

**JURISDICTION** : SUPREME COURT OF WESTERN AUSTRALIA  
IN CHAMBERS

**CITATION** : CHAPMAN -v- GARRIGAN [2017] WASC 336

**CORAM** : MASTER SANDERSON

**HEARD** : 15 AUGUST 2017

**DELIVERED** : 21 NOVEMBER 2017

**FILE NO/S** : CIV 2673 of 16

**MATTER** : Estate of Phyllis Garrigan late of Aegis Transition  
Aged Care Home, 29 Neville Street, Bayswater in the  
State of Western Australia, Retired (Dec)

**BETWEEN** : GEORGE CLAUDE CHAPMAN as Executor of the  
will of the late PHYLLIS GARRIGAN  
Plaintiff

AND

ROBERT GARRIGAN  
First Defendant

TONI CHAPMAN as beneficiary of the will of the late  
PHYLLIS GARRIGAN  
Second Defendant

JODIE MARTIN as beneficiary of the will of the late  
PHYLLIS GARRIGAN  
Third Defendant

PHILIP GARRIGAN as beneficiary of the will of the  
late PHYLLIS GARRIGAN  
Fourth Defendant

JOHN GARRIGAN as beneficiary of the will of the  
late PHYLLIS GARRIGAN  
Fifth Defendant

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*Catchwords:*

Probate - Caveat lodged before application made for grant - Procedure when caveat lodged - Application for grant in solemn form - Costs

*Legislation:*

*Administration and Probate Act 1958 (Vic)*

*Administration Act 1903 (WA)*

*Family Provision Act 1972 (WA)*

*Non-Contentious Probate Rules 1967 (WA)*

*Rules of the Supreme Court 1971 (WA)*

*Result:*

Costs order made

*Category:* A

**Representation:**

*Counsel:*

Plaintiff	:	Mr C V Eastwood
First Defendant	:	Ms E C Hensler
Second Defendant	:	In person
Third Defendant	:	In person
Fourth Defendant	:	In person
Fifth Defendant	:	In person

*Solicitors:*

Plaintiff	:	Eastwood Sweeney Law
First Defendant	:	Contested Wills & Probate Lawyers
Second Defendant	:	In person
Third Defendant	:	In person
Fourth Defendant	:	In person
Fifth Defendant	:	In person

**Case(s) referred to in judgment(s):**

Wheatley v Edgar [2003] WASC 118

1     **MASTER SANDERSON:** This action began life as a proceeding by the plaintiff to prove the will of the late Phyllis Garrigan in solemn form. By the time the matter reached court the first defendant, who for reasons explained below was responsible for proceedings being issued, the plaintiff and the other defendants had resolved their differences. No party had any difficulty in probate of the will being granted. There was an argument about costs. These reasons deal with that issue.

2             The relevant facts can be shortly summarised. On 30 May 2016 Phyllis Garrigan (the deceased) died leaving property situated in Western Australia. The plaintiff is the executor named in the will of the deceased dated 11 July 1989. The first defendant is an adult son of the deceased and is not named as a beneficiary in the will. The second, third, fourth and fifth defendants are adult children of the deceased and are named as beneficiaries in the will. On 3 August 2016 the first defendant lodged a caveat against a grant of probate of the deceased's estate. Relevantly that caveat alleged the will to be invalid on the grounds the deceased 'did not have capacity and/or was subject to undue influence or that the will was made in suspicious circumstances ...'.

3             In an affidavit sworn 28 June 2017 the first defendant explains why he took that step. He says that in or about 2014 his spoke with the second defendant and enquired whether she knew if the deceased had a will. She responded she did not know. Therefore, the deceased and the first defendant had a number of conversations, where the deceased said words to the effect the first defendant would inherit her entire estate. He was somewhat surprised when he received a letter from a solicitor acting for the plaintiff advising him that a will had been located and he was not named as a beneficiary. It was at that point he decided to lodge a caveat.

4             A caveat against a grant of probate is dealt with in s 63 of the *Administration Act 1903* (WA) and r 33 of the *Non-contentious Probate Rules 1967* (WA). The rule is in the following form:

Caveats

- (1)     A person having any interest in an estate in which application is being made for a grant or the sealing of a grant, and intending to oppose the application, shall either personally or by his solicitor enter a caveat in the Registry.
- (2)     A caveat shall be in accordance with Form 3, and shall state fully the nature of the interest of the caveator.

- (3) Subject to subrule (4), a caveat shall remain in force for the space of 6 months only from the day it is entered and then expire and be of no effect, unless otherwise ordered.
- (4) Notwithstanding that a period of 6 months has elapsed after entry of a caveat, the Registrar may require the applicant for a grant to give notice to the caveator before proceeding with his application.
- (5) Where the applicant for a grant or for the sealing of a grant does not obtain an order under section 64 of the Act, he shall, within one month, or such extended time as a Judge or the Registrar may allow after notice of the entry of the caveat, commence contentious proceedings by issuing a writ against the caveator and proceeding in the ordinary manner.
- (6) A caveator may, if no step is taken by the executor or applicant for administration within a period of one month after notice of the entry of the caveat, apply to a Judge or the Registrar for an order directing the executor or applicant to proceed with his application; and the Judge or Registrar may make an order upon such terms as he thinks fit.

5        There are a number of points to be made about this rule. First, it allows 'a person having an interest in an estate' to lodge a caveat. However, s 63 of the *Administration Act* refers to 'any person'. In this case the first defendant did not have an interest in the estate pursuant to the will. Of course if the will was not admitted to probate then he would have had an interest under the provisions of the *Administration Act*. So the introductory words of sub-rule (1) really have to be read as including a person who may have an interest in an estate.

6        Second, sub-rule (1) refers to an estate 'in which application is being made'. That suggests a caveat can only be lodged at some time after an application for grant of probate is made. In fact that is not what happens in practice. A party who wishes to lodge a caveat can do so any time after the death of the deceased and any time prior to the grant being made. That would appear to be consistent with s 63. If no application for a grant has been made it is the practice of this court to open a file and note the existence of the caveat. If an application for probate is then made the application is married with the caveat file and a requisition will issue. When the caveat is lodged a check is made of the probate files which have been opened and if a file exists then the caveat is attached to that file, no further steps are taken to advance the grant of probate again a requisition will issue. So despite what the rules seem to indicate it is open to a party to lodge a caveat before an application for a grant is made. That is what was done in this case.

7           Thirdly, sub-rule (3) seems to anticipate that once a caveat expires the application for a grant can proceed as if the caveat had never been lodged. That of course is subject to the discretion given to the registrar by sub-rule (4). But what is anticipated by sub-rule (4) is simply giving notice to the person who lodged the caveat before proceeding any further with the grant. In practice the registrars consider the application for the grant in the light of the caveat and may determine, based upon what is in the caveat, that an application should be made for proof in solemn form. On the other hand, if the caveat contains little or nothing as to the basis on which it is lodged, the registrar may simply proceed with the grant.

8           Fourthly, sub-rule (5) provides an alternative course of action to s 64 of the *Administration Act*. Under s 64 a person applying for probate when given notice of a caveat may apply to have the caveat removed. But if that step is not taken the party applying for probate must seek proof of the will in solemn form.

9           Fifthly, sub-rule (6) gives a caveator an option of forcing the hand of the party seeking probate. The sub-rule facilitates an action driven by the caveator rather than relying upon the party seeking the grant to take some action.

10          In this case the proper operation of r 33 is important. It was the plaintiff's contention that a caveat should never have been lodged. Rather, it was submitted, some form of action should have been initiated by the first defendant which challenged the will of the deceased. With respect that approach seems to me to be misconceived. A combination of s 63 of the *Administration Act* and r 33 gives a person in the position of the first defendant a right to lodge a caveat. The first defendant cannot be criticised for taking that step.

11          In this case there seems to have been some reluctance on the part of the executor named in the will to provide the first defendant with a copy of the will. This is an issue which not infrequently causes problems both in relation to probate matters and particularly in relation to *Family Provision Act 1972* (WA) matters. There is nothing in the *Administration Act* which entitles any party to a copy of the deceased's will before probate is granted. That is not the case in Victoria where under s 66A of the *Administration and Probate Act 1958* (Vic) a variety of persons are entitled to a copy of the will. As long ago as 1998 the New South Wales Law Reform Commission as part of the project to develop uniformed succession laws for Australia recommended such a provision be adopted nationally. Be that as it may, the position remains in this State there is no

statutory requirement for a named executor to provide anyone with a copy of a will prior to a grant. Of course once probate is granted both the grant and the will are public documents and can be inspected under r 43(a).

12 It is also difficult to see that there is some inherent power in the court to order that a copy of a will be provided to an interested party. Under O 73 r 20 of the *Rules of the Supreme Court* 1971 (WA) a person can be ordered to bring in 'a will or other testamentary paper'. But that rule is only of use once proceedings have been issued. There appears to be no reported case in which a party has sought, let alone obtained, a copy of a will not yet admitted to probate.

13 This is one of those areas where practitioners should exercise common sense. It is difficult to envisage any circumstance where it would be inappropriate for a party who may have an interest in an estate to be denied a copy of the will. Even if a potential beneficiary were to object to that course of action the named executor would be justified in providing a copy of the will upon request. Of course discretion would apply. A party who does not have and could not conceivably have any interest in the estate should not have access to the will. But otherwise the administration of estates would run more smoothly if access was provided as a rule rather than as an exception to some assumed rule.

14 In this case access to the will had been denied to the first defendant prior to his lodging the caveat. In the circumstances it is not difficult to understand why he should have taken the step of lodging the caveat.

15 Once the plaintiff became aware of the existence of the caveat he issued proceedings seeking proof of the will in solemn form. He had every right to take that step: see *Wheatley v Edgar* [2003] WASC 118 [19] and [22]. The first defendant in his affidavit to which I have referred earlier says proceedings were issued without notice to him. That was quite proper. No criticism can be levelled at the plaintiff for taking proceedings when he did.

16 Once proceedings were issued they proceeded under O 73. Order 73 r 15 and r 16 provide a guide as to how pleadings are to proceed. The rules are in the following form:

**15. Defendant may require only proof in solemn form**

In a probate action a party opposing a will may, with his defence, give notice to the party propounding the will that he merely insists on the will being proved in solemn form, and only intends to cross-examine the witnesses produced to support the will and he

may thereupon do so and, if he does not participate further in the action, he shall not be liable to pay the costs of that other party unless the Court considers that there was no reasonable ground for opposing the will.

## **16. Pleadings**

- (1) Where a plaintiff disputes the interest of a defendant he shall so allege in his claim.
- (2) Where by virtue of an interest a party claims to be entitled to a grant of letters of administration another party shall not dispute that interest unless he shows in his pleading that if the allegations in it are proved he would be entitled to an interest in the estate.
- (3) Without prejudice to Order 20 rule 8 a party shall not plead that at the time when a will, the subject of the action, was alleged to have been executed the testator did not know and approve of its contents unless he specifies the nature of the case on which he intends to rely and shall not make any allegation in support of such a plea which would be relevant to any other plea that -
  - (a) the will was not duly executed; or
  - (b) at the time of the execution of the will the testator was not of sound mind, memory and understanding; or
  - (c) the execution of the will was obtained by undue influence or fraud,

unless he also makes that other plea.

17 The plaintiff's statement of claim was in what might be described as classical form. The date of death of the deceased is pleaded and the fact of the will is pleaded. It is alleged the deceased knew of and approved the contents of the will, that it was not revoked in any manner and that at all material times the deceased was of sound mind, memory and understanding. The first defendant's defence is brief and I will quote it in full:

1. The First Defendant admits paragraph 1 of the Statement of Claim.
2. Having no knowledge of the information contained therein, and not having sighted a copy of the will referred to, the First Defendant does not admit paragraphs, 2, 3, 4, 5 and 6.



3. Having no knowledge of the circumstances of the making of the will by the Deceased, the First Defendant does not plead to paragraph 7.
4. With respect to paragraph 8, the First Defendant says that, as he had no knowledge of the Deceased having made a will, and could not obtain a copy from the Plaintiff, in accordance with Order 73.15 the Defendant requires the will to be proved in solemn form.

18       The question is whether a defence in this form satisfies the requirements of r 15 and really does no more than require the plaintiff to prove the will in solemn form. On balance I think it does. No allegation of unsoundness of mind or undue influence are raised by the defence and there is nothing which would satisfy the requirements of r 16. If this matter had gone to trial and the plaintiff had, for instance, produced the witnesses who saw the deceased sign the will then even if counsel for the first defendant had cross-examined these witnesses there would be no basis for awarding costs against the first defendant. So in this case the rules actually prevent an award of costs against the defendant let alone the indemnity costs sought by the plaintiff. When the matter was listed for hearing the trial bundle contained copies of correspondence passing between the parties on the issue of costs and six separate affidavits dealing with that question. In his written submissions counsel for the plaintiff submits this was not a case which fell within r 15. He submitted that was the case for two reasons. First, the first defendant by his defence did not require any witnesses to be produced for cross-examination and second, he did not, until a day or two before trial, withdraw his opposition to the will. In my view neither of these two points count against the operation of r 15. I need not repeat again what I have said above.

19       Accordingly, I am satisfied this is a case where no order for costs ought be made. There will be an order in terms of paragraphs 1 and 2 of the prayer for relief contained in the statement of claim with a further order that the costs of the plaintiff's action be paid out of the estate. There will be no orders as to costs in relation to the first defendant.