

FAMILIES AND
GENERATIONAL ASSET
TRANSFERS: MAKING
AND CHALLENGING
WILLS IN
CONTEMPORARY
AUSTRALIA

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1.0 Project Overview

The project aims to establish a national database on the prevalence, patterns and practices of will making in Australia, the principles underpinning this form of asset distribution and/or contestation and the issues confronting document drafters and members of the community. The methodology has five major components:

1. A national prevalence survey of will making (N= 2,405)
2. A judicial case file review of contested cases (N=245)
3. A document analysis of Partner Organisation (PO) files involving disputed cases
4. Key informant surveys with document drafters
5. Key informant interviews relevant to circumstances of interest (including, complex families, complex assets, and cultural practices).

The project commenced in December 2011 and has a total operating budget of \$375,000.

The first and second components of the project are almost complete and data collection for the third component has commenced.

This document provides:

- summaries of both the judicial case file review and the national prevalence survey
- an update on progress of pilot study of the PO file review
- an outline of the next stages of the project.

Documents describing outcomes for both the national prevalence survey and judicial case file review are provided as supplementary documents.

2.0 Progress to Date

2.1 Judicial Case File Review

Purpose

This part of the research involves a review of all adjudicated succession law cases in Australia during a 12 month period (Jan – Dec 2011). The purpose of this judicial case file review is to identify the legal grounds relied on in contesting wills, disputants' underlying motives and the distributional and equity principles that underpin judgments about contested wills. This analysis will aid our understanding of those disputes most likely to end up in court and the principles applied by the Court when resolving the matter.

Progress

Cases meeting inclusion criteria have been identified, summarised and analysed. Wider analysis of the data set is almost complete and initial work has been reported in a draft publication titled, *A snapshot of succession law contests in Australia*. This document was provided to Industry Partners (via the designated legal contacts) for comment on 5 February 2013.

A copy of the snapshot document is attached as a supplementary document to this report.

Overview of key issues

Family relationships

Analysis to date reveals some key features in the cases that reach the courts and require judicial resolution. One such feature is family relationships marked by complexity, a history of family discord or both. Some family-related factors often present in succession litigation include:

- A testator excluding children from a will, or making an uneven distribution that is perceived to be unfair. This sometimes arose against a backdrop of a history of previous favouritism or significant inter-vivo transfers;
- A testator excluding his or her partner from the will (including sometimes an ex-partner) or providing the partner with only a life interest; and
- Complex or blended families, especially where the testator had remarried and there are children of the deceased from a previous or other relationship.

Children of the testator are the major initiators of litigation. There were a total of 108 family provision claims in the sample (some estates had more than one person making a family provision claim). The bulk of those claims (67) were brought by children, with a majority of those claims by children involving a dispute between siblings (including step and foster siblings).

Large and complex estates

The value of the estate was not listed in just over a quarter of judgments. Of the remaining 143 estates where the value was listed, 60% were valued at \$1 million or less and over half of those estates were worth less than \$500,000 (31% of the 143 cases). Twenty-four cases (17% of the 143 cases) involved an estate valued at over \$3 million.

While there is some evidence to suggest that larger estates (> \$3 million) trigger conflict, smaller estates (< \$500,000) are not immune from contestation. In this sample, smaller estates comprised the majority of litigated cases. Furthermore, when looking only at family provision cases, all claims against 8 large estates included in the sample were successful, whereas only half of all family provision claims made against 21 smaller estates (< \$500,000) included in the sample were successful. This suggests, as expected, the size of the estate is a particularly relevant consideration for the Court.

Complexity of an estate is also a feature of the cases that are litigated. There were cases involving family businesses or trusts, and sometimes there was an intersection between the issues of family dynamics discussed above and complexity of the estate where contributions to family businesses or property arose.

New South Wales

As mentioned at the last Industry Partner meeting, there is noteworthy variation in succession contests in New South Wales. In the sample 12 month period, New South Wales accounted for 87 of the 196 estates contested. (The next closest states were Queensland with 43 estates and Victoria with 31 estates.) Of those 87 contested estates, 60 involved family provision claims. They accounted for 60% of all the family provision claims in the sample across Australia. Family provision claims also

have a higher rate of success in New South Wales than in other Australian jurisdictions. We have not yet identified anything on the face of the judgments of the cases sampled that would explain this variation in New South Wales. For example, one possibility considered was size of the estate but they are not larger in New South Wales than other states. We invite you to consider this issue for discussion.

Discussion Box 2.1

FOR DISCUSSION:

- a) I am conscious of the complexity of this area of law, particularly when reviewing all eight jurisdictions, and so would welcome any brief feedback POs might have on the attached draft publication. The focus of the research is an analysis of the cases in the sample but we are keen for this to adequately capture the position in your State.
- b) We have identified above some key family-related factors that are features of the cases in the sample. Are these the significant family dynamics to consider or are there other relationships/dynamics that we should be looking for?
- c) In terms of estate size, it appears that a small estate does not necessarily deter will contests. Also, very large estates may present a target for litigation, and family provision claims in such cases are likely to be successful. Is this characterisation of the role of estate size consistent with your experience or are there other dimensions we should be considering?
- d) The variation in New South Wales was described above. Are there any explanations for why that State is so different? (e.g., culture of legal profession, practice of Supreme Court, legislative issues?)

2.2 National Prevalence Survey

Purpose

The national prevalence survey explored the prevalence of will making in Australia, the triggers to making, changing or not making a will, advice sought and the way in which assets are typically distributed through wills.

Progress

The survey has been completed and the data extensively analysed. A copy of the final report is attached as a supplementary document to this document. The executive summary from this report is provided in Appendix 1.

Discussion Box 2.2

FOR DISCUSSION:

- a) Any comments on the Executive Summary?
- b) The two strongest predictors of having a will were age and estimated value of the estate. Other demographic characteristics, such as gender and relationship status, are less strongly associated with the likelihood of making a will. Is this finding consistent with your experience and expectation?
- c) The national prevalence survey revealed respondents often failed to update their wills in accordance with changing personal circumstances. Could targeting existing public/state trustee clients to review their wills be a potential source of additional clients and improve the relevance and quality of wills?
- d) Next steps: dissemination of the report (e.g., publications)

2.3 Partner Organisation File Review

Purpose

This component of the research seeks data on cases involving a dispute dealt with, in the first instance, by the partner organisations. Many disputes dealt with by the partner organisations do not go to court, or are settled outside court. The review of public trustee case files will augment the judicial case file review.

Progress

Ethical clearance to collect de-identified data from these files has been obtained and, with the partner organisations, a coding template and notes have been developed and piloted.

To date feedback and completed pilot templates have been provided by ACT, SA and QLD. NSW and WA have indicated they are on track to provide completed pilot templates by the deadline.

Feedback from partner organisations provided during the pilot phase has been incorporated in to the coding template and a copy of the final template is provided as Attachment 1.

The time taken to complete the coding has been estimated at between 10 and 30 minutes depending on the size and complexity of the file.

Data collection during the main study will involve working with partners to review all cases involving a dispute closed between March/April 2013 and September/October 2013.

Discussion Box 2.3

FOR DISCUSSION:

- a) Any comments or feedback on the pilot of the project?
- b) Any comments or feedback on the final coding template and notes?
- c) Proposed next steps and timeframes.

3.0 Planning for the next stages of the research (for information rather than discussion)

3.1 Key informant interviews

This component seeks to develop an in depth understanding of the basis of bequests, the principles of allocation, the processes involved in making a will and knowledge of intestacy. These interviews will explore issues in further depth with 60 and 80 interviews with will makers and non-will makers grouped on the basis of key circumstances of interest.

The research team aims to begin this work by the middle of 2013 and complete this phase by early 2014.

3.1 On line survey of document drafters

This component aims to build on the extensive expertise of POs in drafting wills. It will identify those socio/familial situations which present difficulties to document drafters and their approach to resolving these difficulties.

The research team will develop a draft survey by September 2013 which can then be piloted by the POs. The final version will be made live by November 2013.

4.0 The next Industry Partner meeting (for information rather than discussion)

4.1 Early results from the PO File Review

POs will be provided with early results arising from the analysis of PO files involving disputed cases, including the composition of disputed estates, who is likely to dispute, the processes of resolution and outcomes of the disputes.

4.2 Update on research progress

POs will be provided with updates on research progress at the next Industry Partner meeting.

5.0 The research team

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Appendix 1 – Executive Summary – National Prevalence Survey

Executive Summary

Background

This paper reports data from a national prevalence survey conducted as the first component of the ARC funded project *Families and generational asset transfers: Making and challenging wills in contemporary Australia*. The purpose of this stage of the project was to:

- develop a comprehensive national database on the prevalence of will making in Australia
- identify who is most likely to draw up a will and who is not
- better understand where will makers go for advice and guidance
- explore the way in which assets are typically distributed through wills.

This research will provide foundational data against which the impact of initiatives relating to increasing and improving will making can be evaluated.

Outcomes from the national survey provide evidence of intentions, practices, knowledge and expectations of those who do and do not make wills across populations groups in Australia.

Method and sample

The survey was administered by telephone between August and September 2012. It collected data about:

- demographics (age, gender, relationship status, dependents, highest level of education, degree of ethnic diversity, estimated value of the estate)
- will making intentions, motivations, and triggers
- information and advice sought about the purpose and process of preparing a will
- prior experience with other people's wills; and
- content of current will.

The sample comprises 2,405 Australian adults (18 years or older). The sample was age stratified with half of the respondents aged 18 - 45 years and half aged 46 and over. The oldest respondent was 98 years. Smaller jurisdictions, the Australian Capital Territory (ACT), Tasmania (TAS) and Northern Territory (NT), were oversampled to ensure that sufficient numbers were interviewed to allow for statistical analyses.

Prevalence of having a will

Sixty per cent of the Australian adult population has a valid will. Within the states and territories this proportion varies between one half and two-thirds of all adults (Fig 1, p. 12).¹ The interstate differences are not statistically significant.²

¹ Page numbers as per the report, *Outcomes from a national prevalence survey of will making*, attached as supplementary document

² This means the differences observed are likely to be a function of the sample and do not reflect true differences between states and territories.

The research also examined the prevalence of people having documents that describe their intentions should they lose capacity to make financial, personal and health care decisions (e.g., Enduring Power of Attorney (EPA), Advance Directive (AD)). Less than one third of respondents had prepared an EPA (30%) and even fewer had prepared an AD (14%). Only eleven per cent of respondents had prepared both types of documents.

The distribution of respondents across jurisdictions who report having prepared an EPA is generally consistent with the national sample, although it is somewhat higher in Queensland (39%) and South Australia (37%) and lower in Western Australia (24%) and the Northern Territory (20%). Across all jurisdictions, less than one fifth of respondents had prepared an AD (Table 2, p. 13).

While differences in the percentage distribution of EPAs and ADs across state and territory jurisdictions were statistically significant, this may be a function of the sample size. On further examination there was only a moderate association between state and territory jurisdiction and having an EPA or AD. Interstate differences should therefore be treated cautiously.

Predictors of having a will

In the national sample the two strongest predictors of having a will were age and estimated value of the estate. Will makers tended to be older and to own estates of higher value when compared to non-will makers. Other demographic characteristics, such as gender and relationship status, were less strongly associated with will making behaviour.

Age and estimated value of the estate remained the strongest predictors of having a will across most states and territories. Estate value was the strongest predictor of will making in the Northern Territory. In Western Australia and the Australian Capital Territory estate value was not a significant predictor of having a will. There is also state-level variation in the strength of relationship between other demographic characteristics (gender, relationship status and ethnically diverse background) and will making behaviour (Table 3, p. 16).

Age, estimated value of the estate and other demographic characteristics were not very good at predicting preparation of an EPA or AD. Will making was, however, associated with the preparation of such documents. In particular, will makers were more likely than non-will makers to have prepared an EPA or AD. It is not clear what influenced respondents' decisions to prepare an EPA or AD. Given the close association with will making, triggers may include an intention to "get organised", recommendations by the lawyer who prepared the will, or advice from other professionals (e.g., financial planners).

Planners and procrastinators: what triggers will making

More than half of all will makers (53%) believed efforts to get organised ultimately motivated them to prepare a will. Fewer than one fifth of all will makers identified specific changes in their personal circumstances (e.g., having children) which they believed prompted will making in the first instance. Furthermore, most will makers (82%) did not attribute their decision to prepare a will to advertising instead believing they had made this decision on their own. This suggests that the appropriate timing and methods of targeting Australians to encourage making the initial will needs to be considered in more detail.

On the other hand making changes to an existing will was more likely to be triggered by changes in personal circumstances. The most commonly identified event was having children (33%). Making the effort to get organised was not commonly reported as having triggered changes to existing wills. Almost half of all will makers (46%) had made changes to their will at least once and more than half of these (51%) more than once. Changes were most likely to address changes in asset distribution (66%) and beneficiaries (57%) and least likely to reflect alterations to instructions regarding funeral, guardianship or health care arrangements. Those who made changes to a will were in general older and of higher net worth than those who had not yet made changes (p. 21-22). The need to make changes to a will over a lifetime is a significant issue that is rarely addressed. It may well be the case that the issues around will contestation relate to the failure to change a will to reflect intentions following changes to family circumstances and relationships, assets and pre provisioning through gifting or lending money, assets or articles of value to beneficiaries.

Among non-will makers, procrastination, rather than a strong resistance to will making, appears to explain why they do not have a will. More than half of all non-will makers (54%) intended to prepare a will and most reported that they did not have a will because they had just not got around to it (50%) or had not thought about it (28%). Only seven out of 980 non-will makers included in the sample specifically stated that they had not prepared a will because they believed intestacy laws would divide their assets appropriately.

Knowledge of intestacy

Non-will makers were asked what they believed would happen to an individual's assets if they died intestate. More than one third (39%) of respondents believed family members would divide the assets and more than one quarter (27%) believed the law set out how assets would be divided between family members. Around 16 per cent believed the courts would divide the assets between family members and 14 per cent believed the government would receive the estate. Very few respondents (3%) stated they did not know what would happen to assets of an intestate estate. A high degree of variability in responses was reflected at both the national and state level.

While beliefs about intestacy were not associated with key demographic differences between respondents, they were related to respondents' intentions to prepare a will. In particular, non-will makers who intended to prepare a will were significantly more likely to believe the government would receive an intestate estate, while those who did not intend to prepare a will were significantly more likely to believe family members would divide the assets (Fig 7, p. 31).

Provision, division and instruction

The survey also collected information on who respondents provided for in their wills, what they took into account when deciding how to divide their assets, and what additional instructions they had included in their wills.

For most will makers, it was important to ensure their partner was provided for, their children or others would receive an inheritance and they would protect their assets from claims by those they did not wish to provide for (Table, 18, p.33). When providing for children, almost all (93%) will makers reported dividing their assets equally.

That said, almost two thirds (62%) of will makers believed it was important to provide for their dependents while alive rather than wait until death and almost three quarters (74%) of will makers

believed it was important to use their savings to live comfortably, even if it meant not leaving an inheritance.

When deciding how to distribute their assets, most respondents did not believe it was important to leave a bequest to charity, follow their cultural or religious practices, or recognise support, companionship or assistance provided by friends and organisations (Table 18, p. 33; Table 23, 24, p. 39).

Only a small proportion of will makers included instructions other than the distribution of assets in their wills. For example, just under one quarter (24%) of all will makers had included funeral instructions and very few will makers (17%) had included a specific trust. An exception was the inclusion of guardianship instructions as more than two thirds (69%) of respondents with financial dependents had included guardianship instructions. This finding does suggest, however, that one third of respondents with financial dependents were yet to update their wills to provide for the ongoing care of their dependents.

Advice about the distribution of assets was most likely to be sought from partners and solicitors (p. 27). This was true of individuals preparing their first will and those making changes to an existing will. It is interesting to note, however, that not all will makers sought advice about the division of assets prior to preparing their most recent will and there were some jurisdictional differences in the proportion of will makers who had sought advice (Table 15, p. 28).

Cumulatively, these findings are consistent with previous research which has shown wills typically equally distribute material assets to immediate family members. Very few respondents use their wills to leave additional instructions or call attention to important relationships outside their nuclear family. There was some evidence to suggest that living comfortably in old age and retirement and providing for dependents while alive is as important as leaving an inheritance.

Professional will drafters should discuss the implications of pre-provisioning to beneficiaries through inter-vivo gifts or support. Often such financial assistance (e.g. to purchase a house, assist with a business, pay a grandchild's school fees) or practical support (accommodation, child care) provided to adult children is not equally distributed between future beneficiaries and may impact on the principles underlying asset distribution in a will. It is important that in these contexts the approach used in asset distribution be discussed at the time of drawing up or revising a will.

Public/State trustee clients

Ten per cent of respondents had engaged the Public/State Trustee when preparing their most recent will. This finding was consistent across both national and state jurisdictions (Table 10, p. 25). In comparison, almost three quarters (73%) of will makers had their will drawn up by a private solicitor.

Respondents who had engaged a Public/State Trustee were, on average, older than those who had their most recent will drawn up by a solicitor (p. 24). They were also more likely to be preparing their first will than making changes to an existing will (p. 24). No other demographic variables (e.g., estimated value of the estate, gender, relationship status) reliably distinguished Public/State Trustee users from other will makers.

Public/State Trustees provide a range of other services in addition to will drafting. These include general information about the purpose and process of will making as well as executor services.

However, only a small proportion of respondents appear to have taken advantage of these additional services:

- will makers were least likely to seek advice about asset distribution from the Public/State Trustee and most likely to seek advice from their partner and/or solicitor (p. 27)
- respondents were most likely to nominate family members or friends as executors (Table 28, p. 44)
 - however, those respondents whose will had been prepared by the Public/State Trustee were most likely to nominate the Public/State Trustee as executor.

There were some state-level differences in the proportion of respondents who had nominated the Public/State Trustee as executor. These differences may reflect differences in the cost of services to some extent. However, it was surprising to note the low proportions of will makers who nominated the Public/State Trustee as executor in New South Wales (4%) and Victoria (4%), particularly given these states offer free or reduced cost will preparation to individuals who nominate the Public/State Trustee as executor. By comparison, Western Australia and Queensland which offer similar services had higher rates of people who appointed them as executor (10% and 8% respectively).

In summary

Most Australians have or intend to make a will. Initiatives to increase and/or improve will making would benefit from market segmentation. Three groups that could be targeted are:

- initial will makers – to ensure wills are drafted to plan for likely life events (e.g., birth of subsequent children, increased personal wealth, inter-vivo transfers)
- those with a will - to ensure it is reviewed and updated on a regular basis to reflect life and asset changes
- non will makers – to motivate will making, particularly around key life events (e.g., birth of a child, acquisition of assets).

The survey outcomes also suggest wills are predominantly used to distribute assets equally between partners and immediate descendants. There appears to be little acknowledgement of inter-vivo gifts or carer relationships in the distribution of assets. Increasing will makers' awareness of the association between failure to recognise pre-provisioning and will contests may assist in reducing will disputes.

List of attachments

- Attachment 1 – Final coding template and notes for partner organisation file review

List of supplementary documents

- Supplementary document 1 - A snapshot of succession law contests in Australia
- Supplementary document 2 – Outcomes from a national prevalence survey of will making (+ Appendices)