

TD 2026/D1 - Income tax: deceased estates - meaning of 'right to occupy the dwelling under the deceased's will' in item 2(b) of column 3 of the table in subsection 118-195(1) of the Income Tax Assessment Act 1997

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Draft Taxation Determination

Income tax: deceased estates – meaning of ‘right to occupy the dwelling under the deceased’s will’ in item 2(b) of column 3 of the table in subsection 118-195(1) of the *Income Tax Assessment Act 1997*

1 Relying on this draft Determination

This publication is a draft for public comment. It represents the Commissioner’s preliminary view on how a relevant provision could apply.

If this draft Determination applies to you and you rely on it reasonably and in good faith, you will not have to pay any interest or penalties in respect of the matters covered, if this draft Ruling turns out to be incorrect and you underpay your tax as a result. However, you may still have to pay the correct amount of tax.

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What this draft Determination is about

1. This draft Determination¹ explains the meaning of 'right to occupy the dwelling under the deceased's will' in item 2(b) of column 3 of the table in subsection 118-195(1) of the *Income Tax Assessment Act 1997* (ITAA 1997).

2. This Determination is relevant to individual beneficiaries and trustees of a deceased estate who have an ownership interest in a dwelling acquired from a deceased estate. It clarifies when an individual has a 'right to occupy a dwelling under the deceased's will', which is relevant in determining whether the beneficiary or trustee of the deceased estate is entitled to the capital gains tax (CGT) main residence exemption when a CGT event happens to their ownership interest in the dwelling.

3. This clarification ensures that taxpayers, and those drafting and preparing wills and testamentary trust deeds, are aware of the relevant legislative requirements in item 2(b) of column 3 of the table in subsection 118-195(1) of ITAA 1997 (item 2(b)).

4. This Determination consolidates and replaces the following ATO Interpretative Decisions, all of which have been withdrawn:

- ATO ID 2003/109 *Capital gains tax: Deceased estate – main residence exemption*
- ATO ID 2004/882 *Capital Gains Tax: main residence exemption – deceased estate – right to occupy dwelling for limited period*
- ATO ID 2004/734 *Income tax: Capital gains tax: main residence exemption: right to occupy dwelling under deceased's will*.

5. All further legislative references in this Determination are to the ITAA 1997, unless otherwise indicated.

6. This Determination does not consider any of the other conditions that must be satisfied to disregard a capital gain or capital loss in section 118-195. This Determination also does not consider the circumstances when a trustee acquires an ownership interest in a dwelling under a deceased's will for occupation by an individual in accordance with section 118-210.²

Ruling**Disregarding a capital gain or capital loss – dwelling acquired from a deceased estate**

7. In certain circumstances, subsection 118-195(1) disregards a capital gain or capital loss made from a CGT event that happens in relation to a dwelling (or an ownership

¹ For readability, all further references to 'this Determination' refer to the Determination as it will read when finalised. Note that this Determination will not take effect until finalised.

² The meaning of 'under the deceased's will' in subsection 118-210(1) is addressed in Taxation Determination TD 1999/74 *Income tax: capital gains: in what circumstances does a trustee of a deceased estate acquire an ownership interest in a dwelling 'under the deceased's will' for the purposes of subsection 118-210(1) of the Income Tax Assessment Act 1997?*

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interest in a dwelling) that passed to you³ as a beneficiary of a deceased estate or that you⁴ owned as trustee of a deceased estate.

8. The ownership interest in the dwelling may have been acquired by the deceased before 20 September 1985, or on or after that date. If the dwelling was acquired on or after 20 September 1985, then, just before their death, it must have been the deceased's main residence and must not have been used for the purpose of producing assessable income.

9. The capital gain or capital loss will be disregarded if, from the date of the deceased's death until the end of your ownership interest, the dwelling was the main residence of an individual who had a right to occupy it under the deceased's will.⁵

Right to occupy the dwelling under the deceased's will

10. The phrase 'right to occupy the dwelling under the deceased's will' is not defined in the ITAA 1997 and takes its ordinary meaning, having regard to the statutory context.

11. The right to occupy is a personal right, encompassing the right to reside or 'live on' a property for a specified period.⁶

12. The term 'under' has been considered by the courts, in the context of income tax legislation, to mean 'in accordance with', 'pursuant to' and 'by virtue of'.⁷

13. In *Wilson v Federal Commissioner of Land Tax*⁸, the High Court explained that 'under the will' means 'under the terms of the will'.

14. In *Caratti v Commissioner of State Revenue*⁹ (*Caratti*), the Supreme Court of Western Australia held that rights granted pursuant to a pre-testamentary or post-testamentary agreement did not amount to a right granted under the terms of the deceased's will. In that case, the deceased's will did not expressly grant any right of residence to the appellant. The Court held that the appellant did not have a right to reside at the property 'under the will'. The Court stated (emphasis added)¹⁰:

... attention is directed to the terms of the Will. The Will gives no right of residence to Mr Michael Caratti. He plainly has no such right under the terms of that instrument. Pre-testamentary arrangements of the kind referred to by the appellant are irrelevant to the application of s 22(b)(ii) of the Land Tax Act on its proper construction.

Equally irrelevant is any post-testamentary decision by the appellant as trustee appointed under the Will to allow Mr Michael Caratti to reside at the Property. Insofar as it is alleged that Mr Michael Caratti has a right to reside at the Property pursuant to some agreement entered into with the appellant as trustee in the exercise of the appellant's powers under s 24 of the Trustees Act, *the right (if it be a right) derives from the post-testamentary agreement, or, perhaps, from the appellant's exercise of power under s 24 of the Trustees*

³ In the context of section 118-195, 'you' in relation to a 'beneficiary of a deceased estate' means an individual beneficiary.

⁴ In the context of section 118-195, 'you' in relation to 'trustee of a deceased estate' means individuals who are trustees of a deceased estate and companies who are trustees of a deceased estate (that are 'licensed trustee companies' authorised under the relevant trustee company legislation during the administration of an estate) and other entities that are 'state trustees' under state and territory legislation.

⁵ A capital gain or capital loss may also be disregarded in other circumstances, outlined in column 3 of the table in subsection 118-195(1). For example, when the ownership interest ends within 2 years of the deceased's death, or within a longer period allowed by the Commissioner.

⁶ *Grant v Roberts; Smith v Smith; Roberts v Smith; Curtis v Smith* [2019] NSWSC 843 at [88] citing Edgeworth, B. (2017) *Butt's Land Law*, 7th edn, LawBook Co, Australia, 3.140.

⁷ *Energy Resources of Aust Ltd v Commissioner of Taxation* [2003] FCA 26 at [37].

⁸ [1916] HCA 16.

⁹ [2017] WASCA 128.

¹⁰ [2017] WASCA 128 at [25–26].

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Act. It is not a right given by the terms of the Will, ie, a ‘right under the will’ given to ‘an individual identified in the will’ within the meaning of s 22(b)(ii) of the Land Tax Act.

15. In light of the statutory context in which the words ‘under the deceased’s will’ are found in section 118-195, and consistent with the reasoning adopted in case law, item 2(b) is limited to circumstances where a right to occupy has been expressly granted under the terms of the will to an individual specifically named in the will.

16. An individual will only have a right to occupy a dwelling under the deceased’s will if this right was granted in accordance with the terms of the will itself ‘without the aid or intervention of any subsequent or intermediate transaction’.¹¹

17. A right to occupy granted to an individual by a trustee pursuant to a broad discretion, given to the executor or trustee of the deceased estate under the deceased’s will, is not ‘a right to occupy the dwelling under the deceased’s will’ for the purposes of subsection 118-195(1).

18. Similarly, an individual will not be considered to have a right to occupy a dwelling under the deceased’s will if that right was granted under a separate agreement, such as a deed of arrangement which is entered into between the beneficiaries and executor or trustee of the deceased estate.¹²

Example 1 – right to occupy arising under separate agreement

19. *Pedro buys his house in April 1980. Pedro dies in October 2011 and leaves a will. Under the will, the house is to be sold and the proceeds divided between the beneficiaries named in the will. Maria is named as a beneficiary in Pedro’s will. The will does not grant a right to occupy to any individual.*

20. *The beneficiaries and executor of the deceased estate enter into an agreement whereby one of the beneficiaries, Maria, can occupy the house until it is sold. Maria continues to occupy the property as her main residence until it is sold 3 years later.*

21. *Maria did not have a right to occupy the dwelling under the deceased’s will for the purposes of item 2(b). The right to occupy the house was not expressly granted under Pedro’s will but, instead, arose by virtue of the separate agreement negotiated between the beneficiaries and executor.*

Example 2 – right to occupy arising under exercise of trustee’s broad discretion

22. *Jorge buys a house in February 1998. Jorge lives in the house as his main residence. Jorge dies in January 2021 and leaves a will. The will does not expressly provide a right to occupy the house to any individual. Instead, the will provides a discretion to the executor of the deceased estate to grant a right to occupy the house to any individual. The executor exercises the discretion in favour of Manuel, who is named as a beneficiary in Jorge’s will. Manuel resides in the house until it is sold.*

¹¹ *Thomson v Deputy Federal Commissioner of Land Tax for Tasmania* [1915] HCA 4.

¹² Paragraph 128-20(1)(d) outlines when a beneficiary becomes the owner of an asset in a deceased estate under a deed of arrangement. Paragraphs 33 to 37 and 209 to 223 in Taxation Ruling TR 2006/14 *Income tax: capital gains tax: consequences of creating life and remainder interests in property and of later events affecting those interests* look at situations where a deed of arrangement is entered into to vary the terms of a deceased’s will.

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23. *Manuel did not have a right to occupy the dwelling under the deceased's will for the purposes of item 2(b). Jorge's will did not specifically name or identify Manuel as having a right to occupy the house. The right to occupy arose by virtue of the executor's exercise of a discretion granted under the will.*

Right to occupy the dwelling for a limited period

24. If the deceased's will grants a right to occupy to an individual for a specified period and the individual continues to occupy the dwelling after the expiry of this period, the capital gain or capital loss cannot be disregarded under subsection 118-195(1).

25. However, part of the capital gain or capital loss may be disregarded under section 118-200. If this provision applies, this partial exemption will be calculated in accordance with the formula in subsection 118-200(2).

Example 3 – right to occupy under deceased's will for a specified period

26. *Minjee lives in her home that she bought in May 1990. It is her main residence and is not used to produce assessable income. Minjee dies in October 2019 and leaves a will. The will grants a right to occupy the house to Kim, Minjee's child, for a period of up to 18 months, after which the house is to be sold and the proceeds distributed to Kim and other beneficiaries in the will. After 18 months has elapsed, Kim continues to occupy the property pursuant to an agreement between the beneficiaries and trustee of the deceased estate until the trustee sells the property a year later.*

27. *The trustee is not entitled under subsection 118-195(1) to disregard a capital gain or capital loss that arises from the sale of the property. The deceased's will conferred on Kim a right to occupy for a limited period of 18 months. The trustee is entitled to a partial exemption, calculated in accordance with the formula in subsection 118-200(2).*

Right to occupy the dwelling as a result of court order

28. A family provision order made under the relevant legislation takes effect as if it had been made as a codicil to the deceased's will.¹³ Accordingly, where a right to occupy is granted in a family provision order, it will be treated as if that right to occupy was granted under the deceased's will.

Example 4 – right to occupy as a result of court order

29. *Randeep dies and leaves a will. Randeep's only asset is his house which he bought in August 1975. Under the will, the house is to be sold by the trustees of the deceased estate and the proceeds held on trust for Randeep's children and grandchildren. One of the children, Devinder, is dissatisfied with the terms of the will and applies to the Supreme Court of New South Wales for a family provision order to allow him the right to*

¹³ Family provision orders are made under the relevant state and territory Acts, which, in turn, provide that any such orders take effect as if the provision were made in a codicil to the will of the deceased (see, for example, section 72 of the *Succession Act 2006* (NSW)). In section 10 of the *Family Provision Act 1972* (WA), a provision made by a family provision order takes effect as if it had been made by a codicil to the will of the deceased executed immediately before their death.

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occupy the house until the house is sold. Devinder's claim is successful, and the Court orders that he be granted a right to occupy the house from the date of Randeep's death until the house is sold. This order is made under section 72 of the Succession Act 2006 (NSW) and takes effect as if it had been made as a codicil to the will.

30. *Devinder has a right to occupy the dwelling under the deceased's will for the purposes of item 2(b). The court order under the relevant family provision legislation took effect as if it had been made as a codicil to the deceased's will.*

Deceased estate and testamentary trust

31. For the purposes of item 2(b), the reference to the term 'will' is, properly construed, a reference to the deceased's will only and does not extend to a testamentary trust.

32. In other words, the deceased's will is considered to be separate and distinct from a testamentary trust.¹⁴ Broadly, this is because:

- a deceased estate is created upon the death of the deceased, whereas a testamentary trust arises only after the deceased estate has been administered
- the role of a trustee of a testamentary trust is to hold the trust property, carry out the terms of the trust deed and deal with the beneficiaries' proprietary interests, whereas the role of an executor is to preserve the deceased's assets, pay the deceased's debts and administer the estate.

33. Accordingly, rights granted under a testamentary trust deed are not rights granted under the deceased's will for the purposes of item 2(b).

34. Therefore, an individual will not have a right to occupy the dwelling under the deceased's will for the purposes of item 2(b) in situations where:

- an individual is specifically named in a testamentary trust deed as having a right to occupy the dwelling, or
- the testamentary trust deed provides the trustee of the deceased estate with a discretion to grant a right to occupy the dwelling to any individual.

Example 5 – testamentary trust deed annexed to will

35. *Lalo dies and leaves a will with a testamentary trust deed annexed to it. Probate is granted for both the will and testamentary trust deed. Lalo's only asset is his house, which he bought in November 1982. The will bequeaths the house to Lalo's eldest daughter, Patricia, and does not expressly provide any rights in the property to any other individual. However, the testamentary trust deed annexed to Lalo's will provides a discretion to the trustee to grant a right to occupy the house to any individual. The trustee exercises the discretion in favour of Lalo's youngest daughter, Beatrice. Beatrice proceeds to occupy the house as her main residence.*

¹⁴ See, for example, the discussion in *Whitby and Secretary, Department of Social Services (Social services second review)* [2019] AATA 246 at [45–54].

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36. *Beatrice does not have a right to occupy the dwelling under the deceased's will for the purposes of item 2(b). The will does not specifically name or identify Beatrice as having such a right. The right to occupy arose by virtue of the trustee's exercise of their discretion pursuant to the testamentary trust deed.*

Date of effect

37. When the final Determination is issued, it is proposed to apply to years of income commencing both before and after its date of issue.

Commissioner of Taxation

28 January 2026

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Appendix 1 – Alternative views

1 ***This Appendix sets out alternative views and explains why they are not supported by the Commissioner. It does not form part of the proposed binding public ruling.***

38. An alternative view that has been put to us is that a testamentary trust established under the deceased's will is equivalent to a deceased estate.

39. According to this view, a right to occupy granted pursuant to the testamentary trust deed is tantamount to being granted 'under the deceased's will' for the purposes of item 2(b).

40. Moreover, the alternative view contends that an individual does not need to be specifically named in the deceased's will (or testamentary trust deed) as having a right to occupy the dwelling; it is sufficient if the executor or trustee of the deceased estate has a discretion to grant a right to occupy the dwelling to any individual. Proponents of this view argue that the words in item 2(b) do not impose a requirement for an individual to be specifically named in the deceased's will as having a right to occupy the dwelling.

41. We do not agree with this alternative view.

42. Treating the trustee of a testamentary trust in the same way as a legal personal representative of a deceased estate is our administrative practice for the purposes of Division 128 only. This administrative practice is outlined in Law Administration Practice Statement PS LA 2003/12 *Capital gains tax treatment of the trustee of a testamentary trust*.

43. The administrative practice does not extend to the operation of section 118-195. This is made clear in paragraphs 78, 79 and 203 to 207 of Taxation Ruling TR 2006/14 *Income tax: capital gains tax: consequences of creating life and remainder interests in property and of later events affecting those interests* which state:

78. Division 128 does not appear to apply to trusts. It contains rules about the passing of an asset from a deceased individual's legal personal representative to a beneficiary in the estate.

79. In the context of CGT events E5, E6 and E7, the exception will apply if, as part of the administration of a deceased estate, an asset the deceased owned when they died passes to a beneficiary in accordance with section 128-20. (Note that in certain circumstances where an asset passes to a beneficiary the Commissioner treats the trustee of a testamentary trust in the same way as he treats a legal personal representative: Law Administration Practice Statement PS LA 2003/12 *Capital gains tax treatment of the trustee of a testamentary trust*).

...

203. Accordingly, 'a trust to which Division 128 applies' requires more than the identification of the trust as a deceased estate. The Commissioner considers that the words 'a trust to which Division 128 applies' should be interpreted as a deceased estate to the extent that it is a trust over an asset originally owned by a deceased individual and which may pass to the beneficiary in accordance with section 128-20 (that is, under the will, by intestacy and so on).

204. In the context of CGT events E5, E6 and E7 this means that the exception applies if subsection 128-15(3) applies to relieve any capital gain or capital loss that arises (or would apply in that way if there were a capital gain or capital loss) when an asset passes from the deceased's legal personal representative to a beneficiary in their estate.

205. In certain circumstances the Commissioner treats the trustee of a testamentary trust in the same way as he treats a legal personal representative in relation to the passing of an

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asset of the deceased to a beneficiary: PS LA 2003/12. This is relevant for the scope of the exception in CGT events E5 to E7 which deal with such a passing of an asset.

...

207. The exception for a ‘trust to which Division 128 applies’ is relevant if, during the administration of a deceased estate, the intended remainder owner disposes of their trust interest. However the exception only applies to the extent that an asset owned by the deceased might pass to that beneficiary – these assets are not taken into account in working out the trust’s net asset amount or reduced net asset.

44. Further, the administrative practice in PS LA 2003/12 does not reflect how section 118-195 should be interpreted for the purposes of the income tax legislation. This is outlined in paragraph 2 of PS LA 2003/12:

... the ATO’s practice is not to recognise any taxing point in relation to assets owned by a deceased person until those assets cease to be owned by the beneficiaries named in the will (unless there is an earlier disposal by the legal personal representative or testamentary trustee to a third party or CGT event K3 applies).

45. Therefore, we consider that for the purposes of item 2(b), the reference to the ‘will’ is, properly construed, a reference to the deceased’s will only and does not extend to a testamentary trust for the reasons outlined in paragraphs 31 to 34 of this Determination. Further, we consider that an individual must be specifically named in the deceased’s will as having a right to occupy the dwelling for the reasons outlined in paragraphs 10 to 18 of this Determination.

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Appendix 2 – Your comments

46. You are invited to comment on this draft Determination. Please forward your comments to the contact officer by the due date.

47. A compendium of comments is prepared when finalising this Determination, and an edited version (names and identifying information removed) is published to the Legal database on ato.gov.au. Please advise if you do not want your comments included in the edited version of the compendium.

Due date: 27 February 2026

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References

Related rulings and determinations:

TD 1999/74; TR 2006/14

Legislative references:

- ITAA 1997 118-195
- ITAA 1997 118-195(1)
- ITAA 1997 118-200
- ITAA 1997 118-200(2)
- ITAA 1997 118-210
- ITAA 1997 118-210(1)
- ITAA 1997 Div 128
- ITAA 1997 128-15(3)
- ITAA 1997 128-20
- ITAA 1997 128-20(1)(d)
- Family Provision Act (WA) 10
- Succession Act 2006 (NSW) 72

Cases relied on:

- *Caratti v Commissioner of State Revenue* [2017] WASCA 128; 2017 ATC 30-010
- *Energy Resources of Aust Ltd v Commissioner of Taxation* [2003] FCA 26; 2003 ATC 4024; 52 ATR 120

- *Grant v Roberts; Smith v Smith; Roberts v Smith; Curtis v Smith* [2019] NSWSC 843

- *Thomson v Deputy Federal Commissioner of Land Tax for Tasmania* [1915] HCA 4; 19 CLR 351; (1915) 21 ALR 257
- *Whitby and Secretary, Department of Social Services (Social services second review)* [2019] AATA 246
- *Wilson v Federal Commissioner of Land Tax* [1916] HCA 16; 21 CLR 225; (1916) 22 ALR 79

Other references:

- ATO ID 2003/109 (withdrawn)
- ATO ID 2004/734 (withdrawn)
- ATO ID 2004/882 (withdrawn)
- PS LA 2003/12

ATO references

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