

# Wills, Estates and Trusts

A guide to planning for the future

A Will is one of the four important ways to plan ahead:



**Will**



**Power of Attorney**



**Enduring Guardianship**



**Advance Care Directive**



**NSW Trustee  
& Guardian**





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## About NSW Trustee & Guardian

NSW Trustee & Guardian protects, promotes and supports the rights, dignity, choices and wishes of the people of NSW, including some of the state's most vulnerable people.

We do this by providing a range of services including Will-making, trustee, financial management and guardianship services.

We offer independent and impartial attorney services and have the expertise of solicitors, accountants, trust managers, tax and investment specialists.

## Key terms used in this section

### **Assets**

Things you own such as belongings, bank accounts, property, shares and investments.

### **Beneficiaries**

People and organisations that will receive or benefit from your assets.

### **Contesting a Will**

A formal objection against a Will.

### **Estate**

All of your assets.

### **Executor**

A person or organisation who administers your estate, within the terms of the Will, after you die.

### **Gifts**

The assets or benefits you leave to people in your Will.

### **Intestate**

Not having a valid Will when you die.

### **Probate**

Official recognition from the Supreme Court that a Will is legally valid and there is permission to administer the estate.

### **Revoke**

Officially cancel.

### **Spouse**

Husband or wife.

### **Testamentary capacity**

The legal term used to describe a person's legal or mental capacity to make or update a valid Will.

## Wills

### Your Will

A Will is an important legal document that sets out who you want to receive or benefit from your assets when you die. Making a Will is the best way to help ensure your assets will be distributed to your chosen beneficiaries, according to your wishes.

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

- you must be over 18 years old (the Supreme Court can approve a Will for people under 18 in limited circumstances)
- it must be in writing – it can be handwritten, typed or printed
- it must be signed by you or by someone at your direction, if you are unable to sign 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.



## SAM'S STORY

*Sam filled in a 'do-it-yourself' Will form intending to leave the whole estate to his wife Miranda. He inserted Miranda's name in the section of the form appointing her the executor but forgot to insert her name in the section for nominating a beneficiary. This meant Sam had actually left his entire estate to nobody.*



## Why it's important

Without a valid Will, no-one knows who you wanted to inherit your assets and sentimental items. This means you will be dying intestate.

When this happens, your assets will be distributed according to a formula set out in the *Succession Act 2006* which may not be in keeping with your wishes. This law defines which family members are entitled to your assets and what portion of your estate they are entitled to receive.

If you die without a valid Will the law does not provide for gifts to friends or charities, or any religious or cultural arrangements you may want to make. There is no allowance for pets, who can also be important members of your family.

## Do-it-yourself Wills

It is not recommended that you prepare your own Will. If a Will contains unclear wording, or does not conform to strict legal requirements, the Supreme Court may need to determine what it means, or whether or not it can be accepted as a valid Will. This can result in large legal costs, delays and there is a risk your wishes may not be carried out.

It is better to have your Will professionally prepared by someone that knows the legal requirements and can ensure your wishes are properly recorded. This gives you the opportunity for good estate planning. There are tax considerations that an

estate specialist can discuss with you. More complex family arrangements may also need to be carefully planned for in a Will.

## Making your Will with us

When you book an appointment with us, you will be invited to a face-to-face meeting, where you will be able to talk through your wishes and NSW Trustee & Guardian staff can provide advice. We ensure all areas of testamentary capacity are addressed in the process of drafting a Will and we provide impartial witnesses.

When we prepare your Will you can choose us as executor or someone else of your choice.

## Updating a Will

You should review and update your Will when there are major changes in your life. We also recommend you review your Will about every five years in conjunction with a professional, even if you haven't had a significant life event. This will ensure the Will is still in accordance with your wishes and any changes in the law can be considered.

Situations where you should review your Will and may need to update it include:

- welcoming new children or grandchildren into your family
- relationship changes – starting a de facto relationship, marriage, separation or divorce

- your children remarrying or divorcing and having extended families
- the executor named in the Will dying, or no longer being able or willing to handle the responsibility
- a beneficiary named in the Will dying
- death of your 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 actively consider your estate planning to ensure you have the most effective arrangements in place
- when you buy or sell assets – there are many examples of people gifting assets in their Will but then selling them before they die. This results in some beneficiaries receiving nothing, and others receiving significantly more than was intended in the original Will.

## Relationship changes and your Will

When a significant change in your relationship occurs, if you don't update an existing Will or have one written, it can affect who inherits your estate when you die.

If you're living in a de facto relationship at the time of your death and you don't have a valid and up to date Will, the need to prove the relationship can result in additional expenses and distress to your partner at a time when they are grieving.

Separation and divorce are also important life triggers. In NSW, if you are separated and you pass away without having updated your Will, your spouse may inherit any gifts you leave them. Similarly, if you appointed them as your executor, they may still be entitled to take up that role even if you no longer want them to.



## Contesting a Will

Friends or relatives who believe they have not been sufficiently provided for, may be 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 de facto partner, former spouse, 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.

We can advise you about the best way to address these possible challenges.

## Storing your Will

It is important to keep your original Will in a safe place. The Supreme Court of NSW requires a person's original Will in order to grant probate. If your original Will can't be found, this will cause delay and significant expense and your wishes may not be carried out.

We offer a service called *WillSafe* that provides secure storage for your Will. Electronic copies are made for added security and documents are easy to retrieve when required.

## Have you considered your digital assets?

It's easy to overlook things when you're preparing a Will. One example you may not have considered is your digital assets.

For example, if your executor is unaware of website subscription fees, or bills that you pay automatically online, your estate may be paying for things unnecessarily after you're gone.

It's important to document all of your digital assets, regardless of value. Not doing so could cost your estate money.

Some of the most common digital assets you may need to think about include:

- Emails, blogs and social media accounts, e.g. Facebook, Twitter, LinkedIn
- Domain names and web servers
- Photo/video storage. e.g. YouTube
- Online banking and other financial products
- Reward programs, e.g. Flybuys
- Online retail and payment systems, e.g. eBay, PayPal, Amazon, iTunes
- Computer hard drives and passwords

## Key terms used in this section

### Conflict of interest

A person is in a position to get personal benefit from the actions or decisions made in their official capacity.

### Estate planning

Preparing for the transfer of assets and wealth after death.

### Executor

A person or organisation who administers your estate, within the terms of the Will, after you die.

### Life interest

Where a person has use of property for their lifetime and after their death the property passes to other beneficiaries.

### Renounce

Formally give up the role.

### Trustee

A person or organisation administering a trust on behalf of the person who created it. They manage the assets within the terms of the trust.

## Estate Administration

### Choosing an executor

When you have a Will drafted, you need to consider who you would like to appoint as your executor. This is the person or organisation responsible for administering your estate within the terms of the Will when you die.

Many people appoint a friend or relative as their executor. The reality is the executor is left with the stress and responsibility of administering your estate at a time when they may be grieving.

It is important to ask the person you choose if they are willing to take on the role. Do they have the time and capability to carry out everything that needs to be done? Can they cope with making complex decisions?

Some of the things you should consider:

- Choosing an executor who is not a beneficiary as they may have a conflict of interest.

- Where your executor lives. Are they in the same state and country as you?
- If a trust is created by a Will, you will also need to appoint a trustee to administer the trust.

### What executors and trustees do

Executors and trustees must follow the laws and rules that govern the administration of deceased estates and trusts. Their duties don't necessarily stop after the Will has been administered as there may be ongoing responsibilities, such as when assets being held for children, a life interest in an estate or a long term trust that was set up in the Will.

Executors and trustees can be held personally liable for mistakes made in the administration of the estate or trust. It is important they understand the legal, financial and taxation implications, and maintain independence if there are disputes.

## Responsibilities of an executor when administering an estate

### ADMIN

- locating the Will
- making funeral arrangements (depending on family situation)
- keeping beneficiaries up to date
- notifying government agencies, utilities, financial institutions etc.

### PROBATE

- preparing all necessary documents required to apply to the Supreme Court for a grant of probate
- distributing the estate assets and funds (this includes first ensuring all liabilities and expenses have been accounted for, paying legacies, transferring specific gifts, establishing any ongoing trusts and transferring or paying any remaining assets to the residuary beneficiaries).

### FINANCIAL

- finding out about assets and debts by contacting financial institutions, service providers and government agencies
- making an inventory of personal and household effects, cash, business interests, real estate and securities (including property outside of NSW)
- after probate, preparing account and tax information for beneficiaries
- paying liabilities (including income tax which may relate to the period both before and after the death to date of death)
- accounting for the beneficiaries.



## Our executor services

As a professional executor and trustee our expertise in estate and trust management is valuable in:

- providing impartiality in managing disputes between family members about their inheritance
- managing any long term trusts created by the Will
- administering overseas assets
- handling income and trustee tax issues.


Additionally:

- our in-house genealogy department is able to trace 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
- we are a perpetual organisation so we will always be around to ensure that the instructions of the Will are properly carried out.

## Accepting or declining the role of executor

There are many reasons people are unable to accept the role of executor. This can include living overseas, not having time for the many demands, concerns about having to manage family issues and concerns about taking on the risks of being an executor.





### EVAN'S STORY

*Evan had four sons. He had appointed the eldest as executor. When Evan passed away, it was established that one son had borrowed a large amount of money from him.*

*Evan had also lived with another son for several years and he claimed that as a result of an informal rent agreement Evan's estate owed him a large amount of money. The eldest son appointed as executor became very concerned about conflict and division within the family and that to resolve these disputes the estate would be depleted by large legal costs.*

*If Evan appointed NSW Trustee & Guardian, he could have ensured an independent and experienced executor managed this situation avoiding expensive legal costs.*



## Cost comparison with solicitors

NSW Trustee & Guardian fees for estate administration include work done to get a grant of probate (or administration) and the administration and distribution of the estate. Our fees are regulated and are structured differently to charges a private solicitor makes. This is because we operate under different laws.

The costs charged by a private solicitor are usually separated into the costs of getting the grant of probate (or administration) – referred to as ‘scale costs’ – and the costs of administering and distributing the estate.

Scale costs are fixed by legislation, but there is often work carried out by solicitors before obtaining probate or administration which falls outside of these costs, such as sorting through estate papers and getting valuations or appraisals. The solicitor is entitled to charge for these additional costs if they perform this work.

For the cost of administering and distributing the estate, many solicitors charge on a ‘time spent’ basis. The amount of time spent will vary depending on 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.



## Key terms used in this section

### **Capital**

The initial assets or funds in a trust.

### **Income**

Earnings generated over time.

### **Testamentary trust**

A trust that is created by a Will and begins after you die.

## Trusts

### What is a trust

A trust is a relationship based on confidence between the person creating the trust (you), a person holding assets and funds (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 can be effective in your lifetime.

The benefits of testamentary trusts are that they can provide:

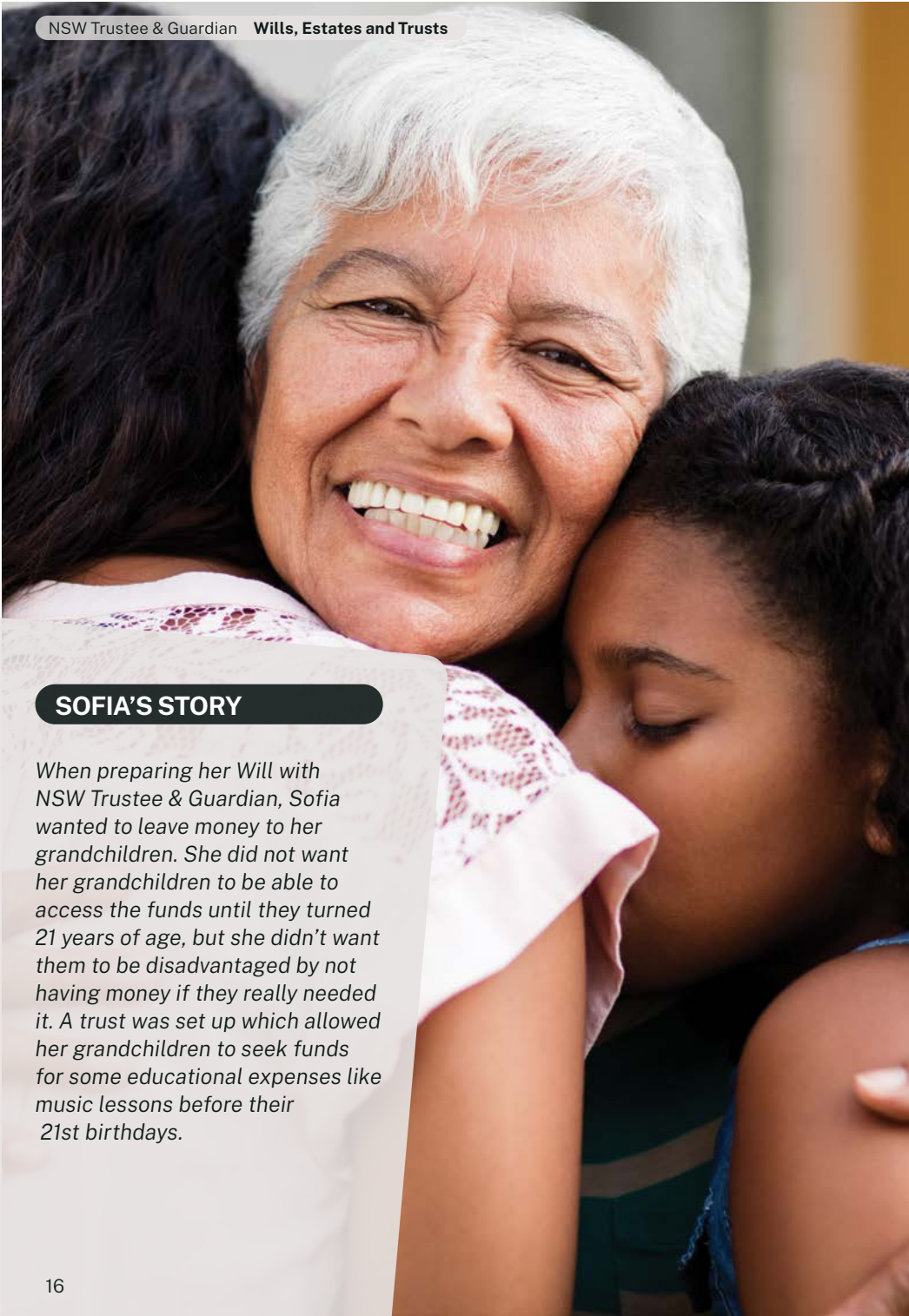
- continuing support for a beneficiary (which could include a charity)
- tax effective estate planning.

We are able to advise on the type of trust you may require and help set it up. When you appoint NSW Trustee & Guardian as trustee, your beneficiaries get the benefit of a professional trustee for as long as the trust needs to run.

### Trusts for children

You may wish to leave a gift to a child as part of your Will. This gift could be held in trust until the child reaches 18 years of age (or an older age if specified). While the funds are held in trust, you may want to specify if it can be used for the child's benefit, for things like education and living expenses.

It's important to choose a reliable trustee so that any fund that is established is managed in a responsible and appropriate way, in accordance with your wishes.



## SOFIA'S STORY

When preparing her Will with NSW Trustee & Guardian, Sofia wanted to leave money to her grandchildren. She did not want her grandchildren to be able to access the funds until they turned 21 years of age, but she didn't want them to be disadvantaged by not having money if they really needed it. A trust was set up which allowed her grandchildren to seek funds for some educational expenses like music lessons before their 21st birthdays.

## 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 the person does not have capacity to manage their own affairs when they turn 18, or can be created for someone who is already an adult. Trusts can also be created for adults vulnerable to financial loss or financial exploitation. These types of trusts can continue for a very long time, particularly if the person is only young when the trust is created.

## Charitable trusts

A trust can give charities long-term benefits through tax effective income from an estate. It is effective when there are large amounts of money involved and can suit a long-term project like a scholarship or medical research.

## Special disability trusts

Special disability trusts can attract social security means test concessions for the beneficiary and eligible contributors. The purpose of the trust is to assist families to make financial provision for the current and future needs of a family member with a severe disability. The beneficiary must be assessed by Centrelink. Consultation with a professional is recommended as there are eligibility criteria and ongoing reporting obligations.

Special disability trusts can be set up during your lifetime or established through your Will.





## Fees

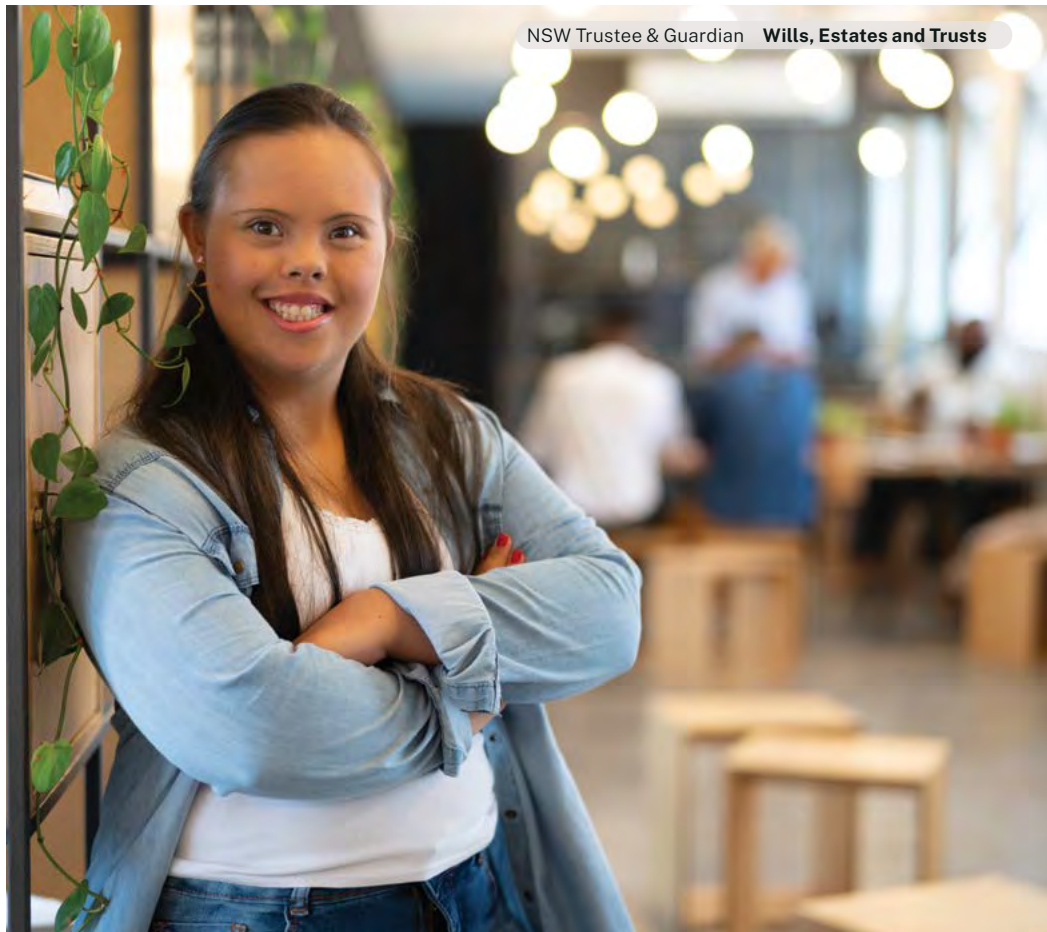
Our fees are available on our website.

Making or updating your Will, Power of Attorney and Enduring Guardianship documents are offered at no charge for customers who are eligible for:

- Full Centrelink Age Pension
- Disability Support Pension (DSP) or the Department of Veteran's Affairs Pension (DVA) who would otherwise be eligible for the full Centrelink Age Pension

Scan to visit our fees  
[www.tag.nsw.gov.au/fees](http://www.tag.nsw.gov.au/fees)





## Inclusive services

We are committed to providing inclusive services for all of our customers. Everyone is different; so please let us know the type of adjustment you require, whether you are meeting with us or accessing our publications.

Requesting an adjustment can include:

- wheelchair access
- hearing amplification or relocating to a quieter area

- access to an interpreter
- documents in large print or electronic formats.

Some reasonable adjustments may require additional time to organise. If you are unsure please contact us in advance of your appointment.

# Plan Ahead with #1 Will maker in NSW

A valid Will, Power of Attorney and Enduring Guardianship documents give you peace of mind that your wishes will be respected, and both you and your loved ones are taken care of.

Plan for your future legal, financial and health decisions today with NSW Trustee & Guardian.

## Contact us



1300 10 20 30



[www.tag.nsw.gov.au](http://www.tag.nsw.gov.au)

## Our locations

- 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
- Estate Administration
- Financial Management



**NSW Trustee  
& Guardian**