(1), 79): *VLRC*

- The **Victorian Law Reform Commission's** Final Report on Succession Law, published on 15 October 2013,[7] and in particular Chapter 9 of that report which deals with small estates. The recommendations made in Chapter 9 are set out in *Appendix 3* to this paper.

7. The paper also refers to these statutory sources of succession law in South Australia:

   - the *Supreme Court Act 1935*, in that it establishes a testamentary causes jurisdiction in the Supreme Court and the *Supreme Court Civil Rules 2006*;
   - the *Wills Act 1936*, which sets out how wills are to be made and used;
   - the *Administration and Probate Act 1919,* and the *Probate Rules 2004* 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*, which governs the duties and liabilities of trustees, including personal representatives for deceased estates;
   - the *Public Trustee Act 1995*, to the extent that it governs the role of the Public Trustee[8] as a trustee, executor of a will or administrator of a deceased estate; and
   - the *Inheritance (Family Provision) Act 1972*, 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.

8. These laws are explained and refined by a body of case law and interact with laws about real property, guardianship, agency, companies, superannuation and taxation and laws that determine the legal status of relationships. Of particular relevance to this paper are:

   - the *Real Property Act 1886* (SA)
   - the *Trustee Companies Act 1988* (SA).

Consultation Paper 29 [2.87]-[2.102]. See also discussion of this method in the *National Committee's Report* vol 3 ch 29.

7 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> (hereafter the *VLRC Final Report*).

8 In some other jurisdictions, there is a different title for the holder of the statutory office of trustee for a jurisdiction. In this paper, for convenience, we use the term Public Trustee.

Part 1: Administration of small deceased estates

1.1 Introduction

9. When a person dies, someone has to take 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 (such a person is called an 'executor'). An executor appointed under a will has authority, dating from the death of the deceased, to administer the deceased's estate.

10. However, organisations or individuals holding assets or property owned by the deceased are generally reluctant to release them to anyone who does not have formal authority from the court to take charge of the deceased's estate.

11. The authority from the court—a grant of probate—formalises the authority given to the executor by the deceased under the will. It protects both the executor from personal liability for acts done in good faith under the authority of the grant and any third party who deals with assets of the estate in good faith and in reliance on the grant.[9]

12. If the deceased did not appoint an executor, or the appointed executor is unwilling or unable to act, or if there was no will, an administrator is appointed by the court and given a similar authority to that of an executor. The authority from the court to the administrator is called a grant of letters of administration (where there is no will) or a grant of letters of administration with the will annexed (where there is a will).

13. Grants of probate, letters of administration or letters of administration with the will annexed are called *grants of representation*. The executors and administrators authorised by such grants to administer deceased estate are called *personal representatives*. In summary, a grant of representation may take the form of

    - a grant of probate[10] (to a person or professional administrator appointed by the testator by will to be the executor of his or her estate);
    - a grant of letters of administration[11] (to a person or professional administrator appointed by the court, for want of a will); or

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9 *Administration and Probate Act 1919* (SA) s 43.

10 Ibid pt 2 divs 1, 5, 6.

11 In South Australia, Part 3 of the *Administration and Probate Act 1919* provides for the distribution of a deceased's estate upon intestacy. Rule 32 of the *Probate Rules 2004* (SA) sets out who is entitled to administer an intestate estate in order of priority. Rule 32 is reproduced in *Appendix 1* to this paper.

- a grant of letters of administration with the will annexed[12] (to a person or professional administrator appointed by the court for want of appointment of an executor by the testator in the will or when the appointed executor is not prepared to act.).

14. Courts may, in certain circumstances, make orders authorising the Public Trustee[13] or a trustee company[14] to administer the estates of people who died leaving property in the jurisdiction; these orders have the effect of a grant of letters of administration.

15. The Supreme Court is the only court in South Australia which may make grants of representation.[15] To apply for a grant, there is a court filing fee (currently $1 059).[16] The applicant will often need to engage a solicitor to advise and prepare the application. The total cost can be significant for a small estate.

16. South Australian legislation offers no real alternative to the formality and cost of obtaining a grant of representation through the Supreme Court.

17. An estate that is administered without formal authority from the court is said to be administered 'informally'.

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

19. Informal administration is most likely to occur when the estate is small. With that informality comes an increased risk of poor administration—for example,

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12 Rule 31 of the *Probate Rules 2004* (SA) sets out who is entitled to be appointed in order of priority. Rule 31 is reproduced in *Appendix 1* to this paper.

13 See, for example, *Public Trustee Act 1995* (SA) s 9, *Administration and Probate Act 1929* (ACT) ss 88, 92; *Public Trustee Act 1913* (NSW) s 23; *Public Trustee Act 1978* (Qld) ss 29, 31; *Public Trustee Act 1941* (WA) s 10(1). The process is summarised in New South Wales Law Reform Commission, *Uniform Succession Laws: Recognition of interstate and foreign grants of probate and letters of administration,* Issues Paper No 21 (2002) [5.44]-[5.47]. Examples of circumstances in which an administration order may be made in South Australia include where, in certain circumstances:
- the deceased died intestate;
- the deceased left a will, but there is no executor resident in South Australia who is willing and capable of acting;
- no application for probate or administration is made, or probate or administration is not obtained within a specified time after the death of the deceased.

14 *Trustee Companies Act 1988* (SA) s 4.

15 The power creating jurisdiction is found in the *Administration and Probate Act 1919* (SA) s 5, and the *Supreme Court Act 1935* (SA) s 18.

16 The fee is revised annually, with the new fee coming into operation on 1 July each year.

inaccurate identification of what the estate comprises or incompetent or dishonest distribution—and the chances of default being detected at all, let alone in time to stop it, are greater than when the estate is administered formally.

20. In recognition of the widespread informal administration of deceased estates, there is some statutory protection in Australia for both the administrator and the third party in an informal administration, and, in at least one Australian jurisdiction, a procedure for dealing in land registered in the name of the deceased without production of a grant. Measures of this kind are discussed in Part 1.3 of this paper (*Informal administration*). Only one of them is available in South Australia.[17]

21. Methods for obtaining authority to administer small estates with something less than a grant or for simplifying and reducing the cost of the grant process itself have developed in many common law jurisdictions.[18] 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 undesirable alternative of informal administration. No such alternative methods are available in South Australia.

22. Part 1.2 of this paper (*Models for simplified administration)* examines a selection of simplified models for obtaining authority to administer a small deceased estate that operate or have been proposed in other jurisdictions. It also puts forward another model.

23. Although some countries (for example, the USA) give beneficiaries statutory authority to administer very small estates without a grant, Australian jurisdictions do not allow this. In Australia, statutory authority to administer without a grant but with a lesser form of authority is given only to professional administrators (the Public Trustee and sometimes also private trustee companies or lawyers) when there is no-one else available to administer a small deceased estate and the professional administrator would otherwise be eligible to administer it.

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17 This is the protection of third parties who make certain payments to survivors of the deceased where no grant is produced. Section 69AA of the *Banking Act 1959* (Cth) allows an authorised deposit-taking institution (an ADI), without production of a grant of representation and with full protection from liability, to apply up to $15 000 of sums deposited in the deceased's account with the ADI to pay for the deceased's funeral expenses or debts, or to the executor of the will or to anyone else who the ADI considers entitled to the amount under the laws of probate and administration. Sections 71 and 72 of the *Administration and Probate Act 1919* (SA) protect ADIs, public hospitals and government departments from liability for the release to survivors of certain monies of the deceased without production of a grant.

18 Note that this Paper does not canvass alternative methods of administration for small estates in the United Kingdom, because they are greatly influenced by estate liability for inheritance tax, a tax that is not imposed in Australia.

24. This kind of restriction is recommended in the most recent reviews of small estate administration in Australia (by the National Committee in 2009[19] and by the Victorian Law Reform Commission (the VLRC) in 2013).[20]

25. Neither body suggested procedures which would allow beneficiaries to administer small estates without a grant. Instead, each preferred, albeit choosing a different procedure,[21] to recommend that an existing procedure for administration without a grant be simplified and restricted to professional administrators and to make small estate administration by grant cheaper and more accessible for lay personal representatives.[22]

26. The VLRC described its approach thus:

> The Commission seeks to strike a balance between recognising the utility of informal administration in some situations and promoting formal administration by ensuring that a number of cheap and accessible options exist for obtaining a grant.
>
> Submissions and consultations concerning current processes of informal administration did not identify significant problems. Consultees were generally of the view that most people would 'have a go' at administering informally, and would only seek a grant of representation where a bank or asset-holder required one.
>
> For this reason, the recommendations in this area represent a clarification and strengthening of the existing protections available to those administering informally. They do not introduce significantly broader or different protections.[23]

27. Unlike South Australia, Victoria already has in place a range of simplified procedures (for example, elections to administer, deemed grants and assisted grants). The VLRC Final Report recommended the discarding of one such simplified procedure and a redirection and strengthening of others rather the introduction of new ones.[24] For informal administration, it endorsed the National

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19 Model Bill ch3 pt 6 divs 2 and 3.

20 *VLRC Final Report* ch 9.

21 The National Committee proposed model provisions which would expand the 'election to administer' procedure and discard the 'deemed grant' procedure, while the VLRC proposed the opposite.

22 Both bodies recommended additional support, by means of filing fee reduction, more accessible information and registry assistance for lay applicants for grants of representation.

23 *VLRC Final Report* 196 [9.74]-[9.76].

24 Ibid 189.

Committee's suggestion to retain a simplified version of its provision setting out the liability to which a person who informally administers an estate is exposed.[25]

28. The South Australian Law Reform Institute acknowledges the findings and recommendations of the National Committee and the VLRC but does not confine this paper to the models recommended by those bodies because, in contrast to every other Australian jurisdiction, South Australia has no simplified procedures and is, in effect, starting with a clean slate.

29. In presenting several alternative procedures, this Paper should not be taken to be suggesting adoption of all of them or any particular one of them. Rather, this review presents an opportunity not only for updating and revising our current administration procedures as they relate to small estates but also for introducing innovations to discourage inappropriate informal administration.

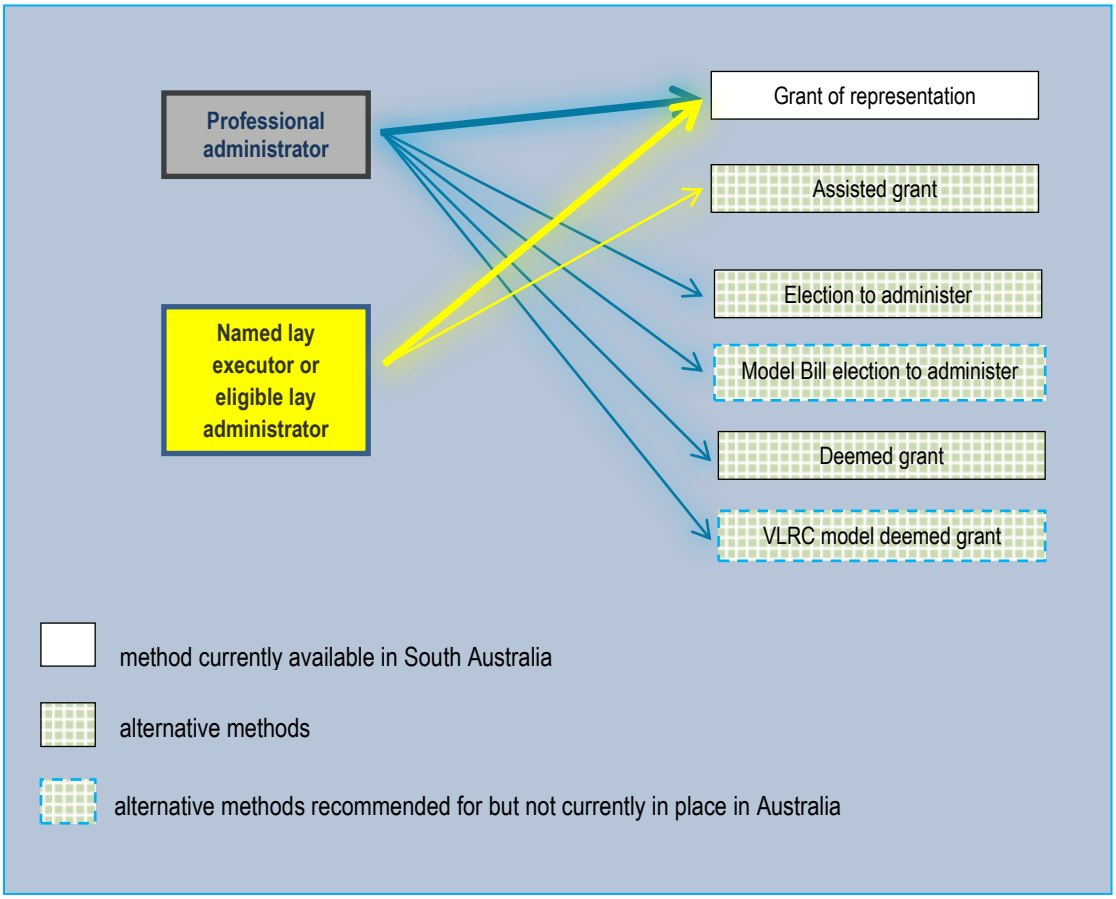
1.2 Models for simplified administration

30. This part of the paper begins with a discussion of the critical considerations for assessing the suitability of a model for simplified administration. It then canvasses ways of simplifying grant procedures, procedures for the professional administration of small estates without a grant (including the models recommended by the National Committee and the VLRC) and procedures for the lay administration of small estates without a grant.

31. The chart on the next page (Fig. 1) represents methods of small estate administration that are available in or recommended for Australian jurisdictions and identifies the position in South Australia.

[25] Ibid 198 [9.87] (Recommendation 70). This measure is discussed in more detail in Part 1.3.1 below.

Fig.1: Methods of small estate administration in Australia



1.2.1 Critical considerations for simplified administration procedures

32. In assessing each model it is important to reflect on the desirability of encouraging administration of small deceased estates by formal grant of representation, because a grant offers the best protection to beneficiaries, administrators, creditors and third parties, whatever the size of the estate. Suggestions for improvement or modification to South Australia's grant procedure and suggestions for simplified procedures that fall short of a grant should aim to support that objective.

33. Set out below are some of the critical considerations in evaluating the suitability of any model for the administration of a small estate, followed by a chart (Fig. 2) illustrating the various models examined in this paper by reference to these considerations.

Entitlement to administer the estate

34. The principle of right following interest may be useful in identifying who, other than the holder of a grant of representation, should be entitled to administer a small estate.

35. If the law in South Australia were amended to allow alternative summary procedures to achieve the effect of a grant of representation, in what circumstances should the Public Trustee be able to use these processes? Sometimes, the Public Trustee will have been named as an executor. In other cases, though, there will be no one willing or able to carry out the role of the executor or administrator and the Public Trustee will step in to fulfil that role. Are there other circumstances in which the Public Trustee should be allowed to use simplified processes to administer the estate?

36. There is also the question of competitive neutrality in procedures restricted to professional administrators which are not available to the general public (for example, elections to administer and deemed grants). Perhaps there should be a role for relevant professionals other than the Public Trustee, if they are covered by professional indemnity insurance. Competitive neutrality is now an important public interest consideration in any legislation that restricts business activities.[26] Perhaps any new deceased estate administration procedure that is not available to lay people should define the class of people to which it is available by their professional characteristics and, where relevant, as it is here, to their associated professional indemnity cover.

37. Other considerations for broadening the class of professional administrators are increasing public accessibility and choice for the administration of small estates and reducing administration costs. The VLRC rejected these reasons and declined to recommend broadening the class of professional administrators to include legal practitioners. It took the view that the purpose of deemed grant procedures is to reduce the costs for State Trustees for the administration of estates which, without subsidy from Government, would not be a commercially viable proposition.[27]

38. Should a beneficiary be able to administer the estate without the authority of the court, as is possible in some parts of the USA? Consistently with their position that new procedures should not encourage informal administration, neither the National Committee nor the VLRC recommended any procedure giving authority to a lay administrator who was not also an approved personal representative to administer a small estate.

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[26] As part of Australia's National Competition Policy, clause 5(1) of the *Competition Principles Agreement* (11 April 1995, as amended to 13 April 2007) provides that 'The guiding principle is that legislation (including Acts, enactments, Ordinances or regulations) should not restrict competition unless it can be demonstrated that:
(a) the benefits of the restriction to the community as a whole outweigh the costs; and
(b) the objectives of the legislation can only be achieved by restricting competition.'

[27] *VLRC Final Report* 209 [9.170]-[9.177].

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

39. It is not easy to identify which kinds of estates should be capable of administration under a form of authority that is less than a grant, because even though the aim is to make the administration of small estates easier, quicker and cheaper, all estates, whatever their size, should be administered properly.

40. In South Australia, there is no threshold monetary value above which a grant of representation is required and no overall obligation on third parties dealing with assets of a deceased estate to require the production of a grant before dealing with the assets of a deceased estate. However, a person dealing with an asset of the estate that is required by law to be disclosed in an application for a grant of representation, should one be made, may do so only if satisfied by official proof that it has been so disclosed, and commits an offence for not complying with this requirement.[28]

41. To cover this risk, many banks and financial institutions will not transact with a person who does not have the authority of a grant. Others will authorise payment without a grant only if all beneficiaries will sign an indemnity to the bank or financial institution.

42. Another important consideration in determining the size of estates that should be administered under a form of authority that is less than a grant is the extent to which this affects their exposure to family provision claims. Smaller estates are less likely to be subject to family provision claims[29] than larger ones,[30] not only because the size of the estate may make the claim futile but because, if the estate is administered informally, the chances of a claim are greatly reduced. A family provision claim against a deceased estate may not be brought in South Australia unless the estate is under a grant of representation.[31] Although informal administration might in every other respect be appropriate for a small estate, it can incidentally shield the estate from family provision claims or conceal the potential for a claim from eligible applicants. A simplified procedure that legitimises an authority to administer that is less than a grant would have similar consequences for family provision claims.

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28 *Administration and Probate Act 1919* (SA) s 44.

29 In South Australia, these claims are made under the *Inheritance (Family Provision) Act 1972* (SA).

30 There are no relevant published statistics in South Australia. However, it is useful to note *VLRC Final Report* 191, [9.30]: 'According to State Trustees (the body dealing most frequently with smaller-value estates) estates valued at up to $100,000 are unlikely to include real estate or be subject to a family provision claim'.

31 See, for example, *Inheritance (Family Provision) Act 1972* (SA) s 8(1) and s 9(4).

43. Any legislated reduction in the level of authority for the administration of small estates should be compatible with the objectives of the family provision laws and not offer a means of defeating them.

44. One way to achieve this might be to limit the size of estates that may be administered under such lesser forms of authority to a level where a family provision claim would not be worthwhile. Another might be to make consequential amendments to the *Inheritance (Family Provision) Act 1972* (SA) to permit claims when specified administration procedures other than grants are used,[32] or, in amendments to the *Administration and Probate Act 1919* (SA) establishing authority to administer by such a procedure, to provide that a person holding authority by means of such a procedure is to be taken to have been granted probate or letters of administration for the purposes of a claim under the *Inheritance (Family Provision) Act 1972*.

45. Other jurisdictions have defined a 'small estate', for the purposes of such procedures, in relation to its monetary value (either its gross value or its value net of liabilities). The VLRC recommended a monetary value of $100 000, CPI adjusted, for small estates that could be administered by deemed grant or that were eligible for assisted grants.[33]

46. There may also be indicators other than value that can be used to identify the estates to which a particular procedure will apply—for example, what the estate comprises (contrast, for example, an estate comprising only household chattels, a car and a bank account, with one that also includes valuable personal belongings and real estate) and the number of beneficiaries (contrast an estate with only one surviving beneficiary with an estate which will devolve upon a large extended family with bequests to charities), and perhaps, as suggested earlier, whether the estate is large enough to be subject to family provision claims or not.

47. There are also some deceased estates with few assets that are distributed informally without a grant but which later require an administrator to be appointed or an executor to take out a grant at the behest of the trustees of the deceased's superannuation fund. In these cases the trustees have decided to pay to the estate but are reluctant to pay what may be quite a large amount to next of kin or to an executor without some form of protection.

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[32] There is precedent for this in s 16 of the *Inheritance (Family Provision) Act 1972* (SA). Section 16(b) treats administration orders made in favour of the Public Trustee under the *Administration and Probate Act 1919* as grants of probate or letters of administration for the purposes of the Act.

[33] *VLRC Final Report* 206 [9.149].

48. As mentioned, one way to identify the kinds of estates for which an alternative method of administration might be suitable would be whether or not the estate included land. Presently, in all Australian jurisdictions except Queensland, land registered in the name of the deceased cannot be transmitted to anyone but a personal representative under a grant of representation.

49. The National Committee, however, noted the effectiveness of provisions in the Queensland real property legislation[34] in 'facilitating the administration of estates [comprising real property] without the need to obtain a grant'. The Committee recommended that, it being inappropriate to include such provisions within model succession legislation, each Australian State and Territory should consider including their equivalent in real property legislation.[35] A detailed discussion of these provisions is in Part 1.3.3 of this paper. For the purposes of the present discussion it should be noted that these provisions can apply to estates of any size, not only small estates.[36]

50. If equivalent provisions are not inserted into the South Australian real property legislation, or if it is to be possible in some other way to administer a small estate that includes land without a grant, there remains the problem of defining what is a 'small estate' for these purposes. In particular, there is the question of how the component of land should affect the calculation of the value of the estate if the monetary threshold for small estates is to be based, as the National Committee suggests, on a net value.

51. Admittedly, this will not be an issue in many simple or small estates where the deceased owned land jointly and it passes by survivorship and is not part of the estate. However, if a small estate is to be defined in terms of net value, and that value is to include the value of the deceased's interests in land, then a small estate may well include a valuable piece of real property that has large mortgage on it that has reduced the net monetary value below the threshold. Equally, real property without improvements (vacant land), which within many parts of Australia is outside or on the fringes of capital cities, may be of modest value. Any threshold for a small estate that is based on a likely value of real estate may therefore be simplistic, or city centric, or both.

52. There is also the question of adjustable thresholds to allow a margin for error in the initial estimate of the value of an estate. In some jurisdictions (such as

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34 *Land Title Act 1994* (Qld) ss 111, 112. These provisions are explained by the National Committee in paragraphs [29.194]–[29.200] of its Report.

35 *National Committee's Report* 142 [29.219]–[29.221].

36 The provisions apply to testate estates of any size, and to intestate estates valued at no more than $300 000.

Victoria), there is a second 'threshold' for elections to administer, which is slightly higher than the first. This second threshold value is the figure above which a full grant must generally be applied for, and may be described as the 'actual value' of the estate rather than the 'estimated value'.

53. But this secondary threshold is not available in Victoria for deemed grants, leaving no margin for error there. There seems to be no clear reason for this; indeed provision for estimation might be useful in setting the threshold for any model for simplified administration of small deceased estates. The VLRC Final Report recommended a remodelled version of a deemed grant which would include adjustable thresholds.[37]

Court involvement

54. 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 involvement, the greater the formality and expense and the less value the simplification has. On the other hand, the involvement of the court has three distinct advantages:

- it gives assurance to beneficiaries that the estate will be administered properly;
- it gives assurance to third parties that their transactions with the person administering the estate will not be challenged; and
- it ensures that there is an official record of proof of title, succession of title, who is the personal representative, what the assets and liabilities of the estate are and whether a grant was made. Not only is this valuable for third parties dealing with the estate, but also for creditors of the estate (not all of whom may be secured) and solicitors conducting collateral litigation (for example, in the Family Court).

55. In examining the level of court involvement in a simplified model, one might ask:

(1) To what extent does the procedure maintain standard grant application requirements for lodging of wills or for filing inventories or affidavits (for example, proving the lack of any other grant or caveat or showing that notice has been given to interested parties) and why?

(2) To what extent will the lack of court involvement and consequent lack of court record make it difficult to ascertain what an estate comprises, whether an estate

[37] *VLRC Final Report* 207 [9.155]-[9.158] (Recommendation 75).

is being administered or not and who has title to the property of the estate, and how much does this matter?

(3) To what extent does the decreased court involvement increase the risk of maladministration? What checks and balances are there in this procedure?

Notice requirements

56. Alternative methods of administration that minimise or remove court involvement sometimes substitute a requirement that public or personal notice be given of the intention to administer the estate without a grant. The more onerous this requirement, though, the less the procedure can promote quick and effective administration or have the advantage of being cheaper than the standard procedure. Also, formal notice in newspapers or Government Gazettes may no longer be as effective as it was in the past, given the decline in newspaper readership and the lack of awareness of the function of Government Gazettes.

57. The alternatives, though, are difficult. Where there is a will, direct notification by standard form letter to all named beneficiaries may seem simple enough, but potential claimants under family provision legislation cannot easily be identified without legal advice. The same difficulty arises in intestate estates, where it would in any case often be problematic for lay applicants to identify, without legal help, who is eligible to inherit under the rules of intestacy, and then to notify all of them directly.

58. The National Committee recommended against any form of notification (that is, both the notice of intention to file an election and the subsequent notice of filing) for its proposed model of an election to administer, but apparently for reasons of cost rather than for the reasons just described.[38]

59. The *VLRC Final Report* declined to follow the National Committee's example and recommended the retention of notice requirements for its remodelled deemed grant, allowing notice to be achieved by online posting on the Supreme Court website.[39]

Searchable official records of administration

60. What is lacking in some of the simplified alternatives for the administration of small estates is the maintenance of an official public record of who has assumed responsibility for the administration of the estate and of what the estate comprises. The contrast with grants of representation and elections to administer, where all relevant information is on the court record and searchable, may detract from the

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38 Ibid 133 [29.179], [29.180] and 171 (Recommendation 29-4).

39 Ibid 208 (Recommendation 76).

appeal of such methods. Acknowledging this, the *VLRC Final Report* recommended the filing of the will as one of the changes to its deemed grant procedure.[40]

61. However, for procedures which do not involve the court at all (such as the deemed grant) or which involve it in only in a formal, non-deliberative way (for example, summary administration by court declaration, discussed later), there may be other ways of maintaining an official record. One way that is suggested in relation to the model of summary administration by declaration is online registration of such records on an existing government website (see paragraphs 142-146). This may also achieve the function of public notice.

Third party protection

62. Grants of representation protect third parties because they assure the authority of a personal representative to deal with the deceased estate and specifically protect people acting in reliance on a grant of probate or administration[41]. The viability of any alternative method of administration 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

63. It is important to consider what protection an alternative method of administration that is less than a grant will give administrators and how to protect the interests of beneficiaries and creditors in the event of fraud or incompetence.

64. A requirement that the administrator report or supply periodic accounts to a court or Public Trustee or to those with an interest in the estate is one safeguard, but is really only effective if the accounts or reports can be compared with an original inventory of the estate.

65. The requirement to file an initial inventory is a formality that has been discarded in some alternative methods of administration. Some of them instead establish a personal legal liability in the person distributing the estate for any loss caused to the beneficiaries.

Cost effectiveness

66. A decision to introduce an alternative method of administering small estates in South Australia will depend not only on the extent to which it makes the administration procedure simpler but also on the extent to which it can make the

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40 Ibid 209 (Recommendation 77).

41 *Administration and Probate Act 1919* (SA) s 43.

cost of administering the estate proportional to its size. The resource impact on State agencies from changes or a cap on fees for small estates will need to be considered.

Cost to the estate

67. Court fees for filing applications, inventories and notices are of concern for alternative procedures that require filing documents with the court. Administration fees are of concern where the procedure is open exclusively to professional administrators. The cost of publishing notices in daily newspapers or elsewhere is of concern when the authority to administer arises wholly or in part from compliance with public notice requirements.

68. In recommending a modified form of election to administer as its preferred alternative to a grant of representation for small estates, the National Committee acknowledged the need for alternative procedures to contain such costs (in this case by capping administration fees[42] and not requiring public notice).[43]

69. The online registration options recommended by the VLRC[44] and canvassed in this paper may be another way of eliminating court costs and public notice costs for alternative methods of administration that do not require a grant of representation.

Other costs

70. The current South Australian scheme of administration could certainly be made cheaper when the estate is small by reducing court fees for grants for small estates, either by a fixed lower fee for estates under a certain amount or using a sliding scale related to the size of the estate.

71. The VLRC recommended that Victorian court fees be on a sliding scale related to the size of the estate and that estates valued at no more than $100 000 be exempt from fees.[45]

72. A reduction in fees, however achieved, would encourage formal administration, but it would not help simplify the administration process itself. The involvement of the Probate Registry, the Public Trustee,[46] the Registrar-General[47] or the

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42 Ibid 135 [29.192].

43 Ibid 115 [29.99] – [29.100].

44 Above n 39.

45 *VLRC Final Report* 201-202 (Recommendation 73).

46 The Public Trustee might be involved if there were to be administration by election or deemed grant (see discussion in Part 1.2.3 below). As mentioned, State Trustees in Victoria offer deemed grants under State Government subsidy, and would not consider the service viable without that subsidy.

47 The Registrar-General might be involved if legislation along the lines of s 112 of the *Land Title Act 1994* (Qld) were to be enacted (see discussion in Part 1.3.3 below).

Registrar of Births Deaths and Marriages[48] in administering a simplified scheme is likely to have implications for those agencies, but if the scheme encourages self-help and reduces inefficiencies and red tape any negative impact may be minimal in the long term.

In conclusion

73. On the next page is a chart illustrating the various models examined in this paper by reference to some of these considerations.

[48] The Registrar of Births Deaths and Marriages might be involved in there were to be a procedure for registering declarations of authority online (see discussion in paragraphs 142-146 below).

Fig 2: Features of models for small estate administration[49]

	Grant *(full, expedited, assisted)*	Election to administer	Deemed grant	Model Bill election to administer	VLRC model deemed grant	Summary administration by declaration	
						Filed in court	Registered online
Source of authority?	Court (*full & assisted)* Probate Registry *(expedited)*	Lodgement with court & advertised public notice	Compliance with statutory requirements & advertised public notice	Lodgement with court	Compliance with statutory requirements & online public notice (SC website)	Court stamp	Registration online
Who uses this method?	A person entitled to be appointed personal representative	Public Trustee	Public Trustee	Public Trustee, private trustee companies and lawyers	Public Trustee	Executor or (where intestate) beneficiary under rules of intestacy	Executor or (where intestate) beneficiary under rules of intestacy
Publicly accessible record?	Yes—Court file	Yes—Court file	No	No	Yes—Will on Court file	Yes	Yes
Includes real estate?	Yes	Yes if estate below threshold value	Yes if estate below threshold value	Yes if estate below threshold value	Yes if estate below threshold value	No	No
Third party protection?	Statutory protection	Assumed, not explicit	Assumed, not explicit	Assumed, not explicit	Assumed, not explicit	Statutory protection	Statutory protection
Fees and costs of seeking authority?	*Full grant:* Court filing fee, legal fees *Assisted grant:* Court filing fee *Expedited grant:* Court filing fee (reduced) & legal fees (reduced)	Fees for filing notice of intention and notice of election in court; and advertising intention and election	Fees for advertising intention to administer	Fees for filing notice of intention and notice of election in court	Fees for online posting and filing will in court	Fees for filing declaration in court	Fees for online registration
Admin fees?	Only if administrator is professional	Professional fees charged to estate	Professional fees charged to estate	Professional fees charged to estate	Professional fees charged to estate	DIY – not unless executor is professional administrator	DIY – not unless executor is professional administrator

[49] Note that while full and assisted grants, elections to administer and deemed grants exist in Australia as methods of estate administration, the other methods described in this table do not. Not all the alternatives canvassed in the Paper are included in the table. Note that the 'VLRC model deemed grant' referred to in the table is called an expedited grant in the *VLRC Final Report*, and the expression 'expedited grant' is used in this paper to describe a simplified form of grant (see paragraphs 87-95).

1.2.2 Simplified grant procedures

74. The two simplified procedures that are available in other Australian jurisdictions for administering small deceased estates by means of a grant of representation are discussed here. Each is designed for lay administrators. One simplifies the process of obtaining a grant of representation (an 'assisted grant') and the other simplifies both that process and the grant itself (an 'expedited grant').[50]

Assisted grant

75. Some jurisdictions allow the Probate Registry to help lay personal representatives to apply for a grant of representation from the Court. This concession does not relax the requirements for a grant, but rather acknowledges that some people will try to apply for a grant without legal help and that it may be to the mutual benefit of the applicant and the court to help them understand the steps that need to be taken, and that making the application process simpler may reduce the incidence of informal administration.

76. This practice exists in some parts of Australia and Canada, but there appears to be no equivalent in the USA.

77. In Australia, this kind of assistance is available only to the public and only for very small estates. It is available in New South Wales, Victoria, Western Australia and the Northern Territory for estates of values ranging, depending on the jurisdiction, from $10 000[51] to $50 000.[52] It has been described as a form of legal aid.[53]

78. The *VLRC Consultation Paper* noted that the 'assisted grant' option was not often used in Victoria.[54] It recorded concerns about potential conflict in the registry both assisting an application and then granting it, and about the inappropriateness of registry staff providing what might well be perceived to be legal advice. Notwithstanding these concerns, the Consultation Paper highlighted the need to provide reliable, timely, helpful and simple information to those seeking to administer an estate, and suggested that it be provided in a generalised way rather

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50 The expedited grant for lay administrators that is described in this Paper should not be confused with the expedited grant process for professional administrators that is recommended in the *VLRC Final Report* (which refers to a form of authority that is deemed to be but is not, in fact, a grant of representation). To avoid confusion, we describe the VLRC expedited grant as the *VLRC model deemed grant* because it is a version of the current Victorian deemed grant under s 79 of the *Administration and Probate Act 1958* (Vic).

51 *Administration Act 1903* (WA) ss 55, 56.

52 In Victoria, the limit is $50 000 where the only beneficiaries are the spouse only or children only or spouse and children only or sole surviving parent of the deceased; otherwise it is $25 000: *Administration and Probate Act 1958* (Vic) s 71.

53 *VLRC Consultation Paper* 21 [2.25].

54 Ibid [2.41]-[2.43].

than individually. It contemplated the provision of free downloadable online information and kits.

79. The *VLRC Final Report*, however, recommended the retention of this service,[55] saying that it offered a means of avoiding informal administration by providing

> an essential alternative route for those not wishing to engage a solicitor or trustee company, or those unable to navigate the grants process without assistance.

80. The *VLRC Final Report* also recommended a change in the maximum value of an eligible estate to $100 000, to be adjusted quarterly by reference to the All Groups Consumer Price Index.[56]

81. In Canada, a similar procedure allows for the issue of a grant of probate or letters of administration by the Registrar, rather than the Court, if the gross value of an estate is below $25 000. Two provinces permit such applications to be prepared by court registry officials in estates below a certain size at the option of the applicant. The BCLI noted that the apparent purpose of this procedure is to allow the applicant representative to obtain a grant without legal assistance.[57]

Suitability of assisted grants for South Australia?

82. 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[58] but the assistance is limited to avoid compromising the court's independence in determining each grant application. 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).

83. However, with the growth in self-represented litigants comes an increasing obligation for courts and court systems to help them. One commentator concluded recently that:

> …if courts remind themselves that access to justice requires that it should be to all 'without fear or favour, affection or ill-will' we should place all of our processes, language, practices and assistance under the microscope of that access to justice to determine whether, in a world in

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55 *VLRC Final Report* 193 (Recommendation 67).

56 Ibid (Recommendation 68).

57 *BCLI Interim Report* 18.

58 *The Probate Rules 2004* (SA) r 7.09: 'No legal advice shall be given to a personal applicant by any officer of the Registry upon any matter connected with the application but such officer shall, as far as practicable, assist such applicant by providing directions as to the course he or she must pursue.'

> which the self-represented are a large proportion, we are showing sufficient awareness, courtesy, consideration and ultimately fairness and justice to those who appear before the court without a lawyer.[59]

84. Given the difficulties of perceived conflict of interest, there may be other ways to achieve access to justice for self-representing applicants for grants of representation that could replace or complement individual assistance by probate registry staff.

85. 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, develop and make available on the Court's website in community languages—

> a package of information for those wishing to seek a grant of representation without professional assistance.[60]

86. Other options, in no particular hierarchy, might be:

    (a) Funding the *deployment of trained and supervised para-legal staff* to work from the Probate Registry and community legal centres to help people with their grant applications, rather than using registry officials. This option may forestall unnecessary expense and delay for courts and applicants not only by improving procedural compliance but also by timely referral of applicants to professional legal advice when appropriate.

    (b) Providing generalised rather than individual assistance in the form of a *downloadable application kit*. Commercially-produced probate kits, available online, come at a high cost and the experience of the South Australian Probate Registry is that their cost does not guarantee compliance with local requirements or alert applicants to relevant legal considerations. A more effective and reliable tool for applicants would be a low-cost, expertly-prepared localised kit along the lines of the enduring powers of attorney and guardianship kits that are available through Service SA at a subsidised price.

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59 Deputy Chief Justice Faulks, 'Self-represented litigants: tackling the challenge' (Speech delivered at the *Managing People in Court Conference*, National Judicial College of Australia and the Australian National University, February 2013) [96] (footnotes omitted). <http://njca.anu.edu.au/Professional%20Development/programs%20by%20year/2013/Managing%20People/Justice%20Faulks.pdf>

60 *VLRC Final Report* 195 (Recommendation 69).

(c) Offering a *guided online lodgement process*, available for both lay applicants and legal practitioners, as is done in Western Australia.[61] The application and lodgement process must be sophisticated enough to decline to lodge applications that are not completed correctly or are incomplete and to prompt referral to legal assistance at appropriate stages. This option would require rule and procedural change.

Expedited grant

87. The model of an expedited grant for lay administrators as an alternative to a full grant[62] is submitted for consideration. It has no precedent in Australia. The aim of this model is to make it quicker, easier and cheaper to obtain authority to administer the kinds of small deceased estates which might otherwise be administered informally, and perhaps poorly, by lay administrators, or for which a full grant to a professional administrator might be too costly for the estate.

88. Informal administration often happens when a financial institution makes a commercial decision not to require a grant of representation before releasing funds held in a small account. It does so at some risk.[63] Also, a person administering an estate without a grant in South Australia has no special statutory protection against liability for dealing with estate assets, in contrast to some other Australian jurisdictions which protect informal administrators from such liability when they 'make payments which would have been legitimate had they had a grant of representation'.[64]

89. If a less exacting yet still official form of grant that was quicker and cheaper to obtain than a full grant were available to those administering small estates, families might be more willing to seek authority to administer (and benefit from the protection from liability that comes with it) and third parties dealing with assets of the estate might be more willing to insist on such a grant rather than running the risk of releasing assets informally. In reducing the number of estates administered informally, an expedited grant procedure could reduce the likelihood of improper or incompetent estate administration, and with it, risks of litigation.

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61 The Western Australian online probate application form is available at <https://www.justice.wa.gov.au/ProbateOnlineForms/>

62 If an expedited grant procedure were to be established, s 44 of the *Administration and Probate Act 1919* (SA) would need to be amended to refer to both a full and an expedited grant.

63 See discussion in paragraphs 40 and 41 above.

64 *VLRC Final Report* 197 [9.82], referring to *Administration and Probate Act 1958* (Vic) s 33(1). The National Committee recommended a similar (and more comprehensible) provision in the model Bill (*National Committee's Report* vol 4, Draft Administration of Estates Bill 2009 cl 435) and the VLRC recommended that the Victorian section be redrafted along these lines: *VLRC Final Report* 198 (Recommendation 70).

90. Under this model, the grant application requirements for estates below a certain value would be simpler and the court fees less than for an ordinary grant and the application would be able to be processed more quickly and less formally.

91. This form of grant would be available to both lay and professional administrators, as long as the estate fell within the statutory definition of a relevant small estate.

92. There are several ways to define which kinds of small estates should be eligible for expedited grants. One is to confine eligibility to estates below a certain value. Another is to confine eligibility to estates that do not include real property, given that a full grant is required by the Lands Titles Office for dealings in land in which the deceased estate has an interest. A third option might be to combine both of these criteria so that only estates below a certain value and which do not include real property are eligible for an expedited grant.

93. An 'expedited grant' procedure would have these features:

- applications would be determined within a short time frame by specialist Probate Registry staff;
- applications would need to evidence the will, certification of death, eligibility as administrator and verification that the estate fell within applicable thresholds;
- an application with the consent of all beneficiaries could be given priority in processing;
- the fee for the application would be less than for a standard grant application;
- lawyers' fees for preparing such applications would be lower because the forms would be simpler.

Suitability of expedited grants for South Australia?

94. An expedited grant procedure could be offered only if there were additional specialist staff in the Probate Registry. Any such scheme may need to be funded by an increase in budget allocation or hypothecation of Probate Registry fee revenue. It should be borne in mind, though, that the administration of small deceased estates by expedited grant has the potential to increase the Probate Registry's overall fee receipts, given that the estate might otherwise have been administered without any form of grant.

95. A reduction in filing fees and legal costs should not be the main attraction of this option over a full grant. Its purpose is to speed up the distribution of small uncomplicated estates and bringing their administration within the oversight of the

court, to some extent, so that creditors and third parties are assured of the administrator's authority and beneficiaries are not short-changed.

1.2.3 Simplified procedures without a grant for professional administrators

96. 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 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*).[65]

97. 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 a personal representative under a grant.

Election to administer

98. The election to administer procedure is available in some parts of Australia and Canada, but there is no equivalent in the USA. Similarities between Australian and Canadian provisions include that the written and advertised notice of election is filed with the court registry and that this procedure enables the Public Trustee or a trustee company to administer an estate below a gross value ceiling without taking out a grant in the normal manner.

99. An election to administer allows for a less formal kind of authority to administer than a grant of representation, but with more or less the same effect. The National Committee Report distinguished an election to administer from a grant this way:

> an election to administer is simply filed in the court registry and, unlike a grant, is not an order issued under the seal of the court.[66]

100. Using this method, authority to administer the estate is achieved by filing a notice of election together with an inventory of the estate with the court and giving public notice (variously, by publication in the daily newspaper or Government Gazette) of

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[65] This expression was coined by the Victorian Law Reform Commission in the *VLRC Consultation Paper* in respect of the procedure offered by s 79 *Administration and Probate Act 1958* (Vic), and is used similarly in this Paper to distinguish it from an actual grant and from an election to administer.

[66] *National Committee's Report* 115 [29.99].

the filing of that election.[67] The Northern Territory is alone in not requiring public notice (despite having statutory power to prescribe such a requirement).

101. In most Australian jurisdictions, elections to administer are available to the Public Trustee (should it otherwise be eligible to administer the estate and where the Court is satisfied that there is no one else entitled to, capable of and ready to take a grant of administration) and sometimes also to private trustee companies (acting as either executor or potential administrator of a small estate).

102. Recently, the Northern Territory extended this option to legal practitioners[68] (and this is the recommendation of the National Committee).[69] In its Final Report on succession law in October 2013, the Victorian Law Reform Commission declined to follow this recommendation, whether in respect of elections to administer or deemed grants. For elections to administer, the VLRC is of the view that a person who can afford a solicitor to administer a small estate by this method can probably also afford the filing fees for a full grant, especially if the VLRC's recommendation for a sliding fee scale for filing grants (corresponding to the value of the estate) and for a nil filing fee for grant applications under $100 000 is adopted.[70] For deemed grants, its reasoning is that

> The purpose of the s 79 [deemed grant] process is to reduce costs to the State Trustees and encourage administration of estates where providing this service would not otherwise be commercially viable … State Trustees is given a government subsidy to provide this service.[71]

103. The threshold value of an estate that may be administered by election in Australia ranges from $50 000 (in Victoria) to $150 000 (in Queensland). Note that Queensland also allows for such an election if the actual value of the estate turns out to be higher, to a value of $180 000.[72]

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67 Victoria, however, requires public notice both before and after filing the election: *Trustee Companies Act 1984* (Vic) ss 11A(5)(b), 11A(6).

68 See the definition of *professional personal representative* in the *Administration and Probate Act* (NT) s 6 and in pt IV, div 2 of that Act which provides for representation by professional personal representations by way of deemed grants and elections to administer.

69 *National Committee's Report* 171 (Recommendation 29-3).

70 Ibid 210 [9.176].

71 *VLRC Final Report* 210 [9.177].

72 For more complete information, please refer to 'Table 1—Comparison of values for small estate mechanisms', *VLRC Consultation Paper* 19.

104. Some Australian jurisdictions[73] also permit elections to administer the remainder of a partially-administered estate where the executor or administrator is no longer able to act, to a statutory maximum value of the un-administered remainder.

105. The *VLRC Consultation Paper*[74] reported that although the election to administer method is available to private trustee companies in Victoria, they rarely use it, there being little financial incentive to manage small estates. Neither does Victoria's Public Trustee (called State Trustees), which prefers to use the alternative of a deemed grant process whenever the estate fits within the monetary thresholds, because it has less formality and is the cheaper and easier method. Even though not required to do so, State Trustees has a practice, where the estate is at the higher end of the value range, of voluntarily filing the will with the court when it uses the deemed grant procedure, so that there is some way to trace what is happening with the estate.

106. The current practice in Victoria was acknowledged by the National Committee in recommending model laws for alternatives to grants of representation for small estates.

107. The National Committee did not, however, abandon elections to administer. Instead it recommended against deemed grants and, for the model law, recommended an expanded form of election to administer which it considered the cheapest and most convenient method for professional administrators to establish authority to administer estates of relatively low value without a grant of representation. Its reason for discarding deemed grants was its view that any advantages deemed grants may have over elections to administer would be accommodated in the expanded form of its recommended election to administer. It also noted that 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.

108. The *Model Bill election to administer* is based on Northern Territory laws[75] under which an election to administer can be filed not only by a Public Trustee or a

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73 New South Wales (to a maximum estimated value of $100 000 (gross) or actual value of $120 000 (gross)); the Northern Territory (to a maximum estimated value of $85 000 (net), with no higher maximum for actual value); Queensland (to a maximum value for the un-administered estate that is the same as for elections to administer whole estates ($150 000 gross) with no higher maximum for actual value);Western Australia (to a maximum estimated value of $10 000 (gross) with no higher maximum for the actual value).

74 *VLRC Consultation Paper* 25 [2.57].

75 *Administration and Probate Act* (NT) s 110B.

trustee company but also by a legal practitioner.[76] The National Committee proposed to modify those laws to permit:

- the maximum *net* value of an estate[77] that could be administered by election to be set, initially, at $100 000,[78] indexed annually by reference to the CPI, and with allowance for an estimated value;
- an election to administer in estates left partly un-administered as a result of the death or incapacity of the personal representative. The recommended threshold amount for the un-administered part of the estate would be an estimated net value of $100 000 (CPI adjusted annually), with allowance for election where there is an actual value that is up to 150% of the estimated amount (this is the same value and allowance as is proposed for an election to administer a full estate);[79]
- a cap on fees for administration by election by the Public Trustee and trustee companies (to enable the costs of administering small estates by election to be less than those for administering a larger estate under a grant of representation);[80]
- the filing of an election to administer without giving public notice. This feature was recommended because it was thought that the small amounts involved in these estates did not justify the potentially considerable costs of public notice.[81]

109. In contrast, the *VLRC Final Report*, after considering the National Committee's recommendation and submissions made to its consultation paper on small estates, recommended the repeal of the legislation authorising elections to administer,[82] and the retention of a refined version of the deemed grant procedure[83] (as to which, see discussion of deemed grants below).

Deemed grant

110. A 'deemed grant' procedure is available to the Public Trustee in some parts of Australia and Canada, but there is no equivalent in the USA.

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76 *National Committee's Report* 99 [29.38]–[29.39], 171 (Recommendation 29-3).

77 Note that the Northern Territory is the only Australian jurisdiction to base its election to administer provisions on a net value.

78 In the Northern Territory, the estimated net value is currently $85 000.

79 *National Committee's Report* 118 [29.114]–[29.116], 170 (Recommendation 29-2(d)).

80 Ibid 135 [29.192], 171 (Recommendation 29-5).

81 Ibid 115 [29.100], 168 (Recommendation 29-1(f)).

82 *VLRC Final Report* Recommendation 74. See discussion at 205-206. The relevant provision is s 11A of the *Trustee Companies Act 1984* (Vic).

83 That is, the procedure described in s79 *Administration and Probate Act 1958* (Vic).

111. Australian jurisdictions that offer a deemed grant procedure[84] 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 in that jurisdiction, and when no application for a grant of representation has been made. In all relevant jurisdictions except the Northern Territory, this option is restricted to the Public Trustee. The Northern Territory has made it available also to trustee companies and legal practitioners.[85]

112. 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 authority of the relevant legislation. 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 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 legislation simply deems the Public Trustee to have been granted probate or administration once the statutory notice period has expired.

113. As noted by the *VLRC Consultation Paper*, 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 requirements 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;[86] 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.

114. The threshold value under which an estate may be administered by deemed grant varies greatly between the jurisdictions that permit this procedure.[87] In the ACT, New South Wales, the Northern Territory and Tasmania, the threshold is a net

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84 The ACT (*Administration and Probate Act 1929* s 87B); New South Wales (*Public Trustee Act 1913* s 34A); Queensland (*Public Trustee Act 1978* s 35); the Northern Territory (*Administration and Probate Act* s 110A); Tasmania (*Public Trustee Act 1930* s 20A); and Victoria (*Administration and Probate Act 1958* ss 3(1), 71(1) and 79).

85 *Administration and Probate Act* (NT) s 110A applying the definition of 'personal representative' in s 6(1).

86 *VLRC Consultation Paper* [2.99]. Although, as noted in that paper and in the *VLRC Final Report*, the internal policy of State Trustees when it uses the deemed grant procedure is often to file the will with the Court: *VLRC Final Report* 209 [9.168].

87 See discussion in *National Committee's Report* 125.

value. In Queensland, it is the value of the estate net of the value of any interest in land. In Victoria, no distinction between net and gross value is made. The threshold range varies: in the Northern Territory, the threshold is $20 000 net, in Victoria the maximum[88] (gross) threshold is $50 000 and in New South Wales it is $100 000 net. For deemed grants, there is no allowance for estimated value, as there is in many jurisdictions for elections to administer. (Note that the VLRC has recommended such an allowance for its model deemed grant).[89] But otherwise, the thresholds for elections to administer and deemed grants are often so similar that, in Victoria at least, State Trustees use the deemed grant procedure routinely rather than the election to administer procedure.[90]

115. The fees chargeable to the estate by the Public Trustee for a deemed grant vary. In New South Wales, for example, the same fees are chargeable for a deemed grant as for a grant of probate or administration. In Victoria, the fees for a deemed grant are lower than for a grant.[91] The *VLRC Consultation Paper* noted that because the value of the estates that are administered by deemed grant is often very low, State Trustees receives a subsidy to ensure that a form of official administration remains available to those with smaller estates, and indeed without that subsidy, the procedure would not be viable for State Trustees.[92] Under their Community Services Agreement with the Department of Human Services, State Trustees receive funding from the government to 'ensure that members of the public have access to services relating to managing and administering their estates and property'.[93]

116. As mentioned, the National Committee thought deemed grants unnecessary if its recommendations for a model form of election to administer were followed, because the Model Bill provisions would expand both the class of person who could file an election and the kinds of estates that could be so administered, as well as simplifying the election filing process.

117. The VLRC, by contrast, recommended discarding elections to administer because Victorian State Trustees did not use this procedure and instead recommended a refined version of its deemed grant procedure, already used routinely by State Trustees for small estates, which would, among other things, ensure that there was

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88 In Victoria, there is a higher threshold when the beneficiaries are close family members; otherwise it is $25 000.

89 Above n 37 and below, paragraph 117.

90 *VLRC Consultation Paper* [2.90], [2.91].

91 It appears that the applicable fee is the fee to file an election to administer—currently $186.70, as compared to $281.90 for a grant.

92 *VLRC Final Report* 210 [9.177].

93 *VLRC Consultation Paper* 30 [2.93].

a searchable official record of the fact that the estate was being administered this way and simplify the public notice process. The *VLRC Final Report* summarised its recommended refinements to the deemed grant procedure as follows:

> - raising the threshold dollar value of estates that may be administered under the scheme to $100,000[94]
> - 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[95]
> - replacing the requirement to advertise in a newspaper with a requirement to advertise on the Court's website, thereby creating a searchable record.[96]

118. For the purposes of comparison, we call this refined model of a deemed grant the *VLRC model deemed grant*.

119. In some provinces in Canada, there is a procedure that is similar to an Australian deemed grant procedure, in that it is available exclusively for the Public Trustee and is achieved by letter to a bank or financial institution announcing that the Public Trustee has authority under the legislation to gather in the assets of a deceased. The estate may then be administered without prior approval by a court. The Public Trustee becomes accountable to the beneficiaries of the estate for the assets and occupies a position similar to a personal representative. Available for quite small estates, it is called 'summary administration without a grant'.[97]

120. In other provinces, an order of a probate court is still required, by which the court may appoint anyone (not just the Public Trustee) to summarily administer the estate without a grant.[98] In these provinces, the court also has a role in supervising the distribution of the estate. The involvement of the court in this variant of the

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94 Note that this is the same maximum value as that proposed by the National Committee for its expanded election to administer procedure.

95 Note that this reference is not to an expedited grant of the kind discussed earlier in this paper, but of an expedited form of deemed grant.

96 *VLRC Final Report* 206 [9.149].

97 *BCLI Interim Report* 15, 16.

98 Ibid 16.

Canadian summary administration procedure makes it very different from an Australian deemed grant.

Suitability of elections to administer or deemed grants for South Australia?

121. The election to administer and deemed grant procedures are not available to lay administrators because the need for them arises in circumstances where ordinarily only a professional administrator would be entitled to administer the estate.

122. Because elections to administer and deemed grants are available for professional administrators elsewhere in Australia, either or both of these alternative procedures may be suitable in South Australia for the professional administration of a small estate.

123. The Model Bill form of election to administer recommended by the National Committee seems to provide a cheaper and more convenient method than a grant for obtaining the authority to administer a small estate. In its current form, though, an election to administer does not appear attractive to professional administrators, at least in Victoria (where a deemed grant is preferred because it does not require the filing of documents or the payment of fees and it is procedurally more straightforward than an election to administer).

124. However, a deemed grant is available to the Public Trustee only (in Victoria this is because State Trustees receives a subsidy to provide this estate administration service, and State Trustees has intimated it might not stay in the business of small estate administration if the subsidised deemed grant procedure were not available),[99] whereas trustee companies and, in one jurisdiction, legal practitioners, may use an election to administer. Both methods require public notice by newspaper advertisement of an intention to administer the estate.

125. If an election to administer or the Model Bill election to administer is thought to be too similar to a grant in terms of formality and cost, and the existing form of deemed grant is thought perhaps a bit too relaxed, an option for South Australian might be the VLRC model deemed grant, should an equivalent subsidy be available for the Public Trustee as there is for Victorian State Trustees.

126. The VLRC model deemed grant could perhaps be refined further for South Australia in either or both of these ways:

- it could specifically discharge from liability third parties who deal in good faith with the administrator;

[99] *VLRC Final Report* 205 [9.145]. See also discussion in *VLRC Consultation Paper* [2.54]-[2.65].

- it could 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 a court.

1.2.4 Simplified procedures without a grant for lay administrators

127. Models for lay administration without a grant are generally designed for executors named in the will or beneficiaries. No such procedures are available in Australia, but they do exist, in various forms, in the USA.[100] We briefly canvass these models and then posit a different method which we call *summary administration by declaration*.

US models

128. The liability and indemnity provisions for these less formal statutory processes put the person administering the estate in much the same legal situation as a person with a formal grant of representation. Broadly, these procedures for the summary administration of small estates have four features in common: (a) permitting informal collection and distribution of the deceased estate by a beneficiary; (b) not requiring a court to approve a personal representative for the estate; (c) being a method of lay, rather than professional, administration; and (d) including a specific statutory release from liability for third parties who rely in good faith on a person's apparent authority to enter into transactions involving assets of the deceased's estate. The statutory release has been characterised as putting the person informally administering the estate in the same position with respect to third parties as a personal representative.[101]

129. The most common types of summary administration procedure in the USA are:

- those where a beneficiary can distribute an estate without a grant, by producing, to anyone holding estate property or owing a debt to the estate, an affidavit evidencing their entitlement to inherit and certification of the death of the deceased (*summary administration by collection affidavit*);
- those where a beneficiary or creditor can distribute a very small estate without a grant but with court approval *(court-approved summary administration)*; and
- those where a beneficiary may distribute certain limited estates without a grant or court approval but is required to file an affidavit with the court after distribution verifying that distribution (*verified summary administration*).

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100 See discussion in the *BCLI Interim Report* 15, 16.

101 *BCLI Interim Report* 27.

130. As mentioned, there is no precedent for summary administration by named executors or beneficiaries in Australia. Neither of the recent reviews of Australian small estate administration (by the National Committee and by the VLRC) recommended any procedure for beneficiary administration. Indeed, each reform body effectively recommended a reduction in the number of methods of professional administration without a grant.

131. That said, South Australia is coming from a position of having *no* alternatives to a full grant and it may be useful to at least consider beneficiary administration models if they would encourage the proper administration of deceased estates that would otherwise be administered informally. It is to that end that we now put forward as a model of beneficiary administration a summary administration procedure recommended by the *BCLI Interim Report*[102] as a simple, fast means of initiating administration without the need for court appointment. It has not yet been enacted in British Columbia.

Summary administration by declaration

132. Under this model, the named executor or, in an intestate estate, a beneficiary under the rules of intestacy may distribute the estate without a grant after making a declaration in prescribed form. What distinguishes this procedure from a deemed grant is that is designed for lay administrators rather than for the Public Trustee. Indeed, it might be regarded as a hybrid of the US collection affidavit procedure and the Australian and Canadian deemed grant procedure.

133. The process would be initiated by statutory declaration in a prescribed standard form (so as to retain the solemnity associated with swearing or affirming but keep this outside formal court proceedings). The declaration would be treated as evidence of an intention to administer.

134. The BCLI version of this procedure would require the declaration to be lodged with the court, not as an application for approval or authority but rather a public declaration of an assumption of responsibility for administering the estate. The filing of the declaration in court

> … permits anyone to determine if the declarant actually has authority to collect assets and give receipts on behalf of the estate. Both beneficiaries and third parties dealing with anyone claiming to be a declarant may need this information. A court registry stamp on a copy of the small estate declaration would signify that the declarant has

[102] *BCLI Interim Report* 26-44 (ch VII). An outline of the BCLI model is in Appendix 4 to this Paper

> publicly assumed responsibility for collecting the assets, discharging the deceased's liabilities, and distributing the remaining estate properly among those entitled. Forcing the declarant to go on record in a publicly searchable database is thus a deterrent to fraud and misappropriation. It also gives assurance to third parties that they can rely on the small estate declaration and need not look behind it.[103]

135. This method is designed to be used for both intestate and testate estates. Where there is a will, the executor makes the declaration. Where there is no will, those who would be entitled to a share in the estate under the rules of intestacy (for example, the spouse) have the right to be declarants (in keeping with the general principle that 'right follows interest').

136. The estates contemplated for this procedure would not include real estate,[104] because in British Columbia, as in almost all jurisdictions in Australia, a grant of representation is required before the real estate of a deceased person may be transferred, and (it considered) the value of the real estate would in any event almost certainly exceed C$50,000. Rather, the procedure would apply to:

> … a typical small estate in which the assets might consist of a motor vehicle, a modest bank account, and some personal property of relatively negligible value.[105]

137. The BCLI recommended (in 2005) a monetary limit of C$50,000 for estates that could be administered summarily. This figure was thought to represent a reasonable estimate of the value of the typical small estate in which assets might consist of a motor vehicle,[106] a modest bank account, and some personal property of relatively negligible value.

Suitability of a summary administration by declaration model for South Australia?

138. A summary administration by declaration procedure would allow people named as executors in a will or people who would be entitled to administer a small deceased estate under the rules of intestacy to achieve a public right of representation by filing a standard form statutory declaration covering prescribed relevant details. The procedure would be designed for small estates that might otherwise be administered informally and therefore at some risk of error.

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103 Ibid 38.

104 Ibid 28.

105 Ibid 27.

106 A grant of representation is not usually needed to transfer or dispose of a motor vehicle.

139. In terms of determining the maximum value of estates for which the procedure should be used, the *BCLI Interim Report* suggested the possibility of using the amount set by intestacy legislation for the net value of an intestate estate below which (in Canada) a surviving spouse inherits the entire estate.

140. In South Australia, where the surviving spouse inherits the estate to a set value and then shares the remainder with any surviving issue, this is known as the 'statutory legacy'. The set value is $100 000 net of debts and expenses.[107] Given that this is also the monetary threshold recommended by the National Committee for estates that are suitable for administration without a grant by professional administrators, and by the VLRC for a deemed grant by the Public Trustee, it may seem too high for unsupervised administration by beneficiaries in South Australia. If summary administration of small estates by lay executors or beneficiaries were thought worthwhile in South Australia, it should perhaps be available only in relation to estates of a smaller net value than this.

141. The BCLI also recommended that the time limits for family provision claims be amended to coincide with the time limits for filing declarations as well as with those for grants.[108] Consistency of this kind would be advisable should South Australia adopt this model. As already mentioned,[109] an additional consideration for such summary administration procedures is the application of South Australian family provision laws (arising from the fact that these claims may be made only when the estate is under a grant of representation).

142. A more convenient and cheaper method of filing the declaration and achieving a publicly accessible public record of the administration is worth considering. The model just described requires the declaration to be filed in court, but merely so that it can be stamped and returned by the court and the stamped copy used to signify that the declarant has assumed authority to administer the estate.

143. But there is no reason why the court need be involved in such a purely formal procedure. Public notice of an assumption of responsibility to administer a small estate under a legislated process need not require filing any documents with the court or the involvement of court officials in receipt or stamping of declarations and facilitating record searches. The same objectives could be achieved at less expense and trouble by the online lodgement on a Government website of a declaration in exactly the same prescribed form, including a statutory release from liability for third parties relying on the registered assumption of authority.

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107 *Administration and Probate Act 1919* (SA) ss 72F, 72G.

108 In South Australia, family provision claims must be made within six months of a grant of representation: *Inheritance (Family Provision) Act 1972* (SA) s 8.

109 See above, paragraphs 42-44.

144. The website could be designed to prevent lodgement of declarations where declared estate assets exceeded the small estate limit or where the estate included real property. With adequate lodgement fees (to be borne by the estate), the system could allow search of online records at no cost by anyone who wanted to check a declarant's authority or the composition of the estate.

145. A suitable website for this might be modelled on or incorporated as part of the South Australian Division of Consumer and Business Services, which permits online applications for occupational licences and registration.[110] It is designed to be an official vehicle for public notice (see, for example, advertised notices of liquor and gaming applications).[111] The site is also designed to permit online public search of records of the information registered on it.[112] Because the site includes the Registry of Births Deaths and Marriages, the online process for registration of a declaration for administration of a small estate could be set up to reject any application made before the relevant death had been registered, and could automatically insert details of certification of death within an application without that information having to be applied for separately. Consideration would need to be given to ways of certifying deaths that occur interstate or overseas.

146. As with the court declaration model, the procedure would be available whether or not the deceased left a will, and there would be no privacy issues because the declared information would not contain details of the will (should there be one) other than who, if anyone, was appointed executor (to show the declarant's eligibility to administer), nor would it identify beneficiaries or creditors of the estate (other than via the declarant's assertion, in an intestate estate, that he or she is a beneficiary under the rules of intestacy). But the main advantages are:

- for a creditor, a third party or a beneficiary—immediate free online access to what the estate comprises and who has authority to administer it, as opposed to having to apply to a court to have an official manually search its records; and for third parties, statutory release from liability for acting in reliance on this record of authority.
- for the State—in there being no demand on court staff resources; in having a cost-neutral system where the costs of maintaining publicly accessible online records are covered by the fees for online lodgement; and in reducing red tape

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110 Information about online registration of birth, for example, is available on <http://www.cbs.sa.gov.au/wcm/births-deaths-marriages-2/>

111 <http://www.cbs.sa.gov.au/wcm/licensing-and-registration/notices-under-the-liquor-licensing-act-1997-and-gaming-machines-act-1992/>

112 See, for example, the occupational licensing public register and the liquor and gaming licensing database on <http://www.cbs.sa.gov.au/wcm/licensing-and-registration/find-a-licence-holder/>

by integrating death certification records already maintained on that site with lodged declarations.

- for the deceased estate—simplicity and ease of administration in removing paperwork requirements (such as providing certification of death and filing documents with the court) and reduction in fees and costs.

1.3 Informal administration

147. In recognition of the fact that a large number of deceased estates are administered informally (that is, without a grant of representation, an election to administer or a deemed grant) and that it is therefore important for informal administrators and third parties to understand 'their potential liability and its limits'[113] the National Committee and the VLRC examined ways of protecting third parties and administrators in such situations. Only one of these protective measures (protection for specific third party payments) is available in South Australia. This part of the Issues Paper reviews provisions aimed at

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

1.3.1 Limiting liability of informal administrators

148. The National Committee recommended a model provision to both declare and limit the liability of those who administer a deceased estate without formal authority.[114] That recommendation was endorsed by the VLRC in its latest report.[115] Both bodies urged that this particular provision be expressed as simply as possible so that lay people could understand it.

149. In terms of 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. In terms of 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.

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113 *VLRC Final Report* 198, [9.87].

114 *National Committee's Report* 171 (Recommendation 29-7) and clause 435 of the Model Bill (reproduced in *Appendix 2* to this paper).

115 *VLRC Final Report* 198 (Recommendation 70).

150. There being no evidence that informal administration is any less rife in South Australia than in other parts of Australia, some legislative clarification of the liability of informal administrators is well worth considering.

1.3.2 Protecting certain payments by third parties

151. There is a way in which some third parties can be protected from liability for paying assets of the deceased directly to beneficiaries whether or not they have a grant of representation. South Australia[116] and most other Australian jurisdictions[117] permit the payment of wages and small sums held on account for a deceased person directly to their survivors in some circumstances, under the protection of a complete discharge of liability. (The South Australian legislation is set out in *Appendix 1* to this paper.).

152. This is a way to ensure small deposits of monies belonging or owing to the deceased can be released promptly before the estate is finalised.

153. In South Australia, the opportunity is restricted to particular entities and payment restricted to extremely small amounts and to a narrow class of survivor. There are two ways in which these payments may be made:

    (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) up to $2 000 in wages owing to a deceased government employee or money held by a Government hospital on behalf of the deceased immediately before death.[118]

    (2) ADIs may similarly pay survivors an account of this amount.[119]

154. The National Committee thought provisions like this might be a 'useful adjunct to the informal administration of estates'[120] were it not for their specific nature and scope. It proposed a more general provision for its model laws

> rather than one that applies only to particular categories of persons who are holding money or other personal property of a deceased person.[121]

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116 *Administration and Probate Act 1919* (SA) ss 71, 72.

117 See, for example, *Administration Act 1903* (WA) s 139 and *Administration and Probate Act 1958* (Vic) s 32.

118 *Administration and Probate Act 1919* (SA) s 71.

119 *Administration and Probate Act 1919* (SA) s 72.

120 *National Committee's Report* 163.

121 Ibid 165 [29.313].

155. The National Committee's model provision is based on section 32(1) of the *Administration and Probate Act 1958* (Vic) but would permit payments not only to spouses and children but also to 'any other person appearing to be entitled to the property of the deceased person'. The *VLRC Final Report* noted that the majority of submissions to its consultation paper (which did not specifically raise this issue) endorsed this expansion.[122]

156. The National Committee's model provision would also permit the payment of amounts up to $15 000[123] without reference to the total size of the estate. The *VLRC Final Report* noted that this limit had been set in 2009 and recommended that it

> could usefully be raised to funds or property up to the value of $25 000.[124]

It recommended that this limit be adjusted quarterly to reflect changes in the All Groups Consumer Price Index.[125]

Updating the South Australian third party payment model?

157. There are some differences between the National Committee's model and the South Australian provisions:

- The model provision covers anyone who holds money or personal property on account for the deceased, while the South Australian provision covers only Government employers, ADIs and Government hospitals and covers only money, not personal effects.
- The model provision authorises the release of money or personal property to the value of $15 000, while the South Australian limit is $2 000.
- The model provision allows the release of money and personal effects not only to the surviving spouse or domestic partner and to children of the deceased but also to 'any other person appearing to be entitled to the property of the deceased person'. By contrast, 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 it is also possible for the Treasurer to authorise release of monies to a person other than the surviving spouse or domestic partner if the Treasurer considers that person to be entitled to it.

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122 *VLRC Final Report* 200 [9.108].

123 Ibid 172 (Recommendation 29-9).

124 *VLRC Final Report* 200 [9.102].

125 Ibid, 201 (Recommendation 71).

- The model provision does not include formalities for authorisation of release of monies (such as those in the South Australian provision for application to and directions from the Treasurer where the money is held by a government agency). Instead, this is a matter of internal administration for the person or organisation releasing money under this provision.

158. There may be merit in amending the South Australian provision along the lines of the model provision, with an appropriate CPI adjusted monetary limit, so that it can allow payments of greater amounts, in a wider range of circumstances, to a wider range of survivors, and with less formality.

159. Critical to any such provision is that it protects those who release money in accordance with its requirements from liability to the estate and also 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.

1.3.3 Expediting dealings with land

160. Except in Queensland, land belonging to the deceased cannot be transferred in Australia without a grant of representation (or in some jurisdictions, an election to administer or a deemed grant) which vests the title of the land with the personal representative, who must then deal with it in accordance with the will or the rules of intestacy.

161. 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.

162. The Queensland provisions allow the Registrar of Lands to register land of which the deceased is the registered proprietor in a person's name as personal representative if he or she has a grant of representation or, there being no grant and:

- there being a will, that person is entitled under it to be the personal representative or the Registrar considers the person would likely succeed in an application for a grant of representation. This can be done whatever the value of the deceased estate—it is not confined to small estates;[126]
- the landowner having died intestate with an estate valued at no more than $300 000 gross at death, and no grant of representation having been made within 6 months of death, the Registrar considers the person would likely succeed in an application for a grant of representation.

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[126] Note that the BLCI, endorsing similar changes to the BCLI *Lands Titles Act*, would limit them to small estates: *BCLI Final Report*, xviii (Executive Summary).

163. 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.[127]

164. The Queensland provisions[128] also permit direct registration of land or an interest in land in the name of a beneficiary under the will if the personal representative (or a person the Registrar considers would succeed in an application for a grant of representation) consents to it and if the person satisfies the Registrar of his or her beneficial entitlement to the land. This entitlement is not limited to small estates, but may be used for estates of any value.

165. As the National Committee points out, this provision

> avoids the registration costs that would be incurred if it were necessary for real property to be registered first in the name of the personal representative, and then transferred into the name of the beneficiary.[129]

166. There is much to be said for the Queensland provisions in simplifying and reducing the costs of the administration of deceased estates that include real property. Their effect, where a grant would otherwise not be needed for the collection and distribution of the rest of the estate, would be to obviate the need for a grant at all when the estate includes real property, removing the costs and time involved in obtaining a grant of representation, and, where there is no dispute as to the beneficial entitlement to the land, removing the registration cost of having to transmit the land first to the personal representative before transmitting it to beneficiaries.

167. The National Committee recommended that all Australian jurisdictions should consider enacting provisions along the lines of these Queensland provisions.[130] The BCLI also recommended similar provisions when proposing its model for summary administration by declaration.[131]

Suitability for South Australia?

168. The National Committee did not suggest that such provisions be part of the Model Administration Bill but rather that they be included in State and Territory real property legislation.

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127 *Land Title Act 1994* (Qld) s 111(3).

128 In this case, *Land Title Act 1994* (Qld) s 112.

129 *National Committee's Report* 138 [29.200].

130 *National Committee's Report*, Recommendation 29-6.

131 *BCLI Final Report*, xviii (Executive Summary); *BCLI Interim Report* 26.

169. The *Real Property Act 1886* (SA) contains no such scheme. There may be some value in introducing similar provisions, at least in relation to small estates, if there is evidence of significant delays and avoidable costs resulting from the current requirements.

170. Some consideration may need to be given, however, to ensuring such provisions are consistent with the objectives of the *Inheritance (Family Provision) Act 1972* (SA) and do not, by obviating the need for a grant, encourage or permit avoidance of family provision claims.[132]

1.4 Summary of reform options

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

172. It may be possible, for example, to alleviate these problems without adding alternatives to grants of representation. This might be achieved by some or any of these means:

(1) reducing the filing costs for small estates administered by grant;

(2) hypothecating revenue received from wills and estate filing fees to the Probate Registry[133] for use in establishing a simplified, quick and low cost grant application procedure for small deceased estates (an *expedited grant*) and perhaps also reducing lawyers' fees for such applications to reflect their relative simplicity;

(3) imposing a cap on administration fees for small estates where the law requires the estate to be administered by a professional administrator;

(4) offering assistance to apply for a grant by one or more of these means:

- free or subsidised information brochures for lay applicants;
- a guided online application lodgement system for lay and professional applicants; or
- subsidised para-legal assistance for lay applicants at Probate registries and community legal centres;

(5) setting out in legislation the extent and limits of liability for people who administer deceased estates informally;

(6) expanding the scope of third party payment protections;

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132 As to this, see discussion in paragraphs 42-44 of this paper.

133 These fees are currently paid into general revenue.

(7) expediting dealings in land under a certain value without a grant.

173. Another approach, in addition to or instead of any such changes, might be to offer less formal and cheaper methods of authorising the administration of small estates than a grant of representation. The models considered for South Australia in this paper are:

(1) elections to administer (as currently operating in other Australian jurisdictions or as proposed by the National Committee for the Model Bill);

(2) deemed grants (as currently operating in other Australian jurisdictions or in the form of the model recommended by the VLRC); and

(3) summary administration by declaration (as recommended by the BCLI or as modified in ways suggested in this paper).

174. Clearly, it may be counterproductive to have too many alternative methods of administration.

175. It could also be argued that too great a departure from current practice elsewhere in Australia may make administration more difficult where a South Australian estate comprises property in other jurisdictions. As to this, the National Committee recommendations for the automatic recognition of interstate grants of representation within Australia included recognition of at least one procedure for small estates other than a grant.[134] Another option would be to restrict alternative methods of administration to property within South Australia.

176. Against arguments that changes to South Australian laws to permit alternative procedures for the administration of small estates should aim for national consistency is the fact that small estates are less likely than larger ones to consist of property in other jurisdictions and hence differences in methods of small estate administration between South Australia and other Australian jurisdictions will not present the problems that prompt calls for uniform laws.

1.6 Questions

We offer a series of questions for submissions to Part 1 of this paper. A questionnaire covering Parts 1 and 2 may be downloaded in word format from our webpage: http://law.adelaide.edu.au/research/law-reform-institute/ under *Current Projects*.

[134] *National Committee's Report,* vol 3, 208 (Recommendations 31.6 and 31.7), referring to an election to administer.

Questions about the administration of small estates

General

1.1 What are your views on permitting some small deceased estates to be administered—

a. under the authority of a grant for which there are less stringent and cheaper application requirements than for a standard grant?

b. under a different form of authority, less stringent than a grant, that may not involve court approval?

1.2 If authority to administer a small deceased estate could be obtained other than by a grant of representation—

a. What criteria do you think should be used to define eligible deceased estates?

b. Are there some kinds of deceased estate which you think should always be administered through a grant of representation?

c. What kinds of protections do you think would be needed for—

i. beneficiaries?

ii. creditors?

iii. third parties?

iv. the person administering the estate?

d. To what extent should a person who administers a small deceased estate under such an authority be personally liable for that administration?

Expedited form of grant

1.3 Do you think that some small deceased estates could be administered through an expedited form of grant with less stringent application requirements than the current grant of representation?

1.4 If so,

a. which small estates should qualify?

b. what should the application requirements be?

Assisted grants

1.5 a. Do you think lay administrators and executors should be given subsidised assistance, short of legal representation, in—

i. applying for a grant of representation?

ii. administering a deceased estate under a grant of representation?

b. If any such assistance is to be provided, who should provide it and what form should it take?

Other models of obtaining authority?

1.6 Other than a full or expedited grant of representation, which, if any, models for the administration of a small estate discussed in this paper do you think would be suitable in South Australia—

a. for a professional administrator?

b. for a lay administrator?

Fees

1.7 Do you think that court fees for filing estate administration documents in the court (whether the estate is administered by grant of representation or by any other means) should reflect the size of the estate? How?

1.8 Do you think that there should be a cap on the fees for administering a small estate when it is required to be administered by a professional administrator?

Expedited dealings with land

1.9 Do you think it should be possible for land registered in the deceased's name at death to be registered, without a grant of representation—

a. in the name of a person who is or is entitled to be the personal representative under the will or under the rules of intestacy?

b. in the name of a person who is entitled to the land, should the personal representative consent to it?

1.10 If either circumstance were to be legislated, should there be any limit on the size of estates to which such a provision might apply and if so what should that limit be?

Protected third party payments

1.11 Do you think that South Australian laws for protected third party payments (which allow third parties to pay monies owed to or held on account of the deceased directly to beneficiaries) should be changed? If so, how?

Part 2: Resolution of minor succession disputes

2.1 Introduction

177. The second aspect of succession law examined in this paper, and for similar reasons of cost efficiency and simplicity, is whether minor disputes about succession matters could be dealt with in a different way than more serious disputes, and, if so, how.

178. The only court in South Australia with jurisdiction to determine disputes about deceased estates, even when the amount involved is small and the issues relatively clear cut, is the Supreme Court.

179. There are many aspects of a deceased estate that may be disputed. Examples include

- the authenticity of a will;
- the capacity of the testator to make the will;
- who should inherit under a will or by operation of the rules of intestacy;
- entitlement to and extent of payments of family provision;
- rectifying mistakes in the will;
- authority to administer the estate, including the passing over of executors, requesting executors to provide accounts, and citing an executor named in a will to obtain probate.

180. In South Australia, Registrars make almost all of the orders for probate and letters of administration, and these are orders of the court. Only when the administration of a deceased estate is quite complex or disputed will the matter go to a judge.

181. Not all such disputes involve large sums of money or are particularly complex, and for these, it can be argued, resolution need not be by a Supreme Court hearing but could be achieved effectively and authoritatively by a lesser court or tribunal or by a mandatory negotiated settlement process where a Supreme Court hearing is required only as a last resort.

182. There are several issues here. One is how to identify disputes that could be dealt with other than by a hearing in the Supreme Court. Another is how and by whom and at what point is that identification to be made. A third is how disputes identified by this process should be resolved.

183. Overriding considerations are whether a new simplified dispute resolution process will be quicker and cheaper for the parties than the current one, the extent to

which it usefully removes minor work from the Supreme Court, and the extent to which an alternative forum is capable of resolving the dispute authoritatively.

184. Similar issues and considerations about more efficient ways to resolve civil disputes generally are being examined by the South Australian Subcommittee of the Australasian Institute of Judicial Administration. A recommendation of that Subcommittee is mentioned below in paragraph 196.

2.2 Identifying minor disputes

185. Potential criteria for a succession law dispute to be resolved other than by a hearing in the Supreme Court might be

- *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.

186. These criteria need to be capable of determination accurately and easily for such a scheme to work.

187. It may be that there should be a process of vetting all claims, with the default presumptions being:

- that a claim is not complex enough to warrant first instance resolution by the Supreme Court; and
- that the value of most claims will not represent a sufficient percentage of the value of the estate to warrant it being heard at first instance by the Supreme Court.

188. These presumptions could be rebutted by affidavits from counsel as to complexity and affidavits from a solicitor as to value. If neither of these presumptions is rebutted the matter is automatically to be heard at first instance in some other way than in the Supreme Court. If only one of the presumptions is rebutted, there would be a discretion as to where the dispute should be heard at first instance.

189. The most suitable person to identify which claims may be heard at first instance by the Supreme Court is the Registrar of Probates. It may also be possible for that power to be exercised, in regional disputes, by district registrars.[135]

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[135] 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.

2.3 Different methods of dispute resolution for minor disputes

190. Authority in succession law appears to remain exclusively with the Supreme Courts of the various Australian jurisdictions, reflecting that these are serious matters for families and individuals, regardless of their monetary value.

191. But although no other Australian jurisdiction has invested a court or tribunal other than its Supreme Court with the power to deal with succession law disputes, the option of using another court or tribunal to hear and determine certain defined estate matters in dispute should not be discounted.

192. Recent changes to the Magistrates' Court jurisdiction in South Australia and the establishment of the South Australian Civil and Administrative Tribunal offer such possibilities.

193. The raising of the Magistrate's Court jurisdiction to $100 000 presents the opportunity for the resolution of succession law disputes below that monetary value by magistrates.

194. Although the recently established South Australian Civil and Administrative Tribunal does not presently have a jurisdiction in succession law,[136] it is possible for such a jurisdiction to be conferred on it in the future. The objectives of the Tribunal[137] may be thought well-suited to the resolution of less serious civil law disputes, particularly those relating to accessibility, to speed of resolution, to the use of alternative methods of dispute resolution, to simplicity, flexibility and informality in procedure and to minimisation of costs. This kind of approach has been described thus:

> The universal aim of tribunals is to resolve disputes fairly, informally, efficiently, quickly and cheaply. It should not be thought that the goals of economy, speed and efficiency compromise the supervening requirement for fairness. The absence of formality and the technical requirements of the rules of evidence does not displace due process, natural justice or procedural fairness.
>
> In a tribunal, evidence may be received in a form which would not be permitted in accordance with the rules of evidence. However, the

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136 The Tribunal has the jurisdiction conferred on it by its establishing Act or by any other Act: *South Australian Civil and Administrative Tribunal Act 2013* (SA) s 31; and a matter may come before it under such conferral by way of its original jurisdiction or its review jurisdiction: *South Australian Civil and Administrative Tribunal Act 2013* (SA) s 32. Note that the provisions concerning jurisdiction in Part 3 of the Act have not, at the date of writing, commenced.

137 *South Australian Civil and Administrative Tribunal Act 2013* (SA) s 8. Note that the provisions concerning objectives in Part 2 of the Act have not, at the date of writing, commenced.

> opposing parties will always be given the opportunity to test the evidence if it is reasonably challenged. Broadly speaking, procedural fairness requires tribunals to do what is fair in the circumstances of each case.
>
> Acting fairly will always require disclosure of the case being made against a party and giving the party an opportunity to respond to that case. Sometimes that may require a tribunal to require facts to be established in ways closer to the methods required by the rules of evidence. Sometimes greater informality will still yield a fair result. However, when greater formality is required it will not be because the rules of evidence are being applied but because fairness in the circumstances requires a stricter approach to the establishing of facts in dispute.
>
> Fairness is not confined, however, to methods of proof. It also requires disclosure and the giving of an opportunity to respond. Disclosure of a serious claim at a hearing without giving a proper opportunity for the other party to respond will itself be likely to offend against procedural fairness. Tribunal procedures generally seek to anticipate and avoid such problems by ensuring that any claim which might not be anticipated is communicated to the parties before a hearing commences.[138]

195. Even if minor succession disputes remain within the Supreme Court jurisdiction, there is scope for procedural change to accommodate them better.

196. The need to develop more efficient ways to resolve civil disputes generally in South Australia has been recognised by the South Australian Subcommittee of the Australasian Institute of Judicial Administration. The Subcommittee has recommended to the South Australian Chief Justice's Procedure Executive Committee that it consider introducing the streaming of civil disputes between courts, by which a judge hearing a case could, at any stage of litigation, transfer it for hearing to a forum that was more appropriate in terms of the complexity and expense of the proceedings. This kind of overarching procedural change might go a long way to easing the problems of access and expense that obstruct the resolution of succession disputes.

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[138] The Hon. Justice Garry Downes AM, 'Tribunals in Australia: Their Roles and Responsibilities', *Reform,* No. 84, Australian Law Reform Commission (Autumn 2004).

197. Whether or not that change occurs, there may be merit in transposing some of the informal procedures that make civil tribunals so successful to any new minor succession law dispute resolution process in the courts.

198. Alternative dispute resolution processes are available in State civil courts in South Australia, but these are not so much a different way of hearing a dispute as an optional adjunct to standard court processes.

199. In the Magistrates Courts, mediation is available for minor and general civil claims,[139] ranging from optional pre-court mediation after the final notice is served to court-ordered mediation after proceedings have commenced. For general civil claims, there is a mandatory conciliation conference after the first directions hearing. There is also the option of expert appraisal for consumer and business matters.

200. In the Supreme and District Courts, for disputes of a greater monetary value, alternative dispute resolution processes of mediation, conciliation and arbitration are available.[140] A Judge or Master or Registrar of either Court may refer the action or any issue arising from it to these processes at any stage of the proceedings. Either Court may refer any question to an expert referee for investigation and report. For the purposes of this assessment the expert referee becomes an officer of the Court.[141] The Supreme Court can also call in expert specially qualified assessors to help it try and hear all or part of a dispute.[142]

201. There is also something to be said for examining successful dispute resolution methodology used in other Australian civil courts such as the Family Court and the Federal Court, with a view to adaptation for the resolution of minor succession disputes in the Supreme Court.

202. In the Family Court, for example, an application for a parenting order may not be heard unless a certificate from an accredited family dispute resolution practitioner is filed with the application, showing that the parties have made genuine efforts to resolve their dispute. Similarly, parties intending to apply for financial orders in the Family Court are encouraged to resolve disputed issues before filing an application and will be ordered to attend family dispute resolution when an application is filed with the Court. A procedure like this could be used for all succession law disputes

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139 Minor civil claims are for amounts up to $25 000 (*Magistrates Court Act 1991* (SA) s 3), and general civil claims are for amounts between $25 001 and $100 000 (*Magistrates Court Act 1991* (SA) s 8).

140 *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 32-4; *District Court Rules 2006* (SA) ch10 (Alternative Dispute Resolution).

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

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

or only for those where the claim, of itself or relative to the size of the estate, is of a certain size or type.

203. 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. The aim is to reduce the costs to litigants and the court system and to speed up the resolution of disputes.

204. Some academics, though, are critical of Government initiatives to push alternative dispute resolution while at the same time increasing the fees and charges for litigation:

> While encouraging informal, mediated solutions to disputes saves time and money and can spare individuals the acrimony of a courtroom stand-off, using a 'price signal' to divert people away from the courts is another matter.
>
> … increased court fees in federal jurisdictions: the Federal Court, the Family Court and the Federal Magistrates Court …[mean] the vast range of matters these courts deal with – from divorce, family law and child support to bankruptcy, administrative law, human rights, privacy, consumer matters and copyright – is becoming more expensive for the many Australians who use the federal courts every year.
>
> … the increased fees apply across the board regardless of whether ADR is appropriate for the particular dispute.[143]

205. There is already precedent within the Supreme Court's civil jurisdiction for the simplification of dispute resolution process for estates under a certain value, or the mandating of alternative paths of dispute resolution for these kinds of disputes There is a procedure for expediting the determination of disputes under the *Inheritance (Family Provision) Act 1976* (SA) where the net value of the estate that is available for distribution is estimated to be under $500 000. These matters may be determined summarily on the available evidence, whether or not that evidence is in a form that complies with the usual rules of evidence, by a Master of the Supreme Court.[144]

206. There may therefore be scope within the jurisdiction of the Supreme Court for some smaller succession disputes (not just those about family provision) to be

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[143] Michael Legg, 'Court costs erode right to justice', *The Australian Financial Review*, 12 February 2013 <http://www.law.unsw.edu.au/news/2013/02/court-costs-erode-right-justice>

[144] *Supreme Court Civil Rules 2006* (SA) rr 312(12), 312(12A).

arbitrated by Supreme Court Masters, even if this necessitates the appointment of specialist Masters who can determine both minor disputes and family provision claims.

207. Establishing a vetting process to ensure that only more serious disputes are heard by the Supreme Court at first instance, having a Master deal with matters 'on the papers' or in a truncated form, and the potential elimination and clarification of issues in dispute by early obligatory alternative dispute resolution may, together or in combination, streamline the adjudication of disputes in relation to small estates. That said, some particular issues, such as lost or informal wills, might always need to be dealt with by a Master. Some major issues, such as questions of testamentary capacity, might continue to require determination by a Judge.

208. In summary, there are options for simplifying and shortening contentious succession claims by using other jurisdictions or by modifying procedures in the Supreme Court.

2.4 Questions

We offer below a series of questions for submission to Part 2 of this paper. A questionnaire covering Parts 1 and 2 may be downloaded in word format from our webpage: http://law.adelaide.edu.au/research/law-reform-institute/ under *Current Projects.*

Questions about the resolution of minor succession disputes

2.1 Do you think there is a need for some succession law disputes to be adjudicated other than by a hearing in the Supreme Court? Why/why not?

2.2 Are there any kinds of succession law disputes that you think should always be adjudicated by a hearing in the Supreme Court? Please give examples.

2.3 If you think some kinds of succession law disputes could be adjudicated other than by a hearing in the Supreme Court, please give examples.

2.4 If some succession law disputes are to be adjudicated by a hearing in the Supreme Court and some by other means, what criteria should be used to identify which kind of dispute should be so adjudicated by each?

2.5 What procedures or features do you think might be useful in alternative methods of adjudicating succession law disputes if they are not to be adjudicated by a hearing in the Supreme Court?

2.6 What roles, if any, do you think these office holders or bodies should play in the adjudication of succession law disputes if this is to be achieved other than by a hearing

in the Supreme Court?

(a) the Registrar of Probates

(b) District Registrars

(c) Masters of the Supreme Court

(d) Magistrates

(e) the South Australian Civil and Administrative Tribunal?

2.7 Do you think the current system of adjudication, or any new system, should include an obligatory mediated process for clarifying and narrowing the issues in dispute before the succession law dispute is allowed to be adjudicated? Why/why not?

2.8 Do you think any new system of adjudication for succession law disputes should be conducted—

(a) without strict adherence to the rules of evidence?

(b) without the right (or automatic right) of legal representation?

(c) with some other degree of informality (and if so, please describe)?

(d) on the papers (i.e. without the need for parties to appear)?

(e) with some reduction in court fees (and if so, please describe)?

2.9 Do you have any other comments on the suggestions made in Part 2 of this Paper?

Appendices

1 South Australian legislation

Extracts from

Administration and Probate Act 1919 (SA)

The Probate Rules 2004 (SA)

Public Trustee Act 1995 (SA)

Supreme Court Civil Rules 2006 (SA)

ADMINISTRATION AND PROBATE ACT 1919 (SA)

Division 4—Payment of certain money in deceased estates without grants

71—Payment without production of probate or letters of administration

(1) Where a Government employee dies and immediately before his death a sum not exceeding two thousand dollars was owing to him by the Government or by a person or authority representing the Government the Treasurer may in his discretion direct that such sum shall be paid to the surviving spouse or domestic partner of the deceased or to any other person to whom the Treasurer deems it just to pay it, or that such sum shall be divided among any of such persons.

(2) (1a) Where a patient in a Government hospital dies and immediately before his death money or other property (not exceeding in amount or value two thousand dollars) was held on his behalf by the hospital, the Treasurer may, in his discretion, direct that the money or property be paid or delivered to the surviving spouse or domestic partner of the deceased, or to any other person who is, in the opinion of the Treasurer, entitled to it, or that the money or property be divided among any such persons.

(3) The Treasurer may refuse to give a direction under this section unless such indemnities or undertakings as he thinks necessary are given.

(4) A person shall not have a claim against the Crown, the Treasurer, or any other person representing the Crown in respect of the payment of money or the delivery of property pursuant to this section; but nothing in this section shall relieve a person receiving money paid or property delivered under this section from any liability to account for or apply that money or property in accordance with law.

(5) In this section—

Government employee means a person employed in the service of the Crown whose remuneration is paid out of money under the control of the Treasurer;

Government hospital means an institution declared by the Treasurer by notice in the Gazette to be a Government hospital for the purposes of this section.

72—Payment by ADI of sums not exceeding $2 000

(1) Whenever on the death of an ordinary customer or depositor the moneys standing to his credit on the books of any ADI do not exceed two thousand dollars, and probate of his will or letters of administration of his estate is or are not produced to the manager of the ADI within three months after the death of the customer or depositor, the manager of such ADI may pay such money to the spouse or domestic partner of such customer or depositor without any proof other than the death of such customer or depositor and the identity of the spouse or domestic partner as the case may be.
(2) Every payment so made shall be valid, and be an effectual release to the ADI against all claims and demands on account thereof.
(3) The next of kin, legatees, executors, or administrators of the deceased customer or depositor shall have all such remedies against the persons to whom such moneys were paid as they would have had against the ADI if such payment had not been made by the ADI as aforesaid.

THE PROBATE RULES 2004 (SA)

Order of priority for grant where deceased left a will

31 The person or persons entitled to a grant of probate or administration with the will annexed shall be determined in accordance with the following order of priority, namely—

(i) The executor;
(ii) Any residuary devisee and/or legatee in trust for any other person;
(iii) Any residuary devisee and/or legatee for life;
(iv) The universal or residuary devisee and/or legatee (including one entitled on the happening of any contingency), or, where the residue is not wholly disposed of by the will, any person entitled to share in the residue not so disposed of or, subject to Rule 35.03, the personal representative of any such person:

Provided that -

(a) unless the Registrar otherwise directs a residuary devisee or legatee whose devise or legacy is vested in interest shall be preferred to one entitled on the happening of a contingency; and

(b) where the residue is not in terms wholly disposed of, the Registrar may, if the Registrar is satisfied that the testator has nevertheless disposed of the whole, or substantially the whole of the estate as ascertained at the time of the application for the grant, allow a grant to be made to any devisee or legatee entitled to, or to a share in, the estate so disposed of or, subject to Rule 35.03, the personal representative of any such person without regard to the persons entitled to share in any residue not disposed of;

(v) Any specific devisee or legatee or any creditor or, subject to Rule 35.03, the personal representative of any such person or, where the estate is not wholly disposed of by the will, any person who, notwithstanding that the value of the estate is such that he or she has no immediate beneficial interest in the estate, may have a beneficial interest in the event of an accretion thereto;

Any specific devisee or legatee entitled on the happening of any contingency, or any person having no interest under the will of the deceased who would have been entitled to a grant if the deceased had died wholly intestate.

Order of priority for grant in case of intestacy

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

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

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

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

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

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

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

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

PUBLIC TRUSTEE ACT 1995 (SA)

9—Administration of deceased estate

(1) The Court may make an order (an "administration order") granting administration of the estate of a deceased person to the Public Trustee, or authorising the Public Trustee to administer the estate of a deceased person—

(a) if, in the opinion of the Court—

i. the deceased has died bankrupt or insolvent; or

ii. a creditor would be entitled to obtain administration of the estate or to institute an action for the administration of the estate,

(and if, in such a case, probate or administration has been granted to a person other than the Public Trustee, the Court may revoke the probate or administration without prejudice to any proceedings taken or act done under it); or

(b) if the deceased has died wholly or partially intestate, leaving property within this State, but not leaving a spouse, domestic partner or next of kin resident in the State who is of or above 18 years of age; or

(c) if—

i. the deceased has made a will without leaving an executor resident in this State willing to act and capable of acting in the execution of the will; and

ii. there is no person of or above 18 years of age in this State entitled to obtain administration with the will annexed; or

(d) if the deceased has made a will and appointed an executor but probate of the will has not been obtained within four months from the death of the deceased; or

(e) if no person entitled to obtain administration (with or without a will annexed) obtains it within three months after the death of the deceased; or

(f) if probate or administration has been granted to a person who desires to retire from the office of executor or administrator (and, in such a case, the Court may revoke the probate or administration without prejudice to any proceedings taken or act done under it); or

(g) if—

i. the estate or portion of it is liable to waste, of a perishable nature or in danger of being lost or destroyed, or great loss or expense may be incurred by reason of delay; and

ii. the executor, person entitled to administration (with the will annexed), spouse, domestic partner or next of kin—

A. is absent from the locality of the estate; or

B. is not known; or

C. has not been found; or

D. is unfit or incapable; or

(h) if an executor, or person entitled to administration, requests the Public Trustee, in writing, to apply for an order under this section; or

(i) if part of an estate, already partly administered, is unadministered owing to the death, incapacity, insolvency, disappearance or absence from the State of the executor or administrator.

(2) If it appears to the Court—

(a) that there is reasonable ground to suppose that a person has died leaving property within this State; and

(b) that the person died intestate or without a will duly proved within a reasonable time after death,

the Court may, without requiring strict proof of death, make an administration order authorising the Public Trustee to administer the person's estate for the benefit of the

person's creditors and for the discharge of the person's liabilities as if the person were dead.

(3) An application for an administration order may be made by—
  (a) the Public Trustee; or
  (b) a person interested in the estate (including a creditor); or
  (c) a guardian or blood relation of a person under 18 years of age interested in the estate.

(4) An administration order may be obtained either without notice or after notice has been given as directed by the Court.

(5) The Court may revoke an administration order and order—
  (a) that probate be granted to an executor entitled to probate of the will of the deceased, or that letters of administration with the will annexed be granted to any person entitled to them;
  (b) that property from a deceased person's estate vested in or under the control of the Public Trustee be transferred or delivered to a person or persons entitled to it, whether in trust or beneficially.

(6) Revocation of an administration order is without prejudice to any proceedings taken or act done under it.

(7) An administration order of a kind referred to in subsection (2) may not be revoked unless the Court is satisfied that special circumstances of the case and lapse of time since the making of the order justify the revocation.

(8) If an order is made authorising the Public Trustee to administer the estate of a deceased person, the Public Trustee will be taken to be the administrator of the estate for the purposes of any other Act but subject to the provisions of the other Act.

SUPREME COURT CIVIL RULES 2006

312—Inheritance (Family Provision) Act 1972

(1) In this rule—

Act means the *Inheritance (Family Provision) Act 1972*.

[ss (2)-(11) and (14) omitted]

(12) The Court may determine an action under the Act summarily when:

  (a) there are reasonable grounds on which to conclude that the net estate of the deceased which will be available for distribution will be less than $500,000; and
  (b) it is in the interests of justice to do so.

(12A) A summary determination under subrule (12):

(a) may be made by a Master;
(b) is to proceed in accordance with such directions as are given by the Court;
(c) may be determined on the basis of evidence which does not conform with the rules of evidence; and
(d) is to have as a primary object the minimization of costs and an expeditious but just resolution of the action.

(13) If an action should have been, but was not, dealt with under subrule (12), the Court may order the plaintiff to bear any costs that might have been avoided if that subrule had been complied with.

2 National Committee model laws

(Extracts from the model administration legislation recommended by the National Committee for Uniform Succession Laws in its Final Report)[145]

ADMINISTRATION OF ESTATES BILL 2009

SCHEDULE 3 DICTIONARY (definition of 'professional administrator')

professional administrator means—

(a) the [public trustee]; or
(b) a trustee company within the meaning of the [insert local equivalent of the *Trustee Companies Act 1968* (Qld)]; or
(c) an Australian legal practitioner within the meaning of the [insert local equivalent of the *Legal Profession Act 2007* (Qld)]

CHAPTER 3 GRANTS OF REPRESENTATION

PART 6 Elections to administer—simplified procedure for small estates

Division 1 preliminary

324 Application of part [Qld *Public Trustee Act*, s30]

This part applies in relation to a deceased person whether the person died before or after the commencement of this section.

325 Definitions for part [R 29-3]

In this part—

CPI means the all groups consumer price index, being the weighted average of the 8 capital cities, published by the Australian statistician.

CPI indexed, in relation to an amount for a preceding calendar year, means the amount is increased by the percentage change in CPI for the [September] quarter for the calendar year immediately before the preceding calendar year and the [September] quarter for the preceding calendar year.

preceding calendar year, in relation to a later calendar year, means the calendar year immediately preceding the later calendar year.

prescribed amount means—

[145] *National Committee's Report* vol 4, 103-124.

(a) for the calendar year ending 31 December [*insert relevant year*]—$100000; or
(b) for a later calendar year—the amount for the preceding calendar year, CPI indexed.

Division 2 No previous grant of representation

326 Filing an election to administer [NT s110B; R 29-1]

A professional administrator may file in the Supreme Court an election to administer the estate of a deceased person if—

(a) the professional administrator is entitled to have a grant of probate of the deceased's will or letters of administration of [or an order to administer] the deceased's estate made to the professional administrator; and
(b) the professional administrator estimates that the net value of the estate in this jurisdiction at the time of filing the election to administer is not more than the prescribed amount; and
(c) no grant of representation of the estate has been made in this jurisdiction; and
(d) no interstate grant of representation of the estate has been made that is effective in this jurisdiction under section 335.

327 Form and content of election to administer [NT s110B; R 29-1]

(1) An election to administer filed under section 326 must be in writing and state the following matters—

(a) the deceased's name, address, occupation and date of death;
(b) details of the deceased's estate;
(c) whether the deceased died leaving a will or without leaving a will;
(d) if the deceased died leaving a will, a statement that, after making proper inquiries, the professional administrator believes—
  (i) that the document annexed to the election to administer is the deceased's last will or a certified copy of the deceased's last will; and
  (ii) that the will has been properly executed.

(2) If the form of an election to administer is approved for use under section 619, the election to administer must be in the approved form.

(3) In this section—

properly executed, in relation to a will, means executed in accordance with the law governing the execution of the will.

328 Status of professional administrator after filing an election to administer [NT s110B; R 29-1]

On filing the election to administer, the professional administrator is taken to be—

(a) if the deceased died leaving a will and the professional administrator is an executor of the will—the holder of a grant of probate of the will; or
(b) if the deceased died leaving a will and the professional administrator is not an executor of the will—the holder of a grant of letters of administration with the will annexed; or
(c) if the deceased died without leaving a will—the holder of a grant of letters of administration on intestacy of the deceased's estate.

329 Value of estate must not exceed prescribed amount [NT s110B; R 29-1]

If, after filing the election to administer, the professional administrator discovers that the net value of the estate in this jurisdiction is more than 150% of the prescribed amount, the professional administrator must—

(a) file in the Supreme Court a memorandum stating the value of the estate in this jurisdiction; and
(b) apply for a grant of probate or letters of administration [or an order to administer].

Division 3 Previous grant of representation

330 Filing election to administer [NT s110C; R 29-2]

A professional administrator may file in the Supreme Court an election to administer the unadministered part of a deceased person's estate if—

(a) a grant of representation of a deceased person's estate has been made to a person (the last personal representative) but, because of the death or loss of legal capacity of the last personal representative, the estate has been left unadministered; and
(b) the professional administrator is entitled to have a grant of letters of administration [or an order to administer] of the unadministered estate made to the professional administrator; and
(c) the professional administrator estimates that the net value of the unadministered estate in this jurisdiction at the time of filing the election to administer is not more than the prescribed amount; and
(d) no grant of representation of the unadministered estate has been made since the death or loss of legal capacity of the last personal representative; and

(e) no interstate grant of representation of the unadministered estate has been made that is effective in this jurisdiction under section 335.

331 Form and content of election to administer [NT s110C; R 29-2]

(1) An election to administer filed under section 330 must be in writing and state details of the following matters—

(a) the last grant of representation;
(b) the death or loss of legal capacity of the last personal representative;
(c) the estate in this jurisdiction left unadministered.

(2) If the form of an election to administer is approved for use under section 619, the election to administer must be in the approved form.

(3) A statement by the professional administrator in the election to administer giving details of the death or loss of legal capacity of the last personal representative—

(a) is evidence of the details stated; and
(b) in the absence of evidence to the contrary, is to be accepted by all courts and persons, whether acting under an Act or not, without further proof.

332 Status of professional administrator [NT s110C; R 29-2]

(1) On filing the election to administer, the professional administrator is taken to be the administrator of the unadministered estate as if a grant of letters of administration of the unadministered estate had been made to the professional administrator.

(2) However, if the professional administrator filed the election to administer because of the last personal representative's lack of legal capacity, subsection (1) applies only for the period of the lack of legal capacity.

333 Value of unadministered estate must not exceed prescribed amount [NT s110C; R 29-2]

If, after filing the election to administer, the professional administrator discovers that the net value of the unadministered estate in this jurisdiction is more than 150% of the prescribed amount, the professional administrator must—

(a) file in the Supreme Court a memorandum stating the value of the unadministered estate in this jurisdiction; and
(b) apply for letters of administration of [or an order to administer] the unadministered estate.

Division 4 Estate administration fees

334 Fees that may be charged under this part [NT s110D; R 29-5]

(1) A professional administrator who administers an estate under this part may charge a fee for the administration.

(2) A regulation may prescribe the maximum fee that a professional administrator may charge under this section.

(3) If a maximum fee is not prescribed, a professional administrator may charge a fee that is not more than the amount that the [public trustee] is entitled to charge according to the [insert local equivalent of scale of commission and fees prescribed under section 74(5) of the *Public Trustee Act* (NT)].

CHAPTER 4 PERSONAL REPRESENTATIVES

PART 4 Powers

[omitting 4.06 -4.10]

411 Ratifying particular acts [Q s54(3); R 29-8]

A personal representative may ratify and adopt any act done on behalf of the deceased person's estate by someone else if the act was one that the personal representative might properly have done himself or herself.

CHAPTER 5 ADMINISTRATION OF ASSETS

PART 11 Informal administration

434 Protection for limited payments made without production of a grant of representation [Vic s32; R 29-9 to 29-11]

(1) This section applies if a person holds money or personal property for a deceased person of not more than $15000 in value.

(2) The person may, without requiring production of a grant of representation, pay the money or transfer the personal property to any of the following persons having legal capacity—

(a) a surviving spouse of the deceased; or
(b) a child of the deceased; or
(c) another person who appears to be entitled to the money or personal property.

(3) A payment of money or transfer of personal property under subsection (2), if made in good faith, is a complete discharge to the person of all liability for the money or personal property.

(4) This section does not affect the right of a person who has a claim to, or against, the deceased's estate to enforce a remedy for the person's claim against a person to whom a payment or transfer has been made under subsection (2).

435 Persons acting informally [Q s54(1); R 29-7]

(1) This section applies if a person who does not hold a grant of representation of a deceased person's estate—

(a) obtains, receives or holds the estate other than for full and valuable consideration; or
(b) effects the release of any debt payable to the estate.

(2) The person is liable to account for estate assets to the extent of—

(a) the estate obtained, received or held by the person; or
(b) the debt released.

(3) However, the person's liability is reduced to the extent of any payment made by the person that might properly be made by a personal representative to whom a grant of representation of the estate is made.

3 VLRC recommendations for small estates

Extract from Victorian Law Reform Commission, *Succession Laws: Final Report* (15 October 2013) xxxiv-xxxv.

Chapter 9 Small estates

Assistance in seeking a grant of representation

67 Section 71(1) of the A*dministration and Probate Act 1958* (Vic) should be replaced with a provision that:

(a) permits a person entitled to probate of the will or letters of administration in respect of an estate not exceeding $100,000 in value to apply to the registrar of probates or, where appropriate, a registrar of the Magistrates' Court, for aid in obtaining a grant of representation

(b) provides for the maximum value of the estate in respect of which the aid may be provided to be adjusted quarterly to reflect changes in the All Groups Consumer Price Index.

68 The Supreme Court of Victoria should publish on its website the quarterly Consumer Price Index adjusted maximum values of estates in respect of which the Probate Office may provide assistance in applying for a grant of representation.

69 The Supreme Court of Victoria, in consultation with Victoria Legal Aid, the Law Institute of Victoria and the Federation of Community Legal Centres, should develop and make available on its website in community languages a package of information for those wishing to seek a grant of representation without professional assistance.

Informal administration

70 Section 33(1) of the *Administration and Probate Act 195*8 (Vic) should be redrafted in the simpler form reflected in the National Committee's model provision dealing with persons acting informally.

71 Drawing on model legislation proposed by the National Committee for Uniform Succession Laws, section 32 of the *Administration and Probate Act 1958* (Vic) should be amended to:

(a) provide a discharge of liability in respect of payments of $25,000 or less

(b) provide that the $25,000 limit will be adjusted quarterly to reflect changes in the All Groups Consumer Price Index

(c) provide that payments made in accordance with the section will serve as a complete discharge of liability

(d) remove the requirement that the party releasing the assets be satisfied that the value of the estate does not exceed a particular limit.

72 The Supreme Court of Victoria should publish on its website the quarterly Consumer Price Index adjusted limit for the purposes of section 32 of the *Administration and Probate Act 1958* (Vic).

Removing costs barriers to formal administration

73 The applicable fee for obtaining a grant of probate or letters of administration in the Supreme Court Probate Office should be based on the estate's value, in a sliding scale, with estates valued at no more than $100,000 attracting a nil fee.

Expedited grants[146]

74 Section 11A of the *Trustee Companies Act 1984* (Vic) should be repealed.

75 Section 79 of the *Administration and Probate Act 1958* (Vic) should be amended to provide that, if in the course of administering a small estate under that section, State Trustees ascertains that the value of the estate exceeds 120 per cent of the adjusted upper value for small estates as set out in section 71(1), it must as soon as practicable apply in the same manner as any other person for a grant of representation.

76 Section 79(2) of the *Administration and Probate Act 1958* (Vic) should be amended to require that notices of intention to administer an estate under this section should be advertised on the Supreme Court's website rather than in a daily newspaper.

77 Section 79 of the *Administration and Probate Act 1958* (Vic) should be amended to require that the will be filed with the Supreme Court Probate Office.

[146] Note that the expedited grants referred to in these recommendations are not the same as the expedited grants discussed in this paper. Rather, they are modifications of what this paper calls 'deemed grants'.

4 BCLI proposal outline

The model proposed by the British Columbia Law Institute is outlined thus in the executive summary of the final report in its Succession Law Reform Project, entitled *Wills, Estates and Succession: A Modern Legal Framework:*

> The procedure proposed to replace the current section 20 of the *Estate Administration Act* would allow estates under a value ceiling set by regulation to be administered without a formal grant of probate or administration. The procedure would be available to the official administrator as well as the deceased's personal representative or the deceased's successors. The procedure would be initiated by the filing of a statutory declaration in the probate registry by the personal representative, if any, a person beneficially interested in the estate, a nominee with the written consent of those beneficially interested, or the official administrator. The role of the probate registry would be limited to entering a record of the filing of the small estate declaration in the civil registry database system and stamping and returning a copy of the small estate declaration.
>
> The copy of the small estate declaration with the court stamp would function like a grant, allowing the declarant to gather the assets of the estate and deal with them as if a formal grant of probate or administration had issued. Persons dealing with the declarant on the strength of the court-stamped declaration would receive a statutory release of liability which would protect them to the same extent as if the declarant had received a formal grant.
>
> The proposed small estate procedure would be limited to estates consisting solely of personal property, as a formal grant of probate or administration is necessary in order to transfer real estate in British Columbia. The Report urges, however, that consideration be given to an amendment to the Land Title Act that would relax this requirement in connection with small estates. The Report recommends that the gross value ceiling for the small estate summary administration procedure be set initially at $50,000 and increased later if considered appropriate.[147]

[147] *BCLI Final Report*, xviii (Executive Summary); *BCLI Interim Report* 26. The BCLI's proposed draft legislation and explanatory policy notes may be found at page 276 (Part 2) of the Final Report.

5 Glossary[148]

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

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

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

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

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

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

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

Lay administrator—a person other than a *professional administrator* who administers a deceased estate. Often, a lay administrator will be a member of the testator's family or a friend of the testator who has been named as *executor* in the will or who applies for *letters of administration* when there is no will. Sometimes, a lay administrator is a *beneficiary* or creditor of the estate.

Legislation—Law made by Parliament. This kind of law can also be called a *statute* or an Act.

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

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

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

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

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

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

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

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

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

Professional administrator—an office or company established by statute to administer deceased estates. Usually this class of *administrator* comprises the *Public Trustee* and private trustee companies as defined by trustee company legislation. In some jurisdictions, the class includes legal practitioners. Contrast with *lay administrator*.

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

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

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

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

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

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

Testator—A person who makes a *will*.

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