

Ms D Jablanovic
Australian Taxation Office

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Dear Danijela

Comments on Draft Taxation Determination TD 2026/D1

We welcome the ATO's efforts to clarify when a right to occupy a dwelling is one that arises under the deceased's Will for the purposes of section 118-195 of the ITAA 1997. We agree with many of the views expressed in the draft TD, but we do not agree with everything.

Matters with which we agree

We agree that:

- a 'right to occupy the dwelling under the deceased's will' requires specification of the persons so entitled but see comment below
- a right to occupy arising as the result of a court ordered variation of the deceased's Will arises under the deceased's Will
- a right to occupy under a post-testamentary agreement (including one to settle a family provision claim) does not arise under the deceased's Will
- a right granted by a trustee pursuant to the exercise of a broad discretion is not one granted under the deceased's Will
- if a Will specifies a limited period for the right, continued occupation by the person after the expiry of the right (who is not also a spouse of ultimate beneficiary) will not count.

Paragraph 15 of the draft TD says that the individual must be one specifically named in the Will. It would be useful to clarify whether this includes a person clearly able to be identified but not named as such, for example, 'My grandson has a right to occupy the dwelling'. In our view no distinction should be drawn between the two examples.

Also, the TD does not deal with Will that says 'Any of X, Y or Z may occupy the dwelling', or where the right is conditional upon the trustee agreeing. It would be useful to clarify this.

Matters with which we do not agree

We do **not** agree with the views expressed in paragraphs 31 to 37 for a number of reasons set out below.

This part of the draft TD appears to conflate two separate tests in subsection 118-195(1)

- the requirement in paragraph 118-195(1)(a) that the person claiming the exemption is the trustee of a deceased estate¹, and
- the requirement in item(2)(b) of the table in subsection 118-195(1) that the person occupying a dwelling have a right to do so under the deceased's Will.

We deal with the second aspect first as it is the subject of the draft TD.

Under a Will

A testamentary trust established under the deceased's Will is clearly not 'equivalent' to a deceased estate (paragraph 38), but this does not resolve the question whether a right to occupy is one granted 'under the Will'.

A Will is a testamentary instrument by which ownership of the deceased's assets is distributed. Probate is a court supervised process of validating a Will. Any part of a document in respect of which probate is granted is part of the deceased person's Will regardless of the format of the document. It makes no legal sense to say that probate was granted of the will and testamentary trust (para 35).

If the terms of the trust are included in a schedule to the main part of the deceased's Will, they are nonetheless part of the Will. The main part of the Will will say something like *I give XXX to be held on the terms of the trust set out in the Schedule to my Will*. The effect of the ATO view is equivalent to saying that something set out in a schedule to a contract is not part of the contract.

Example 5 should simply say that probate was granted of the Will. It follows that the source of any right to occupy referred to in the terms of the testamentary trust is the deceased's Will. If a specific individual is given a right to occupy, it is clearly 'under the deceased's Will'.

Further, while it is possible for the terms of a testamentary trust to be included in a schedule to the Will in our experience this is not common. Most often, a trust is established in the main body of a Will. Would the ATO seek to draw a distinction between the two cases?

¹ Although we note that paragraph 6 indicates that this issue isn't dealt with in the TD

Trustee of a deceased estate

There is a lot of (misguided) analysis in the TD which seeks to limit the right of occupancy to the period of administration. If this is the intended policy outcome, then it should rest on the meaning of the expression 'trustee of a deceased estate' not 'right to occupy'.

A trustee of a deceased estate in other contexts means an LPR of an estate during administration².

While we agree that the ATO **could** (technically) take the view that 'trustee of a deceased estate' when used in section 118-195 means LPR this approach would not be consistent with long-standing practice of allowing occupancy by a person with a right beyond the administration period.

Often administration means that occupancy is not possible for some or all of that period. People have assumed, and the ATO has ruled, that occupancy by a person with a right to occupy under a will or by a spouse can extend into a period of a testamentary trust prior to an asset passing to the ultimate beneficiary of the trust.

If the ATO wants to change its view (and we do not think as a matter of policy it should) the change should take effect for CGT events happening after the date of finalization of the TD (see paragraph 37).

We note that adopting a strict view of the expression 'trustee of a deceased estate' would produce a different result for the trustee of a testamentary trust compared to that of a beneficiary to whom the dwelling passes. That is, the trustee of a testamentary trust could not apply section 118-195 but if the dwelling passed to a beneficiary who then sold it, they could apply the exemption for any period that the property was occupied by someone who had a right to occupy it under the deceased's Will. There would be no basis to take the view that PS LA 2003/12 did not apply to treat the asset as having 'passed to the beneficiary for subsection 118-195(1) purposes.

Other comments

Although we do not agree that the analysis has anything to do with the meaning of the expression '*right to occupy under a Will*,' we offer the following further comments on the TD:

- Example 5 would fail on the lack of specification and so the deceased estate/testamentary trust distinction is irrelevant.
- There is no basis for the view in paragraph 42- 43 that treating a deceased estate and testamentary trust similarly is only for Division 128 (paragraph 42) and does not extend to section 118-195 because of what is said in TR 2006/14 (paragraph 43).

²See for example paragraph 251S(1)(c) of the ITAA 1936

In the first place, the Division 128 limitation is to exclude after-acquired property from the death rollover, and is particularly relevant to CGT events E5 to E7. The subject of this TD is a dwelling that was owned by the deceased, it is not after-acquired. TR 2006/14 says nothing about whether s118-195 could or should apply after administration. We agree that PS LA 2003/12 does not address the issue either (paragraph 44) so you have no support at all from existing ATO products for the view you wish to take.

- This logic would also extend to the spouse (which the TD fails to mention) even though there is no reference to under a Will in item2(a).

Please do not hesitate to contact me or my office should you wish to discuss these comments in further detail.

Yours sincerely

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Managing Director