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Monk, Daniel (2016) 'Inheritance Families of Choice'? Lawyers' reflections on gay and lesbian wills. *Journal of Law and Society* 43 (2), pp. 167-194. ISSN 0263-323X.

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# **‘Inheritance Families of Choice’? Lawyers’ reflections on gay and lesbian wills**

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*This article presents the findings of research about the will writing practices of gays and lesbians. It develops a conversation between sociological literature about ‘families of choice’, which is silent about inheritance, and socio-legal research about ‘inheritance families’, which is relatively silent about sexuality. It demonstrates how research with lawyers can contribute to thinking about inheritance and complement historical archives about personal life and sexuality. Focusing on funeral rites, partners, ex-lovers, friendships, children and godchildren and birth families, the findings reveal how gay men and lesbians have used wills to communicate kinship practices in ways that both converge with and differ from conventional testamentary practices. Examining the findings through the concepts of generationality, family display, connectedness and ordinariness and locating them within the recent history of social and legal changes, it complicates and troubles both anti-normative and individualistic readings of the choices gay and lesbians make in constructing their ‘inheritance families’.*

## INTRODUCTION

In the first UK socio-legal study of inheritance, Finch et al made a compelling case for viewing wills as a site for exploring shifting understandings of family and kinship. One of their conclusions was that ‘a more radical testamentary freedom’ might seem ‘a real possibility’ for those *outside* of ascriptive relationships (those not based on genealogical position and spousal relationships).<sup>1</sup> Their research did not refer to sexual orientation. But the possibility of gays and lesbians disproportionately occupying this ‘outsider’ position – developing kinship practices *contra* to ‘the family’ - has been a key issue in scholarship about sexuality.<sup>2</sup> Indeed gays and lesbians have been identified more widely as exemplars for claims about

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I am grateful to the Socio-Legal Studies Association for funding the research and to the interviewees for their time and interest. I also wish to thank Helen Reece and Antu Sorainen and the anonymous referees for their constructive comments.

<sup>1</sup> J. Finch et al., *Wills, Inheritance and Families* (1996) 181.

<sup>2</sup> J. Weeks et al., *Same Sex Intimacies: Families of Choice and Other Life Experiments* (2001); S. Roseneil and S. Budgeon, ‘Cultures of Intimacy and Care Beyond ‘the Family’: Personal Life and Social Change in the Early 21st Century’ (2004) 52(2) *Current Sociology* 135.

‘individualised’ self-reflexive identities.<sup>3</sup> A key text is the groundbreaking study by Weston that coined the subsequently much cited expression, ‘families of choice’.<sup>4</sup> Yet despite the possibility of choice provided by testamentary freedom and despite the fact that ‘negotiating . . . the demands of death’<sup>5</sup> is a critical site of kinship practice, none of this literature refers to wills or inheritance.

Explanations for this silence warrant further thought. They might include the fact that the focus in recent years on relationship recognition strategically played down the pre-existing ability to protect partners by wills,<sup>6</sup> and the fact that testamentary freedom and practices do not give rise to any obvious ‘equal rights’ claims in law. Moreover, the silence might also be explained by the fact that the subject matter of inheritance per se is perceived as incompatible with wider progressive agendas; the queer theorist Halberstam, for example, describes wills as a key tool of ‘middle class logic’ and consequently inimical with ‘queer time’.<sup>7</sup> More broadly, the silence resonates with the popular thesis, albeit contested, that it is death and not sex that is the dominant taboo of modern society.<sup>8</sup>

Socio-legal scholarship about inheritance is also limited.<sup>9</sup> But in recent years the groundbreaking work by Finch et al has been invigorated by research associated with the Law Commission’s 2009 review of the intestacy rules.<sup>10</sup> This review, premised on the recognition of social changes in ‘family structure’, looked primarily at the legal position of surviving spouses and cohabitants. The approach to gays and lesbians in the review, and most of the associated research, has been to assert and assume an uncomplicated equality of treatment between opposite and same sex couples.<sup>11</sup> However the research by Douglas et al explicitly engaged with the

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<sup>3</sup> A. Giddens, *The Transformation of Intimacy* (1992).

<sup>4</sup> K. Weston, *Families We Choose* (1997).

<sup>5</sup> J. Butler, ‘Is Kinship Always Already Heterosexual?’ (2002) 13.1 *differences* 14, at 15.

<sup>6</sup> D. Monk, ‘Sexuality and Succession Law: Beyond Formal Equality’ (2011) 19(3) *Feminist Legal Studies* 231.

<sup>7</sup> J. Halberstam, *In a Queer Time and Place* (2005) 5.

<sup>8</sup> T. Walter, ‘Modern Death: Taboo or not Taboo?’ (1991) 25 *Sociology* 293.

<sup>9</sup> But beyond the UK see L. Friedman, *Dead Hands* (2009); J. Beckert, *Inherited Wealth* (2004); R. Madoff, *Immorality and the Law* (2010).

<sup>10</sup> Law Commission, *Intestacy and Family Provision Claims on Death* (2011). This resulted in the enactment of the Inheritance and Trustees’ Powers Act 2014.

<sup>11</sup> See C. Williams et al., ‘Cohabitation and intestacy: public opinion and law reform’ (2008) 20(4) *Child and Family Law Q.* 499; E. Cooke, ‘Wives, widows and wicked step-mothers: a brief examination of spousal entitlement on intestacy’ (2009) 21(4) *Child and Family Law Q.* 423. This approach also underlies research where the possibility of different responses to gays and lesbians is acknowledged, see for example G. Morrell et al., *The Law of Intestate Succession: Exploring Non-Traditional Families Final Report* (2009); G. Douglas et al., ‘Enduring Love? Attitudes to Family and Inheritance Law in England and Wales’ (2011) 38(2) *J. of Law and Society* 245, fn 62.

possibility of wider shifts in attitudes to understandings of kinship. Introducing the concept of an ‘inheritance family’, they concluded that in determining its composition people continue to draw on a narrow nuclear family model.<sup>12</sup>

Against this background, this article presents the findings of a small-scale qualitative research project about the will writing practices of gays and lesbians. It endeavours to develop a conversation between the literature about ‘families of choice’, which is silent about inheritance, and the research about ‘inheritance families’, which is relatively silent about sexuality.<sup>13</sup>

The premise for this research – that there may be a specificity of the gay and lesbian experience and practice of will writing - is not to suggest that these experiences are in any way either monolithic or unique; and the terminology ‘gays and lesbians’ is used here in part to highlight the particular significance of gender. But the premise is based on the combined impact of four factors. First, formal legal equality is relatively recent. The experiences of being ‘outside of the law’ suggests that the well-documented assumptions of opposite-sex couples, albeit often wrong, about legal protections provided by the intestacy rules are less likely to be shared by gays and lesbians. Secondly, only a minority of gays and lesbians have children - a key motive for writing wills<sup>14</sup> - and distinct legal implications exist when they do. Thirdly, one consequence of HIV/AIDS was that at a particular moment gay men confronted mortality collectively, ‘familial’ conflicts came to the fore, and specific will-writing services were established. Fourthly, archival evidence demonstrates testamentary freedom has provided and continues to provide gays and lesbians with a legal space for ‘coming-out’, to actively constitute their significant relations, rendering non-heterosexual relations visible.<sup>15</sup>

These factors lend themselves to a hypothesis for the finding of ‘difference’ that resonates with an ‘anti-normative’ tendency in the dominant strands of contemporary queer theory.<sup>16</sup> But to complicate the overly binary nature of oppositional perspectives, inherent in the concept of ‘heteronormativity’, this research

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<sup>12</sup> Douglas et al, id.

<sup>13</sup> For recent exceptions see, Monk, op. cit., n. 6; S. Westwood, ‘Complicating Kinship and Inheritance: Older lesbian’ and Gay men’s will writing in England’ (2015) 23 *Feminist Legal Studies* 181; A. Sorainen, <<http://revaluingcare.net/inheritance-system-and-care-queer-will-writing>>.

<sup>14</sup> S. Brooker, *Finding a Will: a report on Will-Writing Behaviour in England and Wales* (2007).

<sup>15</sup> D. Monk, ‘E M Forster’s will: an overlooked posthumous publication’ (2013) 33(4) *Legal Studies* 572.

<sup>16</sup> For a critical review of this tendency see, R. Wiegman and E.A. Wilson (eds.) ‘Queer Theory without Antinormativity’ (2015) 26(1) *differences*.

intentionally puts aside this framework. Adopting instead a theorized reflexive empirical approach, it takes seriously Smart's call to be attentive to the fact that 'everyday life is messy and complex' and so the challenge is to 'find ways to represent messiness without forcing a coherence and kind of logic on to lived experience'.<sup>17</sup>

## METHODOLOGY

The research took the form of semi-structured interviews with ten lawyers. Research with legal professionals has proved to be insightful, particularly in family law.<sup>18</sup> But apart from Hasson's research,<sup>19</sup> it has not been adopted in the context of inheritance. While comparison of findings is consequently far from straightforward, the advantages of this method were threefold.

First, the questions that lawyers ask clients when drafting wills provide access not only to the contents of wills but also to the reflections and deliberations of the testators. Indeed, the instructions provided for a will in some ways bear a resemblance to the sociological method of asking someone to draw a picture of their 'family'.

Secondly, while based on only ten interviews, it provided 'quick' access to the will writing practices of a very large number of people. Each lawyer was asked how many wills on average they write a year, and this figure, multiplied by the number of years they had been writing wills, resulted in a total of 13,000 – a very rough estimate, but a substantial number.

Thirdly, as many of the lawyers interviewed have been writing wills over a considerable period of time – from the late 1970s to the present - their insights provide access to considerations of shifting experiences of families and kinship; notably both before and after formal legal equality for gays and lesbians. In this way the findings provide a temporal dimension that speaks to 'generationality', a factor

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<sup>17</sup> C. Smart, 'Shifting horizons: reflections on qualitative methods' (2009) 10(3) *Feminist Theory* 1, at 2.

<sup>18</sup> M. Maclean and J. Eekelaar, *Family Advocacy: How barristers help victims of family failure* (2009); A. Melville and K. Laing, 'Closing the gate: family lawyers as gatekeepers to a holistic service' (2010) 6 *International J. of Law in Context* 139.

<sup>19</sup> E. Hasson, 'Where there's a will there's a woman': exploring the gendered nature of will-making' (2013) 21(1) *Feminist Legal Studies* 21; E. Hasson, 'Navigating family and personal relationships: the appointment of testamentary guardians' (2012) 34(3) *J. of Social and Family Law* 279.

often overlooked but which is increasingly recognised as critical for complicating narratives about gays and lesbians.<sup>20</sup>

The interviewees were identified by contacting lawyers who advertise in gay and lesbian media,<sup>21</sup> current members of the Lesbian and Gay Lawyers Association,<sup>22</sup> former members of the Terence Higgins Trust (THT) Legal Services Group,<sup>23</sup> and by word of mouth suggestions. While this sampling was *ad hoc*, an attempt was made to ensure a variety of interviewees. The ten interviewees comprised 7 men and 3 women, were aged between 28 and 67, and they worked in a variety of practices, ranging from London West End to predominantly legal aid Manchester suburbs. All of the lawyers had experience of writing wills for both gays and lesbians. But for some they formed the majority of their clientele, while for others they were, as far as they knew, relatively rare. Significantly the gay clients outnumbered the lesbians. One possible explanation for this is the sampling process itself, most obviously the inclusion of lawyers who wrote wills for people with HIV/AIDS. But the anecdotal practice of home-made will writing through women's informal networks and the fact that lesbians overall as women are likely to be poorer than gay men are other factors that might explain the bias. This is a limitation of the research, and where the findings relate specifically to gay men this is made clear.

A more general limitation was the reliance on the interviewees as an intermediary between the researcher and their clients. In addition, the interviews often required the lawyers to cast their minds back many years and draw on their memories, a problematic sociological resource.<sup>24</sup> Moreover, testators do not always disclose the full picture of their personal lives to their lawyers. And while wills are written in the first person, to a certain extent they represent a form of 'ventriloquism' and their ability to express the authentic voice of a testator is questionable.<sup>25</sup>

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<sup>20</sup> K. Plummer, 'Generational sexualities, subterranean traditions, and the hauntings of the sexual world: some preliminary remarks' (2010) 33(2) *Symbolic Interaction* 163-190; B. Heaphy et al., *Same-Sex Marriages: new generations, new relationships* (2013).

<sup>21</sup> <<http://www.gaytimes.co.uk>; <http://attitude.co.uk>>; <<http://www.queerpod.co.uk>>.

<sup>22</sup> <<http://www.lagla.org.uk>>.

<sup>23</sup> This group provided a will-writing service for people with HIV until 1999.

<sup>24</sup> C. Smart, *Personal Life* (2007) 38.

<sup>25</sup> T.L. Schaffer, 'The lawyer as will maker' (1982) 5(3) *Marriage and Family Rev.* 87; D. Hacker, 'Soulless Wills' (2010) 35(4) *Law & Social Inquiry* 957; D. Horton, 'Testation and Speech' (2012) 101 *Geo. Law Journal* 61; Hasson, op. cit. (2013), n. 19. For the implications on the place of will drafting within the legal profession, see D. Monk, 'Writing (Gay and Lesbian) Wills' (2014) 4(2) *Oñati Socio-legal Series* 306.

Finally, in asserting their ‘professionalism’, lawyers can sometimes be inclined to offer what they consider to be the ‘correct’ answer, especially when the researcher is also a lawyer.<sup>26</sup> This was evident here when on a number of occasions they asserted that there was ‘no difference’ between their straight and gay and lesbian clients, that their wills were, for example, ‘as boring as anyone else’s’ (2). Yet these statements, often made at the beginning of the interview, were frequently later contradicted. That identifying ‘sameness’ was considered ‘the right answer’ - expressing a commitment to the principle of equality - was reinforced by the fact that these assertions were more evident when the lawyer made clear that he or she was heterosexual. Where, however, the interviewee was openly gay or lesbian, they often appeared to be more comfortable speaking of ‘difference’ and drew on what some might perceive as problematic stereotypes. The identity, status and position of the interviewer are always critical factors, but raise particular issues in the context of research about sexuality.<sup>27</sup>

This is a small study. The limitations would render the data inappropriate for asserting any conclusions of a quantitative nature. But as a form of qualitative research the aim is to ‘generalise to theory rather than to populations’<sup>28</sup> and to this end the data’s key value is the extent to which it contributes to interdisciplinary debates about family, kinship and sexuality and to the emerging literature about sexuality and inheritance. It aims to raise questions rather than provide answers.

## FUNERAL WISHES

For lawyers the meat of a will, its primary function, is the transfer of real and personal property. Shaffer has argued that property is ‘the medium of expression for will makers’<sup>29</sup> and socio-legal research reflects this by focusing almost exclusively on beneficiaries.<sup>30</sup> One consequence of this is that funeral wishes are overlooked. And a striking finding here was their particular significance for gay male clients, and the extent to which, far from being marginal, they brought to the fore key themes that emerge throughout the findings.

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<sup>26</sup> J. Eekelaar et al., *Family Lawyers* (2000) 200.

<sup>27</sup> K. Brown and C. Nash (eds.) *Queer Methods and Methodologies* (2010).

<sup>28</sup> A. Bryman, *Social Research Methods* (2008) 391.

<sup>29</sup> Schaffer, op. cit., n. 25, p. 94.

<sup>30</sup> Finch et al, op. cit., n. 1; Douglas et al, op. cit., n. 11.

There are practical reasons why relying on a will to express funeral wishes is problematic; as one of the lawyers noted, ‘by the time someone looks at the will they’ve been buried when they ought to have been cremated’ (5). The pragmatic necessity of communicating preferences in other ways was emphasised by most of the lawyers. But while respecting the wishes of clients, the lawyers sometimes expressed ambivalence about the emphasis placed on funeral wishes, for example: ‘I often felt it was a disproportionately important thing to some of these people’ (7), and, ‘funeral wishes . . . sometimes gay people might go slightly over the top’ (5).

Two distinct issues are raised here: importance and form. In thinking about the former it is perhaps revealing that the lawyers who spoke at most length about this aspect of will writing were those with a substantial gay client base during the early days of AIDS when large numbers of gay men were dying. As one lawyer commenting on that period noted:

Sometimes funeral wishes were the only reason for writing a will . . . that wasn’t unusual then . . . and it was always then to keep a family away (10).

Another confirmed that for these clients:

Funeral and disposal of the remains were hugely important . . . sometimes I would have 2 or 3 goes at drafting the clause where the client would keep changing this or that or adding some more directions (4).

The distinctiveness of these experiences was reinforced, implicitly, by lawyers with very few gay clients. For they noted that:

The only time that seems to come up is when elderly ladies come in and they’ve got their Co-op plan and they’re keen to ensure that their family know that they’ve paid on their plan (3).

Not many people are keen to put something in because a lot of the time they say ‘oh well so and so will sort it out’ or ‘they know what my wishes are’ (2).

Another explicitly noted that in the early years of AIDS:

Straight clients were generally not infected . . . but even if they were terminal, those with cancer, they weren't quite as bothered about disposal of their remains . . . the gay clients who were infected and were close to the end were quite emotional . . . some of them were sitting there with clenched fists while they were talking to me about the type of funeral they wanted . . . this was a big issue for them. Straight clients [pause] no they weren't so bothered about it (4).

What the gay clients at these time would have very possibly experienced, and almost certainly would have been conscious of, is what Green and Grant describe as 'disenfranchised grief'.<sup>31</sup> Watney's description of the funeral of a gay man who died in 1986 evokes this poignantly:

In the congregation of some forty people there were two other gay men beside myself, both of whom had been his lover. They had been far closer to Bruno than anyone else present, except his parents. Yet their grief had to be contained within the confines of manly acceptability. The irony of the difference between the suffocating life of the suburbs where we found ourselves, and our knowledge of the world in which Bruno had actually lived, as a magnificently affirmative and life-enhancing gay man, was all but unbearable.<sup>32</sup>

It is also important to locate the significance of these funeral wishes within the broader political climate; a time when prejudices and fears about AIDS cohered with the prohibition against 'the acceptability of homosexuality as a pretended family relationship' in the notorious Section 28 of the Local Government Act 1988. The memories of the lawyers here consequently speak both to Watney's insistence, in 1987, of speaking of 'political funerals',<sup>33</sup> and, similarly, to Crimp's seminal article in 1989, which made a compelling case for troubling the binary of 'mourning' and

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<sup>31</sup> L. Green et al., 'Gagged grief and beleaguered bereavements? An analysis of multidisciplinary theory and research relating to same sex partnership bereavement' (2008) 11 *Sexualities* 275.

<sup>32</sup> S. Watney, *Policing Desire* (1987) 7.

<sup>33</sup> S. Watney, *Practices of Freedom* (1994) 250.

‘militancy’.<sup>34</sup> As Halperin notes, ‘grief and anger weren’t individualizing or privatizing, however individual or private they might also be’.<sup>35</sup>

In turning to the form that funeral wishes might dictate, a number of lawyers spoke of the importance of parties; and this applied equally to older and younger clients and to gays *and* lesbians (the word ‘gay’ in the quotes below referring to both). The lawyers also indicated that they sometimes play an active role in this:

Leaving a decent sum of money for a party for their friends is not uncommon amongst gay clients. It may conform to a stereotype there but certainly that is not unheard of and I’m often called upon to decide what is a reasonable amount to leave their Executors for the party for the friends and [laughter] obviously it depends on whether I’m going or not (8).

Parties oh yes and I do tell my clients that the wake is tax deductible so . . . why not have a great party and, again, probably, gay people rather than straight people who may be concerned about saving their money for their wife or their kids etc (5).

Sometimes the lawyers suggested that the funeral and the party were in effect hard to distinguish:

I did have incidents which were sort of blackly comic in a way . . . people, often with a highly developed sense of camp who wanted it, wanted that to follow through to the funeral itself. I well remember people talking to me about how they wanted the Humming chorus from Madame Butterfly as the coffin came in [laughter] but then the next day they’d want to change it to the Triumphal March from Aida (7).

In taking parties as seriously as property in thinking about the constructing of an ‘inheritance family’, Finch’s concept of ‘family display’ is pertinent.<sup>36</sup> Funeral parties from this perspective can be understood as important moments for experiencing,

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<sup>34</sup> D. Crimp, ‘Mourning and Militancy’ (1989) *October* 51: 3-18.

<sup>35</sup> D. Halperin, ‘Among men – history, sexuality, and the return of affect’ in *Love, sex, intimacy and friendship between men, 1550-1800*, eds. K. O’Donnell and M. O’Rourke (2003) 3.

<sup>36</sup> J. Finch, ‘Displaying Families’ (2007) 41(1) *Sociology* 65.

observing and narrating ‘who matters’, ‘who is my family’. But providing for a party is different from explicitly naming people in a will, for bequests communicate significance regardless of whether the bequest is accepted or more widely known. In contrast, the communication of kinship through a party requires people to attend, and this reinforces Finch’s point that creating kinship is often dependent on the actions of others, that some form of display, observation and recognition is required.<sup>37</sup>

Instructions about the dispersal of ashes were also referred to:

Most of them had very strong views about what should happen to the ashes and some of them made requests like . . . ‘I want my ashes to be scattered . . . in the South China Sea’. One wanted them scattered off the top of a particular mountain, and not just where the ashes should go but who should be given the job of taking the ashes. They were absolutely specific (4).

Talking of gay clients, it may be that they want to be cremated and their ashes scattered in Mykonos or Ibiza or Fire Island. I had one client gosh he wanted some in Amsterdam and some in Fire Island, all over places where he’d had good times (5).

Albeit with caution, it is tempting to read in these detailed desires a conscious or unconscious sense that for some a coffin was too akin to ‘the closet’<sup>38</sup> - somewhere never to be returned to. Richards et al suggest that these dispersals reflect the mobile lifestyle among gay men as well as the drive for freedom and control of their own lives that is characteristic of gay liberation.<sup>39</sup> Using a will as a means of expression was also evident in one lawyer’s reminiscence of clients’ disappointment about the absence of a requirement for a formal reading of the will.

People also had old fashioned ideas from movies about will reading ceremonies that would happen after they died; they were quite disappointed when I said that, you know, there is no such thing . . . they thought, you

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<sup>37</sup> For a fictional account of a testator ‘miscalculating’ here see B Chatwin, *UTZ* (1988) 11.

<sup>38</sup> E. Sedgwick, *Epistemology of the Closet* (1990).

<sup>39</sup> T.A. Richards et al, ‘Death Rites in the San Francisco Gay Community: Cultural Developments of the Aids Epidemic’ (1999-2000) 40 *Omega (Westport)* 335.

know, it followed on from the funeral . . . they wanted it to have a dramatic effect (7).

In planning parties, choreographing rites, multiple sites of dispersal of remains, troubling the boundaries between public and private, and political and personal, there is a performance of ‘promiscuity’, which as Sen reminds us is a ‘moving forward through indiscriminate mixing – a tendency that had to wait for the Victorians to become a sin’.<sup>40</sup> That the promiscuous is rarely condoned mirrors in some ways the ambivalent perceptions of the instructions as, ‘over the top’, ‘disproportionately important’, and ‘camp’. Moreover, underlying these observations lurks a potential unease, for the investment in ‘a dramatic effect’, constructing a ‘melodrama’,<sup>41</sup> defiantly disrupts Watney’s memory of the experience of grief and mourning being restricted by the strict ‘confines of manly acceptability’.

It is important to emphasise that the findings here are in no sense quantitative. Most notably none of the lawyers provided explicit examples of lesbians in this context. This may reflect the limited reach of this research, but their presence and role in the early days of AIDS have frequently been overlooked.<sup>42</sup> It may be that lesbian rituals of mourning are organized collectively and informally beyond the text of a testator’s will. And the silence here may reflect the extent to which the significance for gay men is a response to dominant understandings of masculine modes of mourning, which may be less applicable to women generally. More research is needed here. Moreover, that the very particular instructions were far more *likely* to be from gay male clients does not suggest that they were *typical* of the gay clients. Nevertheless the narratives spoken of here speak to the complex interaction of a gay sensibility, style and subjectivity, an issue too often ignored in sociological literature, and avowedly so by equal rights campaigns.<sup>43</sup>

In turning to look at types of beneficiaries, the possibility of ‘dramatic effect’ is more complex but no less significant.

## ‘PARTNERS’

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<sup>40</sup> A. Sen (2012) <<http://blog.fotomuseum.ch/2012/02/1-photography-a-promiscuous-life-part-i/>>.

<sup>41</sup> For a defence of ‘melodrama’ see: P. Brooks, *The Melodramatic Imagination* (1995).

<sup>42</sup> For lesbians activism and AIDS, see: A. Cvetkovich, ‘Legacies of Trauma, Legacies of Activism: ACT UP’s Lesbians’ in *Loss, The Politics of Mourning*, eds. D. Eng and D. Kazanjian (2003) 427.

<sup>43</sup> D.M. Halperin, *How to be Gay* (2012). See also the seminal work by S. Sontag, ‘Notes on Camp’ in *Against Interpretation* (1966).

On the surface a far more conventional story appears in the context of partners. In terms of both the contents of and the motives for writing a will, the lawyers' reflections cohere with other research,<sup>44</sup> and the approach adopted by the Law Commission,<sup>45</sup> in emphasising the centrality of the surviving 'spouse'. As one lawyer commenting on current practice noted:

I think the majority are in a relationship for sure, because a lot of single people who I talk to and try to advocate will writing say that they don't need a will . . . the same applies to gays and lesbians (6).

While the overarching message from the findings here is one of convergence between gay, lesbian and heterosexual wills, at the same time the lawyers suggested variations, and highlighted distinct motivations, that reflected the shifting legal landscape of same sex relationship recognition and broader understandings of 'inheritance families'.

The following observations of the period before relationship recognition were typical:

The overwhelming motivation, bearing in mind it was before the Civil Partnership Act, was to give a partner inheritance rights . . . the main motivation would always be for the partner or the long term friend to be recognised (7).

Well with THT clients, it was basically that the surviving lover should have the client's assets (4).

In clear contrast to research about heterosexuals,<sup>46</sup> the lawyers emphasised awareness amongst their gay and lesbian clients that their partners would not be recognised in the intestacy rules. This was the case for wills written in the past and now. One

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<sup>44</sup> Douglas et al, op. cit., n. 11.

<sup>45</sup> Law Commission, op. cit., n. 10.

<sup>46</sup> A. Barlow and J. Smithson, 'Legal assumptions, cohabitants' talk and the rocky road to reform' (2010) 22(3) *Child and Family Law Q.* 328.

consequence of this was a tendency for gay and lesbian clients to be younger than heterosexual clients.

I would say the gay and lesbian clients are possibly on the younger side and I think that's partly down to an awareness of the automatic provision not being there because the straight clients would, if they've married . . . know there's some sort of provision and, if not, then they might be under the mistaken belief there is (2).

Similarly, another observed that:

What I would say is the people who are in same sex relationships are more aware of why they might need to make a will, whether they've formed a partnership or not, it seems to be in their consciousness that there isn't automatic provision for a partner . . . whereas opposite sex couples might believe that there's something called a common law wife so that still has a shadow (3).

The 'consciousness' of the law is not surprising for older gays and lesbians. Indeed a heightened legal and political awareness was one of the unintended consequences of Section 28.<sup>47</sup> Similarly one of the lawyers who was a member of the THT observed the wider impact of AIDS, on lesbians as much as gay men, in the development of this 'consciousness':

Because of the work that we were doing in encouraging infected people to make their wills earlier, that information then trickled out to other gay people who were not infected and so word permeated through. If you think of the *Gay Times* and the *Pink Paper*, they were read by all sorts of people, infected or not and so, yes, gay people in their 20's were reading these publications and

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<sup>47</sup> M. Cook, *A Gay History of Britain* (2007) ch. 6.

thinking, ‘I’m in a relationship with somebody else in good health . . . maybe we should write a will’ (4).<sup>48</sup>

For younger gays and lesbians the awareness of the significance of legal recognition may be more attributable to the debates in Parliament about the CPA (and more recently same sex marriage). The plight of surviving partners played a critical role in demands for legal recognition, arguably to the extent that it strategically played down the protection provided by wills.<sup>49</sup>

It is of course possible that the lawyers’ views about gay and lesbian ‘consciousness’ of the law simply reflected the fact that they were primarily talking about people who contacted them in order to write a will. There is no way of knowing how many do not write wills, through oversight or otherwise. But in countering this, many also spoke of their experiences of acting for surviving partners in conflicts with families when the deceased had not written a will. Probate lawyers see both sides.

A key question is the impact of the CPA on will writing. None of the lawyers indicated any differences about partners being included on the basis of whether they were in a civil partnership<sup>50</sup> or cohabiting - a significant finding bearing in mind the centrality of cohabitation rights in recent debates.<sup>51</sup> One reported change was an increasing ability for gays and lesbians to be open about their relationships with lawyers.

I’ve had couples who in the past have bought property together and . . . rather than as joint tenants, they would have been advised to own as tenants in common because the solicitor didn’t see them as a couple . . . ‘why would you want him to inherit your half of the house, surely you want it to go to your family?’ . . . That attitude has pretty much changed as I understand it’ (9).

One lawyer suggested that the possibility of legal recognition might have led to fewer people writing wills:

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<sup>48</sup> It is interesting to contrast the effectiveness of this awareness campaign with the less successful attempts to educate heterosexual cohabitants about their legal position, see Barlow and Smithson, *op. cit.*, n. 46.

<sup>49</sup> Monk, *op. cit.*, n 6.

<sup>50</sup> This research was undertaken before the Marriage (Same Sex Couples) Act 2013.

<sup>51</sup> Williams et al, *op cit*, n. 11; Douglas et al, *op cit.*, n. 11; Law Commission, *op. cit.*, n. 10.

In some respects it [the CPA] has had a change, there are I suppose fewer couples because they don't immediately think 'I need a will' . . . it's partly to do with people not appreciating the intestacy laws (9).

No other lawyers made this point. But many remarked that while gays and lesbians were aware that their partners were not previously protected, this did not mean that they had any detailed knowledge of the intestacy rules; more widely there is evidence to suggest that many gays and lesbians entering civil partnerships have little awareness of the legal implications.<sup>52</sup> Moreover, they all noted that none of their clients knew about the revocation rule, whereby entering into a civil partnership (or marriage) has the effect of revoking a prior will. This rule will impact on those who used a will to express funeral wishes and included people other than their partners in their will.<sup>53</sup> The findings suggest that this is more likely to affect gays and lesbians, for while partners have a central place in most wills, this was complicated in a number of ways.

In contrast to the majority, one lawyer, who wrote wills up until the early 1990s, observed that the wills were: 'Not primarily about partners, wills reflected a network of friendship . . . you got a sense of their life' (10).

The place of friends is explored in more detail below but it is significant that while those in relationships were seen by most of the lawyers to be in a majority – the above comment being atypical - some suggested that single gays and lesbians were in the past and now more likely to make wills:

60/40 couples/singles . . . usually it is that they are creating a family . . . but a substantial number of single people amongst gays . . . it goes again to the . . . a lot of gay people don't get on with their families (9).

Single people writing wills . . . Definitely, because they're aware of the implications of not having one and they're not in a civil partnership and they don't want to rely on the intestacy rules (8).

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<sup>52</sup> R. Harding, *Regulating Sexuality* (2011); R. Auchmuty, 'Dissolution or disillusion: the unraveling of civil partnerships, in *From Civil Partnership to Same-Sex Marriage*, eds. N. Barker and D. Monk (2015) 199.

<sup>53</sup> Monk, *op. cit.*, n. 6; D. Monk, <<http://www.pinknews.co.uk/2013/03/04/comment-those-in-civil-partnerships-need-to-be-aware-of-what-happens-to-wills/>>.

Lawyers who suggested that partners are the key beneficiaries complicated this picture when talking about the proportion of the estate: ‘I suppose about 60 per cent of those couples would leave everything to each other’ (8); and ‘So the majority, maybe around 60 per cent are leaving everything to the partner’ (5).

This fact itself does not conflict with the general patterns about the centrality of partners. But one reason for this cited by the lawyers was that their gay and lesbian clients in relationships were more likely to be financially independent. A consequence of this would be that dependency and the financial contributions of a partner, critical factors identified by Douglas et al,<sup>54</sup> might be a less relevant consideration. The lawyers with the largest proportion of gay and lesbian clients both noted this:

For the most part we have clients who are . . . economically independent. It is very much the minority where one has one partner who is incredibly well to do and the other partner isn’t and is kept. It does happen, much more so with straight couples (5).

I think that they tend to be as a general rule, quite financially independent . . . it’s quite rare in my experience for there to be one person who has nothing and the other person to have everything. The majority of these couples have not [pause] one of them hasn’t had to sacrifice a career to raise children. They’ve both worked as a rule . . . they have their own money as a general rule (8).

You’d be surprised how many couples . . . the property is owned in one name. Certainly for straight couples . . . less so for gays . . . possibly because they’re two separate people with jobs. As a gay person generally, you have to support yourself (9).

In these comments ‘gay’ referred to lesbians too – but the impact of children, discussed below, is critical here. The statements bear out other research findings, which suggest that economic inter-dependency is far more common in heterosexual

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<sup>54</sup> Douglas et al, op. cit., n. 11, p. 266.

couples.<sup>55</sup> As Smart comments, ‘the issue of equality (or inequality) for same-sex couples is established in relation to other matters and not in relation to money’.<sup>56</sup> With younger gays and lesbians both more likely to have children it remains to be seen if this pattern will alter.

The lawyers further complicated the privileged position of partners in wills by highlighting the enduring nature of gay and lesbian relationships with ex-partners.

It is very strange . . . Straight wills seem to exclude the ex-partner absolutely . . . you know, ‘I do not want that bastard to inherit anything of mine’ . . . whereas a lot of gay wills [pause] ex partners remain friends so they may sort of actually leave a memento to them or say ‘I want to leave them a house’ because they were their ex-partner . . . there doesn’t seem to be that same sense of aggression necessarily (9).

Of course, the lovers obviously came into the category of friend (4).

[ex-lovers] might still be good friends and they do feature. I had one particular client he seems to have had a stream of people who have come through his life as lovers and they all seem to feature. He feels obliged to look after them all (5).

The presence of ex-lovers in the wills attests to the importance of being attentive to how terminology is not simply descriptive but productive of knowledge, in this context reinforcing assumptions and ideals about the exclusivity of the conjugal couple. One lawyer noted this implicitly in explaining the role of sympathetic lawyers:

One reason why someone might want to go to a gay solicitor is simply because they kind of know more about it and they know more about how the

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<sup>55</sup> K. Norrie, ‘Marriage is for heterosexuals – may the rest of us be saved from it’ (2000) 12(4) *Child and Family Law Q.* 363. See also Weeks et al, op. cit., n. 2.

<sup>56</sup> Smart, op. cit., n. 24, p. 180. See also R. Auchmuty, who argues that economic independence was political and particularly important for lesbians, ‘When Equality is not equity: homosexual inclusion in undue influence law’ (2003) 11 *Feminist Legal Studies* 163.

thing works compared to heterosexual relationships where it tends to be that you break up and you never speak again unless you've got kids (8).<sup>57</sup>

One final and unexpected finding about partners, which spoke to an earlier period, concerned marriages of convenience, often between a gay man and a lesbian. Prior to the CPA these had a particular significance for same sex trans-national relationships. It is not possible to know the extent to which these marriages were entered into to enable a person to live with a British lover who would now have the option of formalising the relationship; these marriages have never been researched.<sup>58</sup> But, either way, these marriages, which utilised (and transgressed) an institution from which their own relationships were excluded, are a fond part of anecdotal community history.<sup>59</sup> In the context of inheritance they resulted in the need to effectively 'uncouple' in a will. Awareness of these marriages was one of the reasons why sympathetic lawyers in the past would never assume that an openly gay or lesbian client was not married. As one of the lawyers recounted:

In the 90s when it was common for arranged marriages, marriages of convenience, they would have the phrase 'I'm leaving nothing to blah de blah for reasons known to both of us' . . . so that would explain why they had excluded their wife or husband, if it came to being challenged (9).

In the past gays and especially lesbians were also more likely to have been in more conventional opposite sex marriages – which raised particular implications in the context of children.

## 'CHILDREN'

Children occupy a central place in the practices and legal regulation of inheritance. As Gilding notes, it is convention rather than reflexivity that dominates this aspect of

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<sup>57</sup> In the context of heterosexual relations it is possible that post-divorce financial settlements might influence the absence of ex-partners in their wills.

<sup>58</sup> For the position now: 'Fake gay marriages exposed in London', 22 September 2014: <<http://www.bbc.co.uk/news/uk-england-29223041>>.

<sup>59</sup> A famous example is the marriage between the W.H. Auden and Erika Mann; while they had little contact in later life she left him a small gift in her will: E. Mendelson, 'Why Auden Married' <<http://www.nybooks.com/articles/archives/2014/apr/24/why-auden-married/>>.

family life.<sup>60</sup> Even in England and Wales where, in contrast to civil law systems,<sup>61</sup> testamentary freedom enables parents to disinherit their (non-dependent) children,<sup>62</sup> such an action is culturally exceptional, deemed ‘unnatural’,<sup>63</sup> and can give rise to judicial and popular speculation and suspicion.

The findings here suggest that gay and lesbian will writing is fundamentally no different in this respect and coheres with Douglas et al’s finding that children ‘represent the project of the self to which people attach most significance during their lives’.<sup>64</sup> As one lawyer noted:

The children are very rarely excluded or not fairly provided for, I would say . . . I don’t believe that there’s any less desire to provide for their children than with the heterosexual people (8).

This was confirmed by lawyers who suggested that the less conventional aspects of gay and lesbian wills in part simply reflected the fact that they were still less likely to have children:

I suppose . . . the difference between the gay wills and the straight will is that straight wills often have children . . . parents are obliged to leave their estate to their kids . . . but there’s more flexibility for a gay person (5).

The same lawyer went on to suggest that this might be changing:

As time’s going on and perhaps with more gay people having their own families, having children, then perhaps friends feature less in their wills because they will have their own children whom they feel primarily responsible for (5).

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<sup>60</sup> M. Gilding, ‘Reflexivity over and above convention: the new orthodoxy in the sociology of personal life, formerly sociology of the family’ (2010) 61(4) *The Brit. J. of Sociology* 757.

<sup>61</sup> For a defence of the civil system see, L. Marques, ‘We are not born alone and we do not die alone’ (2014) 4(2) *Onati Socio-legal Series* 264.

<sup>62</sup> G. Douglas, ‘Family Provision and Family Practices’ (2014) 4(2) *Onati Socio-legal Series* 224.

<sup>63</sup> J. Sherman, ‘Undue Influence and the Homosexual Testator’ (1981) 42 *University of Pittsburgh Law Rev.* 225.

<sup>64</sup> Douglas et al, op. cit., n. 11, p. 247. See also Westwood op cit., n. 13.

Here the reference to 'gay' is revealing, for in the context of children the position of lesbians is very different. Lesbians both in the past and now are much more likely to have children. In the recent past custody disputes between lesbians and their former husbands were a critical site of legal conflict and political activism.<sup>65</sup> In this period wills were also important, not simply to benefit the children, but for appointing guardians - a point emphasised by popular guides to the law from the 1980s.<sup>66</sup> While relevant for all parents, it was particularly important for lesbians at a time when lesbian co-parents had no possibility of being legally recognised as parents. Hasson has noted that the appointment of guardians is overlooked in inheritance studies, yet they provide a significant insight into people's personal community and relationships.<sup>67</sup> How guardianship has been and is now used by lesbians warrants further research.

While the fundamental desire to privilege children was a key finding here, one lawyer noted that instructions for wills - for both lesbians and increasingly for gay men too - often brought to the fore questions of parenthood.

It all depends on how the family has been created . . . whether or not having children was a joint decision between the two of them . . . but if it's a couple who've had children together . . . everything to the partner, very much like a married couple. Where . . . one parent has come in with children, you're going to have to consider . . . biological father or mother or whatever, what rights they have in relation to it . . . you know I may send them to one of my colleagues who deals with family law (9).

The practitioner demarcation of probate and family law is problematic for people seeking advice as many firms only provide one or the other.<sup>68</sup> However one question not addressed by the lawyers, and which warrants further research, is whether gay and lesbian co-parents who are not biologically related to a child are more likely to

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<sup>65</sup> See V. Clarke, 'Feminist perspectives on lesbian parenting: a review of the literature 1972 – 2002' (2005) 7(2) *Psychology of Women Section Rev.* 11; S.B. Boyd, 'What is a "Normal" Family?' (1992) 55(2) *Modern Law Review* 269; H. Reece, 'Subverting the Stigmatization Argument' (1996) 23(4) *J. of Law and Society* 484.

<sup>66</sup> P. Crane, *Gays and the Law* (1982) 144; L. Harne and Rights of Women, *Valued Families: The Lesbian Mothers' Legal Handbook* (1997, 2<sup>nd</sup> edn.) 186.

<sup>67</sup> Hasson, op. cit. (2012), n. 19.

<sup>68</sup> Monk, op. cit., n. 25.

consider the child part of their inheritance family than, for example, a heterosexual step-parent. In Douglas et al's research, and in recent debates about intestacy reform, the tension between the primacy of parent-child blood ties and the position of surviving 'second' spouses is a key issue.<sup>69</sup> In the context of gay and lesbian inheritance families the more ambivalent significance of blood ties,<sup>70</sup> together with the findings about ex-partners above, suggest that in this context adult-child relationships might be more likely to endure beyond the adult relationship than in heterosexual families.<sup>71</sup>

Two unexpected issues relating to children were raised which depart from conventional narratives. Both were raised by a number of the lawyers and discussed in some detail. The first concerned gay men with children from earlier heterosexual relationships, and the second concerned 'godchildren'.

While conventionally an important motive for will writing, two lawyers indicated that it was only *their* raising of the issue with gay clients that sometimes revealed the existence of children. This was in stark contrast to lesbians with children – who would almost always be living with or be in contact with the children – and confirms the extent to which in gay and lesbian politics in the recent past children were almost exclusively associated with the latter.

When writing wills for gay men who only mentioned a partner or friends it was always important *not to assume* they didn't have children . . . you'd be surprised how many had children in previous marriages and now had no contact . . . it was important to ask because of any future challenges (10).

What was more common was gay men in a gay relationship who would tell me, *because I asked*, that they had previously been married and had children (4).

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<sup>69</sup> Douglas et al, op. cit., n. 11.

<sup>70</sup> A. Diduck, 'If only we can find the appropriate terms to use the issue will be solved': law identity and parenthood' (2007) 19(4) *Child and Family Law Q.* 1; R. Leckey, 'Two Mothers in Law and Fact' (2013) 21(1) *Feminist Legal Studies* 1.

<sup>71</sup> See *Baynes v Hedger* [2009] EWCA Civ 374, for a challenge to a lesbian god-parent/co-parent's will.

As the reference to ‘future challenges’ indicates, in these situations the gay men did not consider these children to be part of their ‘inheritance family’ and the lawyers were tasked with ensuring that they were effectively excluded.

Often children were dealt with by being ignored in the will, and then an explanation in the side document about why they were being ignored. For example ‘I haven’t seen the child for the last 10 years’ or ‘the child’s mother told me I should never have anything more to do with the child’ (4).

These narratives from the past cohere with research that has revealed the extent to which older gay men as well as lesbians are parents.<sup>72</sup> The clients here, predominantly men over forty in the 1980s and 1990s, are of the generation who were not only more likely to have married before coming out as gay, but would also have had almost no possibility of challenging an ex-wife determined to refuse ‘access’. The 1977 House of Lords case of *Re D*, which decisively cut a father out of a child’s life explicitly because of the father’s homosexuality, is testament to the prevailing social and legal context about gay men as fathers.<sup>73</sup> Confirming that these scenarios are both less likely now and less distinctive is the experience of a younger lawyer who noted in a matter of fact way:

It’s not a big issue but it must be 5 – 10 per cent of wills I make for gay men, where they have had families, may have been married . . . they have a partner who’s perhaps their primary concern but they have children in the background so it’s a bit like when I do wills for people who are on their second marriage (5).

While unusual, there are many reasons why parents might disinherit their children. And it is far from unheard of for heterosexual men to disappear from a child’s life. But the findings here throw light on a very particular experience where the violence of law itself played a critical role in the construction of ‘inheritance families’.

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<sup>72</sup> B. Heaphy et al., ‘Ageing in a non-heterosexual context’ (2004) 24(6) *Ageing and Society* 881.

<sup>73</sup> *Re D (An Infant) Adoption: Parent’s Consent* [1977] AC 602 HL. D. Bradley, ‘Homosexuality and Child Custody in English Law’ (1987) 1 *International J. of Law Policy and the Family* 155.

The inclusion of ‘godchildren’ in the wills of gays and lesbians was significant as Douglas et al found that they figured hardly at all.<sup>74</sup> Their findings were mirrored here in the experiences of a lawyer who had very few gay or lesbian clients. In response to the question: ‘What about godchildren? Children of friends?’, the response was:

Virtually never. I’m still in touch with my godmother but I don’t think she’s recognised me in her will. No, the godparent relationship sadly is over (1).

However the lawyers who had a large number of gay and lesbian clients all had a very different response. This applied to gays *and* lesbians and far from being something in the past was a practice that appeared to be increasing. The following three observations were typical and were expressed with great certainty:

Yes, godchildren . . . *particularly* with gay clients . . . I often wonder if married couples appoint gay friends to be godparents, knowing that they’re not going to have their own children and perhaps it’s a good idea from a monetary aspect and certainly I do feel that my gay clients perhaps think more of their godchildren than straight clients (5).

Absolutely. A lot of gay people are godparents now . . . there is that much more so than previously, they will leave something to them . . . they have these relationships now and they can be acknowledged publicly I suppose (9).

They too benefit, that’s definitely a feature with gays . . . It’s not uncommon I would say but it’s certainly . . . children of friends to benefit without question. Godchildren? Often the same, one and the same aren’t they? (8).

While the expression ‘godchild’ was used, these relationships are not necessarily religious or formalised in any way. That there exists no alternative secular terminology that indicates a status for particular ‘children of friends’ reinforces the extent to which these relationships remain marginal. The inclusion of godchildren

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<sup>74</sup> Douglas et al, op. cit., n. 11.

also supports findings, explored below, which indicate that friends are more likely to be included in gay and lesbian wills, and also reinforces the idea that ‘blood ties’ may be of far less significance for gays and lesbians in creating ‘familial’ forms of vertical transmission. Sedgwick’s celebration of ‘avuncular’ relationships – which for her refers to aunts as much as uncles - is pertinent here for she applauds that their:

Intimate access to children needn’t depend on their own pairing or procreation. It’s very common, of course, for some of them to have the office of representing nonconforming or non-productive sexualities to children.<sup>75</sup>

A comparison with nieces and nephews, however, is revealing as one lawyer both supports but also complicates interpreting these relationships as uncomplicated representations of ‘families of choice’:

If somebody is going to leave a bequest or make provision for nieces or nephews and they have godchildren, quite often if they are giving pecuniary legacies, then it is the same, there’s no distinction. If it’s a division of residue estate it’s often the case that it would be the family that would take a bigger share (9).

The popularity of gay men, in particular, as godparents is, it would seem, more than a contemporary anecdotal journalistic myth.<sup>76</sup> And the fact that the practice overall appears to be increasing was reinforced by the fact that references to godchildren were far less pronounced in the accounts of the two lawyers who predominantly wrote wills during late 80s and early 90s. Lawyer 5’s reference to the monetary aspects above might also explain why it seems more frequently, although far from universally, to be men than women who are chosen, for gay men are more likely to be richer and less likely to have children of their own than lesbians.

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<sup>75</sup> E. Sedgwick, ‘Tales of the Avunculate: The Importance of Being Earnest’ in *Tendencies* (1994) 63. For further application and discussion of this concept see Monk, op. cit., n. 15.

<sup>76</sup> J. Turner, ‘Gay godfathers are chic so why do gay fathers still freak us out?’ *The Times*, 13 September 2003, <<http://www.thetimes.co.uk/tto/law/columnists/article2046021.ece>>.

D. Waters, ‘Gay godfathers rule’ *The Guardian*, 4 April 2009, <<http://www.guardian.co.uk/lifeandstyle/2009/apr/04/david-waters-godfather>>.

## ‘FRIENDS’

Friends occupy a central place in the literature about ‘families of choice’ – and have long been perceived as of particular significance for gays and lesbians.<sup>77</sup> But reading ‘friendship’ as a relationship potentially at odds with and representing an alternative to ‘the family’ is not new.<sup>78</sup> E.M. Forster, in his 1906 novel *The Longest Journey*, spoke of both their marginalisation and a desire for recognition that mirrors current concerns:

So strong it is, and so fragile . . . Nature has no use for us: she has cut her stuff differently. Dutiful sons, loving husbands, responsible fathers – these are what she wants, and if we are friends it must be in our spare time . . . he wished there was a society, a kind of friendship office, where the marriage of true minds could be registered.<sup>79</sup>

Calls to take friendship seriously often shift, arguably too quickly, into a demand for legal recognition. In a succinct review of the literature, Westwood, who is sympathetic to claims for inheritance rights claims for friends, acknowledges that the proposed solutions are all ‘problematic in different ways’ in both principle and practice.<sup>80</sup>

In the recent socio-legal research about inheritance none of the scenarios or vignettes used included any mention of friends;<sup>81</sup> their significance has also been marginalised in overlooking the appointment of Executors and Guardians – a particularly important issue for lesbians as noted above. However, Douglas et al did

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<sup>77</sup> Weeks et al, op. cit., n. 2; P. Nardi, ‘Friendship in the Lives of Gay Men and Lesbians’ (1994) 11(2) *J. of Social and Personal Relationships* 185-199; S. Roseneil, ‘Why We Should care About Friends: An argument for queering the care imaginary in social policy’ (2004) 3(4) *Social Policy and Society* 409; S. Westwood, ‘“My Friends are my Family”: and argument about the limitations of contemporary law’s recognition of relationships in later life’ (2013) 35(3) *J. of Social Welfare and Family Law* 347; C. Lind, ‘Power and the Taking of Responsibility: shifting the legal Family from marriage to Friendship’ in *Taking Responsibility, Law and the Changing Family* eds., C. Lind et al (2010).

<sup>78</sup> J. Eekelaar, *Family Law and Personal Life* (2006) ch. 2; A. Grayling, *Friendship* (2014); A. Bray, *The Friend* (2003).

<sup>79</sup> E.M. Forster, *The Longest Journey* (2006, Penguin Classics) 64. And see his own will where friends have a central place: Monk, op. cit., n. 15.

<sup>80</sup> Westwood, op. cit., n. 77, p. 360. See also L Rosenbury, ‘Friends with Benefits?’ (2007) 106 *Michigan Law Rev.* 189; D. Chambers, ‘For the Best of Friends and for Lovers of All Sorts, A Status Other than Marriage’ (2001) 76 *Notre Dame Law Rev.* 1347.

<sup>81</sup> Williams et al, op. cit., n. 11; Douglas et al, op. cit., n. 11.

address the issue and concluded that ‘friends are not prioritized over family but may be included in the absence of a created family’.<sup>82</sup>

The findings here would appear to challenge this ‘default’ model. The following are examples of typical statements and the references to ‘gay’ below included lesbians:

I would say that gay and lesbian clients are more inclined to pass things on to friends and that seems to be one motivation for them making their wills (2).

A lot of the straight people who come in it’s all families and very rarely do friends, or charities for that matter, come in and one of the things that I’ve noticed with gays is that friends do pop up a lot more (3).

Gay people will leave shares of their residue to friends more than straight couples. The survivor of straight couples might be more inclined to think of charities and family . . . with gay people, a lot of them consider their good friends as their family, friends certainly feature more I would say in the wills I do for gay people (5).

With straight wills, the lion’s share would go to family . . . With gay wills, there would be more emphasis on things going to lovers and friends (4).

Lots of the wills of gay men weren’t primarily about partners, they reflected a network of friendships . . . you got a sense of their life (10).

While on first reading presenting a challenge to the findings of Douglas et al, and notwithstanding the inherent difficulties in comparing findings from different methods, the striking point is the extent to which the findings arguably cohere. The most obvious reason for this is that the wills spoken of above might simply be examples of the small percentage of people who *do* include friends. Moreover, Douglas et al found that friends were more likely to be found in the wills of younger people and those without children, both categories that disproportionately, according

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<sup>82</sup> Douglas et al, id., p. 256.

to the lawyers here, include gays and, albeit to a lesser extent, lesbians. Furthermore, a closer reading of the data complicates interpreting the statements above as cohering with a celebratory ‘families of choice’ model. This is because the lawyers here confirmed Douglas et al’s finding that people who included friends were ‘more apt to suggest leaving personal belongings to them’.<sup>83</sup> Again in this context references to ‘gays’ included lesbians.

Yes, gay people often have big groups of friends and they want to leave a little bit of money to lots of people or a share to lots of people so you might have somebody getting 1 per cent of their estate, somebody else getting 10 per cent and there are these complicated long arrangements (8).

Friends, certainly in my experience, pretty rarely have the residual legacy, they normally get sort of £2000 or £5000 whatever (1).

They [friends] would be spoken of in terms of who was going to be getting bequests (4).

Quite often it’s pecuniary legacies or asking people to be able to select a memento from their personal chattels . . . or they get a small sum of money, just a little thank you, ‘thank you for being my friend’, ‘have a little holiday’ (9).

One lawyer, however, disagreed, and highlighted the importance of looking at survivorship clauses:

On gays’ wills, on the second death, if we’re talking about people in partnerships, then friends will feature largely in residue. On single gay people, yes friends feature in residue too (5).

Specific gifts, legacies and parties are all ways of personalising a will, enabling it to be read and experienced as an expressive form of life writing as much as a functional

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<sup>83</sup> Id., p. 256.

text for the transfer of legal title. The significance of possessions as a form of ‘identity property’<sup>84</sup> and the distinction between material and symbolic values are critical here.<sup>85</sup> Executors have a critical role to play here and, echoing Westwood’s findings, it may be that the recipient of a specific gift is far closer emotionally to a testator than the beneficiary of the residue of an estate.<sup>86</sup> The making of a specific gift – pecuniary or otherwise - enables testators to distinguish between those they might feel obliged to mention and those they wish to mention. The catch-all expression ‘beneficiaries’ obscures these distinctions. But Roman and continental legal systems make a clear distinction between ‘heirs’ and ‘legatees’.<sup>87</sup> Of course, unlike in these systems, testators in England have a choice about who falls into which category, but this distinction resonates on an emotional level.

The position of friends was further complicated by the finding, noted above, that the category ‘friends’ can include ex-partners. It is possible to romanticise the ease and value of these enduring relationships. How friendships, of all types, are kept going despite ‘irritations, disappointments, boredom and even some antagonism’<sup>88</sup> has recently been explored by Smart et al. In supporting the argument that ‘*idealised* friendships are not the answer to the problematic *realities* of other relational forms’,<sup>89</sup> they note that:

Friendship tends to be valorized as a supportive, mutually beneficial relationship and the force of this depiction has often been developed in the context of arguments about how friendships are chosen rather than imposed and how they reflect shared interests and intimacy. Hence the idea that there may well be unrewarding or poor friendships has not been much explored even though it is well understood in the parallel field of family studies that close relationships can sometimes be experienced as enduringly problematic.<sup>90</sup>

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<sup>84</sup> Smart, *op. cit.*, n. 24, pp. 156-8; A. Komter, ‘Heirlooms, Nikes and Bribes: Towards a Sociology of Things’ (2001) 35(1) *Sociology* 59; M.J. Radin, ‘Property and Personhood’ (1982) 35 *Stanford Law Rev.* 957.

<sup>85</sup> J. Finch and J. Mason, *Passing On: Kinship and Inheritance in England* (2000) 15.

<sup>86</sup> Westwood, *op. cit.*, n. 13.

<sup>87</sup> E. Champlin, *Final Judgments: Duty and Emotion in Roman Wills 200BC – AD 250* (1991).

<sup>88</sup> C. Smart et al, ‘Difficult friendships and ontological insecurity’ (2013) 60(1) *The Sociological Rev.* 91.

<sup>89</sup> B. Heaphy and K. Davies, ‘Critical friendships’ (2012) 1(3) *Families, relationships and Societies* 311, p. 324 (emphasis in the original).

<sup>90</sup> Smart et al, *op. cit.*, n. 88, p. 92.

This came to the fore in an unexpected way in the lawyers' references to pets.

As one lawyer observed:

No, pets were very important to these people and one of my clients explained why, it was that while the client was ill in bed, the cat was always there, the friends would come and go but the cat was always there (4).

Others commented - 'Oh lesbian cat clauses, I've had to put in plenty of them' (10), and 'It used to be more common with lesbians but increasingly common with gay men now' (9). Arguing, wisely, against sweeping interpretations, Tipper notes that 'pets may be seen as family, belongings, children, things, individuals, companions and commodities'.<sup>91</sup> Curiously, she omits the word 'friend'. But the place of pets in wills – and the possible gendered dynamics - adds a new dimension to the emerging literature on the animal-human boundary, and it is a subject that warrants further research.

#### 'FAMILIES'

Throughout the findings an underlying thread is that the wills of gays and lesbians have been utilised to construct 'inheritance families' that are in some ways unconventional. Read through an 'individualisation' thesis<sup>92</sup>, with the emphasis on an ideal of pure or reflexive relationships, these wills represent a departure from the conventional *ties* of 'family'.

In the explicit references to families the findings to a certain extent bear this out. But at the same time they demonstrate that testators' 'choice' of inheritance family is contingent on the behaviour of their families as much as their own.

Some of them did not want their parents in the will at all because they couldn't stand their parents, or *the parents had issues over the fact that these people were gay*, so parents weren't going to get anything (4).

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<sup>91</sup> B. Tipper, 'Pets and Personal life' in *Sociology of Personal Life* ed. V. May (2011) 85 at 96. See also M. Fox, 'Taking Dogs Seriously' (2010) 6 *Law, Culture and the Humanities* 37.

<sup>92</sup> For a critical review, see Smart, *op. cit.*, n. 24, pp. 17-26.

With gay wills there would be more emphasis on things going to lover and friends, *especially in those cases where family were excluded because of attitudes to sexuality* (4).

Particularly within the lesbian and gay set up, sadly people have been ostracised and their families don't support the relationship, *in which case*, it will all go to, what might be called, the more sympathetic family, I've certainly come across that (1).

As the emphasis added above indicates, what is striking about these findings – and which applied equally to lesbians and were typical of responses from all the lawyers – is the extent to which the exclusion of biological family members was frequently perceived to be *in response* to having been rejected by their family *because* of their sexuality. One lawyer indicated that this rejection was sometimes communicated through a parental will:

I know that many of them were excluded from their family's will, that's certainly come up in the past (8).

But one lawyer noted that while familial attitudes might be a consideration, unfettered testamentary freedom could be trumped by a sense of obligation in the context of 'family money', expressing the significance of 'blood tie and lineage'<sup>93</sup>:

I think that the feeling of it being family money and having received it anyway, in spite of their sexuality, means that that overrides the prejudice and they think 'oh I really should do it' . . . that would be the general feeling (8).

A critical question is whether this applied across the time-line or whether it is a practice primarily from the past. One lawyer observed that:

Usually it's because of their disapproval of their lifestyle, well sexuality.

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<sup>93</sup> Douglas et al, op. cit., n. 11, p. 263.

. . . It's always been a feature but I don't remember it being particularly common or uncommon at any one time, I don't think it's changed very much actually (8).

However the majority, referring to both gay men and lesbians, identified a significant shift:

In the 90s a lot of wills excluded the family. It was interesting they didn't seem to have the same relationship with their family, which people do now, because now they will make provision for family, leave things for parents or siblings. Gay people seem to have much better relationships with their families these days . . . you see it in their wills, the attitude has changed . . . I think people ran away to the City and didn't have anything to do with their families, there are still people who don't and want to exclude family completely, but the vast majority will mention at least one sibling (9).

A lot of older gay people I've made wills for don't refer to family, it's more likely to be younger people that still have relationships with their family. If they want to get in the will, for siblings and nieces and nephews, they should be nice to the gay people (5).

These observations of a generational shift mirror research about older gays and lesbians, which has found that they are more likely to be estranged from their families.<sup>94</sup> There is a poetic but compelling parallel here between the wills of older gays and lesbians and those of soldiers in ancient Rome. Mobile, and debarred in law from marriage, Champlin notes how the 'lack of family did not inhibit testation for them' but that:

the majority of soldiers chose as heirs their comrades. Here more than anywhere one senses the lack of interest in family who are not descendants, the absence of feeling that patrimony must be handed over, augmented but

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<sup>94</sup> Heaphy et al, op. cit, n. 72. See also Westwood, op. cit., n. 13.

otherwise intact, to the next familial heir: the childless entrusted their money to their friends.<sup>95</sup>

Confirming the generational shift, Heaphy et al's research about younger gays and lesbians found: 'coming out tended not to fundamentally disrupt "given" relationships with kin'; an increased 'personal importance of maintaining connections with families of origin'; and that they 'appeared to be more actively invested in convention than in radical relational experimentation'.<sup>96</sup>

A further indication of a generational shift can also be detected in the findings here about charities:

In the 80's and 90's Crusade and Terence Higgins Trust featured largely and sometimes these gay charities continue to receive benefit but less so than they did 10 years ago, much less so than 20 years ago (5).

Certainly in the 90s . . . most gay people would leave things to virtually all gay charities and now there is a broader range . . . in the 90s everything was much more focused on being gay . . . whereas now it's about different life experiences . . . the main gay charities seem to get mentioned occasionally but not so much as they used to (9).

Only gay men were referred to in this context. It is possible that women's rights charities featured in lesbian wills from the past – but generational shifts may be similar. And again the narratives here echo Heaphy et al's finding that for younger people 'ideals and practices were embedded in and supported by personal communities rather than critical sexual communities', a shift that reflects a broader move from identity to intimacy.<sup>97</sup>

How to respond to and interpret the 'post equality world'<sup>98</sup> is a complex question. For some commentators these shifts resonate with a broader critique of contemporary mainstream gay and lesbian politics. For them, the focus on formal legal equality – and relationship rights in particular – has silenced earlier radical and

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<sup>95</sup> Champlin, op. cit., n. 87, pp. 60, 144.

<sup>96</sup> Heaphy et al, op. cit., n. 20, pp. 13, 3, 4.

<sup>97</sup> Id. p. 13.

<sup>98</sup> R. Leckey (ed.) *After Legal Equality* (2015).

feminist perspectives and with it the possibility of alliances with broader social, racial and economic justice claims.<sup>99</sup> Yet, while mindful of this, Heaphy et al have introduced the concept of ‘ordinariness’ as an alternative to ‘assimilation’ as a framework for conceptualising the impact of the social and legal changes.<sup>100</sup> And Moran warns against the pitfalls of theories that, in a desire for clarity, interpret life through ‘simplistic violent hierarchies of politics as either progressive or reactionary’.<sup>101</sup> Generationality – how changing social experiences mark off groups from each other - is often overlooked within these debates, but as Plummer argues it provides an *additional* framework for complicating ‘clashes between systems of aspiration’.<sup>102</sup>

The significance of generational standpoints is clear from the findings about families. But across the generations what is constant is that families matter. Central to this reading is Smart’s concept of ‘connectedness’. She emphasises that ‘connectedness’ is ‘not a “human good”’ or ‘invariably nourishing and inevitably desirable’.<sup>103</sup> Thus it is as evident in the conscious *dekinning* in the wills of older gays and lesbians as it is in the inclusion of families in the wills of the younger clients. Connectedness as a concept is helpful here as it complicates the construction of a crude binary between ‘individualisation’ and ‘family’.<sup>104</sup> Consequently the findings cohere with Douglas et al’s identification of the importance of ‘inheritance families’ being, ‘grounded in love’,<sup>105</sup> for this is an implicit acknowledgment of the significance of its opposite: hate. From this perspective a will from which a birth family is excluded represents not simply a celebration of an alternative ‘family of choice’ but an affective text that communicates the extent to which personal choices are scripted collectively rather than independently; in other words, while testamentary freedom enables the exercise of agency, ‘agency does not imply freedom *from* power’.<sup>106</sup>

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<sup>99</sup> R. Ferguson, ‘The historiographical operation of gay rights’ in Leckey, id.; R. Auchmuty, ‘Dissolution or disillusion: the unraveling of civil partnerships’ in Barker and Monk op. cit., n. 52.

<sup>100</sup> Heaphy et al, op. cit. n. 20.

<sup>101</sup> L. Moran, ‘What kind of field is “law, gender & sexuality”?’ Present concerns and possible futures’ (2009) 17(3) *Feminist Legal Studies* 309, at 312.

<sup>102</sup> Plummer, op. cit., n. 20, p. 182.

<sup>103</sup> Smart, op. cit, n. 24.

<sup>104</sup> Id, p. 189.

<sup>105</sup> Douglas et al, op. cit., n. 11, p. 271.

<sup>106</sup> Heaphy et al, op. cit., n. 20, p. 8 (emphasis in the original).

## CONCLUSIONS

The small scale of this research requires caution in reaching conclusions. But the findings here have a number of uses.

One of the established benefits of empirical research with lawyers is its ability to provide insight into how legal practice operates ‘in the shadow of the law’<sup>107</sup> - a line of enquiry that highlights that in providing advice lawyers also mould and act as gatekeepers to law. The research here demonstrates a further use by revealing that lawyers’ memories and interactions with clients provide a rich source that can contribute to sociological debates about families and personal life. While not without its limitations it is a method that could be used to examine a wide range of other issues beyond law.

A key use here was the ability to present a reflective picture of will making across generations, from the late 1970s to the present day. This timeline is particularly valuable in the context of gays and lesbians as it encompassed divergent moments of relative ‘liberation’ as well as key social and legal moments, such as the AIDS crisis and the introduction of equal rights. In this way the findings provide an alternative archive that complements other historical and sociological sources. Here the findings about the gay men who ‘lost’ contact with their children and the complex funeral wishes, especially during the early days of AIDS, are important as both have been under-researched. But the dominance of men in these accounts highlights a more general limitation and the need for further research that focuses on lesbians.

For both gays and lesbians a key finding that spoke to the significance of generations was the increasing tendency for the younger clients to include members of their birth families in their wills. This is a shift that undoubtedly reflects the impact of familial homophobia on earlier generations and demonstrates that, as Weeks notes, ‘attitudes have surely changed in fundamental ways’.<sup>108</sup> But caution is required here, as it is important to emphasise that this shift is not experienced by all, and that the findings here, like much research, obscures the experiences from all generations of less privileged and confidently open gays and lesbians. The relationship between personal and political consciousness in kinship formation is complex, and the findings

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<sup>107</sup> W. Felstiner et al, ‘The Emergence and Transformation of Disputes: Naming, Blaming and Claiming’ (1980-1981) 15 *Law and Society Rev.* 631.

<sup>108</sup> J. Weeks, *The World We Have Won* (2007) 3.

here highlight how inheritance can be a revealing site for complicating accounts that to date focus almost exclusively on the couple relationship and children.

In the context of finding ‘differences’ between gays and lesbians and heterosexuals, a key finding was convergence in respect of the centrality of partners and children in wills. In this respect there was also a high degree of continuity across generations and one that applied equally to gays and lesbians. With more acceptance by birth families and with both gays and lesbians more likely to have children of their own, in the future the convergence may increase. But the findings here indicate that the centrality of partners does not necessarily mean the relationships are experienced in the same ways in terms of dependency and exclusivity. And the findings about friends, and linked to this the recognition of children of friends (‘godchildren’), both evident in contemporary wills, indicate distinctive ways in which both gays and lesbians have used and continue to use wills to recognise kinships that remain marginalised in conventional understandings of ‘inheritance families’. It is important to emphasise that these differences complicate rather than contradict the stories of convergence. Further research about personal belongings, and, particularly by lesbians, the appointment of guardians, are avenues that might further complicate the picture. And it is also important to acknowledge Westwood’s point that wills ‘do not always reflect the most significant relationships, care practices or kinship formations’.<sup>109</sup> In other words ‘inheritance families’ are not the same as lived experiences of families.

The cautious findings of difference suggest that the intestacy rules are likely to be more at odds with the ‘inheritance families’ of many of the lawyers’ gay and lesbian clients. The findings confirm the already acknowledged need to reconsider the position of cohabitants on intestacy - an issue arguably of equal concern to heterosexuals. But the need for further research about the position of children of same-sex co-parents is a distinctive issue. Whereas their position on parental divorce (dissolution or separation) has attracted considerable attention, questions about inheritance have been overlooked and may come to the fore in years ahead as the increasing number of gay and lesbian parents age and their children negotiate their deaths. But more widely, the degrees of convergence, the extent to which the findings *confirm* their distinctiveness, and most importantly the difficulty of factoring in ‘more

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<sup>109</sup> Westwood op. cit., n. 13, p. 184.

subjective features'<sup>110</sup> all point towards highlighting the importance of will writing rather than a reform of the intestacy rules. That more could be done to target information and improve access to services was emphasised by one of the younger lawyers who, commenting on the Law Society's annual Write a Will Week, noted that 'generally that's for straight people' (9).

The principle of testamentary freedom, while not unlimited,<sup>111</sup> privileges autonomy and the individual. In doing so it creates a space for the construction of inheritance families that can resist conventions. And for this reason they have and remain an important site for gays and lesbians – and others – to communicate alternative personal lived experiences that sometimes, but not always, cohere with radical aspirations. But wills are complex texts – exercises in life writing – and the findings draw attention to the necessity of troubling ideas of autonomy in the creating of families and kin by taking seriously the place of emotions, memories and connectedness, as much as structures and functions. Indeed it is this quality of wills that makes them such a compelling resource for testators as much as scholars.

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<sup>110</sup> Douglas et al, *op. cit.*, n. 11, p. 254.

<sup>111</sup> Douglas, *op. cit.*, n. 62; Monk, *op. cit.*, n. 6.