



SOLOMON HOLLETT LAWYERS

Who funds the contest of a Will?

A COMPREHENSIVE GUIDE



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Who funds a dispute?

The death of a family member or close friend is never easy, and wrapping up the estate can be an enormous task that requires time, diligence and the ability to carefully navigate legal issues that may arise.

You won't be surprised to learn that contesting a Will can be a stressful and complex process that can have unpredictable outcomes. Beyond the emotional toll and the complexity of contesting a Will, the question of cost also comes in. Who pays to challenge a Will? Is it the Will contestant? Is it the challenge defender?

A Will challenge is a legal action taken when there are doubts about the validity of the Will, concerns around the circumstances under which it was created, or if the Will fails to adequately provide for someone the Will maker had a moral obligation to provide for.

Contesting a Will can be difficult for several reasons, one of those being the timing. If you plan to contest a Will by making a Family Provision claim, then you'll have 6 months from the date of the grant of probate to do so. Once a grant of probate is given to the executor, the Will is authorised to be carried out given that there are no questions surrounding the validity.

If you want to contest a Will in Western Australia after the initial 6 months have elapsed, you will need special permission from the Court to do so, which is unlikely to be granted unless there is a compelling reason that an application was not commenced during the 6 month period.

If you are acting as an executor of Will, it is best practice not to distribute the estate until after the 6 month period has elapsed, so that you know there aren't any claims waiting in the wings.

If you're worried about the timing of your claim, it's good to call on a lawyer to ensure the best chances of success.

And who can challenge a Will? Not everyone can contest a Will by making a Family Provision claim. In Western Australia, you can only contest a Will if you are an eligible

person and believe you have been left without adequate and proper provision in the Will.

Here in WA, an eligible person is one of the following:

- A married partner or de facto partner;
- Someone receiving or entitled to receive maintenance from the recently deceased;
- A child of the deceased; or, under certain circumstances
- A grandchild, stepchild or a parent of the deceased.

The Supreme Court looks at these types of claims by breaking them down into a two-limb test. First, the Court will decide if whatever was left to the claimant by the deceased person (if anything) was a proper and adequate provision.

Secondly, the Court (if satisfied that the provision was inadequate) will exercise its discretion to alter the distribution of the estate to ensure that the provision is proper and adequate for the claimant's needs (having regard to a whole raft of factors, including the financial position of the claimant and other beneficiaries, the size of the estate and the relationship between the deceased person and the claimant, among other things).

The costs of challenging a Will

There are financial implications to challenging a Will. The process is not only emotionally taxing but also financially demanding, with various costs potential challengers should be aware of before undertaking the journey.

Legal fees – these are usually the most substantial part of the costs involved in challenging a Will. These can vary depending on the specifics of your case, including:

- Consultation fees: Initial meetings with estate litigation lawyers to discuss the viability and implications of your case.
- Preparation costs: The work involved in preparing your case, including collecting evidence, drafting legal documents, and developing a strategy.
- Representation fees: Costs associated with having a lawyer and/or barrister represent you in negotiations, mediation, and court proceedings. This can include hourly rates or, in some cases, a contingency fee based on the outcome of the case.
- Expert witness fees: If your case requires testimony from expert witnesses (e.g. medical experts on a testamentary capacity), these specialists will charge for their services.

Court fees – Filing a claim to challenge a Will incurs court fees, which are standardised but can differ based on the court's jurisdiction and the specific requirements of the case.

- Filing fees: These are charged for submitting the necessary documents to begin your challenge (but you may get a significant discount if you are a pensioner).
- Hearing fees: Additional costs may be incurred for each court hearing required for your case.
- Administrative costs: You might encounter miscellaneous fees for court services, document handling, or other procedural necessities.

Mediation costs – Before a case goes to trial, parties are often encouraged or required to undergo mediation in an attempt to resolve the dispute amicably. You might have costs including:

- Mediator fees: Professional mediators charge for their services, often by the hour or a flat rate for the mediation session. If the Court orders the parties to attend a Court based mediation, there are also fees associated with this.
- Venue costs: If mediation occurs at a neutral location, there may be fees for renting the space.
- Preparation time: Both parties' legal teams will need to prepare for mediation, incurring additional legal fees.

Who pays to challenge a Will? Who will pay the legal costs? From the court fees to the legal fees, family provision cases or any type of challenge of a Will can get quite expensive for claimants and defendants alike. You may be surprised to learn that according to the Family Provision Act 1972 (WA), the Judge has the final say in who ends up footing the bill for the legal costs incurred – whether each party pays their own costs, or the costs come out of the deceased's estate.

However, while this may invite confusion, it's common for the court to award the claimant their legal costs, provided the claim is successful. Judges will examine whether the claimant has been disadvantaged due to the deceased's failure to adequately provide for them in the Will.

Usually, the costs associated with the executor's work are covered by the deceased person's estate. Of course when discussing your case with us we will be able to confirm this when we meet.



Likelihood of success

Statistics from from our own research and around the country to be aware of include the following.

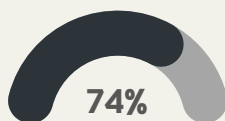
Research we recently undertook revealed that around 42% of Western Australians surveyed had no Will in place, including those with no Will or not sure if they had one. This percentage aligning with the often cited 40% of Australian adults nationally who die intestate (without a Will). Intestacy can be disastrous; even a poorly made Will can yield better results (not that we recommend this strategy, of course). Even an online Will, something derived from ChatGPT or a dusty Post Office kit with odd font choices can serve you better than none at all. Frankly, even scrawling a note on a cocktail napkin and signing it is likely better than not recording your wishes at all, although history tells us time and again this is practically a guarantee of dispute. The bottom line is – don't die without a valid Will, intestacy leaves the door right open for a claim.

The war is from within – 80% of claims come from immediate family. Each year the number of Wills challenged or contested leaps ahead of the last, the majority being contested under Family Provision legislation which is similar nationwide, with adult children the most common claimants in Will challenges. Recent research from the University of Queensland reveals that more than 80% of claims against Wills are brought by immediate family members, with more than 60% of these claims brought by adult children of the deceased, and over 20% by partners or ex-partners.

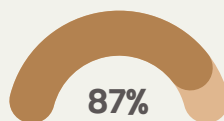
74% of estate challenges succeed. When a challenge does arise, national research reveals there is a very high rate of success, with 74% of cases that go to trial resulting in a change of distribution from what was outlined in the original Will, again the great research from the University of Queensland. Claims by partners and ex-partners were most successful at an 83% success rate, with children at 76%, extended family at 73% and others at 64%. (The category of extended family and others also include other categories of claimants in NSW and Victoria who are not eligible claimants in Western Australia – a cautionary reminder that the laws whilst similar, do vary from State to State).

Mediation works in resolving disputes.

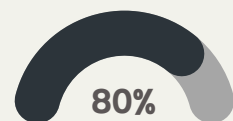
Mediation is the process of structured dialogue and presentation of positions that either comes before going to Court or more commonly, is actively part of the Court process itself. The same Queensland research also revealing that most disputes resolve during mediation and don't end up going to trial, with around 87% of mediations resulting in changes to the original distribution set out in the deceased's Will. Mediation is successful because it is a cost effective and efficient way to dispose of claims, because the alternative of going to trial can be long, drawn out, very expensive and with no certainty of success.



Percentage of cases going to courts nationally involving a change of distribution from what was outlined in the original Will



Percentage of cases going to mediation nationally involving a change of distribution from what was outlined in the original Will

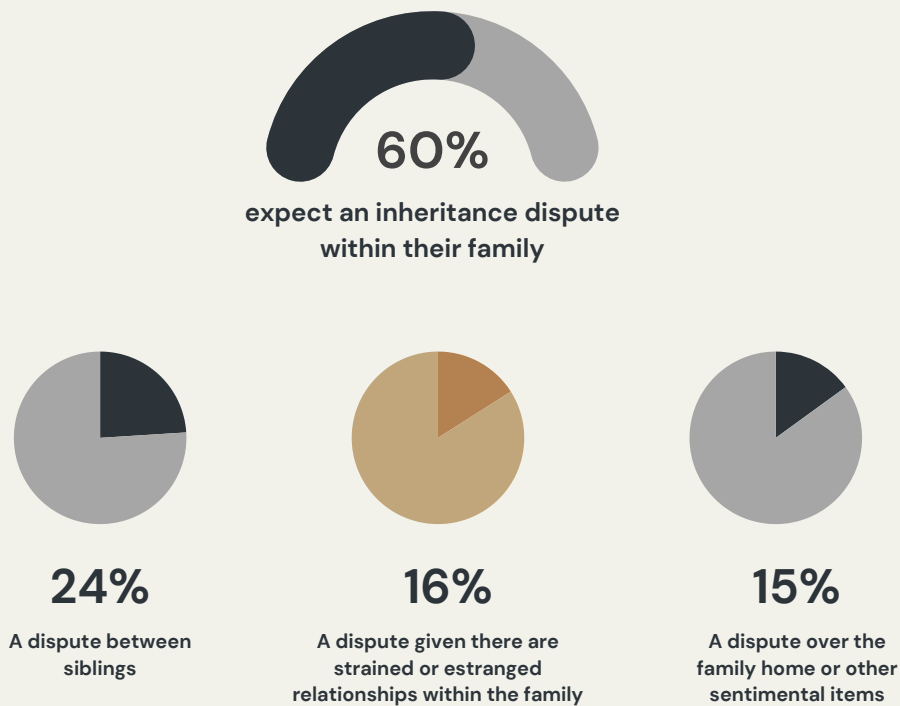


Percentage of claims against Wills going to courts nationally which are brought by immediate family members

Types of disputes

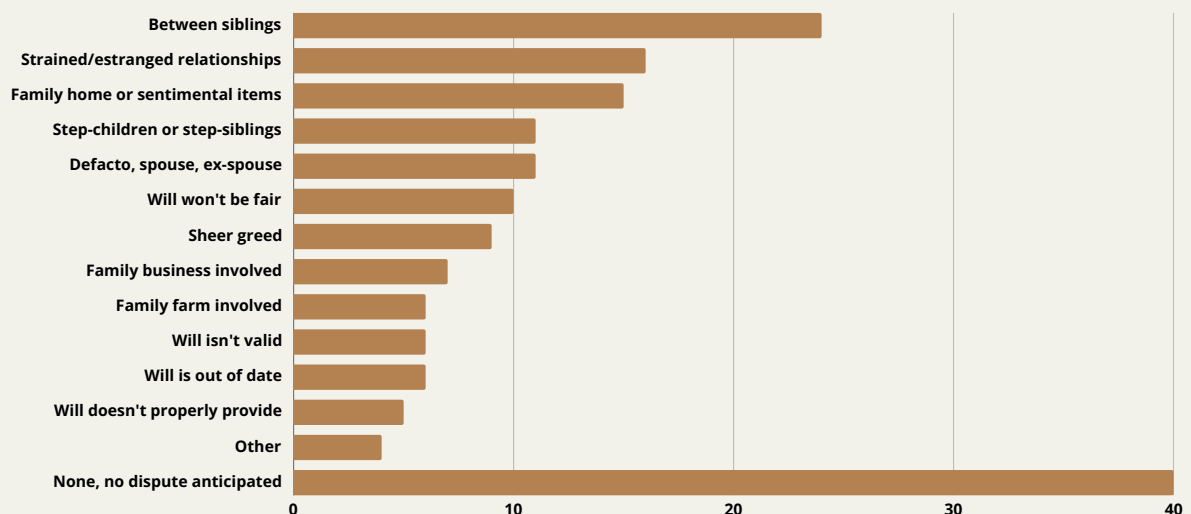
Recent Solomon Hollett research findings

What types of inheritance disputes Western Australians are anticipating within their families?



What types of disputes do you anticipate?

(Multiple options – presented in percentage form)



Types of disputes

Recent Solomon Hollett research findings

What types of inheritance disputes Western Australians are anticipating within their families?

Inheritance disputes are high on the agenda for Western Australians and are often publicly on display through the dynastic turmoil of prominent families on the front pages for all the wrong reasons in recent years, increasing wealth and complexities in all levels of family, business and asset structures creating greater awareness of the possibility and potential for dispute.

Even so, we were alarmed by the percentage of respondents anticipating an inheritance dispute within their own family. It's an extraordinary percentage.

Our best guess was that perhaps 25% had contemplated the likelihood of dispute, but the survey revealed 40% did not see a dispute looming – and, disturbingly, a whopping 60% who are anticipating an inheritance dispute.

There is a positive here in that it indicates a high awareness of risk, although a negative result in that it illustrates the likelihood and propensity for great trouble when no action is taken to course-correct prior to death or loss of mental capacity.

Statistical associations between age, income, parental and relationship status were explored in the survey with each of the inheritance concern, wealth aspiration and anticipated inheritance dispute responses.

Only one notable pattern of difference across these subsets of respondents emerged – which is that respondents around age 44 were least likely to anticipate an inheritance dispute and those around 59 in age most expectant of such a dispute.

Evaluating the root causes of these anticipated disputes reveals that 24% of respondents see a potential dispute between siblings, 16% due to estranged or strained relationships within the family, and 15% over sentimental items including the family home.

Complex family dynamics and structures were also significant factors, with 10% of Western Australians anticipating a dispute between spouse, ex-spouse or de facto spouse, and a similar percentage predicting issues with step-children or step-siblings. Many concerns identified in verbatim comments revolved around mental health issues in younger generations, and favouritism of heirs based on personal relationships rather than family ties.

Interestingly, 6% of respondents anticipated disputes because there was a farm in the family, and 7% of respondents due to a family business – and although these appear smaller percentages, they are high on our radar given that they probably represent those in the survey who are involved in family businesses and farming enterprises.

In reality, we would suggest it is possible that many people in these categories would have some awareness that the family farm or business puts them in high-risk territory for family disputes. Additionally, the value proposition in family businesses and farms is usually high, with much greater financial stakes and long-term viability of the business at play.

Types of disputes

Recent Solomon Hollett research findings

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A more modest 5% based their anticipation of a dispute on the Will not making proper provision. This is a very fascinating statistic for analysis as the concept of making proper provision for a beneficiary is the foundational plank of any claim being brought to challenge a Will under the Family Provision legislation in WA.

This again points to a lack of succession literacy in WA, and a foundational misunderstanding of the risks and realities of challenging Wills.

Again, the analysis of the written comments and verbatims was deeply revealing. For the 40% of Western Australians surveyed who were not anticipating a dispute, the essential reason why not came down to siblings in their family getting along; everyone having seen the Will and it being well socialised; independent children with no need or expectation for provision; families with only one child; legal advice being taken on board; the fact beneficiaries know what is coming down the line ahead of time having had the benefit of plenty of discussion; and that all sentimental or emotionally-charged items have already been distributed during lifetime.

Of concern is the volume of comments around dispute being unlikely because of a belief that siblings presently enjoyed a good relationship. Whilst siblings may have loving and sound relationships, it is often the spouses and partners of the beneficiaries who are the genesis of disputes.

Similarly, many respondents stated they believed that Wills making equal distributions amongst beneficiaries would lead to fewer disputes. However, many inheritance disputes we see revolve around the tenet that equal isn't always considered right and proper – and in the Court's eyes beneficiaries' different financial circumstances and competing needs are the basis for awarding differing amounts to warring beneficiaries, and equality in a Will does not prevent a challenge at all.

Not surprisingly, concerns amongst respondents grow as age increases – with 32% of 35–54s expecting a dispute and this doubling to 64% for those aged 70 and over.

Interestingly, the highest numbers of anticipated disputes our research revealed are both in the higher income brackets where there is more to fight over, and in the lowest income brackets where even the smallest amounts can be life-changing to beneficiaries.

In households with over \$200,000 in annual income, 74% expect a dispute, 58% in the \$150–\$200K bracket, 73% in the \$100–150K bracket, and an alarming rise to 83% in the \$60–100K bracket.

A few further considerations

What factors influence the court's decision on cost allocation?

- The conduct of the parties: This includes both the challenger's and the defender's behaviour before and during the litigation. Unreasonable conduct, such as refusing a reasonable settlement, may influence the court to order that party to pay the costs.
- The success of the challenge: If the challenge of the Will is successful, the court might order the estate or the defender to pay the challenger's legal costs. However, success does not guarantee an award of costs, especially if the court finds the success partial or the challenge only marginally justified.
- The nature of the relationship: The closeness of the relationship between the challenger and the deceased can also be a factor, particularly in family provision claims where the court considers the moral duty of the deceased to provide for the challenger.

If you're challenging a Will, it's crucial to understand these potential costs, but also manage them effectively. Here are a few strategies:

- Initial consultation: Take advantage of our free 15-minute initial consultation to get a clear estimate of the expected costs tailored to your specific situation.
- Budget planning: You can work with your legal team to develop a budget plan, considering all possible expenses to avoid unexpected financial pressures.
- Cost-benefit analysis: What are the potential benefits of challenging the Will? What are the likely costs? Consider both the financial and emotional aspects when weighing up these things.
- Alternative Dispute Resolution (ADR): Explore mediation and other forms of ADR as a means to potentially reduce costs before commencing court proceedings

When it comes to family estates and inheritance disputes, forward-planning and security are everyone's best friends. Here at Solomon Hollett Lawyers, our experience tells us that getting ahead of the game cannot be underestimated.

That's why our dedicated team of estate and succession lawyers is ready to apply extensive experience, put the right strategies in place and get you the right outcome.

We act on behalf of anyone who feels they have been left out of a Will or testament as well as executors and beneficiaries who want to defend against predatory attacks.

Whether you've been completely or partially excluded, worried about the timeline, costs, or just need answers now about contesting a Will, get in contact with our team and take advantage of our free 15-minute initial consultation. We're here to help you keep what's rightfully yours.

About Solomon Hollett Lawyers

THE TEAM BEHIND THIS GUIDE

We are a highly experienced, highly regarded and awarded team of lawyers, here to help Western Australians with the right advice to protect their assets and secure their legacies.

We deliver top quality legal advice, strategies and representation, helping our clients get ahead and achieve the right outcomes across succession law Wills and estate planning, inheritance disputes, commercial law and commercial disputes.

We trust you've gained valuable insights from this Guide – we look forward to staying in touch.





SOLOMON HOLLETT LAWYERS

Succession law + Wills and estates + Inheritance disputes
Commercial law + Commercial disputes

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This guide is not intended to and does not constitute legal advice and must be treated as a general guide only. Please note: the content is based on Western Australian law, and that succession laws differ from State to State within Australia. The information and commentary is subject to change, and general in nature and may not take into account your particular circumstances.

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