



NSW Trustee
& Guardian

A Guide for Wills, Estates and Trusts



*NSW Trustee & Guardian has the
expertise to write a Will for you
and ensure your wishes are
properly documented
and carried out.*

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Please note: The fees outlined in this brochure are current at the time of publication. For any changes to the fees charged by NSW Trustee & Guardian the information will be made available via our website www.tag.nsw.gov.au

NSW Trustee & Guardian provides professional services in Will making, Powers of Attorney, Trusts and Estate Administration. We offer the expertise of accountants, trust managers, taxation and investment specialists on staff.

What is a Will?

A Will is a legal document that sets out who (known as beneficiaries) you want to receive your assets when you die. Making a Will is the only way you can ensure your assets will be distributed according to your wishes when you die.

What happens if I die without a Will?

If you die without a Will it means you die 'intestate'. Without a valid Will, no one knows who you wanted to inherit your assets and sentimental items. Your assets will be distributed according to a formula set in NSW intestacy law, the *Succession Act 2006*.

Also, the law does not provide for gifts to friends or charities, or arrangements you may want to make for cultural or religious reasons. There is no allowance for pets, but if you have a pet you probably want to ensure it is cared for if something happens to you.

If you are in a de-facto or same sex relationship, it is necessary to supply sworn evidence that the relationship existed. This can be expensive and distressing at a time when loved ones are grieving. It is much easier to draft a Will naming your partner as a beneficiary.

Can I prepare my own Will or use a do-it-yourself Will kit?

We do not recommend preparing your own Will. If a Will does not conform to strict legal requirements the courts may decide it is not valid and it will be as if you didn't have a Will.

Without understanding the legal requirements you may risk making a mistake, creating uncertainty or losing opportunities for good estate planning.

The precise wording of a Will is a specialised and important legal task. Unclear wording is extremely common in home made Wills and may result in substantial cost and delay in having the Supreme Court decide what the person making the Will wanted.

A Will is an important legal document. It is therefore advisable to have your Will drafted by people with expertise who can ensure your wishes are properly recorded and carried out.

Where should I keep my Will?

A Will can only be used if it can be found when required. It is important to store your original Will in a safe place. It's a good idea to tell someone close to you where your Will is stored. There have been many instances where family and friends were aware that a Will existed but they were unable to locate it when it was required. The Supreme Court of NSW requires a person's original Will in order to grant probate. If the original Will can't be found, the starting position of the Court is that the deceased person did not have a Will.

NSW Trustee & Guardian Will Safe provides secure storage for important planning ahead documents whether it is a Will, Power of Attorney or Enduring Guardianship Appointment. Electronic copies are made for added security and documents are easy to retrieve when required.

Will Safe Storage Fees (including GST)	
Single document deposit (Will, Power of Attorney or Enduring Guardianship)	\$29
Deposit up to three documents	\$49
Deposit up to three documents for NSW Seniors Card holders	\$29

For clients who appoint NSW Trustee & Guardian as their executor or attorney (including substitute) document storage is free of charge.

How do I ensure my Will is valid?

For a Will to be valid it needs to comply with certain criteria:

- unless married, you must be over 18 years old (the Supreme Court can approve a Will for people under 18 only in exceptional circumstances)
- it must be in writing – it can be handwritten, typed or printed
- it must be signed by the person making the Will and witnessed by two or more witnesses (beneficiaries should not be a witness as it may cancel out their entitlement)
- you must have ‘testamentary capacity’. This means you:
 - know the legal effect of a Will
 - must be aware of the extent of your assets
 - must be aware of the people who would normally be expected to benefit from your estate
 - must not be prevented by reason of impairment from reaching rational decisions as to who is to benefit from your Will.

At NSW Trustee & Guardian we will ensure areas covering testamentary capacity are addressed in the process of drafting a Will and we will provide impartial witnesses. We are also able to provide advice in relation to estate planning and who may contest your Will.



How often should my Will be revised or updated?

Your Will expresses your wishes at a particular point in time. You should regularly review your Will as your life circumstances change so that it accurately reflects your current wishes.

Situations where you may want to update your Will include:

- welcoming new children or grandchildren into your family
- marriage
- separation or divorce
- starting a defacto relationship
- your children having remarried or divorced and have extended families
- the executor named in the Will having become ill, is unable to handle the responsibility or has died
- a beneficiary named in the Will having died: when writing your Will, it is wise to name substitute beneficiaries
- death of spouse
- the value of legacies diminishing over time: while you may have left a sum of money that seemed significant when you last made your Will, what is it worth in 'today's' dollars?

- retirement often results in people restructuring their affairs. This is an ideal time to be proactive in your estate planning and possibly look at setting up tax effective arrangements through your Will
 - when you buy or sell assets: there are many examples of people gifting assets which they sold before they died. This resulted in some beneficiaries receiving nothing, while others received significantly more than was intended in the original Will.
-

If I get married or divorced does that affect my Will?

If you marry after you have made a Will, the Will is generally revoked or cancelled, unless it was made in anticipation of marriage. Similarly, if you divorce after you make your Will, it only revokes or cancels any gift to a former spouse. It also cancels your former spouse's appointment as executor, trustee or guardian in the Will unless the former spouse is trustee of property left on trust for beneficiaries that include children of both you and your former spouse. However, this won't apply if the Court is satisfied that the Will maker did not intend by divorce to revoke the gift or appointment. Those issues require specific legal advice.

Who can contest my Will?

While you are entitled to leave your assets to anyone you wish, in some circumstances, friends or relatives who believe they have not been sufficiently provided for are entitled to contest your Will.

People who can contest your Will under the *Succession Act 2006* are not restricted to your spouse and children. Claimants can include a defacto partner and former spouse. It may also include grandchildren and people who have lived in the same household as you, if they are able to show that they have been dependent on you.

The person needs to convince the Court that they should receive a share or greater share of your estate, based on their 'need'.

An increasing number of people now have complicated family structures such as blended families and second marriages. This may increase the likelihood of your Will being contested.

At NSW Trustee & Guardian we can advise you about the best way to address possible challenges.



What is an executor and trustee and what do they do?

An executor of a Will carries out the wishes of a person after they die. The role of the executor is to manage the estate within the terms of the Will and protect the assets of the estate. A trustee looks after ongoing bequests to family and friends for a specific time stated in a Will – for example a trust for your children or grandchildren. The executor and trustee must comply with various laws and rules that govern the administration of deceased estates and trusts.

An executor's duties do not necessarily cease when the final distributions have been made. This can occur where assets are held for children, where income from an estate is payable to its beneficiaries during their lifetime, there is a life interest in an estate or a long term trust is set up by the Will. They may have to continue in the role of trustee until the trust ends or funds are used up.

Because the trustee is often required to manage assets over a long period there is a vital need for permanency and financial management skills. If you are holding funds as a trustee you can retire and appoint a new trustee. NSW Trustee & Guardian is able to act as trustee for you and offers both perpetuity and prudent financial management for ongoing trusts.

Many people when nominated as an executor are unsure of what is expected of them. The steps that an executor needs to take when administering an estate are outlined on the next page.

Locate Will

Make funeral arrangements (if required)

Preliminary meeting with family and business associates

Advise beneficiaries and ascertain immediate needs of the family

Protect assets

Protect business interests

Collect valuables and income

Insure all property

Keep surplus funds invested

Determine assets and debts, and prepare statement detailing these

Personal effects

Securities

Real Estate

Property outside
NSW

Cash

Business
interests

Debts due

Debts owing

Apply to Supreme Court for a grant of probate
and attend to legal formalities

Realise assets to pay liabilities
including income tax to date of death

Prepare accounting and tax
information for beneficiaries

Distribution of Estate

Establishment of Trusts

Pay legacies and hand over
specific bequests

Transfer funds or assets
to beneficiaries

Obtain receipts

Prepare final statement
for beneficiaries

**Continuing Administration and Asset Management
(if required e.g. to manage longer term trusts)**

When appointing an executor, you should ensure that he or she has the time and capability to carry out the required duties.

As you can see, being someone's executor can be complicated and a lot of work, often requiring an understanding of complex legal, financial and taxation matters. The person you appoint as executor is not legally obliged to accept the appointment. They may not be willing or able to undertake the duties, responsibilities and liabilities the role entails and may decide to appoint another person to act in their place. It is important to talk to your proposed executor to see if they are willing to be appointed.

Who should I appoint as my executor and trustee?

Many people appoint a friend or relative as their executor. They may do this as a compliment, a way of acknowledging their respect and admiration for that person. The reality is that they are left with the stress and responsibility involved in administering your estate at a time when they may be grieving.

Appointing an executor is not a favour that you give to a friend or relative. It is an important personal responsibility that can be time consuming, challenging and requiring complex decisions. When appointing an executor, you should ensure that he or she has the time and capability to carry out the required duties. It is advisable to avoid appointing someone who is a beneficiary and may have a conflict of interest. It is also unwise to appoint an executor who is your age or older than you, to reduce the possibility that they die before you. It is also best that you do not nominate executors who live overseas or interstate as this can cause delays and complications when administering the estate.

Why should I make my Will with NSW Trustee & Guardian and appoint them as my executor and trustee?

As being an executor is a complex and time consuming task, it is wise to appoint a professional executor such as NSW Trustee & Guardian. This minimises the workload and burden on your family and friends at a difficult time.

We have been administering estates for over 100 years and are experts in estate management offering a full estate administration service. As professional executors we have a range of staff specialising in estate and trust management, legal, financial and accounting services and are therefore fully equipped to deal with any problems that may arise during the course of administering the estate.

Our expertise in estate management is especially valuable in:

- providing impartiality in managing disputes between family members in relation to inheritances – ensuring that you will not be caught in the middle or exposed to any liability
- managing any long term trusts created by the Will
- administering overseas assets
- handling income and trustee tax issues.

Additionally:

- we have extensive interstate networks through other public trustees
- our in-house genealogy department is able to trace those people entitled as beneficiaries under a Will and next of kin who are entitled to assets in an intestate estate, potentially reducing the time necessary to administer the estate. It also reduces the risk and legal consequences of distributing the estate to the incorrect people
- all money received from an estate or trust is held in an account called the NSW Trustee & Guardian Common Fund, and earns interest calculated on daily balances which is credited to each account in June and December each year
- NSW Trustee & Guardian is a perpetual organisation so we will always be around to ensure that the instructions of the Will are properly carried out.



What does it costs to prepare a Will and Power of Attorney?

When we prepare your Will and Power of Attorney, you can choose us as your executor and attorney, or someone else of your choice.

Preparation services are provided free for people on a full Centrelink Age Pension.

Fees (including GST)	Will	PoA*	PoA + Will
Document preparation	\$330	\$220	\$440
NSWTG document update	\$220	\$165	\$330

*Power of Attorney

How do NSW Trustee & Guardian costs differ from a solicitor?

Our fees for administering an estate are set by government and are structured differently to charges a private solicitor makes. This is because we operate under different legislation.

The costs charged by a private solicitor are usually separated into the costs of obtaining the grant of probate or administration, and secondly the costs of administering and distributing the estate. The costs that can be charged by private solicitors for the grant of probate or administration are fixed by legislation and are often referred to as scale costs.

The scale costs cover work that is necessary to obtain the grant but there is often work carried out by solicitors to obtain the grant which falls outside of the scale costs (for example, sorting through estate papers and obtaining valuations or appraisals) and solicitors are entitled to charge separately for that work.

A private solicitor's charges for handling an estate will normally include the scale costs, costs for any additional work outside of the scale and costs for administering the estate.

It's very difficult to compare NSW Trustee & Guardian's charges with costs charged by a private solicitor. Many solicitors charge on a 'time spent' basis and the amount of time spent will depend on numerous factors, such as the complexity of the estate. Some solicitors charge higher hourly rates than others so the fees charged by one solicitor may be quite different to another.

If I am a trustee or executor, can I hand over my responsibilities?

As you can see from the information provided, the responsibility of a trustee is continuing, complex and involves many obligations.

If you're a trustee or executor, you can ask us to take over the administration from you. This will mean the beneficiaries will get the benefit of a professional trustee for the term of the trust.

Fees for deceased estate administration

Deceased estate administration involves carrying out a person’s wishes as set out in their Will, and distributing the assets of their estate. NSW Trustee & Guardian fees are competitive and are set by government. Our fee includes both work done to obtain a grant of probate or administration, and the work to administer and distribute the estate. The fee incurred is based on the value of solely owned assets in the estate. Joint assets, such as bank accounts or a house will not attract a fee. The fees are set out in the following table:

Fees (including GST)	
One-off executor fee	Based on asset values: 4.4% on the first \$100,000 3.85% on the second \$100,000 2.75% on the third \$100,000 1.65% any amounts over \$300,000 Minimum fee of \$220
Estate management	0.77% per year on value of assets held
Account keeping	\$132 per year
Investment	0.11% per year of value of assets invested in NSWTG investment funds

Additional fees may apply including: fees for the investigation and lodgement of tax returns, a fee to cover the legal work involved for transferring property to surviving joint tenants.

If your solely owned assets are a family home or a rollover of superannuation inherited by your spouse/partner the commission will be reduced to 1.1% if the value of the family home or superannuation is over \$100,000. If the value is less than \$100,000 there is a minimum fee of \$1,100 (incl. GST) or 2.2% of the value (whichever is the lesser). No commission is charged on assets owned as joint tenants. A fee of \$330 (incl. GST) plus out of pocket expenses is necessary to cover the legal work involved for transferring property to surviving joint tenants.

For the investigation and lodgement of tax returns a minimum fee of \$275 (incl. GST) up to one hour applies, plus up to maximum \$220 (incl. GST) per hour for extra hours required.

All money received from an estate, trust or Power of Attorney is held in an account called the NSW Trustee & Guardian Common Fund, and earns interest calculated on daily balances which is credited to accounts in June and December each year.

Helping you understand Trusts

A trust is a relationship based on confidence between you (the person creating the trust), a person holding property (the trustee), and a person to receive benefit from the property (the beneficiary).

A trust is created either by a Will, by a deed or a court order:

- a trust created by a Will is called a testamentary trust, and becomes effective from your death.
- in contrast, a trust created by a deed is effective in your lifetime.

The benefits of a trust are:

- provides for continuing support for a beneficiary including a charity
- provides tax effective estate planning.

What types of trusts are created and administered by NSW Trustee & Guardian?

Trusts for children

Trusts for children can be created as simply as making a gift to a child in your Will. If you die before that child reaches 18 years of age (or an older age you have specified) the gift is automatically held in trust for the child until they reach that age. While the funds are held in trust they can be used for the child's benefit, such as for education and living expenses or you can specify in your Will restrictions on how the funds can be used. It is important to choose a reliable trustee to ensure that the funds are wisely invested and available for the use of the child.

Trusts for adults not able to manage their own finances

Trusts for adults can be an extension of a trust created for a child, if that child does not have the capacity to manage their own affairs when they turn 18. These types of trusts can continue for a very long time, if the person is only young when the trust is created – they are often created to continue until the person dies. Again the choice of trustee is very important as it can be a very long and onerous process with ongoing investment responsibilities.

Family Discretionary Trusts

These trusts give the trustee discretion in the way income and/or capital is applied for the benefit of the trust recipients, who are referred to as the beneficiaries. They require a trustee to be responsible and flexible, working together with your beneficiaries. The simplest form of this trust provides for the income to be split equally between your beneficiaries with a discretion for the trustee to vary the way in which capital is used, depending on the purposes you specify. A more complex version of this trust allows the trustee to split the income and/or capital between your beneficiaries depending on what is most tax effective. This would require consultation and co-operation with your beneficiaries and their tax advisers.

Ultimately, the assets in the trust are either used up over the term of the trust for purposes you specify or gifted to your beneficiaries when the trust ends, such as a set date or when the last beneficiary reaches a specified age.

Family Discretionary Trusts are often used to manage family succession over two generations when protecting assets against family disputes and marriage breakdown. These types of trusts can also be created during your lifetime but there are additional tax advantages where the trust is established in your Will.

Charitable Trusts

You may wish to provide long term benefit to charity by providing tax free income from your estate, rather than giving an immediate gift. This type of trust is effective if large amounts of money are involved and the purpose of the gift suits a long term benefit, for example, scholarships or medical research.

Given these trusts can continue in perpetuity or for as long as there are funds sufficient for the purpose of the trust, NSW Trustee & Guardian is well placed to be there for as long as the trust continues.



Special Disability Trusts

Special Disability Trusts are a relatively recent addition to trusts, created by federal government legislation. These trusts attract social security means test concessions for the beneficiary and eligible contributors. The purpose of the trust is to assist immediate family members and carers to make financial provision for the current and future care and accommodation needs of a family member with a severe disability and receive means test concessions. These types of trusts can be set up during your lifetime or established through your Will when you die.

The beneficiary must be assessed by Centrelink as eligible and this should be done before the trust is created, to ensure that the person with a disability meets the strict criteria. It is also important to consult with a financial advisor and have a professional prepare the Special Disability Trust Deed. There are ongoing reporting obligations for these trusts.

What does it cost to set up a trust?

If NSW Trustee & Guardian administers an estate including an continuing trust, the one-off trustee fee is not charged. If setting up a new trust or transferring a trust to NSW Trustee & Guardian the one-off trustee fee is charged.

Fees (including GST)	
One-off trustee fee	Based on asset values: 3.85% on the first \$100,000 2.75% on the second \$100,000 1.65% on the third \$100,000 0.55% any amounts over \$300,000 Minimum fee of \$220
Trust management	0.77% per year on value of assets held (excluding the principal place of residence)*
Account keeping	\$132 per year
Investment	0.11% per year of value of assets invested in NSWTG investment funds

*For some categories of trusts, including but not limited to testamentary, inter vivos, trusts for sale, or trusts resulting from a family provision claim, the principal place of residence is included in the asset total.

For the investigation and lodgement of tax returns a minimum \$275 (incl. GST) up to one hour and up to \$220 (incl. GST) for additional hours if required. Our annual investment planning fee varies depending on the value of the trust we manage.

Additional fees

Our fees do not cover costs from other organisations e.g. banks, valuers and services related to real estate assets including buying and selling; ongoing fees to manage assets held in trust; and out of pocket expenses such as postage, phone and photocopying.

There may be further costs for additional work, for instance if there is legal advice required, overseas assets involved, the entitlement or Will is contested, or we have to search for missing beneficiaries and/or prepare family trees.

A full schedule of NSW Trustee & Guardian fees is available on our website www.tag.nsw.gov.au/fees



What do I do next?

NSW Trustee & Guardian recommends you review your Will every five years or as your life circumstances change. Your Will expresses your intentions according to your circumstances at a particular point in time. It is therefore important to make or update your Will to accurately reflect changes in your circumstances, such as:

- marriage
- separation or divorce
- new assets purchased
- assets being sold
- birth of new children or grandchildren.

This also allows you to take advantage of the many opportunities for creating trusts in your Will. If you would like to make or update your Will and discuss setting up a trust, please contact us on **1300 364 103**. NSW Trustee & Guardian has experienced trust, legal and taxation officers to provide the information you need. Staff are happy to spend time with you to provide independent advice to clarify the benefits of planning ahead for you, your family and friends. You can also start your Will online at **www.tag.nsw.gov.au**

Plan Ahead with NSW Trustee & Guardian

You can make your Will, Power of Attorney and Enduring Guardianship documents at a plan ahead day or one of our branches. We regularly hold plan ahead days at community venues across NSW. Check our website for upcoming plan ahead days in your area www.tag.nsw.gov.au/planahead

There is an agent for NSW Trustee & Guardian at every Local Court in NSW. Service NSW Centres also offer information on NSW Trustee & Guardian services.

Branches

- Bathurst
 - Broken Hill
 - Lismore
 - Newcastle
 - Parramatta
 - Port Macquarie
 - Sydney CBD
 - Wagga Wagga
 - Wollongong
-

Services

- Will Making
- Will Safe Storage
- Power of Attorney
- Enduring Guardianship
- Trust Administration
- Deceased Estate Administration
- Financial Management

Contact us

1300 364 103 *(local call cost only)*

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www.tag.nsw.gov.au



**NSW Trustee
& Guardian**