GRANTS OF PROBATE AND ADMINISTRATION

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OVERVIEW

1. The purpose of this paper is to provide an overview of the practice of the Supreme Court in its Probate jurisdiction. It examines the different types and functions of caveats, proceedings for a grant in solemn form, the nature of notices and an explanation of special grants.

CAVEATS

2. A caveat is a notice to the Registrar or an officer of the Court not to let anything be done in the relation to a will without notice to the person who lodges the caveat –**In Re Emery** 1923 P 184. If a person who wishes to challenge the making of a grant fails to lodge a caveat the Court may proceed to make a grant. A caveat cannot be entered after a grant has been made – **In the Will of Clarke** (1922) 22 SR (NSW) 228.

3. The Probate rules provide for three types of caveats. They are a caveat:

   (a) requiring proof of a will in solemn form - Pt 78 r68:
   (b) raising a general objection pursuant to Pt 78 r66; and
   (c) in respect of an informal testamentary document - Pt 78r67

CAVEAT REQUIRING PROOF IN SOLEMN FORM

4. In **Azzopardi v Smart** (1992) 27 NSWLR 232 the defendant lodged a caveat requiring proof of a will in solemn form and then sought to challenge the validity of the will on grounds other than its due execution. Powell J stated that the lodging of such a caveat entitled the caveator to have the will proved in solemn form and this entitled the caveator to cross examine any witnesses as to the question of due execution of the will. The caveator is not entitled to cross-examine to prove incapacity.

5. His Honour cited with approval the judgement of Walker J in **Beatson v Perry** (1906) 6 SR (NSW)167 where the practice was justified for the following reasons. First proof in solemn form may be demanded many years after the death of the testator's death. If it were open by cross examination of an attesting witness to raise incapacity the persons propounding the Will may be placed at a disadvantage because the witnesses who could have proved capacity may then be dead. Second if by cross examination of the attesting witnesses a case is made out that the testator was incapable or unduly influenced it cannot be contended that the matter should be decided only on the evidence of the witnesses called to prove the will in solemn form. The plaintiffs would be entitled to call witnesses to rebut the case so raised. Finally both parties have a right to the costs of proving a will in solemn form out of the estate. If other questions were allowed to be raised on such an application the parties would be enabled to litigate those questions without the risk of having themselves liable to pay the costs. This last ground was not followed by Street J in **Peters v Peters** (1907) 7 SR (NSW) 398. In that case His Honour held that there was no entitlement to costs and the question of costs remained in the discretion of the Court.

6. Powell J's statement of principle has more recently followed by Einstein J in **The Estate Of Irene Elizabeth Dampf In the Will called Irene Dampf) late of North Narrabeen v Richard Dampf & Anor** [2010] NSWSC 619

GENERAL CAVEAT

7. This is the appropriate form of caveat to lodge if the caveator seeks to raise grounds other than want of due execution. Accordingly if the caveator seeks to attack the will on the ground that the testator lacked testamentary capacity a general caveat should be lodged. The caveat requires that no grant should be made without the caveator being given prior notice.

CAVEAT IN RESPECT OF AN INFORMAL TESTAMENTARY DOCUMENT

8. This caveat is lodged when the caveator wishes to be heard before the Court makes a declaration under S8 Succession Act or if still relevant s18A Wills Probate & Administration Act 1898 as to whether a document that was not executed in accordance

with the prescribed requirements constitutes a will of the deceased.

WHAT INTEREST IS SUFFICIENT TO SUSTAIN A CAVEAT

9. In order to lodge a caveat the caveator must establish an interest in the estate.

10. In **Poulos v Pellicer** [2004] NSWSC 504 Windeyer J was required to decide whether the wife of a man, whose mother had died leaving a will giving all of her estate to a niece, which will had the effect of revoking a former will giving everything that to her son, had an interest so as to entitle her to defend proceedings for a grant of letters of administration with the will annexed of a later will, the wife being engaged in property adjustment proceedings against the husband in the Family Court of Australia. His Honour held that the interest was insufficient. At the conclusion of this paper I have set out the relevant extract from His Honour's Judgment which summarises the principles.

DURATION OF A CAVEAT

11. A caveat remains in force for six months from the date of lodgement. The court may extend the caveat. Alternatively the caveator may lodge a fresh caveat. The lodgement of repeated caveats without proper cause is an abuse of process that may be restrained by injunction.

REMOVING A CAVEAT

12. A person who is precluded from obtaining a grant by reason of the lodgement of a caveat has three possible courses of action open. The first is to wait until the caveat lapses. However this may only result in the caveator lodging a fresh caveat. The second is to file a Summons (or in the event that a summons for probate has already been filed a Notice of Motion) for an order that the caveat cease to be in force. Finally they may institute contested proceedings for a grant.

13. Pt 78 r71(4) provides that if the Court considers that the evidence fails to show that the caveator has an interest in the estate or a reasonable prospect of establishing such interest and there is a doubt as to whether the grant ought to be made the Court may

order that the caveat cease to be in force. Accordingly the onus is upon the caveator to establish an interest and matters occasioning doubt.

14. In **Azzopardi v Smart** supra Powell J considered that the caveator had to be in a position to tender evidence raising at least a prima facie case of the ground of invalidity relied upon. This approach was not followed by Windeyer J in **Weinstock v Beck** [2007] NSWSC 19. In that case His Honour expressed the view that there is no requirement to establish a prima facie case or a serious question to be tried. His Honour was of the view that the issue was whether or not there is reason to allow the matter to proceed as a contested suit. In that case the caveator alleged that the nominated executor should be passed over by the court by reason of misconduct. It was on that basis as opposed to lack of testamentary incapacity that the caveator contested the making of a grant. In. more recent times Hallen J has considered the principles in **Martin v Matthews** [2021] NSWSC 1040 **, In the Estate of Robyn Alice May Linworth** [2021] NSWSC 334 & **Estate of Theresa Katalinic :Vea & Katalinic v Katalinic** [2020} NSWSC 805 where his Honour adopted a similar approach to Windeyer J.

15. The third alternative is to institute contested proceedings. This is done by filing a Statement of Claim that joins the caveator as defendant and seeks a grant in solemn form.

GRANTS IN COMMON FORM & SOLEMN FORM

16. There are two types of grants of probate. The first is a grant in common form. This is the normal grant when there is no dispute as to the validity of the will. The proceedings are instituted by summons and supported by affidavit. There is no defendant and no one is cited to see the proceedings. Such a grant is revocable. A party seeking revocation of a grant in common form must explain their failure to caveat and demonstrate that there is a question as to the validity of the Will. Once the court determines that the grant should be revoked the party propounding the will bears the same onus as if the Will had been originally contested – **Nicolson v Knaggs** [2009] VSC 64 at paragraphs 76-77.

17. The second and far less usual is a grant in solemn form. A grant in solemn form is the result of contested proceedings. On the distinction between grants in solemn form and common form see **Estate Kouvakas: Lucas v Konakas** [2014] NSWSC 786 per

Lindsay J. It operates as a res judicata and is good against all the world and is irrevocable provided that the proper notice has been given to all persons interested and subject to the following exceptions. The first is that a later will is subsequently discovered. The second is if it later emerges that the testator married after the execution of the will or if the testator's marriage was terminated after execution. The third is if the judgement was obtained by fraud or there was some procedural irregularity or unavoidable accident which prevented the party opposing taking part in the proceedings.

18. An executor has an absolute right to a grant in solemn form and should seek one if there is doubt as to the validity of the Will. In such proceedings the executor should serve notice of the proceedings on all persons having an adverse interest. An executor may seek a grant in solemn form even after a grant in common form has been made- **Geddes, Rowland & Studdert** supra at paragraph 40.66. The authors state that if this is done the practice of the Court is to impound the grant in common form as opposed to revoking it-see p845, however I am aware of one case that I appeared in where the grant was revoked and a grant in solemn form issued.

19. If a caveat has been lodged proceedings for a grant in solemn form should be instituted by a Statement of Claim and the caveator must be a party Pt 78 r72. A Statement of Claim is also appropriate where a defendant is to be joined -- eg: where there is a competing application for a grant already on foot. Precedents for a Statement of Claim may be found in **Mason & Handler Succession Law and Practice New South Wales** at paragraph 6081.

20. The majority of proceedings for a grant in solemn form are pleaded .Cases in which questions of testamentary capacity are raised are pleaded. The evidence is usually taken by way of affidavit .The usual sources for evidence include the following.

21. Firstly the solicitor who took instructions to prepare the will .The affidavit from the solicitor should be aimed at establishing that he/she asked the client questions designed to satisfy the test of testamentary capacity laid down in **Banks v Goodfellow** (1870) LR5 QB 549 at 565. Specifically the evidence should try to establish that the client knew that they were making a will, its effect, the extent of the property that he/she was disposing of and the claims to which he/she should be giving effect. For an illustration of a case where that the solicitor carefully questioned the client and his evidence was absolutely

critical to the ultimate success see **D'Apice v Gutkovich** (No 2) [2010]1333. This case is to be contrasted to **Manning v Hughes (**No2)2010 NSWSC 226 where the solicitor's failure to ask questions relevant to the question of capacity resulted in the Court finding against the Will he had prepared.

22. Secondly persons who knew and had dealings with the deceased. Evidence from persons who are well acquainted with the deceased are often given great weight by the court .In particular evidence of the activities, conversations, family circumstances and relationships with persons who might be expected to be the object of testamentary recognition by the deceased are given great weight. Similarly evidence as the activities the deceased carried out such as buying and selling shares, managing their own financial circumstances and whether they looked after themselves or were in receipt of care are relevant.

23. Thirdly medical practitioners who actually cared for the deceased.

24. Fourthly expert witnesses. However in this regard it should be noted that in **Revie v Druitt** (2005) NSWSC 902 at paragraph 34 Windeyer J expressed the view that there are limits to the usefulness of expert medical practitioners who had never seen the deceased. Notwithstanding this such evidence may be important and even decisive in cases involving delusions - See Windeyer J in **Kozac v Berwicki** (2008) NSWSC 39 at Paragraph 49.

25. Fifthly medical records relating to the deceased.

26. If a caveat in respect of an informal testamentary document is lodged the proceedings are instituted by Statement of Claim which seeks a declaration that that the deceased did or did not intend the document to be his/her will. The caveator is joined as a party. Irrespective of whether such a caveat has been lodged if an informal document exists it must be disclosed and all affected persons other than the caveator must either consent in Form 134 to the proposed declaration - Pt 78 r42 or be served with notice in Form135 or the Court must dispense with service. See the table of procedural steps in **Mason & Handler** supra at paragraph 5125.2.1

NOTICES (FORMERLY CITATIONS)

27. There are three types of notices, namely:

(a) notice of proceedings (previously citation to see the proceedings);
(b) notice to apply for administration (formerly a citation to pray for administration); and
(c) apply for probate (formerly a citation to take probate).

NOTICE OF PROCEEDINGS

28. The purpose of this type of notice is to bind a person having an interest in the proceedings to the outcome. In proceedings for a grant in solemn form any person who has an adverse interest to the person propounding the will and who is sought to be bound by the outcome should be given notice of the proceedings. The notice notifies the person that if they do not answer it by entering an appearance in the proceedings, the proceedings may be heard and determined in their absence. Unlike the previous rule the new rule specifically binds a person who has been given notice to all orders and decisions including orders made by consent. The prescribed form of notice is Form 140.

NOTICE TO APPLY FOR ADMINISTRATION

29. This is a notice issued against a person who has a superior right to a grant of letters of administration. The notice requires that person to apply for administration and informs them that if they do not comply with the notice by applying for a grant of administration then the court may grant administration to the person who has caused the issue of the notice.

NOTICE TO APPLY FOR PROBATE

30. This notice may be issued in the event that an executor delays in making an application for a grant. The prescribed form is Form 138 It informs the executor that failure to comply with the notice will result in the loss of their right in respect of the executorship and the representation to the testator and the administration of his/her estate shall without any further renunciation devolve in like manner as if the executor had not been appointed.

31. The difficulty with this form of citation is that it may prompt a dilatory executor to Institute proceedings and take a grant. The preferable approach is to apply the court for a grant of letters of administration with the will annexed under section 75 of the Probate & Administration Act for letters of administration. Such an application can be made in the executor has failed to apply for a grant within three months of the deceased's death.

32. The application is heard by the Registrar ex parte . In addition to the usual documents for a grant of administration with the will annexed. there must be an affidavit deposing to the executor's neglect or refusal to take probate. A notice should be served on the executor of the applicant's intention to apply. A suggested notice is to be found in Form of 5.29. in **Geddes, Rowland & Studdert** supra.

FILING OF NOTICES

33. The notices are filed and served on the relevant persons. The notice to apply for administration and the notice to apply for probate require an answer within 14 days (if the person served is in New South Wales) and 28 days (if the person served is outside New South Wales).

SPECIAL GRANTS

DOUBLE PROBATE

34. Where two or more executors are nominated in a will s.41 of the Probate and Administration Act provides that the Court may make a grant to one of them and reserve leave to the other or others to come in and apply for a grant of probate at a later time. In the event that an executor to whom leave has been reserved applies for and obtains a grant this is known as a grant of double probate. The notice of intended application and summons should refer to the fact that the application is for a double probate (just as the same documents in the original application should make it clear that it is an application by one of the executors). Precedents for the summons and affidavit are to be found in **Geddes , Rowland & Studdert** supra at Forms 2.08 and 2.09 and **Mason & Handler** supra at paragraph 5141

CESSATE PROBATE

35. Where an executor's appointment is limited by the Will as to time or the happening of a particular event and a substitute executor is then appointed by the Will to act upon the expiration of that time or the happening of the event the application by the substitute executor is known as a grant of cessate probate. The documents are similar to those for double probate. The affidavit must establish that executorial duties remain to be performed.

ADMINISTRATION DURING MINORITY

36. This grant is made in the event that the person entitled to a grant of probate or alternatively administration is a minor. In these circumstances a grant may be made to the minor's Guardian. Once the person who would be entitled to a grant ceases to be a minor they may apply in their own right.

37. Where the application is made by a person who is the legal Guardian of a minor the court will require evidence proving this, that no order of the court has been made in respect of the care and control or guardianship of the minor and that the deceased did not appoint a testamentary Guardian of the minor. Where custody of the child has been taken from its legal Guardian, the court will require that notice of the Guardian's application be served upon the person having physical care and control of the child .The duly verified consent of that person or an affidavit service of notice of the application upon him or her should be filed will with the application. Where the deceased has appointed a testamentary Guardian the court will generally prefer to grant administration to the testamentary Guardian rather than the legal Guardian – see **Geddes, Rowland & Studdert** supra at p794-5.

38. Pt 78 r52 allows a minor aged 16 or above to elect a guardian for the purposes of applying for administration. Precedents for the affidavit as to age, Election of Guardian ,affidavit of witness to election of guardian and affidavit of fitness are at paragraph 5217.3.1 of **Mason & Handler** supra.

39. In the absence of a testamentary, legal or elected guardian within New South Wales the court may assign the Guardian for the purpose of applying for administration –Pt 78 r31.

Precedents for the summons to assign a Guardian and affidavit in support are set out at paragraph 5217.3.2 of **Mason & Handler** supra

GRANTS FOR PERSONS UNDER A DISABILITY

40. This grant is appropriate where the person entitled to a grant is incapable of administering the estate because of a physical or mental incapacity. In these circumstances the Court may make a grant limited to the period of the incapacity. The application must be supported by medical evidence which outlines the nature of the incapacity, its length, nature and the person's prognosis of recovery.

ADMINISTRATION UNADMINISTERED ESTATE "DBN"

41. This grant is made when the sole administrator or the last survivor of a number of administrators dies without having fully administered the estate. Precedents for the summons and affidavit in support are at Forms 5.01 and 5.03 of **Geddes, Rowland & Studdert** supra and paragraph 5225 of **Mason & Handler** supra.

ADMINISTRATION WITH THE WILL ANNEXED "CTA"

42. This grant is appropriate when:

(a) the deceased makes a will but does not appoint an executor;
(b) a grant of probate is revoked on the ground that the executor has been guilty of misconduct;
(c) the executor renounces;
(d) an executor fails to appear in response to a notice;
(e) an executor is unable to act;
(f) the executor dies before the deceased or alternatively dies before taking a grant:
(g) the executor dies after taking a grant but before completing administration

Precedents for the summons are at Forms 4.01 of **Geddes , Rowland & Studdert** supra.

ADMINISTRATION WHERE THE NOMINATED EXECUTOR OR NEXT OF KIN IS RESIDENT

OUT OF THE JURISDICTION

43. Section 72 of the Probate and Administration Act empowers the court to make a grant of administration to an attorney appointed by a person who would be entitled to a grant of probate or grant of administration on intestacy if that person is out of the jurisdiction. The grant is limited until the absent of executor/administrator applies for and obtains a grant. A precedent for additional paragraphs for the affidavit of applicant is at paragraph 5237 of **Mason & Handler** supra. Section 72 is to be contrasted to section 76 which empowers the court to make a grant after six months from the deceased's death where the executor or administrator resides out of the jurisdiction and the absence causes loss or delay to the administration of the estate. Precedents for the Summons and affidavit are at Forms 5.30 and 5.31 of **Geddes, Rowland & Studdert** supra and paragraph 5233 of **Mason & Handler** supra

ADMINISTRATION PENDENTE LITE

44. Section 73 of the Probate and Administration Act enables the court to make a grant of administration pending the determination of the validity of a will or a suit as to whether administration of an estate should be granted. In order to obtain such a grant the evidence must establish that it is necessary to protect the assets of the estate during the currency of the litigation. The court will normally appoint a single administrator who is neutral. An affidavit of fitness of the proposed administrator is required.

ADMINISTRATION AD LITEM

45. This grant is given for the purposes of commencing or continuing litigation affecting the estate. The grant is limited to representing the estate in the proceedings. In order to obtain such a grant urgency must be established and the applicant must not be in a position to obtain a general grant.

ADMINISTRATION TO PROTECT ASSETS

46. This grant is made to protect the estate or a particular estate asset. The most common circumstance in which it is made is where the deceased was a solicitor or real estate agent in sole practice and no person is alive who is authorised to conduct the business.

The grant is also made for the purposes of completing a particular transaction, for example, the completion of the sale of a property. The summons sets out the powers which are sought- see the precedents at Form 5.34 of **Geddes , Rowland & Studdert** supra and paragraph 5249 of **Mason & Handler** supra. The affidavit should set out the value of the estate, urgency and an indication of how long the grant will be required for – see the precedent at paragraph 5249 of **Mason & Hander** supra

CREDITOR'S GRANTS

47. A creditor may sometimes be entitled to obtain a grant of administration. Their right to do so is always inferior to that of any other person otherwise entitled. In the event that the deceased left a will the creditor must cite the executor. If the executor fails to answer the citation then the creditor must cite the beneficiaries. In the event that there is no will or alternatively there is a partial intestacy the creditor must cite those persons entitled to take on intestacy.

ADMINISTRATION FOR THE PURPOSE OF SEEKING A FAMILY PROVISION ORDER

48. These grants are made to persons who have made an application for a family provision order under Chapter 3 of the Succession Act or under the now repealed Family Provision Act . The grant allows the application to be made and is only appropriate in the event that no grant has otherwise been made in the relevant estate. It has been held that an application for provision can be in the absence of an existing grant as long a grant has been made prior to the time the order for provision is actually made – **Leue v Reynolds** (1986) 4 NSWLR 590. It is now common for the family provision list judge to make such grants where appropriate in the Friday List without the need for a formal application.

PROCEEDINGS FOR THE REVOCATION OF A GRANT

49. Contested proceedings for the revocation of a grant are commenced by Statement of Claim joining the person who obtained the grant as defendant and citing all those who have an adverse interest to the applicant for revocation. Common examples involving applications to revoke are where it is alleged that the grant should not have been made because the deceased lacked testamentary capacity or because a subsequent Will has

been found :see the precedent at paragraph 6101 of **Mason and Handler** supra. If a common form grant has been made in error by reason of the fact that the Court overlooked the existence of a caveat the proper procedure is that the Registrar should request the return of the grant for cancellation. In the event that request is refused the Registrar should bring a motion- **Kozak v Berwicki** [2008] NSWSC 39 per Windeyer J

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Poulos v Pellicer [2004] NSWSC 504

"The general law is reasonably clear. First s144 of the Wills Probate and Administration Act 1898 does not mean what it says. Probate litigation is interest litigation. It is not to be undertaken or interfered in by outside busybodies. This has been established here and in England for many years. See for example ***Bascombe v Harrison*** [1849] EngR 959; (1849) 2 Rob Ecc 118; 163 ER 1262; ***Re Devon; Fitzgerald v Fitzgerald*** [1943] SR Qd 137; ***Hughes v Public Trustee*** (unreported NSWCA 19 August 1980); ***Gertsch v Roberts*** (1993) 35 NSWLR 631.

11 Second, any interest or reasonable possibility of an interest, however remote, will be sufficient to entitle a person to become a party: ***Kipping v Ash*** [1845] EngR 1034; [1845] 1 Rob Ecc 270; 163 ER 1035 and ***Bascombe***.

12 Third, although in earlier times it might have been held that next of kin entitled on intestacy had sufficient interest to challenge a will even if, in the event of a challenge succeeding, there was an earlier will not yet subject to dispute not benefitting the next of kin: ***Hendy v Jenkins*** (1900) Vol XXI NSWR (Bankruptcy and Probate cases) 43, that is no longer the position unless there is some evidence casting doubt upon the earlier will or wills as the grant or lack of grant will not be either beneficial or detrimental to the next of kin.

13 Fourth, at least in this State, irrespective of the position in Queensland (see ***Hogarth v Johnson*** (1987) 2 Qd R 383) a possible claim under the Family Provision Act is not sufficient interest to challenge a will: ***Arbuz v Sanderson*** (unreported Waddell J 24 March 1986) the interest being dependent upon order, not validity of the will. This does not matter in this case, irrespective of the somewhat conflicting decisions on Family Provision Act type claims, because as appears from the judgment of O'Ryan J Mr John Culina has no intention of making a claim under that Act, surprising as it may be as the whole of his mother's estate has been left to a cousin of his in Croatia.

14 Fifth, a creditor has no sufficient interest to challenge a will because the claim will be against the estate, whether any particular will is admitted to probate or whether there is an intestacy: ***Menzies v Pulbrook*** [1841] 2 Curt 845; 163 ER 605.
15 The sufficiency of interest is usually stated to depend upon whether the person seeking to challenge the document propounded will take a different, meaning greater or even lesser, benefit in the estate if that document is not admitted to probate: ***Will of Adcock*** (1905) 10 ALR 268.

16 The question however is whether interest is interest in the outcome or interest in the estate or perhaps whether the interest required must be direct or can be derivative. An appointee under a power of appointment exercised under one will has, it seems, the necessary interest to defend the proceedings for a grant of probate of a later will under which the power is exercised against that appointee. ***In Re Devoy: Fitzgerald v Fitzgerald*** [1943] Qd R 137 the following passage appears at page 147 of the judgment of Philp J:

If the argument for Miss FitzGerald be correct, then presumably the only persons who can intervene are those "interested in the estate of the deceased," which must mean the estate of the testator whose will is in issue. This would involve that persons interested in the action but not in

the estate cannot intervene. Now, the validity of a will exercising a power of appointment over property not part of the testator's estate must, like any other will, be determined in a probate action - Tatnall v. Hankey [1838] EngR 779; ([1838] 2 Moo. P.C. 342, at p. 350: [1838] EngR 779; 12 E.R. 1036, at p. 1039) - and no one would doubt that a person interested in the validity of the will only in so far as it purported to be an exercise of such a power could intervene prior to 1895 just as he could contest the will as an original party. See Hogarth-Swann v. Weed ([1931] 274 Mass. 314). I cannot believe that a construction of 0. XII., r. 17, which would deprive such a person of his right to intervene is correct.

While this statement was obiter the conclusion is compelling. A will or a codicil may do nothing other than exercise the power of appointment. The appointee has a direct interest in supporting the document or resisting the grant of a later document contrary to the interests of the said appointee. Nevertheless, the person taking under the power of appointment exercised by a will has no interest in the estate of the deceased person exercising the power. To that extent the statement in Williams and Mortimer: Executors Administrators and Probate 3rd Edition at page 339:
Where a party can show that the court has jurisdiction to make a decree in a probate action which may affect his interest or interests in the estate of a deceased however slightly, such person has a right to be a party to the action.

and the somewhat shorter statement in Mortimer on Probate 2nd Edition at page 533:

The interest must be an interest in the estate of the deceased so as can be affected by victory in the suit.

may be too limiting.

17 In ***Gertsch v Roberts*** at page 630 Powell J held that a person whose interest was clearly derivative had no sufficient interest to become a party. In that case a forged will had been admitted to probate and it was necessary to make an application for revocation of the grant. The estate after revocation would go on intestacy, in this case to the mother of the deceased who had survived him but died before application for revocation was made. It was held that those persons who would take through the mother's estate could not be made parties to the proceedings for revocation and that it would be necessary for them to obtain a grant of letters of administration in the mother's estate and then bring revocation proceedings. There were other complications but so far as it is relevant here it was held, following ***In the Goods of Crause*** [1858] [1858] EngR 981; 1 Sw & Tr 146; 164 ER 668 that an ultimate interest by expected devolution through an intermediate estate was insufficient without grant of administration in the intermediate estate. See also ***Partington v Attorney General*** [1869] LR 4 HL 100.

18 In part of the litigation in the Whiteley estate, namely ***Whiteley v Clune: the estate of Brett Whiteley*** (unreported Powell J 19 March 1993) His Honour was dealing with an application of Mrs Whiteley, the former wife of the deceased, to be added as a party for the purpose of seeking an order that she be appointed with Mr Clune an administrator ad litem of her former husband's estate. Her claim was based on entitlement to part of the estate of her former husband pursuant to an order of the Family Court made some three years earlier when both she and the deceased were alive, under which she was given the right to choose certain paintings. Her interest in those circumstances was not an interest in the estate which would be affected by the outcome of the

contested proceedings but rather an interest pursuant to a court order placing her, as His Honour found, in much the same position as a creditor. Whether any, and if so, what instrument should be admitted to probate would not bear upon her claim against the estate which existed irrespective of the terms of any will or any entitlement on intestacy.

19 It might seem to follow from these decisions the defendant caveator in the present case has no interest entitling her to contest the will of the deceased. Her interest in the estate, if it could be said to be that, is even one step further away from the interest of Mrs Whiteley. Mrs Whiteley had an entitlement to part of the assets of the estate pursuant to a court order. The defendant has the possibility of obtaining an order that part of any moneys which Mr John Culina may receive from the estate of his mother should go to her. It is not a direct or even an indirect interest in the estate. But it is necessary to consider cases which might require a different conclusion.

20 The case upon which counsel for the defendant relied which is contrary to the requirement for direct rather than derivative interest is the case ***In re Seymour*** [1934] VLR 136. That was a decision of Mann ACJ apparently delivered ex tempore without it seems a great deal of argument. Nevertheless the Acting Chief Justice appears to have relied upon a decision of a'Beckett J in ***The will and codicils of Simeon*** [1910] VLR 335 which held that a person having an interest in the will, included all persons "having an interest in the will being set aside". There is, I think, nothing to support so wide a statement, as an interest of that kind could be very remote from the estate of a deceased person. In ***Seymour*** a bankrupt son received substantial benefits under an earlier will and far lesser benefits under a later will of his father. The mortgagee from the bankrupt holding a second mortgage over an hotel property over which the deceased held a first mortgage filed a caveat. The question was whether he had a caveatable interest. If the later will were not admitted to probate then the caveator's mortgage would advance to a first mortgage over the hotel property because the first mortgage from the mortgagor's son to his deceased father had been effectively discharged pursuant to the terms of the will. His Honour said at page 137:

Deciding this case for myself, I have before me a caveator who is a secured creditor of, a son of the testator, and that son, if the present will is set aside, would appear to be a substantial beneficiary under an earlier will, and the benefit he would take under the earlier will is a benefit that would fall within the security of the present applicant. So that in that sense the present applicant is an assignee of property which under the earlier will would fall to his assignor, and under the will now propounded that security or advantage entirely disappears. In my opinion, such an applicant has an interest which entitles him to lodge a caveat. I think that view is to some extent supported by the case of Dixon and Dickenson v. Allinson and Wife (1), though, having regard to the difference of procedure and to the fact that I have here to deal with a statutory provision calling for interpretation, I doubt whether it is direct authority. On that view I think that the caveat is a good caveat, in that it is lodged by a competent litigant.
(1) [1864] [1864] EngR 834; 3 Sw & Tr 572; 164 ER 1397

The facts are not very clear from the report and the assignment proposition seems to have been given considerable weight.

21 ***Dixon & Dickenson v Allinson*** does provide support for the decision in ***Re Seymour***, although the application involved was not contested. By her will and codicil a Mrs Wilson had given certain property to her husband; the husband survived his wife but died nine days later. A

bank was a creditor in his estate; the bank was placed into liquidation; the executors named in the will of Mrs Wilson sought leave to serve a citation on the liquidators as representing all creditors of Mr Wilson. This was not opposed. The complete judgment is as follows:

December 6. - Sir J.P. Wilde: In this case the plaintiffs propound the will and codicil of Ann Wilson, wife of William Stitt Wilson, who survived his wife, but is since dead. The executors of the will of the deceased are also executors of the will of the husband. There are certain persons representing the East of England Bank as creditors of the husband; these are official liquidators of the bank; the question is, what interest have they in the matter? They are creditors of the husband, and, as such, interested in supporting the codicil propounded, by which the husband's estate would be benefited; thus, though somewhat circuitously, they have a real and substantial interest. In Kipping and Barlow v. Ash, 1 Rob. 270, Sir H Jenner Fust considered that the bare possibility of an interest was sufficient to enable a person to oppose a testamentary instrument. In the present case I think it is quite proper to cite the official liquidators.

The effect of this case and ***Seymour*** is to place a creditor of a beneficiary in the estate in a better position than a creditor in the estate the former being interested in the outcome, the latter being interested in the estate and unaffected by any particular grant.

22 There is a further case decided by Master Connolly in the Supreme Court of the ACT, namely ***Re the Estate of Aaldert Van Den Berg deceased*** [1999] ACTSC 82. There the deceased's wife had brought proceedings in the Family Court prior to his death in relation to the ownership of the matrimonial home. That home passed to Mrs Van Den Berg by survivorship on the death of her husband and under his will she was named as sole executor and beneficiary. The son of the deceased wished to make a claim against his father's estate under the Family Provision Act and for that purpose sought to continue the proceedings in the Family Court. Naturally enough Mrs Van Den Berg would have brought those proceedings to an end if she obtained a grant of probate of the will of her husband. The son wished to obtain a grant of letters of administration ad litem to continue those proceedings. Again the facts are not very clear but it seems that an application was made that a caveat lodged by the son cease to be in force. That application failed. The learned Master held that the caveator had a sufficient interest. It seems to me reasonably clear that he had no such interest. He had no basis whatsoever to contest the application for a grant of probate. What may or may not have been the position with the Family Court proceedings it is not necessary to determine, but on any basis it could not bear on the right of the wife to a grant of probate of a will, the validity of which was not subject to challenge. It may well have been a case for the application of Pt6.2 r6.65 of the Family Court Rules.

23 Finally to complete the survey it was held in ***Lindsay v Lindsay*** (1872) 42 LJ P & M 32 that purchasers from an administrator of part of the estate of a deceased person had an interest entitling them to intervene in proceedings for revocation of the grant of administration on the ground that a will had been found. (It should be noted that the reference to the report of this case given in Williams & Mortimer 3rd Edition as [1872] LR P & D 459 is not on this point). It would probably follow that an assignee of a hope of succession bearing fruit under a particular will, or the assignee of any interest of a beneficiary under a will revoked by a later will if valid, would have sufficient interest to oppose proceedings for a grant of probate of the later will.

What is the necessary interest?

24 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."