

# CHALLENGING A WILL ON THE GROUNDS OF TESTAMENTAR INCAPACITY

## PRACTICE AND PROCEDURE

### INTRODUCTION

My paper will focus on the practical and procedural aspects of challenging a will on the grounds of a testator's testamentary incapacity.

In particular I will attempt to provide an overview of the following three areas:

- A. The caveat procedure
- B. The presentation of evidence in court and
- C. The approach adopted by the Courts in deciding orders for costs.

### 1. THE CAVEAT PROCEDURE

1. A person seeking to challenge the validity of the last will of a deceased testator will need to lodge a caveat against the probate application brought by its propounder. Section 58 of the Administration and probate Act 1958 states:

*“ Any person may lodge with the registrar in accordance with the Rules of the Supreme Court a caveat against the making of a grant.”*

The courts have qualified the apparent breadth of this section by requiring the caveator to have sufficient standing in order to lodge a valid caveat. A caveator will have sufficient standing if his or her material interest is effected by the application to prove the last will of the testator. (See *Re Seymour [1934] VLR 136* and for a very detailed discussion on the subject of sufficient standing in the context of probate litigation see *Poulos v. Pellicer [2004] NSWSC 504*).

2. In most cases the caveator will have lodged a caveat because he or she stands to benefit more from the terms of a preceding will or pursuant to the statutory scheme of distribution applying to intestate estates under the Administration and Probate Act 1958 than under the terms of the last will. In those circumstances there will off course be no question that the caveator has sufficient standing to lodge a valid caveat against the probate application.
3. Rule 8.01 of the Administration and Probate Rules 1994 prescribes that the caveat be in Form 3-8 A and must be signed and dated by the caveator or his or her solicitor. The caveat will have a life of 6 months after it is lodged and may be renewed. It needs to be lodged before the probate application is filed with the Registrar of Probates. The caveat will provide the Registrar of Probates with

particulars of the deceased and the caveator and will require the Registrar to give notice to the caveator of any application for a grant of probate of the will of the deceased. Pursuant to rule 8.04 a caveat may be withdrawn by the caveator filing a notice of withdrawal in Form 3-8B. Once the application for probate has been made the caveat can only be withdrawn with the consent of the applicant.

4. As soon as the application for a grant of probate is filed, the Registrar will notify the caveator of the application who is then required to file with the Registrar and serve on the applicant his or her grounds of objection to the application within 30 days of being notified by the Registrar. The Registrar will also immediately notify the applicant that a caveat has been lodged against his or her application for a grant of probate of the deceased's will.
5. The caveator will usually state the grounds of objection in the form suggested in Rule 8.06 1(e). The objection will in most cases be that the testator lacked testamentary capacity during the period before and at the time of the execution of the will being propounded. In some cases it may be possible to specify a date after which the testator ceased to have the requisite degree of testamentary capacity (e.g. where the testator suffered sudden brain damage as from a stroke or an accident). However it is not necessary or usual to provide anything more than a basic statement of the grounds of objection.
6. When the caveator has filed and served his grounds of objection within the 30 days prescribed by Rule 8.03, Rule 8.07 will require the application for probate to be brought before a Judge in the Practice Court for directions. The application for directions from the judge will be by summons which will usually be issued by the caveator and served on the applicant. However if the caveator fails to apply for directions within 7 days from filing his or her grounds of objection the applicant may make the application for directions. The application will be heard by the Judge sitting in the Practice Court on a Thursday at a date fixed by the Prothonotary.
7. At the directions hearing the caveator will be made a defendant to the proceeding and orders will be made (which will usually be made with the consent of counsel for the parties) that the evidence in chief will be by affidavit and a timetable will be set down for the following:
  - a) Discovery by each party of all medical evidence relating to the testator's testamentary capacity and of all testamentary documents in their possession;
  - b) The filing and service of affidavits by each party (Usually the plaintiff is given 28 days within which to file any further affidavits; the defendant is given 28 days after the time limited for the plaintiff's affidavits in which to reply to the plaintiff's affidavits and finally the plaintiff is given 28

days after the time limited for the defendant's affidavits in which to reply to those affidavits.);

- c) A mediation where the parties agree and the Judge considers it appropriate;
  - d) Notice to be given to interested persons prescribing a time within which they can apply to be joined as defendants and
  - e) the listing of the matter.
8. Rule 8.08 empowers the Judge to make any other directions for the conduct of the proceeding that he or she deems "*conducive to its effective, complete, prompt and economical determination.*"
  9. Where the caveator asserts the validity of the penultimate will he or she can propound it at the same time as contesting the validity of the last will. The directions given at the return of the summons of the plaintiff's application for probate of the last will can with some co-operation from both parties ensure that both the plaintiff and the caveator's application for probate proceed to trial together thus circumventing the costly and time consuming necessity for two separate contested probate proceedings.
  10. This can be achieved by the parties applying for orders from the Judge which as well as providing for the directions listed above, can if the caveator has not yet made his or her probate application, also include directions providing a time frame for the filing and service of the caveator's application for probate of the penultimate will ; for the plaintiff to file and serve his grounds of objection to the caveator's application for a grant of the penultimate will; and for both applications to be listed for trial together. In addition the directions should also order that that the validity of the last will be determined by the Court first. If the last will is found to be valid there will off course be no need for the Court to make a determination with respect to the penultimate will.
  11. Where a compromise is reached between the parties at any stage after an application for probate is made by the plaintiff in which they agree that the last will should be proved a withdrawal of caveat form needs to be filed by the caveator together with the consent of the applicant to enable the Registrar to grant probate of that will.
  12. In *Walsh v. Wallace [2005] VSC 124*, Habersberger J decided that where the penultimate will has not been propounded and there has been a compromise between the parties in which they agree not to prove the last will but instead to prove the penultimate will, a separate application for a grant of probate of the penultimate will needs to be made after the Court determines that in respect of the last will there is in the words of *Murphy J in Re Grey Smith, deceased [1978] VR*

596 “... *A well-founded suspicion that it does not express the true will of a free and capable testator*”.

13. In *Walsh v. Wallace* orders were made granting probate of the penultimate will to the plaintiff of which he was also appointed executor and dispensing with the requirement that the executor advertise his intention to apply for probate of that will. These orders were made subject to the Registrar being satisfied with the application in common form.

## **2. THE PRESENTATION OF EVIDENCE IN COURT**

14. The burden of proving a will lies with the party propounding the will. As recently stated by Ormiston J A in the Court of Appeal case of *Kantor & Another v. Vosahlo* [2004] VSCA 235 at paragraph 3:

*“There has never been the slightest doubt that those who seek to propound a will for probate bear the burden of establishing to the court that probate should be granted to them and that this ultimate burden remains upon them throughout the trial...”* (see also *Bailey v. Bailey* (1924) 34 CLR 558 at 570.)

15. The standard of proof required of the propounder is the normal civil standard but the weight of evidence required to discharge this onus will depend on the weight of the evidence that is introduced by the defendant in support of his or her claim that the testator lacked testamentary capacity. In *Kantor & Another v. Vosahlo* the medical evidence presented to the court at the trial suggested that the testatrix although capable of lucid intervals was mentally incapacitated by senile dementia. This caused Byrne J to state that the executors bore a “*heavy onus of proof that the deceased acted at the relevant time in a period of temporary lucidity.*” On appeal the decision of Byrne J was overturned.

Phillips and Buchanan JJA stated in paragraph 58:

*“There is no warrant, then, for describing the onus on the propounders in this case as “heavy” or the standards as other than the ordinary one applicable in a civil suit. Of course the cogency of the evidence necessary to discharge the onus will depend upon the circumstances of the case, as it always does; the source of the doubt as to capacity will say much about what must be proved to dispel the doubt.”*

16. The evidence necessary to successfully challenge a will based on the testator’s testamentary incapacity will of course vary in each case. The plaintiff will usually resist a claim that the testator lacked testamentary capacity by obtaining affidavits from the solicitor or the person who prepared the will as well as the attesting witnesses of the will. The plaintiff and the defendant will in most cases then rely

on supporting affidavit evidence gleaned from the testator's treating doctors, friends, neighbours and in some cases expert medical witnesses, to buttress their case. In some cases it may be possible to tender documents such as medical tests, hospital records and progress notes.

17. The courts will of course expect to be provided with the best evidence that is relied on by each party. In the recent case of *Harrison v. Carey; re Castles, deceased* [2006] VSC 104 Byrne J was extremely critical of the failure of counsel to tender sodium level tests and other medical records that both counsel sought to rely on through the secondary evidence of the deceased's general practitioner. At paragraph 23 Byrne J stated:

*"I pause at this stage to make mention of the first of a number of very unsatisfactory aspects of the evidence at this trial. It appeared to be the case of the caveatrix that the sodium level of Mrs Castles was abnormally low between 23 September and 4 October 2004. It improved after that date and so did her mental and physical condition. This case, then, was that the patient was confused on 30 September and unable to make a will and that this was demonstrated by the electrolytes tests which were taken regularly and perhaps daily during this period.*

*24. All of this is perfectly understandable. That the test results were not tendered in evidence is less so. When I raised this with counsel, I was told that the results were available but that counsel for the propounder had indicated that they objected to the tender on the ground of hearsay. It is regrettable that counsel for the caveatrix did not press the tender so that the validity of the objection could be the subject of a ruling, but this was not done.*

*25. And then, after counsel for the propounder had indicated that the test results were inadmissible and counsel for the caveatrix had accepted this, each of them relied on secondary evidence of those parts of the test results which appeared to favour them."*

Later on at paragraph 28 Byrne J observed that:

*"to my mind, all of this is most unsatisfactory. While this is litigation in an adversary environment, I am asked to determine an issue as to the status of the propounded will and, as a consequence, as to the disposition of certain property. I am far from satisfied that the objection to the test results, if proper, is a good one. I am, in any event, very uncomfortable with the stratagems which both counsel adopted to by-pass the problem of inadmissibility."*

18. Expert medical evidence may be relied on by the caveator but it will usually be in circumstances where the expert has never examined the deceased and may have limited evidence on which to base his opinion. In the New South Wales case of

*Revie v. Druit [2005] NSWSC 902* Windeyer J made the observation at paragraph 34 that:

*“... lay evidence of the activities, conversations, family circumstances and relationships of the deceased and evidence from doctors, often general practitioners who were treating doctors during the lifetime of the deceased, usually is of far more value than reports of expert medical practitioners who have never seen the deceased”*

However after having made this statement the Judge in this case found that the expert medical witness called by the caveator provided valuable evidence in re-examination which assisted him in finding that the deceased lacked testamentary capacity at the time of making his will. The expert medical witness was an experienced geriatrician who provided a report based on an examination of nursing home and hospital and guardianship board records. This report on its own was said by the Judge to have, *“been of little assistance”* but his observations and conclusions regarding the deceased’s recorded pattern of behaviour in re-examination was considered by the Judge *“valuable”*. The expert witness had observed that the deceased’s lack of understanding of his need for care, his lack of short term memory and his inability to reason was consistent with frontal lobe disease and supported his conclusion that this would have prevented the deceased from being able to properly evaluate the competing claims of persons who were the natural objects of his bounty.

19. Practitioners should also be aware of the formal requirements necessary for the admission of expert medical evidence.

Order 44 of the Supreme Court Rules regulates the form and scope of the evidence that can be presented by an expert at trial. An “expert” is defined by rule 44.01 as a *“person who has specialised knowledge based on the person’s training, study or experience”*.

20. A defendant seeking to adduce expert medical evidence must conform to the requirements set down in the order.
21. Firstly Order 44.03 (1) (a) of the rules provides that as soon as practicable after the engagement of an expert witness, he or she must be provided with an expert witness code of conduct in Form 44 A. The code informs the expert witness that he or she is not an advocate for a party and that he or she has an overriding duty to impartially assist the court in matters relevant to their expertise. The code then sets out the information that needs to be included in the report or any supplementary report. The code also informs the expert that the court may require the expert to confer with any other expert that may be called to give evidence by the opposing party to produce a joint report in which they specify the matters they agree on and those on which they disagree.

22. Secondly Order 44.03 (b) of the rules provides that the expert witnesses report must be served on each other party no later than 30 days before the day fixed for trial.
23. Finally Order 44.05 provides that a party relying on the evidence of an expert witness cannot without the consent of the other party or with the leave of the court, adduce any evidence from him or her at the trial that is not contained within the report.

### 3. COSTS

24. Costs in a contested probate application are in the discretion of the court. However beyond this general statement of law the answer to the question of who bears the legal costs where the application for probate is challenged on the grounds of testamentary incapacity will depend on a number of factors.
25. A successful challenge will usually result in the caveator's legal costs being paid from the estate on a solicitor/client basis. In those circumstances the unsuccessful executor's legal costs will also usually be paid out of the estate on the same basis. The exception to this general rule is where the actions of the executor have somehow contributed to or prolonged the litigation between the parties. However for the caveator to succeed in obtaining an order requiring the executor to pay his own costs he is required to provide positive evidence that the executor's conduct actually lead to additional costs in proving the will. (See the Court of Appeal decision in *The Ballarat Trustees, Executors And Agency Co. Ltd. v. Field and Others* [1931] V.L.R. 37).
26. An unsuccessful challenge will usually result in the caveator being ordered to pay his or her own legal costs except where the testator's own actions or those of the residuary beneficiary(s) have caused the caveator to instigate legal proceedings because there were reasonable grounds for questioning the testamentary capacity of the deceased testator. In those circumstances the caveator's solicitor/client costs will usually be ordered to be paid from the estate. (see *Shorter v. Hodges* (1988) 14 NSWLR 698). The unsuccessful caveator is only at risk of being ordered to pay the costs of the estate where the court determines that there were no reasonable grounds for questioning the testator's testamentary capacity.

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