

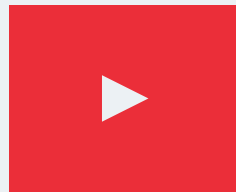


Orders for preserving property in family law cases

Provincial Advocates
Training Conference 2021



Legal Aid BC



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2021 Provincial Advocates Training Conference

Patrick Grayer – Grayer Law Office

Family Law: Preserving Property

Certificates of Pending Litigation

- Must file a Notice of Family Claim in BCSC Form 3 claiming an interest in the property and pleading a CPL, as well as a CPL in *Land Title Act* (LTA) Form 33, both with the Supreme Court.
- Filed using LTA Form 17C with the Land Title Office online at MyLTSA (ltsa.ca) under section 215 of the LTA. The forms are all auto fillable and reasonably easy to use. Filing requires an LTSA account and a Juricert electronic signature so you will need a lawyer, notary, or agent to do it. You may still be able to file a paper copy at the Land Title Office with an appointment.

- 
- CPL lets a prospective buyer or lending institution know the property is subject to a family law claim. Title to a property cannot be transferred nor can a property be refinanced with a CPL in place.
 - Once filed the LTO will mail a copy of the CPL to all registered owners of the property.
 - The registered owner or a party with an interest in the property can apply to the court to have a CPL removed under sections 252 to 256 of the LTA if no steps have been taken in the action for a year, the action has been discontinued or dismissed, or if the continued registration of the CPL will cause hardship or inconvenience to the owner.

Land (Spousal Protection) Act

- An entry can be filed against a family “homestead” under section 2 of the Act on application of a spouse (married or common law) in Form B and supported by an affidavit in Form C. This is not automatically provided to the owner spouse. These Forms are then filed with the LTSA using LTA Form 17.
- An application for entry can be made while the spouse is still resident in the homestead, even if they are separated, or for one year after the spouse moves out. Resident does not necessarily mean the spouse is occupying the homestead at all times.
- Property registered other than in the name of one spouse only is not a homestead, for example held in joint tenancy.

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- Where an entry has been made, any sale or transfer of the homestead by the owner spouse is void for all purposes without the written consent of the spouse.
 - An owner spouse who claims that land is not a homestead, or advances any other reason the entry should not have been made, may apply to the court to have the spouse show cause why the entry should not be discharged.
 - An entry may be cancelled on application where the spouse has died, or the marriage of the spouses is annulled or dissolved.
 - The Act ceases to apply when the property issues between the spouses are settled under the FLA.

Section 91 *Family Law Act*

- **91** (1) On application by a spouse, the Supreme Court must make an order restraining the other spouse from disposing of any property at issue under this Part or Part 6 [*Pension Division*] until or unless the other spouse establishes that a claim made under this Part or Part 6 will not be defeated or adversely affected by the disposal of the property.
- (2) The Supreme Court may make one or more of the following orders:
 - (a) for the possession, delivery, safekeeping and preservation of property;
 - (b) for the purpose of protecting the applicant's interest in property from being defeated or adversely affected,
 - (i) prohibiting the other spouse from disposing of, transferring, converting, or exchanging into another form, property in which the applicant may have an interest, or
 - (ii) vesting all or a portion of property in, or in trust for, the applicant.
- (3) The Supreme Court may make an order under this section before notice of the application is served on the other spouse, or may order that notice of the application be served on the other spouse.

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- A party can bring an Application to the court to “freeze” assets in the other party’s name so they cannot dispose of them prior to settlement or court order. This is usually done without notice to the other party on an urgent basis under Rule 10-8. Evidence is required in affidavit form those assets are at risk. A Notice of Family Claim needs to be filed prior if a proceeding has not already been commenced.
 - Generally, you need not know specific account numbers but only the institution name and branch address.
 - A court is unlikely to make an order to restrain a party from disposing of family assets or property at issue when the party and the property are outside the jurisdiction, although an exception is sometimes made when a spouse has attained to the jurisdiction of the court.
 - The court will generally not restrain the assets of a third party, including a corporation, except when the party is the sole or majority shareholder or the directing mind of the corporation.

Content for Part 1: Orders Sought in the Notice of Application:

pursuant to s. 91 of the *Family Law Act*, s. 39 of the *Law and Equity Act*, and Rules 12-4 and 12-1 of the Supreme Court Family Rules,

(1) the respondent be restrained and enjoined from disposing of, encumbering, assigning, or in any similar manner dealing with family property, or of any property in which the claimant has, or may have, an interest, pending final determination of this action, without the consent in writing of the claimant or without further order of this Court;

(2) the *[party or whomever]* deliver up to *[the registrar, a party, or whomever]* all items set out in Schedule A attached to this notice of application;

Content for Affidavit:

- (1) clear identification of assets
- (2) present location of assets
- (3) ownership of assets/contributions to preservation or acquisition of assets
- (4) actions or statements of respondent which indicate that they might dispose of items
- (5) reasonable apprehension that the property will be disposed of and that they cannot be replaced or compensation for any loss be paid out of the remaining property
- (6) where an order is being sought that certain assets be delivered to the applicant, the registrar, or some other person, there must also be some evidence that the respondent is not inclined to obey court orders or agreements to restrict disposition or encumbering of assets.

Content for draft order:

- THIS COURT ORDERS that:
 - 1. all family property be preserved until further order of this court, and that neither the *[party]* nor the *[party]* may transfer, sell, encumber, or deal in any way with any family property, including but not limited to *[list of assets]*, which either party has in their possession or control as of the date of this order.
- *[OR]*
- THIS COURT ORDERS that:
 - 1. the *[party]*, is restrained from transferring, selling, converting, disposing of or encumbering any family property pending final determination of this proceeding without the consent in writing of the *[party]* or further court order, and in particular, without restricting the generality of the foregoing, the following property:
 - (a) the Registered Savings Plan with *[name of financial institution]* registered in the name of the *[party]* under plan number *[number]* and any other Registered Retirement Savings Plans registered in the name of the *[party]*;

- (b) the mutual funds account with *[name of financial institution]* registered in the name of the *[party]* under account number *[number]* and any other investment account registered in the name of the *[party]*;
- (c) the *[description of vehicle, including year, make model]* registered in the name of the *[party]*;
- (d) household goods currently located at *[address]*;
- (e) the *[party's]* pension arising out of their employment with *[name of pension administrator]*; and
- (f) *[any other specific property sought to be protected or preserved]*.
- 2. The *[party]* and the *[party]* are further hereby restrained and enjoined from doing anything which has or may have the effect of depreciating or dissipating the value of any corporate or business asset in the name of either of them which may be family property or which the *[party]* or the *[party]* has an interest, except in the ordinary course of business, without the consent in writing of the other party or further order of this Court.
- 3. For the purposes of this Order, the “ordinary course of business” expressly excludes transfers of capital between corporations, except on 10 days’ written notice being given to the other party or their counsel, with liberty to apply to the Court for directions.

July 4, 2021

■ **BY FAX: 1 (888) 555-5555**

Toronto Dominion Bank
[branch address]
Toronto, Ontario, MXX XXX

Dear Madam or Sir:

Re: **[name of client]**

And: ***Name v Name, BCSC Vancouver Registry, Court File No. xxx***

Please be advised that our client, [full name], has obtained an “Order Made After Application” (enclosed) in BC Supreme Court in Vancouver on June 28, 2021 restraining the disposal of assets by your client, [full name], birthdate [dob].

As per the Order, we are allowing Mr. XX to have one open chequing account for the purposes of day-to-day expenses and receiving his paycheques. We have been advised by his legal counsel that he intends to use his TD Chequing Account #4xxxx for this purpose. We are therefore allowing this account to remain open, but any other accounts that Mr. XX has with TD shall be frozen.

Yours truly,

Encl.

Fact Pattern

- Jianmin (he/him) and Stephanie (she/her) have been married for 10 years and have two children. They separated August 2021 and Jianmin moved out of the family home into an apartment in Yaletown. The parties own a house located at 666 E. 6th Ave, Vancouver, but only Jianmin is on title and on the mortgage, which is held by TD.
- Jianmin is employed as an electrician and has an annual salary of \$120,000. Stephanie is employed part time as an administrator with the VSB and has an annual salary of \$40,000 Stephanie's salary is auto-deposited into their one RBC joint account. Jianmin's salary is deposited into an account solely in his name
- Jianmin then transfers funds into the joint account on the last day of each month to cover expenses, including a monthly mortgage payment of \$2,400 due on the first day of each month. The parties also have a joint RBC credit card which is auto-withdrawn from the joint account on the 27th of each month typically in the amount of \$2,000 to \$3,000.

- The family has one vehicle, a 2006 Honda Odyssey, which Stephanie drives, as Jianmin has use of a company vehicle. The Honda is insured until next April.
- Stephanie has no other bank or investment accounts nor another credit card. Stephanie knows Jianmin has other bank accounts and investments, as she has copies of old statements and access to some of them on the family computer.
- From the joint account and access to Jianmin's accounts she has established:
 - Jianmin did not deposit funds into the RBC joint account in September.
 - The TD mortgage payment due October 1 was not made.
 - The RBC joint credit card withdrawal on September 27 put the RBC joint account into overdraft.

- Jianmin had a sole TD credit card bill of \$17,652 in September when typically his bills have been \$400 to \$500 each month. Charges have included:
 - Insurance on a vehicle.
 - Jewelry.
 - A luxury resort in the Bahamas.
 - Expensive restaurants.
 - Holt Renfrew.
- Jianmin withdrew \$70,000 from a TD RRSP on September 26.
- Jianmin withdrew \$120,000 from a TD Line of Credit secured against the family home.
- Stephanie has not seen Jianmin for a few weeks but swears she saw him getting in the driver's door of a new Tesla when she drove by his workplace the other day.



Legal Remedies

- What are Stephanie's legal options for preserving property?
- What are Stephanie's BEST legal options?

PAGE OF PAGES

- Each term used in the representation and declaration set out above is to be given the meaning ascribed to it in Part 10.1 of the *Land Title Act*.

Deduct LTSA Fees? Yes

STC? YES

ADDITIONAL INFORMATION:

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4. PERSON TO BE REGISTERED AS CHARGE OWNER: (including occupation(s), postal address(es) and postal code(s))

2. PARCEL IDENTIFIER AND LEGAL DESCRIPTION OF LAND:
[PID] [LEGAL DESCRIPTION]

STC? YES

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[PID] [LEGAL DESCRIPTION]

STC? YES

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[PID] [LEGAL DESCRIPTION]

STC? YES

Land Title Act

FORM 33 (*Family Law Act*)

(section 215(6))

NATURE OF INTEREST: CHARGE: certificate of pending litigation

HEREWITH FEE OF \$

LEGAL DESCRIPTION AND PARCEL IDENTIFIER NO.(S): *[specify]*

Address of person entitled to register this certificate of pending litigation:

[specify]

Full name, address, telephone number of person presenting application:

[specify]

I certify that the title to an estate or interest in the land above mentioned could change as an outcome of the proceeding mentioned below.

SIGNATURE OF APPLICANT, OR
SOLICITOR OR AUTHORIZED AGENT

No.: *[specify]*
[specify] REGISTRY

IN THE *[specify]* COURT OF *[specify]*

BETWEEN:

PLAINTIFF/PETITIONER

AND:

DEFENDANT/RESPONDENT

CERTIFICATE OF PENDING LITIGATION

I CERTIFY that this proceeding claims for an order under the *Family Law Act* respecting the division of property. Subject to Rule 22-8 of the Supreme Court Family Rules, a copy of the document by which the claim is made may be obtained from the Court Registry.

Given under my hand and the seal of the court at *[specify]*, British Columbia, this *[specify]* day of *[specify]*, 20*[specify]*.

REGISTRAR

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-

-
- What are Stephanie's legal options for preserving property?
- What are Stephanie's BEST legal options?

**AFFIDAVIT—APPLICATION FOR ENTRY—LAND (SPOUSE PROTECTION) ACT—
FORMS REGULATION, FORM A**

Form A

I, *[name]*, of *[address]*, in the Province of British Columbia, make oath and say:

- (1) That my spouse, *[name]*, of *[address]*, is the registered owner of all and singular *[legal description]*.

Or

- (1) That I, *[name]*, of *[address]*, am the registered owner of all and singular *[legal description]*.

- (2) That I am the lawful spouse of *[name]*, of *[address]*.

- (3) That on the land there is a dwelling occupied by [name] and myself as our residence.

Or

- (3) That on the land there is a dwelling that was last occupied by *[name]* and myself as our residence on *[month, day, year]*.

SWORN BEFORE ME at
[location], in the Province of British
Columbia, [month, day, year]

A Commissioner for taking
affidavits for British
Columbia

[signature]

[Apply stamp, or type or legibly print name of commissioner.]

**APPLICATION FOR ENTRY—LAND (SPOUSE PROTECTION) ACT—FORMS
REGULATION, FORM B**

Form B

Application for Entry

Date *[month, day, year]*

I, *[name]*, solemnly declare that I am *[in case of solicitor (solicitor for [name] and that)] [in case of agent (of the full age of 19 years, that I reside in the Province of British Columbia, and that I am the authorized agent of [name], and that)] [in case the spouse in whose name the homestead is registered makes the entry on the other spouse's behalf (the spouse of [name] and that)] [name]* is entitled to an entry on the title to the land hereunder described, and make application under the *Land (Spouse Protection) Act* for entry.

The full name, address and occupation of the person entitled is: *[name]*, *[address]*, *[occupation]*.

[Description of homestead]

[Documents in support]

And I make this solemn declaration conscientiously believing it to be true, and knowing that it is of the same force and effect as if made under oath and the *Canada Evidence Act*.

Declared before me <i>[month, day, year]</i> at	)	
<i>[location]</i> , British Columbia	)	
	)	
	)	
	)	
_____	)	_____
A Commissioner for taking	)	<i>[signature]</i>
affidavits for British	)	
Columbia	)	
	)	

[Apply stamp, or type or legibly print name of commissioner and full postal address.]

NOTICE OF APPLICATION—SUPREME COURT FAMILY RULES, FORM F31

Form F31 (Rule 10-6(3))

No. *[File number is not required if initiating the file]*
[Location] Registry

NOTICE OF APPLICATION

In the Supreme Court of British Columbia

Claimant: *[Surname; First Name; Second Name; Third Name] [Add AKA/DBA] [Add Legal Rep.]*

Respondent: *[Surname; First Name; Second Name; Third Name] [Add AKA/DBA] [Add Legal Rep.]*

[Rule 21-1 of the Supreme Court Family Rules applies to all forms.]

Name(s) of applicant(s): *[name(s)]*

To: *[name(s) of party(ies) or person(s) affected]*

TAKE NOTICE that an application will be made by the applicant(s) to the presiding judge or master at the *[address of registry in which the family law case is being conducted]* on *[dd/mm/yyyy]* at *[time of day HH:MM AM/PM]* for the order(s) set out in Part 1 below.

Part 1: ORDER(S) SOUGHT

[Using numbered paragraphs, set out the order(s) that will be sought at the application and indicate against which party(ies) the order(s) is(are) sought.]

1. _____
2. _____

Part 2: FACTUAL BASIS

[Using numbered paragraphs, set out a brief summary of the facts supporting the application.]

1. _____
2. _____

[If any party sues or is sued in a representative capacity, identify the party and describe the representative capacity.]

Part 3: LEGAL BASIS

[Using numbered paragraphs, specify any rule or other enactment relied on and provide a brief summary of any other legal arguments on which the applicant(s) intend(s) to rely in support of the orders sought.]

1. _____
2. _____

Part 4: MATERIAL TO BE RELIED ON

[Using numbered paragraphs, list the affidavits served with the notice of application and any other affidavits and other documents already in the court file on which the applicant(s) will rely. Each affidavit included on the list must be identified as follows: "Affidavit [sequential number, if any, recorded in the top right hand corner of the affidavit] of [name], made [dd/mm/yyyy]".]

1. Affidavit # _____ of _____ made _____
2. Affidavit # _____ of _____ made _____
3. Affidavit # _____ of _____ made _____
4. Financial Statement:

Estimated time

The applicant(s) estimate(s) that the application will take: _ hours _____ minutes.

[Check the correct box.]

- ☐ This matter is within the jurisdiction of a master.
- ☐ This matter is not within the jurisdiction of a master.

TO THE PERSONS RECEIVING THIS NOTICE OF APPLICATION: If you wish to respond to this notice of application, you must, within the time for response to application described below,

- (a) file an application response in Form F32,
- (b) file the original of every affidavit, and of every other document, that
 - (i) you intend to refer to at the hearing of this application, and
 - (ii) has not already been filed in the family law case, and
- (c) serve on the applicant 2 copies of the following, and on every other party one copy of the following:

- (i) a copy of the filed application response;
- (ii) a copy of each of the filed affidavits and other documents that you intend to refer to at the hearing of this application and that has not already been served on that person;
- (iii) if this application is brought under Rule 11-3, any notice that you are required to give under Rule 11-3(9).

Time for response to application

The documents referred to in paragraph (c) above must be served in accordance with that paragraph,

- (a) unless one of the following paragraphs applies, within 5 business days after service of this notice of application,
- (b) if this application is brought under Rule 11-3, within 8 business days after service of this notice of application, and
- (c) if this application is brought to change, suspend or terminate a final order, within 14 business days after service of this notice of application.

Date: *[dd/mm/yyyy]*.

Signature

☐ applicant ☐ lawyer for applicant(s)

[type or print name]

To be completed by the court only:

Order made

☐ in the terms requested in paragraphs *[number]* of Part 1 of this notice of application

☐ with the following variations and additional terms:

Date: _____

Signature of

☐ Judge ☐ Master

Appendix

[The following information is provided for data collection purposes only and is of no legal effect.]

THIS APPLICATION INVOLVES THE FOLLOWING:

[Check the box(es) below for the application type(s) included in this application.]

- ☐ discovery: comply with demand for documents
- ☐ discovery: production of additional documents
- ☐ other matters concerning document discovery
- ☐ extend oral discovery
- ☐ other matter concerning oral discovery
- ☐ amend pleadings
- ☐ add/change parties
- ☐ summary judgment
- ☐ summary trial
- ☐ service
- ☐ interim order
- ☐ change order
- ☐ adjournments
- ☐ proceedings at trial
- ☐ appointment of additional expert(s): financial matters
- ☐ other matters concerning experts

The following certificate must be completed by each party to a divorce claim.

PARTY'S CERTIFICATE (*Divorce Act* (Canada), s. 7.6)

[] By checking this box, I [*name of party*], certify that I am aware of my duties under sections 7.1 to 7.5 of the *Divorce Act* (Canada), which say:

7.1 A person to whom parenting time or decision-making responsibility has been allocated in respect of a child of the marriage or who has contact with that child under a contact order shall exercise that time, responsibility or contact in a manner that is consistent with the best interests of the child.

7.2 A party to a proceeding under this Act shall, to the best of their ability, protect any child of the marriage from conflict arising from the proceeding.

7.3 To the extent that it is appropriate to do so, the parties to a proceeding shall try to resolve the matters that may be the subject of an order under this Act through a family dispute resolution process.

7.4 A party to a proceeding under this Act or a person who is subject to an order made under this Act shall provide complete, accurate and up-to-date information if required to do so under this Act.

7.5 For greater certainty, a person who is subject to an order made under this Act shall comply with the order until it is no longer in effect.

The following certificate must be completed for each party to a divorce claim who is represented by a legal adviser.

LEGAL ADVISER'S CERTIFICATE (*Divorce Act* (Canada), s. 7.7(3))

[] By checking this box, I *[full name]*, legal adviser for *[name of party]*, certify that I have complied with section 7.7 of the *Divorce Act* (Canada), which says:

7.7 (1) Unless the circumstances of the case are of such a nature that it would clearly not be appropriate to do so, it is the duty of every legal adviser who undertakes to act on a spouse's behalf in a divorce proceeding

- (a) to draw to the attention of the spouse the provisions of this Act that have as their object the reconciliation of spouses; and
- (b) to discuss with the spouse the possibility of the reconciliation of the spouses and to inform the spouse of the marriage counselling or guidance facilities known to the legal adviser that might be able to assist the spouses to achieve a reconciliation.

(2) It is also the duty of every legal adviser who undertakes to act on a person's behalf in any proceeding under this Act

- (a) to encourage the person to attempt to resolve the matters that may be the subject of an order under this Act through a family dispute resolution process, unless the circumstances of the case are of such a nature that it would clearly not be appropriate to do so;
- (b) to inform the person of the family justice services known to the legal adviser that might assist the person
 - (i) in resolving the matters that may be the subject of an order under this Act, and
 - (ii) in complying with any order or decision made under this Act; and
- (c) to inform the person of the parties' duties under this Act.