Caveatable Interest in Family Law

A practical NSW guide for separated couples

What is a caveat?

A caveat is a notice recorded on the NSW land title Register by a person who claims a legal or equitable estate or interest in land. Depending on its terms, it can prevent specified dealings from being registered without notice to, or consent from, the caveator.

A caveat does not itself create an interest in property. The person lodging it must already have a recognised interest capable of supporting the caveat.

The critical family-law distinction

Being married to, or in a de facto relationship with, the registered owner does not by itself necessarily give the other person a caveatable interest. Nor does a possible future entitlement to a family-law property adjustment automatically establish one.

The claimed interest must be identified from the actual facts, documents and equitable principles. Urgent legal advice is important before lodging, maintaining, challenging or withdrawing a caveat.

When might an interest exist?

Possible foundations

Whether an interest is caveatable is highly fact-specific. A solicitor may investigate whether the evidence supports a presently existing legal or equitable interest, rather than only a personal claim for money or a future family-law order.

- An express trust, resulting trust or constructive trust affecting the land.
- An enforceable agreement or declaration concerning ownership of the property.
- An equitable charge, lien, unregistered mortgage or other security interest.
- Contributions and dealings that, together with the parties? intentions or assurances, may support an equitable proprietary claim.
- Another recognised interest in land arising from the documents and circumstances.

What may be insufficient on its own?

- The existence of a marriage or de facto relationship.
- Occupation of the home or payment of ordinary household expenses without more.
- A general assertion that a property settlement is expected.
- A debt or personal right to repayment that is not secured against the land.
- A wish to stop a sale while legal rights are investigated.

Process, challenge and risk

Before lodging

- Obtain a current title search and identify the registered proprietor and existing dealings.
- Collect contracts, loan records, bank statements, correspondence and evidence of contributions or assurances.
- Identify the precise estate or interest claimed and the facts or instrument said to create it.
- Consider whether the proposed prohibition is properly matched to that claimed interest.
- Ask whether an undertaking, injunction or family-law order is the safer and more appropriate protection.

If a caveat is challenged

The registered owner may use a lapsing-notice process. Strict time limits can then apply. The caveator may need to begin court proceedings promptly and satisfy the court that there is a serious question to be tried and that the balance of convenience supports preserving the caveat.

Court applications can involve urgent evidence, legal costs and adverse-costs risk. Do not ignore a lapsing notice or assume that negotiations pause the deadline.

Compensation exposure

Section 74P of the Real Property Act 1900 (NSW) provides for compensation where a person lodges or, without reasonable cause, refuses or fails to withdraw a caveat and loss is attributable to that conduct. The exact application depends on the circumstances.

Preparing for urgent advice

Information to bring

- The property address, title details and any contract for sale or refinancing notice.
- A timeline of acquisition, separation, contributions, promises and ownership discussions.
- Bank records, loan documents, transfer documents and written agreements.
- Correspondence with the registered owner, agent, lender or conveyancer.
- Any caveat, lapsing notice, proposed dealing, court application or existing family-law orders.
- The date of any deadline, auction, settlement or threatened transfer.

Other protective options

Depending on the facts, alternatives may include negotiated undertakings, injunctions, preservation orders or other relief in family-law or state proceedings. A caveat should not be used as a substitute where no caveatable proprietary interest exists.

Key sources

- Real Property Act 1900 (NSW), including Part 7A and section 74P.
- NSW Land Registry Services, Registrar General?s Guidelines: Caveats and lapsing notices.
- Federal Circuit and Family Court of Australia and Legal Aid NSW information on property settlements.

Seek advice before lodging or responding to a caveat

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