



Granny Flat Rights 2021

Centrelink offer some excellent pension concessions for parents to build a granny flat in their child's back yard or modify the house etc. With raising awareness of elder abuse Centrelink also strongly encourage parents to obtain a right of occupancy over their child's house. This would take the form of a life time right to reside for ATO purposes.

While Centrelink is busy protecting its customers, another government department, the ATO, is having a field day taxing their children on the value of this right with no main residence exemption and no 50% CGT discount. The ATO is taxing, at the child's full marginal tax rate the transfer of assets between a parent and child. Further, even if the parent gives the child nothing in return for the life time right, the ATO will still deem an amount changed hands (basically the market value of rent over Granny's life expectancy) and tax the child on something that just doesn't exist.

This law has been around for 36 years now! But finally as from 1st July, 2021 changes have been made. They are in section 137 ITAA 1997. You still need to be very careful as there are traps that well meaning family members can fall into.

- It only applies to agreements entered into on or after 1st July, 2021
- **Granny must be over age pension age** or disabled for at least the next 12 months.
- The property must be a dwelling and be owned by an individual not a company or a trust
- No rent can be charged which means no rent assistance to the parent though the parent is permitted to contribute to the running costs of the property
- The right to occupy is intended to be for the life of granny but it can have termination or variation clauses. For example moving to a different property.
- The agreement must be in writing and clearly show that the parties agree to be legally bound by it.
- The agreement can set conditions for money to have to be repaid by the house owner. Tax does not apply to this transfer back to granny.
- It does not have to be a child parent relationship it can be friends etc just as long as it is individuals on both sides of the contract.
- The individual granting the right to granny does not have to be also living in the property, in fact the granny flat right can be for the whole property. But granny cannot give their main residence exemption to the property so it may be exposed to CGT on sale.

Before you rush out and enter into one of these arrangements to avoid the tax, consider that it is only the existence of the contract, the Granny flat right, that creates a CGT liability. If you have no agreement with Granny then CGT does not apply. If Granny has no occupancy rights there is no CGT problem. There is a bit of spruiking going on in this area. Please don't be dragged into a contract for the sake of it, only if granny wants one and then check off the above list to make sure the solicitor has got it all covered.

If something on the list does not suite your circumstances, such as Granny not having reached age pension age. There is an alternative that still gives Granny a right to occupy. Consider an ownership right not a granny flat entitlement. Joint tenancy will automatically transfer the property to the survivor. If the child has not used the house to produce income in the past (other than the 6 year rule), the transfer of part ownership would be covered by the child's main residence exemption so no capital gains tax. As long as the parent's share of the house was covered by the parent's main residence exemption for CGT purposes, the whole time, then when the parent dies, there would be no tax downside for the child. Eventually when the child sells the house it would just be like the transfer to the parent never happened.

Joint tenancy should be seriously considered if there are two separate dwellings on the property as only owners can use their main residence exemption to protect a property from CGT. The only way the granny flat and the main house can be treated as one dwelling is if they are used together as the family home. The ATO takes a rather strict view on this in TD 1999/69. Even if you are all related, unless you are in and out of each other's home frequently and eat together more than once a week. The granny flat will be considered a separate dwelling. This means that only part of the property will be covered by the child's main residence exemption. The parent cannot cover the other part with theirs because their name is not on the title.

Note a Granny flat right or partial ownership does not override the banks right to repossess the property.