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## SUGGESTIONS TO CLIENTS ABOUT ISSUES RELEVANT TO WILLS & MATTERS YOU NEED TO CONSIDER WHEN MAKING A WILL

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### General notes to Clients

1. Capital gains tax:

You are required by s 121-20 if the ITAA 1997 (Cth) [“the Tax Act”] to keep records in relation to those of your assets which are subject to capital gains tax. The records, must be in English, and they must, broadly, enable ready ascertainment of:

- (a) if you acquire an asset:
  - (i) the date of acquisition
  - (ii) the cost base to you (purchase price and other costs in buying, eg stamp duty); and
- (b) if you dispose of an asset:
  - (i) the date of disposal;
  - (ii) the cost base to you (purchase price, costs in buying, improving and selling); and
  - (iii) the sale price or consideration in respect of the disposal

You should therefore maintain a list of significant assets, directed at meeting these requirements, and that list should be kept with the copy of your will to simplify the task of your executors.

The way in which your will is drawn, or the way in which you arrange or conduct your affairs, may affect the incidence of capital gains tax (“CGT”). You should discuss these questions with your accountant or tax adviser.

2. Pension entitlements:

A gift under your will to someone who receives a pension (or who may become entitled to a pension) may have the effect of increasing their income or their assets, and so reducing their entitlements, or dis-entitling them altogether. This matter is complex. You should consult a specialist or the Department of Social Security about it.

3. Property you **CANNOT GIVE BY WILL:**

- (a) Jointly held property **cannot** be given by will. This passes automatically to the surviving joint owner on the death of the first dying joint owner – it does not form part of the estate of the first person dying. (If you own property with

another person you may hold it either as 'joint tenants' or as 'tenants in common'. It is easy to confuse the two, and it is important to be sure what type of tenancy you have in the property. Joint tenancy and tenancy in common described more fully below).

- (b) Property held in trust **cannot** be given by will. This passes to or is held for the beneficiaries of the trust according to the terms of the trust.
- (c) Shares can usually be given by will; however certain shares in private companies cannot be given by will.
- (d) Partnership property can usually be given by will, so only your interest in any partnership property may be given by will, not all the partnership property.
- (e) Superannuation. Your superannuation arrangements may not entitle you to dispose of your superannuation assets by your will. The rules differ from scheme to scheme and you may have nominated a specific beneficiary for your superannuation fund – you should discuss the matter with the administrators of your superannuation fund.
- (f) The proceeds of life insurances policies. If the owner of the policy has nominated a beneficiary of the policy, the nomination takes precedence over the terms of the will. It follows that, where a nomination is made the proceeds of the policy do not form part of the estate. If you wish the proceeds of the policy to someone other than the nominee, you must change the nomination. If you are not sure whether you nominated a beneficiary, or who you nominated, you should consult the insurance company concerned.
- (g) Capital guarantee deposits. Some capital guarantee deposits where a beneficiary is nominated (for example, friendly societies, and some banks) cannot be given by will.

#### 4. Joint tenancy and tenancy in common

##### A. Joint tenancy:

This is a form of co-ownership in which the following principles apply.

- (a) There are no specific shares in the property. In theory each joint tenant owns the whole of the property. No party has a specific share in the property while the joint tenancy continues. This means that the joint tenants must have equal interests in the property, and are entitled equally to its rents and profits. There can be two or more joint tenants.
- (b) The principle of 'survivorship' applies. On the death of one joint tenant the surviving joint tenant gets the whole property automatically by operation of law, irrespective of any will made by the joint tenant who died, and irrespective of the intestacy rules. This gives considerable protection to a joint tenant.

It follows that property held in joint tenancy does not form part of the estate of a joint tenant who dies. This is important when deciding whether a grant of probate is needed. A grant of probate is required if the estate contains land (except in Queensland) – but this does not include property held in joint tenancy, as it does not form part of the

estate. The property passes automatically, by operation of law, to the survivor or survivors without forming part of the estate of the first-dying. A grant of probate is therefore not required for transfer (to the other joint tenant or tenants) of property held by the deceased as a joint tenant. Further, a joint tenant cannot in her or his will deal with property held in joint tenancy, because the property goes automatically to the other joint tenant on the death of the testator.

- (c) The principle of joint tenancy applies to real as well as personal property – it applies to land as well as to property like cars, shares, furniture and bank accounts.
- (d) Joint tenancy is usual in marriage where the spouses want to hold the property equally, and also want the principle of survivorship to apply. It is not common in other situations. In particular, it would not usually be appropriate to register a house in joint names where one partner to a marriage buys the house using only her or his own money or has contributed much more to the house than the other partner.

#### B. Tenancy in common:

This is a form of co-ownership in which the following principles apply:

- (a) The property is held in common with others but where (in contrast with joint tenants) the share of a deceased tenant in common passes to her or his beneficiaries under her or his will or intestacy and does not automatically pass to the surviving tenant or tenants in common.
- (b) Tenants in common have fixed, undivided shares in the property. Tenants in common can have unequal shares (for example, two-thirds to one and one-third to the other). The share belonging to a tenant in common becomes part of the estate that the tenant in common when he or she dies; that is, a testator who is tenant in common can leave her or his share by will or, if there is no will, the intestacy rules apply to the share that belonged to the tenant in common. (There is no principle of survivorship for tenants in common).
- (c) Tenancy in common is frequent in property given to be shared between partners, and, say, in a gift to a testator's children. It is infrequent between husband and wife. However, where there are children of a previous relationship or where the parties have contributed unequally to the asset concerned it is appropriate for a husband and wife to own property as tenants in common – they can leave their shares to their own children, and they can own unequal shares in the property to reflect their respective contributions to the property.

### **What you need to consider when making your Will**

The main points you should take into account are as follows:

- do you wish to leave your assets (“your estate”) to one person, or to be divided between a number of people;
- consider what should happen if any of those people have died before you;

- do you want to give any specific asset (eg a picture) or any specific amount (eg \$5,000.00) to a specific person?
- who do you wish to be your Executor (this is the person who signs the court documents to get your will sealed by the Supreme Court of NSW and who then distributes your assets according to the instructions in your will).
- who do you wish to be your Executor if the first person you listed dies before you?
- do you have any children under 18 years of age for whom you need to appoint a guardian if you should die?
- do you have any special request for burial or cremation or scattering of ashes?

### **Our NRG Precedent Will**

Our standard format will has:

- one spouse giving everything to the other spouse (this can be varied to refer to defactos), so if the spouse is alive at the date of death of the will making spouse, they receive everything and the rest of the will does not apply.  
  
[if the other spouse dies before the will making spouse then the rest of the will does apply]  
  
[if there is no spouse (or defacto) then clause 5 is deleted]
- 2 executors (but you can have just one).
- provision for giving specific gifts before the balance of the assets are given to the specified people.
- a clause stating that if a person to whom you intended to give something dies before you , then if they have children that “gift” goes to those children.  
  
[This clause can be deleted if you wish]
- provision for the appointment of a guardian for children under 18 years of age.
- provision for you to state whether you wish to be buried or cremated and have any special arrangements made.

### **General**

It is always important to ensure that your assets will go to the people you specify, so the wording of a will must be precise, and there are many situations in which our standard precedent document will need major amendments (eg giving a person a life interest [life use] in an asset, or dividing property between children of difference marriages).

If you have any questions at all, please call us.

### **Reconsidering your will & Possible Revocation of Your Will or Parts of it**

1. If you marry, your will will be revoked by the marriage unless the will is expressed to

- be made in contemplation of that marriage. Consult us about your will if you decide to marry.
2. Divorce is likely to affect your will. The matter is complex and the law is not uniform throughout Australia. Proposals for change are being considered in some states. If you are contemplating divorce, or have been divorced since making your will, consult us.
  3. Review the copy of your will every two or three years or whenever a major event occurs in your family or your assets or the taxation laws change (to make sure the will is still what you want). In particular, consult us:
    - (a) if you change your name, or anybody named in the will changes theirs;
    - (b) if an executor dies or becomes unwilling to act as executor or becomes unsuitable due to age, ill health or for any other reason;
    - (c) if a beneficiary (someone who has been left something in the will) dies;
    - (d) if you have specifically left any property which you subsequently sell or give away, or put in trust or into a partnership, or which changes its character or name. This applies particularly to specifically bequeathed shares in a company which restructures its share capital;
    - (e) if you marry or divorce;
    - (f) if you enter or end a domestic relationship;
    - (g) if you have matrimonial difficulties; or
    - (h) if you have children (including adopted or foster children).
  4. If you wish to change your will or revoke it or make a new will without informing your husband or wife or partner or the solicitor who prepared your will, you may do so, but you should consult us.
  5. Do not add or delete from the will after execution. Consult us if you want to change or revoke your will because even the simplest changes must be correctly done or they may have disastrous results.
  6. If you later wish to make a list, letter or other document which relates to your affairs after your death, you should consult us. The danger is that it may not be clear whether the document is intended to be testamentary in nature (ie a will or codicil), and litigation about the status of the document may result.

With Compliments  
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