

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 community members. 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 (N=139)
4. On line surveys with document drafters (Public Trustee officers and solicitors in private practice)
5. Key informant interviews with samples relevant to circumstances of interest (including complex families, complex assets, diverse cultural practices and people aged over 45 years who have made a conscious choice not to make a will).

The first, second and third components of the project (1, 2 and 3 above) are almost complete and data collection for the survey of document drafters (the fourth project component) will close at the end of March. Interviews are currently underway for the fifth component of the project (key informant interviews).

This document provides:

- early results from the PO file review
- early results from the on line survey of document drafters
- early results from the key informant interviews
- update on research progress

Analysis of the on line survey and key informant interview data is currently in progress. Hence only preliminary findings are provided here. Results will be presented in full at the next Industry Partner meeting in September 2014.

2.0 Progress to Date

2.1 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 when making and changing wills 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 was provided to POs via the Industry Partner meeting in March 2013. During analysis of national prevalence survey data, emergent themes, as well as issues requiring validation and/or further exploration in subsequent key informant interviews were identified.

In addition to the report, national prevalence survey outcomes are also being reported in a publication titled *Keeping it in the family: will making prevalence, triggers and intentions*. This academic paper will be submitted to a high ranking socio-legal journal (Journal of Law and Society). Work on this publication is ongoing. A draft of this document (then titled *Making and changing wills in contemporary Australia: prevalence, triggers and intentions*) was forwarded to the POs for comment in November 2013 with no changes being requested. A second paper is a publication titled *Prevalence and predictors of advance directives in Australia*, which also reports on national prevalence survey data. This paper will be submitted for review in the next two months. Work is also underway on a third paper determining the prevalence of planning documents (wills, advance directives and Enduring Powers of Attorney for financial matters) and examining sociodemographic characteristics related to the number of planning documents completed by survey participants. This paper will be submitted to an international gerontology and geriatric medicine journal (Australasian Journal on Ageing). A draft of this publication will be circulated to POs for feedback and approval prior to submission.

2.2 Judicial Case File Review

Purpose

This part of the research involved a review of all adjudicated succession law cases in Australia during a 12 month period (January – December 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 principles applied by the Court when resolving the matter. Initial analysis of judicial case review data assisted in identifying the target groups for the semi-structured interviews.

Initial themes were discussed at the Industry Partner meeting in March 2013 and feedback was provided on the work undertaken to date. Cases meeting inclusion criteria have been identified, summarised and analysed. Work has been reported in a draft publication titled *A snapshot of succession law contests in Australia*. The target journal for this paper is the UNSW Law Journal, a highly ranked academic legal journal. A draft of this manuscript will be provided to the POs within the next two months for feedback and approval.

2.3 Partner Organisation File Review

Purpose

The Partner Organisation (PO) file review data was collected from cases involving a dispute dealt with, in the first instance, by the POs. Many disputes dealt with by the POs 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 was obtained and, with the POs, a coding template and notes was developed and piloted. The main study commenced 1 March 2013. Data collection during the main study involved working with partners to review all cases involving a dispute closed between March/April 2013 and September/October 2013. Given its small size, ACT coded cases closed between October 2012 and October 2013 during the six month main study period.

Due to restrictions on the type of data able to be provided by the Victorian State Trustees, a less detailed template was developed for use in Victoria. Where possible, Victorian data was analysed and reported along with data from the other States. Where analyses involved data items that were not available from Victoria we have indicated that the findings presented exclude Victorian cases.

The research team obtained 139 cases for the PO file review. We appreciate the considerable in kind support provided by the organisations involved in this data collection. Data analysis has now been completed and included examination of the nature of disputed cases and the factors associated with their occurrence and resolution. Results have been compared with the analysis of the judicial case file review to provide further insight into contestation and responses.

A copy of the report of preliminary outcomes of the PO file review is provided in Appendix 1.

Overview of key issues (preliminary)

- The Partner Organisation (PO) file review was designed to address research questions relating to will disputes and socio- cultural and family norms, expectations and obligations that underpin challenges to wills. Findings from this review will augment the earlier review of all adjudicated succession law cases in Australia between January and December 2011.
- The research team obtained 139 cases for the review.
- Within the reviewed cases, people generally needed some kind of formalised assistance to resolve disputes and almost a third ended up going to court.
- Most claims launched to contest wills were successful i.e. led to a change in distribution.
- The existence of poor and/or complex personal relationships between beneficiaries, disputants and/or the deceased were a feature of most cases involving will disputes, particularly where disputes were escalated to court.
- There are significant costs of will contestation both for the estate and the individuals involved in disputes. Previous research has identified that in addition to the direct costs is the indirect cost of extending the time for probate of the will. This review highlights that one of the most significant costs of will contestation is the damage to familial relationships that appears to both drive and be worsened by contestation.

- Findings of this review highlight the role of Public Trustees in providing financial management and advocacy services to protect and support vulnerable people in the community such as those with impaired capacity, as well as offering services such as will drafting and deceased estate administration.

2.4 On line Survey of Document Drafters

Purpose

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.

Progress

The research team developed a draft survey and completed a pre-test with seven legal colleagues in June 2013. Ethical clearance for this research component was obtained from The University of Queensland and Queensland University of Technology. A pilot study was undertaken with our primary contact/s within each PO, alongside two or three document drafters within their organisation. The research team adjusted the survey in response to feedback obtained via this pilot work.

The online survey for document drafters was made live on 9 October 2013. An email containing background information and a survey link was sent to our primary contact/s within each PO for distribution to colleagues in their organisation (employed part or full time) with experience in the area of will drafting. The research team also distributed the survey through relevant State Law Societies for completion by private solicitors who draft wills. This was to ensure that there is opportunity to include a diverse national sample of will drafters. All State Law Societies agreed to distribute information on the survey.

The survey takes around 15 minutes to complete and no identifying information (electronic or otherwise) is captured by the survey. All responses, therefore, remain anonymous and confidential.

As of 19 March 2014, 219 surveys have been commenced. We have undertaken a preliminary analysis of 187 responses, excluding the case study section. Please note a number of the surveys have missing data and/or have only been partially completed. The survey will remain open until 31 March, and hence respondents may still return to a partially complete survey and it is anticipated that additional respondents will also complete the survey. Results provided are early findings and should not be considered indicative of final results. Additionally, preliminary findings are for not available for public distribution. As data collection is ongoing findings will be presented in full at the next Industry Partner meeting.

Next steps are to complete data collection and more thoroughly analyse the full dataset and case study data. This survey relies predominantly on quantifiable measures therefore is being analysed in a similar way to the prevalence survey and PO file review data. Findings will be presented in full at the next Industry Partner meeting.

Overview of key issues (preliminary)

Table 1 below provides a snapshot of participant characteristics.

Table 1 Characteristics of respondents

Variable	n	%
Respondents (n=187)		
<i>Jurisdiction</i>		
New South Wales	38	24
Queensland	30	19
Western Australia	24	15
Victoria	22	14
Tasmania	16	10
South Australia	7	4
Australian Capital Territory	6	4
Northern Territory	0	0
<i>Area</i>		
Capital city	62	48
Urban area	14	11
Regional area	36	28
<i>Current occupation</i>		
Will drafter/solicitor within a Public/State Trustee	64	43
Private solicitor - general	34	23
Private solicitor – wills and estate planning specialist	31	21
Will drafter/solicitor within a trustee company	10	7
Other ¹	9	6
<i>Average wills drafted per year</i>		
Mean (SD)	271 (396.55) ²	
Median	100	
Range	0-2000	
<i>Average deceased estates administered per year</i>		
Mean (SD)	32.2 (168.56) ²	
Median	10	
Range	0-2000	

NB Variables contain missing data, including 40% missing cases for area. Percentages are the proportion of valid cases. ¹ Examples of 'other' are community lawyer/solicitor, retired, working in local government. ² Large standard deviations reflect the wide range of values.

Allocation principles used in framing wills and bequests

Use of unequal allocation principles

- More than half of will drafters (61%) 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 achieve equitable outcomes (e.g., children obtain similar levels of financial security)
 4. To reflect children's needs (e.g., greater distribution to a child with high care needs)
 5. To reflect the degree of care and (non-financial) support they received from each child
 6. To recognise prior financial or non-financial contributions the child has made to the testator's business or farm
 7. To reflect each child's status (e.g., a biological or step child)

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, concerns about a child's partner, children have financial difficulties or gambling/drug/alcohol problems.

Inclusion of non-family members as beneficiaries

- Will drafters typically reported that only occasionally do clients intend to include beneficiaries who are not family members.
- 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.
- The inclusion of pets as beneficiaries was seen as posing difficulties for will drafters (half of the respondents identified this situation as 'difficult' or 'very difficult'). However 11% of respondents reported having not seen clients who intend to include pets as beneficiaries.

Situations presenting challenges to document drafters

- Family characteristics identified as creating the most difficulties included:
 - Blended families
 - Estrangement and family discord
 - Children/adult children with disability or mental health problems
 - Dislike of child's spouse/partner
 - Presence of a family member with issues related to alcohol/drugs, spendthrift/bankruptcy/gambling
- Estate characteristics often identified as presenting difficulties included:
 - Estates including complex trusts arrangements
 - Family businesses and farms
 - International assets

Approaches used to manage challenges

- Respondents were asked to rate how likely they were to employ particular strategies when faced with a client expressing intentions presenting a high risk of being contested.
- Approaches used 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., testamentary 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 your client and their family members or significant others about your client's intentions

- Respondents were then asked what else they might do in circumstances where a client describes intentions they believe present a high risk of being contested. Common strategies included explaining the costs (economic, social etc.) of will disputes and making file notes regarding the client's intentions and stated reasons together with the advice given.
- Respondents considered the suggested the following approaches to be only somewhat effective in reducing the risk of contestation:
 - Encouraging clients to explain their decision in their will or accompanying document
 - Encouraging clients to discuss their intentions with their family members, executor and important others
 - Encouraging clients to distribute their assets as inter-vivos gifts
- Further, half of those surveyed reported that they had never facilitated discussions between clients and their family members or significant others about the client's intentions.

2.5 Key Informant Interviews

Purpose

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

Based on the identified key circumstances of interest, participants in these interviews include:

A. Testators: Purposive sample of 60 - 70 adults (approximately equal numbers of men and women) grouped on the basis of three circumstances of interest (complex families, complex assets, cultural practices).

a) Complex assets (approximately 20 interviews): Target groups will include (1) farmers who own their own property ; (2) people with significant international assets; and (3) people with a complex mix of assets such as multiple properties and shares valued over \$3 million.

b) Complex families (approximately 15-20 interviews): Target groups will include (1) families where there has been more than one marital type relationship and children or adult children from at least one of these. These children or adult children may include biological/adopted and/or stepchildren of any age; and (2) families with a child or adult child with impaired capacity for decision making related to intellectual disability.

c) Cultural practices that suggest different forms of family provision than those generally reflected in family provision legislation (16 interviews): Participants include self-identified members of Islamic communities in Sydney and Melbourne.

and

B. People without a will: Purposive sample of 20 adults aged over 45 years who do not intend to make a will (approximately equal numbers of men and women).

Progress

A semi-structured interview schedule was developed by the research team and circulated to the POs for feedback in October 2013 (see Appendix 2 for the final schedule). Ethical clearance for this research component was obtained from The University of Queensland and Queensland University of Technology. Interviews with members of Islamic communities in Sydney and Melbourne commenced in January 2014 and have now been completed. The Australian Multicultural Foundation were contracted to recruit and interview Islamic participants. Interviews were carried out in English to minimise interpreter and transcription costs.

Work is currently underway recruit participants in South East Queensland where the research team have access to trained interviewers. The research team is also conducting interviews and commencing data analysis. We aim to complete this phase by September 2014 although this depends on timeframes for participant recruitment (which has been slower than anticipated thus far).

As of 19 March 2014, 20 interviews (all 16 Islamic interviews and four interviews for other target groups) have been undertaken, and 19 transcribed and imported into NVivo qualitative data analysis software. As data collection is currently in progress findings will be presented in full at the next Industry Partner meeting.

3.0 The Next Industry Partner Meeting (for information rather than discussion)

3.1 Results from the on line survey of document drafters

A copy of the final report of outcomes of the on line survey will be provided to POs. The POs will also be provided with copies of any other publications arising from this research component.

3.2 Results from the key informant interviews

A copy of the final report of outcomes of the key informant interviews will be provided to POs. A thematic analysis will explore characteristics associated with differing attitudes towards will making and principles in use e.g. size and nature of assets; family structure; cultural patterns. For non will makers we will report on knowledge of the implications of intestacy laws, reasons for not making a will, perceptions of barriers to making a will and alternative transfer strategies in use by these individuals. The POs will be provided with copies of any other publications arising from this component of the study.

3.3 Update on research progress

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

3.4 Information dissemination

The research team will facilitate discussion of strategies for dissemination of research findings.

4.0 The research team

- Cheryl Tilse – c.tilse@uq.edu.au
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Appendix 1 – Preliminary Outcomes from the PO File Review

Executive summary

- The Partner Organisation (PO) file review was designed to address research questions relating to will disputes and socio- cultural and family norms, expectations and obligations that underpin challenges to wills. Findings from this review will augment the earlier review of all adjudicated succession law cases in Australia between January and December 2011.
- The research team obtained 139 cases for the review.
- Within the reviewed cases, people generally needed some kind of formalised assistance to resolve disputes and almost a third ended up going to court.
- Most claims launched to contest wills were successful i.e. led to a change in distribution.
- The existence of poor and/or complex personal relationships between beneficiaries, disputants and/or the deceased were a feature of most cases involving will disputes, particularly where disputes were escalated to court.
- There are significant costs of will contestation both for the estate and the individuals involved in disputes. Previous research has identified that in addition to the direct costs is the indirect cost of extending the time for probate of the will. This review highlights that one of the most significant costs of will contestation is the damage to familial relationships that appears to both drive and be worsened by contestation.
- Findings of this review highlight the role of Public Trustees in providing financial management and advocacy services to protect and support vulnerable people in the community such as those with impaired capacity, as well as offering services such as will drafting and deceased estate administration.

Introduction

The PO file review data was collected from cases involving a dispute dealt with, in the first instance, by the POs. This research component was designed to answer the following research questions:

1. What are the legal grounds relied on in contesting wills?
2. What distributional and equity principles underpin judgements about contested wills? How do these vary by state jurisdiction?
3. What implicit factors or motivations underpin the contestation of wills?

Many disputes dealt with by the POs do not go to court, or are settled outside court. The review involved collection of data on testator and estate features, personal relationships, asset distribution in wills, disputant attributes, dispute description, resolution processes and outcomes of cases.

For the purposes of this review a dispute included any disagreement about who gets what and why. This definition was intended to capture disagreements initiated by beneficiaries, persons not included in the will, and/or the Public Trustee.

More specifically, cases involving a dispute were defined as those where:

1. a person engaged in action or argument which had the potential to change what they would otherwise receive under a will or intestacy provisions,
 - this included circumstances where it did not appear that the disputant was directly motivated to change what they would otherwise receive (e.g., challenging the validity of a will)
 - changes to what was ultimately received included both changes to the financial value of the bequest or changes to the property received (i.e., financial value of property may remain the same, but the nature of the property has changed)

2. **and** this action or argument was persisted with on two or more occasions,
 - this included contact through any form of communication, including telephone, email, solicitor's letter and in person visits
 - contact that did not pursue an action or argument that has the potential to change what an individual would otherwise receive was not counted (e.g., an enquiry as to the progress of administering an estate or an enquiry about the way in which assets were divided)

3. **and** resolution of the issue required informal and/or formal intervention by someone other than a beneficiary of the will (note: intervention could include action by a representative from the office of the Public Trustee or the courts).

Ethical clearance to collect de-identified data from PO files was obtained and, with the POs, a coding template and notes was developed and piloted. The main study commenced 1 March 2013. Data collection during the main study period entailed reviewing all cases involving a dispute closed between March/April 2013 and September/October 2013. Given its small size, ACT coded cases from October 2012 to October 2013 during the six month data collection period.

Due to legal restrictions on the data able to be provided by the Victorian State Trustees for this research, a less detailed template was developed for that state. Where comparable data has been collected, Victorian data was analysed and reported along with data from the other States. Where no comparable data was available we have indicated that findings presented exclude Victorian cases.

The review comprised 139 cases (see Table 1). New South Wales (NSW), Queensland (QLD) and Victoria (VIC) provided the most cases (33, 31 and 30 respectively). Western Australia (WA) was next with 22 cases, followed by 11 from South Australia (SA). The Australian Capital Territory (ACT) and Tasmania (TAS) each provided six cases. Figures include cases provided during the pilot.

Table 1 Number of cases by State (n=139)

Jurisdiction	Cases
New South Wales	33
Queensland	31
Victoria	30
Western Australia	22
South Australia	11
Australian Capital Territory	6
Tasmania	6

What was disputed?

- Most cases (92%) involved challenges to wills rather than intestate estates.
- In almost all cases (98%) there was a single dispute (this figure excludes VIC cases).
- Family provision claims were the most frequent category of contest across all States. Table 2 provides the overall figures for types of contests in the file review.

Table 2 Types of contests (n=139)

Type of contests	n	%
Family provision claims	119	86
Construction cases	5	4
Validity cases	4	3
Other cases	11	8

- Disputes involving intestate estates (n=10) were often initiated because there was a family member (usually a child) with a disability (n=3) or a minor (n=2) seeking a greater share of the estate than usually entitled to under intestacy provisions. In three cases friends of the deceased made claims on an intestate estate when no next of kin had been identified.

Features of disputed wills and allocation principles

- Median estate value was \$420,000 (range \$40,000-\$10,000,000). Table 4 below compares estate values across the PO file review and judicial case file review data sets.
- This data suggests that smaller estates are not immune from contestation.

Table 4 Estimated value of estate categories

	Number of estates where value known	Size of estate			
		Under \$500,000	Between \$500-\$999,999	Between \$1m-\$2,999,999	Over \$3.million
PO File Review	137	60%	25%	10%	4%
Judicial Case File Review	145	32%	28%	23%	17%

- Principles of distribution were provided in 82% of cases. There was considerable variability in allocation principles used in wills (refer to Table 5 below).

Table 5 Allocation principles (n=139)

Allocation principle	n	%
Equality	31	27
Deservedness	28	25
Reciprocity	15	13
Spousal	14	12
Equity	5	4
Need	5	4
Recognition of prior financial contribution	3	3
Cultural/religious practices	2	2
Other	19	17

NB. Common examples of 'other' allocation principles were: most or all of the estate was left to one or more charities, most or all of the estate was left to only one child at the exclusion of their sibling/s or where spouses received only a right to reside in the martial home. Multiple response options were allowed.

- This finding suggests that the personal circumstances of testators and benefactors impacts upon the extent to which testators uphold the equity principle. Deservedness, reciprocity and the desire to provide for a spouse appear to provide strongest justification for unequal distribution.
- Principles of distribution rarely reflected cultural/religious reasons (2% of cases), as was also found in the national prevalence survey.
- To some extent allocation principles varied depending on testator characteristics.
 - On average testators who used principles of deservedness were older (M=82.3 years, SD=9.38) than those who did not (M=74.9 years, SD=15.19), $t(1, 83) = -2.96, p = 0.004$.
 - Testators born in Australia were more likely than overseas born testators to employ principles of deservedness when allocating assets in their wills (35% versus 18% respectively, $p = 0.044$, Fisher's exact test).

- Estimated estate value did not impact on allocation principles employed in the will.

Factors relevant to disputes (excludes Victorian cases)

- In 62% of cases the nature of the estate (e.g., international assets, family trusts) was not judged as relevant to the dispute. In these cases information on the nature of the estate was not provided.
- Where the nature of the estate was relevant to the dispute (and hence data on estates was available), there was substantial variability in estate type/nature reported. Given the small number of valid cases and the variability within them, it wasn't possible to determine how features of estates may contribute to disputes. It is clear, however, that there is contestation around some quite small estates.
- Personal relationships were relevant to the dispute in 75% of cases.
- In more than half of the disputes (62%), at least one aspect of complexity within personal relationships between beneficiaries, disputants and/or the deceased was described. Involvement of children/adults with a significant disability or ill health was the most commonly reported aspect of complexity (48% of cases), followed by new spousal/de-facto relationships (34%), separation or divorce (32%), addition of biological and/or stepchildren to the relationship structure (25%) or diagnosed drug or alcohol addiction (11%). This finding points to the complexity of relationships often working in the background to drive disputes.

Who is likely to dispute?

- Claims by biological children of the deceased were the largest category of persons initiating disputes (70% of cases).
- Gender distribution was almost evenly split for all disputant types (e.g., primary, joining, emerging disputants).
- The average age of primary disputants was 46 years, while the average age of all disputants was 52 years. The distribution of disputants' ages is depicted in Figure 1 below.

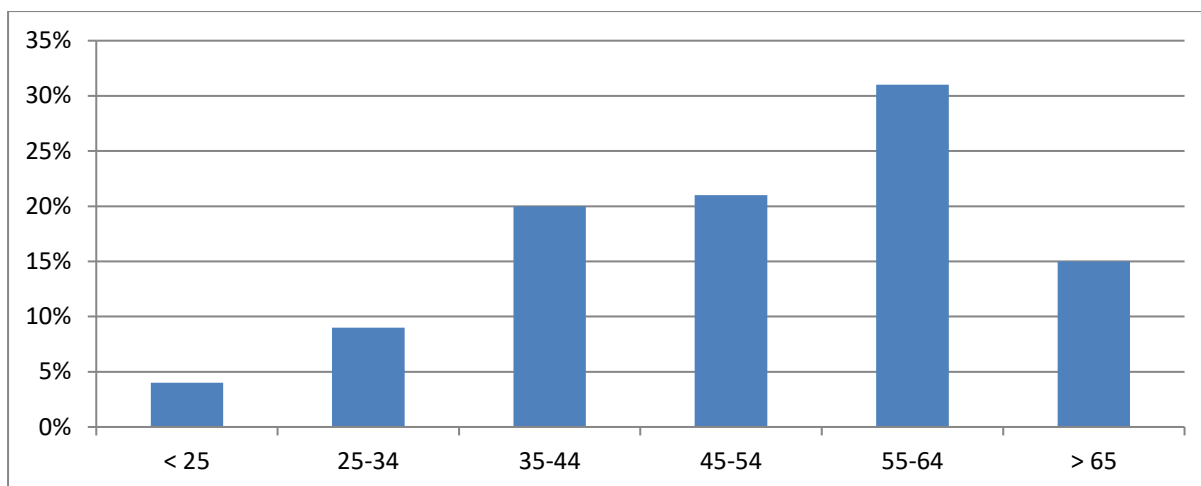


Figure 1 Age of disputants

- Twenty four per cent of disputants were adults with impaired capacity and four per cent were minors.
- Disputants were slightly more likely to be beneficiaries than not (54% of disputants).
- In nearly half of the cases (47%) the dispute was described as arising due to exclusion, although insufficient provision was also common, being reported in 37% of cases.

Role of the Public Trustee

- The role of the Public Trustee was most commonly as executor of the will (in 64% of cases), followed by financial manager for an existing client (23%), administrator of an intestate estate (6%) or other (7%). ‘Other’ usually referred to disputes in which the Public Trustees took on dual roles, typically being both executor of the will and financial manager for an existing client.
- The Public Trustee became involved in the dispute during the course of administration (63% of cases), initiated the dispute (27%), joined an existing dispute (6%) or other (4%).
- Where disputant/s had impaired capacity (24% of disputants), the Public Trustee typically initiated disputes on the behalf of existing clients for whom they were acting as financial managers. This finding highlights the important role of the Public Trustees in advocating for clients with impaired capacity, many of whom have significant financial need.

Grounds for contest (excludes VIC cases)

- Commonly reported grounds for contest were financial need (32% of cases), followed by deservingness as a function of type or quality of relationship with the deceased (22%) or sense of entitlement (19%). All other grounds for contest were identified for fewer than 10% of cases. Multiple responses were allowed.

Processes of resolution

- The most frequent process of resolution identified was informal negotiation between parties (48% of disputes); however this process in isolation did not typically achieve a resolution.

The majority of cases involving informal negotiation also involved at least one other process of resolution.

- Forty per cent of disputes involved mediation, and in 87% of these cases agreement was reached. NB. Mediation is compulsory for family provision applications in NSW (by statute) and QLD (effectively through a practice direction) and there is a strong emphasis on this practice in all other States.
- The most commonly identified driver of efforts to achieve a resolution was the Public Trust Case Officer (39% of cases), followed by the solicitor for the disputant/s (34%), and other Public Trust employee (usually Legal Officer) (27% of cases).
- There was no relationship between estate value, complexity in personal relationships or allocation principles and type of resolution processes employed.

Timing of mediation

- Data from reviewed cases suggests the time taken to get to mediation may be an important factor in dispute resolution. The time between notification of a dispute and mediation was significantly longer where disputes escalated to Court (473 days compared to 217 days for disputes that did not escalate to Court, $p=0.001$, Fisher's exact test).
- Time between notification of a dispute and mediation across the States is listed below in Table 6. While the mean and median values differ considerably, States vary less with respect to the most common length of time between notification of a dispute and mediation.

Table 6 Time between notification of a dispute and mediation by jurisdiction

Jurisdiction	Mean time (days)	Median time (days)	Mode time (days)
Australian Capital Territory	90	90	90
South Australia	96	90	150
Western Australia	267	270	270
Victoria	185	105	90
New South Wales	382	255	150
Queensland	657	540	120
Tasmania	140	120	120

NB. Where multiples modes exist, the smallest is shown.

Relationship with grounds for contest

- Cases where financial need was a ground for contest were more likely to be resolved through agreement being reached during mediation (47% compared to 27% for other cases, $p = 0.049$, Fisher's exact test) and resolution by Court – consent order (35% compared to

11% for other cases, $p = 0.006$, Fisher's exact test) than were cases where financial need was not a grounds for contest.

- Cases where sense of entitlement was a grounds for contest were more likely to be resolved through ratification by Deed of Family Arrangement (29% compared to 9% for other cases, $p = 0.028$, Fisher's exact test) than were cases where sense of entitlement was not a grounds for contest. NB. It was not uncommon for multiple grounds for contest to be cited and the above analyses did not account for this.

Escalation to Court

- Almost a third (31%) of cases escalated to Court for resolution (including 15% resolved by consent order and eight percent resolved by judicial order).
- There was no relationship between estate value and whether or not disputes escalated to Court.
- There was no relationship between whether or not disputes escalated to Court and type of complexity in personal relationships between beneficiaries, disputants and/or the deceased e.g., young children are the primary beneficiaries of the estate, separation/divorce etc. However, when there were multiple aspects of complexity within personal relationships (e.g., where there was a new spousal or de-facto relationship and children or adults with a significant disability or ill health) cases were more likely to escalate to Court (61% of cases with multiple complexities in relationships went to Court compared to 35% of other cases, $p = 0.048$, Fisher's exact test).
- The quality of relationships between disputant/s and other beneficiaries (before contents of the will were known) was significantly associated with likelihood of escalation to Court. Half or more of cases in which relationships were very poor or poor went to Court (60% for very poor, 50% for poor), compared with none where relationships were good or very good ($p = 0.020$, Fisher's exact test). Relationship quality likely reflects the level of capacity of the parties to mediate an outcome.

Factors associated with escalation to Court

- Compared to other principles of distribution, cases were significantly more likely to escalate to Court if allocation reflected spousal distribution (54% of cases versus 25% of cases without spousal distribution, $p = 0.045$, Fisher's exact test).
- Compared to other principles of distribution, cases were significantly more likely to escalate to Court if allocation reflected principles of reciprocity (33% of cases versus 8% of cases without principles of reciprocity, $p = 0.014$, Fisher's exact test).
- Cases were significantly more likely to escalate to Court if the grounds for contest included a will which did not reflect the testator's expressed wishes (100% of cases versus 35% of cases where this was not a grounds for contest, $p = 0.048$, Fisher's exact test). However, this result should be treated with caution as only three cases included a will which did not reflect the testator's expressed wishes as grounds for contest. Further, it was not uncommon for multiple grounds for contest to be cited and the analysis did not account for this.

Outcomes of the disputes

- The most frequent outcome sought by the disputant was redistribution of the estate such that they received some greater, unquantified amount from the estate (34%).
- Across claim types most cases (77%) were successful i.e. the contest led to a change in distribution (this figure excludes VIC cases).
- There was no significant relationship between jurisdiction, estimated estate value, contest type or allocation principles and success rate.
- Success of family provision claims differed across claimant types. Table 7 below provides a snapshot of successful family provision claims by claimant type.

Table 7 Successful family provision claims by claimant type (n=109)

Claims by partner or ex-partner	Claims by child/ren	Claims by extended family	Claims by others	Total successful claims	Total claims
83%	76%	73%	64%	139	183

NB. Excludes VIC cases. The 'children' category includes step-children and adopted children.

- In more than half of cases (61%) the outcome of the dispute was that a compromise was reached. Generally the disputant/s received some greater amount from the estate.
- There was no relationship between principles of distribution or grounds for contest (e.g., financial need, deservingness) and outcome of the dispute.
- A significant cost of will contestation is damage to familial relationships. There was a significant difference between the quality of relationships between disputant/s and other beneficiaries before contents of the will were known and after 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 ($p < 0.001$, Fisher's exact test).
- 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 (mode = 6 months, mean = 12 months, range = 0-60 months).
- There was no relationship between contest type (family provision claims, construction cases, validity cases etc.), complexity in personal relationships between beneficiaries, disputants and/or the deceased (e.g., involvement of children/adults with a significant disability or ill health, new spousal/de-facto relationships separation or divorce) or quality of relationships

between disputant/s and other beneficiaries (before contents of the will were known) and the cost incurred by estates or time taken to resolve disputes.

- There was no relationship between whether or not disputes escalated to Court and type of complexity in personal relationships between beneficiaries, disputants and/or the deceased e.g., involvement of children/adults with a significant disability or ill health, new spousal/de-facto relationships separation or divorce etc. However, when there were multiple aspects of complexity within personal relationships cases were more likely to escalate to Court (61% of cases with multiple complexities in relationships went to Court compared to 35% of other cases, $p = 0.048$, Fisher's exact test).
- The quality of relationships between disputant/s and other beneficiaries (before contents of the will were known) was significantly associated with likelihood of escalation to Court. Half or more of cases in which relationships were very poor or poor went to Court (60% for very poor, 50% for poor), compared with none where relationships were good or very good ($p = 0.020$, Fisher's exact test). Relationship quality likely reflects the level of capacity of the parties to mediate an outcome.

Relationship between processes of resolution and costs to the estate

- On average, disputes involving informal negotiation incurred lower costs to the estate (\$10,565 compared to \$35,450 for other disputes), $t(1,75) = 2.99$, $p < .004$.
- Other resolution processes (mediation, escalation to Court etc.) were unrelated to costs incurred by estates.

Relationship between processes of resolution and time taken to resolve dispute

- Disputes involving informal negotiation took less time to resolve (8.9 months compared to 14.7 months for other disputes), $t(1,107) = 3.19$, $p < .002$.
- Conversely, disputes where the process of resolution included resolution by Court (Judicial Order) took more time to resolve (20.9 months compared to 11.4 months for other disputes), $t(1,107) = -2.44$, $p < .016$.
- Other resolution processes (mediation, escalation to Court etc.) were unrelated to time taken to resolve disputes.

Contributor/s to the observed outcome (excludes Victorian cases)

- There was considerable variability in the reported contributor/s to the observed outcome of disputes. The most common response was 'other' (48% of disputes) e.g., disputants' claim was based on a 'weak' case, beneficiaries and/or individuals excluded from the will had a significant disability or ill health. Further contributor/s to observed outcomes included all parties demonstrating a willingness to compromise (20% of cases), parties acknowledging, supporting or agreeing with the claim brought by the disputant and/or a desire by one or more parties to settle the matter quickly (14% each).

- The key contributor to the observed outcome was more likely to be all parties demonstrated a willingness to compromise (38% compared to 15% of other cases, $p = 0.024$, Fisher's exact test) or parties acknowledge/support/agree with claim brought by disputant (33% compared to 10% of other cases, $p = 0.014$, Fisher's exact test) in cases where the grounds for contest included sense of entitlement.
- In cases where the grounds for contest included financial need the key contributor to the observed outcome was more likely to be greater certainty in the mediation process than found in other resolution approaches (15% compared to 3% of other cases, $p = 0.031$, Fisher's exact test). This observation reflects the fact that cases where financial need was a grounds for contest were more likely to be resolved through agreement during mediation.
- The key contributor to the observed outcome was more likely to be desire to avoid further costs to the estate in cases where the grounds for contest included deservingness as a function of type or quality of relationship with deceased (25% compared to 8% of other cases, $p = 0.038$, Fisher's exact test). NB. It was not uncommon for multiple grounds for contest to be cited and the above analyses did not account for this.

Variations across jurisdictions

- Compared to other jurisdictions, NSW had a large proportion of very high value estates (nearly a quarter of estates had an estimated value over \$1 million).
- For family provision claims, WA had a significantly lower success rate than the other States (45% compared to 81-100% of other cases, $p = 0.014$, Fisher's exact test).
- Role of the Public Trustee varied across jurisdictions. In many jurisdictions, the most common role by far was as executor of the will. However, in WA and VIC the Public Trustee's role was often as financial manager for an existing client. In WA this was the most common Public Trustee role (46% of cases) and in VIC acting as financial manager for an existing client and executor of the will were the most common roles (40% each).
- Consistent with the above finding, compared to other jurisdictions, VIC and WA had a high proportion of cases involving disputants with impaired capacity (57% and 50% respectively). In both States the most common timing of Public Trustee involvement was initiating the dispute (50% of cases in VIC and 48% in WA), followed by involvement during the course of administration (43% of cases in both States).
- A significantly higher number of disputes escalated to Court for resolution in QLD and NSW than in other States (18 and 13 respectively, $p < 0.001$, Fisher's exact test). This finding is likely due in part to the higher number of cases overall from these States; however these States also had a high proportion of cases escalated to court. Table 8 below provides the number and proportion of disputes escalated to Court by State.

Table 8 Disputes escalated to Court by State (n=139)

Jurisdiction	Cases escalated	Total cases	%
Australian Capital Territory	0	6	0
South Australia	3	11	27
Western Australia	4	22	18
Victoria	2	30	7
New South Wales	13	33	39
Queensland	18	31	58
Tasmania	3	6	50

Comparison with Judicial Case File Review findings

Similarities

- Proportions of will makers were similar (92% for the PO file review and 89% for the judicial case file review).
- Gender of testators was similar (53% male for the PO file review and 57% male for the judicial case file review).
- The age profiles of testators were similar (9-10% were aged under 60 years, more than half aged between 70 and 89 years for both reviews).
- Family provision claims by children of the deceased (including step-children and adopted/foster children) were the largest category of persons instigating disputes (74% of cases for the PO file review and 62% of cases for the judicial case file review).
- In the PO file review, most family provision claims (77%) were successful (i.e. led to a change in distribution); this figure was 80% in the judicial case file review.

Differences

- Family provision claims represent a greater proportion of contest types in the PO file review (86% compared to 51% of estates for the judicial case file review). The increased proportion of construction and validity cases in the judicial case file review may reflect a greater need for these types of cases to escalate to Court (e.g., to determine the validity of a will or to resolve questions or disputes as to how a will should be construed).
- In the PO file review family provision was the most frequent category of contest across States. In the judicial case file review this was also true of most States except SA and WA where contests about validity were more common.

- Estate value was higher in judicial case file review cases (see Table 4 on page 4). One limitation of these results is that not all cases specified whether figures stated were gross or net values (net value was used when stated).
- In the PO file review NSW had the highest proportion of estates over \$1million (24%) whereas in the judicial case file review Victoria had the highest proportion of estates over \$1million (53%).
- A higher proportion of family provision claims in the judicial case file review were made by partners or ex-partners (25% compared to 15% for PO file review).
- In the PO file review there was no relationship between estimated estate value and success rate of claims, whereas in the judicial case file review claims against a larger estate appeared more likely to succeed than claims against a smaller estate.

Limitations

- This file review does not capture the full spectrum of disputes (i.e. only those dealt with by the POs).
- The data set does not provide statistics on the number of contested cases per year and there is no information about features of non-reported cases.
- Amongst the cases reviewed, the smallest estate value was \$40,000 and the number of intestate estates administered was small. Thus the data did not allow us to explore the nature of contests as a function of testacy and intestacy or what happens if the estate is administered informally (usually due to low value of estate <\$20,000).

NB. Percentages quoted throughout this document may not total 100 due to rounding.