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10 March 2026

Dear Danijela,

Draft Taxation Determination 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

CPA Australia is Australia's leading professional accounting body and one of the largest in the world. We represent the diverse interests of more than 176,000 members in over 100 countries and regions. We make this submission in response to the ATO's consultation on **Draft Taxation Determination 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** (TD) on behalf of our members and in the broader public interest.

We welcome the opportunity to make this submission to the Australian Taxation Office and support the TD's aim to consolidate and replace the three withdrawn ATO Interpretative Decisions into a single tax determination. We make the following comments and key points for your consideration of the draft TD:

- a beneficiary has a "right to occupy" the dwelling which is the main residence of the beneficiary which is a right that derived under the terms of the Will per Item 2(b) of the table in subsection 118-195(1) of the ITAA 1997 (with the right to occupy supplemented by the operation of subsection 11(2) of the *Trustee Act 1958 (VIC)* (the NSW equivalent, subsection 14DA(2) of the *Trustee Act 1925 (NSW)*). Similar provisions are contained in all other states and territories Trustee Acts nationally.
- There is no legal basis for the Commissioner to narrow the identification of a beneficiary to an individual specifically named in the will in subsection 118-195(1) of the *Income Tax Assessment Act 1997*.

If you have any queries, contact me at jenny.wong@cpaaustralia.com.au or Bill Leung, Tax Technical Advisor on bill.leung@cpaaustralia.com.au.

Yours sincerely,

Jenny Wong
Tax Policy Lead

Appendix

Detailed discussion

1. Paragraphs 15 – 17 and paragraphs 31 – 36

We do not agree with the TD's interpretation the requirement in item(2)(b) of the table in **subsection 118-195(1)** of the *Income Tax Assessment Act 1997* (ITAA 1997) that the person occupying a dwelling only have a right to do so specifically named and expressly granted under the terms of the deceased's Will and does not apply to granted by a trustee for that part of the estate is to be held upon trust. We respectfully submit with the reasoning below that the interpretation provided by the Commissioner in the TD is incorrect.

Where a Will does not (expressly) grant any individual a right to occupy a dwelling, but by (an express) direction to the executor/trustee that part of the estate is to be held "upon trust"[1] for a beneficiary a right to occupy a dwelling, it is then necessary to examine **section 11 of the *Trustee Act 1958 (VIC)*** (the NSW equivalent, **section 14DA of the *Trustee Act 1925 (NSW)***. Similar provisions are contained in all other states and territories Trustee Acts nationally[2]), which gives a trustee (which includes an executor of an estate) the power to purchase dwellings for a beneficiary, or to allow a beneficiary to reside in a house held subject to a trust (which for present purposes includes an estate).[3]

Subsection 11(1) of the *Trustee Act 1958 (VIC)* (the NSW equivalent, subsection 14DA(1) of the *Trustee Act 1925 (NSW)*)[4] provides that:

> *Subject to the instrument creating the trust, a trustee may:*
>
> *(a) invest any trust funds in the purchase a dwelling house for a beneficiary to use as a residence; or*
>
> *(b) enter into any other agreement or arrangement to secure for a beneficiary a right to use a dwelling house as a residence.*

If the dwelling was not purchased by the executors, and the executors did not enter into an agreement or arrangement to secure the dwelling, but rather the dwelling was already a part of the estate, then subsection 11(2) of the *Trustee Act 1958 (VIC)* (the NSW equivalent, subsection 14DA(2) of the *Trustee Act 1925 (NSW)*)[5] is relevant, as it provides that:

> *Despite the terms of the instrument creating the trust, a trustee may, if to do so would not unfairly prejudice the interests of other beneficiaries, retain as part of the trust property a dwelling house for a beneficiary to use as a residence.*

That is, pursuant to section 11(2) of the *Trustee Act 1958 (VIC)* (the NSW equivalent, section 14DA(2) of the *Trustee Act 1925 (NSW)*)[6], and notwithstanding the terms of the Will, the executor could retain the dwelling (being trust property) for the use of a beneficiary.

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[1] "Upon trust" in a will means assets are not distributed directly to beneficiaries, but are instead held and managed by a trustee (often the executor) for the beneficiaries' benefit. This creates a testamentary trust that comes into effect only upon the will-maker's death.
[2] Similar provisions are contained in all other states and territory Trustee Acts nationally, i.e. **section 28** of the *Trusts Act 1973 (QLD)*, **section 12** of the *Trustee Act 1936 (SA)*, **section 24** of the *Trustees Act 1962 (WA)*, **section 12** of the *Trustee Act 1898 (TAS)*, **section 14E** of the *Trustee Act 1925 (ACT)* and **section 10A** of the *Trustee Act 1893 (NT)*.
[3] Barlin, Denis (2015), **Selected Issues in the Taxation of Deceased Estates**, Thirteen Wentworth Selborne, Lexology, 18 May 2015, p 26-30
[4] Similar provisions are contained in all other states and territory Trustee Acts nationally, i.e. section 28(1) of the *Trusts Act 1973 (QLD)*, section 12(1) of the *Trustee Act 1936 (SA)*, section 24(1) of the *Trustees Act 1962 (WA)*, section 12(1) of the *Trustee Act 1898 (TAS)*, section 14E(1) of the *Trustee Act 1925 (ACT)* and section 10A(1) of the *Trustee Act 1893 (NT)*.
[5] Similar provisions are contained in all other states and territory Trustee Acts nationally, i.e. section 28(2) of the *Trusts Act 1973 (QLD)*, section 12(2) of the *Trustee Act 1936 (SA)*, section 24(2) of the *Trustees Act 1962 (WA)*, section 12(2) of the *Trustee Act 1898 (TAS)*, section 14E(2) of the *Trustee Act 1925 (ACT)* and section 10A(2) of the *Trustee Act 1893 (NT)*.
[6] Id

Subsection 11(3) of the *Trustee Act 1958 (VIC)* (the NSW equivalent, subsection 14DA(3) of the *Trustee Act 1925 (NSW)*)[7] provides that:

> *A dwelling house purchased, retained or otherwise secured for use by the beneficiary as a residence may be made available to the beneficiary for that purpose on such terms and conditions consistent with the trust and the extent of the beneficiary's interest as the trustee thinks fit.*

Subsection 11(4) of the *Trustee Act 1958 (VIC)* (the NSW equivalent, subsection 14DA(4) of the *Trustee Act 1925 (NSW)*)[8] provides that:

> *The trustee may retain a dwelling house or any interest or rights in respect of a dwelling house acquired under this section after the use of the dwelling/house by the beneficiary has ceased.*

Subsection 11(5) of the *Trustee Act 1958 (VIC)* (the NSW equivalent, subsection 14DA(5) of the *Trustee Act 1925 (NSW)*)[9] provides that:

> *In this section, dwelling house includes:*
>
> *(a) any building or part of a building designed, or converted or capable of being converted, for use as a residence; and*
>
> *(b) any amenities or facilities for use in association with the use of a dwelling house.*

Whilst subsection 11(2) of the *Trustee Act 1958 (VIC*) (the NSW equivalent, subsection 14DA(2) of the *Trustee Act 1925 (NSW)*)[10] allows a dwelling to be used by a beneficiary, that power is expressed to be "notwithstanding the terms of the Will". That power (contained in section 11 of the *Trustee Act 1958* (the NSW equivalent, section 14DA of the *Trustee Act (1925)*)[11] supplements the powers that the executors have pursuant to the terms of the Will.

The issue is whether the power contained in subsection 11(2) of the *Trustee Act 1958* (the NSW equivalent, subsection 14DA(2) of the *Trustee Act (1925)*)[12] is a right to occupy which is "*… under the deceased will…*" (i.e. whether it satisfies item 2(b) in Column 3 of subsection 118-195(1) of the ITAA 1997).

In particular, if a beneficiary had a *"... right to occupy the dwelling under the Deceased's Will"*, then the main residence exception in relation to that property will apply. The question is whether a beneficiary's occupancy of a dwelling house was "under the Deceased's Will".

Prima facie, a beneficiary has a right to occupy the dwelling, as subsection 11(2) of the *Trustee Act 1958 (VIC)* (NSW equivalent, subsection 14DA(2) of the *Trustee Act 1925 (NSW)*)[13] was satisfied. The issue then is whether that right to occupy was because of subsection 11(2) of the *Trustee Act 1958 (VIC)* (the NSW equivalent, subsection 14DA(2) of the *Trustee Act 1925 (NSW)*)[14] (i.e. independent of the terms of the will), or whether the statutory power contained in subsection 11(2) of the *Trustee Act 1958* (VIC) (the NSW equivalent, subsection 14DA(2) of the *Trustee Act 1925 (NSW)*)[15] is deemed to be part of the powers under the Will, and therefore a power "under" the Deceased's will.

The term "*… under the deceased's will …*" is not defined in the *1997 Act*. As a result, the term takes on its ordinary meaning. The term "under" is defined in the Macquarie Dictionary ((online edition)[16] as (including):

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[7] Similar provisions are contained in all other states and territory Trustee Acts nationally, i.e. section 28(3) of the *Trusts Act 1973 (QLD)*, section 12(3) of the *Trustee Act 1936 (SA)*, section 24(3) of the *Trustees Act 1962 (WA)*, section 12(3) of the *Trustee Act 1898 (TAS)*, section 14E(3) of the Trustee Act 1925 (ACT) and section 10A(3) of the Trustee Act 1893 (NT).

[8] Similar provisions are contained in all other states and territory Trustee Acts nationally, i.e. section 28(4) of the *Trusts Act 1973 (QLD)*, section 12(4) of the *Trustee Act 1936 (SA)*, section 24(4) of the *Trustees Act 1962 (WA)*, section 12(4) of the *Trustee Act 1898 (TAS)*, section 14E(4) of the *Trustee Act 1925 (ACT)* and section 10A(4) of the *Trustee Act 1893 (NT)*.

[9] Similar provisions are contained in all other states and territory Trustee Acts nationally, i.e. section 28(5) of the *Trusts Act 1973 (QLD)*, section 12(5) of the *Trustee Act 1936 (SA)*, section 24(5) of the *Trustees Act 1962 (WA)*, section 12(5) of the *Trustee Act 1898 (TAS)*, section 14E(5) of the *Trustee Act 1925 (ACT)* and section 10A(5) of the *Trustee Act 1893 (NT)*.

[10] Ibid at 5

[11] Ibid at 2

[12] Ibid at 5

[13] Ibid at 5

[14] Ibid at 5

[15] Ibid at 5

[16] National Library of Australia, **Macquarie dictionary [electronic resource]: Australia's national dictionary online**, "View online" tab

> ***1.*** *Beneath and covered by …* ***5.*** *Subject to …* ***14.*** *With the favour or aid of …* ***16.*** *In accordance with …* ***22.*** *In a subordinate position or condition …*

The correct view therefore is that the term "*… under the deceased's will …*" should be construed as under the powers and/or trusts which arise as a result of the Deceased's will. That is, certain powers and trusts have been created as a result of the Will being admitted to probate, with those powers and trusts evidenced in the Will, contained in the general law and in statute (such as subsection 11(2) of the *Trustee Act 1958 (VIC)* (the NSW equivalent, subsection 14DA(2) of the *Trustee Act 1925 (NSW)*)[17].

This was the approach taken by the Court of Appeal in ***Re Dion Investments Pty Ltd* [2014] NSWCA 367** (*Re Dion*).

Barrett JA (with whom Beazley P and Gleeson JA agreed) observed at [42] in *Re Dion* that:

> *"the terms of the trust have, in the eyes of equity, an existence that is independent of the provisions of the deed that define them…".*

At [43] Barrett J in *Re Dion* observed that

> *"... the equitable rights and interest of a beneficiary cannot be taken away or varied by anyone unless terms of the trust itself (or statute) so allow".*

In considering the power to vary, Barrett JA in *Re Dion* observed at [48]:

> *Whether one is dealing with exercise of power of variation or amendment conferred by the settlor and stated in the trust instrument, the species of consensual variation based on the Saunders v Vautier principle or the Court's response to some emergency, the situation is never one in which the provisions of the trust instrument made between settlor and trustee are altered. Rather,* ***there is a variation or supplementation of the terms of the trust derived from that instrument or the powers of the trustees conferred by that instrument. Shorthand references to amendment of a trust deed must be understood accordingly.***

Likewise, the words "*… under the deceased's will…"* is a shorthand reference to the terms of the trusts (and powers) which are derived as a result of that Will being admitted to probate. Some of the trusts and powers may not be contained in the words of the Will but may also be derived by statute and the general law.

Therefore, the words "*… under the Deceased's Will… "* is contained in Item 2(b) of the table in subsection 118-195(1) of the ITAA 1997, needs to be read as the terms of the Will derived from that instrument, or the powers of the trustee conferred by that instrument, as supplemented or varied by legislation. That is, and per the reasoning of Barrett JA in *Re Dion*, the terms of the Will have, in the eyes of equity, an existence that is independent of the provisions of the Will that define them ([42]). As a result, the terms of the Will include the power as contained in subsection 11(2) of the Trustee Act 1958 (VIC) (the NSW equivalent, subsection 14DA(2) of the *Trustee Act 1925 (NSW)*)[18].

Based on the above, a beneficiary has a "right to occupy" the dwelling which is the main residence of the beneficiary which is a right that derived under the terms of the Will per Item 2(b) of the table in subsection 118-195(1) of the ITAA 1997 (with the right to occupy supplemented by the operation of subsection 11(2) of the *Trustee Act 1958 (VIC)* (the NSW equivalent, subsection 14DA(2) of the *Trustee Act 1925 (NSW)*)[19].

2. Paragraph 15 – an individual specifically named in the will

The Wills Act 1997 (VIC) (the NSW equivalent, ***The Succession Act 2006 (NSW)***) and similar provisions are contained in all other states and territories Trustee Acts nationally[20] do not strictly require that a beneficiary be identified in a will by their full legal name, but it does require that the beneficiaries are identifiable with sufficient certainty. The Act governs how trustees manage assets for beneficiaries, including those named or defined by class (e.g., "my children"). A will must clearly state who is to receive assets, but this can be satisfied through a description or class of persons (e.g., "my children" or "my spouse") rather than a specific, full name, provided the

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[17] Ibid at 5
[18] Ibid at 5
[19] Ibid at 5
[20] ***Succession Act 1981 (QLD), Succession Act 2023 (SA), Wills Act 1970 (WA), Wills Act 2008 (TAS), Wills Act 1968 (ACT), Wills Act 2000 (NT)***.

executor can determine exactly who that is. Likewise, the *Trustee Act 1958 (VIC)* (the NSW equivalent, the *Trustee Act 1925 (NSW)* and similar provisions are contained in all other states and territories trustee Acts nationally[21] do not strictly require a beneficiary to be named explicitly by name in a will to be valid, but it does require that beneficiaries be identifiable or ascertainable. There is no legal basis for section 118-195 of the ITAA 1997 to allow the Commissioner to adopt a stricter interpretation which significantly restricts and narrows the identification of a beneficiary to an individual specifically named in the will.

3. Paragraph 37 – date of effect

Where a Will does (expressly) grant any individual a right to occupy a dwelling, or by (express) direction to the executor/trustee that part of the estate is to be held "upon trust" for a beneficiary a right to occupy a dwelling which is a main residence, the proposed commencement date of this TD will not impact them based on our interpretation above. On the other hand, where the right to occupy the dwelling exists:

- under a post-testamentary agreement, or
- right to occupy the dwelling for a limited period, or
- a right granted by a trustee pursuant to the exercise of a broad discretion

We agree with the Commissioner that the above situations are not granted under the deceased's Will. The commencement date of the TD should apply to years of income commencing both before and after its date of issue.

Conclusion

If the Commissioner disagrees with the above interpretation, a test case should be funded by the Australian Taxation Office for the judiciary to determine the correct interpretation of the law and the rights of taxpayers instead.

[21] Ibid at 2