



Caveats and family law

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E&A Lawyers has made the decision to no longer provide family law services. While we no longer take on any new family law matters, we are happy to assist by referring you to lawyers specialising in this area. Please don't hesitate to contact us if you would like a referral.

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It can be a common practice that the former matrimonial home, or other Australian properties owned by the parties to a family law matter, are registered on title in one of the parties' sole names. This can understandably create some anxiety for the party who is not named on title when a separation occurs.

Parties may consider lodging a caveat on property that is not in their name, however, this is not a straightforward process. There are complex criteria which must be met before anyone can lodge a caveat on property, including after separation or divorce.

What is a caveat?

A caveat is a document that can be lodged with the Titles Office in your State. In New South Wales, it is NSW Land Registry Services.

A caveat is lodged on a property title and is a statutory injunction which acts as a formal notice on the property that a dealing cannot be registered or the property otherwise disposed of without the person who lodged the caveat first removing that caveat.

Once a caveat is lodged, it does not create an interest in property. Rather, it protects that property from being dealt with in any way; for example, selling the property or transferring it, until that caveat is removed.

A caveat not only prevents the legal owner (on title) from dealing with that property, it is a notice to any third party (for example, a financier looking to issue a mortgage over the property) that the person who has lodged the caveat has an interest in that property.

I'm the party who is not on title. What are my rights in family law?

The *Family Law Act 1975 (Cth)* provides powers to grant injunctions (for example, to prevent a party from disposing of assets) in cases where there is a real danger that a claim under s79 *Family Law Act 1975 (Cth)* during [property settlement negotiations](#), may be defeated or prejudiced unless an injunction is granted.

The key term here is 'real danger'.

There is a high threshold that must be met before the Federal Circuit and Family Court of Australia will consider granting an injunction. There must be some:

1. clear evidence that a party intends to dispose of the property by, for example, sale or transfer or in some way hide the asset; or
2. clear conduct with which a direct inference can be drawn, that the other party is about to undertake actions designed to disrupt fair and equitable property settlement.

Absent that real danger being proved, it is unlikely that an injunction would be granted.

When can I lodge a caveat?

Usually, the quickest way to injunct (that is, prevent or delay) the sale or encumbrance of a property would be to lodge a caveat.

However, it is crucial to note that separating from your partner or being a party to family law proceedings does not provide you with a caveatable interest in the property. A caveatable interest in relation to real property is an interest in Torrens Title land that is capable of supporting a caveat.

The *Family Law Act* does not give the party to a marriage, or de facto relationship, a legal or equitable right to property before a financial order (dealing with property) is made by the Federal Circuit and Family Court of Australia. You cannot place a caveat on a property unless you fulfil the requirements of having a caveatable interest. Otherwise, you risk the caveat lapsing and having to pay the other party's costs associated with the removal of the caveat.

One of the most common caveatable interests is on the grounds of 'an implied, resulting, or constructive trust'. A constructive trust is a trust arising by operation of law, rather than by the parties' intention. A constructive trust may be regarded as either a substantive institution by way of implied or resulting trust or a remedial device to effect restitution of the property. For example, if John Doe provides the money to purchase 123 Fake Street but places that property into Jane Doe's sole name, then Jane Doe holds 123 Fake Street on trust for John Doe.

The November 2022 case of [Pethrick & Folmar \[2022\] FedCFamC1F 905](#) ("Pethrick & Folmar") highlights that contributions under the *Family Law Act 1975 (Cth)* do not constitute an implied, resulting, or constructive trust.

Pethrick & Folmar case

In the case of *Pethrick & Folmar*, the de facto wife placed a caveat on a property owned solely by her de facto husband and on another property owned by the de facto husband and his brother, citing the grounds of 'implied, resulting, or constructive trust'. However, the de facto wife's Initiating Application for financial orders sought "a just and equitable division of the assets" without particularity.

The de facto husband sought orders for the removal of the caveats on both properties, stating that he wanted to sell the properties to pay debts, including legal fees. The Court stated:

"It is trite that contributions do not, in and of themselves, give rise, without more, to an interest in property. If that were so, sections 79 and 90SM of the Family Law Act might well be otiose." *Pethrick & Folmar* [2022] FedCFamC1F 905 (17 November 2022) [26].

The Court ordered that the de facto wife remove the caveats over the properties at her own cost and that the properties were able to be sold by the de facto husband. Any proceeds of sale of the properties were to be held in a trust account for a period of 14 days. Notably, the husband still has ongoing [disclosure obligations](#) (during family law proceedings), including any proceeds of the sale of the two properties.

Get help from a family lawyer

This case serves as a reminder that a caveat should not be placed over a property without a caveatable interest first being established. An understanding of caveats (lodging and removing) during family law proceedings is crucial. This is a particularly complex area of law, and it is vital that anyone considering lodging a caveat seek legal advice from a lawyer experienced in family law.

Contacting a family lawyer

For more information or to arrange a consultation with a lawyer, you can call or email us.

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