

# ***PCG 2019/5 - Capital gains tax and deceased estates - the Commissioner's discretion to extend the 2-year period to dispose of dwellings acquired from a deceased estate***

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! This document has changed over time. This version was published on *30 September 2022*

! There is a Compendium for this document: **PCG 2019/5EC** .



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## Practical Compliance Guideline

# Capital gains tax and deceased estates – the Commissioner’s discretion to extend the 2-year period to dispose of dwellings acquired from a deceased estate

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### **📌 Relying on this Guideline**

This Practical Compliance Guideline sets out a practical administration approach to assist taxpayers in complying with relevant tax laws. Provided you follow this Guideline in good faith, the Commissioner will administer the law in accordance with this approach.

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**What this Guideline is about**

A1. This Guideline is about how the capital gains tax (CGT) main residence exemption may apply where you dispose of a dwelling that passed to you either as an individual beneficiary or trustee of a deceased estate.

A2. All legislative references in this Guideline are to the *Income Tax Assessment Act 1997*.

1. Section 118-195 disregards capital gains and capital losses made from certain CGT events that happen in relation to a dwelling that:

- was a deceased person's main residence and was not being used to produce assessable income just before they died<sup>2</sup>, or
- was acquired by the deceased before 20 September 1985.

2. If you dispose<sup>3</sup> of an ownership interest in a dwelling that passed to you as an individual beneficiary or as the trustee of the deceased's estate within 2 years of the deceased's death, any capital gain or loss you make on the disposal is disregarded. The Commissioner has the discretion to extend the 2-year period.

3. Generally, we will allow a longer period where the dwelling could not be sold and settled within 2 years of the deceased's death due to reasons beyond your control that existed for a significant portion of the first 2 years.

4. This Guideline outlines a safe harbour compliance approach that allows you to manage your tax affairs as if we had exercised the discretion to allow you a longer period.

5. This Guideline also outlines the factors we will consider when deciding whether to exercise the discretion to extend the 2-year period.

6. You may be entitled to a partial exemption for any capital gain or loss made from the disposal of your ownership interest in a dwelling if section 118-195 does not apply.<sup>4</sup> This Guideline applies equally in relation to the Commissioner's discretion to extend the 2-year period for partial exemptions.

**Date of effect**

7. This Guideline applies both before and after its date of issue.

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<sup>1</sup> [Omitted.]

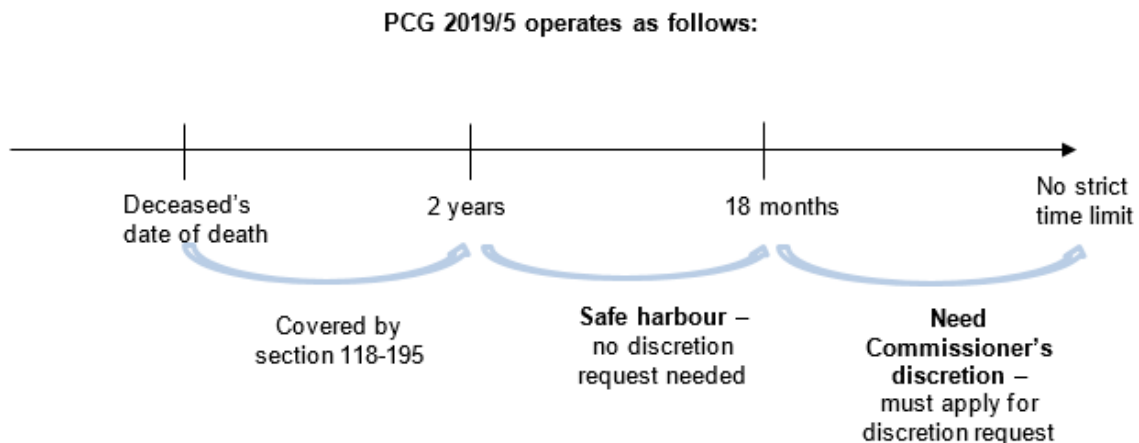
<sup>2</sup> For dwellings acquired on or after 20 September 1985. In some cases, the use of a dwelling to produce assessable income can be disregarded (see sections 118-145 and 118-190).

<sup>3</sup> This Guideline applies where the relevant CGT event is a disposal. Subsection 118-195(2) lists other CGT events where a capital gain or loss may be disregarded and we may allow a longer period within which your ownership interest in the dwelling ends following the deceased's passing.

<sup>4</sup> Section 118-200.

**Safe harbour – compliance approach**

8. If your circumstances satisfy the conditions listed in paragraph 11 of this Guideline, you can manage your tax affairs as if we had allowed you a period longer than 2 years. The following diagram illustrates how the safe harbour can be relied on:

**Diagram 1: Guideline operation**

9. If you choose to use this safe harbour and are subsequently chosen for an ATO compliance check, we will seek to ensure that you satisfy the conditions in paragraph 11 of this Guideline, including checking that the additional period is no longer than 18 months. We will not allocate compliance resources to determine whether or not we would have actually exercised the discretion where you have satisfied the conditions in paragraph 11 of this Guideline.

10. You should maintain all records necessary to support your claim that you are eligible for the safe harbour.

**Safe harbour – conditions**

11. To qualify for the safe harbour, you must satisfy all of the following conditions:

- during the first 2 years after the deceased's death, more than 12 months was spent addressing one or more of the circumstances described in paragraph 12 of this Guideline
- the dwelling was listed for sale as soon as practically possible after those circumstances were resolved (and the sale was actively managed to completion)
- the sale was completed (settled) within 12 months of the dwelling being listed for sale<sup>5</sup>

<sup>5</sup> Where the sale contract falls through for reasons outside of your control and the property is relisted for sale, the relevant 12-month period commences from when the dwelling is relisted for sale and not the original listing. However, the total maximum time period that the safe harbour can be relied on is a period of 42 months from the deceased's death (noting we may exercise the discretion for longer periods).

- if any of the circumstances described in paragraph 13 of this Guideline were applicable, they were immaterial to the delay in disposing of your interest, and
- the longer period for which you would otherwise need the discretion to be exercised is no more than 18 months.

***Circumstances that took more than 12 months to resolve***

12. One or more of the following circumstances must have taken more than 12 months to address:

- the ownership of the dwelling, or the will, is challenged
- a life tenancy or other equitable interest given in the will delays the disposal of the dwelling
- the complexity of the deceased estate delays the completion of administration of the estate
- settlement of the contract of sale of the dwelling is delayed or falls through for reasons outside of your control, or
- restrictions on real estate activities imposed by a government authority in response to the COVID-19 pandemic.

***Circumstances that cannot be material to delays in disposal***

13. In order to qualify for the safe harbour, none of the following circumstances can have been material to the delay in disposing of your interest:

- waiting for the property market to pick up before selling the dwelling
- waiting for refurbishment of the dwelling to improve the sale price
- inconvenience on the part of the trustee or beneficiary to organise the sale of the dwelling, or
- unexplained periods of inactivity by the executor in attending to the administration of the estate.

**Extending the 2-year period – exercising the Commissioner’s discretion**

14. In considering whether to extend the 2-year period, we weigh up all of the factors (both favourable and adverse) having regard to the facts and circumstances of the case.

14A. In practice, the facts we would consider in deciding whether to exercise the discretion would be fully understood only once the sale of the dwelling is completed. Ordinarily, it would be difficult for us to exercise our discretion prior to that time.

14B. Our general administrative approach is to exercise our discretion after the settlement of the sale of the dwelling. However, in some circumstances we may consider exercising our discretion prior to settlement of the sale of the dwelling where clarity is needed to resolve a matter.

15. Factors that would weigh in favour of us allowing a longer period include those listed in paragraph 12 of this Guideline. The absence of some or all of those favourable factors does not necessarily preclude us from allowing a longer period.

16. Factors that would weigh against us allowing a longer period include those listed in paragraph 13 of this Guideline.

17. Other factors that may be relevant to the exercise of our discretion (but are not relevant for the safe harbour) include but are not limited to:

- the sensitivity of your personal circumstances and of other surviving relatives of the deceased
- the degree of difficulty in locating all beneficiaries required to prove the will
- any period the dwelling was used to produce assessable income, and
- the length of time you held the ownership interest in the dwelling.

18. How much weight we give to each factor will depend upon the circumstances of each particular case. The circumstances that caused the delay in disposing of the ownership interest are more important than the length of the delay. The amount of any potential capital gain or loss is not relevant to whether the discretion is exercised.

19. We will not allow a longer period for even a very short delay beyond 2 years if there are no relevant circumstances present. Likewise, a lengthy delay will not prevent us from allowing a longer period where relevant circumstances caused the delay and persisted for the overwhelming majority of the total period.

### **Examples**

20. Examples 1 to 10 of this Guideline illustrate how the safe harbour can apply in various situations and how we would approach exercising our discretion.

#### **Example 1 – safe harbour – life tenancy**

21. *Mr Bishop acquired a dwelling before 20 September 1985. He died on 22 March 2014 and his will granted a life tenancy to his wife. Title to the property remained in the hands of the trustee of the estate. Mr Bishop's 2 adult children from a previous marriage are the beneficiaries of his estate.*

22. *Mrs Bishop continued to live in the dwelling until she died on 18 April 2017.*

23. *The trustee had the dwelling cleaned and placed on the market as soon as practically possible after Mrs Bishop died. A contract for the sale of the property was signed on 11 July 2017 and settlement occurred on 14 August 2017.*

24. *Because the delay in disposing of the dwelling was caused by the life tenancy (circumstances described as a favourable factor) and the property was marketed and sold as soon as was practical after the death of Mrs Bishop, the trustee could rely on the safe harbour (provided no materially adverse factors were present).*

#### **Example 2 – no safe harbour – family member residing in dwelling**

25. *Ms Evans lived with Bevan (her adult son and full-time carer) in her main residence until she died on 1 September 2013. Ms Evans acquired the dwelling after 20 September 1985 and it was not being used to produce assessable income when she died.*

26. *On the basis the dwelling would be sold and settled within a 2-year period, the trustee of the estate allowed Bevan to continue to live in the dwelling until he found*

full-time employment. Bevan was not given any right to occupy the house under Ms Evans' will.

27. In June 2016, Bevan obtained full-time employment and moved out of the dwelling. The trustee then sold the dwelling.

28. Because the delay in selling the dwelling was not caused by any of the circumstances described as favourable factors, the trustee cannot rely on the safe harbour. The decision to allow Bevan to reside in the dwelling was a matter of choice within the control of the trustee.

### **Example 3 – no safe harbour – storm damage and renovations**

29. Mr Wong lived in a dwelling that was his main residence until he died on 1 January 2016. Mr Wong acquired the dwelling before 20 September 1985.

30. On 14 July 2016, a severe storm damaged the dwelling, which required repairs before it could be advertised for sale. As well as completing repairs, the trustee also engaged builders to undertake other significant renovations to improve the value of the dwelling before sale. Work was completed on 18 May 2017.

31. The dwelling was listed for sale on 26 June 2017 and actively managed until eventually sold. Settlement occurred on 17 January 2018.

32. Although the storm damage was outside of the control of the trustee and the property was sold shortly after the 2-year period, the trustee cannot rely on the safe harbour because the most significant factor in delaying the sale was the decision to renovate the dwelling, which was entirely within the control of the trustee.

### **Example 4 – no safe harbour – subdivision of land**

33. Mrs Papageorgiou lived in her main residence until she died on 1 June 2015. Mrs Papageorgiou acquired the dwelling after 20 September 1985 and it was not being used to produce assessable income when she died.

34. The trustee completed its administration of Mrs Papageorgiou's estate and the dwelling was owned by the beneficiaries of that estate (Mrs Papageorgiou's 4 adult children) as joint owners.

34A. The beneficiaries of Mrs Papageorgiou's estate decided to subdivide the property to increase the sale price. A plan was submitted to the council on 30 November 2015. On 1 July 2016, the council advised that the plan was not approved.

35. The beneficiaries appealed the decision on 22 July 2016 and attended a hearing on 12 October 2016. On 28 February 2017, a tribunal advised that a new subdivision application should be lodged with the council. A new application was submitted to the council on 24 March 2017, but by 1 June 2017 the council had not made a decision.

36. While the resolution of the subdivision application is beyond the control of the beneficiaries, they cannot rely on the safe harbour because the delay is due to the decision to subdivide, which is not necessary for the resolution of the estate or the disposal of the dwelling.

### **Example 5 – safe harbour – legal challenges**

37. Mr Hawke acquired a dwelling before 20 September 1985, which was his main residence until he died on 3 October 2013. Mr Hawke's will stated that the dwelling was to

pass (in equal shares) to his 2 adult children from his first marriage. The will also made separate provisions for both his first and second wives.

38. Both the first and second wives commenced legal proceedings to challenge the terms of the will. The children received legal advice that they could not dispose of the dwelling until those legal challenges had been resolved. Negotiations took place between all beneficiaries and a settlement was eventually reached, with Supreme Court orders handed down on 21 July 2015. In accordance with the order, the dwelling was to be disposed of and the proceeds distributed between the beneficiaries.

39. The dwelling was placed on the market on 1 September 2015 and sold, with settlement occurring on 16 November 2015.

40. The children could rely on the safe harbour because:

- the delay in disposing of the dwelling was due to legal challenges to the will (circumstances described as a favourable factor)
- the children clearly took positive steps to address these circumstances
- there were no materially adverse factors, and
- no more than an additional 18 months was required.

#### **Example 6 – no safe harbour – inactivity**

41. Ms Kahn lived in her main residence until she died on 6 May 2013. Prior to her passing, her spouse moved into the dwelling. Her will stated that the dwelling was to pass in equal shares to her 3 children.

42. After Ms Kahn's death, her spouse continued to live in the dwelling and the children commenced legal proceedings to remove Ms Kahn's spouse from the property. The matter was settled on 8 July 2014.

43. After the matter was settled, the property remained vacant for 18 months while the children decided what to do with the property. The property was eventually put on the market in January 2016 and sold, with settlement occurring on 3 April 2016.

44. While there was a delay in disposing of the property due to the legal action to remove the deceased's spouse from the dwelling, the children cannot rely on the safe harbour because the dwelling was not listed for sale as soon as practically possible after those circumstances were resolved.

#### **Example 7 – no safe harbour – serious illness of legal personal representative**

45. Mr Hubbard acquired a dwelling before 20 September 1985. He lived in his main residence until he died on 19 September 2014. Mr Hubbard's son, Richard, was the sole executor and beneficiary of Mr Hubbard's will. The house was the estate's only asset.

46. Shortly after probate was granted, Richard was diagnosed with a serious illness and spent a large period of time hospitalised. As soon as Richard's health improved, he cleaned out the property and placed the house on the market in January 2017, with settlement occurring on 2 April 2017.

47. Because the delay in selling the dwelling was not caused by any of the circumstances described as favourable factors, Richard could not rely on the safe harbour. However, if asked to exercise our discretion, we would take into account the fact that:

- Richard's serious illness prevented him from attending to the administration of the estate for a significant period



- *he took steps to resolve this as soon as practically possible, and*
- *the period for which Richard would need our discretion to be exercised is only short.*

**Example 8 – safe harbour – complexity of deceased estate**

48. *Mr and Mrs Harrison acquired their main residence after 20 September 1985. Mr Harrison died in July 2008 and Mrs Harrison became the sole owner of the dwelling. Mrs Harrison died on 29 February 2016 and was survived by her 2 daughters, Jane and Sally. The dwelling was not used to produce assessable income prior to Mrs Harrison's death. The daughters were unsure whether Mrs Harrison had a will.*

49. *Jane moved into the property without Sally's knowledge soon after Mrs Harrison died. Sally wanted to sell the dwelling and sought Jane's agreement to sell. No agreement was reached and Jane became increasingly obstructive.*

50. *During January 2017, Sally engaged solicitors in an attempt to resolve the issue. A number of court actions followed. During this period, Jane made 2 unsuccessful attempts to have the title transferred into her name solely. Letters of administration were also issued to Sally and subsequently revoked during this period. In early 2018, Jane sought to obtain finance to acquire Sally's interest in the property but was unable to do so.*

51. *In October 2018, on the basis that Mrs Harrison had no will, the Supreme Court ruled that the property be sold. Jane was evicted and the property was sold, with settlement occurring on 14 May 2019.*

52. *Because the delay in disposing of the property was caused by the complexity of the estate (including uncertainty about the will and the multiple legal proceedings) and the property was listed and sold as soon as practicable after those issues were resolved, the sisters could rely on the safe harbour.*

**Example 9 – safe harbour – complexity of deceased estate**

52A. *Mr O'Connor acquired his main residence after 20 September 1985. The dwelling was not being used to produce assessable income when he died in December 2015. Mr O'Connor's will provided that the dwelling was to pass to his only son David, in his capacity as the sole executor and beneficiary. The dwelling was never David's main residence.*

52B. *In administering the estate, the trustee discovers that the dwelling is intrinsically tied to Mr O'Connor's business as it was being used as security for the deceased's business debt. It takes an extended time for the trustee to untangle the deceased's financing and business arrangements in order to be able to sell the dwelling free from encumbrances.*

52C. *As soon as the dwelling was free from those encumbrances, it was listed for sale in February 2019 and sold with settlement occurring on 30 March 2019.*

52D. *Because the delay in disposing of the property was caused by the complexity of the estate (complex asset and liability position of the estate) and the property was listed and sold as soon as practicable after those issues were resolved, David can rely on the safe harbour.*

**Example 10 – safe harbour – more than one circumstance**

52E. *Mr Smith acquired his main residence after 20 September 1985. Mr Smith died in April 2019. Mr Smith's will provided that the dwelling pass to his adult children.*

52F. *The children listed the dwelling for sale in June 2019 but were immediately approached by a neighbour claiming that the driveway and part of the garage were occupying the neighbour's property. The children withdrew the dwelling from sale until the issue could be resolved.*

52G. *In April 2020, the issue with the neighbour was resolved. The dwelling was relisted for sale.*

52H. *In July 2020, COVID-19 restrictions came into effect, including a lockdown and limits on real estate viewings and auctions. There was very little interest in the dwelling during the lockdown and no offers were received.*

52I. *In December 2020, the lockdown was lifted and restrictions on real estate sales removed. In April 2021, the property sold, with a settlement occurring in June 2021.*

52J. *Because the delay in disposing of the property was caused by the complexity in administration of the deceased estate (10 months) and the impact of COVID-19 measures (5 months), and they took longer than 12 months to resolve in total, the children can rely on the safe harbour.*

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**Further considerations**

53. Where your circumstances fall outside of the safe harbour, but you want us to consider exercising our discretion, you should write to us and request a private ruling.

53A. Where an application for the discretion is made, and granted, it will apply regardless of whether the disposal of the ownership interest results in a capital gain or a capital loss. Where section 118-195 applies, the capital gain or capital loss is disregarded. How this may impact you in your circumstances should be considered before an application is made.

54. Where the safe harbour is not available and we do not exercise our discretion, your capital gain or capital loss will be calculated on the basis that the dwelling was acquired for its market value as at the date of the deceased's death.<sup>6</sup>

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**Commissioner of Taxation**27 June 2019

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<sup>6</sup> Table items 3 and 4 of subsection 128-15(4).

**Amendment history**

| <b>Date of amendment</b> | <b>Part</b>          | <b>Comment</b>  |
|--------------------------|----------------------|---|
| 30 September 2022        | Title and preamble   | Reference to CGT was made that does not otherwise affect the content or principles of the Guideline   |
|                          | Paragraph A1         | Clarified that 'you' is an individual, whether you are a beneficiary or a trustee   |
|                          | Paragraph 8          | Added a diagram to illustrate how the safe harbour can be relied on   |
|                          | Paragraph 14         | Extended the application of the Guideline in response to COVID 19 pandemic  |
|                          | Paragraphs 15 and 16 | Added clarity on our administrative approach when managing discretion requests  |
|                          | Example 4            | Indicated that administration of the estate has been completed and the beneficiaries own the dwelling   |
|                          | Example 9            | Added further clarity on complexity of deceased estates – deceased asset and liability position   |
|                          | Example 10           | Provided example on COVID-19 pandemic impact  |
|                          | Paragraph 54         | Moved a footnote to a stand-alone paragraph with a view to assisting applicants to consider their circumstances before lodging a discretion request |
|                          | Throughout           | Multiple minor content and style updates that do not otherwise affect the principles of the Guideline   |

## References

*Previous draft:*

PCG 2018/D6

ITAA 1997 118-190

ITAA 1997 118-195

ITAA 1997 118-195(2)

ITAA 1997 118-200

ITAA 1997 128-15(4)

*Legislative references:*

ITAA 1997

ITAA 1997 118-145

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ATO references

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