Families and generational asset transfers: Making and challenging wills in contemporary Australia

Online survey of will drafters

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A national on line survey of private and public will drafters distributed through State/public trustee offices in seven states/territories and law societies and community legal centres across all states/territories yielded 257 responses. The survey, using questions, scales and case scenarios sought to canvas perceptions of difficulties facing will drafters and the strategies used to address them.

Key findings

Challenges

Analysis of survey responses shows that wills are used largely to equally distribute assets to immediate family members. This fits closely with the findings of the prevalence survey.

Family characteristics presenting challenges to document drafters include blended families, estrangement and family discord, children/adult children with disability or mental health problems, dislike of a child's spouse/partner and presence of a family member with issues related to alcohol/drugs or spending/bankruptcy/gambling. Estate characteristics often identified as presenting difficulties include complex trust arrangements, family businesses and farms and international assets. Many of these issues are being followed up in the in-depth interviews currently underway.

Strategies used by will drafters when concerned about the risk of contestation

- Spending time discussing the likelihood and reasons why the will may be contested as well as the costs (economic, social etc.) of will disputes
- Encouraging the client to explain their decision in their will or a document to be read in conjunction with their will
- Making file notes about the client's intentions and stated reasons together with the advice given.

Responses to case scenarios demonstrate the potential for a range of conflicting advice if testators with complex circumstances consult several solicitors.

Perceptions of effectiveness of strategies

Although document drafters had a clear view of best practice to reduce the risk contestation, many did not consider strategies to be highly effective. Open ended responses suggest that drafters consider they have a responsibility to highlight contestation risks, and offer suggestions for ways to reduce these risks, yet ultimately it is up to testators to determine asset distribution.

Some respondents reported that not all clients are worried about contestation, or willing to deal with the underlying issues which may lead to contestation. Most respondents do not appear confident that any particular strategies can really prevent contestation.

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

Implications

Findings highlight the ever present tension between balancing testamentary freedom with the testator's duty to provide for family. A pertinent issue is whether the balance is being appropriately struck between testamentary freedom and the duty to provide if document drafters have little confidence in their ability to mitigate contestation risks. Further, the earlier judicial case review highlighted that competent, financially-comfortable adult children are making successful claims, as are claimants from extended family and even outside the family. Taken together, these findings suggest the need for legislative changes as well as consideration of the norms, principles and legal grounds underlying court judgements in contested cases.

Contestation risks may be better managed by addressing underlying family dynamics and issues which operate to drive contestation. Document drafters in the survey had varying perceptions regarding the appropriateness and effectiveness of facilitating discussions between clients and their family members/significant others about their intentions. Facilitating such discussions at the will drafting stage may enable some testators to attend to family relationship issues. However, in other situations issues such as undue influence and conflict of interest may negate the use of such an approach. In this instance it may be more appropriate for will drafters to simply highlight the value of dealing with family issues as a way of reducing the risk of later contestation.

Clients with intentions that present a high risk of being contested often also have complex personal and/or estate circumstances. Hence document drafters should advise these clients of changes in circumstances which may warrant consideration of changes to their will (e.g., acquired disability in children, divorce/partnering) and require further family discussion regarding their will.

Project overview

This summary is based on the results from Stage 4 – on line survey of will drafters. The survey invited document drafters to share, at a broad level, their experience of the difficulties encountered with the will drafting process and the approaches they use to overcome those difficulties. The aim of this research component was to identify socio/familial situations and estates which present particular difficulties to document drafters and to detail approaches to resolving these difficulties.

The research team drafted a survey and completed a pre-test with seven legal colleagues in June 2013. Ethical clearance for this research was obtained from The University of Queensland and Queensland University of Technology. A pilot study was undertaken with the POs (seven public trustee organisations across Australia) and the survey was adjusted in response to this pilot work.

The on line survey was made live on Qualtrics on line survey platform on 9 October 2013. An email containing background information and a survey link was sent to contact/s within each PO for distribution to all document drafters within and outside their organisation with experience in the area of will drafting. The research team also distributed the survey through relevant community legal centres as well as State Law Societies for completion by private solicitors who draft wills. This was to ensure that there was opportunity to include a diverse national sample of will drafters. All State Law Societies agreed to distribute information on the survey to their members via their organisation's electronic newsletter. The online survey was open to participants for a period of six months and took around 15 minutes to complete. Qualtrics does not store IP addresses or other information that could be used to identify the participants. All responses, therefore, remained anonymous and confidential.

This document presents a summary of results for the 257 surveys completed. Responses to questions on other planning documents (enduring powers of attorney and advance directives) are not presented as many respondents (65-95%) failed to answer these questions.

Respondents

Table 1 below provides a snapshot of respondent characteristics (n=257). Respondents had a broad range of professional experience, however, most (70%) were private solicitors (either general solicitors or wills and estate planning specialists) or Public/State Trustee will drafters/solicitors.

Table 1 Characteristics of respondents

Variable	n	%
Respondents (n=257)		
Jurisdiction		
New South Wales	39	15
Queensland	64	25
Western Australia	30	12
Victoria	25	10
Tasmania	22	9
South Australia	12	5
Australian Capital Territory	6	2
Northern Territory	0	0
State not given	59	23

Variable	n	%
Area		
Capital city	101	39
Urban area	24	9
Regional area	69	27
Area not given	63	25
Current occupation		
Will drafter/solicitor within a Public/State Trustee	65	25
Private solicitor - general	66	26
Private solicitor – wills and estate planning specialist	49	19
Will drafter/solicitor within a trustee company	10	4
Other[1]	14	5
Current occupation not given	53	21
Average wills drafted per year		
Mean (SD)	225 (355.09)[2]	
Median	100	
Range	0-2000	
Number not given	59	23
Average deceased estates administered per year		
Mean (SD)	29 (144.03)[2]	
Median	12	
Range	0-2000	
Number not given	63	25

NB Percentages quoted are the proportion of valid cases and may not total 100 due to rounding. Years of experience not provided as predominantly missing cases. [1] Examples of 'other' are community lawyer/solicitor, retired, working in local government. [2] Large standard deviations reflect the wide range of values.

On average, solicitors and will drafters from within Public/State Trustees drafted more wills per year (M=430, SD=443.90) than private solicitors (M=100, SD=130.87), $t(1, 69) = -5.82$, $p < 0.001$. While general private solicitors drafted an average of 83 wills per year, private solicitors who were wills and estate planning specialists drafted an average of 134 wills per year. Very large standard deviations reflect the wide range of experience with will drafting; average number of wills drafted per year by Public/State Trustees ranged from 0-1650 and 0-1200 for private solicitors. Eligible survey respondents included those with previous experience in will drafting, resulting in four 'zero' responses. The observed difference in average numbers of wills drafted per year is likely because 57% of solicitors were general solicitors rather than wills and estate planning specialists.

Across most states (WA, Vic, Tas and Qld) there were significantly more respondents who were private solicitors than those from Public/State Trustees. Conversely in NSW more respondents were from Public/State Trustees than private solicitors (76% versus 24% respectively, $p < 0.001$, Fisher's exact test). Given the differences in the sample between the states and the small number from some states, the analysis will primarily use the national data.

Figure 1 Survey respondents by state

Key findings

Allocation principles used in framing wills and bequests

The responses reported here record will drafters' perceptions of patterns and practice based on their own experience. Analysis of survey responses shows that wills are used largely to equally distribute assets to immediate family members (i.e. spouse and children). A belief that assets should be distributed equally between children predominates amongst testators. Respondents indicated that very few testators recognise in their will friends, organisations including charities, carers or pets. This reflects very strongly the findings of the national prevalence study.

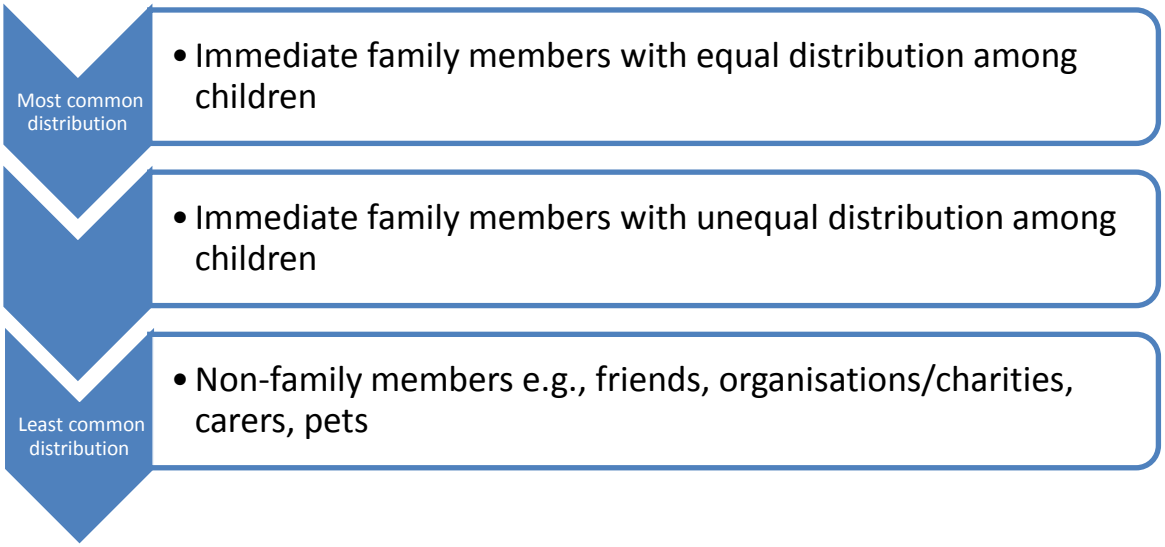

Figure 2 Hierarchy of allocation principles

Use of unequal allocation principles

More than half of will drafters (58%) reported that parents only occasionally chose to divide their assets unequally between their children (including as alternative beneficiaries). Reasons for parents' unequal division from **most to least commonly** observed were:

1. To reflect the quality of each child's relationship with the testator
2. To recognise prior financial contributions made by the testator to each child
3. To reflect the degree of care and (non-financial) support they received from each child
4. To reflect children's needs (e.g., greater distribution to a child with high care needs)
5. To achieve equitable outcomes (e.g., children obtain similar levels of financial security)
6. To reflect each child's status (e.g., a biological or step child)
7. To recognise prior financial or non-financial contributions the child has made to the testator's business or farm
8. To prioritise cultural and/or religious beliefs (e.g., appointing beneficiaries based on gender or position within the family, such as the eldest child)
9. Other reasons e.g., lack of contact/estrangement between a parent and child(ren), family discord, concerns about a child's partner, children have financial difficulties or drug/alcohol problems.

Will drafters from Public/State Trustees were more likely than private solicitors to report unequal division of assets between children (28% versus 13% reported this allocation occurred frequently, p = 0.013, Fisher's exact test) (Figure 3). However most respondents across both groups reported that unequal allocation occurred only occasionally.

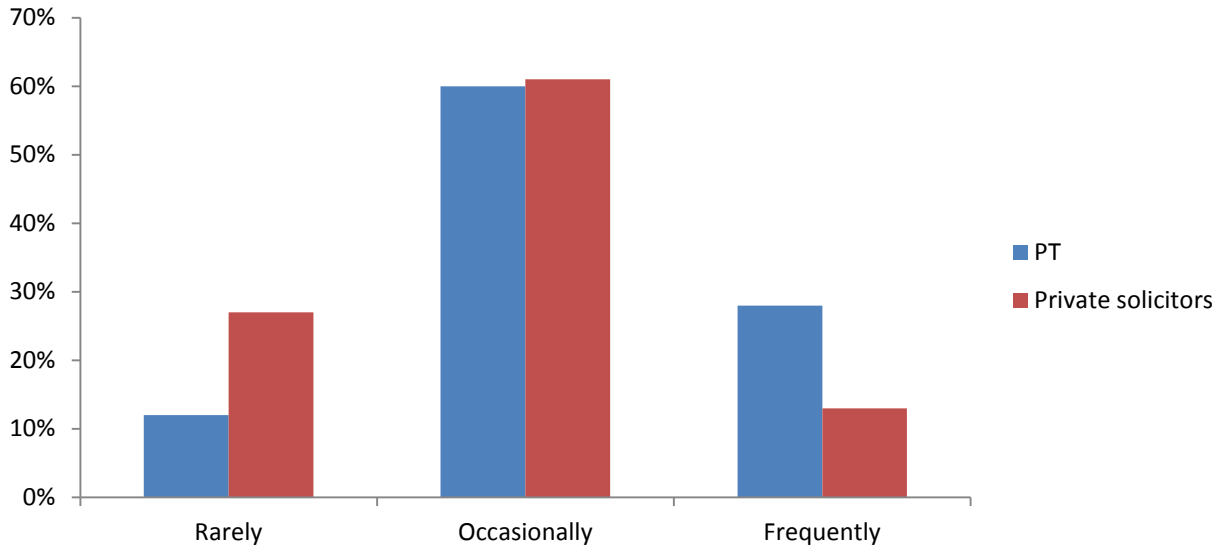

Figure 3 Frequency unequal division of assets between children

Overall there was agreement across will drafters from Public/State Trustees and private solicitors regarding reasons for parents' unequal division between children. The exception was where parents allocated assets to recognise prior financial or non-financial contributions to the testator's business or farm. Private solicitors reported encountering this more often than other will drafters from

Public/State Trustees. Perhaps this reflects the differing client bases of public and private will drafters.

Inclusion of non-family members as beneficiaries

Will drafters typically reported that clients only occasionally intend to include beneficiaries who are not family members (Figure 4). Will drafters from within Public/State Trustees were more likely than private solicitors to report that clients frequently include beneficiaries who are not family members. Twenty eight percent of will drafters from within Public/State Trustees reported this distribution occurred frequently compared to only 13% of private solicitors, ($p < 0.001$, Fisher's exact test).

Fewer than 20% of respondents considered the inclusion of friends/other people who are not family members or organisations/groups (including charities) as beneficiaries as presenting difficulties. However the inclusion of pets as beneficiaries was seen as posing difficulties for will drafters with over half of the respondents identified this situation as 'difficult' or 'very difficult'. There was agreement across groups regarding the level of difficulty posed by inclusion of different types of beneficiaries outside the family (e.g., friends, organisations and charities, carers, pets).

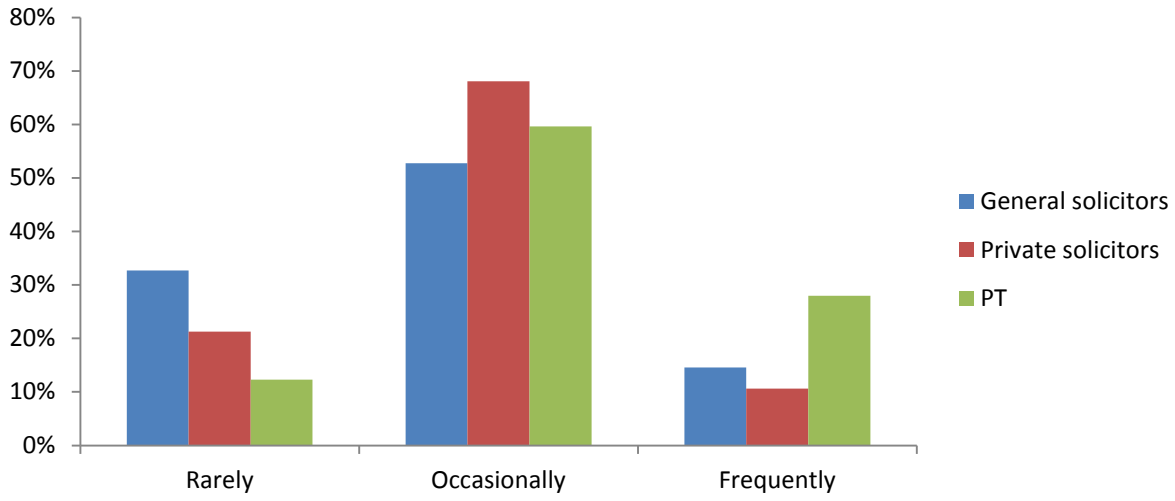

Figure 4 Frequency of client intentions to include beneficiaries outside the family

Situations presenting challenges to document drafters

Respondents were asked to identify what family and estate characteristics typically create the most difficulties when drafting a will.

Family characteristics identified as creating the most difficulties included:

- Blended families (primarily due to conflicting entitlements of the testator's current spouse and children from different relationships). Additional difficulties identified related to the two partners differing in their wishes regarding asset distribution and/or when there is unequal contribution to the joint asset base.
- Estrangement, family discord and sibling rivalry.

- Children/adult children with disability, mental health problems and/or substance misuse.
- Dislike of a child's spouse/partner.
- De-facto relationships.
- Families in which the testator proposes unequal distribution but does not discuss these intentions with their family members.

Estate characteristics often identified as presenting difficulties included:

- Estates including complex trusts arrangements (e.g., family trusts).
- Superannuation (especially self-managed funds).
- Life tenancy in realty (particularly where the property requires repairs).
- Small estates.
- International assets.
- Companies and businesses.
- Family businesses and farms, particularly where children have contributed unequally.

Approaches used to manage challenges

This section presents the approaches commonly used to manage challenges and perceptions of the effectiveness of approaches. Where appropriate the responses of the three major respondent groups - public trust will drafters, private will and estate specialists and general solicitors - have been compared and contrasted.

Approaches commonly used to reduce contestation

Respondents were presented with a list of approaches and strategies which might be used with clients with complex personal circumstances or intentions that present a high risk of being contested. Respondents rated how likely they were to employ each particular strategy on a scale with responses ranging from "very unlikely" to "very likely" (and including a response option "I have not used this approach").

Approaches/strategies from **most to least commonly** reported were:

1. Spending time discussing the likelihood, and reasons why, the will may be contested
2. Encouraging the client to explain their decision in their will or a document to be read in conjunction with their will
3. Providing advice on the way in which assets are typically distributed through wills
4. Encouraging the client to consider will alternatives (e.g., a trust)
5. Encouraging the client to discuss their intentions with their family members, executor and important others
6. Encouraging the client to distribute their assets as *inter-vivos* gifts
7. Taking a leading role in facilitating discussions between the client and their family members or significant others about the client's intentions. More than half of those surveyed reported that they had never used this strategy/approach.

The first two responses listed above were the most common approaches for both private solicitors (general and wills and estate planning specialists) and will drafters from within Public/State Trustees.

Respondents were then asked what else they might do in circumstances where a client describes intentions they believe present a high risk of contestation. Common strategies included:

- Encouraging the client to consider distributing assets outside the will, typically through the use of joint tenancy, superannuation binding death benefit nominations and trusts (most often family trusts)
- Explaining the costs (economic, social etc.) of will disputes
- Providing advice in writing
- Making file notes regarding client's intentions and stated reasons together with the advice given.

Perceived effectiveness of approaches

Respondents were presented with a list of four approaches and strategies which may be used when managing clients with complex personal circumstances or intentions that present a high risk of being contested. Respondents rated the effectiveness of each particular strategy on a scale with responses ranging from "very ineffective" to "very effective" (and including a response option "I have not used this approach").

There was a gap between use of the four strategies presented and the perceived effectiveness of the strategies. Frequency of strategy use exceeded perceptions of effectiveness for all four approaches presented. For example, while 98% of PTs and 96% of private solicitors reported that they were likely or very likely to encourage their client to explain their decision in their will or a document to be read in conjunction with the will, only 42% of respondents rated this approach as effective or very effective in reducing risk of contestation. This suggests that while document drafters often put forward strategies to reduce contestation risks they may not be confident in the effectiveness of these strategies.

Respondents considered the following approaches to be most effective in reducing contestation risk:

- Encouraging clients to explain their decision in their will or accompanying document (42% rated this approach as effective or very effective, 29% rated this approach as somewhat effective)
- Encouraging clients to discuss their intentions with their family members, executor and important others (38% effective or very effective, 24% somewhat effective)
- Encouraging clients to distribute their assets as *inter-vivos* gifts (37% effective or very effective, 18% somewhat effective).

Taking a leading role in facilitating discussions between the client and their family members or significant others about the client's intentions was seen by most respondents as being either of limited effectiveness or was not an approach they had used (Figure 5).

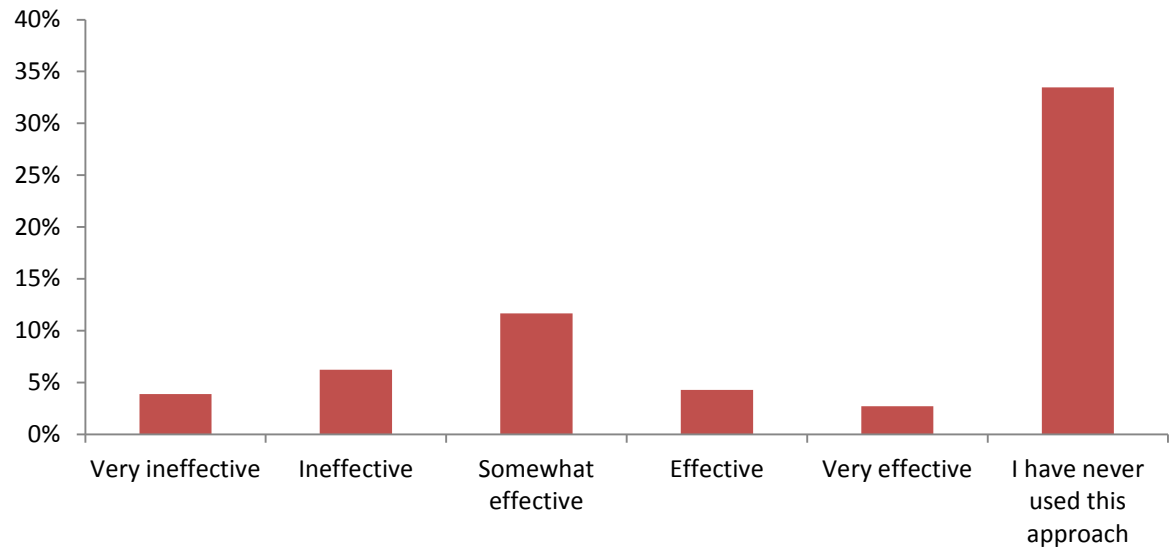

Figure 5 Perceived effectiveness of facilitating discussions about client intentions

There was a high level of agreement between will drafters from within Public/State Trustees, general private solicitors and private solicitors who were wills and estate planning specialists regarding (1) approaches used when managing clients with complex personal circumstances or intentions and (2) perceived effectiveness of various approaches. Exceptions were regarding:

1. Taking a leading role in facilitating discussions between the client and their family members or significant others about the client's intentions. Twenty seven percent of specialist solicitors and 16% of general solicitors reported that they were likely or very likely to use this approach compared to only 6% of will drafters from Public/State Trustees (p = 0.002, Fisher's exact test).

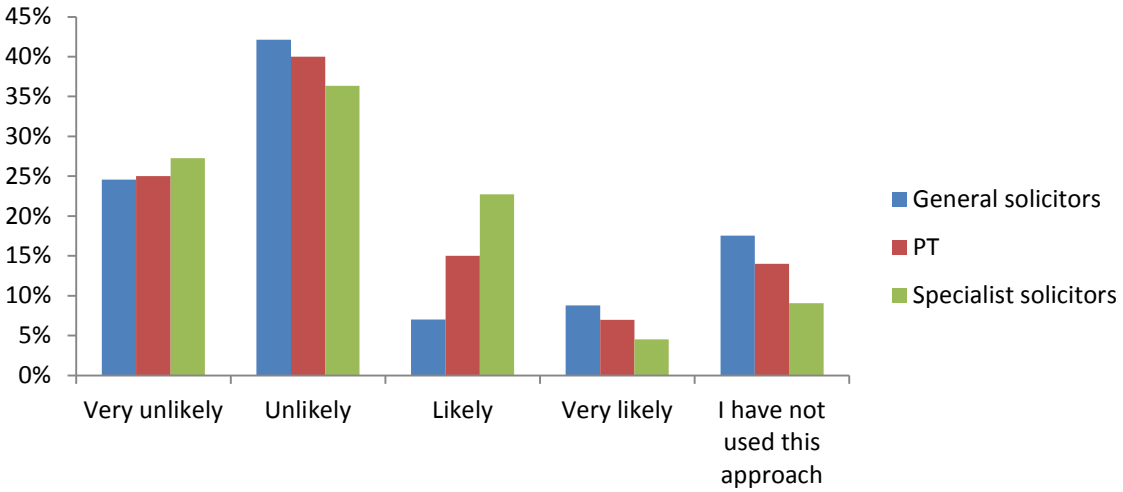

Figure 6 Use of facilitating discussions about client intentions

The majority of both private solicitors and respondents from Public/State Trustees reported that they had never taken a leading role in facilitating discussions between the client and family members/significant others about the client's intentions. Perceived effectiveness of this approach

was rated poorly; 18% of specialist and 17% of general solicitors regarded this approach as effective or very effective, no will drafters from within Public/State Trustees did (p = 0.001, Fisher's exact test).

2. Encouraging the client to distribute their assets as *inter-vivos* gifts. Sixty six percent of specialist solicitors and 58% of general solicitors reported that they were likely or very likely to use this approach compared to only 35% of will drafters from Public/State Trustees, p = 0.001, Fisher's exact test.

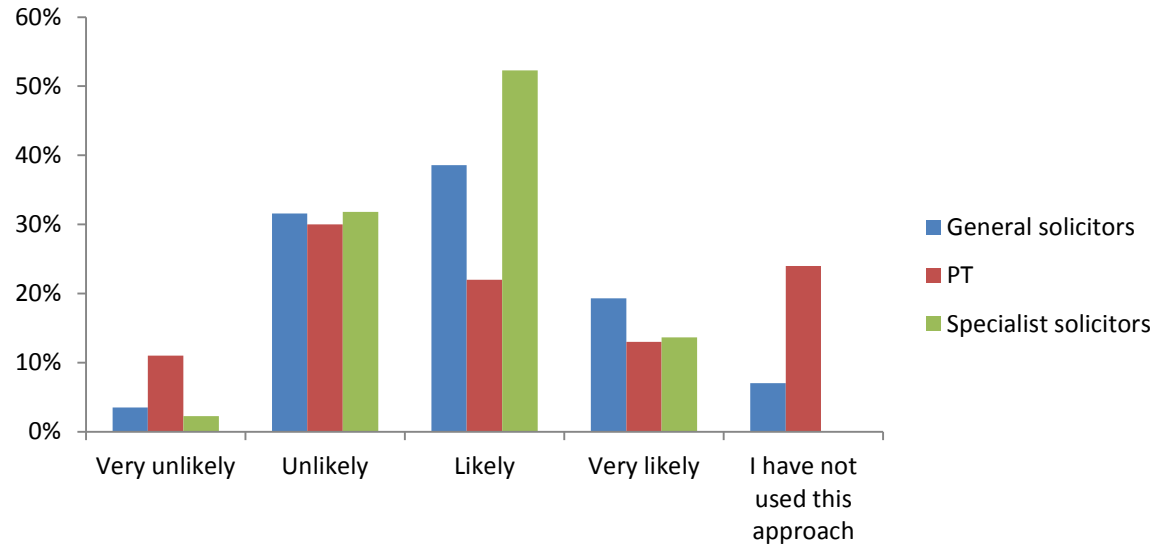

Figure 7 Encouragement of *inter-vivos* gifts

While 41% of specialist and 50% of general solicitors regarded this approach as effective or very effective, only 23% of will drafters from within Public/State Trustees did (p < 0.001, Fisher's exact test). Whether this reflects a difference in client bases of private and public will drafters is yet to be determined.

Reponses to case scenarios

Three short case studies describing fictional clients with complex personal circumstances were presented with open ended questions attached. Respondents were randomly assigned a single case study to complete. Respondents were asked to identify what presented the greatest difficulty in drafting a will for a client with these personal circumstances and to detail approaches they would take to will drafting if presented with a client in these circumstances.

Across the three case studies the majority of respondents identified the threat of contestation as being problematic. Proposed approaches to will drafting in the given context were highly variable across respondents. The most frequently identified step will drafters would take to reduce the likelihood of contestation was to encourage their client to explain their decision in writing, typically in a document (letter, statutory declaration, affidavit) to be read in conjunction with the will in the event of contestation. Consistent with the survey questions, very few respondents proposed they

would facilitate discussions between the client and their family members or significant others about the client's intentions for any of the cases.

Case Study 1: Mrs. Jones requests that her assets be divided equally between two of her three children and that under no circumstances her second husband benefit from her estate.

Mrs. Jones explains she divorced her first husband after 10 years of marriage and two daughters. She married her second husband a few years later and they have been living together in the family home for the last 29 years. Her second husband brought one son to the marriage.

Mrs. Jones is keen to see her estate divided equally between her biological daughter and step-son. She claims to have had little contact with her second daughter following her divorce. Mrs. Jones praises her first daughter and step-son for providing emotional and practical support to her in the last four years during which she was diagnosed with heart disease. When questioned further, Mrs. Jones alleges that her current husband is often physically violent towards her, although admits she has never contacted police or sought to press charges.

Mrs. Jones identifies her primary asset to be the family home worth $350, 000 and a small amount of cash savings. The home is held solely in Mrs. Jones' name and was awarded to her during her divorce. The cash savings she earned while married to her second husband. While the family home is in her name, all assets of the marriage are communal.

Mrs. Jones has not discussed her intentions with any of her family members.

When asked what, if anything, presents the greatest difficulty in drafting a will for a client with these personal circumstances, respondents most commonly identified the potential for a family provision application to be launched by Mrs. Jones' husband and/or second daughter who have been excluded from her will. A common concern was that Mrs. Jones has not provided for her husband in any way, even via a life interest or right of residence in the family home. A number of respondents indicated that Mr. Jones' financial position would be an important consideration in this case. Some respondents reported that Mrs. Jones' allegations of physical violence would be difficult to substantiate in the circumstances. Others expressed concern for her safety and well-being and stated that they would encourage her to seek assistance and/or report the violence.

By far the most frequently identified step will drafters would take to reduce the likelihood of Mrs Jones' will being contested was to encourage Mrs Jones to explain her decision in a document (letter, statutory declaration, affidavit) to be read in conjunction with her will in the event of contestation. Only a minority suggested Mrs. Jones explain her decision within the will itself. Other common approaches were to spend time discussing the likelihood, and reasons why the will may be contested as well as expected outcomes/consequences of contestation and encouraging Mrs. Jones to consider a life interest or right of residence in the family home for her husband. A further suggestion was encouraging Mrs Jones to consider transferring the house to her first daughter and step-son in her lifetime/putting their names on the title deed as joint tenants so that the house automatically passes to them on her death. While some respondents suggested Mrs. Jones discuss her intentions with her family, others felt this was inappropriate given the allegations of violence from her husband.

Case Study 2: Jonathon, who is widowed, owns a two-third share of a large cattle property that has been operated by his family since the early 1880s. Jonathon inherited his share from his father. One third of the property is owned by Jonathon's cousin, William, who currently resides in the UK. The title of the property is held in a family company of which Jonathon and William are shareholders.

Jonathon wants to leave his share of the property to his eldest son, Thomas, who unlike Jonathon's other two children remained on the farm to oversee operations.

Jonathon also owns a share portfolio, the value of which is forecast to increase significantly over the next 20 years. While Jonathon has always treated his children equally, he believes it is important that ownership of the farm is simplified and efficiency of operations improved. Jonathon has high hopes Thomas will be able to purchase the final third of the property from William and believes the contents of the share portfolio will enable Thomas to do so.

Jonathon states that he has provided significant financial support to his other son and daughter by funding their university degrees and living expenses while at university. He emphasises the fact that he provided this financial support despite his two younger children making no contribution to the operation of the farm and having no intention to contribute to the farm in the future.

Jonathon is seeking to draft a will that will provide Thomas the best opportunity to gain ownership of the farm in its entirety and leave the residue of his estate to be equally divided between his remaining son and daughter, primarily his

Most respondents commonly identified two broad difficulties in relation to this scenario. One was uncertainty around the nature and value of the estate at the time of Jonathon's death e.g., value of share portfolio and cattle property, whether or not William is agreeable to selling the final third of the property (and associated cost) etc. Another issue identified was the potential for a family provision application resulting from unequal distribution of assets amongst Jonathon's children. Respondents also highlighted some of the complexities involved in transferring shareholding in a family company e.g., a company can have several classes of shares on issue. A small number also questioned Jonathon's assumption that Thomas intended to/would buy a one-third share of the property from William.

As with the previous case study, the most frequently identified step will drafters would take to reduce the likelihood of Jonathon's will being contested was to encourage him to explain his decision (and prior financial contributions to the two excluded children) in writing, typically in a document (letter, statutory declaration, affidavit) to be read in conjunction with his will in the event of contestation. A further strategy was to spend time discussing the likelihood, and reasons why, the will may be contested and expected outcomes. Other respondents stated they would encourage Jonathon to consider transferring his share in the company to Thomas in his lifetime or putting Thomas's name on the title deed as joint tenants so that Jonathon's share automatically passes to Thomas on Jonathon's death (although this approach would attract stamp duty and capital gains tax). A small number of respondents suggested that Jonathon could leave his share of the property to Thomas but equally distribute his share portfolio to his three children and/or discuss his intentions with his family.

Case Study 3: Mrs. T emigrated with her husband to Australia 40 years ago. They have two Australian-born and educated children, one son and one daughter. She was widowed 5 years ago.

In her traditional culture the eldest son is expected to provide practical care and financial support to his parents in exchange for being the sole inheritor of the family wealth.

Mrs. T currently lives alone in the family home and, in recent years, is experiencing failing health. Her daughter, who lives in the same suburb as Mrs. T, has provided significant practical and emotional care to her mother over this time. Mrs. T's son, who lives 1.5 hours south of Mrs. T, phones his mother regularly and tries to visit at least once every couple of months.

Mrs. T believes her son will soon ask her to move in with his family, a wife and two young children. She has not discussed this issue with her son but believes he is aware of his duty. Mrs. T's daughter reports her brother has been quite clear he does not want their mother to move in with his young family. Mrs. T refuses to accept that her son will not do his duty. She intends to appoint her son as executor of the estate.

Mrs. T would like to draft a will that reflects her cultural values and facilitates eldest-son succession. She has discussed her deeply held cultural beliefs with her daughter. Her daughter is upset by Mrs. T's decision. She points out that she has provided most of the care to her mother and argues that in Australian culture children are treated equally by their parents.

Mrs. T attends with her daughter.

Most commonly respondents identified difficulties around the potential for a family provision application to be launched by Mrs. T's daughter who has been excluded from her will despite having provided significant care and support to Mrs. T. Many respondents also stated that Mrs. T's daughter should not be in attendance during the meeting. The fact that Mrs. T has prioritised cultural beliefs when dividing her assets was seen as problematic by many given that these beliefs differ from those of the broader Australian community (and possibly Mrs. T's children) and the requirements of Australian law, and because there is no evidence to suggest her son will fulfill his duty to support his mother as she expects. However some respondents felt that Mrs. T's cultural beliefs should be respected and that the will should be drafted in accordance with her wishes.

By far the most frequently identified step will drafters would take to reduce the likelihood of Mrs T's will being contested was to spend time discussing the likelihood, and reasons why, the will may be contested as well as expected outcomes/consequences of contestation. Respondents also reported that they would encourage Mrs T. to explain her decision in a document to be read in conjunction with her will in the event of contestation. Only a minority suggested Mrs. T explain her decision in her actual will. Some respondents reported that they would encourage (and in some cases facilitate) discussion between Mrs T and her children regarding her intentions. While some stated they would encourage Mrs. T to make at least some provision for her daughter, others expressed that if Mrs. T's intentions were unchanged following discussion of contestation risks, no further action was warranted. A small number of respondents reported that they would encourage Mrs. T to consider will alternatives (e.g., trust) or to distribute her assets as *inter-vivos* gifts to the son and/or daughter. Many respondents stated that they would only consult Mrs. T on her own (not with her daughter present).

Summary

Strategies proposed by respondents to manage clients with complex personal circumstances included:

- Encourage clients to explain their decision in a document (letter, statutory declaration, affidavit) to be read in conjunction with their will in the event of contestation.
- Spend time discussing the likelihood, and reasons why, the will may be contested as well as expected outcomes/consequences of contestation.
- Encourage the client to consider making some level of provision for a family member they intended excluding from their will.
- Encourage clients to consider will alternatives (e.g., trust) or to distribute their assets as *inter-vivos* gifts.

Will drafters also emphasised the need to document the will making process e.g., the client's intentions and stated reasons together with any advice given.

Although document drafters suggested strategies to reduce contestation, they did not consider these able to prevent contestation altogether. Perceptions regarding effective strategies were also highly variable. There is the potential for testators with complex circumstances who consult multiple legal professionals to receive conflicting advice.

The quotes below reflect a strong view that that contestation cannot be avoided.

> "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. Undue influence, FPA, lack of capacity, they may not be successful, but they can always cause a lot of pain and suffering."

> "The law allows FPA if adequate provision has not been made from an estate. 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. That is life. I am not confident that by this survey or any other work that you do that you will arrive at any startling new way of drafting wills to prevent people making a claim against an estate. But good luck."

Conclusion

The patterns of allocation reported by will drafters reflect the findings of the national prevalence survey. A distribution to family with equal shares to children was seen as least likely to be problematic by will drafters.

Difficulties in drafting wills were related to family structure, dynamics, special needs or problems and/or the nature of assets to be distributed. Complex assets (such as complex trusts, superannuation, international assets, farms and businesses) and recognising unequal contributions to assets were also highlighted as presenting challenges to drafters. These issues are being explored in more depth in interviews with testators.

Will drafters are generally not optimistic about being able to avoid contestation particularly where there are complex family dynamics and/or an unwillingness of the testator to take advice. There is also recognition that no strategies on the part of a will drafter can totally prevent an eligible applicant from making a challenge.

Will drafters identified as problematic the lack of understanding within the broader community about the importance of having an appropriate will, the time involved in properly drafting a will, the consequences of intestacy and family provision legislation. Some respondents reported that even will drafters often have limited understanding of relevant legislation and issues, particularly given not all specialise in wills and estate planning.

Numerous respondents discussed the highly individual nature of wills due to differences in clients' personality, family situation, assets, cultural background etc. and noted that drafting wills has become an increasingly complicated process as a result of the greater complexity of people's personal circumstances (e.g., blended families, addiction/mental health issues) and the intricacy of people's financial circumstances (superannuation, family trusts etc.). It often takes considerable time to obtain comprehensive information about a testator's family, financial and other circumstances. Some respondents suggested that not all will drafters take the time needed to fully understand the client's circumstances and document their intentions. They also noted that not all clients are willing to pay for the level of advice required to best give effect to their wishes and/or not all are worried about contestation, or willing to do what is required to deal with the underlying issues.