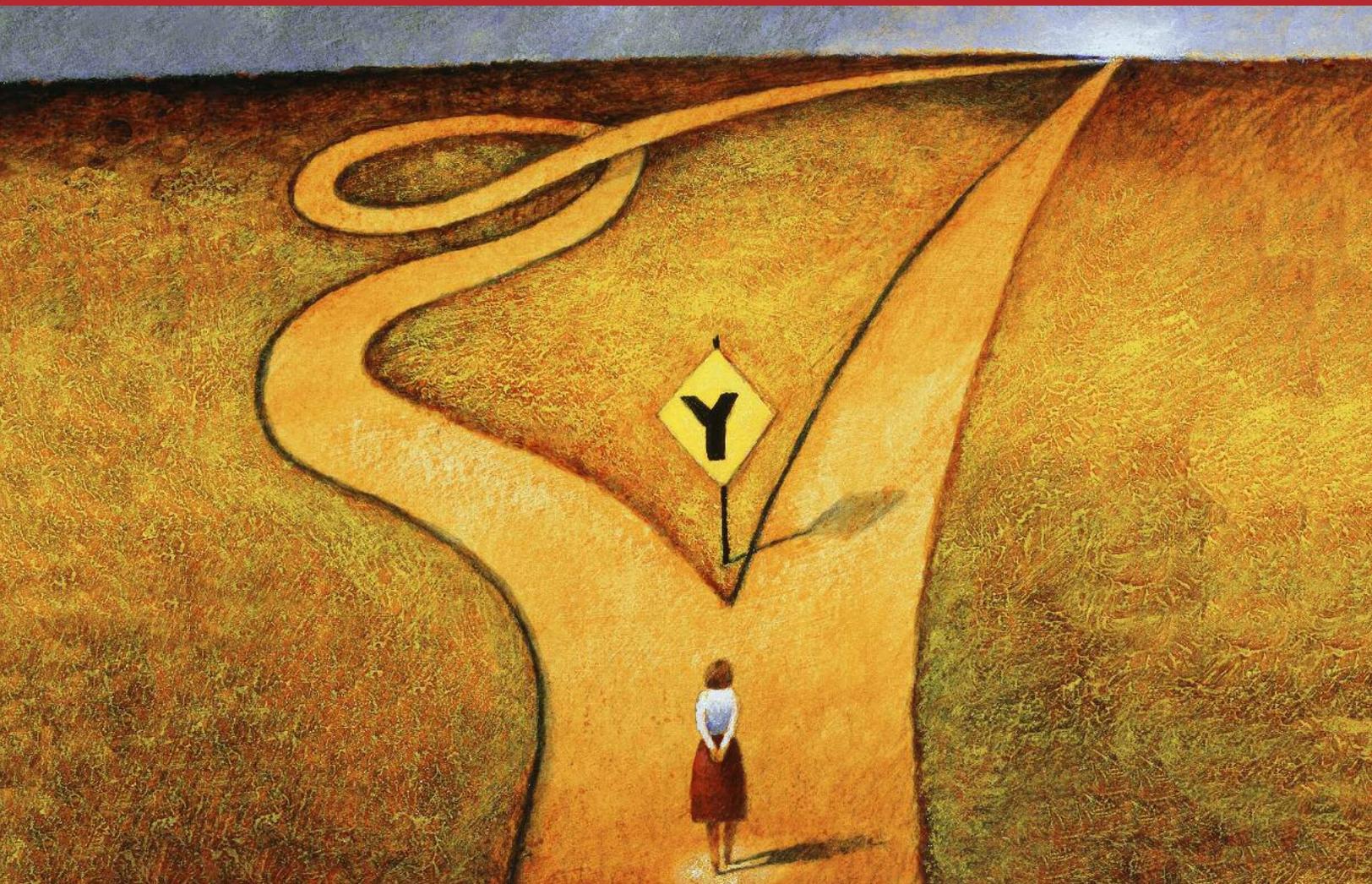


Simplified Procedures for Small Estates

FINAL REPORT
August 2015



LAW COMMISSION OF ONTARIO
COMMISSION DU DROIT DE L'ONTARIO



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Disponible en français
Available online at www.lco-cdo.org
ISBN: 978-1-926661-74-2

This publication may be cited as follows:
Law Commission of Ontario, *Simplified Procedures for Small Estates: Final Report*
(Toronto: August 2015)

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. The LCO 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 and selects projects that are of interest to and reflective of the diverse communities in Ontario. It has 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.

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The opinions or points of view expressed in our research, findings and recommendations do not necessarily represent the views of our funders, the Law Foundation of Ontario, the Ministry of the Attorney General, Osgoode Hall Law School, and the Law Society of Upper Canada, or of our supporters, the Law Deans of Ontario, or of York University.

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FOREWORD

Probate is designed to achieve several purposes, including protecting beneficiaries and others from fraud, the estate representative from liability and, at least where there is a will, the testator's interests, among others. The Ontario probate system appears to work effectively at reasonable cost for most estates, particularly when an estate representative is able to retain a lawyer. The major exception to this is probating "small" estates, for which the requirements and costs, including fees and legal assistance, of probate may be disproportionate to the value of the estate.

Accordingly, in February 2013, the Law Commission of Ontario's Board of Governors approved a project to review the application of probate to small estates to assess whether there was a basis for the perception that there should be a separate process for small estates and to make recommendations about an appropriate process. After research that included processes established or proposed in other jurisdictions and consultations with various individuals and institutions concerned with the administration of estates, we are pleased to recommend a separate small estates probate stream in this Final Report, approved by the Board of Governors on August 18, 2015.

We have defined a "small" estate as having a value up to \$50,000, and have concluded that estate representatives are less likely to probate these estates because it may not be worth doing so with the result, at times, that the estate assets are "left on the table" or, if probated, the cost of doing so is unreasonable relative to the estate's value.

We considered the option of exempting small estates from probate, as some jurisdictions do. However, we have concluded that it is preferable to maintain the basic protections of a court-supervised probate process for these estates, but to make it more accessible. We have designed a simplified system that applicants can more easily complete without any, or with minimal, legal assistance, through increased informational and self-help resources, while retaining the most important protections of probate. We believe this system will encourage estate representatives, who might otherwise avoid the probate system, to obtain the benefits of probate for the beneficiaries, as well as themselves, and would reduce the costs of probating to a more reasonable level.

The Board of Governors, composed of appointees of the founding partners, the judiciary and members at large, approved this Final Report in August 2015. The Board's approval reflects its members' collective responsibility to manage and conduct the affairs of the Law Commission of Ontario, and should not be considered an endorsement by individual members of the Board or by the organizations to which they belong.



Bruce P. Elman
Chair, Board of Governors



Dr. Patricia Hughes
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While Project Advisory Group members have played an invaluable role throughout the project, they should not be taken to have endorsed this Final Report or any of its recommendations.

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The Law Commission of Ontario would also like to extend its thanks to the numerous organizations and individuals who helped shape this project through their involvement in the public consultations. A full list of contributing organizations and individuals can be found in Appendix A.

TABLE OF CONTENTS

EXECUTIVE SUMMARY	viii
I. INTRODUCTION	1
II. ABOUT PROBATE	5
A. The Purpose of Probate	5
1. The Purpose and Benefits of Probate	5
2. Public Misperception about Probate	7
B. The Probate Process	9
C. The Cost of Probate	10
1. Total Cost of Probate	11
2. Perceived Cost of Probate	13
III. WHAT IS A SMALL ESTATE?	14
A. Current Ideas About the Meaning of “Small Estate”	14
B. Definition of Small Estate for this Project	17
C. Establishing the Value Limit for a Small Estates Process	19
1. Defining Small Estate in Relation to Monetary Value.....	19
2. Other Possible Eligibility Criteria.....	21
3. The Value Limit for a Small Estates Process: The Conclusion	22
IV. SMALL ESTATES AND THE CURRENT PROBATE SYSTEM	25
A. What We Know about the Use of the Probate System	25
B. Evidence of a Systemic Problem with Small Estates and Probate	27
C. Particular Probate Requirements that May Pose a Challenge for Small Estates	29
1. Absence of a Will	29
2. Where There is a Will (There May Not Always Be a Way)	31
3. Family Dynamics.....	32
4. Finding a Willing Applicant	33
5. Capacity Issues	33
6. Obligation to Post Security.....	34
7. Identifying, Finding and Notifying Beneficiaries	35
8. Valuing the Assets	36
9. Estate Administration Tax and Estate Information Return	37
10. Real Property	39
11. The Forms and Court Procedures.....	39
12. Lack of Public Knowledge about Probate.....	40
13. Personal Barriers	41
14. Rural Communities	41
15. Public Resources	42
D. How is the Probate System Working Currently?.....	43
E. Probating Small Estates without a Lawyer	43
1. Currently Most (But Not All) Estate Representatives Hire a Lawyer.....	44
2. Current Challenges in Obtaining Probate without a Lawyer	45

V. THE OPTION OF ADMINISTERING SMALL ESTATES WITHOUT PROBATE	48
A. How Often Are Small Estates Administered Without Probate?.....	48
B. Duty of Financial and Other Institutions to Safeguard Assets	49
C. Duty of Financial and Other Institutions to Keep Client Information Confidential	53
1. Financial Institutions	53
2. Canada Revenue Agency	54
D. Discretionary Waiver Policies	55
E. Consequences of Avoiding Probate.....	59
1. Complications Administering the Estate	59
2. Whether Lack of Probate Leads to an Increased Risk of Fraud	60
VI. BALANCING ACCESSIBILITY AND LEGAL PROTECTION IN A SMALL ESTATES PROCEDURE	62
A. The Principle of Proportionality in Balancing Accessibility and Legal Protection	62
B. Other Legal Processes Balancing Accessibility and Legal Protection	64
1. Small Claims Court and the Simplified Procedure.....	65
2. Children’s Law Reform Act	65
3. Unclaimed Property Programs	67
VII. IMPROVING PROBATE FOR SMALL ESTATES	69
A. Possible Models for a Small Estates Procedure	71
1. Introduction.....	71
2. Alternatives to a Court-Based Small Estates Procedure.....	72
3. Court-Supervised Small Estates Procedures	73
B. Value Limit of \$50,000 for Estates with and without Wills.....	77
C. Application Form and Requirements	78
D. Notice Requirements under a Small Estates Process	82
E. Minors and Incapable Persons	84
F. No Bond Requirement.....	85
1. Earlier Law Reform Debate on Bond Requirement for Estates (Regardless of Value)	85
2. Stakeholder Perspectives on Bond Requirement for Small Estates	86
3. Non-Resident Applicants in a Small Estates Procedure	87
G. Legal Effect and Consequences of a Small Estates Process.....	87
1. Legal Effect of a Small Estates Process.....	87
2. Subsequently Discovered Assets.....	88
3. Consequences for Financial and Other Institutions	88
H. Estate Administration Tax and Estate Information Return	90
I. Online Delivery of a Small Estates Process	92
J. Legal Information on the Purpose of Probate and the Small Estates Process	95
K. Simplified Forms and Online Forms Assistant	97
L. Telephone Help-Line for Estate Representatives	100
M. Cost-Sensitive Legal Advice.....	102
N. Encourage Will-Making.....	105
O. Publicly Searchable Estates Database.....	106
VIII. LIST OF RECOMMENDATIONS	108
APPENDIX A: ORGANIZATIONS AND INDIVIDUALS CONTRIBUTING TO THE PROJECT	112
ENDNOTES	114

EXECUTIVE SUMMARY

This LCO project has reviewed the probate system in Ontario as it affects small estates. Probate is a court process establishing the validity of a will, where there is one, and an estate representative's legal authority to act on behalf of the estate. Although probate is not mandatory, it is practically necessary to administering most estates. The concern motivating this project has been that the cost of obtaining probate does not necessarily relate to the value of the estate being probated so that the cost can be disproportionately high for small estates. The smaller the estate, the more likely this is the case. In some cases, the cost of probate will outweigh the benefits altogether so that these small estates are not administered and whatever assets there are in the estate are not distributed. These small estates are effectively shut out of the system.

This is a practical problem and, in this Report, we develop a practical solution. We recommend the *creation of a small estates process for estates valued up to \$50,000*. (Recommendations 1 and 2) This would be a different stream of probate parallel to the regular stream used by larger estates. (Recommendation 7) It would be designed to be *much simpler to navigate without legal assistance*. (Recommendation 3) At the same time it would retain essential legal protections of the regular probate stream, most particularly the *notice requirement*. (Recommendations 4 and 5) The small estates process would be available *whether or not there is a will and regardless of the assets contained in the estate or the identity of the beneficiaries*. (Recommendation 5) Applicants would be required to be *resident in Ontario and be able to attest to the declarations on the application form*. (Recommendation 3) *No security bond would be necessary*. (Recommendation 6)

We emphasize that this is a practical solution in that it involves a compromise: to reduce the cost and improve the accessibility of probate for small estates, we propose eliminating some of the evidentiary requirements of the process intended to establish the applicant's legal entitlement to administer the estate. However, we believe that the small estates process we are recommending succeeds in striking an appropriate balance between the principles of accessibility to the process, on the one hand, and the legal protection afforded by the process, on the other hand.

The Report proceeds as follows. After an introduction to the project in chapter I, chapter II discusses the purpose of probate and the process involved in obtaining probate in Ontario. Probate is often perceived as an administrative barrier to obtaining possession of estate assets and as a vehicle for collecting estate administration tax. However, probate also provides important legal protection to testators, beneficiaries, creditors and estate representatives, as well as promoting commercial stability. We conclude that probate is valuable for all these reasons and should be encouraged for small estates as well as large estates.

Chapter III addresses the difficult question of what should be considered a small estate eligible for a small estates process. In order to preserve legal protection while improving accessibility, the procedure should be available only to those estates for which cost is an obstacle to accessing the current system. The recommended value of \$50,000 is a bright line cut-off necessary in order to keep the procedure simple enough to be effective. This figure takes into account what we learned during the consultations about the typical cost of probate in Ontario and the value of estates accessing the current system. This figure is also in line with other analogous value limits, such as that used in the formula for calculating estate administration tax.

Chapter IV describes some of the challenges that may be faced by estate representatives applying for probate for small estates and how these challenges may contribute to the overall cost of probate. Most estate representatives hire a lawyer to assist with a probate application and we consider the costs associated with this as well as the practical feasibility of obtaining probate without legal assistance. Chapter V looks at the option of administering small estates without probate and the role of probate from the perspective of financial and other institutions holding small estate assets. Chapter VI considers the principle of proportionality in balancing accessibility and legal protection as it affects the probate process and analogous legal processes.

Our recommendations are contained in chapter VII. We conclude that *Ontario should amend Rule 74 of the Rules of Civil Procedure and the Estates Act to provide for a small estates process for estates worth up to \$50,000.* (Recommendations 1 and 2) This process would combine the protection of court supervision with a much simpler application process designed to be accessible to small estates without legal assistance. We draw on various models of small estates procedures in operation elsewhere but develop a unique approach that we think most suitable to Ontario. *Our recommended process would continue to observe the substantive requirements for probate (validity of the will, if any, and legal entitlement of the applicant) but would lower the evidentiary threshold necessary to prove those requirements.* (Recommendations 1, 3, 4 and 7) For example, instead of filing multiple affidavits with the court as evidence of the validity of the will, an applicant would simply check boxes declaring the facts necessary to establish validity. *We contemplate a single application form of no more than two pages accompanied by a copy of the will, if any, and the death certificate as well as confirmation that notice was served.* (Recommendation 3)

Applicants in a small estates procedure would remain liable for payment of estate administration tax. However, they would be *exempt from the additional administrative burden of filing an Estate Information Return with the Ministry of Finance.* (Recommendation 8) This would ensure that the procedure remains simple and, therefore, accessible to all small estates.

Another key protection in our recommended small estates procedure would be *retention of the notice requirement so that beneficiaries have an opportunity to learn about the application and protect their own interests. However, the forms involved in serving notice would be simplified and the applicant would be required to wait 30 days before filing the application.* (Recommendations 4 and 5)

Once issued, *a small estates certificate (“Small Estates Certificate”) would have the same legal effect as probate except that the estate representative’s authority would be restricted to the estate assets listed in the application form, with one opportunity to amend the form.* (Recommendations 1 and 7) This is important so that financial and other institutions would be able to rely on Small Estates Certificates to release assets without risk of liability. It would also ensure that other legal regimes referencing the probate system would not be disrupted.

Financial and other institutions holding estate assets would remain bound by their own legislative frameworks and would retain discretion to release assets without probate. However, the promise of statutory protection from liability would create a strong incentive for institutions to require a Small Estates Certificate before releasing assets. This would have the practical effect of providing much needed commercial certainty to asset transfers after death.

The Report also recommends a range of legal supports as part of a small estates procedure that can be tailored to the value and relative complexity of particular estates. These include simplified forms and an online delivery system, a plain-language guide to probate, a telephone help line and cost-sensitive legal advice. (Recommendations 9 to 13)

Finally, the Report makes two related recommendations: one for *a public education campaign on the importance of making a will and, two, for the creation of an online estates database that is searchable by third parties* so that they may determine whether or not they have a potential interest in an estate. (Recommendations 14 and 15)

We have concluded that, with the protections we have recommended, most particularly the notice requirement, fraud should not be a significant concern detracting from the benefits of a new small estates process. Rather, the adoption of a small estates procedure along the lines described in this Report would be a positive development for Ontario’s probate system. The ease and affordability of the new process should encourage many more estate representatives of small estates to file for probate, thereby protecting themselves in their administration of the estate and facilitating the collection of the estate assets, as well as protecting the beneficiaries and creditors of the estate. The process would significantly reduce the pool of small estates that remain outside the protection of the system. Finally, it would have broader commercial benefits for Ontario in standardizing the practices around releasing assets after death.

I. INTRODUCTION

This project considers whether there is a need in Ontario for a simplified administration process for small estates and, if so, what that process should look like.¹ Currently, most estates are, as a matter of practice, even if not by law, subject to probate regardless of size. Probate is a court process that is applicable when someone dies. Its purpose is to validate the deceased's will (where there is one) and establish the legal authority of the applicant to administer the estate. In Ontario, a successful probate application results in the issuance of a Certificate of Appointment of Estate Trustee (COA) which acts as proof of the estate representative's authority.² The estate representative may show the COA to financial and other institutions as necessary in order to collect the deceased's assets and otherwise represent the estate.

The concern in this project is that, for some small estates, the cost of probate, including both the estate administration tax and legal fees, may be so high relative to the estate value that the estate representative will decide that it is not worth accessing probate.

Probate is an important part of Ontario's estate administration regime. It protects the beneficiaries and others with an interest in the estate from loss resulting from fraud or improper administration by an unauthorized estate representative. It protects the testator's wishes as expressed in his or her will. It protects the estate trustee from liability for acting in accordance with a will that is later revoked. It protects third party institutions from liability for releasing assets or confidential information to anyone other than the deceased's legal representative. From a societal perspective, probate brings certainty to, and thereby facilitates, commercial transactions transferring wealth after death. It also acts as a public record of estates allowing those with potential interests in an estate to pursue their claims.

However, in the current probate system, the costs involved in a successful probate application are not necessarily proportional to the value of the estate. The concern in this project is that, for some small estates, the cost of probate, including both the estate administration tax and legal fees, may be so high relative to the estate value that the estate representative will decide that it is not worth accessing probate.³ In some cases, this may mean that the estate representative will not administer the estate at all or, at least, will abandon assets that are not available without probate. Even if the estate representative does undertake probate, the estate available for distribution may be unduly diminished.

Some jurisdictions, including some provinces in Canada, have adopted simplified procedures for administering small estates. Small estates have been defined as a monetary value ranging anywhere from \$5,000 to \$275,000.⁴ There are a variety of different approaches, but they typically provide for relaxed procedural or evidentiary requirements or both for estates valued at less than the designated amount. Their goal is to strike a balance between the legal protections of a full probate process and the affordability and accessibility necessary to ensure that small estates will, in fact, be administered. To date, Ontario has not adopted a simplified procedure for small estates.

This project was approved by the Board of Governors on February 28, 2012. Between September 2013 and February 2014, the Law Commission of Ontario (LCO) engaged in a substantial process of preliminary research and interviews in order to identify the subject matter of the project and determine where the LCO can best contribute to the issues. An expert Project Advisory Group was established, the members of which are listed at the beginning of this Report. They have been of assistance at every stage of the project up to the draft final report, prior to approval by the Board of Governors. The issues to be addressed and the project methodology were established in June 2014. The intensive, pro-active consultations phase of the project began with the release of the Consultation Paper in September 2014 and broad consultations took place until January 2015.

The LCO consulted with identified stakeholders including the Ministry of the Attorney General (MAG), the Ministry of Finance, the Ontario Public Guardian and Trustee (OPGT), the Office of the Children's Lawyer (OCL), the Superior Court of Justice, court staff, estates lawyers and clerks across Ontario, the Canada Revenue Agency, several banks, as well as organizations representing credit unions, insurance companies and bonding agencies. A particular effort was made to reach out to individuals who have acted as estate representatives in Ontario. The LCO contacted numerous community organizations. It also developed a plain-language questionnaire directed at individuals and made this available online, in court offices, libraries and elsewhere throughout Ontario.

Five focus groups were held with different stakeholder groups, including one focus group with individual estate representatives. Participants hailed from both urban and rural communities including Thunder Bay, Sault Ste. Marie, Windsor, Haileybury (Temiskaming Shores), Hamilton, Pembroke, Toronto, Ottawa, St. Catharines, Kingston, Nipigon, Jackson's Point, Oshawa, Parry Sound, London and Essex County. A list of institutions participating in the project is included as Appendix A to this Report. Individuals are not identified for confidentiality reasons.

We received 24 responses to the questionnaire and had 9 members participate in the individuals' focus group. In addition, both estate practitioners and court staff spoke about the experiences of their clients and this has also been helpful in formulating the recommendations below. Although the evidence of individual estate representatives cannot be said to be fully representative of this stakeholder group as a whole, other sources provide support for what we heard, as well as insight into other experiences.

It is also important to point out that there is a dearth of empirical evidence available on the functioning of the probate system in Ontario. There is no breakdown of the different values of estates being probated from year to year, nor any correlation of estate value with whether or not the estate has a will. There is no way of determining how many probate applications are filed without legal

assistance or the likelihood of these being rejected by court staff. It is certainly not possible to determine how many estate representatives administer estates outside the probate system, nor how many estates are abandoned altogether. Expanding the collection of probate statistics would be valuable for any future reform efforts involving the probate system.

The LCO is grateful for the feedback it received over the course of the consultations period and has carefully considered every contribution in formulating its recommendations, even though we may not refer to any particular contribution explicitly.

In considering the options for reforming the administration of small estates, the LCO has been governed by a number of principles. Underlying this Report is the tenet that estate administration is a social value that should be promoted and, in doing so, testator intentions should generally be respected. Furthermore, the probate system is a valuable tool in furthering these underlying goals. Probate provides legal protection for beneficiaries, creditors, the estate representative and others interested in estates. However, the legal protection afforded by probate is directly related to the rigour of the application process. And the cost of navigating a more rigorous process creates a barrier for some small estates and may prevent them from accessing probate altogether. Therefore, these two goals of legal protection and accessibility must be balanced so that the burden of administration involved in applying for probate is proportional to the value of the estate. Together the recommendations below reflect what we have concluded is an appropriate balance between these two goals of legal protection and accessibility. The interplay among these principles is further discussed throughout the Report, particularly in chapter VI.

...[T]he two goals of legal protection and accessibility must be balanced so that the burden of administration involved in applying for probate is proportional to the value of the estate.

This Report begins in chapter II by setting the context as to the purpose and features of Ontario's probate system generally and the problem being addressed in this project. Chapter III discusses the definitional issue key to any small estates process, that is, what is a small estate or, more accurately, what eligibility criteria reflective of small estates should be adopted in a possible small estates process in Ontario. For reasons we explain in this Report, we have determined that an appropriate cut off for designating a "small" estate is that it be worth no more than \$50,000. Chapter IV turns to a discussion of the difficulties currently experienced by estate representatives in the probate system and considers the extent to which these difficulties are dependent on the value of the estate being probated. An overarching issue here is whether or not legal representation, with its attendant costs, is or should be practically necessary in order to probate a small estate in Ontario. Having examined potential obstacles in probating a small estate in Ontario, chapter V considers the feasibility of the alternative option to administer small estates without probate. In chapter VI, the Report looks at the relationship between two key principles underlying this project, accessibility and legal protection, and

We have considered the problems experienced by small estates in the larger context, taking into account both the original purpose of probate and its role in modern society.

considers whether there are analogous legal processes in Ontario that inform how these principles should be balanced in a small estates process.

These first six chapters all contribute to an understanding of the nature and degree of the problems currently experienced by small estates within the probate system. In chapter VII, we recommend that these problems be addressed by creating a small estates procedure available to estates worth up to \$50,000. We conclude that, given the purpose and benefits of probate, this small estates procedure should operate within the court system and result in a grant equivalent to probate (with one modification). However, we recommend that the process for small estates should be significantly simplified to make it less likely that an estate representative will need to incur the cost of legal assistance in order to benefit from it.

Some of our recommendations may also improve the process for larger estates, or estate administration more generally. However, the focus of this project has been on a more effective administration process specifically for small estates. We have considered the problems experienced by small estates in the larger context, taking into account both the original purpose of probate and its role in modern society.⁵ Our recommendations are intended to rationalize the probate process for small estates with the future in mind rather than the past.

II. ABOUT PROBATE

A. The Purpose of Probate

1. The Purpose and Benefits of Probate

The primary purpose of probate is to validate the will, where there is one, and confirm or establish the authority of the estate trustee to act on behalf of the estate, depending on whether there is a will. From a legal perspective, probate ensures that the estate is administered by the correct person according to the wishes of the testator or, where there is no will, according to principles of succession law. By ensuring that the correct person is in charge, probate goes some way to protecting the entitlement of the beneficiaries and others with an interest in the estate. Probate also protects the estate trustee by establishing his or her authority to act and shielding him or her from liability for actions taken pursuant to a will if the will is later set aside.⁶

By ensuring that the correct person is in charge, probate goes some way to protecting the entitlement of the beneficiaries and others with an interest in the estate.

Probate also has a number of other associated functions. Interaction with the court system serves to educate an estate trustee to some extent as to the legal responsibilities that come with his or her role. Probate also provides a public record of estates so that individuals potentially interested in an estate may learn about it and assert their claim. Probate is also used to trigger certain limitation periods for claims against the estate.⁷

Therefore, the primary purpose of probate is to protect a range of different interests, most specifically the following:

- the testator's intentions (as expressed in the will)
- the beneficiaries and others with interests in the estate
- the creditors, and
- the estate trustee

In a paper commissioned by the LCO for this project, Christine Hakim explains,

The over-arching rationale behind probating estates seems to be safeguarding the estate against fraud and mismanagement. Whether by way of an unsanctioned representative, by way of falsely reporting or mishandling estate assets, or by probating a testamentary document other than the true last will of the deceased, the rationale behind estate administration today is to protect the deceased's estate from being mishandled, wasted, or otherwise misused.⁸

The danger which probate is designed to address has been colourfully expressed by legal blogger Lloyd Duhaime:

Probate is the fulfillment of a dead person's decisions in the absence of the most interested party, the decedent/testator. When a dishonest person who would be entitled to a large part of the estate if there were no will (intestate) comes across an original will which leaves him or her next to nothing, there is but that person's conscience preventing him or her from destroying the will and acting as if it never existed. It is a feeding ground for dishonest people and these opportunities for abuse need sharp, effective law to protect the citizenry.⁹

Of course, probate is not a guarantee against occurrences of fraud or improper administration. Probate is intended to prevent anyone other than the legally authorized estate trustee from taking control of the estate. However, a properly-authorized estate trustee may be just as inclined to act fraudulently as an estate representative who has not been approved by the court. The converse is also true. An estate representative who is acting without probate may be just as likely as the estate trustee to administer the estate faithfully in accordance with the deceased's wishes.¹⁰

Financial and other institutions holding the deceased's assets rely on probate as authoritative evidence that the estate trustee is legally entitled to receive them on behalf of the estate.

In spite of the protective benefits of probate, there is no explicit legal requirement that estate representatives file for probate. And, since estate administration tax is payable as part of a probate application, there is strong disincentive from doing so.¹¹

However, there is also another important benefit of obtaining probate. Financial and other institutions holding the deceased's assets rely on probate as authoritative evidence that the estate trustee is legally entitled to receive them on behalf of the estate. Without this stamp of authority, institutions will often refuse to release the assets since they risk liability by releasing the assets to the wrong representative.¹² Some institutions may refuse to deal with an estate representative who has not obtained probate in order to prevent the risk of liability for improperly disclosing confidential information.

Financial and other institutions will sometimes agree to waive the requirement for probate where the assets in issue are small in value or other circumstances suggest that the risk of liability is low. For example, these institutions are more likely to waive probate where there is an uncontested will appointing the estate representative as executor or where the beneficiaries are limited to a spouse or spouse and adult child. Many institutions will require that the estate representative and, sometimes, the beneficiaries sign an indemnity. Larger institutions have established waiver policies. However, the decision to waive probate is ultimately a discretionary one based on the institution's internal risk assessment.

There is a great deal of theoretical literature in the United States questioning the continued need for a court-supervised probate system in modern economic and social conditions. The LCO reviews some of this literature in section II of the

Consultation Paper in this project.¹³ However, the LCO has not drawn conclusions about the continuing desirability or efficacy of the probate system generally. Most stakeholders in this project clearly believe that the probate system continues to be necessary in Ontario to regulate the transmission of wealth after death. Instead, the LCO has focused on the specific needs of small estates in Ontario. In particular, it has considered whether a new separate small estates process is merited in Ontario and, if so, whether it should be incorporated into the existing probate system or operate outside the probate system. This Report should not be interpreted as a comment on the probate system in the context of larger estates.

2. Public Misperception about Probate

Probate plays a valuable role in validating the will, if one exists, and establishing the authority of the estate trustee regardless of whether there is a will, as well as protecting the interests of various other persons affected by the administration of the estate. However, the legal protection offered by probate is not typically front and centre in the minds of estate representatives deciding whether or not to file an application. Usually, the more immediate concern is whether or not probate is practically necessary in order to gather in the estate assets. If probate is not required by institutions holding the assets, then the estate representative will be very tempted to administer the estate outside the probate system and save the cost of the estate administration tax and legal fees, as well as avoiding the administrative burden.

...[T]he primary protective purpose of probate may be lost in the financial calculus to determine whether or not it is necessary to bring in the assets.

Therefore, the primary protective purpose of probate may be lost in the financial calculus to determine whether or not it is necessary to bring in the assets. This is unfortunate. Probate brings financial benefits, too, in providing some insurance against fraud or improper administration. More immediately, it might well dissuade disgruntled family members from pursuing disputes that would otherwise be subject to expensive litigation. As the Trusts and Estates section of the Ontario Bar Association noted in its submission to this project, probate may be particularly valuable to beneficiaries of limited means who do not have the resources to protect their own interests through litigation.¹⁴

Although the benefit of probate as proof of authority to receive estate assets is valuable in its own right, this benefit should not be viewed in isolation from the primary protective role of probate. Otherwise, the costs of probate may appear to overwhelm its benefits. And where an estate is small in value, it may seem particularly egregious to require the estate representative to complete the necessary application requirements, thereby exhausting much of the estate's value.

During the LCO consultations, a surprising number of stakeholders, professional and otherwise, seemed to view probate as little more than a bureaucratic impediment to administering the estate. In their view, the goal was to convince institutions to waive the probate requirement and liberate the assets. These

stakeholders did not seem to appreciate that anything is lost by avoiding the probate process altogether.¹⁵

Some individual stakeholders who have acted as estate representatives held an even more negative view of probate. They considered that probate is nothing more than a revenue stream for government:

Why pay the probate fees for a simple estate with no real estate. The government doesn't deserve a share of everything... [Probate is] just a death tax, plain and simple. And the required lawyers are just another unwanted expense. Let's not pretend that the probate system is there to 'help' anyone. Beneficiaries are always free to hire a lawyer and pursue legal action should they feel that an estate is being handled improperly.¹⁶

This limited understanding of the function of probate is, perhaps, to be expected given how closely probate and Ontario's estate administration tax are intertwined. The probate process is used as an administrative vehicle for collecting estate administration tax. The amount of tax due is based on the value of the estate recorded in the probate application and the tax becomes payable with the filing of the application.¹⁷ However, the probate system itself is both conceptually and functionally distinct from the tax.¹⁸

The probate process is used as an administrative vehicle for collecting estate administration tax ... However, the probate system itself is both conceptually and functionally distinct from the tax.

Probate fees such as the estate administration tax in Ontario, as well as the other costs of probate, have had implications for estate planning as well. There is a widespread practice of planning to avoid probate.¹⁹ One popular technique is for people to put their property in joint ownership with their heirs with the intent that it will be transferred directly to their heirs when they die. According to several stakeholders, this practice has led to grave concerns about financial abuse where, for example, an adult child takes control of the property for his or her own benefit before the parent's death.²⁰

Probate plays an important function in providing legal protection to beneficiaries and others interested in small estates as well as to the trustees representing these estates. It is perhaps difficult to convey this message to estate representatives where probate is so closely wrapped up with the estate administration tax regime. The result is public misperception that probate is to be avoided at all costs. This misunderstanding may be contributing to the problems that some small estates face under the current probate system. A more balanced understanding of probate, where the protective function of probate is appreciated along with its costs, would allow small estate representatives to make a more informed decision as to whether or not a probate application is merited.

B. The Probate Process

Probate applications in Ontario are divided into non-contentious and contentious matters. Contentious matters involve a challenge to the will or the authority of the applicant and these are dealt with as court proceedings under Rule 75 of the *Rules of Civil Procedure*.²¹ This project is not concerned with contested probate matters.

Non-contentious probate applications are regulated by Rule 74 of the *Rules of Civil Procedure*.²² Although supervised by the Ontario Superior Court of Justice, these do not usually require a court appearance. Instead, applicants complete a number of application requirements designed to ensure that the will, if any, is valid and that the applicant has legal authority to administer the estate. A completed application is filed with the court's estate office in the county or district of the deceased's permanent residence. Court staff review the application to ensure that it is complete and there are no readily apparent problems with the information provided. Court staff also search to ensure that there has been no other application filed in respect of the estate.²³ If there are no concerns, the Registrar may issue a Certificate of Appointment (COA). If there is any doubt about the information contained in the application, it is referred to a judge.²⁴ Currently, approximately 80 per cent of probate applications are approved by the Registrar without the need for referral to a judge.²⁵

Although supervised by the Ontario Superior Court of Justice, [non-contentious probate applications] do not usually require a court appearance.

There are different requirements for applications involving estates with wills and those involving estates without wills.²⁶ Applications for estates with a will are subject to Rule 74.04. The applicant must complete Form 74.4 and attach a number of supporting documents.²⁷ Form 74.4 is a four page document requiring information about the deceased person and the value of the estate and information confirming the applicant's entitlement to apply to be estate trustee. The application also contains several standard statements to which the applicant must swear confirming his or her entitlement to apply and the duty to faithfully administer the estate. The number and type of supporting documents that must be attached to an application under Rule 74.04 will vary depending on the circumstances of the estate. However, standard requirements include the following documents:

- an original copy of the will and any codicil (a codicil is a testamentary document modifying a will),
- an affidavit of execution of the will sworn by witnesses to the execution of the will, or other evidence of due execution of the will,
- additional affidavits if the will is a holograph will (handwritten) or if it appears to have been altered,
- an affidavit swearing that the applicant has served notice of the application on all those interested in the estate including the Public Guardian and Trustee or the Children's Lawyer, or both, where there are minor or incapable beneficiaries, and additional documents where the applicant was not named as executor in the will.²⁸

Applications for estates without a will are subject to Rule 74.05. The applicant must complete Form 74.14 and attach a number of supporting documents. Form 74.14 requires similar information as for estates with a will but with additional detail about the marital status of the deceased. The form also requires a list of the beneficiaries interested in the estate, and the following supporting documents, among others:

- an affidavit swearing that the applicant has served notice of the application on beneficiaries,
- proof of consent to the applicant's appointment by beneficiaries who together have a majority interest in the value of the estate, and
- an administration bond in the amount of double the value of the estate.²⁹

An estate representative must determine which of the myriad of rules applies to the particular estate in issue and then identify and complete the necessary forms. Notice must be served on all beneficiaries and the estate must be valued. Where there is no will, the applicant must seek the consent of the beneficiaries and arrange an administration bond.

An estate representative must determine which of the myriad of rules applies to the particular estate in issue and then identify and complete the necessary forms.

In addition to these requirements, and regardless of whether there is a will, the applicant must also pay the estate administration tax due under the *Estate Administration Tax Act*.³⁰ After the COA is issued, the applicant has 90 days to file an Estate Information Return with the Ministry of Finance.³¹

Once these requirements have been completed and a COA issued, the estate trustee will proceed to gather in the assets, pay debts and tax liabilities and distribute the remainder to the beneficiaries. Absent any conflict, this may take place without any further interaction with the court.³²

C. The Cost of Probate

As discussed above, estate representatives may decide whether or not to apply for probate. For many estates, this decision will be effectively made by the financial and other institutions holding the deceased's assets, depending on whether they require probate before releasing those assets. However, the ultimate decision is left to the estate representative. This will involve some form of cost benefit analysis where the costs of proceeding with a probate application are weighed against the benefits to be gained in probating the estate. For many estates, this cost benefit analysis will be clear. The net value of the estate (after paying the costs associated with probate) will be significant enough to justify proceeding with an application. However, for smaller estates, the cost benefit analysis may not be so clear. In either case, the estimated costs of probate will be an essential factor in the estate representative's decision.

Since it is the estate representative who will generally determine whether or not to apply for probate, the costs of probate include everything experienced as costs by estate representatives, including all aspects of the probate application, monetary and otherwise, and the cost of legal assistance when it is required.

1. Total Cost of Probate

In this project, we are concerned with the cost of probate specifically rather than the cost of estate administration generally. Probate is the gateway to administering an estate and lawyers are often hired to assist with both. There may not be a clear distinction drawn between the costs of one rather than the other. Certainly in consultations practitioners and clients sometimes tended to conflate the two. However, for the purpose of this project, we are examining all costs associated with the probate application itself up to the point that the COA is issued.

Probably the best known cost associated with probate is the estate administration tax payable as part of the probate application.³³ This is calculated as a percentage of the estate's value. Up to \$50,000, estates are taxed at a rate of 0.5 per cent of the value of the estate. Beyond \$50,000, estates are taxed at a rate of 1.5 per cent of the value exceeding \$50,000. A \$50,000 estate must pay \$250. Estates worth less than \$1,000 are exempt from the tax.

For many estates, the biggest cost of probate will be the legal fees involved in hiring a lawyer to prepare the application on the estate representative's behalf.

The estate administration tax regime has been controversial and has its share of detractors among the estates bar as well as in the community generally.³⁴ However, it is only one component of the cost of probate.

For many estates, the biggest cost of probate will be the legal fees involved in hiring a lawyer to prepare the application on the estate representative's behalf. Legal fees must cover the cost of completing the substantive requirements of the application. They also cover the cost of the lawyer's expertise and assistance in navigating the process and advising on the significance of probate and the role and responsibilities of being an estate trustee. Sometimes these cost elements are combined into a flat fee which is set depending on the anticipated complexity of the probate application.

According to cost estimates from practitioners in both rural and urban communities across Ontario, the flat fee to have a lawyer prepare a straightforward probate application will generally be somewhere between \$1,000 and \$5,000, with the majority reporting fees less than \$3,000. In *Canadian Lawyer's 2014 Legal Fees Survey*, the average legal fees for probate in Ontario was reported to be \$1,952.³⁵ However, these figures represent probate practice prior to the new requirement under the *Estate Administration Tax Act* to file the Estate Information Return.³⁶ There is some suggestion that this new requirement will

require a corresponding increase in legal fees by perhaps \$500 to \$1,000.³⁷ In any event, the legal fee will typically cover meeting with the client once or twice, filling out the application using software and sending notices to the beneficiaries. Educating the client about the legal responsibilities of acting as estate trustee is often the most costly component of the legal fee because of the time required. Usually excluded from the legal fee is the work of gathering information about estate assets and beneficiaries. At least for estates without extensive assets, these are typically carried out by the estate representative personally.

There may be some flexibility built into the legal fees charged. For example, the fee might be increased where there are many beneficiaries. If the practitioner carries out other services such as locating key information for the application, an hourly administration fee may be added on. However, except in the case of very large or very small estates, the value of the estate is generally not taken into account in setting the legal fee.

There does not appear to be consensus on what is a reasonable legal fee for a probate application relative to the estate's value. The executor of a \$19,000 estate may be reasonably content to pay \$1,100 in legal fees for probate, whereas the executor of a \$455,000 estate may complain strenuously about paying \$1,700 in legal fees where the estate is a straightforward one.³⁸ In any event, it seems unlikely that lawyers are charging too much for this service. The 2014 Legal Fees Survey noted wills and estates as one area where practitioners feel they have hit a fees ceiling. Given the increasing costs of overhead, profits are "small or non-existent".³⁹

The grief and stress caused by the death of a loved one will add to the challenge of obtaining probate for even a very simple estate.

In addition to the estate administration tax and legal fees payable, a probate application may involve incidental costs associated with finding and serving beneficiaries with notice, valuing property and so forth. There are also non-financial costs that may discourage applicants from accessing the process in the first place. For example, applicants who do not hire a lawyer typically must spend time and effort looking for alternative means of assistance, educating themselves about the process and completing the paperwork.

Another significant cost of probate is emotional in nature. The grief and stress caused by the death of a loved one will add to the challenge of obtaining probate for even a very simple estate. In consultations, several court staff spoke about the emotional toll that probate exacts from those who are mourning loved ones, particularly where there is no lawyer to shield them from the process. Of course, administering an estate can be highly emotional for someone grieving the loss of a loved one whatever process is in place, but staff members and other stakeholders suggested that grief may be exacerbated for someone struggling to satisfy an unduly complicated process, perhaps without legal assistance.

2. *Perceived Cost of Probate*

Regardless of the actual cost of probate, there is a strong public perception in Ontario that probate is too expensive and is to be avoided whenever possible. For some Ontarians, probate is too expensive as a matter of principle, regardless of what it may or may not cost in any particular case.

Apart from this principled opposition to the costs associated with probate is a more specific misunderstanding as to the actual amounts in issue. Some estate representatives have a grossly inflated idea about what probate costs. The LCO heard about estate representatives who believed that the estate administration tax would be 15 per cent, or even 30 per cent, of the value of their estate. One practitioner told of a client who believed that probate was 50 per cent of the estate and would take 6 months to process.

Some of this misperception seems to stem from general discontent over Ontario's comparatively high estate administration tax. However, in truth, Ontario's tax is not that far off probate fees in some of the other Canadian provinces.⁴⁰ It is also based on the value of the estate, with a higher rate for estates worth more than \$50,000. The misperception might also partly arise from the influence of financial and estate planners who make their living helping clients to avoid probate. It might also derive from a more generalized mistrust of probate inherited from the very different probate system in the United States.⁴¹ Whatever the case, no matter how eminently reasonable is the cost of probate in fact, access to the probate system will not improve unless the public understands it to be so.

...[N]o matter how eminently reasonable is the cost of probate in fact, access to the probate system will not improve unless the public understands it to be so.

III. WHAT IS A SMALL ESTATE?

Currently in Ontario, the same probate process applies to all estates regardless of value, although the estate administration tax varies with value. Therefore, there is no legal concept of small estate in Ontario. In this project, the LCO has considered what should be a small estate for the purpose of accessing a simplified procedure, assuming such a process is introduced in Ontario.

There are several factors to take into account here. This chapter first considers the current understanding among members of the estates community as to what constitutes a small estate. Next, the variability of the concept of small estate and the challenges of measuring this concept are discussed. Third, we consider the particular value limit and other eligibility criteria most appropriate for a new small estates procedure in Ontario. We conclude by recommending that any new small estates procedure should be available to estates with a gross value of no more than \$50,000, regardless of the type of assets.

If there was one statement consistently heard during the consultations, it was that there is no typical small estate for probate purposes.

A. Current Ideas About the Meaning of “Small Estate”

If there was one statement consistently heard during the consultations, it was that there is no typical small estate for probate purposes. The monetary value of an estate simply does not correspond to its complexity. A \$5,000 estate may require probate and a \$100,000 estate may not. In consultations, we heard several stories of practitioners probating very small estates for a variety of purposes. For example, one practitioner probated an estate worth \$2,000 in order to prevent the risk of an earlier will being recognized.

It is this lack of correspondence between value and complexity that explains why the cost of probating small estates can be disproportionate to their value. The possible complexity of even very small estates caused some stakeholders to argue against the adoption of a small estates procedure with reduced procedural protections. One practitioner noted:

Difficulties in probate applications are not unique to small estates. However, the low value creates a perception of unreasonableness about the need to comply with procedures to protect beneficiaries, creditors, third parties and others with a potential interest in the estate.⁴²

On the other hand, although practitioners acknowledged the potential complexities of even small estates, they also noted that many small estates are straightforward and would benefit from a simplified procedure. Most practitioners, as well as court staff, supported the goal of improving access to the probate process for those “simple” small estates.

When asked to set a dollar value defining a small estate, stakeholders expressed a wide range of opinions. Some urban practitioners suggested \$100,000 as a meaningful value since they find it easier to justify a probate application to their clients where the estate is worth at least this amount. They reported that clients are less likely to return after an initial meeting with the practitioner where the estate is worth less than about \$80,000 to \$90,000.⁴³

One court staff member suggested \$100,000 to correspond with the Simplified Procedure under Rule 76 of the *Rules of Civil Procedure*.⁴⁴ However, other court staff suggested \$25,000 as an appropriate value limit for a small estates procedure, noting that this amount would not pose as much of a liability risk as higher amounts would. This amount was also thought to be reasonable because it aligned with the jurisdictional limit for small claims court.

Individual estate representatives also had a variety of opinions as to what constitutes a small estate. These ranged from \$5,000 to \$1,000,000. The most common value limit mentioned was \$100,000. However, several individuals felt that an estate should be worth less than \$25,000 to be considered small.⁴⁵

The wide range of opinions as to what is a small estate is evident from the following responses from stakeholders:

- \$1,000
- minor assets such as a few thousand dollars in the bank or a vehicle or RRSP or similar
- \$10,000
- \$10,000 in the bank and no real estate
- \$25,000 - \$30,000
- \$50,000 net (calculating on gross value would push more estates with limited resources into the standard stream)
- \$50,000 without real estate
- a few thousand dollars or, if there is a life insurance policy, \$50,000 to \$100,000
- \$75,000
- \$100,000
- \$100,000 with no single asset worth more than \$25,000
- \$100,000 without real estate but \$50,000 in rural areas of Ontario
- \$500,000 taking into account real estate
- anything without real estate – monetary value is irrelevant
- one asset, one beneficiary – monetary value is irrelevant
- one person who is both executor and sole beneficiary, or a widowed person is the executor and there is one child – monetary value is irrelevant

Clearly, there is no consensus on what currently qualifies as a small estate in Ontario. In addition to the monetary value of the estate, factors such as the type of assets in the estate, the presence of real estate and the number and identity of beneficiaries may also be considered relevant.

Stakeholders also offered several case examples of small estates for which probate was problematic in some way. These ranged widely in terms of monetary value as well as other attributes as is evident from the following examples:

- The deceased died intestate with a car (jointly-owned with her common law husband) and a bank account of \$1,400. The bank told the deceased's daughter that she must go to a lawyer and be appointed trustee in order to obtain the \$1,400.
- The deceased's estate consisted primarily of tax free savings accounts worth \$33,000. The deceased had not understood that he could designate his wife as beneficiary of the accounts. The bank insisted on probate. The issue was complicated because of the client's language barriers.
- A will provided for the testator's estate to go to his issue "per stirpes" (each branch of the family receives an equal amount and if the heir has predeceased the testator, that share is distributed equally among his or her children). The testator had 9 children but 3 of these predeceased him. Of those 3 deceased children, 2 had their own children. One had 2 children and the other had 5 children. Of these latter 5 grandchildren, the practitioner was unable to locate 2 of them. In total, there were 13 beneficiaries to locate and particular problems locating 2 of them. This was all for an estate worth approximately \$70,000.
- A testator with an estate worth \$60,000 had prepared his own will by filling out a form obtained from the internet. A search for the witnesses to the will came up empty. A banker's affidavit was filed in place of an affidavit of execution but was rejected by the registry office as insufficient proof of the authenticity of the will. As a result, it was necessary to hire a private investigator for \$6,000 to track down the witnesses to the will. One witness was found in England so that it was necessary to have an affidavit sworn in that jurisdiction. In total it ended up costing \$30,000 to probate a \$60,000 estate.
- The deceased left a will naming an adult child as executor. The estate was worth approximately \$20,000 and was made up of a bank account, the Canada Pension Plan (CPP) death benefit, a small investment account and an entitlement to pension benefits. There were seven or more beneficiaries including minors. The bank refused to release the assets without probate even though the executor had been the deceased's attorney for property several years before the death. The executor hired a lawyer to obtain probate. Although the executor was unhappy having to pay lawyer's fees

(\$2,000), the overall process was described as “easy”. The executor explained, “Because there was very little money left I had no problem with my family.” The executor had no problem with the probate system but was upset with the bank’s refusal to waive probate.⁴⁶

Clearly, there is wide variation in what stakeholders perceive to be a small estate as well as the range of circumstances perceived to be problematic.

B. Definition of Small Estate for this Project

Since there is no predetermined or commonly understood concept of what is a small estate in Ontario, the definition chosen for the purpose of this project should relate to the primary goal of the project to improve access to probate for small estates while maintaining its legal protections. Therefore, the definition of small estate should target those estates for which cost is likely to be an obstacle to accessing the current system.

...[T]he definition of small estate should target those estates for which cost is likely to be an obstacle to accessing the current system.

Generally speaking, cost tends not to be an obstacle to probating large estates. Where probate is required in order to collect the assets necessary to administer a large estate, the estate representative may object to the cost of probate, perhaps with good reason, but will be resigned to proceed with an application and pay the associated costs out of the estate. However, for smaller estates, the cost of probate may be close to or even exceed the value of the estate so that it is no longer financially worthwhile to probate it. One stakeholder referred to this as the “walkaway” point, that is, the point at which the estate representative and beneficiaries are willing to walk away from the assets rather than proceed with a probate application. This captures the idea of a small estate but it is too narrow for our purposes. Some small estates will be probated even where it is not financially worthwhile to do so. For example, the estate representative may probate and administer the estate out of a sense of duty or loyalty to the deceased. Or probate may be sought in order to verify the validity of the will where there is a risk that a third party will bring a will challenge in the future. Therefore, a small estate for the purpose of this project should also include small estates that are probated but only by incurring disproportionate costs. These will include estates worth probating in strictly monetary terms but leaving so little for the beneficiaries that it is not justifiable on public policy grounds.

The point at which probate costs become an obstacle to accessing probate (whether or not a probate application is pursued) is a relative concept that will vary both with the value of the estate and the cost of probate. It will be different in every estate depending on the nature of the estate, its assets and its beneficiaries, whether or not there is a will, as well as the costs necessary to respond to these and a myriad of other potential factors. This point at which cost becomes an obstacle is also partly

subjective. It will depend on the economic or other resources of the estate representative and beneficiaries, as well as their personal value system about finances and frugality. Some estate representatives may choose to apply for probate and administer a small estate where the net value of the estate only exceeds the total cost of probate by a few hundred dollars. As noted above, some estate representatives choose to probate and administer small estates for sentimental or other reasons even where the costs exceed the value of the estate. In contrast, an estate representative may find it easier to walk away from an estate with a net value of hundreds or even thousands of dollars where he or she experiences language, educational or other barriers to accessing the probate system.

Some assistance in defining the point at which cost becomes an obstacle to access is found in a recent decision of the Supreme Court of Canada.⁴⁷ The Court found that court-imposed hearing fees will be unconstitutional where they effectively deny low income people the right to bring their claim to court. Chief Justice McLachlin held that this denial of rights occurs where hearing fees are so high that they cause undue hardship to the litigant seeking adjudication. The Chief Justice specified that undue hardship may be experienced not only by impoverished litigants but also by litigants who must sacrifice reasonable expenses in order to bring a claim.⁴⁸

Given the inability to determine the point at which costs impede access precisely, the value limit for a small estates procedure should err on the side of inclusion.

There are two important distinctions between the court-imposed hearing fees considered in the *Trial Lawyers* decision and the issues in this project. First, the cost of probate is not a publically levied fee like the hearing fees considered in that case (although estate administration tax is one element of probate costs). Second, the probate system does not engage the same rule of law concerns as does access to civil litigation. Nevertheless, the court's reasoning does support the idea that probate costs may be considered an obstacle to accessing the system even where they do not exceed the value of the estate but are disproportionate to its value, and even where the estate representative decides to probate the estate in spite of disproportionate costs.

Therefore, a small estates process, if it is to be effective, will target those estates for which the cost of probate often represents a disincentive in accessing probate,

- whether or not the costs actually exceed the value of the estate,
- whether or not the estate representative decides to probate the estate in spite of disproportionate costs, and
- without regard for the personal wealth of the estate representative and beneficiaries.

Given the inability to determine the point at which costs impede access precisely, the value limit for a small estates procedure should err on the side of inclusion.

In addition to this conceptual definition of small estate, there are other factors to take into consideration in establishing a specific value limit for a possible small estates process. These are discussed next.

C. Establishing the Value Limit for a Small Estates Process

Although it is clear that there is no commonly agreed upon value limit for defining a small estate in Ontario, the LCO's goal in this project is to further public policy goals rather than merely reflect public opinion. Our proposed monetary value limit of \$50,000 has been chosen as the best means of balancing the goals of promoting accessibility to probate and preserving the legal protections of the system.

1. Defining Small Estate in Relation to Monetary Value

As discussed in the Consultation Paper, the LCO has determined that a small estate should be defined in relation to its monetary value rather than other factors such as its relative simplicity.⁴⁹ The LCO's project is motivated by a concern for estate representatives and beneficiaries who must pay disproportionate costs in order to access the benefits of the probate system. Looking at the monetary value of the estate in relation to the costs of probate is the best way to approximate the hardship that estate representatives may experience in accessing probate (or in choosing not to access probate). Monetary value as an eligibility criterion also provides a clear cut-off which is important in designing a small estates procedure that is easy to navigate, and thereby less costly to use.

Our proposed monetary value limit of \$50,000 has been chosen as the best means of balancing the goals of promoting accessibility to probate and preserving the legal protections of the system.

This approach is in contrast to that taken in British Columbia in its comprehensive overhaul of B.C.'s succession law resulting in new legislation, the *Wills Estates and Succession Act* (WESA).⁵⁰ The B.C. government rejected the idea of a procedure for "small estates" but chose, instead, to implement a simplified process for probating "simple estates".

Earlier in the B.C. reform process, the British Columbia Law Institute (BCLI) had prepared an *Interim Report on the Summary Administration of Small Estates*, in which it recommended the adoption of a small estates procedure available to estates valued at less than \$50,000 with no real property, both where there is a will and in an intestacy.⁵¹ However, the Ministry ultimately decided against implementing this for several reasons.⁵² Apparently, in designing the forms, the small estate form was only slightly shorter than the usual form. This is unsurprising. The information that BCLI felt should be included in the small estates declaration was, in some respects, just as detailed as that required by Ontario's current probate process. The B.C. government was not comfortable simplifying the process sufficiently that it would have made it appreciably easier to use. It found a balance between accessibility and protection closer to the protection end of the spectrum. There was also concern that banks would rely on the \$50,000 value limit to require probate in cases where they would otherwise waive probate.⁵³

Small estates procedures in other jurisdictions have tended to define small estate in relation to "bright line" monetary value limits which apply whether or not the

estate involves a will.⁵⁴ For example, Manitoba has a court-based small estates procedure that is available to estates with a total value of \$10,000 consisting of either personal or real property.⁵⁵ Saskatchewan has a similar procedure but it is available to estates worth up to \$25,000 and containing exclusively personal property.⁵⁶ The Northwest Territories is currently considering the implementation of a small estates procedure in that province which would be available to estates having a net value of less than \$35,000.⁵⁷ The Northwest Territories' draft form suggests that the provision would apply to estates containing only personal property, although this is not yet clear.⁵⁸

Small estates procedures are also in place throughout the United States and are included in the *Uniform Probate Code*.⁵⁹ These similarly define small estate in relation to a monetary value limit which ranges in different states from US\$10,000 to US\$275,000. Most common are value limits of US\$100,000 or limits around the US\$50,000 mark.⁶⁰

Australia has several forms of small estates procedure in place and has recently engaged in a number of reform projects in this area.⁶¹ A value limit of AU\$100,000 (at time of writing roughly equivalent to CAN\$95,000) has been most popular here.

Of course, there are several possible obstacles to assessing the true value of a small estate. The value of certain assets may not be clear or their value may change over time. It may be that only an estimated value of the estate is available at the time of the probate application with the valuation being finalized only after probate is granted. Similarly, new assets or additional liabilities against the estate may be discovered later on. Future legal claims against the estate may also affect its value.

Another challenge is to discourage testators and estate planners from artificially structuring larger estates so as to fall within the value limit. One way of dealing with this tendency is to keep the value limit low enough that only genuinely small estates are likely to be able to fit within it.

Under Ontario's probate process, a Certificate of Appointment of Estate Trustee (COA) operates as a grant of authority over all estate assets whatever their value and whenever discovered. Traditionally it was the practice that, six months after a COA is granted, court staff would follow up on COAs granted on the basis of estimated valuations in order to confirm those valuations. However, there was no way for court staff to know if new assets had been discovered in the meantime.⁶² This practice will change now that estate representatives must file Estate Information Returns with the Ministry of Finance directly.⁶³ Although under the current probate system, valuation issues may have consequences for the administration of the estate and the amount of estate administration tax payable, they do not affect the legitimacy of the estate trustee's authority.

In contrast, for small estates procedures based on a monetary value limit, valuation issues may well affect the legitimacy of the estate representative's authority. For example, an estate representative might apply to administer a \$40,000 estate

under a small estates procedure based on a \$50,000 value limit. Once authorized, if another \$20,000 asset is later discovered, then the total value of the estate will exceed the small estates procedure's value limit. In these circumstances, the estate representative's authority may be brought into question.

Several reform projects in Australia have addressed this concern for subsequent increases to the valuation of small estates. They provide for a monetary value limit (AU\$100,000) but with a safety net provision requiring a formal grant if the estate is later discovered to exceed the value limit by 120 per cent or 150 per cent.⁶⁴ In other jurisdictions, the difficulty of valuing small estates at the probate stage has been addressed by limiting the estate representative's authority to the assets declared in the small estates application procedure.⁶⁵ If additional assets are discovered thereafter, the estate representative must re-apply for authority to administer those assets.

There is also the issue of whether the gross value or net value of an estate should be used in determining eligibility for a small estates procedure. Both these measures are used in different small estates procedures in other jurisdictions.

During consultations, the predominant view was that the gross value of the estate should be used in the interests of keeping a small estates procedure as simple and streamlined as possible.

During consultations, the predominant view was that the gross value of the estate should be used in the interests of keeping a small estates procedure as simple and streamlined as possible. This also prevents the manipulation of large estates in order to fit within the value limit.⁶⁶

A novel approach to the definition of a small estate was suggested by the Office of the Children's Lawyer (OCL). Approaching the issue from the perspective of minor beneficiaries, the OCL suggested that it was not the value of the estate as a whole that was relevant but, rather, the value of particular beneficial interests in the estate. A small estates process based on total estate value would mean that minor beneficiaries with equal financial interests in different estates would receive different levels of legal protection. This makes sense from the perspective of vulnerable beneficiaries but a small estates program based on the value of beneficial interests would not be practically feasible. In particular, the value of beneficial interests will not always be known at the point that an application for probate is filed.

2. Other Possible Eligibility Criteria

Any feature of an estate that tends to contribute to its complexity, thereby increasing the costs of probate, is potentially relevant to assessing eligibility for a small estates procedure. However, complicating factors do not necessarily indicate one way or another whether a small estate should be eligible for a small estates process. From one point of view, greater complexity means increased barriers to accessing probate so that the estate should be eligible for a small estates procedure in order to ensure that the estate is administered. From another

point of view, greater complexity means greater potential for fraud or improper administration so that the estate should be not be eligible for a small estates procedure but should be subject to the protections of the full probate process.

For example, the absence of a will (intestacy) tends to increase the complexity and cost of probate.⁶⁷ During consultations, court staff reported more problems with applications by small estates involving intestacies. Even with intestacies valued as low as \$5,000 or \$10,000, financial institutions will send family members to the courthouse to get the “paperwork” before they will release the assets. In many cases, these family members have very little understanding of the significance of probate and the estate is clearly too small to warrant it. So these estates might receive the legal protection of probate appropriate for the degree of complexity involved in administering them, but at an entirely disproportionate cost. In some circumstances, complexity arguably weighs in favour of eligibility for a small estates procedure in spite of the loss of legal protection that entails.

Most jurisdictions with the exception of a few such as New Jersey and Louisiana, do not distinguish between testacies and intestacies in their small estate procedures.⁶⁸ It may be that, as with many of the elements of small estates, there are too many possible variations to generalize about what is the “typical” small estate.

...[T]he absence of a will (intestacy) tends to increase the complexity and cost of probate.

During consultations, court staff reported more problems with applications by small estates involving intestacies.

A few jurisdictions also have additional eligibility criteria. Some small estates procedures determine eligibility in part by what kind of property is in the estate. For example, Saskatchewan, Iowa and Michigan restrict small estates procedures to estates with personal property only.⁶⁹ BCL’s proposed small estate procedure also would have excluded real estate, likely because B.C.’s *Land Title Act* expressly requires probate for transmission of real property after the owner’s death.⁷⁰ Ontario’s *Land Titles Act* does not make this a legislative requirement although probate is required as a matter of policy.⁷¹

Some jurisdictions have two value limits which apply depending on the identity of the beneficiaries. For example, Maryland has a small estates procedure for estates worth less than \$50,000 but this value limit increases to \$100,000 where the spouse is the sole beneficiary.⁷²

All these considerations demonstrate the complexity around the concept “small estate” and the various factors in addition to monetary value that might be considered relevant to eligibility for a small estates process.

3. The Value Limit for a Small Estates Process: The Conclusion

Although the question of eligibility for a small estates process has been answered by highly varying amounts and other criteria, a small estates process itself must be simple and easy to use in order to be successful. The above discussion

demonstrates that there is no logical array of eligibility criteria that will neatly capture that category of estates for which access to probate is unduly compromised. Value is relative and other factors such as the type of assets and the number and identity of the beneficiaries may impact the cost of probating the estate. In these circumstances, the LCO concludes that a bright line monetary eligibility limit for a small estates process best balances the goals of accessibility and legal protection.

A more challenging issue is what monetary value limit makes most sense in the Ontario context. The focus of this project on accessibility leads us to conclude that the value limit should be a modest number encompassing those estates for which access to probate really is in danger but excluding larger estates for which a small estates process would be primarily a convenience.

For this reason, we have concluded that the relatively large monetary limits of some U.S. small estates procedures are not appropriate for the design of an Ontario small estates procedure.⁷³ Traditionally, probate in the U.S. requires a court hearing and can be a costly procedure compared to Ontario standards.⁷⁴ Where costs are higher, it follows that they will pose an obstacle for higher value estates.

The focus of this project on accessibility leads us to conclude that the value limit should be a modest number encompassing those estates for which access to probate really is in danger but excluding larger estates for which a small estates process would be primarily a convenience.

The LCO has concluded that a value limit of \$50,000, being the gross value of the estate at the time of the deceased's death, should achieve the best balance between accessibility and legal protection for the greatest number of Ontario estates. The figure of \$50,000 was chosen for several reasons. First, considering that the cost of hiring a lawyer to obtain probate is typically between \$1,000 and \$5,000, a \$50,000 value limit should be ample to capture almost all Ontario estates for which cost poses an obstacle to accessing probate while also allowing for inflation.

Second, a \$50,000 value limit should be low enough to discourage large estates from using estate planning strategies to fit within the small estates process. In most cases, the legal costs involved in restructuring a large estate to fit within a \$50,000 value limit would likely exceed the potential savings.

Third, a \$50,000 limit would capture most vehicle transfers in Ontario. Motor vehicles are assets that are typical of small estates. A \$50,000 limit would as a practical matter also exclude almost all real estate in Ontario. Real estate is not usually typical of small estates and its transfer involves additional procedures under Ontario's Electronic Land Registration System (E-LRS) which will typically require legal representation.⁷⁵ In any event, the LCO has concluded that real property as part of a small estate should not preclude access to a small estates procedure.

Fourth, a value limit of \$50,000 also falls within the range of other analogous value limits in Ontario law. For example, under the *Estate Administration Tax Act*,

the amount of tax payable in relation to estate value jumps from 0.5 per cent to 1.5 per cent where the estate is worth more than \$50,000.⁷⁶ Also, the Ontario Small Claims Court jurisdiction covers claims up to \$25,000. This amount was chosen several years ago in 2010 and it applies to specific claims rather than the total value of someone's property.⁷⁷ Therefore, a value limit of \$50,000 for the total value of a small estate is, at least, reasonable in relation to the \$25,000 small claims limit.

...[A] Small Estates Certificate should be limited to the particular assets specified in the application... . If new assets are discovered in a small estate and the revised value of the estate remains under \$50,000, the estate representative would be able to file a summary amendment to the certificate.

The LCO has also considered how best to address the risk that a small estate valued at \$50,000 or less at the time of applying under a small estates procedure will subsequently be re-evaluated to be worth more than \$50,000. We have concluded that a Small Estates Certificate should be limited to the particular assets specified in the application rather than being a general grant in relation to the total estate as is currently the case in Ontario's probate system. If new assets are discovered in a small estate and the revised value of the estate remains under \$50,000, the estate representative would be able to file a summary amendment to the certificate so that his or her authority would expand to encompass the new assets. Only one amendment would be permitted per estate. If new assets are discovered that brings the revised value of the estate over the \$50,000 value limit, the estate representative would be required to file under the regular probate stream for a COA. In this latter scenario, actions already taken pursuant to the Small Estates Certificate would remain valid under ss. 47(1) of the *Trustee Act*.⁷⁸

The LCO believes that this method of dealing with subsequently discovered assets is preferable to the Australian approach of having both a value limit and a second larger value limit as a safety net. Two value limits would complicate what is intended to be a very simple process. Also, a small estates process that does not link a grant of authority to particular assets would provide limited means for enforcing value limits against estate representatives who undervalue the estate.

IV. SMALL ESTATES AND THE CURRENT PROBATE SYSTEM

The project was motivated by concerns that probate may be disproportionately expensive for some small estates and that the process may be sufficiently complex that the estate representative may not undertake probate and may abandon the assets or fail to distribute them appropriately. A threshold issue in the project is to assess the extent of this perceived problem. To what extent can we say that estate representatives of small estates in Ontario currently have difficulty accessing the probate system or that difficulties lead them to ignore the probate system? In using the term “small estate”, we refer to estates worth up to \$50,000, as explained in the previous chapter. After considering the evidence of a problem probating small estates in Ontario, we consider how particular elements of the current probate process may contribute to this problem.

There is no way of knowing how many small estates are administered without probate in Ontario. Similarly, there is no way of knowing how many small estates are not administered at all.

A. What We Know about the Use of the Probate System

Unfortunately, there is no empirical evidence addressing these questions. Ontario gathers very few statistics on probate applications and there are no statistics at all on the administration of estates outside the probate system. We do know that between 2009 and 2012, there were about 17,000 probate applications with a will and 3,000 applications without a will filed in Ontario annually.⁷⁹ We do not know the value of the estates subject to these applications, nor whether the applications were made by individuals or lawyers acting on their behalf. According to a very informal poll of estates court staff throughout Ontario, anywhere from 10 to 40 per cent of probate applications are for estates worth less than \$100,000.⁸⁰

There are even fewer statistics on the number of estates that are administered without probate. A rough idea can be inferred by comparing the number of probate applications to the number of deaths in Ontario over the same period. Between 2009 and 2012, there were approximately 90,000 deaths in the province annually.⁸¹ Thus we may surmise that less than one quarter of Ontario estates are being probated. Of those not being probated, many will be large estates using estate planning techniques to avoid the need for probate. There is no way of knowing how many small estates are administered without probate in Ontario. Similarly, there is no way of knowing how many small estates are not administered at all.

There is some empirical evidence available in other jurisdictions. The British Columbia Law Institute (BCLI) reported that in 2004/2005, 44 per cent of British Columbia probate applications were valued at less than \$100,000.⁸² In 2011, the Law Commission of England and Wales released a report on *Intestacy and Family Provision Claims on Death*. The Commission found that more than half of

all estates are administered without a formal grant and that these are most likely to be intestate.⁸³ Intestate estates are generally of a lower value than where there is a will.⁸⁴

Although there is no empirical evidence in Ontario confirming that estate representatives of small estates do not access the probate system, the consultations revealed significant anecdotal evidence of a problem. This was particularly the case in speaking with court staff and government representatives. Court staff members are on the front lines dealing with small estates. They described frequent situations where bereaved family members are told by financial institutions or other agencies that they must fill out a form at the court office before the financial institution will release the deceased's assets. These family members are not aware of the significance of probate and the estate assets are not sufficient to cover the cost of a probate application in any event. Court staff cannot give legal advice but they typically try to explain the nature of estate administration and some suggest that the person try to negotiate with the bank.

Most estates practitioners agreed with the need for small estate reform in Ontario. Although a few practitioners denied that there was any problem, particularly given the dearth of statistics, the majority of practitioners had either experienced disproportionate costs probating small estates themselves or were aware of the problem anecdotally.

Most estates practitioners [we heard from] agreed with the need for small estate reform in Ontario.

There were differing views on the extent of the problems experienced by small estates. Many estate practitioners felt that the current probate system needs only minor reforms to accommodate small estates, such as simplifying the forms. One noted that the problem is not with the procedure itself but whether it is economically feasible to get involved.⁸⁵ According to another, "the system is not broken. It lumbers along."⁸⁶

Other estates practitioners felt that there are problems with the probate system but that these are not unique to small estates. They suggested that the scope of the project was artificially narrow and that the system should be looked at globally:

The current system is not terrible. It has problems but they exist for most estates. It is possible to get probate for small estates on an affordable basis in most cases. Some of the problems that exist are created by the deceased failing to do basic planning. Therefore, I am reluctant to see time and money spent to solve only part of a larger problem when overall reform could benefit a wide range of estates.⁸⁷

The system is laborious and hard to explain; the time involved in obtaining probate is unduly long and the restrictions and demands imposed by banks makes [sic] it almost impossible to avoid. I do not know that it actually protects creditors.⁸⁸

Still other estates practitioners reported particular problems probating small estates and they supported the idea of a new streamlined process directed specifically at small estates.

The LCO also heard stories from individuals who have acted as estate representatives, both of problems obtaining probate for small estates as well as problems administering small estates without probate.⁸⁹ However, there were also reports of probate being obtained without much problem.

The extent of the problem probating small estates in Ontario is unclear not only because of the lack of empirical data on the probate system, but also because there is no shared conception of what is a “small estate” in Ontario. Although most stakeholders agreed that some kind of reform is necessary, their suggestions as to the nature and extent of reform varied widely depending on their personal definition of a “small estate”.

B. Evidence of a Systemic Problem with Small Estates and Probate

Institutions, both public and private, rely on probate to satisfy themselves of the estate representative’s legal authority to represent the deceased.

In addition to the anecdotal evidence of a problem, there is also evidence of systemic challenges with the way that financial and other asset-holding institutions deal with small estates both within and outside the probate system. Institutions, both public and private, rely on probate to satisfy themselves of the estate representative’s legal authority to represent the deceased. Without this stamp of authority, these institutions bear the risk of liability if they pay estate assets to or otherwise deal with the wrong estate representative. Stakeholders from certain institutions explained that they have a legal duty to require probate in these circumstances even where the cost of obtaining probate exceeds the value of the estate.

For example, some financial institution stakeholders expressed concern about managing their risk of liability while being responsive to waiver requests in appropriate circumstances. Other financial institutions saw the problem not so much as risk management as in complying with their legal duty to deal only with properly authorized representatives. A third problem commonly expressed was the unpredictability and client dissatisfaction caused by inconsistent waiver policies among different financial institutions and even within the same institution.

The Canada Revenue Agency (CRA) is a particular example of an institution that is legally obliged to require probate of estates in certain circumstances. The estate representative is required to file the deceased’s final tax return with the CRA. The CRA is required under section 241(1) of the *Income Tax Act* to deal only with the legally authorized representative of a deceased taxpayer.⁹⁰ Therefore, the CRA views probate as a legal requirement rather than a matter of cost/benefit analysis, particularly in the case of intestacies. However, the CRA will exercise discretion to waive probate in limited cases where there is evidence of undue hardship.⁹¹

There are also other government agencies with similar ambiguous situations to address. For example, under section 515(2)(d) of the *Criminal Code*, an accused may post cash bail personally.⁹² Typically this amount is not more than \$5,000. Once the case is concluded, so long as there is no forfeiture order, the cash is returned. Where the accused has died in the interim, family members may claim the money instead. However, it is not clear what evidence should be required by government officials in order to establish that the claimant is legally entitled to receive the money. As of yet, no rules have been developed to address this issue.⁹³

Evidence of a systemic problem is particularly acute for administrators of pension plans attempting to pay out death benefits where the beneficiary is the employee's estate. The pension plan administrator has a statutory duty under section 45 of the *Pension Benefits Act* to require from the person entitled to a benefit the information necessary to calculate and pay the benefit. So long as the administrator requires this information, he or she may rely on it in determining who is legally entitled to receive the benefit.⁹⁴ However, the administrator will not be discharged where there is actual notice that the person is not entitled to the payment or where there is "an inaccuracy in or impropriety with respect to the information provided".⁹⁵ Therefore, administrators will generally require probate before paying out death benefits to an estate. Where there is a will, some pension plans have adopted policies to waive probate in the case of benefits worth less than \$50,000 for example. However, where there is no will, the claimant has no presumptive authority to act on behalf of the estate and there is nothing an administrator can rely on to indicate that it has met its statutory obligation in section 45.⁹⁶

There is a problem for individual estate representatives who must pay for a legal process the purpose of which they do not understand, yet the effect of which may be to eat up a substantial portion of their inheritance.

This can be a problem on an institutional level for pension plans with many small accounts.⁹⁷ Estate representatives are often unwilling to apply for probate for these small amounts and instead choose to abandon them. The LCO heard in consultations this happens in a "substantial number" of cases even where the benefit is as much as \$2,000 or \$3,000. The problem for these estate representatives is not only the cost but also what they see as the aggravation, time, energy and "hassle" of the probate process.

In spite of the absence of empirical data on the extent of the problems experienced by small estates in Ontario's probate system, it seems clear that a problem exists. There is a problem for individual estate representatives who must pay for a legal process the purpose of which they do not understand, yet the effect of which may be to eat up a substantial portion of their inheritance. The precise nature and extent of this problem depends on how "small estate" is defined. There is also a systemic problem in that probate is the commonly accepted means of establishing legal authority under several statutory regimes, both provincial and federal. Where the practical reality is that there is no money in the estate to pay for probate or to make it worthwhile to do so, this creates gaps in those regimes and leads to uncertainty about who should be entitled to collect estate assets.

C. Particular Probate Requirements that May Pose a Challenge for Small Estates

In order to determine whether a small estates process makes sense for Ontario and, if so, how best to design it, it is necessary to understand the specific difficulties experienced by estate representatives of small estates under the current probate system.

The LCO heard a range of views from practitioners about the degree of difficulty experienced by small estates under the current process. A few practitioners were adamant that the existing forms are easy to complete and there is no problem with the process. Other practitioners reported having trouble justifying the cost of probate to their clients with small estates. Rural practitioners, in particular, spoke of clients who were caught between the bank's requirement that they obtain probate and the disproportionate cost of doing so.

These perspectives from practitioners are useful but they do not tell the whole story. The estate representatives of very small estates will not go to a lawyer. They are more likely to seek advice from their financial institution or court staff. In the LCO's consultations with these stakeholders, a somewhat fuller picture emerged with respect to small estates. For many of these estates, the probate process is, for practical purposes, inaccessible.

What is it about the current system that complicates the probate process for small estates and drives up costs? There are numerous factors that may come into play and some (not all) are discussed below. Some of these affect small estates in particular but most are difficulties that may arise in any probate application, regardless of value. Some factors, such as strained relationships among surviving family members, would complicate even an ideal probate process.

Roughly 50 per cent of Canadians do not have a will and, for 30 per cent of these, the reason given is that they do not have enough assets to justify making a will.

1. Absence of a Will

Roughly 50 per cent of Canadians do not have a will and, for 30 per cent of these, the reason given is that they do not have enough assets to justify making a will.⁹⁸ Unfortunately, there are no statistics available on the relative value of Ontario estates with and without wills. It might be assumed that estates without wills tend to be smaller in value but this is not necessarily the case, particularly where a will exists but has been lost (or hidden).

In consultations, estate practitioners consistently reported having fewer files involving intestacies. It may be that estate representatives of estates without wills are less likely to hire a lawyer to assist with probate. Again, it does not necessarily follow that estates without wills are smaller in value.

Whatever the incidence and value of small estates without wills in Ontario, the absence of a will is a key factor (perhaps *the* key factor) tending to complicate the probate process. A will naming an executor establishes the testator's intentions so that the role of the court is limited to authenticating the will and ensuring that the applicant is, indeed, the executor named by the testator.⁹⁹ However, where there is no will, the deceased's intentions are unknown and the court must exercise its discretion to appoint an appropriate estate trustee according to the statutory framework in the *Estates Act*.¹⁰⁰ This additional responsibility on the part of the court necessitates additional information from the applicant including: renunciations from anyone with a prior entitlement to be estate trustee, consents from beneficiaries entitled to a majority of the value of the estate assets and evidence that the applicant has obtained an administration bond.¹⁰¹

Applying for probate in intestacy may be particularly complicated where the deceased was living in a common law relationship. Although a common law spouse may act as estate trustee in intestacy, he or she is not a "spouse" for the purposes of the *Succession Law Reform Act* and, therefore, is not entitled to inherit under the distribution scheme in Part II of the Act.¹⁰²

The additional requirements for obtaining probate in intestacy may also pose practical difficulties for an applicant or his or her lawyer. For example, according to practitioners, it is more often necessary in an intestacy to track people down. Usually, no one, including the client, will have all the information necessary to complete the probate application.

Also, as is the case with any negative assertion, it may be difficult to establish that there is no will. Family members frequently do not have that kind of personal information about the deceased. One survey found that only 54 per cent of Canadians have spoken to their family about their intentions for their will.¹⁰³ The fact that the estate representative has not heard about a will does not mean that one does not exist. Most concerning, and a significant gap in the current probate system, is the possibility that a family member may hide a will that is not in their best interests.

Form 74.14 under Rule 74 of the *Rules of Civil Procedure* requires the applicant for probate in an intestacy to swear the following oath:

I have made a careful search and inquiry for a will or other testamentary document of the deceased person, but none has been found. I believe that the person did not leave a will or other testamentary document.

Even estates law specialists in Ontario are not clear on the extent of this duty to make a "careful search". Applicants represented by a lawyer may pay \$400 to \$800 to post a notice in the newspaper or a professional journal seeking information about the existence of a will. However, it is hard to say how often these notices are read. The LCO heard that some communities of estates practitioners have developed informal email systems to alert each other to new

estates and will searches. Neither of these avenues is likely to be available to an estate representative of a small intestacy who cannot afford a lawyer.

These factors will tend to complicate the probate process and increase costs for all intestacies. But for small intestacies, the increased costs are more likely to discourage estate representatives from accessing the probate system at all. This can have particularly severe consequences where there is no will. The existence of an apparently valid will is often sufficient to convince financial institutions to waive the probate requirement for small estates.¹⁰⁴ However, where there is no will, financial institutions generally refuse to waive probate even for small estates. This is understandable. Financial institutions are faced with the same dilemma that courts have in these circumstances. Without a will, there is no clue as to the testator's intentions and no presumptive authority on the part of the estate representative. The institution must rely heavily on its own risk assessment to determine who is entitled to administer the estate. Without a will, most financial institutions are unwilling to take this chance. Often, the result is that the estate representative is stuck. He or she may not be able to afford or be willing "to front" the cost of probate and cannot access the estate assets without probate. As a result, the assets are abandoned.

...[W]here there is no will, financial institutions generally refuse to waive probate even for small estates.

As will be discussed further below, the difficulties faced by small estates without wills in Ontario's probate system is the most immediately urgent problem identified in this project. Ideally, a small estates procedure would bring these small intestacies into the probate system thereby ensuring that estate assets are not left languishing in institutional accounts but, instead, find their way into the hands of the beneficiaries as provided for in Ontario's *Succession Law Reform Act*.¹⁰⁵

2. Where There is a Will (There May Not Always Be a Way)

Where there is a will, the probate application requires evidence that the will is legitimate and that it is the final will of the deceased. The original will and any codicil must be attached to the application.¹⁰⁶ Additional evidence is provided in a series of forms appended to the application.

One requirement that sometimes poses problems for estates of any value is the requirement that a witness to the execution of the will file an affidavit of execution (Form 74.8).¹⁰⁷ Ideally, this affidavit is sworn at the time the will is executed and is stored with the will. However, it is not uncommon that the affidavit is missing and the witnesses have died or cannot be found. In this case, the applicant must seek other evidence of "due execution". Banks have traditionally been asked to provide an affidavit based on the testator's signature card. However, bankers are becoming increasingly reluctant to do this since, with the advent of electronic banking, they are less likely to know their client. One practitioner recalled a case where the testator had signed his signature card at age 16. By the time he died at age 57, his signature had changed and the bank refused to provide an affidavit.

Even if it is possible to obtain an affidavit, it may not be enough on its own to convince the court that the will is legitimate. Costs of probate may be increased by any of these factors: searching for witnesses to the will, assembling alternative evidence of due execution and obtaining legal advice when the application does not go as planned.

Probate will also be complicated if the will is a holograph will (entirely in the testator’s handwriting) or has been altered. This increases the risk that the will is not authentic or does not represent the testator’s true intentions. The probate application must include additional elements to address this risk. In the case of a holograph will, the applicant must file an affidavit (Form 74.9) that the handwriting and signature are that of the deceased.¹⁰⁸ Where the will has been altered, the application must include another affidavit (Form 74.10) comparing the will then to its condition at the time of execution.¹⁰⁹

Form 74.9 requires the affiant to attest to the statement: “I was well acquainted with the deceased and have frequently seen the deceased’s signature and handwriting.” Whether or not this will lead to increased probate costs will depend on how easy it is to find someone who can satisfy these conditions. Form 74.10 must be sworn by someone who witnessed the execution of the will.

The practical reality is that any will may raise a red flag and result in increased probate costs, particularly those that are not professionally drafted. Estate representatives may find it difficult not only to complete the forms, but also to navigate any complicating factors that may arise without legal assistance.

What would be the consequences if a small estates procedure were available for small estates unable to bear the costs of assembling the evidence that the will is valid? Eliminating some of the evidentiary requirements would likely lower the associated application costs and make it possible for more small estates to access probate. On the other hand, reducing the standard of proof that the will is valid would increase the risk that the estate will be administered under the wrong will. There is a clear conflict between accessibility and accuracy of the process here, one that must be balanced in developing any small estates process.

Costs of probate may be increased by any of these factors: searching for witnesses to the will, assembling alternative evidence of due execution and obtaining legal advice when the application does not go as planned.

3. Family Dynamics

Family disputes may be an overarching complication in probating estates of any value. Family disputes lead to other complications such as difficulties obtaining a copy of the will and identifying the estate assets. Common law or subsequent marriages increase the likelihood of disputes, especially where there is no will. Disputes are more likely to arise when the deceased is the last member of a family group and inheritances pass outside the more usual avenues from spouse to spouse or parent to child.

These are difficulties that are shared by estates of any value. Just because the monetary value of an estate may be small does not mean that family members will not fight about it. As one government representative pointed out, “[p]eople get as angry and bitter about \$1,000 as \$100,000 when it is ‘family’”.¹¹⁰

The complications caused by family disputes affect the entire estate administration process and in many cases are simply irresolvable. Once disputes move into the litigation process, estate assets are quickly eaten up by court costs. Parties are emotional and will sometimes fight far beyond the point that it makes financial sense to do so. However, depending on the form it takes, a small estates process could ensure that more of these disputes are played out within the structure and protections of the court system.

4. Finding a Willing Applicant

Rather than fighting for control of an estate, some families will not be interested in administering an estate at all. Particularly for small estates, it may be difficult to find someone willing to take on the cost and responsibility of acting as estate representative. Family members may not be able to cover the upfront cost of obtaining probate. Or they may shy away from taking on responsibility where executor fees are not sufficient financial incentive. Where an estate is so small that it is possibly insolvent, lawyers may advise estate representatives to renounce their position so that they avoid becoming responsible for paying creditors where there is not enough in the estate to cover the deceased’s debts.¹¹¹

The Ontario Public Guardian and Trustee (OPGT) has authority under the *Crown Administration of Estates Act* to apply to be estate trustee where there is no one else to take on that role.¹¹² However, this jurisdiction is exercised only as a last resort and only in relation to estates with a net value of \$10,000 or more.¹¹³

Where there is no one willing to act as estate representative, it can be difficult to deal with immediate problems such as making funeral arrangements. A longer term concern is whether the estate will be administered at all.

5. Capacity Issues

Capacity issues involving one or more beneficiaries necessarily complicate probate applications of any value. Minors or incapable persons having an interest in an estate are protected by the requirements in Rule 74 that notice of any probate application be provided to the OPGT or the OCL or both.¹¹⁴ The OPGT or the Office of the Children’s Lawyer (OCL) or both will play a supervisory role over the probate proceedings with the degree of their involvement determined by the nature of the interests at stake.

Where there is no one willing to act as estate representative, it can be difficult to deal with immediate problems such as making funeral arrangements. A longer term concern is whether the estate will be administered at all.

For example, where minors have a beneficial interest in an estate, the OCL will ensure that the minor is paid according to the terms of the will and may seek an accounting where there is no will or no trust terms in the will. Where the minor's share exceeds \$10,000, the OCL will ensure that it is paid into court as required under section 51 of the *Children's Law Reform Act* (CLRA).¹¹⁵ If the OCL has concerns about the administration of the estate, it will require the estate representative to bring a court application to pass the estate accounts.

It is important to note that the OPGT and OCL receive notice of vulnerable beneficial interests in an estate only where a probate application is filed.¹¹⁶ Under the current probate system where it seems that many estate representatives of small estates may not file probate applications, vulnerable beneficiaries may not be receiving this protection. One of the arguments in favour of introducing a simplified probate process for small estates in Ontario is that it would encourage more estate representatives of small estates to file for a Small Estates Certificate. This would bring these small estates within the protection of the probate system and would trigger legal protections such as notice to the beneficiaries (including OPGT and OCL in respect of vulnerable beneficiaries). On the other hand, the opposite argument can be also made, that small estates with vulnerable beneficiaries should *not* be eligible for any small estates process because the current court supervised probate system affords crucial protection to these beneficiaries. The OCL took this latter position in its submission to the LCO.¹¹⁷ However, again, this argument is premised on the assumption that the estate representative applies for probate in spite of disproportionate costs.

Under the current probate system where ... many estate representatives of small estates may not file probate applications, vulnerable beneficiaries may not be receiving [the] protection [of probate].

6. Obligation to Post Security

Some probate applications are significantly complicated by the requirement that the estate representative post security with the application. This is a requirement where

- there is no will,¹¹⁸
- there is a will but the applicant is not named in the will as executor,¹¹⁹ or
- there is a will but the applicant is not resident in the Commonwealth.¹²⁰

According to the *Estates Act*, the security must be for an amount that is double the value of the estate (subject to the court's discretion).¹²¹

The security requirement acts as a safeguard against improper administration of the estate where the testator has not vouched for the estate representative in the will or where the estate representative is beyond the jurisdictional reach of the court. Several stakeholders emphasized that, in spite of the trend to seek a waiver of the bond requirement, it continues to be an important protection against misappropriation of the estate assets in many cases and, most particularly, where there are minor or incapable beneficiaries. However, in the case of small estates,

the current bond requirement is generally thought to be impractical. In consultations, court staff indicated that one of the biggest difficulties people experienced with small estates is meeting the security requirement where there is no will. Estate representatives may not know where to get a bond or may not have the personal assets to qualify for a bond. For estates worth less than \$100,000, Rule 74.11 allows the use of a personal surety, such as a family member or friend, but the amount of the bond still must be double the value of the estate.¹²² Bonds also add time pressure to complete the administration since they are subject to a yearly fee.

Where an estate representative is unable to obtain a bond, there may be no one else to apply for probate. This will be particularly detrimental to minor or incapable beneficiaries who are not in a position to protect their own interest in the estate.¹²³

The practice has developed for applicants to file a motion to dispense with the bond requirement as part of the probate application.¹²⁴ This is a paper proceeding and is frequently successful.¹²⁵ However, there is no standard form for bringing this motion and it is an area where estate representatives with no legal representation may be particularly disadvantaged.

...[C]ourt staff indicated that one of the biggest difficulties people experienced with small estates is meeting the security requirement where there is no will.

7. Identifying, Finding and Notifying Beneficiaries

Rule 74 requires that notice of a probate application be served on “all persons entitled to share in the distribution of the estate”.¹²⁶ There is no guidance on how legal entitlement is to be determined and establishing who is entitled would presumably be a significant challenge for many applicants without legal assistance.

Once identified, beneficiaries must be found. In an increasingly global world, beneficiaries are more likely than in the past to be living in areas far from Ontario. However, in an increasingly online world, electronic searches are more often successful in locating them. Other modern tools such as DNA testing may also come into play here. Complications in identifying and finding beneficiaries may occur in a small estate just as in a large estate, but will result in disproportionate costs in the former.

Once beneficiaries are found, the rules provide that the estate representative must send notice of the application in set forms. There is a different form to be completed depending on whether there is a will or no will (forms 74.7 and 74.17 respectively). Service is by regular letter mail to the person’s last known address.¹²⁷ Notice is also to be sent to OPGT and OCL where there are minor or incapable beneficiaries.¹²⁸

During the consultations, several stakeholders indicated that contacting beneficiaries was not a problem even where, for example, there were seven or more beneficiaries or where a beneficiary lived overseas. One practitioner indicated that, in 17 years of practice, there was rarely any extra effort required to locate beneficiaries. Some court staff agreed that, in their experience, locating beneficiaries is not usually a problem.

Nonetheless, this requirement may be particularly challenging for estate representatives without legal assistance. As Hakim notes:

It is critical to remember that the average Ontarian has little or no experience with court forms or affidavits. In my practical experience, and in the experience of the practitioners I spoke with, preparing the Notice, deciphering who exactly should receive the Notice, understanding and completing the prescribed method of service, correctly preparing an Affidavit, and having it properly sworn, is a daunting task for most people and one of the biggest barriers to accessing the probate system.¹²⁹

Again, these difficulties may be greater in the case of small estates where the estate representative is less likely to have legal assistance.

Valuation difficulties are not unique to large estates. Small estates are not necessarily simple estates.

8. Valuing the Assets

Another requirement on the application form for probate is a valuation of the assets of the estate.¹³⁰ In Ontario, the valuation must be divided into real estate (net of encumbrances) and personal property. However, until recently, there was no need to break the value down into individual assets.¹³¹ The valuation is used to calculate the estate administration tax payable.¹³² If the estate representative is unable to determine the value at the time of the application, an estimated value may be provided along with an undertaking to provide a final figure within six months of the Certificate of Appointment (COA) being issued.¹³³

During consultations, there were mixed opinions about the difficulty involved in valuing property for the purpose of the probate application. Some practitioners felt that valuing rural property can be problematic. Others felt that professional appraisal reports were reliable and that the process worked fine.

According to Hakim,

In my practical experience, it can be a lengthy proposition to ascertain all of a deceased's assets and liabilities, and obtain valuations of them. If disclosure from financial institutions is required for such valuation to occur, or where the deceased's estate may require valuations of stock, corporate shares or personal property, or if the estate representative has low financial literacy, the requirement of the valuation and/or inventory can be a bar to accessibility, as it can present too many difficulties for estate representatives to complete without professional assistance.¹³⁴

Valuation difficulties are not unique to large estates. Small estates are not necessarily simple estates. They may contain assets that are difficult to value although they are not valuable.

Court staff expressed concern about the reliability of the valuation figures contained in probate applications. For example, apparently some practitioners have a practice of always claiming \$50,000 as the value of real property and will not include an undertaking to correct this number. Court staff will scrutinize applications to determine whether there is any reason to doubt the valuation provided but they cannot look behind that valuation. Where an estimated value has been provided, court staff traditionally followed up with the estate trustee at the six month point.¹³⁵ However, there was no means for taking into account assets discovered thereafter. Presumably, the new verification and audit regulations introduced by the Ministry of Finance are intended to address these kinds of concerns. These regulations are discussed in the next section immediately below.

Problems with the valuation of property may affect estates both large and small depending on the assets involved. They are of concern to this project only to the extent that they may increase the overall cost of probate beyond the resources of estate representatives of small estates.

9. Estate Administration Tax and Estate Information Return

If valuing the assets was traditionally difficult for some unrepresented estate representatives, then the new audit and verification regulation introduced by the Minister of Finance in January of this year will most likely increase this barrier.¹³⁶ This regulation adds a new layer to the probate process by requiring estate trustees to complete and file a form listing details about each of the assets in the estate. The form must be filed with the Ministry of Finance within 90 days after the issuance of a COA.

This new regulation completes Ontario's estate administration tax regime which has been under development since 1992. That was the year that the government tripled the amount payable in probate fees at that time.¹³⁷ This resulted in a legal challenge and in 1998 the Supreme Court of Canada held that what had been called a "fee" was effectively a tax.¹³⁸ The Court explained that "probate fees do not 'incidentally' provide a surplus for general revenue, but rather are intended for that very purpose. The revenue obtained from probate fees is used for the public purpose of defraying the costs of court administration in general, and not simply to offset the costs of granting probate".¹³⁹ Ontario passed the *Estate Administration Tax Act* that same year in order to provide legislative authority for the collection of this tax.¹⁴⁰ However, the tax continued to be collected as part of the probate process and was paid into court. For this reason, there was little oversight of the amounts received.

Finally, in 2011, the Ministry of Finance was given direct authority over the tax and it designed the new Estate Information Return to provide it with information allowing it to better enforce payment of the tax.¹⁴¹ The new return requires a high degree of detail about each individual estate asset, its value, where it is located and so forth. Although estate representatives may find it daunting, a representative from the Ministry noted that it is much less complicated than the Canada Revenue Agency's income tax return. The Ministry has also issued a guide to completing the return targeted at laypeople.¹⁴²

The new return must be completed by all estates regardless of value. The Ministry representative explained that this was necessary in order to collect baseline information about estate assets.

Some estates practitioners have challenged the idea that the new return is easy to complete and accessible to estate representatives. According to one estates practitioner,

This is going to really drive up the costs – legal and otherwise – of administering an estate. There will be extra cost in preparing the Return, as well as obtaining valuations where proper valuations perhaps were not sought before and ETs [Estate Trustees] were basing value on research.¹⁴³

Some estates practitioners have challenged the idea that the new return is easy to complete and accessible to estate representatives.

Barry Corbin has criticized the new audit regime suggesting that, among other things, it may create delays in the distribution of estates and dissuade people from being willing to step forward as estate trustee.¹⁴⁴

The new audit and verification regime took effect only in January of this year; therefore, it remains to be seen to what extent the requirement to complete the Estate Information Return will create an additional barrier to obtaining probate in Ontario.

During the consultations, several stakeholders suggested that the estate administration tax regime should be modified to benefit small estates. Some suggested that the minimum amount at which the tax applies (currently at \$1,000) be increased in order to exempt small estates from the tax altogether. Others suggested imposing a flat tax on small estates. One practitioner suggested that the estate administration tax be abolished altogether to save resources and, instead, a surtax be added to the deceased's terminal provincial tax return. Consideration of whether to reduce the amount of estate administration tax payable by small estates is beyond the scope of this project which has been focused specifically on the probate process. The revenue implications of reduced estate administration tax are simply unknown. That being said, the impact of the new Estates Information Return on the accessibility of the probate process is directly in issue in this project and is discussed further in chapter VII below.

10. Real Property

Almost all of Ontario real property has been transferred from the Registry system to the Land Titles system.¹⁴⁵ Under the Land Titles system, most estates containing real property must file for probate since the Director of Titles requires a COA as part of the property's transfer from the deceased to the estate and from the estate into the hands of the beneficial owner.¹⁴⁶ The Director of Titles has established a policy exempting real property worth less than \$50,000 from this requirement where there is a will indicating who is entitled to the property and where certain other requirements are met including an indemnity agreement.¹⁴⁷

A probate waiver for the transfer of the deceased's real property is not available in intestacy. This is not a problem for most small estates. Given the average value of property in Ontario, there are just not that many small estates that will contain real property. However, real property in some rural locations may be of sufficiently low value that the owner may be considered to have a small estate. Where there is no will, a COA is currently required in order to transfer this property.

There are 65 different forms under Rule 74, most of which are at least potentially applicable to an uncontested probate application.

11. The Forms and Court Procedures

A key barrier for small estates accessing the probate system is the cost of legal representation. And yet, legal representation is often practically necessary in order to successfully navigate the forms and procedures leading to the issuance of a COA. Legal assistance may be necessary to decipher the language used in the forms, as well as to appreciate the responsibilities that accompany a successful application.

There are 65 different forms under Rule 74, most of which are at least potentially applicable to an uncontested probate application. Even for someone with legal training, it can be bewildering sorting out the purpose of all these forms in order to determine which ones pertain to a particular application.

Once the relevant forms have been identified, a layperson must figure out the meaning of the words used in each form. Even where the questions are clear on their face, many laypeople will not appreciate the legal significance of their answers. Several of the questions invite the applicant to explain their answer but without context as to what kind of information is being requested. For example, if the applicant is the deceased's spouse, the form asks whether or not the applicant has elected to receive the entitlement under section 5 of the *Family Law Act*. If "yes", the form provides space for the applicant to "explain why the spouse is entitled to apply". These kinds of questions about legal entitlement presume that the applicant has the legal knowledge necessary to provide an answer. It is safe to say that the majority of Ontarians are unaware of the legal principles governing who is "entitled" for these purposes.

Some key problems with the current forms were described during the consultations. The section of the form asking about the deceased's divorces can raise practical difficulties. An executor who is the child of the deceased may not know these details and must obtain them from Family Court.

Some observed that the requirement for the application for a COA to be commissioned is a problem for some people. The court office offers a service for unrepresented applicants to have affidavits sworn for \$13 but, according to several practitioners, this practice does not appear to be well known.

Even if the legal requirements for a successful probate application are navigable by a layperson, the time and effort necessary to devote to the process can constitute a barrier for some.¹⁴⁸

In spite of several suggestions for improving the forms, stakeholders generally felt that each of the forms had a valuable purpose and should not be eliminated. Court staff pointed out that the Ontario probate system is recognized world-wide as being authoritative. Even individual stakeholders did not complain about the forms as might be expected.

A number of government representatives, among other stakeholders, expressed concern that estate representatives do not understand their responsibilities or the significance of the process they are following.

12. Lack of Public Knowledge about Probate

The seemingly wide misperception among the public about the purpose of probate was discussed above. This lack of public knowledge also extends to the probate process itself. A number of government representatives, among other stakeholders, expressed concern that estate representatives do not understand their responsibilities or the significance of the process they are following. People do not read the online guide but simply print off the forms and fill them in. There are also specific areas of misinformation. For example, many people mistakenly believe that all intestacies are dealt with by the OPGT.

This confusion also extends to the substantive issues of legal entitlement. According to one stakeholder:

...[M]any people who are quite honest and aboveboard have come to erroneous conclusions as to who is entitled to what, and what should happen with the money, or are quite ready to ignore creditors. Or, they are reluctant to do anything, as they believe they will have to personally pay debts.¹⁴⁹

Certainly, misinformation or lack of knowledge can complicate the probate process for estates of any value. However, here again, this concern is augmented in cases of small estates where there may be no extra money to obtain the assistance of a lawyer.

13. Personal Barriers

There is much literature detailing the racial, ethnic, linguistic, gender and other personal barriers that can prevent people from accessing the justice system generally.¹⁵⁰ Some comments during the consultations suggest that at least some of these barriers also extend to the probate system. For example, some individual stakeholders pointed to practical problems such as distance, health, age and other barriers as impediments to navigating the process. One individual noted that court staff would not communicate by phone or email so that she had to go to the court office several times in person, an hour and a half trip from her home.¹⁵¹ Another individual explained that the process can be particularly trying for same-sex couples because they often have difficulty proving their entitlement.¹⁵²

A small estate procedure designed to improve access to the probate system will only be fully successful if it improves access for all estate representatives of small estates, regardless of personal barriers.

The value of real property is typically lower in rural communities, selling for less than \$50,000 in some cases, so that even estates with real property may be small in value.

14. Rural Communities

It became apparent early in the project that people in rural communities may have very different experiences with the probate system from those in urban communities. Therefore, the LCO reached out to stakeholders from a range of communities.

According to practitioners and court staff consulted, urban communities such as Toronto tend to probate larger and more complex estates.¹⁵³ There may be both primary and secondary wills and sophisticated assets. The estate representative is more likely to hire a lawyer.

In rural communities, estates are more likely to be smaller and straightforward. “Once you step outside the money bubble”, as one practitioner put it, probate practice is less formal, more relationship-based. One rural practitioner observed that, with less wealth, people are grateful for a little windfall and there is less worry about notifying beneficiaries and risk of fraud. People are more likely to abandon assets rather than incurring the cost of probate.

There are several distinctions between urban and rural communities that might impact on the probate experience, including the following:

- The value of real property is typically lower in rural communities, selling for less than \$50,000 in some cases, so that even estates with real property may be small in value.
- Real property can be difficult to value in rural communities. There are many unique properties and a property may sit on the market for many months. Without a firm valuation, court staff are more likely to reject the application.

- Large families are more typical of rural communities. More beneficiaries complicate the probate application and drive up the cost.
- Some rural communities were originally settled by one family so that many people have the same last name. This can complicate identifying and tracking down beneficiaries.
- In some small communities, beneficiaries may have problems obtaining independent legal advice before signing an indemnity in favour of a financial institution. This may be because there are fewer lawyers practicing in the community or because the lawyers are unable to act due to a professional conflict of interest.
- Access to information is relatively limited in rural areas. People do not necessarily have broadband internet access. They are more likely to rely on lawyers or other professionals to disseminate legal information although this does not necessarily lead to legal representation
- It is more likely in rural communities that testators and estate representatives will have a personal relationship with their financial institution. Where this is the case, it is more likely that the financial institution will agree to waive probate.

An accessible small estates procedure must be equally available everywhere.

Of course, these are generalizations and there is just as much chance that a small estate probate application will be filed in Toronto as in Kenora. An accessible small estates procedure must be equally available everywhere.

15. Public Resources

Government programs offering public services will always struggle with funding issues and limited resources. The probate system is no exception. Counter staff at registry offices have the constant challenge of assisting people with small estates who ask for probate without understanding what it is or the full process involved. These people have no money for a lawyer. Staff must attempt to be helpful without stepping over the line and giving legal advice.

Resource constraints are also evident in the amount of time necessary to process probate applications in different registry offices and different times of year. A number of stakeholders offered rough estimates of processing times in locations across the province. Delays were widely seen to be a problem in Toronto. Other smaller centres, such as Kingston and Windsor, reportedly issued probate in as little as a couple of weeks. An application in Brampton was said to take two and a half months but in Milton only three weeks. In Ottawa, the estimate was six weeks. While waiting for a COA, nothing can be done. Debts cannot be paid and this can be stressful for estate representatives.

The OPGT noted its own resource limitations. The OPGT takes over the administration of estates and applies for probate in about 200 to 250 cases per year. The office is involved in about 1,100 applications at any one time. Most of these are in regard to intestacies. The average value of estates dealt with by the OPGT is creeping up to about \$100,000 and it is not unusual for them to administer intestacies worth up to \$1M. They do not administer insolvent estates or estates worth less than \$10,000. The OPGT only administers estates as a last resort and it does not have the resources to take on a bigger role.

In order to be workable, a small estate process must take into account the realities of limited resources.

D. How is the Probate System Working Currently?

Overall, most practitioners and court staff felt that the current probate process is reasonably satisfactory as a means of proving wills and establishing the authority of estate representatives for the majority of Ontario estates.

Overall, most practitioners and court staff felt that the current probate process is reasonably satisfactory as a means of proving wills and establishing the authority of estate representatives for the majority of Ontario estates. The current application requirements were generally felt to be appropriate to protect larger estates without undue cost. Although numerous complications might arise in the application process depending on the existence of a will, the number, identity and location of beneficiaries, the type of assets and so forth, these do not undermine the value of the process generally.

However, many stakeholders from each of the stakeholder groups believed that the situation was different in the case of small estates where the cost of probate poses an obstacle to accessing the process at all. These are estates with just enough assets that it might be worth obtaining probate but for the cost of a lawyer. Or, there is effectively no money in the estate but probate is required for some other purpose such as filing the final tax return or even for sentimental reasons. For these estates, difficulty accessing the probate system is not so much related to any particular flaw in the process, but rather to financial barriers pure and simple.

In these circumstances, it does no good to insist that these estates go through the current probate process. There needs to be some alternative means for increasing the likelihood that these estates are protected by probate and administered for the benefit of those interested. In chapter VII below, we make recommendations to address these small estates.

E. Probating Small Estates without a Lawyer

The cost of hiring a lawyer to assist with a probate application will typically represent a significant portion of the total cost of probate. The smaller the value

of an estate, the more disproportionate legal costs may be relative to total cost. One of the key and most controversial issues in this project is the extent to which legal assistance is or should be necessary in filing for probate, particularly in the case of small estates.

1. Currently Most (But Not All) Estate Representatives Hire a Lawyer

We do not know how many estate representatives currently file for probate without legal assistance. Some practitioners we consulted had never heard of a successful application by a layperson. On the other hand, it is clear from court staff and others that there are applications by laypersons being granted. During consultations, we heard many informal “guesstimates” of the percentage of self-represented probate applications. None of these is reliable on its own, but together they suggest that self-represented probate applications are not inconsequential although they are in the minority overall.

For example, several court staff suggested that approximately 90 per cent of probate applications are filed by lawyers, but that the number of self-represented parties is increasing every year.¹⁵⁴ Apparently, applications by laypersons have become more frequent since the forms were put online in 1995 and the rule requiring staff to help people with estates less than \$1,000 was repealed.¹⁵⁵ This 90 per cent estimate was also supported by an informal review of a random stack of court files.

One of the key and most controversial issues in this project is the extent to which legal assistance is or should be necessary in filing for probate, particularly in the case of small estates

Of the 24 questionnaire responses received by the LCO, 13 of these involved probate applications. Of these, 7 were filed by individuals without a lawyer. These individuals used various tools for assistance, including relying on court staff, reading the Law Society of Upper Canada’s guide and talking to friends who had been through the process.

Rural practitioners reported that estate representatives for small estates with no real estate typically do not hire a lawyer, but get advice from their banker or other financial institution instead. This practice is not ideal since financial institutions are generally motivated to have estate assets stay with the institution.

It is also common in rural communities for lawyers to offer free initial consultations on estates matters. Of the estate representatives taking advantage of free consultations, it was estimated that only perhaps 55 to 60 per cent went on to hire a lawyer.

Therefore, it is reasonable to infer that, although most probate applications are filed with legal assistance, there are an appreciable number of applications currently being filed by laypersons.

2. Current Challenges in Obtaining Probate without a Lawyer

Currently, an individual attempting to navigate the probate process without a lawyer faces a number of roadblocks.

The terminology used in Ontario's probate system is clumsy and unintuitive. The word most likely to be recognized by a layperson, "probate", was essentially eliminated from Rules 74 and 75 in 1994 and replaced by the less recognizable phrase "Certificate of Appointment of Estate Trustee".¹⁵⁶ Twenty years later, the underlying legislation continues to refer to grants of probate and letters of administration.¹⁵⁷ Also, the term "probate" continues to be widely used by estates practitioners as well as estate representatives.¹⁵⁸

Some of the rules for obtaining probate are technical and may be confusing for laypeople. For example, although it is not always necessary to obtain a COA, there are no clear rules as to when an application is or is not necessary.¹⁵⁹ There are also rather arcane rules around the location in which the application must be filed. That is, an application must be filed with the court in the county or district where the deceased's property is located or where the deceased resided, depending on the circumstances.¹⁶⁰

The court forms are available online and they may also be completed online. However, the completed forms must be printed out, commissioned and filed in person. Therefore, attendance at the courthouse remains necessary.

The sheer number of forms required for an application is unwieldy and it is not clear which forms are applicable to any particular estate.¹⁶¹ Also, although there are forms for almost every contingency, there is no form for a motion to dispense with the requirement to post an administration bond. An unrepresented applicant must draft this motion from scratch.

The court forms are available online and they may also be completed online. However, the completed forms must be printed out, commissioned and filed in person. Therefore, attendance at the courthouse remains necessary.

There is no easy way for laypeople to become aware of Ontario estates and applications for probate, save for periodically phoning the court office for an update.

Finally, there is no official guide to filing for probate and no single internet access point for information and forms relating to the COA process. There is useful information contained on the *Frequently Asked Questions About Estates* page on the Ministry of the Attorney General website. It links to the court forms.¹⁶² It also links to information about common errors encountered when completing applications.¹⁶³ Yet this information is incomplete and does not take the reader through the application process step by step. The Law Society of Upper Canada (LSUC) has created online guides which do provide step by step information.¹⁶⁴ However, these guides are intended for lawyers and are not in plain language. For example, the guides define a "will" as a "testamentary instrument that must be made in writing." The phrase "testamentary instrument" is undefined.

Beyond the MAG and LSUC sources, there is a distinct lack of information directed at the public on navigating Ontario's probate system. Established providers of legal information such as Community Legal Education Ontario (CLEO) do not offer information on probate, but tend to focus on higher priority areas such as criminal law, refugee law and family law.¹⁶⁵ For example, there are no materials specific to probate on CLEO's Your Legal Rights site.¹⁶⁶ LegalLine does offer an online article on probate but this is too brief to be of assistance on its own.¹⁶⁷ The LSUC's online service Your Law includes information on wills and estates but this does not seem to include information on filing for probate.¹⁶⁸ Pro Bono Law Ontario (PBLO) does not deal with probate matters.¹⁶⁹ Nor is there information on probate on their website.¹⁷⁰

The public information on probate that does exist emphasizes its complexity, rather than demystifying it, and, in some cases, discourages the layperson from acting without a lawyer. For example, the Service Ontario site, *What To Do When Someone Dies*, states, "Without a will, an estate is distributed according to the law. This can be a complex process. If you are in this situation, you might want to contact a lawyer." The reader is advised to contact the Lawyer's Referral Service.¹⁷¹ Similarly, the Ministry of the Attorney General site, *Frequently Asked Questions About Estates*, notes that a lawyer is in the best position to provide legal advice on whether probate is necessary or not. Where legal assistance is encouraged at the very start of the probate process, a reader may reasonably conclude that legal assistance is advisable generally.¹⁷²

...[T]here is a distinct lack of information directed at the public on navigating Ontario's probate system.

Most other Canadian jurisdictions also fall short of offering a probate system navigable without legal assistance.

British Columbia recently revised its probate forms to improve the instructions on how to complete them.¹⁷³ However, there is no general guide with the forms that explains the process or how each form relates to the overall process.¹⁷⁴ There is a forms user's guide but this provides only technical information on how to fill out the forms.¹⁷⁵ The Ministry of Justice website includes some general information about estates but the website suggests that, for more information, the reader should consult a lawyer or a commercial self-help guide.¹⁷⁶ The website does list Clicklaw and Dial-A-Law as resources. Clicklaw provides a slightly better although brief guide to the forms.¹⁷⁷ B.C.'s *Wills, Estates and Succession Act* and the accompanying Probate Rules are still new and it may be that more material will become available. However, at this point it seems that British Columbia has not yet fully succeeded in its effort "to establish a more user-friendly probate system".¹⁷⁸

Information on Saskatchewan's small estates procedure is perhaps even more elusive.¹⁷⁹ Although the Saskatchewan Court of Queen's Bench has a webpage on applying for probate, there appears to be no information specifically addressing the summary administration procedure.¹⁸⁰ The Court website does link to the Wills and Estates webpage of the Public Legal Education Association of Saskatchewan

(PLEA) which provides basic public legal information about the summary administration process in Saskatchewan.¹⁸¹ However, there is no information on how to follow the summary procedure.

Manitoba has made more effort to deliver publicly accessible information on its small estate procedure and this is discussed below in chapter VII.B.

No matter how well designed a small estates procedure may be and how carefully it weighs the relative significance of legal protection and accessibility, it will not be entirely effective unless estate representatives are able to learn about it and navigate it without the cost of legal assistance. Therefore, a key goal in this project is to facilitate the use of the probate system by laypeople administering small estates.

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The law underpinning the probate system is complex and oversimplifying the process risks eroding the legal protections it provides. However, any concern that probate may be oversimplified is largely hypothetical in Ontario at present. There has not been a significant effort to make the system more accessible to laypeople, at least since 1995 when the forms were put online. And, in fact, the probate system in Ontario remains poorly understood, convoluted and overly technical for laypersons. There are several ways that the system might be made more accessible to laypeople without large public expenditure. Possibilities for getting around these roadblocks and improving access to the probate system for small estates will be discussed in chapter VII below.

V. THE OPTION OF ADMINISTERING SMALL ESTATES WITHOUT PROBATE

In light of the unpopularity of the estate administration tax as well as the effort and expense involved in obtaining probate, there is a strong incentive for the estate representative of a small estate to avoid probate and distribute the assets informally. However, in addition to the loss of legal protection, there are also other challenges associated with avoiding probate. In this section, we explore the option to administer a small estate outside the probate system.

A. How Often are Small Estates Administered Without Probate?

As noted above, more than three quarters of Ontario estates are not probated. This is not a particularly helpful statistic since it also encompasses larger estates that have been carefully structured to avoid the need for probate. As one practitioner pointed out, the result is a curious and incongruous system in which mid-sized estates tend to be probated but the largest and smallest estates are not.¹⁸²

[One] practitioner referred to the “weird” compulsion that many people have to avoid probate and noted that they may end up spending more money on dispute resolution than they save in tax.

People tend to avoid probate not only because they cannot afford it but also in order to circumvent the tax requirement, as well as the administrative process. More than one stakeholder attributed the problem with the probate system to the tripling of estate administration tax in the 1990s. Before this, there was apparently little fuss around probate. Nevertheless, the process itself can also be a deterrent. As discussed in the previous section, the process can be intimidating and confusing for laypersons.

Practitioners described clients going to great lengths to avoid probate even where the estate administration tax payable was relatively small. For example, one client was adamant about avoiding probate to save \$6,000 in estate administration tax in spite of the fact that it would compromise the testamentary plan for a \$400,000 estate.¹⁸³ Another practitioner referred to the “weird” compulsion that many people have to avoid probate and noted that they may end up spending more money on dispute resolution than they save in tax.

One individual stakeholder described administering an estate without probate even in the face of roadblocks put up by a financial institution:

The...bank forced me at the last moment when I didn’t go the Probate route to provide all sorts of personal financial asset information before they would release the Estate Funds to the heirs. They released Estate funds to pay Estate creditors but then change their regulations internally, I was told, and wanted personal declaration of my financial assets that were much greater than the value of the Estate in question.¹⁸⁴

One consequence of this trend to avoid probate wherever possible is an increased risk of financial abuse. Many practitioners and other professionals were aware of financial abuse in the form of putting property into joint ownership in order to avoid probate. For example, one practitioner described an estate in which he acted as both executor and lawyer. Family members convinced the testator to put property in joint ownership shortly after the will was executed. When the testator passed away, this allowed the family members to avoid probate, ignore the provisions of the will and avoid dealing with the executor. Unlike many stakeholders, this practitioner did not approve of probate waivers by banks. His view was that the practice of banks waiving probate was short circuiting the legal protection intended by the system:

My experience is that banks particularly disrespect the process by offering to let executors and administrators to have access to funds up to \$100,000 by providing an indemnity so the bank is off the hook for liability. They don't seem to care about beneficiaries, spousal claims, creditors etc. and individuals signing these things don't know the legal implications. It is also my view that it isn't just the monetary value of an estate which is important but also the legal issues surrounding an estate.¹⁸⁵

Institutions holding a deceased's assets have a legal duty (statutory or common law or both) to safeguard those assets on behalf of the deceased.

Another practitioner took the view that banks should not release assets without probate since this sends the wrong message to estate representatives. This individual commented,

Too many estate representatives do not take their job seriously. They are okay at organizing information and some general administration tasks but they are lax in reporting to beneficiaries and filing tax returns or locating creditors. Sometimes this is a result of long-standing family feuds. Probate sends a message that someone who takes on the role of ET [estate trustee] needs to be very serious about doing a good job, acting reasonably, and prepared to accept personal liability.¹⁸⁶

Anecdotal evidence suggests that there is an established practice of avoiding probate particularly for small estates, although there are no numbers to gauge it. Next we consider the effect of this practice on the financial and other institutions that hold estate assets.

B. Duty of Financial and Other Institutions to Safeguard Assets

Institutions holding a deceased's assets have a legal duty (statutory or common law or both) to safeguard those assets on behalf of the deceased. The assets may be transferred only to an estate representative who is legally authorized to receive them on behalf of the estate.¹⁸⁷ The scope of the institution's duty to establish this legal authority is generally a matter of interpretation. As noted in section IV.B above, institutions tend to interpret these provisions strictly.

For example, the federal *Bank Act* allows banks to rely on provincial probate systems as evidence of authority to receive the deceased's assets. Section 460 provides that the delivery to the bank of an affidavit explaining a request for payment, along with a grant of probate, grant of letters of administration or "other document of like import", constitutes sufficient authority for the bank to make the payment. However, the section also reserves the bank's right to refuse to make payment unless additional evidence is provided.¹⁸⁸

The point of this provision is to protect banks from liability if they release assets on the basis of a Certificate of Appointment (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 accept a COA as proof of authority but it does not *require* that banks accept a COA and, in fact, it reserves the right of banks to require other such proof as deemed necessary. That being said, in practice, banks rely on section 460 of the *Bank Act* in seeking proof of probate before releasing assets. The banks may exercise this right to require probate even for assets having designated beneficiaries.¹⁸⁹

The representative body for Ontario credit unions reported that the probate system can be "prohibitively expensive and complex" for their members and it supports the idea of a simplified procedure for small estates.

The analogous legislation applying to Ontario credit unions is more flexible than is the *Bank Act* provision. Section 42 of the *Credit Unions and Caisses Populaires Act, 1994* exempts credit unions from liability where they release amounts less than \$50,000 to estate representatives without probate so long as the credit union acts in good faith and seeks evidence of the person's entitlement to receive the money.¹⁹⁰

Nevertheless, the LCO heard in consultations that credit unions also tend to take the position that probate is required before releasing assets to an estate representative. Where they do agree to waive the probate requirement, credit unions impose a 30 day waiting period before releasing estate monies in order to give other family members the opportunity to assert a claim.¹⁹¹

Credit unions often have longstanding relationships with their members. The representative body for Ontario credit unions reported that the probate system can be "prohibitively expensive and complex" for their members and it supports the idea of a simplified procedure for small estates.¹⁹²

Insurance companies also have the challenge of determining whether or not a particular beneficiary or estate representative is entitled to receive a payout when the insured dies. The legislative requirements for life insurance companies are particularly vague in this respect. Section 203 of the *Insurance Act* provides that an insurer has thirty days to pay out insurance money on receiving "sufficient evidence" of an event upon which the money becomes payable and the right of the claimant to receive the money.¹⁹³

Although the provision does not specify what evidence will be sufficient to establish the claimant's right to receive payment, the practice of life insurers has

generally been to require the executor to probate the will.¹⁹⁴ However, this is not a mandatory requirement.¹⁹⁵

Section 207 of the *Insurance Act* also gives life insurers statutory protection from liability where they have not received authoritative evidence of the right to receive insurance money and they have mistakenly paid insurance proceeds out to the wrong person (presumably in accordance with section 203). The provision does preserve the rights or interests of any person other than the insurer. Therefore, the proper recipient would still be able to make a claim for the proceeds directly against the person who mistakenly received them.¹⁹⁶

In a written submission, the Canadian Life and Health Insurance Association Inc. supported the idea of a simplified process for small estates “since court supervision is not economically feasible for majority of the smaller estates”.¹⁹⁷

There are similar legislative provisions applicable to other institutions and particular kinds of asset transfers, none of which is entirely clear about the scope of the institution’s duty to protect against the release of assets to an unauthorized person. As a result, from the perspective of these institutions, releasing assets without probate leaves them open to a significant risk of liability.

...[I]nstitutions have developed policy to address the issue of what evidence of authority should be required before releasing assets.

This risk was realized in the Court of Appeal decision in *Monteiro v. Toronto Dominion Bank*.¹⁹⁸ A Kuwaiti family was in litigation over the validity of the mother’s will which had left all her assets to her daughter. Before the will challenge had been settled, and contrary to its own internal procedures, Toronto Dominion Bank released the mother’s assets to her sons. Once the will was ultimately determined to be valid, TD was held to be liable to the daughter for the missing assets. As the Court reasoned,

...[T]he situation TD finds itself in is the product of it having ignored its own internal procedures and thereby having paid the wrong party. In that regard, TD was the author of its own misfortune. Its internal procedures were designed to prevent this exact situation from occurring, but having chosen to ignore these procedures, TD now finds itself liable to [Daughter] for the funds in the account. I see no injustice in this result.¹⁹⁹

Even where there is little or no legislative guidance, institutions have developed policy to address the issue of what evidence of authority should be required before releasing assets. There are a myriad of these policies for different institutions and different types of assets. These policies generally vary depending on whether or not there is a will.

For example, transferring Canada Savings Bonds can be a problem since it is not possible to designate a beneficiary on these. Even in small estates, these may not be released without probate. However, a detailed policy has been created providing for their release depending on their monetary value and the identity of the estate beneficiaries.²⁰⁰

A deceased's motor vehicle may generally be transferred to an executor on providing the Ministry of Transportation with a copy of the will. Where there is no will, it may be transferred in certain circumstances where the beneficiary obtains a lawyer's letter stating his or her entitlement or, where there is more than one beneficiary, stating that the other beneficiaries have no claim on the vehicle. According to one practitioner, this can be a problem in some circumstances:

The Ministry will often transfer an ownership to a beneficiary based on a lawyer's opinion letter that the beneficiary is entitled to the vehicle if there is a will, or if there is a surviving spouse who would inherit the entire estate as the preferential share, but if there is no will and no spouse, it is almost impossible to get the vehicle transferred. Since people with small estates and no will tend to have less valuable vehicles, the cost of obtaining probate just to deal with a vehicle can be ridiculously disproportionate.²⁰¹

It is not only financial institutions who rely on probate. Apparently, it can also be a challenge to transfer utility accounts without a will.²⁰²

All these legislative provisions and policies provide guidance on the scope of the institution's legal duty to safeguard the deceased's assets after death. However, the legal duty remains unclear and here lies the reason for the caution exercised by institutions, as well as the frustration of estate representatives and practitioners.

The legal duty of financial and other institutions to safeguard their estate assets is often unappreciated by estate representatives.

Financial institution stakeholders emphasized that the decision to require probate in any particular case is not simply a matter of cost/benefit analysis. In some cases it will make more sense to release small value assets rather than undergo the hassle of holding the assets up until probate is granted. Nonetheless, the law is that the institution must protect the assets and the privacy of the owner.

The legal duty of financial and other institutions to safeguard their estate assets is often unappreciated by estate representatives. Practitioners generally felt that banks were uncooperative in cases of small estates, telling the LCO that banks may require probate in order to release assets as low as \$10,000 and where the total value of the estate does not support the cost of a probate application.

In consultations, financial institutions complained about the intense pressure they are under from family members and their lawyers to waive probate. This is also a problem beyond the estates context in other situations where financial institutions are required to establish the authority of a client's representative. Institutional stakeholders explained that they are presented with all sorts of documents, printed off the internet or prepared by a law student, but these are not reliable and banks are generally obliged to reject them.

Financial institutions are also pressured by creditors to release moneys owing to them. Typically, financial institutions will agree to pay funeral expenses or taxes pending probate, but will not pay other creditors because they do not want to risk preferring one creditor over another.

C. Duty of Financial and Other Institutions to Keep Client Information Confidential

1. Financial Institutions

Financial and other institutions have a duty not only to protect their clients' assets but also their privacy. For example, the *Bank Act* requires banks to take reasonable precautions to ensure that unauthorized persons do not access or use information held by the bank.²⁰³ The Act also charges bank directors with establishing procedures for protecting confidential information, as well as a committee for overseeing those procedures.²⁰⁴

The concern here is not only to protect the privacy of the client but also that of third parties. For example, when an estate representative gains access to the account of a deceased client, they also access any ancillary information contained in that account about joint account holders, beneficiaries under trusts and other instruments, persons interacted with in the course of financial dealings (information in passbooks or electronic records) and so forth.

...[P]rivacy laws have led financial institutions to adopt restrictive policies around releasing client information to third parties, including estate representatives.

Similar legislative duties are imposed on other financial institutions.²⁰⁵ These are in addition to the traditional banker's duty of confidentiality in common law.²⁰⁶ More recently, the introduction of federal privacy legislation, the *Personal Information Protection and Electronic Documents Act* (PIPEDA), has brought greater attention to the protection of confidential information.²⁰⁷ PIPEDA reinforces the duty of financial institutions to keep the sensitive information of their clients secure.

These privacy laws have led financial institutions to adopt restrictive policies around releasing client information to third parties, including estate representatives. In consultations, several stakeholders noted that it can be a challenge to obtain information from banks. For example, one practitioner spent three months sending letters to a bank asking for a valuation and still received the wrong information. Another practitioner described a case where the probate application was not filed until eight months after death because of the delay in obtaining information from financial institutions about the deceased's assets.

Court staff also reported banks and insurance companies refusing to release information about a deceased's assets. This makes it impossible for the estate representative to provide an accurate valuation of the estate for the purpose of a probate application. Financial institutions are particularly strict about maintaining privacy where there is no will naming the estate representative as executor.

Other practitioners thought that there were adequate practices in place to deal with the difficulty valuing assets. Many file an affidavit of estimated value with the probate application. However, this requires filing an amended statement later to confirm the final value. In some cases, banks will agree to release financial information only to a lawyer and on an undertaking to use the information only for probate purposes.

Where a bank or other institution requires probate in order to release information about the assets of a small estate, the estate representative may be placed in an impossible position. First, he or she will probably incur the extra expense of filing an affidavit of estimated value and then going back and correcting the value later on. Second, without knowing the value of the assets, the estate representative may not have a good idea of whether or not the estate is worth probating at all.

Some jurisdictions have dealt with this problem as part of estate administration reform initiatives. For example, under the new B.C. Probate Rules, where applicants are unable to access financial information about the estate pending a probate application, the Court may issue an Authorization to Obtain Estate Information.²⁰⁸ In contrast, the Alberta Law Reform Institute recommended against this measure in their report on estate administration, favouring educational initiatives instead.²⁰⁹

2. Canada Revenue Agency

Even if there are no assets in an estate, CRA must ensure they are dealing with a legal representative so that they can send the Notice of Assessment and other mail to the correct address.

Another privacy issue may arise when an estate representative attempts to file the deceased's final tax return with Canada Revenue Agency (CRA). CRA is bound by section 241(1) of the *Income Tax Act* to require proper authorization before releasing taxpayer information.²¹⁰ Even if there are no assets in an estate, CRA must ensure they are dealing with a legal representative so that they can send the Notice of Assessment and other mail to the correct address.

Section 241 is a broad provision for protecting taxpayers against disclosure of their confidential information in unauthorized circumstances. It begins with a general prohibition against government officials disclosing taxpayer information without authorization. There follows a number of statutory exceptions that permit the disclosure of information in specific enumerated circumstances. For example, an official may disclose taxpayer information where necessary for administering or enforcing the Act. It may also disclose information with the consent of the taxpayer.

Section 241 does not address the specific circumstances in which information may be disclosed to a "legal representative" of a deceased taxpayer.²¹¹ Therefore, in refusing to accept a deceased's final return without probate, CRA relies on the general prohibition against disclosing information without authorization.

CRA's 2012 Guide, *Preparing Returns for Deceased Persons*, defines "legal representative" as an executor, administrator or liquidator (in Quebec). Executor and administrator are each defined as requiring court approval or court appointment.²¹² However, other material available on the CRA website indicates that an executor named in a will may also be a legal representative, suggesting that probate may not be necessary in all cases.²¹³

In consultations, court staff reported regularly dealing with estate representatives of small estates who are forced to seek probate even where the estate has no assets because CRA tells them that it is required. On the other hand, practitioners were divided in their experience filing final tax returns with CRA. Some practitioners indicated that filing the return without probate has never been a problem. However, most acknowledged experiencing some difficulty dealing with CRA without probate. Several expressed the view that the emphasis on privacy in estates matters was excessive and operated as a barrier to justice. Again, the problem was seen to be particularly acute where there was no will.

D. Discretionary Waiver Policies

In spite of the legal duty of financial and other institutions to protect the deceased's assets and information, the reality is that it is impractical to require probate in every case when dealing with an estate representative. Financial and other institutions have developed policies to address those circumstances where it is deemed to be an acceptable risk to waive the probate requirement.²¹⁴

There are a number of variables taken into account by these institutions in considering requests to waive the probate requirement. There may even be competing interests within the institutions. For example, the trust branch of a bank may have a commercial interest in being cooperative with the estate representative's lawyer, whereas the retail branch may have a relationship with the family and, therefore, different motives. Also, the retail bank will have a range of customers, both sophisticated and unsophisticated, and will have accounts with smaller balances than, say, the trust branch or the investment brokerage. Each of these factors may influence the risk assessment.

Therefore, as might be expected, there is a wide variation among waiver policies adopted by different institutions. There is also variation within a single institution as to the policies adopted by different branches and the interpretation of a policy by staff members within a single branch. Staff members have different levels of experience with legal documents and therefore scrutinize them differently.

That being said, waiver policies do tend to have some common attributes. First, they usually apply only where there is a will. Probate is necessary for intestacies with limited exceptions. It may be waived in intestacies involving very small amounts like \$1,000, or with the consent of the beneficiaries.²¹⁵ In intestacy, financial institutions may accept a marriage certificate and indemnity in lieu of probate.²¹⁶ However, probate will usually be required where there is more than one beneficiary.

Second, waiver policies are usually directed at assets less than a certain value. It is the value of the asset held by a particular institution that is significant here

...[T]here is a wide variation among waiver policies adopted by different institutions. There is also variation within a single institution as to the policies adopted by different branches and the interpretation of a policy by staff members within a single branch.

rather than the value of the estate itself. The value limit varies among institutions as does how strictly it is followed. At one bank, the cut off is \$25,000. At another bank it is \$100,000.²¹⁷

Some waiver policies are stratified. For example, at one financial institution, waiver requests under \$25,000 are left to the discretion of the bank manager. Waiver requests between \$25,000 and \$100,000 must be approved by the legal department. Waiver requests above \$100,000 are denied. Another financial institution has the same stratified policy except that the manager's discretion applies up to \$30,000. Some financial institutions have no set policy but rely on the discretion of individual managers.

Third, waiver policies are ultimately subject to what some financial institutions referred to as "KYC" or "know your client". Managers will exercise discretion based on their own knowledge of the deceased, the estate and any apparent risk factors. Some of the factors noted in consultations include the following:

- size of the estate
- existence of a will
- age of the will
- simplicity/complexity of the will
- conflicting instructions from family members
- number of beneficiaries
- whether there are ex-spouses
- extent of knowledge of the deceased
- identity of the executor (whether spouse of the deceased, existing bank customer, Canadian resident with assets in Canada, approved by the beneficiaries, whether named in the will)
- type of assets (registered or non-registered, banking or brokerage), and
- jurisdictional issues, such as where executor is not resident in Ontario

...[F]inancial institutions may refuse to waive probate even for very small estates if there are "red flags" increasing the risk of a problem... .

Typically, financial institutions are more likely to waive probate for a small estate. However, the opposite may also be the case. Financial institutions are sometimes motivated to waive probate for a larger estate in order to ensure that either the assets remain with the institution or a debt owed to the institution by the deceased is recovered.

Conversely, financial institutions may refuse to waive probate even for very small estates if there are "red flags" increasing the risk of a problem, such as the following:

- holograph or \$99 will
- will changed shortly before death
- capacity issues
- evidence of family dispute

- someone other than spouse named designated beneficiary
- joint accounts with anyone other than spouse
- out of province executor
- out of province beneficiary
- pressure to act quickly
- executors who don't get along
- nieces and nephews (no emotional attachment to deceased)

Banks even have discretion to require probate in respect of an asset payable to a designated beneficiary (which usually transfers outside the estate). If the beneficiary is someone other than the spouse and the amount is above \$100,000, banks are likely to require probate.

Financial and other institutions have developed their own techniques for reducing the risk of liability for probate waivers. In this way, these institutions essentially mimic the probate process. For example, applicants are often required to fill out a form providing details about the estate so that the institution can conduct a meaningful risk assessment. Also, value limits are adopted in order to cap potential liability and the executor or beneficiaries or both may be required to provide an indemnity.²¹⁸ Another technique used by some financial institutions is to impose a waiting period after death before estate assets may be released.²¹⁹ This provides an opportunity for beneficiaries or others to come forward who wish to challenge the estate representative's right to receive the assets.

Financial and other institutions have developed their own techniques for reducing the risk of liability for probate waivers. In this way, these institutions essentially mimic the probate process.

The CRA has a Taxpayer Representative Information Section that reviews unique scenarios involving estate representatives. There are internal policies that are applied on a case by case basis. The agent will review a number of factors in addition to the size of the estate, including strife in the family and previous tax history. For some small estates, the agent, in his or her discretion, may settle for a letter signed by all the siblings designating the representative.

In applying waiver policies, financial institutions have the same challenges gathering sound evidence to establish legal authority as is inherent in the probate system. One example commonly mentioned is the difficulty proving a common law partnership where there are no mutual children. Even waiver policies limited to estates where the only beneficiaries are the spouse or children or both are not ironclad. There remains a risk that these are not the real family members. A spouse might provide a marriage certificate as proof but there is no way to know whether there was a subsequent divorce.

Therefore, it is important to note that the decision to administer an estate without probate does not eliminate the problems associated with establishing authority to represent the estate. Rather, it simply shifts the responsibility for determining legal authority from the courts to the institutions holding the deceased's assets.

There are a number of potential concerns with this practice. First, from a societal perspective, one might argue that it is inappropriate for private institutions to be driving these determinations of legal authority either by making these determinations themselves or, alternatively, by effectively forcing estates into the probate system. Second, from an accessibility perspective, one might question why some estate representatives choose to access the legal protection afforded by probate while other representatives of estates of the same value and attributes make do with an informal risk assessment carried out by individual institutions. A third, more practical, concern is the lack of consistency in waiver policies. It is very difficult for estate representatives and their counsel to predict in what circumstances particular financial institutions are likely to waive probate. This unpredictability undermines the commercial advantages of a probate system. It is also inefficient. Estate representatives can spend as much time and money obtaining a bond and completing paperwork in order to avoid probate as they would in obtaining probate.²²⁰

One practitioner told the LCO,

I have seen banks release over \$100,000 without probate, and refuse to release \$12,000 where there was a will and the surviving spouse was the named executor and beneficiary.²²¹

It is very difficult for estate representatives and their counsel to predict in what circumstances particular financial institutions are likely to waive probate.

A few examples illustrate the lack of consistency among waiver decisions.

One practitioner described a recent file involving an estate worth approximately \$20,000. The will named the deceased's adult daughter as sole beneficiary and executor. A bank holding \$10,000 in the deceased's bank account refused to release this amount to the executor without probate. This was in spite of the fact that the daughter had operated the bank account as her father's power of attorney for several years before his death. A complaint to the bank's estate department was unsuccessful since the department refused to interfere with the discretion of local bank managers.

In another case, a bank refused to release a \$6,000 guaranteed investment certificate (GIC) without probate because the staff was not familiar with the deceased or the estate representative. It was easier for the practitioner to file for probate (reducing his own fee) than to argue about it.

The LCO heard that the transfer of shares without probate can be particularly time consuming and complex. In one case, an elderly woman was left five shares in a particular company's stock by her deceased husband. These were worth very little. Since this was the only asset in the estate, she decided that it was not worth going through the effort and expense of administering the estate. However, she felt the personal loss of giving up something left to her by her husband.

Waiver policies are also unpredictable for larger estates. The LCO heard about a bank helping to restructure an estate so that its value would fall below the \$100,000 value limit for waiving probate, thereby circumventing its own policy.

There is cause to believe that the informal waiver practices of financial and other institutions will become more problematic in the future. Financial institutions do not know their clients as they once did. The trend to online banking is making it increasingly difficult to rely on local knowledge in determining whether it is safe to waive probate. Some stakeholders predicted that the trend will be for waiver practices to be centralized. One bank is already in the process of creating a centralized computer system for managing waiver requests in order to improve consistency within the bank. However, a side effect will be to reduce discretion and, quite possibly, reduce the number of waiver requests approved.

At an industry-wide level, financial institution stakeholders felt that there was a limit to what they could do to develop consistent policies around releasing assets after death. In fact, several financial institutions indicated that the industry would welcome rules designed to standardize these practices.

E. Consequences of Avoiding Probate

There is cause to believe that the informal waiver practices of financial and other institutions will become more problematic in the future.

Although the decision of a financial institution to waive probate in respect of a particular estate asset may be a welcome relief to the estate representative or beneficiary, it brings with it its own concerns. First, there are a number of implications for how the estate will be administered going forward. Second, without court sanction, the estate remains vulnerable to fraud. These consequences are discussed in turn.

1. Complications Administering the Estate

Where a financial institution agrees to waive probate, there may be a practical problem determining where to deposit the assets. A financial institution may be willing to waive probate for the release of a particular asset but may refuse to waive probate for the purpose of opening an estate account.²²² The institution incurs an increased risk in the latter situation because an estate account remains open indefinitely and the risk extends to all assets passing both in and out of the account. This is a particular problem where there is no will. According to one practitioner,

...[I]t is not up to the banks to figure out who they should be taking instructions from in the absence of an appointment either by Will or by [COA]. The banks are not in the biz of that sort of due diligence.²²³

There are a few ways to get around this. Some law firms will deposit the funds into their own trust account and issue a cheque to the estate representative (acting like a financial institution). In other cases, the financial institution will release assets not to the estate but directly to the beneficial owner. The problem is that, without probate, the assets may essentially bypass the estate and there is

no structure to ensure that they are administered according to the will or succession law. As a result, it may be difficult for creditors or others interested in the estate to make their claim.

Without probate, there is no public record showing who has applied to administer the estate, the approximate value of the estate and the beneficiaries of the estate. The notice provisions are important to allow beneficiaries to follow up on the administration of the estate. A public record also allows other non-beneficiaries to access information about the estate.

This is a particular concern in the case of minors or incapable beneficiaries. Without probate, there is less chance of a minor dependent recovering support from the estate under the *Succession Law Reform Act* (SLRA).²²⁴ For example, the girlfriend of a deceased, who is executor pursuant to the deceased's will, may be able to convince the bank to release the amount she is entitled to under the will. If there are no other significant assets in the estate, chances are that there will be no probate application and, therefore, no public notice of the estate. The parent of a minor child of the deceased, a dependent of the deceased's estate, may never become aware that a claim on behalf of the child is available under the SLRA.²²⁵

Without probate, there is no public record showing who has applied to administer the estate, the approximate value of the estate and the beneficiaries of the estate.

Another problem where there is no probate is the general uncertainty regarding the validity of the will and the authority of the person purporting to represent the estate. Without probate, there is no person legally responsible to collect the assets, pay debts including taxes, and protect the interests of beneficiaries. Many estate representatives will administer an unprobated estate out of a sense of loyalty to the deceased or moral obligation even where they have no beneficial entitlement. However, these estates are not settled for legal purposes and, absent a loyal estate representative, these estates may not be administered at all.

2. Whether Lack of Probate Leads to an Increased Risk of Fraud

Without probate, there is little to prevent an imposter from taking control of the estate. There is no assurance that the will provided to a financial institution is the true and final will, that beneficiaries will become aware of their entitlement or that the estate representative will not abscond with the money.

Fraud as a result of probate waiver was a key concern for many stakeholders during consultations. One practitioner felt that the risk of improper administration was doubled or tripled where the estate was administered without probate. That being said, there was very little actual evidence of fraud occurring as a result of waiving probate. Several practitioners noted that fraud was infrequent and was just as likely to be perpetrated by a properly authorized estate trustee as it was by a "pretender" who did not have authority to deal with the estate. Institutional stakeholders also denied that fraud was a practical concern in deciding to waive probate, particularly where there is a will.

Our members have found that fraud is not a significant issue in small estates with current controls and would not expect a simplified procedure to materially impact this.²²⁶

Estates fraud is exceptional. A small estates procedure, while it may in theory increase the likelihood of fraud, would also impose a limit on the amount that is susceptible to fraud. In addition, small estates procedures may facilitate and accelerate estate settlement.²²⁷

One practitioner suggested that increased fraud would not be a problem with a small estate process only because “that door is already wide open”.²²⁸

That is not to say that there is no fraud associated with administering estates without probate. It is simply that, in many cases, these problems occur independently of the probate system.

That is not to say that there is no fraud associated with administering estates without probate. It is simply that, in many cases, these problems occur independently of the probate system. For example, family members may continue to use the deceased’s bank cards before reporting the death. This is improper but it is not something that the probate system can control.

The most likely scenario for fraud absent probate is an adult child convincing a parent to put property in joint ownership ostensibly to avoid probate but really so that the child gains control of the assets. Many stakeholders indicated that this is a common practice which causes havoc with estate administration. However, again, it is not something that the probate system can control directly.

There is clearly a need for a legal solution to the abuse of joint ownership but it is a problem that lies beyond the scope of this project. However, reform of the probate system for small estates may have an indirect benefit. Joint ownership is popular particularly as a way of avoiding probate. The creation of a small estates process that reduces the cost of probate may remove the incentive to avoid the probate system, thereby bringing more estates within the protection of the probate system.

VI. BALANCING ACCESSIBILITY AND LEGAL PROTECTION IN A SMALL ESTATES PROCEDURE

After considering the practical legal factors affecting small estates and probate, including those a new procedure would need to take into account, in this chapter we view the possibility of a separate small estates procedure and the impact on its design through the lens of two fundamental principles: that of accessibility to probate, and that of the desirability of legal protections for those affected by estates administration.

A. The Principle of Proportionality in Balancing Accessibility and Legal Protection

...[R]eforming legal processes in order to promote access to justice involves a balancing exercise along a spectrum of access at one end and legal protection at the other end.

Usually, notions of access and justice are tightly wound together. Improved access should result in more justice. However, a key challenge in law reform is the ever-shifting relationship between these concepts. When we “unpack” the legal processes involved in a particular procedure and assess them against the importance of achieving justice through that procedure, we sometimes find that all these processes are not necessary to achieve the goal. Nevertheless, at some point, encouraging more access to a legal procedure may be at the cost of the significant legal protections that are the very purpose of the procedure. These cases undermine the efficacy of the system and lessen justice. From this perspective, reforming legal processes in order to promote access to justice involves a balancing exercise along a spectrum of access at one end and legal protection at the other end.

A legal system rich in procedure will typically benefit the wealthy rather than the poor, since only the wealthy will be able to afford to access the full range of the legal protection provided by the process.²²⁹ On the other hand, dispensing with protective procedures may leave the process open to abuse, resulting in more harm than good for all parties. For example, in some cases streamlined pretrial procedures may not afford parties the time to fully understand the issues and their respective legal positions. This may result in a longer trial if preliminary matters that might otherwise have been informally resolved must, instead, be played out in a formal adversarial setting. And, in the probate context, simplified procedures may increase the risk of complications in administering the estate. For example, deficiencies with the will which would be revealed in a full probate application might, instead, be discovered only after the estate has been distributed.

The principle of proportionality is widely applied in the legal context to justify the relaxation of procedural protections involved in a legal process in order to reduce

the cost for individuals in accessing that process and, thereby, increase access to justice. Proportionality is a response to the concern that our civil justice system “offers perfection for the few and nothing at all for the many”.²³⁰ It recognizes that all the procedures forming part of a particular procedure may not actually be necessary to achieve justice and that, in fact, they may impede realizing justice for more disadvantaged members of our population.

Proportionality has also been recognized as applicable in the context of estate administration. Mr. Justice Brown has called for court staff to adopt a “culture of common sense” in processing non-contentious probate applications.²³¹ In fact, proportionality is already reflected in the current design of the probate system. In consultations, a government representative estimated that about 80 per cent of probate applications are approved by the Registrar without the need for referral to a judge.²³² This two tier process reflects the fact that, in order to achieve justice, some more complex probate applications require greater judicial resources than do other, more straightforward applications.

Although the principle of proportionality is invoked as a means of improving access to justice, there is a danger is that it may be used instead to promote efficiency at the expense of justice. Colleen Hanycz worries that, in some circumstances, more access may lead to less justice:

...[P]roportionality is already reflected in the current design of the probate system.

Lying at the heart of Woolf’s mandate was the assumption, maintained to this day, that enhancing efficiency results in enhanced access to justice. It is this central, largely untested assumption that is most problematic. Certainly, providing less costly and time-consuming procedural mechanisms would seem logically connected to improving the access of citizens to that procedure. However, the bigger question remains as to whether that same procedure, in the light of its reduced processes, retains the ability to deliver *just, accurate outcomes*.²³³ (emphasis added)

Most of the literature on proportionality in civil justice addresses its application to adversarial dispute resolution processes. Although proportionality is equally applicable to the court’s probate function, it should be applied somewhat more cautiously in this context. This is so for at least two reasons.

First, unlike in adversarial disputes, all the interests at stake in a probate application will not be represented before the court. The court acts not as an adjudicator but as what Frans S. Slatter, in writing about administrative agencies, described as a “determination maker”:

The determination-making function can be distinguished from the adjudicative function in that the former does not involve the resolution of a dispute and is not primarily adversarial. It often involves a finding of the facts that exist and then a decision as to whether these facts fit criteria that may be well or poorly defined.²³⁴

In probate applications, the testator is no longer able to express her or his intentions to the court and part of the court’s role is to protect these intentions as

reflected in the will. Similarly, the court is responsible to protect the interests of beneficiaries and creditors whether or not they are before the court. Any proportionality analysis must be particularly sensitive to these “missing parties”.

A second, and closely related, reason why proportionality must be applied cautiously in probate matters is that the interests before the court are not necessarily quantifiable and, thus, cannot be evaluated by way of a cost/benefit analysis. Justin W. de Vries and Angelique Moss make this point in relation to will challenges and guardianship disputes asking, “[w]hat constitutes costs which are disproportionate when the interests at stake is [sic] the welfare of an incapable individual?”²³⁵

A cost/benefit analysis must take into account the interests of the parties as well as the system itself. And the interests of the parties may vary. For example, not every estate representative values the legal protection of probate enough to pay the price and undergo the “hassle”, as he or she may perceive it, of obtaining it. Many will be focused on the practical goal of obtaining possession of the estate assets. With their knowledge of the deceased’s family and the circumstances surrounding the estate, they may believe that a legal claim against them is very unlikely. In these circumstances, probate may be perceived as paternalistic and the associated costs will be considered to outweigh any perceived benefits. On the other hand, there may be circumstances surrounding the estate of which the estate representative is unaware. Therefore, the interests of the beneficiaries and creditors must also be factored in here.

In applying a proportionality analysis, it is important not to lose sight of all the interests potentially engaged in a probate application whether or not they are identifiable.

Proportionality is a necessary principle informing the design of a small estates procedure that is effective in promoting accessibility while preserving legal protection. However, proportionality is only one piece of the puzzle. In applying a proportionality analysis, it is important not to lose sight of all the interests potentially engaged in a probate application whether or not they are identifiable. It is also important to ensure that the analysis does not slide into a cost/benefit analysis but maintains a concern for protecting vulnerable parties.

B. Other Legal Processes Balancing Accessibility and Legal Protection

This same tension between access and legal protection is played out in a number of other Ontario legal processes. The LCO has examined several processes which might be considered somewhat analogous to probate in order to determine if there are lessons to be learned. In each case we have concluded that there are differences in context which limit the usefulness of these processes as models for a small estates procedure. We discuss four of these here: Small Claims Court, the Simplified Procedure under Rule 76 of the *Rules of Civil Procedure*, the procedure governing the receipt and administration of monies owing to minors by guardians under section 51 of the *Children’s Law Reform Act* and unclaimed property programs.

1. Small Claims Court and the Simplified Procedure

Perhaps the most obvious example of a proportional approach to access to civil justice is the development of the small claims court.²³⁶ Ontario's Small Claims Court has jurisdiction over most civil claims worth no more than \$25,000.²³⁷ According to section 25 of the *Courts of Justice Act*, the Court is required to "hear and determine in a summary way all questions of law and fact and may make such order as is considered just and agreeable to good conscience".²³⁸ In this section, the word "summary" is intended to reflect a commitment to proportionality and the court procedures involved in a small claims court action are substantially streamlined.²³⁹

More recently, the Simplified Procedure in Rule 76 of the *Rules of Civil Procedure* was created in order to improve access to justice for slightly larger claims (currently, less than \$100,000).²⁴⁰ This rule also reflects the principle of proportionality by appreciably reducing pre-trial procedures.²⁴¹

One significant distinction between Small Claims Court and the Simplified Procedure is the extent to which they contemplate that claimants will be legally represented. The Small Claims Court was intended to allow for laypeople to pursue their claim directly, without the added cost of legal representation.²⁴² In contrast, it is clear that the Simplified Procedure was designed for use by legal counsel.²⁴³

The extent to which either the Small Claims Court or the Simplified Procedure has improved access to justice has been questioned.²⁴⁴ A key concern is that any time and efficiency gained by simplified procedures at the pre-trial stages of an action may be lost later on since the parties must resolve outstanding issues in order that the case is ready for determination.²⁴⁵ In other words, complications are not eliminated but merely deferred.

Both the Small Claims Court and the Simplified Procedure are adversarial processes for dispute resolution. Therefore, the balancing exercise between legal protection and accessibility may be expected to be somewhat different than the balancing exercise appropriate for a small estates probate procedure.

2. Children's Law Reform Act

The primary purpose of probate is to authorize an estate trustee to receive and administer money owing to the beneficiaries of an estate. A similar process is contained in the *Children's Law Reform Act* (CLRA). The purpose of the guardianship of property scheme for minor's property is to authorize a legal guardian of property to receive and manage money owing to minors and to distribute it once they attain the age of entitlement.²⁴⁶ In both probate and guardianship, the chosen person acts as a trustee of property beneficially owned by another and there is the same risk that the trustee will either improperly or fraudulently administer the property.

Therefore, both regimes have adopted an administrative, court-supervised process for making this determination of authority. However, there is a distinction between these two regimes. Unlike the probate system, the guardianship provisions in the CLRA implicitly recognize that the burden of undergoing the guardianship process may outweigh its benefits where the amount at stake is small. Thus section 51 of the CLRA provides that someone owing money to a minor, other than pursuant to a court order, may pay it to a parent or person having custody (or to the minor directly in certain circumstances) without proof of guardianship so long as the value is less than \$10,000.²⁴⁷

Interestingly, this provision is not really worded as an attempt to protect parents from the administrative burden of applying to be a guardian of property where only small amounts are at stake. Rather, it seems to be primarily intended to protect third parties owing money to minors from the risk of paying out the money to the wrong person.

In any event, the question for this project is whether it would be appropriate in Ontario to adopt a similar small value exception to the probate process. Like the guardianship provision, this might be designed to protect third party financial and other institutions making small value payments to an estate representative without proof of probate. This type of informal administration of small estates has been adopted in some Australian jurisdictions.²⁴⁸

The pros and cons of introducing a similar statutory protection provision into Ontario's probate system are discussed below. At this point it should be noted that, although there are several points of similarity between the probate and guardianship processes, there are also some differences that limit the analogy.

First, there is an alternative to guardianship that does not exist for probate. Where no guardian of a minor's property has been appointed, and there is no will, trust or legislative authority authorizing management of the minor's money, money or property owing to the minor that is worth more than \$10,000 can be paid into court and managed on behalf of the minor.²⁴⁹ Therefore, neither the minors' caregivers nor third parties holding the money owing to them are reliant on the guardianship process in the same way that estate representatives and financial institutions are reliant on the probate process.

On the other hand, the guardianship process was designed to protect some of the most vulnerable members of society. The beneficiaries of estates (excepting minors or incapable persons) are not vulnerable in the same sense. Once provided with notice of a probate application, beneficiaries are generally able to take steps to protect their own interests.

Therefore, although section 51 of the CLRA provides a useful analogy for considering the potential benefit of similar statutory protection provision in the probate system, the different context must be kept in mind.

Unlike the probate system, the guardianship provisions in the CLRA implicitly recognize that the burden of undergoing the guardianship process may outweigh its benefits where the amount at stake is small.

3. Unclaimed Property Programs

Where an estate representative decides that the cost of obtaining probate outweighs its benefit, assets owing to the estate may go unclaimed. What happens to these assets? In some jurisdictions, there are programs providing for unclaimed bank accounts and other intangible property to be collected by an administrator and paid out to claimants establishing that they are entitled to it.

For example, federally registered banks hand unclaimed accounts over to the Bank of Canada after 10 years of no account activity. The Bank of Canada acts as a custodian of the funds. It holds amounts less than \$1,000 for 30 years and amounts more than \$1,000 for 100 years. Available information about the account is inputted into an electronic database which is searchable by the public. Anyone entitled to the money, including a personal representative of the deceased owner's estate, may make a claim. The Bank of Canada exercises discretion as to the type of proof it will require from claimants in order to establish their entitlement to the money. It may or may not require legal documents proving that the claimant is representing the estate.²⁵⁰

Where an estate representative decides that the cost of obtaining probate outweighs its benefit, assets owing to the estate may go unclaimed.

Alberta also has an unclaimed property program that makes use of a U.S. online claim process, *MissingMoney.com*.²⁵¹ There are different requirements for proving claims among the various jurisdictions using this service. However, the MissingMoney website states that an heir entitled to the property of a deceased would generally be required to provide “documentation such as death certificate, Letters of testamentary, [or] proof of the account owner's connection with the last known address....”²⁵²

In 2003, the Uniform Law Conference of Canada developed a *Uniform Unclaimed Intangible Property Act* (UUIPA). Estate claims under this uniform Act could be dealt with informally. Under section 17, the administrator would have discretion to allow an estate claim notwithstanding the absence of documentary proof if satisfied that the claimant is entitled to the property but for some procedural impediment such as the fact that the estate has not been probated.²⁵³

Presumably, the effect of this provision would be that any loss resulting from the administrator making payment to the wrong person would be borne by the estate rather than the administrator.²⁵⁴

Ontario does not currently have a regime for unclaimed balances under provincial jurisdiction. In 2012-2013, the Ontario Ministry of the Attorney General undertook a consultation process considering the UUIPA and the possibility of introducing an unclaimed property program in Ontario; however, no legislation has yet been produced.²⁵⁵ Recently, a spokesperson for the Ontario government suggested that unclaimed property legislation was not currently a priority.²⁵⁶

These unclaimed property programs provide context for considering the procedural requirements appropriate to establishing the authority of estate

*...[F]or small estates ...
[the probate] application
requirements are out of
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informal requirements of
several, similar legal
processes in Ontario.*

representatives claiming small amounts. If Ontario were to adopt legislation similar to the UUIPA, estate assets not paid out due to the failure of the estate representative to obtain probate could eventually find their way into an unclaimed property program. The procedural rigour of the probate process could be replaced by the relatively informal requirements of section 17 of the UUIPA. Under section 17, an estate representative might be able to gain possession of the assets where he or she could not have done so earlier. This incongruity, although perhaps minor, illustrates that there is a need for an alternative process providing for the release of small amounts to estate representatives when probate does not make commercial sense.

The probate system operates in an historical bubble without regard to the contemporary, informal practices that have grown up around it. The application requirements in Rule 74 for establishing the authority of estate representatives make sense where relatively large amounts are at stake. However, for small estates (particularly very small estates), these application requirements are out of step with the relatively informal requirements of several similar legal processes in Ontario.

VII. IMPROVING PROBATE FOR SMALL ESTATES

The preceding chapters of this Final Report have described a number of problems that may arise in probating small estates under the current probate system in Ontario. These complications are not specific to any particular component of the probate process. That is, none of the current legal requirements is inherently inappropriate for small estates. On the contrary, with one or two exceptions, it seems that the current application requirements for probate continue to be important to protect most Ontario estates from fraud or improper administration. The real problem for small estates is one of economic feasibility. Regardless of the value of obtaining probate, at some point the cost of doing so may exceed the benefits, or at least make it not worthwhile. At that point, estate representatives may decide that the probate system is effectively inaccessible. They may decide to administer small estates without probate or may abandon the assets and fail to administer the estate at all.

...[I]t seems that the current application requirements for probate continue to be important to protect most Ontario estates from fraud or improper administration. The real problem for small estates is one of economic feasibility.

This problem accessing the probate system is, in some circumstances, a systemic one. Some asset-holding institutions such as pension plans interpret their governing legislation as requiring them to insist on probate as proof of authority before releasing assets. For these institutions, the probate requirement is more than a matter of risk management. It is a statutory duty that strictly precludes them from waiving probate, at least where there is no will. As a result, these institutions may be left holding many small accounts that have been abandoned due to the disproportionate cost of obtaining probate.

Although Ontario does not currently have a small estates process, small estates procedures are in operation in two Canadian jurisdictions, Saskatchewan and Manitoba, and throughout the United States and Australia.²⁵⁷ In these jurisdictions, the problem of probating small estates has been significant enough that a legislative solution has been deemed necessary.

Not every jurisdiction has determined that a small estates procedure should be adopted. In 1999, the Law Reform Commission of Nova Scotia prepared a report on probate recommending against a small estates procedure for fear that it would overly complicate the probate system.²⁵⁸ More recently, a 2013 Alberta Law Reform Institution (ALRI) report on estate administration chose not to address the problem of small estates directly. ALRI did acknowledge that some estates are administered informally but it concluded that this practice was not a matter for legislative reform:

If banks want to pay out assets informally on the basis of some indemnity or undertaking, this is a matter of policy for financial institutions.²⁵⁹

As discussed above, British Columbia chose not to bring into force the small estates procedure recommended by British Columbia Law Institute (BCLI) in its

2005 Interim Report and written into the *Wills, Estates and Succession Act* (WESA). The government chose instead a procedure designed to facilitate the administration of simple estates.²⁶⁰

The LCO has considered the example of these jurisdictions and observes that the context is quite different here. Nova Scotia and British Columbia were both engaged in law reform projects on probate generally. A more particular concern for small estates was perhaps subsumed within the broader goal of simplifying the system overall. For example, the British Columbia government ultimately concluded that a small estates procedure was not needed since the new probate rules were already very similar to those proposed for small estates.²⁶¹ And Alberta's project focused on the duties of estate representatives after appointment rather than the appointment process. ALRI's comment, above, was only indirectly related to the issue of small estates under the probate system. Furthermore, it is the LCO's view that while financial institutions are free to apply their own policies for paying out assets, the matter is not entirely separate from a public concern about an accessible probate process

In any event, the LCO has concluded as a result of its consultations with the identified stakeholder groups that Ontario would benefit from a streamlined small estates procedure. This is to encourage the estate representatives of small estates to access the benefits of probate and, ultimately, ensure that these estates are administered according to the intentions of the testator or the principles of succession law. At the same time, this procedure must be designed so as to preserve a proportionate degree of legal protection for the beneficiaries, creditors and the estate representative.

...[T]he LCO has concluded as a result of its consultations with the identified stakeholder groups that Ontario would benefit from a streamlined small estates procedure.

In considering what estates should be eligible for a small estates procedure, we have focused on those estates for which the cost of probate is likely to impede access to the process. Access may be impeded either because the cost exceeds the value of the estate or because the cost is sufficiently disproportionate to the value of the estate that probate is not worthwhile. As discussed in chapter III above, this point is indeterminable. It will vary depending on both the value of the estate and the cost of probate. However, the LCO has concluded that, consistent with other jurisdictions with a separate process for small estates, in order to make a small estates procedure practically effective, eligibility for the procedure should be defined by a bright line monetary value limit. More specifically, we have concluded that a small estates procedure should be available to estates with a gross value up to \$50,000.

The remainder of this chapter delineates the elements of a low cost, small estates procedure that the LCO believes would give estates worth up to \$50,000 an alternative to incurring the cost of the full probate system. This small estates procedure would exist alongside the regular or standard probate stream. It would involve a one or two page application form by which the applicant would attest to his or her entitlement to administer the estate. There would be few evidentiary requirements, although the requirement to serve the application on those

interested in the distribution of the estate would be retained. A successful application would result in the issuance of a Small Estates Certificate with the same legal effect as a Certificate of Appointment (COA) in the regular probate stream except that authority would be limited to the specific assets listed in the application. The estate would remain liable to pay the estate administration tax, but would be exempted from filing the Estate Information Return. The procedure would be designed to be accessible to estate representatives without legal assistance. Ideally, applicants would be able to file applications online.

During consultations, many stakeholders from all stakeholder groups expressed concern for those estates with a value just beyond the value cut off (for example, \$52,000). Why should they lose out on the benefits of a small estates procedure? This is a concern that applies to all “bright line” cut-offs. However, some of the LCO’s recommendations below (such as recommendations for a plain-language guide to probate and simplified forms) have the potential to benefit estates of any value, including those only slightly above eligibility for the small estates process.

...[T]here is a wide range of small estates procedures operating in different jurisdictions. They were created to respond to local probate traditions and have evolved quite differently in different legal contexts.

A. Possible Models for a Small Estates Procedure

1. Introduction

A pivotal issue in developing a small estates process is the degree to which it should be supervised by the court alongside the regular stream probate process. Currently, there is a wide range of small estates procedures operating in different jurisdictions. They were created to respond to local probate traditions and have evolved quite differently in different legal contexts.

Some procedures are administered by the court and result in a legal grant of probate similar to the usual probate process. These tend to offer a relatively significant degree of legal protection but may be more procedurally involved and, thus, somewhat more costly for the applicant. At the other end of the spectrum is informal administration. This may be no more than a statutory provision protecting asset-holding institutions from liability where they release assets to estate representatives without probate. There is no court involvement here at all and little or no legal protection for those interested in the estate. But neither are there costly procedural requirements. So long as the estate representative is legally authorized in fact and is acting properly, the full value of the estate is available for distribution to the creditors and beneficiaries.

Between these two ends of the spectrum are a myriad of other models that attempt to balance some degree of court supervision with simplified procedures designed to keep costs down.²⁶² In this section, we describe some of the advantages and disadvantages of key models in operation in other jurisdictions. Next, we explain why the LCO has concluded that a court supervised small estates process would be the most appropriate model for Ontario.²⁶³

2. Alternatives to a Court-Based Small Estates Procedure

Informal Administration

As noted above, the informal administration model lies at one end of the spectrum and involves no court supervision at all. Instead, financial and other institutions are simply given statutory protection from liability where they release assets worth less than a certain value without proof of probate. If it turns out that the assets are given to the wrong person, the institution is protected and the loss is borne by the estate.²⁶⁴

This approach facilitates the release of specific estate assets held by specific institutions. However, institutions are not required to release the estate assets they hold and it is still possible that a probate application may be necessary to obtain possession of certain assets.

There would be some benefits to a small estates procedure based on informal administration. The comfort of statutory protection would encourage most financial institutions to waive the probate requirement for small asset transfers. The result would be the industry-wide adoption of the particular value limit established by legislation. This would address the commercial uncertainty caused by institutions having different value limits for waiving probate. It would also be a commercially friendly solution since it would facilitate the release of small value assets directly to those entitled to them.

Practical benefits aside, the key drawback of the informal administration model is that it would continue, and indeed promote, the current practice where larger estates benefit from probate protections and small estates are more likely to be administered outside the probate system. This model would not retain any of the protective benefits of probate. It would not authorize the applicant to act on behalf of the estate generally. It would not involve any assessment of the validity or terms of a will. Most importantly, it would provide little or no protection against fraud.

Affidavit Procedures

A model that may or may not involve some degree of court supervision is the affidavit procedures common in U.S. jurisdictions.²⁶⁵ This model is provided for in the *Uniform Probate Code* (UPC) and has been widely adopted into state legislation.²⁶⁶ Under this model, persons entitled to estate assets may prepare an affidavit which is given directly to financial or other institutions to authorize the release of particular assets held by that institution. Some jurisdictions, but not all, require that the affidavit be filed with the court.²⁶⁷ Affidavit procedures are available only where the total value of the estate is under a legislated value limit. The maximum value set out by the UPC is \$25,000, but states tend to set higher amounts.²⁶⁸ The procedure typically applies both where there is a will and in

...[T]he informal administration model lies at one end of the spectrum and involves no court supervision at all.

intestacies, although in some jurisdictions it applies only to intestacies.²⁶⁹ Legislation provides that financial or other institutions are statutorily protected from liability where they release assets on the basis of an affidavit. No estate representative is appointed under this model.²⁷⁰

For example, New York has a small estates affidavit procedure (SEAP) applicable to estates consisting only of personal property and having a value not exceeding US\$30,000.²⁷¹ These affidavits are filed with the court and it appears that the process works reasonably well.²⁷²

Affidavit procedures are designed as a middle ground between the protection of a court supervised small estates process and the accessibility and convenience of informal administration. However, different procedures range dramatically in the degree of legal protection they afford.²⁷³ Affidavit procedures filed with the court may not differ significantly from court-supervised procedures discussed below.²⁷⁴

Administration by Public Trustee

Affidavit procedures are designed as a middle ground between the protection of a court supervised small estates process and the accessibility and convenience of informal administration

In some jurisdictions, including several Canadian provinces, small estates may be administered by the public trustee or some other professional administrator.²⁷⁵ Typically, the public trustee or other administrator may elect whether or not to become involved in any particular case.

There is no similar provision in Ontario law giving the Ontario Public Guardian and Trustee (OPGT) particular authority to administer small estates and the OPGT has not traditionally played this kind of protective role for small estates. During consultations we heard that the OPGT does not have the resources to expand its role in regard to small estates and that this situation is not likely to change in the near future. In any event, the LCO does not believe that expanding the OPGT's role in this direction is advisable. There is nothing about the small monetary value of an estate that, in and of itself, suggests that an estate representative should be replaced by a public official. Respect for the testator's intentions requires that a named executor represent the estate where possible. We have concluded that the protective power of the OPGT is best concentrated on those estates where there truly is no one else to carry out the administration.

3. Court-Supervised Small Estates Procedures

The Manitoba and Saskatchewan Models

The two Canadian provinces that currently have small estates procedures in place, Manitoba and Saskatchewan, have chosen court-based procedures.

In Saskatchewan, an *ex parte* application may be made to the court to distribute an estate without a grant where the estate is made up of personal property not

exceeding \$25,000 in value.²⁷⁶ The estate representative's scope of authority is limited to the terms of the resulting court order, which covers particular assets. Although the Rules expressly provide that the application may be brought without notice to the beneficiaries, in practice, the court requires that notice of the application be served to heirs where there is no will.²⁷⁷ After distributing the assets, the applicant undertakes to file the receipts with the registrar.

According to a Saskatchewan court official, this small estates procedure is used perhaps two or three times per month, usually by unrepresented applicants and more often in the case of intestacy. The court official felt that this procedure offered negligible benefits over the usual probate process. It is not all that much easier than the usual application and it can be limiting since it does not result in a grant which would provide the estate representative with authority to open an estate bank account or receive subsequently discovered estate assets.²⁷⁸

Manitoba has a similar small estates procedure for estates worth less than \$10,000 whether or not there is a will and whether or not the estate includes real property.²⁷⁹ There is no provision for notice to beneficiaries or creditors. The resulting order is limited to the listed assets, and does not result in a grant of probate. According to a Manitoba court staff member, this process is used reasonably often, perhaps 10 times per month, mostly by unrepresented people who are dealing with small assets including bank accounts, mineral rights or vehicles.

Most recently, the Northwest Territories has drafted legislation providing for a similar small estates procedure in that jurisdiction. It is based on the Saskatchewan model and, if enacted, it would apply to estates with a net value of less than \$35,000. Again, it would not result in a grant; however, the standard form court order would provide that it has the same effect as a grant.²⁸⁰

Of the various models examined by the LCO, these are most similar to the small estates procedure we recommend below. However, these procedures do not result in a formal grant and, therefore, are not necessarily a full alternative to the regular probate stream.²⁸¹ Also, the Manitoba and Saskatchewan procedures are, in some respects, relatively informal. For example, the Saskatchewan form does not require notice and does not require the applicant to make any declarations as to the validity of the will, if any, or their entitlement to administer the estate. In fact, the Saskatchewan form does not mention the possibility of a will at all. The Manitoba form does require that any will be attached to the application. However, unlike the Saskatchewan form, it does not require the applicant to list the assets of the estate (with the exception of real property).

In other respects, the Saskatchewan procedure is relatively formal. The Saskatchewan form requires that the applicant list precisely how the estate is to be distributed and then to file the receipts with the court. (The Northwest Territories form would also require this.)

...[The models in Saskatchewan and Manitoba, and proposed in Northwest Territories] ... are most similar to the ... procedure we recommend ... [but they] do not result in a formal grant... .

Court Supervision Remains Important for Small Estates in Ontario

There was a significant degree of general support among all stakeholder groups for the current court sanctioned probate system. Although stakeholders had many suggestions for improving the system, most felt that it was functional and should continue to be available to Ontario estates regardless of value. As one practitioner put it, even though the current system may effectively be a rubber stamp, it continues to operate as a deterrent to fraud through our “residual cultural memory”. In other words, in spite of the actual effectiveness of the probate system, society continues to believe in its effectiveness and this belief, in and of itself, serves as a deterrent to fraud.

During consultations, a number of suggestions were made for reducing the cost of probate by outsourcing all or part of the system to alternative forums. For example, one practitioner speculated that responsibility for the system might be transferred to an administrative tribunal. A few stakeholders, including legal technology specialist Dan McAran, proposed that probate for small estates be regulated through an online registry in conjunction with specially authorized lawyers.²⁸² The Surety Association of Canada contributed a written submission proposing that probate for small estates be replaced by a mandatory private insurance scheme.²⁸³

The LCO considers that a court supervised small estates process is the model most in keeping with the protective philosophy behind Ontario’s probate system.

As a result of the consultations and its research, the LCO has concluded that court supervision is of continued importance to an effective probate system generally. The LCO considers that a court supervised small estates process is the model most in keeping with the protective philosophy behind Ontario’s probate system. It is also most in keeping with the rationale behind this project to increase accessibility to probate for small estates. The recommendations in this Report demonstrate that there is more that can be done within a court based probate system to ensure that it is accessible to all Ontario estates regardless of value.

Some might argue that a court supervised small estates process will undermine the credibility of the existing probate system and call into question why larger estates should be required to meet additional application requirements to achieve the same stamp of authority. The answer here is that the balance between achieving accessibility while maintaining legal protection in a legal process is never clear. There will always be a question whether accessibility is being over-emphasized at the expense of legal protection and vice versa. A court supervised small estates process is itself an attempt to strike this balance. It offers more protection to small estates than they receive when they are informally administered. But it emphasizes accessibility over the procedural protections of the usual probate process. It also reflects the principle of proportionality in that additional procedural protections are deemed appropriate to address more valuable estates.²⁸⁴

We have also concluded that, unlike the small estates procedures in Manitoba and Saskatchewan, it is important that a court supervised small estates procedure result in the issuance of a Small Estates Certificate with the same legal effect as a COA issued under the usual probate process. The Small Estates Certificate will also send the signal that the small estates procedure has the same legitimacy as the usual probate process so that third parties may rely on it when releasing assets. The small estates process also has the benefit of not requiring amendments to various incidental legislation and regulations that rely on the issuance and legal effect of a COA.

However, under the usual probate process, a COA has the legal effect of authorizing the estate trustee in respect of the estate as a whole, including any subsequently discovered assets. This would not be an appropriate feature for a small estates process based on a monetary value limit. It would give rise to the concern that a dishonest estate representative might declare the value of the estate to fall within the value limit, make use of the small estates procedure and then later purport to have discovered additional estate assets bringing the total estate value above the value limit. In order to remove the temptation for applicants to underrepresent the size of the estate, a Small Estate Certificate under a small estates procedure should authorize the estate representative only in relation to the estate assets listed in the application (with one opportunity to amend the identified value of the assets). This will require incidental amendments to the *Estates Act*, such as ss. 32(2), for example, which deals with the evaluation of subsequently discovered property.²⁸⁵

A court supervised small estates process that is streamlined in the way we describe below should ... extend the protection of probate to many more small estates than are currently being administered informally.

This concern for the possibility of a dishonest estate representative is also reason to favour continued court supervision over informal administration. In a court supervised process, the applicant is required to include the estate value in the application. This number is typically given some degree of scrutiny by court staff.²⁸⁶ Also, the act of filing an application with the court itself adds a degree of formality that might dissuade some applicants from acting dishonestly.

A court supervised small estates process that is streamlined in the way we describe below should address the problem of finding someone willing to act as estate representative for very small estates. It should also encourage testators planning their estates to do their gift giving within the protection of probate. It should extend the protection of probate to many more small estates than are currently being administered informally. Furthermore, it should address the systemic problem of small accounts being abandoned by making it economically feasible to distribute these into the hands of those beneficially entitled to them.

The Law Commission of Ontario makes the following recommendation:

1. a) The Estates Subcommittee of the Civil Rules Committee prepare and the Ontario government enact amendments to Rule 74 of the *Rules of Civil Procedure* and the *Estates Act* to provide for a simplified small estates procedure as an alternative to the existing probate system for Ontario estates valued at up to a monetary amount specified by regulation.
- b) This procedure result in a court issued Small Estates Certificate with equivalent legal effect to a Certificate of Appointment of Estate Trustee, except that authority is limited to the estate assets specifically listed in the application.

B. Value Limit of \$50,000 for Estates with and without Wills

...[T]he LCO has concluded that a small estates process should be available to estates having a total value on the date of the deceased's death of up to \$50,000.

As discussed in chapter III.C.3 above, the LCO has concluded that a small estates process should be available to estates having a total value on the date of the deceased's death of up to \$50,000. In order to prevent artificially structured "small" estates from accessing the process, value would be measured as a gross amount consistent with section 32(1) of the *Estates Act*.²⁸⁷ Unlike the definition of value in the *Estate Administration Tax Act*, the value of encumbrances on real property contained in the estate would not be deducted from total value.²⁸⁸ Value would be calculated in relation to all of the deceased's assets whether or not located in Ontario and whether or not discovered as of the date of the application.

There was discussion during consultations as to whether a small estates process should be directed primarily at estates with wills, estates without wills, or both. One suggestion was to impose a relatively low eligibility threshold for estates without wills and a higher eligibility threshold for estates with wills as a means of encouraging more testators to make a will. The LCO has considered this proposal in relation to the rationale of this project to improve accessibility to probate. Although it is usually easier to administer a small estate without probate where there is a will, small estates may have difficulty accessing the probate system whether or not there is a will. Furthermore, a dual eligibility threshold would complicate a process that must remain simple if it is to be effective. Therefore, the LCO recommends that a single eligibility threshold be set for small estates both with and without wills.

The Law Commission of Ontario makes the following recommendation:

- 2.a) The small estates procedure be available in respect of estates with a total value not exceeding \$50,000.
- b) Total value be calculated consistent with section 32(1) of the *Estates Act* as all of the property that belonged to the deceased at the date of his or her death, including property discovered subsequent to a Small Estates Certificate being issued, and without regard to any encumbrance on real property that is included in the property of the deceased person.
- c) The \$50,000 value be designated by regulation to be amended as appropriate.

The small estates stream of probate should be significantly simplified relative to the existing probate process so that estate representatives of small estates have a real alternative to the current process.

C. Application Form and Requirements

The LCO has concluded that instituting two streams of probate, regular or standard and small estates, would best respond to the need to take into account both accessibility and the legal protections of probate for all estates. The streams differ in the weight given to the two factors. Notably, among other differences, the Small Estates Certificate, while equivalent to a COA issued under the regular stream, would provide limited legal authority to deal with only those assets listed in the application. To address assets discovered after the issuance of the Small Estates Certificate, applicants would be permitted one amendment, so long as the revised value of the estate does not exceed \$50,000.

The small estates stream of probate should be significantly simplified relative to the existing probate process so that estate representatives of small estates have a real alternative to the current process. We have examined a number of application forms used in other jurisdictions and have been struck by the wide variety in use. No two forms are alike. This is further evidence that there is no easy compromise to be made between the accessibility of probate and the legal protection it affords.

Both Saskatchewan and Manitoba have adopted abbreviated forms with relatively few requirements. Saskatchewan's form requires a list of the deceased's assets and their allocation to creditors and beneficiaries, each of whom must also be listed.²⁸⁹ No notice is required although, as a matter of practice, court staff require notice where there is no will. The form also requires a list of the persons holding the deceased's assets. The form does not require information about the validity of the will, if there is one. Nor must the applicant make any statement about his or her legal entitlement to administer the estate. However, the court maintains some supervision over the administration of the assets since the applicant undertakes to file all receipts with the registrar.

Manitoba's application form requires the applicant to state his or her relationship to the deceased, but there is no declaration of legal entitlement to administer the estate.²⁹⁰ The form also requires the applicant to attach the will if there is one, although there is no declaration as to the validity of the will. The deceased's next of kin must be listed along with their ages. There is no requirement for the applicant to file receipts with the court; however, he or she does undertake to provide an account of the administration when required.

Northwest Territories' proposed small estates program would involve application requirements similar to those in Saskatchewan. There would be no notice requirement, but the applicant would undertake to file all receipts with the registrar.²⁹¹

Of the myriad of different application requirements in small estates programs in other jurisdictions, it is difficult to perceive a pattern or logic behind the array of requirements deemed important and those that have been omitted. Although the LCO favours a court supervised procedure as in Saskatchewan and Manitoba, it has concluded that a more formalized application process is suitable in this jurisdiction where the eligibility limit will be higher (\$50,000) and the Small Estates Certificate will have the same legal effect as a COA.

...[T]he validity of any will and the legal entitlement of the applicant to administer the estate should continue to be eligibility requirements for a Small Estates Certificate.

Therefore, the LCO has concluded that the best compromise between accessibility and legal protection in Ontario lies in continuing to observe the traditional requirements for probate but shifting the responsibility for the truth of those requirements from the court to the applicant. For example, the validity of any will and the legal entitlement of the applicant to administer the estate should continue to be eligibility requirements for a Small Estates Certificate. However, instead of being required to file documentary proof that these requirements are met, the applicant would check boxes making declarations to this effect.

The instructions available with the small estates application form and the obligation to swear to or affirm these declarations would impress upon the applicant their significance and his or her legal responsibility in administering the estate. However, completing and filing the application would be much easier. A number of affidavits potentially required under the current process would be replaced by one affidavit.

Besides completing the application, the applicant would need only send the application to the beneficiaries, gather the death certificate and will, if there is one, and have the application commissioned and filed with the court. A 30 day delay period before filing the application would provide an opportunity for beneficiaries to receive the notice and challenge the application if they wish. If online filing were available, as the LCO recommends below, an electronic substitute for swearing or affirming the application could be explored.

The same application form would be used whether or not there was a will and would be designed to be completed by a layperson. It would require the following information:

- the name, last address and spousal status of the deceased and date of death
- the name and Ontario address of the applicant and relationship to the deceased
- a list of estate assets and their value,
- the basis of entitlement to administer the deceased's estate (by checking the basis from a standardized list), and
- standard form declarations to be checked that to the best of the applicant's knowledge and belief:
 - the deceased had property in Ontario
 - the estate is worth not more than \$50,000
 - no one else has applied to be estate trustee for the estate
 - if there is a will, it is the last valid will of the deceased, there are no issues as to the proper execution of the will and there have been no alterations to the will
 - if the will is handwritten, that the whole of the document, including the signature, is in the handwriting of the deceased
 - if there is no will, a careful search was made and the applicant reasonably believes that the deceased did not leave a will
 - if there are others entitled to administer the estate, they have renounced their right
 - 30 days have passed since notice of the application was sent to beneficiaries
- a declaration promising to faithfully administer the estate according to law and to provide a full accounting of the administration when required
- the applicant's signature sworn or affirmed before a commissioner of oaths.

Significantly, the only supporting evidence required for the declarations in the application form would be the following:

- a copy of the death certificate (including one issued by a funeral director)
- a copy of the will where there is one (the original will would not be required), and
- a form declaring that the application was sent to the beneficiaries (including the OPGT, Office of the Children's Lawyer (OCL) or both where appropriate).

The estate representative would be personally responsible for the validity of the information contained in the application and would be liable for loss to the estate resulting from inaccurate information.²⁹²

The small estates application would require commissioning or notarization. The LCO heard conflicting views about the extent to which the current requirement for commissioned probate applications is an obstacle for estate representatives of small estates. Although a commissioning service is offered in court offices, this is not well publicized and may be considered somewhat expensive (\$13 per form). It would be more reasonable when only one form is required, rather than the larger number in the regular probate stream.

A few jurisdictions in the United States have dispensed with the requirement to commission small estates affidavits.²⁹³ In these jurisdictions, the form contains a statement advising the applicant of the legal consequences of giving false information and the applicant signs the application “upon penalty of perjury”. However, the LCO has decided that, given the relative lack of evidentiary proof required under the streamlined process, it is important for some formality to accompany a small estates application in order to dissuade applicants from taking their responsibilities too lightly.

Just as important as the small estates application form itself would be the explanatory material that would accompany the form. This material would guide the applicant through each box and explain in plain language the legal significance of checking the box and of assuming responsibility for the estate.

Just as important as the small estates application form itself would be the explanatory material that would accompany the form.

The role of the court office would be to assess the application for completeness; however, the court would not be obliged to look behind it. This is similar to the role that BCLI envisioned that the court would play in the B.C. small estates declaration process, although that process was not brought into force.²⁹⁴ The court office would issue Small Estates Certificates on an expedited basis so that these small estates may be administered quickly and cost-effectively.

Some stakeholders raised a concern about increased risk of fraud in a system with fewer procedural requirements, although others did not consider this to be a significant concern for practical purposes. One practitioner noted that fraudsters are more likely to act outside the court system, by forging a cheque, for example. Another practitioner stated, “I’m less worried about fraud than people walking away”.²⁹⁵ The LCO has concluded that any potential risk of fraud associated with fewer evidentiary requirements is outweighed by the likely benefit of bringing more small estates within the protection of the probate system.

Legal protection in a small estates procedure would be achieved in two ways: first, with a requirement that the applicant send the application to those interested in the distribution of the estate and, second, by having the applicant declare that particular risk factors are not present. For example, if the applicant is not the executor named in the will, he or she would have the choice to check a box stating that the executor had renounced his or her right to apply for probate.

Furthermore, it must be remembered that the small estates stream would be designed in part for small estates that might otherwise not be in the probate

system. Therefore, they would receive at least more legal protection than they do currently. It would also encompass estates that would be in the system, but perhaps at an undue financial cost and effort.

The Law Commission of Ontario makes the following recommendation:

- 3.a) The small estates procedure involve a short, streamlined application form requiring the following information:
 - i. basic information about the estate,
 - ii. basic information about the applicant,
 - iii. basis of the applicant's entitlement to administer the estate,
 - iv. a list of estate assets and their value, and
 - v. a standardized declaration affirming the applicant's acceptance of the responsibility to administer the estate according to law.
- b) The form be sworn or affirmed by the applicant before a commissioner of oaths.
- c) The form require the following supporting documents:
 - i. a copy of the death certificate,
 - ii. a copy of the will, if one exists, and
 - iii. a form declaring that the notice requirement described in Recommendation 4 has been met.
- d) The court office process and issue Small Estate Certificates on an expedited basis.

...[I]t is important that notice to beneficiaries and others interested in an estate continue to be required as part of a small estates process.

D. Notice Requirements under a Small Estates Process

Notice is pivotal to the procedural fairness of any court or administrative process. However, even the duty to provide notice has been adjusted in some circumstances in order to facilitate access to justice. For example, certain small claims court jurisdictions have either modified or eliminated the rules for service of documents.²⁹⁶

The reduced procedural protections of an Ontario small estates process would place a corresponding responsibility on beneficiaries to protect their own interests. Therefore, it is important that notice to beneficiaries and others interested in an estate continue to be required as part of a small estates process.

Even where there is a duty to give notice to beneficiaries, there is still an issue as to whether there should be an additional requirement for proof of service to be filed with the court. It might be sufficient to dispense with proof of service so long as the applicant is made aware of the responsibility to notify beneficiaries as part of the application process.

Retaining the current requirement in Rule 74 to file proof of service of notice with the court would significantly add to the complexity of the process. It would also call into question just how vigilant the court is expected to be in verifying the information contained in a small estates application. On the other hand, effective notice is the threshold requirement for the protection of beneficial interests in the estate. Of all the procedural protections that might be compromised in order to promote accessibility to probate for small estates, the notice requirement is arguably most integral to the fairness of the process.

On balance, the LCO is of the view that the notice requirement should be retained as part of a small estates process and that there should continue to be some proof of service filed with the court. The simplest procedure would be to forgo a separate notice form and, instead, require the estate representative to serve the completed application form itself. Accompanying the application form would be a cover page with set language explaining to the recipients why they are receiving the application, the standard rights of beneficiaries under an estate and the process to be followed before distribution.²⁹⁷ The applicant would be required to send this to the last known address of each of the known beneficiaries. Where there are minors or incapable beneficiaries, the notice would be sent to the OCL and the OPGT respectively. This notice requirement would be in addition to the online estates database recommended below.

A passage of time is required after notice to beneficiaries has been sent out and before the application can be filed. ... We have concluded that a 30 day delay period would be appropriate.

It is common in many jurisdictions for a delay period to be incorporated as part of a small estates process. A passage of time is required after notice to beneficiaries has been sent out and before the application can be filed. This allows time for beneficiaries to receive the notice and challenge the application if they so wish. The LCO believes that this is a simple, low cost means of providing beneficiaries with a real opportunity to protect their interests. We have concluded that a 30 day delay period would be appropriate.

In filing the application form with the court, the estate representative would be required to attach a single form declaration that the service requirements have been met. This form would be appreciably shorter and easier to understand than is the current Affidavit of Service of Notice under Rule 74.

Another form of notice in the current probate process is the requirement for proof of consent of the beneficiaries in intestacy. The LCO believes that this requirement should be eliminated from a small estates process. The LCO heard in consultations that this requirement can delay and complicate the application. Beneficiaries may be out of the country, they may be minors or incapable or otherwise unresponsive. Yet it is arguable that this consent requirement does not significantly improve the legal protection of intestacies over and above the notice requirement. The purpose of notice is to provide beneficiaries with an opportunity to challenge the application if they so wish. In the absence of such a challenge, it is reasonable to infer consent at least for the purpose of a small estates process.

The Law Commission of Ontario makes the following recommendation:

4. The small estates procedure require that the applicant
 - i. send a copy of the application and an explanatory form to all known persons entitled to share in the distribution of the estate at least 30 days before filing the application with the court,
 - ii. send the application to the Office of the Public Guardian and Trustee or the Office of the Children’s Lawyer, or both, as applicable, where there are minors or incapable beneficiaries at least 30 days before filing the application with the court, and
 - iii. file with the court, along with the small estates application, a single page declaration that the notice requirement has been met.

The best solution to preserve the legal protection of vulnerable beneficiaries is not to exclude them from its potential benefits but, rather, to maintain the notice requirement...

E. Minors and Incapable Persons

With the reduced court scrutiny involved in a small estates process, persons interested in an estate would have a greater responsibility to protect their own interests by challenging the applicant’s appointment if necessary. However, this would not be possible for most minors or incapable persons. The importance of protecting these vulnerable beneficiaries is reflected in the current requirement in Rule 74 to serve notice on the OPGT and OCL whenever minors or beneficiaries are interested in an estate.

Many practitioners and other stakeholders, including the OCL, felt that estates involving minors or incapable beneficiaries should be excluded from a small estates process. This is understandable on the assumption that the alternative is for these beneficiaries to be protected under the current probate process. But, in practice, we have seen that not all beneficiaries of small estates are protected under the current system. Some small estates are not administered at all. Some are administered but informally without legal protection. Some are probated but at disproportionate cost which is incurred by all those with an interest in the estate. Therefore, it is not necessarily the case that minors and incapable beneficiaries would be disadvantaged by a small estates procedure. Reduced procedural protections would be offset to some extent by the increased accessibility and reduced cost of the process.

The best solution to preserve the legal protection of vulnerable beneficiaries is not to exclude them from its potential benefits but, rather, to maintain the notice requirement under Rule 74 that the applicant serve the application on the OPGT and OCL where appropriate.

There remains a risk that applicants filing under a small estates process will simply not report the existence of minor or incapable beneficiaries. However, that is already a risk inherent in the probate system and is not one which should cause small estates to lose out on the benefits of a small estates process.

The Law Commission of Ontario makes the following recommendation:

- 5.a) The small estates procedure be available to small estates even where there are minor or incapable beneficiaries.
- b) Pursuant to Recommendation 4(ii), the applicant be required to send a copy of the application to the Ontario Public Guardian and Trustee or the Office of the Children’s Lawyer, or both, as applicable, at least 30 days before filing the application with the court.

F. No Bond Requirement

1. *Earlier Law Reform Debate on Bond Requirement for Estates (Regardless of Value)*

During consultations, stakeholders did not identify substantive probate requirements they considered unnecessary to the protection of the estate and those interested in it. This is with the exception of the mandatory bond requirement.

The current bond requirement for estate representatives not named in a will applies regardless of the value of the estate. This requirement has been the subject of ongoing reform efforts beginning with the Ontario Law Reform Commission (OLRC) in its 1991 *Report on Administration of Estates of Deceased Persons*.²⁹⁸ The OLRC recommended dispensing with this bonding requirement for intestacies and wills not naming the applicant but retaining the bonding requirement for non-residents.²⁹⁹ The court would continue to have discretion to order a bond in other circumstances.³⁰⁰

In 2010 and 2012, the Ontario Bar Association (OBA) suggested reforms to the Ministry of the Attorney General (MAG) along the lines recommended by the OLRC.³⁰¹ The OBA reasoned as follows:

Given that all those who are appointed to act as trustee in these circumstances must reside in Ontario and given the clear remedies for breach of fiduciary duty, there is little or no policy justification for requiring the additional expense and regulatory burden of requiring either a bond or a motion to dispense with a bond. This is an unnecessary cost to beneficiaries and the justice system.³⁰²

However, the OBA suggested that a bond still be required where there are minor or incapable beneficiaries.

“...[T]here is little or no policy justification for requiring the additional expense and regulatory burden of requiring either a bond or a motion to dispense with a bond.”

– Ontario Bar Association

The OLRC and OBA both noted that other jurisdictions, such as England, have made similar reforms to their bond requirements. British Columbia can now be added to that list. In its new *Wills, Estates and Succession Act* (WESA), which came into force on March 31, 2014, British Columbia eliminated the mandatory requirement that applicants for administration provide security except where a minor or a mentally incapable adult is interested in the estate. The government noted that, among other things, the security requirement “adds complexity and delay, increasing the overall cost of an administration”.³⁰³

In contrast, the Surety Association of Canada (SAC) has emphasized the protective role of surety bonds.³⁰⁴ In its 2012 submission to MAG, SAC proposed a number of specific recommendations that would improve the ability of bonds to play this role.³⁰⁵

2. Stakeholder Perspectives on Bond Requirement for Small Estates

During the LCO’s consultations it became apparent that there is a strong degree of consensus among the estates bar that the general bond requirement is more burdensome than it is protective and should be dispensed with subject to specific limitations. This is particularly so in relation to small estates.

[The LCO’s consultations indicated] that there is a strong degree of consensus among the estates bar that the general bond requirement is more burdensome than it is protective and should be dispensed with subject to specific limitations.

SAC also filed a written submission in this project, discussing the role of administration bonds specifically in the context of small estates.³⁰⁶ Far from conceding that the bond requirement is burdensome for small estates, SAC proposed a small estates process that would make use of the protective effect of administration bonds as an alternative to the current court based process. Under this proposal, applicants to administer estates worth less than \$100,000 would register with the court and provide an administration bond in the amount of the value of the estate. This would secure the interests of beneficiaries and creditors as well as payment of the estate administration tax. The court would maintain a registry of estate trustees but would not scrutinize applications. Very small estates worth less than \$10,000 would be exempted from the requirement to provide security.

The SAC’s proposed process would provide some protection to beneficiaries and creditors of small estates while reducing costs. However, it would entirely eliminate court scrutiny of proposed estate trustees. Anyone with the funds sufficient to post a bond would presumably be entitled to register. Any will, no matter how suspect, could be put forward. It is not clear from the SAC’s proposal how conflicting applications would be addressed. Once registered, beneficiaries and creditors would be required to protect their own interests by making a claim against the secured amount.

In the LCO’s view, this proposal would essentially privatize the probate process for small estates. It would react to fraud rather than preventing it. Although the security would offer some deterrent against wrongdoing, the estate representative would only be deterred where he or she expects beneficiaries and creditors to be vigilant enough to protect themselves.

For these reasons, and particularly the additional complexity and cost that would be involved, the LCO has concluded that no bond should be required as part of Ontario's small estates procedure.³⁰⁷ Instead, the primary protective element for the Ontario small estates procedure should be the notice requirement described above.

3. Non-Resident Applicants in a Small Estates Procedure

The LCO's conclusion that a bond should not be required in a small estates procedure has particular implications for non-residents applying to administer small estates. Under the regular probate stream, non-resident executors (named in a will) may apply for a COA where they are either resident in the Commonwealth or they post a bond.³⁰⁸ However, non-residents wishing to administer intestacies are not entitled to apply at all.³⁰⁹ Instead, where there are no other next-of-kin residing in Ontario, the OPGT may apply to administer these intestacies.³¹⁰

Eliminating the bond requirement in a small estates process would not have any impact on the current prohibition against non-residents administering intestacies. However, it would mean that executors residing outside Ontario would not be able to take advantage of the small estates process. They would be required to apply under the regular probate stream. This is a necessary restriction. A bond requirement, even for a narrow category of applicants, would likely introduce a degree of complexity and cost sufficient to undermine its purpose.

...[T]he LCO has concluded that no bond should be required as part of Ontario's small estates procedure.

The Law Commission of Ontario makes the following recommendation:

6. Security not be required as part of an application for a Small Estates Certificate.

G. Legal Effect and Consequences of a Small Estates Process

1. Legal Effect of a Small Estates Process

A small estates application would be approved by the court and would result in the issuance of a Small Estates Certificate with the same legal effect as a COA. Third parties would be able to bring a proceeding to challenge Small Estates Certificates just as they may with COAs.³¹¹

The legal equivalency of COAs and Small Estates Certificates would be important to ensure that other legal processes relying on the issuance of a COA would not be disrupted. For example, there should be no effect on the *Bank Act* confidentiality provisions or the *Income Tax Act* rules for establishing legal authority. Nor should there be concern for possible constitutional implications of reform.

This model of small estates process would also alleviate any jurisdictional concerns. For example, other jurisdictions that rely on Ontario COAs as authoritative evidence of legal authority would be able to continue to do so.

2. Subsequently Discovered Assets

It would also be important to make provision for subsequently discovered assets without unduly complicating the process. The LCO has concluded that the appropriate procedure should depend on the revised total value of the assets.

If the revised total value of the estate remained \$50,000 or less, the certificate holder would file a summary statement with the court disclosing the new assets and their value and the court would issue an amended certificate extending the certificate holder's authority to the new assets. In order to provide applicants with sufficient incentive to discover and list all estate assets in the original application, only one amendment to a Small Estates Certificate would be permitted.

If, on the other hand, the revised total value of the estate exceeded the \$50,000 value limit, the certificate holder would be required to apply for a grant of probate under the regular stream. The Small Estates Certificate would remain valid authority for actions already carried out by the certificate holder according to subsection 47(1) of the *Trustee Act*.³¹² However, a COA would be required in order to administer the newly discovered assets. This is an important limitation to the small estates process intended to prevent estate representatives of larger estates from abusing it.

Financial and other institutions relying on a Small Estates Certificate would be statutorily protected just as they are currently under section 47 of the Trustee Act.

3. Consequences for Financial and Other Institutions

Financial and other institutions relying on a Small Estates Certificate would be statutorily protected just as they are currently under section 47 of the *Trustee Act*.³¹³ The Small Estates Certificate would contain a statement making this clear so that institutions would be more likely to accept it.

Otherwise, a small estates process would have no direct impact on financial and other institutions. They would remain bound by their own legislative framework and would retain their current discretion to decide what evidence of legal authority will be required to release estate assets or otherwise deal with the estate representative.

However, a small estates process would likely have a significant practical effect in reducing probate waivers. Financial and other institutions would have a strong incentive to refuse to exercise their discretion to release assets without a Small Estates Certificate. The simplified process would make it more reasonable to expect their clients to apply for a Small Estates Certificate and this would give financial institutions added protection from liability.

Since financial institutions would still have discretion to release low value assets without probate, where certain estate assets have been released, an estate representative might still wish to use the small estates procedure in order to collect the remaining estate assets. In these circumstances, the release of some assets without probate would not affect the total value of the estate for the purpose of meeting the \$50,000 value limit. The value limit must be based on the total value of all estate assets whether or not they are already in the possession of the estate representative. Otherwise, the estate representative of a large estate may be able to use probate waivers in order to reduce the size of the estate to fit under the \$50,000 value limit. For example, the estate representative of an estate worth \$100,000 may already have possession of estate assets worth \$60,000. This should not then entitle him or her to file a small estates application in respect of the remaining \$40,000.

Some may consider the reduced availability of probate waivers as a regressive consequence of this reform since certain small estates may be required to go through probate where they would otherwise have qualified for a probate waiver. However, this loses sight of the purpose of probate. It is more than an administrative process for gathering estate assets. The system continues to have a valuable role providing legal protection to estate representatives, beneficiaries and creditors. Also, it must be remembered that even a probate waiver application has its share of administrative requirements to complete, including indemnity agreements in many cases. The goal of a small estates procedure is to provide small estate representatives with the option of obtaining court supervised probate without appreciably more cost and difficulty than they would experience in seeking a probate waiver (and perhaps even less in some cases). Nevertheless, these recommendations would not affect the discretion of institutions to waive probate.

The Law Commission of Ontario makes the following recommendation:

- 7.a) The Estates Subcommittee of the Civil Rules Committee prepare and the Ontario government enact amendments to Rule 74 of the *Rules of Civil Procedure* and the *Estates Act* as necessary to provide that a Small Estates Certificate issued under a small estates procedure have the same legal effect as a Certificate of Appointment of Estate Trustee in the regular probate stream, with the sole distinction that authority under a Small Estates Certificate be limited to the specific assets listed in the application.
- b) The small estates procedure provide that where additional estate assets are discovered subsequent to the issuance of a Small Estates Certificate,
 - i. if the revised total value of the estate does not exceed \$50,000, the estate representative may file a statement disclosing the new assets and the court may amend the Small Estates Certificate accordingly,
 - ii. applicants be limited to one amendment per estate,
 - iii. if the revised total value of the estate exceeds \$50,000, the estate representative must apply to administer the new assets by filing an application for probate under the regular stream.

Small estates probated under a small estates process would continue to be responsible for payment of the estate administration tax.

H. Estate Administration Tax and Estate Information Return

Small estates probated under a small estates process would continue to be responsible for payment of the estate administration tax. For estates worth \$50,000, the tax is \$250. In spite of the small amount at stake, the audit and verification regulation recently issued by the Ministry of Finance would require that estate representatives of small estates also complete an Estate Information Return (EIR).³¹⁴ The LCO is concerned that this additional process would drive up application costs and potentially undo the good being done by a small estates procedure.

The audit and verification regulation has only recently been introduced and it is not yet possible to assess the degree of difficulty that it will pose for unrepresented applicants of small estates. However, as noted by practitioner Vince De Angelis,

While the amount of tax being paid by estates should not be any greater than currently applicable, the costs of complying with the new reporting requirements and the challenge of assessments where necessary will likely increase the costs incurred by the estate. This will only cause further delays and complicate the administration of even the most modest of estates. Add to this the additional exposure to civil and criminal penalties faced by estate representatives and their advisors under the EATA [*Estates Administration Tax Act*], finding someone to act as the estate representative may become a challenge.³¹⁵

Although the EIR requires the same kind of information as would be required in a small estates application form, the EIR is designed for all estates regardless of value, including estates with significant and complex assets. Therefore, the form is seven pages long and includes a degree of detail that is not applicable to most small estates. For example, the applicant must include the assessment roll number and the property identifier number for each parcel of real property owned by the estate. He or she must specify the percentage of the deceased's ownership in the property and subtract any encumbrances. For investments, the name and address of the broker or agent, as well as the name of the issuer, the type and details of the instrument or account number and the number of units is required. For vehicles, the vehicle identification number or the hull serial number is required. In the section titled "Other Assets", the applicant is required to list business interests, copyrights, patents and trademarks, among other things. This may well be confusing to applicants acting on their own even where the small estate does not contain most of the assets listed on the form. The concern here is similar to the concern for unrepresented applicants navigating the 65 forms under Rule 74 in order to find the one or two forms that apply. The very presence of a large amount of extraneous information still obligates the applicant to consider and make the determination that it is extraneous.

...[T]he LCO is concerned that the detail required by the EIR and the process required to complete and file it would be intimidating for many estate representatives of small estates.

Therefore, the LCO is concerned that the detail required by the EIR and the process required to complete and file it would be intimidating for many estate representatives of small estates. In some cases, they may be compelled to obtain legal assistance. In other cases, they may be discouraged from filing for probate altogether. Harkening back to the principles underlying this Report, imposing the EIR requirement on small estates is arguably an example of the burden of administration being disproportionate to the value of these estates.

And the rationale behind the EIR, to enforce payment of estate administration tax in order to maximize tax revenue, is less relevant to small estates where the tax revenue is very small. It seems unlikely to be cost-effective for the Ministry of Finance to review EIRs for amounts less than \$250 or to attempt to enforce such small tax liabilities. In any event, for small estates, the LCO suggests that the goal of accessibility to probate outweighs the value of any lost tax revenue that might be recovered.

The LCO is not suggesting that small estates be exempt from any scrutiny around the value of the estate but merely that this scrutiny be proportionate to the amounts at issue. The application form being recommended in this Report would require that the applicant list individual estate assets and their value. This is already a significant improvement over Ontario's current application form which requires only a single number representing the total value of the personal and real property of the estate respectively.

The LCO's recommendation for an application form requiring a breakdown of estate assets and their individual value is also in keeping with small estates

procedures in other jurisdictions. For example, in Saskatchewan, the application requires that each estate asset be listed along with the name and address of the person possessing it and its value. The proposed Northwest Territories application form would require the same. BCLI's proposed form would have required a breakdown and description of each asset and its value.

The LCO believes that the recommended small estates process would provide sufficient formality and would require enough details about the estate to provide effective deterrence against fraudulently underreporting assets. Therefore, although small estates would continue to be required to pay estates administration tax, the LCO has concluded that they should be exempt from the new requirement to file an EIR.

The Law Commission of Ontario makes the recommendation that:

8. The Ontario government amend the *Estate Administration Tax Act* and its regulations to exempt estates filing under the small estates process from the requirement to file an Estates Information Return.

There were several suggestions during the consultation process for designing a small estates process to be delivered online.

I. Online Delivery of a Small Estates Process

There were several suggestions during the consultation process for designing a small estates process to be delivered online. In particular, several practitioners pointed to Ontario's Electronic Land Registration System (E-LRS) as a possible model for an online small estates procedure. One legal technology expert sent in a written submission for an online small estates process modeled after the E-LRS in which lawyers authorized by the Law Society of Upper Canada (LSUC) would issue COAs or refer applications to the court. The proposal noted that an online system could allow for automatic service of applications to the OPGT or the OCL or both. New York's value limit of \$30,000 was suggested as an initial value limit with the idea that this might be raised to \$100,000 once the new process proved effective.³¹⁶

The similarities between the probate and land titles systems generally suggest that the E-LRS might be an appropriate model to consider in looking at a small estates procedure for Ontario. The land titles system is intended to establish legal entitlement to deal with real property, just as the probate system is intended to establish legal entitlement to deal with an estate. There is a difference in that the registered land owner has beneficial ownership of the property whereas an estate trustee is just that, a trustee for the beneficiaries of the estate. However, the intent of both systems is to protect those entitled to property and promote commercial certainty by providing the public with reliable information as to the true owner/representative of the property.

The E-LRS allows authorized users (lawyers or other professionals) involved in a land transaction to create, sign and register documents online.³¹⁷ The user has an account on the system and is responsible for paying costs and the land transfer tax. In a land transaction, the users representing the seller and buyer can “message” each other in order to create a document that is acceptable to both, after which the users sign electronically and one user registers the final document. The registration takes effect immediately but is later reviewed by registry office staff for form and completeness.³¹⁸

In cases where the title of land is to be transferred from a deceased to the estate representative, the estate representative’s lawyer must register a “transmission application”. The lawyer must make a “law statement” attesting that the owner is deceased and the estate representative has the authority to transfer the property.³¹⁹ The lawyer is required to retain in the files, evidence supporting these statements.³²⁰ Lawyers maintain insurance to cover the risk of liability here.

In spite of the similarities between probate and the E-LRS, there are key distinctions in their function that, perhaps, explains the enduring role of courts in administering probate and limits the usefulness of the E-LRS as a model. For example, where a land transfer is recorded in the E-LRS, the parties interested in the land are typically alive and able to protect their own interests.³²¹ In probate, part of the court’s role is to protect the intentions of the deceased who is, by definition, unable to protect them personally.

Another distinction between the two regimes is the approach taken to deterring and compensating for fraud. In the E-LRS, this is addressed in several ways. There are strict requirements for establishing the client’s identity and each party on a transaction must be represented by independent lawyers. The system is also protected by restricting access to registered users only.³²² In addition, the Land Titles Assurance Fund was established to provide compensation for losses due to fraud as well as administrative error.³²³ The probate system also encourages individuals with interests in an estate to rely on the issuance of a COA. This is achieved through section 47(1) of the *Trustee Act* which serves to validate actions taken under the authority of the COA, even where the COA is later revoked.³²⁴ However, in the probate system, this statutory protection is offered only in the case of honest error and is expressly withheld in the case of the estate trustee’s fraud.

The relative vulnerability of the interests at stake in the probate system and the relative lack of protection against fraud indicate that the balance between legal protection and accessibility in a small estates procedure should be struck somewhat closer to the legal protection end of the spectrum than is the case in the E-LRS.

In its Issues Paper on the administration of small estates, the South Australian Law Reform Institute (SALRI) also raised the idea of an online small estates process, again without the supervision of the court.³²⁵ It reasoned as follows:

Public notice of an assumption of responsibility to administer a small estate under a legislated process need not require filing any documents with the court or the involvement of court officials in receipt or stamping of declarations and facilitating record searches. The same objectives could be achieved at less expense and trouble by the online lodgement on a Government website of a declaration in exactly the same prescribed form, including a statutory release from liability for third parties relying on the registered assumption of authority.³²⁶

This reasoning is preliminary and SALRI has not yet released a Final Report in this project. However, the LCO believes that there are other factors to consider in dispensing with court supervision in addition to the relative degree of expense and trouble involved. Also to be taken into account is the potential for increased fraud without the sobering influence of court supervision, as well as potential legal consequences for other legislative provisions that rely on court supervised probate (such as legal standing for third parties challenging a declaration).

The LCO has concluded that an online small estates process operating without court sanction would not be appropriate for small estates. However, there is a great deal of merit in exploring the online delivery of a court supervised small estates procedure in Ontario.

A large proportion of the institutional knowledge developed by the government with [the small claims online filing program] would be equally applicable to the design of an online small estates process.

The Ontario government has made a number of important initiatives in providing online court services over the past several years. A significant project has been to develop an online process for filing small claims court materials. After a six month pilot project, this program was rolled out earlier this year. Individuals and businesses can now file small claims and pay court fees online as long as the claim is for a fixed amount.³²⁷ A Quick File program is available for professionals using the system and, for individuals, there is a Filing Wizard through Service Ontario's website which guides individuals through the process of inputting information. A users' guide provides further instructions in plain language and includes snap shots of webpages that the user should expect to see.³²⁸ Big blue arrows point to the correct buttons to be clicked at each stage of the process. Certain information such as the amount of pre-judgment interest to be claimed is generated automatically based on the date inputted and the applicable rate. Supporting documents may be uploaded as part of the form being submitted. Where no defence is filed, a default judgment may be requested online.

While it is early yet for evaluation, Ontario's small claims online filing system appears to be an excellent means of reducing the cost and increasing the accessibility of this particular legal process. A large proportion of the institutional knowledge developed by the government with this initiative would be equally applicable to the design of an online small estates process. This kind of delivery platform is perhaps particularly suitable in the probate context where there are typically no opposing parties and there is a significant administrative component to the process. Therefore, the LCO suggests that an online delivery platform would be an equally beneficial initiative to improve accessibility to probate for small estates.

The Law Commission of Ontario makes the following recommendation:

- 9.a) The Ministry of the Attorney General leverage the institutional expertise gained in designing its online small claims court filing process for the purpose of designing a similar online filing system for a small estates procedure, with the goal of reducing the application costs of probate for small estates and increasing the efficiency of the system overall.
- b) A paper process be retained for applicants who cannot or do not access online services.

J. Legal Information on the Purpose of Probate and the Small Estates Process

Improved understanding about the role of the probate system and its cost would help estate representatives of small estates make better decisions as to whether or not to file for a Small Estates Certificate.

Probate is suffering from a significant image problem. It was widely reported in consultations that people do not appreciate the legal protections provided by the probate system. Many seem to perceive the system as no more than a mechanism for collecting estate administration tax. Others view the paperwork as meaningless government bureaucracy. Still others have an exaggerated idea of the cost of probate and do not believe that there is value in hiring a lawyer to assist with the process. The consultations revealed that the cost of hiring a lawyer to obtain probate is generally reasonably affordable except in the case of very small estates.

The conversation about probate tends to be whether it is “needed” or not to access estate assets. There is less recognition of the value of probate in protecting the beneficiaries and creditors from fraud or improper administration and the estate representative from liability for relying on an invalid will.

Numerous stakeholders, including the Canada Revenue Agency, called for more public education, particularly around the need for proper authorization in order to represent an estate.³²⁹

Improved understanding about the role of the probate system and its cost would help estate representatives of small estates make better decisions as to whether or not to file for a Small Estates Certificate.

It is just as crucial that estate representatives have a clear understanding of the process of obtaining a Small Estates Certificate. Meaningful access to any legal process, including probate, requires more than the formal standing to invoke the process. The tools necessary to make use of the process, information guides, forms and instructions must themselves be accessible to the user.³³⁰ As Hakim notes,

Simply reducing the complexity of the process is not sufficient. To be successful, any simplified procedure must be accompanied by significant legal self-help services and education tools, in order to also reduce the perception of complexity, so that individuals feel empowered to utilize the mechanisms available to them.³³¹

A clear understanding of one's legal rights is also important in order to determine when to hire a lawyer rather than representing oneself. This is particularly the case for estate representatives of small estates who may be less inclined to seek out individualized legal advice.

As discussed above in chapter IV.E.2, there is a need in Ontario for better legal information on the responsibilities of an estate trustee, the requirements for navigating the probate process and the reasons why information is required at each step of the process. Existing resources are limited in scope and are not entirely successful in explaining legal concepts in language that is fully accessible by laypeople.

Therefore, one of the LCO's key recommendations is the creation of a plain language guide explaining the purpose of probate and how to navigate the small estates process. It would also benefit those using the regular probate stream, particularly self-represented applicants, to have available a plain language guide.

...[T]here is a need in Ontario for better legal information on the responsibilities of an estate trustee, the requirements for navigating the probate process and the reasons why information is required at each step of the process.

Although probate involves complex legal concepts, this should not preclude a plain language guide that is effective to take laypeople through the process step by step. During consultations, a government official and at least one practitioner drew an analogy to tax guides issued by the Canada Revenue Agency (although the extent to which these guides achieve their purpose is a matter of opinion).³³² To be effective, a comprehensive, government-authored guide to the purpose of probate and the process of obtaining a Small Estate Certificate should be made widely available online, in court offices and funeral homes through Community Legal Education Ontario (CLEO) and other public institutions. It should be published in English, French and other languages reflecting the linguistic diversity of Ontarians.

Some jurisdictions have already made a concerted effort to provide estate representatives of small estates with plain language guidance through the process. In Canada, Manitoba has been relatively successful in this respect. Information on Manitoba's summary administration process is available on the Community Legal Education Association Manitoba (CLEAM) website. CLEAM has created a plain language Guide to Administering Estates under \$10,000.³³³ There is also a preliminary general document on probating an uncomplicated estate worth less than \$100,000.³³⁴ These guides are clearly worded and easy to read and are useful models for designing a similar plain-language guide to an Ontario small estates procedure.³³⁵

New York's small estates affidavit procedure (SEAP) discussed above is successful in part due to a comprehensive web of supports including simplified instructions,

plain language guides, court help centres and programs for assisting unrepresented applicants.

A 2005 manual by the Canadian Council on Administrative Tribunals (CCAT) recommends that administrative tribunals undergo a literacy audit to determine how best to improve access to the tribunal through use of plain language, responsiveness to the individual needs of those using the tribunal, staff training and so forth.³³⁶ This is perhaps a longer term goal for the probate system.

The Law Commission of Ontario makes the following recommendation:

10. a) The Ministry of the Attorney General, in partnership with institutions such as the Law Society of Upper Canada and other appropriate service organizations, publish an authoritative, plain-language guide addressing the following:
 - i. the purpose of the probate system, the responsibilities of estate representatives and the relative costs and benefits of obtaining probate and
 - ii. how to navigate the small estates process.
- b) This guide be made widely available online, in court offices, funeral homes and other relevant public institutions.
- c) In addition to English and French, this guide be published in other languages reflecting the linguistic diversity of Ontarians.

Hand in hand with a plain language guide to probate is the need for simplified language in the application materials themselves.

K. Simplified Forms and Online Forms Assistant

Hand in hand with a plain language guide to probate is the need for simplified language in the application materials themselves. Currently, there are a myriad of forms under Rule 74 with technical language that may pose difficulty even for lawyers who are not familiar with estates law. In order to be accessible to unrepresented estate representatives, the small estates application form, notice form and accompanying instructions would have to be much simpler than these current forms.

There is a limit to the extent that forms can be simplified without undermining their effect. Small claims court is another court process that is organized around forms. In writing about small claims court, Shelley McGill has noted the need for a delicate balance between too few and too many forms:

Moderate use of standard forms can further several small claims court objectives. They can make the system easy to use for both administrators and litigants, inform users of the rules and promote a fair forum through meaningful disclosure.

However[,] balance is the key to success; too many forms overwhelm the user and bog the system down in paper. Long forms are intimidating, appear complicated, and may obscure the very information they are trying to convey. Too few forms leave the user ill-informed about the process and the opposing party's case.³³⁷

B.C.'s new Probate Rules include rather lengthy forms for the purpose of guiding applicants through the process. The forms integrate step-by-step instructions and make use of standardized language that allows applicants to simply check the appropriate box. We believe that this is a promising approach for Ontario, although a much shorter form would be sufficient for the small estates process that we recommend.

An important element of a simplified application form would be an online forms assistant to guide applicants step by step through the small estates application requirements. At each step, an information box would explain the significance of the question and information required and would provide the applicant with possible responses. Some of the questions would require that the applicant fill in information, but the applicant would also be able to answer other questions simply by ticking the appropriate box. The forms would also be available in hard copy. An online forms assistant would differ from an online filing system since the applicant would be required to print out the completed materials and manually file them with the court. An online forms assistant would already be part of the online delivery system in recommendation 9a above. However, where online delivery is not yet in place, an online forms assistant may be an incremental step towards this bigger goal.

An important element of a simplified application form would be an online forms assistant to guide applicants step by step through the small estates application requirements.

One promising model for a small estates forms assistant is the interactive small estates affidavit procedure (SEAP) in New York.³³⁸ SEAP is a part of CourtHelp which is a broader initiative for providing on-line legal information and a self-help system for unrepresented litigants.³³⁹ The SEAP webpage describes the program and lists the eligibility requirements in clear language. A checklist sets out the information needed to complete the program. Key terms are linked to definitions and further instructions. Computer requirements are explained and then the user is welcome to begin the SEAP interactive module.

Upon beginning the SEAP module, the screen displays a virtual guide standing on a pathway with enumerated stopping points leading to a courthouse in the distance. As questions are answered, the user appears to proceed along the path towards the courthouse. The virtual guide communicates with the user through word bubbles that present text. The text is simply worded. For example, the guide advises that you would fill out the affidavit "to ask the Surrogate's Court for the authority to keep or give away the property of someone who died."

The user answers a series of questions that are automatically compiled into a completed Affidavit of Voluntary Administration. As part of the process, SEAP informs users of each of the duties of an estate representative and requires them

to click a box agreeing to each one before proceeding to the next. The completed form also contains clear instructions on how to file the Affidavit with the court, the duties of a voluntary administrator, what to do if additional assets are found after filing the affidavit, and so on.

SEAP has received some positive user feedback, most of which suggests that users *perceive* the program as helping them to successfully complete the affidavit procedure without a lawyer's help, including the following comments:

*Very helpful to complete forms at home on-line before coming to court. I feel more prepared with this process.*³⁴⁰

*Really appreciate the opportunity to prepare the forms online. It made the process go faster. My papers are neater and more accurate.*³⁴¹

*Saved me time and I did not have to take time off from work to travel to a different county's clerk office.*³⁴²

*Appreciate the easy use since I am not a lawyer.*³⁴³

*This is a great website, I waited all this time to file because I couldn't afford a lawyer to do this.*³⁴⁴

*Love how they confirm your answers, verify so it's done correctly.*³⁴⁵

*Very helpful, [court staff] pleasant people to work with. They made this experience very easy for me and made me feel very comfortable.*³⁴⁶

...[I]t is important that simplification is not gained at the cost of legal protection and that a small estates process also provide legal supports such as a telephone help line... .

SEAP has been modified since its inception in 2009 to respond to user feedback. In 2011, the SEAP website received over 23,000 unique site visits.³⁴⁷

The NYS Courts Access to Justice Program (NYA2J) has developed a best practices guide for designing and administering court document assembly programs such as SEAP.³⁴⁸ NYA2J has also developed best practices for structuring court help centers and programs to assist unrepresented litigants as well as best practices for help center staff in providing legal information.³⁴⁹

SEAP apparently goes a long way in making manageable a complicated "simplified" process. It does appear possible for people to successfully file the Small Estate Settlement form without a lawyer and everything is delivered from a single web platform, reducing the likelihood that individuals will search for potentially erroneous information elsewhere.

Ontario may learn from New York and other jurisdictions in designing simplified forms for a small estates process.³⁵⁰ However, it is important that simplification is not gained at the cost of legal protection and that a small estates process also provide legal supports such as a telephone help line, discussed immediately below.

Simplification is also a desirable goal in relation to Ontario's probate system generally. The LCO suggests that the forms under Rule 74 should be reviewed with

a view to consolidating the number of forms and adopting simplified language where possible. In particular, the LCO suggests that the commonly understood term “probate” be restored to the Rules in place of the current official term, Certificate of Appointment of Estate Trustee with or without a Will.

The Law Commission of Ontario makes the following recommendation:

11. a) A small estates application form, notice form, instruction sheet and other application materials be designed with simplified language accessible to unrepresented applicants, beneficiaries and others interested in the estate.
- b) If the small estates process is not being delivered online pursuant to Recommendation 9, an online forms assistant be developed to guide applicants step-by-step through the application process and educate them as to the meaning and effect of each of the application requirements.

Court staff field many questions from individual estate representatives. However, they are limited in the assistance they can provide by significant resource constraints, as well as by the prohibition against giving legal advice.

L. Telephone Help-Line for Estate Representatives

Even a well-developed small estates process with a plain language guide to the process, simplified forms and online delivery will not be accessible to all Ontarians. Some small estates will raise issues that can only be addressed through individualized legal advice. Some estate representatives will continue to experience language, literacy, technical and other barriers precluding them from navigating the system without assistance.

Currently, estate representatives who cannot afford a lawyer tend to seek assistance from financial institutions, court staff, funeral directors and friends and neighbours, among others.³⁵¹

Some practitioners suggested that financial institutions may be in a conflict of interest in certain circumstances when they advise their clients about probate matters. One practitioner raised a concern about a new professional designation, executor advisors, that may lead unqualified individuals to provide unlicensed legal advice.³⁵²

Court staff field many questions from individual estate representatives. However, they are limited in the assistance they can provide by significant resource constraints, as well as by the prohibition against giving legal advice.

The consultations revealed that the assistance received from this diffuse group of informal advisors is frequently inaccurate and inconsistent. The LCO suggests that a centralized source of “real time” assistance would reduce these inaccuracies

and gradually clear up some of the widespread misperceptions about the probate system. It would also be an objective source of assistance staffed by experts (although not necessarily lawyers). A telephone help line would be an appropriate alternative source of assistance for estate representatives who are not comfortable with or cannot access the online process and wish to speak to a “real person”. In order for a help line to be meaningful for Ontarians whose first language is not English or French, it would be important to offer assistance in other languages in common use.

A telephone help line would be valuable not only to estate representatives of small estates but also to estate representatives filing applications under the regular probate stream.

A modest investment of resources would be necessary to set up and staff a telephone help line. However, a help line would also conserve resources, particularly by relieving the current load on court staff. Over time, it should lead to fewer mistakes on probate applications which would reduce the resources necessary to process them.

A telephone help line would be ... appropriate ... for estate representatives ... who wish to speak to a “real person”. ... [I]t would be important to offer assistance in other languages [in addition to English and French]...

Consideration should be given as to how a probate help line initiative might be integrated into existing access to justice projects in Ontario.³⁵³ For example, community legal clinics in Ontario are currently engaged in a long list of transformation projects listed at the Association of Community Legal Clinics of Ontario website.³⁵⁴ Also, the Action Group on Access to Justice (TAG) is facilitating several projects in which different service organizations collaborate on access to justice initiatives.³⁵⁵

Of course, a telephone help line, like most legal supports, would not be sufficient on its own. There will be applicants who cannot benefit from a help line due to literacy, language or other barriers.³⁵⁶ For this group, legal representation or personal assistance from other trusted intermediaries may be necessary.

The Law Commission of Ontario makes the following recommendation:

12. The Ministry of the Attorney General, in partnership with institutions such as the Law Society of Upper Canada and other appropriate service organizations, establish a telephone help line for estate representatives of small estates, staffed by knowledgeable advisors and promoted widely as a resource for legal assistance in navigating the small estates process.

M. Cost-Sensitive Legal Advice

Lawyers play a valuable role in probate matters, not just in guiding their clients through the application process, but also explaining the legal consequences of probate and advising them as to their role and responsibilities as estate trustee. Some practitioners felt that legal assistance is a practical necessity in the probate system for which people should be willing to pay a reasonable amount. The cost of hiring a lawyer to assist in obtaining probate (\$1,000 to \$5,000 for a straightforward estate) will be reasonable for most Ontario estates. For these estates, it makes good sense for an estate representative to hire a lawyer.

Legal representation would be equally valuable to estate representatives probating small estates under a simplified small estates process. Although the process may be simplified, the legal effect of probate and the responsibilities of the estate representative remain complex concepts that may not be fully appreciated by an unrepresented estate trustee. As discussed in chapter II above, estate representatives often misunderstand probate to be nothing more than an administrative matter involving a few forms.

Although legal advice is valuable in probating Ontario estates of any value, it is a reality that some estates are too small to cover the cost of legal representation or, at least, too small to make legal representation worthwhile.

There may also be additional reasons why legal advice is advisable for estate representatives of small estates. Some estate representatives will experience language or other barriers that make it difficult for them to access the legal system. One clinic lawyer indicated that their clients generally do not have the skills to obtain probate on their own, especially where there is no will. Since the estates are not large enough to justify hiring a lawyer, clients abandon the assets. There was a concern that even a simplified court-based procedure would not be accessible by their clients.

Although legal advice is valuable in probating Ontario estates of any value, it is a reality that some estates are too small to cover the cost of legal representation or, at least, too small to make legal representation worthwhile.³⁵⁷

There are valuable initiatives in Ontario offering low-cost legal advice to Ontarians in certain circumstances. However, for the most part, these are unavailable for probate matters. For example, the Law Society of Upper Canada (LSUC) operates a Lawyer Referral Service which matches people with lawyers in particular practice areas. These lawyers will provide a free 30 minute consultation, after which their fee is negotiated privately with the individual. JusticeNet is a service consisting of a group of lawyers in different practice areas who provide legal advice to low income clients at a reduced rate.³⁵⁸ Unfortunately, the areas of law covered apparently do not include estate administration or probate.³⁵⁹ Legal Aid Ontario states that it “does not cover Power of Attorney or wills and estates”, but that some community legal clinics may be able to assist.³⁶⁰ However, according to a clinic lawyer, community clinics generally do not take on estates matters with the result that clients must abandon the estate assets if they cannot obtain other assistance.³⁶¹

Access to legal services has been identified as a pressing concern throughout the civil justice system.³⁶² The 2010 Report of the Ontario Civil Legal Needs Project, *Listening to Ontarians*, recognized that traditional legal representation for family and other civil matters will not be accessible to many low and even middle income Ontarians.³⁶³ It suggested a different approach to accessing legal services based on a menu of options depending on the type of legal assistance required.³⁶⁴ For example, it suggested there may be a role for unbundled legal services, paralegal representation, *pro bono* services such as offered by Law Help Ontario, accurate and reliable information on the Internet, telephone advice hotlines (with competent staff) and so on. However, the Report recognized that in spite of the availability of these services, in some cases Ontarians will require access to a qualified lawyer or paralegal in order to achieve a just and fair outcome.³⁶⁵ This is particularly the case for many Canadians who do not have the literacy level to make effective use of legal information in written form.³⁶⁶

The LCO addressed the need for affordable access to family law services in our 2013 Report, *Increasing Access to Family Justice Through Comprehensive Entry Points and Inclusivity*.³⁶⁷ We pointed out significant barriers that may prevent people with family disputes from benefiting from the substantial amount of family law information already available online and through specialized programs.³⁶⁸ For many people, these standardized sources of legal information were of limited usefulness without some personal assistance in applying the information to their own situation. The Report suggested that non-lawyer “trusted intermediaries” might be trained to provide assistance to these individuals.

Similar considerations may apply in the context of probating small estates. However, probate is materially different in some respects from other parts of the civil justice system. Typically, an uncontested probate application will not be adversarial. Nor will it involve an “essential legal need” described in the CBA’s Equal Justice Report as

[T]hose that arise from legal problems or situations that put into jeopardy a person or a person’s family’s security – including liberty, personal safety and security, health, employment, housing or ability to meet the basic necessities of life.³⁶⁹

Several of the practitioners we spoke with drew a distinction between two components of the legal services commonly provided by estates practitioners. One component is assisting the client with completing and filing the probate application along with supporting materials. In an uncontested application, this may largely be an administrative task. The other component is advising the client about the legal significance of the application requirements and the legal significance of probate, as well as the role and responsibilities of acting as estate trustee. Practitioner stakeholders emphasized the importance of this role given the complexity of the probate system generally and the potential for personal

liability by estate trustees. Several practitioners rejected the idea of a do-it-yourself small estates process specifically because they felt that this general advisory role could not be properly outsourced.

The LCO agrees that it is important for all estate representatives to understand the legal responsibilities and risk of liability that accompany a successful probate application regardless of the value of the estate in issue. However, it may be possible in a small estates process to separate these two components of legal services in order to reduce the overall cost of probate while ensuring that estate representatives receive the legal advice necessary for their role.

First, there should be a cost-effective means of providing general legal information to estate representatives filing small estates applications. This is particularly important in probate matters so that the applicant understands the significance of acting in a representative capacity. Much of the information that estate representatives should understand in order to fulfill their role will be standard for all estates regardless of their make-up or value. Therefore, it should be possible in many cases for this information to be relayed in a standardized manner, especially since, unlike most legal processes, probate is often not adversarial.

...[P]roviding general legal information ... is particularly important in probate matters so that the applicant understands the significance of acting in a representative capacity.

There are several possible delivery methods for this kind of standardized legal information. Above, we make recommendations for two such possibilities: a plain-language guide to probate and a telephone help line. Other possibilities might involve a half hour appointment with a volunteer lawyer or a law clinic or public seminar program designed to educate the estate representative generally about the role and responsibilities of being an estate trustee. It might be an online information module that applicants complete as part of their application. It might be modeled after the family court Mandatory Information Program (MIP) in which parties to a contested claim attend an information session on the effects of separation and divorce, the court process and alternatives to court.³⁷⁰ It might be some combination of these. Whatever the delivery method, the idea would be to provide standard legal information rather than legal advice about the estate being administered. However, if the small estate raised particular complexities, the applicant might be referred to a lawyer for individualized legal advice.

Since some estate representatives will require legal assistance with even the simplest form, additional legal supports should be available for this group. A program such as JusticeNet may make it possible for estate representatives of small estates to hire a lawyer at a reduced rate. Or, if feasible within financial restraints, some legal clinics might expand their services to include probate applications for clients with significant barriers. These kinds of initiatives might be connected to one or more of the transformation projects already underway by community law clinics in Ontario.³⁷¹ If so, eligibility rules would have to be modified to reflect the value of the estate rather than the income of the client.³⁷²

It is also worth considering the possibility of paralegals assisting with probate applications for small estates. Although paralegals are not currently licensed to represent clients on probate applications or estate administration, some stakeholders suggested that their permitted scope of practice might be expanded to cover these areas.³⁷³

Law students may also be of assistance where properly supervised by a lawyer. Student Legal Aid Services Societies (SLASS) operate out of Ontario's seven law schools.³⁷⁴ In order for SLASS to play this kind of role, the current scope of their services would have to be enlarged to include probate matters and, again, LAO eligibility rules would have to be modified.

Countless times in the consultations, the plea was made to promote will-making in order to reduce the risk of problems later on in obtaining probate and administering the estate.

The Law Commission of Ontario makes the following recommendation:

13. a) In the case of small estates, estate practitioners consider separating two components of traditional legal representation (distinguishing the provision of general information about probate from individualized advice about navigating the probate process) to allow tailoring of legal supports to the particular needs of applicants.
- b) In addition to Recommendations 10 and 12, the Ministry of the Attorney General, in partnership with institutions such as the Law Society of Upper Canada and other appropriate service organizations, consider further methods of delivering standardized information about the purpose of probate and the probate process to estate representatives of small estates.
- c) Targeted legal assistance for estate representatives of small estates be offered on a needs basis through a wider variety of service organizations such as community legal clinics, student legal aid clinics or programs such as JusticeNet.

N. Encourage Will-Making

Countless times in the consultations, the plea was made to promote will-making in order to reduce the risk of problems later on in obtaining probate and administering the estate. Last year, a public awareness campaign aimed at encouraging will-making was launched by the Ontario Bar Association.³⁷⁵ The LCO believes that a similar or expanded campaign promoting professionally drafted wills would assist in preventing some of the difficulties otherwise encountered in obtaining probate for small estates. Instead of targeting educational initiatives at high wealth Ontarians engaged in estate planning, these should be directed instead at ordinary Ontarians who are more likely to leave a small estate.

The Law Commission of Ontario makes the following recommendation:

14. The Ministry of the Attorney General, in partnership with institutions such as the Law Society of Upper Canada and other appropriate service organizations, collaborate on a public awareness campaign for educating the public on the importance of making a will and appointing an executor for Ontario estates regardless of value.

O. Publicly Searchable Estates Database

The consultations revealed that one of the key factors tending to complicate applications for probate and drive up legal costs is disputes among family members. Some of these disputes arise because of a lack of information as to the respective rights and responsibilities of the estate trustee, the beneficiaries and others with a potential interest in the estate.

Even an ideal probate system cannot eliminate family conflict. However, it can seek to minimize conflict by adopting fair and transparent procedures.

Even an ideal probate system cannot eliminate family conflict. However, it can seek to minimize conflict by adopting fair and transparent procedures. There is always room for improvement here. Hakim suggests that the current rules for providing notice of a probate application lack transparency.³⁷⁶ This was corroborated during consultations. Court staff and the OPGT both noted that they receive regular phone calls from individuals attempting to determine if an estate exists and if they may have some interest in it.

There is some variation among the provinces as to the degree of notice required as part of a probate application. Most provinces have similar notice requirements to Ontario. However, Manitoba legislation requires no notice whatsoever to beneficiaries, although at least one Manitoba practitioner provides notice to beneficiaries as a matter of good practice.³⁷⁷ Nova Scotia does require notice to beneficiaries, although not until *after* the grant has been issued rather than beforehand.³⁷⁸ There is also variation in the type of information required to be included in the notice, ranging from the bare fact that an application is being made to a list of all those interested in the estate and a copy of the will.³⁷⁹ If more and better information were available to beneficiaries and potential beneficiaries as part of the application for probate, this would serve to manage expectations and help to avoid disputes from arising in the first place.

Currently, Rule 74 requires that notice be served on “all persons entitled to share in the distribution of the estate”. It is up to the applicant to determine who is entitled to be served and there is no direct way for individuals who are not served but believe they might have an interest in the estate to learn about their claim. In fact, these potential beneficiaries may not even be aware that the deceased has passed away.

A publicly searchable electronic database of deaths and probate applications would go some way to alerting people with a potential interest in an estate of the existence of the estate and the person applying to be estate trustee. Several stakeholders expressed interest in the creation of this kind of public estates database. This would be another way that technology would be useful in improving the probate process for small estates.³⁸⁰

The more difficult issue is what kind of information should be publicly available in an estates database. The information contained in wills and probate applications is highly personal. There is a concern that people will be dissuaded from making a will or filing for probate if they feel that, in doing so, their private information may become available for public consumption.³⁸¹ On the other hand, wills are currently accessible by the public under section 27 of the *Estates Act*.³⁸² An online estates database would be required to strike an appropriate balance between maintaining openness in the probate system and protecting this kind of private information from unrestrained dissemination in the public sphere.³⁸³

In particular, naming estate beneficiaries in a public estates database would be problematic. The Office of the Children's Lawyer expressed its concern about the danger for minors and other vulnerable persons if information about their beneficial interests in an estate were to be publicly available. The LCO agrees that this would violate the privacy interests of all beneficiaries whether or not they are otherwise vulnerable and, for this reason, does not recommend that the names of beneficiaries be accessible in an online estates database. Instead, an estates database should list only the name and address of the deceased, the date of death (confirmed by the Office of the Registrar General) and the name and contact information of the estate trustee or applicant to be estate trustee. This information would allow anyone with a potential interest in the estate to learn whether or not an application for probate has been filed which would then allow them to take steps to protect their interests.³⁸⁴

A publicly searchable electronic database of deaths and probate applications would go some way to alerting people with a potential interest in an estate... .

The Law Commission of Ontario makes the following recommendation:

15. The Ministry of the Attorney General, in partnership with the Office of the Registrar General, develop an online, publicly searchable database of Ontario estates containing the following information:
 - i. name and address of the deceased,
 - ii. date of death,
 - iii. name and contact information of any applicant for either a Small Estates Certificate or a Certificate of Appointment of Estate Trustee, and
 - iv. confirmation when a certificate has been issued.

VIII. LIST OF RECOMMENDATIONS

The Law Commission of Ontario makes the following recommendations:

1. a) The Estates Subcommittee of the Civil Rules Committee prepare and the Ontario government enact amendments to Rule 74 of the *Rules of Civil Procedure* and the *Estates Act* to provide for a simplified small estates procedure as an alternative to the existing probate system for Ontario estates valued at up to a monetary amount specified by regulation.
b) This procedure result in a court issued Small Estates Certificate with equivalent legal effect to a Certificate of Appointment of Estate Trustee, except that authority is limited to the estate assets specifically listed in the application.
2. a) The small estates procedure be available in respect of estates with a total value not exceeding \$50,000.
b) Total value be calculated consistent with section 32(1) of the *Estates Act* as all of the property that belonged to the deceased at the date of his or her death, including property discovered subsequent to a Small Estates Certificate being issued, and without regard to any encumbrance on real property that is included in the property of the deceased person.
c) The \$50,000 value be designated by regulation to be amended as appropriate.
3. a) The small estates procedure involve a short, streamlined application form requiring the following information:
 - i. basic information about the estate,
 - ii. basic information about the applicant,
 - iii. basis of the applicant's entitlement to administer the estate,
 - iv. a list of estate assets and their value, and
 - v. a standardized declaration affirming the applicant's acceptance of the responsibility to administer the estate according to law.
b) The form be sworn or affirmed by the applicant before a commissioner of oaths.
c) The form require the following supporting documents:
 - i. a copy of the death certificate,
 - ii. a copy of the will, if one exists, and
 - iii. a form declaring that the notice requirement described in Recommendation 4 has been met.
d) The court office process and issue Small Estate Certificates on an expedited basis.

4. The small estates procedure require that the applicant
 - i. send a copy of the application and an explanatory form to all known persons entitled to share in the distribution of the estate at least 30 days before filing the application with the court,
 - ii. send the application to the Office of the Public Guardian and Trustee or the Office of the Children's Lawyer, or both, as applicable, where there are minors or incapable beneficiaries at least 30 days before filing the application with the court, and
 - iii. file with the court, along with the small estates application, a single page declaration that the notice requirement has been met.
5. a) The small estates procedure be available to small estates even where there are minor or incapable beneficiaries.
 - b) Pursuant to Recommendation 4(ii), the applicant be required to send a copy of the application to the Ontario Public Guardian and Trustee or the Office of the Children's Lawyer, or both, as applicable, at least 30 days before filing the application with the court.
6. Security not be required as part of an application for a Small Estates Certificate.
7. a) The Estates Subcommittee of the Civil Rules Committee prepare and the Ontario government enact amendments to Rule 74 of the *Rules of Civil Procedure* and the *Estates Act* as necessary to provide that a Small Estates Certificate issued under a small estates procedure have the same legal effect as a Certificate of Appointment of Estate Trustee in the regular probate stream, with the sole distinction that authority under a Small Estates Certificate be limited to the specific assets listed in the application.
 - b) The small estates procedure provide that where additional estate assets are discovered subsequent to the issuance of a Small Estates Certificate,
 - i. if the revised total value of the estate does not exceed \$50,000, the estate representative may file a statement disclosing the new assets and the court may amend the Small Estates Certificate accordingly,
 - ii. applicants be limited to one amendment per estate,
 - iii. if the revised total value of the estate exceeds \$50,000, the estate representative must apply to administer the new assets by filing an application for probate under the regular stream.
8. The Ontario government amend the *Estate Administration Tax Act* and its regulations to exempt estates filing under the small estates process from the requirement to file an Estates Information Return.
9. a) The Ministry of the Attorney General leverage the institutional expertise gained in designing its online small claims court filing process for the purpose of designing a similar online filing system for a small estates

- procedure, with the goal of reducing the application costs of probate for small estates and increasing the efficiency of the system overall.
- b) A paper process be retained for applicants who cannot or do not access online services.
10. a) The Ministry of the Attorney General, in partnership with institutions such as the Law Society of Upper Canada and other appropriate service organizations, publish an authoritative, plain-language guide addressing:
- i. the purpose of the probate system, the responsibilities of estate representatives and the relative costs and benefits of obtaining probate and
 - ii. how to navigate the small estates process.
- b) This guide be made widely available online, in court offices, funeral homes and other public institutions.
 - c) In addition to English and French, this guide be published in other languages reflecting the linguistic diversity of Ontarians.
11. a) A small estates application form, notice form, instruction sheet and other application materials be designed with simplified language accessible to unrepresented applicants, beneficiaries and others interested in the estate.
- b) If the small estates process is not already being delivered online pursuant to Recommendation 9, an online forms assistant be developed to guide applicants step-by-step through the application process and educate them as to the meaning and effect of each of the application requirements.
12. The Ministry of the Attorney General, in partnership with institutions such as the Law Society of Upper Canada and other appropriate service organizations, establish a telephone help line for estate representatives of small estates, staffed by knowledgeable advisors and promoted widely as a resource for legal assistance in navigating the small estates process.
13. a) In the case of small estates, estate practitioners consider separating two components of traditional legal representation (distinguishing the provision of general information about probate from individualized advice about navigating the probate process) to allow tailoring of legal supports to the particular needs of applicants.
- b) In addition to Recommendations 10 and 12, the Ministry of the Attorney General, in partnership with institutions such as the Law Society of Upper Canada and other appropriate service organizations, consider further methods of delivering standardized information about the purpose of probate and the probate process to estate representatives of small estates.

- c) Targeted legal assistance for estate representatives of small estates be offered on a needs basis through a wider variety of service organizations such as community legal clinics, student legal aid clinics or programs such as JusticeNet.
14. The Ministry of the Attorney General, in partnership with institutions such as the Law Society of Upper Canada and other appropriate service organizations, collaborate on a public awareness campaign for educating the public on the importance of making a will and appointing an executor for Ontario estates regardless of value.
 15. The Ministry of the Attorney General, in partnership with the Office of the Registrar General, develop an online, publicly searchable database of Ontario estates containing the following information:
 - i. name and address of the deceased,
 - ii. date of death,
 - iii. name and contact information of any applicant for either a Small Estates Certificate or a Certificate of Appointment of Estate Trustee, and
 - iv. confirmation when a certificate has been issued.

APPENDIX A: ORGANIZATIONS AND INDIVIDUALS CONTRIBUTING TO THE PROJECT

A. In-Person Focus Groups

1. Estate practitioners in the GTA in partnership with Hull & Hull LLP (November 4, 2014)
2. Members of the Central Estates Technical Table (CETT) in partnership with the Ministry of the Attorney General (November 18, 2014)
3. Individual estate representatives in partnership with the York West Active Living Centre (November 25, 2014)
4. Estate practitioners in the Kingston-Frontenac area (November 27, 2014)
5. Estate practitioners in the Windsor-Essex area in partnership with Sutts Strosberg LLP (December 1, 2014)

B. Individuals and Organizations Consulted

1. Joanne Brigmantas, Dermody Law
2. British Columbia Law Institute
3. British Columbia Ministry of Justice
4. Canada Revenue Agency, Taxpayer Representative Information Section
5. Canadian Association of Gift Planners
6. Canadian Bankers Association
7. CIBC Trust
8. Barry Corbin, Corbin Estates Law
9. John Cyr, John Cyr Law
10. Bill Dermody, Dermody Law
11. Avvy Go, Clinic Director, Metro Toronto Chinese & Southeast Asian Legal Clinic
12. Manitoba Court of Queen's Bench, Probate Division
13. New York County Surrogate's Court
14. New York State Courts, Access to Justice Program
15. New York State Courts, Onondaga County
16. Ontario Bar Association
17. Ontario Ministry of Finance
18. Ontario Ministry of the Attorney General, Court Services Division
19. Ontario Ministry of the Attorney General, Management Information Unit
20. Ontario Office of the Children's Lawyer
21. Ontario Public Guardian and Trustee
22. Ontario Superior Court of Justice, Toronto

23. Ontario Superior Court of Justice, Ottawa
24. Ontario Teachers' Pension Plan
25. Seppo K. Paivalainen, Vauthier, Paivalainen
26. Anita Phillips, Morgan and Phillips LLP
27. Suzana Popovic-Montag, Hull & Hull LLP
28. Salvation Army
29. Saskatchewan Ministry of Justice
30. Scotiabank, Regulatory Support
31. Scotiatrust, Kingston
32. Surety Association of Canada
33. TD Bank Financial Group
34. Mary Thomson, CFP and Past-President of Council on Aging Frontenac-Kingston

C. Written Submissions Received

1. William J.F. (Bill) Bishop
2. Blair L. Botsford
3. Canadian Bankers Association
4. Canadian Life and Health Insurance Association
5. Central 1 Credit Union
6. Robert L. Jenkins
7. Dan McAran
8. Office of the Children's Lawyer
9. Ontario Bar Association
10. Martin Schulz
11. Surety Association of Canada

D. LCO Commissioned Research

In major projects, the LCO issues a call for the preparation of research papers in particular subjects relevant to the project. It relies on these papers in the same way as any research. The papers do not necessarily reflect the LCO's views. The LCO commissioned the following paper for this project:

Christine M. Hakim, "Balancing Accessibility and Procedural Protection in a Small Estates Probate Procedure in Ontario" (Winter 2014), online at: <http://www.lco-cdo.org>.

ENDNOTES

1. “Probate” is the commonly understood term for the court supervised process that establishes the legal authority of an estate representative to administer the estate. In Ontario, Rule 74 of the *Rules of Civil Procedure* adopts the specialized term Certificate of Appointment of Estate Trustee with or without a will (COA): Ontario, *Rules of Civil Procedure*, R.R.O. 1990, Reg. 94 [*Rules of Civil Procedure*]. However, the term “probate” continues to be used informally: see, for example, Chris Markou, “To Probate or Not to Probate? – That is the Question”, *Your First Estate Administration*, Ontario Bar Association (May 29, 2014), 2. One of the goals of this project is to improve accessibility to the probate process for small estates and an important aspect of accessibility is the use of plain language terminology. For this reason, the LCO generally uses the term “probate” throughout the Report. The term “COA” is used when referring to the specific procedures set out in Rule 74. In chapter VII the LCO makes recommendations designed to simplify probate for estate representatives who are not represented by a lawyer. One of these recommendations is to eliminate from the Rules convoluted and obscure terms such as “Certificate of Appointment of Estate Trustee with or without a will”.

2. There are several terms used to describe the person acting on behalf of an estate. For the purpose of this Report, “estate representative” is a generic term referring to anyone who is representing an estate in fact, whether or not a COA has been issued. Once a COA has been issued, the representative is known as the “estate trustee”. An “executor” or “executrix” is an estate representative who has been named by the testator in his or her will. An executor may or may not file for probate and become an estate trustee.

3. What is or should be considered a small estate for the purpose of a simplified process is a foundational issue in this project and is addressed in chapter III. We conclude that a small estate eligible for a small estates process should be worth no more than \$50,000. The phrase “small estate” is used throughout this Report to refer to this definition.

4. A \$5,000 value limit applies in Ohio for filing for a Summary Release of Administration where the applicant is not the deceased’s spouse: *Ohio Revised Code*, §2113.031, online: Ohio Law and Rules, <http://codes.ohio.gov/orc/2113.031>. A \$275,000 value limit applies in Oregon’s small estates procedure, consisting of not more than \$75,000 in personal property and \$200,000 in real property: *Oregon Revised Statutes*, §114.515, online: Oregon Laws.org, <http://www.oregonlaws.org/ors/114.515>.

5. Probate is an archaic area of law which is arguably ripe for a comprehensive overhaul. According to a 2013 blog, probate reform has, to date, been “tentative and piecemeal”. The post suggests that probate should require no more than a few simple, user-friendly forms and it challenges reformers to redesign the process for efficiency and plain language without compromising the legal protection afforded to citizens: Lloyd Duhaime, *Protecting the Dead From the Undead: Wills and Probate Law Reform*, Duhaime.org, LawMag (November 11, 2013), online: <http://www.duhaime.org/LawMag/LawArticle-1594/Protecting-the-Dead-From-the-Undead-Wills-and-Probate-Law-Reform.aspx>.

6. *Trustee Act*, R.S.O. 1990, c.T.23 [*Trustee Act*], s.47(1).

7. *Succession Law Reform Act*, R.S.O. 1990, c.S.26 [SLRA], s.61.

8. Christine M. Hakim, *Balancing Accessibility and Procedural Protection in a Small Estates Probate Procedure in Ontario*, Prepared for the Law Commission of Ontario (December 2014), 5, online: <http://lco-cdo.org/en/Small-Estates-Commissioned-Paper-Hakim-2015>.

9. Duhaime, note 5.

10. It is questionable how important the probate system is in fact in preventing fraud. During the consultations, consultees identified very few examples of fraud occurring as a result of the failure to obtain probate.

11. *Estate Administration Tax Act*, 1998, S.O. 1998, c.34, Schedule [EATA], s.2.

12. Interviews with several financial institutions. Also see *Monteiro v. Toronto Dominion Bank*, 2008 ONCA 137 [*Monteiro*], para. 55, online: <http://www.canlii.org/en/on/onca/doc/2008/2008onca137/2008onca137.html?autocompleteStr=monteiro%20&autocompletePos=3>.

13. Law Commission of Ontario, *Simplified Procedures for Small Estates: Consultation Paper* (September 2014) [LCO, *Small Estates Consultation Paper*], 7-12. Online: <http://lco-cdo.org/en/small-estates-consultation-paper>.

14. Written submission to the LCO from the Ontario Bar Association, Trusts and Estates Section (OBA) (April 2, 2015) [OBA 2015 submission].

15. Other stakeholders also recognized that the role of probate is more complex and holds benefits for small estates in addition to the fees and paperwork involved.

16. Questionnaire response from individual estate representative (January 20, 2015).

17. This has changed with the introduction of the audit and verification regulation earlier this year. Now an Estate Information Return is filed with the Ministry of Finance: *Information Required Under Section 4.1 of the Act*, O. Reg. 310/14 [EATA Regulation].

18. In *Re Eurig Estate*, the Supreme Court held that probate fees, the precursor to Ontario's estate administration tax, were a tax rather than a fee specifically because they were intended to defray the costs of court administration in general and were not simply to offset the costs of granting probate: *Re Eurig Estate*, [1998] 2 S.C.R. 565 [*Eurig*], para.17.

19. Norman F. Dacey, *How to Avoid Probate* (New York: Crown Publishers, 1965). Revised editions of Dacey's book were published into the 1990s.

20. See, for example, Tim Cestnick, "Where there's a will: How to minimize probate fees", *Tax Matters The Globe and Mail* (August 1, 2011; updated September 6, 2012). The continued popularity of estate planning to avoid probate was confirmed in the LCO's interviews with practitioners and representatives from financial institutions.

21. *Rules of Civil Procedure*, note 1, Rules 75.01 – 75.05.

22. *Rules of Civil Procedure*, note 1, Rule 74.

23. *Rules of Civil Procedure*, note 1, Rule 74.12.

24. *Rules of Civil Procedure*, note 1, Rule 74.14.

25. LCO interview with Ministry of the Attorney General (MAG) representative (July 13, 2015).

26. *Rules of Civil Procedure*, note 1, Rule 74.04.

27. There are a number of different requirements under Rule 74 intended to respond to a range of circumstances. These can be bewildering for an unsophisticated estates representative. Only the core requirements are noted here.

28. As of January 1, 2016, an amendment to Rule 74.04 will require that the applicant also file proof of death with the application: O. Reg. 193/15, ss.9(1).

29. As of January 1, 2016, an amendment to Rule 74.05 will require that the applicant also file proof of death with the application: O.Reg. 193/15, s.10.

30. EATA, note 11, s.3.

31. EATA Regulation, note 17.

32. The Rules provide for a passing of accounts but, in practice, beneficiaries often consent to waive this requirement, especially where the estate is small: *Rules of Civil Procedure*, note 1, Rules 74.16 – 74.18.

33. EATA, note 11, s.2.

34. Barry S. Corbin, "Estate Administration Tax – The Nightmare Begins", (2011) 29:4 *Deadbeat*, Ontario Bar Association Trusts and Estates Section Newsletter; Barry Corbin, "Estate Administration Tax Audit & Verification – A New World" in LSUC, 15th Annual Estates & Trusts Summit (2012) [Corbin, *New World*]; Barry Corbin, "What's Wrong with the Estate Administration Tax Act, 1998 and How to Fix It", 17th Annual Estates and Trusts Summit, LSUC (November 3, 2014) [Corbin, *What's Wrong*].

35. Michael McKiernan, “The Going Rate: Canadian Lawyer’s 2014 Legal Fees Survey Shows Lawyers Split on Whether to Hike Fees” *Canadian Lawyer* (June 2014) 33, 37. The article notes that the maximum amount of legal fees for probate reported in Ontario was \$4,745. The minimum was \$1,356. Clearly, estate representatives of estates worth less than \$1,356 or thereabouts are not seeking legal services.
36. EATA, note 11, and EATA Regulation, note 17.
37. LCO interview with urban estates practitioner (July 22, 2015).
38. Examples taken from questionnaire responses from individual estate representatives (October 14, 2014 and January 16, 2015).
39. McKiernan, note 35, 34.
40. Probate fees for a \$100,000 estate in selected Canadian provinces are as follows: Ontario - \$1,000 (EATA, note 11, s.2), British Columbia - \$850 (*Probate Fee Act*, S.B.C. 1999, c.4, s.2), Alberta - \$275 (*Surrogate Rules*, Schedule 2, A.Reg. 130/95 as amended), Nova Scotia - \$1002.65 (*Probate Act*, R.N.S. 2000, c.31, s.87), Quebec (non-notarial wills) - \$105 (Québec, *What To Do In the Event of Death*, online: <http://www4.gouv.qc.ca/EN/Portail/Citoyens/Evenements/decès/Pages/faire-verifier-testament-tribunal.aspx>).
41. John H. Martin, “Reconfiguring Estate Settlement” (2009) 94 *Minnesota Law Review* 42.
42. Written submission to LCO from Blair L. Botsford, botsfordLAW (December 2, 2014) [Botsford Submission].
43. LCO Focus Group No. 1, estate practitioners in the GTA.
44. *Rules of Civil Procedure*, note 1, Rule 76 [Simplified Procedure].
45. Several stakeholders noted the \$25,000 jurisdictional limit of the Ontario Small Claims Court as influential in their opinion: *Small Claims Court Jurisdiction*, O. Reg. 626/00, as amended [Small Claims Court Regulation], under the *Courts of Justice Act*, R.S.O. 1990, c. C.43 [CJA].
46. Questionnaire response from individual estate representative (December 17, 2014).
47. *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)* 2014 SCC 59 [Trial Lawyers v. BC].
48. *Trial Lawyers v. BC*, note 47, paras. 45-47.
49. LCO, *Small Estates Consultation Paper*, note 13, 14.
50. *Wills, Estates and Succession Act*, S.B.C. 2009, c.13 [WESA]. WESA came into force in March 2014.
51. British Columbia Law Institute (BCLI), *Interim Report on the Summary Administration of Small Estates*, BCLI Report No. 40 (December 2005), online: http://www.bcli.org/sites/default/files/Summary_Administration_Small_Estates_Interim_Rep.pdf.
52. The small estate declaration provisions were included in WESA and even though the government has chosen not to bring them into force at the moment, it has reserved the possibility of introducing a small estates declaration in the future: WESA, note 50, Part 6, Division 2, ss.109-120 [not in force].
53. A contextual distinction between the probate system in B.C. and that in Ontario is that B.C. probate fees are only payable by estates worth more than \$25,000. B.C. financial institutions will often use this figure as a basis for releasing assets without probate. According to one B.C. commentator, financial institutions may incorrectly assume that since estates worth less than \$25,000 are not required to pay fees, they are not subject to probate at all. In Ontario, estate administration tax does not apply to estates worth less than \$1,000, with the result that financial institutions are less likely to assume that probate is not required.
54. See, for example, International Claim Association Law Committee (ICALC), *Small Estate Administration 50-State Survey*, 2008, online: www.claim.org/documents/lawsurvey.doc.
55. Manitoba, *The Court of Queen’s Bench Surrogate Practice Act*, C.C.S.M. c.C290 [Manitoba Act], ss.47(1). The provision refers to the “total” value of the estate suggesting that a gross value is to be used.
56. *Saskatchewan Administration of Estates Act*, S.S. 1998, c. A-4.1 [Saskatchewan Act], s.9. The amount is established by regulation: *The Administration of Estates Regulations*, c. A-4.1, Reg. 1 [Saskatchewan Regulation], s.8.2. The

provision does not specify whether this amount is gross or net although s.8 of Reg. 1 provides that any loans related to real property are to be deducted in calculating value.

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57. Northwest Territories, *Proposed Estate Administration Rules of the Supreme Court of the Northwest Territories*, Draft for Discussion Only, Presented to the Law Society of the Northwest Territories (November 13, 2014) [NWT Proposed Rules and Forms], online: www.lawsociety.nt.ca/data/public/other/probate-rules-draft.pdf.
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58. NWT Proposed Rules and Forms, note 57, Form 3 (*Draft Memorandum and Affidavit in Support of Application for Declaration of Small Estate*).
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59. National Conference of Commissioners on Uniform State Laws, *Uniform Probate Code* (2010) [UPC].
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60. ICALC, note 54; Joseph N. Blumberg, “51 Flavors: A Survey of Small Estate Procedures Across the Country” (2014) 28 *Probate & Property Magazine*, online: <http://www.jdsupra.com/legalnews/51-flavors-a-survey-of-small-estate-pro-08930/>.
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61. 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/_data/assets/pdf_file/0017/372005/QLRC-Report-65-Volume-3.pdf](http://www qlrc.qld.gov.au/_data/assets/pdf_file/0017/372005/QLRC-Report-65-Volume-3.pdf); 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.justice.nsw.gov.au/Documents/r124.pdf>; 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; South Australian Law Reform Institute (SALRI), *Small Fry: Administration of Small Deceased Estates and Resolution of Minor Succession Disputes*, Issues Paper 5 (January 2014) [SALRI Paper], 11-12, online: http://www.law.adelaide.edu.au/research/law-reform-institute/documents/small_fry_IP5_final.pdf.
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62. Where new estate assets are discovered after a COA is granted, the estate trustee is required within six months to deliver an updated statement of value to the Registrar: *Estates Act*, R.S.O. 1990, c.E.21 [*Estates Act*], s. 32.
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63. EATA, note 11.
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64. National Committee Report, note 61, 147 (150 per cent); VLRC Report, note 61, 207 (120 per cent).
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65. See, for example Saskatchewan and New York small estate procedures: Saskatchewan Act and Regulation, note 56; *New York Code, Surrogate’s Court Procedure* [NY Code], § 1304.
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66. A U.S. book counsels people on exactly how to get around small estate value limits by restructuring one’s estate: Mary Randolph, *8 Ways to Avoid Probate*, 10th ed. (Berkeley, California:, NOLO, 2014).
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67. It is also important for another reason, that is, where there is no will, financial institutions are much more likely to refuse to waive probate. This is discussed further below.
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68. New Jersey *N.J. Stat.* 3B:10-3; La. *C.C.P.* Art. 3421–3443.
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69. Saskatchewan Act and Regulation, note 56; *Iowa Code* 633.356; Michigan *MCLS* 700.39830.
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70. British Columbia, *Land Title Act*, R.S.B.C. 1996, c. 250, s.266.
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71. *Land Titles Act*, R.S.O. 1990, c.L.5 [LTA], ss.120-127; see discussion below in chapter IV.C.10.
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72. Maryland, *Estates and Trusts Code*, para.5-601, also see North Carolina, *NC Gen. Stat.* 28A-25-1.
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73. In Washington the value limit is \$100,000: Washington, *RCW* 11.62.010 [Washington Code]. In California it is \$150,000: California, *Probate Code*, §13100 [California Code].
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74. For a discussion of the U.S. probate system as well as the author’s suggested reforms, see Martin, note 41.
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75. See the discussion on transferring real property in chapter VIII.
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76. EATA, note 11, ss.2(6)

77. Small Claims Court Regulation, note 45.
78. *Trustee Act*, note 6, ss.47(1).
79. Statistics provided by the Ministry of the Attorney General, Management Information Unit (July 11, 2013).
80. LCO Focus Group No. 2, Central Estates Technical Table (CETT) court staff members, November 18, 2014 [Focus group of court staff].
81. Statistics Canada, *Deaths, estimates, by province and territory*, online: <http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/dem007a-eng.htm>.
82. BCLI, note 51.
83. Law Commission (U.K.), *Intestacy and Family Provision Claims on Death*, Law Comm No 331, 2011, 1.
84. In conjunction with the U.K. Law Commission's Intestacy project, HM Revenue & Customs analyzed empirical data around the value of net estates reported for probate. According to this study, in 2008 14% of probated estates had a value of less than £25,000 and 38% of probated estates had a value of less than £100,000 (of these, 33% were testate and 64% were intestate): Law Commission (U.K.), note 83, Appendix D, 241.
85. Interview with rural practitioner (November 17, 2014).
86. Interview with rural practitioner (October 25, 2013).
87. Botsford submission, note 42.
88. Anonymous questionnaire response (November 10, 2014).
89. Not enough individuals participated in the consultation process to draw general conclusions about the experiences of estate representatives of small estates. However, the responses that the LCO did receive have been valuable as descriptive accounts of what is and is not working under the current probate system.
90. The *Income Tax Act* provides that there must be proper authority for the Canada Revenue Agency (CRA) to release taxpayer information: *Income Tax Act*, R.S.C. 1985, c.1, 5th Supp., ss. 241(1). The "legal representative" of a deceased person for income tax purposes is the executor, administrator or liquidator (in Quebec) of the estate. Generally speaking, these representatives must be court-appointed: Canada Revenue Agency, *Preparing Returns for Deceased Persons 2014*, T4011(E) Rev. 14 [CRA Guide], 5-6, online: <http://www.cra-arc.gc.ca/E/pub/tg/t4011/t4011-14e.pdf>.
91. Email from CRA representative (January 24, 2015).
92. *Criminal Code*, R.S.C., 1985, c. C-46, ss.515(2)(d).
93. Interview with MAG representative (March 31, 2014).
94. *Pension Benefits Act*, R.S.O. 1990, c.P.8 [PBA], s.45. Also see, in relation to pre-retirement death benefits specifically, ss.48(7), 48(10).
95. Ari Kaplan and Mitch Frazer, *Pension Law*, 2nd edition (Toronto: Irwin Law, 2013), 289-290.
96. It seems that probate will not always be required by pension administrators even where there is no will. According to the Ontario Pension Board website, probate may not be required to legitimate a claim even where there is no will so long as the death benefit in issue is worth less than \$30,000: OPB, *Survivor pensions and death benefits, Security for the ones you love*, online: http://www.opb.ca/portal/opb.portal?_nfpb=true&_pageLabel=Pensioners&path=/OPBPublicRepository/OPB/Public/Pensioners/SurvivorPensionsandDeathBenefits/en/Survivor%20Pensions%20and%20Death%20Benefits#b.
97. Pension plans have a greater number of very small accounts since 2012 when immediate vesting of pension benefits was introduced into the PBA, note 94, as a result of Bill 236: *Pension Benefits Amendment Act, 2010*, c.P.9. The immediate vesting provisions came into force on July 1, 2012. Prior to these amendments, pension benefits did not vest until two years after the employee started employment. Now, pension plans may have many little accounts of accrued benefits for employees who have been employed for less than two years: Interview with pension plan representative (December 16, 2014).
98. The Globe & Mail, "Power of Attorney for Property Just as Important as a Written Will: Scotiabank

- Estate Planning Experts” (April 04, 2014), online: <http://www.reuters.com/article/2014/04/04/idu snmkwzfj35a+1co+mkw20140404>.
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99. *Rules of Civil Procedure*, note 1, Rule 74.04.
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100. *Estates Act*, note 62, s.29.
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101. *Rules of Civil Procedure*, note 1, Rule 74.05.
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102. *Estates Act*, note 62, s.29; SLRA, note 7, ss.1(1), Part II, ss.44-49.
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103. *The Globe & Mail*, note 98.
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104. This practice is discussed below at chapter V.D.
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105. SLRA, note 7, Part II, ss.44-49.
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106. A codicil is: “[a] written supplement or addition to a will that may alter or revoke provisions in the existing will. Executed by the testator, with the same formalities of a will.” Law Society of Upper Canada, *How to Prepare an Application for a Certificate of Appointment of Estate Trustee with a Will* (updated November 2013), online: <http://www.lsuc.on.ca/For-Lawyers/Manage-Your-Practice/Practice-Area/Trusts-and-Estates-Law/Wills/How-to-Prepare-an-Application-for-a-Certificate-of-Appointment-of-Estate-Trustee-with-a-Will/>.
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107. *Rules of Civil Procedure*, note 1, Rule 74.04(1)(c), Form 74.8.
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108. *Rules of Civil Procedure*, note 1, Rule 74.04(1)(d), Form 74.9.
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109. *Rules of Civil Procedure*, note 1, Rule 74.04(1)(e), Form 74.10.
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110. Email from a government representative (August 5, 2014).
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111. Gillian Fournie, *Insolvent and Bankrupt Estates*, deVries Litigation (May 26, 2015), online: <http://www.devrieslitigation.com/insolvent-and-bankrupt-estates/>.
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112. *Crown Administration of Estates Act*, R.S.O. 1990, c.C.47 [CAEA], s.1.
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113. Ontario Office of the Public Guardian and Trustee (OPGT), *Estates Administration: The Role of the Public Guardian and Trustee* (2012), 2, online: <http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/estatesadmin.pdf>.
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114. *Rules of Civil Procedure*, note 1, Rule 74.04(4) – (6), Rule 74.05(3)-(4).
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115. *Children’s Law Reform Act*, R.S.O. 1990, c. C.12 [CLRA], s.51.
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116. The exception here would be if the OPGT had applied to assume administration of the estate under CAEA, note 112, s.1. It should be noted that the OPGT’s dual roles as a guardian protecting the interests of incapable beneficiaries and as estate trustee of last resort are legislatively distinct and kept completely separate as a matter of public administration.
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117. Written Submission to the LCO from the Office of the Children’s Lawyer (OCL) (February 2, 2015) and email (February 24, 2015) [OCL Submission].
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118. *Rules of Civil Procedure*, note 1, Rule 74.05(1)(d), *Estates Act*, note 62, s.35.
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119. *Rules of Civil Procedure*, note 1, Rule 74.04(1)(h), *Estates Act*, note 62, s.35.
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120. *Estates Act*, note 62, s.6. The provision that exempts Commonwealth residents from posting a bond is widely considered to be anachronistic and in need of reform. For example, under this provision, a deceased person’s only daughter would have to post a bond with her probate application if she lives in Boston but she would be exempt from doing so if she lives in Tonga.
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121. *Estates Act*, note 62, s.37.
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122. *Rules of Civil Procedure*, note 1, Rule 74.11(1)(d).
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123. OBA, *Modernizing Requirements for Bonding of Estate Trustees*, Submitted to the Ministry of the Attorney General, April 2012 [OBA 2012 Submission], 2, online: <http://www.oba.org/CMSPages/GetFile.aspx?guid=e90ef4b5-d3a8-45cf-98ac-90f0c5b7e2bb>.
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124. Mr. Justice Brown laid out several factors to be considered in a motion to waive the bond requirement in *Re Henderson Estate* (2008), 45 E.T.R. (3d) 189 (Ont. S.J.).
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125. In 2009, approximately 75 per cent of waiver requests were successful on first application: Natalia R. Angelini, *The Tricky Business of Administration Bonds*, Hull & Hull LLP Breakfast Series (June 2009), 1.

126. *Rules of Civil Procedure*, note 1, Rule 74.04(2), Rule 74.05(2).
127. *Rules of Civil Procedure*, note 1, Rule 74.04(7), Rule 74.05(5).
128. *Rules of Civil Procedure*, note 1, Rule 74.04(4),(5),(6) and Rule 74.05 (3),(4).
129. Hakim, note 8, 84-85.
130. The applicant must choose the correct application form among several possibilities depending on whether there is a will or not, whether the applicant is an individual or corporation and other contingencies. See, for example, *Rules of Civil Procedure*, note 1, forms 74.4, 74.5, 74.14, 74.15.
131. A valuation of individual assets as well as additional information is required to complete the new Estate Information Return for the Ministry of Finance: EATA Regulation, note 17; Ontario Ministry of Finance, *Guide to Estate Information Return*, 9955E_Guide (2015/01) [EIR Guide], online: [http://www.forms.ssb.gov.on.ca/mbs/ssb/forms/ssbforms.nsf/GetFileAttach/9955E~2/\\$File/9955E_Guide.pdf](http://www.forms.ssb.gov.on.ca/mbs/ssb/forms/ssbforms.nsf/GetFileAttach/9955E~2/$File/9955E_Guide.pdf). This is discussed further below in chapter VII.H.
132. *Rules of Civil Procedure*, note 1, Rule 74.13, EATA, note 11.
133. *Rules of Civil Procedure*, note 1, Rule 74.13(2). Also see *Estates Act*, note 62, s.32.
134. Hakim, note 8, 11-12.
135. *Estates Act*, note 62, ss.32(2).
136. EATA Regulation, note 17, s.4.1.
137. The probate fee was authorized by the *Administration of Justice Act*, R.S.O. 1990, c. A.6, s.5, and the amount set by O. Reg. 293/92.
138. *Eurig*, note 18.
139. *Eurig*, note 18, para. 20.
140. EATA, note 11.
141. Ontario Ministry of Finance, *Estates Information Return* (EIR), online link at: <http://www.fin.gov.on.ca/en/tax/eat/>.
142. EIR Guide, note 131.
143. Email from an estates practitioner (February 3, 2015).
144. Corbin, *New World*, note 34; Corbin, *What's Wrong*, note 34.
145. Teranet, *Land Registration System in Ontario*, online: <http://www.teranet.ca/land-registration-system-ontario>.
146. This is not an express requirement in the Act but is required in the form prescribed by regulation: LTA, note 71, ss.120-127; *Transmission Application (for Registration of Executor or Administrator as Owner)*, O. Reg. 430/11, s.12, online: http://files.ontario.ca/transmission_application_for_registration_of_executor_or_administrator_a_s_owner_under_sections_120_121_122_or_127_of_the_land_titles_act.pdf; Rose H. McConnell, *Document Registration Guide*, 12th ed. (CCH, 2011), 495.
147. McConnell, note 146, 509-510. There is also a first-dealing policy as discussed in the LCO's *Small Estates Consultation Paper*, note 13, 24.
148. Hakim, note 8, 26.
149. Email from government representative, note 110.
150. See for example, Constance Backhouse, "What is Access to Justice?" in *Access to Justice for a New Century: The Way Forward* (Toronto: Law Society of Upper Canada, 2005), 121-122; Roderick A. Macdonald, "Access to Justice in Canada Today: Scope, Scale and Ambitions" in Julia Bass, W.A. Bogart and Frederick H. Zemans, eds., *Access to Justice for a New Century – The Way Forward* (Toronto: Law Society of Upper Canada, 2005); Law Commission of Ontario, *Increasing Access to Family Justice Through Comprehensive Entry Points and Inclusivity* (Toronto: February 2013) [LCO, *Increasing Access*], 40-49; Hakim, note 8, 25-32.
151. Questionnaire response from individual estate representative (November 11, 2014).
152. LCO Focus Group No. 3 of individual estate representatives (November 25, 2014).
153. Interviews with estates practitioners and court staff.
154. Focus group of court staff, note 80.

155. Interview with court staff member (October 31, 2013).
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156. O. Reg. 484/94.
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157. *Estates Act*, note 62; *Trustee Act*, note 6; *Estate Administration Act*, R.S.O. 1990, c.E.22 [EAA].
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158. Markou, note 1.
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159. The Law Society of Upper Canada advises that a COA is “typically necessary ... where: the estate is large and the assets are not (i) readily transferable, or (ii) transferable outside probate; there is real property; or a *financial institution requires a certificate*.” [emphasis added]: LSUC, “How to Prepare an Application for a Certificate of Appointment of Estate Trustee with a Will”, *Practice Area Resources* [LSUC, “COA w/ will”], online: <http://www.lsuc.on.ca/For-Lawyers/Manage-Your-Practice/Practice-Area/Trusts-and-Estates-Law/Wills/How-to-Prepare-an-Application-for-a-Certificate-of-Apointment-of-Estate-Trustee-with-a-Will/#s2>.
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160. *Estates Act*, note 62, s.7. See also Ontario, Ministry of the Attorney General, *Frequently Asked Questions about Estates* [MAG, FAQs], online: <http://www.attorneygeneral.jus.gov.on.ca/english/estates/estates-FAQ.asp#s1>.
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161. 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) and Certificate of Appointment of Estate Trustee with a Will (Form 74.13).
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162. Court forms are located online: <http://www.ontariocourtforms.on.ca/english/civil/>.
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163. 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.
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164. Law Society Upper Canada, *How-To Briefs*, online: <http://www.lsuc.on.ca/with.aspx?id=2147490949>.
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165. Community Legal Education Ontario (CLEO), online: <http://www.cleo.on.ca>.
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166. CLEO, *Your Legal Rights*, online: <http://yourlegalrights.on.ca/legal-topic/wills-and-estates/death-and-inheritances>.
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167. Legalline, online: http://legalline.ca/legal_answers/ontario/wills_and_estates/wills/probating_a_will.html.
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168. Law Society of Upper Canada, *Your Law: Wills & Estates*, online: <http://www.lsuc.on.ca/with.aspx?id=2147483838>.
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169. Telephone conversation with Pro Bono Law Ontario (PBLO), July 2015.
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170. PBLO, *Law Help Ontario*, online: <https://www.lawhelpontario.org/lawsuits-disputes/superior-court/how-to-guides-superior/>.
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171. Service Ontario, *What To Do When Someone Dies*, online: <https://www.ontario.ca/government/what-do-when-someone-dies>.
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172. MAG, *FAQs*, note 160.
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173. British Columbia, Ministry of Justice, *Supreme Court Civil Rules – Probate Forms* [B.C. Probate Forms], online: http://www.ag.gov.bc.ca/courts/other/supreme/2010SupRules/info/index_probate.htm.
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174. See, for example, forms P3 and P4, *Affidavit of Applicant for Grant of Probate or Grant of Administration with Will Annexed* (short or long): B.C. Probate Forms, note 173.
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175. British Columbia, Ministry of Justice, *Supreme Court Civil and Family Forms “How To” Guide*, online: <http://www.ag.gov.bc.ca/courts/other/supreme/2010SupRules/HowToForms.pdf>.
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176. British Columbia, Ministry of Justice, *About Wills and Estates*, online: http://www.ag.gov.bc.ca/courts/other/wills_estates.htm.

177. ClickLaw, *I'm applying for probate. Where can I find the forms required?*, online: <http://www.clicklaw.bc.ca/question/commonquestion/1112>.
178. See e.g. British Columbia, Ministry of Justice, *Wills, Estates and Succession Act and Probate Rules: Questions and Answers* [WESA Q&A], 3, online: <http://www.ag.gov.bc.ca/legislation/shareddocs/wesa/qa.pdf>.
179. Saskatchewan Act, note 56, ss.9(1); Saskatchewan Regulation, note 56, s.8.2.
180. Courts of Saskatchewan, Court of Queen's Bench, *Application for Probate*, online: <http://www.sasklawcourts.ca/index.php/home/court-of-queen-s-bench/wills-and-estates/application-for-probate>.
181. Public Legal Education Association of Saskatchewan (PLEA), *Wills and Estates*, online: http://www.plea.org/legal_resources/?a=377&searchTxt=&cat=28&pcat=4.
182. Interview with urban estates practitioner (September 24, 2013).
183. LCO Focus Group No. 4 of Kingston estate practitioners (November 27, 2014).
184. Questionnaire response from individual estate representative (January 16, 2015).
185. Questionnaire response from estates practitioner (December 2, 2014).
186. Botsford submission, note 42.
187. *Monteiro*, note 12.
188. *Bank Act*, S.C. 1991, c.46, s.460 [*Bank Act*].
189. Interview with court staff member (December 11, 2013).
190. *Credit Unions and Caisses Populaires Act, 1994*, S.O. 1994, c.11, s. 42 [CUCPA].
191. Written submission to the LCO from Central 1 Credit Union (December 5, 2014) [Central 1 Submission].
192. Central 1 Submission, note 191.
193. *Insurance Act*, R.S.O. 1990, c.l.8, s.203 [*Insurance Act*]. The section also requires that the insurer receive evidence of the age of the person whose life is insured as well as the name and age of any beneficiary.
194. Manulife Tax Topics, *Probate Overview* (updated October 2014), online: https://repsourcepublic.manulife.com/wps/wcm/connect/dbeof780433c501db9e5ff319e0f5575/ins_tepg_taxtopicprobate.pdf?MOD=AJPERES&CA CHEID=dbeof780433c501db9e5ff319e0f5575.
195. In *Rozon v. Transamerica Life Insurance Co. of Canada*, the insurer asserted that "sufficient evidence" in a case of payment to a personal representative who was designated under a will required that the will be probated by the Court. The Court held that there was nothing in the *Insurance Act* which should lead a court to interpret "sufficient evidence" to mean that a will *must* be probated. The decision gives no indication as to the evidence that the personal representative had provided (and the Court had accepted as sufficient) in lieu of probate. However, it seems likely this was the unprobated will: *Rozon v. Transamerica Life Insurance Co. of Canada*, [1999] O.J. No. 5599; supplementary reasons [1999] O.J. No. 5600; aff'd by [1999] O.J. No. 4538 (C.A.).
196. *Insurance Act*, note 193, s.207.
197. Written submission to the LCO from the Canadian Life and Health Insurance Association (CLHIA) (December 16, 2014) [CLHIA Submission].
198. *Monteiro*, note 12.
199. *Monteiro*, note 12, para. 55.
200. Bank of Canada Business Rules, *Canada Savings Bonds*, online: <http://www.csb.gc.ca/14700/transfer-or-redeem-from-a-deceased-owner-all-provinces-except-quebec/>.
201. Written submission to the LCO from Martin Schulz, November 12, 2015 [Schulz submission].
202. Interview with representative of a financial institution (November 26, 2014).
203. *Bank Act*, note 188, ss.244(d).

204. *Bank Act*, note 188, ss.157(1)(c),(d).
205. For example, credit unions are subject to CUCPA, note 190, s.143.
206. *Tournier v. National Provincial and Union Bank of England*, [1924] 1 K.B. 461 (C.A.).
207. *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 [PIPEDA].
208. British Columbia, *Supreme Court Civil Rules*, Part 25 – Estates [B.C. Probate Rules], Rule 25-4(1), Form 18, online: http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/168_2009_00.
209. Alberta Law Reform Institute (ALRI), *Estate Administration*, Final Report 102 (August 2013), 68-71, online: http://www.alri.ualberta.ca/docs/FR_102_estate_administration.pdf.
210. *Income Tax Act*, note 90, ss.241(5).
211. It is interesting to consider the statutory history of ss.241(5) of the *Income Tax Act*, note 90. Currently, this section provides that taxpayer information may be disclosed with the consent of the taxpayer. However, an earlier version allowed for the release of taxpayer information to the taxpayer or a legal representative or agent: *Income Tax Act*, S.C. 1970-71-72, c. 63, ss.241(5). A decision interpreting this earlier version found that “legal representative” included a widow who had not gone to the expense of obtaining a COA: *Grewal v. Gauthier*, [1993] O.J. No. 398, Master Garfield. We have not found any commentary on why the reference to legal representatives was removed from ss.241(5).
212. CRA Guide, note 90, 5.
213. Canada Revenue Agency, *Legal Representative*, online: <http://www.cra-arc.gc.ca/tx/ndvdl/lf-vnts/dth/rprsnttv-eng.html>; Canada Revenue Agency, *What to do Following a Death* (RC4111), online: <http://www.cra-arc.gc.ca/E/pub/tg/rc4111/rc4111-e.html>.
214. Financial institutions will often use a form in assessing an application for a probate waiver. In England, Barclays PLC (Equiniti Financial Services) uses a *Small Estate Declaration and Indemnity* form which applies where a next of kin has holdings in the bank that do not exceed £10,000 (CAN\$20,500 at time of writing) in each company, online: <http://www.shareview.co.uk/4/Info/Portfolio/Default/en/Home/Shareholders/documents/smallestatesformbarclays.pdf>. This waiver form is available even where there is no will. The form asks for a declaration and a copy of the Death Certificate but no other proof of authority is necessary. According to a financial institution stakeholder, similar forms are used by some Ontario financial institutions (October 10, 2013).
215. Recall that estates worth less than \$1,000 are exempt from payment of the estate administration tax: EATA, note 11, ss.2(2).
216. There are other exceptions. For example, according to one financial institution stakeholder, insurance companies may agree to waive probate in intestacy where the estate representative provides a statutory declaration and indemnity/release, the estate has no debts and there are no other survivors.
217. Interviews with representatives from financial institutions (October 24, 2014, November 4, 2014, November 26, 2014).
218. Although financial institutions usually require indemnities in order to release assets without probate, many stakeholders acknowledged that these have little practical effect. By the time a new will is discovered or fraud occurs, the money is often long gone or the cost of litigation is not worth the chance of recovery.
219. For example, a 30 day waiting period was included in previous versions of the CUCPA (but no longer appears in the current version of the legislation): CUCPA, note 190, historical version for the period January 1, 2007 – April 30, 2007), s.43.
220. Interview with representative of an institutional beneficiary (November 5, 2014).
221. Schulz Submission, note 201.
222. Interview with estates practitioner (December 3, 2013).
223. Email from rural practitioner (February 3, 2015).
224. Under Part V of the SLRA, note 7, the dependent of a deceased may make a claim against the

estate for support where adequate provision was not otherwise made for him or her. A dependent is generally a spouse, parent, child, or brother or sister of the deceased, to whom, immediately before death, the deceased was providing, or had a legal obligation to provide support.

225. OCL Submission, note 117.
226. CLHIA Submission, note 197.
227. Written submission to the LCO from the Canadian Bankers Association (CBA) (January 9, 2015) [CBA Submission].
228. Interview with estates practitioner (October 23, 2013).
229. Hakim, note 8, 44.
230. Lord Devlin, Talk for the BBC given in 1970, quoted in Colleen M. Hanycz, “More Access to Less Justice: Efficiency, Proportionality and Costs in Canadian Civil Justice Reform” (2008) 27 C.J.Q. 98, 98.
231. Mr. Justice Brown, “A View from the Bench” in Melanie A. Yach, ed., *Key Developments in Estates and Trust Law*, (Aurora: Canada Law Book, 2010).
232. Interview with MAG representative, note 25.
233. Hanycz, note 230, 103. Lord Woolf was appointed by the Lord Chancellor in 1994 to review England’s rules of civil procedure with a view to improving access to justice, reducing the cost of litigation, and removing unnecessary complexity. His final report, released in 1996, has been influential in Ontario reform efforts: The Right Honourable Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the civil justice system in England and Wales* (July, 1996), online: <http://webarchive.nationalarchives.gov.uk/+/http://www.dca.gov.uk/civil/final/contents.htm>.
234. Frans F. Slatter, *Parliament and Administrative Agencies*, A Study Paper prepared for the Law Reform Commission of Canada (Minister of Supply and Services Canada, 1982), 15, online: <http://www.lareau-legal.ca/Parliament.pdf>.
235. Justin W. de Vries & Angélique Moss, “Brave New World! The Cost of Proportionality in Will Challenges and Guardianship Disputes: Discovery, Summary Judgment and the Courts’ Discretion in Fixing Costs” (2010), online: <http://devrieslitigation.com/legal-resources/legal-papers/brave-new-world-cost-proportionality-will-challenges-guardianship-disputes-discovery-summary-judgment-courts-discretion-fixing-costs/>.
236. CJA, note 45, ss.22, 23 and *Rules of the Small Claims Court*, O. Reg. 258/98 [Small Claims Court Rules].
237. Small Claims Court Regulation, note 45, s.1.
238. CJA, note 45, s.25.
239. See Hakim, note 8, 38-41 for a fuller discussion of the small claims court procedure.
240. *Rules of Civil Procedure*, note 1, Rule 76.02.
241. “The procedural changes that the simplified procedure calls for have facilitated greater access to the legal system through its foundational principle of proportionality.” Lesly Joseph, “Rule 76 – Costs, Benefits and Implications” (2008) 34 *Advoc. Q.* 88, 91; Hakim, note 8, 41-46.
242. More recently in Ontario, legal representation by lawyers or paralegals seems to be encouraged in small claims court: Shelley McGill, “Small Claims Court Identity Crisis: A Review of Recent Reform Measures” (2010) 49 *C.B.L.J.* 213, 230-231.
243. As quoted by Joseph, note 241, 106.
244. Hakim, note 8, 40, 44-45.
245. Justice Warren K. Winkler, “Civil Justice Reform – The Toronto Experience” from *The Warren Winkler Lectures on Civil Justice Reform* (2007-2008) 39 *Ottawa L.R.* 99, 106.
246. CLRA, note 115, ss.47 – 58.
247. CLRA, note 115, ss.51.
248. These are discussed in chapter VII.A.2 below.
249. Ontario, Ministry of the Attorney General, Office of the Children’s Lawyer, *Guardianship of Property of Minor Children*, online: <http://www.attorneygeneral.jus.gov.on.ca/english/family/ocl/propguard.asp>.
250. Bank of Canada, *Unclaimed Balances, How to Claim*, online: <http://www.bankofcanada.ca/unclaimed-balances/how-to-claim/>.

251. Missing Money, online:
<http://www.missingmoney.com/Main/Index.cfm>.
252. Missing Money, *Frequently Asked Questions*, online:
<http://www.missingmoney.com/GeneralHelp/FAQ.cfm#Claimoa>.
253. Uniform Law Conference of Canada, *Uniform Unclaimed Intangible Property Act* [UUIPA], s.17, online: <http://www.ulcc.ca/en/uniform-acts-new-order/current-uniform-acts/545-josetta-1-en-gb/uniform-actsa/unclaimed-intangible-property-act/1114-unclaimed-intangible-property-act>.
254. There does not appear to be commentary or case law interpreting this provision.
255. Ontario, Ministry of the Attorney General, *Proposed Unclaimed Property Program*, online: http://www.attorneygeneral.jus.gov.on.ca/english/about/uipp_consultation.asp.
256. Jeremy McDonald, “Unclaimed assets of \$5B await Canadians, expert says”, CBC News (July 9, 2015), online:
<http://www.cbc.ca/m/touch/news/story/1.3140196>.
257. Small estates procedures have been common in the United States since 1914 when an early version was enacted in New Jersey. In 1961, the Bennett Commission in New York recommended a small estates procedure for intestacies having personal property of a gross value of \$3,000 or less. A surviving spouse, child, grandchild, parent or sibling could apply to be a voluntary administrator by swearing an affidavit containing a list of beneficiaries, assets and known liabilities: New York (State) Temporary State Commission, *Report of the Temporary State Commission on the Modernization, Revision and Simplification of the Law of Estates to the Governor and the Legislature* [Bennett Commission Report]. That recommendation eventually became the New York Surrogate Court’s Small Estate Affidavit Procedure [SEAP], online:
<http://www.nycourthelp.gov/diy/smallestate.html>. SEAP is discussed in chapter VII.K below.
258. Law Reform Commission of Nova Scotia, *Probate Reform in Nova Scotia*, March 1999, 40-42, online:
http://www.lawreform.ns.ca/Downloads/Probate_FIN.pdf/.
259. ALRI, note 209, 73. ALRI did recommend that personal representatives who choose to administer an estate informally should, nonetheless, have a statutory duty to provide notice to beneficiaries, ALRI, 51. This provision was enacted with Alberta’s new *Estate Administration Act*, S.A., 2014, c.E-12.5, s.10.
260. See chapter III for a discussion of B.C.’s decision to define eligibility for its procedure in relation to simplicity rather than monetary value.
261. British Columbia, Ministry of Justice, *The Wills, Estates and Succession Act Explained*, Part 6 Administration of Estates [BC, *WESA Explained*], online:
<http://www.ag.gov.bc.ca/legislation/shreddocs/wesa/Part6.pdf>.
262. Another way of dealing with small estates is to retain the full probate process but provide court staff assistance to small estate representatives in navigating the process. This kind of assistance was once available for very small estates in Ontario and certain other provinces but was repealed: *Estates Act*, note 62, s.51 [repealed]. However, assisted grant procedures do continue to be available to laypeople in certain Australian states. See, for example, *Administration and Probate Act 1958* (Vic) s.71.
263. The LCO received numerous other suggestions for reform during the consultation period. For example, one stakeholder raised the idea of reversing the statutory assumption in the SLRA, note 7. Instead of estate representatives of intestacies being required to establish legal authority through the probate system, legal authority would be assumed absent any reason to doubt it. This would give financial institutions more comfort in dealing with family members who meet the statutory criteria to act as estate representative. The LCO is concerned that this would effectively take intestacies out of the probate system and would provide less protection to the beneficiaries.
264. National Committee Report, note 61, 158-163. Variations of informal administration have been adopted in Australia and England. For example, Australia’s federal *Banking Act* provides that financial institutions may pay up to AU\$15,000 (just over CAN\$14,000 at the time of writing) of the deceased’s assets for the deceased’s funeral expenses, executor fees or to anyone else who it

believes is entitled to the amount. There is no need to produce a will or grant of probate for this purpose and the financial institution is statutorily protected in respect of these payments: *Banking Act 1959* (Cth), s.69AA(1); Contrast Canada's *Bank Act*, note 188, s.460. Australian law reform bodies continue to recommend informal administration provisions for certain purposes: National Committee Report, note 61, 165-167; VLRC Report, note 61, 200. The willingness of some Australian jurisdictions to embrace informal administration might indicate a lack of concern for the protection of beneficiaries. On the other hand, Australia has in place more specific statutory provisions designed to deter estate fraud that do not exist in Ontario. See, for example, *Administration and Probate Act 1958* (Vic), s.66(1).

265. There is a third possibility, universal succession, provided for in the *Uniform Probate Code* (UPC), which allows for estate assets to pass directly into the hands of the beneficiaries with their consent and where they assume responsibilities for estate liabilities: *UPC*, note 59, §3-312-3-322. There is no court supervision. On receiving a complete application, the registrar will issue a Statement of Universal Succession which establishes the successor's title to the assets. There is no maximum value limit, and therefore this is not a true small estates procedure. In any event, it does not appear to have been adopted by any states.
266. *UPC*, note 59, §3-1201-1202.
267. There are various versions of this model, some of which require that the affidavit be filed with the court and others which entail no court involvement at all. For example, in Arizona's affidavit procedure, court filing is required where the estate includes real property but not where it includes personal property: *Ariz Rev Stat* s.14-3971. Even among procedures which require court filing, some require closer court scrutiny than others. In some procedures, the registrar merely reviews the affidavit for completeness. In others, the court issues a formal authorization of voluntary administration. See New York's SEAP, note 257.
268. In Texas, the maximum value is \$50,000, exclusive of homestead and other exempt property: Texas, *Estates Code*, ch 205 [Texas Code], §205.001(3). In California, it is \$150,000, exclusive of property not located in California: California Code, note 73, §13100. In Washington, it is \$100,000, calculated on the value of estate for probate purposes:

Washington Code, note 73, §11.62.010(2)(c). The maximum for Oregon's affidavit procedure is \$275,000 where not more than \$200,000 of that amount can be real property and no more than \$75,000 can be personal property: Oregon Code, note 4, s.114.515.

269. Texas Code, note 268.
270. *UPC*, note 59, §3-1201; California Code, note 73, §13100; Texas Code, note 268, §205.001(1); Washington Code, note 73, §11.62.010(1).
271. An applicant entitled to administer the estate may fill out an Affidavit of Voluntary Administration, including a list of individuals with an interest in the estate, a list of estate assets and a list of estate liabilities. The registry office then sends notices to the beneficiaries. There is no special protection for minors or incapable beneficiaries. Once approved by the court, a Certificate of Voluntary Administration is issued and the Act provides a statutory release for institutions releasing assets pursuant to a Certificate. However, this procedure does not result in a grant and the applicant's authority is limited to the assets listed in the form: NY Code, note 65, Art 13.
272. In one county, over 900 small estates applications a year were received. According to a rough estimate, over half of these were for very small estates worth less than \$10,000. Also, over half were filed by unrepresented individuals. In another county, roughly 1,500 small estate applications were received and, again, over half were filed by unrepresented individuals. The process is used more often in the case of intestacies. Interviews with New York court representatives (July 16, 2014, July 25, 2014 and August 5, 2014).
273. In British Columbia, BCLI recommended a small estates process very similar to an affidavit procedure: BCLI, note 51. More recently, the South Australian Law Reform Institute (SALRI) prepared an Issues Paper suggesting that a similar collection by affidavit procedure be considered for South Australia. In a departure from the BCLI recommendation, SALRI suggested that a collection by affidavit procedure might be filed in an online publicly accessible registry similar to those used for commercial licensing: SALRI Report, note 61, 38-42.

274. Although affidavit procedures are popular in the United States, there is little discussion in the literature of the risk of fraud involved. However, the possibility of fraud was discussed in the 2009 debates to raise the maximum value of California's small estates procedures. The Executive Committee of the Trusts & Estates section of the State Bar of California (TEXCOM) submitted that its members were not aware of even a single incidence of fraud associated with the small estates procedure: Trusts and Estates Section, The State Bar Association of California, *Update of Provisions of the Probate Code Pertaining to the Collection or Transfer of Small Estates Without Formal Probate Administration – Legislative Proposal*, The State Bar of California (2009). However, the different probate tradition in the U.S. and Canada makes it difficult to compare experiences.
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275. *Public Trustee Act*, RSNWT 1988, c.P-19, ss.26(1) and 25(3); *Public Trustee Act*, S.A. 2004, P-44.1, ss.13(1), 16(10), Saskatchewan Act, note 56, ss.7(1), *Public Trustee Act*, R.S.N.S. 1989, c. 379 s.16. Australian states also have election procedures that require the trustee or administrator to file notice with the court. In Victoria, there is also a deemed grant procedure in which the administrator is statutorily authorized to assume administration of the estate directly, without notice to the court. See the discussion in the LCO's *Small Estates Consultation Paper*, note 13, 37-38.
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276. Saskatchewan Act, note 56, s.9; Saskatchewan Regulation, note 56, s.8.2.
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277. Interview with Saskatchewan court representative (July 23, 2014).
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278. Interview with and email from Saskatchewan court representative (July 23, 2014 and July 17, 2014). Saskatchewan also has a more specialized procedure for estates containing real estate worth less than \$15,000. In this provision, the registrar's office will assist the applicant in completing the materials necessary to obtain a grant: Saskatchewan Act, note 56, ss. 7; Saskatchewan Regulation, note 56. Apparently this procedure was intended to deal with small value property interests such as mineral rights. However, in practice it is almost obsolete.
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279. Manitoba Act, note 55, s.47.
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280. NWT Proposed Rules and Forms, note 57, Form 4.
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281. We also reviewed other options for simplified court-supervised small estates processes. For example, in the United States, summary administration, adopted by several states in varying forms, allows family members with statutory allowances to directly collect their statutory allowances where the value of the estate does not exceed the amount of those allowances: *UPC*, §3-1203, 3-1204. The statutory entitlements are set out at §2-402 (homestead allowance), §2-403 (exempt property) and §2-404 (family allowance). This process is too limited to provide a model for a small estates process that applies to the full range of assets. Another approach is to expedite the issuance of a full grant by reducing the requirements and formalities, although maintaining the oversight of the court: SALRI Paper, note 61, 27-28. SALRI did not discuss what effect an expedited grant would have on later discovered assets. If the grant encompassed all estate assets (as is usual), there would be a significant temptation for applicants to falsely under-report the value of an estate in order to fit within the simplified process.
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282. Written submission to the LCO by Dan McArán (October 30, 2014) [McArán Submission].
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283. Written submission to the LCO by the Surety Association of Canada (SAC) (December 2014) [SAC 2014 Submission].
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284. As discussed above, this balance is also reflected in other legal processes such as B.C.'s new forms under WESA, note 50, Ontario's Small Claims Court Rules, note 236, and the Simplified Procedure, note 44.
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285. *Estates Act*, note 62, ss.32(2).
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286. Focus group of court staff, note 80.
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287. *Estates Act*, note 62, ss.32(1).
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288. EATA, note 11.
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289. Saskatchewan Regulation, note 56, Form 16-36 (*Application in Small Estates Memorandum to the Judge*).
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290. *Manitoba Court of Queen's Bench Rules*, [Manitoba Rules], Rule 74.15, Form 74BB (*Request for Order Under Section 47 of the Court of Queen's Bench Surrogate Practice Act*).

291. NWT Proposed Rules and Forms, note 57, Form 2 (*Application for Declaration of Small Estate*) [not in force] and Form 3 (*Memorandum and Affidavit in Support of Application for Declaration of Small Estate*) [not in force].
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292. The LCO's recommendations address the key elements of a small estates process and application form. However, there will be more detailed issues to consider if the government implements these recommendations. For example, there was discussion in consultations about the degree of detail that should be required in listing the estate assets in a small estates application form and how the administration tax should be remitted where no Estates Information Return is required.
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293. See, for example, Washington Code, note 73, 9A.72.085.
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294. See chapter III.C above.
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295. Interview with estates practitioner (February 25, 2015).
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296. McGill, note 242, 237.
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297. Hakim recommends this simplified form of notice for estates of any value as a way of reducing the complexity and the appearance of complexity of the current probate process: Hakim, note 8, 87-88. For the moment, the LCO suggests that it be adopted as part of a small estates process. If successful, it might be implemented in the regular probate stream as well.
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298. Ontario Law Reform Commission (OLRC), *Report on Administration of Estates of Deceased Persons* (Toronto: 1991), 222-229, online: <https://archive.org/details/reportonadministooonta>.
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299. OLRC, note 298, 227.
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300. Where a bond is required, the OLRC recommended that its amount should generally be equal to the value of the estate (rather than double that value): OLRC, note 298, 229.
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301. OBA 2012 Submission, note 123.
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302. OBA 2012 Submission, note 123, 4.
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303. BC, *WESA Explained*, note 261, s. 128.
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304. Surety Association of Canada, *Protecting Estates, Estate Beneficiaries & Creditors, Bonding of Estate Trustees*, submitted to Ministry of Attorney General, October 2012 [SAC 2012 Submission], 2.
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305. SAC agreed with the OLRC and OBA suggestions that the amount of a bond, where required, should be reduced to the value of the estate: SAC 2012 Submission, note 304, 19.
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306. SAC 2014 Submission, note 283.
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307. Missouri, *R.S.Mo.* 473.097.
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308. *Estates Act*, note 62, s.6.
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309. *Estates Act*, note 62, s.5. There are some narrow exceptions to this rule as illustrated by *Re Armstrong Estate*, 2010 ONSC 2275, interpreting s. 29.
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310. CAEA, note 112, s.1.
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311. *Rules of Civil Procedure*, note 1, Rules 75.03, 75.04.
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312. *Trustee Act*, note 6, s.47.
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313. *Trustee Act*, note 6, s.47.
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314. EATA Regulation, note 17.
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315. Vince De Angelis, *Estate Administration Tax Act Requirements in Effect on January 1, 2015* (January 20, 2015), online: <http://www.oba.org/Sections/Trusts-and-Estates-Law/Articles/Articles-2015/January-2015/Estate-Administration-Tax-Act-Requirements-in-Effe>.
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316. McAran Submission, note 282.
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317. Teranet, note 145.
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318. Marguerite E. Moore, *Title Searching & Conveyancing in Ontario*, 6th ed. (Lexis Nexis, 2010), 635-636.
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319. McConnell, note 146, 496-498.
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320. Moore, note 318, 646-648.
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321. By definition, not *all* interested parties are alive where real property is transferred from a deceased to the estate. However, the interests of the deceased are protected by the probate system since the estate representative must usually obtain a COA (unless the estate is exempt pursuant to the Director of Titles policy discussed in chapter IV.C.10 above).

322. Moore, note 318, 689-701.
323. Hakim, note 8, 61-62.
324. *Trustee Act*, note 6, ss.47(1).
325. SALRI Paper, note 61, 40.
326. SALRI Paper, note 61, 40.
327. Ontario, Ministry of the Attorney General, *Suing in Small Claims Court*, online: <http://www.attorneygeneral.jus.gov.on.ca/english/courts/scc/#filing>.
328. Ontario, Ministry of the Attorney General, *Small Claims Court E-filing Service User Guide* (2015), online: http://www.attorneygeneral.jus.gov.on.ca/english/courts/scc/e-filing/small_claims_e-filing_user_guide.pdf
329. Interview with and email from CRA representative (January 23 and 24, 2015).
330. See, for example, Lorne Sossin, "Access to Administrative Justice and Other Worries" in Colleen M. Flood & Lorne Sossin, eds., *Administrative Law in Context*, 2d ed. (Toronto: Emond Montgomery Publications, 2013); Council of Canadian Administrative Tribunals (CCAT), *Literacy and Access to Administrative Justice in Canada: A Guide for the Promotion of Plain Language* (Ottawa: 2005), 12, online: <http://www.ccat-ctac.org/CMFiles/Publication/Literacyandjustice.pdf>.
331. Hakim, note 8, 96.
332. Hakim also makes this suggestion: Hakim, note 8, 96. She notes that income tax preparation guides are mass-produced, readily available in locations such as post offices and pharmacies, and designed to help individuals with no tax background.
333. Community Legal Education Association (Manitoba) (CLEAM), *Estates Under \$10,000* [CLEAM Summary Guide], online: <http://www.communitylegal.mb.ca/wp-content/uploads/Estates-Under-10000.pdf>.
334. CLEAM, *Manitoba Probate Guide for Small Estates* [CLEAM Small Estates Guide], online: <http://www.communitylegal.mb.ca/wp-content/uploads/Probate-Guide-Read-this-First1.pdf>.
- The CLEAM site also provides a comprehensive checklist of tasks for executors, which doubles as a plain-language message conveying the magnitude of responsibility entailed by the executor's role: CLEAM, *An Executor's Checklist* (2008), online: <http://www.communitylegal.mb.ca/wp-content/uploads/Executors-Checklist1.pdf>.
335. Another example of an unofficial plain-language guide was published by the People's Law School in British Columbia after WESA came into force: People's Law School (B.C.), *Being an Executor* (2014), online: http://www.publiclegaled.bc.ca/wp-content/uploads/2014/04/English-Being-an-Executor-2014_online.pdf.
336. CCAT, note 330.
337. McGill, note 242, 234.
338. New York, SEAP, note 257.
339. New York CourtHelp, online: <http://www.nycourts.gov/courthelp/>. This is the court system's website for unrepresented litigants.
340. Suffolk County Surrogate's Court Small Estate Program (29 July 2013), New York State Courts Access to Justice Program, *DIY Forms User Testimonials* [SEAP User Testimonials], online: <http://www.nycourts.gov/ip/nyaj2j/diytestimonials.shtml>. (Unsurprisingly, the collection of testimonials does not include negative feedback.)
341. Suffolk County Surrogate's Court Small Estate Program (27 August 2012), SEAP User Testimonials, note 340.
342. Monroe County Surrogate's Court Small Estate Program (5 May 2012), SEAP User Testimonials, note 340.
343. Suffolk County Surrogate's Court Small Estate Program (22 January 2012), SEAP User Testimonials, note 340.
344. Richmond County Surrogate's Court Small Estate Program (18 October 2011), SEAP User Testimonials, note 340.
345. Orange County Surrogate's Court Small Estate Program (7 January 2010), SEAP User Testimonials, note 340.

346. Onondaga County Surrogate's Court Small Estate Program (4 January 2010), SEAP User Testimonials, note 340.
347. In 2011, CourtHelp as a whole received over 740,000 unique visits, or 23% more visits than it received in 2010: New York State, *Unified Court System Annual Report 2011*, online: <https://www.nycourts.gov/reports/annual/pdfs/2011annualreport.pdf>.
348. New York State Courts Access to Justice Program, *Document Assembly Programs Best Practices Guide for Court System Development and Implementation Using AzJ Author* (June 2013), online: http://www.nycourts.gov/ip/nyazj/pdfs/BestPractices_courtsystemdocument_assemblyprograms.pdf.
349. NYS Courts Access to Justice Program, *Best Practices for Court Help Centers and Programs to Assist Unrepresented Litigants*, online: http://www.nycourts.gov/ip/nyazj/pdfs/NYSA2j_BestPracticesHelpCenter.pdf; Hon A Gail Prudenti & Fisher, Hon Fern A, *Facilitating Access Training Program: Reference Manual, vols 1 & 2* (New York State Unified Court System, 2013), online: <http://www.nycourts.gov/ip/nyazj/pdfs/FATPV1.pdf>, <http://www.nycourts.gov/ip/nyazj/pdfs/FATPV2.pdf>.
350. See suggestions in Hakim, note 8, 102.
351. Interview with rural estates practitioner (November 17, 2014); Botsford submission, note 42.
352. Botsford submission, note 42, 2.
353. This comment is equally applicable to recommendations 10, 13 and 14.
354. Association of Community Legal Clinics of Ontario (ACLCO), *Community Legal Clinic Transformation Projects*, online: http://www.aclco.org/public_docs/Projects_Docs/Overview.html#V.
355. Law Society of Upper Canada, *Examples of TAG Collaborative Initiatives*, online: <http://www.lsuc.on.ca/with.aspx?id=2147498877>.
356. LCO, *Increasing Access*, note 150.
357. Recall that the affordability of legal advice in probating an estate is based on the value of the estate, not on the personal resources of the estate representative. An estate representative acts as a trustee to the estate. Costs of probating and administering the estate are deducted from the value of the estate: see chapter III.B.
358. JusticeNet, *Who qualifies for this service?*, online: <http://www.justicenet.ca/who-qualifies/>. Eligibility requires that the individual have a family income of less than \$59,000 and is in financial difficulty.
359. JusticeNet, *Areas of Law Covered*, online: <http://www.justicenet.ca/areas-of-law/>.
360. Legal Aid Ontario, *Power of Attorney/Wills and Estates*, online: http://www.legalaid.on.ca/en/getting/type_civil-willsandestates.asp.
361. Email from community legal clinic lawyer (January 5, 2105).
362. See, for example, Action Committee on Access to Justice in Civil and Family Matters, *Access to Civil & Family Justice – A Roadmap for Change*, October 2013; Ontario Civil Legal Needs Project, *Listening to Ontarians*, 2010; CBA Access to Justice Committee, *Reaching Equal Justice: an Invitation to Envision and Act*, 2013.
363. Ontario Civil Legal Needs Project, note 362.
364. Ontario Civil Legal Needs Project, note 362, 56.
365. Ontario Civil Legal Needs Project, note 362, 60.
366. CBA Access to Justice Committee, note 362, 10, citing Employment and Social Development Canada, *Indicators of Well-Being in Canada, Learning – Adult Literacy*, online: <http://well-being.esdc.gc.ca/misme-iowb/.3ndic.1t.4r@-eng.jsp?iid=31>.
367. LCO, *Increasing Access*, note 150, 69-71.
368. Specialized programs include Family Law Information Centres (FLICs) and the Mandatory Information Program (MIP): LCO, *Increasing Access*, note 150, 18-22.
369. CBA Access to Justice Committee, note 362, 25.
370. See *Family Law Rules*, O. Reg. 114/99, Rule 8.1.

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371. ACLCO, note 354.
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372. JusticeNet, note 358; Legal Aid Ontario, *Am I Eligible for Legal Aid?*, online: <http://www.legalaid.on.ca/en/getting/eligibility.asp>.
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373. Law Society of Upper Canada, *Choosing the Right Legal Professional*, online: <http://www.lsuc.on.ca/lawyer-or-paralegal/>.
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374. Legal Aid Ontario, *Student Legal Aid Services Societies*, online: <http://www.legalaid.on.ca/en/contact/contact.asp?type=class>.
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375. Ontario Bar Association, *Make A Will*, online: <http://www.oba.org/News-Media/Press-Releases/2014/November-is-MAKE-A-WILL-MONTH>.
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376. Hakim, note 8.
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377. Hakim, note 8, 9 and footnote 23.
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378. Hakim, note 8, 9.
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379. Ontario does not require that the complete will be attached to the notice but some other provinces do.
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380. Hakim, note 8, 62-63.
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381. Judges Technology Advisory Committee, *Open Courts, Electronic Access to Court Records and Privacy: A Discussion Paper*, (Canadian Judicial Council, May 2003), 29-30, online: https://www.cjc-ccm.gc.ca/english/news_en.asp?selMenu=news_pub_all_en.asp.
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382. Estates Act, note 62, 27.
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383. Judges Technology Advisory Committee, *Model Policy for Access to Court Records in Canada* (Canadian Judicial Council, September 2005), online: https://www.cjc-ccm.gc.ca/english/news_en.asp?selMenu=news_pub_all_en.asp.
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384. SALRI noted the privacy issues in creating a publicly accessible database of small estate declarations. It suggested that the registry should not include details of the will or the names of beneficiaries or creditors: SALRI Paper, note 61, 41.