

Episode 77: Summary

Episode name: Preserving Marital Assets: To Caveat or Not to Caveat?

Guest(s): Chauntelle Ingenito

What area(s) of law does this episode consider?

Preserving marital assets.

Why is this topic relevant?

A couple of minutes in the morning list in the Federal Circuit and Family Court of Australia is all it takes to see how important the distribution of property can be in a separation, and just how heated arguments between former spouses about property can become.

Under Part VIII of the *Family Law Act 1975* (Cth), the Court has certain powers in relation to property. Section 78 permits the Court to make a declaration about the title to property or the property rights. Under section 79, the Court has the power to alter property interests, and under section 114(1)(e) the power to issue an injunction in relation to dealings involving the property of a party to the marriage.

Knowing how and when to rely on these sections is a key skill for any lawyer practising in family law.

What legislation is considered in this episode?

Family Law Act 1975 (Cth)

Real Property Act 1900 (NSW)

What are the main points?

- Lodging a caveat will stop any transaction involving real property from occurring. The person placing the caveat, however, has an implied undertaking as to damages and any losses that arise out of the caveat being lodged, particularly if it's improperly lodged.
- Caveatable interests can arise where there are non-financial contributions such as repairs to a property and increasing the value of the land in some way.
- One of the benefits of electronic property exchange platforms is a dropdown list of caveatable interests. If something doesn't fit into the dropdown list, it's unlikely to be a proper interest.
- Practitioners must be satisfied that when registering, or even drafting, a caveat, that their client has a legitimate equitable interest that gives rise to a caveatable interest in the property.
- Otherwise, the practitioner risks the Court making a referral to the Legal Services Commissioner of their state.
- Injunctions can prohibit a party from doing something which a caveat may not be able to cover. For example, where there is money left over from the sale of a property, an injunction can restrain dealings with that money, whereas a caveat cannot. A caveat also does not prohibit the bank from taking

possession of a property, and it may even encourage them to do so as a breach of the mortgage.

- When an injunction application is heard ex parte, a practitioner has a duty of full and frank disclosure to the Court.
- This means that the practitioner must also present the arguments for the opposing side, or the party that has been excluded. If a practitioner is found to have breached that duty, they risk losing the benefits of the orders granted. It can also result in a complaint being made to the Legal Services Commissioner.
- Take detailed file notes of what you are told by your client. Sometimes, it may be suitable to have the client execute a contemporaneous document to confirm what they are telling you. This could be a statutory declaration, which are typically kept on file, but at least a document that is kept on electronic record.
- When lodging a caveat, Chauntelle recommends that you should be satisfied with the evidence before you that you could argue in the Supreme Court that the caveat should not lapse.
- If applying for an extension of the caveat, you may be able to get an urgent hearing date before Division 1 of the Federal Circuit and Family Court of Australia. Otherwise, apply to the Supreme Court to seek a transfer under their cross vesting powers to argue it in Division 1.
- Chauntelle recommends getting experience in multiple areas of the law. The best way to do this is to work in a small firm. Learn the different evidentiary requirements of different courts.

What are the practical takeaways?