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Writing (Gay and Lesbian) Wills

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Monk, D., 2014. Writing (Gay and Lesbian) Wills. *Oñati Socio-legal Series* [online], 4 (2), 306-322. Available from: <http://ssrn.com/abstract=2431093>



Abstract

This article presents some of the findings of an empirical research project that explored writing wills for gay men and lesbians. The research aimed to examine the extent to which wills might contribute to sociological debates about alternative kinships and intimate citizenship. While the overarching aim of the project was an interest in the contents of the wills (which is to say the intentions of the testators), it also revealed the influence of the lawyers on the contents of the wills and the extent to which changes in legal practice in England have impacted on the place of will-drafting within the legal profession. Exploring this throws light on the extent to which wills express the authentic voice of a testator and raises questions about access to qualified will writers. Turning to the content of the wills, the place of 'god children' or children of friends' is examined. While a very particular type of beneficiary, the focus provides a space for thinking more widely about the construction of the 'inheritance families' of gay men and lesbians.

Key words

Wills; inheritance; gay men and lesbians; lawyers

Resumen

Este artículo presenta algunos de los resultados de un proyecto de investigación empírico que ha analizado la redacción de testamentos para hombres gay y lesbianas. El objetivo de la investigación fue examinar el grado en que los testamentos pueden contribuir a los debates sociológicos sobre parentescos alternativos y ciudadanía íntima. Si bien el interés principal del proyecto era el contenido de los testamentos (es decir, las intenciones de los testadores), también se puso de manifiesto la influencia de los abogados en el contenido de los testamentos y la forma en la que los cambios en la práctica legal en Inglaterra han influido en la redacción de testamentos en el ámbito de la profesión legal. Esta

Article resulting from the paper presented at the workshop *Wealth, Families and Death: Socio-Legal Perspectives on Wills and Inheritance* held in the International Institute for the Sociology of Law, Oñati, Spain, 25-26 April 2013, and coordinated by **Daphna Hacker** (Tel Aviv University) and **Daniel Monk** (Birkbeck, University of London).

I would like to thank the participants and, at a later stage, the referees, for their helpful comments and suggestions.

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investigación permitió conocer hasta qué punto los testamentos expresan la voz auténtica de los testadores, y planteó cuestiones sobre el acceso a redactores de testamentos cualificados. En cuanto al contenido de los testamentos, se analiza el papel que juegan los 'ahijados' o los hijos de amigos. Siento un tipo muy particular de herederos, el planteamiento ofrece un espacio para reflexionar más ampliamente sobre la construcción de "familias de herencia" para hombres gay y lesbianas.

Palabras clave

Testamentos; herencia; hombres gay y lesbianas; homosexuales; abogados

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1. Introduction

'The fact that English testators can choose how they dispose of their property means that the scene is set for using property transmission to constitute relationships in an active meaningful way' (Finch and Mason 2001, p. 3).

This article presents some of the findings of an empirical research project that set out to examine the will-writing practices of gay men and lesbians.¹ The key aim of the research was to initiate a dialogue between the extensive sociological literature about sexuality, intimate citizenship and alternative kinships² (a body of work that makes no reference to inheritance) and the socio-legal literature about inheritance (which makes very limited references to sexual orientation). While the former tends to emphasise the particularity in the experience of gay men and lesbians, or 'difference'; the latter, to the extent that it is mentioned at all, emphasises formal legal equality, or 'sameness' (see Monk 2011). The findings here suggest a need to be cautious of and to trouble both approaches. To demonstrate this, one very particular finding is explored here: the inclusion in wills of references to 'god-children' or children or friends.

The overarching aim of the project was an interest in the contents of the wills (which is to say the intentions of the testators). But inevitably the significance of role of the lawyers who wrote the wills came to the fore. For while wills are written in the first person, the people who draft them are active participants at all stages of the process of will-making, to the extent that, as others have noted, they have a 'ventriloquist' role and their ability to express the authentic voice of a testator is questionable (Frank 2010, Gordon 2010, Hacker 2010, Horton 2012, Hasson 2013). Here not only was their impact on the content of the wills evident, but in addition the research revealed shifts in the role and the place of will-drafting within the legal profession more generally. Consequently the research is about writing wills per se, as well as wills for gays and lesbians (hence the brackets in the article title). Nevertheless, it is argued here that there is a particular resonance between the two issues, for changes in will writing services are particularly significant for testators whose wills in any way deviate from the conventional familial norms premised on relational as opposed to ascriptive relations (Finch *et al.* 1996)

Before turning to the findings, the paper explains the premises for undertaking the research, and then summarises the methodology.

2. Equality and beyond

In 2009 the newly established UK Equality and Human Rights Commission published a report entitled *Moving forward: putting sexual orientation in the public domain*. It concluded that:

Greater awareness can make a real difference to public attitudes, not just so that disapproval becomes a thing of the past – but also so that diversity is welcomed rather than simply tolerated. Putting sexual orientation in the public domain is also a means to inclusion. It involves including people both numerically and literally . . . it is a deliberate choice not to leave some people on the margins. This makes citizenship equal, not just for LGB people, but for everyone. (Botcherby and Creegan 2009, p. 15)

In the context of attitudes and approaches to will-writing, while research has acknowledged difference in the context of gender, age, ethnicity, relative wealth and relationship status (single or coupled), there has been very little empirical

¹ 'Writing Wills/dealing with intestacy: Gay and Lesbian Perspectives'. This research was funded by a grant from the UK Socio-Legal Studies Association (SLSA). It forms part of a broader project examining the inheritance and sexuality drawing on archival, literary (Monk 2013) and doctrinal sources (Monk 2011).

² See, e.g., Weston (1997), Weeks *et al.* (2001), Roseneil and Budgeon (2004).

research into the particular experiences of gay men and lesbians.³ Thinking about differences is then not unusual, and it is particularly important for law in the context of intestacy reform initiatives, premised as they are, in part, on appreciations of 'changing family structure' and an attempt to reflect the wishes of the deceased had they made a will (Law Commission 2009, Cooke 2009). While societal norms are explicit in the context of intestacy rules, they are, problematically, less visible in the context of the application of doctrinal rules in inheritance disputes premised on respecting testamentary freedom (Sherman 1981, Fellows 1991, Leslie 1996, Maillard 2009, Monk 2011).

At the same time, however, there can be a formulaic 'tick-box' quality to ever expanding categories of identity; and the mainstreaming of diversity agendas has not been without its critics (Ahmed 2012). Moreover in jurisdictions where same-sex marriage/civil partnership and equal parenting rights have been enacted, there is a tendency for the achievement of formal legal equality to mask substantive lived experiences and in doing so substantive inequalities. In this vein the starting point for this research was not simply to be 'inclusive' as a matter of principle. Rather, it was premised on both grounded experiential reasons and for the perspective it provides for engaging with the existing literature. It is not suggested that gay and lesbian experiences are in any way either monolithic or unique. Nor is the importance of acknowledging the contested and contingent meanings of 'gay' and 'lesbian' and 'community' underestimated. But with those riders the premise for exploring 'difference' in this context are the *combined* impact of the following factors. First, formal legal equality (in particular same sex relationship recognition) is relatively recent; consequently the evidence that heterosexual people often do not make wills because of false assumptions about the legal protection provided by inheritance law for unmarried partners (Brooker 2007) are arguably less likely to apply. Secondly, having children is a key motive for writing wills (Brooker 2007), and while gay men and lesbians have always had children and increasingly do so openly and with legal recognition, some research does suggest that they are still less likely to have children and when they do different legal issues arise. Thirdly, the impact of HIV/AIDS - confronting mortality collectively and community based will-writing services⁴ – both directly and indirectly created for many in the late 1980s and 1990s a very particular shared experience and collective memory of inheritance conflicts.⁵ Fourthly, testamentary freedom has and continues to provide gay men and lesbians with a legal space for 'coming-out', to actively constitute their significant relations, rendering non-heterosexual relations visible and wills a political significance. (Monk 2011, 2013).

3. Methodology

The research took the form of approximately 1.5 – 2 hour semi-structured interviews with ten lawyers. All of the lawyers had some experience of writing wills

³ Research by the National Consumer Council (Brooker 2007) referred to race and class but made no reference to sexuality. Similarly there is no reference to gays and lesbians in the key socio-legal texts (Finch *et al.* 1996; Finch and Mason 2001). Research from the USA focuses on the practical issues and predominately on the impact of HIV/AIDS (Allison 1997) and the personal/political dimensions of legal disputes (Ronner, 2003). Research that has looked at sexual orientation has only addressed the position of same-sex couples: Fellows *et al.* 1998; Humphreys *et al.*, 2010; Douglas *et al.*, 2011. Research by Morrell *et al.*, 2009, included individuals from same-sex couples as a distinct group for exploring views about intestacy but in the findings there was no discussion of the specificity of this group's views.

⁴ In the UK volunteer solicitors for The Terence Higgins Trust (the first grass roots AIDS charity) operated a will writing service until 2000). See also Stoller 1997, Watney 2000 and Cook 2007.

⁵ This is particularly the case as legal recognition of same-sex couples came after the introduction of treatment that resulted in HIV no longer being a life-threatening condition. See also Berendt and Michaels (1991); Allison (1997); Johanson and Ford Bay (1989): tellingly despite the titles of these articles referring to HIV/AIDS, the content and the issues raised refer to the distinctive kinship networks of only gay men. And the same is true of media coverage at the time, see Johnson (1987) in *The New York Times*; Angel (1988) in *Los Angeles Daily Journal*, For a literary representation of three inheritance stories from this period (and the first coinage of the expression 'AIDS Widows') see Monette (1990).

for gay men and lesbians. But while for some they formed the majority of their clientele for others they were, as far as they knew, relatively rare. They included men and women, were aged between 28 and 65 (consequently some were recently qualified while others were about to retire) and worked in a variety of practices ranging from expensive London West End to predominantly legal aid Manchester suburbs as well as lawyers who worked as volunteers for HIV charities during the late 80s and early 90s. Collectively they had experience of writing wills for over 35 years, with the majority writing on average over 100 wills a year. The key advantage of this method was the quick access it provided to the testamentary reflections and deliberations of a large number of gay men and lesbians (in addition to and alongside other groups). The questions lawyers ask their clients in this context are remarkably similar to those sociologists ask, albeit for different reasons when researching domestic life, kinships, dependency and care. Moreover, in contrast to interviews with testators, it provided insight into what people do rather than what they say they would do or think is the right thing to do. Of course at the same time the method has inherent limitations: the fact that it was only ten lawyers; the reliance on solicitors as an intermediary between the researcher and their clients; the exclusion of individuals who have not contacted solicitors and those who self-made wills. It is also important to highlight that people who have not made wills are totally absent from this research; and their perceptions are of course critical in thinking about intestacy (Fellows *et al.* 2010). These limitations would render the data inappropriate for asserting any conclusions of a quantitative nature, but the data does facilitate debate and interdisciplinary dialogue about a variety of issues relating to will writing, lawyers, kinship and sexuality, as well as adding to discussions about empirical methodologies for researching inheritance.

4. Will writing by lawyers

The Law Society in England and Wales (the professional organisation representing solicitors) advises individuals seeking information about wills that:

Although it is possible to write a will without a solicitor's help, this is generally not advisable as there are various legal formalities you need to follow to make sure that your will is valid. Without the help of an expert, there's a real risk you could make a mistake, which could cause problems for your family and friends after your death
Law Society in England and Wales (2014).

The Law Society has also recently supported calls for the regulation of will-writing (Baksi 2013). None of this is surprising. While wills historically were written by priests (Craig and Litzenberger 1993) the professionalisation of will-writing and the associated provocatively what could be describe as attempted 'colonization' of it by lawyers is a trend that has deep roots (Frank 2010, pp. 21-63). This small research adds to these debates in two ways. First the process of identifying lawyers to interview threw some light on the reasons why lawyers offer will-writing services and what militates against this. And secondly it revealed strong views and marked differences in approaches to will writing.

A number of strategies were used to identify lawyers to take part in this project: contacting those who advertise in the gay press and/or were involved in the Terence Higgins Trust Will Writing Project, and through knowledge of leading practitioners working within the gay and lesbian community. What became quickly apparent is that very few and indeed a decreasing number of solicitors write wills. This was particularly true of solicitors and firms working in family law; in other words by those whose work explicitly addresses the legal consequences of parenting and relationships. One of the lawyers who took part in the project identified specialisation and insurance indemnity as the main reasons for this.

'I'm a bit of a dinosaur, these days everybody has to be a specialist, which I think [pause] it's a bit unfortunate for a general High Street practice. . . . I tend to think of myself as a bit of a legal GP. . . . We have crazy situations. There is a chap down the road, a young chap who's just starting off with his own practice and he's a

matrimonial lawyer and he just does matrimonial cases so when people separate, one of the first things you need to look at is their wills because very often the will will be out of date and I said to him well, what do you do and he said oh I refer it on. I said a straightforward simple will, I'm sure he could deal with it and he said no couldn't possibly, I'm not a will specialist and it's just crazy so you end up with a separating client going to him for the matrimonial advice, very often the house has to be sold, somebody else for the conveyancing advice and then somebody else for the will, it's just mind boggling. . . . the main driver is indemnity insurance. I think people don't want to go outside their levels of expertise because they're worried they'll get sued. One of the major expense in a legal practice is indemnity insurance premiums, it is the second biggest expense in most practices after salaries, so people are very, very keen to keep that down . . . and I think also that it's training now, nowadays when you are trained, when you go the College of Law or whatever it's called now, you're guided towards being a specialist. (Lawyer 1)

Indemnity insurance for solicitors is calculated on the basis of fields of practice. Wills and probate attract particularly high premiums: a reflection of the courts expansion of the duty of care owed not just to testators but also potentially to legatees.⁶ In the context of training it is perhaps worth noting here that despite the fact that inheritance is a key site for thinking about family dynamics and indeed increasingly of familial legal disputes, it is not always included within family law courses or modules or treated as a very marginal issue. There are practice and doctrinal explanations for this - inheritance disputes of course raise issues relating to equity, property and taxation law - but they reinforce the fact that legal categorization is at odds with lived/real life categories and that this impacts on the delivery of important legal services.

Another reason why lawyers are reluctant to write wills is simply, insurance aside, the fact that it is not considered remunerative enough. As one lawyer noted:

Well, we charge an hourly rate and the hourly rate tends to be half of our usual private client rate for doing other work, such as litigation you know family litigation, that kind of thing, because it's always been discounted but it pays more than Legal Aid so it's halfway between the two really. It isn't remunerated to the level it should be because I think it's some of the most important work you do because if there are any problems with it, the person is not there to explain why they've done it. In many other situations where you know, if you're buying a house, they're insured, if you're getting divorced you can stand there and say what happens, if you're fighting over kids, you can give evidence but if you've got a problem with a will then you're not there to sort it out so you need to make sure that it's as right as it can be at the outset. (Lawyer 8)

One way in which lawyers sometimes factor in the lack of remuneration is by viewing it as a form of advertising: offering a free will in the hope that the testators will return with more remunerative work at a later stage. A variation on this on a much larger scale was the arrangement one of the lawyers interviewed had with a trade union: in return for being instructed to undertake all the unions' highly remunerative personal injury work, the lawyers would offer free wills to all the union's members. As the lawyer noted:

The majority of my clients come to me through Trade Union schemes as part of their Trade Union membership benefits, . . . there is a free will scheme for members that's quite well marketed and advertised, so the member applies for the will pack, fills that in and then that comes to me, so sometimes they won't have had any actual contact with me at all, I'll just be a name on the bottom of the letter. (Lawyer 6)

Linking wills with professional remuneration is not new: when clergy wrote wills it is perhaps not coincidental that bequests to religious institutions were the norm.

⁶ See in particular *White v Jones* [1995] 2 AC 207 and Kerridge (2009, ch. 15).

Concern for the after-life was a genuine consideration, but these bequests may have been influenced by the person who drafted the will.⁷

Who writes a will also influences the form that it takes and here again there was marked variation, with remuneration again sometimes having an impact.

My attitude is that the will is the client's will, it's as simple as that. I have to say my heart sinks when there's 'I leave my stapler to such and such a person', but ultimately it's their will and it's important that their will accurately reflects their wishes so, although my heart does rather sink, *particularly as there is a fixed fee for a will* (Lawyer 1, emphasis added)

A similar concern but with a different outcome was suggested by another who wrote wills on a voluntary basis:

They would sometimes want to give explanations for the gifts, or would say I am giving you money in recognition of the love or care or whatever. To be honest, I always discouraged that, again, simply from a drafting point of view. I was probably quite austere in my approach, *I was there to provide a basic service . . . I would always encourage them if they wanted to say anything, off the point, to do it in a side letter*' (Lawyer 6, emphasis added)

A further typical response from one of the participants was:

In my drafting style I tend not to put in descriptors because it clutters up the will really (Lawyer 2)

The reluctance of lawyers to facilitate the expressive potential of wills – a finding found, and criticized, in other research (Hacker 2010, Gordon 2010) was certainly borne out here.⁸ However the use of side letters was often favoured or suggested, as above, for including 'off-the-point' issues.

In some contexts the lawyers, albeit for pragmatic reasons, felt obliged to encourage testators to add reasons in the will. This was particularly the case where testators were excluding close relatives. For example:

'It's probably better to have something in the will to show the reason why so that if she makes a claim as a dependent you can look at the reasons why and address it in your will, because when the will's looked at you're not going to be here to clarify these (Lawyer 3)

And similarly:

People generally don't want exclusion to be communicated, is my experience, they don't want to hurt anybody's feelings . . they just don't want to rub it in, kick them when they're down, sort of thing, but as I say, sometimes because of the Family Dependents Act,⁹ you actually have to put it in (Lawyer 1)

Others however took the opposite approach and in doing so revealed different approaches to the use and purpose of 'side letters':

I would advise against putting it in the will because I used to advise that if the reasons were in the will itself, that it might trigger a challenge of the will because the intended beneficiary, or the non-beneficiary might argue that what was in the will was untrue and therefore, that the client had not been mentally competent, so I advised that it was dangerous to put the reasons in the will but the reasons should go in a side document and let's use it if we need it. . . . I always advised against putting an explanation because somebody else who was left out or felt aggrieved or who felt they would have wanted more, that person could come along and say this is rubbish, these reasons for giving such a big amount of money to the cleaning lady are fatuous and I never ever wanted to give people fuel for them to

⁷ Medieval historians have long debated how to interpret these bequests (Goose and Evans 2000; Craig and Litzenberger 1993).

⁸ But note that others have argued that wills written in the conventional legal genre can also be highly expressive (Horton 2012, Monk 2012).

⁹ This is a reference to The Inheritance (Provision for Family and Dependents) Act 1975; (Douglas 2014).

argue wills . . . I never had a will challenged, so, for instance, all these side documents, I realised I was right that all these explanations about why certain people were not getting bequests, I was right to keep it out of the document that went in the Register that became open to public inspection (Lawyer 4)

Some of the other lawyers also opposed including reasons for exclusions in the will; but their reasoning was different. For example:

A lot of the time I would try to discourage too much of a statement in the will, mainly because it is a public document after probate's granted, so do they want to air those kind of grievances in public (Lawyer 2)

Similarly Lawyer 9 noted:

'Occasionally I have had to draw the line and say 'this is a public document' . . . it's usually when they want to exclude somebody and the reasoning why and it can be quite vitriolic so, rather than put in they little phrase about bastard, bastard, bastard, effing C, you sort of say 'because we have been estranged for a long time' or something.

The references to the public nature of wills on the content of wills is significant as not all countries treat wills in this way. The history and rationale for the public nature of wills has recently been reviewed by Jaconelli. While sympathetic to increased 'posthumous privacy' at the same time he recognizes the inherent difficulty in balancing the rights of the testator against those of people who may have a legitimate claim on an estate (Jaconelli 2012). There are no moves to change the public nature of wills but a lack of clarity, indeed consistency, concerning their public/private status was demonstrated most recently in debates about the UK Equality Act 2010. Here arguments in favour of opening conditional clauses in wills up to potential human rights claims were rejected on the basis of conceptualizing testamentary freedom as a right that operates firmly in the private sphere. (Monk 2011, Chalmers 2007). The very contingency of the public/private status of wills arguably demonstrates the public interest and economic and political use of 'privacy' (Olsen 1985).

Arguments for regulating will writing are underpinned by an understanding that it is an important service that has considerable impact on individuals. But if will writing is to be regulated this may make it more likely for people to rely on lawyers to write wills; certainly the legal profession encourages this. If so then the availability of lawyers willing to take on this task is important. In other words the Law Society should perhaps think about the accessibility and availability as much as the quality of provision. Moreover regulation may need to address the differences of views about styles of writing wills. An appreciation of the specific and particular needs of different groups in society is important here; for as the findings below indicate, the intestacy rules are less likely to cohere with the wishes of certain communities.

5. Remembering god-children/children of friends

In turning to the content of the wills drafted by the lawyers the focus here is on one very specific aspect: the naming as beneficiaries by gays and lesbians of children that are not, in any sense, 'theirs'. In other words children with whom they are not in any form of parental relationship, whether that be biological, social or legal or dependent in any way on a partner relationship. The expression 'god child/parent' is often used to describe these relationships but they are not necessarily in any way religious or formalized in any way. As relationships initiated through friendships with the child's parents they are distinct from simply cross-generational friendships. In recent years legal research has focused in great detail and across numerous jurisdictions on gay and lesbian parenting rights (see for example, Zanghellini 2010, Leckey 2011, 2013, Diduck 2007). While the UK is unusual in that gay and lesbian parenting rights – in particular the ability to adopt - preceded same-sex

relationship recognition¹⁰ it is often perceived as both the next-step and often intimately linked to debates about relationship recognition (McCreery 2008). Adult relationships with god-children/children of friends, however, are absent in the literature and it is only in the context of inheritance, and in particular testamentary freedom, that a space exists for the recognition of such relationships in a legal form. It should be made clear from the outset that the argument here is not that these relationships should be more widely recognised in law. Rather that the focus on obtaining legal recognition of relationships (whether partner or parental) obscures and creates silences about the significance – emotionally – of such forms of ‘connectedness’ (Smart 2007). Moreover, taking these relationships seriously provides a space for demonstrating both the ways in which some gay and lesbian kinship practices may indeed be different from dominant familial norms and, at the same time, how in the desire to create and acknowledge relationships with children and people from younger generations they play with, rather than operate outside of, these norms.

Recent research in the UK about will writing found that god-children figured hardly at all (Douglas *et al.* 2011, Humphreys *et al.* 2010). In the research here that finding was mirrored in the experiences of the lawyers who had very few gay or lesbian clients. For example in response to the question: ‘What about God children? Children of friends?’,¹¹ one lawyer answered:

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

However in answer to the same question the lawyers who had a larger number of gay and lesbian clients all had a very different response. The following three responses were typical and were expressed with great certainty:

Yes, God children in particular and of course that applies to gay clients as well as straight clients [pause] but *particularly* with gay clients . . . I often wonder if married couples appoint gay friends to be God parents, 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 God children than straight clients or at least, if we’re talking straight clients, men and women, it’s the women that probably think more of their God children than the men¹², who’ve probably forgotten who their God children are, but certainly with gay people, God children do feature. (Lawyer 5)

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. God-children? often the same, one and the same aren’t they? (Lawyer 8)

Absolutely. A lot of gay people are God parents now . . . there is that much more so than previously, they will leave something to children or acknowledge children, they are there, they think about them, they have these relationships now and they can be acknowledged publically I suppose. (Lawyer 9)

As the lawyer above suggests, it may be that this is more common now than previously. Unlike the lawyers quoted above – who are all currently in practice - the reference to god-children was less pronounced by the two lawyers who wrote wills predominantly during late 80s and early 90s (a high proportion for gay men with HIV/AIDS). The popularity of gay men as god fathers is, it would seem then, more

¹⁰ No explicit laws barred gay men and lesbians from adopting or fostering individually but were able to do so as a couple as a result of the Adoption and Children Act 2002. See also the Human Fertilisation and Embryology Act 2008. Statutory recognition of same-sex couples was introduced by the Civil Partnership Act 2004 and same sex marriage by the Marriage (Same Sex Couples) Act 2013.

¹¹ This question, was asked of all the lawyers in the context of talking through the usual provisions in conventional wills (executors, funeral wishes, specific legacies, residue etc) and alongside questions about other categories of potential beneficiaries (parents, children, partners, siblings, nieces and nephews, friends); the same categories used by Douglas *et al.* (2011).

¹² The gendered distinction is reflected in research by Humphreys *et al.* (2010), where only women who have made wills refer to god-children, albeit only 1%: Table 3.2. See also Hasson (2013).

than a contemporary anecdotal journalistic myth (Turner 2003, Waters 2009)¹³ and Lawyer 5's reference to the motives of the parents might also explain why it seems more likely to be men than women who are chosen. But it is important to emphasise that we know very little about these contemporary god-parent/god child relationships. It is an aspect of personal life that has received little, if any, attention; and of course has much to say about the parents as it does about the children and the god parents.

It is possible to read the place made for god-children/children of friends in gay and lesbian wills, and the contrast it provides with 'straight' wills, in a manner that emphasises and celebrates 'difference' as opposed to 'sameness'; an approach that critiques formal legal equality (Leckey 2014). Such a reading would challenge the applicability to gays and lesbians of the finding by Douglas *et al.*, that:

so far as it has been suggested that people may be seen as having a 'personal community' - 'a specific subset of people's informal social relationships...[which] represent people's significant personal relationships and include bonds which give both structure and meaning to their lives', these do not seem to impinge on their views when it comes to determining inheritance (Douglas *et al.* 2011, p. 246).

One result of the marginalizing of difference can be seen in relation to intestacy. For here the exclusion of non-traditional family forms from the rules means that for many gay men and lesbians testamentary freedom and will writing are arguably as important now as they were prior to relationship recognition.¹⁴

A 'celebratory' reading of difference might also applaud, as Eve Sedgwick does, the counter normative possibilities inherent in 'avuncular' relationships¹⁵ to not simply expand the notion of the family but to destabilize and trouble children's understanding and experience of the nuclear family. Offering 'a socialization that contests much that is implicit in the very notion of socialization itself' (Sedgwick 1994, p. 59) she proposes that we: 'Forget the name of the Father. Think about your uncles and your aunts', on the grounds that:

'It is the very badness of their fit with . . . streamlined modern models of "family" - that makes them such good places to look for . . . resistance to the sleek "same"/"different" scientism of modern gender and sexual preference' (Sedgwick 1994, p. 60)

and that:

'Because their 'Intimate access to children 'needn't depend on their own pairing or procreation, its very common, of course, for some of them to have the office of representing nonconforming or non-productive sexualities to children' (Sedgwick 1994, p. 63).

Avuncular godparents, in this model, can teach us that there is more in life than partnership and parenting. Moreover making the avuncular relationships visible in wills, in particular, is significant as it can add materiality to alternative stories of kinship which too often, in a desire to make visible alternative kinship, fail to examine this dimension and in doing so fail to make the useful distinction that Douglas *et al.*'s coinage of the expression 'inheritance family' introduces. As Shonkwiler notes:

¹³ See lengthy thread of responses to query about whether a gay man can be a God Father for a catholic child: <http://forums.catholic.com/showthread.php?t=405093> Catholic Answers Forums, the largest Catholic Community on the Web, The Guardian (2012).

¹⁴ This of course does not apply to all or simply to gays and lesbians as resistance to recognizing opposite sex cohabitation in the rules makes clear. But this is not to suggest that the laws on intestacy should necessarily expand to include families of choice (even if such a task was feasible). As Douglas *et al.* (2011, p. 254) note: how one defines the inheritance family can quite legitimately vary according to whether it is being done for the purposes of individual will making or generalized norm setting through the intestacy law.

¹⁵ For Sedgwick (1994, p. 59) the avuncular is a far broader category: 'patron, friend, literal uncle, godfather, adoptive father, sugar daddy'.

'Family is not just whom you choose it is also who you spend your money on . . . money does become a vehicle a language a conduit for constructing family in recognizable social terms (Shonkwiler 2008, p. 552, see also Heaphy *et al.* 2013).

But alongside these readings it is possible to offer more cautious and ambivalent interpretations. And in doing so acknowledge Heaphy's observation that:

'narratives about lesbian and gay reflexivity sometimes confuse analysis with prescription and actualities with potentialities' (Heaphy 2008, p. 1)

This is a pertinent reminder for empirical research especially where the tendency is to read what one wants is always present. And in this context in particular it makes clear that radical readings can be imposed just as easily as conservative moral agendas; 'the family' is never a neutral descriptive term (Triger 2012).

6. Nieces and nephews

One way in which the data provided an interesting complication is when the lawyers commented on the distinctions between god-children/children of friends and nieces and nephews.

Initially, one lawyer suggested that gays and lesbians did not distinguish the two categories:

Absolutely, equally, equally, it's our close friend . . . not biologically related but, yes you can be very close to these children (Lawyer 9)¹⁶

But the same lawyer complicated this later by noting:

If somebody is going to leave a bequest or make provision for nieces or nephews and they have god children, 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.

Similarly one suggested that the two are treated equally, in terms of life-time gifts but later noted:

. . . there's more flexibility for a gay person because of the siblings, the nieces and nephews generally don't depend on them so it is bunched in their hands when they receive it and my clients sometimes think in terms of need and sometimes they just, there is that nexus well some of this money might have been family money and blood is thicker than water so and although I love my friends, my money will go back to my family, possibly more if it's family money, rather than they've actually earned it all themselves. (Lawyer 5).

The distinction between legacies and residue is an important factor that complicates the relative status of members of a testator's 'inheritance family'. Moreover it is a one that reflects the civil law distinction between 'heirs' and 'legatees', a distinction lost in the common law category of 'beneficiaries'.

Alongside this evidence of a more conventional approach to biological relatives and 'family money', all the lawyers stressed that for gay men and lesbians the way in which they were treated by their family and in particular the degree of acceptance of their sexuality was a critical factor that frequently trumped any notion of biological family obligation.

As one commented:

Wanting to exclude family, family difficulties definitely have often been a factor, namely my siblings, my parents, my children, whoever don't recognise my relationship and I don't want them to get anything so it's more of a, rather than wanting to positively provide for somebody, they positively do not want to provide for the people who disapprove of them, so that's quite a common one. (Lawyer 8)

¹⁶ Examples of wills by gay men that include both god children and nieces and nephews on equal terms are those by the writer E M Forster (see Monk 2013) and more recently that of the designer Alexander McQueen (BBC News 2011).

Moreover another lawyer noted a shift here:

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 (Lawyer 9)

What these observations suggest is that in constructing their 'inheritance family', gays and lesbians rather than simply operating outside of the traditional family form or rejecting 'family' altogether, instead – at least in their wills - negotiate and give expression to different understandings of family. And gay men and lesbians may be more likely to use wills as the vehicle to communicate these negotiations. But alternative 'families of choice' do not, and perhaps cannot, simply replace biological families, rather they add to and complicate them and are always in a relationship with them (whether that results in being included *or* excluded from the will). The observation above that younger gay men and lesbians are more likely to refer to their birth families in their wills is not surprising, certainly in the UK where attitudes to sexuality have changed dramatically,¹⁷ but it provides an important reminder that the loss of families of birth was for many not a question of 'choice' at all and indeed coheres with the research by Douglas *et al.* (2011) that points to the ongoing resilience of the nuclear family.

7. Conclusion

The Law Society of England and Wales advises that wills are 'particularly important' for people who cohabit and are not married or in a civil partnership and 'vital' if you have children or dependants (Law Society in England and Wales 2014). This is of course wise advice. Moreover it represents not only the current law on dependants (Douglas 2014) but also reiterates concerns about intestacy, which in recent debates have focused on the position of surviving spouses and cohabitants (Law Commission 2009, Cooke 2009, Williams *et al.* 2008, Fellows *et al.* 1998). Inheritance practices from this perspective have a socio-economic function and are represented as a form of familial 'responsibility'. But this focus also implicitly legitimizes certain familial norms (Fellows 1991, Triger 2012). This research does not set out to critique the current laws in England, rather the place of god-children/children of friends in the wills of gay men and lesbians simply serves to bring to the fore the wider creative potential of wills and of the particular importance it has for those for whom the intestacy rules do not 'fit'. The findings here suggest that this may particularly apply to gay men and lesbians. But as Fellows *et al.* note (2010) there is very little research in this field that looks at unmarried people without children (regardless of sexual orientation) and further research here is required. Testamentary freedom enables people, in effect, to 'opt out' of intestacy norms. But those individuals and members of communities whose testamentary desires are likely to be furthest from the rules of intestacy require not simply the liberty to opt out but the delivery of warnings, targeted information and accessible professional services.

Bibliography

- Ahmed, S., 2012. *On Being Included: Racism and Diversity in Institutional Life*. Durham: Duke University Press.
- Allison, D., 1997. The Importance of Estate Planning Within The Gay and Lesbian Community. *Thurgood Marshall Law Review*, 23 (2), 445-482.
- Angel, C., 1988. Legal Challenges to AIDS Patients' Wills Seen on Rise. *Los Angeles Daily Journal*, 16 Aug.

¹⁷ This is borne out by opinion polls, and the recent overwhelming support in the House of Commons for same-sex marriage (400 in favour/175 against) reflected this. See also Heaphy *et al.* (2013), for empirical research exploring the 'ordinariness' of young gay and lesbians.

- Baksi, C., 2013. Regulate will-writing but not estate administration, LSB recommends. *The Law Society Gazette* [online], 13 February. Available from: <http://www.lawgazette.co.uk/news/lgb-unveils-strategy-will-writing> [Accessed 31 March 2014].
- BBC News, 2011. Alexander McQueen leaves money for dogs to be pampered. *BBC News* [online]. Available from: <http://www.bbc.co.uk/news/uk-england-london-14295860> [Accessed 2 April 2014].
- Berendt, E., and Michaels, L., 1991. Your HIV Positive Client: Easing the Burden on the Family Through Estate Planning. *The John Marshall Law Review* [online], 24 (3), 509-542. Available from: http://library.jmls.edu/pdf/ir/lr/jmlr24/24_24JMarshallRev509%281990-1991%29.pdf [Accessed 1 April 2014].
- Botcherby, S. and Creegan, C., 2009. *Moving forward: putting sexual orientation in the public domain* [online]. Manchester: Equality and Human Rights Commission; London: The National Centre for Social Research (NatCen). Available from: http://195.224.14.164/uploaded_files/research/research40_so_moving_forward.pdf [Accessed 21 September 2013].
- Brooker, S., 2007. *Finding a Will: a report on Will-Writing Behaviour in England and Wales* [online]. London: National Consumer Council. Available from: <http://www.probate-solicitors.co.uk/resources/Nat%20Consumer%20Council%20Report%20on%20OWills%20Sep%202007.pdf> [Accessed 31 March 2014].
- Chalmers, J., 2007. Testamentary Conditions and Public Policy. In: K G C Reid, M de Waal and R Zimmerman, eds. *Exploring the Law of Succession*, 99-113. Edinburgh University Press.
- Champlin, E., 1991. *Final Judgments: Duty and Emotion in Roman Wills 200BC – AD 250*. University of California Press.
- Cook, M., 2007. From Gay Reform to Gaydar. In: M Cook, ed. *A Gay History of Britain: Love and Sex Between Men since the Middle Ages*. London: Greenwood, 179-213.
- Cooke, E., 2009. Wives, widows and wicked step-mothers: a brief examination of spousal entitlement on intestacy. *Child and Family Law Quarterly*, 21 (4), 423-442.
- Craig, J. and Litzenberger, C., 1993. Wills as religious propaganda: the testament of William Tracy. *Journal of Ecclesiastical History*, 44 (3), 415-431.
- Diduck, A., 2007. If only we can find the appropriate terms to use the issue will be solved': Law, Identity and Parenthood. *Child and Family Law Quarterly*, 19 (4) 1-23.
- Douglas, G., et al., 2011. Enduring Love? Attitudes to Family and Inheritance Law in England and Wales. *Journal of Law and Society*, 38 (2), 245-271.
- Douglas, G., 2014. Family Provision and Family Practices - The Discretionary Regime of the Inheritance Act of England and Wales. *Oñati Socio-legal Series* [online], 4 (2), 222-242. Available from: <http://ssrn.com/abstract=2431005> [Accessed 29 April 2014].
- Fellows, M.L., 1991. Wills and Trusts: "Kingdom of the Fathers". *Law and Inequality*, 10, 137-162.
- Fellows, M.L., Spitko, E.G., and Strohm, C.Q., 2010. An Empirical Assessment of the Potential for Will Substitutes to Improve State Intestacy Statutes. *Indiana Law Journal* [online], 85 (2), 409-448. Available from:

- http://ilj.law.indiana.edu/articles/85/85_2_Fellows.pdf [Accessed 11 April 2014].
- Fellows, M.L., *et al.*, 1998. Committed Partners and Inheritance: An Empirical Study. *Law and Inequality*, 16 (1), 1-95.
- Felstiner, W., Abel R., and Sarat, A., 1980-1981. The Emergence and Transformation of Disputes: Naming, Blaming and Claiming. *Law and Society Review*, 15 (3-4), 631-354.
- Frank, C., 2010. *Law, Literature, and the Transmission of Culture in England, 1837-1925*. Farnham: Ashgate.
- Finch, J., and Mason, J., 2001. *Passing On: Kinship and Inheritance in England*. London: Routledge.
- Finch, J., *et al.*, 1996. *Wills, Inheritance and Families*. Oxford University Press.
- Goose N., and Evans, N., 2000. Wills as an Historical Source. *In*: T. Arkell, N. Evans, N. Goose, eds. *When death do us part: Understanding and interpreting the probate records of Early Modern England*. Oxford: Leopard's Head Press.
- Gordon, D.S., 2010. Reflecting on the Language of Death. *Seattle Law Review* [online], 34 (2), 379-438. Available from: <http://digitalcommons.law.seattleu.edu/sulr/vol34/iss2/2/> [Accessed 10 April 2014].
- Hacker, D., 2010. Soulless Wills. *Law & Social Inquiry* [online], 35 (4), 957-983. Available from: http://works.bepress.com/daphna_hacker/6/ [Accessed 4 March 2014].
- Hasson, E., 2013. 'Where There's a Will There's a Woman': Exploring the Gendered Nature of Will Making. *Feminist Legal Studies online*, 21 (1), 21-37.
- Heaphy, B., 2008. The Sociology of Lesbian and Gay Reflexivity or Reflexive Sociology? *Sociological Research Online* [online], 13 (1). Available from: <http://www.socresonline.org.uk/13/1/9.html> [Accessed 1 April 2014].
- Heaphy, B., Smart, C., and Einarsdottir, A., 2013. *Same Sex Marriages: New Generations, New Relationships*. London: Palgrave Macmillan.
- Horton, D., 2012. Testation and Speech. *Georgetown Law Journal* [online], 101 (1) 61-111. Available from: <http://georgetownlawjournal.org/files/2012/11/Horton.pdf> [Accessed 1 April 2014].
- Humphreys, A., *et al.*, 2010. *Inheritance and the family: attitudes to will-making and intestacy*. London: NATCEN.
- Jaconelli, J., 2012. Wills as Public Documents – Privacy and Property Rights. *Cambridge Law Journal*, 71 (1), 147-171.
- Johanson S.M., and Bay K.F., 1989. Estate Planning for the Client with AIDS. *Texas Bar Journal*, 52, 217.
- Johnson, K., 1987. AIDS victims' Wills Under Attack. *New York Times* [online], 19 Feb, B1. Available from: <http://www.nytimes.com/1987/02/19/nyregion/aids-victims-wills-under-attack.html> [Accessed 1 April 2014].
- Kerridge, R., 2009. *Parry and Kerridge: The Law of Succession*. 12th ed. London: Sweet and Maxwell.
- Law Commission, 2009. *Intestacy and Family Provision Claims on Death: Overview. Consultation Paper No 191 (Overview) 29 October* [online]. London: Law Commission. Available from:

- http://lawcommission.justice.gov.uk/docs/cp191_Intestacy_Consultation_Overview.pdf [Accessed 1 April 2014].
- Law Society in England and Wales, 2014. *Making a will* [online]. London: Law Society. Available from: <http://www.lawsociety.org.uk/for-the-public/common-legal-issues/making-a-will/> [Accessed 1 April 2014].
- Leckey, R., 2011. Law Reform, Lesbian Parenting, and the Reflective Claim. *Social & Legal Studies*, 20 (3), 331-348.
- Leckey, R., 2013. Two Mothers in Law and Fact. *Feminist Legal Studies*, 21 (1), 1-19.
- Leckey, R., 2014. Must equal mean identical? Same-sex couples and marriage. *International Journal of Law in Context* [online], 10 (1), 5-25. Available from: journals.cambridge.org/abstract_S1744552313000347 [Accessed 2 April 2014].
- Leslie, M.B., 1996. The Myth of Testamentary Freedom. *Arizona Law Review*, 38 (1), 235-290.
- Maillard, K.N., 2009. The Color of Testamentary Freedom. *Southern Methodist University Law Review*, 62, 1783-1816. Available from: <http://ssrn.com/abstract=956834> [Accessed 2 April 2014].
- McCreery, P., 2008. Save Our Children/Let Us Marry: Gay Activists Appropriate the Rhetoric of Child Protectionism. *Radical History Review*, 100, 186-207.
- Monk, D., 2011. Sexuality and Succession Law: Beyond Formal Equality. *Feminist Legal Studies*, 19 (3), 231-250.
- Monk, D., 2013. E M Forster's will: an overlooked posthumous publication. *Legal Studies*, 33 (4), 572-597.
- Monette, P., 1990. *Afterlife*. New York: Crown.
- Moran, L., 2009. What kind of field is 'law, gender & sexuality'? Present concerns and possible futures'. *Feminist Legal Studies*, 17 (3), 309-313.
- Morrell, G., Bernard, M., Legard, R., 2009. *The Law of Intestate Succession: Exploring Attitudes Among Non-Traditional Families Final Report* [online]. London: NATCEN. Available from: http://lawcommission.justice.gov.uk/docs/law_of_intestate_succession_research.pdf [Accessed 10 April 2014].
- Olsen, F.E., 1985. The Myth of State Intervention in the Family. *University of Michigan Journal of Law Reform*, 18 (4), 835-864.
- Ronner, A.D., 2003. Homophobia: in the Closet and in the Coffin. *Law and Inequality*, 21 (1), 65-113.
- Roseneil, S., and Budgeon, S., 2004. Cultures of Intimacy and Care Beyond 'the Family': Personal Life and Social Change in the Early 21st Century. *Current Sociology*, 52 (2), 135-159.
- Sedgwick, E.K., 1994. Tales of the Avunculate: The Importance of Being Earnest in Tendencies. In: E.K. Sedgwick. *Tendencies*. London: Routledge, 52-72.
- Sherman, J.G., 1981. Undue Influence and the Homosexual Testator. *University of Pittsburg Law Review*, 42 (1), 225-246. Available from: http://works.bepress.com/jeffrey_sherman/16/ [Accessed 2 April 2014].
- Shonkwiler, A., 2008. The Selfish-Enough Father: Gay Adoption and the Late-Capitalist Family. *GLQ: A Journal of Lesbian and Gay Studies*, 14 (4), 537-567.
- Smart, C., 2007. *Personal Life*. Oxford: Polity.

- Stoller, N. E., 1997. From Feminism to Polymorphous Activism: Lesbians in AIDS organizations. In: M. PLevine, P.M. Nardi and J.H. Gagnon, eds. *Changing Times: Gay Men and Lesbians Encounter HIV/AIDS*. University of Chicago Press.
- The Guardian, 2012. I'm gay and am offended that my friend didn't want me to be the godfather to his son. *The Guardian* [online], 12 February. Available from: <http://www.guardian.co.uk/lifeandstyle/2012/feb/12/gay-not-godather-friends-son> [Accessed 30 March 2014].
- Triger, Z., 2012. Introducing the Political Family: A New Road Map for Critical Family Law. *Theoretical Inquiries in Law*, 13 (1), 361-384.
- Turner, J. 2003. Gay godfathers are chic so why do gay fathers still freak us out? *The Times* [online], 13 September. Available from: <http://www.thetimes.co.uk/tto/law/columnists/article2046021.ece> [Accessed 1 April 2014].
- Waters, D., 2009. Gay godfathers rule. *The Guardian* [online], 4 April. Available from: <http://www.guardian.co.uk/lifeandstyle/2009/apr/04/david-waters-godfather> [Accessed 1 April 2014].
- Watney, S., 2000. *Imagine Hope: AIDS and gay identity*. London: Routledge.
- Williams, C., Potter, G., Douglas, G., 2008. Cohabitation and intestacy: public opinion and law reform. 20(4) *Child and Family Law Quarterly* 499-521.
- Weeks, J., Heaphy, B., Donovan, C., 2001. *Same Sex Intimacies: Families of Choice and Other Life Experiments*. London: Routledge.
- Weston, K., 1997. *Families we Choose*. New York: Columbia University Press.
- Zanghellini, A., 2010. Lesbian and Gay Parents and Reproductive Technologies: The 2008 Australian and UK Reforms. *Feminist Legal Studies*, 18 (3), 227-251.