



CAVEATS

SVENSON BARRISTERS WILLS & ESTATES CPD DAY

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Caveats

- Role of the Court
- Standing
- Grounds of objection
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Role of the Court

A noble ideal.

‘The Court in its probate jurisdiction has an inquisitorial role that requires a greater supervision and control of proceedings than adversarial common law proceedings. The primary function of the Court in exercising its probate jurisdiction is to make grants of representation. Caveats act as a mechanism for notice from the Court to a party interested in an estate that an application for a grant of representation has been made in respect of a deceased estate.

What should be in the grounds?

Evidence and findings of facts are matters for trial. The grounds are taken at their highest and ought to be particularised as such, including verbatim correspondence where appropriate.

Hughes [80], see also *Lehr v Matters* [2024] VSC 640 Where Daly AsJ included the grounds of objection in a schedule with verbatim quotations of correspondence.

Lehr v Matters

(mn) From November 2017, the testator's pain specialist was Dr John Monagle. Dr Monagle provided a statement to a coronial investigation into the testator's death, in which he states that:

- (i) Dr Monagle first saw the testator in February 2018, where he presented with a long list of medication intolerances, and a list of medications already trialled and failed for his pain.
- (ii) By early 2019, ketamine infusions were considered for trial in management of the testator's complex regional pain syndrome, and an initial ketamine infusion was undertaken in October 2019.
- (iii) From that time, ketamine infusions continued intermittently. Initially infusions were planned, but increasingly they became precipitated by presentations to the emergency department, which presentations were a complex mix of pain and psychological and social distress.
- (iv) The testator's pain was subsequently compounded by persistent neuropathic pain in his left arm after cervical spine disc prolapse/cervical surgery.
- (v) The testator was a complex character to manage, particularly in reference to his mental health issues, and intermittently spoke about "not being here".
- (vi) The testator used a combination of psychiatry drugs (citalopram, mirtazapine and alprazolam [sic]) and oxycodone for pain relief.

Lehr v Matters [2024] VSC 640 Where Daly AsJ included the grounds of objection in a schedule with verbatim quotations of correspondence,

Grounds of objection

Grounds of objection are covered in the rules, Order 8 of the Supreme Court Rules (Administration and Probate) 2014. 8.06. These are extensive and it should be noted that when you lodge your grounds you should set out as completely your case as possible as without leave of the court it is not permitted to rely on other grounds.

‘(1) Where a grant is sought in relation to a will (including a document intended to be a will), the grounds of objection may be stated as follows—

- (a) that there is a later will or act of revocation and the date of that will or act of revocation;*
- (b) that the will was not executed by the testator;*
- (c) that the will was not executed in conformity with the Wills Act 1958 or the Wills Act 1997 and specifying the relevant section;*
- (d) that the document of which probate is being sought—*
 - (i) was not executed in conformity with the Wills Act 1958 or the Wills Act 1997 ; and*
 - (ii) was not intended by the deceased to be the deceased's will;*

Grounds of objection

(e) *that the testator lacked testamentary capacity—*

(i) during the period shortly before and at the time of execution;

or (ii) existing before that period and due to insanity or imbecility of which the symptoms first manifested themselves at a date to be set out;

(f) that the testator acted under undue influence specifying the person exercising that influence.

(2) Where a grant is sought as upon an intestacy, the grounds of objection may be stated as follows —

(a) that a will exists and the date of the will;

(b) that the applicant for the grant does not have the capacity or stand in the relationship in which the applicant seeks administration;

(c) that the caveator or some other person seeking administration has a better right, stating the nature of the right; or

(d) that the proposed administrator is disqualified, stating the reason for the disqualification.

(3) The caveator shall specify any ground of objection not included in those set out in paragraphs (1) and (2).

(3.1) The caveator shall give particulars of any fact or matter raised in the grounds of objection set out in paragraphs (1), (2) and (3).

(4) Unless the Court otherwise orders, the caveator shall not rely on any ground of objection of which notice has not been given in accordance with this Rule.'

Case for investigation

In *Gardiner v Hughes* the Court of Appeal held the question is whether there is a ‘case for investigation’ or ‘something to go on’. In determining whether a caveator’s grounds of objection are capable of giving rise to a prima facie case the assertions of fact raised by the caveator are to be taken to be true and the question is then asked whether they call for further investigation. The Court must have regard to the overall narrative. A prima facie case is relatively easy to discharge.

Gardiner v Hughes (No 2) [2019] VSCA 198, [41]-[42], see also *Lehr v Matters* [2024] VSC 640, [13].

Ibid [80], see also *Re Robustelle* (No 2) [2023] VSC 72 [15] and *Re the estate of Drousiotou* [2026] VSC 19 [16]

Ibid [82]-[83].

N1 *Lehr v Matters* [14] see also, *Lynch v Perpetual Trustees Co Ltd* [2022] VSC 702 [50].

Testamentary capacity

In *Banks v Goodfellow*, Lord Cockburn set out the test for testamentary capacity:

“It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and with a view to the latter object that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties; that no insane delusion shall influence his will on disposing of his property, and bring about a disposal of it which would not have been made otherwise.”

(1870) LR 5 QB 549, 565 (Cockburn CJ)

Presumption of knowledge and approval

Where a will is prepared and witnessed by a solicitor suspicious circumstances are sufficient to rebut the presumption that a testator knew and approved a will. In *Nock v Austin*, Isaacs J summarised the principles in relation to knowledge and approval drawn from the leading cases where suspicious circumstances arise.”

Nock v Austin (1918) HCA73; (1918) 25 CLR 519, 528.

Civil Procedure Act 2010 (Vic)

CIVIL PROCEDURE ACT 2010 - SECT 63

Summary judgment if no real prospect of success

Section 63 (1) Subject to section 64, a court may give summary judgment in any civil proceeding if satisfied that a claim, a defence or a counterclaim or part of the claim, defence or counterclaim, as the case requires, has no real prospect of success.

CIVIL PROCEDURE ACT 2010 - SECT 64

Court may allow a matter to proceed to trial

Despite anything to the contrary in this Part or any rules of court, a court may order that a civil proceeding proceed to trial if the court is satisfied that, despite there being no real prospect of success the civil proceeding should not be disposed of summarily because—

- (a) it is not in the interests of justice to do so; or
- (b) the dispute is of such a nature that only a full hearing on the merits is appropriate.

Role of the Court

The caveat procedure exists to ensure that estates are administered in an orderly manner and that any issues arising before a grant of representation is made can be investigated and dealt with by the Court. This ensures that any grant gives effect to the final valid testamentary wishes of the deceased or the intestacy provisions and title to any real or personal property owned by the deceased at the date of their death passes in accordance with these wishes or provisions. All participants in a proceeding must be mindful that the purpose of the probate jurisdiction is ensuring that the testamentary intentions of a deceased person are carried out and the beneficiaries receive what is due to them.'

Re Przychodski at [14-15].

Gardiner v Hughes

It is important to distinguish a grant of probate from other types of orders which courts can make.

‘The primary function of the Court in exercising its probate jurisdiction is to make grants of probate or grants of letters of administration. A grant of probate or a grant of letters of administration is more than just a Court order: it is proof of the validity of the will that the applicant sought to propound.’

Re Gardiner [2016] VSC 541 at [22] (“Re Gardiner”).

Gardiner v Hughes

Caveat proceedings are interest based litigation.

Gardiner v Hughes involved a revocation application and challenge to probate of a will on the basis of testamentary capacity.

The Deceased never married, did not have a partner at the time of his death, had no children and his parents had predeceased him.

The plaintiffs were a niece and nephew who would take from the estate under intestacy. They were not named in the will or the prior wills.

At issue was whether they had standing to challenge the will, i.e. whether they had an interest in the estate. There were three wills.

Gardiner v Hughes

At first instance in the Supreme Court of Victoria as the Trial Judge McMillan J found that *‘Whilst there is dicta to the effect that the ‘bare possibility of an interest’ is sufficient to establish standing, what constitutes an ‘interest’ sufficient to bring a proceeding in the probate jurisdiction necessarily precludes an ‘officious inter-meddler’ and ‘outside busybodies’ in a contested hearing to determine whether the document propounded was the last valid will of a free and capable testator.’*

‘In this case, the applicants are not beneficiaries under the probated will of the deceased, nor are they beneficiaries under the deceased’s penultimate will or his third will. Accordingly, they are unable to establish a prima facie case for an interest in the deceased’s estate and do not have standing to seek to revoke the grant of probate or to seek the declarations as to the invalidity of the deceased’s three wills.

Her Honour cited the Civil Procedure Act 2010 and referred to the case of Van Wyk on the question of real prospect of success.

Re Gardiner at [26].

Re Gardiner at [45].

Van Wyk v Albon [2011] VSC 120 (“Van Wyk”).

Gardiner v Hughes - Appeal

In Gardiner v Hughes, the decision went to the Court of Appeal and was heard by Tate, Kyrou and McLeish JJA, Their Honours reversed the decision of McMillan J.

The judgment of Kyrou J which Tate and McLeish JJA agreed with had this to say about the standing,

“The preliminary question was confined to the issue of standing. Because the applicants stood to benefit if the claims they made in their summons were upheld, they had standing to pursue that summons. That was so, both in so far as the applicants sought to achieve a full intestacy upon invalidity of all the wills, and since they sought a partial intestacy in the alternative by impugning the position of the second respondent if the 2015 will were valid.” and this to say about the issue of the CPA, *“Nothing in the CPA alters this conclusion. Even where there is merit in requiring a party before trial to establish a prima facie case, there is no occasion to do so in the absence of any prior application or direction in that regard. If anything, the CPA assists the applicants because it stands against the rigid application of rules of procedure in preference to ensuring that the real issues in dispute are determined. In that way, the CPA tells against the submissions of the third respondent, in particular, which treated the fact that a revocation proceeding ordinarily deals only with the validity of the will of which probate was sought as a strict limitation on the matters which the parties could raise, or the court could determine, in such a proceeding. The aim of just and efficient resolution of the real issues in dispute indicates that no such rigid approach is to be taken.”*

Gardiner v Hughes at [94].

Gardiner v Hughes at [95]

Standing

‘Any person may lodge with the registrar in accordance with the Rules of the Supreme Court a caveat against the making of a grant.’

This doesn't actually mean any person. Which should be read as having standing.

AAP Act s58

Standing – Bare possibility of an interest

In *Re Falzon* which dealt with whether purported annotations of an old will give rise to standing McMillan J applied the judgment of McLeish JA in *Gardiner v Hughes* *“in order to establish standing, an applicant for an order revoking a grant of probate or letters of administration must have a sufficient interest in the proceeding. Sufficiency of interest is established by showing that the applicant’s rights would or might be affected if the grant were to be revoked. The bare possibility of an interest will suffice.”*

Re Falzon [2022] VSC 55 (“*Re Falzon*”)

Gardiner v Hughes at [90].

Standing – Limited interest

In Govindan v Charan Keith JR held that a limited interest in an estate does not establish standing.

The Deceased died at the age of 91 in 2019. One caveator, a niece was entitled to received ‘jewelry’ in a 2006 will, the second caveator was married to the first caveator.

The plaintiff sought that the caveats be dismissed as the caveators lacked standing and secondly the caveat failed to set out a prima facie case, and it should be struck out pursuant to s63 of the CPA on the basis that there was no real prospect of success.

Judicial Registrar Keith cited the overarching purposes of the CPA and the burden and resources required to run a trial where there was no mention in the inventory of jewelry but furniture items and effects were valued around \$1000 and held *‘The “interest” of the caveator here does not warrant the estate incurring costs of the proceedings and delay in the distribution of the estate. The caveators’ interest is limited to the gift of the jewellery and even that interest is lost if the 2006 will is not admitted to probate. For these reasons the caveat must be dismissed.’*

Govindan v Charan [2020] VSC 137 (“Govindan v Charan”)

CPA ss7,9.

Govindan v Charan at [27]

Standing - Antepenultimate

In *Re Robustelle McMillan J* held that a caveator had standing. The caveator would not benefit from the last, penultimate but the antepenultimate will.

The Deceased died aged 91. The estate was comprised of a large farm holding which was managed by Stephen Atkins, who also lived at the property with his son Bryden Atkins (Bryden) and partner. Stephen was the residuary beneficiary, effectively taking the bulk of the estate, but he predeceased her, dying in 2020.

The farm was valued at around \$7.2Million.

Bryden applied for probate on the grounds that he was the residuary beneficiary.

Jeanette Mary Clarke (Jeanette) a niece of the Deceased filed a caveat challenging the final will on the basis of undue influence and want of testamentary capacity and the penultimate will on the basis of undue influence.

Standing - Antepenuultimate

Her Honour cited the High Court's decision in *Nobarani v Mariconte* where a self represented party was held to have standing on the basis of an unspecified share of jewelry in a previous will from 2004.

Ultimately Her Honour held that the caveator had standing in *Re Robustelle*.

The case is important because it clarifies from a procedural position what is to happen when there are numerous wills to be challenged.

"A challenge to multiple wills cannot be heard in one application as there will be different grounds relied upon in respect of separate wills and different parties in respect of each will. As the caveator is challenging the 2018 will and the 2012 will, the appropriate procedure is for the plaintiff to issue a separate application, in the alternative, for a grant of the 2012 will. In the usual course, the separate applications are heard together, with the validity of the 2018 will heard and determined first and prior to the determination of the validity of the 2012 will. This ensures that the real issues in dispute concerning the 2018 will and the 2012 will are before the Court, in circumstances where if the 2008 will is the last valid will, Mr Schreiber intends to apply for a grant of the 2008 will."

Re Robustelle [2022] VSC 493 ("Robustelle")

Nobarani v Maniconte [2018] HCA 36; (2018) 265 CLR 236 ('Nobarani v Mariconte')

Re Robustelle at [53].

Grounds of objection

The caveat can act as an entry point to bringing proceedings to challenge the will and as such itself can be challenged.

In *Re Przychodski* Justice McMillan heard an application for summary dismissal of a caveat proceedings pursuant to s63 of the Civil Procedure Act ('CPA'), the rules or the inherent jurisdiction of the Supreme Court of Victoria on the basis that the caveat had no real prospects of success.

Her Honour cited the Court of Appeal decision in *Lysaght* and the judgment of Warren CJ and Nettle J (as Their Honours then were) to explain the meaning of no real prospects of success pursuant to s63 of the CPA *'... the respondent to the application for summary judgment has a 'real' as opposed to a 'fanciful' chance of success; that the 'real chance of success' test is to some degree a more liberal test than the 'hopeless' or 'bound to fail' test; and that, as the law is at present understood, the real*

Re Przychodski [2016] VSC 781 ("Re Przychodski").

r 23.03(2) of the Supreme Court (General Civil Procedure) Rules 2015

Grounds of objection

chance of success test permits of the possibility that there may be cases, yet to be identified, in which it appears that, although the respondent's case is not 'hopeless' or 'bound to fail', it does not have a real prospect of succeeding'.

Lysaght Building Solutions Pty Ltd v Blanalko Pty Ltd (2013) 42 VR 27, 39 [29] (“Lysaght”)

Her Honour also cited the Court of Appeal in Mandie and held that s63 applied where claims were, “‘fanciful’, ‘futile’ or ‘unarguable’”.

Mandie v Memart Nominees Pty Ltd [2016] VSCA 4 (5 February 2016) [43]–[47] (Kyrou, Ferguson and McLeish JJA) (“Mandie”).

Re Przychodski at [13].

Grounds of Objection

The standard orders will allow the caveator to amend their grounds of objection.

In *Re Przychodski* the initial grounds of objection did not satisfactorily outline the grounds and there was an order for further particulars, in fact the grounds were submitted four times. Her Honour had characterised this as '*significant latitude*' but the caveator had still failed to establish a factual basis for a prima facie case and so the caveat had no real prospects of success and Justice McMillan struck out the caveat.

Re Przychodski at [59].

Standing v prima facie grounds

There is a good overview of the principles of standing set out by Justice Windeyer in the New South Wales Supreme Court decision of *Poulos v Pellicer*.

First it is necessary to go into some detail of the different parties. Mrs. Culina died in 2000. She left a sizeable estate to her niece, Durda Burjan in Croatia. A month before her death she made a new will revoking all previous wills. The previous will left the entirety of her \$7 Million estate to her son, John Culina (John). John was named as the sole executor of the new will but did not apply for probate, Ms. Burjan instructed a Mr. Poulos to apply for letters of administration with will attached.

John was married to and estranged from his wife Delores Pellicer (Dolores) and was involved in a property dispute in the Family Law Courts, proceedings which had commenced a few days after the new will was made.

It was understood that if John took from the estate then there would be a significant pool of assets which could then be the subject of orders in the Family Law Court proceedings.

Delores filed a caveat against the estate of Mrs. Culina. She also sought orders setting aside the new will and sought an order that John apply for a family provision claim against the estate, these were dismissed but the general property proceedings were still on foot.

Delores had made a prima facie case questioning the validity of the new will but at issue was standing, that is whether there was an interest in the case.

His Honour found there was not sufficient interest.

Poulos v Pellicer In the Estate of Culina [2004] NSWSC 504 (“Poulos”)

Standing v prima facie grounds

'Some principles were helpful: It is difficult to reconcile all these decisions but the following conclusions are available (a) The discussion on wills exercising a power of appointment makes it apparent that interest in the estate is not a pre-condition to being a party. Nor is it necessary for whatever interest is necessary to be financial. An executor of a prior will has the interest necessary to challenge a later will.

(b) In Re Devoy and Dixon & Dickenson v Allinson have not been overruled in subsequent cases. This would make it undesirable not to follow them in like circumstances unless local cases are inconsistent with them. They are authorities against a requirement for a direct interest in the estate. They support the "interest in the result" requirement but do require a direct benefit.

(c) Gertsch v Roberts and In re the Goods of Clause are not necessarily contrary to Devoy and Dixon. The first two cases relate to interest through devolution of estates and the requirement to establish the intermediate right to representation rather than to rely upon an ultimate subsequent expectant right dependent upon an intermediate claim which might not be proved. A creditor of a beneficiary does not need a judgment to establish a right. The position would be different if the debt were disputed.

(d) An interest can be acquired by purchase making the required interest one not necessarily coming from the terms of the will but deriving from assignment.'

Poulos at [24].

Recent cases

In the matter of the estate of Wendy Elizabeth Hall [2024] VSC 781

Struck out for lack of standing

Re McKenzie: Watts v Cardell [2025] VSC 295

Offending grounds struck out

Re the estate of Dunham [2025] VSC 746

Caveator lacks standing and prima facie case

Re the estate of Iovenitti [2026] VSC 106

Plaintiff failed to answer responses to grounds of objections

Not in interests of judgment to grant summary judgment and a full hearing on the merits is appropriate pursuant to s. 64 CPA

Recent cases

***Re Pellettieri* [2025] VSC 20**

In *Re Pellettieri* [2025] VSC 20 Daly AsJ considered the relevance of a post-will assessment of testamentary capacity and found there was sufficient material in the grounds and the evidence of a medical assessment by a neuropsychologist which was prepared 2 years post will to raise a prima facie case.

Caveats

QUESTIONS?

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