

WHAT'S NEW IN SUCCESSION LAW

Granny Flat Gains

Removal of CGT will bring two major benefits

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By [Christine Smyth](#)



On 5 October 2020, the Treasurer, Josh Frydenberg, and the Minister for Housing and Assistant Treasurer, Michael Sukkar, announced the removal of Capital Gains Tax (CGT) from granny flat arrangements.

“Under the measure, CGT will not apply to the creation, variation or termination of a formal written granny flat arrangement providing accommodation for older Australians or people with disabilities,” their announcement said. “The measure will commence as early as 1 July 2021 subject to the passing of legislation.”²

The announcement is not only welcome from a tax reduction aspect but, more importantly, because of the requirement for these agreements to be in writing in order to benefit from the CGT exemption.

We know these arrangements are often entered into informally. The lack of documentation makes it difficult for both parties to evidence the true nature of the agreement, causing protracted and expensive litigation at a later time. The introduction of a requirement of writing before the parties can access the CGT exemption will hopefully encourage families to seek legal advice.

For practitioners unfamiliar with these arrangements, this article aims to address some of the general matters to which you will need to have regard.

If acting for the aged person, you must consider whether they are entitled to or seek to become entitled to social security under the *Social Security Act 1991* (Cth) (Social Security Act). If they are, then restrictions apply.

For social security purposes, a ‘granny flat interest’ is defined as follows:

“A person has a granny flat interest in the person’s principal home if:
(a) the residence that is the person’s principal home is a private residence; and
(b) the person has acquired for valuable consideration or has retained:
(i) a right to accommodation for life in the residence; or
(ii) a life interest in the residence.”³

For social security purposes, where a granny flat interest is created, its value is generally the same as the amount paid for acquiring the interest.⁴ Importantly, for social security preservation the aged person cannot obtain legal title to the property either directly or indirectly through their partner, a trust or company they control.

The social security granny flat arrangement is further restricted by the ‘five year rule’. The Social Security Act provides that a single person or couple can make gifts up to \$10,000⁵ in a single year with a maximum of \$30,000⁶ over a five-year rolling period (minus the \$10,000) if applicable, without it impacting their social security benefits.⁷ Any gift valued at more than that is classified as a ‘deprived asset’ for five years from the date of the gift, and is deemed as an asset of the aged person.⁸

However, an exemption applies to the aged person’s home. Where the aged person’s home ownership is divested as part of the granny flat arrangement in exchange for valuable consideration in the form of a right of residence for life in another property, this forms a “special residence”⁹ which exempts the aged person’s home from the deprivation rule.

In exploring the viability of a granny flat arrangement, the following is a non-exhaustive list of issues to be canvassed and preferably reduced to writing:

- Have all the parties received independent advice – legal, financial, social security?
- Are the assets/money pledged to be gifts to the person housing the aged person?
- What kind of personal care and support will the homeowner’s family provide, if any?
- Is someone seeking or entitled to seek a carer payment?
- What are the health care needs? Is the aged person in receipt of a Homecare package?¹⁰ What is to happen if their health worsens and they need to be moved to a medical facility for a prolonged period?

- What is to happen if the homeowner suffers financial difficulty?
- Who is responsible for maintenance and outgoings?
- How is the arrangement to be reflected in the aged person's will and the will of the homeowner?

The rise of the granny flat arrangement also adds complexity to family provision claims. *Megerditchian v Khatchadourian* [2019] NSWSC 1870 and *Megerditchian v Khatchadourian* [2020] NSWCA 229 is a recent example of how the benefit and burden of shared housing arrangements impact family provision applications.

In *Megerditchian v Khatchadourian* [2019] NSWSC 1870, the court in the first instance (upheld on appeal), found that the housing arrangements within the family were entirely relevant to the application. The son, Hampartzoum, lived with his father, Souren, his whole life. Souren had owned the family home in joint tenancy with his wife. On her death, her share of the home passed to Souren.

Later, Souren gifted a half share to his son, held in joint tenancy. Souren died aged 91 in May 2018, and Hampartzoum received the remaining share by survivorship. By that stage, Hampartzoum had held an ownership entitlement in the family home for about 10 years.

Souren's 71-year-old daughter, Vanoush, who lived with her adult daughter, brought a claim for further provision against her father's estate.

One of the questions for determination was whether the former family home could be subject to a notional estate order. In finding in favour of Vanoush that half of the property was liable to be designated as notional estate, the court at first instance addressed the welfare and housing arrangements between the deceased and his son, finding:

"[193] It is quite clear that 'proper' provision under s59(1)(c) does not require equality between the testator's children. The deceased was entitled to make greater provision for the son who stayed close to his parents, than to the daughter who (for whatever reason) did not. Hampartzoum's many contributions to his parents' welfare are facts which the Court would not lightly cast aside, even if there were stronger evidence than there is that the deceased was to blame for the rift with Vanoush. In my view the Court would not be justified in rewriting the deceased's will in a way which would nullify, or jeopardise, the intention for Hampartzoum to have the Mowbray Road property as his home after his parents died."

On appeal, in *Megerditchian v Khatchadourian* [2020] NSWCA 229 Emmett AJA noted in relation to the housing arrangements between the applicant and her daughter:

"[I]t is well established that, prima facie, an infant child has a claim to be maintained and supported, an adult child capable of maintaining and supporting himself or herself usually does not. ^{Citing *Hughes v National Trustees, Executors and Agency Company of Australasia Limited* (1979) 143 CLR 134 at 147 (Gibbs J); [1979] HCA 2.} Furthermore, his Honour considered that, if a parent owes no obligation to provide a home for a child whilst the parent is alive, that absence of obligation does not change merely because the parent dies."

The above is merely a snapshot of the issues for consideration in a granny flat arrangement. Some 16% (about four million) Australians are over 65 years,¹¹ of them 63% receive income support from the Australian Government.¹²

For the 2019-20 financial year, around 1.45 million (73%) of Australians in receipt of a pension were classified as homeowners (with or without a mortgage).¹³

These figures indicate that the granny flat arrangements continue to be a significant alternative to institutional care. The initiative of tethering the CGT exemption to a formal written agreement is a welcome step in protecting vulnerable clients.

Christine Smyth is a former President of Queensland Law Society, a QLS Accredited Specialist (succession law) – Qld, a QLS Senior Counsellor and Consultant at Robbins Watson Solicitors. She is an executive committee member of the Law Council Australia – Legal Practice Section, Court Appointed Estate Account Assessor, and member of the Proctor Editorial Committee, STEP and Deputy Chair of the STEP Mental Capacity SIG Committee.

Footnotes

¹ ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/removing-capital-gains-tax-granny-flats.

² *Ibid.*

³ *SS12C(2), (3) and 1118(1)(ga) Social Security Act 1991 (Cth)*.

⁴ *SS1118(1)(c)(i)–(iii) Social Security Act 1991 (Cth)*, although a reasonableness test is applied. Department of Social Services, ‘Guide to Social Security Law’ (2014) [4.6.4.50].

⁵ *S1126AA Social Security Act 1991 (Cth)*.

⁶ *S1126AB Social Security Act 1991 (Cth)*.

⁷ *S1118 Social Security Act 1991 (Cth)*.

⁸ *Fulcher v Department of Family and Community Service [2005] AATA 332*.

⁹ *Ibid.*

¹⁰ myagedcare.gov.au/help-at-home/home-care-packages.

¹¹ abs.gov.au/ausstats/abs@.nsf/o/1CD2B1952AFC5E7ACA257298000F2E76.

¹² superguide.com.au/in-retirement/age-pension-rates.

¹³ *Ibid.*