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

Now therefore:

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

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

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

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

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

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

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

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

Final Report 2

August 2013

South Australian Law Reform Institute

Sureties' guarantees for letters of administration

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

Postal address:

SA Law Reform Institute

Adelaide Law School

University of Adelaide

North Terrace

Adelaide SA 5005

Contact details:

(08) 8313 5582

SALRI@adelaide.edu.au

www.law.adelaide.edu.au/reform/

Publications

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THE UNIVERSITY of ADELAIDE

Government of South Australia
Attorney-General's Department

THE LAW SOCIETY OF SOUTH AUSTRALIA

Contents

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[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>.

Participants

South Australian Law Reform Institute

Director Professor John Williams

Deputy Director Helen Wighton

Advisory Board

Professor John Williams (Chair)

The Hon David Bleby QC

Terry Evans

The Hon Justice Tom Gray

Ingrid Haythorpe

Professor Rosemary Owens

Jonathan Wells QC

Administrative Officer Louise Scarman

Succession Law Reference Group

The Hon Justice Tom Gray, Supreme Court of South Australia

Steven Roder, Registrar of Probates, Supreme Court of South Australia

Ray Frost, Senior Partner, Treloar & Treloar, Adelaide

Adelaide University Law School

Jonathan Davies, as a student of 2011 elective Law Reform

This Final Report and the Issues Paper that preceded it were written by Helen Wighton, Deputy Director of the Institute, with support from the Institute's Succession Law Reference Group.

Abbreviations

Grant of administration – In this paper, the expression 'grant of administration' means a grant of letters of administration, or a grant of letters of administration with the will annexed, or any other form of grant of administration.

Grant of representation – in this paper, the expression 'grant of representation' means both a grant of probate and a grant of administration.

Issues Paper - South Australian Law Reform Institute, Issues Paper 2, *Dead Cert: Sureties' Guarantees for Letters of Administration,* December 2012 <http://www.law.adelaide.edu.au/reform/>

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) <http://www.qlrc.qld.gov.au/Publications.htm>

Introduction

1. In 2011, the Attorney-General of South Australia (the Hon. John Rau M.P.) invited the Institute to identify the areas of succession law that were most in need of review, to conduct a review of each of these areas and to recommend reforms. The Institute's Advisory Board identified seven topics for review and established a Succession Law Reference Group to assist.

2. One of those topics was whether the South Australian statutory requirement for sureties' guarantees to be provided before some intestate estates can be administered should be retained or modified. This requirement, aimed at compensating beneficiaries or creditors of a deceased estate for loss caused by maladministration, has been criticised as onerous and unnecessary, needlessly obstructing the prompt administration of deceased estates.

3. The Institute's consultation began with the release, in January 2013, of an Issues Paper[2] and accompanying questionnaire, both posted on the Institute's website.

4. The Issues Paper explored those concerns about the requirement for sureties' guarantees against the background of the current law and its history. It reviewed relevant provisions in the *Administration and Probate Act 1919* (SA), *The Probate Rules 2004* (SA) and the *Public Trustee Act 1995* (SA). It looked at the approaches taken in other jurisdictions in Australia and overseas, including the approach recommended for model laws on this topic by the National Committee for Uniform Succession Laws,[3] established by the Standing Committee of Attorneys-General. It put forward several models for change, ranging from simple abolition of the requirement, with no further change, to retaining the requirement in certain circumstances or setting up a compensation fund. Finally, the paper put a series of questions about the need for reform and approaches to reform.

5. Invitations for submissions were sent to all South Australian probate lawyers, the South Australian judiciary, the Law Society of South Australia, South Australian community legal centres and the Legal Services Commission, three large insurance companies, the Public Trustee, to leaders of the independent Parliamentary parties and the Shadow Attorney-General. The Issues Paper was sent to the South Australian Attorney-General.

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[2] South Australian Law Reform Institute, *Dead Cert: Sureties' Guarantees for Letters of Administration,* Issues Paper 2 (December 2012) <http://www.law.adelaide.edu.au/reform/> (referred to hereafter as the Issues Paper).

[3] 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> referred to hereafter as the *National Committee's Report.*

6. The Institute received submissions from several law firms,[4] the Law Society of South Australia[5] and the Society of Trust and Estate Practitioners (South Australian Branch).[6] The Legal Services Commission advised that it does not work in this area.

7. While all submissions acknowledged the problems with the requirement for sureties' guarantees that were identified in the Issues Paper, and the need to reform this law, their suggestions for reform sometimes differed.

8. This Final Report completes the Institute's review of sureties' guarantees. The Report does not repeat the detail given in the Issues Paper. Instead it summarises relevant law in South Australia and the problems people have raised about it, evaluates the reform models put forward in the Issues Paper in the light of submissions to that paper, and recommends specific reforms.

The need for reform

Current law

9. When a person dies without leaving a will, or leaves a will that is invalid and there is no valid previous will, or appoints a person as executor under a valid will but that person is unable or unwilling to act as executor, there is no one with authority to gather in and distribute their property (the deceased estate).

10. Before the estate can be distributed, the court must give someone permission to administer the estate. The laws about intestacy set out which members of the deceased's family may apply to the court to be the administrator. Almost always, the member of the family who applies will be one who stands to inherit part or all of the estate under the rules of intestacy.

11. Usually the court will have no problem giving the applicant permission to administer the estate. It does this by granting the applicant 'letters of administration' (where there is no will) or 'letters of administration with the will annexed' (where there is a will).

12. But in some circumstances the law requires the applicant first to arrange for someone to guarantee that the estate will be administered properly. The person who gives such a guarantee is called a 'surety'. The surety is usually another member of the deceased's family or a family friend who has been asked to do this to help the family finalise the estate.

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[4] These submissions were from Mr JR Mason, Mason Westover Homburg; Ms VA Paunkov, Mellor Olsson Lawyers; and Mr TJ O'Brien, O'Briens Solicitors.

[5] The submission of the Law Society of SA, sent by Mr John White, President, was prepared by its Succession Law Committee.

[6] The submission of the Society of Trust and Estate Practitioners (SA Branch) was prepared by Ms Joan Sedsman.

13. In signing the guarantee, the surety agrees to pay for loss caused when the administrator does something wrong - for example, not distributing part of the estate to someone who is entitled to it. The guarantee is to make good this loss, assuming the loss cannot be recovered from the administrator.

14. Laws requiring some form of security against maladministration in South Australia were first enacted in the *Administration and Probate Act 1919*,[7] which required every applicant to provide an administration bond.

15. The Act was amended in 1978[8] following recommendations by the South Australian Law Reform Committee[9]. The amendments restricted the occasions on which a bond was required to specific circumstances thought to present a heightened risk of maladministration, and also allowed the Supreme Court to require a bond in any other circumstance if it thought one necessary. The circumstances were:

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

16. The Act was further amended in 2003[10] to replace the requirement for an administration bond with a requirement for a guarantee, in the same circumstances, from one or more third party sureties, still permitting the Supreme Court to require a surety's guarantee in the absence of such circumstances should it think it necessary. The amendment also permitted the Supreme Court dispense with the requirement for a surety guarantee where satisfied that it is 'beneficial or expedient to do so',[11] require a further or additional guarantee or reduce the amount guaranteed.[12] That has remained the current law.

17. In South Australia, the limit on the amount that the surety must pay under the guarantee is the sworn gross value of the South Australian estate or such lesser amount as the Supreme Court determines.[13] In practice, the Court requires two sureties, except where the

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7 *Administration and Probate Act 1919* (SA) s 31.

8 *Administration and Probate Act Amendment Act 1978* (SA) No. 80 of 1978 (assented to 16 November 1978).

9 Law Reform Committee of South Australia, *Relating to administration bonds and to the rights of retainer and preference of personal representatives of deceased persons,* Report No 22 (1972).

10 *Administration and Probate (Administration Guarantees) Amendment Act 2003* (SA).

11 *Administration and Probate Act 1919* (SA) s 31(10).

12 Ibid s 31(4).

13 Ibid s 31(3).

administrator is the widow, widower, domestic partner or personal representative of the deceased, or where the surety is a corporation.[14]

18. The surety guarantee requirements in South Australia apply also to applications to the South Australian Supreme Court to 'reseal' grants of administration made outside South Australia where the estate includes property or assets located in South Australia.[15] Unless resealed by the South Australian Supreme Court, these grants cannot authorise dealings with property within South Australia. All Australian jurisdictions require or permit their Supreme Courts to require some form of 'adequate security' before an interstate or overseas grant of administration may be resealed. Some, including South Australia, give the Court a discretion to dispense with the requirement.

Problems with the current law

19. The requirement for a third person, or surety, to compensate for loss caused by the mishandling of the estate of a person who dies intestate is designed as an additional remedy for innocent beneficiaries or creditors of the estate when the administrator does not have enough money to reimburse their loss.

20. One of the concerns expressed about this requirement is that there is no such remedy when the deceased leaves a valid will. The law has never required executors to provide surety guarantees or bonds. This is because an executor is assumed to be a person the testator thought competent to administer the estate properly, making maladministration unlikely and the prospect of the executor being unable to reimburse loss similarly so. By contrast, the person who administers an intestate estate is appointed by the court. This kind of appointment was once seen to present a greater risk to beneficiaries than appointment by the testator, in terms of the likelihood of maladministration and of the defaulting administrator not having the means to remedy loss, because it was introduced into English law when the rules of intestacy were not as clear as they are today and there was a real risk that the court might appoint someone unsuitable.[16] That rationale can no longer be maintained today. Indeed, a court being asked to appoint an administrator for an intestate estate has at least some opportunity to test the risk of maladministration and consequent loss, but there is no such opportunity or involvement of the court when an executor is validly appointed. As one submission noted:

> Although it is correct to state that a testator has the opportunity to choose a person they trust and that they expect to administer the estate in a way that best benefits the beneficiaries, that is not always the case. Older testators, in particular, are

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[14] *The Probate Rules 2004* (SA) r 49.02(a).

[15] *Administration and Probate Act 1919* (SA) pt 2 div 5.

[16] This was the view of Legoe J in *Re the Estate of Sopru* (1992) 165 LSJS 132.

> sometimes vulnerable to pressure from a child. At least with intestacy, this problem is averted to some extent as all children have equal right to apply for a grant of administration, and the administrator is required to submit a report on the administration to Public Trustee within six months of the date of the grant.
>
> …
>
> In this State, an administrator is almost invariably a beneficiary if not the beneficiary of the intestate estate. An administrator appointed by the court almost invariably receives a benefit from the estate and has a vested interest in ensuring the estate is administered promptly and efficiently. The same cannot be said of executors appointed by testators.[17]

21. Another concern about the requirement for a surety guarantee is that the guarantee is made by a private individual, usually a family member or friend of the family, without cover by a bank or insurance company, because financial institutions are no longer willing to shoulder the risk of default. Even a small estate may be worth many tens of thousands of dollars – usually too large a sum for many people to guarantee confidently. The difficulty of arranging the guarantee or, if this is impossible, applying to court to reduce the amount of the penalty, or share the burden by appointing additional sureties, or dispense with the requirement altogether creates a significant barrier to the timely administration of intestate estates. One submission put it this way:

> More often than not, the potential administrator is unable to find someone willing to guarantee their conduct who has net assets worth the gross value of the deceased estate. In my experience, it is often families from the lower socio-economic areas that resist making a will during their lives due to the cost involved. Accordingly, it is unreasonable to expect the potential administrator to have access to individuals with assets worth the gross value of the estate … I am not aware of any companies who will provide sureties.[18]

22. There is also the problem that people who stand as sureties may not always understand that their guarantee will be strictly enforced (whatever hardship that might cause) and that they cannot recover the money paid out under the guarantee. Indeed, as one submission noted:

> Currently, there is no requirement that people providing a surety obtain independent legal advice to enable them to be fully informed of the potential risks. A surety is an enforceable document attaching with it significant risk.[19]

23. The problems of difficulty and undue burdens on private individuals prompted changes to the law in 2003. Now, in practice, in almost all cases where the law would require a surety's guarantee, the Supreme Court takes advantage of those amendments in either dispensing

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[17] Submission of the Society of Trust and Estate Practitioners (SA Branch).

[18] Submission of Mellor Olsson Lawyers.

[19] Ibid.

with the requirement altogether or reducing the amount of the guarantee. Sometimes the Court will also appoint an additional administrator.

24. Another criticism of the requirement is that it is unnecessary because there is no evidence that in South Australia anyone has suffered loss from an administrator acting wrongly or that anyone has enforced a surety's guarantee. Indeed, senior probate practitioners and the Registrar of Probates in South Australia say they do not know of any such application having been made in South Australia, and this was acknowledged in submissions.

25. With little evidence of even occasional maladministration of intestate estates or of sureties' guarantees being enforced, the extraordinary remedy of a third party guarantee seems a heavy-handed response, demanding an unnecessary commitment of private and State resources for little or no return.

Consideration of reform options

26. The Issues Paper suggested a range of reform options, presenting models used in other parts of Australia and in the model laws recommended by the National Committee for Uniform Succession Laws, and looked at the approaches taken in New Zealand and the United Kingdom. It posed a series of questions about whether reform was needed and the form it should take, including whether measures affecting the rights and responsibilities of administrators should apply equally to executors.

27. The discussion of each model that follows, and the Institute's recommendations for reform, are informed by that research and by submissions to the Issues Paper.

Model 1

To remove any requirement for administration security without further reforms

28. Model 1 would remove any requirement for sureties' guarantees or any other form of security for the administration of a deceased estate, without changing the law in any other way.

Submissions

29. All submissions supported removing the current requirement for sureties' guarantees (by which it is mandatory in specified circumstances and otherwise at the discretion of the court). All thought the current requirement redundant for the reasons canvassed in the Issues Paper and identified by the National Committee for Uniform Succession Laws as arguments in favour of its abolition:

    - the fact that they are required only when an administrator is appointed [and not when there is an executor];

- the cost involved;
- the difficulty in obtaining a surety;
- the fact that there is only infrequent recourse to sureties; and
- the degree of protection afforded.[20]

30. Only one submission unequivocally preferred Model 1.[21] This submission was that further changes to the law would simply increase regulation or 'red tape', with consequent cost and delay, would offer little deterrence to those who are 'criminally-minded' and would 'not take us much further than current existing remedies'.[22] The submission suggested that, should there be evidence of a real problem with administrators after the abolition of the requirement for sureties' guarantees, the cheapest solution would then be for a grant of representation to be made only where a solicitor is instructed and undertakes to see the matter through to completion, so that aggrieved beneficiaries could be compensated through the solicitor's professional indemnity insurance.

The Institute's views

31. The Institute agrees with the reasons given in these submissions and by the National Committee that there should no longer be any requirement for sureties' guarantees or any other form of security before the issue of a grant of administration.[23] It is of the view that the same reasons militate against South Australian Supreme Court being entitled to require sureties' guarantees before resealing foreign grants.[24]

32. Most importantly, the Institute believes that the requirement for administration security should be removed from the Act without delay and that this amendment is so important to

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[20] *National Committee's Report* vol 1, 252 [9.41].

[21] Submission of O'Brien's Solicitors. Another submission, from the Law Society of SA, appeared to endorse Model 1 in asserting that 'sureties guarantees for Letters of Administration be abolished altogether' (in paragraph 7 of its submission) and in answering the question 'What are your views on the reform models suggestion in this Issues paper' (Question 6) by saying it favoured Model 1 and had no other suggestions. Later, however, in paragraphs 34-37 of its submission, the Law Society proposed and endorsed a model under which sureties' guarantees could be imposed at the discretion of the court, and the court given additional powers designed to reduce the likelihood of maladministration, which fits the approach taken in Model 6.

[22] Submission of O'Brien's Solicitors.

[23] The National Committee's recommendations to abolish requirements for administration security (Recommendations 9-1 and 9-2) are set out in Appendix 2 to this paper.

[24] Ibid. The recognition of foreign grants of representation is one of the topics being reviewed by the Institute as part of its succession law reform project. Of note is that the National Committee has proposed that all Australian jurisdictions abolish their requirements for grants made in other Australian jurisdictions to be resealed: see for example, Queensland Law Reform Commission, *Recognition of Interstate and Foreign Grants,* Working Paper No 55 (2001), on behalf of the National Committee, and *National Committee's Report* vol 3 chs 31-39. If that were to happen in South Australia, there would be no need for separate requirements for security for such grants.

the effective administration of deceased estates that it should not wait upon the preparation of other amendments that might be made in response to this Report, because these will need careful attention to detail and will take time to prepare.

33. The Institute also takes the view that there are convincing arguments for doing more than simply removing the requirement for sureties' guarantees.

34. Model 1 assumes that a person to whom the Supreme Court makes a grant of administration will be suitable and competent to administer the estate (much in the same way that an executor appointed by the testator is assumed to be competent) when, in fact, neither the Court nor the beneficiaries and creditors have much opportunity to test competence or suitability or monitor performance in a timely way. Current checks and balances are largely remedial, enabling an audit of past transactions, rather than preventative.

35. Although there appear to have been very few instances of maladministration or enforcement of sureties guarantees in South Australia, the reasons for this are unknown. It may well be that the requirement for surety guarantees is indeed a deterrent; or it may simply be that in most intestate estates the administrator is very often one of the beneficiaries and has every interest in ensuring that the estate is administered properly.[25]

36. Without knowing the reason for the lack of resort to sureties guarantees in South Australia, it might seem irresponsible to remove this secure source of compensation, designed to be used when existing remedies serve no purpose against an impecunious administrator,[26] without also doing something to improve awareness of what is required of administrators, to improve remedies for those who suffer loss, to give the Supreme Court explicit powers to change or substitute administrators and to give beneficiaries and creditors better ways of calling administrators to account to avert default.[27] That is why the Institute, although recommending the removal of any requirement for administration security, does not support Model 1.

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[25] The latter reason was pointed out in the submission of the Society of Trust and Estate Practitioners (SA Branch) – see above n17 and accompanying text.

[26] Existing remedies are of little use when the administrator had absconded or is impecunious. They include private civil action for breach of the administrator's duty as a trustee; private civil action in *devastavit* for loss caused by wilful default; and the possibility of recompense through sentence orders for restitution of property or compensation should the administrator be prosecuted successfully for an offence of dishonesty relating to the maladministration. For a discussion of these remedies, see Issues Paper, 7, 8.

[27] Current reporting requirements include an administrator's obligation to submit periodic accounts to the Public Trustee (*Administration and Probate Act 1919* (SA) s 56); the ability of beneficiaries or creditors or the Public Trustee to compel account when an administrator defaults on this obligation (*Administration and Probate Act 1919* (SA) s 58); and the obligation of administrators or executors holding property belonging to a person who is not legally competent or who is not resident in the State to pay or deliver the property to the Public Trustee one year after the death of the intestate or testator or within six months after the property has been sold or realised (*Administration and Probate Act 1919* (SA) s 65).

Recommendation 1

(1) The *Administration and Probate Act 1919* (SA) should be amended so that it no longer requires a grant of administration or the resealing of a foreign grant of representation to be conditional upon the provision of an administration guarantee or any other form of security.

(2) For the effective administration of deceased estates in South Australia it is important that this amendment be made as soon as possible, even if this necessitates introducing it to Parliament earlier than other amendments arising from this Report.

Model 2

To remove any requirement for administration security but to require administrators to be appointed by the consent of beneficiaries

37. Model 2 would remove any requirement for administration security, and would change the law only as to the way administrators are appointed. Under this model, an administrator could not be appointed without the consent of all the beneficiaries. Responsibility for the appointment would fall upon those who might suffer loss or damage in the event of maladministration.

38. Under this model, if beneficiaries could not collectively approve a particular applicant, they could either ask the Supreme Court to appoint another person with experience in administration as co-administrator (with the originally proposed or any other eligible administrator) or ask the Court to appoint an experienced legal practitioner, the Public Trustee or a trustee company as sole administrator.

Submissions

39. None of the submissions supported this model. As one submission put it, this model has

> the potential for huge disagreements between family members who are all entitled equally to apply for a grant … Although there is that potential now under the current law, there is no formal process that needs to be met before one member of the family takes the step of applying for a grant.[28]

[28] Submission of the Society of Trust and Estate Practitioners (SA Branch).

The Institute's view

40. The Institute does not endorse this model, partly for the reasons given in submissions to the Issues Paper but also because the formalisation of family consensus on the choice of administrator may cause rather than stem disagreement. Most families work out informally who should administer the estate. Requiring everyone to sign off on that agreement may encourage unnecessary power plays and make the process more fraught than it might otherwise be. It may also mean that people will be appointed to administer estates simply because, for subjective reasons, they are acceptable to every member of the family, even though they do not have the necessary skills or ability for this task.

41. However, there is something to be said for allowing beneficiaries the *option* of suggesting an alternative administrator if they are not happy with an applicant who would otherwise be entitled to the grant. The National Committee recognised this and recommended a procedure where the court could, at the application of the beneficiaries, appoint their unanimous nominee, as long as all the beneficiaries were adult. A nominee who would not otherwise be entitled to a grant could be appointed this way. The procedure would be available for both testate and intestate estates.[29]

42. The Institute agrees that this kind of procedure gives the court a flexibility to make the grant to an appropriate person where there is little other viable option. It considers it one of several ways to promote the proper administration of a deceased estate once the remedy of a surety guarantee is removed, and that it is most suited to Model 3, discussed below.

Model 3

To remove any requirement for administration security and to introduce other measures designed to prevent or deter maladministration

43. Removing any requirement for administration security will, in theory at least, deprive aggrieved beneficiaries of a secure 'reserve' source of compensation. This model proposes to counterbalance that deprivation with a range of additional measures to make it less likely that administrators will default and to improve the chances of compensation for loss should that default occur.

44. One such additional measure would be to give statutory expression to the duties of administrators. Related to this would be a statutory liability for failure to perform a duty (including but not limited to the legislated duties) and a power in the Supreme Court to

[29] *National Committee's Report* vol 1, 129, Recommendation 4-13 (reproduced in Appendix 2 to this paper) and discussion at [4.193]–[4.209].

grant relief to those who suffer loss or damage as a result of such failure in any way it saw fit, including awarding damages.[30]

45. Then, for situations where there is doubt about the ability of the person applying for the grant to administer the estate, or about the way the estate is being administered, this model would also give the Supreme Court additional powers to intervene to encourage the proper administration of the estate.

46. The first additional power would permit greater flexibility in determining who is to administer the deceased estate. The Court would have the ability to 'pass over' an eligible applicant and make the grant to another person, or, if the grant had already been made, to revoke it and appoint a different administrator or different joint administrators.[31] It would also be able to require an application to be by joint administrators (for example, the original applicant and another person).

47. The second would be to allow the Court to require undertakings to report regularly in complicated estates, either as a condition of the grant or at any time during the administration of the estate. Breach of an undertaking could result in an order to repay the estate an amount equivalent to any direct or indirect financial benefit which could reasonably be attributed to that breach.

48. Another feature of this model is that it would apply to all deceased estates, so that executors and administrators would have the same duties and be subject to the same liability and accountability.

Submissions

Statutory expression of duties

49. Two submissions opposed the statutory expression of duties of administrators and executors, arguing that because a list of duties cannot be exhaustive it may be of limited use to administrators in difficult or unexpected situations.[32]

50. One of these submissions mentioned that '[t]here is a suggestion of a Code of Conduct being prepared for lay administrators to deal with these sorts of issues as 'unrepresented

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[30] This was a recommendation of the National Committee: *National Committee's Report* vol 2, 23 Recommendation 14-1 (reproduced in Appendix 2 to this paper). The model law recommended was a modified version of *Succession Act 1981* (Qld) s 52(2).

[31] Insofar as it would allow the substitution of one candidate for another, this power was proposed by the National Committee (see *National Committee's Report,* vol 1, 127, Recommendation 4-10, reproduced in Appendix 2 to this paper), preferring it to requiring the application to be by joint administrators (on the ground that this would often prove difficult) or by a corporate administrator (on the ground that this might prove expensive for the estate): see discussion in *National Committee's Report* vol 1, 88-92 [4.185–4.209].

[32] Submissions of O'Briens Solicitors and the Law Society of SA [39].

parties' and remarked that this would be unhelpful in difficult situations, may not be consulted by lay administrators or help them when they got into trouble, and would not be capable of being monitored.[33]

51. It should be noted that the Institute's Issues Paper on sureties' guarantees did not suggest or refer to a code of conduct. Rather, the Issues Paper proposed the statutory expression of the duties of administrators within the *Administration and Probate Act 1919* (SA) itself.

52. Two submissions[34] supported the proposal as a valid means of encouraging the competent administration of estates.

Assimilation of duties of executors and administrators

53. All submissions supported the law assimilating the duties and liabilities of executors and administrators.

Penalties for breach of statutory duty

54. Only one of the submissions specifically endorsed there being criminal sanctions for breach of a statutory duty, to encourage the competent administration of estates.[35] The remaining submissions made no comment on this point.

Powers to remedy breach of duty

55. Only one of the submissions (which supported the abolition of sureties' guarantees but opposed the introduction of any additional measures) specifically opposed establishing a statutory power to award damages for breach of duty. The reason given was that such a provision would offer no more than what is already available at common law.[36]

56. Two other submissions, in opposing any additional measures being introduced, also opposed, as one such measure, the introduction of provisions that would give the Supreme Court specific power to remedy loss caused by breach of an administrator's duties, but gave no reasons.[37]

57. The remaining submissions, which endorsed Model 3, supported additional measures, including this one.[38]

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[33] Submission of the Law Society of SA [39].

[34] Submissions of Mellor Olsson Lawyers and the Society of Trust and Estate Practitioners (SA Branch).

[35] Submission of Mellor Olsson Lawyers, in answer to question 2(a)(i).

[36] Submission of O'Briens Solicitors.

[37] Submissions of the Law Society of SA and Mason Westover Homburg, in answer to Question 2(a)(v).

[38] Submissions of Mellor Olsson Lawyers and the Society of Trust and Estate Practitioners (SA Branch).

Powers to pass over and substitute administrators etc.

58. Measures giving the Supreme Court powers to substitute an administrator or to require the application to be by joint administrators received wide support in submissions to the Issues Paper.

59. All submissions supported the Court's power to determine who should administer the estate being enhanced to expressly include a power to dismiss an application and either require an application by joint administrators, or require an application by a particular person, or, after the grant had been made, to remove an administrator and substitute someone else, or appoint a joint administrator, for the purposes of reducing the risk of maladministration.

60. The kinds of circumstances identified in submissions as those in which the Court's powers as to the *choice of administrator* should be exercised included prima facie affidavit evidence:[39]

    - of unsuitable attributes in the applicant (such as being a convicted felon, having been unable to manage funds in the past, having a history of maladministration or having demonstrated a propensity to exert undue influence over the testator);[40]
    - that the applicant lacks the necessary administrative expertise when the estate is particularly large or complex.[41]

61. Three of the five submissions explicitly supported making these powers exercisable with respect to testate estates as well as intestate estates, with one of them noting that:

> Although ... a testator has the opportunity to choose a person they trust and … expect[s] to administer the estate in a way that best benefits the beneficiaries, that is not always the case. Older testators, in particular, are sometimes vulnerable to pressure from a child. At least with intestacy, this problem is averted to some extent as all children have equal right to apply for a grant of administration, and the administrator is required to submit a report on the administration to Public Trustee within six months of the date of the grant.[42]

62. The circumstances identified in submissions as those that should give rise to the Supreme Court's power to *remove and substitute administrators* included prima facie affidavit evidence to the Court:

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[39] The submission of O'Brien's Solicitors suggested that the court should be able to exercise these powers on prima facie evidence supplied by affidavit.

[40] Submissions of Mason Westover Homburg, Mellor Olsson Lawyers, O'Brien's Solicitors and the Law Society of SA. The last example is presumably what is meant by the Law Society of SA's answer to Question 4(a) of the Issues Paper, which suggests that the power be exercised 'in the same circumstances as those in which a court would pass over the eligible applicant if they had been appointed executor by a will made by the deceased immediately before the deceased dies.'

[41] Submission of the Society of Trust and Estate Practitioners (SA Branch).

[42] Ibid.

- of maladministration or failure to account to the public Trustee or to the persons entitled to benefit in a timely manner; and
- of the same circumstances 'as those in which the court would remove and replace an executor.'[43]

63. The Issues Paper did not suggest any restrictions on the class of substitute administrators, and most submissions made no mention of restrictions.[44] One submission, though, which supported the abolition of sureties' guarantees without any further changes to the law, suggested that if, after the law were so changed, there still appeared to be a real problem with administrators, the law should then be further changed to provide that a grant of administration should only be made when a solicitor was instructed and saw the matter through to completion.[45] And another submission suggested that:

> Where there is concern over provision of accurate or complete information, the most reliable system for provision of information to the court is for the application for letters of administration to be made by an experienced legal practitioner, whether acting for a nominated Administrator alone or appointed jointly.[46]

64. This same submission went on to propose a regime that permitted a discretion to require a surety guarantee and under which the Supreme Court could require a joint legal practitioner administrator where the estate had a value of over $500 000 and a beneficiary or the applicant was an infant, mentally disabled or severely physically disabled.[47]

The Institute's views

65. The Institute recommends Model 3. Aside from the removal of any requirement for sureties guarantees (see Recommendation 1) a considerable amount of work will need to be done on the detail of the rest of this model before any amendments can be introduced to Parliament.

66. Model 3 is broadly based on the approach taken in Queensland, where the requirement for administration security has been removed and the legislation[48] sets out the duties of administrators, including a statutory liability for neglect or failure to perform these duties

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43 Submission of the Law Society of SA.

44 Submissions of Society of Trust and Estate Practitioners SA Branch, Mellor Olsson Lawyers and Mason Westover Homburg.

45 Submission of O'Brien's Solicitors.

46 Submission of the Law Society of SA [6].

47 Ibid [36]-[37].

48 *Succession Act 1981* (Qld) s 52.

and a power in the Supreme Court to make such order as it thinks fit by way of relief, including an order for damages.[49]

67. The Queensland model has been evaluated positively by both the National Committee and the Western Australian Law Reform Commission.

68. The Institute's view is that the interests of beneficiaries and creditors of deceased estates and the public interest in the orderly and prompt distribution of deceased estates would best be served if the law were changed so that:

- there is no longer any ability to require a surety guarantee;
- the primary duties of administrators and executors (as personal representatives and as trustees) are set out clearly in legislation;
- personal representatives are to be personally liable to compensate creditors or beneficiaries who suffer loss or damage as a result of a breach of duty;
- the Supreme Court can require personal representatives to give undertakings in respect of the administration of a deceased estate, and may punish breaches of undertaking by compensatory orders, including damages, and reflecting any direct or indirect benefits that derive from the breach;
- a grant of probate or of administration may not be made to a person who is not an adult;
- the Supreme Court and the Registrar of Probates, on application by a person with an interest in the deceased estate, has express power to pass over an applicant for a grant of probate or of administration and substitute someone else, or make a grant conditional upon it being exercised jointly or being subject to undertakings or the applicant instructing a professionally indemnified person to conduct the administration.

69. Another matter to be considered in any legislated exposition of the duties and liabilities of personal representatives and of the Supreme Court's powers to intervene in or supervise the administration of a deceased estate is that a personal representative may have additional duties as a trustee. A will may set up trusts to manage estate assets and income for the beneficiaries. Trusts may be needed in both testate and intestate estates when a beneficiary is under a particular age at which he may take or if he or she may only take upon the happening of a particular event which has not yet occurred. In these circumstances, and subject to the requirements in s 65 of the Act,[50] the personal representative will need to set

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[49] Ibid s 52(2).

[50] Section 65 of the *Administration and Probate Act 1919* (SA) requires administrators to deliver the part of the estate belonging to a person who is *sui juris* to the Public Trustee to be administered thereafter by the Public Trustee. Section 67 allows the court to dispense with this requirement if 'satisfied by affidavit that it is

up a trust fund to manage and protect the assets to which this beneficiary is entitled until he or she may take. Sometimes these trusts may need to be administered for many years.

70. As a trustee for a beneficiary of a deceased estate, a personal representative in South Australia is, like any other trustee, subject to the *Trustee Act 1936* (SA). The duties and liabilities of trustees set out in that Act apply to all trustees, whether they are personal representatives for deceased estates or not. It is beyond the scope of this review to consider the duties of trustees at large. However, the Institute is of the view that any legislative exposition of the duties and liabilities of personal representatives should cover *all* their duties and liabilities, including those required of them when acting as trustees. It may well be that the *Trustee Act 1936* (SA), rather than the *Administration and Probate Act 1919* (SA), is the better source for this.

71. The Institute notes that 'administration proceedings'[51] can be brought in the Supreme Court to have it examine the administration of an estate or trust and if necessary make an order with which an administrator or trustee must comply, on pain of a monetary penalty or contempt. Through these proceedings, the Supreme Court may supervise each step of the administration of the estate or trust, which can be costly and is clearly a last resort. The Institute does not recommend any change to this procedure other than to suggest that it be expressed clearly in the relevant Acts and Rules.

72. The main aspects of the model recommended by the Institute are discussed in detail below.

Statutory expression of administrators' duties

73. Model 3 proposes that there be a legislated list of the duties of a person charged with administering a deceased estate. These duties are not to be confused with what must be done by applicants for a grant of probate or administration (for example, to provide a statement of assets and liabilities[52]); rather, they are the duties required of a person to whom a grant has been made.

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beneficial or expedient so to do' – for example when it is persuaded that the administrator is competent to administer the trust.

[51] In *Kennedy v Hill & Ors* [1999] SASC 440 [18], the Full Court of the Supreme Court of South Australia said: 'Administration proceedings are a vehicle to obtain a decision "affecting the administration of an estate or a trust [for which it] would previously have been necessary to have a decree or judgment for the administration of the estate or execution of the trust": *Re Davies; Davies v Davies* (1888) 38 Ch D 210 at 212.'

Administration proceedings are authorised by r 206 of the *Supreme Court Civil Rules 2006* (SA). The procedure is no longer set out in these Rules but may be found in *Supreme Court Rules 1987* (SA) r 103 (which is used when a party is unhappy with the administration and wants the court to intervene and supervise) and rr 63.04 and 63.05 (which are invoked by the administrator or trustee themselves to obtain the court's direction and supervision).

[52] *Administration and Probate Act 1919* (SA) s 121A(1).

74. The Institute supports the statutory expression of administrators' general duties for the same reasons as the National Committee[53] - namely to emphasise the importance of these duties and inform lay personal representatives about them - but also to form the basis of statutory sanctions for breach of duty.

75. It is also of the view, as discussed in paragraphs 69 and 70, that the duties and liabilities of administrators and executors as trustees should not be overlooked in any such statutory expression.

76. The statutory expression of administrators' general duties and related measures providing civil sanctions for breach of duty may go some way to preventing maladministration, especially if reinforced by authoritative brochure information for lay personal representatives that is free or available at a subsidised low cost. An example of information provided this way is a manual entitled *Now you are a guardian,* produced by the Office of the Public Advocate for private guardians appointed in South Australia. This booklet

> clarifies a guardian's authority, outlines a guardian's duties and responsibilities and offers advice to a guardian faced with difficult issues or decisions.[54]

77. If similar kinds of publicly-produced material were available for lay personal representatives, the Probate Registry, the Legal Services Commission and community legal centres could actively refer people to it and to sources of legal advice, including low cost subsidised sources. At this stage, no such material is available nor are there any sources of free or subsidised advice in South Australia.[55] The Probate Registry itself is not funded to provide information or advice, and it may not be appropriate, in any event, for a court, through its registry, to provide information or online material about a person's legal obligations.

78. As lay people are permitted by law to be personal representatives and to fulfil that role without legal representation or advice, the Institute is of the view that it is in the interests of the proper administration of deceased estates that any legislative clarification of their duties and liabilities be accompanied by the production of inexpensive fact sheets or brochures explaining those duties in plain English.

79. As a side note, the Institute does not endorse the suggestion of a code of conduct for lay administrators, referred to in one submission,[56] because lay administrators, by definition, belong to no professional organisation to which a code can be applied or which could be held accountable for the supervision or monitoring of the code.

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[53] *National Committee's Report* vol 1, 328 [11.19].

[54] The manual may be purchased from Service SA for $8.80: see <http://shop.service.sa.gov.au/site/page.cfm?content=search_results.cfm&mode=single&product_id=4918>

[55] The Legal Services Commission of South Australia does, however, publish fact sheets on making a will and on enduring powers of attorney: see <http://www.lsc.sa.gov.au/cb_pages/publications.php>

[56] Discussed in paragraphs 50 and 51.

80. The formulation of general duties that the National Committee recommended[57] was a version of a section in the Queensland *Succession Act 1981*,[58] which would require anyone administering a deceased estate to:

> (a) collect and get in the real and personal estate of the deceased and administer it according to law; and
>
> (c) when required to do so by the court, deliver up the grant of probate or letters of administration to the court; and
>
> (d) distribute the estate of the deceased, subject to the administration thereof, as soon as may be.

81. Although the Institute agrees that these are indeed the kinds of general duties that should be expressed, and notes that a similarly expressed set of duties, albeit with greater emphasis on accountability, is listed in the forms of oath for administrators in South Australia,[59] it is not convinced that this formulation is of great assistance to lay administrators.

82. Firstly, the list is incomplete in not including any general reference to duties of accountability, disclosure and dealing with undisclosed property or, at least, links to such duties. Although these duties were not included in the National Committee's model law list of *primary* or generic duties, they are recommended to be included in the model laws.[60]

83. The South Australian Act already imposes a duty of accountability (to render an account of the administration of the estate to the Supreme Court or the Public Trustee when so required (whether by order of a court or by the Act itself)), duties of disclosure (for example, the duty to disclose assets and liabilities that come to the administrator's notice after the inventory provided for the grant has been lodged)[61] and a related duty not to dispose of any assets that have not been disclosed.[62]

84. Because these are important checks against maladministration, the Institute is of the view that any amendment expressing the primary duties of administrators should include generic mention of these duties, with specific links to the provisions that deal with them, and reference also to the duties and liabilities of personal representatives acting as trustees.

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[57] *National Committee's Report* vol 1, 394, Recommendation 11-2 (reproduced in Appendix 2 to this paper).

[58] *Succession Act 1981* (Qld) ss 52(1)(a), (c), (d).

[59] See, for example, *The Probate Rules 2004* (SA) r 11 form 52 (Oath of administrator) (reproduced in Appendix 1 to this paper).

[60] *National Committee's Report* vol 1 ch 11, 323 and in particular Recommendations 11-3, 11-4, 11-8, 11-12, at 395 and 396. The duties discussed in detail in Chapter 11 include the duty to file an inventory and related duties with respect to dealings with undisclosed assets, the duty to file and pass accounts, the duty to maintain documents, the duty to provide access to documents, and the duty to transfer property held for certain kinds of beneficiaries to the Public Trustee.

[61] *Administration and Probate Act 1919* (SA) ss 121A(2), (2a).

[62] *Administration and Probate Act 1919* (SA) s 121A(3).

85. Secondly, the provisions recommended by the National Committee are written in a way that assumes a knowledge of the legal requirements and procedures that lay administrators or executors are unlikely to have. They assert that administrators must perform their duties, described in the broadest terms, but leave unanswered the question of what those broad duties entail – for example, what is required for 'collect[ing] and get[ting] in the real and personal estate of the deceased', and what it takes to 'administer [that estate] according to law'.[63] Without those answers, a duty to 'distribute the estate of the deceased, subject to the administration thereof, as soon as may be'[64] has very little meaning for a lay reader. On the other hand, a fully itemised list of duties may be confusing because some duties depend on the existence of particular circumstances. Too many qualifications can make a provision as hard to understand, or have as little meaning, as an over-generalised one. It should be noted that in South Australia some of the more general duties are already expressed in broad terms in the forms of oath for administrators and executors.[65]

86. In the Institute's view a solution may be, firstly, for the new provisions to spell out plainly what should be done to fulfil the primary duties of administrators and executors, including when acting as trustees, and to cross-reference these provisions with other relevant provisions; and secondly, for those other relevant provisions to have their language and structure improved to make them comprehensible to lay administrators.[66]

87. Not every duty and liability need be expressed in detail in the legislation. The task of identifying which duties and liabilities should be expressed in legislation and how this is to be done may not be easy and may take some time.

Assimilation of duties of administrators and executors

88. As mentioned, all submissions supported changing the law to make executors and administrators have the same duties and accountability.

89. Noting that the ACT, New South Wales, Queensland and Victoria have all made this change, and that all submissions to its review that addressed this issue were in favour of it, the National Committee made a similar recommendation.[67] New Zealand also has a provision to this effect.[68]

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63 *Succession Act 1981* (Qld) s 52(1)(a).

64 *Succession Act 1981* (Qld) s 52(1)(d).

65 See, for example, *The Probate Rules 2004* (SA) 101 (Form 40: Executor's oath), 115 (Form 48: Oath of administrator with the will annexed) and 122 (Form 52: Oath of administrator).

66 An example of a provision that may be difficult to understand in its present form is s 65 of the Act, which requires administrators and executors to pay over money and deliver property to Public Trustee in certain circumstances.

67 *National Committee's Report* vol 1, 394, Recommendation 11.1 (reproduced in Appendix 2 to this paper).

68 *Administration Act 1969* (NZ) s 41.

90. The Institute can see no basis for distinguishing duties and liabilities that pertain to administrators from those that pertain to executors or for making one kind of personal representative any less accountable than the other. It is of the view that, although a will may give an executor additional powers, administrators and executors should have the same general powers, liabilities and responsibilities, and that this should be made quite clear in the legislation.

Executors and administrators to be adults

91. Although this point was not canvassed in the Issues Paper, the Institute is of the view that it would be inconsistent for amendments designed to improve the standard of administration of deceased estates and to protect the interests of beneficiaries not also to provide that grants of representation made to individuals may be made only to adults. The National Committee acknowledged the need for this to be expressed in the Act.[69]

92. The Institute does not propose to recommend any changes to the rules governing what the Supreme Court is to do when the person entitled to a grant or appointed executor is a child,[70] (namely to make the grant to the child's parent or guardian until the child becomes an adult, or, where the minor is a co-executor with adult executors, to make the grant to the adult executors with leave to the minor to apply upon majority) because those options are not relevant to this review.

Penalties for breach of statutory duty

93. The National Committee's position was that:

> the model legislation should not impose any criminal sanctions. Such provisions are inappropriate in legislation of this nature. Specifically, the model legislation should not include provisions to the effect of section 121A(5) or 44 of the *Administration and Probate Act* 1919 (SA).[71]

94. The National Committee based this approach on the views of the majority of submissions to its enquiry, which supported civil rather than criminal sanctions because of the likelihood of genuine error when lay people administer deceased estates.

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[69] *National Committee's Report* vol 1, 130, Recommendation 4-18 (reproduced in Appendix 2 to this paper). See also discussion at 110 [4.274], [4.275].

[70] See *The Probate Rules 2004* (SA) rr 42, 43.

[71] *National Committee's Report* vol 1, 343 [11.81]. The South Australian provisions to which the Report refers impose these penalties: on personal representatives for failing to disclose assets discovered after a grant of representation has been made or for dealing with assets that have not been disclosed (s121A); and on persons other than personal representatives, for failing to satisfy themselves, before dealing with an asset of a deceased estate, whether that asset has been disclosed in accordance with s 121A of the Act (s44).

95. The Institute agrees. It notes also that the Act's offences relating to a personal representative's failure to carry out a duty, and their penalties,[72] do not reflect the difference between deliberate or contumacious breaches and breaches that are unintentional or simply a result of inexperience. Criminalisation of breaches of duty is questionable for this reason alone; but in any event minor criminal penalties are unlikely to deter deliberate breaches or stop mistakes.

96. Also, if the crime is victimless, in the sense that breach has not caused loss to beneficiaries or creditors, criminal prosecution is unlikely to follow. And an administrator who acts dishonestly or fraudulently will be liable under the general criminal law for offences of dishonesty.[73]

97. In the Institute's view, a better approach would be to remove these criminal penalties and instead focus on the administrator's liability to remedy loss caused by breach of duty (as to which see the discussion under *Powers to remedy breach of duty* below).

Recommendation 2

South Australian legislation governing the administration of deceased estates and of trusts arising from those estates should be variously amended to:

(1) provide that the duties, liabilities and accountability of administrators and executors are the same except to the extent that those of an executor may be expressed to be different in the will;

(2) provide that the Supreme Court may not make a grant of representation to an individual who is not an adult;

(3) list the primary duties of personal representatives charged with administering deceased estates or with administering trusts arising from deceased estates and spell out plainly what should be done to fulfil those duties, cross-referencing with relevant provisions;

(4) update the language and structure of current provisions relating to these to make them comprehensible to lay administrators and executors;

(5) remove all criminal penalties for breaches of duties of personal representatives acting as administrators or as trustees of deceased estates.

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[72] The *Administration and Probate Act 1919* (SA) provides only one level of penalty: a maximum of $2 000 for breaches of various administrators' or executors' duties that are deemed summary offences. These behaviours that are subject to these penalties are: failing to disclose assets discovered after a grant of probate or letters of administration has been made or for dealing with assets that have not been disclosed (s 121A(5)) and failing to apply to the court for directions when a surety or co-administrator under a grant or re-sealed grant dies or loses legal competence (ss 31(13), 18(12)).

[73] See *Criminal Law Consolidation Act 1935* (SA) pt 5 (Offences of dishonesty).

Power to require undertakings from personal representatives

98. Model 3 would give the Supreme Court explicit authority to require undertakings of personal representatives, whether as a condition of a grant or imposed at any other stage of the administration of the estate, as a means of ensuring the proper administration of the estate.

99. Although the Court may draw on its inherent power to require undertakings, the Institute is of the view that expressing this power in the Act is important to strengthen the Court's role in promoting the proper administration of deceased estates and, along with specific compensatory powers related to loss caused or benefits derived from failures to comply with undertakings, to support its ability to call personal representatives to account and to remedy loss caused by maladministration.

Powers to remedy breach of duty etc

100. Under Model 3, the Supreme Court would be given explicit powers to remedy a breach of duty or a failure to comply with an undertaking made to the Court or a direction of the Court.

101. In the Institute's view, the personal liability of personal representatives should be to *any* person who suffers loss or damage arising from the personal representative's neglect or failure to perform a duty in relation to the administration of the estate. This is the position taken by the National Committee.[74]

102. It agrees with the National Committee recommendation that this personal liability

> should be expressed to apply in respect of a failure to perform any of the duties of a personal representative, and not be restricted to a failure to perform any of the statutory duties imposed by the model legislation.[75]

103. Consistent with its view that legislative expression of the duties of personal representatives should include those in relation to the administration of any trust arising from a deceased estate, the Institute is of the view that the legislation should make it clear that a personal liability of the kind described above should also attach to an executor or administrator in relation to the administration of a trust arising from the estate.

104. Provisions to this effect would go some way to minimising disputes and litigation on the extent of the personal liability of an administrator or executor.

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[74] In Recommendation 14-1, the National Committee recommended a provision along the lines of s 52(2) of the *Succession Act 1981* (Qld) which refers to 'the application of any person aggrieved by' a personal representative's breach of duty: *National Committee's Report* vol 2, 23, Recommendation 14-1.This recommendation is reproduced in Appendix 2 to this paper.

[75] *National Committee's Report* vol 2, 24, Recommendation 14-1(b) (reproduced in Appendix 2 to this paper).

105. The Institute is of the view that the Supreme Court's powers to remedy loss arising from breach of a personal representative's duty should be expressed in the widest terms, including the power to award damages.

106. There should also be a specific power to order a personal representative who fails to honour an undertaking or comply with a court direction to compensate any aggrieved person for direct or indirect loss arising from that behaviour, and, in addition, to repay to the estate any financial benefit the personal representative received, directly or indirectly, as a result of not meeting the undertaking or complying with the direction.

Recommendation 3

(1) The *Administration and Probate Act 1919* (SA) should be amended

(a) to give the Supreme Court express power to require undertakings of personal representatives as to the manner in which the administration of a deceased estate is to be conducted or accounted for, or as to any other matter that in the opinion of the Court may assist the proper administration of the deceased estate;

(b) to establish, for personal representatives, a liability to any person who suffers loss or damage as a result of the personal representative's

i. failure to perform any of the duties required of them by law in the administration of a deceased estate;

ii. failure to comply with an undertaking given to the Court as to the administration of a deceased estate; or

iii. failure to comply with a direction of the Court or the Registrar of Probates as to the administration of a deceased estate.

(c) to give the Supreme Court wide powers to remedy loss or damage arising from a personal representative's failure to perform a duty, failure to comply with an undertaking given to the Court or failure to comply with a direction of the Court or the Registrar of Probates, including powers

i. to direct the personal representative to pay into the estate an amount equivalent to any financial benefit that they have obtained directly or indirectly as a result of that failure;

ii. to direct the personal representative to compensate any person who has suffered loss or damage as a result of that failure; and

iii. to make any other order the Court considers appropriate to compensate those who have suffered loss or damage as a result of the failure.

(2) Corresponding amendments should be made to the *Trustee Act 1936* (SA), as appropriate, in relation to the liability of personal representatives acting as trustees.

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

107. The South Australian Supreme Court already has a general power to appoint joint administrators.[76] However, it has no express power to pass over an applicant and appoint someone further on in the statutory order of priority for administrators or to appoint someone who would not otherwise be entitled to the grant and may be appropriate. The Rules[77] merely identify who may be appointed if all the members of any class or classes having priority are cleared off.

108. Also, as the National Committee noted,[78] the Court has no express power to revoke an appointment:

> There is no specific statutory provision in South Australia empowering the making of an order for the removal of a personal representative from office. Nevertheless, he or she may be removed from office by a revocation of his or her grant of representation and by the appointment of a substituted personal representative.[79]

109. In the Institute's opinion, the Supreme Court needs express powers if it is to intervene effectively and without fear of legal challenge when it is concerned about the administration or potential administration of a deceased estate.

110. There is a preliminary point to consider, raised in one of the submissions:[80] that the Supreme Court or the Registrar of Probate will rarely have information before it on which to base a decision to dismiss an application for a grant of administration other than for statutory ineligibility.[81] The Act does not require applicants to disclose characteristics that might give cause for concern about their capacity to administer the estate properly, such as mental or severe physical incapacity, previous mishandling of funds or criminal convictions. Unless such matters are brought to the decision-maker's attention (unlikely in an unopposed application) the grant will routinely be made to an applicant who is eligible[82] (subject, of

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76 *Administration and Probate Act 1919* (SA) s 23.

77 *The Probate Rules 2004* (SA) r 32.

78 *National Committee's Report* vol 2, 461 [25.19].

79 Ibid. The quotation was from DM Haines, *Succession Law in South Australia* (LexisNexis, 2003) [19.1] interpreting the section in the *Administration and Probate Act 1919* (SA) (s 5) that vests powers to grant or revoke probate and letters of administration in the Supreme Court.

80 Submission of the Law Society of SA [6], [38].

81 I.e. whether the applicant falls with the relevant class of person described in the *Administration and Probate Act 1919* (SA) pt 3A (Distribution on intestacy).

82 Entitlement to administer an intestate estate is governed by Rule 32 of *The Probate Rules 2004* (SA) in this order of relationship to the deceased: surviving spouses, children or children of predeceased children, parents, siblings or children of predeceased siblings, grandparents, aunts and uncles or children of predeceased uncles and aunts.

course, to requirements for sureties guarantees, which are based on other kinds of information not directly related to the applicant's capacity to administer the estate properly).[83]

111. The Institute does not suggest that people applying for grants of representation should be required to assert or prove competence (other than having to give their age) or suitability.

112. A better solution would be for the Supreme Court and the Registrar to be able to require relevant information from an applicant if a person with an interest in the estate has opposed the application. In this way, the responsibility to take steps to ensure that an appointment is suitable lies with the beneficiaries and creditors who stand to lose if the appointment turns out to be unsuitable, rather than with the court.

113. The National Committee's approach was to recommend[84] that the model laws should frame the criteria for making a grant and for passing over in broad terms, while specifying the ordinary circumstances in which a grant of administration might be made.[85] In particular it recommended that there be a general power in the Supreme Court, on application, to pass over a person who would otherwise be entitled to a grant of representation if the Court considers it:

> appropriate
>
> (a) for the proper administration of the estate; and
>
> (b) in the interests of the persons who are, or who may be, interested in the estate;

and then either to make a grant to another person who would be entitled to it[86] or instead to refuse to make it to the person who is otherwise entitled and make it to any other person who is otherwise entitled or to any person the Court considers appropriate.[87]

114. The National Committee then went on to suggest that the model law should also set out the specific circumstances in which the Court should have power to pass over and substitute a personal representative,[88] namely

(a) where the person committed an offence relating to the deceased's death;[89]

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[83] The information that dictates whether a surety guarantee is required relates to whether the applicant lives out of the State, whether the applicant has a claim against the estate arising from a liability incurred by the deceased before death, and the legal competence of beneficiaries: *Administration and Probate Act 1919* (SA) s 31(1).

[84] *National Committee's Report* vol 1, 85 [4.178].

[85] Those circumstances are not discussed in this paper. They are already clearly expressed in Part 3A of the *Administration and Probate Act 1919* (SA).

[86] *National Committee's Report* vol 1, 127, Recommendation 4-10 (reproduced in Appendix 2 to this paper).

[87] Ibid, 128, Recommendation 4-11 (reproduced in Appendix 2 to this paper).

[88] Ibid, 128, Recommendation 4-12 (reproduced in Appendix 2 to this paper).

(b) where the Court is satisfied that the applicant or someone else with relevant knowledge reasonably believes that the deceased's estate is sufficient to pay, in full, the debts of the estate,[90] and all the beneficiaries under the will are adults[91] and they agree that an executor or one of the executors should be passed over;[92] or where all the intestacy beneficiaries are adults and they agree that a grant should be made to a person other than the person or all of the persons otherwise entitled.[93]

115. The Institute agrees with this approach, as long as the legislation makes it clear that a decision to pass over or substitute a personal representative is entirely at the Supreme Court's discretion, whatever the beneficiaries might agree.

116. The general power would encompass situations where the applicant's circumstances raise concerns about their capacity to administer the estate: for example, how much experience they have in managing funds, their educational level, any relevant mental disability (including intellectual disability) or physical disability, and any relevant criminal convictions or criminal charges.

117. The Institute is also of the view that the general and specific powers of substitution should be available to the Supreme Court, on application, *after* a grant is made, to enable the Court to intervene when satisfied that the estate is not being administered properly or is at risk of not being administered properly. And, in order to exercise these powers in such circumstances, and indeed to exercise its powers as to the administration of deceased estates generally, the Supreme Court should be given a specific jurisdiction to make *and revoke* grants.[94]

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89 See discussion, *National Committee's Report* vol 1, 88.

90 As to the limitation to solvent estates, see discussion, *National Committee's Report* vol 1 [4.201], [4.208] and Recommendation 4-13 (reproduced in Appendix 2 to this paper).

91 Subject to the proviso, in Recommendation 4-14 (*National Committee's Report* vol 1, 129), that if an adult beneficiary lacks capacity to make this kind of agreement, the agreement may be made by a person who has lawful authority to make decisions on his or her behalf, as long as this person is not also a beneficiary.

92 See discussion, *National Committee's Report* vol 1 [4.193]-[4.203].

93 See discussion, *National Committee's Report* vol 1 [4.204]-[4.209].

94 The National Committee recommended that the model law include a provision based on s 6 of the *Succession Act 1981* (Qld), which it described as conferring 'a very broad jurisdiction, ensuring that the court can make and revoke grants, hear and determine all testamentary matters, and hear and determine all matters relating to the estate and the administration of the estate of any deceased person': *National Committee's Report* vol 1, 25 [3.26]; 36, Recommendation 3-1.

Recommendation 4

(1) The *Administration and Probate Act 1919* (SA) should be amended to provide that, on application by a person with an interest in the distribution of a deceased estate, the Supreme Court may, if it considers it is appropriate for the proper administration of the estate and in the interests of those who are, or who may be, interested in the estate:

(a) pass over an applicant for a grant of representation and appoint another person who would otherwise be entitled to the grant or any other appropriate person;

(b) require the application to be made jointly, to include another person who would otherwise be entitled to the grant or any other appropriate person;

(c) impose any condition (other than to require administration security) upon the grant;

(d) revoke a grant and make a fresh grant to any other appropriate person or persons, and in doing so impose any condition (other than to require administration security) upon the fresh grant.

(2) For the purposes of this recommendation, *any other appropriate person* means a person who has experience in managing deceased estates and is professionally indemnified for this work; a corporate administrator; any other person nominated by agreement of all the adult beneficiaries; or any other person the Court considers appropriate.

Recommendation 5

(1) To coincide with the commencement of reforms enacted in response to Recommendation 3, the Government should release a brochure spelling out in plain language and in practical detail:

(a) the duties and liabilities of a personal representative under a grant of probate or letters of administration, including when acting as a trustee;
(b) how personal representatives are appointed and the options available for appointment;
(c) how personal representatives can obtain help while administering a deceased estate, including links to the legal profession, the Public Trustee and trustee companies;
(d) what beneficiaries or creditors of a deceased estate can do if they are concerned about the way the estate is being administered;
(e) what the Supreme Court can do to prevent maladministration of a decease estate or to compensate those who suffer loss or damage as a result of such maladministration.

(2) The brochure should be available at a subsidised low price through Service SA at the Probate Registry, the Legal Services Commission and community legal centres.

Model 4

Compensation fund when all else fails

118. Model 4 would only arise if security were no longer to be required for the administration of deceased estates. It would give beneficiaries an avenue of last resort for covering their loss through access to a compensation fund.

Submissions

119. No respondent endorsed this reform option and several particularly opposed it.[95] The following comments accurately represent the views of these respondents:

> I do not think a compensation fund is a good alternative as the money generated to fund [it] … would come from increasing the fee to apply for probate or the addition of a levy and I consider that the current fee is already too high.[96]

> South Australia already has the highest overall filing fee; the same filing fee applies regardless of whether the estate is worth $50 000 or $5m. In a small estate requiring a grant … any additional costs would be an imposition … To add another layer of bureaucracy and cost to the administration process would be a retrograde step. And as litigants against the Legal Practitioners Guarantee Fund have found to their dismay in a relatively recent raft of claims against a legal firm, they must have exhausted claims against all other third parties before the fund could be accessed. Many potential litigants did not proceed with their claims because of the costs that were involved, and so suffered loss in any event.[97]

The Institute's views

120. The Institute agrees with respondents' criticisms of this model – namely that to maintain such a compensation fund, additional costs and perhaps more red tape would need to be imposed on deceased estates for little or no benefit, given that having to exhaust all other avenues of litigation before becoming eligible for compensation may prove to be a prohibitively expensive exercise. The Institute does *not* recommend that a compensation fund be established to compensate victims of maladministration of deceased estates.

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[95] Submissions of Mellor Olsson Lawyers, O'Briens Solicitors and the Society of Trust and Estate Practitioners (SA Branch).

[96] Submission of Mellor Olsson Lawyers.

[97] Submission of the Society of Trust and Estate Practitioners (SA Branch).

Model 5

To allow the Supreme Court to require sureties' guarantees in certain defined circumstances or when thought appropriate, with no further change to the law

121. In Western Australia,[98] Victoria[99] and the Australian Capital Territory,[100] the Supreme Court has an unfettered discretion to require a surety's guarantee. This is also the approach in England and Wales. In New Zealand, by contrast, the Court's power to require sureties' guarantees is limited to circumstances when it is satisfied that the requirement would be expedient having regard to:

> The value of the estate;
>
> The financial position of the proposed administrator;
>
> The extent of his interest (if any) in the estate;
>
> Whether or not he is a creditor in the estate;
>
> Whether or not there are any minor beneficiaries or beneficiaries under any other disability;
>
> Such other matters as the Court thinks relevant.[101]

122. None of these jurisdictions also has clear provisions in their Acts setting out the duties and liabilities of personal representatives and giving the Supreme Court express powers to remedy loss or take action to prevent maladministration.

Submissions

123. No submission supported this model. Those who wanted to retain a discretion to require a surety guarantee also wanted to give the Supreme Court additional powers aimed at reducing the risk of maladministration, which is the approach taken in Model 6.

The Institute's views

124. The Institute does not support the model. Retaining a discretion to require a guarantee flies against the unanimous view of respondents to this paper that sureties' guarantees do not work. They are difficult if not impossible to obtain because financial institutions won't back

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

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

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

[101] *Administration Act 1969* (NZ) s 7(6).

them; they are beyond the private resources of most families; arranging them causes undue delay in the administration of estates; there is a risk that lay people signing them do not understand the consequences; and enforcement can be avoided by becoming insolvent or restructuring assets. If guarantees don't work, there seems little point in requiring them.

Model 6

To allow the Supreme Court to require sureties' guarantees in certain defined circumstances or when thought appropriate and also to put in place additional measures to reduce the likelihood of maladministration

125. Model 6 would work similarly to Model 5 but also put in place additional measures to reduce the likelihood of maladministration (as per Model 3).

Submissions

126. No submission specifically endorsed this model.

127. One submission[102], however, put forward a proposal with some similar features, but without allowing additional measures of the kind contemplated by Model 3 to be put in place. These features were to allow the Supreme Court to require sureties' guarantees 'as a matter of prudence'[103] in some circumstances and at the same time to give the Court specific powers to impose conditions on the grant designed to reduce the risk of maladministration.

128. The proposal would give the Supreme Court discretion to impose conditions on a grant, including requiring a guarantee, when the estate was substantial (with a value over $500 000) and then only when a beneficiary or the applicant had a 'legal disability'[104] or the Court 'considers that there are special circumstances making it desirable to require a joint legal practitioner administrator'.

129. This proposal would permit a lay applicant in such cases to administer the estate without providing a surety guarantee only when he or she agreed to instruct a legal practitioner to conduct the application and administer the estate, or agreed to conduct the application jointly with a legal practitioner. Otherwise, the lay applicant could administer the estate only if he or she provided sureties' guarantees.

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[102] Submission of the Law Society of SA.

[103] Ibid [31-33].

[104] Defined in the submission of the Law Society of SA, [36(a)], as 'infancy, mental disability or severe physical disability'.

The Institute's views

130. The Institute does not support Model 6 because, as mentioned in discussion of previous models, it does not think there is any place for sureties' guarantees in the laws governing the administration of deceased estates.

131. Nor is the Institute attracted to the Law Society's proposal. Its main objection is that the proposal would permit sureties guarantees to be required for some estates despite all submissions to the Issues Paper, including this one, asserting that '[s]ureties guarantees for letters of administration [should] be abolished altogether'.[105] Moreover, the Law Society acknowledged that:

> The requirement of an Administration Guarantee appears anomalous and potentially ineffective. In the absence of any known claims it also appears needless. The process of obtaining an Administration Guarantee imposes cost and delay, and potentially may frustrate the administration of an estate.[106]

132. Another objection is that in permitting sureties' guarantees only for estates above a certain value, the proposal

(a) overlooks the fact that the higher the value of the estate, the more difficult it is to find someone who will guarantee it, leading to the very problems of routine applications for dispensation of the requirement and reduction of penalty that have led to calls to abolish the requirement for sureties' guarantees; and

(b) overlooks the reality that estates of lesser value may nonetheless be difficult to administer and represent the same or greater risk of maladministration than some larger estates.

133. Also, should there be such a scheme, the Institute can see no reason for restricting the class of substitute or joint appointees to lawyers. Any professional person who is capable of managing funds and is professionally indemnified (for example, a chartered accountant) should be suitable, or, for that matter, a person without such indemnity who is agreed upon by all beneficiaries.

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[105] Submission of the Law Society of SA [7]. See also this submission's answer to Question 1: 'Should a person other than the administrator of a deceased estate be required, by guarantee to pay for loss arising from the administrator's breach of duty'. Answer: 'No, because there is no compelling reason to treat an administrator differently from an executor'.

[106] Submission of the Law Society of SA [31], [32].

List of recommendations

Recommendation 1

(1) The *Administration and Probate Act 1919* (SA) should be amended so that it no longer requires a grant of administration or the resealing of a foreign grant of representation to be conditional upon the provision of an administration guarantee or any other form of security.[107]

(2) For the effective administration of deceased estates in South Australia it is important that this amendment be made as soon as possible, even if this necessitates introducing it to Parliament earlier than other amendments arising from this Report.[108]

Recommendation 2

South Australian legislation governing the administration of deceased estates and of trusts arising from those estates should be variously amended to:

(a) provide that the duties, liabilities and accountability of administrators and executors are the same except to the extent that those of an executor may be expressed to be different in the will;[109]

(b) provide that the Supreme Court may not make a grant of representation to an individual who is not an adult;[110]

(c) list the primary duties of personal representatives charged with administering deceased estates or with administering trusts arising from deceased estates and spell out plainly what should be done to fulfil those duties, cross-referencing with relevant provisions;[111]

(d) update the language and structure of current provisions relating to these to make them comprehensible to lay administrators and executors;[112]

(e) remove all criminal penalties for breaches of duties of personal representatives acting as administrators or as trustees of deceased estates.[113]

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[107] See discussion at [19]-[25], [29] and [31]-[33] above.

[108] See discussion at [32] above.

[109] See discussion at [88]-[90] above.

[110] See discussion at [91], [92] above.

[111] See discussion at [73]-[87] above.

[112] See discussion at [85], [86] above.

[113] See discussion at [93]-[97] above.

Recommendation 3

(1) The *Administration and Probate Act 1919* (SA) should be amended

(a) to give the Supreme Court express power to require undertakings of personal representatives as to the manner in which the administration of a deceased estate is to be conducted or accounted for, or as to any other matter that in the opinion of the Court may assist the proper administration of the deceased estate;[114]

(b) to establish, for personal representatives, a liability to any person who suffers loss or damage as a result of the personal representative's

i. failure to perform any of the duties required of them by law in the administration of a deceased estate;

ii. failure to comply with an undertaking given to the Court as to the administration of a deceased estate; or

iii. failure to comply with a direction of the Court or the Registrar of Probates as to the administration of a deceased estate.[115]

(c) to give the Supreme Court wide powers to remedy loss or damage arising from a personal representative's failure to perform a duty, failure to comply with an undertaking given to the Court or failure to comply with a direction of the Court or the Registrar of Probates, including powers

i. to direct the personal representative to pay into the estate an amount equivalent to any financial benefit that they have obtained directly or indirectly as a result of that failure;

ii. to direct the personal representative to compensate any person who has suffered loss or damage as a result of that failure; and

iii. to make any other order the Court considers appropriate to compensate those who have suffered loss or damage as a result of the failure.[116]

(2) Corresponding amendments should be made to the *Trustee Act 1936* (SA), as appropriate, in relation to the liability of personal representatives acting as trustees.[117]

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[114] See discussion at [98], [99] above.

[115] See discussion at [68], [100]-[106] above.

[116] Ibid.

[117] See discussion at [68]-[70], [103] above.

Recommendation 4

(1) The *Administration and Probate Act 1919* (SA) should be amended to provide that, on application by a person with an interest in the distribution of a deceased estate, the Supreme Court may, if it considers it is appropriate for the proper administration of the estate and in the interests of those who are, or who may be, interested in the estate:

(a) pass over an applicant for a grant of representation and appoint another person who would otherwise be entitled to the grant or any other appropriate person;

(b) require the application to be made jointly, to include another person who would otherwise be entitled to the grant or any other appropriate person;

(c) impose any condition (other than to require administration security) upon the grant;

(d) revoke a grant and make a fresh grant to any other appropriate person or persons, and in doing so impose any condition (other than to require administration security) upon the fresh grant.[118]

(2) For the purposes of this recommendation, *any other appropriate person* means a person who has experience in managing deceased estates and is professionally indemnified for this work; a corporate administrator; any other person nominated by agreement of all the adult beneficiaries; or any other person the Court considers appropriate.[119]

Recommendation 5

(1) To coincide with the commencement of reforms enacted in response to Recommendation 3, the Government should release a brochure spelling out in plain language and in practical detail:

(a) the duties and liabilities of a personal representative under a grant of probate or letters of administration, including when acting as a trustee;

(b) how personal representatives are appointed and the options available for appointment;

(c) how personal representatives can obtain help while administering a deceased estate, including links to the legal profession, the Public Trustee and trustee companies;

(d) what beneficiaries or creditors of a deceased estate can do if they are concerned about the way the estate is being administered;

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[118] See discussion at [107]-[117] above.

[119] See discussion at [41], [42] and [133] above.

(e) what the Court can do to prevent maladministration of a decease estate or to compensate those who suffer loss or damage as a result of such maladministration.[120]

(2) The brochure should be available at a subsidised low price through Service SA at the Probate Registry, the Legal Services Commission and community legal centres.[121]

[120] See discussion at [76]-[78] above.

[121] Ibid.

Appendices

1 Extracts from South Australian legislation

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

The Probate Rules 2004 (SA) rr 49, 32, 33, 34, 36 and Form 52

Administration and Probate Act 1919 (SA)

Part 2

Division 5—Sealing of grants made outside this State

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

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

18—Administration guarantees may be required before administration sealed

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

the Court may grant such relief as it thinks fit.

(9) This section does not apply to—

(a) the Public Trustee; or

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

(c) a trustee company.

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

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

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

Maximum penalty: $2 000.

(13) In this section—

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

19—As to foreign probate or administration

(1) In section 17—

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

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

20—Definitions

In this Division—

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

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

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

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

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

31—Administration guarantees

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

the Court may grant such relief as it thinks fit.

(9) This section does not apply to—

(a) the Public Trustee; or

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

(c) a trustee company.

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

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

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

(13) If—

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

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

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

Maximum penalty: $2 000.

(14) In this section—

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

Part 3

Division 3—General provisions relating to administration of estates

56—Statement and account to be delivered

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

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

56A—Court may order delivery of statement and account

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

58—Proceedings to compel account

(1) If at any time any administrator—

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

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

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

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

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

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

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

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

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

(a) is not *sui juris*, or

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

shall deliver, convey, or transfer such property to the Public Trustee immediately after the expiration of one year from the date of the death of the intestate or testator, or within six

months after such sooner time as the same or such portion thereof as is available for that purpose, has been sold, realised, collected, or got in.

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

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

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

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

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

66—Effect of delivery etc to Public Trustee

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Probate Rules 2004 (SA)

Order of priority for grant in case of intestacy

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

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

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

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

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

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

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

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

FORM 52

Rule 11

OATH OF ADMINISTRATOR

South Australia
In the Supreme Court
Testamentary Causes Jurisdiction

In the Estate of AB deceased

I C.D. of [*address and occupation*] make oath and say that:

1. A.B. late of [*address and occupation*] deceased died intestate [*clear off all persons having a prior entitlement to the grant using the appropriate wording contained in the Table to Rule 11.08*].
2. I am the [*here describe the applicant as in Rule 14.01*] of the said deceased.
3. I will:

   (a) collect, get in and administer according to law the estate of the deceased;

   (b) when required to do so by the Court, produce to the Court a full statement and account of my administration of the estate;

   (c) when required to do so by the Court, deliver up to the Court the grant of administration;

   (d) deliver at the office of Public Trustee of the State of South Australia within 6 calendar months from the date of administration being granted to me a statement and account verified by my declaration of all the estate of the deceased and of my administration of such estate.

4. The deceased died at ..... on the ..... day of ..... 19.. aged ..... years.
5. To the best of my knowledge information and belief the whole of the estate in the State of South Australia consists of real estate not exceeding in value the sum of *$…… and personal estate not exceeding in value the sum of *$…….. [*or* real estate only not exceeding in value the sum of *$……] [*or* personal estate only not exceeding in value the sum of *$……..].

Sworn at …….. by C.D.)
on the …….. day) C.D.
of …… 19 …)

Before me:

……..

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2 Relevant National Committee recommendations

Extracts from: 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 <http://www.qlrc.qld.gov.au/Publications.htm>

CHAPTER 4

The court's general discretion to pass over a person who would otherwise be entitled to a grant

4-10 The model legislation should include a provision that applies if the court, on application, considers it appropriate:

(a) for the proper administration of the estate; and

(b) in the interests of the persons who are, or who may be, interested in the estate;

to pass over a person who would otherwise be entitled to a grant of probate of a deceased person's will or letters of administration of a deceased person's estate and to make a grant to a person other than the person, or all of the persons, who would otherwise be entitled to a grant.

4-11 The model legislation should provide that, in the circumstances referred to in Recommendation 4-10, the court may refuse to make a grant of probate or letters of administration to the person otherwise entitled and may instead make a grant to:

(a) without limiting paragraph (b), if there is more than one person entitled to the grant — any or all of the other persons entitled; or

(b) any person the court considers appropriate.

See Administration of Estates Bill 2009 cl 347.

347 Supreme Court's general discretion

(1) This section applies if the Supreme Court, on application, considers it appropriate to make a grant of probate or letters of administration of a deceased person's will or estate to a person other than the person, or all of the persons, otherwise entitled to the grant of probate or letters of administration—

(a) for the proper administration of the deceased's estate; and

(b in the interests of the persons who are, or may be, interested in the deceased's estate.

(2) The Supreme Court may refuse to make a grant of probate or letters of administration of the will or estate to a person otherwise entitled to the grant and make the grant to—

(a) without limiting paragraph (b), if there is more than 1 person entitled to the grant—any or all of the other persons entitled; or

(b) any person the court considers appropriate.

The court's power, in specific situations, to pass over a person who would otherwise be entitled to a grant

4-12 The model legislation should provide that, if the court considers that there are reasonable grounds for believing that a person who would otherwise be entitled to a grant of probate of the deceased's will, or letters of administration of the deceased's estate, has committed an offence relating to the deceased person's death, the court may refuse to make a grant of probate or letters of administration of the will or estate to a person otherwise entitled to the grant and may make the grant of probate or letters of administration to:

(a) without limiting paragraph (b), if there is more than one person entitled to the grant — any or all of the other persons entitled; or

(b) any person the court considers appropriate.

See Administration of Estates Bill 2009 cl 348.

> **348 Offences relating to the deceased's death**
>
> (1) This section applies if the Supreme Court, on application, considers there are reasonable grounds for believing that a person otherwise entitled to a grant of probate or letters of administration of a deceased person's will or estate has committed an offence relating to the deceased's death.
>
> (2) The Supreme Court may refuse to make a grant of probate or letters of administration of the will or estate to a person otherwise entitled to the grant and make the grant of probate or letters of administration to—
>
> (a) without limiting paragraph (b), if there is more than 1 person entitled to the grant—any or all of the other persons entitled; or
>
> (b) any person the court considers appropriate.

4-13 The model legislation should include a provision that:

(a) applies if:

(i) all the beneficiaries of a deceased person's estate are adults; and

(ii) all the beneficiaries agree that a grant of probate of the deceased's will or letters of administration of the deceased's estate should be made to a person or persons, other than the person or all of the persons who would otherwise be entitled to the grant, nominated by the beneficiaries; and

(b) provides that the court may, on application, make the grant of probate or letters of administration to the person nominated by all of the beneficiaries.

See Administration of Estates Bill 2009 cl 349(1)–(2).

> **349 Person entitled to original grant of probate or letters of administration**
>
> (1) This section applies if—
>
> (a) all the beneficiaries of a deceased person's estate are adults; and
>
> (b) all the beneficiaries agree that a grant of probate or letters of administration of the deceased's will or estate should be made to a person or persons, other than the person or all of the persons otherwise entitled to the grant, nominated by the beneficiaries.
>
> (2) The Supreme Court may, on application, make the grant of probate or letters of administration to the person or persons nominated by all the beneficiaries.

Age at which an individual may be appointed as an executor or administrator

4-18 The model legislation should provide that the court may make a grant of probate or letters of administration to an individual only if the individual is an adult.

See Administration of Estates Bill 2009 cl 312(1).

> **312 Grants of probate and letters of administration**
>
> (1) The Supreme Court may make a grant of probate or letters of administration of a deceased person's will or estate to an individual only if the individual is an adult.

CHAPTER 9

Administration bonds and sureties

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

See Administration of Estates Bill 2009 cl 617(1).

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

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

See Administration of Estates Bill 2009 cl 617(2)

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

CHAPTER 11

Rights and duties of a personal representative

Assimilation of the rights and liabilities of personal representatives

11-1 The model legislation should include a provision to the effect of section 50 of the *Succession Act 1981* (Qld), so that every person to whom a grant of letters of administration is made has the same rights and liabilities and is accountable in the same manner as if the person were the deceased's executor.

See Administration of Estates Bill 2009 cl 400.

> **400 Rights and liabilities of administrators**
>
> (1) A person to whom the Supreme Court makes a grant of letters of administration of a deceased person's estate has the same rights and liabilities, and is accountable in the same way, as the person would be if the person were the deceased's executor.
>
> *Note*—See section 339 for the accountability of executors and administrators by representation.
>
> (2) Subsection (1) is subject to any condition or limitation of the grant of letters of administration.

General duties of personal representatives

11-2 The model legislation should include provisions to the effect of section 52(1)(a), (c) and (d) of the *Succession Act 1981* (Qld), and provide that a personal representative has a duty:

(a) to collect and get in the estate of the deceased and administer it according to law;

(b) to deliver up the grant of probate or letters of administration to the court when required by the court to do so; and

(c) to distribute the estate of the deceased, subject to its administration, as soon as practicable.

See Administration of Estates Bill 2009 cl 401.

> **401 General duties**
>
> (1) A personal representative has the following general duties—
>
> (a) to collect the deceased person's real and personal estate and administer it according to law;
>
> (b) if the personal representative is appointed under a grant of representation—to deliver up the grant of representation to the Supreme Court, when required to do so by the court;
>
> (c) to distribute the deceased person's estate, subject to its administration, as soon as practicable.

CHAPTER 14

The liability of a personal representative

14-1 The model legislation should include a provision to the effect of section 52(2) of the *Succession Act 1981* (Qld), except that the model provision:

(a) should refer to a personal representative who 'fails' to perform his or her duties, instead of the current reference in section 52(2) of the *Succession Act 1981* (Qld) to a personal representative who 'neglects' to perform his or her duties; and

(b) should be expressed to apply in respect of a failure to perform any of the duties of a personal representative, and not be restricted to a failure to perform any of the statutory duties imposed by the model legislation.

See Administration of Estates Bill 2009 cl 404.

> 404 **Remedy if personal representative fails to perform duties**
>
> (1) If a personal representative fails to perform his or her duties as personal representative, the Supreme Court may, on the application of any person aggrieved by the failure, make any order it considers appropriate.
>
> (2) Without limiting subsection (1), the court may make any or all of the following orders—
>
> (a) an order for damages;
>
> (b) an order requiring the personal representative to pay interest on any amount under the personal representative's control;
>
> (c) an order for the costs of the application.

.

3 Glossary[122]

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

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

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

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

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

Bona vacantia – A legal expression for property that has no clear owner (for example, the property of a person who dies intestate with no known kin). Legislation usually requires this property to pass to the Crown.

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*.

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

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[122] 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.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Testator - A person who makes a *will*.

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