SUPREME COURT OF QUEENSLAND

CITATION:	*Woodgate v Hobbs & Anor* [2011] QSC 224
PARTIES:	**NEIL WOODGATE** (applicant) v **WILLIAM JAMES HOBBS** first respondent) **DOROTHY JEAN HOBBS** (second respondent)
FILE NO:	BS 13689 of 2010 BS 4922 of 2011
DIVISION:	Trial
PROCEEDING:	Applications
DELIVERED ON:	24 June 2011
DELIVERED AT:	Brisbane
HEARING DATE:	24 June 2011
JUDGE:	Fryberg J
ORDERS:	Application for the removal of caveat is dismissed.
CATCHWORDS:	Succession – Will, Probate and Administration – Probate and Letters of Administration – Practice – Queensland – Caveats – Application to set aside caveat lodged against a grant of probate – Prima facie insufficient evidence to show that testator had testamentary capacity *Barrand v Coxall* [1999] QSC 352, applied
COUNSEL:	T W Quinn for the applicant D Marks for the respondent
SOLICITORS:	De Groots for the applicant Connollys Lawyers for the respondent

[1] **FRYBERG J**: In relation to the question of testamentary capacity which is the central issue in the matter now before me, the resolution of that issue will determine whether a caveat lodged against the grant of probate in respect of Mr Boisen's Will should be removed.

[2] On behalf of the applicants for removal, Mr Quinn has very ably urged a number of factors which favour the removal. He has pointed to the uncontradicted evidence of the medical records and the evidence of Mr Trost, the solicitor, who took the Will. Both point with some strength to the likelihood that the testator was of sound mind and capable of making a Will.

[3] The factor which troubles me about the matter is the way in which the instructions for the Will were taken. They were taken at a time when the testator had come down with pneumonia, had been flown from Wondai to Brisbane, and was in hospital in his last month of life at the age of 89. He was, it is, I think, common ground, weak at the time and speaking was an effort.

[4] Mr Trost, the solicitor who took the Will was summoned by Mr Woodgate, a retired solicitor who was the proposed executor and also a beneficiary under the Will. Mr Woodgate told Mr Trost that the testator wanted to make changes to his Will and provided him with a list of the changes which the testator had previously indicated to him, Mr Woodgate, that he wished to make.

[5] Mr Trost was introduced to the testator and Mr Woodgate then left. The testator told Mr Trost in response to questioning that he wished to change his Will. Mr Quinn relies on that sentence to indicate that the testator's desire was clearly expressed to be to amend the Will. I do not think the testator's statement is so unequivocal.

[6] Mr Trost proceeded, using the previous Will as a template, to obtain amendments to the Will. Provided that that was precisely what was wanted by the testator, there is no harm in that. Mr Trost made reasonable efforts on the evidence before me to ensure that the testator was alert and his cerebral processes were working. But he was sick, he was tired and he was weak. It is possible that his wish was to make a new Will, not simply to amend the existing one.

[7] Prima facie I do not think Mr Trost should have taken and used instructions from Mr Woodgate in this way without confirming that this was indeed what the testator wanted to do.

[8] I am also troubled by the fact that neither side attended upon the medical staff, who were on duty at the time, promptly and obtained evidence from them about the testator's condition while the matter was fresh in their minds. No evidence from the medical staff has been put before me apart from the medical records. It is, I think, unsatisfactory to resolve the issue in this way. One must, of course, to a degree balance perfect satisfaction with considerations of delay and cost. However, as Mackenzie J pointed out in Coxall[1], the onus on those who seek to have a caveat removed is high. In the current case there is other litigation on foot between the parties which could be amended so as to include the proof of the Will in solemn form.

[9] It seems to me that because of the matters to which I have referred, this is not a case

[1] *Barrand v Coxall* [1999] QSC 352.

where the caveat should, at this stage, be removed. I will therefore decline to make the orders sought in that application.