Simplified Procedures for Small Estates in Ontario

Consultation Paper

September 2014

LAW COMMISSION OF ONTARIO
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ABOUT THE LAW COMMISSION OF ONTARIO

The Law Commission of Ontario (LCO) was created by an Agreement among the Law Foundation of Ontario, the Ontario Ministry of the Attorney General, Osgoode Hall Law School and the Law Society of Upper Canada, all of whom provide funding for the LCO, and the Law Deans of Ontario's law schools. York University also provides funding and in-kind support. It is situated in the Ignat Kaneff Building, the home of Osgoode Hall Law School at York University.

The mandate of the LCO is to recommend law reform measures to enhance the legal system's relevance, effectiveness and accessibility; improve the administration of justice through the clarification and simplification of the law; consider the use of technology to enhance access to justice; stimulate critical legal debate; and support scholarly research. The LCO is independent of government. It selects projects that are of interest to and reflective of the diverse communities in Ontario and is committed to engage in multi-disciplinary research and analysis and make holistic recommendations, as well as to collaborate with other bodies and consult with affected groups and the public more generally.

This Consultation Paper is available on the LCO's website at www.lco-cdo.org.

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I. INTRODUCTION

When a person dies, it is expected that someone will step forward to collect the deceased's assets, pay off any debts and distribute the remainder to the beneficiaries. This person, referred to as the estate representative in this project, is typically a family member or friend of the deceased.[1] Although most family members or friends who undertake this role will not have legal training, they are responsible for carrying out what can be a complex administration process. In order to formalize their authority to deal with the estate's assets, they must file a court application for a Certificate of Appointment of Estate Trustee with or without a Will (COA).[2] This is commonly known as obtaining "probate" or "probating" the estate.[3] Most people require legal assistance in order to navigate this process.

Where the value of an estate is relatively small, the cost of obtaining probate may drain the estate so that there is very little left for beneficiaries. This raises the concern either that the estate will be administered without the protection of probate, or that the estate will not be administered at all and the deceased's assets will be abandoned.

Of course, opinions differ on what amounts to a "small" estate. Defining that concept is a key issue in this project as discussed below.

Some jurisdictions in Canada, the United States and the Commonwealth have adopted simplified procedures for administering small estates. There are a variety of different approaches but they typically involve an alternative process with relaxed procedural and/or evidentiary requirements for estates valued at less than a particular designated amount. Their goal is to strike a balance between the greater legal protection offered by the full probate process and the increased affordability and accessibility of a simplified process.

To date, Ontario has not adopted a simplified procedure for small estates. In this project, the Law Commission of Ontario (LCO) considers whether it should do so and, if so, what that procedure should look like. The LCO is examining the current requirements for obtaining probate in Ontario and the experience of Ontarians seeking to administer small estates under this process. The LCO is also looking to small estate procedures in other jurisdictions as possible models for an Ontario small estate process.

This project was approved by the Board of Governors on February 28, 2013. Between August 2013 and February 2014, the LCO engaged in a preliminary research and interview process in order to consider the legal and social problems raised by the project, identify particular issues to be addressed and define the scope of the project so as to make best use of LCO resources.

During this period, approximately 20 preliminary interviews were carried out in person or by phone with key stakeholder groups including estates practitioners (in both urban and rural communities), government representatives including court officials, financial institutions, representatives from other jurisdictions considering small estates law reform and others. The LCO also assembled an expert Advisory Group representing these same stakeholder groups in order to provide ongoing advice throughout the project. The Advisory Group members are listed at Appendix A of this consultation paper.

This consultation paper describes Ontario's existing probate process and compares this to specialized small estate processes in use in other jurisdictions. It invites all Ontarians to comment on the best definition of "small estate", the experience of probating small estates under the current process and on ways to improve the process. In particular, the LCO would like to know how costly it is to probate small estates currently, whether legal assistance is considered necessary to the process and whether there are ways that the existing process might be made more user-friendly. More specific questions appear throughout the consultation paper and the LCO invites comments on any or all of these questions. With the benefit of this consultation process, the LCO will prepare a final report with recommendations on whether a simplified process would facilitate the administration of small estates in Ontario and, if so, the preferred design for that process.

II. THE PURPOSE OF PROBATE

A. The Role of Court-Supervised Probate in Modern Society

Probate is a legal process regulating the transmission of wealth after death. It establishes the validity of wills and authorizes the persons responsible for administering estates. Court-supervised probate systems have existed since before the *Statute of Frauds* was passed in 1677.[4] The first Court of Probate was introduced in Ontario (Upper Canada) in 1793, only one year after the new province was established.[5] Today, probate systems are the norm throughout the Commonwealth and the United States.

A court-supervised probate system has a number of functions. It assists in the orderly administration of assets on death and this preserves peace in the community and stability in the commercial world.[6] It provides some protection to beneficiaries and creditors against poor administration or fraud and it provides the estate trustee with some education about his or her legal responsibilities. Another benefit is that it provides a public record of estate trustees administering Ontario estates.

Over the years, probate systems have come under fire, particularly in the United States, for causing unnecessary delay in estate settlement, being unduly expensive and lacking privacy.[7] It has become the practice of estate planners to organize their clients' assets in order to minimize or avoid probate.

U.S. commentators have also argued that probate systems are out of step with modern forms of wealth and ways of transferring wealth. Today, the key assets in an estate are more likely to be personal property rather than real property as was once the case. And it is more likely that personal property will be held by a third party financial institution. According to an oft-quoted statement by Roscoe Pound, "Wealth, in a commercial age, is made up largely of promises."[8] Life insurance policies, pensions and registered savings plans all may be directly transferred on death by naming a designated beneficiary. Property may also be jointly held so that, again, it is passed directly on death. These transfers bypass the probate system and legal representation is not usually necessary. For this reason, some forms of non-probate transfer have been referred to as "poor man's wills".[9]

The prevalence of these non-probate assets and the ease with which they may be transferred is argued to detract from the need for and efficacy of a formal probate system.[10] Although a significant amount of wealth is transferred by these devices, they are not subject to the formal protections of probate.[11] And yet, these transfers are just as vulnerable to fraud or financial

abuse as are estate transfers. Adult children are just as likely to exert undue influence convincing a parent to put property in joint tenancy, as they are convincing the parent to execute a will.[12]

Commentators have also argued that another function of court-supervised probate systems, the protection of creditors, is out of step with modern commercial practices. Improved data processes for calculating and evidencing consumer debt as well as the development of secured lending practices mean that creditors are less reliant on probate to recover debts.[13] Also, much of a deceased's wealth that a creditor may look to for satisfying a debt is likely to be transferred outside the probate system anyway.[14]

These concerns have led some to question the suitability of the court process for overseeing estate administration. According to John Langbein,

> Because the Anglo-American procedural tradition is preoccupied with adversarial and litigational values, the decision to organize any function as a judicial proceeding is inconsistent with the interests that ordinary people regard as paramount when they think about the transmission of their property at death: dispatch, simplicity, inexpensiveness, privacy.[15]

Similarly, John H. Martin argues that a court-supervised probate system is not merited absent some complaint from an interested party. He quotes from an earlier article by Robert Stein and Ian Fierstein:

> It seems unwise to require tens of thousands of estates to incur the time and expense of a particular judicial review because one or two of the thousands of estates might have a particular problem.[16]

Martin also makes the point that a mandatory court-based probate system may generate a false sense of security since it is practically limited in its ability to prevent financial abuse.[17]

B. The Policy Rationale for Small Estate Procedures

The movement in the U.S. to simplify or even eliminate court-supervised probate focuses on the probate system as a whole rather than the particular problem of small estates. Small estate procedures are seen as partial measures for ameliorating the probate process, specifically for the benefit of small estates. Small estate procedures are beneficial in reducing delay and expense in the probate system. They might even be argued to preserve the legitimacy of probate by offering a middle ground between the requirements of the full probate system and the lack of supervision associated with non-probate transfers. There are associated risks, of course, since small estate procedures relax some of the protections designed to prevent fraud

or financial abuse.[18] However, these risks must be considered in context. The probate system does nothing to prevent fraud or financial abuse where assets are transferred outside of the estate. Moreover, it is possible that small estate procedures may actually reduce financial abuse by encouraging estate representatives to take advantage of the procedure in circumstances where they would not otherwise have filed for probate. One of the goals in this project is to consider the extent of the risks associated with introducing a small estate procedure into Ontario relative to the likely benefits.

Interestingly, a concern for fraud is not all that prevalent in the U.S. literature on small estate procedures. Rather, the emphasis seems to be on facilitating estate settlement. One of the early U.S. small estates law reform initiatives was in New York in 1961.[19] The Bennett Commission was appointed to carry out comprehensive reform of estates law with a focus on simplified procedures for smaller estates. In the introduction of its report, the Commission stated:

> …[T]he interest of property owners of consequence is greatly overshadowed by the interest of the majority of our people. Of far more importance to the latter is freedom from undue expense and delay… The Commission must weigh the desirability of a tight, logical rule to govern every possible case, as against a simple, reasonable rule for the convenience of the vast majority.[20]

The Commission recommended the introduction of streamlined probate procedures, including a small estate procedure. The philosophy behind these recommendations was expressed as follows:

> To create the most serviceable statutes meant, as visualized by the Bennett Commission, making recommendations for the 999 honest persons out of 1,000 and not recommendations that would penalize timewise and expensewise the vast majority of the citizens of the State of New York in order to stop the one dishonest person. The Commissioners felt that there are many other methods to detect and to punish the dishonest person.[21]

More recently, the policy rationale behind California's small estate provisions was expressed by the Trusts & Estates Section of the California Bar (TEXCOM) as follows:

> The statutory scheme concerning use of the small estate procedures balances the potential for fraud against the costs and delays of formally probating a small estate. In balancing those issues, a determination has already been made that for estates of a certain size, the benefits of allowing small estates to avoid the burden of formal probate administration outweighs the potential for fraud. Further, removing small estates from the already overburdened courts' dockets would allow judges to focus more attention on estates where actual misfeasance has been alleged or indicated.[22]

In recommending an increase of the maximum value for small estate procedures in California, TEXCOM stated that it was not aware of any published decisions "involving purported or actual fraudulent use of the Probate Code sections" and that none of the estate planning attorney members of TEXCOM was aware of even a single incidence of fraud associated with these provisions.[23] TEXCOM suggested that the opposition to small estate procedures originated mostly from companies that commercially benefited from complex probate procedures, such as heir-finding services.[24]

TEXCOM also assured the legislature that any concern for abuse would be addressed by provisions in the Probate Code subjecting anyone using fraudulent means to obtain estate assets to triple damages.[25] This, however, raises an important distinction between the California and Ontario probate models. Ontario law does not provide for such high damage awards for fraud and would not have this legal tool at its disposal for discouraging the abuse of small estate procedures.[26]

Some U.S. authors do express caution that removing estate administration from the supervision of the courts brings with it inherent risks. According to one commentator,

> Passive probate works well for sophisticated consumers of probate services. But it is not without costs for the unsophisticated consumer who lacks the resources to access information and monitor the players in the probate process. Considering the tendency of human beings to be tempted by large amounts of money, less savvy participants in the American probate system often suffer.[27]

Steven Seidenberg echoed this concern in a 2008 article for the American Bar Association Journal:

> …[A]voiding probate means there is less outside supervision of asset transfers, making it easier for fraudulent schemes or family disputes to keeps assets away from beneficiaries and creditors who are entitled to them.[28]

There is little literature on small estate procedures in Canada. However, the British Columbia Law Institute (BCLI) discussed the rationale underlying small estate procedures in its *Interim Report on the Summary Administration of Small Estates*.[29] It described the social and economic purposes of probate as ensuring orderly disposition of property in order to preserve peace in the community, ensuring that debts are paid, discouraging misappropriation and ensuring that dependents are provided for so that they do not become public charges. BCLI stated that these purposes apply regardless of the size of the estate and concluded:

> If there is no simple and inexpensive means by which those entitled to inherit a modest estate can recover and divide its assets, they could be excused for considering the legal system to be deficient.[30]

BCLI discussed the impracticality of small estates going through the usual probate process, highlighting the expense and formality of the process and the need for legal assistance. It cited two statistics supporting its recommendation for a small estate process in B.C.:

> In 2004/05 approximately 44% of all applications for grants of probate and administration in British Columbia related to estates under $100,000 in value. Processing these applications takes up one-third of probate registry staff time.[31]

BCLI's discussion touches on a couple of different rationales for adopting a simplified procedure for small estates. A primary reason is to make it easier for beneficiaries to access the assets that the deceased intended for them. Simplified procedures assist beneficiaries with limited financial means to probate small estates. Another reason is to assist estate representatives in administering small estates in a cost-effective manner. The goal here is to promote access to this particular form of court process. There is also a concern for the efficient operation of the probate system itself as suggested by BCLI's reference to the registry staff time devoted to small estates applications.

In general, small estate procedures seem to be primarily intended to ensure that small estates may access the procedural benefits of court-supervised probate. This, in turn, benefits the beneficiaries and anyone else with an interest in those estates. It also indirectly assists financial institutions and others who rely on the probate system for evidence of legal authority in dealing with a deceased's assets.

Small estate procedures are also intended to reflect the principle of proportionality. Some probate officials have expressed their embarrassment at having to direct estate representatives through convoluted legal steps completely out of proportion with the amounts at stake.[32] Proportionality is a key element of access to justice and has been explicitly enshrined in the Ontario *Rules of Civil Procedure*:

> Rule 1.04 (1.1) In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.[33]

The Supreme Court of Canada recently addressed this principle in the context of summary judgment motions, noting that rigorous procedural formalities are not always to be preferred:

> A fair and just process must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found. However, that process is illusory unless it is also accessible — proportionate, timely and affordable. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure.

> There is, of course, always some tension between accessibility and the truth-seeking function but, much as one would not expect a jury trial over a contested parking ticket, the procedures used to adjudicate civil disputes must fit the nature of the claim. If the process is disproportionate to the nature of the dispute and the interests involved, then it will not achieve a fair and just result.[34]

The court's reasoning would seem to be equally applicable to a non-adversarial process such as the probate system. In Ontario's *Civil Justice Reform Project Report*, which recommended the introduction of the proportionality rule into the *Rules of Civil Procedure*, Mr. Justice Osborne made clear that the principle of proportionality should have broad application to all civil proceedings.[35]

In Ontario at present, the extent of a need for a small estate procedure is unclear. We do have anecdotal reports that the current probate process is disproportionately expensive for small estates and that it is generally too complex for estate representatives to navigate without legal assistance. The prevalence of small estate processes in other jurisdictions with similar probate systems also supports the suggestion that Ontario may benefit from such a procedure. However, statistics on the number of small estates that are currently probated in Ontario and the experience of small estates both in and out of the probate system are not available. In the absence of this empirical evidence, the Law Commission of Ontario (LCO) must rely on the experiences of Ontarians participating in this consultation process, including those who have probated small estates in Ontario, have administered small estates without probate or have chosen not to administer small estates at all.

The LCO encourages anyone who has been involved in administering what they thought of as a small estate in Ontario to participate in these consultations. In order to make it easier for people to tell their story, the LCO has developed a short, plain language questionnaire at: http://www.lco-cdo.org/en/small-estates-consultation-questionnaire.

The questionnaire can be submitted online or it may be printed and sent to us. Or just call us and we will send you one by mail. See our contact information at the end of this paper.

III. SCOPE OF THE PROJECT

A. Estate Assets

This project is concerned specifically with estate administration in Ontario and, accordingly, with estate assets. Estate assets are those solely owned by the deceased that do not have a designated beneficiary other than the estate. It is important to emphasize that a deceased's assets do not always form part of the estate. As noted in the previous section, jointly-held assets with right of survivorship pass directly to the surviving joint tenant. Other assets such as insurance proceeds, RRSPs, RRIFs and pension benefits may have designated beneficiaries other than the estate. Where they do have designated beneficiaries, they pass directly to those beneficiaries. Because these assets do not form part of the estate, they are not subject to the probate process and are outside the scope of this project. Only estate assets are included in the definition of small estates.

B. Small Estates and Simple Estates

One of the key tasks in the project is to choose a meaningful definition of "small" estate. In preliminary interviews, some stakeholders noted that some estates of small monetary value may be relatively difficult to administer. Numerous complications can occur including, for example, concerns about the validity of the will or difficulty locating beneficiaries. In such cases, a simplified probate process may be inappropriate even for very small value estates. Therefore, the suggestion was made that the Law Commission of Ontario (LCO) focus, instead, on "simple" estates, that is, relatively straightforward and uncontentious estates of any value. A simple estate may involve, for example, a will with a named executor and no issues as to validity, commonplace assets all located within the jurisdiction, no minor or incapable beneficiaries and only a few beneficiaries who are easily located. A simple estate may be relatively inexpensive to probate even though it may have a high value.

Presumably, all Ontario estates would benefit to some extent from a simplified probate procedure. For example, British Columbia recently introduced new simplified *Probate Rules* and decided, as a result, that a separate small estate process was unnecessary:

> The benefit of the small estate procedure was that it would be simpler and faster. The new probate rules have prescribed forms very similar to the small estate declaration proposed by the British Columbia Law Institute. The new probate rules make a distinction between simple and complex applications and ensure that the processing of an application is dependent upon the complexity of an application, rather than the value of the estate. Therefore, there is not any advantage to these provisions, because under the new probate rules all applicants will get the same benefits – those with simple applications in particular.[36]

B.C.'s consideration of small estates was part of a much broader reform initiative devoted to simplifying estates law generally. In contrast, the LCO's project is specifically concerned for testators and beneficiaries with limited resources. The LCO intends this project to be a more targeted examination of estates of small monetary value where the cost of obtaining probate may unduly diminish or even exhaust the estate.[37] In such cases, the estate may remain undistributed or may be distributed informally without the procedural protections of the probate process. Therefore, the LCO considers that this project should be first and foremost focused on the monetary value of Ontario estates rather than their complexity.

Defining "small" estate by reference to an estate's monetary value has the following three benefits:

- It should keep the project within its intended scope. A focus on uncontentious or "simple" estates would inevitably lead into an examination of Ontario estate administration generally and this could quickly expand beyond the LCO's intent.
- It will address access to justice issues where the estate representatives of small estates are lower-income and, as a result, are practically precluded or dissuaded from accessing a legal process which, on its face, is available to all Ontarians.
- It is consistent with the approach in other jurisdictions where specialized alternative processes to the full probate system have been made available only to estates worth less than a specific monetary value.

Therefore, a small estate for the purpose of this project is an estate of small monetary value.[38]

Another key issue is to determine what other criteria should be required for estates to be eligible for a simplified process. In what circumstances should it be appropriate to relax the legal protections of the full probate process and what should a simplified process look like?

Of course, the LCO might conclude that the current probate process remains necessary to protect estates of any value from fraud or improper administration. If so, there might still be ways in which access to the current process can be improved such as, for example, simplifying the forms or improving public education about the legal responsibilities of estate representatives and the importance of probate.

C. What Amount is Small?

Having established that a small estate is to be defined in relation to its monetary value, the issue of what range of values should be considered to be "small", and how this should be calculated, will be addressed as part of the project. Defining a small estate process in relation to monetary value is necessarily somewhat arbitrary.[39] Jurisdictions with small estate procedures have adopted a wide range of value limits in respect of a variety of different procedures, as discussed below. Canadian provinces have defined "small" in terms of values ranging from less than $3,000 to $50,000. United States small estate procedures reflect a similarly wide spectrum of values with some procedures available to estates worth as much as US$275,000.[40] Recent law reform projects in Australian States have coalesced around the figure of AU$100,000.

In choosing a value limit for a small estate process, it is also important to consider how that value is to be calculated. It might be based on either the gross or net value of the estate. It also might be appropriate to provide for different value limits to respond to different circumstances such as the identity of beneficiaries or changes to the valuation of the estate. These more sophisticated formulas for calculating estate value have been implemented in some Australian jurisdictions as is discussed below. They add a degree of complexity to a small estate procedure but are intended to respond to different levels of risk in small estate applications.

D. Distinguishing Between Small Estates and Estate Planning

The cost of obtaining probate in Ontario greatly increased in 1992 with the introduction of the estate administration tax.[41] Not surprisingly, several estate planning strategies have been developed to avoid the tax. Since the tax is only payable on obtaining a Certificate of Appointment of Estate Trustee (COA), the goal of estate planning has been to avoid probate where possible and arrange for the transfer of assets outside the estate. Although this practice may result in "small" estates in some cases, this is a side effect of what is primarily a tax avoidance strategy.

The estate administration tax remains highly controversial in Ontario. One significant challenge for this project will be to maintain a distinction between the tax-related reasons for avoiding probate and the LCO's focus on simplifying the probate process for the benefit of true small estates. Of course, these issues overlap since payment of the estate administration tax is a cost of obtaining probate for small estates just as it is for larger estates. But the estate administration tax is already designed to be proportionate to the value of the estate and, therefore, is less of a focus for our purposes than the costs associated with the complexity of the probate process, including the need for legal assistance.

It will also be necessary to consider the tax implications of the LCO's eventual recommendations. For example, a proposal to eliminate probate for small estates would obviously have some impact on government revenues.

IV. ONTARIO LAW CURRENTLY

A. The Practical Necessity of Probate in Administering Ontario Estates

Obtaining a Certificate of Appointment of Estate Trustee (COA) is a court-supervised process establishing the authority of an estate representative to administer a deceased's estate. Where the deceased has left a will naming an executor, that executor is authorized to act by the terms of the will. In this case, obtaining a COA simply confirms that appointment by establishing that the will is valid and that the estate representative is indeed the executor named in the will. On the other hand, where a deceased dies intestate or where there is a will but no named executor, it is the COA itself that conveys to the estate representative the legal authority to administer the deceased's estate.

It is not mandatory that an estate representative obtain a COA. However, it is practically necessary to do so in most cases depending on the nature of the estate assets.[42] For a financial institution holding the deceased's assets, a COA is authoritative evidence that it may release the assets to the estate representative without risk of liability. Even where an executor is named in a will, a COA is usually necessary to assure financial institutions that the will is valid and that the testator did not make a later will naming someone else executor. Therefore, financial institutions most often require a COA before they will release these assets.

An estate representative who administers an estate without obtaining a COA takes a significant risk. He or she may be held personally liable to the beneficiaries, creditors or other claimants for any improper payments made out of the estate.[43] This is so even if the payments were made pursuant to the terms of a will which is only later found to be invalid.[44] In contrast, estate trustees with a COA are protected by subsection 47(1) of the *Trustee Act* which provides that actions taken in good faith remain valid even if the COA is subsequently revoked.[45]

It is also often advisable for an estate representative to obtain a COA in order to trigger certain limitation periods for claims against the estate. For example, under section 61 of the *Succession Law Reform Act* (SLRA), a dependent of the deceased has six months after the grant of a COA to seek a support order where the deceased has not otherwise made adequate provision for him or her.[46]

B. The Current Process of Applying for Probate

A COA has essentially the same effect whether it is based on a will or an intestacy. In both cases, it confirms the authority of the estate trustee to administer the estate. However, the different purposes of a COA with and without a will (confirming the authority of the executor under the will in one case and making an original appointment in the other case) requires that the court establish different criteria for issuing them. For example, where there is a will, an important purpose of the COA process is to test its validity by considering whether the formal requirements of the SLRA have been met.[47] This reflects the importance placed by our society on the fulfillment of a testator's wishes.

The applicable rules for obtaining a COA are summarized in Appendix B below. Generally, Rule 74.04 of the *Rules of Civil Procedure* addresses cases where there is a will.[48] The application form consists of a number of questions about the deceased and the will (designed to establish validity of the will) and a question about the value of the assets in the estate.[49] The applicant must also attach several documents intended to establish the following:

- the validity of the will (the original will and any codicils, an affidavit of execution of the will, or other evidence of validity)
- that beneficiaries, particularly vulnerable beneficiaries, have notice of the application (in some cases this requires notice to the Children's Lawyer and the Public Guardian and Trustee), and
- the entitlement of the applicant to act as estate trustee (where, for example, the applicant is not named as executor in the will or lives outside the jurisdiction)

Rule 74.05 addresses cases where there is no will. This application form consists of questions designed to establish that the applicant is legally entitled to administer the estate and includes questions about the search for a will, the persons entitled to share in the estate and other circumstances affecting the applicant's entitlement to be estate trustee. It also requires a valuation of the estate.[50] The applicant must attach documents establishing that:

- beneficiaries, particularly vulnerable beneficiaries, have notice of the application
- beneficiaries entitled to a majority of the value of the assets consent to the appointment of the applicant as estate trustee
- any person with prior entitlement to administer the estate has renounced that right, and
- the applicant has posted security in the form of an administration bond in the amount of two times the value of the estate.[51]

Both application forms (with and without a will) require that the applicant swear an oath attesting to the truth of the contents and undertaking to faithfully administer the estate according to law.

In addition to the application materials, the estate representative must pay a deposit equal to the estate administration tax owing under the *Estate Administration Tax Act*.[52] The amount of estate administration tax (or "probate fees" as it is also called) is calculated as a percentage of the estate's value. Estates valued at less than $1,000 are exempt from the tax. Estates valued at more than $1,000 must pay as follows:

- $5 for each $1,000, or part thereof, of the first $50,000 of the value of the estate, and
- $15 for each $1,000, or part thereof, of the value of the estate exceeding $50,000.[53]

For example, an estate worth $50,000 must pay $250 and an estate worth $100,000 pays $1,000.

Once the application materials are received and the deposit paid, a COA may be issued by the Registrar or, if there are deficiencies in the information submitted, the Registrar may send it back to the applicant to be corrected and resubmitted. If the application is not complete or there is some doubt as to the information contained in the application, the Registrar will refer the application to a judge.[54]

After the COA has been issued, the estate trustee proceeds to gather in the assets, identify creditors, pay debts and taxes and distribute the remainder to the beneficiaries as dictated by the terms of the will or by succession law in the case of an intestacy. Unless a dispute arises, this often takes place without any further involvement of the court.

Currently, there is no specialized small estate process in Ontario. The only estates legislation specifically addressing small estates is the *Estates Administration Tax Act* which provides that estates valued at less than $1,000 are exempt from the tax.[55] However, even these very small estates must go through the full application process in order to receive a COA.

C. The Cost of Obtaining Probate

The cost of obtaining probate will include the cost of compiling the material necessary for a successful probate application as well as the estate administration tax payable. This project is primarily concerned with the application costs which are not proportionate to the value of the estate in the same way that estate administration tax is.

Application costs may vary widely depending on the complexity of the estate among other factors. Cost is influenced by whether or not there is a will, the number and location of beneficiaries, whether there are minor or incapable beneficiaries, the likelihood of a family dispute, the type of assets in the estate and whether or not there are creditors to be paid. The cost may also depend on the local availability and cost of legal services and the local estate registry's practice in scrutinizing applications.

There is anecdotal evidence that Ontarians typically hire a lawyer to prepare and file the application materials to obtain probate. To the extent that this is so, most application costs will be in the form of legal fees. Legal fees may be calculated as a flat rate, an hourly rate or some combination of these. The Law Commission of Ontario (LCO) has heard of cost estimates for probate applications ranging from less than $1,000 up to $30,000 (for estates ranging in value and complexity). During this consultation process, the LCO hopes to hear from many more Ontarians about their experiences probating estates, including whether they felt it necessary to hire a lawyer and how much it cost in total.

One factor that does not necessarily affect application costs is the value of the estate.[56] Probating a small estate may cost as much as or more than a much larger estate depending on the above factors.[57]

For example, an estate worth $300,000 may consist of a home, a pension and two bank accounts. The testator has left a will appointing her adult child as executor and sole beneficiary. Although it would likely be necessary to obtain probate in these circumstances, the cost of doing so should be relatively low. There is no need to track down other beneficiaries and the assets are standard and should not be difficult to value. A reasonable lawyer's fee plus estate administration tax of $4,000 still leaves the beneficiary with a significant inheritance.

In contrast, consider an estate worth $60,000. The testator has left a will appointing one of his adult siblings as executor and listing his parents and siblings as beneficiaries. It is a holograph will (handwritten) which raises questions about its validity. There is no affidavit of execution so that the executor must find someone to confirm the testator's handwriting. The registry office

rejects the probate application several times for this reason. In addition, the testator was an independent contractor and the estate assets include several small accounts. Poor record keeping makes it difficult to locate these assets and value them. In these circumstances, the legal expense necessary to successfully probate this estate may chew up a large proportion of it. Depending on the number of beneficiaries entitled to a share of the remainder, the amount received by any one beneficiary may be seem disproportionately low relative to the size of the estate and the cost of probating it.

In this kind of situation, where probate is costly compared to the value of the estate, the decision to seek probate involves some form of cost/benefit analysis. Other expenses related to administering the estate, such as executor fees, will also be factored in.[58] There is a concern that, in these circumstances, estate representatives may administer the estate without the protection of probate or that they may choose not to administer the estate at all.

There is also a slightly different situation where obtaining probate will not be financially feasible. This is where the estate is so small that there is really nothing to administer but probate is required for some legal purpose like filing the deceased's final tax return. In this situation, there is no cost/benefit analysis but simply a legal obligation that may need to be personally funded by the estate representative. For example, the LCO heard about a parent whose adult child died without a will. Since there were no assets in the estate, the parent did not apply for probate. Later, a very small pension was discovered with the estate listed as beneficiary. This required the parent to file a tax return and the Canada Revenue Agency required probate as proof of the parent's authority. Since the parent lived outside Ontario, obtaining probate was complicated and would involve a court application. The value of the pension was nowhere near enough to fund such an application.

There are endless permutations and combinations of circumstances that may complicate a probate application and drive up costs. Probate might also lead to increased administration costs since administration will take place under the scrutiny of the beneficiaries and, potentially, the court. In any event, the key point is that these potential costs do not necessarily correspond to the value of the estate.

Questions for Feedback:

1. Have you been involved in administering what you consider to be a small estate or estates? Briefly explain your experience.

2. In your opinion, what is the maximum value that an estate can have and still be considered a "small" estate?

3. Do you think that the cost of probating a small estate in Ontario is reasonable relative to its value? If not, what parts of the process are unreasonably costly?

D. Estate Administration by the Ontario Public Guardian & Trustee

Ontario's Public Guardian and Trustee (PGT) plays two distinct roles in the administration of estates. First, the PGT represents mentally incapable persons having an interest in estates administered by others where they do not have a guardian or attorney with authority to act.[59] Second, the PGT may apply to administer estates where no executor has been named and there is no family member or beneficiary in Ontario willing and able to take on this role.[60]

This second role is intended to be exercised only as a last resort. In order to be appointed estate trustee, the PGT must apply for a COA following essentially the same process as any other applicant.[61] There are no procedural short-cuts except that the PGT is not required to post security.[62] Where there is no will, the PGT, like any other applicant, must obtain the consent of beneficiaries entitled to a majority of the value of the estate's assets.[63]

At any given time, the PGT has more than 1,400 estates under administration.[64] The PGT has established a policy of seeking probate only for estates with a net value of $10,000 or more.[65]

E. Administering Small Estates without Probate

Although there is no separate small estate process in Ontario, there are a variety of laws and policies that circumvent the probate process in certain circumstances in order to facilitate the transfer of estate assets on death.[66] These vary depending on the institution holding the assets and the type of assets in question. They usually, but not always, require a will naming the estate representative as executor.

1. Assets Held by Financial Institutions

The federal *Bank Act* allows banks to rely on provincial probate systems resulting in a "grant of probate", "grant of letters of administration" or "other document of like import" as evidence of authority to receive the deceased's assets.[67] This provision protects banks from liability if they release assets on the basis of a COA or other court-issued document but it later turns out that the recipient was not legally entitled to the assets after all. It allows banks to rely on a COA as proof of authority. However, it does not *require* that banks rely on a COA and, in fact, it reserves the right of banks to require other such proof as deemed necessary.

Ontario credit unions are subject to the *Credit Unions and Caisses Populaires Act, 1994* which is more flexible than the federal *Bank Act*.[68] It authorizes credit unions to release assets below a prescribed amount without a COA where a statutory declaration or some other evidence establishes the person's entitlement to receive the amount. Currently, the prescribed amount is set by regulation at $50,000.[69] This provision effectively sidesteps the COA process for small estates by substituting less rigorous evidentiary requirements proportionate to the lower amounts in issue. However, the LCO heard in preliminary interviews that, in practice, credit unions tend to require probate.

In addition to these legislative provisions, financial institutions have developed internal policies addressing the decision whether or not to require a COA before releasing a client's assets.[70] There are a myriad of policies for different institutions and different types of assets. For example, the Bank of Canada Business Rules contain a detailed chart listing the documentary evidence required to transfer Canada Savings Bonds in different circumstances. Where there is a will and the savings bonds are part of the estate, the Bank generally requires a COA regardless of the value of the bonds. However, where a spouse is the sole beneficiary under the will, the Bank will release up to $75,000 in bonds on the basis of a certified copy of the will and proof of death. This amount drops to $50,000 in the event that a spouse and children are beneficiaries of the estate.[71] Financial institutions have developed these policies on the basis of their own unique matrix of risk factors. There is no consistent approach.

The decision by financial institutions whether or not to release assets without probate is often viewed as one of risk management. However, this is perhaps overly simplified. Financial institutions have a legal duty to protect the property that their clients entrust to them. According to one financial institution stakeholder, it is not relevant that it makes more sense on a cost/benefit analysis to release small assets rather than undergo the inconvenience of holding them until probate is granted. The law is that the bank must protect the assets and the privacy of the owner by dealing only with a legally authorized representative.[72]

Another practical barrier to administering an estate without probate is the reluctance of financial institutions to open estate accounts without this proof of legal authority. Opening an estate account raises similar legal concerns to the transfer of assets. However, an estate account involves numerous transfers of assets in and out of the account over a period of time and financial institutions may conduct a different risk assessment than is applied to a singular transfer of assets.

2. Assets Controlled by Other Institutions

It is possible to transfer real property without probate in certain circumstances. Under the *Land Titles Act*, the Director of Titles is authorized to determine the evidence required to establish entitlement to real property on the death of a registered owner.[73] The Director has established a policy of waiving formal probate where a will exists and the property is valued at less than $50,000. Instead of probate, the estate representative must file a copy of the will and death certificate, an affidavit attesting to the value of the property and an agreement to indemnify the Land Titles Assurance Fund from any claims by beneficiaries.[74] There is also a first dealing policy that permits a one-time waiver of the probate requirement for the first transfer of real property after conversion from the Registry system to the Land Titles system. Similar evidentiary requirements are in place. There must be a will as well as an affidavit and agreement to indemnify the Land Titles Assurance Fund.[75]

For real property remaining under the registry system, the *Registry Act* permits property of any value to be transferred on the basis of the original or notarial copy of the will, proof of the testator's signature or affidavit of execution and a copy of the death certificate.[76]

The *Estates Administration Act* provides for the transfer of real estate without probate in some circumstances even where there is no will. After three years, any real property remaining in the estate automatically vests in those beneficially entitled to it.[77]

The *Business Corporations Act* provides for the transmission of securities on the death of the registered holder without a COA in certain circumstances where the estate representative is able to provide reasonable proof of their right to become the registered holder.[78]

These laws and policies, and the discretion of the individuals implementing them, clearly have a practical impact on the need for an estate representative to incur the cost of obtaining probate in certain cases. Therefore, it is important in this project to consider how these laws and policies interrelate with the probate system in Ontario, particularly as it affects small estates.

V. DIFFICULTIES ADMINISTERING SMALL ESTATES

A. Difficulties Obtaining Probate for Small Estates

This section considers in more detail what elements of the probate process may be disproportionately costly and complex for small estates. One issue is the extent to which legal assistance is or should be necessary in navigating the process. Larger estates are almost always administered with legal advice. However, for smaller estates, the cost of legal assistance may well be the factor that tips the balance and dissuades family members from applying to administer the estate. Small estate processes in other jurisdictions are typically designed to be accessible to laypeople without legal assistance. However, lawyers play an important role in the current Certificate of Appointment of Estate Trustee (COA) process, both in safeguarding against fraud and in educating their clients as to the legal responsibilities of being estate trustee. It will be important for the Law Commission of Ontario (LCO) to balance both the costs and the benefits of legal assistance in the probate process in order to develop recommendations maximizing access to justice.

There are also specific application requirements under Rule 74 of the *Rules of Civil Procedure* that may be particularly onerous for applicants attempting to administer small estates.[79] Here are some examples raised during the LCO's preliminary interviews:

- Ontario wills are not valid unless there are two witnesses to their execution.[80] Therefore, an affidavit of execution of the will is required before a COA will be issued. This affidavit is not always with the will and it may be difficult to locate the witnesses to obtain an affidavit after the fact. A search for witnesses can increase application costs, disproportionately affecting small estates. If the witnesses cannot be found, it is sometimes possible to have a financial institution swear an affidavit on the basis of the testator's signature card on file.
- It may also be difficult in some circumstances to identify and locate the beneficiaries in order to serve them with notice of the application. The cost of a private investigator may be prohibitive for small estates. Currently, there are no guidelines addressing how far applicants must go in satisfying themselves that all potential beneficiaries have been located. However, the value of the estate is one factor to be taken into account.[81]
- The application for a COA also requires a valuation of the estate. This may be difficult to obtain quickly in some circumstance, such as where the estate includes unusual assets or real property located in rural settings. Many estate

practitioners use an estimated value for the purpose of the application form with the undertaking to correct this when the actual value is available. However, this option may not be readily apparent to applicants without legal assistance. The government's proposed audit and verification regime, discussed below, is also likely to complicate this step.

- The Rules require that applicants for a COA without a will must post an administration bond with their application.[82] Administration bonds are also necessary in some cases where there is a will, such as where the executor resides outside of the Commonwealth.[83] In practice, estate practitioners normally apply to have the court waive the bond requirement and the court often grants this order where the beneficiaries consent. However, without legal assistance, applicants may not be aware of this practice or may not be able to take advantage of it.
- Another potential roadblock for small estates is where an applicant cannot afford to pay the estate administration tax required for the issuance of a COA. Courts may vary this requirement where there are sufficient assets in the estate to cover the tax.[84] Otherwise, it is up to the discretion of the financial institution whether or not to release this amount from the estate before the COA is issued. Financial institutions may be cooperative particularly where there is a will but, if not, the result may be that applicants are unable to afford the upfront fees necessary to discharge their obligations or obtain their inheritance.

Questions for Feedback:

4. What difficulties tend to arise in obtaining probate specifically for small estates? Please briefly explain the basis for your answer.

   (For example, handwritten or altered wills, difficulty obtaining affidavits from witnesses to a will, difficulty locating beneficiaries, difficulty valuing the assets, minor or incapable beneficiaries, family disputes, other)

B. Difficulties Administering Small Estates Without Probate

The cost of legal assistance and complicated application requirements are both reasons why estate representatives may be discouraged from obtaining probate for small estates. However, estate representatives may have just as much difficulty administering the estate without probate. In particular, they often have difficulty collecting the deceased's assets since they

must rely on the discretion of bank managers and other financial institutions to waive the COA requirement. These institutions will sometimes do so where the estate is small and the risk of liability is perceived to be low. They may agree to release assets to the estate representative on the basis of a personal indemnity agreement executed by the estate representative or the beneficiaries or both. However, this is a discretionary practice that varies from institution to institution and in respect of different kinds of assets.

Estate representatives requesting a waiver of probate are typically subject to an individual risk assessment that takes into account factors such as the value of the estate, whether the estate representative is a client of the institution or otherwise known to the manager and whether there is any controversy over the terms of the will. The result is that there is no standard practice as to when the COA requirement will be waived, and apparently similar cases may be dealt with inconsistently. An estate representative may be successful having the assets held by one institution released but be unable to gain possession of assets held by another institution. From the perspective of an estate representative or family members of the deceased person, this may seem unfair, particularly where the size of the estate is such that the legal assistance practically necessary to obtain probate is unaffordable.

Although there are important legal reasons for financial institutions to require probate, the effect of this may put estate representatives of small estates in an impossible position. They must obtain probate in order to gain possession of the assets making up the estate and, yet, if they do so, there may not be sufficient assets left to make administering them worthwhile.

Questions for Feedback:

5. What difficulties tend to arise in administering small estates without probate?
   a. How difficult is it to get financial institutions or others to release the deceased's assets?
   b. How difficult is it to file the deceased's final tax return with the Canada Revenue Agency?

   Please briefly explain the basis for your answer.

6. Where financial institutions release small value assets without requiring probate, do you think that this increases the risk of the assets falling into the wrong hands? If so,
   a. How serious is this risk?
   b. Are you aware of cases where the assets of an estate have fallen into the wrong hands? Explain.

7. Where financial institutions agree to release small value assets to an estate representative without probate,
   a. Should financial institutions be protected from liability?
   b. What standard of care should be expected of financial institutions before they are protected from liability?

VI. SMALL ESTATE PROCEDURES IN OTHER JURISDICTIONS

Small estate procedures in other jurisdictions vary widely which makes a comparative evaluation of them somewhat difficult. Canadian approaches to this issue are also distinct from American approaches.

A. Small Estate Procedures in Other Provinces

Canadian provinces generally take one of four approaches to the problem of probating small estates.

1. Specialized Court Procedures Alternative to a Formal Grant

Two provinces have created specialized court procedures that authorize representatives to administer small estates without a formal grant. In Saskatchewan, the *Administration of Estates Act* and accompanying regulations provide for a simplified procedure for estates valued at less than $25,000 and consisting only of personal property. The estate representative may bring an *ex parte* motion to a judge who may order the property to be transferred to the representative without a grant. Unlike a grant of probate, the order applies only to the particular assets listed in the motion. The representative becomes liable to pay reasonable funeral expenses and the debts of the deceased and to distribute the remainder to the beneficiaries or next of kin. The order authorizes financial institutions to release assets to the representative and protects them from the risk of liability. [85]

Manitoba has a similar provision that provides for a court order transferring a deceased's property to an estate representative without a grant. In Manitoba, the estate may include real property but must have a value of less than $10,000.[86] Again, there is no requirement to give notice to beneficiaries or creditors.

2. Administration by the Public Trustee Without a Grant

In some provinces, there is legislation that either simplifies or eliminates the probate process where the public trustee assumes the administration of small estates where no one else is available to do so. There is no obligation on the public trustee to undertake small estate administration under these provisions. Therefore, they are only effective to the extent that public trustees choose to exercise their discretion.

For example, in Alberta, the *Public Trustee Act* contains two different options for the administration of small estates which apply both to testacies and intestacies. Section 13, titled "Summary disposition of small estates", provides that, where no one has been granted probate, the Public Trustee may take possession of and administer an estate consisting only of personal property valued at less than the prescribed amount (currently $5,000).[87] There is no need for the Public Trustee to obtain probate under this provision. Instead, there is a prescribed form for the Public Trustee to complete which is to act as conclusive proof of the Public Trustee's authority.

Section 16 of the Alberta *Public Trustee Act* applies in relation to somewhat larger estates (currently less than $50,000). Again, the Public Trustee may elect to administer the estate where no one else has been granted probate. But there are incrementally greater procedural requirements under this provision. The Public Trustee must file an election and affidavit disclosing the value of the estate and the names and interests of anyone who may have an interest in the estate. This must be certified by the court and, on completion of the administration, the Public Trustee must file an account of the administration.[88] These small estates provisions are in addition to the more general provision granting the Public Trustee authority to apply under the usual process to administer an estate where no one else has done so.[89]

In Saskatchewan, the official administrator may choose to administer estates valued at less than $25,000 without a grant even where the estate contains real property.[90] New Brunswick provides that the public trustee may administer estates valued at less than $3,000 on filing an affidavit with the Registrar.[91] Northwest Territories has a similar provision for estates valued at less than $10,000.[92]

Nova Scotia similarly provides the public trustee with discretion to administer estates valued at less than $25,000 but only in the case of intestacies.[93] The Law Reform Commission of Nova Scotia considered the possibility of creating a small estate procedure in its 1999 Final Report, *Probate Reform in Nova Scotia*. It rejected the idea, expressing concern that this could result in a third kind of estate and make the system too complex. The Commission preferred the *status quo* in which representatives either choose to apply for formal probate or, alternatively, bypass the system altogether.[94]

3. Assistance from Court Staff in Completing the Application for a Grant

Another option for reducing the cost of administering small estates is to require court staff to complete the necessary paperwork on behalf of the applicant. In Alberta, court staff have the

discretion to prepare application materials for estates consisting of personal property only that is valued at less than $3,000.[95] However, this provision will disappear when Alberta's new *Estate Administration Act* comes into force, likely in the spring of 2015.[96]

In Saskatchewan, the Registrar is required to prepare grant applications for applicants in estates worth up to $15,000.[97] Ontario once had a similar provision in the *Estates Act* for estates valued at less than $1,000 but this was repealed in 1998.[98]

Under the Saskatchewan model, court staff assist applicants in completing the application materials but applicants must still meet all of the same evidentiary and procedural requirements for obtaining probate.

4. No Specialized Small Estate Procedure

British Columbia, like Ontario, has no legislation specifically addressing small estate administration.[99] However, British Columbia has made this choice intentionally by deciding not to bring into force a small estate process included in its new *Wills, Estates and Succession Act* (WESA).[100]

Small estate administration was identified as a reform priority during the three year review of British Columbia wills and estates law that preceded the enactment of WESA. The British Columbia Law Institute (BCLI) recommended in an interim report that a process of administration by statutory declaration be available for estates valued at less than $50,000 with no real property.[101] This recommendation was adopted in Part 6, Division 2 of WESA entitled Small Estate Administration. However, the Ministry of the Attorney General later announced that Division 2 would not be brought into force. In drafting the new *Probate Rules*, the Ministry determined that a separate small estate procedure was no longer necessary. Instead, the *Probate Rules* provide two options for filing an application for estate grant where there is a will: a short-form affidavit for simple estates and a long-form affidavit for more complex estates. Applicants are entitled to use the short form if the application meets a list of criteria indicating that the estate is a "simple" one. Some attributes of simplicity include the following: the executor is named in the will, there is evidence that there is no later will, there are no known issues respecting execution of the will and there are no apparent modifications to the will. The value of the estate is not relevant to the choice between the short-form or long-form affidavit.[102]

Although the B.C. government decided against bringing into force WESA's small estate procedure, BCLI's *Interim Report on Summary Administration of Small Estates* remains valuable

as a discussion of the various small estates models proposed or adopted in other jurisdictions.[103] BCLI considered the option common in the rest of Canada and the Commonwealth of giving the public trustee responsibility for administering small estates. However, BCLI rejected this approach as inconsistent with the evolution of the public trustee's role in British Columbia.[104] Instead, BCLI favoured a summary procedure that would allow estate representatives to distribute small estates by way of statutory declaration.

BCLI's proposal would allow a limited class of declarants to assume responsibility to administer a small estate by completing a statutory declaration in a prescribed form. Eligible declarants would include the executor, beneficiaries, a spouse or another entitled in an intestacy, another person with the consent of all persons entitled to a share of the estate or the official administrator.[105] The declaration would include a number of questions about the estate including facts about the deceased, the basis for the declarant's entitlement to act, the value of the estate and the list of persons interested in the estate. The declaration would also contain information about the declarant's legal obligations. Copies of the declaration would be sent to persons interested in the estate and, in some circumstances the Public Trustee. After a waiting period, the declaration would be filed with the court registry. There would be no scrutiny of the declaration by court officials.

BCLI's statutory declaration procedure would be available to estates with a gross value of less than $50,000 and containing only personal property. BCLI found that this figure best represented "the value of a typical small estate in which the assets might consist of a motor vehicle, a modest bank account, some personal property of relatively negligible value".[106] Estates containing real property would be excluded from the procedure since, under B.C.'s *Land Titles Act*, the transfer of real estate on death required proof of probate. BCLI suggested that this exclusion should be revisited if the legislation were amended to give the land title registrar some discretion in this requirement. There would be a statutory release from liability for anyone releasing assets to the estate in reliance on the declaration.

B. Small Estate Procedures in the United States

The U.S. approach to probate is quite different from that in Canada. U.S. courts have traditionally played a relatively intensive role in supervising the estate administration process.[107] This court-based formal probate model can be costly and creates delay in the settlement of straightforward estates.[108] This has sparked much criticism over the years. A first-hand critique of U.S. probate as applied to small estates was offered by an Alabama probate judge:

> The judge of probate…comes in contact with the people of his county and hears a great many of their problems. One of the greatest hardships witnessed in the field of small estates occurs when probate proceedings are necessary to perfect the title to property in a decedent's beneficiary or heir at law….
>
> Mrs. Elenor Grigg, my chief officer in the probate court division, served under three probate judges prior to my election. Through the years she has witnessed the frustration and anger generated by the present system. When she has informed the beneficiary or heir of a small estate of the legal procedure necessary to obtain letters testamentary or letters of administration, the response has generally been: "It's just not worth fooling with."[109]

The *Uniform Probate Code* (UPC) is one reform introduced to offer a variety of non-judicial alternatives to the formal probate process.[110] The prevailing philosophy behind the UPC (and much state legislation) is to leave probate in the private sphere to the extent possible and have the court assume authority only where an interested person petitions the court to do so.[111]

Small estate procedures in the United States have developed in response to this probate tradition and, as a result, are, themselves, quite distinct from those available in Canada. Canadian small estate processes tend to rely on public officials (the court or the public trustee) to assume responsibility for, or at least supervise, the application process. U.S. small estate procedures vary in their requirements but some popular models involve little or no contact with the courts.

Therefore, it is important to consider to what extent particular U.S. small estate processes are appropriate models for Ontario reform. What might be termed a small estate process in the United States may not be all that different from Ontario's usual probate process. For example, some common features of U.S. small estate procedures were summarized by John H. Martin:

> Despite their variety, [small estate procedures] exhibit common features. Generally, they shorten the settlement period, accelerate distribution of assets to the beneficiaries, and place liability for the decedent's debts on the distributees. When an inventory is required, it occurs at the opening step, and may be needed solely to show the estate is qualified to use the small estate mechanism. Accountings are not required unless demanded by a beneficiary, and there are no closing procedures to satisfy. Some of the procedures allow for settlement without the use of a personal representative. Some also address concerns that use of the shortened process will be abused. Overall, privacy for beneficiaries is increased, because an alternative procedure results in briefer encounters with the court.[112]

Several of the features listed here as attributes of small estate procedures (no inventory requirement, no mandatory accounting and no closing procedures) are already common features of Ontario probate practice. It is important, then, to evaluate U.S. small estate processes on their specific requirements in relation to those required in Ontario.

The UPC provides three distinct options for administering small estates with little or no court involvement. The states have adopted these options to varying extents and have developed a myriad of other options. Wisconsin, for example, has seven different small estate procedures.[113] For present purposes, the small estate options contained in the UPC are generally representative of this broader array of options.

1. Universal Succession

First, the UPC provides an option known as universal succession (or succession without administration) which is available regardless of the value of the estate. As of 2008, these provisions had not been adopted by any states but they remain in the UPC.[114] Universal succession would permit the deceased's successors to consent to accept estate assets directly by also assuming responsibility for discharging estate obligations.[115] Successors would file a joint application with the Registrar stating, among other things, that they represent all of the competent heirs or competent residuary devisees of the estate and assuring the Registrar that there are no probate or appointment proceedings pending. They would also assume personal responsibility for (i) taxes, (ii) debts of the deceased, (iii) claims against the deceased and the estate and (iv) distribution of the estate. The Registrar would review the application for completeness and issue a statement of universal succession. There would be no court scrutiny and no appointment made. Nor would there be any obligation for applicants to give notice of the application. However, once a statement was issued, successors would have 30 days to provide notice to heirs or devisees not included in the application (due to incapacity).[116]

2. Collection by Affidavit

The UPC also has options specifically directed at small estates. Where an estate is valued at less than $25,000, a successor (that is, someone entitled to money or personal property of the deceased other than a creditor) may seek the release of a particular estate asset from any person or institution holding it on the authority of a special affidavit that protects the person or institution (although not the successor) from liability.[117] Some states require that the affidavit be filed with the court and others do not. No notice is required but the procedure may not be invoked until 30 days after the deceased's death.

The collection by affidavit option is popular and has been widely adopted in state legislation. In some states, the threshold amount for invoking this option has been increased to amounts as high as $150,000 (California) and $275,000 (Oregon).[118] The requirements for invoking the procedure vary widely from jurisdiction to jurisdiction. For example, some states require court authorization while others do not.[119] Certain states make the procedure available only to

intestacies. And some states make the procedure available to estates containing both personal and real property.[120]

3. Summary Administration

Another option is directed at estates valued at less than the total of certain statutory allowances for the surviving spouse or minor, dependent children, funeral expenses and medical expenses of the deceased. This procedure requires the appointment of a personal representative and probate of the will if there is one. The personal representative may then invoke summary administration in order to distribute the estate to those entitled without notice to creditors.[121] Again, there is much variation among the procedures adopted by different states. However, summary administration procedures generally contain some protections for beneficiaries and creditors and tend to proceed as a mini probate proceeding.[122]

The UPC small estate provisions emphasize reduced court involvement in the administration of small estates where possible. It is possible that Ontario might learn something from the U.S. system in spite of the very different probate tradition here. The small estate process recommended by BCLI was adapted from the U.S. administration by affidavit option.[123] However, it is important to keep in mind differences in the American estate administration process generally and to question the effectiveness and fairness of these summary procedures.

C. Small Estate Procedures in England

England has enacted a series of statutes that allow for certain types of assets of small value to be paid out to estate representatives without probate. These provisions are available to "a miscellany of assets including National Savings certificates, Government stock, building society funds, trade union, industrial, provident or friendly society funds, and certain pension and other payments to some public sector workers".[124] They tend generally to be payments associated with past employment, particularly in the public service, and payments due from public institutions.[125]

Most of these provisions are listed in a schedule to a general statute, *Administration of Estates (Small Payments) Act 1965 (U.K.)*.[126] They apply equally to estates with and without wills. Eligibility under the Act is typically determined in relation to the value of the individual asset being held rather than the value of the estate as a whole. Currently, that figure is £5,000 but this has not been updated since 1984.

In 2011, these small payment provisions were reviewed by the Law Commission of England and Wales as part of its project on *Intestacy and Family Provision Claims on Death*.[127] The Law Commission noted in its Report the importance of the role played by estate representatives and

"the need to ensure that they are not subjected to undue burdens, whether in terms of cost or complexity".[128] This was particularly the case for estate representatives of intestacies:

> …[W]e have to bear closely in mind the fact that administrators are unlikely to be lawyers; those who can take out letters of administration of an intestate estate are essentially those entitled to the property. They will therefore be family members; few will be lawyers, and many will not take legal advice. Intestate estates tend to be of relatively low value, and there is much to be said for keeping administrative procedures as simple as possible in order to avoid unnecessary cost and worry.[129]

The Law Commission considered whether the value cut-off for these small payment provisions should be increased. During consultations, this proposal received mixed reviews from stakeholders. Some felt that updating the value cut-off was necessary since the provisions are important to reduce costs associated with probate. Others raised the possibility that an increased ceiling would lead to a greater risk of fraud. Others emphasized the importance of probate as a public record and as the relevant date for calculating the time for bringing a claim against the estate. There was also concern expressed about the different treatment of other assets not covered by the provisions. For example, banks sometimes released assets worth up to £20,000 without probate.[130]

The Law Commission itself noted that a Non-Contentious Probate Rules working group was separately examining ways of simplifying the probate process so that estate representatives of small estates may obtain probate without legal assistance.[131] The Commission concluded that there was "considerable dissatisfaction with the current law but also considerable disagreement as to any potential reform".[132] Any reform of the small payment provisions would require more fundamental review and the Commission, therefore, recommended that the government commission such a review.[133] It does not appear that this has taken place as of yet.[134]

In addition to the small payments provisions in England, the Public Trustee also has authority and, indeed, a responsibility to administer estates of small value under the *Public Trustee Act, 1906*.[135] There are three different provisions here:

- Under ss. 2(1)(a), the Public Trustee is authorized to act in the administration of estates of small value and, under ss.2(3) it may not decline to accept a trust on the ground only of its small value. The term "small" in this context is not defined by the Act.
- Under ss. 3(1) of the Act, a family member may apply to the Public Trustee to take over the administration of an estate with a gross value of less than £1,000 and, where the beneficiaries are "persons of small means" and the Public Trustee shall

administer the estate unless there is a good reason not to do so. (Apparently, estates that are solvent and worth less than £1,000 are rare enough now that this provision has fallen into disuse.[136])

- Under ss. 3(5), where an estate of small value is before the court and the court is of the opinion that it could be more expeditiously administered by the Public Trustee, the court may order that the Public Trustee do so.

D. Small Estate Procedures in Australia

Australian small estate procedures vary from state to state (with South Australia having no such procedures at all), but in many respects the jurisdictions are roughly similar.[137] Australia has also been active in law reform initiatives in estate administration law and most of these have addressed the issue of small estates. In 2009, the National Committee for Uniform Succession Laws (National Committee) produced a comprehensive report on the *Administration of Estates of Deceased Persons*.[138] That same year, the New South Wales Law Reform Commission (NSWLRC) provided its own commentary on the recommendations contained in the National Committee's report.[139] The Victorian Law Reform Commission (VLRC) took the National Committee's recommendations into account in preparing its 2013 report *Succession Laws Report*.[140] And, in early 2014, the South Australian Law Reform Institute (SALRI) released a discussion paper addressing small estates specifically.[141]

The discussion in each of these reports tends to be organized around existing and proposed models for small estate administration. These models are as follows:

1. Election to Administer (by Public Trustee)

In most states, the public trustee or other approved representative may elect to administer small estates on filing some form of election or affidavit with the court. The election to administer option is seen as a means of avoiding the cost that would be incurred by relatively small estates if a grant were necessary.[142] The process is apparently well accepted in the different states.[143] Some states require that the public trustee give public notice of the election. However, in its Report, the National Committee suggested that this was not warranted given the small value of the estates involved (AU$100,000 was the figure proposed by the National Committee).[144]

The value ceiling for the election procedure varies from state to state. In 2009, the National Committee recommended that it be available in respect of estates that, in the opinion of the representative, have a net value of less than AU$100,000.[145] The Committee also

recommended a safety net provision requiring the representative to obtain a formal grant if the estate is later found to exceed this amount by 150 percent.[146]

Victoria has in place a variant of this election procedure known as a "deemed grant". In certain circumstances, the State Trustees may administer small estates by advertising this intention in a daily newspaper. No court filing is required. This is apparently a popular option, particularly for very small estates worth less than AU$10,000.[147] State Trustees receive a subsidy to cover the costs of this service.[148] In its report, the VLRC recommended an amalgam of the election procedure and deemed grant process. It suggested that the deemed grant process be amended to improve its procedural integrity and increase the value ceiling to AU$100,000 (with a safety net figure of 120 percent). The State Trustees would be required to file the will (if there is one) with the Probate Office and to advertise its intention to administer the estate in a searchable database on the Court's website.[149]

2. Assisted Grant (By Probate Office)

Victoria also provides for the probate office to assist estate representatives obtain a grant for small estates.[150] Eligibility for this service depends on the value of the estate but also on the relationship of the beneficiaries to the deceased. Estates valued at less than AU$50,000 qualify for assistance where the beneficiaries are limited to the deceased's partner, children or a sole surviving parent or some combination of these. Where there are other beneficiaries entitled to a share of the estate, the estate must be worth less than AU$25,000 to qualify for assistance. There is a modest fee of AU$102.70 charged for this service in addition to the standard grant application fee.[151]

The intent of this provision is to reduce the legal costs otherwise associated with a probate application. The Supreme Court of Victoria website explains it as follows:

> In eligible cases an officer of the Court (Small Estates Officer) obtains instructions from, prepares and lodges the application on behalf of the applicant. The assistance provided by the Court reduces the need for persons to retain a solicitor and acts as a legal aid service to the public.[152]

The probate office has the discretion to refer difficult applications to the Court or to a legal practitioner.[153]

In its Report, the VLRC recommended that the service be retained, reasoning as follows:

> The service saves the applicant the time they would otherwise have spent preparing a grant application. It also saves them the money they might otherwise have spent engaging a solicitor to prepare the application. It encourages those in control of small estates to obtain a full grant rather

> than choosing informal administration, potentially avoiding some of the risks of liability that may arise with the informal process.[154]

However, VLRC found that the existing AU$25,000/$50,000 dual threshold for the service was too low. It recommended eliminating the dual threshold (so that Victoria would be consistent with the other States) and choosing a single, higher threshold.[155] It ultimately chose a figure of AU$100,000, noting the State Trustees' submission that estates worth less than AU$100,000 "are unlikely to include real estate or be subject to a family provision claim, and therefore 'rarely involve administrative complexity'".[156] Although the higher ceiling might result in more complex estates using the service, VLRC noted that these could be directed to the Court or a legal practitioner as is the current practice.

As a separate recommendation, VLRC advised that the probate office should offer a package of clearly written information, "a probate pack", to assist individuals who apply for a grant without the assistance of a legal practitioner.[157]

3. Informal Administration

Certain of the Australian law reform bodies have acknowledged and, indeed, encouraged the informal administration of small estates as a legitimate alternative to a formal grant. The National Committee addressed the issue of informal administration in its recommendations:

> …the National Committee acknowledged that, in all jurisdictions, a significant number of estates are administered informally – that is, without a grant. It noted that this practice is facilitated by factors such as the joint ownership of property and the willingness of some financial organisations, such as banks, to release funds up to a specific amount without requiring the production of a grant of probate or letters of administration.[158]

The Committee determined that, given the high incidence of informal administration, it was better to address it in legislation. The Committee's tacit acceptance of informal methods of administering small estates is illustrated by the title chosen for chapter 29 of its Report: "Mechanisms to facilitate administration and to minimize the need to obtain a grant".[159]

In contrast, SALRI's recent discussion paper on small estate administration is less approving of informal administration. It states,

> In assessing each model it is important to reflect on the desirability of encouraging administration of small deceased estates by formal grant of representation, because a grant offers the best protection to beneficiaries, administrators, creditors and third parties, whatever the size of the estate.[160]

Several possible statutory mechanisms for facilitating informal administration are considered in the Australian law reform reports, including the following:

- provisions codifying the common law that protects those informally administering an estate to the extent that they make payments that would properly have been made under a grant.[161]
- provisions limiting the liability of asset-holders that release assets up to a particular value without requiring proof of a grant.
- provisions allowing for the transfer of real estate without a grant where the property is of relatively small value and the land registrar considers that the representative would succeed in an application for a grant. In this case, the representative is given the same statutory protection that would be available under a formal grant.[162]

The National Committee approved of each of these forms of statutory protection for informal administration. In particular, it recommended the adoption of a general provision protecting from liability anyone who makes payments of less than AU$15,000 in respect of an estate without requiring a grant.[163] Four years later, VLRC concurred with this recommendation but suggested that the ceiling be increased to AU$25,000.[164] This value threshold should be applied to the amount held by the particular asset-holder rather than the overall value of the estate:

> The National Committee was of the opinion that the value of the money actually held by the payer is a sufficient limitation, and that the payer should not need to ascertain the estate's value, as this may well discourage them from releasing the funds. Removing this requirement means that the focus is on ensuring simple transactions can take place smoothly regardless of the size of the estate.[165]

4. Administration by Statutory Declaration

This model is not currently used in Australia but was proposed by SALRI as an amalgam of several small estate models it studied, particularly BCLI's proposal for administration by statutory declaration. SALRI's model would permit estate representatives of small estates to file a statutory declaration in prescribed form of their intention to administer the estate. Instead of filing this declaration with the court, SALRI proposed that it be filed in an online government registry similar to existing licensing registries. The registry could be designed to reject the registration of estates valued at more than the threshold (which SALRI suggested should be AU$100,000). It might also be coordinated with the registry of deaths so that a small estate could not be registered until the death was registered. Third parties releasing assets in reliance on the declaration would be protected with a statutory provision limiting their liability. According to SALRI, this statutory declaration procedure would be very low cost to applicants. It

would provide a public searchable record of small estates while freeing up court resources and the public nature of the declaration would offer some disincentive to maladministration.

E. Developing the Best Model for Ontario

This review of small estate procedures and law reform proposals in other provinces, the United States, England and Australia offers several models that Ontario may look to for reform in this jurisdiction. However, it must be remembered that the legal context in which some of these small estate processes operate in their home jurisdiction may make it inappropriate to transplant them to Ontario. For example, Ontario does not have the treble damages awards that act as a disincentive to fraud in some states in the United States. And the estate administration tax payable in Ontario is much higher than in many of the jurisdictions discussed above.[166] Therefore, these models must be considered as a combination of elements, some of which might be useful to a small estate procedure in Ontario, rather than as fully formed models to be accepted or rejected as a whole.

VII. ISSUES FOR CONSIDERATION

Having examined the current probate system in Ontario and a range of small estate procedures available in different jurisdictions, this section turns to some specific issues raised by the possibility of a small estate procedure in Ontario.

A. The Role of the Courts in Regulating Probate

An important preliminary question that will determine whether any of the small estate processes recommended elsewhere would meet Ontario needs is about the value that Ontario places on court involvement in the administration of small estates.[167] A court-sanctioned probate process has four important benefits:

- It provides protection for the estate representative, the beneficiaries and creditors against improper administration and financial abuse.
- It impresses upon estate representatives the importance of the legal responsibilities they assume in administering an estate.
- It provides assurance to third parties that they are releasing the deceased's assets to the legally authorized representative.
- It provides a public record of the probate application. This allows others interested in the estate to discover its status and it provides a database for future research.

Although these are important benefits to those estates that are probated, it appears that a significant number of Ontario small estates are administered informally and, therefore, are not benefitting from court supervision.[168] And the decision whether or not an estate representative of a small estate must obtain probate is, for practical purposes, often made by the financial and other institutions holding the deceased's assets. In playing this role, these institutions are in some sense carrying out the same function that the court plays in a court-supervised small estate process. These institutions informally assess the validity of the will, if there is one, and the authority of the estate representative. Where the amount at stake is low, they may decide to proceed with less than optimal evidence of legal authority.

This project must consider whether this practice is consistent with the intent of Ontario's probate system and whether it is in the public interest to leave the functional control over small estates with financial institutions or whether this is something that should be explicitly regulated by Ontario law. If a legal solution is warranted, one possibility would be to formalize and structure the practice by financial institutions (maybe by setting a standard value ceiling and limiting liability). Alternatively, the Law Commission of Ontario (LCO) may conclude that the

protective function of the probate process is better housed in a dedicated, court-supervised, small estate procedure or some other public process.

In its *Final Report on Estate Administration*, the Alberta Law Reform Institute (ALRI) considered whether there should be some regulation of the practice of financial institutions to release assets without probate.[169] ALRI decided against legislative reform, stating "[i]f banks want to pay out assets informally on the basis of some indemnity or undertaking, this is a matter of policy for financial institutions."[170]

Although fraud prevention and educating estate trustees are important benefits of a grant of probate, these benefits may be legislated even outside the probate system. For example, Alberta's new *Estate Administration Act* imposes obligations on estate representatives even when they do not apply for probate.[171] Under section 10, estate representatives acting without a grant must, nonetheless, notify beneficiaries, other family members, a surviving spouse, and the Public Trustee where applicable, as to the identity of the deceased person and the estate representative and the nature of the gift left to the beneficiary.[172] This duty is enforceable by court order under section 8 of the Act, although it is unclear how a beneficiary who has not received notice would know to bring such an application. [173]

As discussed above, there has been some movement in the United States to rethink the role of courts in granting probate and, instead, explore the idea of removing estate administration from the public sphere. The *Uniform Probate Code* has been designed around the idea of letting "self-interest" govern the administration process and minimizing the role of public officials to the extent possible.[174] Critics suggest that succession without administration may lead to confusion among beneficiaries over their respective responsibilities and, potentially, to conflict.

The LCO must consider in this project where the administration of Ontario small estates should fall along this spectrum between full supervision by the courts and no supervision at all. A greater role for courts may increase costs and reduce accessibility. A reduced role for courts may lead to decreased costs but may also compromise the fairness and efficacy of the process.

Questions for Feedback:

8. Currently, probate means that the will (if there is one) and the appointment of the estate representative undertaking to administer the estate have been approved by the court. Should some form of court approval be a required element of a small estate procedure?

9. The South Australian Law Reform Institute (SALRI) has proposed an online searchable registry of probate applications as an alternative to court approval. (See page 40 above.) Would an online searchable registry be an appropriate model for a small estate procedure in Ontario? Why or why not?

B. Eligibility Requirements for a Small Estate Procedure

1. Value Limit

If the LCO concludes that a simplified court-supervised probate process for small estates would be the best means of balancing the public interest in procedural protection with the values of affordability and accessibility, the next step will be to consider what estates should be eligible for such a process. The appropriate value limit will depend, in part, on the degree of protection provided by the recommended small estate procedure.

As discussed above, value limits for small estate procedures in other jurisdictions range from amounts as small as $3,000 to amounts as large as $275,000. Of course, the value limit most appropriate for a small estate procedure will depend to some extent on the type of procedure adopted. For example, a higher value limit might be justified where there is a higher degree of protection built into the procedure. A relatively low value limit might be appropriate for a resource-intensive procedure such as a court-assisted grant in order to prevent overwhelming the court with applications. The value limit will also depend on the method of calculation chosen. A lower limit would presumably be appropriate where the procedure facilitates the transfer of individual assets value rather than an entire estate.

Any amount chosen as a limit for a small estate procedure in Ontario must also be consistent with analogous value limits in other Ontario legislation. For example, one benchmark might be the amount set aside as the preferential share for a surviving spouse in an intestacy under the *Succession Law Reform Act*.[175] Currently this is set by regulation at $200,000.[176] On the other end of the scale, another benchmark might be the $10,000 amount that may be paid out by the Children's Lawyer to a parent or guardian on behalf of a child without proof of guardianship.[177] A similar option is the $20,000 amount that the Ontario Public Guardian and Trustee may release to heirs or a personal representative without a Certificate of Appointment of Estate Trustee (COA).[178]

There are several other factors also to be considered in choosing a single, meaningful number as the value limit for a small estate procedure, such as the following:

- Value is a relative concept which is perceived differently depending on the personal circumstances of the valuer. A so-called "small" estate may be small in the eyes of some Ontarians but very significant for others.
- From the perspective of estate beneficiaries, the value of their share of the estate may be influential in their assessment of the cost of obtaining probate. For example, $1,000 may be seen as a reasonable price for obtaining probate where the estate is worth $10,000 and the spouse of the deceased is the sole beneficiary. However, that same amount may seem unreasonably expensive where the estate must be divided among the deceased's five children and each beneficiary can expect to receive only $2,000. Also, the cost may actually increase because of the extra effort in sending notice to five beneficiaries. Of course, just as the value of the estate must be divided five ways, so too will the costs. Therefore, the perception of disproportionate costs here may be more apparent than real.
- As one stakeholder pointed out, the issue of value cannot be separated from the issue of validity. For example, an estate may be small only because, when the testator was alive, someone was using undue influence to pilfer it over time. Alternatively, additional assets may be discovered later on that increase the value of the estate.

Another possibility is to include other criteria in addition to monetary value in defining a small estate for the purpose of a small estate procedure. The best example of this is Victoria's existing small estate procedure for small estates valued at less than $25,000 but also available to estates up to $50,000 where beneficiaries are restricted to the deceased's partner, children and/or sole surviving parent. The Victorian Law Reform Commission recommended eliminating this dual limit in the interests of consistency with other Australian states.[179] However, this may be worth considering in Ontario as a means of better managing the risk of improper administration while making the procedure available to a larger number of small estates.

Another consideration here is how the value limit of small estates should be calculated. Most small estate procedures are defined in relation to the overall value of the estate, either gross value or net value after the deceased's debts are paid. However, some small estate procedures are defined in relation to the value of the deceased's assets being held by a particular asset-holder.[180] Also, some jurisdictions have adopted dual limits to allow for a margin for error in the initial estimate of the value of an estate. Thus, if the estate representative finds in the course of administering the estate that its actual value is higher than estimated, there is another higher limit to determine whether the representative is required, at that stage, to apply for probate.[181]

Questions for Feedback:

10. What should be the maximum value of a small estate eligible for a small estate procedure in Ontario? Should this amount be calculated based on the gross or net value of the estate?

11. In some jurisdictions, there are two value limits set for a small estate procedure. One value limit establishes which estates are small enough to be eligible for the process. If those estates are later learned to have a higher value than originally thought, a second, slightly higher, value limit applies to determine whether or not the estate must then apply for full probate. Would this kind of dual value limit be suitable for an Ontario small estate procedure?

2. Other Requirements

Consideration must be given to the kind of assets typical of small estates. Many jurisdictions provide small estate procedures only where the estate does not include real property. This seems reasonable particularly since real property tends to be valued in excess of the typical small estate value limit. However, this is not necessarily the case, particularly in rural communities where an estate may include real estate of a relatively low value. In defining eligibility for a small estate process, it will be important to consider the circumstances of stakeholder groups in different areas of Ontario.

Although the value of the assets in a small estate is necessary information for a COA application, there is no reason that the nature of those assets should be relevant to the application. However, the type of assets making up a small estate becomes very significant if administering it without probate. This is because the policies and practices for releasing assets without probate vary among different institutions and according to asset-type.

It will also be important to consider in what circumstances a small estate procedure will not be appropriate. There are a variety of complexities that may require the full procedural protections associated with probate regardless of the small value of the estate. A prime example is the possibility that a beneficiary lacks capacity. Another possibility may be where there is no will (and therefore, no *prima facie* evidence that the estate representative has authority to act). Jurisdictional issues may also complicate a small estate. For example, a small

estate process may not be appropriate where the executor or the beneficiaries live outside Ontario or where the estate contains foreign assets.

Questions for Feedback:

12. Please identify any of the following characteristics that you think should make estates ineligible for a small estate procedure:
    - ☐ There is a will
    - ☐ There is no will
    - ☐ Estate includes real property assets
    - ☐ Beneficiaries who are minors or incapable
    - ☐ Other characteristics – please specify

    Please explain.

C. Accessing Financial Information without Probate

In some cases, financial institutions refuse to provide information about the value of the assets they hold on behalf of a deceased, citing privacy concerns. Since a valuation of the assets in the estate is required information to obtain probate, the refusal to disclose this information puts applicants in a Catch-22 situation. This problem has become more prevalent with the introduction of stricter privacy legislation.[182]

It is not yet clear the extent to which this is a practical problem for Ontario small estate representatives. However, it was enough of a problem in British Columbia that the province addressed it in their new Probate Rules. Where a B.C. applicant has filed a complete application except for the affidavit of assets and liabilities, Rule 25-4 requires that the Registrar issue an Authorization to Obtain Estate Information (Form P18). The applicant may deliver this Authorization to financial institutions requiring them to share information about the assets being held. Where a financial institution refuses to cooperate, Rule 25-8 allows the applicant to seek a court order requiring it to comply.[183]

The Alberta Law Reform Institute also considered this issue in its recent *Final Report on Estate Administration*.[184] ALRI noted that financial institutions are subject to both federal and provincial privacy laws that prevent them from releasing information to anyone other than an authorized representative of the deceased.[185] ALRI suggested possible ways to get around this problem. For example, a nominal value might be used for the purpose of the probate application with the understanding that this would be corrected once probate was granted and

the true value available. Or, an applicant might apply to the court for a temporary appointment in order to obtain the information, after which the application would be completed. However, ALRI concluded that these measures were not necessary. The consultations revealed that most people did not experience difficulty obtaining information. Instead of a legislative solution, ALRI encouraged educational initiatives.

Questions for Feedback:

13. Probate and small estate procedures both require estate representatives to provide a valuation of the estate. In some cases, banks are reluctant to release this information without probate.
    a. Do you see this as a problem in Ontario?
    b. Should Ontario have a mechanism requiring financial institutions to disclose before probate the value of the assets that they hold for a deceased?

D. Filing the Deceased's Final Tax Return without Probate

The Canada Revenue Agency (CRA) is sometimes strict about requiring a COA before accepting the deceased's final return from an estate representative. This requirement may cause significant injustice where the estate has little or no value and a COA would not otherwise be necessary to administer the estate.

The CRA's concern is to protect taxpayer confidentiality as required by subsection 241(1) of the *Income Tax Act* and other federal law.[186] Subsection 241(1) is a very detailed provision protecting taxpayers against disclosure of their confidential information in unauthorized circumstances. The circumstances in which it is permissible for CRA to disclose information to the legal representative of a deceased taxpayer is not explicitly addressed. In practice, the decision whether or not a COA is required is left to the discretion of individual officers who consider a large number of factors including the size of the estate and whether or not there is known to be strife among the family members.

Any recommendation for a small estate process in Ontario must consider the implications of CRA policy and practice and whether Ontario might work with the federal government to adapt CRA practices to a small estate process.

Questions for Feedback:

14. Federal authorities such as the Canada Revenue Agency are bound by privacy and other laws requiring them to deal only with legally authorized representatives of a deceased. How might an Ontario small estate procedure be designed in light of these requirements?

E. Role of the Public Guardian & Trustee

The Ontario PGT's policy not to be involved in administering estates worth less than $10,000 is a bit different from the role of other public trustees in administering small estates without the need for court appointment.[187] This contrasting practice in other jurisdictions raises the question whether Ontario's PGT should play a similar role here and, if so, whether it would be appropriate to relax or remove the COA requirement in these circumstances. Also relevant to this issue, of course, is the resource constraints that the PGT faces at current funding levels. As noted above, the LCO is of the preliminary view that the PGT should not be undertaking a new role in administering small estates.

Questions for Feedback:

15. Should the Public Guardian and Trustee be involved in small estate administration in Ontario? If so, how?

F. Procedural and Evidentiary Requirements of a Small Estate procedure

With all court processes, there is a balance to be struck between the procedural safeguards necessary to achieve justice and the greater accessibility possible when these procedural safeguards are relaxed. This compromise is reflected throughout Ontario's court system. For example, the full procedural protection offered by the *Rules of Civil Procedure* where relatively large amounts of money are subject to a legal claim are loosened for the smaller value claims governed by the Simplified Procedure in Rule 76 and even smaller claims directed to the Small Claims Court.[188] Of course, these are adversarial processes with distinct procedural safeguards and are not directly analogous but the compromise between accessibility to the procedure and procedural protection is the same.

This trade-off is also illustrated by other Ontario laws. The *Public Guardian and Trustee Act* provides that, where the PGT is holding property on behalf of a deceased, a COA is sufficient authority for the PGT to release the property to the estate representative.[189] However, the provision also relaxes this procedural protection where small amounts are in issue. The PGT has discretion to distribute property to representatives on the basis of other satisfactory evidence of authority where the amount in issue is less than $20,000. The PGT is protected from liability so long as the payment is prudent and made in good faith.[190]

Another example of this trade-off is contained in the *Children's Law Reform Act* which allows for money or personal property owing to children and valued at less than $10,000 to be made directly to the parents or custodians without proof of guardianship.[191]

These examples illustrate that in some circumstances it is considered acceptable to compromise the procedural protections associated with a full court process in order to ensure that lower value matters receive the benefit of a court process proportionate to their value. A key question underlying this project is where this balance should be struck in respect of small estates accessing Ontario's probate system.

In considering how best to facilitate access to justice for small estates, it is important to keep in mind the underlying function of Ontario's probate system to ensure that estate administration is fair and orderly and accords with the testator's intentions and succession law. Some stakeholders have suggested that it may be difficult to simplify the system without hampering this function. For example, although a small estate process that is navigable by laypeople might lead to increased efficiency and significant cost savings, this must be balanced against the important function that lawyers play, both individually (by educating applicants as to their role and responsibilities) and collectively (as a check against fraud).

1. What application requirements may be dispensed with?

Some of the complexity of estates administration is due to the wide range of different circumstances it must address. For example, different procedural requirements are necessary to establish authority depending on whether there is a will or not. There are numerous other variables as well that may necessitate specific procedures. A challenge in this project is to determine what procedural and evidentiary requirements of the existing probate process might be dispensed with while ensuring that the resulting small estate process achieves its purpose.

2. Dispensing with the security requirement?

Particularly ripe for reform is the current requirement that an applicant post an administration bond where (a) there is no will or the applicant is not named in the will, and (b) where there is a will but the executor does not live in the jurisdiction.[192] There has been increasing pressure from the estates bar to eliminate or, at least, relax these requirements.[193]

Under section 37 of the *Estates Act*, administration bonds must be double the amount of the estate.[194] This is arguably excessive and may deter family members from seeking a COA. Furthermore, bonding companies require personal information from the applicant which can also be a deterrent. In practice, practitioners almost always seek a court order dispensing with the bond requirement. This is most often granted however it requires a court application which is clearly a potential barrier for an estate representative with no legal assistance. In British Columbia, the *Wills, Estates and Succession Act* has dispensed with an automatic security requirement for applicants, requiring security only where there are minors or incapable beneficiaries interested in the estate.[195]

Questions for Feedback:

16. Which of the current requirements for obtaining probate in Ontario should continue to be required under a small estate procedure?
    - ☐ Affidavit of execution of will
    - ☐ Notice to beneficiaries
    - ☐ Notice to PGT or Children's Lawyer where minor or incapable beneficiaries
    - ☐ Public record of estate trustee
    - ☐ Consent of beneficiaries entitled to majority of assets (where no will or no executor named)
    - ☐ Administration bond
    - ☐ Other – please specify

    Which of the current requirements could be dropped? Please explain.

G. Implementation and Accessibility

Whatever small estate process the LCO might recommend, its success would depend in large part on its administration by the government and its presentation to the public. Accessibility of the process to laypeople would be a crucial determinant of its success. A key assumption

underlying procedural simplification for small estates administration is that do-it-yourself measures, including legal self-help materials, significantly reduce an administrator's expenses by eliminating the need for a lawyer.

Ontario's probate process is currently relatively costly and complex, generally requiring the assistance of a lawyer to navigate. The application process involves numerous forms and is somewhat unwieldy for that reason.[196] The Ministry of Attorney General's website offers applicants basic guidance on its "Frequently Asked Questions About Estates" page, including, for example, information regarding where to obtain a COA application.[197] That links to a website hosting court forms, including COA application forms in writable PDF files.[198] There is also a link to information about common errors encountered when completing applications.[199] The latter information contains links to estates law resources, including a link to the Estates & Trusts "How-tos" developed by the Law Society of Upper Canada (LSUC).[200] The LSUC guides include technical glossaries, but these are not in plain language. For example, the definition of a "will" is a "testamentary instrument that must be made in writing." The phrase "testamentary instrument" remains undefined. Therefore, although guides to the COA process are reasonably accessible to the public, legal assistance generally remains necessary.

Jurisdictions with small estate procedures have adopted a range of public education techniques. Canadian provinces generally offer limited information about small estate procedures on their court websites and they discourage applicants from applying for probate without legal advice. For example, the online public interface for the small estate processes in Manitoba and Saskatchewan are currently piecemeal, comprising different websites and incomplete guidance. British Columbia is an exception. The new *Probate Rules* are accompanied by plain language forms that guide laypeople through the required information.

In contrast to the Canadian jurisdictions, New York appears to reflect "best practices" in the implementation of small estate processes. New York has a Small Estates Affidavit procedure (SEAP) applicable to estates consisting only of personal property and having a value not exceeding US$30,000.[201] The process is clearly designed and accessible through an interactive plain language tool which guides applicants through the process of filling out the necessary affidavit. Selected information is available in other languages such as Spanish, French and Chinese.[202] The webpage has a clear description of the eligibility requirements for the program and a checklist of information needed to complete the program. The SEAP interactive module directs the user along a virtual pathway with enumerated "stopping points" that recede into the distance. Guidance is offered at each stop with simply worded pop up bubbles. As the questions are answered, the user appears to get closer to a courthouse visible in the distance. Upon finishing the program, the user can print technical instructions (also available in Spanish)

as well as the completed affidavit. Court staff are specially trained to assist the public in using SEAP and related programs. However, users are advised, on a FAQs page, that it is always best to speak with a lawyer about one's particular situation and of where to find an attorney should they need one.[203] SEAP has received some positive user feedback, suggesting that users perceive the program as helping them to successfully complete the affidavit procedure without a lawyer's help.

Relative to other jurisdictions examined, SEAP appears to be a successful delivery structure allowing New Yorkers to file the Small Estate Settlement form without a lawyer. Part of its success may be the repetition of basic information (e.g., how to get a death certificate, not to sign an affidavit unless before a notary); and its delivery from a single web platform, reducing the likelihood that individuals will search for (potentially erroneous) information elsewhere.

Questions for Feedback:

17. Should the government and/or courts provide greater assistance to people without a lawyer who are applying for probate for a small estate?
    a. If so, what kind of assistance would be appropriate? (Telephone help line, duty counsel at court registry offices, service for having affidavits sworn, other)
    b. Would it be appropriate to charge a modest fee for these kinds of services?
    c. If so, would it be preferable to charge a set fee or a fee based on the value of the estate?

H. Impact of Ontario's New Audit and Verification Regime on a Small Estate Process

The province is in the process of developing a new regime to be administered by the Ministry of Finance that will allow the government to audit COA applications and require proof of the valuation of estate assets. Some have expressed concern that these new requirements will significantly complicate the application process.[204] Assuming that this proposed audit procedure proceeds, this may have implications for the advisability and development of a small estate process in Ontario.

VIII. POSSIBLE OPTIONS FOR REFORM

Having sifted through the various small estate procedures in use or proposed in other jurisdictions, and taking into account various issues specific to the Ontario context, the Law Commission of Ontario (LCO) suggests some possible options for small estates reform in Ontario. These are preliminary options intended to form a basis for consultations. The LCO welcomes suggestions from stakeholders and will carefully consider the input received during the consultation process in developing recommendations for the final report.

A. Status Quo

The first option is the status quo. This would mean that all Ontario estates would continue to be subject to the existing probate process. Perhaps the problem of administering small estates is not significant enough to merit relaxing the important procedural protections associated with probate. Some stakeholders have suggested that the probate process is not broken and need not be fixed. In order to assess this, it is important to hear from as many Ontarians as possible about their experience probating small estates under the current probate process.

However, as a result of its preliminary research and investigations, the LCO has tentatively concluded that some form of small estate procedure would be beneficial in Ontario.

B. Court-Assisted or Facilitated Probate

This option is to retain the current probate process for estates of all values but to develop improved public information or programs or both to assist individuals applying for probate for small estates where they do not have a lawyer. This option emphasizes the importance of court scrutiny in protecting estates, beneficiaries and asset-holders from improper administration and ensuring that the transfer of wealth after death is orderly and carried out in accordance with testator intentions or succession law. In particular, this model would ensure that beneficiaries continue to be given notice of a probate application. However, the model also likely means that, in the absence of a dedicated small estate procedure, some small estate representatives will continue to bypass the probate procedure and administer the estate informally where they are able to convince asset-holders to release estate assets without probate.

One approach to facilitating use of the current probate process for small estates is B.C.'s decision in their new *Wills, Estates & Succession Act* (WESA) to simplify probate application forms generally rather than adopting a separate small estate process.[205] Another approach is an

assisted-grant procedure similar to that in Saskatchewan or Victoria, Australia. Here, the legislation contemplates court staff taking an active role in helping applicants to complete the probate application essentially as a legal aid service. In Ontario, such a program would require a significant infusion of financial and other support from the Ontario government. It is worth noting that, in recommending a court-assisted small estate process for Victoria, the Victorian Law Reform Commission (VLRC) was suggesting that an existing program continue with an increased threshold, rather than recommending the creation of an entirely new program (as would be necessary in Ontario).[206]

Improved public information about the probate system would be a particularly important element of this option. For example, VLRC recommended that the court create a "probate pack" providing clear, comprehensive, readily available public information in community languages so that estate representatives may obtain a grant without legal assistance. Of course, such public information is only successful to the extent that it is actually accessible by applicants. This is discussed further below.

C. Simplified Probate Process

This option would involve a small estate process that is court-sanctioned but with reduced procedural and evidentiary steps.

Examples of this model might include the specialized court procedures available to small estates in Saskatchewan and Manitoba. However, these procedures require applicants to bring a court application and it is not clear what other procedural or evidentiary requirements are involved. Neither jurisdiction seems to require that beneficiaries receive notice of an application.

This model is also similar to the summary administration procedures adopted in some American states. In considering this model, a key question is whether it is possible to relax or eliminate any of the evidentiary or procedural requirements currently necessary to obtain probate without creating uncertainty about the legitimacy of the application and making it inappropriate for a court to approve it.

D. Administration by Statutory Declaration

This option would involve a small estate process that requires registration with the court (or a government website) but no court scrutiny and no grant. In the absence of a formal grant, a statutory release of liability would protect asset-holders who rely on the statutory declaration.

There are numerous variations of this model in operation in the United States and versions of it have been proposed by British Columbia Law Institute (BCLI) and South Australian Law Reform Institute (SALRI) in their reports on small estate administration. The key element of this model is that it attempts to establish a middle ground between no court supervision at all and a formal grant of probate. The statutory declaration or affidavit is generally a streamlined document that varies in the amount of information required and notice requirements but is simpler than a traditional probate application. The declaration is registered with the court or a government agency. Registration does not purport to verify the contents of the declaration as probate would, but it creates a public record of the estate and the name of the estate representative and it signals to the representative the legal responsibilities required of the position. Registration also establishes a date for calculating time limits for claims against the estate and other claims.

In order for this option to work, it would probably be necessary to relax some of the procedural and evidentiary requirements that are currently necessary to obtain probate. One of the reasons that the government chose not to implement BCLI's proposal for administration by statutory declaration was that the proposed declaration form would have required much of the same information that a usual probate application requires (including a list and valuation of the estate assets, a list of debts and a statement that the applicant has made reasonable efforts to locate creditors of the estate, a list of beneficiaries and their entitlement, and an obligation to send a copy of the declaration to each of the beneficiaries).[207] The government noted that "[t]he benefit of the small estate procedure was that it would be simpler and faster. The new probate rules have prescribed forms very similar to the small estate declaration proposed by the British Columbia Law Institute".[208]

In contrast, SALRI's suggested version of a declaration under this model would not contain any details of the will, if there is one, other than the name of the deceased and the executor. Nor would it identify beneficiaries or creditors of the estate.[209] In spite of this, SALRI suggested that the administration by declaration model had benefits for everyone involved, particularly where the declaration was put into a public, searchable registry rather than being filed in court. Beneficiaries, creditors and third parties would have free online means of locating an estate

and its administrator, it would free up court resources, and it would be appreciably easier for estate representatives to complete the paperwork and get on with administering the estate.[210]

Although this option seems attractive, the counterbalancing factor to be taken into account is the potential for increased risk of fraud or improper administration without the procedural safeguards traditional to the probate process.

E. Public Trustee's Election to Administer

Versions of this option are common in other jurisdictions in Canada, England and Australia. The public trustee is given discretion in certain circumstances to administer small estates with varying degrees of court involvement but, generally, something less than a full formal grant. In some jurisdictions such as Alberta, Saskatchewan and Victoria, no grant is necessary (sometimes called a "deemed grant"). In Alberta, New Brunswick, Northwest Territories and most jurisdictions in Australia, the public trustee may elect to administer a small estate on filing a written election or affidavit with the court. Notice to beneficiaries may or may not be required under this model.

This option would only ensure the administration of small estates that the Public Guardian and Trustee chooses to accept. BCLI noted in its Small Estates Report that this traditional model for administering small estates was not in keeping with the more modern role of the public trustee in British Columbia. The LCO tentatively suggests that the same conclusion should be drawn in Ontario but invites comments on this point.

F. Informal Administration

This final option reflects the reality that many small estates are administered without any court involvement at all. To a large extent this model is truly informal in that there is no public regulation but, instead, private dealings between estate representatives and asset-holders. However, in some jurisdictions this practice is facilitated by statutory provisions offering limited liability to asset-holders who decide to release assets without probate.

In some cases, such as in England, statutory protection for releasing assets without probate is offered only in respect of certain assets. In contrast, the National Committee for Uniform Succession Laws (National Committee) and the VLRC recommended in their reports a general provision protecting anyone releasing small amounts in respect of an estate. It seems that there has also been some call in England for standardizing the procedures of various financial and other asset-holding institutions for releasing assets without probate.[211]

The issue here is whether Ontario should focus on law reform directed at court procedures making probate more accessible to small estates or whether it should also consider how to facilitate the administration of those small estates that never enter the court process at all.

G. Summary

In considering the six options above, the LCO suggests that a preliminary issue is whether or not Ontario's existing court supervision model can be made cost-effective for small estates. This involves looking at possible options for assisting applicants in using the existing probate process without the need for legal assistance, such as some form of court service to assist applicants, or enhanced public information or procedures for guiding individuals through the probate process such as developing online applications, or some combination of these methods of assistance.

If it is determined that court supervision is just not economically feasible for a significant number of small estates in Ontario (therefore rejecting models A and B above), there are three ways of proceeding. First is to adopt some other more relaxed process that attempts to stand-in for court protection (models C or D above). Second is the possibility of charging the PGT with the responsibility for administering at least some small estates (model E above). Third is simply to accept and facilitate informal administration by statutorily protecting third parties who release assets without probate (model F above).

Questions for Feedback:

18. This project is considering whether Ontario should create a simplified process for administering small estates.
    a. Do you think this would be a good idea?
    b. If so, which of the following options for small estate reform would be most effective? (Please read the description of these options at pages 54 to 58, and then check those that you think would be most effective.):
        - ☐ Model A: Status Quo
        - ☐ Model B: Court-assisted or facilitated probate
        - ☐ Model C: Simplified court-sanctioned probate
        - ☐ Model D: Administration by statutory declaration
        - ☐ Model E: Public Guardian & Trustee's election to administer
        - ☐ Model F: Informal administration
        - ☐ Other

c. Please explain your choice/choices.

19. There are many interests engaged in the administration of small estates.

a. In considering reform to the probate process, which of the following should the LCO be particularly concerned to protect:

- ☐ The intentions of the deceased
- ☐ The estate representative
- ☐ Beneficiaries
- ☐ Financial institutions
- ☐ Creditors
- ☐ Others –please specify

b. Please explain briefly how the interests you have identified would benefit from reform of the probate process for small estates.

IX. WE WANT TO HEAR FROM YOU

This project addresses the concern that the cost of obtaining probate in Ontario may be disproportionate to the value of small estates, thereby discouraging the use of probate for those estates. The project explores different models for administering small estates and considers whether there should be a simplified small estate process in Ontario and, if so, what form that small estate procedure should take.

Many people from different sectors have something of value to contribute to the Law Commission of Ontario's (LCO's) work in this project. We want to hear from you, whether you are an individual who has been involved in administering a small estate, a beneficiary or creditor of a small estate, an estates lawyer or other professional, or in any other way interested in the issues raised in this report.

Our consultation period runs until **December 11, 2014**. There are many ways to express your views or help us hear from those affected by this project:

- Complete the easy questionnaire posted on our website: http://www.lco-cdo.org/en/small-estates-consultation-questionnaire.

- Send us your comments in writing, by fax, in an email or in our online comment box. We are particularly interested in answers to the consultation questions asked in this paper, but welcome comment on any aspect of small estate administration in Ontario.

- Give us a call and arrange a time to talk about your experiences in person or on the telephone.

- Help us arrange a focus group of your peers.

- We can arrange to travel to different parts of the province or to set up web consultations.

- You may have other suggestions for how you can best express your views or help others tell us their experiences.

We will make every effort to have consultations in appropriate languages; however, the LCO's resources are not extensive and we would appreciate suggestions about how to address this issue.

Please get in touch with us or send in your submission by Thursday, December 11, 2014.

CONTACT INFORMATION FOR THE LAW COMMISSION OF ONTARIO

Tel: 416.650.8406
Toll-Free Tel: 1.866.950.8406
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Toll Free TTY: 1.877.650.8082
Fax: 416.650.8418
lawcommission@lco-cdo.org

Questionnaire: http://www.lco-cdo.org/en/small-estates-consultation-questionnaire.

Explain that you are interested in talking about the Small Estates project and someone will discuss with you how you can participate in a way that works for you.

APPENDIX A: MEMBERS OF THE SMALL ESTATES ADVISORY GROUP

Holly Allardyce - Scotia Private Client Group
Monique Charlebois - Office of the Public Guardian and Trustee
Laura Craig - Ministry of the Attorney General, Court Services Division
Ian Hull - Hull & Hull LLP
Hilary Laidlaw - McCarthy Tetrault LLP
Suzanne Michaud – Royal Bank of Canada, RBC Law Group
Satie Seeraj - Ontario Superior Court of Justice, Estates and Assessments
Georgia Swan - HGR Graham Partners LLP
Jasmine Sweatman - Sweatman Law
Mary-Alice Thompson - Cunningham Swan LLP
The Honourable Mr. Justice Kevin Whitaker - Ontario Superior Court of Justice

APPENDIX B: SUMMARY OF RULE 74, *RULES OF CIVIL PROCEDURE*

Rule 74, *Rules of Civil Procedure* Requirements for COA Applications **With a Will**	**Rule 74, *Rules of Civil Procedure* Requirements for COA Applications** **Without a Will**
• 74.04 = An application is in form 74.4 or 74.5 and requires: o Name, address and last occupation of deceased o Place and date of death o Date of last will and any codicils o Age of deceased at date of will o Marital status of deceased, married or divorced after will o Is witness also a beneficiary? o Value of assets (net value of real property) o Are there beneficiaries other than applicant? o Explain why applicant entitled to apply (if not named as executor)	• 74.05 = An application is in form 74.14 and requires: o Name, address and last occupation of deceased o Place and date of death o Applicant's belief that there is no will o Marital status of deceased, other marriages or divorces o Persons entitled to share in estate and relationship to deceased o Value of assets (net value of real property) o Explain why applicant entitled to apply (s.29 *Estates Act* – order of those entitled to apply)
• An application must be accompanied by: o original will and any codicils o notice of application to all beneficiaries (notice to OPGT and Children's Lawyer where appropriate) o affidavit of service of notice of application o affidavit of execution of will o for holograph wills, additional affidavit re handwriting and signature o for wills with any alterations, additional affidavit as to condition of will at time of execution o renunciation from any other person named as estate trustee in the will o if applicant not named in will, consent	• An application must be accompanied by: o notice of application to all beneficiaries (notice to OPGT and Children's Lawyer where appropriate) o affidavit of service of notice of application o renunciation from any person who is prior to applicant o consent to COA by beneficiaries entitled to majority of assets o administration bond

to COA by beneficiaries entitled to majority of assets o draft order granting COA (where assets named in will) o administration bond where applicant is not named in will or is outside Ontario • 74.06 = rules for successors to estate trustees • 74.11 = where applicant is non-resident or not named in will, rules for obtaining administration bond • 74.12 = procedure on applications for COA. Court must receive from Estate Registrar certification that: (1) no other application has been filed (2) that there is no notice of objection and (3) there is no other relevant will deposited with the Registrar. • 74.13 = rules for payment of estate administration tax • 74.14 = Registrar may issue a COA unless application is not complete or there is some doubt as to the information, in which case application referred to judge • 74.15 = provision for beneficiaries to seek court orders such as requiring applicant to provide a statement of assets of estate or requiring ET to pass accounts	• 74.05.1 rules for nominees of foreign estate trustees • 74.07 = rules for successors to estate trustees • 74.11 = rules for obtaining administration bond • 74.12 = procedure on applications for COA. Court must receive from Estate Registrar certificates that: (1) no other application has been filed (2) that there is no notice of objection and (3) there is no other relevant will deposited with the Registrar. • 74.13 = rules for payment of estate administration tax • 74.14 = Registrar may issue a COA unless application is not complete or some doubt as to the information, in which case application referred to judge • 74.15 = provision for beneficiaries to seek court orders such as requiring applicant to provide a statement of assets of estate or requiring ET to pass accounts

APPENDIX C: QUESTIONS FOR CONSIDERATION

1. Have you been involved in administering what you consider to be a small estate or estates? Briefly explain your experience.

2. In your opinion, what is the maximum value that an estate can have and still be considered a "small" estate?

3. Do you think that the cost of probating a small estate in Ontario is reasonable relative to its value? If not, what parts of the process are unreasonably costly?

4. What difficulties tend to arise in obtaining probate specifically for small estates? Please briefly explain the basis for your answer. (For example, handwritten or altered wills, difficulty obtaining affidavits from witnesses to a will, difficulty locating beneficiaries, difficulty valuing the assets, minor or incapable beneficiaries, family disputes, other)

5. What difficulties tend to arise in administering small estates without probate?

    a. How difficult is it to get financial institutions or others to release the deceased's assets?
    b. How difficult is it to file the deceased's final tax return with the Canada Revenue Agency?

    Please briefly explain the basis for your answer.

6. Where financial institutions release small value assets without requiring probate, do you think that this increases the risk of the assets falling into the wrong hands? If so,
    a. How serious is this risk?
    b. Are you aware of cases where the assets of an estate have fallen into the wrong hands? Explain.

7. Where financial institutions agree to release small value assets to an estate representative without probate,
    a. Should financial institutions be protected from liability?
    b. What standard of care should be expected of financial institutions before they are protected from liability?

8. Currently, probate means that the will (if there is one) and the appointment of the estate representative undertaking to administer the estate have been approved by the

court. Should some form of court approval be a required element of a small estate procedure?

9. The South Australian Law Reform Institute (SALRI) has proposed an online searchable registry of probate applications as an alternative to court approval. (See page 40 above.) Would an online searchable registry be an appropriate model for a small estate procedure in Ontario? Why or why not?

10. What should be the maximum value of a small estate eligible for a small estate procedure in Ontario? Should this amount be calculated based on the gross or net value of the estate?

11. In some jurisdictions, there are two value limits set for a small estate procedure. One value limit establishes which estates are small enough to be eligible for the process. If those estates are later learned to have a higher value than originally thought, a second, slightly higher, value limit applies to determine whether or not the estate must then apply for full probate. Would this kind of dual value limit be suitable for an Ontario small estate procedure?

12. Please identify any of the following characteristics that you think should make estates ineligible for a small estate procedure:
    - ☐ There is a will
    - ☐ There is no will
    - ☐ Estate includes real property assets
    - ☐ Beneficiaries who are minors or incapable
    - ☐ Other characteristics – please specify

    Please explain.

13. Probate and small estate procedures both require estate representatives to provide a valuation of the estate. In some cases, banks are reluctant to release this information without probate.
    a. Do you see this as a problem in Ontario?
    b. Should Ontario have a mechanism requiring financial institutions to disclose before probate the value of the assets that they hold for a deceased?

14. Federal authorities such as the Canada Revenue Agency are bound by privacy and other laws requiring them to deal only with legally authorized representatives of a deceased.

How might an Ontario small estate procedure be designed in light of these requirements?

15. Should the Public Guardian and Trustee be involved in small estate administration in Ontario? If so, how?

16. Which of the current requirements for obtaining probate in Ontario should continue to be required under a small estate procedure?
    - ☐ Affidavit of execution of will
    - ☐ Notice to beneficiaries
    - ☐ Notice to PGT or Children's Lawyer where minor or incapable beneficiaries
    - ☐ Public record of estate trustee
    - ☐ Consent of beneficiaries entitled to majority of assets (where no will or no executor named)
    - ☐ Administration bond
    - ☐ Other – please specify

    Which of the current requirements could be dropped? Please explain.

17. Should the government and/or courts provide greater assistance to people without a lawyer who are applying for probate for a small estate?
    a. If so, what kind of assistance would be appropriate? (Telephone help line, duty counsel at court registry offices, service for having affidavits sworn, other)
    b. Would it be appropriate to charge a modest fee for these kinds of services?
    c. If so, would it be preferable to charge a set fee or a fee based on the value of the estate?

18. This project is considering whether Ontario should create a simplified process for administering small estates.
    a. Do you think this would be a good idea?
    b. If so, which of the following options for small estate reform would be most effective? (Please read the description of these options at pages 54 to 58 above and then check those that you think would be most effective.):
        - ☐ Model A: Status Quo
        - ☐ Model B: Court-assisted or facilitated probate
        - ☐ Model C: Simplified court-sanctioned probate
        - ☐ Model D: Administration by statutory declaration
        - ☐ Model E:Public Guardian & Trustee's election to administer

- ☐ Model F: Informal administration
- ☐ Other

Please explain your choice/choices.

19. There are many interests engaged in the administration of small estates.
    a. In considering reform to the probate process, which of the following should the LCO be particularly concerned to protect:
        - ☐ The intentions of the deceased
        - ☐ The estate representative
        - ☐ Beneficiaries
        - ☐ Financial institutions
        - ☐ Creditors
        - ☐ Others – please specify

20. Please explain briefly how the interests you have identified would benefit from reform of the probate process for small estates.

ENDNOTES

[1] A 2012 survey by CIBC found that 84% of Canadians with a will say that they have named a family member or friend as executor: Canadian Press, "Where There's A Will, There Better Be A Qualified Executor", *Winnipeg Free Press*, June 23, 2012, B13. Online: http://www.winnipegfreepress.com/business/finance/where-theres-a-will-there-better-be-a-qualified-executor-160105215.html. In some cases, the testator or family prefers to hire a lawyer or a trust company to act as estate representative. This is financially feasible only for larger estates, typically those valued at more than $300,000. In other cases, where no family or friend is available to act as estate representative, the Ontario Public Guardian and Trustee (PGT) may, as a last resort, undertake to administer the estate pursuant to the *Crown Administration of Estates Act*, R.S.O. 1990, c.C.47, s.1 [CAEA].

[2] The terminology used in estate administration is far from uniform. In this paper, an individual who has informally undertaken to administer an estate (that is, without probate or before probate is granted) will be referred to as the "estate representative". If an estate representative obtains a Certificate of Appointment of Estate Trustee (COA) from the court formalizing his or her authority, he or she is referred to as the Estate Trustee (Estate Trustee with a Will where a will names the Estate Trustee as executor or Estate Trustee without a Will where there is no will or the will does not name the Estate Trustee as executor).

[3] In this paper, the more precise term, "COA", is used in discussing the Ontario process specifically and the generic term "probate" is used to describe the process generally.

[4] *Statute of Frauds*, 29 Car. II, ch.3, par. 19 (1677). Pre-1677, probate for personal property was managed by ecclesiastical courts. There was no probate for land at that time: James Lindgren, "Abolishing the Attestation Requirement for Wills" (1989-1990) 68 N.C.L.Rev. 541, 551.

[5] Ontario Law Reform Commission (OLRC), *Report on Administration of Estates of Deceased Persons* (1991), 9.

[6] British Columbia Law Institute (BCLI), *Interim Report on the Summary Administration of Small Estates*, BCLI Report No. 40, December 2005, 2. John Langbein describes the functions of probate similarly although he includes the function of clearing title so that the deceased's property becomes marketable again: John H. Langbein, "The Nonprobate Revolution and the Future of the Law of Succession" (1984) 97 Harvard Law Review 1108, 1117 [Langbein, "Nonprobate Revolution"].

[7] Martin is commenting on the U.S. probate system which is different from Ontario's system in a number of significant respects. However, his critique is also generally applicable to probate systems on this side of the border: John H. Martin, "Reconfiguring Estate Settlement" (2009-2010) 94 Minn. L. Rev. 42 [Martin, "Reconfiguring"]. Also see Charles Dent Bostick, "The Revocable Trust: A Means of Avoiding Probate in the Small Estate?" (1968-1969) 21 U. Fla. L. Rev. 44 detailing the flaws of the probate system specifically in relation to small estates.

[8] Roscoe Pound, *An Introduction to the Philosophy of Law* 236 (1922), quoted in Lindgren, note 4, 557.

[9] In a 2012 address, John Langbein provided statistics on the astonishing total value of non-probate assets currently held by financial intermediaries in the United States and concluded that "there is no turning back, no possibility of proctoring a probate-centred system of wealth transfer on death.": Langbein, "Major Reforms of the Property Restatements and the Uniform Probate Code: Reformation, Harmless Error, and Nonprobate Transfers" (2012) 38 ACTEC L. J. 1, 17 [Langbein, "Major Reforms"].

[10] Martin, "Reconfiguring", note 7.

[11] Langbein describes these financial intermediaries as "functioning as free-market competitors of the probate system and enabling property to pass on death without probate and without will." Financial intermediaries include life insurance companies, pension plan operators, commercial banks, savings banks, investment companies, brokerage houses and stock transfer agents: Langbein, "Nonprobate Revolution", note 6, 1108.

[12] Stewart E. Sterk & Melanie B. Leslie, "Accidental Inheritance: Retirement Accounts and the Hidden Law of Succession" (forthcoming 2014) 89 N.Y.U. L. Rev. 4.

[13] Langbein, "Nonprobate Revolution", note 6, 1120-1125; John H. Martin, "Improving Michigan Estate Settlement" (2012) 29 T.M. Cooley L. Rev. 1, 18.

[14] Robert A. Stein & Ian G. Fierstein, "The Demography of Probate Administration" (1985) 15 U. Balt. L. Rev. 54, 106.

[15] Langbein, "Nonprobate Revolution", note 4, 1116.
[16] Martin, "Reconfiguring", note 7, 83, quoting from Stein & Fierstein, note 14, 105-106. Martin's reasoning is similar to the cost/benefit analysis that supports the adoption of small estate procedures. Keep in mind, however, that the U.S. probate system is traditionally more court-intensive than Ontario's system.
[17] Martin, "Reconfiguring", note 7, 83.
[18] Catherine Curtis describes the case of a fraudulent executor in Texas, the experience of which led that State to introduce a notice requirement for beneficiaries: Catherine S. Curtis, "128A Notice Requirements: Adding to the Burden or Preventing Fraud for the Texas Probate System" (2009-2010) 16 Tex. Wesleyan L. Rev. 437.
[19] According to the Bennett Commission Report, 14 states already had small estates laws and feedback from these other states was that the procedure was in general use and was found to be useful and practical: New York (State) Temporary State Commission [Bennett Commission], *Report of the Temporary State Commission on the Modernization, Revision and Simplification of the Law of Estates to the Governor and the Legislature*, vol. II, 1963, 79.
[20] Bennett Commission, note 19, vol. I, 1962, 11.
[21] Standish F. Medina, "The Philosophies of the Bennett Commission on Estates Underlying the EPTL and the SCPA" (1966-1967) 33 Brook. L. Rev. 414, 416.
[22] Trusts and Estates Section, The State Bar Association of California [TEXCOM], *Update of Provisions of the Probate Code Pertaining to the Collection or Transfer of Small Estates Without Formal Probate Administration – Legislative Proposal* (T&E-2010-08) (The State Bar of California, 2009), 5. Online: http://www.calbar.ca.gov/LinkClick.aspx?fileticket=ncHaz-_kOkk%3D&tabid=751.
[23] TEXCOM, note 22, 5.
[24] TEXCOM, note 22, 5.
[25] TEXCOM, note 22, 5.
[26] The Supreme Court of Canada has rejected the practice of assessing punitive damages as a ratio of compensatory damages: *Whiten v. Pilot Insurance Co.,* 2002 SCC 18, para. 127.
[27] Paula A. Monopoli, *American Probate: Protecting the Public, Improving the Process* Boston (Northeastern University Press, 2003), x.
[28] Steven Seidenberg, "Plotting Against Probate: Efforts by Estate Planners, Courts and Legislatures to Minimize Probate Haven't Killed It Yet" (2008) 94 A.B.A.J. 57.
[29] BCLI, note 6, 2.
[30] BCLI, note 6, 2.
[31] BCLI obtained these statistics from the Court Services Branch of the British Columbia Ministry of Attorney General. Similar statistics do not appear to be available in Ontario.
[32] Bennett Commission, note 19, •.
[33] Ontario, *Rules of Civil Procedure*, R.R.O. 1990, Reg. 94 [*Rules of Civil Procedure*], Rule 1.04 (1.1).
[34] Hryniak v. Mauldin, 2014 SCC 7, para. 28.
[35] Ontario, *Civil Justice Reform Project: Summary of Findings & Recommendations*, Honourable Coulter A. Osborne, Q.C., November 2007, 134.
[36] British Columbia, Ministry of Justice, *The Wills, Estates and Succession Act Explained, Part 6: Administration of Estates*. Online: http://www.ag.gov.bc.ca/legislation/wills-estates-succession-act/pdf/Part6.pdf.
[37] For very small estates, funeral costs may exhaust the estate prior to probate. The Canada Pension Plan (CPP) has provided for this possibility. Where there is no estate or no executor has applied for the death benefit payable under CPP, the death benefit will be paid directly to the person who has paid or is responsible for funeral expenses: Service Canada, Death Benefit, online: http://www.servicecanada.gc.ca/eng/services/pensions/cpp/death-benefit.shtml.
[38]The LCO will not necessarily conclude that a specialized probate process for estates of small monetary value is a viable option for Ontario. However, the intent "going in" is to develop an improved process specifically for these small estates.
[39] A value cut-off would be most appropriately set by regulation or policy rather than in legislation since the amount will necessarily change over time.
[40] This is the value limit in Oregon: Oregon Revised Statutes, s.114.515.

[41] *Estate Administration Tax Act, 1998*, S.O. 1998, c.34 [EATA].
[42] In *Re Eurig Estate,* the Supreme Court of Canada recognized the "practical compulsion" for an executor to apply for a COA in most cases stating, "[t]he fact that in some instances probate may be avoided does not lessen the fact that in Ontario letters probate are the rule in virtually all estate affairs": *Re Eurig Estate,* [1998] 2 S.C.R. 565, para. 17.
[43] An estate representative who chooses to avoid probate takes the risk of being considered to be a trustee *de son tort*, that is, a person who is not appointed a trustee but who undertakes to administer an estate for the beneficiaries. Even though well-intentioned, a trustee *de son tort* becomes personally liable for any actions that would amount to a breach of trust if properly appointed a trustee: Donovan W.M. Waters, Q.C., Mark R. Gillen, Lionel D. Smith, *Waters' Law of Trusts in Canada*, 4th ed. (Toronto: Carswell, 2012), 514-515.
[44] See *Silver Estate v. Silver* (2000) 35 E.T.R. (2d) 287 (S.C.J.) per Cullity J., paras. 3, 36.
[45] *Trustee Act*, R.S.O. 1990, c.T.23, ss. 47(1) [*Trustee Act*].
[46] *Succession Law Reform Act*, R.S.O. 1990, c.S.26, ss. 61(1) [SLRA]. Note that under ss. 61(2), the court may extend this limitation period in certain circumstances.
[47] SLRA, note 46.
[48] *Rules of Civil Procedure*, note 33.
[49] *Rules of Civil Procedure*, note 33, Rule 74, Form 74.4. There are variations of this form that address slightly different circumstances. The requirement to provide a valuation of the estate derives from s. 32 of the *Estates Act*, R.S.O. 1990, c.E.21 [*Estates Act*].
[50] *Rules of Civil Procedure*, note 33, Rule 74, Form 74.14. The hierarchy of persons entitled to apply to be Estate Trustee without a Will is set out in s.29 of the *Estates Act*, note 49.
[51] The bond requirement is contained in s.35 of the *Estates Act*, note 49. Under s.37 of the Act, the bond is required to be "in a penalty of double the amount under which the property of the deceased has been sworn".
[52] *Rules of Civil Procedure*, note 33, Rule 74.13 and EATA, note 41, Schedule, ss.2, 3.
[53] EATA, note 41, Schedule, s.2.
[54] *Rules of Civil Procedure*, note 33, Rule 74.14.
[55] EATA, note 41, ss. 2(2).
[56] Although the value of the estate does determine the estate administration tax payable.
[57] This is especially the case since testators with large value estates may have more resources to engage in careful estate planning which reduces the size and value of the estate on the testator's death. In other words, the testator is able to pay to eliminate any complications with the estate while still alive.
[58] See *Trustee Act*, note 45, s. 61.
[59] Notice of an application for a COA must be served on the PGT in certain circumstances under Rules 74.04(6) and 74.05(4) of the *Rules of Civil Procedure*, note 33.
[60] *Public Guardian& Trustee Act*, R.S.O. 1990, c. P.51, s.7 [PGTA].
[61] CAEA, note 1, s.1.
[62] CAEA, note 1, s.4. The PGT does have statutory authority to release property in its possession up to a value of $20,000 to heirs of the estate without a COA: PGTA, note 60, ss.10(3).
[63] *Rules of Civil Procedure,* note 33, Rule 74.05(1)(c), Form 74.19.
[64] Ontario Office of the Public Guardian and Trustee [OPGT], *Estates Administration: The Role of the Public Guardian and Trustee*, 2012. Online: http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/estatesadmin.pdf.
[65] OPGT, note 64, 3.
[66] As discussed above, estate assets are those owned solely by the deceased and do not have another designated beneficiary.
[67] *Bank Act*, S.C. 1991, c.46, s.460 [*Bank Act*].
[68] *Credit Unions and Caisses Populaires Act, 1994*, S.O. 1994, c.11, s.42 [CUCPA].
[69] O. Reg. 237/09, s.7.
[70] In this project, a financial institution is broadly defined to include banks, credit unions, insurance companies, investment dealers, mutual fund dealers and others holding the assets of a deceased person.

[71] Bank of Canada Business Rules, Canada Savings Bonds. Online: http://www.csb.gc.ca/canada-savings-bonds-program/services-bond-owners/transferredeem-from-a-deceased-owner-all-provinces-except-quebec/.
[72] For example, banks are required to comply with the obligations set out in Schedule 1 of the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5, ss.5(1) [PIPEDA]. See, in particular, Principle 4.3.6.
[73] *Land Titles Act*, R.S.O. 1990, c.L.5, s.124.
[74] Director of Land Registration and Director of Titles, Letter to all Land Registrars, April 1, 1993. Online: http://www.gov.on.ca/en/information_bundle/land_registration/content/ONT06_024516.html.
[75] Kate Murray, Director of Titles, Memo To Land Registrars Re: Estate Conveyancing, October 30, 2000. Online: http://files.ontariogovernment.ca/em200003.pdf.
[76] *Registry Act*, R.S.O. 1990, c.R.20, ss. 53(a).
[77] *Estates Administration Act*, R.S.O. 1990, c.E.22, ss. 9(1) [EAA].
[78] *Business Corporations Act*, R.S.O. 1990, c.B.16, ss. 67(8).
[79] *Rules of Civil Procedure*, note 33, Rule 74.
[80] SLRA, note 46, s. 4.
[81] See Monique Charlebois, "The Estate Trustee's Duty to Search for Heirs" (2003-2004) 23 E.T.P.J. 209, 216-217, 221.
[82] Also see *Estates Act*, note 49, ss. 35-37.
[83] *Estates Act*, note 49, s. 6.
[84] See Ian Hull, C.S., Rhys Newman, "Applications for Certificates of Appointment: Tips and Traps", *Practice Gems: Probate Essentials 2013*, September 19, 2013, 3-18-3-20.
[85] *Administration of Estates Act*, S.S. 1998, c.A-4.1, s. 9; *Administration of Estates Regulations*, R.R.S. c.A-4.1 Reg. 1, s. 8.2. Also see Rule 16-36 of Saskatchewan's *2013 Queen's Bench Rules*.
[86] *The Court of Queen's Bench Surrogate Practice Act*, C.C.S.M. c. C290, s.47; Manitoba *Court of Queen's Bench Rules*, Rule 74.15 and Forms 74BB and 74CC.
[87] *Public Trustee Act*, S.A. 2004, c.P-44.1, s. 13; *Public Trustee General Regulation*, A.R. 241/2004, s.2 and Form 1.
[88] *Public Trustee Act*, S.A. 2004, c.P-44.1, s. 16; *Public Trustee General Regulation*, A.R. 241/2004, s.3 and Form 2. This provision was explained during second reading of the *Public Trustee Act (Bill 19)* in 2004. Mr. Hancock stated: "The bill also broadens the scope of an expeditious procedure that applies to estates of modest monetary value. Generally, the Public Trustee must apply to the court for a grant of administration to acquire the right to administer an estate, but if the deceased has not left a will and the estimated value of the estate is below a prescribed amount, another procedure is available. Instead of applying to the court for a grant of administration, the Public Trustee may file an election to administer the estate. The bill extends this procedure to cover smaller estates where the deceased has left a will."
[89] *Public Trustee Act*, S.A. 2004, c. P-44.1, s. 15.
[90] *Administration of Estates Act*, S.S. 1998, c. A-4.1, s. 44.1; *Administration of Estates Regulations*, R.R.S. c. A-4.1, Reg. 1, s. 8.3.
[91] *Probate Court Act*, R.S.N.B. c. P-17.1, s. 20. The *Law Reform Notes* published by the New Brunswick Department of Justice indicate that, in 1995/1996, New Brunswick considered the possibility of a small estate process specifically for intestacies. No resolution of this issue is evident from the materials available online: Legislative Services Branch, Department of Justice, *Law Reform Notes*, Issue 5, November 1995 and Issue 6, June 1996.
[92] *Public Trustee Act*, R.S.N.W.T. 1988, c. P-19, s. 26.
[93] *Public Trustee Act*, R.S.N.S. 1989, c. 379, s. 16.
[94] The Commission noted that approximately 70% of deaths in Nova Scotia did not lead to a formal grant of probate: Law Reform Commission of Nova Scotia, *Final Report: Probate Reform in Nova Scotia*, March 1999, 16, 40-42.
[95] *Administration of Estates Act*, R.S.A. 2000, c. A-2, s. 19.
[96] *Estate Administration Act*, S.A. 2014, c. E-12.5, not yet in force [EAA (Alta.)].
[97] *Administration of Estates Act*, S.S. 1998, c. A-4.1, s.7; *Administration of Estates Regulations*, R.R.S. c. A-4.1 Reg. 1, s. 8.1.
[98] Estates Act, note 49, s.51, repealed by *Tax Credits and Revenue Protection Act, 1998*, S.O. 1998, c.34, ss. 63(2).

[99] To be accurate, B.C. no longer has a small estate procedure after March 31, 2014. Prior to this date, B.C.'s *Estate Administration Act*, R.S.B.C. 1996, c.122, s.20 contained a provision intended to facilitate the administration of estates worth less than $25,000. However, this was repealed on March 31, 2104 when the new *Wills, Estates and Succession Act* was brought into force: *Wills, Estates and Succession Act*, S.B.C. 2009, c. 13 [WESA].
[100] WESA, note 99.
[101] BCLI, note 6.
[102] *Supreme Court Civil Rules*, B.C. Reg. 168/2009, Part 25 – Estates [B.C. Probate Rules].
[103] BCLI, note 6.
[104] BCLI, note 6, 26.
[105] BCLI, note 6, 52.
[106] BCLI, note 6, 27-28.
[107] Grayson M.P. McCouch, "Probate Law Reform and Nonprobate Transfers" (2008) 62 U. Miami L. Rev. 757, 758; Karen Sneddon, "Beyond the Personal Representative: The Potential of Succession Without Administration" (2008-2009) 50 S. Tex. L. Rev. 449, 459-460.
[108] Sneddon, note 107, 460-461.
[109] Perry O. Hooper, "Small Estate Law for Alabama" (1973-1974) 4 Cumb.-Samford L. Rev. 440, 441.
[110] Only about 20 states have adopted the *Uniform Probate Code* (UPC) in full but it is also influential in the remaining states: John H. Martin, "Non-Judicial Estate Settlement" (2012) 45 U. Mich. J. L. Reform 965, fn 1 [Martin, "Non-Judicial"].
[111] Lawrence H. Averill, Jr. & Mary F. Radford, *Uniform Probate Code and Uniform Trust Code in a Nut Shell*, 6th ed., West, 2010, 321-322.; Richard V. Wellman, Chief Reporter of the Uniform Probate Code Project, National Conference of Commissioners on Uniform State Laws, "The Uniform Probate Code: A Possible Answer to Probate Avoidance" (1968-1969), 44 Ind. L. J. 191, 199.
[112] Martin, "Non-Judicial", note 110, 970.
[113] Martin, "Non-Judicial", note 110, 970, citing Mark T. Johnson, "Comment, A 'Simple' Probate Should Not Be This Complicated: Principles and Proposals for Revising Wisconsin's Statutes for Probate Summary Procedures" (2008) Wis. L. Rev. 575, 576-577.
[114] Sneddon, note 107, 485-486.
[115] The UPC defines "successors" as "persons, other than creditors, who are entitled to property of a decedent under his [or her] will or this [code]": *Uniform Probate Code*, s. 1-201 (2010) [UPC].
[116] UPC, note 115, ss. 3-312 – 3-322.
[117] UPC, note 115, ss. 1-201(49), 3-1201, 3-1202.
[118] Cal. Prob. Code, s. 13100; Or. Rev. Stat., s.114.515. In both these states, this threshold amount applies to real property as well as personal property.
[119] Martin, "Non-Judicial", note 110, 969.
[120] Martin, "Non-Judicial", note 110, 968.
[121] UPC, note 115, ss. 3-1203, 3-1204. The statutory entitlements are set out at ss. 2-402 (homestead allowance), ss. 2-403 (exempt property) and ss.2-404 (family allowance). This is loosely analogous to ss.36(2) of Ontario's *Estates Act*, note 49, dispensing with the bond requirement where the surviving spouse is estate trustee without a will and the net value of the estate does not exceed her preferential share.
[122] Martin, "Non-Judicial", note 110, 969.
[123] BCLI, note 6.
[124] Law Commission, *Intestacy and Family Provision Report*, Law Com No. 331 (London: The Stationary Office, 2011), 95. Online: http://lawcommission.justice.gov.uk/docs/lc331_intestacy_report.pdf.
[125] Williams, Mortimer and Sunnucks, *Executors, Administrators and Probate*, 20th ed., Sweet & Maxwell, 2013, paras. 6-07 to 6-16.
[126] *Administration of Estates (Small Payments) Act 1965* (U.K.), c.32, Schedules.
[127] Law Commission, note 124.
[128] Law Commission, note 124, 21.
[129] Law Commission, note 124, 89.

[130] Law Commission, note 124, 96. For more detail on the consultation responses, see Law Commission, *Intestacy and Family Provision Claims on Death, Analysis of Consultation Responses,* Consultation Paper 191 (Responses), December 14, 2011, 107-110. Online: http://lawcommission.justice.gov.uk/docs/cp191_intestacy_responses.pdf.
[131] The Non-Contentious Probate Rules working group put out draft rules for the consultation process during the summer of 2013. As of August 2014, these rules have not yet been adopted.
[132] Law Commission, note 124, 96.
[133] Law Commission, note 124, 97.
[134] As of August 2014.
[135] *Public Trustee Act, 1906* (U.K.), 6 Edw. VII, c.55, ss. 2, 3.
[136] Williams, Mortimer and Sunnucks, note 125, para. 3-19.
[137] South Australian Law Reform Institute (SALRI), *Small Fry: Administration of Small Deceased Estates and Resolution of Minor Succession Disputes*, Issues Paper 5, January 2014, 11-12 [SALRI Paper]. Online: http://www.law.adelaide.edu.au/research/law-reform-institute/documents/small_fry_IP5_final.pdf.
[138] Queensland Law Reform Commission, *Administration of Estates of Deceased Persons: Report of the National Committee for Uniform Succession Laws to the Standing Committee of Attorneys General*, Report 65 (2009), volume 3 [National Committee Report]. Online: http://www.qlrc.qld.gov.au/publications/QLRC%20Report%2065%20Volume%203.pdf.
[139] New South Wales Law Reform Commission (NSWLRC), *Uniform Succession Laws: Administration of Estates of Deceased Persons*, Report 124, December 2009 [NSWLRC Report]. Online: http://www.lawreform.lawlink.nsw.gov.au/agdbasev7wr/lrc/documents/pdf/r124.pdf.
[140] Victorian Law Reform Commission (VLRC), *Succession Laws Report*, August 2013 [VLRC Report]. Online: http://www.lawreform.vic.gov.au/sites/default/files/Succession_Laws_final_report.pdf.
[141] SALRI Paper, note 137.
[142] National Committee Report, note 138, 97.
[143] National Committee Report, note 138, 95-96. The Committee recommended that the election procedure be available to the public trustee, trustee companies and legal practitioners only where they would otherwise be entitled to obtain a formal grant.
[144] National Committee Report, note 138, 105, 115.
[145] National Committee Report, note 138, 105.
[146] National Committee Report, note 138, 106.
[147] VLRC Report, note 140, 204-205.
[148] Victoria's State Trustees is a government owned but privately operated organization that offers public trustee services under a Community Services Agreement with the government, as well as some commercial services: State Trustees, *State Trustees Annual Report 2013*, Victoria, Australia, 4. Online: https://www.statetrustees.com.au/annual-report/annual-report-2013.
[149] VLRC Report, note 140, 206.
[150] *Administration and Probate Act, 1958* (Vic.), s.71.
[151] VLRC Report, note 140, 190.
[152]Supreme Court of Victoria, *Grants of Probate or Administration for Small Estates.* Online: http://www.supremecourt.vic.gov.au/home/forms%2c+fees+and+services/wills+and+probate/grants+of+probate+or+administration+for+small+estates.
[153] *Administration and Probate Act, 1958* (Vic.), s.78.
[154] VLRC Report, note 140, 190.
[155] VLRC Report, note 140, 190-193.
[156] VLRC Report, note 140, 191.
[157] VLRC Report, note 140, 193-195.
[158] National Committee Report, note 138, 151.
[159] National Committee Report, note 138.
[160] SALRI Paper, note 137, 13.
[161] National Committee Report, note 138, 157; VLRC Report, note 140, 196-198.
[162] National Committee Report, note 138, 142.

[163] National Committee Report, note 138, 161,165.
[164] VLRC Report, note 140, 200.
[165] VLRC Report, note 140, 200.
[166] Probate fees vary dramatically across Canada. In 2013, a $10,000 estate would have had to pay probate fees as follows: $250 (Ontario), $85 (Newfoundland), $70 (Nova Scotia), $65 (Quebec), $25 (Alberta), $0 (B.C.): Lynne Butler, "What Does Probate Really Cost?", Estate Law Canada, April 2010, updated August 27, 2013. Online: http://estatelawcanada.blogspot.ca/2010/04/what-does-probate-really-cost.html.
[167] The courts have traditionally been the mechanism for determining who has authority to administer a deceased's estate. The first Court of Probate was introduced in Upper Canada in 1793, only one year after the new province was established. Since that time, legislative reform has been largely directed at the type of evidence necessary to establish the authenticity of a will or the authority of an estate representative and the procedural requirements involved in the appointment of an estate trustee: OLRC, note 5, 9.
[168] Models reducing or eliminating court involvement from small estate administration are designed as a compromise to address this reality.
[169] Alberta Law Reform Institute (ALRI), *Estate Administration, Final Report 102*, August 2013, 73.
[170] ALRI, note 169, 73.
[171] EAA (Alta.), note 96.
[172] EAA (Alta.), note 96, s.10.
[173] EAA (Alta.), note 96, s.8.
[174] Averill & Radford, note 111.
[175] SLRA, note 46, s. 45.
[176] O.Reg 54/95, s.1.
[177] Children's Law Reform Act, R.S.O. 1990, c. C.12, s. 51 [CLRA].
[178] PGTA, note 60, ss. 10(3).
[179] VLRC Report, note 140, 192.
[180] These tend to be informal procedures allowing for the collection of estate assets by affidavit with little or no involvement of the court.
[181] See VLRC Report note 140, 207.
[182] See, for example, PIPEDA, note 72.
[183] B.C. Probate Rules, note 102, Rules 25-4, 25-8, Form P18.
[184] ALRI, note 169, 68-71.
[185] In Ontario, these laws include PIPEDA, note 72.
[186] *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.)), s. 241(1).
[187] See, for example, *Public Trustee Act*, R.S.N.S. 1989, c.379, s.16 (less than $25,000); *Administration of Estates Act*, S.S. 1998, c.A-4.1, s.44.1 (less than $25,000); *Probate Court Act*, R.S.N.B., c. P-17.1, s.20 (less than $3000); *Public Trustee Act*, R.S.N.W.T. 1988, c.P-19, s. 26 (less than $10,000).
[188] A simplified procedure under Rule 76 of the *Rules of Civil Procedure*, note 33, is available for claims between $25,000 and $100,000. Claims under $25,000 are heard in Small Claims Court. On the difficult balance to be struck between access and justice in small claims court, see Shelley McGill, "Small Claims Court Identity Crisis: A Review of Recent Reform Measures" (2010) 49 C.B.L.J. 213, 217-219.
[189] PGTA, note 60, ss. 10(1).
[190] PGTA, note 60, ss. 10(3), 10(4).
[191] CLRA, note 177, s.51.
[192] *Estates Act*, note 49, s. 35 (no will) and s.6 (will exists but executor resides outside the Commonwealth).
[193] See, for example, Ontario Bar Association, Modernizing Requirements for Bonding of Estate Trustees, Submission to the Ministry of the Attorney General, April 2012, online: http://www.oba.org/CMSPages/GetFile.aspx?guid=e90ef4b5-d3a8-45cf-98ac-90f0c5b7e2bb.
[194] *Estates Act*, note 49, s.37.
[195] WESA, note 99, s.128.
[196] For example, where there is a will, the following documents and items must be filed with the Estate Registrar of the Ontario Superior Court of Justice: the original will; the original codicil(s), if any; Affidavit of Execution of Will

(Form 74.8); Affidavit(s) of Execution of Codicil(s), if one or more codicils exist (Form 74.8); Application for Certificate of Appointment of Estate Trustee with a Will (Form 74.4); Notice of an Application for a Certificate of Appointment of Estate Trustee with a Will (Form 74.7); Affidavit of Service of Notice (Form 74.6); estate administration tax; and a Certificate of Appointment of Estate Trustee with a Will (Form 74.13).

[197] The Ontario Ministry of Attorney General's Estates FAQ website is relatively easy to find (a Google search for "Ontario probate" rendered the site in the first result) and is available in both French and English.

[198] Ontario, Court Services, "Rules of Civil Procedure Forms". Online: http://www.ontariocourtforms.on.ca/english/civil/.

[199] Ontario, Ministry of the Attorney General, "Avoid Common Errors in Applying for a Certificate of Appointment of Estate Trustee". Online: http://www.attorneygeneral.jus.gov.on.ca/english/estates/avoiding_common_errors.pdf. See generally, Ontario, Ministry of the Attorney General, "Frequently Asked Questions About Estates". Online: http://www.attorneygeneral.jus.gov.on.ca/english/estates/estates-FAQ.asp#s1.

[200] Law Society of Upper Canada (LSUC), "How-To Briefs". Online: http://www.lsuc.on.ca/with.aspx?id=2147490949.

[201] New York Surrogate's Court Procedure, N.Y. SCP., Art. 13, §§ 1301, 1302.

[202] See New York Surrogate's Court, "Surrogate's Court Small Estate Affidavit Program", *New York CourtHelp*. Online: http://www.nycourthelp.gov/diy/smallestate.html. The link appears in the top right-hand corner of the homepage. The link is somewhat misleading, however, because it appeals only to Spanish speakers.

[203] New York Surrogate's Court, "Frequently Asked Questions – DIY Forms", *New York CourtHelp*. Online: http://www.courts.state.ny.us/courthelp/faqs/guidedInterview.html#q13.

[204] See Barry Corbin, "Estate Administration Tax Audit & Verification – A New World" in *LSUC, 15th Annual Estates & Trusts Summit*, 2012.

[205] WESA, note 99.

[206] VLRC Report, note 140, 190-192.

[207] BCLI, note 6, 33-35.

[208] British Columbia Ministry of Justice, *Explanation of WESA,* Part 6, Division 2, Small Estate Administration. Online: http://www.ag.gov.bc.ca/legislation/shareddocs/wesa/Part6.pdf.

[209] SALRI Paper, note 137, 41.

[210] SALRI Paper, note 137, 41-42.

[211] As reported by a law firm in Manchester, England: Latimer Lee LLP, "Is a Grant of Probate Required?" October 9, 2012. Online: www.latimerlee.com/grantofprobaterequired.