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

Review of Public Trustee files

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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, parties 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 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-$2,999999	Over $3.million
PO File Review	137	60%	25%	10%	4%
Judicial Case 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). This finding suggests that the personal circumstances of testators and benefactors impacts upon the extent to which testators uphold the equity principle.

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.

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.

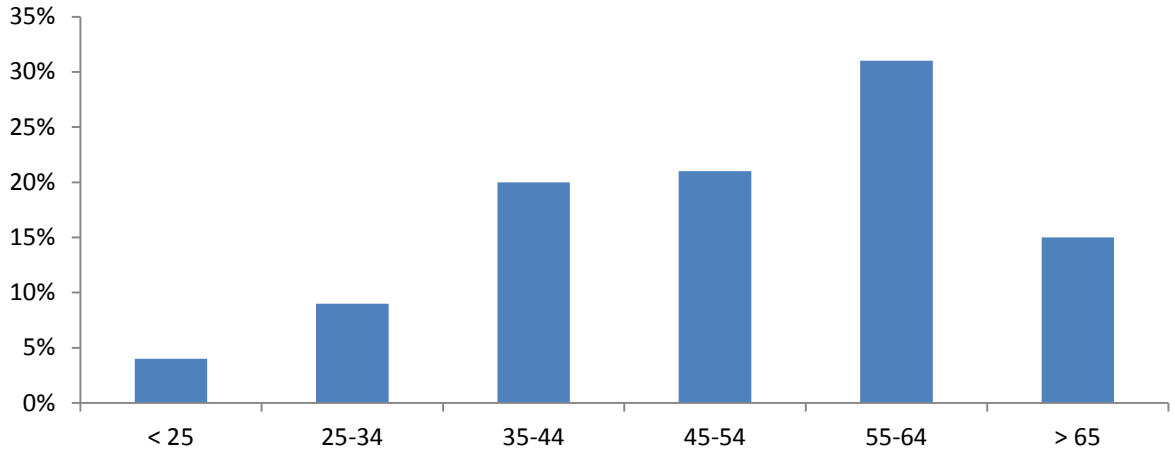

Figure 1 Age of disputants (years)

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%) (see Figure 2 below). 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.

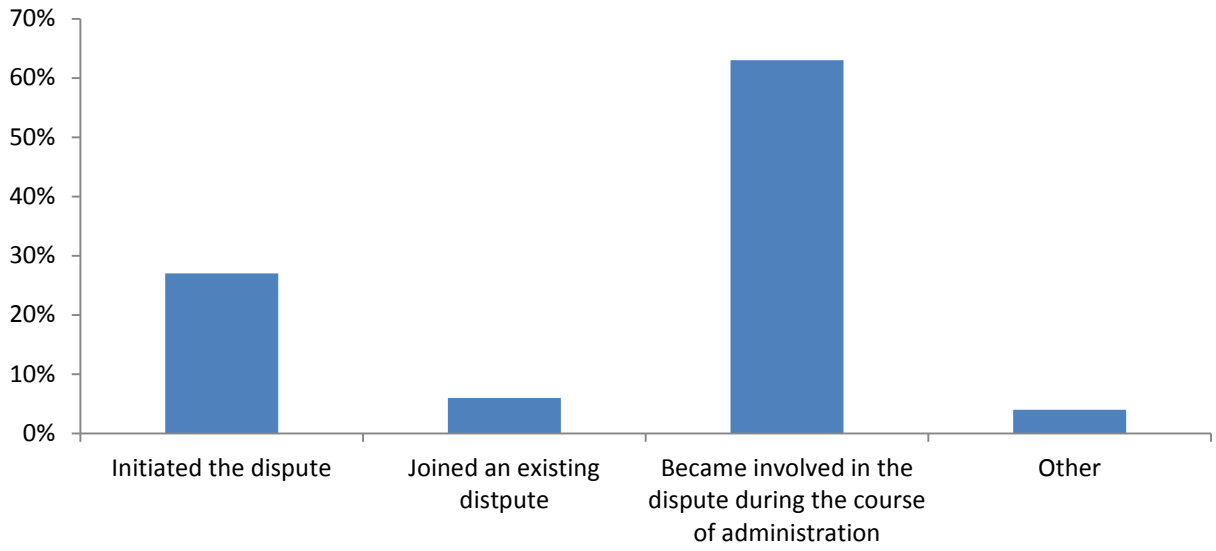

Figure 2 Timing of Public Trustee involvement

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 heath) 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). Figure 3 below depicts the proportion of cases which escalated to Court for the commonly reported principles of distribution. NB. Multiple allocation principles could be given for a single dispute.

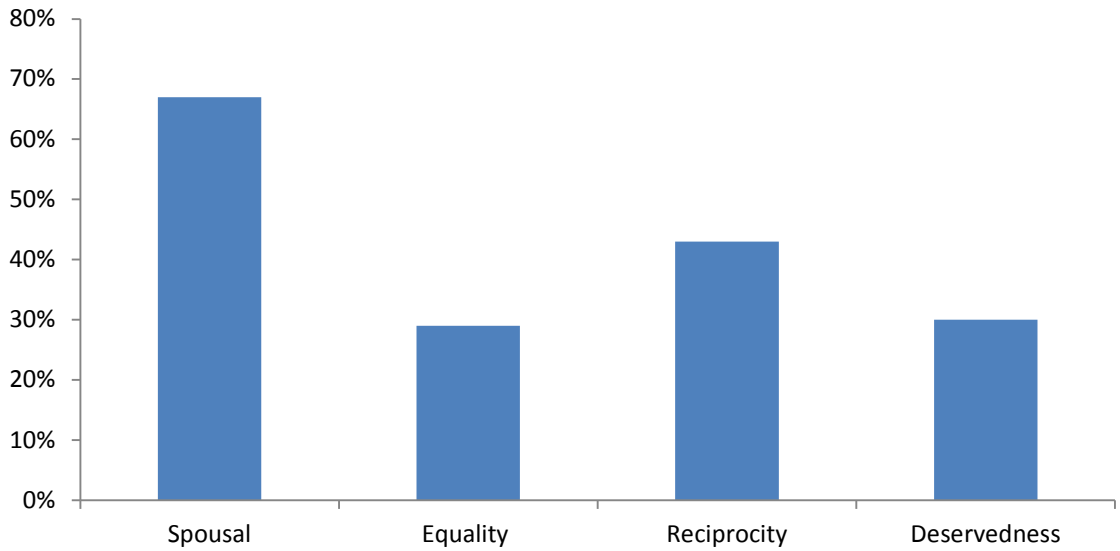

Figure 3 Proportion of cases which escalated to Court by common allocation principles

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 the cost incurred by estates or time taken to resolve disputes and:

- 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).

Similarly, 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 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 (see Figure 4). 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 10% where relationships were good and none where they were very good (p = 0.020, Fisher's exact test). Relationship quality likely reflects the level of capacity of the parties to mediate an outcome.

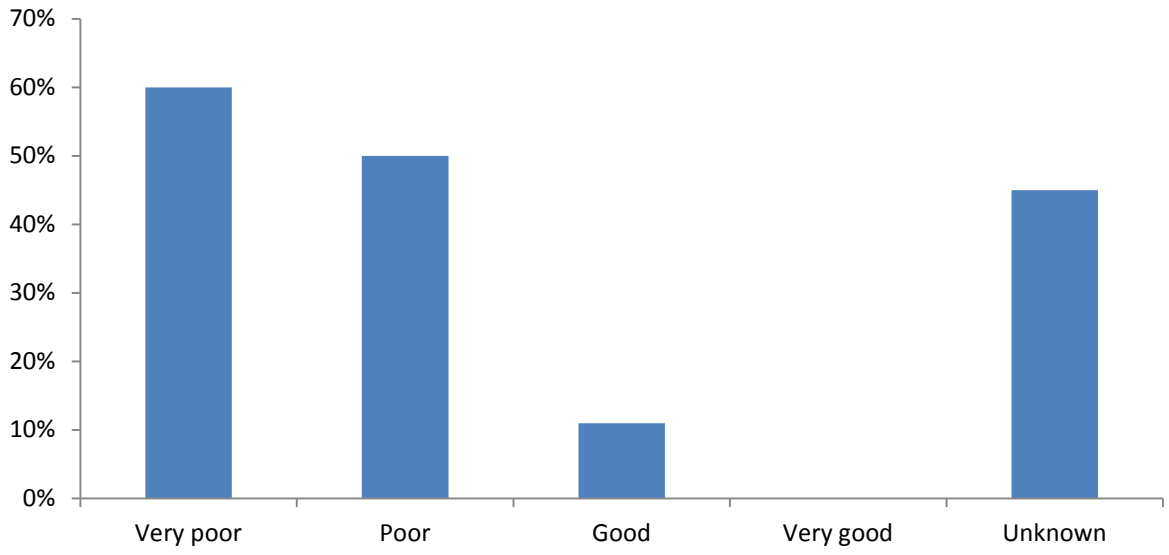

Figure 4 Proportion of cases which escalated to Court by relationship quality

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 (see Figure 5). 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).

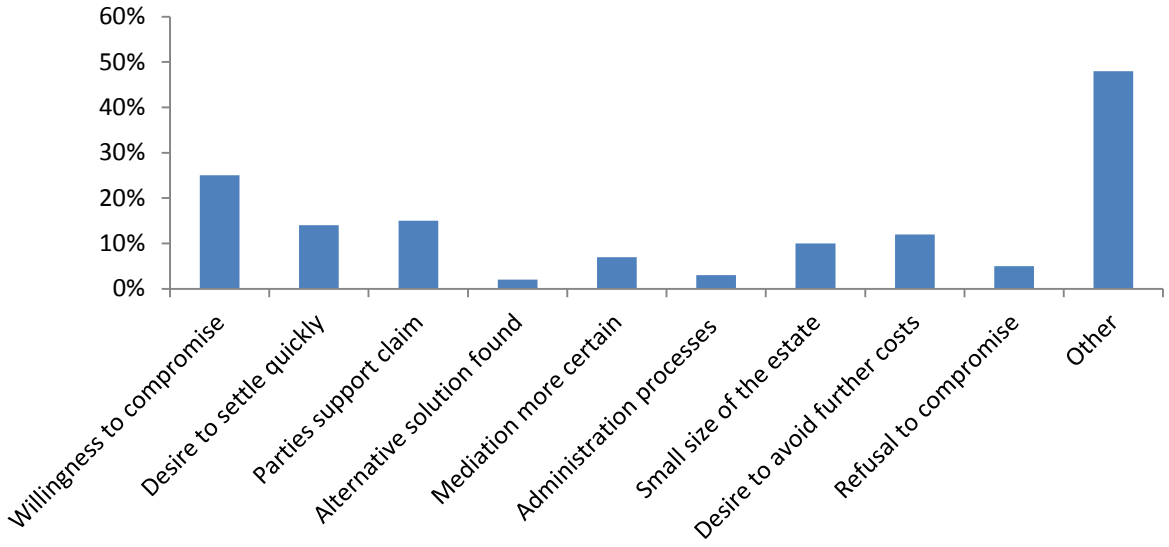

Figure 5 Key contributors to the outcome observed

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 Review findings

Similarities

Proportions of will makers were similar (92% for the PO file review and 89% for the judicial case review). Gender of testators was comparable (53% male for the PO file review and 57% male for the judicial case 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 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 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 review). The increased proportion of construction and validity cases in the judicial case 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 review this was also true of most States except SA and WA where contests about validity were more common. A higher proportion of family provision claims in the judicial case review were made by partners or ex-partners (25% compared to 15% for PO file review).

Estate value was higher in judicial case review cases (see Table 4 on page 6). 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 review Victoria had the highest proportion of estates over $1million (53%). In the PO file review there was no relationship between estimated estate value and success rate of claims, whereas in the judicial case review claims against larger estates appeared more likely to succeed than claims against smaller estates.

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.