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LITIGATION
— ESTATE ALERT

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Preservation, Patience and Persistence: The Dilemmas of a Litigator in Estates

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In *Re Estate of Ireni Traitses*,[1] Justice David Brown raised the issue of a cost-effective procedure when dealing with a "one house will fight". Quite often, the estate assets that are the subject matter of litigation relate to just that – some *de minimis* personal property, small bank account balances and a family home. Depending on where the house is, the value of the home can be worth half a million dollars or over a million dollars in value. In this context, where all the value of the estate is in the house, a litigator must decide when it is important or appropriate to seek preservation of the major asset in the estate and how to go about the preservation.

A certificate of pending litigation (or *lis pendens*) ("CPL") is an often used tool in order to preserve real property and unregistered interests in such property. The test to obtain a CPL is that there must be an interest in land in question and there must be a reasonable claim to that interest in land.[2]

Although there have been cases that discuss the equitable discretion of a judge on a motion to grant or discharge a CPL, in order for the motion to be granted or the CPL to be maintained, there must be a reasonable claim to the interest in land.[3] The judge does exercise his or her discretion in equity and looks at all of the relevant matters between the parties in determining whether or not the certificate should be vacated.[4] However, a claim to an interest in land is required.

The threshold in respect of the "interest in land" issue in a motion seeking a CPL is whether there is a triable issue as to such interest, not whether the plaintiff will likely succeed. A claim of the merits is not to be conducted.[5] The onus is on the party opposing the CPL to demonstrate that there is no triable issue in respect to whether the party seeking the CPL has "a reasonable claim to the interest in the land claimed".[6]

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1 *Re Estate of Irenei Traitses*, 2014 ONSC 2102 (SCJ).
2 *Todd Family Trust v. Barefoot Science Technologies Inc.*, 2013 ONSC 523 (Div Crt) at paras 13 and 16. It is not necessarily the case that the party whose instance is requesting the CPL have an interest in land; rather, it must be that an interest in the land be asserted in the proceedings. *See Chilian v. Augdome Corp.* 1991 CarswellOnt 422 (CA) at para 55 where a claim was made that, if substantiated, would adversely affect the defendant's interest in the land.
3 *Ibid*, the Court commented that it may be that "arriving at this finding [whether there is a reasonable claim to an interest in land] includes the exercise of discretion, but such discretion is circumscribed by the need to comply with that requirement."
4 *Clock Investments Ltd. v. Hardwood Estates Ltd.*, (1977) 16 OR (2d) 671 (Ont Div Ct) at para 9.
5 *Hupka v. Aarts Estate*, 2003 CarswellOnt 737 ["*Hupka*"] at para 79 citing *572383 Ontario Inc. v. Dhunna*, [1987] OJ No 1073 (Ont Master).
6 *Hupka, supra*, at para 50.

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Therefore, if a party is claiming an interest in an estate and the value of the estate is in a house, litigators must assess the appropriateness of obtaining a CPL in such circumstances. A situation where a mortgage or lien is put on the property or the house is sold, before a judgment is rendered and executed on or before a settlement is obtained, will be a highly undesirable outcome.

The merits of the CPL motion depend on the shape of the claim (for example, is there an articulated claim against the property or a claim against the residue of the estate? Are there any trust claims being made against the property?). Courts will likely grant a CPL in the estate context where allegations are made that a portion of the proceeds of sale of property or portions of the estate was used to buy the real property in question.[7] However, where a claim is made against the estate (articulated in general terms) or the residue of the estate, a CPL will not likely be granted.

OTHER OPTIONS FOR PRESERVATION

If a CPL is not available in the circumstances, there are other options to ensure property in an estate is preserved. These options include, but are not limited to:

1. obtain an order for directions setting out that certain property (not necessarily the real property) will be preserved pending a further court order or that it can only be disposed of or dissipated on the consent of all parties;
2. appoint an estate trustee during litigation who will determine when it is appropriate to dissipate assets (for example, to pay taxes) on behalf of the estate. However, this option might not be helpful where fraudulent conduct was involved (i.e. you need to preserve property that is not held in the estate but was an asset of the estate);
3. continue with the executor that was appointed by the will as an estate trustee during litigation but put stringent rules or limits on his or her powers;[8]
4. appoint a receiver if one of the estate assets is a business;
5. pay or have funds paid into Court;[9] and
6. put a caution or notice on title to the property if certain requirements are met.[10]

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[7] *Jordan v. Jordan*, 2013 ONSC 6948 (SCJ) at para 8.
[8] *Dempster v. Dempster Estate*, 2008 CarswellOnt 6878 (Ont SC).
[9] This was done in *Moskalev v. Fraev Estate*, 2012 ONSC 6669 where the plaintiff wanted a CPL vacated as a result of a pending sale of property. The Court only allowed the CPL to be vacated if the fair market value of the property (less fees and mortgage) were paid into Court. See also *Leung Estate v. Leung* [2004] OJ No. 1417 (SC).
[10] This provides limited relief for a short time period. See section 71 of the *Land Titles Act*, RSO 1990, c L 5.

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