

Property Settlement - Caveats in Family Law in Queensland – Application and Purpose

It is becoming more frequent in family law disputes for property to be registered in one party's name only. This may be because one party owned the property prior to the commencement of the relationship, or the parties during the relationship make that choice based on other financial/tax/commercial/asset protection factors.

If a property is registered in your former partner's name only, you should prior to or following a relationship breakdown ask yourself questions such as:

- Can my ex sell the property without my consent?
- Can my ex further encumber (e.g. mortgage) the property without my consent?
- Can my ex transfer all or a share of the property to someone else without my consent?

If you answered yes to any of the above questions you could be exposed. This exposure can be heightened in family law disputes, particularly in the early stages of a relationship breakdown where emotions run high, parties are angry, and often they lose their trust in one another. A combination of these factors (and/or other factors) may cause one party to have concerns that the other party (who is the legal owner of the property) will:

- Sell the property or further encumber the property in order to defeat their property settlement entitlement or to reduce the net assets available for division by way of property settlement;
- Use sale proceeds to waste money, spend money or otherwise deal with money; and/or
- Further encumber the property to reduce equity in the property:

So how can you protect your interest and what can you do to ensure that the property is not disposed of or further encumbered? You should seek advice immediately about lodging a caveat against the property.

What is a Caveat?

A caveat is a formal document that is lodged at the Queensland Titles Office with the Department of Natural Resources and Mines. It is a notice to the Registrar which prohibits the registration of an instrument or document (for example a transfer or mortgage) until the caveat is withdrawn, removed, lapses, or is cancelled.

Put simply, if a caveat is registered on the property, the property (or any portion of the property) cannot be sold because the transfer cannot be processed while the caveat is on the title. Further, if a caveat is registered on the property it cannot be further encumbered because a mortgage cannot be processed while the caveat is on the title.

Why Lodge a Caveat?

There are tactical advantages in lodging a caveat, however the process can be rather onerous and it is imperative that your caveat is prepared properly (as consequences can follow if you do not have proper basis to lodge the caveat). Further, if you are thinking about lodging a caveat, you will need to contemplate whether you are prepared to go through the process of commencing court proceedings and make an application for interlocutory injunctive relief so as to ensure the caveat does not lapse. This is discussed further below.

Do I have an automatic right to lodge a Caveat if I am in a de facto or material relationship with the owner?

The role of a caveat is to preserve the property until such time as a court can determine the right of the party who lodges the caveat. Although caveats can be used in family law matters, caveats are dealt with under the *Land Title Act 1994* (Qld).

The *Land Title Act 1994* (Qld) sets out who can lodge a caveat. In a family law context, this includes:

- Someone who claims an interest in a lot; and
- Someone who has the benefit of an existing Order of an Australian court restraining a registered proprietor from dealing with the lot.

Therefore, you do NOT have an automatic right to lodge a caveat merely because you are in a de facto relationship or married to the legal owner. You must show that you are claiming an interest in the property (and you must identify the interest you have in the property) or you must have an existing court order.

So how do you prove you have an interest in a lot? You need to establish that:

- You have a legal or equitable interest in the property; OR
- You have a right, power or privilege over to the property.

You may assume that as a de facto partner, or spouse, you have a legal or equitable interest. This is not the case, as equitable and legal interests are clearly distinct from the right to obtain a property settlement under the *Family Law Act 1975*.

It is beyond the scope of this fact sheet to enter into a detailed discussion on the law of equity and equitable interests that give rise to the ability to lodge a caveat if it is for the same reason that you lodged it last time. However, it is not unusual, in family law matters for one party to argue that he or she has an equitable interest in a particular property having regard to the respective contributions made by the parties during the relationship. It is therefore important that you seek legal advice prior to lodging a caveat as to what equitable interest you may have.

What if I have a Court Order?

If you have a Court Order that injuncts the legal owner from dealing with the property, you can deliver a copy of the Order to the Titles Office when the caveat is lodged to ensure that it will not lapse.

What Happens after Caveat is Lodged and What Must I Do?

Once a Registrar accepts the caveat the Registrar must give written notice of the lodgement of the caveat to the registered owner of the property.

Once the registered owner has been provided with notice of the caveat, the registered owner is entitled to serve a notice on the person who lodged the caveat requiring them to commence court proceedings to establish the interest claimed under the caveat.

If you have lodged the caveat and are served with this notice by the registered owner, you **MUST** do the following:

1. Commence court proceedings to establish the interest claimed under the caveat **within 14 days** after the notice is served; **AND**
2. Notify the Registrar **within 14 days** that court proceedings have been commenced and identify the court proceedings to the Registrar.

If you do not do both of these things, your caveat will automatically lapse.

If you are not served with the Notice, then you have **three (3) months** to do both of the steps identified above. If you do not do this within **three (3) months** then the caveat will automatically lapse. Once the caveat lapses, you cannot re-issue another caveat for the same reason unless you obtain the Court's permission.

It is important that you seek legal advice prior to filing any court proceedings to ensure you file in a court of competent jurisdiction and to ensure you seek the appropriate remedy to establish your claimed interest in the property.

Can my Caveat be Removed?

The Registered owner can, at any time, apply to the Court to have the caveat removed.

Can I Withdraw my caveat?

Yes, you can withdraw a caveat at any time by lodging a request for it to be withdrawn. There may be a filing fee.

Can I lodge a Second Caveat?

If your caveat lapses, is withdrawn, cancelled or removed, you will need to make an application to court to seek the court's permission to lodge another caveat. It is therefore important to ensure that your caveat does not lapse.

Risks / Consequences of Lodging Caveat

Any person who lodges or continues to lodge a caveat without reasonable cause must compensate anyone else who suffers loss or damage as a result.

Caveats, when used correctly, are useful tools for protecting a partner's interest in relation to real property. However, there are consequences of lodging a caveat and when they are used incorrectly people can end up in complex legal proceedings.

It is therefore important to ensure you are aware of all of the risks involved in lodging a caveat and ensure you receive advice about whether it is appropriate in your matter to lodge a caveat.

Anyone who is thinking of lodging a caveat in Family Court matters should get Specialist Family Law advice. Our Accredited Specialists have expert knowledge in relation to caveatable interests and would be happy to assist you if you think you have a caveatable interest in a property.

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Flow Chart – Caveat Timelines

