

**VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL**

**RESIDENTIAL TENANCIES DIVISION**

**RESIDENTIAL TENANCIES LIST**

VCAT REFERENCE NO. R2024/11355

**CATCHWORDS**

Termination of rental agreement after death of sole renter – Repealed section 228 of the *Residential Tenancies Act 1997* (Vic) – Sections 91N, 91S, 344 and 345 of the *Residential Tenancies Act 1997* (Vic) – Difference between notice of death and notice of intention to vacate - Creation of residential rental agreement where person is residing in the rented premises – Application for possession where premises occupied without consent – Meaning of ‘entitled to possession’ – Application for possession struck out.

<b>APPLICANT</b>	Homes Victoria
<b>RESPONDENT</b>	Ms Cheryl Carroll
<b>WHERE HELD</b>	Melbourne
<b>BEFORE</b>	Member F. Gelev
<b>HEARING TYPE</b>	Telephone hearing
<b>DATE OF HEARING</b>	7 and 10 May 2024
<b>DATE OF ORDER</b>	10 May 2024
<b>DATE OF REASONS</b>	13 May 2024
<b>CITATION</b>	Homes Victoria v Carroll (Residential Tenancies) [2024] VCAT 474

**ORDER**

VCAT finds:

1. The application is not valid because the applicant is not ‘entitled to possession’ as required by section 345(a) of the *Residential Tenancies Act 1997* (Vic).
2. The Tribunal will provide written reasons.

VCAT orders:

1. The application for a possession order is struck out.

**Member F. Gelev**

**APPEARANCES:**

For Applicant

Mr C. Bonnici, Homes Victoria

For Respondent

Ms D. Carroll, the respondent’s daughter



## REASONS

1. This is an application for a possession order by Homes Victoria under section 344 of the *Residential Tenancies Act 1997* (Vic) ('the Act') on the basis that the premises are occupied without consent by the son of the respondent.<sup>1</sup>
2. The reason why the application must be struck out is because the residential rental provider is not entitled to possession as they have failed to terminate the rental agreement with the late Cheryl Carroll ('the respondent').
3. Homes Victoria has not acted in accordance with the current provisions of section 91N which apply when terminating an agreement where there has been the death of a sole renter.
4. This case first came before me on 3 May 2024. I adjourned the case and sought further evidence from the parties. The case returned for a further hearing on 10 May 2024. On that date only the daughter appeared on behalf of the respondent, there was no appearance by Homes Victoria. I made the above orders on 10 May 2024.

## BACKGROUND

5. The respondent is the sole renter of the rented premises. She passed away on 11 February 2024.
6. After being notified of the renter's death by phone on 13 February 2024, Homes Victoria sent to Ms Carroll's daughter ('the daughter') a document entitled 'Notification of death by legal representative or next of kin' ('Notification of death') and asked her to fill out the form, date it, sign it and return it.
7. The daughter signed and returned the form on 28 March 2024. According to the daughter's evidence on 10 May 2024, the respondent's son ('the son') moved into the property *before* 28 March 2024, but after the respondent's death. According to the electronic file notes provided to the Tribunal, the son told Homes Victoria "he did not live with his mother ... until just *before* she passed".<sup>2</sup> As already mentioned, Homes Victoria seek a possession order against the son, although he is not the respondent in this proceeding.
8. The key part of the form signed by the daughter as next of kin is as follows:

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<sup>1</sup> It is not clear why the late renter is the respondent. Had I been persuaded that an order of possession must be made, I would have allowed an amendment to the application making Mr Carroll the respondent.

<sup>2</sup> Note 1006937609, 24/4/24, italics added.



I ... as ... Next of Kin of the deceased ... hereby authorise the termination on 11/02/2024 (date no more than 28 days from today) of the tenancy of the above tenant.

9. The form refers numerous times to section 228 of the Act. Section 228 was repealed in 2021. Since 29 March 2021 section 91N prescribes four methods to terminate a rental agreement after the death of a sole renter. The provision was not merely renumbered; sections 91N and 228 are different in some important respects, including that a rental agreement can no longer be terminated by notice of death or notification of death.
10. Section 228(1)(a) provided that if a sole tenant<sup>3</sup> died, the tenancy agreement would be terminated 28 days after the landlord has been given notice of the death of the tenant by the next of kin.
11. Section 91N contains no equivalent to subsection 228(1)(a). It relevantly provides:

**91N Termination after death of sole renter**

- (1) If a renter dies, the residential rental agreement terminates at the earliest of the following dates—
  - (a) the termination date specified in the notice of intention to vacate given under subsection (2); or
  - (b) the termination date specified in the notice to vacate given [by the residential rental provider] under subsection (3); or
  - (c) the termination date specified in the Tribunal order under subsection (5); or
  - (d) a date agreed in writing between the residential rental provider and ... the next of kin of the deceased renter.
- (2) The ... next of kin of the deceased renter may give the residential rental provider a notice of intention to vacate the rented premises due to the death of the renter specifying a termination date, which, in the case of a fixed term residential rental agreement, may be a date before the end of that agreement...
- (3) The residential rental provider may give the ...next of kin of the deceased renter a notice to vacate the rented premises due to the death of the renter specifying a termination date, which, in the case of a fixed term residential rental agreement, may be a date before the end of that agreement.
- (4) If a residential rental provider is unable to give notice to vacate under subsection (3) because the legal personal representative or next of kin of the deceased renter cannot be located, the residential rental provider may apply to the Tribunal for—
  - (a) an order to terminate the residential rental agreement; and

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<sup>3</sup> The terms renter, residential rental provider and rental agreement replaced tenant, landlord and tenancy also on 29 March 2021.



- (b) if required, a possession order.
  - (5) On an application under subsection (4), the Tribunal may
    - (a) make an order terminating the residential rental agreement; and
    - (b) make a possession order under Part 7.
- 12. Under the current law asking a deceased person's next of kin to fill out and send back to Homes Victoria a notice of death or 'Notification of death' form achieves no discernible purpose.
- 13. Under section 91N, instead of giving 'Notification of death' the renter's next of kin can give a notice of intention to vacate to terminate the rental agreement (subsections 91N(1)(a) and (2)). It has to be in writing, but there is no prescribed form.
- 14. The second option, if the next of kin does not send to Homes Victoria a notice of intention to vacate, is for Homes Victoria to serve a notice to vacate (subsections 91N(1)(c) and (3)). There is no prescribed notice period in a notice of intention to vacate or a notice to vacate under section 91N; the termination date does not have to be, for example, at least 14, 28 or 60 days after the notice is given, but in either case it has to be a date after the notice is given to the recipient (the termination date cannot predate the notice).
- 15. The third option, where the next of kin can be contacted, is for the next of kin and residential rental provider and the next of kin to agree in writing to terminate the residential rental agreement (subsection 91N(1)(d)). However, the law requires that a specific termination date be agreed, that is, the next of kin saying, for example, that they will vacate 'soon' or get the renter's belongings removed 'in the next few days' or 'next week' does not terminate the agreement.
- 16. The fourth option, seeking a Tribunal order, is only relevant where the next of kin cannot be 'located' (subsections 91N(1)(c), (4) and (5)).
- 17. Homes Victoria submitted at the first hearing that the Notification of death signed on 28 March 2024 could be construed as, or taken to be, a notice of intention to vacate under subsection 91N(1)(a) with a termination date of 11 February 2024.
- 18. I disagree. First, the form used by Homes Victoria is called 'Notification of death', not a 'Notice of intention to vacate', and it is clear it was created by Homes Victoria some time ago to comply with section 228 of the Act, not to comply with section 91N. As already mentioned, the form refers more than once to section 228 of the Act and is it clearly an obsolete form.
- 19. Secondly, a party cannot unilaterally end a rental agreement with retroactive effect i.e. with a termination date earlier than the date of the notice. It would not be in accordance with the Act, it would go against

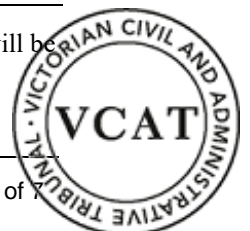


common sense, and it would create enormous difficulties and uncertainty if a party to a rental agreement could choose a past date that suits them as the termination date e.g. a renter who leaves a property without returning the keys and without telling the rental provider they have left could give a notice of intention to vacate a few weeks later with a vacate date in the past (the vacate date being the date they left the property) and assert they are not liable to pay rent beyond the date they left. In other words, in my view even if I were to accept – and I do not – that the Notification of death form could be used by next of kin as a notice of intention to vacate, in this case the notice of intention to vacate would not be valid because the termination date specified by the daughter was a past date.

20. Thirdly, according to the internal electronic file notes kept by Homes Victoria and provided to the Tribunal, Homes Victoria's own view in early April 2024 was that the rental agreement had not been terminated yet.<sup>4</sup>
21. Fourthly, the daughter's evidence at the first hearing was that she did not consider the Notification of death form to be a notice of intention to vacate. On 28 March 2024, when she signed the document, the premises were not completely vacant yet and she needed a few more days to remove some of the respondent's belongings. She said she had spoken with Homes Victoria about this. I am satisfied that if the daughter wanted the Notification of death to be considered a notice of intention to vacate, she would have specified a future date – in early April 2024 – as her vacate date. She told me that she did not read the 'Notification of death' carefully and assumed the date she should write down was the date when her mother died rather than a future date when the unit will become vacant.
22. I find that in the absence of a notice of intention to vacate with a specific *future* termination date, the rental agreement with the respondent has not been terminated in accordance with subsection 91N(1)(a) and (2).
23. Homes Victoria correctly pointed out that the rental provider and the next of kin can agree to terminate the agreement. There was no evidence of such an agreement because of the absence of a specific termination date in the discussions between the daughter and Homes Victoria. I find that the parties did not agree in writing to terminate the rental agreement under section 91N(1)(d).
24. Therefore, as of 10 May 2024 the rental agreement with the sole renter, the respondent, has not been terminated in accordance with section 91N nor any other provision of the RT Act.

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<sup>4</sup> Note 1006894141, date 3/4/24: "...As you have submitted the termination form the house [sic] will be terminated. Is there still any of your mums [sic] belongings at the property to take. Once the termination is done you will not be able to get back into the property."



## The present application for possession under section 344 of the Act

25. Sections 344 and 345 relevantly state the following:

### **344 Application for possession order if premises occupied without consent**

- (1) A person who claims to be entitled to the possession of premises may apply to the Tribunal for a possession order if—
  - (a) the premises have been rented premises under a residential rental agreement at any time within the period of 12 months before the date of the application; and
  - (b) the applicant alleges that the premises are occupied solely by a person (not being a renter under a residential rental agreement) who entered into or remained in occupation without the applicant's licence or consent or that of any predecessor in title of the applicant.

### **345 Order of Tribunal**

The Tribunal must make a possession order for the premises if the Tribunal is satisfied that—

- (a) the applicant under section 344 is entitled to possession of the premises; and
- (b) there are reasonable grounds for believing that a person is occupying the premises without licence or consent.

26. It is not necessary for present purposes to consider in detail the two limbs of section 344(1). This is because the application fails under section 345(a). Homes Victoria is *not* entitled to possession while the rental agreement with the deceased renter has not been terminated. For as long as it remains on foot, there is no entitlement to possession.<sup>5</sup>

## **Application to create a new rental agreement: Section 91S**

27. Section 91S relevantly states:

- (1) A person who has been residing in rented premises as that person's principal place of residence and who is not a party to a residential rental agreement applying to those premises may apply to the Tribunal for an order requiring the residential rental provider of the premises to enter into a residential rental agreement with the person if ... (e) the renter has died and there is no surviving renter.

28. It is not clear exactly when the son moved in. However, had Homes Victoria terminated the rental agreement with the deceased renter in a timely manner in accordance with section 91N, the son might not have been able to make a valid application under section 91S of the Act, because it seems that by the time he moved into the premises they would no longer have been 'rented premises'.

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<sup>5</sup> *Kovac v Homes Victoria (Residential Tenancies)* [2024] VCAT 58 at [69]-[72].



29. The Tribunal is not critical of the son's decision to move in to the property. It observes that he is quite vulnerable and not only eligible for housing but on Homes Victoria's priority list. Homes Victoria advised at the first hearing that they expect to offer him a property in the near future.
30. If Homes Victoria wishes to apply again for a possession order, it must terminate the existing rental agreement with the deceased renter in accordance with section 91N of the Act and reapply to the Tribunal. It must further ensure that the application is made against the 'occupant' (the son) as opposed to the former renter.

**Member F. Gelev**

