

## FAMILIES AND INTERGENERATIONAL TRANSFERS: CHANGING THE OLD ORDER?

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### I INTRODUCTION

Much has been said about the baby boomer generation and its hedonism. But while the evidence suggests that many baby boomers do not intend to leave their children an inheritance, there are a number of explanations for this. The first relates to the need to fund their retirement, the uncertainty of what they will need and the length of the period of this need. The second explanation is that baby boomers often provide extensive financial support to their adult children, which diminishes their capacity to save for retirement, and to leave significant lump sums as inheritance. Thirdly, although many baby boomers are wealthy, a significant number have little or no assets to leave as an inheritance.

The two principal forms of intergenerational wealth transfer are inter vivos transfers and testamentary dispositions. Inter vivos transfers are transfers or gifts of assets during the donor's life time. Testamentary dispositions are gifts or assets left by will. Whereas inter vivos gift giving reflects the principles of social exchange and reciprocity, and often leads to differential outcomes in relation to children, testamentary dispositions generally adopt the principle of equal sharing, referred to in this article as the 'equality principle'. Testamentary dispositions can be modified as a consequence of Family Provision legislation. Under this legislation courts can effect amendments to a testator's dispositions and order that adequate provision be made for the maintenance and needs of eligible beneficiaries without having regard to the equality principle.

The first section of this paper provides background information concerning the baby boomer generation, with a focus on the level of their wealth and assets. The second section deals with the practice and intentions of baby boomers in transferring their assets through both inter vivos transfers and testamentary dispositions. It also examines the evidence and explanations for the equality principle, and analyses the nature, extent and explanations for the two types of intergenerational exchanges. The paper concludes with an overview of how baby boomers' testamentary dispositions to children can be displaced by family provision legislation, and argues that where adult children are concerned, putting

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an economic value on familial obligations may be at odds with family cohesiveness.

## II BACKGROUND

As post-war baby boomers<sup>1</sup> become senior citizens, there is a sense that, unlike earlier generations, they will adopt lifestyles inconsistent with leaving significant assets to their children. The identity of the baby boomers, also sometimes referred to as the 'Me' generation, has largely been shaped by the formative experiences of post-war economies which emphasised individualism and consumerism.<sup>2</sup> In the United States, researchers have theorised that, unlike the generation before them, the baby boomers experienced prosperity and affluence, radical social changes, civil rights movements and rapid technological change, and as a result may be thought of as 'individualistic, competitive free agents with high interest in self fulfilment through personal growth'.<sup>3</sup>

Similar experiences and values may apply to the Australian baby boomers and underpin how they view both retirement and their obligations to succeeding generations. As the attributes above suggest, baby boomers do not necessarily see retirement as a time to conserve resources for the next generation. Rather, retirement is often seen as an opportunity to lead a full life, and as period for self-fulfilment, travel and hobbies.<sup>4</sup> However, it does not necessarily follow that their self-fulfilment is pursued at the expense of the next generation.

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- 1 This is usually taken to cover the time period 1946–64, see US Census Bureau, *Oldest Baby Boomers Turn 60* (2006) <[http://www.census.gov/Press-Release/www/releases/archives/facts\\_for\\_features\\_special\\_editions/006105.html](http://www.census.gov/Press-Release/www/releases/archives/facts_for_features_special_editions/006105.html)> at 8 September 2008. For the purposes of this article, unless otherwise indicated, the age cohort are those born in the period 1946–65 as this correlates with Australian statistical collections, Australian Bureau of Statistics ('ABS'), 'First Australian Baby Boomers Reach 60: ABS' (Media Release, 13 December 2006) <<http://www.abs.gov.au/ausstats/abs@.nsf/mediareleasesbyReleaseDate/E577D6E3D294A2B7CA2572420077FEDB?OpenDocument>> at 18 September 2008.
  - 2 Jim Ogg and Catherine Bonvalet, 'The Baby Boomer Generation and the Birth cohort of 1945–1954: a European Perspective' (Paper presented at the ESRF Social Science Week, 10 March 2006) <[http://www.youngfoundation.org.uk/files/content/Europeanbabyboomers\\_01.pdf](http://www.youngfoundation.org.uk/files/content/Europeanbabyboomers_01.pdf)> at 8 September 2008.
  - 3 Carolyn Egri and David Ralston 'Generation Cohorts and Personal Values: A Companion of China and the US' (2004) 15 *Organization Science* 210, 211, 213.
  - 4 See AXA Retirement Scope, *Retirement, a New Life After Work?* Wave 3 – (2007) <<http://www.axa.ca/axainternetwebapp/client/en/quiSommesNous/barometreaxaEN.pdf>> at 8 September 2008. ('AXA Retirement Scope 2007'). Australia (78 per cent of both working and retired respondents) ranked well above US 71 per cent (retired) – and 66 per cent (working) , in positive images of retirement. See also AARP Global Aging Program, *International Retirement Security Survey* conducted by Harris Interactive (2005) <<http://www.aarp.org/research/intl/comparisons/irss.html>> at 8 September 2008. ('*International Retirement Security Survey*').

### A Financial status

As a generation, baby boomers have been characterised as financially secure.<sup>5</sup> Older Australians, particularly baby boomers, have been the beneficiaries of rising housing prices,<sup>6</sup> access to successful public floats of utilities and banks and, up until recent times, a share market boom.<sup>7</sup> In Australia, this wealth has been supplemented by the introduction of compulsory employer and employee superannuation contributions<sup>8</sup> and the benefits accruing from dual income households.<sup>9</sup> In 2003–2004, older Australians (aged 65+) accounted for 23 per cent of total household wealth, which was projected to increase to 47 per cent by 2030.<sup>10</sup> Their younger counterparts, the baby boomers, are even richer, holding a little over 50 per cent of the wealth in Australia, although just 37 per cent of the adult population.<sup>11</sup>

However, these statistics are skewed by high net worth groups with large resources, with the richest quartile (25 per cent) holding 59.7 per cent of total wealth.<sup>12</sup> In reality, most individual baby boomers have modest means, with most of their assets being held in housing equity, and also increasingly in superannuation.<sup>13</sup> Average superannuation savings for a male baby boomer was

5 In 2003–2004, the average net worth of individual baby boomers was \$381 000 with the richest 25 per cent of baby boomer households having an average net worth of \$910 499. See, AMP.NATSEM, *Baby Boomers – Doing it for Themselves* (2007), *Income and Wealth Report* Issue 16, 17 ('*Baby Boomers – Doing it for Themselves*').

6 In 2005–6, older boomer couples (55–64) without dependants had net average property assets of \$497 000, which is just over one half of their total net value assets of \$976 600. See ABS, *Household Wealth and Wealth Distribution, 2005–06* (Cat No 6554.0) Table 20. This may be reduced as a result of the significant drop in some property values in 2007 and 2008.

7 On average baby boomer couples (55–64) have \$377 000 in home equity, \$129 100 in investment property, \$202 700 in superannuation, \$156 600 in other financial assets (bank accounts, trusts, shares, businesses) and \$129 900 in other wealth (contents of family home, cars, & other assets), *ibid* 32–33. This may be reduced by the fall in share prices in 2007–2008.

8 The *Superannuation Guarantee (Administration) Act 1992* (Cth) requires employers to contribute 9 per cent of earnings for employees.

9 57.5 per cent of Australian women (15+) are in the workforce. See ABS, *Labour Force, 2007* (Cat No 6206).

10 AMP.NATSEM, *Baby Boomers – Doing it for Themselves*, above n 5, 17; AMP.NATSEM, 'You Can't Rely on the Old Folks' Money' (2003) 5 *Income and Wealth Report*, 4. See also Bruce Headey, Gary Marks and Mark Wooden, 'The Structure and Distribution of Household Wealth in Australia' (Working Paper No. 12/04, Melbourne Institute, 2004) <[www.melbourneinstitute.com](http://www.melbourneinstitute.com)> at 8 September 2008.

11 They hold 50.3 per cent of total wealth. They are not averse to debt to accumulate assets: baby boomer couples aged 55–64 with children carry more debt than other baby boomers; they have the highest loan rates for rental property, investment and home mortgages, (50.3 per cent). See AMP.NATSEM, *Baby Boomers – Doing it for Themselves*, above n 5, 11, 17. Households with the reference person in the age group 55–64 have the highest net worth of any age group household with \$823 785 on average, See ABS, *Household Income and Income Distribution, 2005–6* (Cat No 6523.0) Table 13.

12 AMP.NATSEM, *Baby Boomers – Doing it for Themselves*, above n 5, 18.

13 The 2003–4 figures were: 75 per cent of individual baby boomers aged 45–64 have assets of \$342 000 or less, with over 50 per cent being held in housing equity and 15–19 per cent held in superannuation. The lowest 25 per cent of baby boomers have just \$68 300 in assets with \$29 400 of this in home equity and \$10 900 in superannuation; lone households are especially poor with 41.2 per cent in the lowest wealth quartile, *ibid* 17, 19. The AMP-NATSEM group have not yet undertaken a revision of these figures based on the figures for the period 2005–6.

\$87 100 in 2003–2004: but half of the group had \$31 000 or less. Women fared even worse in superannuation savings. The average for women was \$35 000 but 30 per cent have no superannuation, 50 per cent had \$8 000 or less, and 70 per cent had \$25 000 or less.<sup>14</sup>

In relation to income, the average couple over 65 is also relatively poor and consumes almost all of their earnings. In 2004, the principal source of income for couples 65 and over was government pensions and allowances (67.8 per cent).<sup>15</sup> In comparison to other age cohorts and family groups, couples over 65 with no dependants spent a higher percentage of a modest weekly expenditure on recreation (15.6 per cent) and food and non-alcoholic beverage consumption (20.8 per cent).<sup>16</sup>

There are two distinct groups within the baby boomer cohort: those with high incomes still in employment, and those on low incomes who have retired early.<sup>17</sup> For single baby boomers who have retired early, the cohort aged 50–59 has little or no income. Retired couples in this bracket fare little better, with half having an annual income less than \$20 000. Their position is, of course, considerably improved if their partner is employed.<sup>18</sup>

The average weekly amount spent by the boomer cohort is similar to younger households. Baby boomers spend more on health care and on food, alcohol, transport, personal care and miscellaneous goods and services than do younger households. They also expend more on recreation and entertainment; some 12 per cent of their total expenditure.<sup>19</sup> However, this expenditure seems to be relative

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- 14 Simon Kelly, 'Entering Retirement: The Financial Aspects' (Paper presented at the Communicating the Gendered Impact of Economic Policies: The Case of Women's Retirement Incomes, Perth, 12–13 December 2006) <[http://www.cbs.curtin.edu.au/files/Kelly\\_Paper.pdf](http://www.cbs.curtin.edu.au/files/Kelly_Paper.pdf)> at 8 September 2008; AMP-NATSEM *Income, Superannuation and Debt – Pre and Post retirement*; 'The Lump Sum: Here Today, Gone Tomorrow' (2004) 7 *Income and Wealth Report* 6. Baby boomer couples (55–64) without dependants had an average of \$202 700 in superannuation; couples 65+ had an average of \$107 200, lone person 65+ had \$26 600. See ABS, *Household Wealth and Wealth Distribution*, above n 6, Table 20. See also, *SEQUAL-RFI Reverse Mortgage Study: It's on the House* (2008) <[http://www.sequal.com.au/images/stories/sequal\\_rfi\\_study.pdf](http://www.sequal.com.au/images/stories/sequal_rfi_study.pdf)> at 18 September 2008; (35 per cent of 60+ do not have superannuation).
- 15 ABS, *Australian Social Trends*, 2006 (Cat No 4102.0) *Household Expenditure Patterns by Life Cycle* based on the years 2003–4: at the end of 2004 full or part government pensions were received by: 80 per cent of *persons* 65+ and 76.4 per cent of *couples* 65+. By far the majority of single persons 65+ and couples 65+ are in the lowest and second lowest quintiles for disposable household income, see ABS, *Household Income and Income Distribution*, 2005–2006 (Cat No 6523.0) Table 4. The median income for a couple 65+ was \$349 and for a single person 65+, \$290.
- 16 The average weekly expenditure for a couple 65+ was \$614.65 out of an income of \$620, ABS, *Australian Social Trends*, 2006 (Cat No 4102.0) *Household Expenditure Patterns by Life Cycle* based on the years 2003–4.
- 17 AMP-NATSEM *Income, Superannuation and Debt, Pre and Post Retirement*, above n 14, 13.
- 18 Based on the HILDA Survey, wave 2, see *ibid* 5.
- 19 This was just 10.9 per cent of income. Based on the ABS, *Household Expenditure Survey*, 2003–4 (Cat No 6530) unit record data, boomer households spend an average \$60 per week on health. They spend an *average* \$132 per week on recreation in comparison to \$120 per week by younger households (under 45 years), *Baby Boomers – Doing it for Themselves*, above n 5, 14.

to the household income of baby boomers, and accords with larger levels of discretionary income as housing and other associated costs diminish.<sup>20</sup>

While the average baby boomer has a modest level of assets and income, retirees now have increased longevity,<sup>21</sup> smaller families,<sup>22</sup> and high levels of home ownership.<sup>23</sup> For the majority of seniors, the family home is their major asset.<sup>24</sup> Further, the majority of Australians now see themselves as primarily responsible for funding their own retirement,<sup>25</sup> and (despite the existence of Medicare) expect to make some contribution towards their health care from their own savings with limited assistance from their family and private health insurance.<sup>26</sup>

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- 20 Based on 2003–2004 ABS survey, household expenditure on recreation was as follows - under 45 years – 9.5 per cent of income; 45–64 years – 10.4 per cent of income; 65+ years – 13.15 per cent of income: *ibid* 14.
- 21 The predicted life space for those born in Australia between 2003 and 2005 is male: 78.5 years, female: 83.3 years; median age at death in 2005 was 76.8 years for males and 82.9 years for females: see ABS, *Deaths* (2005) (Cat No 3302.0). The average life expectancy for 65 year olds in 2002–4 was 86 (females), 83 (males): ABS, *Year Book Australia* (2007) 129.
- 22 Down from an average of 3 children in the early 1920s to a rate of just on 1.8 children per woman in 2005: see ABS, *Year Book Australia* (2008) (Cat No 1301.0), 125. Currently the annual growth rate for the year ended 30 June 2006 was 1.3 per cent, with a current fertility rate of 1.81: ABS, *Population by Age and Sex*, Australian States and Territories (2006) (Cat No 3201.0); ABS, *Births*, Australia (2005) (Cat No 3301.0)
- 23 Diana Olsberg and Mark Winters, *Ageing in Place: Intergenerational and Intrafamilial Housing Transfers and Shifts in Later Life* (Australian Housing and Urban Research Institute Final Report No 94, 2005) 6, 32–3 (*'Ageing in Place Report'*).
- 24 In the age cohort, 55–64, baby boomer households have, on average, 42 per cent of their wealth tied up in the family home; for the middle 50 per cent between 53–56 per cent of wealth is in the family home, *Baby Boomers – Doing it for Themselves*, above n 5, 8–9, 17; ABS *Household Wealth and Wealth Distribution* 2003–4, above n 6, Table 18. In 2004, 86.4 per cent of couples 65+ owned their own home outright, 4 per cent of that age group had a mortgage; 8.4 per cent rented a home, ABS, *Australian Social Trends, Household Expenditure by Life Cycle* (2006) (Cat No 4102.0); see also, Simon Kelly, Anne Harding 'Funding the Retirement of Baby Boomers' (2004) 11 *Agenda* 99, 104.
- 25 Only 25 per cent of persons who intend to retire thought that government pensions or allowances would be their main source of income in retirement; 41 per cent expected superannuation or an annuity to be the main source of income, see ABS, *Year Book Australia*, (2007), above n 21, 167. This might seem optimistic as currently 67.8 per cent of couples 65+ rely on government pensions and allowances as their principal source of income, ABS, *Household Expenditure Survey, 2003–2004* (Cat No 6530.0 Reissue). This optimism is reflected in the AXA survey. In the first wave in 2005, respondents (both working and retired) regarded 75 as 'old': AXA Retirement Scope, Jan 2005, *Retirement, a new life after work?* See <[www.retirement-scope.axa.com/country/download/2005/retirement\\_scope\\_australia\\_en.pdf](http://www.retirement-scope.axa.com/country/download/2005/retirement_scope_australia_en.pdf)> at 8 September 2008. (*'AXA Retirement Scope 2005'*). Australia ranked fourth highest in relation to the number of respondents expecting to fund their own retirement – after Hong Kong, Canada, USA and Singapore. This might seem optimistic as currently 67.8 per cent of couples 65+ rely on government pensions and allowances as their principal source of income, ABS, *Household Expenditure Survey, 2003–2004* (Cat No 6530.0 Reissue).
- 26 *International Retirement Security Survey* above n 4, 71. In the past there has been significant opposition to using the family home to fund future health needs.

Most Australians responding to the 2005 AARP survey are confident of having sufficient resources for retirement.<sup>27</sup> Confidence increases with level of household income, marital status and is marginally greater for those having tertiary education.<sup>28</sup> In the AARP survey just 20 per cent of respondents thought that a public pension would be the major source of funding for retirement.<sup>29</sup> The respondents to the survey were aged 30–65 years perhaps suggesting a level of optimism in comparison to the 2004 rate of public pension provision (67.8 per cent) referred to above. This may be tempered by the enthusiastic take up of share offers<sup>30</sup> and increasing levels of property investment<sup>31</sup> as well as generous taxation concessions for superannuation; superannuation contributions are compulsory for employees since 1992 with government co-contribution for low pay workers.<sup>32</sup>

In summary, while baby boomers and older Australians collectively have a great deal more assets than other age groups, these figures are skewed by a small cohort of very wealthy baby boomers. In fact, the majority of individual baby boomers have modest assets and income, with most holding the family home as their major asset, with increasing sums also being held in superannuation. There is also a significant income divide between those that are still employed and those that have retired. The latter are typically income poor. Further factors reducing the capacity to leave an inheritance include parents supporting their children for much longer periods and the need to fund an indefinite period of retirement. With all of these factors at play, many older Australians will simply not have the capacity to leave much in the way of assets to the next generation.

This information provides a context for considering the practice and intentions of baby boomers in transferring their assets to their children.

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27 23 per cent are very confident of having sufficient resources for retirement; 41 per cent are somewhat confident, 22 per cent not too confident and 23 per cent not at all confident; 20 per cent expect their major source of income to be a public pension; *ibid* 46, 50. The reasons given for being behind in saving for retirement are: they do not earn enough to save for retirement, (30 per cent) paying off a mortgage (26 per cent), raising a child or grandchild (26 per cent), unemployment (14 per cent), health or medical expenses (14 per cent); *ibid* 57.

28 *Ibid* 51.

29 *Ibid* 46. This is consistent with the ABS survey of persons 45+ for the period August 2004 to June 2005, which found that 25 per cent expect to be on the pension; ABS, *Retirement and Retirement Intentions, 2004–5* (Cat No 6238.0).

30 53.7 per cent of adult Australians own shares directly (40.6 per cent) or through superannuation or managed funds, see Australian Stock Exchange, 'A Nation of Shareholders' (Media Release, 8 February 2000) <[http://www.asx.com.au/about/shareholder/media\\_releases/MR080200\\_AS3.htm](http://www.asx.com.au/about/shareholder/media_releases/MR080200_AS3.htm)> at 8 September 2008.

31 See ABS *Household Wealth and Wealth Distribution*, above n 6, Table 20. Taxation deductions for negatively geared investment property have made investment properties attractive; approximately 20 per cent of Australian households own property other than the home they live in; the average net value in 2005–2006 was \$120 100.

32 *Ibid*. In 2005–2006 superannuation funds were the largest financial (non housing) asset held by Australian households; 76 per cent of households had some superannuation, the average value was \$85 000; 71 per cent of respondents in the 2007 SEQUAL survey intended to use super to fund their retirement: see *SEQUAL-RFI Reverse Mortgage Study: It's on the House*, above n 14, 31.

## II INTERGENERATIONAL TRANSFERS<sup>33</sup>

### A Inter Vivos Transfers

#### 1 *Financial transfers*

The majority of Australians (60 per cent of those working and 66 per cent of those retired) think that retirees should financially assist their children and grandchildren.<sup>34</sup> In a study conducted in 1996, over 70 per cent of Australian parents reported that they provided financial assistance to their children.<sup>35</sup> Parents still in the workforce, those with high incomes and educational qualifications were more likely to provide financial help,<sup>36</sup> most particularly to young adults.<sup>37</sup> Adult children living with their parents or close by also receive significant financial assistance, with proximity leading to higher levels of family exchange.<sup>38</sup> Assistance with the purchase of a home is a common reason for financial assistance,<sup>39</sup> though this assistance may be in the form of a loan rather than an outright gift.<sup>40</sup>

There is, however, evidence that parents may be reluctant to provide substantial financial gifts or transfers of assets prior to their death.<sup>41</sup> This reluctance may stem from the uncertainties associated with the costs of funding their retirement and aging health care costs; and the effect that large gifts may

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33 This can be used in multiple senses. In this article it will be used to indicate lineal generations and relations between parents and their children, see the discussion by Lawrence Solum, 'To our Children's Children's Children: The Problems of Intergenerational Ethics' (2001–2002) 35 *Loyola LA Law Review* 163, 169.

34 See *AXA Retirement Scope 2005* above n 25, 21. This compares poorly with other countries with USA scoring 70 per cent retired, 73 per cent working, 23.

35 75 per cent of men and 70 per cent of women had so reported, Christine Millward, 'Family Relationships and Intergenerational Exchange in Later Life' (Working Paper No 15, Australian Institute of Family Studies, 1998) 16. (This paper was based on a 1996 survey).

36 *Ibid.*

37 57 per cent of parents provided financial support to children aged 18–24 living away from home, ABS, *General Social Survey: Summary of Results*, 2006 (Cat No 4159.0) Table 24; Millward, above n 35, 19.

38 Millward, above n 35, 18.

39 80 per cent of parents in a recent survey were willing to assist children with home ownership. It may mean working longer (30 per cent) or giving up retirement savings (10 per cent), reduce discretionary spending (26 per cent), reduce holidays (23 per cent), not upgrading the family vehicle (22 per cent), redrawing or mortgage the family home (10 per cent). 73 per cent of young people think that their parents should assist: ING Direct, 'Parents Pay Price of Kids' Property Pursuits' (Media Release, 19 March 2008). 1992 figures were that 446,000 children no longer living with parents had received assistance in the previous ten years to 1992 to purchase property; 286 000 received a loan and 147 000 a gift of money, ABS, *Australian Social Trends 1995*. (Cat No 4102.0).

40 Olsberg and Winters, above n 23, 64.

41 Gifts given prior to death may be brought into account in family provision applications, see as an illustration *Moller v Allen* [2006] NSWSC 39, *Family Provision Act 1982* (NSW) s 27(1) and see discussion in Part 3 of this article.

have on adult children's savings, taxation considerations and pension eligibility.<sup>42</sup>

According to overseas studies, there is evidence that financial assistance given to children prior to death distinguishes between children based on need<sup>43</sup> or is given as a reward for particular individual assistance to parents.<sup>44</sup> There is also a large body of econometric literature on the effect and timing of intergenerational transfers to adult children and the factors that influence such transfers. In United States, there is strong evidence that inter vivos transfers are not directly related to compensation for reduction in a child's permanent income, and an increase in a child's income does not result in a corresponding decrease in financial transfers.<sup>45</sup> Research also demonstrates that bequests and inter vivos transfers by parents to needier children with lower incomes are not necessarily significantly larger than transfers to other children unless they intend to compensate for events that were beyond the child's control.<sup>46</sup> However, the most recent US evidence also suggests that financial support is given to less well-off children to compensate for short term income loss and for permanent reductions in income.<sup>47</sup>

This current research confirms that parents during their life time provide significant financial support to their adult children. This may be to help with home purchase or to assist less well off children. We now turn to look in more detail at the motivations for inter vivos transfers.

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42 Transfers can affect pension eligibility, see Centrelink, *Information you need to know about your claim for Age Pension* <[www.centrelink.gov.au](http://www.centrelink.gov.au)> at 18 September 2008. See Luc Arrondel and Anne Laferriere, 'Taxation and wealth transmission in France' (2001) 79 *Journal of Public Economics* 3, 6–9 for the influence of inheritance tax on inter vivos bequests in France. In Australia, taxation on superannuation payments to family non dependants after death may similarly encourage inter vivos transfers prior to death. In the UK, inheritance by a spouse is exempted from inheritance tax: Karen Rowlingson and Stephen McKay, *A Literature Review and Secondary Analysis of Data* (2004) Attitudes to Inheritance, 15 <<http://www.jrf.org.uk/knowledge/findings/socialpolicy/0385.asp>> at 8 September 2008.

43 Kathleen McGarry, *Testing Parental Altruism: Implications of a Dynamic Model* (2006) University California LA, National Bureau of Economic Research <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=227641](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=227641)> at 8 September 2008; Rob Alessie and Arie Kapteyn, 'New Data for Understanding Saving' (2001) 17 *Oxford Review of Economic Policy* 55, 65; Deidre Drake and Jeanette Lawrence, 'Equality and Distributions of Inheritance in Families' (2000) 13 *Social Justice Research* 271, 286.

44 Inter vivos transfers to a child providing informal care have the advantage that gifts can adapt to the level of care given, need not be disclosed to other children and can provide benefits when needed rather than after death: see Edward Norton and Courtney Van Houtven *Inter vivos Transfers and Exchange* (2005) Rand Corporation <[www.rand.org/labor/seminars/adp/pdfs/2005norton](http://www.rand.org/labor/seminars/adp/pdfs/2005norton)> at 8 September 2008.

45 US evidence and modelling suggests that if the parents' income decreases by \$1, transfer to the child is reduced by 5c; a \$1 increase in a child's income reduces the amount received by less than 8c; see Joseph Altonji, Fumio Hayashi, and Laurence Kotlikoff, 'Parental Altruism and Inter vivos Transfers: Theory and Evidence' (1997) 5 *Journal of Political Economy* 1121.

46 Gifts for example on birth of children or assistance with home purchase were not considered, Mark Wilhelm 'Bequest Behaviour and the Effect of Heir's Earnings: Testing the Altruistic Model of Bequests' (1996) 86 *American Economic Review* 874, 890.

47 McGarry above n 43.



## 2 *Inter Vivos Transfers – Motivations: Altruism, Exchange or Old Age Security?*

### (a) *Old Age Security*

There are a number of hypotheses to explain the motivations for intergenerational transfers.<sup>48</sup> The first is that in the absence of parents being able to provide for themselves in their old age, old age security is better assured by transfers to children of money, goods and services.<sup>49</sup> Old age security encompasses more than financial support. It also includes services and assistance to older parents. This is especially important because the estimate, in 2003, was that just over half of Australians aged 60+ have a disability with most continuing to reside in a private dwelling.<sup>50</sup> They have significant needs for care and assistance with adult children providing considerable help to their older parents. In assessing whether the motivation for transfers to children is old age security, this section will discuss the extent to which families provide for the needs of elderly parents, the factors that influence the provision of assistance including cultural norms of responsibility and the impact of government services on family assistance.

When older Australians choose to remain in the family home, assistance – whether public or private – can therefore be crucial.<sup>51</sup> Government policy actively supports seniors living in the community through the provision of publicly available community care services.<sup>52</sup> Their primary needs for assistance are property maintenance and health care. Less frequent needs were transport, housework, mobility and self care. The need for assistance in all of these categories increased with age.<sup>53</sup> Families usually provide this kind of care, although significant numbers (61 per cent) obtain formal assistance from medical professionals and gardeners.<sup>54</sup>

It might be anticipated that the level of material (non-financial) assistance provided to the baby boomer generation may be lower than previous generations

48 Lee Lillard and Robert Willis, 'Motives for Intergenerational Transfers: Evidence from Malaysia' (1997) 34 *The Demography of Ageing* 115. Two of the most influential articles are Altonji, Hayashi, and Kotlikoff, above n 45; Wilhelm, above n 46, 890.

49 Lillard and Willis, above n 48.

50 ABS, *Disability, Ageing and Carers: Summary of Findings* (2003) (Cat No 4430).

51 The percentage of older Australians living in cared accommodation increases with age. In 2003, 5 per cent of 60+ Australians were in cared accommodation, the median age was 85 years, women comprised 72 per cent of older persons in cared accommodation, almost third were affected by dementia or Alzheimer's disease, see ABS, 'Older People in Cared Accommodation', *Australian Social Trends* (2006) (Cat No 4102.0).

52 The care arrangements are: Home and Community Care (HACC), Community Aged Care Packages (CACPs) and Veteran's Home care, Extended Aged Care at Home (EACH), see Australian Institute of Health and Welfare *Australia's Welfare*, 2005 (Cat aus65) 159. As to whether this 'crowds out' family assistance, see Harald Kunemund, Martin Rein, 'There is More to Receiving Than Needing: Theoretical Arguments and Empirical Explorations of Crowding In and Crowding Out' 19 *Ageing and Society* 93, 94.

53 *Disability Ageing and Carers*, above n 50 Tables 21, 22.

54 *Ibid.* Partners provided high levels of care and assistance with lesser, but significant support, by children, see Tables 21, 22, 23. See also the earlier study by Millward, above n 35, 9.

due to a number of factors, including: increased levels of mobility resulting in greater geographic distance from parents;<sup>55</sup> smaller numbers of children;<sup>56</sup> high levels of participation in the workforce by Australian women;<sup>57</sup> and longer periods of dependency by children, particularly those in tertiary education.<sup>58</sup>

Family assistance to older Australians is influenced by a number of factors such as: geographic proximity (greater levels of contact); parental divorce (less assistance especially if remarried);<sup>59</sup> gender (older mothers are more likely to be assisted); age (those aged 60+ are more likely to be assisted); non-English speaking background (higher financial assistance from children); and income (higher income parents get less assistance).<sup>60</sup> Australian research has found that parents exhibit greater reliance on their adult children when they have 'fewer material or social resources (due to low income, migrant status, or lack of a partner)'.<sup>61</sup> Gender also plays a very important role in exchanges, with high levels of intergenerational support occurring between mothers and daughters.<sup>62</sup> Australian children cite a variety of reasons for providing care for parents with a disability or aged 60+ including: family responsibility; emotional obligation; a feeling that they were able to provide better care for the family member than other people; and finally, that other family members or friends were either not willing or able to provide care.<sup>63</sup>

55 This might be overplayed, see Millward, above n 35, 6 (over half of the seniors were within 30 minutes driving distance of a child).

56 Down from an average 3 children in the early 1920s to a rate of approximately 1.8 children per woman, see ABS, *Year Book Australia*, 2007 above n 21.

57 57.5 per cent of Australian women (15+) are in the workforce; see ABS, *Labour Force*, 2007 (Cat No 6206). Evidence from a 1996 survey suggests that women will try to adopt part time or job sharing work arrangements, so that they can provide care and assistance, Millward, above n 35, 35.

58 57 per cent of Australian parents provided financial support to children aged 18–24 and living away from home. This included helping purchase large items, paying bills, rent, mobile phone costs, food and clothing, lending a vehicle, driving them places as well as assisting with education costs, see ABS, *General Social Survey: Summary of Results* (2006) (Cat No 4159.0) Table 24; Millward, above n 35, 19. See also Judy Schneider 'The Increasing Financial Dependency of Young People on their Parents' (2000) 3 *Journal of Youth Studies* 5.

59 This also has an impact on assets available in retirement, see David de Vaus, Matthew Gray, Lixia Qu and David Stanton, *The Consequences of Divorce for Financial Living Standards in Later Life* (Research Paper No 38, Australian Institute of Family Studies, 2007).

60 Christine Millward, 'Divorce and Family Relations in Later Life' (1997) 48 *Family Matters* 30, 32–33. See also Paulo Saad, *Support Transfers Between Elderly Parents and Adult Children in two Brazilian Urban Settings* (2001) <[http://www.iussp.org/Brazil2001/s50/S55\\_04\\_Saad.pdf](http://www.iussp.org/Brazil2001/s50/S55_04_Saad.pdf)> at 8 September 2008.

61 This is based on 1996 figures. See Millward, above n 35, 12.

62 It is suggested that there is a hierarchical scale of carers. The Western model, in order comprises: partner, daughter, daughters-in-law, sons, sons-in law, other relatives. The hierarchy may be culturally dependent; see Kunemund and Rein, above n 52, 94. See also, ABS, 'Family Functioning: Family Support', *Australian Social Trends* (1995) (Cat No 4102.0). Based on 1992 data, daughters provide higher levels of support for meals, housework, personal and nursing care than do sons. Similarly in the 2003 data, daughters provided significantly greater support than sons in all aspects of assistance, except property maintenance, ABS, *Disability, Ageing and Carers* (2003) (Cat No 4430.0) Partners provided high levels of care and assistance with lesser, but significant support, by children, see Tables 21–23.

63 The Australian figures can be found in ABS, *Disability, Ageing and Carers* above n 62, Table 33.

Arguably, this hypothesis (old age security) is less important in the Australian setting, where means-tested old age pensions are provided,<sup>64</sup> a universal publicly funded health care system exists,<sup>65</sup> subsidised residential aged care is available,<sup>66</sup> and superannuation for employees has been compulsory since 1992<sup>67</sup> with government co-contributions available for low income earners.<sup>68</sup> In contrast with citizens in many other developed countries, Australians do not think that children should provide financial support to their retired parents.<sup>69</sup>

Although government may provide for the basic needs of older Australians, this does not mean that adult children do not support or assist their older parents. It has been suggested that government policies may have a distorting effect on these support relationships by providing substitutes for family support<sup>70</sup> or making the role of caregiver more onerous.<sup>71</sup> The argument assumes that a strong welfare State will result in less 'family solidarity', thus 'crowding out' family obligations and intergenerational transfer.<sup>72</sup> But the converse may apply: the more the older person receives from the State, the greater the opportunity for intergenerational transfer.<sup>73</sup> Although services provided by the public sector may not be replicated by the family,<sup>74</sup> other types of support may be provided with no diminution in family solidarity, and in this situation reciprocity may continue while family burdens are diminished.<sup>75</sup> The evidence is that Australian families provide greater levels of support to seniors (60+) than government or other formal providers in the areas of self care, communication, cognition or emotion, paperwork, transport and meal preparation, and much of this is provided by partners, with significant contributions also made by daughters and to a lesser extent, by sons.

Although old age security may be less important in Australia, there is still scope to argue that transfers to adult children may be motivated by the need for additional support and help in old age. But the research does not give strong

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64 44 per cent of Australians receive a government pension or allowance as their main source of income just after retirement: ABS, *Year Book Australia* (2007), above n 21, 167.

65 See *ibid* 277 for a general description.

66 The Commonwealth government provides subsidised residential aged care places; the fees and charges are subject to assets and income tests, see <[http://www.health.gov.au/internet/main/publishing.nsf/Content/ageing-rescare-resentry\\_a.htm](http://www.health.gov.au/internet/main/publishing.nsf/Content/ageing-rescare-resentry_a.htm)> at 16 September 2008.

67 *Superannuation Guarantee (Administration) Act 1992* (Cth).

68 *Superannuation (Government Co-contribution for Low Income Earners) Act 2003* (Cth).

69 This is the lowest out of 11 countries. 57 per cent of those working at 55 per cent of the retired respondents thought children should provide material assistance; see *AXA Retirement Scope 2007*, above n 4, 35.

70 The two principal assistance packages are Home and Community Care (HACC), Community Aged Care Packages (CACPs).

71 David Ribar and Mark Wilhelm "Exchange, role modelling and the intergenerational transmission of elder support attitudes: Evidence from three generations of Mexican-Americans" (2006) 35 *The Journal of Socio-Economics* 541–631, 515.

72 Kunemund and Rein, above n 52, 94–5.

73 *Ibid* 94.

74 The Australian figures can be found in ABS, *Disability, Ageing and Carers* above n 62, Tables 21–23.

75 Kunemund and Rein, above n 52, 97.

support to this as a motivation. Reciprocity is the better explanation for transfers to and from adult children.

The nature of these intergenerational exchanges can be affected by cultural norms associated with responsibility, which may shift over time. This has been particularly evident in Japan, where levels of intergenerational responsibility have been found to be decreasing,<sup>76</sup> and may also be relevant in Australia, which is currently experiencing high levels of immigration from non-English speaking countries.<sup>77</sup> Reciprocity is a key factor in these exchanges, and the contribution of resources to children increases the probability of receiving help in return.<sup>78</sup> For example, where parents babysit for their adult children, there is a strong correlation with increased assistance being provided to aging parents.<sup>79</sup> In summary the main motivations for transfers between parents and adult children seems to be based on reciprocal exchanges rather than the need to ensure security in old age.

#### (b) Investing in Children's Earning Capacity

A second explanation for intergenerational transfers is that parents invest in their children by grants and loans to promote children's earning capacity, particularly through funding their children's education. In return for this investment, it is expected that children will support their parents in old age.<sup>80</sup>

A great deal of research attests to the financial support provided by parents to adult children, which (as might be expected) increases with parents' financial capacity. In 1996, the Australian Later Life Families Study found that for parents between 50 and 70 and still in the workforce, those with partners, high incomes and/or educational qualifications were more likely to provide financial help to their children.<sup>81</sup> Two thirds of parents said that they had given financial assistance to their adult children,<sup>82</sup> even parents on low incomes (below \$15 000).<sup>83</sup> Additional help was provided to daughters with young children,<sup>84</sup> and generally speaking higher levels of assistance flowed 'through maternal kin lines than paternal ones.'<sup>85</sup>

76 See Kunemund and Rein, above n 52, 98, summarising Japanese research showing diminishing co-residence with eldest sons.

77 In November 2004, 28 per cent of the population aged 15 and over were born overseas; 68 per cent of migrants were born in countries where English is not the main language, ABS, 6250.0 – *Labour Force Status and Other Characteristics of Migrants* (2004) <<http://www.abs.gov.au/ausstats/abs@.nsf/ProductsbyReleaseDate/90AE3040E103143BCA2574560014C2A2?OpenDocument>>. at 18 September 2008. 20 per cent of older Australians (65+) were originally from mainly non-English speaking countries; *Australia's Welfare 2005*, above n 52, 137.

78 Kunemund and Rein, above n 52, 103.

79 Ibid 113. It is also related to proximity; see the five country survey by Kunemund and Rein.

80 Saad, above n 60; Lillard and Willis, above n 48, 116.

81 Millward, above n 35, 16.

82 Ibid 16.

83 Ibid: 64 per cent of that group provided financial assistance.

84 Ibid 19.

85 Ibid 20. Note also the problems of women caring for both children and parents, the 'sandwich generation' discussed at 35.

It is difficult to assess how far this financial support is effectively an investment to support a child's future earning capacity. However, parents certainly may be viewed as investing in their children's future security by supporting children for longer periods for their education, absorbing living costs where adult children remain at home and assisting with home purchases. Assistance is given through the provision of loans to children to fund home purchase<sup>86</sup> or by parents acting as guarantors for their children's loans.<sup>87</sup> Even those with quite modest means or on pensions assisted family members to purchase a home.<sup>88</sup> Parents also support their children's income and earning capacity by providing childcare. In particular, grandparents provide high levels of unpaid informal child care, thus adding to the capacity of their (particularly female) adult children to be employed.<sup>89</sup> In 2002, 19 per cent of children aged 0-11 years had been looked after by their grandparents in the week surveyed, and overall grandparents provided 31 per cent of total hours of care in the survey week.<sup>90</sup> Grandparents raising grandchildren accounted for 1 per cent of all families with children 0-17 years.<sup>91</sup> Although there are some allowances available to carers, frequently these are means tested and payments may impact on grandparents' pension payments and eligibility. As a result, many grandparents are forced to utilise their retirement savings to support grandchildren they are raising.<sup>92</sup>

The survey evidence suggests that a substantial proportion of Australians do not expect their children to provide them with financial support,<sup>93</sup> nor do they

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86 Olsberg and Winters, above n 23, 88 (1/3 of respondents (aged 50+) had given loans to children; the loans were largely repaid). 3.6 per cent had provided financial assistance to purchase a home: *ibid* Table 9, 64. Or occasionally to start up a new business, see Millward, above n 35, 19.

87 Litigated cases in Australia suggest that 35 per cent of guarantors were parents providing guarantees for loans for their children. 37 per cent of guarantors were over 60 years, 28 per cent were 50-59 years, see New South Wales Law Reform Commission, *Darling, Please Sign this Form: a Report on the Practice of Third Party Guarantees in New South Wales*, Research Report 11 (2003) [3.9].

88 Olsberg and Winters, above n 23, 58.

89 A 1996 study indicated that children's participation in the workforce did not have a significant impact on the level of childminding provided by grandparents, see Millward, above n 35, 25.

90 ABS, *Australian Social Trends*, 'Family Functioning: Informal Child Care Provided by Grandparents' (2005) (Cat No 4102.0). Note a child care benefit is available for approved and registered child care, encouraging formal rather than informal childcare: *ibid*.

91 ABS, *Family Characteristics Australia* (2003) (Cat No 4442.0).

92 *Grandparents raising Grandchildren* Report Commissioned for the Hon Larry Anthony, Minister for Children & Youth Affairs (2003). <<http://www.dest.gov.au/NR/rdonlyres/5628C0E8-EE57-4626-99FE-7EE0A12404A6/21941/GrandparentsRaisingGrandchildrenReport.pdf>> at 8 September 2008 [6.2.1].

93 In the third wave of the AXA survey, Australia was the second lowest country (after UK) whose respondents thought that children should provide financial assistance to their parents. 30 per cent of working persons and 20 per cent of retired persons thought that children should provide financial support to their parents: *AXA Retirement Scope 2007* above n 4, 35. See also *International Retirement Security Survey*, above n 4, 46. (1 per cent expected to receive financial support from children or family as their principal source of support). But see Millward, above n 35, 9, reporting a 1996 study that 23 per cent of her sample of received financial assistance from their adult children.

intend to live with their children in retirement.<sup>94</sup> But while it is difficult to pin down evidence that the motivation for transfers to adult children is to ensure reciprocal assistance in old age, there is some evidence that parents provide resources to children to promote the child's earning capacity.

*(c) Family as insurance*

A third possible rationale for intergenerational transfers is that the family provides an insurance mechanism for sharing and spreading risk.<sup>95</sup> Specifically, the family provides protection for unexpected setbacks such as job loss, serious illness, death or injury. However, the need for this type of family insurance in Australia is diminished by government provision of unemployment, sickness and invalid benefits and payments. Nevertheless, since government provision is both modest and means tested, there is still scope for families to provide additional income support. Without meaningful statistical information, the rate at which these kinds of transfers occur in Australia is speculative, though it may explain some situations where financial gifts are given to children.<sup>96</sup> This overlaps with the fourth suggested explanation for intergenerational transfers.

*(d) Altruism*

Altruism, in this context, is used to mean the giving of gifts to children without the expectation of reward or repayment. Economists test this by asking whether parents make financial transfers to children to equalise income deficits.<sup>97</sup> Transfers would not be altruistic if transfers were made to compensate for providing assistance or emotional support. Using this methodology, US research has generally rejected altruism as an explanation for most inter vivos transfers.<sup>98</sup> Rather, there is stronger support for the 'exchange theory': that transfers are generally made in response to assistance. In contrast, in relation to bequests, reciprocity or exchange has a much less significant role to play, and in the absence of a surviving spouse, the usual pattern is that children share an estate equally without discrimination.

94 This is the lowest in the countries surveyed (except for Netherlands and Belgium with 0 per cent) with 1 per cent of respondents indicating that their ideal retirement would be living with their children. See *AXA Retirement Scope 2005*, above n 25, 33.

95 See generally, Raphael Di Tella and Robert MacCulloch, 'Informal Family Insurance and the Design of the Welfare State' (2002) 112 *The Economic Journal* 481.

96 There are occasional illustrations in the literature such as precarious employment, see Millward, above n 35, 19. See also McGarry above n 43.

97 There is a huge amount of literature on this. For examples rejecting the altruism hypothesis, see Altonji, Hayashi, and Kotlikoff, above n 45; Wilhelm above n 46. Cf McGarry, above n 43.

98 If the parents' income decreases by \$1, transfer to the child is reduced by 5c; a \$1 increase in a child's income reduces the amount received by less than 8c, see, Altonji, Hayashi, and Kotlikoff, above n 45.

## B Testamentary Dispositions

### 1 Testamentary Intentions

Older Australians (50+) almost universally have a last will,<sup>99</sup> giving Australia one of the highest rates of will-making in the world.<sup>100</sup> The specific testamentary intentions of Australians have been the subject of a number of local and international surveys. In relation to savings, the latest information is that the majority of Australians (66 per cent of those still working and 59 per cent of those retired) do not expect to leave an inheritance;<sup>101</sup> only 24 per cent (working) and 32 per cent (retired) intend to maintain savings to pass onto their heirs, and 9–10 per cent are uncertain.<sup>102</sup> But in relation to the family home, the available evidence suggests that older Australians expect to leave it to their children.<sup>103</sup> With respect to baby boomers, the Australian *Ageing in Place Report* found that of the 7,000 respondents aged 50+, over 30 per cent of the baby boomers thought they would leave no assets in their wills.<sup>104</sup>

The *Australian Ageing in Place Report* explored some of the reasons why Australians may choose not to leave an inheritance.<sup>105</sup> A survey of respondents over 50 found those in public housing and private rental accommodation to be twice as likely as other groups to consume all their resources prior to death.<sup>106</sup>

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99 Possible explanations for this include a free will making service by Public Trustee Offices in various states and low cost wills provided by solicitors in anticipation of higher value estate administration. In New South Wales, the Public Trustee NSW drew 10,984 wills without fee, for the year ending 30 June 2006; Public Trustee NSW, *Auditor Opinion* (2006) <[http://www.audit.nsw.gov.au/publications/reports/financial/2006/vol5/pdf/016\\_0368\\_public\\_trustee\\_nsw.pdf](http://www.audit.nsw.gov.au/publications/reports/financial/2006/vol5/pdf/016_0368_public_trustee_nsw.pdf)> at 8 September 2008.

100 Reporting 96.2 per cent of respondents had made a will, See, Olsberg and Winters, above n 23, 69; rates increased with age and housing tenure.

101 The survey question was whether they intended to ‘Draw down on savings’ or ‘Maintain savings to pass on to heirs’ which suggests that the question was related to savings only, and not housing assets, see *AXA Retirement Scope 2007* above n 4, 99.

102 *AXA Retirement Scope 2007* above n 4, 99. 30 per cent of Australians who feel that they are behind in saving for retirement, believe that they do not earn enough to: save for retirement, (30 per cent) pay off a mortgage (26 per cent), raise a child or grandchild (26 per cent), unemployment (14 per cent), health or medical expenses (14 per cent), see *International Retirement Security Survey* above n 4, 57.

103 In the SEQUAL–RFI 2007 survey of 1000 respondents, 75 per cent of 60+ seniors intended that the family property be left to children as inheritance, see *SEQUAL–RFI Reverse Mortgage Study: It’s on the House*, above n 14, 9. Note that in UK, housing assets are usually bequeathed, Pensions Commission (UK), *Pensions: Challenges and Choices – The First Report of the Pensions Commission* (2004) 186–188.

104 See Olsberg and Winters above n 23, 12, 65.

105 Compare the 2002 survey in the UK suggesting a variety of other factors might be relevant, such as professional and managerial status and ethnicity, See Karen Rowlingson and McKay, above n 42.

106 Olsberg and Winters, above n 23, 65. See also Alex Dolan, Peter McLean and David Roland, ‘Home Equity, Retirement Incomes and Family Relationships’ (Paper presented at the 9<sup>th</sup> Institute of Family Studies Conference, Melbourne, 9–11 February 2005) suggesting at 13 that home ownership is stable across all ages 50–85+; similarly liquid assets (usually bank accounts) are similarly stable across all age groups and this maintains even though older age groups have lower incomes. This is suggestive but not conclusive that assets are not being consumed at the expense of the next generation. In 2004, 17.3 per cent of all baby boomers are renters, see *Baby Boomers – Doing it for Themselves*, above n 5, 22.

Similarly pensioners and those still working thought they would not leave an inheritance.<sup>107</sup> Those in the baby boomer group were also less likely to leave an inheritance. The probability of consuming all assets prior to death diminishes with age.<sup>108</sup> From age 75, only 14 per cent thought they would leave no assets compared to 33 per cent of respondents in the age groups 50–59, 60–74.<sup>109</sup> This evidence suggests that the intention not to provide an inheritance may be partially driven by lack of assets as well as uncertain future medical and other needs.<sup>110</sup>

The *Ageing in Place Report* did not find that seniors intended to deprive their family of an inheritance by using the family home to fund retirement living. For most Australians the family home is their single largest value asset,<sup>111</sup> and many Australians aged 50+ are very reluctant to release the equity in their homes even if it is to fund future nursing and other needs.<sup>112</sup> Future needs would be met out of savings, superannuation or insurance as the first option, then selling<sup>113</sup> or renting the family home before taking out a loan.<sup>114</sup> The take up of equity release schemes, the most usual being a reverse mortgage, may also be affected by the care that needs to be taken to ensure that pension eligibility is not affected.<sup>115</sup> This reluctance to utilise the equity in the family home may be diminishing. Following rapid increases in 2006 and 2007, the number of reverse mortgages in

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107 Olsberg and Winters, above n 23, 65.

108 Ibid 66.

109 Ibid. The age cohort 50–69 still working have high levels of debt; the average was \$85 500 AMP-NATSEM *Income, Superannuation and Debt Pre and Post Retirement*, above n14, 8.

110 Ibid 65. Single and widowed seniors are more likely to sell the family home to move into aged care, see *SEQUAL-RFI Reverse Mortgage Study: It's on the House*, above n 14, 39.

111 In 2005–2006 the statistics were as follows: outright home ownership without a mortgage : 86.4 per cent of couples 65+, 61.1 per cent of 55–64 year old couples, 74 per cent of single persons 65+. Homes with mortgages comprised: 5.9 per cent of couples 65+, 28.2 per cent of 55–64 year old couples, 3.5 per cent of single persons 65+. With increases in superannuation, less of family wealth is tied up in the family home: in the age cohort, 55–64, baby boomer couples have, on average, 39 per cent of their wealth tied up in the family home; 65–74 couples have 43.5 per cent and single persons 65+ have 56 per cent of net wealth in the family home, ABS, *Household Wealth and Wealth Distribution* above n 6, Tables 5, 20. These are averages so may be skewed by high net worth individuals, see the earlier figures in *Baby Boomers – Doing it for Themselves*, above n 5, 8–9, 17; Simon Kelly and Ann Harding ‘Funding the Retirement of Baby Boomers’ (2004) 11(2) *Agenda*, 99, 104.

112 The survey question was ‘Imagine at sometime in the future you were to need nursing, security, company or other forms of assistance (maybe even residential care), how would you pay for it?’ Olsberg and Winters, above n 23, 54. See also *SEQUAL-RFI Reverse Mortgage Study: It's on the House*, above n 14, 51 (73 per cent of respondents were not likely to take out a reverse mortgage, 11 per cent thought it unlikely, 6 per cent thought it would be likely).

113 Many plan to move from a larger home to smaller residence which may release some funds, see Olsberg and Winters, above n 23, 42; *SEQUAL-RFI Reverse Mortgage Study: It's on the House*, above n 14, 7 (31 per cent plan to downsize).

114 Between 5.5 per cent (50–59) to 7.2 per cent (60–74) thought they would take out a loan to fund future needs, see Olsberg and Winters, above n 23, 54.

115 A reverse mortgage may affect entitlement to the aged pension as it may affect assets and income eligibility for the pension.



Australia has risen to 33 700 by the end of 2007.<sup>116</sup> At the end of 2007, the average age of holders of unpaid loans was 74 years with just 10 per cent of borrowers under age 65 and the majority on an annual income of less than \$40 000.<sup>117</sup> The average sum borrowed was \$60 000<sup>118</sup> which is quite modest in comparison to capital city housing prices.<sup>119</sup> Reverse mortgage funds were used for the following purposes: home improvement (15 per cent), income (12 per cent), debt repayment (11 per cent), travel (8 per cent), car (5 per cent), aged care (3 per cent), reinvestment (2 per cent), gifts (2 per cent) and unassigned (42 per cent).<sup>120</sup> The number of reverse mortgages is small and utilised largely by low income households for immediate future needs. This does not suggest that seniors intend to squander the inheritance on high living at the expense of their children. The current evidence does not support the description of baby boomers or older Australians as the greedy generation.

Researchers have also provided a range of explanations for a failure to leave an inheritance, even where there was capacity to do so. These explanations include: diminished need resulting from children's higher levels of education and income; weaker bonds resulting from geographic distance of children and fewer children choosing to take on the family business;<sup>121</sup> a shift from 'self sacrifice' to 'self interest' with increased consumption and spending on lifestyle;<sup>122</sup> a reduced desire to benefit the next generation; the complexity of remarriage<sup>123</sup> and new

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116 James Hickey, Kim Landley and Joshua Ling, *SEQUAL/Trowbridge Deloitte, Reverse Mortgage Market Study (December 2007)* (2007)

<[http://www.sequal.com.au/images/stories/seqal\\_trowbridge\\_deloitte\\_reverse\\_mortgage\\_study\\_2007.pdf](http://www.sequal.com.au/images/stories/seqal_trowbridge_deloitte_reverse_mortgage_study_2007.pdf)> at 16 September 2008 ) This represents about 1.4 per cent of the estimated 3.8 million Australians aged 60+; see *SEQUAL-RFI Reverse Mortgage Study: It's on the House*, above n 14, 11.

117 Hickey, Landley and Ling, above n 116, 20.

118 Ibid 4.

119 For example in Sydney, the biggest market for reverse mortgages, the median price for established houses in Quarter 3, 2006 was \$480 000, ABS, *House Price Indexes*, Capital Cities, 2007 (Cat No 64160).

120 These figures are approximate, see Hickey, Landley and Ling above n 116, 21. In a non randomised sample ASIC reported that out of 29 survey respondents, funds were used for the following purposes (more than one purpose could be indicated): modify/renovate home (11), supplement income (10), buy car (9), consolidate debt (7), financially assist relatives (6), aged care costs (2), other (3). 14 out of 29 respondents indicated that immediate future needs was the motivation: Australian Securities & Investment Commission, *All We Have is this House – Consumer Experiences with Reverse Mortgages* Report No 109 (2007), 11–13.

121 AMP.NATSEM, 'You Can't Rely on the Old Folks' Money', above n 10, 10.

122 High on Australian's list of activities that are planned for retirement are travel (55 per cent of those working, 26 per cent of retired plan to travel); hobbies (Australia ranked 1), volunteer work (Australia ranked 2), *AXA Retirement Scope 2007* above n 4, 28. This is not lost on the tourism industry, see Megan Cleaver and Thomas Muller, 'The Socially Aware Baby Boomer: Gaining a Lifestyle-Based Understanding of the New Wave of Ecotourists' (2002) 10 *Journal of Sustainable Tourism* 173.

123 See ABS, *Australian Social Trends*, Family Formation: Trends in Marriage and Divorce 1995, (Cat No 4102.0); Olsberg and Winters, above n 23, 86.

relationships; the diminution in close personal relationships with children and a greater sense of independence and diminished altruism.<sup>124</sup>

It is possible also that the attitudes of adult children to inheritances have changed. An English survey in 2002 reports that 46 per cent of adult children think that their parents should spend their money on themselves, 12 per cent say they have no need for an inheritance, while only 35 per cent say that they expect to receive money or assets after their parents' death.<sup>125</sup> However, younger people have greater expectations of an inheritance (45 per cent) and are less inclined to think that parents should spend their money on themselves (37 per cent). The report also suggests that inheritance expectations are related to dependency and that couples without children were more likely to take the view that parents should spend their money on themselves.<sup>126</sup>

There are often good reasons why many baby boomers do not intend to leave an inheritance. The research referred to previously indicates that many baby boomers have quite modest resources. In particular, those in rental accommodation, on pensions and those that have to continue in employment to support themselves, may not have assets to leave to their children. It has also been noted earlier that the extended financial support given to young adults may hinder saving for retirement and the capacity to leave an inheritance. The more affluent baby boomers intend to finance their own retirement. Their main assets are their homes and superannuation which may be needed to fund their retirement and future aged care needs thus diminishing their capacity to leave a substantial inheritance.

## 2 Intended Beneficiaries

In a recent survey, a sample of Australians aged 50 and over indicated that, in most cases, they intend to leave their assets to surviving spouses or children.<sup>127</sup> This is consistent with a small scale survey of South Australian wills granted probate which also noted it is rare for testators to skip a generation by leaving inheritances to grandchildren.<sup>128</sup> Suggested reasons for generation skipping are that middle-aged children<sup>129</sup> are well established and have less need than grandchildren and the potential impact of divorce settlements on children's

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124 Simon Kelly and Ann Harding, 'Don't Rely on the Old Folks Money: Inheritance Patterns in Australia' (2006) 4 *Elder Law Review* 3. For a survey of the literature, see R Hancock et al, *Attitudes to Inheritance, An Exploratory Study* (2002). In 2002, 32 per cent of Australians aged 65–74 and 24 per cent aged 75+ undertook voluntary work, ABS, *General Social Survey. Summary of Results, 2002* (Cat No 4159.0).

125 Rowlingson and McKay, above n 42, 19.

126 Ibid.

127 Olsberg and Winters, above n 23, 76. See also *AXA Retirement Scope 2005* above n 25, 80.

128 Lisel O'Dwyer, 'The Impact of Housing Inheritance on the Distribution of Wealth in Australia' 36(1) *Australian Journal of Political Science* 83, 91. In that South Australian study, barely 2 per cent of inheritances passed to grandchildren only. See also Olsberg and Winters, above n 23, 76: less than 1 per cent of the respondents aged 50+ intended to leave their property to their grandchildren only but in the group 75+ 1.8 per cent so intended. Note half the baby boomers did not have grandchildren in the Olsberg and Winters, *Ageing in Place* survey: ibid 72.

129 50–59 years is the age group receiving the most inheritances; Kelly and Harding, above n 124 9.

assets.<sup>130</sup> Higher divorce rates and greater numbers of lone person or single parent households would also be expected to impact on dispositions to spouses over time.

### 3 Testamentary Dispositions: The Equality Principle

The standard testamentary disposition to children<sup>131</sup> is that the children should share the estate equally.<sup>132</sup> The equality principle neither rewards, compensates, punishes nor discriminates between children according to gender or their individual conduct and circumstances. It avoids potentially expensive assessments based on individual needs, contributions or moral worthiness.<sup>133</sup> The wish to avoid family disharmony and envy may be important objectives.<sup>134</sup> It is unknown whether the financial and emotional costs of family provision applications<sup>135</sup> might also be a factor.<sup>136</sup> The principle of equal distribution is important as a final distribution and a ‘public gesture’ demonstrating that the parent values each child equally.<sup>137</sup> It reflects a ‘profound moral assumption of the intrinsic value of all individuals [that] has permeated the private sphere of family life, defining the appropriate treatment of children.’<sup>138</sup> The equality principle may also be preserved in civil law by statute where the equality of children is thought of as akin to a human right.<sup>139</sup>

130 There is anecdotal evidence that parents of children involved in divorce settlements frequently seek to argue that what appeared to be a ‘gift’ to a child to purchase property was in fact a loan. This is difficult to argue when institutional mortgagees normally require certification from parents that the funds are provided as a gift; see Kelsey Munro, ‘A House Divided’, *Sydney Morning Herald* (Sydney) 10 April 2007 <<http://www.smh.com.au/news/australian-capital-territory/a-house-divided/2007/04/18/1176696876073.html>> at 8 September 2008.

131 There is some US evidence based on the Health and Retirement Surveys 1992, 1994 and 1996 that biological children are more likely to receive gifts than step children or adopted children, see S Hochguertel and H Ohlsson, *Compensatory Inter vivos Gifts* (Working Paper 31, Department of Economics, Goteborg University 2003).

132 In Australia, the intention is to leave it to a surviving spouse first (43.8 per cent) and then children equally (37.8 per cent), See Olsberg and Winters, above n 23, 76; *AXA Retirement Scope 2005* above n 25, 80. See also O’Dwyer, above n 128, 91 (Wealthier testators may make distributions unequally on a ‘rational or compassionate basis’). The US evidence is that 80 per cent of bequests are divided equally (or close to equally) between the testator’s children, Mark Wilhelm above n 46, 880. There is variability in this figure, see C O’Connor, ‘Empirical Research on How the Elderly Handle their Estates’ (1986) 20 *Generations* 13; reporting 95 per cent of wills leaving property equally to children.

133 Drake and Lawrence above n 43, 273–4.

134 *Ibid* 273.

135 See generally John de Groot and Bruce Nickel, *Family Provision in Australia* (2<sup>nd</sup> ed, 2001). Family farms can cause particular difficulties; see *ibid* [2.48].

136 It is uncertain whether most testators would be aware of this legislation; it is thought likely if the will is drawn by a professional. Solicitors may provide a low cost will making service and Public Trustees in the various states normally provide a free will making service. As to the US experience, see T P Schwartz, ‘Testamentary Behavior: Issues and Evidence About Individuality, Altruism and Social Influences’ (1983) 34 *The Sociological Quarterly* 337, 340.

137 Drake and Lawrence, above n 43, 287.

138 *Ibid* 287.

139 Barbara Willenbacher, ‘Individualism and Traditionalism in Inheritance Law in Germany France and England and United States’ (2003) 28 *Journal of Family History* 208, 210, 212–213; land is an exception: *ibid* 213.

Would testators provide a larger bequest to an adult child who had unambiguous needs or if the child had provided substantial assistance to the testator? The answer is unclear.<sup>140</sup> In relation to adult children with less resources or special needs, there is some limited Australian evidence of wills where wealthier testators made distributions unequally on 'a rational or compassionate basis'.<sup>141</sup> Whilst there is some equivocal evidence from preference studies,<sup>142</sup> it seems that in the case of actual bequests the equality principle still prevails.<sup>143</sup> There is stronger evidence that gifts made *prior to death* may compensate for assistance provided or special needs or reduced income due to circumstances beyond the child's control.<sup>144</sup> But inheritance patterns (equal sharing by children) appear resistant to change and less discretionary than cash transfers prior to death.<sup>145</sup> The equality principle means that families 'do not strike hard bargains over resources and that the generations do not form interest groups. Explicit negotiations do not take place and help and support are not given because of detailed rules'.<sup>146</sup>

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- 140 Suggesting that this is the case, see Drake and Lawrence, above n 43, 280–281. (study based on vignettes demonstrating that elderly respondents would vary the equality principle based on need and reciprocity). But compare Misa Izuhara 'Negotiating Family Support? The "Generational Contract" Between Long-term Care and Inheritance' (2004) 33 *Journal of Social Policy* 649, 659. Izuhara found that the provision of long term care in Britain and Japan was not linked to bequests to the carer. In a Dutch survey, only 3 per cent of respondents planned a bequest to children on the basis that their children would care for them in their old age; respondents with high income and education are more likely to leave an inheritance irrespective of care and this applies also to respondents 65+: see Alessie and Kapteyn, above n 43, 66. Caregivers themselves may be equivocal about this; see C O'Connor, above n 132, 13, citing R A Kane, *Family Caregiving of the Oldest Old* (1995).
- 141 Confirming unequal treatment in a few cases: O'Dwyer, above n 128, 91; Drake and Lawrence, above n 43, 280–281 (study based on vignettes demonstrating that elderly respondents would vary the equality principle based on need and reciprocity); cf Alessie and Kapteyn, above n 43, 66.
- 142 Participants responding to different scenarios involving beneficiaries with special needs, reduced income or different contributions would have made some special provision, see Drake and Lawrence, above n 43, 271. Contrast this with the findings of a 2002 UK survey that found that expectations of inheritance are not related to the care or assistance given, however, there may be some expectations where financial support has been given, see Rowlingson and McKay, above n 42, 20–23.
- 143 In a Dutch survey, it was found that 3 per cent of respondents would vary bequests where they had been provided with care. Additionally, it was found that respondents with high levels of income and education are more likely to leave an inheritance irrespective of care, this applies also to respondents aged 65 and over. See Alessie and Kapteyn, above n 43, 66 Compare Drake and Lawrence, above n 43, 280–1 (study based on vignettes demonstrating that respondents (63–91 yrs) would vary the equality principle based on legitimate need and reciprocity, and on recognition of assistance given; only 20 per cent would *not* deviate from the equality rule).
- 144 McGarry above n 43; Alessie and Kapteyn, above n 43, 65; Drake and Lawrence, above n 43, 286. But compare US research that bequests and inter vivos transfers by parents to needier children with lower incomes are not necessarily significantly larger unless there were events beyond the child's control; gifts for example on birth of children or assistance with home purchase were not considered, see Mark Wilhelm, above n 46, 890.
- 145 Clare Ungerson, 'Thinking about the Production and Consumption of Long-term Care in Britain: Does Gender still Matter?' (2000) 29 *Journal of Social Policy* 623, 637.
- 146 Bo Anderson, 'Distributing Social Goods between Generations' (2005) 6 *Social Justice Research* 343, 352.

The equal distribution principle ignores issues of gender, contribution, character or conduct. It contrasts with Family Provision legislation which does not adopt an equality principle and may take into account contributions or conduct in so far as it is necessary for the needs and maintenance of the testator's non dependant adult children. Consequently, a testator's bequest though conforming to the equality principle may be modified by the operation of the family provision legislation.

### III FAMILY PROVISION

#### A Background

The common law adopts a principle of testamentary freedom within the family context. In *Banks v Goodfellow*,<sup>147</sup> Cockburn CJ captured the doctrine of 'testamentary freedom' as follows:

The English law leaves everything to the unfettered discretion of the testator, on the assumption that, though in some instances, caprice or passion, or the power of new ties, or artful contrivance, or sinister influence, may lead to the neglect of claims that ought to be attended to, yet, the instincts, affections, and common sentiments of mankind may be safely trusted to secure, on the whole, a better disposition of the property of the dead, and one more accurately adjusted to the requirements of each particular case than could be obtained through a distribution prescribed by the stereotyped and inflexible rules of a general law.<sup>148</sup>

Family provision legislation<sup>149</sup> qualifies this principle of testamentary freedom by permitting a court to interfere with a testator's will or statutory distribution on intestacy if the will or distribution does not make adequate provision for an eligible applicant. Under the legislation a non-dependent adult child can be an applicant.<sup>150</sup>

The assessment of whether provision should be made out of a deceased's estate is a two-stage process. The first step is to determine whether adequate

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147 (1870) 5 LR QB 549.

148 Ibid 563–5.

149 *Family Provision Act 1969* (ACT); *Family Provision Act 1982* (NSW); *Succession Act 1981* (Qld), ss 40–43; *Inheritance (Family Provision) Act 1972* (SA); Tas: *Testator's Family Maintenance Act 1912* (Tas); *Administration and Probate (Family Provision) Act 1962* (Vic); *Inheritance (Family and Dependents Provision) Act 1972* (WA). Note that in NSW, there is a bill in draft stage entitled 'Succession Amendment (Family Provision) Bill 2008' and see recommended draft legislation in New South Wales Law Reform Commission *Uniform Succession Laws: Family Provision*, Report No 110(2005).

150 *Family Provision Act 1969* (ACT) s 7(1)(c); *Family Provision Act 1982* (NSW) s 6(1) 'eligible person' para (b); *Family Provision Act* (NT) s 7(1)(c); *Succession Act 1981* (Qld) s 40; *Inheritance (Family Provision) Act 1972* (SA) s 6(c); *Testator's Family Maintenance Act 1912* (Tas) s 3A. In Victoria, the applicant must first show that the deceased had a 'responsibility' to make provision for that person, this could include an adult child, *Administration and Probate Act 1958* (Vic) s 91(4)(a), *Coombes v Ward* [2004] VSCA 51; *Inheritance (Family and Dependents Provision) Act 1972* (WA) s 7(1)(c).

provision has been made for the applicant.<sup>151</sup> The High Court in *Singer v Berghouse*<sup>152</sup> described the first step in the process in relation to the New South Wales legislation as follows:

[A]n assessment of whether the provision (if any) made was inadequate for what, in all the circumstances, was the proper level of maintenance etc appropriate for the applicant having regard, amongst other things, to the applicant's financial position, the size and nature of the deceased's estate, the totality of the relationship between the applicant and the deceased, and the relationship between the deceased and other persons who have legitimate claims upon his or her bounty.<sup>153</sup>

If this is answered affirmatively, the second stage of the inquiry deals with the amount that the applicant should receive:

The determination of the second stage... involves similar considerations. Indeed, in the first stage of the process, the court may need to arrive at any assessment of what is the proper level of maintenance and what is adequate provision, in which event, if it becomes necessary to embark upon the second stage of the process, that assessment will largely determine the order which should be made in favour of the applicant...<sup>154</sup>

In *Re Allen (deceased), Allen v Manchester*,<sup>155</sup> Salmond J said that an adequate provision is one which 'a just and wise father would have thought it his moral duty to make in the interests of his widow and children had he been fully aware of all the relevant circumstances.' Today, however, there is a clear divergence of opinion in the High Court whether reference to 'moral duties' can presently assist a determination.<sup>156</sup> For some members of the Court, the 'moral duties' standard is unhelpful, a gloss on the statutory text,<sup>157</sup> and liable to mislead: 'It is therefore better to forgo any convenience that these shorthand expressions may offer in favour of adherence to the relevant statutory language.'<sup>158</sup> Yet Gleeson CJ has taken an opposing view of 'moral duties':

151 *Family Provision Act 1969* (ACT) s 8(2) refers to 'adequate provision for the proper maintenance, education or advancement'; *Family Provision Act 1982* (NSW) s 9(2) refers to 'inadequate for the proper maintenance, education and advancement in life'; *Family Provision Act 1979* (NT) s 8(1) refers to "adequate provision is not available... for the proper maintenance, education and advancement in life"; *Succession Act 1981* (Qld) s 41(1) refers to 'adequate provision... for the proper maintenance and support'; *Inheritance (Family Provision) Act 1972* (SA) s 7(1)(b) refers to 'without adequate provision for his proper maintenance, education or advancement in life'; *Testator's Family Maintenance Act 1912* (Tas) s 7(1)(b) refers to 'without adequate provision for his proper maintenance and support'; *Administration and Probate Act 1958* (Vic) s 91(1) refers to 'proper maintenance and support of a person for whom the deceased had responsibility to make provision', *Inheritance (Family and Dependents Provision) Act 1972* (WA) s 6(1) refers to 'proper maintenance, support, education or advancement in life'.

152 (1994) 181 CLR 201.

153 *Ibid* 209-210. (Mason CJ, Deane and McHugh JJ); endorsed in *Vigolo v Bostin* (2005) 79 ALJR 731.

154 (1994) 181 CLR 201, 210 (Mason CJ, Deane and McHugh JJ).

155 [1922] NZLR 218, 220-1.

156 See the criticism in New Zealand Law Commission, *Succession Law: A Succession (Adjustment) Act*, Report No 39 (1997)[4], [32]-[34].

157 *Singer v Berghouse* (1994) 181 CLR 201, 209 (Mason CJ, Deane and McHugh JJ) [17]. This issue was discussed in Rosalind Atherton 'The Concept of Moral Duty in the law of Family Provision - a Gloss or Critical Understanding?' (1999) 5 *Australian Journal of Legal History* 5.

158 *Vigolo v Bostin* (2005) 79 ALJR 731 [73] (Gummow and Hayne JJ).

They connect the general but value-laden language of the statute to the community standards which give it practical meaning. In some respects, those standards change and develop over time. There is no reason to deny to them the description ‘moral’.<sup>159</sup>

What Gleeson CJ means by a ‘moral duty’ is also informed by the reference to the Canadian decision in *Tataryn v Tataryn*.<sup>160</sup> There McLachlin CJ referred to ‘current societal norms’ as having two aspects: the first, that duties that would have been legally binding during the deceased’s lifetime and

[t]he second type of norms as are found in society’s reasonable expectations of what a judicious person would do in the circumstances, by reference to contemporary community standards. These might be called moral obligations, following the language traditionally used by the courts.<sup>161</sup>

Despite the divergence in views, it is clear that the legislation is to be construed using the standard of current community values, however one describes the approach. Yet it appears that current community values as applied by the courts in family provision applications do not reflect intergenerational transfers between parents and children referred to above.

### B The Adequacy Test

Courts may interfere with the distribution of an estate if there is inadequate provision for an eligible applicant. The test is adequacy rather than fairness,<sup>162</sup> and it is based on the applicant’s needs, rather than on any equality principle.<sup>163</sup> In *Blore v Lang*<sup>164</sup> Fullagar and Menzies JJ said:

The...legislation [is] for remedying, within such limits as a wide discretion would set, breaches of a testator’s moral duty to make adequate provision for the proper maintenance of his family – not for the making of...a fair distribution of ... [the] estate. Equality is not something to be achieved by the application of the Act, although in some cases equality may set a limit to the order to be made – for instances, where there is not enough to provide proper maintenance for all entitled to consideration whose need is the same.<sup>165</sup>

In determining the extent of provision, the relative worth and circumstances of other beneficiaries can be relevant to whether the deceased has made ‘proper’ provision. Courts applying the test of a wise and just testator may make

159 Ibid [25]. Compare Callinan and Heydon JJ at [114]–[116].

160 (1994) 2 SCR 807.

161 Ibid 820–1.

162 *Blackmore v Allen* [2000] NSWCA 162

163 *Sullivan v Sullivan* [2007] NSW SC 343 [32]; *Serle v Walsh* [2006] QSC 377 [56][58]; *Moller v Allen* [2006] NSWSC 39 [54],[69].

164 (1960) 104 CLR 124. See also *Blair v Blair* [2002] VSC 95 [81] (per Harper J) – a wise and just testator would have put both sons in an equal position in the provision of funds to set them up in life – this did not result in an equal division of the estate.

165 Although dissenting, it has been accepted as a statement of principle, (1960) 104 CLR 124, 135. See also *Cooper v Dungan* (1976) 50 ALJR 539.

additional provision for beneficiaries who are poorer than their siblings.<sup>166</sup> Reflecting what had been part of the standard approach, legislation in New South Wales and Victoria specifically requires the Court to take into account provision previously given by the deceased person to any applicant.<sup>167</sup> Indirectly, the application of these principles moves towards the broader equality principle whereby children are placed in equivalent financial positions.<sup>168</sup> But the purpose of this inquiry is not to place children in equal positions, but rather to determine whether ‘adequate’ or ‘proper’ provision has been made.<sup>169</sup>

### C Character or Conduct of the Applicant

The standard bequest to children equally makes no distinction based on the nature or quality of the relationship between the parent and child. In comparison, the legislation does permit discrimination between children on the basis of their character and conduct.<sup>170</sup> However, recent authorities suggest a slightly more relaxed view of the nature of relationships between parents and children. It is now rare that lack of communication or estrangement prevents an award being made in favour of an applicant child.<sup>171</sup> Under the legislation, older authority suggested that ‘the bare fact of paternity’ itself without any relationship would not result in an award. No award was made in *Pontifical Society for the Propagation of the Faith v Scales*<sup>172</sup> where the applicant aged 50 had no communication with his father since his parents had separated 46 years previously. Recent authority takes a much more generous approach particularly if the lack of communication is due to the parent’s failure to acknowledge the child and maintain contact.<sup>173</sup> The mere fact that parent and child are estranged will not

166 *Burke v Powell* [2006] NSWSC 108 – siblings virtually destitute, variable amounts awarded depending upon needs; single applicants without dependants were awarded less than applicants with dependants. Compare *Gapes v Haerberle & Haerberle* [2003] VSC 461 (refusal to disturb equal distribution to beneficiaries); *Sherborne Estate: Vanvalen v Neaves* [2005] NSWSC 59 (provision only to the extent that it is adequate). See also the Victorian provision, s 91(4)(h) (the financial resources of the applicant and any beneficiary to be taken into account).

167 *Family Provision Act 1982* (NSW) s 9(2)(a). Note the wider Victorian provision in *Administration and Probate Act 1958* (Vic) s 91(4)(l) and see *Ross v Ross; McLean v Ross* [2002] VSC 544. In this case, gifts to the other children by the deceased were relevant to the award to the applicant, see [86]. See also *Testator’s Family Maintenance Act 1912* (Tas) s 7(b).

168 *Ross v Ross; McLean v Ross* [2002] VSC 544 [91].

169 See as an illustration, *Sherborne Estate; Vanvalen v Neaves* [2005] NSWSC 59.

170 *Family Provision Act 1969* (ACT) s 8(3)(a); *Family Provision Act 1982* (NSW) s 9(3)(b); *Administration and Probate Act 1958* (Vic) s 91(4)(o), see also *Blair v Blair* [2002] VSC 95. In some jurisdictions a Court is empowered to refuse to make an order on that ground, see *Family Provision Act* (NT) s 8(3); *Succession Act* (Qld) s 41(2)(c); *Inheritance (Family Provision) Act 1972* (SA) s 7(3); *Testator’s Family Maintenance Act 1912* (Tas) s 8(1); *Inheritance (Family and Dependants Provision) Act 1972* (WA) s 6(3).

171 Suggesting a less lenient approach; see Groot and Nickel, above n 135 [2.9].

172 (1962) 107 CLR 9. See also *Lo Surdo v Public Trustee* [2005] NSWSC 1186 (applicant adopted at birth, minor contact some years later, no provision was made); *Charlesworth v Herring* [2007] NSWSC 312 (small estate, competing needy beneficiaries, disabled son no contact for 30 years, no provision was made).

173 *Gorton v Parks* (1989) 17 NSWLR 1, 9-10.



usually prevent an award,<sup>174</sup> even if the reason for the estrangement is that the child has been extremely abusive and hostile.<sup>175</sup> However, a line might be drawn where the applicant was guilty of severe and continuing domestic violence against the deceased.<sup>176</sup> Even the risk that the applicant may dissipate the award does not necessarily prevent provision being made.<sup>177</sup> The decisions suggest reluctance to bar an applicant on the grounds of estrangement although the quality of the relationship may affect the quantum of the provision.

#### D Contributions to the Welfare of the Deceased

It is relevant to the assessment if the applicant has made contributions to the deceased, whether these are by way of ‘building up the estate’<sup>178</sup> or contributing ‘to the welfare’ of the deceased.<sup>179</sup> Statistical information demonstrates that daughters provide significantly greater personal care and assistance to parents aged over 60 than do sons, with the exception of the areas of home maintenance.<sup>180</sup> Although the legislation allows the non-financial contributions to be taken into account, there is a risk that more easily quantifiable financial contributions may unwittingly be given greater weight.

The provision out of an estate based on contributions puts a price on assistance and particularly recognises the importance of economic contribution. It is at odds with the role of social exchange within family relationships (referred to above) where assistance is not measured in monetary terms but is given through love and affection.<sup>181</sup>

The courts may be requested to make additional provision that takes into consideration an applicant’s extended period of care giving. The legislation allows this to be taken into account as a contribution to the welfare of the deceased.<sup>182</sup> Long term carers justify more extensive provision where possible.<sup>183</sup>

174 *Mayfield v Lloyd-Williams* [2004] NSWSC 419 (lack of communication for 26 years, re-established relationship in last 4 years of testator’s life). Problems may particularly arise on parental divorce or separation, see *Palmer v Dolman* [2005] NSWCA 361 [113]-[121] per Ipp JA delivering the judgment of the court. Cf *Monaco v Keegan* [2006] NSWSC 825.

175 *Wheatley v Wheatley* [2006] NSWCA 262 (Bryson JA delivering the judgment of the Court).

176 *Murphy v Stewart* [2004] NSWSC 569 (drunken, violent ex husband’s claim disallowed).

177 Courts have capacity to make conditional awards, see *Alquist v ANZ Executors & Trustee Co Ltd* [2004] NSWSC 1116 (son entitled to provision even though he had a history of drinking and gambling).

178 The NSW provision is more explicit, referring to s 9(a)(i) ‘the acquisition, conservation or improvement of property of the deceased person’.

179 The ACT and Victorian provisions also refer to contributions by family members; *Family Provision Act 1969* (ACT) s 8(3)(c); *Administration and Probate Act 1958* (Vic) s 91(4)(k). This may be captured in NSW by the reference to ‘indirect’ contribution in s 94(3)(a). The older authorities are referred to by Anthony Dickey *Family Provision After Death*, (1992) 89.

180 This included self-care, mobility, communication, cognition or emotion, health care, paperwork, transport, housework, meal preparation, ABS, *Disability, Ageing and Carers*, above n 62. Partners were more likely to provide high levels of care and assistance than children. See *ibid* Tables 21–23. See also the earlier study by Millward above n 35, 9.

181 Anderson, above n 146, 353; Toni Antonucci, ‘Social Supports and Social Relationships in R H Binstock and LK George (eds) *Handbook of Ageing and the Social Sciences* (3<sup>rd</sup> ed, 1990).

182 *Family Provision Act 1982* (NSW) s 9(3)(a); *Administration & Probate Act 1958* (Vic) s 91(4)(k).

In *Dulhunty v Dewhist*<sup>184</sup> the daughter who had cared for her father towards the end of his life and who had ‘greater closeness...greater service and devotion’ than her sister who lived overseas retained two thirds of the estate. In *Achard v Achard*<sup>185</sup> the testator made a bequest to children equally. In that case, an adult child, the applicant, had resided with the deceased over lengthy periods, provided some level of financial contribution and was promised the home on the parent’s death. It was held that the applicant was entitled to more substantial provision in those circumstances. Where carers have forgone or reduced their employment prospects in order to care for the deceased, this appears to be given additional weight in assessing the extent of provision.<sup>186</sup>

However, the decisions indirectly and only partially recognise the importance of reciprocity as a basis of award. The relevant question for purposes of family provision is not ‘Should I reward my benefactor?’ but ‘Do I have a duty to X to make provision for his or her proper maintenance and support?’<sup>187</sup>

### E Financial assistance

Financial assistance provided to the deceased may be taken into account in determining whether adequate provision has been made.<sup>188</sup> Adult children residing with the deceased may have paid such things as rates and outgoings but these might be counterbalanced by free accommodation.<sup>189</sup> An applicant may have worked in a family business or property for inadequate reward.<sup>190</sup> These types of claim may be coupled with a claim that particular assets were promised to the applicant as recompense for working on the property or in the business.<sup>191</sup>

### F Gender

Family provision legislation does not, on the face of it discriminate on the basis of gender.<sup>192</sup> Whilst the older authorities drew distinctions between adult sons and unmarried adult daughters based on need, these distinctions are no longer consistent with current community standards.<sup>193</sup> Consistently with

183 *Burke v Powell* [2006] NSWSC 108. This case concerned destitute siblings, where a long-term carer who assisted in paying out mortgage, rates and outgoings was given additional provision.

184 [2005] NSWSC 607 [34]; *Curran v Duncan* [2006] WASC 9; *Phipps v Knott* [2003] NSWSC 470 (applicant grandson co-resident with deceased and provided extensive personal care and material non-financial assistance – carer’s pension for part of the period).

185 [2005] WASC 220; *Spence v Antunovich* [2004] NSWSC 1128.

186 See, eg, *Carter v O’Brien* [2007] VSC 21 [32]–[34] (where partner and carer entitled to approx 1/3 of the estate worth \$310 000; 8 children, all but one very poor, shared the balance).

187 *Schmidt v Watkins* [2002] VSC 273 [24] (Harper J).

188 This is explicit in *Family Provision Act 1969* (ACT) s 8(3)(c); *Family Provision Act 1982* (NSW) s 9(3)(a) and *Administration and Probate Act 1958* (Vic) s 91(4)(k).

189 See *Burke v Powell* [2006] NSWSC 108.

190 *Ross v Ross*; *McLean v Ross* [2002] VSC 544 [83]; *Schmidt v Watkins* [2002] VSC 273 (per Harper J) [25].

191 *Vukic v Luca Grbin & Ors* [2006] NSWSC 41. These claims might be independently enforceable based on estoppel, constructive trust or agreement.

192 *Blair v Blair* [2002] VSC 95 [6], (Harper J); *Allan v Allan* [2001] VSC 242 [67].

193 *Allan v Allan* [2001] VSC 242; *Curran v Duncan* [2006] WASC 9.

developments in family law, contributions by a homemaker or a carer are now taken into account. The NSW and ACT legislation specifically mention the value of a homemaker as a contribution to the deceased as a relevant factor to the award.<sup>194</sup> As already mentioned, female daughters typically provide extensive personal care and assistance to elderly parents, which qualifies as a contribution to the welfare of the deceased.

### G Summary

Family provision legislation is based on principles of maintenance or need rather than a formal principle of equality. A testator who has bequeathed an estate in equal shares to her or his adult children without taking into account the relative needs and contributions of their children risks modification as a consequence of the Family Provision legislation. The legislation allows discrimination on the basis of economic contributions, filial support and assistance to the deceased and the child's character and conduct. Although these factors are to be taken into account, economic and other contributions are relevant only to the extent required for adequate provision to be made.

## IV CONCLUSION

This paper has explored the nature of intergenerational transfers between parents and children. Despite the rhetoric of baby boomers as the 'greedy generation', there is evidence to suggest that while baby boomers plan to enjoy their retirement, they have a committed sense of social responsibility for themselves and their families. Although as many as 30 per cent of baby boomers do not intend to leave an inheritance, this may be explained by a variety of factors. Baby boomers will require significant resources to fund their retirement; much of their wealth is tied up in housing assets and superannuation needed for retirement and future care; they provide very extensive financial support to adult children, reducing their capacity to save for retirement and leave an inheritance; many have little or no assets making it difficult to leave a substantial inheritance.

In relation to inter vivos transfers, gifts of income, assets and services may be viewed as expressions of family cohesion, with parents and children involved in extensive reciprocal transfers. These transfers occur unequally, with those in close proximity providing the most assistance to older parents and reciprocally receiving more in exchange. Mother-daughter relationships appear to be particularly important in this respect. Inter vivos transfers in Australia do not seem to be motivated by old age security. Transfers from parents to children may reflect investment in children's earning capacity. Alternatively, transfers may

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194 *Family Provision Act 1969* (ACT) s 8(3)(d); *Family Provision Act 1982* (NSW) s 9(3)(a)(ii). In Victoria, it may be taken into account in the general "welfare" contribution (s 91(4)(k) or under any other matter relevant, ss 91(4)(p). See also *Mallett v Mallett* (1984) 156 CLR 605 which uses phraseology similar to the ACT and NSW provisions and see Patrick Parkinson, 'The Yardstick of Equality: Assessing Contributions in Australia and England' (2005) 19 *International Journal of Law, Policy and the Family* 163.

operate as a level of family insurance or altruism with respect to supporting a relatively disadvantaged child.

Quite different motivations seem to operate when dealing with testamentary dispositions, in which bequests to children normally occur in equal shares. This reflects a view that each child is innately precious to parents irrespective of gender, contribution, character or conduct. The finality of testamentary dispositions also recognises that the testator will no longer be able to make a timely response to the unforeseen vicissitudes of adult children's lives such as divorce, loss of employment or illness that may be experienced in the future.

Finally this paper has contrasted family provision legislation which allows a court to modify a testator's dispositions so as to make adequate provision for eligible beneficiaries including non-dependant adult children. In making an award, courts take into account contributions by the child to building up the estate or to the welfare of the deceased. Under this legislation, assistance is now something to be given economic value; not given out of love and affection without expectation of reward but as a service of economic value to the donor.