



Having the last word?

WILL MAKING AND CONTESTATION IN AUSTRALIA

KEY FINDINGS
ARC LINKAGE PROJECT
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- NSW Trustee & Guardian
- Public Trustee for the Australian Capital Territory
- Public Trustee of Queensland
- Public Trustee, South Australia
- Public Trustee, Tasmania
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EXECUTIVE SUMMARY

Increased longevity and the need to fund living and care expenses across late old age, greater proportions of blended and culturally diverse families and concerns about the increasing possibility of contestation of wills highlight the importance of understanding current will making practices and intentions. Yet, there is no current national data on the prevalence of wills, intended beneficiaries, the principles and practices surrounding will making and the patterns and outcomes of contestation. This project sought to address this gap.

This report summarises the results of a four year program of research examining will making and will contestation in Australia. The project was funded by the Australian Research Council (LP10200891) in conjunction with seven Public Trustee Organisations across Australia. The interdisciplinary research team with expertise in social science, social work, law and social policy are from The University of Queensland, Queensland University of Technology and Victoria University. The project comprised five research studies: a national prevalence survey, a judicial case review, a review of Public Trustee files, an online survey of will drafters and in-depth interviews with key groups of interest.

The report outlines key findings. On the basis of the evidence provided recommendations are presented to support the achievement of these policy goals: increasing will making in the Australian population, ensuring that the wills of those Australians who have taken this step reflect their current situation and intentions, and reducing will contestation.

KEY FINDINGS

Will making

- Most Australians have a will (59%) or expect to make one (22%).
- Few people make a deliberate decision not to make a will.
- Making a will is triggered by life stage changes or changes in assets.
- Older people and those with assets most commonly make wills.
- Not all wills reflect current intentions and/or circumstances.
- Wills are primarily used to distribute assets. Having a will to nominate guardians, choose executors and/or clarify funeral arrangements is undervalued.
- Wills are the major, but not sole, component of later life planning. Enduring powers of Attorney and Advance Directives are much less commonly used to plan for the future.

Allocation principles and distribution

- Wills are a ‘family document’ where most assets are distributed to family members. Charities and other organisations are not commonly nominated as beneficiaries. The view of wills as a mechanism to distribute “family money” has potential to foster a sense of entitlement amongst family members.
- Most wills provide for equal shares for children regardless of the pattern of resource exchanges across the life course.
- The complexity of families, cultural considerations and complex assets can displace usual allocation principles. Those who distribute assets unequally most commonly include blended/step families, families with a child with a cognitive disability, those following distribution linked to cultural considerations and farmers and others with intergenerational businesses.
- Most make wills using professional advice. Do-it-yourself will kits are not commonly used.
- Most will makers are satisfied with advice received/processes used but some identify specialised needs. Will makers with complex circumstances could receive conflicting advice.
- There is a potential tension between seeking highly individualised specialised advice and the capacity or willingness to pay for it.

Contestation of wills

- Most wills that are contested are done so under family provision legislation.
- Adult children are the most common claimants in will contests.
- Contestation arises from need, greed or entitlement. The evidence shows that there is a cohort of financially independent adult children who successfully contest estate distributions.
- Contestation has a high rate of success whether it is through mediation or the courts.
- Will contests are problematic with economic, social and relationship costs.
- There is unexplained variation in estate contestation by State that requires further examination (e.g. impact of community attitudes and legal culture).
- Will drafters lack confidence in being able to prevent contestation.

KEY RECOMMENDATIONS

Recommendations are outlined with regard to public education campaigns, professional education, service and practice responses to meet specialised needs and law reform.

Increasing will making

1. The promotion of the relevance of wills as important documents to consider at major life stages is a priority.
2. To enhance will making, younger people (those aged less than 50 years) will need to be targeted in public education campaigns. Specific campaigns that engage people in thinking

about will making at points of transition such as marriage, cohabitation, divorce, having children, buying a house, and traveling overseas are likely to yield a stronger response. The association between making a will and being older needs to be challenged.

3. Those who are deliberate non will makers (as opposed to procrastinators) are a small, diffuse and hard to find group and are not worth targeting.
4. Research findings suggest that educating people about intestacy laws is unlikely to change whether or not people will make a will. As lack of knowledge of the consequences of dying intestate does not drive will making, it does not provide a driver of public education campaigns aimed to enhance will making. Perhaps a better emphasis is on looking after family given that intestacy creates problems for families in terms of practical inconvenience.
5. People should be encouraged to see wills as serving a broader purpose as family planning documents (e.g., also about guardianship), not just as a document about asset distribution.
6. When a person decides to make a will, there is an opportunity for them to consider wider future planning (including financial planning and health decision-making). Lawyers, financial planners and others should take this opportunity to inform people of these wider planning documents along with appropriate referrals for information and advice where needed (e.g. their GP for an advance directive).

Ensuring wills are up to date

7. Education campaigns need to target current will makers about regular revisions to their will, regardless of how it was drawn up. Wills need to be presented as a dynamic rather than a static document that needs regular revision.
8. The Public Trustee could take a leadership role in developing succession planning, education and support for parents of a child with a cognitive disability.
9. Continuing education for private and public practitioners should address the needs of specialised groups in drawing up wills such as farmers and those with intergenerational businesses, those with international assets, parents with a child with a cognitive disability and blended/step families.

Wills as family documents

10. The lack of attention given to bequests outside of families raises significant issues for organisations and charities and perhaps suggests that for charities and fundraisers a focus on *inter vivos* transfers and planned giving is likely to be most productive rather than relying on substantial bequests.
11. A strong norm about wills being about transfers of assets within families underpins community attitudes of entitlement to 'family' money that can foster challenges to testators' intentions.

Contestation

12. Lawyers who practise in this area need to know how to properly advise people with complex issues (or access advice/expertise themselves for these situations). Clients with intentions or circumstances that present a high risk of contestation require advice around what life changes might necessitate revision to their will, further family discussion or additional advice or strategies to reduce risk. Lawyers who are undertaking work in this field (even if not specialising in it) need to ensure they understand the full range of strategies to address risks of contestation in these complex settings.
13. Contestation risk may be better managed by addressing underlying family dynamics and

issues which operate to drive contestation at the time the will is being made. This may include engaging expert help from professionals other than lawyers to try and address underlying family issues and dynamics. There may be a range of appropriate services/strategies – mediation, counselling, specialised financial advice, spending more time with the document drafter, communication with the family.

14. There is evidence that competent and financially comfortable adults are making successful family provision claims as are extended family. These findings raise questions about the need for legislative reform as well as consideration of the norms, principles and legal grounds underlying court judgments and mediation.
15. A sense of entitlement from adult children as beneficiaries, regardless of need and testator's intentions, should be broadly challenged in community education, legal education and in practice processes. The intentions of family provision legislation should be more widely understood and supported.
16. Facilitators of contestation such as the high rate of success (both before the courts and in mediated agreements), community attitudes and legal culture that, in some circumstances, encourages contestation require further systematic investigation.
17. Community and legal education (including continuing professional development for lawyers) is needed to address cultural concerns. State and Territory Governments should also review their succession law, and in particular their family provision legislation, to ensure that the appropriate balance is struck between testamentary freedom and the duty to provide for family.

IN CONCLUSION

Systematic data collection on the prevalence, practices, intentions and contestation provides an evidence base for increasing will making, ensuring wills are up to date and reducing contestation. Although most who write a will set out to have the last word on their intentions and relationships, the data on contestation suggests that the mix of current family provision legislation with community attitudes toward family money and a sense of entitlement to it, might well facilitate challenges to this.

1. PROJECT OVERVIEW

Wills are important family, social, economic and legal documents. Yet some people die without a valid will, and many wills that are written are later contested. This research project developed the first national data set on who does and does not make a will and why, as well as the nature of will contests in Australia and factors associated with their occurrence and resolution. The aims were to identify the prevalence of will making, the allocation principles used, the challenges faced by individuals and will drafters in making wills and the patterns and problems arising from contestation of wills. The research findings are intended to provide an evidence base for public education campaigns, professional education, service and practice responses to meet specialised needs, and law reform.

This publication reports data from the Australian Research Council (ARC) funded project Families and generational asset transfers: *Making and challenging wills in contemporary Australia*. This is a joint project between The University of Queensland (UQ), Queensland University of Technology (QUT) and Victoria University (VU) supported by the Australian Research Council (project number: LP110200891) in partnership with seven public trustee organisations across Australia: NSW Trustee & Guardian; Public Trustee for the Australian Capital Territory; Public Trustee of Queensland; Public Trustee, South Australia; Public Trustee, Tasmania; Public Trustee, Western Australia and State Trustees Limited, Victoria.

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Research Studies

The findings reported here are drawn from five major research studies:

- A prevalence survey explored the prevalence of will making in Australia, reasons for making, changing or not making a will, advice sought and asset distribution in wills. A sample of 2405 Australian adults was interviewed by telephone between August and September 2012.
- A judicial case review of contested cases in Australia in 2011 identified the legal grounds relied on in contesting wills, disputants' characteristics and underlying motives and outcomes of contestation. 215 cases involving 195 estates were identified in the one year period analysed.

- A review of Public Trustee files involving disputed cases. This aimed to complement the judicial case review by including cases that do not necessarily end up in court. The 139 cases identified were dealt with, in the first instance, by the Public Trustee and many were settled outside court.
- An online survey of will drafters (Public Trustee officers and private lawyers). This survey was completed by 257 will drafters. It aimed to identify social and family situations presenting difficulties to will drafters, approaches taken to resolve these difficulties, and common approaches to will making. It also explored the views of professional will drafters on the risks of contestation and how they are managed.
- In-depth interviews (68) with a range of groups to enhance understanding of non will makers and the challenges faced by will makers with complex family situations (e.g. blended/step families, parents of children with a cognitive disability), complex assets (e.g. farms and intergenerational businesses, international assets and/or large estates) or cultural considerations around wills and inheritance that may suggest particular approaches (e.g. Islamic will makers). These interviews explored in depth selected issues, perspectives and difficulties that had been identified in the prior four components as requiring greater understanding. Participants in the interviews were not representative of the wider Islamic communities or those with complex families or complex assets; the intention was to give insight into the range of experiences within these groups and how they might approach and manage potentially complex situations.

A limitation of the research is that the prevalence survey and interviews under represent the very wealthy who are perhaps less likely to volunteer to participate in research.

This short report provides an overview of key findings. Detailed reports on each study are available on the website <http://www.uq.edu.au/swahs/families-and-generational-asset-transfers-making-and-challenging-wills-in-contemporary-australia-28788> or from the research team through the Chief Investigator, Cheryl Tilse, Contact: c.tilse@uq.edu.au.

2. KEY FINDINGS

WILL MAKING: PREVALENCE, INTENTIONS AND TRIGGERS

Results reported in this section are based on the national survey of the prevalence of wills in Australia, in-depth interviews with non will makers aged over 45 who have decided not to make a will and interviews with other targeted groups who have a will.

Most Australians have a will or expect to make one

Almost 60% of adult Australians have made a will. This is a high proportion in comparison with the reported rates in the UK and the US but is consistent with other Australian surveys. The likelihood of making a will increases with age and the amount of assets. However, 93% of people over 70 have a will regardless of assets. The age cohort at which more than half of respondents have a will is 40-49. Most younger people do not have a will.

Although 40% of Australians do not have a will, most of this group (54%) are planning to make one. Procrastination (I haven't got around to it) is the main reason for not having a current will. Concerns about costs or difficulties in will making processes did not emerge as important in deciding to not to make a will but could be important in procrastination.

Few people make a deliberate decision not to make a will. Deliberate non will makers were very difficult to locate for more in-depth interviews. They are a diverse group with a range of reasons for not intending to make a will. These included having few assets, not having children or dependents, being from a cultural group (e.g., Russian, Sri Lankan) in which will making is not normative behaviour and/or having confidence that family members will manage assets appropriately and a will is not needed. Some non-will makers had jointly held assets and binding superannuation nominations, thus not all could be described as being non-planners or as having few assets.

Making a will is triggered by life stage changes or changes in assets

Getting organised, having children, cohabitation and changes in assets such as buying a house were the main triggers for making a will. Age, however, remains an important indicator. Almost all (93%) older people have a will. For those under thirty with others financially dependent on them, only 35% reported having a will. A small number of Islamic participants stated that making a will is a religious duty. Awareness of the consequences of dying without a will i.e. knowledge of intestacy law does not drive will making, nor does it drive decisions not to make a will. Most (82%) indicated that the prompt to make a will came from within themselves. Among those

respondents who had been prompted by a third party (n = 255, 18%), family members (n = 100, 39%) were the most commonly reported prompts. Less commonly reported prompts were professionals (n = 87, 34%) and advertising (n = 65, 25%).

Not all wills reflect current intentions and/or circumstances

The need to make changes to a will over a lifetime is a significant issue that is not always addressed. In the prevalence survey, 46% had made changes to their initial will. Compared to people who had not made changes to their will, respondents who had made changes were older and had estates of higher estimated value. The changes made adjusted provisions to meet evolving life circumstances such as changes in asset base and/or family responsibilities. Those circumstances which prompted changes to wills were similar to those which prompted individuals to prepare their first will. The most commonly reported reason was having children. For those who had made three or more changes, having children or grandchildren and relationship changes were significantly associated with will updates rather than changes in financial circumstances, work or health. The interviews showed that for some groups, changing a will can be prompted by a specific event e.g. having a child with a disability, or becoming part of a blended family.

In the interviews many will makers did not feel that their most recent will was relevant for their current circumstances and wishes, and were presently reviewing or looking to review it in the near future. This finding shows the importance of understanding will making as a lifetime process rather than a static document. Not all people review wills at key transition points e.g., marriage, having children, divorce, retirement, buying a house. There is a risk that if a will is not updated following changes in family circumstances and relationships and assets, it will not reflect the testators' intentions at time of death and may not make provision for new or changed relationships. How this relates to contestation requires further exploration.

Wills are primarily used to distribute assets

Currently, some functions of wills are not commonly used. Most testators use wills primarily to indicate their intentions around the transfers of assets. People typically do not see wills as family planning documents that can be used for a range of purposes. These include nominating guardians for their children, choosing executors to represent their wishes after death and ensuring they have a good understanding of the intentions behind the distribution or specifying funeral arrangements/wishes regarding disposal of their body etc. In the prevalence survey, most will makers focused on asset distributions; only a small proportion of will makers included other instructions. Less than one quarter (24%) of all testators had included funeral instructions and fewer will makers (17%) had included a specific trust. An exception was the inclusion of guardianship instructions. Two thirds (69%) of will makers with financial dependents included guardianship instructions. Almost one third (31%) of respondents with financial dependents, however, were yet to update their wills to provide for ongoing care and support of dependents. It is possible that some testators have made their wishes about such non-financial matters clear to their likely survivors and family however the opportunity to deal with such matters in their wills to ensure that their wishes are clear and up to date should be brought to the testator's attention.

Wills are the major, but not sole, component of later life planning

In addition to wills, there are other major aspects of planning for the end of life. These include documents such as Enduring Powers of Attorney (EPAs) that appoint substitute decision makers for financial decision making in the event of incapacity and Advance Directives (ADs) which allow a person to make health decisions in advance. In the prevalence survey it was evident that

there is a hierarchy in terms of completion rates for wills, EPAs and ADs. Having a professionally drafted will was correlated with EPA and AD completion, as well as being older and having a higher estate value. Completion rates for EPAs (30%) and ADs (14%) were still low despite the fact that most wills were professionally drafted. Notwithstanding considerable promotion of these enduring documents over the past decade, uptake still remains quite low in comparison with the general acceptability of wills. Private lawyers generally encourage completion of EPAs with wills rather than promoting ADs suggesting that there is a strong focus on financial decision making and planning rather than a more broadly based approach that includes all aspects of later life planning.

ALLOCATION PRINCIPLES AND DISTRIBUTION

Principles of allocation have to be understood in the context of the complexity of the family and assets, cultural practices and pre-provisioning. The prevalence survey shows very clear patterns of distribution and allocation principles. The survey of will drafters also confirms these as the most common patterns. The in-depth interviews however demonstrate that, for some groups of will makers, these patterns do not hold.

Wills are a ‘family document’ where most assets are kept in the family

In the prevalence survey, most will makers believed it was important to make provision for immediate family members, in particular their children, their current spouse or partner, and, to a lesser extent, their grandchildren. Will makers were least concerned about making provision for other people or organisations to recognise their support, companionship or assistance. From the available information there is little indication that the principles varied according to size of the estate.

Only 16% reported that it was important to provide for charities/organisations. Women and those without children were more likely to consider making such bequests, however, half of those without children still rated leaving provisions for organisations as unimportant. Non-parents prioritised providing for a current spouse/partner or for their own parents rather than organisations or individuals outside the family. For the small group without partners or children, provision for other people to recognise support/companionship and/or friendship was the most common response, followed by provision for care of pets. It is of interest to note that charitable bequests did not receive a higher priority from this group. The survey of will drafters also supported a view that testators most commonly distributed assets between partners and children. The inclusion of pets as beneficiaries was identified as posing difficulties for will drafters for over half of the will drafters surveyed.

In contrast to this general pattern, almost all Islamic respondents in the interviews mentioned making charitable bequests in their will, with some charities being religious in nature. This reflects the spirit of Sharia law where Muslims are encouraged to give money to charity from the one third of their estate they can distribute as they wish. This is in contrast with most other participants, who did not plan to give charitable bequests.

Most wills provide for equal shares for children

Testators with children make decisions about whether to leave equal or unequal shares to children. In the prevalence survey and the survey of will drafters, an equal share for children was the overriding principle identified. In the prevalence survey the overwhelming majority (93%) of respondents with children stated that they would provide equal shares to their children. Seven per cent of respondents (n = 81) stated they would leave unequal shares. Unequal shares were commonly related to perceived need, behaviour, differentiating biological and step children, and/or acknowledging prior contributions of the testator to the child. These results reflect a norm of equality of distribution and the inclusion of all children as heirs, regardless of whether they are financially dependent or recipients of prior *inter vivos* transfers. Reciprocity did not seem to be an important allocation principle in the prevalence survey or interviews. There was little evidence that provision of care or financial support by family members and/or organisations impacted on asset distribution. This finding has implications for family carers, care providers and charities.

The complexity of families, cultural considerations and complex assets can displace usual allocation principles

The interviews contrasted with the findings of the prevalence and will drafter surveys with unequal distribution being a fairly common feature. They demonstrate the importance of family structure, relationship quality and culture. There was little evidence that the distribution principles applied varied by age/life stage or gender of the testator. Common reasons for unequal distribution were cultural beliefs (e.g., those following Islamic distribution guidelines where sons receive twice the share of daughters) or family structure (e.g., distinguishing between biological and step children) and deservedness (e.g. reflecting relationship quality). Testators with a child with a cognitive disability also were more likely to consider unequal distribution. Interviews with farmers and owners of intergenerational businesses indicate that distribution principles are likely to be affected by issues related to the liquidity of the business and separating management succession from succession of ownership. In interviews, many participants talked about ‘equality’ when asked to discuss principles underlying asset distribution; however this word was used to indicate perceived fairness rather than to indicate that assets were divided equally between beneficiaries. Will drafters also identified blended/step families, families with poor quality relationships and complex estates as presenting particular challenges to making a will.

- **Step and blended families and unequal shares**

In Australia, 5-6% families comprise step children. ‘Family complexity can vary according to whether there are joint as well as step children in the family. Will drafters identified blended/step families as one of the groups having particular challenges in making a will. The interviews explored these issues further.

In interviews most will makers in step/blended families reported either excluding or leaving a smaller share to their step children. The extent to which being part of a blended family was seen as problematic for will making depended on factors such as the duration of relationship, age of step-child(ren) at time of parents’ cohabitation/marriage, degree of “active parenting” of step child(ren) and timing of relationship e.g., early versus later life relationship formation. For such families it was often about the extent to which children were seen to be children of both

¹ Qu, L., & Weston, R. (2013). Australian households and families (Australian Family Trends No. 4). Melbourne: Australian Institute of Family Studies.

parties. Many families involved later life relationships in which various family members had never lived together, potentially limiting relationship closeness. Only a few people were aware of the contents of their ex-partner's will in relation to their children and this knowledge generally had no impact on the will makers' own will.

- **Disability and unequal shares**

Testators with a child/adult child with a disability or mental health problems were identified by will drafters as presenting particular challenges in making a will. The interviews recruited testators with an adult child with a cognitive disability as this group face potential difficulties in will making around provision of lifetime care for a child with a decision making disability and concerns about management of an inheritance. Around a third of testators interviewed who had an adult child with a cognitive disability left equal shares to their children in their will. However pre-provisioning to children with disability was common; including purchasing accommodation and this was taken into account in leaving equal shares. Two thirds reported leaving unequal shares; one third leaving more to the child with a disability and one third leaving less. These decisions were based on factors such as the child's level of disability and potential costs of meeting future care needs as well as the needs and financial position of other children. Testator's perceptions about need and their responsibility to provide for an adult child with disability were relevant when making a will, however, of more importance were practical considerations such as preserving pension eligibility.

- **Quality of the relationship and unequal shares**

Estrangement and family discord, dislike of a child's spouse/partner and presence of a family member with issues related to alcohol/drugs or spending/bankruptcy/gambling were identified by will drafters as presenting challenges. In the prevalence survey nearly half (n = 37, 46%) of the small number of respondents who stated they would leave unequal shares attributed this decision to the child's behaviour (e.g., poor management of money, addiction, lack of contact). In the interviews, interpersonal relationships between testators and potential beneficiaries often impacted on asset distribution with poor quality relationships often leading to reduced provision or exclusion from the will.

- **Pre-provisioning and unequal shares**

In the prevalence survey, almost two thirds (62%) of will makers believed it was important to provide for their dependents while alive rather than wait until death. These contributions, however, rarely formed part of the distribution decisions. Only one third of the small group allocating unequal shares to children reported that prior support or financial assistance was a reason for leaving unequal shares. In the interviews, although *inter vivos* giving was common and strongly based on need, few testators had taken account of such gifts when drawing up their will.

- **Cultural considerations and unequal shares**

Cultural and religious beliefs also influenced allocation. The interviews specifically recruited members of Muslim communities who have given some consideration to Sharia law regarding inheritance in making or contemplating making a will. This group was recruited to provide some insight into how individuals manage a potential mismatch between cultural values and Australian law around will making. Most distributions of assets either followed prescribed Islamic distribution guidelines (leading to unequal distribution to children based on gender) or reflected broader principles of ‘fairness’ seen as the underlying intent of Islamic wills (examples given were equal allocation regardless of gender, unequal distribution based on need) – usually leading to equal distribution to children regardless of gender. The use of prescribed Islamic distribution principles was a slightly more common approach. In three instances religion reportedly had little impact on distribution.

- **Complex assets and unequal shares**

Estate characteristics often identified as presenting difficulties by will drafters include complex assets such as complex trust arrangements, family businesses and farms and international assets. Consistent with this, in the prevalence survey over a quarter (n = 22, 27%) of those leaving unequal shares to children were doing so in recognition of the child’s financial contributions or work in the respondent’s business or farm.

In interviews with farmers, distribution was typically equal between adult children, though in one instance a daughter who had contributed more to the farm was allocated a larger share and another testator left unequal shares to account for previous *inter vivos* transfers. There was no evidence of unequal shares being based on gender with sons being favoured over daughters. One participant commented that if there was any interest in succession amongst family members they hoped that appropriate division of the estate which would keep the farm intact could be achieved via family agreement. Another testator planned to leave a sum of cash to the manager of his property in recognition of their contribution to the farm.

A couple of the farmers with large estates had complex ownership and trust arrangements. A number of participants envisaged their farm would be sold following their death to facilitate asset distribution, although alternative plans would be welcomed if a successor was identified. One participant reported that the farm may be sold prior to their death to fund relocation in retirement.

Many of the farms of interviewees had been purchased by the testator rather than inherited from family. This might well have made a difference in the approach to the farm as a business rather than as an intergenerational family property. Given the small number of interviews it is unclear if this influenced asset distribution.

Ten participants reported having overseas assets which included property. A couple of testators also had overseas bank accounts and/or shares but did not hold property overseas. Where this information was known, international assets were usually to be distributed to children. Few participants had written wills overseas – in some instances assets were held in countries with prescriptive inheritance laws which dictated distribution, in other cases informal agreements for asset distribution had been made within the family, and for some participants no planning for allocation of these assets had been made. Distribution of international assets did not appear

a priority for many participants, with a couple stating that they would prefer assets were left to relatives living overseas whom they considered had greater need.

Large estates did not impact on allocation decisions, although those with larger estates were more likely to consider trusts. A couple of the farmers, however, with large estates had complex ownership arrangements and distribution mechanisms including companies and trusts.

WILL MAKING PROCESSES AND PRACTICES

Findings from this section are drawn from advice and satisfaction levels reported in the prevalence survey, the online survey of will drafters and the interviews.

Most make wills using professional advice

Most testators in the prevalence survey had their will drawn up by a private general solicitor (58%) or a wills and estate specialist (15%). Only 6% used the Public Trustee, prepared their will using hard copy or internet will kit (11%) or drew it up themselves (5%). In interviews most testators had their will drawn up by a private solicitor. Some people had sought advice prior to making their will while others primarily engaged professional services for will drafting. Only a small proportion of will makers used succession specialists. Whether this arises from concerns about costs or limited access or not seeing a specialist as being necessary is unclear. Those who used succession specialists were more likely to have an estate valued at over \$500,000. Will drafters identified as problematic the lack of community understanding of the importance of having an appropriate will, the time involved in drafting a will and the consequences of intestacy and family provision legislation.

Most will makers are satisfied with advice received/processes used but some identified specialised needs

In the interviews with non will makers, few identified barriers in relation to cost or complexity of will making processes that impacted on their willingness to make a will. Testators whose situations are complicated by a number of factors, however, may not necessarily be satisfied with their will and often find it hard to access the appropriate information/advice to settle on desired changes.

Many of the interview groups (especially Islamic participants and those with a child with disability) require and are looking for specialist legal advice, which can be difficult to obtain. Same-sex couples, those with farms or intergenerational businesses are also seeking specialised advice. Testators who had a range of challenges for example, a blended family, unequal value of assets brought into a later life partnership, and a stepchild with a mental health problem reported difficulties in accessing specialised advice.

Islamic participants sought advice for Islamic wills from the Koran, religious figures, the internet and will templates designed to comply with Australian and Islamic law. Those who identified a conflict with Australian law sought advice from lawyers and financial planners specialising in Islamic wills.

Participants with a child with a disability expressed concerns regarding the lack of professional advisors that had expertise in the particular area of disability. Participants spoke of the importance of seeking information from other parents. Although the Public Trustees have an established role in asset management for people with decision making disabilities, most parents consulted private lawyers to draft wills (only three used the Public Trustees).

Will drafters noted the tension between taking time to develop a comprehensive understanding of the highly individualised nature of testators' circumstances, assets and intentions and client willingness to pay for such expertise.

Will makers with complex circumstances could receive conflicting advice.

In the interviews, a testator discussed wanting to exclude a step child who was currently a beneficiary, but had concerns about contestation. Consultation with multiple legal professionals had yielded conflicting advice about the relative contestation risks associated with exclusion and reduced provision. Consequently, the will remained unchanged but was seen as being unsatisfactory. Another will maker with complex assets had an out-dated will in part due to uncertainty about whether or not an earlier *inter vivos* transfer of property should be accounted for in their current will.

The survey of will drafters presented three case scenarios that included complex circumstances. These included complex families (estrangement, alleged physical violence), complex assets (a farm owned by family company and share portfolio with unknown future value) and cultural considerations (where a testator's cultural values differ from the broader community and their own children). All involved departures from equal shares reflecting relationship quality, contribution to the testator's farm and cultural expectations around inheritance and care provision. The diversity of responses to these scenarios suggests that there is potential for a range for conflicting advice if will makers with complex circumstances consult several lawyers. A key concern from will makers in relation to these scenarios was the potential for contestation arising from the proposed arrangements.

CONTESTATION OF WILLS: PATTERNS AND RESPONSES

This section uses results from the analysis of contested wills that come to court and are judicially resolved, the review of public trustee files of contested cases that are resolved out of court or proceed to court after mediation has failed and the online survey of will drafters. The analysis has a particular focus on contests that are brought under family provision legislation.

We note that this research only captures some of the estate contestation that occurs in Australia. For example the PT file review only includes files from those offices so does not include files of private lawyers. Likewise, the judicial case review will only capture cases that required resolution by the courts. Nevertheless, this data provide rich insight into the nature of estate contestation in Australia.

Most wills are contested under family provision legislation

In the judicial case review 51% of estates contested were through family provision claims; in the PT file review 86% of cases were family provision claims.

Adult children are the most common claimants in will contests

In the judicial case review and the public trustee file review most claimants were adult children. In the judicial case review, 86% of claims are brought by immediate family: either children of the deceased (63%) or partners (including ex-partners) (23%). Over half of family provision claims brought by *all claimants* were brought by competent adult children. The majority of relationship contests for claims brought by children are between siblings with another quarter being driven by conflict between the deceased's child (ren) and the deceased's partner. In contests identified by the PT, claims by biological children of the deceased were the most common (70%).

Of the family provision claims in the judicial case review, 9% were on behalf of adult children with impaired capacity and 3% were on behalf of minors. In the PT file review, 24% of claims were for people with impaired capacity and 4% were minors. Where the disputant has impaired capacity, the PT typically initiated disputes on behalf of existing clients for whom they were the financial manager or administrator. This highlights the importance of the role of the PT in advocating for clients with impaired capacity, many of whom have significant financial need. It may also reflect family patterns of insufficient provision for an adult child with a disability from a will to protect pension entitlements or because of pre-provisioning.

Contestation arises from need, greed or entitlement?

Contestation most commonly is driven by both exclusion and significant disparity in distribution. In the judicial case review there is some evidence to support that some family members are greedy rather than being in need. In the PT file review, although need was identified as driving contestation in 32% of cases, the type or quality of the relationship with the deceased (22%) and or a sense of entitlement (19%) were also important reasons. Pre-provisioning is an important issue often not considered in wills, however it did not come up strongly in terms of driving

contestation. The size of the estate did not make a difference to whether it was contested in both of the file reviews.

In the PT review, in 62% of disputes complexity of the family relationships was identified as important in disputes. This included involvement of children/adults with a significant disability or ill health, new spousal/defacto relationships (34%), separation or divorce (32%) addition of children or step child to the family (25%) or diagnoses of drug or alcohol addiction (11%). The judicial case review also revealed that complex or difficult family relationships were present in contested cases with blended families or families with a history of conflict (e.g. estrangement) often present.

Contestation has a high rate of success

When there is contestation, there seems to be a reasonably high rate of success, whether it is through the court or through mediation. In the judicial case review 74% of cases involved a change of distribution, with some variation depending on the claimant. In the PT file review 77% of claims were successful. Claims by partners/ex-partners were most successful (83% of cases), followed by children (76%), extended family (73%) and others (64%). There was no significant relationship between jurisdiction, estimated estate value, contest type or allocation principles and success rate. Further, there was no relationship between principles of distribution or grounds for contest (e.g., financial need, deservingness) and outcome of the dispute. The judicial case review shows a somewhat similar pattern with claims by partners/ex-partners most successful (88% of cases), followed by other (83%), extended family (71%) and children (69%). Claims against larger estates appear to be more likely to succeed than those against smaller estates.

Mediation seeks to avoid costly court contests

Legal practitioners in all states and territories seek to use mediation to avoid costly court contests. From the PT file review, it appears that the PTs are fairly effective in diverting contests away from court (31% went to court); although this may have implications for testamentary intention given the very high rates of changes to distribution in mediated cases (87%). Estate value did not influence whether or not a dispute went to court; poor quality relationships between the disputants and other beneficiaries were important in escalation to court.

In the PT file review where financial need was a ground for contest, cases were more likely to be resolved through agreement during mediation. Data from the PT file review suggests the time taken to get to mediation may be an important factor in dispute resolution and likelihood of escalation to court.

Will contests are problematic

Will contests are problematic due to potential limitations on distributing the estate according to the testator's expressed wishes and economic costs for stakeholders, typically erosion of some or even all of the estate, as well as costs to family relationships. In the PT file review the median cost incurred by estates was \$11,900 (range \$0-\$500,000). In addition to costs incurred by estates, almost a quarter of disputants (24%) incurred costs from the dispute (median cost was \$14,918, range \$0-\$105,000). Median estimated time between notification of the dispute and case closure was 9 months, highlighting further costs in terms of delays in estate administration. There was a significant difference between the quality of relationships between disputant/s and

other beneficiaries before contents of the will were known and relationship quality after contents of the will were known. Eighteen percent of relationships were poor/very poor prior to contents of the will being known whereas 26% were poor/very poor after contents of the will were known.

State differences in patterns of contestation

In the judicial case review the major variation in results related to New South Wales. Even allowing for differences in population, quite a different picture of estate contestation emerged for this State. It had the highest number, and rate per person, of contested estates and much of this is due to the fact that it has the highest number, and again rate per person, of estates subjected to family provision claims. Sixty percent of all Australian family provision claims are in relation to estates in New South Wales, but yet, the rate of success of these claims is in line with the national average. The high rate of contestation in NSW may point to the importance of factors other than law e.g., implementation of law, culture within the legal profession, broader social attitudes etc. given the context of a largely similar legal framework (notional estates do not account for the observed differences).

Will drafters lack confidence in being able to prevent contestation

Will drafters put forward a range of strategies used when concerned about potential contestation. These included discussing the likelihood of contestation and the reasons for it as well as the costs, encouraging testators to explain allocation decisions in a will or a separate document and taking good case notes about clients' intentions and stated reasons. They were also asked to rate the effectiveness of such strategies. Despite these views on best practice to reduce risk, many did not consider the strategies to be highly effective.

“nothing will prevent a spurned child from bringing a costly challenge to the estate – they will find a way no matter what you do to prevent it”

“some people have an unhealthy sense of entitlement and don't respect the wishes of the will maker. You can't draft documents or legislate to change that”

The evidence from the survey of will drafters seems to suggest that contestation cannot be prevented and will drafters have very little optimism that this is achievable. This finding is potentially related to the high rate of success of contestation.

3. IMPLICATIONS AND RECOMMENDATIONS

On the basis of the evidence presented from this national study, we make the following recommendations to support the achievement of these policy goals:

- Increasing will making in the Australian population
- Ensuring that the wills of those Australians who have taken this step reflect their current situation and intentions
- Reducing will contestation from that which occurs in informal disputes between parties through to judicial resolution of disputes

Recommendations are outlined with regard to public education campaigns, professional education, service and practice responses to meet specialised needs and law reform.

Increasing will making

Making a will is a social norm, with very little resistance to making a will. Having a will is, however, is associated with ageing. The majority of those who do not have a current will are planning to do so. Campaigns to increase will making would benefit from market segmentation and targeted messages. In the prevalence survey there was a quite a large cohort of younger people who did not have wills who are potentially a captive audience in terms of targeted campaigns. The procrastinators can be identified fairly easily in the prevalence survey. They are, on average 40 years of age and parents with financial dependent(s) in possession of an estate valued at less than \$500,000.

Recommendation

1. The promotion of the relevance of wills as important documents to consider at major life stages is a priority.
2. To enhance will making, younger people (those aged less than 50 years) will need to be targeted in public education campaigns. Specific campaigns that engage people in thinking about will making at points of transitions such as marriage, cohabitation, divorce, having children, buying a house, and traveling overseas are likely to yield a stronger response. The association between making a will and being older needs to be challenged.
3. Those who are deliberate non will makers (as opposed to procrastinators) are a small, diffuse and hard to find group and are not worth targeting.
4. Research findings suggest that educating people about intestacy laws is unlikely to change whether or not people will make a will. As lack of knowledge of the consequences of dying intestate does not drive will making, it does not provide a driver of public education campaigns aimed to enhance will making. Perhaps a better emphasis is on looking after family given that intestacy creates problems for families in terms of practical inconvenience.

Wills are generally used in a very narrow way to transfer assets. Community education should focus on increasing understanding that wills are also useful in nominating guardians, ensuring that an executor understands allocation decisions and the reasons behind them and being clear about funeral arrangements and any family or cultural concerns about disposal of the body. A broader understanding of what constitutes assets (e.g. superannuation entitlements) would also be useful. The link between will making and having substantial assets also needs to be challenged.

Recommendation

5. People should be encouraged to see wills as serving a broader purpose as family planning documents (e.g., also about guardianship), not just as a document about asset distribution.

As concerns about getting organised and providing for families are the main triggers for will making, there is opportunity for public and private will drafters and financial planners to assist clients to broaden the consideration of end of life planning to include enduring documents nominating substitute decision makers. Many already do so, linking estate planning with enduring powers of attorney. Advance directives, however, are not linked with financial planning and the take up remains small.

Recommendation

6. When a person decides to make a will, there is an opportunity for them to consider wider future planning (including financial planning and health decision-making). Lawyers, financial planners and others should take this opportunity to inform people of these wider planning documents along with appropriate referrals for information and advice where needed (e.g. their GP for an advance directive).

Ensuring wills are up to date

Although Australians have high rates of making wills, some wills are out of date and do not reflect current assets, intentions and/or family circumstances. Wills need review and potential revision with changes in circumstances. Private and professional will drafters need to target people about regular revision. We are aware that Public Trustee organisations already do this with current clients. There is a need to change the perception that a will is a one-off activity.

Recommendation

7. Education campaigns need to target current will makers about regular revisions to their will, regardless of how it was drawn up. Wills need to be presented as a dynamic rather than a static document that needs regular revision.

While most will makers reported accessing appropriate advice, some will makers have out of date wills as a result of being unable to access specialised advice. This particularly applied to parents of a child with a cognitive disability. The Public Trustees' expertise in the areas of trusts, disability support and financial administration could be further developed to provide information packages and support around succession planning for parents of a child with a cognitive disability. The role of the Public Trustee in contesting will on behalf of clients with a disability could act as disincentive for some parents to engage with PT Offices.

Recommendation

8. The Public Trustee could take a leadership role in developing succession planning, education and support for parents of a child with a cognitive disability.
9. Continuing education for private and public practitioners should address the needs of specialised groups in drawing up wills such as farmers and those with intergenerational businesses, those with international assets, parents with a child with a cognitive disability and blended/step families.

Wills as family documents

Wills are statements about relationships. The primacy of spousal and intergenerational transfers in wills reflect strong views that a will is about getting organised to provide for family members rather than reflecting a sense of a wider group of social relationships and obligations. A belief that immediate family (i.e. spouse and children) should be the beneficiaries and that material assets should be distributed equally between children predominated. These social norms are reflected in family provision legislation. Entitlement based on relationships rather than need or reciprocity is a strong theme across all data. The limited recognition of prior contributions, support from non family members or organisations provides strong support for understanding wills as statements about relationships.

Recommendation

10. The lack of attention given to bequests outside of families raises significant issues for organisations and charities and perhaps suggests that for charities and fundraisers a focus on *inter vivos* transfers and planned giving is likely to be most productive rather than relying on substantial bequests. To enhance charitable bequests, the weak social norms around such giving will need to be challenged.
11. A strong norm about wills being about transfers of assets within families underpins community attitudes of entitlement to 'family' money that can foster challenges to testators' intentions.

Reducing contestation

Potential triggers for contestation are: complex family situations such as blended families, large estates or estates with no close family to benefit where there appears to be a perception a wider group of people should be beneficiaries, poor interpersonal relationships within a family and irrational litigants who will not be deterred from making claims they see to be fair. Contestation is costly in terms of direct costs and the costs of delaying probate and the damage done to family relationships.

Many testators already explain their decision in a document to be read in conjunction with their will which indicates a willingness to take time to try and prevent contestation. Some testators who have good family relationships, knowing that contests can tear families apart, may choose to spend time up front trying to address the relevant issues. Strategies to avoid contestation need further development. Some potential strategies are outlined in the recommendations below.

Recommendation

11. Lawyers who practise in this area need to know how to properly advise people with complex issues (or access advice/expertise themselves for these situations). Clients with intentions or circumstances that present a high risk of contestation require advice around what life changes might require revision to their will, further family discussion or additional advice or strategies to reduce risk. Lawyers who are undertaking work in this field (even if not specialising in it) need to ensure they understand the full range of strategies to address risks of contestation in these complex settings.
12. Contestation risk may be better managed by addressing underlying family dynamics and issues which operate to drive contestation at the time the will is being made. This may include engaging expert help from professionals other than lawyers to try and address underlying family issues and dynamics. There may be a range of appropriate services/strategies – mediation, counselling, specialised financial advice, spending more time with the document drafter, communication with the family.

The findings around contestation highlight the ever present tension between balancing testamentary freedom with the testator's duty to provide for those dependent on him or her. A pertinent issue is whether the balance is being appropriately struck if will drafters lack confidence in their ability to mitigate contestation risk and contestation has a high rate of success. Mediation can avoid costly court contestation, but also has a high success rate for claimants.

Recommendations

13. There is evidence that competent and financially comfortable adults are making successful family provision claims as are extended family. These findings raise questions about the need for legislative reform as well as consideration of the norms, principles and legal grounds underlying court judgments and mediation.
14. A sense of entitlement from adult children as beneficiaries, regardless of need and testator's intentions, should be broadly challenged in community education, legal education and in practice processes. The intentions of family provision legislation should be more widely understood and supported.
15. Facilitators of contestation such as the high rate of success (both before the courts and in mediated agreements), community attitudes and legal culture that, in some circumstances, encourages contestation require further systematic investigation.
16. Community and legal education (including continuing professional development for lawyers) is needed to address cultural concerns. State and Territory Governments should also review their succession law, and in particular their family provision legislation, to ensure that the appropriate balance is struck between testamentary freedom and the duty to provide for family.

Recent legislative changes in Victoria around family provision to tighten eligibility to be a claimant and to give greater weight to demonstrating dependency on the testator at the time of their death have been noted. There is also a renewed focus on regard for testamentary freedom. These changes provide a basis to evaluate the impact of legislative reform of this type and should be the subject of empirical research.

Conclusion

Wills are important social, economic and legal documents. They are also statements about relationships and intentions. Systematic data collection on the prevalence, practices, intentions and contestation provides an evidence base for increasing will making, ensuring wills are up to date and reducing contestation. Changing current practices around will making and contestation requires a range of interventions that include community education, challenges to strong social norms around entitlement, professional education, provision of accessible and affordable specialised advice to individuals with complex issues and reviews of succession law and the principles underpinning judgements.

Although most who write a will set out to have the last word on their intentions and relationships, the data on contestation suggests that the mix of current family provision legislation with community attitudes toward family money and a sense of entitlement to it, might well facilitate challenges to this.

Glossary

<i>Inter vivos</i>	Transfers or gifts of assets during a donor's lifetime.
Notional estate	When assets which are not part of the deceased's estate at the time of death are included in the estate for the purpose of family provision claims.
PT – Public Trustee.	This generic term is used throughout the report for the various State based offices. The majority of states and territories use this term. Exceptions are: the NSW Trustee & Guardian and State Trustees Limited, Victoria

