NSW LAW REFORM COMMISSION

RESEARCH REPORT 13

I give, devise and bequeath: an empirical study of testators' choice of beneficiaries

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1. Introduction

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BACKGROUND

1.1 If a person dies without a will or with a will that only disposes of part of his or her property, the part of the property that has not been dealt with will usually be distributed according to a set of statutory rules that apply to intestate estates. Different rules of distribution apply in different States and Territories across Australia.

1.2 The NSW Law Reform Commission is conducting a review of the law relating to intestacy as part of the work of the National Committee for Uniform Succession Laws. The National Committee was established by the Standing Committee of Attorneys General to review the existing State laws relating to succession and to propose model national uniform laws.

PURPOSE OF THIS RESEARCH

1.3 The Commission decided that, in framing recommendations relating to intestate estates, it would be useful to obtain information about the characteristics of both testate and intestate estates and also about how people who make wills choose to distribute their estates. This decision was made in light of studies that have informed recommendations for changes to the law of intestacy in other jurisdictions. These other reviews were considered useful in determining how people who do not write wills might have intended to distribute their property upon death.

1.4 This study involved a survey of 650 matters filed in the Probate Registry of the Supreme Court of NSW in September 2004. The survey elicited information concerning the demographic characteristics of the deceased persons, the nature of their estates and how they intended their property to be distributed.

THIS RESEARCH REPORT

1.5 This Research Report first sets out the methodology and parameters of the study in Chapter 2. This includes the process of data collection, an overview of the files examined and the characteristics of the deceased persons whose estates were studied. Chapter 3 details the results of the study, including the characteristics of estates with and without wills and, in the case of estates with wills, how the testators intended to distribute their estates. Chapter 4 discusses the results and compares them with similar studies conducted in other comparable jurisdictions. A consideration of the limitations of this type of study is also included in this chapter.

2. The study

- **Methodology**
- **Parameters**

METHODOLOGY

Data collection

2.1 This study gathered data related to trends in distribution of deceased estates from a cross-section of applications filed at the Probate Registry of the Supreme Court of NSW. The sample consisted of 650 estates (files 114600 - 115250) that were filed at the Supreme Court in September 2004, representing 2.9% of the 22,506 probate applications received by the Court in 2004.

2.2 Each file was examined by reference to a structured survey drafted by Joseph Waugh, a legal officer at the NSWLRC. Information regarding each estate was gathered through a manual search of the files, which included documents such as death certificates, grants of administration of the estate, property inventories, consent forms and statements from executors and relatives, and in many cases the actual will. Data collection occurred at the NSW Supreme Court between 31 August and 9 September 2005.

2.3 The survey gathered key information related to type of grant, characteristics of the deceased including demographics, marital status and family structure, value of the estate, the presence of real estate and whether the deceased also held joint property. In cases with wills, the study recorded preferred distribution characteristics involving residue, bequests, life interests, as well as representation and substitutionary clauses, and survivorship clauses. In cases of intestacy, the study identified beneficiaries of the estate where available.

File overview

2.4 Of the 650 files examined, 571 (87.8% of files) were included in later analysis. Details of grant types included for analysis are as follows:

536	(82.5% of files)	grants of probate
23	(3.5%)	letters of administration
12	(1.8%)	letters of administration (with will annexed)

2.5 Of the 71 files (12.2%) that were excluded, 46 did not include sufficient information for analysis, or incorporated death certificates or property that involved administration outside NSW. A further 33 files were in use at the time of review, most likely as a result of

ongoing proceedings such as family provision applications relating to the estate:

20	(3.1% of files)	grants for reseal
14	(2.2%)	elections to administer
3	(0.4%)	bona vacantia estates
9	(1.4%)	died overseas, or no death certificate available
33	(5.1%)	files in use

PARAMETERS

Characteristics of the deceased

2.6 The age at death for the deceased within the sample ranged from 28 years to 102 years, with an average age of 80.4 years. As such, the sample represented a historical cohort born between 1900 and 1975, the average date of birth being 1923. The deceased was female in 317 estates (55.5%), and the deceased was male in 254 estates (44.5%). The date of death in the sample was 2004 in 514 or 90.0% of cases, whereas in the remaining 57 cases (10.0% of files) dates of death ranged between 1980 and 2003. As such, the majority of the survey sample represented a cross-section of the 45,881 deaths in NSW in 2004, which comprised 22,430 (48.9%) females, and 23,451 (51.1%) males.

2.7 At the time of death, 148 (25.9%) of the deceased were considered to have a spouse for the purposes of succession law, with 127 married

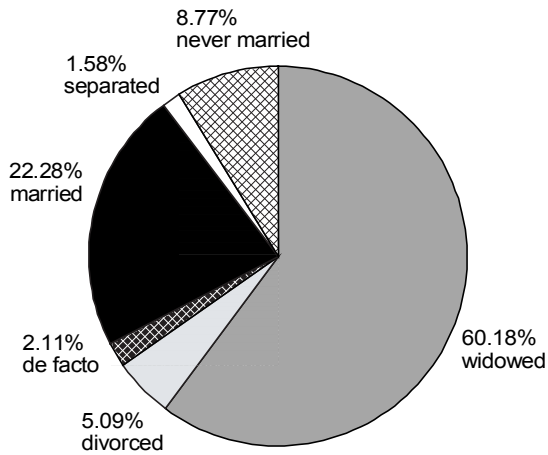

Figure 2.1: Marital status for the deceased at time of death

(96 males, 31 females), 9 married but in the process of separation (7 males, 2 females), and 12 acknowledged as having a de facto spouse (8 males, 4 females). 422 (74.1%) of the deceased were not married at the time of death, with 343 widowed (101 males, 242 females), 29 divorced (15 males, 14 females), and 50 never married during their lifetime (26 males, 24 females).

2.8 The high proportion of males in marriage, and the high proportion of females who were widowed reflect a trend within the sample of males dying younger on average (77.3 years), in comparison to females (82.8 years). As such, males were more likely in this cross-section to be the first partner of a spousal relationship to die, leaving the female as the surviving partner.

2.9 The majority of the deceased were survived by children, with 463 (81.1%) files identifying living children at the time of death, in comparison to 108 (18.9%) estates that did not identify children as survivors.

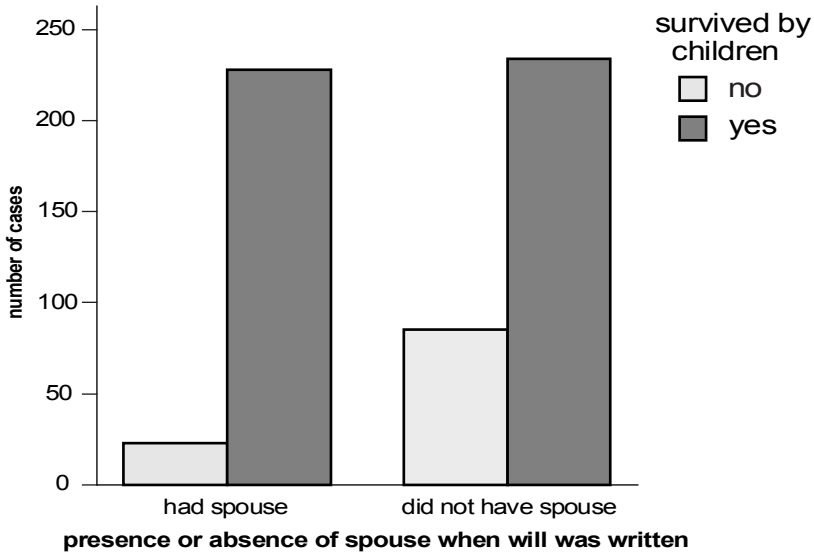

Figure 2.2: Categorisation of sample estates by presence or absence of surviving spouse and children

3. The findings

- **Characteristics of estates**
- **Estates with wills**
- **Estates without wills**

CHARACTERISTICS OF ESTATES

3.1 The mean net value of all the estates was $752,169. However, having regard to the large range of estate values (from $1,000 to $123,851,389), the average estate value is more accurately indicated by the median value range of $300,000-400,000 for all estates. The average net value of estates with wills was $774,802 (median value $300,000-400,000), with estate values ranged between $1,000 and $123,851,389. The average net value for estates without wills was $213,888 (median value $100,000-200,000), and ranged between $12,255 and $967,690. Of the 23 estates without wills, 10 (43.5%) had a value of less than $100,000, in comparison to 84 (15.3%) estates with wills of less than $100,000, from a subsample total of 548. This data demonstrates that on average, intestate estates are of smaller net value than those with wills.

3.2 Of the 571 files, 71 identified the deceased as also owning joint property with another party. In 12% of estates with wills the deceased also owned joint property, whereas in 21.7% of intestate estates the deceased owned joint property. The majority held joint property with a spouse through marriage (83.1% of joint property cases), and as such it was more likely the deceased would be male (78.9% of cases). This suggests that in many cases distribution of estate wealth may occur through transmission of joint property to the benefit of the surviving spouse, commonly a widowed female. Female widows were therefore more likely to hold property absolutely, rather than in joint tenancy. The average value of property held jointly between the deceased and another party was $499,824, and in 64.8% of such cases the property value included real estate.

3.3 365 of the 571 files included real estate within the estate of the deceased. 64.8% of estates with wills included real estate, whereas 43.5% of estates without wills involved real estate. The likelihood of an estate holding real estate was unrelated to the marital status of the deceased, so that 63.2% of the deceased with spouses held real estate, and 64.8% of the deceased who were not in relationships with spouses held real estate. Estates were more likely to include real estate when the deceased was survived by children. In such cases 67.3% held real estate, in comparison to cases where the deceased did not have children, where 50.5% held real estate.

ESTATES WITH WILLS

Characteristics

3.4 Of the 571 estates included in this analysis, 548 contained wills filed in association with applications for probate and letters of administration with the will annexed. The average net value of estates with wills was $774,802, within the median value range $300,000-400,000. The age at death for the deceased in these cases ranged from 37 years to 102 years, with an average of 81.21 years. Estates with wills were more likely to involve a female than a male, representing 55.8% and 44.2% of cases respectively, possibly because females in this sample survived their spouse or partner in most cases and as such their estates may be less likely to be distributed as joint property (see paragraph 3.2).

3.5 The mean age at which testators last updated their wills was 72.3 years, which indicates that on average the last amendment predated death by 9 years. This interval means that actual distribution patterns may reflect second or third preferences in cases where beneficiaries have predeceased the testator. In order to account for such intervals the data was analysed so that distribution patterns reflected those initially intended or preferred from the will, as opposed to actual distribution patterns at the time of death. This was achieved by re-coding the marital and family status of the deceased to indicate these relational networks at the time the will was written. As such, distribution patterns reported in the present study show how deceased persons preferred to distribute their estate in the context of their family environment when they wrote the will.

3.6 At the time of writing the will 238 of the testators were involved in a spousal relationship (136 males, 102 females), representing 43.4% of all testate cases. The deceased did not have a spouse when they wrote the will in 310 cases (106 males, 204 females), or 56.6% of testate estates.

Presence / absence of spouse	Marital Status	Number of Cases	Percentage
Had a spouse	Married	220	40.1%
	Separated	8	1.5%
	De facto	10	1.8%
Did not have a spouse	Widowed	239	43.6%
	Divorced	26	4.7%
	Never Married	45	8.2%
	TOTAL:	548	100.0%

Figure 3.1: Distribution of marital status when the will was written

3.7 The study identified 454 testators (82.9% of testators) as having children when they wrote the will, and 94 testators (17.1%) as not having children when they wrote the will. Testators who had a spouse when they wrote the will also had children in 222 or 93.3% of cases, and testators who did not have a spouse were identified as having children in 232 or 74.8% of cases. The deceased was more likely to have children across every category of marital status, except for testators who had never married. 42 of the 45 who had never married (93.3% of estates) did not identify living children at the time the will was written.

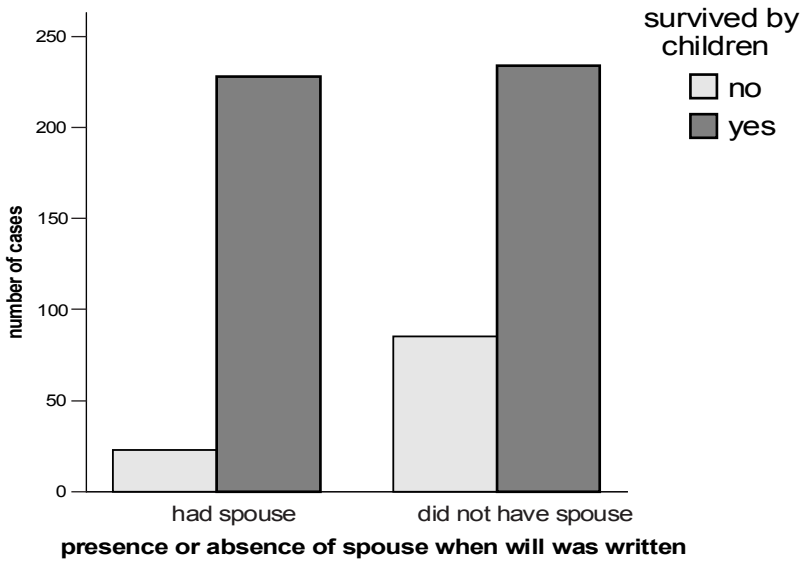

Figure 3.2: Presence or absence of spouse and children for cases with wills, when the will was written

Distribution where testator had spouse only

3.8 Of the 16 testators who had a current relationship with a spouse but had no children at the time the will was written, 100% gave the entire residue of the estate to their spouse. This trend applied both to 14 married testators and 2 in de facto relationships. 2 estates (12.5%) also provided for nieces and nephews in the form of substantial bequests ("substantial bequests" are defined in this study as being more than 15% of the estate). 10 estates within this category contained substitutionary clauses, the majority of which provided for siblings (30% of clauses) and their children (60%), being nieces and nephews of the deceased.

Marital / Familial Status	Distribution	Total	Total	Total
Spouse, no children	All to spouse	16	16	
Spouse, and children	All to spouse, none to children	167		
	All to children, none to spouse	43		
	Some to spouse, some to children	5		
	Some to children and other, none to spouse	7	222	238
Children, no spouse	All to children	190		
	Some to children, some to other	28		
	None to children, all to other	14	232	
No spouse, or children	To nieces and nephews	19		
	To siblings	25		
	To other family	10		
	To other than relatives	24	78	310
TOTAL				548

Figure 3.3: Table of intended distribution from wills by presence or absence of spouse and children

Distribution where testator had spouse and children

3.9 When they wrote the will, 222 testators had both a spouse and children. The intended distribution of these estates is illustrated in figure 3.4. Residue of the estate was distributed entirely to the spouse so that children received no portion of the residue in 167 (75.2%) cases, whereas children were the sole beneficiaries of residue to the exclusion of the spouse in 43 (19.4%) estates. Both the spouse and children of the testator shared as beneficiaries of the residue in 5 (2.3%) estates. The estate was shared between children and other family members or non-relational parties to the exclusion of the spouse in 7 (3.2%) cases.

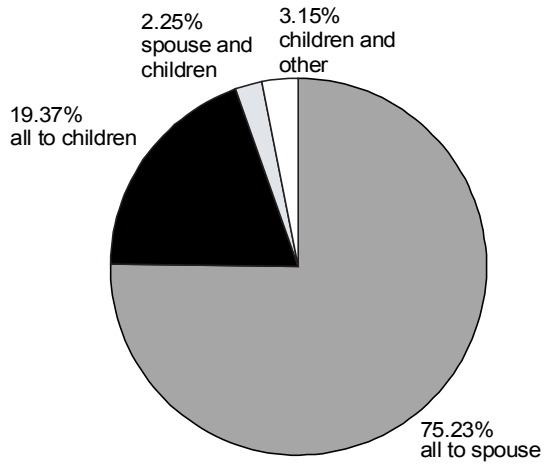

Figure 3.4: Distribution where testator had spouse and children when they wrote the will

3.10 It may be seen from the results that within this family environment, spouses were included in residue distributions in 172 (77.5%) of the cases and received no residue in 50 (22.5%) cases. In no estate did the testator exclude both spouse and children from residuary distribution. Children were excluded from receiving any portion of the residue in 75.2% of estates. However, of the 167 estates that gave all of the residue to the spouse, 14 (8.4%) testators made substantial bequests to their children and 148 (88.6%) provided for their children within substitutionary clauses. Only 10 cases were identified in this category in which the children received no part of the residue and were not given a bequest or named as a substitutionary beneficiary, representing 4.5% of all estates where the testator had both spouse and children. As such, there were few examples in these estates where the children received no consideration under the will.

3.11 The 50 estates in which the spouse did not receive any part of the residue were examined to determine whether other provisions were made for the spouse. Only 4 of the wills made substantial bequests to the spouse. Of the 35 cases in this category that involved real estate, 5 wills gave the spouse a life interest (see paragraph 3.28). The absence of provision for the spouse from these estates was not explained by the ownership and transmission of joint property between the testator and the spouse, with only 5 of the cases indicating the deceased held assets in joint tenancy. This indicates that in a number of cases no significant provision was made for the spouse, which may reflect that testators were unwilling to provide for the spouse in these cases, and the possibility that such spouses held independent assets.

3.12 The hypothesis that females may be more likely to distribute to children because the male spouse is more likely to hold separate real estate or have independent wealth was tested. Comparisons of gender proportions showed that in relation to the ratio of males (57.7%) and females (42.3%) who had both a spouse and children when they wrote the will, females were no more likely to distribute residue to their children than males, with proportions of 42.7% and 58.3% respectively. Moreover, the proportion of males who owned separate real estate was no more than would be expected from the gender ratio, so that distribution of the 35 cases of real estate comprised 57.1% for males, and 42.9% for females.

3.13 As the size of the estate increases, is there a greater tendency to provide for both spouse and children? The above data indicates that only 5 cases distributed residue between both spouse and children, and the average net value of these estates was $146,417, with a median range of $100,000-200,000. In comparison, the majority of estates that left all to the spouse had an average net value of $505,480, within the value range of $300,000-400,000. This data suggests that distribution amongst both spouse and children is firstly an uncommon preference, and further is not associated with larger estate values.

Distribution where testator had spouse and children from previous relationships

3.14 Of the 222 cases where the deceased had both a spouse and children when the will was written, 16 testators were identified as having children from previous relationships. The residuary distribution of these estates is shown in figure 3.5. The testator named the current spouse as sole beneficiary of residue in 7 (43.7%) estates, whereas children received the residue exclusively in 5 (31.3%) cases. The residuary estate was shared between the spouse and children in

2 (12.5%) cases, and the estate was shared between children and other family members or non-relational parties to the exclusion of the spouse in 2 (12.5%) cases.

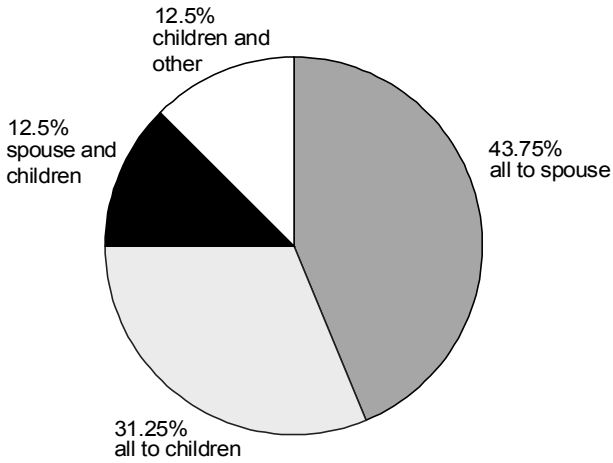

Figure 3.5: Distribution where testator had a spouse and children from previous relationships

3.15 The above data demonstrates that spouses received some residue in 56.2% of estates, and children from previous relationships received residue in 56.3% of cases. The equal distribution between spouses and children for these cases is distinct in comparison to the overall trends for testators who had both a spouse and children, which were weighted in favour of the spouse so that 77.5% of estates provided for the spouse to some degree, whereas 24.9% of estates provided for children.

3.16 Of the 7 estates where the spouse was not a beneficiary of the residue, only 2 files indicated joint tenancy between the testator and spouse. This finding indicates that in 5 cases, or almost one third (31.3%) of estates where the deceased had a spouse and children from previous relationships, the spouse received no provision from the estate of the testator either as a direct beneficiary of residue under the will, or from transmission of joint property after the death of the testator.

Distribution where testator had children only

3.17 Of the 310 testators who were not in a spousal relationship when the will was written, 232 were identified as having children. In 207 (89.2%) of these estates, the deceased was widowed when they

wrote the will, and were divorced or had never married in 22 (9.5%) and 3 (1.3%) cases respectively. The distribution for residuary estates where the testator had children but no spouse when they wrote the will can be seen in figure 3.6. Children of the deceased were the sole beneficiaries of residue in 190 (81.9%) estates, and shared some portion of residue with other family members and non-relational parties in 28 (12.1%) cases. There were 14 (6.0%) estates in which other parties were the sole residuary beneficiaries, so that children received no part of the residue.

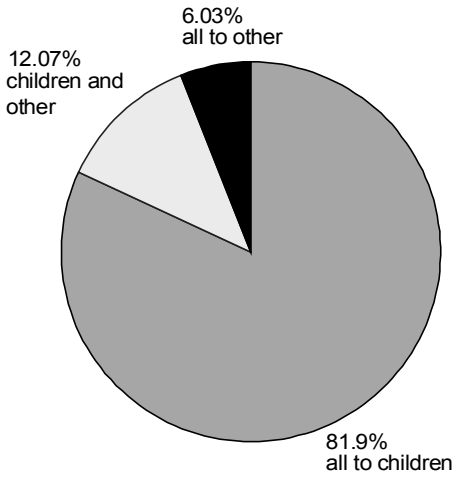

Figure 3.6: Distribution where testator had children only

3.18 These results indicate that in 218 (94.0%) of the estates children received a substantial portion of the residuary estate, whereas other parties were beneficiaries to some extent in 42 (18.1%) cases. Of the 218 estates in which children were named as beneficiaries of the residue, representations for their children (grandchildren of the testator) were specified in 56.4% of cases, and for issue of the testator's children in 6.9% of cases.

3.19 The majority of beneficiaries other than children were in a direct relationship with the testator's children (27 cases, 64.3%), either as grandchildren to the testator in 21 cases, or spouses to the testator's children in 6 cases. Other parties that received portions of the residue included friends in 7 cases, other family members in 2 cases, and charities in 3 estates.

3.20 In the 14 cases where no residuary provision was made for the children the primary beneficiaries were grandchildren who were

identified in 5 cases, and individuals of no relation to the deceased in 7 cases. Of these estates 3 left substantial bequests to children, and 1 case named children as the substitutionary beneficiary. These data suggest that in all but a very small proportion of estates, provision was made in these cases for children or their nuclear family.

Distribution where testator had no spouse or children

3.21 78 testators did not have a spouse or children at the time they wrote the will. In 9 of these estates the children had already predeceased the testator when the will was written. This resulted in several cases where the deceased nominated their grandchildren or children in-law as beneficiaries. In order to determine the pattern of distribution when nuclear family beneficiaries are not available, the following data represents distribution for the 69 estates where the testator never had children. The spouse was widowed in 25 (36.2%) of these cases, was divorced in 2 (2.9%) cases, and had never married in 42 (60.9%) cases.

3.22 Distribution of residuary estates where the testator did not have a spouse when they wrote the will, and never had children is illustrated in figure 3.7. Siblings of the deceased were the primary beneficiaries of residue in 23 (33.3%) estates, and nieces and nephews were bequeathed the residue in 17 (24.6%) cases. Other relatives of the testator such as parents, cousins, and aunts or uncles received the residue of 7 (10.1%) estates, whereas parties other than family members, including friends and charities, were entitled to the residue in 22 (31.9%) cases.

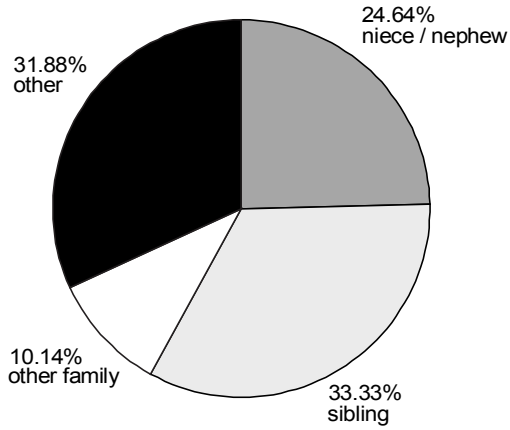

Figure 3.7: Distribution where testator did not have spouse or children

3.23 The data for these estates reveals that in most cases where there were no children or spouses, the majority of testators provided for brothers and sisters (33.3%) and their children (24.6%), being nephews and nieces of the testator. Evidence of testator intentions to provide for the families of siblings was further demonstrated in representations for residuary distribution, with 39.1% of distributions to siblings allowing representation to their children. However, none of the distributions to siblings included representation to their issue.

3.24 Further, 41.2% of distributions to nieces and nephews incorporated representations to their children, being grand-nephews and nieces of the testator. One representation clause for the testator's nephew specified issue, indicating an intention to provide for the sibling's family to the extent of considering great grandchildren of the brother or sister. These data demonstrate that in many cases testators were willing to make provisions for grand-nephews and nieces under the will, in the event that the nephew or niece should predecease the testator.

3.25 These findings indicate that besides provision for siblings and their families, other relatives received little consideration within this sample. 7 estates (10.1%) made reference to other family in distribution of residue, such as to uncles and aunts, parents, cousins, and relations by marriage. No testator provided for older-generation family members such as grandparents. It may be noted that the minimal consideration of elder relatives such as parents, aunts and uncles, and grandparents may reflect both unwillingness to provide for these relatives, and the probability that many such family members would have predeceased the testator, in light of the average age (81.21 years) of testators in the sample.

3.26 In contrast, almost a third of estates (31.9%, 19 cases) named parties other than relatives as the primary beneficiary, so that 15 residuary estates were distributed to friends and other non-relational parties, and 4 were distributed to charities.

Survivorship clauses in wills

3.27 Almost one third (32.3%) of estates with wills contained survivorship clauses that specified the length of time a party must survive after the death of the testator in order to receive a portion of the estate. Survivorship clauses related to the spouse as a beneficiary in the majority of cases (76.8% of clauses), and to children as beneficiaries (19.2%). Only 6 clauses (3.4%) specified a set survivorship interval for

all beneficiaries within the will. Specified intervals for the survivorship clause ranged from 14 days to 1 year, the most common duration being 30 days, or an average month.

Life interests in wills

3.28 Provisions establishing life estates, whereby a specified party may make use of assets from the estate until their death, were present in only 28 wills, or 5.1% of all testate cases. 35.7% of life estates were bequeathed to the spouse, whereas various other parties such as children and siblings were the subject of the remaining life estate provisions. The assets involved in life estate provisions reverted to the residuary beneficiaries in 39.3% of cases. In the remaining 60.7% of wills involving life estates, those entitled in remainder were specified within the will, the majority of which (46.4% of all life estates) involved children of the deceased.

ESTATES WITHOUT WILLS

Characteristics

3.29 Of the 571 files used in analysis, 23 involved letters of administration in which the deceased was intestate. The average net value of these estates was $213,888, within the median range of $100,000-200,000. Age at death of the deceased ranged from 28 years to 99 years, at an average of 60 years. Males and females were similarly likely to be intestate, representing 52.2% and 47.8% of cases respectively.

3.30 In 8 of the intestate cases the deceased was in a spousal relationship (6 males, 2 females) at the time of death, representing 34.7% of all intestate estates. The deceased was not survived by a spouse in 65.3%, or 15 cases of intestacy (6 males, 9 females). The distribution of marital status in such estates is indicated in figure 3.8.

Presence / absence of spouse	Marital Status	Number of Cases	Percentage
Was survived by spouse	Married	5	21.7%
	Separated	1	4.3%
	De facto	2	8.7%
Was not survived by spouse	Widowed	7	30.4%
	Divorced	3	13.0%
	Never Married	5	21.7%
	TOTAL:	23	100.0%

Figure 3.8: Distribution for marital status at time of death in cases of intestacy

3.31 The average net value of estates where the deceased was survived by a spouse at the time of death was $201,920, with a value range median of $100,000-200,000. The deceased was survived by children in 7 of these estates, whereas 1 deceased who had a de facto spouse was childless.

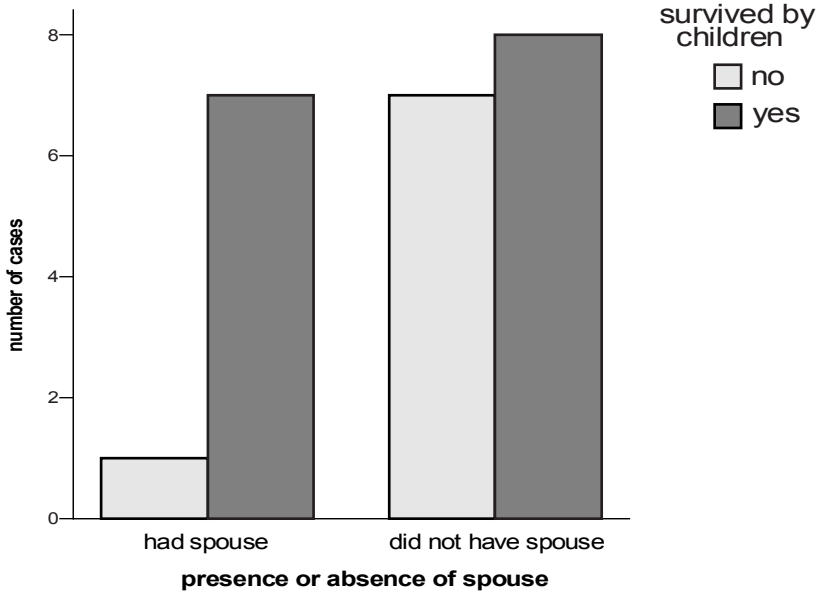

Figure 3.9: Presence or absence of spouse and children for cases of intestacy, at time of death

3.32 The average net value of intestate estates where the deceased did not have a spouse at the time of death was $209,952, within the median range of $100,000-200,000. The deceased was childless in 7 of these estates, arising from 1 widowed estate, 1 case of divorce, and 5 cases where the deceased had never married. The files did not provide complete information to indicate which parties would qualify as beneficiaries to the estate in the 7 cases where the intestate had no surviving spouse or children.

4. Analysis

- Introductory comments
- Distributive preferences
- Characteristics of testate and intestate estates
- Limitations

INTRODUCTORY COMMENTS

4.1 The purpose of this study is to test certain assumptions that underlie the current intestacy distribution regimes and also much of the academic literature regarding intestate succession. The principal assumption is that an intestate would have wanted to allocate his or her estate in a particular way, depending on which members of the family survive. So, for example, if an intestate is survived by a spouse and children, he or she would have wanted the estate to be distributed between the spouse and children but with certain preferential arrangements being made for the spouse. Another assumption is that an intestate's distribution preferences might be different depending on the size of the estate. So, for example, it is assumed that the intestate would prefer children to benefit more from a substantial estate. Another conclusion, often drawn in the literature, is that intestate estates should be treated differently because they are, on the whole, smaller than testate ones.

4.2 The present study tested the underlying assumptions of the rules of distribution by undertaking a survey of probate files in order to identify testators' actual preferences for distribution of their estates and to compare characteristics of testate and intestate estates. The following discussion explores these findings against the background of past studies in the field and analyses their implications for the current law of intestate succession. Limitations of the present study and directions for future research and reform are also discussed.[1]

DISTRIBUTIVE PREFERENCES

4.3 The following paragraphs approach the task of discerning the distributive preferences of persons who have not made a will, by reference to the current rules of distribution in NSW and the issues raised in the Law Reform Commission's Issues Paper 26.

1. See para 4.23-4.31.

Where a spouse or partner but no issue survive

If the intestate is not survived by any issue, should the surviving spouse/partner be entitled to the whole of the estate?

4.4 In NSW, the surviving spouse or partner is entitled to the whole of the intestate's estate in the absence of surviving issue. This is also the case in Queensland, ACT, SA, Tasmania and Victoria.[2] In contrast, the report of the English Committee on the law of intestate succession in 1951, asserted that if an intestate leaves a spouse and one or both parents but no issue, then the intestate would wish that a fixed sum and one half of the remaining estate should be given to the spouse, and the remainder be given to the parents.[3] This view is still accommodated in the distribution regimes in WA and NT which allocate a portion of an intestate estate to parents or siblings if the intestate is survived by a spouse or partner, but not issue.[4]

4.5 According to distributive preferences in this study, in 100% of cases where the testator was survived by a spouse and not issue, the testator gave the entire residue of the estate to the spouse. This result aligns with the findings of some comparative wills studies in which the deceased distributed his or her property consistently with rules that gave the whole estate to the surviving spouse.[5] A limitation of this finding is that it is not known whether or not the testator had parents or siblings at the time of making the will, except in those cases in which there were substantial bequests or substitutionary clauses.[6]

Where a spouse or partner and issue survive

In principle, should the deceased's estate be divided between a surviving spouse and issue?

4.6 In NSW, if one or more issue and spouse or de facto partner survive, the spouse or partner is entitled to a prescribed amount from

2. NSW Law Reform Commission, *Uniform Succession Laws: Intestacy* (Issues Paper 26, 2005) at para 3.22.

3. England, *Report of the Committee on the Law of Intestate Succession* (Cmd 8310, 1951) at 5, 12-13.

4. *Administration Act 1903* (WA) s 14(1) Table It 4; *Administration and Probate Act 1969* (NT) Sch 6 Pt 1 It 3.

5. A Dunham, "The method, process and frequency of wealth transmission at death" (1963) 30 *University of Chicago Law Review* 241 at 252-253; Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Final Report No 78, 1999) at 192.

6. See para 3.8.

the estate, personal chattels and a proportion of the remaining estate, with a right to obtain the intestate's interest in the shared home. The issue are entitled to the rest.[7] However, the results of the study do not follow this pattern. Spouses inherited the entire residuary estate, to the exclusion of the children, in 75.2% of the cases. A mere 2.3% shared the residue between spouse and children. It is evident that sharing the residuary estate between the spouse and children is not a common preference.

4.7 As an aside, it should be noted that 14 (8.4%) testators made substantial bequests to their children and 148 (88.6%) named children as heirs within substitutionary clauses, indicating that children in these estates did receive consideration, though the interests of the surviving spouse were preferred.

4.8 A deviation from the pattern of current intestacy law to favour the surviving spouse as opposed to the surviving children is supported by previous research.[8] The Albertan review of Surrogate Court files in 1999 found that the spouse received more than 90% of a testator's estate in 73.1% of cases and the entire estate in 69.7% of cases. Additionally, Sussman, Cates and Smith (1970) conducted a study in Ohio and found that an overwhelming majority named the spouse as the sole heir of the residuary estate. The authors also pointed out that surviving children in intestacies often signed over their share of inheritance to the surviving parent. It was not possible to investigate this phenomenon in the current study.

4.9 Interestingly, interview studies, in which a respondent was asked to rank their hypothetical "dispository wishes",[9] have also found that the spouse's interests are favoured over sharing the estate between the surviving spouse and lineal kin. Fellows, Simon and Rau (1978) surveyed 750 persons living in Alabama, California, Massachusetts, Ohio and Texas, and found that a majority of respondents wanted to leave their entire (hypothetical) estates to a surviving spouse.[10]

7. NSW Law Reform Commission, *Uniform Succession Laws: Intestacy* (Issues Paper 26, 2005) at para 3.28-3.59.

8. Law Reform Commission of British Columbia, *Statutory Succession Rights* (Working Paper 35, 1982) at 373; M B Sussman, J N Cates and D T Smith, *The Family and Inheritance* (Russell Sage Foundation, USA, 1970) at 289.

9. M L Fellows, R Simon & W Rau, "Public attitudes about property distribution at death and intestate succession laws in the United States" [1978] *American Bar Foundation Research Journal* 319 at 324.

10. M L Fellows, R Simon and W Rau, "Public attitudes about property distribution at death and intestate succession laws in the United States" [1978] *American Bar Foundation Research Journal* 319 at 359.

Presence of joint property

4.10 The survey has also revealed that a large majority of testators did not own joint property when they died. Only 12% of estates with wills contained joint property, the majority of which were held in common with a spouse through marriage (83.1% of joint property cases) and were usually held by a deceased male (78.9% of cases). This suggests a number of things. First, that in many cases where a male predeceases a female spouse, the property will have been held jointly and distribution will have occurred by survivorship without the need to go to probate. Secondly, that joint ownership with a spouse may mean that a will need not be written at all. A will may be needed only when the property cannot be transmitted upon death to the surviving spouse as jointly owned property.

Effect of the size of the estate

As estate size increases, is the deceased more likely to divide it between a surviving spouse and issue?

4.11 Previous research has shown that as the size of the estate increases, there is a greater likelihood that both the spouse and children will be provided for in wills.[11] This is thought to be because larger estates have a greater capacity to provide for both the spouse and children's interests. However, the results of the current study do not support this proposition. Division of an estate between spouse and children is not only uncommon in general, but in larger estates as well. The greater size of the estate does not lead to a greater likelihood that the testator will share the estate between the surviving spouse and children. This may be because the majority of the testators' children are adults and may therefore be independent. It may also suggest that the testator expects the spouse ultimately to pass the estate on to the issue of their relationship. This is borne out by the preference for benefiting the issue of the relationship if the spouse or partner predeceases the testator. Understandably, the average testator appears to be more concerned with the surviving spouse whose financial wellbeing is likely to be intertwined and dependent on his or her own.

Where a spouse or partner and issue of a previous relationship survive

4.12 There is a caveat to the suggestion that surviving spouses should inherit to the exclusion of children. In 43.7% of cases where there were children of a previous relationship, the spouse received

11. England, *Report of the Committee on the Law of Intestate Succession* (Cmd 8310, 1951) at 7.

the entire residuary estate, whereas in 31.3% of cases children of a previous marriage inherited the residue. In the 7 estates (43.7%) where the spouse was excluded, only 2 files indicated joint tenancy between the testator and spouse. In 5 cases (31.3%) the spouse was not taken care of by way of joint property or through the estate.

4.13 The results indicate an increased trend toward making some provision for the testator's children where there are children from a previous relationship. This may reflect two possibilities. The first is that in cases where there are children from previous relationships, testators demonstrated increased concern that the children would not be provided for by the current spouse, and thus were more likely to provide for them explicitly within the will. The second is that surviving spouses may have held independent assets from their previous relationships, so that testators did not consider their welfare to be dependent on benefiting from the estate.

4.14 Previous research also demonstrates that the presence of children from a previous marriage alters the distribution pattern.[12] The Albertan review of Surrogate Court files (1999) found that in these circumstances only 29% of testators gave their entire estate to the spouse, another 29% gave the estate to their children and 25.8% shared the estate between the spouse and children. Moreover, a commissioned attitude survey investigating English intestacy law in 1995 found that the people interviewed clearly preferred that a distribution regime favouring the spouse to the exclusion of the children, should not apply to cases where there were children from a former marriage.[13]

Where the issue only survive

If one or more issue, but no spouse or de facto partner, survives the intestate, should those issue be entitled to the whole of the intestate estate?

4.15 The current intestacy law, which provides that, in the absence of a surviving spouse or partner, the issue are entitled to the whole of an estate, is supported by the results of this study. The data from this study indicate that in 94.0% of cases children received a substantial portion of the residuary estate; other parties were beneficiaries to

12. Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Final Report No 78, 1999) at 193; S M Cretney, "Reform of intestacy: the best we can do?" (1995) 111 *Law Quarterly Review* 77 at 92.

13. S M Cretney, "Reform of intestacy: the best we can do?" (1995) 111 *Law Quarterly Review* 77 at 92.

some extent in only 18.1% of files. The other beneficiaries named were direct descendants of the testator, involving either children and/or grandchildren, or their spouses. Of the 14 cases (4.5%) where children were excluded from residuary provision, 3 estates left substantial bequests to the children and 1 case involved the children in substitutionary clauses. Only a very small quantity of cases did not make provision for the children and their nuclear family. This is in accordance with research reported by the Albertan review of Surrogate Court files (1999) in which 76.5% of unmarried (divorced, widowed or never married) testators gave their entire estate to their children. [14]

Where other next of kin survive

If the intestate dies without a spouse or partner and without issue, which next of kin should be entitled to the estate?

4.16 If a parent or parents survive the intestate, but no spouse or issue, then they are entitled to the whole of the estate. If parents are also not available, then the estate goes to the relevant next of kin. Brothers and sisters take first, then grandparents and finally aunts and uncles. The issue of brothers and sisters of the intestate are entitled to take the share of their deceased parent. The question whether this order is appropriate was examined by looking at those cases where the nuclear family, that is, children, grandchildren and children-in-law, were not available.

4.17 The data indicates that the majority of testators provide for siblings and the siblings' children. This is further supported by representation clauses, in the majority of cases, giving the residue to children of a deceased sibling. It appears that testators generally think one generation ahead: nieces and nephews represent siblings; grandnieces and grandnephews represent nieces and nephews. So representation to the issue of siblings, rather than just the children of siblings, seems to be justified in the general scheme.

4.18 The 'other family' category received very little consideration, a mere 10.1% distributing the residuary estate to uncles, aunts, parents, cousins or in-laws. In contrast, close to a third of estates named parties unrelated to the deceased as the primary heirs, so that 15 residuary estates were allotted to friends and some to charities. So, beyond bestowing a residuary estate upon a surviving spouse, issue or parents, it appears that most people favour giving to siblings and, to a lesser

14. Alberta Law Reform Institute, *Reform of the Intestate Succession Act* (Final Report No 78, 1999) at 194.

extent, other family members. This has been supported by previous research. Glucksman (1976) found that in cases of no surviving spouse or issue, a sample of testators from New Jersey favoured distributing the residuary estate between collaterals, particularly siblings.[15]

4.19 Finally, beyond spouse, issue, parents and collaterals it appears that deviations represent individual preferences of a testator that cannot be adapted to a statutory default regime. Dunham (1963) also found similar results from a sample in Illinois, when there were neither surviving spouse nor issue.[16]

CHARACTERISTICS OF TESTATE AND INTESTATE ESTATES

4.20 The average age at death in intestate cases was 60 years, considerably younger than the age at death in testate cases (81.2 years). Additionally, the value of intestate estates is significantly lower (between $100,000-200,000) than the value of testate estates (between $300,000-400,000). These results are reinforced by previous research in which testators have been found to be older, wealthier and have larger estates than those who die intestate. The difference between the two groups threatens generalisations extended from testators to those who die intestate.[17] The two populations may have different distributive preferences, potentially affected by age, estate size and wealth.

Age of the deceased

4.21 It should be noted that age is a confounding variable in the current study. Since the mean age of testators is 81.2 years, there is a difference of 21.2 years between testate and intestate cases, a difference large enough to be a generation gap. In a majority of testate cases parents, grandparents and aunts and uncles will most likely have predeceased the testator, skewing distributive preferences in favour of siblings, their family, friends and even charities. Preferential treatment of parents over siblings and other family cannot be assessed

15. J R Glucksman, "Intestate succession in New Jersey: does it conform to popular expectations?" (1976) 12 *Columbia Journal of Law and Social Problems* 253 at 276.

16. A Dunham, "The method, process and frequency of wealth transmission at death" (1963) 30 *University of Chicago Law Review* 241 at 254.

17. M K Johnson and J K Robbenolt, "Using social science to inform the law of intestacy: the case of unmarried committed partners" (1998) 22 *Law and Human Behavior* 479 at 484; A Dunham, "The Method, Process and Frequency of Wealth Transmission at Death" (1963) 30 *University of Chicago Law Review* 241 at 248; M B Sussman, J N Cates and D T Smith, *The Family and Inheritance* (Russell Sage Foundation, USA, 1970) at 288.

from the available data. This means that potential distribution of one who dies unmarried and childless could indeed favour parents or grandparents, since they are more likely to be available, over siblings and other family when compared to the average testate cases.

Size of the estate

4.22 It should be noted that the size of the estate in intestate cases was uniform whether there was a spouse or not. However, when compared to the 5 testate cases in which the spouse and children shared the residuary estate, the median value of the estate was the same as the median value of estates in intestate cases. This suggests that smaller estates are more likely to be divided between the surviving spouse and children. Further research into this possibility is needed.

LIMITATIONS

Differences between testators and intestates

4.23 There is an important disadvantage to using wills studies, as distinct from interview studies in which distributive preferences are investigated through responses to hypothetical scenarios, involving the presence or absence of potential beneficiaries. As previously mentioned, there are considerable differences between persons with and without wills. Testators tend to be older (45 years or more), have larger estates, a larger income and higher educational attainment, though there does not appear to be a gender difference, that is, males are not more likely than females to have made a will, and vice versa.[18] The validity of drawing conclusions from testators that can be generalised to intestates is threatened by these differences. Intestacy laws should represent common distributive preference, so investigation within a more representative sample may be necessary.

4.24 Consequently, it is constructive to note that looking at interview studies or wills of a still living sample of testators, may prove fruitful in understanding distributive preferences of younger unmarried and childless persons when parents, grandparents, aunts and uncles are still available. Interview studies are able to investigate a more wide-ranging, and thus younger, sample. Furthermore, a close correspondence between testate wills and distributive preferences on hypothetical scenarios has been taken as support for the validity of

18. M K Johnson and J K Robbenolt, "Using social science to inform the law of intestacy: the case of unmarried committed partners" (1998) 22 *Law and Human Behavior* 479 at 484.

interview studies.[19]

4.25 Fellows, Simon and Rau (1978), in their survey of persons from a variety of American states, found that respondents preferred both parents and siblings to share in the estate and 41% disinherited siblings when two parents were presumed to be alive, while only 29% did so when respondents were asked to presume that only one parent survived.[20] This is at odds with what was found in this study, presumably because of the older age of testators. The favouring of siblings as beneficiaries, in the absence of a surviving spouse and children, may not be found if younger age groups were better represented in the sample.

Effect of legal advice on preferences

4.26 It is useful to take into account the effect legal advice may have on the distribution of an estate. Wills are most often written with the advice of a lawyer and as such, the effect of legal advice on arriving at a distributional preference is an important factor to take into account when framing intestacy statutes.[21] Indeed, experimental evidence suggests that when participants believe a default to be premised on better information than their own, they tend to switch over to it as a preference.[22] This means that legal advice may change default distributive preferences. This is important to consider when comparing wills studies with interview studies. Obviously, wills studies will often involve some form of legal advice and this will effect subsequent distributive preferences.

Overrepresentation of female testators

4.27 A further limitation of the study, linked to the restriction wills studies place on sample characteristics, involves the overrepresentation of female testators. Years at death ranged from 1980-2004, the median year being 2004. In 2004, there were a total of 45,881 deaths in NSW,

19. M K Johnson and J K Robbenolt, "Using social science to inform the law of intestacy: the case of unmarried committed partners" (1998) 22 *Law and Human Behavior* 479 at 494.

20. M L Fellows, R Simon and W Rau, "Public attitudes about property distribution at death and intestate succession laws in the United States" [1978] *American Bar Foundation Research Journal* 319 at 347.

21. M K Johnson and J K Robbenolt, "Using social science to inform the law of intestacy: the case of unmarried committed partners" (1998) 22 *Law and Human Behavior* 479 at 483.

22. A J Hirsch, "Default rules in inheritance law: a problem in search of its context" (2004) 73 *Fordham Law Review* 1031 at 1077.

22,430 being female (48.9%) and 23,451 male (51.1%).[23] This should be compared to a female to male division in the sample of 55.5% female deceased to 44.5% male deceased. Since males die younger than females, it is possible that the wills of many male testators did not reach probate as often as wills of widowed female testators, as joint property passed directly to the usually female surviving spouse, thus bypassing probate. The sample of wills then does not represent the population of deaths in 2004, presenting a larger number of widowed females and a lesser number of male testators predeceasing a surviving spouse. This does not affect the validity of the findings since joint property would pass directly to the surviving spouse in intestate cases as well.

Very small estates

4.28 It should also be mentioned that wills involving elections to administer, that is, estates below the value of $15,000,[24] were excluded from the sample, possibly leading to under-representation of estates of a smaller financial value and potentially skewing the results. Using only those wills that have been formally proved is an obvious limitation.[25] This may have led to an underestimation of the tendency of testators to share smaller estates between the surviving spouse and children. This may have significant implications when it is considered that intestate estates tend to be of a smaller value than testate ones.

Changes to the composition of families

4.29 The sample in this survey represents a specific cohort. Recent trends in Australia's population mean that the family structure of future cohorts will be significantly different. Fertility and marriage rates are decreasing as the childbearing age increases.[26] The lowest total fertility rate ever recorded in Australia was recorded in 2000.[27] If this level were to be sustained over an extended period the next

23. NSW Registry of Births Deaths and Marriages, "Deaths: Total number of deaths registered in New South Wales" <*http://www.bdm.nsw.gov.au/deathsStatistics.htm*> (as at 15 December 2005).

24. *Wills, Probate and Administration Act 1898* (NSW) Part 2, Division 4.

25. A Dunham, "The method, process and frequency of wealth transmission at death" (1963) 30 *University of Chicago Law Review* 241 at 247.

26. Australian Bureau of Statistics, Population Feature Article, "Marriages and Divorces in Australia in 2003" (September 2004) <*http://www.abs.gov.au*>.

27. S A Khoo and P McDonald, *The Transformation of Australia's Population* 1970-2030 (UNSW Press, Sydney, 2003) at 41.

generation would be 16% smaller than the current generation of childbearing age. The implication then, is that over time, there will be a rise in the number of testators who were never married. Furthermore, there will be fewer children per family.

4.30 Australian divorce rates are increasing, and although remarriage rates are decreasing,[28] there is the potential for a greater number of children from a previous marriage in future cohorts. This possibility lends greater value to the finding that the presence of children who are not also the children of a surviving spouse changes distributive patterns that favour giving all to the spouse.

4.31 These issues are particularly important when one considers that intestates, as previously mentioned, die younger than testators. So investigation of distributive preferences in the face of no surviving spouse or issue is particularly important. Future research investigating the changing trends and their impact upon distributive preference will be vital in maintaining appropriate intestacy laws that reflect common 'dispository wishes'.[29]

28. Australian Bureau of Statistics, Population Feature Article, "Marriages and Divorces in Australia in 2003" (September 2004) <*http://www.abs.gov.au*>.

29. M L Fellows, R Simon and W Rau, "Public attitudes about property distribution at death and intestate succession laws in the United States" [1978] *American Bar Foundation Research Journal* 319 at 324.

Appendix: Survey document

File number: _____/04

Type: Probate / Letters of administration / Letters of administration (with will)

Date of grant:

Sex: M/F

Date of death:

Date of will:

Gross value: $

Nett value: $

Value includes real estate: Yes/No

Age:

Marital status at death:

Married / Widowed / Divorced / Separated / Never married / other

Number of marriages:

Children: Yes / No

Living:

Dead:

Under 18:

Value of jointly held property: $

Value includes real estate: Yes/No

Beneficiaries on intestacy: full/partial

spouse / defacto / children / gc / ggc / sibling /nephew /gp / aunt

Life interest: Yes/No ... Spouse / Other

Residue:

Spouse: ___%

____ Children: __ % - Equal shares/other

Representation:

Children/issue/other

Other:

___ _____: __% - equal /other

Bequests:

Real estate:

Personal property:

Large pecuniary (>$1000):

Small pecuniary (<$1000):

Substitutionary clause:

____ Children: __% - Equal shares/other

Representation:

Children/issue/other

Other:

___ _____: __% - equal /other

Form of will: Typescript / Hand written

Pre-printed form: typed / hand

Survivorship clause: Yes/No

Who applies to:

Time:

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