

ESTATE CONTESTATION IN AUSTRALIA: AN EMPIRICAL STUDY OF A YEAR OF CASE LAW

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I INTRODUCTION

Estate litigation is a source of ongoing concern. Issues have been raised both in the media¹ and academic literature² about matters such as the frequency with

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- 1 See, eg, Rachel Browne, 'Where There's a Will, There's a Writ', *The Sydney Morning Herald* (online), 9 May 2014 <<http://www.smh.com.au/nsw/where-theres-a-will-theres-a-writ-20140509-zr5ib.html>>; Renee Viellaris, 'Kids Fight for Your Cash as Legal Squabbles among Families Eat into Estates', *The Courier Mail* (online), 13 April 2013 <<http://www.couriermail.com.au/news/queensland/kids-fight-for-your-cash-as-legal-squabbles-among-families-eat-into-estates/story-e6freoof-1226619468014>>; Richard Ackland, 'Where There's a Will, There's a Chance for Wasteful Litigation', *Sydney Morning Herald* (online), 13 April 2012 <<http://www.smh.com.au/federal-politics/political-opinion/where-theres-a-will-theres-a-chance-for-wasteful-litigation-20120412-1wwfk.html>>.
- 2 See, eg, Myles McGregor-Lowndes and Frances Hannah, 'Reforming Australian Inheritance Law: Tyrannical Testators vs Greying Heirs?' (2009) 17 *Australian Property Law Journal* 62; Rosalind F Croucher, 'Succession Law Reform in NSW – 2011 Update' (Speech delivered at the Blue Mountains Annual Law Conference, Katoomba, 17 September 2011); Prue Vines, *Bleak House Revisited? Disproportionality in Family Provision Estate Litigation in New South Wales and Victoria* (Australasian Institute of Judicial Administration, 2011); Victorian Law Reform Commission, *Succession Laws*, Report (2013).

which wills are challenged and legal costs. While the potential financial cost to the testator's family and friends (who are generally beneficiaries) through the dissipation of the estate is generally well-known, estate contestation can also lead to other significant adverse outcomes. For example, the distribution of assets after death is not a purely financial or legal exercise,³ and dispositions in a will can represent a very public realignment of relationships and hierarchies within a family.⁴ These disputes, which necessarily challenge that statement of family relationships by the testator, are likely to create, or exacerbate, family disharmony and conflict,⁵ and/or become a focal point for past injustices or disputes.⁶ This is unsurprising given some of the features of a will contest: it occurs during a period of grief,⁷ pits claimants against beneficiaries, and often brings contact with the legal system (which traditionally has taken an adversarial approach to the resolution of these disputes), all of which exacerbate family tensions.⁸ This conflict is often not limited to the period of the legal dispute and can persist over time, in some cases across generations.⁹ Engagement with legal processes also shifts private life into the public domain, requiring families to air their 'dirty laundry'.¹⁰ This loss of privacy can cause not only embarrassment and reputational damage, it can also be a source of further family conflict with the family member who has brought such matters to public view. Estate contestation also has implications for the state through the resources it requires from the publicly funded judicial system.¹¹

Yet despite the range of significant adverse consequences from estate litigation, there has been very little empirical research examining these disputes, and nearly all of it has been done overseas. Although based on data now over 30

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- 3 Andrew Stimmel, 'Mediating Will Disputes: A Proposal To Add a Discretionary Mediation Clause to the Uniform Probate Code' (2002) 18 *Ohio State Journal on Dispute Resolution* 197; Susan N Gary, 'Mediation and the Elderly: Using Mediation to Resolve Probate Disputes over Guardianship and Inheritance' (1997) 32 *Wake Forest Law Review* 397.
 - 4 Jeffrey P Rosenfeld, 'Social Strain of Probate' (1980) 6 *Journal of Marital and Family Therapy* 327.
 - 5 Gerry W Beyer, Rob G Dickinson and Kenneth L Wake, 'The Fine Art of Intimidating Disgruntled Beneficiaries with In Terrorem Clauses' (1998) 51 *Southern Methodist University Law Review* 225; Martin D Begleiter, 'Anti-contest Clauses: When You Care Enough To Send the Final Threat' (1994) 26 *Arizona State Law Journal* 629; Gary, above n 3; Stimmel, above n 3; *ibid*; Sandra L Titus, Paul C Rosenblatt and Roxanne M Anderson, 'Family Conflict over Inheritance of Property' (1979) 28 *The Family Coordinator* 337.
 - 6 Stimmel, above n 3; Gary, above n 3; Ray D Madoff, 'Lurking in the Shadow: The Unseen Hand of Doctrine in Dispute Resolution' (2002) 76 *Southern California Law Review* 161.
 - 7 Lela P Love and Stewart E Sterk, 'Leaving More than Money: Mediation Clauses in Estate Planning Documents' (2008) 65 *Washington and Lee Law Review* 539; Gary, above n 3.
 - 8 Stimmel, above n 3.
 - 9 Love and Sterk, above n 7; Gary, above n 3; Titus, Rosenblatt and Anderson, above n 5.
 - 10 Love and Sterk, above n 7; Beyer, Dickinson and Wake, above n 5; Begleiter, above n 5; Gary, above n 3.
 - 11 Begleiter, above n 5.

years old, the landmark study into will contests was conducted by Schoenblum.¹² He examined all wills ‘offered to probate’ – a United States (‘US’) concept, not an Australian one – over a nine year period from 1976 to 1984 in one US county and looked at a range of issues, such as the frequency of wills offered to probate that were contested (less than one per cent) and the circumstances that lead to will contests. Other more recent empirical studies (usually with contestation being just a component of a wider estate study) include consideration of issues such as gendered perspectives on will contests in Israel,¹³ differences in litigation outcomes between judicial and jury decision-making in different US counties,¹⁴ and the likelihood of holographic wills becoming the subject of judicial contest.¹⁵

The most notable empirical contribution to understanding estate litigation in Australia comes from Prue Vines’ *Bleak House Revisited? Disproportionality in Family Provision Estate Litigation in New South Wales and Victoria*.¹⁶ This study examined the issue of legal costs and the extent to which they were disproportionate to the size of the estate in dispute. Vines concluded that further empirical research was needed to explore some of the key findings of her project,¹⁷ which suggests a need for a better empirical evidence base to understand estate contestation generally.

This article seeks to contribute to that needed empirical research and reports on a study which reviewed all publicly available succession law judgments in Australia during a 12-month period. The article begins with a brief overview of the relevant Australian law and the method adopted for the case review to provide some context for the analysis that follows. It then shifts to its primary objective: to provide an overview of Australian estate litigation during this period with a particular focus on analysing the family provision contests, which comprised over half the cases in the sample. The article examines how many estates were subject to family provision claims, who were contesting them, and to what extent those challenges were successful. The article also considers variation in estate litigation across Australian states and the impact of estate size on contests. It concludes by identifying the themes that emerged from these judicial cases and outlines their significance for law and practice reform.

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- 12 Jeffrey A Schoenblum, ‘Will Contests – An Empirical Study’ (1987) 22 *Real Property, Probate and Trust Journal* 607. Other American studies of will contests from earlier times include: Dennis Collins, ‘Will Contests in Nebraska: Incompetency and Undue Influence’ (Paper presented at the 12th Annual Institute on Estate Planning, University of Nebraska College of Law, 17–18 July 1986) (review of 42 court cases); Lawrence M Friedman, Christopher J Walker and Ben Hernandez-Stern, ‘The Inheritance Process in San Bernardino County, California, 1964: A Research Note’ (2007) 43 *Houston Law Review* 1445 (a more recent paper but reporting on findings from 1964 data that two per cent of wills probated in a US county were contested).
- 13 Daphna Hacker, ‘The Gendered Dimensions of Inheritance: Empirical Food for Legal Thought’ (2010) 7 *Journal of Empirical Legal Studies* 322.
- 14 Ronald Chester, ‘Less Law, but More Justice? Jury Trials and Mediation as Means of Resolving Will Contests’ (1999) 37 *Duquesne Law Review* 173.
- 15 Stephen Clowney, ‘In Their Own Hand: An Analysis of Holographic Wills and Homemade Willmaking’ (2008) 43 *Real Property, Trust and Estate Law Journal* 27.
- 16 Vines, above n 2.
- 17 *Ibid* 35.

II A BRIEF OVERVIEW OF KEY SUCCESSION LAW ISSUES

It is not the purpose of this article to give a detailed account of Australian succession law. Nevertheless, a basic outline of the legal position across the country on the key areas being considered is important. We identify some legal differences across states and territories that may give context to the variation in Australia emerging from this empirical study into succession contests.¹⁸

In this study we have grouped the succession law contests into four categories: family provision claims, cases relating to the validity of a will, those relating to how a will should be construed and a final category of cases that do not fit within the previous three categories ('other'). What follows is a brief statement of the relevant law in each of these areas, coupled with a few observations about how these categories were treated in the subsequent analysis. A final set of issues are those likely to have an impact on whether succession contests are litigated: the use of mediation and the impact of costs.

A Family Provision Claims

The largest category of cases in the sample relates to family provision claims. A testator is entitled to be 'capricious and improvident'¹⁹ when making a will and one of the traditional foundations of succession law was the primacy of testamentary freedom.²⁰ However, the unfettered discretion of a testator has been limited by the development of testator's family maintenance and family provision legislation which acknowledges a moral, as well as a legal, imperative on the testator to provide for certain individuals.²¹ Over time, the operation of this legislation has widened from its original intent,²² both with respect to categories of eligible persons as well as the property potentially subject to a claim.²³

The legislation in each state and territory, as it relates to the key issues of what constitutes adequate provision, who are eligible applicants, what property may be the subject of an order, and the criteria to be considered by the court, is

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- 18 The Uniform Succession Laws Project fulfilled its mandate in 2009 to review the laws in each Australian jurisdiction and recommended model uniform succession laws: Rosalind F Croucher, 'Towards Uniform Succession in Australia' (2009) 83 *Australian Law Journal* 728, 728; Queensland Law Reform Commission, *Consolidated Report to the Standing Committee of Attorneys General on the Law of Wills*, Miscellaneous Paper No 29 (1997) ii. Despite this, the movement towards national succession laws has been slow: Croucher, 'Towards Uniform Succession in Australia', above n 18, 751. See also Glenn Dickson, 'Crying Out for Uniformity' [2012] (July) *STEP Journal* 60.
- 19 *Bird v Luckie* (1850) 8 Hare 301, 306; 68 ER 375, 378 (Lord Knight Bruce V-C).
- 20 Vines, above n 2, 3.
- 21 Ibid; Croucher, 'Towards Uniform Succession in Australia', above n 18, 739.
- 22 The legislation was originally concerned with preventing widows and children from being left destitute: Vines, above n 2, 3.
- 23 Croucher, 'Towards Uniform Succession in Australia', above n 18, 739.

set out in the Appendix. Although there is a broadly consistent approach taken across Australia, there are jurisdictional differences that are of significance.²⁴

For example, at the time of the study, Victoria had the widest class of potential applicants which was framed in terms of a ‘person for whom the deceased had responsibility to make provision’.²⁵ New South Wales had the next largest class of eligible applicants.²⁶ Section 57 of the *Succession Act 2006* (NSW) lists all eligible persons while section 59 differentiates between members of that list, the effect being a two category approach.²⁷ Individuals who fall within the first category, which includes spouses (marital, de facto and same-sex) and children,²⁸ are automatically able to make a claim.²⁹ Individuals falling within the second category need to meet additional criteria demonstrating that ‘there are factors which warrant the making of the application’.³⁰ The second category includes former spouses; grandchildren or members of a household who were or had previously been wholly or partly dependent on the deceased; and persons with whom the deceased was living in a close personal relationship at the time of the deceased’s death.³¹

Another important difference is the concept of notional estate in New South Wales, which has significantly extended the potential property that could be subject to a family provision claim.³² No other jurisdiction has yet incorporated notional estate provisions,³³ despite their inclusion in the model legislation.³⁴

24 Even NSW, the only jurisdiction to implement (in the *Succession Amendment (Family Provision) Act 2008* (NSW)) parts of the model family provision legislation (the Model Family Provision Bill 2004 is set out in Queensland Law Reform Commission, *National Committee for Uniform Succession Laws: Family Provision – Supplementary Report to the Standing Committee of Attorneys General*, Report No 58 (2004) app 2) diverged from the recommended model. This was most notable in the definition of ‘eligible person’. The amendments to include family provision legislation in the *Succession Act 2006* (NSW) and repeal the *Family Provision Act 1982* (NSW) came into effect on 1 March 2009. See Croucher, ‘Towards Uniform Succession in Australia’, above n 18, 738.

25 *Administration and Probate Act 1958* (Vic) s 91(1). This was later amended by *Justice Legislation Amendment (Succession and Surrogacy) Act 2014* (Vic) s 5. See also Vines, above n 2, 4. For an outline of the changes brought about by the *Justice Legislation Amendment (Succession and Surrogacy) Act 2014* (Vic), see the Appendix.

26 *Succession Act 2006* (NSW) ss 57, 59.

27 *Succession Act 2006* (NSW) s 59(1)(b).

28 *Succession Act 2006* (NSW) ss 57(1)(a)–(c), 59.

29 *Succession Act 2006* (NSW) ss 57, 59(1)(a).

30 *Succession Act 2006* (NSW) s 59(1)(b); See also Vines, above n 2, 4.

31 *Succession Act 2006* (NSW) ss 57(d)–(f); See also Vines, above n 2, 4.

32 See *Succession Act 2006* (NSW) pt 3.3. See also Croucher, ‘Towards Uniform Succession in Australia’, above n 18, 740.

33 It should be noted that in Queensland, a *donatio mortis causa* will be deemed estate property: *Succession Act 1981* (Qld) s 41(12); John de Groot and Bruce Nickel, *Family Provision in Australia* (LexisNexis Butterworths, 4th ed, 2012) 53.

34 Croucher, ‘Towards Uniform Succession in Australia’, above n 18, 739.

Once eligibility has been established,³⁵ family provision applications generally have two stages.³⁶ The first is to establish whether the testator has provided adequate support for the maintenance, education, advancement and/or support for the individual in question. The combination of these words varies between jurisdictions, although the terminology adopted seems to have little practical impact,³⁷ with the legislation being expansively interpreted.³⁸ Once inadequate provision is demonstrated, the second stage requires the court to determine whether provision should be made and, if so, to what extent.³⁹ This second stage asks the court to put itself in the place of a ‘wise and just’ testator.⁴⁰ As demonstrated in the Appendix, there are various factors that will be taken into consideration by a court which vary between jurisdictions. However, the fundamental aim is balance – between the deceased’s moral obligation to provide (for an expanding class of ‘eligible person’); the applicant’s need and moral claim;⁴¹ the need and moral claim of existing beneficiaries; and the deceased’s testamentary freedom.⁴² The legislation in all jurisdictions except New South Wales, the Australian Capital Territory and Victoria refers to disentitling conduct. In those jurisdictions, a variation of the phrase ‘character and conduct’ has been adopted with seemingly little practical difference.⁴³

B Disputes about the Validity of a Will

The succession law contests about the validity of wills in the sample (the next largest category) were grouped as either a dispute as to testamentary capacity or as to compliance of the testamentary document with the requirements of form. As with family provision legislation, jurisdictional discrepancies exist regarding the formal requirements. However, unlike the family provision legislation, the Model Wills Bill has had more success, having been adopted (in whole or in part) in New South Wales, Queensland, Victoria, Western Australia and the Northern Territory.⁴⁴

For a will to be valid, it must comply with the formal writing and witnessing requirements and the testator must intend it to operate as such, while knowingly

35 Generally, a person’s eligibility to make an application will be considered at the date of death although it is possible for the relevant date to be the date of order as is the case in, eg, NSW: *Succession Act 2006* (NSW) s 59(1)(c); de Groot and Nickel, above n 33, 29.

36 *Singer v Berghouse* (1994) 181 CLR 201, 209–10 (Mason CJ, Deane and McHugh JJ).

37 Vines, above n 2, 3.

38 de Groot and Nickel, above n 33, 27–8.

39 *Singer v Berghouse* (1994) 181 CLR 201, 209–10 (Mason CJ, Deane and McHugh JJ).

40 *Bosch v Perpetual Trustee Co Ltd* [1938] AC 463, 478. This raises issues about defining what is ‘wise’ and ‘just’, who should be able to determine this and how such a determination should be made: de Groot and Nickel, above n 33, 25.

41 de Groot and Nickel, above n 33, 11.

42 Croucher, ‘Towards Uniform Succession in Australia’, above n 18, 751.

43 See de Groot and Nickel, above n 33, 19, 34–5. See also Appendix.

44 The Model Wills Bill is contained in in New South Wales Law Reform Commission, *Uniform Succession Laws: The Law of Wills*, Report No 85 (1998) app 1. The NT legislation replicates the model Bill and NSW, Queensland and Victoria are relatively faithful, while WA has significantly departed from the model provisions: Croucher, ‘Towards Uniform Succession in Australia’, above n 18, 730.

and freely approving of its contents.⁴⁵ A testator must be of sound mind, memory and understanding⁴⁶ to make or change a will.⁴⁷ Testamentary capacity is task-specific,⁴⁸ and is a question of fact.⁴⁹ We note that disputes about undue influence are legally distinct from capacity concerns,⁵⁰ but have grouped these together for the purposes of this analysis given that they often share similar factual elements. An example is an elderly widowed testator with mid-stage dementia, made to see a solicitor by her daughter, with that daughter then the only beneficiary named in the new will to the exclusion of the testator's other children. At first glance, these circumstances give rise to concerns about testamentary capacity as well as the possibility that the daughter may be exercising coercion over her mother.

C Construction Cases

The third category of cases that emerged from the sample was comprised of cases involving questions or disputes as to how a will should be construed. Provided that the deceased makes their intention clear, the courts will, where possible, give effect to the expressed intention with the ultimate aim being the avoidance of intestacy.⁵¹ Failing a clear testamentary intention, the courts will resort to the rules of construction.⁵² In addition to the general rules of construction,⁵³ the principles of testamentary construction focus on ascertaining the expressed intention of the testator,⁵⁴ while construing the will as a whole.⁵⁵ Words are given their usual or ordinary meaning, although this presumption can be replaced if a contrary intention can be evidenced.⁵⁶ The court may take into account the surrounding circumstances in construing a term.⁵⁷

45 *Astridge v Pepper* [1970] 1 NSW 542; Rosalind Croucher and Prue Vines, *Succession Families, Property and Death: Text and Cases* (LexisNexis Butterworths, 4th ed, 2013) 219.

46 We note that arbitrariness, capriciousness, eccentricity, perceived injustice or maliciousness are not grounds for alleging testamentary incapacity: *Bird v Luckie* (1850) 8 Hare 301, 306; 68 ER 375, 378 (Lord Knight Bruce V-C); *Perpetual Trustee Co Ltd v Clarke* (1895) 16 NSWLR (Bky & P) 20, 27 (Owen CJ). See also Harvey D Posener and Robin Jacoby, 'Testamentary Capacity' in Robin Jacoby et al (eds), *Oxford Textbook of Old Age Psychiatry* (Oxford University Press, 4th ed, 2008) 753, 754.

47 *Re Macfarlane* [2012] QSC 20, [9] (McMeekin J); New South Wales Law Reform Commission, *Wills for Persons Lacking Will-Making Capacity*, Report No 68 (1992) 3. See also A A Preece, *Lee's Manual of Queensland Succession Law* (Lawbook, 7th ed, 2013) 48; *Tipper v Moore* (1911) 13 CLR 248.

48 Daniel C Marson, Justin S Huthwaite and Katina Hebert, 'Testamentary Capacity and Undue Influence in the Elderly: A Jurisprudent Therapy Perspective' (2004) 28 *Law & Psychology Review* 71, 82.

49 Preece, above n 47, 49. See also *Re Estate of Griffith; Easter v Griffith* (1995) 217 ALR 284; *Re Macfarlane* [2012] QSC 20, [9], [16] (McMeekin J).

50 *Astridge v Pepper* [1970] 1 NSW 542; Croucher and Vines, above n 45, 219–20.

51 *Re Harrison Estate* (1885) 30 Ch D 390, 393 (Lord Esher MR); Ken Mackie, *Principles of Australian Succession Law* (LexisNexis Butterworths, 2nd ed, 2013) 188, 197–8.

52 Traditionally the 'rules' were inflexibly applied, an approach which has relaxed in modern times: Mackie, above n 51, 188.

53 See, eg, *eiusdem generis*.

54 *Perrin v Morgan* [1943] AC 399.

55 *Fell v Fell* (1922) 31 CLR 268, 273–4 (Isaacs J); *Perrin v Morgan* [1943] AC 399.

56 *Allgood v Blake* (1873) LR 8 Ex 160. The usual or ordinary meaning will be applied even if the result is eccentric or capricious because that is the testator's right: *Bird v Luckie* (1850) 8 Hare 301, 306; 68 ER 375, 378 (Lord Knight Bruce V-C).

57 *Fell v Fell* (1922) 31 CLR 268; *Allgood v Blake* (1873) LR 8 Ex 160.

D Other Disputes

The remaining disputes in the sample did not fit within any of the preceding categories. The breadth of these issues means it is not possible to outline the key relevant law but we note that the main types of cases falling into this category were cases about establishing next of kin, making statutory wills, reviewing the conduct of executors and determining who was able to administer an estate.

E Mediation and Costs

Two final issues that need to be considered as part of this wider overview of the law are mediation and costs. Both are capable of facilitating or encouraging settlement of disputes without the need for judicial intervention and so are important issues when examining how often and why succession contests occur.

1 Mediation

Mediation is a process by which the parties seek to reach agreement so as to avoid the need for judicial resolution of their dispute.⁵⁸ Since 1 March 2009, New South Wales has had a statutory requirement that parties must undergo compulsory mediation in an application for a family provision order unless special reasons exist.⁵⁹ Queensland also requires mediation for family provision applications as parties are required to submit a dispute resolution plan in a draft directions order which is to be served with the originating application.⁶⁰ In the remaining states and territories (and in New South Wales and Queensland for non-family provision matters), mediation or other forms of dispute resolution are

58 Laurence Boulle and Nadja Alexander, *Mediation Skills and Techniques* (LexisNexis Butterworths, 2nd ed, 2012) 1–2.

59 *Succession Act 2006* (NSW) s 98. There was no form of compulsory mediation under the previous *Family Provision Act 1982* (NSW). See also Supreme Court of New South Wales, *Practice Note No SC Eq 7 – Family Provision*, 15 May 2009, para 8. The issue of compulsory court ordered mediation raises questions such as whether it is likely that the parties could construe the attempted alternative dispute resolution method as a court process whereby they do not have a choice; and if the mediator's role is viewed as judicial in nature. Vines has addressed the importance of mediation in resolving succession disputes: Vines, above n 2, 31–2, 35. Further research into the utility of compulsory mediation is warranted.

60 Supreme Court of Queensland, *Practice Direction No 8 of 2001 – Family Provision Applications*, 10 December 2001, para 8(b); see also *Civil Proceedings Act 2011* (Qld) pt 6; *Uniform Civil Procedure Rules 1999* (Qld) ch 9 pt 4. Case appraisal is also possible: *Uniform Civil Procedure Rules 1999* (Qld) ch 9 pt 4 div 4; *Civil Proceedings Act 2011* (Qld) pt 6.

not legislatively mandated but are good practice and will generally be ordered by a court if not already undertaken by the parties.⁶¹

2 Costs

Underpinning any order of costs is the doctrine of proportionality;⁶² that is, the mechanisms used to resolve a dispute should reflect the value, complexity and significance of the matter.⁶³ The usual rule for costs is that they ‘follow the event’ and generally, if there is an order for costs, it is on a party–party, or standard, basis unless an order is made to the contrary.⁶⁴ However, a different approach is often taken in succession cases. For example, where a successful family provision application has been made, the position has traditionally been that costs are paid out of the estate on a solicitor–client, or indemnity, basis,⁶⁵ although some changes have occurred.⁶⁶ To illustrate, in New South Wales and the Australian Capital Territory, the usual order now is that the plaintiff’s costs will be paid on a standard basis and the defendant’s costs on an indemnity basis, both out of the estate.⁶⁷ In the Northern Territory and Queensland,⁶⁸ costs may be ordered on a standard or indemnity basis.⁶⁹ In South Australia, the court can

61 See ACT: court may refer to mediation and parties have a duty to participate ‘genuinely and constructively’: *Court Procedure Rules 2006* (ACT) rr 1179–80. NSW: see *Civil Procedure Act 2005* (NSW) pt 4; *Uniform Civil Procedure Rules 2005* (NSW) pt 20. NT: court may refer to mediation: *Supreme Court Rules* (NT) r 48(13); *Supreme Court Act* (NT) s 83A. Queensland: see *Uniform Civil Procedure Rules 1999* (Qld) ch 9 pt 4; *Civil Proceedings Act 2011* (Qld) pt 6. SA: court may refer to mediation: *Supreme Court Act 1935* (SA) ss 65–6; *District Court Act 1991* (SA) ss 32–3; Supreme Court of South Australia, *Practice Directions Part I – Practice Directions*, 13 March 2014, para 5.1.8.2, ch 9. Tasmania: court may refer to mediation: *Supreme Court Rules 2000* (Tas) r 518. Victoria: court may refer or parties can request mediation: *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 50.07; *Supreme Court Act 1986* (Vic) s 24A; Supreme Court of Victoria, *Practice Note No 1 of 1996 – Civil Case Management – Targets and Draft Directions* [1997] 1 VR 527. WA: mediation under direction (case management principles): *Supreme Court Act 1935* (WA) pt VI, s 167(1)(q); *Rules of the Supreme Court 1971* (WA) r 4A.8, O 29; Supreme Court of Western Australia, *Consolidated Practice Directions 2009*, 27 October 2014, para 4.2.1. Note that although not compulsory by law in Victoria, Vines describes a ‘culture of mediation’ that has developed in Victoria and that it has become ‘standard’: Vines, above n 2, 14.

62 See, eg, *Civil Procedure Act 2005* (NSW) s 60; *Civil Procedure Act 2010* (Vic) s 24. For a detailed discussion on the perceptions of proportionality and whether costs are disproportionate to, in particular, the value of the estate in NSW and Victoria, see Vines, above n 2.

63 Vines, above n 2, 7.

64 *Singer v Berghouse* (1994) 181 CLR 201. See also de Groot and Nickel, above n 33, 304.

65 See ACT: *Court Procedure Rules 2006* (ACT) r 1721. NSW: *Uniform Civil Procedure Rules 2005* (NSW) r 42.1; *Succession Act 2006* (NSW) s 99. Queensland: *Uniform Civil Procedure Rules 1999* (Qld) rr 681–2. SA: *Supreme Court Civil Rules 2006* (SA) r 263; Supreme Court of South Australia, *Practice Direction of 2006*, 13 March 2014, para 8.1. Tasmania: *Supreme Court Rules 2000* (Tas) r 918; *Testator’s Family Maintenance Act 1912* (Tas) s 3(1). Victoria: *Supreme Court Act 1986* (Vic) s 24; *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 63.02 (which do not specify that costs follow the event unless ordered). WA: *Rules of the Supreme Court 1971* (WA) r 66.1.

66 de Groot and Nickel, above n 33, 295.

67 Ibid.

68 An order for costs out of the estate is a debt for the purposes of s 59 of the *Succession Act 1981* (Qld): *Re Linning* [1995] 1 Qd R 274.

69 de Groot and Nickel, above n 33, 295.

exercise its discretion, including where the estate is small.⁷⁰ If a *Calderbank* letter has been sent, generally costs out of the estate will only be ordered until the date of the letter.⁷¹ If an application is unsuccessful, normally there is no order as to costs.⁷² However, in New South Wales, for example, it is becoming more common that a plaintiff will be ordered to pay the defendant's costs on a party-party basis when an application is dismissed.⁷³

III RESEARCH PROGRAM

This research is part of a multi-year national research project on the prevalence of making and changing wills and the dynamics of making, changing and contesting wills.⁷⁴ In addition to a review of the judicial cases examined in this article, the project includes a national prevalence survey of will-making, a document analysis of contested wills in public trustee offices, a national online survey of document drafters, and interviews with will-makers and those who have not made a will. A literature review and a review of wider relevant case law and legislation were also undertaken as part of the project.

A Method and Sampling

The purpose of this aspect of the project was to review all judicially resolved contests about succession law in Australia over a 12-month period (January – December 2011) to understand the nature of this type of litigation, the grounds for legal challenge relied upon, and why people contest estate distributions. To do this, all publicly available cases relating to conflicts about succession law were located. The method employed was a search of three databases – CaseBase on LexisNexis AU,⁷⁵ FirstPoint on Legal Online⁷⁶ and Austlii⁷⁷ – using the term 'succession' over a one year time period, from 1 January 2011 to 31 December 2011 inclusive.⁷⁸ The very broad search term 'succession' was chosen deliberately to ensure maximum inclusion of potentially relevant cases. The databases were searched one after the other and duplicated cases were identified and excluded from the cumulative list. Also excluded in this process were cases that were obviously not about wills and estates such as those dealing with

70 Supreme Court of South Australia, *Practice Direction of 2006*, 13 March 2014, para 8.1.

71 de Groot and Nickel, above n 33, 296.

72 Ibid 298.

73 Ibid 298–9.

74 See the project website for further information about the wider research program: School of Nursing, Midwifery and Social Work, *Families and Generational Asset Transfers: Making and Challenging Wills in Contemporary Australia*, University of Queensland <<http://www.uq.edu.au/swahs/families-and-generational-asset-transfers-making-and-challenging-wills-in-contemporary-australia-28788>>.

75 LexisNexis, *CaseBase* <<http://www.lexisnexis.com.au/knowledge-network/Products/CaseBase/>>.

76 Thomson Reuters, *FirstPoint* <<http://www.thomsonreuters.com.au/firstpoint/productdetail/72572?>>.

77 Austlii, *Australian Legal Information Institute* <<http://www.austlii.edu.au/>>.

78 We note that this may not include alternatives to traditional estate litigation such as equitable causes of action based on resulting or constructive trusts but doing so was not feasible.

criminal law,⁷⁹ personal injuries,⁸⁰ or corporate law.⁸¹ This resulted in a total of 253 cases included for review.

Of the 253 succession law cases that remained, further criteria were applied to exclude those cases that were not relevant to this study. Cases which dealt with procedural matters that do not shed light on the focus of this study, namely why and how wills are contested, were excluded. Examples include a case dealing with whether a hearing should occur in public or not,⁸² and whether a person could be treated as having died.⁸³ Another case was not about the distribution of an estate, but rather, involved an application to posthumously extract sperm from a deceased.⁸⁴ There were also cases where there was no ‘contest’ involved and the court’s role was rather responding to whether an outcome agreed to by the parties could be achieved. Finally, there were also a few cases where there was insufficient information generally or in relation to the aims of our study to justify inclusion. An example here is special leave applications to the High Court.⁸⁵ After these further cases were excluded, a total of 215 cases remained for analysis which involved contests in relation to 195 estates (some estates were the subject of multiple cases over the collection period).⁸⁶

B Data Collection

Once the sample had been identified, the data from these cases were collected and entered into Word documents and Excel spreadsheets for analysis. Template documents and spreadsheets, as described below, were developed and piloted to ensure consistency of data collection. Rigour was ensured by a sample of cases, their summaries and how each was coded being checked by two other members of the research team.

There was a three stage process of data collection:

1. First, a short précis of each case in the sample was entered into a Word table with key descriptive variables such as state, the type of case and nature of claimant. This document provided a useful overview to navigate through the sample as a whole.
2. Each case was then individually summarised in a Word document template, including data on:
 - o the deceased, such as their age, gender, place of residence and family situation (marital status, dependants);

79 *Fernando v Balchin* [2011] NTSC 10; *DPP (NT) v Dickfoss* (2011) 28 NTLR 71.

80 *Amaca Pty Ltd v Booth* (2011) 246 CLR 36.

81 *Harding Investments Pty Ltd v PMP Shareholding Pty Ltd [No 3]* (2011) 285 ALR 297.

82 *Ashton v Pratt* [2011] NSWSC 1092.

83 *Lashko v Lashko* [2011] WASC 214.

84 *Edwards; Re Estate of Edwards* (2011) 81 NSWLR 198.

85 Transcript of Proceedings, *Hanna v Hanna* [2011] HCATrans 67 (11 March 2011); Transcript of Proceedings, *Northey v Juul* [2011] HCATrans 57 (11 March 2011).

86 Of course, this methodology will only provide insight into estate contestation that is judicially resolved. We note that most estate contestation is resolved without recourse to the courts: see below nn 117–18 and accompanying text.

- o the estate, such as whether or not there was a will (or more than one), and details of executors;
 - o the contest, such as the parties involved in the dispute, the nature of the claim, and the major claims of claimants, including implicit norms apparent in the claims; and
 - o the judgment, including identified norms in the court's reasoning and key quotes.
3. Finally, data from each case was collected and entered into an Excel spreadsheet. A coding frame to do this was established by the research team. This stage involved the most detailed data collection as it included the matters already collected in the Word summary template but provided more context to that summary by including text entries on data such as:
- o demographic characteristics of claimants, others involved in litigation and potential and actual beneficiaries (for example, their financial position and special needs through disability or other needs);
 - o information on the relationships involved in the contest, such as who the substantive contest involved, and information about complex family and other relationships such as blended families;
 - o other planning dimensions involved, such as the existence of powers of attorney, guardianship/administration orders or trusts; and
 - o the wider financial situation relevant to the dispute, including care and financial contributions given during the deceased's lifetime, and inter vivos transfers.

C Analysis

The data were collected, as described above, to facilitate both quantitative and qualitative analysis, and this analysis focused on the family provision cases. These cases comprised over half the sample and the transparent nature of these contests (that is, there was a direct claim for additional funds) allowed for further analysis. The first quantitative stage was to undertake basic analysis as to the frequency of some key variables in the estate disputes. This foundation data provides an overview as to the state of estate contests and helps determine what patterns or trends can be discerned from these cases. This analysis included, for example, the frequency of disputes across states, the types of disputes, who is bringing them and how often cases are successful. The results of this quantitative analysis were reviewed by another researcher outside the research team for accuracy. The Excel spreadsheets were integral to this quantitative analysis as they enabled cases to be grouped together in different ways, for example by state, by type of dispute or by type of claimant, depending on the issue being examined.

The qualitative analysis of the cases sought to understand the themes or patterns that emerged from those data. This was a more targeted analysis that was

driven by issues of interest raised by the results of the quantitative analysis and findings from the other components of the wider research project.⁸⁷ The thematic analysis undertaken for these issues involved looking for common features in the cases which could be grouped together.⁸⁸ This included, for example, an examination of family provision cases that were successful and those that were not to see if there were any common features of each. It also involved looking not only for common patterns or themes but also at outliers which might help explain trends. The Excel spreadsheets were the starting point for this analysis as they enabled the grouping of cases by particular variables to explore like cases together. It was then possible to look across the text entries in the rows of the spreadsheet to understand the various aspects of a particular case, as well as the text entries in the columns of the spreadsheet to understand what the cases as a whole in that group were saying about a particular variable. The Word summary template for these cases was then consulted to better understand the case, and at times the actual judgment itself was re-read.

To illustrate, disability was one issue examined in the thematic analysis and cases were sorted accordingly to allow further examination of aspects of those cases, such as the nature of that disability (physical or cognitive) and the type of claimant (minor or adult). For some of these cases, the judgment was reviewed again, in conjunction with the Word summary, to better understand the role that disability played in each case.

D Limitations

The study is limited to cases that are publicly available by searching the three major databases listed above. Although searching across these databases will locate unreported judgments, not all judgments are available on these sites. This appears to be the case for a small number of Supreme Court decisions on succession law which referred to earlier decisions in the same matter that were not available. It may be that some were not included in the database because they dealt with merely procedural matters.⁸⁹

A second limitation acknowledges that cases are constructed documents in two ways. The first is that the parties and their legal representatives present their case in a particular way that is likely to be most advantageous to their interests. This can be relevant in terms of how facts are presented, such as a version of family history favourable to their claim. It can also be relevant as to how their case is constructed as a matter of law (that is, if a claim is pursued under family provision or as an attack on the will itself). Further, having chosen a category of legal claim, the need to present that claim in terms that match the relevant statutory or common law criteria influences the shaping of the case.

⁸⁷ See the introductory paragraph of Part III: Research Program above.

⁸⁸ Virginia Braun and Victoria Clarke, 'Using Thematic Analysis in Psychology' (2006) 3 *Qualitative Research in Psychology* 77.

⁸⁹ See, eg, *Affoo v Public Trustee of Queensland* [2012] Qd R 408, where reference was made to two earlier hearings in February and March 2011 but neither of these cases was found in any of the three database searches. At least one these hearings seemed to be procedural in nature.

The second process of construction occurs at judgment whereby the judge filters the case detail through the process of writing the judgment. This process of sorting indicates that judgments do not automatically contain all information put forward at the hearing. Instead it appears that judges, at times, mention in general terms information that may be relevant but choose not to remark on it in detail, thereby alluding to matters that could be unsavoury or salacious. The result of this is further limiting of the case details publicly available for analysis.

A third limitation is the extent of information cases contain. Some cases contained very detailed information about the estates and the disputes, whereas others simply provided a brief overview of the outcomes limited to less than a page of information. Size of estate was another factor regarding which varying degrees of information were provided. In some cases, the value of the estate was not stated, whereas in others it was. Moreover, estate size could be given as a gross figure, a net value (or both), or be unclear whether it was gross or net.

A final limitation of the study is that while the overall sample size is reasonably large, when grouping estates by state, claimant or other variables, the number of estates within each of those subcategories can be relatively small. The article does report on descriptive statistics to help explain trends. However, these results need to be viewed in light of the relevant sample size.

IV A YEAR OF ESTATE CONTESTS

A Number and Nature of Estate Contests

In 2011, there were 215 succession law cases that fell within the sampling criteria for this review, involving a total of 195 estates. Table 1 shows the number of contested estates and claims against those estates by state and the four categories of contest outlined above.

Of note is New South Wales, which had twice the number of contested estates of any other jurisdiction at 87 estates, with Queensland and Victoria next at 43 and 31 estates respectively. Some of this may be a reflection of population, but even allowing for it being the most populous Australian state, New South Wales comfortably had the highest rate of estates that were the subject of judicial case resolution at 1 estate contested per 83 307 persons.⁹⁰ Next closest was Queensland with 1 estate contested per 104 953 persons, while the other large state in Table 1 (Victoria) had only 1 estate contested per 179 823 persons.⁹¹

90 This was calculated using population statistics as at the end of 2011 to correspond with the period of the judicial cases sample: Australian Bureau of Statistics, *Australian Demographic Statistics: December Quarter 2011* (Publication, 20 June 2012).

91 For the other states (in order of Table 1 and note that some states involve small numbers of estates, with the NT excluded as having only one estate in the sample) – ACT: 1 estate contested per 123 567 persons; SA: 1 estate contested per 109 667 persons; Tasmania: 1 estate contested per 170 567 persons; WA: 1 estate contested per 183 631 persons.

Table 1: Estates and Claims by Jurisdiction and Contest Category

State	Estates in Sample/Claims	Family Provision	Validity	Construction	Other
NSW ^A	87/101	59/72	11/11	8/8	9/10
Qld	43/44	14/15	10/10	7/7	12/12
Vic	31/34	19/22	5/5	3/3	4/4
SA	15/15	2/2	9/9	2/2	2/2
WA	13/14	3/3	7/8	0	3/3
Tas	3/3	1/1	1/1	0	1/1
ACT	3/3	0	0	1/1	2/2
NT	1/1	1/1	0	0	0
Total*	196/215	99/116	43/44	21/21	33/34

* New South Wales has one estate with claims in the two categories of family provision and validity, thus the figures in this row are increased by one along with those totals.

New South Wales is also responsible for 60 per cent of all family provision estates contested in Australia with three times the number of Victoria, the next highest state.⁹² Again, population differences do not account for this rate of family provision contestation in New South Wales, which sits at 1 estate per 122 831 persons.⁹³ Victoria is the next closest state with 1 estate contested per 293 395 persons, followed by Queensland with 1 estate contested per 322 357 persons.⁹⁴

Looking at the categories of cases, family provision is responsible for more than half of the estate contests in 2011 (99 estates). For this reason, and because it represents the archetypal case of conflict where parties are openly challenging estate distribution, there is a particular focus in the results that follow on this category of contest. Family provision was usually the most frequent category of contest across states, except in South Australia and Western Australia where contests about validity arose more frequently.

B Nature of Contested Estates

The vast majority of disputes involved an estate with a will or potential will made by the deceased: 173 of the 195 estates. Four of those 173 estates also

92 McGregor-Lowndes and Hannah also note that NSW has the highest number of family provision claims: McGregor-Lowndes and Hannah, above n 2, 69.

93 This was calculated using population statistics as at the end of 2011 to correspond with the period of the judicial cases sample: Australian Bureau of Statistics, above n 90.

94 For the other states – SA: 1 estate contested per 822 500 persons (note only 2 estates in sample); WA: 1 estate contested per 795 733 persons (note only 3 estates in sample). Tasmania, NT and ACT are not included because they only have 1, 1 and 0 family provisions claims respectively in the sample.

involved disputes about intestacy as well as a will, while a further 15 estates only gave rise to issues of intestacy. The presence or absence of a deceased's will was not stated in two estates and the remaining five estates involved applications to make statutory wills.

Of the 195 contested estates, 111 involved a deceased male, 79 involved a deceased female and the remaining five were joint estates involving both a husband and wife. The age of the deceased was not stated in 78 of the estates. Of the remaining 117 estates, only 10 were younger than 60 years of age, with over half of the deceased dying between the ages of 70 to 89.

Data on the size of estates were also collected, although a limitation of these results is that the estate value was not listed in just over a quarter of judgments. Of the 54 estates with unstated values, 10 were described as being of 'modest' value and 7 were defined as 'significant'. Table 2 outlines the size of the remaining 141 estates by jurisdiction where the value was listed. A further limitation of these results is that not all cases specified whether gross or net values were given; however, net values were used in the analysis when both were stated.

Table 2: Estates by Size and Jurisdiction

State	Number of Estates Where Value Known	Size of Estate			
		Under \$500 000*	\$500 000–\$999 999	\$1 Million–\$2 999 999	Over \$3 Million
NSW	70	25	21	13	11
Qld	25	8	7	6	4
Vic	25	5	5	9	6
SA	8	5	1	1	1
WA	8	3	1	3	1
Tas	2	0	2	0	0
ACT	2	0	1	1	0
NT	1	0	1	0	0
Total	141 (100%)	46 (33%)	39 (28%)	33 (23%)	23 (16%)

* There were a small number of insolvent cases and they were considered to be estates of known value in that they were worth less than \$500 000.

Sixty per cent of contested estates were valued at less than \$1 million and over half of those estates were worth less than \$500 000 (33 per cent of the 141 cases). Twenty-three estates (16 per cent of 141) involved an estate valued over \$3 million. Looking at state comparisons, of the estates contested in Victoria, more appear to be of a higher value (worth more than \$1 million) than elsewhere, with 60 per cent in that State, compared to 40 per cent in Queensland and 35 per cent in New South Wales.

C Who Is Contesting?

This Sub-part considers who is contesting estates on the basis of family provision laws, and examines the identity of claimants and the nature of the ‘contesting relationship’ involved. Table 3 shows who is bringing family provision claims across Australia in the disputed estates in the sample. From this point forward in the article, individual results for family provision claims will only be presented by jurisdiction for New South Wales, Victoria and Queensland. The number of cases for the other states and territories are too small to draw meaningful conclusions: Western Australia has only three family provision cases in the sample, South Australia has two, Tasmania and the Northern Territory have one each, and the Australian Capital Territory had none. The national figure reported will include all states and territories, including those not individually shown in the table.

Table 3: Estates and Claims by Claimant Type and Jurisdiction for Family Provision

State	Total Estates	Total Claims	Partner	Ex-partner	Children*			Extended Family	Other
					Adult Children	Adults with Incapacity	Minors		
NSW	59	72	13	4	39	6	3	4	3
Vic	19	22	3	0	10	2	0	4	3
Qld	14	15	6	0	6	2	0	0	1
Other	7	7	1	0	5	0	0	1	0
Total	99	116 (100%)	23 (20%)	4 (3%)	60 (52%)	10 (9%)	3 (3%)	9 (8%)	7 (6%)

[Note: figures do not add up to 100 per cent due to rounding].

* Includes stepchildren and foster children.

Eighty-six per cent of claims were brought by immediate family: either children of the deceased (63 per cent) or partners (including ex-partners) (23 per cent). To better understand the nature of the ‘children’ claimants (the largest cohort), this group has been further subcategorised by whether the child is a competent adult, an adult with issues relating to decision-making capacity, or a minor. An adult claimant was coded as having capacity issues only if there was clear evidence of this in the judgment, but there was no need for a substitute decision-maker to have been appointed or acting in that role for an adult to be included in this category.⁹⁵ Over half of family provision claims brought by *all claimants* were brought by competent adult children.

95 We are conscious that capacity is both time and matter specific and so a global statement of incapacity is problematic. For our purposes, it was sufficient if the judgment raised clear evidence that a claimant had difficulties with some aspects of decision-making capacity.

But what sort of ‘relationship contest’ do these claims involve? Starting with claims by children, Table 4 sets out how each of these claims are characterised in terms of the key relationships involved.

Table 4: Family Provision Claims by Children* and Contesting Relationships

State	Claims	Contest between Siblings [^]	Children of Deceased vs Partner of Deceased	Children vs Extended Family	Children vs Other
NSW	48	30	14	3	1
Vic	12	8	0	1	3
Qld	8	4	3	1	0
Other	5	1	3	0	1
TOTAL	73 (100%)	43 (59%)	20 (27%)	5 (7%)	5 (7%)

* Includes stepchildren and foster children.

[^] Although they may not technically be siblings or step-siblings, children from de facto relationships are also treated as such where the dispute is with other children of the deceased.

The majority of relationship contests for claims brought by children are between siblings, with another quarter being driven by conflict between the deceased’s child or children and the deceased’s partner. This latter group is consistent with the patterns that emerge when looking at family provision claims brought by partners. Table 5 demonstrates that 70 per cent of family provision claims brought by partners (including ex-partners) are in the context of a dispute with the generation that follows.

Table 5: Family Provision Claims by Partners and Contesting Relationships

State	Claims	Current Partner vs Child of Another Relationship	Current Partner vs Own Child	Current Partner vs Extended Family	Ex-partner vs Current Partner	Ex-partner vs Child of Another Relationship	Ex-partner vs Other
NSW	17	10	1	2	2	1	1
Qld	6	5	0	0	0	0	1
Vic	3	2	0	1	0	0	0
Other*	1	0	0	1	0	0	0
Total	27 (100%)	17 (63%)	1 (4%)	4 (15%)	2 (7%)	1 (4%)	2 (7%)

* Note that ‘Other’ in this table is WA only.

V HOW SUCCESSFUL ARE FAMILY PROVISION APPLICATIONS?

A Defining Success

‘Success’ is a complex concept when applied to estate disputes given the multiple interested parties and their relative interests. In this study, it is only possible to meaningfully and consistently determine success for family provision cases, which comprise over half of the estates in our sample. In these cases, claimants are explicitly making a claim against the estate and it is possible to determine whether that has been successful. Success is defined for these purposes as when there is either provision made for a claimant not already a beneficiary under an estate or provision to an existing beneficiary is increased. A successful challenge is determined by a change in distribution (either testamentary or intestacy).

Success cannot be determined adequately for the remaining three categories of contest we examined. In relation to the ‘other’ category, its cases are so disparate that measuring success consistently across the category is not possible. For the construction cases, the purpose of these applications is to determine how a testamentary document should be construed. At least on the face of the case, there is generally no winner or loser as the court is simply determining the testator’s intentions. We do acknowledge, however, that there will often be conflicts that prompt this litigation, which sit beneath the formal legal exercise of determining meaning, which will be resolved in favour of one party or the other.

Validity contests also present challenges in terms of measuring success. In some cases it will be clear, such as where one party successfully challenges a will on the basis that another party induced the testator to execute a will without capacity to do so. But other validity cases present difficulties in terms of measuring success, such as where the issue for the court to determine is which of a number of possible wills is valid. What counts as success in this instance as various parties may be advocating for acceptance of different wills? So in the validity category of cases, it is also not possible to have a reliable measure of success that works consistently across this cohort of cases. For these reasons, what follows then is a discussion of the success of *family provision* claims in Australia.

A final comment about the calculation of successful estate challenges is to note that a small number of cases did not involve a final determination on the merits, but instead involved an interlocutory application about the future of a matter and/or how it should be conducted.⁹⁶ Because this does not represent a successful challenge to the estate, these seven cases will be excluded from the number of estates that will be considered in this Part.

⁹⁶ An example is an application for an extension of time to institute proceedings: *Sassoon v Rose* [2011] NSWSC 378; *Leggett v Jansen* (2011) 4 Australian Succession and Trusts Law Reports 500.

B Successful Family Provision Claims

Table 6 shows the level of successful family provision claims in Australia and by various states, and which claimants were most successful. Across the country, three-quarters of family provision claims were successful. Partners had the highest level of successful litigation, which probably reflects recognition that the moral duty to provide is strongest in relation to one's partner. Children claimants were least successful, although their rate of success was still high at above two-thirds. Surprisingly, claimants from the extended family and even outside the family also had a high level of success given their more remote relationship to the deceased.

Table 6: Successful Family Provision Claims by Claimant Type and Jurisdiction

State	Claims Excluding Interlocutory	Successful Claims (% Success)	Successful claims/total claims by: (% success)			
			Partner or Ex-partner	Child or Children	Extended Family	Others
NSW	71	54 (76%)	13/16 (81%)	35/48 (73%)	3/4 (75%)	3/3 (100%)
Vic	18	12 (67%)	2/2 (100%)	7/12 (58%)	1/2 (50%)	2/2 (100%)
Qld	13	10 (77%)	5/5 (100%)	5/7 (71%)	0	0/1 (0%)
Other	7	5 (71%)	1/1 (100%)	3/5 (60%)	1/1 (100%)	0
Total	109	81 (74%)	21/24 (88%)	50/72 (69%)	5/7 (71%)	5/6 (83%)

Of note is that the rate of success in New South Wales corresponds with the national average. Recall that this jurisdiction was home to 60 per cent of family provision cases. So while the majority of this litigation occurs in this one state, there is no evidence to suggest that litigants in New South Wales are more successful than their interstate counterparts.

Table 7 considers the impact of the size of the estate on success. One overall pattern that clearly emerges is that claims against larger estates appear more likely to succeed than those against smaller estates. There is a clear linear relationship between the size of the estate and the rate of success in contesting it. This could be a reflection of the fact that a large estate is better able to meet a wider range of potential claimants than a small estate where the judge may be forced to conclude that there are insufficient funds to warrant altering a testator's intentions or intestacy legislation.

A clear exception to this trend arises for partners. Claims brought by partners, even against estates worth less than \$500 000, appear to have a high prospect of success regardless of estate size. Again, this is likely to reflect the moral

imperative recognised by the courts to provide for partners. By contrast, the likelihood of a child's successful claim is more sensitive to estate size.

Table 7: Successful Family Provision Claims by Claimant and Estate by Size

Claimant	Claims Excluding Interlocutory	Successful Claims (% Success)	Successful claims/total claims by size of estate (% success)				
			Under \$500 000	\$500 000–\$999 999	\$1 Million–\$2 999 999	Over \$3 Million	Not stated
Partner or Ex-partner	24	21 (88%)	9/11 (82%)	3/4 (75%)	4/4 (100%)	3/3 (100%)	2/2 (100%)
Child or Children	72	50 (69%)	14/26 (54%)	18/26 (69%)	9/11 (82%)	5/5 (100%)	4/4 (100%)
Extended Family	7	5 (71%)	0/1 (0%)	0	5/6 (83%)	0	0
Others	6	5 (83%)	0	0	4/4 (100%)	1/1 (100%)	0/1 (0%)
Total	109	81 (74%)	23/38 (61%)	21/30 (70%)	22/25 (88%)	9/9 (100%)	6/7 (86%)

Claims by extended family and others are also worth commenting on. It was noted above that there is perhaps a surprisingly high level of success for these claimants given their more remote relationship to the deceased. Firm conclusions should not be drawn from such small numbers in the analysis but a likely factor in this situation is that none of these successfully contested estates were worth less than \$1 million. The general trend noted above that larger estates are more able to bear wider claims would mean these other claimants were more likely to succeed. It is also possible that only very strong cases from these more remote categories of claimants, for example involving situations of special and close dependency on the deceased, are likely to be taken forward to judicial resolution.

VI WIDER THEMES IN FAMILY PROVISION CONTESTS

We turn now to consider what wider themes emerge from the analysis and organise this discussion in terms of the three main variables considered to date: claimants, estate size and state (or territory). In line with the focus above, our emphasis will be on family provision claims, particularly those in relation to the three largest states in Australia – New South Wales, Victoria and Queensland – as well as the national picture.

A Claimants

The most significant theme in terms of claimants is the role of the children of the deceased. As noted above, children are the most frequent claimants in family provision cases, accounting for almost two-thirds of claims (63 per cent). And although they are less successful than other claimants, they still succeed in 69 per cent of cases.⁹⁷

The nature of these children claimants warrants further consideration, as some commentators have identified adult children as an area of concern in family provision litigation. For example, McGregor-Lowndes and Hannah argue that there are few impediments to adult children making a family provision claim and that it has become easier to succeed in these claims over time.⁹⁸ In particular, concern has been expressed about financially comfortable adults who are seeking more provision, contrary to testators' wishes, despite not needing it. Croucher has described a cohort of 'independent, self-sufficient 50 and 60 year olds wanting to get more of the pie from their parents, notwithstanding that the parent had made a conscious decision that they had already had enough and/or did not deserve more (or even anything)'.⁹⁹

There was at least some support for these concerns in this sample. First, it is *competent adult* children of the deceased who are responsible for the bulk of these children claims. As shown earlier in Table 3, 70 of the 73 children claims were by adult children of the deceased and only 10 of these 70 had some kind of impaired capacity. This left 60 claims by competent adult children.

To further explore the nature of these claimants, we reviewed these 60 cases with a focus on the financial position and other aspects of the claimant's situation to see if the claimant could *clearly* be regarded as a 'financially comfortable adult just wanting more'. We note that this is a subjective inquiry and so took what we regarded as a conservative approach so as to not overestimate the number of claimants in this group.¹⁰⁰ Evidence relied upon was the nature of the asset base (for example, one claimant's net worth exceeded \$1 million), the claimant's income (for example, joint income from one couple exceeded \$150 000), and the nature and number of dependents (for example, whether a claimant was caring for someone with a disability or special needs). Taking a

97 An interesting comparison from New Zealand, the home of family provision legislation, is that since a key New Zealand Court of Appeal decision was handed down, the success rate of claims by adult children has been 78 per cent (down from with 91.5 per cent some 13 years earlier): Nicola Peart and Bill Patterson, 'Charities and the *FPA*: A Turning Tide' [2007] *New Zealand Law Journal* 53.

98 McGregor-Lowndes and Hannah, above n 2, 78.

99 Croucher, 'Succession Law Reform in NSW', above n 2. See also McGregor-Lowndes and Hannah, above n 2.

100 Subsequent detailed qualitative analysis of these cases will tackle questions such as these, but it is not feasible in this article (which is providing a quantitative overview of the cases) to examine in more detail whether an adult child is motivated by 'need or greed'. We also considered that merely using whether a claim was successful or not as a measure of need was problematic as the courts' jurisdiction involves consideration of a wider range of factors, such as the size of estate available for distribution and the relative position of other beneficiaries.

conservative approach, we identified approximately one-third of the claimants that could be regarded as ‘financially comfortable adults just wanting more’.¹⁰¹

The other clear picture that emerges from our analysis is that family provision litigation is generally an intergenerational dispute between a deceased’s children and partners (especially if that partner was not the children’s parent) or a dispute between siblings. This issue of frequency of contestation also accords with reports by Vines as to which family provision disputes are most likely to be pursued vigorously. She notes anecdotal reports from her research that disputes between siblings and those between children of a former marriage and subsequent partner of the deceased are the ‘fiercest’.¹⁰²

B Size

As noted above, gathering comparable data from cases about the size of estates was difficult. Some cases did not state the value of the estate, whereas others were unclear as to whether the figure given was gross or net. That said, two broad observations can be made.

First, it appears that small estates are not immune from contest.¹⁰³ As noted above, where estate value was stated, 60 per cent of contested estates were valued below \$1 million and just over half of those estates were worth less than \$500 000. This may be a reflection of the position with costs in these cases, where the traditional disincentive to litigating (the threat of an adverse costs order) is not present in the same way (or at least that is the perception).¹⁰⁴ It could also be because estate litigation is often not a commercial decision, reflecting the idea that wills are not only legal documents but those that reflect family hierarchies and relationships.¹⁰⁵ Emotion and a sense of injustice can be significant drivers in these cases to address such issues, even if the potential financial benefits are not great.

The second observation is that larger estates were more likely to be successfully challenged, perhaps because of the ability of a larger estate (at least in family provision cases), to satisfy a wider range of competing claims. This was not universal though as, for example, small estates had a high rate of success in family provision cases by partners. This is likely to reflect the priority given to providing for one’s partner if insufficient regard has been had to his or her provision or maintenance.

101 In calculating this figure, we excluded those cases where there was not sufficient information to make a judgment about the claimant’s financial position.

102 Vines, above n 2, 14. See also: at 31–2.

103 Although different from this study in methodology, making comparison unhelpful, we note that Schoenblum also concluded that small estates were as likely to be contested as large ones: Schoenblum, above n 12, 617.

104 Vines, above n 2, 11, 34.

105 Janet Finch and Jennifer Mason, *Passing On: Kinship and Inheritance in England* (Routledge, 2000).

C State

Variation looking through the lens of state is also noteworthy. Jurisdictional difference provides an opportunity to reflect on the impact of potentially different laws, practices and other influences that vary by state. The major variation in these results relates to New South Wales. Even when allowing for differences in population,¹⁰⁶ quite a different picture of estate contestation emerges for this State. As noted above, it has the highest number, and rate per person, of contested estates and much of this is due to the fact that it has the highest number, and again rate per person, of estates subjected to family provision claims.¹⁰⁷ Sixty per cent of all Australian family provision claims are in relation to estates in New South Wales, but yet, the rate of success of these claims is in line with the national average. So presumably more litigation is not generated in this area because it is a better forum in which to contest a will. What then are the possible causes? We consider the potential impact of the nature of the estate and of state law.

1 *Nature of Estate*

One hypothesis considered was that New South Wales estates were larger than others; larger estates are more 'worth' challenging and this would generate more claims. It is the only jurisdiction with the concept of notional estate, which allows the court to include other property outside the estate as within it. This has the potential to increase the money available for distribution under a family provision claim and so notionally increases the value of the estate. But this hypothesis was not supported by the data as estates in the study were not larger in New South Wales than in other states: both Victoria and Queensland had larger estates (on average) yet fewer contests.

It may be thought that the mechanism of notional estate increased the number of estates that are worth challenging, hence increasing the frequency of contests in New South Wales. The argument is that there is a cohort of estates without sufficient value in them to warrant disputing them. However, the availability of notional estate increases the worth of these estates and so makes them a more attractive proposition to contest. This would not necessarily result in a number of high value estates, just an increase in the number of contestable estates.

We tested this hypothesis by looking more closely at the New South Wales family provision cases and the role that notional estate provisions were playing. Notional estate was mentioned in relation to 15 of the 59 estates, but in 5 of those estates, it was clear it was not driving the contest, for example, because the potential increase in the estate's value was very small. However, in the remaining 10 estates, we concluded that in 8, the availability of notional estate was very likely to have played a role in bringing a family provision claim. Examples

106 See above nn 90–1, 93–4 and accompanying text.

107 That NSW is different draws some support from Vines' study: Vines, above n 2, 31. Although only comparing with Victoria, Vines concluded that the rate of disproportionate costs in relation to the size of the estate was higher in NSW.

included cases where the only assets in the estate available for distribution were those brought in as notional estate and where the value of the estate increased significantly (sometimes by millions of dollars) due to these provisions.

So it is proposed that because of the availability of notional estate in New South Wales, some of the family provision claims that were brought there are very unlikely to have been brought in other jurisdictions. However, this statement needs to be seen in context. Eight estates is a relatively modest number and notional estate goes only a little way to explaining the position in New South Wales. If those eight estates were excluded, New South Wales would still have well over double the number of contested estates through family provision than Victoria (the next highest state), so there are other more important influences at play.

2 *State of Law*

The legal framework discussed earlier in this article noted that family provision law had taken a broadly consistent approach across Australia. There is, however, some variation and the issue is whether this could explain the frequency of family provision claims in New South Wales. Notional estate is one area in which New South Wales is unique in Australia and its possible impact has been discussed above.

Another difference is who may apply as an ‘eligible person’. Although the law in New South Wales created one of the widest classes of potential claimants in Australia, we do not consider that this explains why that state has such a high rate of family provision claims. First, Victoria had the widest class of applicants at the time of the study – broader than New South Wales – and it had one-third of the family provision claims that New South Wales did. Secondly, the overwhelming majority of claims in New South Wales (65 from 72) came from partners and children who were clearly recognised as appropriate claimants under all regimes. And of the remaining seven claims in New South Wales, three were from grandchildren (who are also recognised by most jurisdictions as possible claimants, including explicit recognition in four states), leaving only one other claimant from within extended family and three ‘other’ claimants from outside family. This suggests that the breadth of possible claimants in New South Wales is not contributing (or contributing only marginally) to the high rate of family provision claims in that State.

The role of mediation also varies in Australia. Although common practice across the country, New South Wales is again unique, having imposed a statutory requirement for compulsory mediation in family provision matters (absent where special reasons exist not to) since 1 March 2009.¹⁰⁸ The bulk of the New South Wales cases in the sample were initiated after this date and so would have been subject to this requirement. One might expect this to have reduced the number of family provision matters proceeding to judicial resolution and perhaps it has done

108 Although we note, as discussed above, that Queensland also requires parties to submit a dispute resolution plan in a draft directions order for family provision applications.

so. This is a cross-sectional study so there is no reference point to compare previous and later years, only across jurisdictions in a single year. In any event, the mandating of mediation in New South Wales has not reduced family provision contests when compared to other jurisdictions.

3 Other Factors

Having determined that estate size and state law played a relatively limited role in explaining the frequency of family provision claims in New South Wales, the question then arises as to other possible causes. One possibility is that while the law is not different in such a way as to explain the variation in New South Wales, the practice, operation and culture of that law is. In other words, the 'law in action' may be different from the 'law in books'.¹⁰⁹ Vines raises this prospect in relation to mediation. She notes that, at the time of her study, despite mediation being recently made compulsory for family provision matters in New South Wales, there may be 'still ... some way to go before the culture of mediation becomes such that it really affects the level of litigation'.¹¹⁰

Another possible factor could be variation in the legal professions across states. Differences between jurisdictions in areas such as the level of specialisation in succession law by the profession or the nature of public advertising by lawyers about the possibility to contest an estate could also have an impact on whether estate contestation occurs. It is not possible in this study, however, to reach a conclusion on these, or other, 'law in action' factors. The primary sources relied upon in this research (cases) do not provide reliable information on these issues. This points to the need, however, for more research in this area; particularly in relation to New South Wales which is clearly different from other Australian states.

VII CONCLUSION

This article has provided an overview of estate contestation in Australia over a 12-month period with a focus on family provision claims. This empirical baseline provides a foundation to start evaluating law and practice and consider whether change is needed. Australia has a history of succession law reform and review, such as that undertaken by the National Committee for Uniform Succession Laws,¹¹¹ and reform efforts in this area continue, as evidenced most recently by the report of the Victorian Law Reform Commission.¹¹²

109 This distinction is usually attributed to Roscoe Pound, 'Law in Books and Law in Action' (1910) 44 *American Law Review* 12.

110 Vines, above n 2, 35.

111 Examples of this research can be found at New South Wales Law Reform Commission, *Uniform Succession Laws* (29 January 2015) <http://www.lawreform.justice.nsw.gov.au/Pages/lrc/lrc_completed_projects/lrc_completedprojects2000_2009/lrc_uniformsuccessionlaws.aspx>.

112 Victorian Law Reform Commission, above n 2.

One of the key questions raised in this article is the role of adult children in family provision litigation. Other commentators have identified this as an issue,¹¹³ and this research has demonstrated empirically that there may be some substance to the concern that competent, financially comfortable adult children are making claims. This raises questions about whether this is the intended and/or proper function of family provision legislation and whether this intrusion into testamentary freedom is warranted. Originally designed to avoid widows and children of the testator being left destitute, some have criticised the evolution and widening of family provision to already financially comfortable claimants.¹¹⁴ One option for reform that has been advanced is to remove adult children from being automatically eligible for family provision and instead require them to demonstrate that the deceased had a responsibility to provide for them. This was the position adopted by the National Committee for Uniform Succession Laws in 1997,¹¹⁵ and it is one that Croucher has also recommended.¹¹⁶

A second issue is whether the balance is being appropriately struck between testamentary freedom and the duty to provide if 75 per cent of family provision cases are successful. We are conscious that the cases which require judicial resolution are a fraction of family provision claims, as the vast majority settle before or during court proceedings.¹¹⁷ Therefore, these cases are representative only of those cases that require judicial intervention and so this issue may not be of wider concern. And we are aware too that this rate of success could be a reflection of the fact that the meritorious claims which should be resolved without court action may not be settled: defendants, who are generally not at risk of cost sanctions if they lose, may continue to dispute claims that should be accepted.¹¹⁸ Nevertheless, this finding could raise questions as to whether the legal framework is too generous; or courts in their interpretation of that framework, are too quick to alter testamentary dispositions; or whether some of these contests are able to be settled without judicial intervention, through the use of, for example, compulsory alternative dispute resolution mechanisms.

Our objective in undertaking this empirical review was not to take and then defend a position on these questions. Rather, it was to provide a baseline for understanding the current state of certain aspects of estate litigation in practice. What is evidenced from the empirical baseline we have determined is that resolution of these conundrums highlights the ever-present tension between

113 See Croucher, 'Succession Law Reform in NSW', above n 2; McGregor-Lowndes and Hannah, above n 2.

114 See, eg, Rosalind Croucher, 'Conflicting Narratives in Succession Law – A Review of Recent Cases' (2007) 14 *Australian Property Law Journal* 179, 200, who notes: '[u]nless we seriously look at such questions [about the role of property in families] then we will continue to tinker with the legislation, a bit this way, a bit that, and end up writing a blueprint for bludging'.

115 Queensland Law Reform Commission, *Report to the Standing Committee of Attorneys General on Family Provision*, Miscellaneous Paper No 28 (1997) 10–14.

116 Croucher, 'Succession Law Reform in NSW', above n 2. See also McGregor-Lowndes and Hannah, above n 2, 82.

117 Victorian Law Reform Commission, above n 2, 99.

118 *Ibid* 101.

balancing testamentary freedom with the testator's duty to provide.¹¹⁹ The issue of how the legislative framework is being implemented in practice requires further thought, as does the potential role of compulsory mediation in all states and territories. Reform to this important area of law is, and indeed must be, ongoing to meet the ever-changing notions of family and how testators do, and 'should', provide for people who are seen to be 'dependent' upon them.

119 For a general discussion of some of the philosophical tensions in this balance, see Rosalind F Croucher, 'How Free Is Free? Testamentary Freedom and the Battle between "Family" and "Property"' (2012) 37 *Australian Journal of Legal Philosophy* 9.

APPENDIX: AUSTRALIAN FAMILY PROVISION LEGISLATION

Legislation	NSW	Qld	Vic	SA	WA	Tas	NT	ACT
	Succession Act 2006 (NSW) ch 3	Succession Act 1981 (Qld) pt 4	Administration and Probate Act 1958 (Vic) pt IV ²⁰	Inheritance (Family Provision) Act 1972 (SA)	Family Provision Act 1972 (WA)	Testator's Family Maintenance Act 1972 (Tas)	Family Provision Act 1970 (NT)	Family Provision Act 1963 (ACT)
Adequate provision	Maintenance, education or advancement in life (s 59(2))	Maintenance and support (s 41(1))	Maintenance and support (s 91(3)) ²¹	Maintenance, education or advancement in life (s 7(1))	Maintenance, support, education or advancement in life (s 6(1))	Maintenance and support (s 3(1))	Maintenance, education and advancement in life (s 8(1))	Maintenance, education or advancement in life (s 8(2))
Eligible applicants ²²	Wife, husband; de facto partner; child; former wife or husband; a person who was a member of the same household as, and was dependent upon, the deceased; a grandchild who was wholly or partly dependent upon the deceased; a person with whom the deceased was in a close personal relationship at the date of the deceased's death (ss 57(1)(a)–(f))	Spouse, child or dependent (s 41(1))	A person for whom the deceased had responsibility to make provision (s 91(1)) ²³	Spouse; person divorced from the deceased person; domestic partner; child; child of spouse or domestic partner; child of the child of the deceased; parent; sibling (s 6)	Spouse and de facto partner at time of death; entitled to maintenance if former spouse/de facto partner; child; grandchild if maintained or if parent had predeceased grandparent; stepchild; ²⁴ parent (including by marriage) (s 7)	Spouse (note s 9(4) still applies even if they remarry or enter into a significant relationship); children, parents of the deceased, if the deceased dies without leaving a spouse or children; a person who at the date of death was receiving or entitled to receive maintenance (ss 3A(a)–(e))	Spouse or de facto partner; former spouse or de facto partner; child; grandchild; parent (ss 7(1)(a)–(f)). Note: conditions apply to claims by a former spouse/de facto partner, stepchild, grandchild and parent	Partner; person in domestic relationship with deceased for two or more years continuously; child; stepchild; grandchild; parent (ss 7(1)(a)–(f)). Note: conditions apply to claims by a stepchild, grandchild and parent

120

The sections dealing with family provision in Victoria were subject to significant change as a result of the *Justice Legislation Amendment (Succession and Surrogacy) Act 2014* (Vic). Note that the focus of this article is on the legal framework as at the time of the study and this is reported in this Appendix. However, these recent changes are noted in the footnotes for completeness.

121

Now *Administration and Probate Act 1958* (Vic) s 91(1).

122

Defined in: *Family Provision Act 1969* (ACT) ss 2, 7(9); *Succession Act 2006* (NSW) s 21C; *Family Provision Act 1970* (NT) ss 4, 7(7); *Succession Act 1981* (Qld) ss 5AA, 40, 40A; *Inheritance (Family Provision) Act 1972* (SA) s 4; *Testator's Family Maintenance Act 1972* (WA) s 4. The recent Victorian reforms also added a definition of 'eligible person': *Administration and Probate Act 1958* (Vic) s 90.

123

The Victorian reforms narrowed the categories of claimants to include (subject to certain limitations not stated here): current and former spouse and domestic partner; child (including an adopted child and stepchild); person who spent substantial time with deceased and believed deceased to be his/her parent; registered caring partner; grandchild; spouse domestic partner of child if child dies within one year of the deceased; and member of household. *Administration and Probate Act 1958* (Vic) s 90.

124

See ss 7(eb)–(eb) for specific provisions relating to the eligibility of stepchildren in WA.

Property that may be subject to order	NSW	Qld	Vic	SA	WA	Tas	NT	ACT
	The estate (ss 63–4) including any property designated as notional estate under pt 3.3	The estate (s 41(1))	The estate (s 91(1))	The estate	The estate (s 6(1))	The estate (s 3(1))	The estate (s 8(1))	The estate (s 8(1))
Matters to be considered by the court	The nature and duration of the relationship, any responsibilities owed by the deceased to the applicant, the nature and extent of the estate (including notional estate); the financial resources and needs (present and future) of the applicant; if the applicant cohabits with another person; any physical, mental or intellectual disability of the applicant or any beneficiary of the estate; the applicant's age; any financial or non-financial contributions by the applicant; any provision made for the applicant during the deceased's lifetime or from the estate; the deceased's testamentary intentions; whether the applicant was being maintained by the deceased; any other person liable to support the applicant; the applicant's character and conduct;	Disentitling character or conduct (s 41(2)(c))	Any relationship (nature and length) between the deceased and the applicant; any obligations of the deceased to the applicant/other applicant(s)/beneficiaries; the size and nature of the estate; the financial resources (including earning capacity) and financial needs of the applicant/other beneficiary; present and future; any physical, mental or intellectual disability of any applicant beneficiary; the applicant's age; any voluntary contribution of the estate or welfare of the deceased or the deceased's family; any benefits previously given by the deceased to any	Disentitling character or conduct (s 7(3))	Disentitling character or conduct, or on any other ground (s 6(3))	Whether the applicant has any independent means, whether provided by the deceased or from any other source (ss 7(a)–(b)); disentitling conduct (s 8(1)); the deceased's reasons (s 8A)	Any benefits conferred (expressly or otherwise) on applicant by the deceased or by will (s 8(2)); disentitling character or conduct (s 8(3)); the testator's reasons (s 22)	The character and conduct of the applicant; the nature and duration of the relationship between the applicant and the deceased; any financial and non-financial contributions made directly or indirectly; any contributions (including homemaker or parent) to the welfare of the other person; the income, property and financial resources of both; the physical and mental capacity for employment; the financial needs and obligations of both; the responsibilities of either to support any other person; any order made under the <i>Domestic Relationships Act 1994</i> (ACT) s 15; any maintenance payments by one to

