



NSW Trustee
& Guardian

A Guide to Executorship and Probate



*NSW Trustee & Guardian
provides professional and
independent executor
services to the
people of NSW.*

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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



Introduction

Being the executor of a Will can be challenging. It is a job that requires financial, legal, taxation, and sometimes conflict resolution skills. It is important to appoint someone who has the ability to carry out the role, or consider a professional executor.

NSW Trustee & Guardian has over 100 years of experience preparing Wills and acting as executor and administrator for deceased estates. In this booklet we answer the most commonly asked questions and concerns about the administration of a deceased estate.

If, after reading this booklet, you require further information about the role of NSW Trustee & Guardian as executor of an estate please call **1300 364 103**.

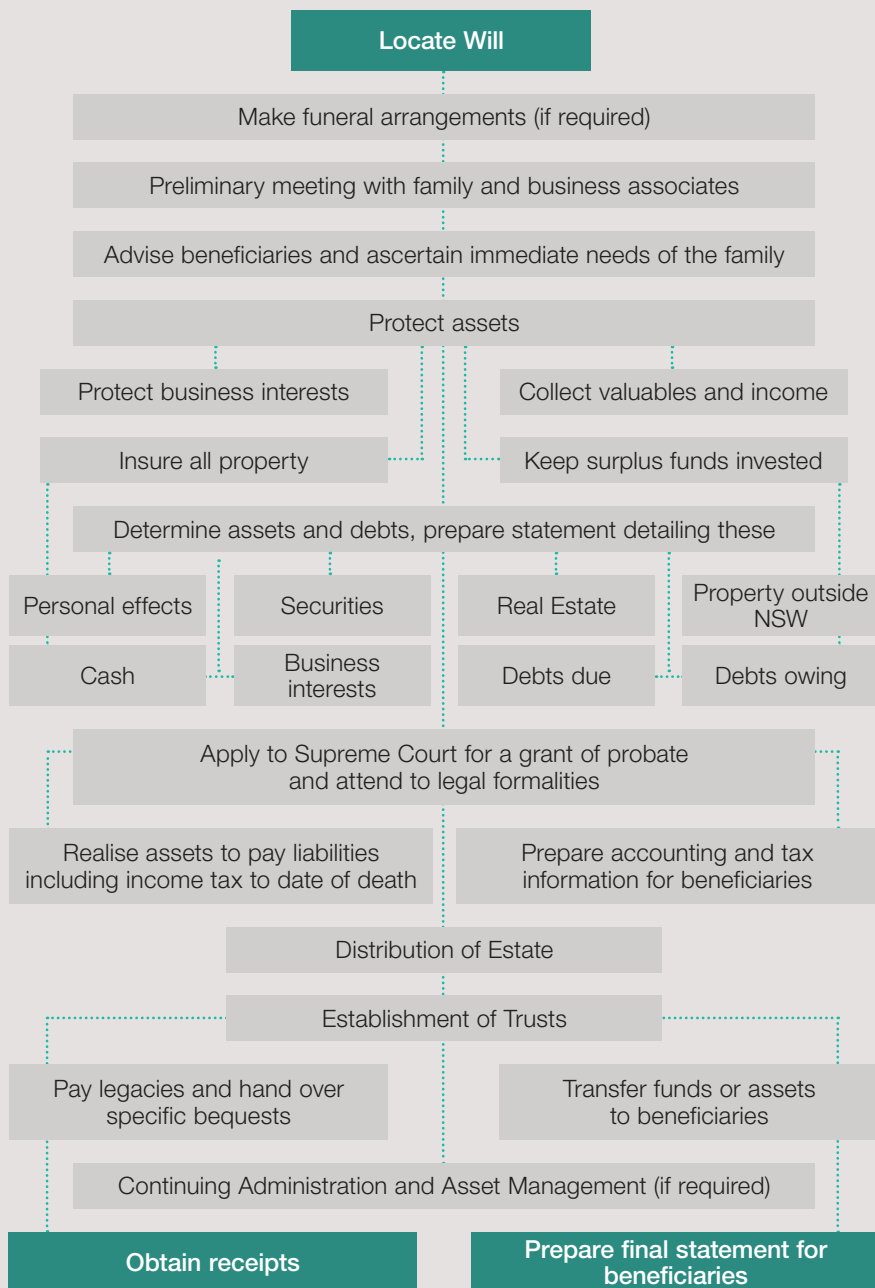
What does it mean to be appointed an executor?

When a person makes a Will they need to appoint someone to administer the estate. This person is known as the executor of a Will and their role is to carry out the directions contained in the Will. Their role becomes effective following the death of the person who made the Will.

Many people see it as a compliment or a sense of duty that they appoint a relation or close friend as their executor. However, the majority of people when nominated as an executor are unsure of what is expected of them and this can lead to mistakes being made and the executor being held liable.

As an executor it is important to understand the legal, financial and taxation implications of any actions you may take. Additionally, it is particularly important to maintain independence if there is the added complication of disputes. Finalising a person's affairs while grieving can be daunting and emotionally challenging. Sorting out their affairs can take months or possibly years if the estate is complex or involves disputes, ongoing trusts or life interests.

The steps that an executor needs to take when administering an estate are outlined in the chart overpage.



How long is administration of an estate likely to take?

The time taken to administer an estate varies widely and is dependent on the complexity of the estate. Factors such as how long it takes to sell assets such as real estate, if anyone contests the Will, and locating missing beneficiaries can also play a role.

Being an executor, even for a simple estate, can take a long time. Due to legislative changes in the *Probate and Administrative Act 1898*, the minimum time to finalise an estate is six months from the date of death. If you as the executor distribute the estate before this time you are not protected if claims are made against the estate, and you may become personally liable for these claims. However, most estates are finalised within 9–12 months. If there are difficulties locating beneficiaries, income or tax issues, challenges to the Will, or the estate involves setting up trusts for minors or life interests, the duties of the executor may take several years.

What is probate?

As an executor you will need to apply for probate. Probate is official recognition that a Will is legally valid and gives you permission to administer the estate. An application is made to the Probate Registry of the Supreme Court for a 'grant of probate'. The grant is a document certifying that the Supreme Court recognises the authority of the executor(s) to deal with the estate. This will enable you to administer the estate (collect the assets and pay any debts of the deceased person, and then to distribute the assets as directed).

A grant of probate is necessary to ensure that the person seeking the release of assets has the authority to do so. Therefore banks and other asset holders, such as insurance companies and superannuation funds, generally require probate before releasing or transferring assets. A grant of probate is also necessary if real estate is to be transferred or sold.

How do I obtain probate?

To obtain a grant of probate the executor must file various legal documents at the Supreme Court. Documents required include: the original Will, the death certificate and a complete statement of all assets and liabilities of the estate.

For a comprehensive summary of the requirements and the forms go to the probate section at the NSW Supreme Court website:

www.supremecourt.justice.nsw.gov.au

Who may contest the Will?

While a person is entitled to leave their assets to anyone they wish there are a number of grounds on which the distribution of a person's estate can be challenged:

- **Validity of the Will:**
 - On the grounds of a lack of capacity of the testator (person who wrote the Will) – they did not have the legal capacity to make the Will.
 - The testator may have been subjected to undue influence by a third party.
 - The Will does not comply with formal legal requirements, for example it may not be signed by the testator in the presence of two or more witnesses.
- **Construction of the Will:** What do the terms in the Will mean? The Will may be poorly worded or unclear. An application may be made seeking the assistance of the court in the interpretation or construction of the Will.
- **Challenges under the family provision sections of the *Succession Act 2006*:** Family or people in a close relationship with the deceased person or dependents who believe they have not been adequately provided for are entitled to contest the Will. Those who can contest the Will are not restricted to spouse and children. Claimants can include a de facto partner, any other dependants or a former spouse of the deceased. Complicated family structures such as blended families and second marriages may increase the likelihood of a Will being contested.

Challenges to a Will can be costly and delay the process of estate administration.

Considerations for an executor

Funeral arrangements: Family members normally arrange the funeral. However, if there is no family or they are unwilling to do this, the executor can be required to make the arrangements. If you are unable to access bank accounts, funeral cost may be at your expense until reimbursement from the estate can occur.

Confirmation of assets and debts: Confirmation of assets and debts of the estate is done by contacting financial institutions, service providers, government departments, relevant companies, searching records (especially Land and Property Information) and may also require preparation of an inventory of household goods and personal effects.

Protecting the assets of the estate: As executor it is your responsibility to protect the assets of the estate. This may involve storing valuables such as jewellery, ornaments or paintings, or investing surplus funds after debts have been paid. As an executor you can be held personally liable for any damage to property which has not been secured or insured.

Notification of government agencies: As executor you should notify government agencies of the death to ensure that liabilities do not continue and that income such as pensions are stopped.

Time to administer an estate: Executors must ensure that the administration of an estate is commenced and completed within a reasonable time. If it can be demonstrated you caused any undue delays resulting in a financial loss then you could be personally liable for this loss.

Realisation of assets: If you need to sell assets before you can distribute the estate you will need to ensure that you obtain a fair price for these assets. If you do not do this the beneficiaries have a legal right to sue you personally to recover the shortfall.



Accounting: Every person who is administering an estate has a duty to account to the beneficiaries. Whether formal accounts are required is determined by the categories set out in section 85 of the *Probate and Administration Act 1898*. Beneficiaries are entitled to an account of administration activities and if they are dissatisfied with your performance as executor they may approach the court to have you removed.

Tax liabilities: If you have distributed all the assets of the estate to the beneficiaries and the estate still owes money to the tax office, as executor, you are personally liable to make the payment.

Estate distributions: As an executor you must exercise caution when determining who is entitled to receive money or assets under the terms of the Will. Distributions for which you may be liable can occur through a mistaken interpretation of the Will or failure to identify all the beneficiaries.

What is a trustee and what are their responsibilities?

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 the funds are used up.

The trustee is often required to manage assets over a long period so 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 take over this role for you and offers both perpetuity and prudent financial management for ongoing trusts.

How do I renounce my executorship?

While people may see it as the duty of a relative or close friend to be appointed as executor, they often do not consider that what they are asking is a huge task for someone who may be grieving and distressed. Being an executor, even for simple estates, can take a considerable amount of time. The skills required can also be very difficult for an executor who does not have relevant experience in law, accounting, business management or finance. As executor you may be liable for your management of the estate.

Just because you have been nominated as the executor does not mean you have to accept. Taking on the responsibility may not be the right thing for you at the time, and it is unlikely that the person who nominated you would have wanted to put you in a stressful situation.

If you have been named as the executor of a Will you are under no legal obligation to accept the appointment. If you do not wish to act as executor, you can 'renounce' and transfer the role to an independent professional executor such as NSW Trustee & Guardian. Once probate has been granted it is more difficult to renounce, although it can be done by following a procedure set out in the *Probate and Administration Act 1898* which allows for the appointment of NSW Trustee & Guardian or a trustee company to be replacement executor or administrator.

Why choose NSW Trustee & Guardian as executor?

NSW Trustee & Guardian has been administering estates for over 100 years. We are experts in estate management offering a full estate administration service. As professional executors we have staff specialising in estate and trust management, legal, financial and accounting services. We are fully equipped to deal with any problems that may arise during the course of administering an 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 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 in an estate forms part of our Common Fund and earns interest calculated on daily balances, which is credited to each account in June and December
- 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.

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

The fees that NSW Trustee & Guardian charge for administering an estate are regulated and are structured differently to charges a private solicitor makes. This is because NSW Trustee & Guardian operates 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'.

Scale costs cover work that is necessary to obtain the grant (for example, preparing court documents), 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.

Overall, it is 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.

*NSW Trustee & Guardian
offers prudent and secure
management of trusts set
up by a Will or deed.*

What does NSW Trustee & Guardian charge for executor services?

NSW Trustee & Guardian fees are competitive and are regulated. We charge a fee that covers the 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, except a minimal charge to ensure a house is registered in the name of the joint tenant.

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 NSW TG investment funds

What are NSW Trustee & Guardian’s fees for document preparation?

When your Will and Power of Attorney are prepared by NSW Trustee & Guardian you can choose your own executor and attorney or choose NSW Trustee & Guardian for independent and impartial services.

Preparation services are provided free for people eligible for a full Centrelink Age Pension (including people receiving other government benefits, such as a Department of Veterans’ Affairs Pension, who would otherwise be eligible for a full Centrelink Pension).

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

*Power of Attorney

What do our fees cover?

Our fee covers the following steps involved in administering the estate:

- confirming the Will is valid
- meeting with the beneficiaries
- with a Will, certifying entitlement in the estate
- preparing a plan setting out what will be done (the administration plan)
- applying to the court for approval to go ahead (for the grant of administration or probate)
- writing to banks and other institutions to get asset details
- arranging asset valuations and inventories
- consulting with beneficiaries and keeping them informed of progress
- sorting out debts
- managing the sale or distribution of assets
- preparing a final statement of the whole process
- storing estate records.



Additional fees

Our charges do not cover costs from other external 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.

What should I do next?

If you have been appointed an executor and wish to renounce the executorship you can contact NSW Trustee & Guardian on **1300 364 103** or via **www.tag.nsw.gov.au**

We are committed to providing inclusive services for everyone

Everyone is different, so it is important that you tell us the type of adjustment you require.

Requesting an adjustment can include:

- bringing a support person with you
- 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 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)

+61 2 9240 0700

www.tag.nsw.gov.au



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