

Preservation of Property: Cautions, Court Orders and CPLs (and others)

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*The author would like to thank Jeffrey W. Lem, Director of Titles, for his comments and insight.

Introduction

There is no “one size fits all” registration that can be done in the land registry system to preserve property, much to the disappointment of a party who may have a compelling and legitimate reason to tie up property. The one exception is a court order, but it requires the additional step of convincing a judge of the relief sought and there is the practical matter of timing. Preservation of property will always require a discussion of the background and the available options which may not be ideal or immediate.

The tension in preservation of property registrations is always timing and cost: the options start from simple and cost effective to complex, time consuming and expensive. Before seeking a court order, one can run through the available options and determine whether there is a registration that may meet the aims of the property preserver.

Joint Tenancy Severance

A severance of a joint tenancy is a fast, simple mechanism that can be done unilaterally at any time during ownership and may be effective for preserving the interest of one of the joint tenants.

Murdoch v. Barry gives a succinct definition of joint tenancy:

The two principal features of a joint tenancy are the right of survivorship and the “four unities”. The four unities of a joint tenancy are the unities of title, possession, interest and time which are defined as follows:

- (1) Unity of title, that is, all joint tenants must take under the same instrument;
- (2) Unity of interest, that is, the interest of each joint tenant must be identical in nature, extent and duration;
- (3) Unity of possession, that is, each joint tenant is entitled to undivided seisin or possession of the whole of the property and none holds any part separately to the exclusion of the others, and

(4) Unity of time, that is, at common law the interest of each joint tenant must vest at the same time.¹

A severing of a joint tenancy will convert the ownership of the property from joint tenants to tenants-in-common which can be useful if the severing joint tenant is ill or protracted negotiations regarding the property are expected. These registrations will often be requested in acrimonious family law matters but severances are just as applicable in any kind of joint ownership property dispute. It can be done at any point in time that both (or several) owners are on title.

Since no notice is required to the other titleholders, the process involves the registration of a transfer from one owner to him/herself for the purpose of severing the joint tenancy and does not contravene the prohibition of alienation of property under the *Family Law Act*.²

The registration of a severance will not address all the issues between the parties but resolves the unfortunate situation where a property transfers via right of survivorship to the surviving joint tenant when that was not the intention of one of the parties.

Mortgages

A mortgage defined under the under the *Mortgages Act*. includes “any charge on any property for securing money or money’s worth.”³

A mortgage can be a useful tool in settlements to secure future obligations, but it has the added benefit of preserving property in the sense that any disposition of the property will require notice to the mortgagee. Mortgages can be used to secure the ongoing financial responsibilities of one party or used as security to prevent or encourage certain action(s) to occur in the future when both parties are agreeable to the registration.

The best way to affect this kind of obligation (especially if the registration is conditional on certain events occurring) is to have the mortgagor execute an acknowledgement and direction agreeing to the mortgage terms while binding the party by contract for automatic registration without further consent upon specified events occurring/not occurring. Note however that if the mortgagor dies, the mortgage should be treated the same way as a ‘zombie deed’ and cannot be registered.⁴ The more appropriate route to preserving property may be a Caution, if applicable. This risk should be explained to your client when an acknowledgement and direction has been executed to secure a settlement term

¹ *Murdoch v. Barry* [1975] 10 Ont. S.C. OR (2d) 626 at para. 14.

² *Horne v. Horne Estate* [1987] 60 O.R. (2d) 1.

³ *Mortgages Act*, R.S.O. 1990, c. M. 40 s. 1.

⁴ *Thompson v. Elliott Estate*, 2020 ONSC 1004.

with the understanding it is only to be registered if and when there is a default against the debt it is securing.

Under the *Land Titles Act*, registered charges against property require certain elements. The first is a principal amount.⁵ Consequently, a charge that is silent on principal will not be valid – in fact, such a thing cannot even be registered in Land Titles from a technical perspective; the Teraview system will not allow you to sign the document.

A registered mortgage can be with or without interest and with or without a power of sale.⁶

The effect of the registration is that it gives the mortgagee an interest in the land subject only to its own qualifications and any previous encumbrances.⁷

If a settlement results in the registration of a mortgage against title, typically institutional lenders will not agree to be subject to one of these mortgages. You may want to consider adding an obligation of the mortgagee to postpone their mortgage to an institutional lender; however, the institutional lender may still have an issue with the registration regardless of its subordinate position.

Many institutional mortgages contain a prohibition on secondary financing which presents a practical issue associated with these kinds of secondary registrations to secure obligations between the parties. If an institutional mortgage and settlement mortgage are being registered concurrently, consent will be required by the institutional lender and you are unlikely to receive it.

If the settlement mortgage is being registered after the registration of an institutional mortgage, it is incumbent to advise the mortgagor of the prohibition on secondary financing in the institutional loan (if applicable) and the associated risks of registration.

Matrimonial Home Designation

Under s. 20 of the *Family Law Act* either both spouses or one spouse can unilaterally designate a home as a matrimonial home.⁸ The effect of such a designation is to put a third-party purchaser on notice of the interest. Under ss. 20(6), the removal of a matrimonial home designation can occur upon one of the following events:

(a) a cancellation, executed by the person or persons who made the original designation, in the form prescribed by the regulations made under this Act;

⁵ *Land Titles Act*, R.S.O. 1990, c. L.5, ss. 93(2).

⁶ *Land Titles Act*, R.S.O. 1990, c. L.5, ss. 93(1).

⁷ *Land Titles Act*, R.S.O. 1990, c. L.5, ss. 93(4).

⁸ *Family Law Act*, R.S.O. 1990, c. F. 3, s. 20.

- (b) a decree absolute of divorce or judgment of nullity;
- (c) an order under clause 23 (e) cancelling the designation; or
- (d) proof of death of one of the spouses.⁹

Matrimonial home designations do not require a court order for removal and are simple applications that can be registered on title with little delay which makes them attractive from an expediency perspective. Furthermore, their removal can be affected by the party who had the designation registered in the first place or upon other enumerated events as listed above.

Spouses may have more than one matrimonial home¹⁰ so the question of whether a property qualifies may be a discussion that requires further analysis with the family lawyer, and you may want to consider obtaining an affidavit from the registrant confirming that they understand the definition of a 'matrimonial home' and that their property will qualify.

Be wary of the improper withdrawal of a designation of a matrimonial home. In a recent family law case, costs were awarded against counsel personally for improperly removing a designation.¹¹ In *Haroon v. Sheikh*, counsel was acting both as a real estate lawyer and a family lawyer and removed a designation on the basis that the parties were already divorced, which the court ultimately found not to be the case. *Haroon v. Sheikh* involved the validity of a foreign divorce and will be inapplicable to most real estate lawyers, but it is a stark reminder of the consequences of getting registrations (or in this case removals) wrong.

Court Orders

While arbitration is a popular alternative to the courts to resolve disputes, particularly with property, an arbitration award is not a court order for the purposes of transferring property and any arbitration award must be turned into a court order to be registrable.

The first issue to contemplate with court orders that are being registered on title is to ensure that the property is properly described, which is not solely the municipal address. The safest course of action, particularly if there is an error or a description issue, is to describe the property three ways: municipal address, legal description and PIN(s).

A court order may have many orders and the component related to the property is set out in one of several paragraphs. Ideally, the court orders would be split so that there was one court order dealing specifically with the property and another dealing with the balance of the relief. This is the preferred method by the Land Registry

⁹ *Family Law Act*, R.S.O. 1990, c. F. 3, ss. 20(6).

¹⁰ *Reeson v. Kowalik (Reeson)*, [1991] O.J. 1634, 36 R.F.L. (3d) 396 (Ont. Gen. Div.)

¹¹ *Haroon v. Sheikh*, 2020 ONSC 1284.

Office(LRO)¹² but also addresses privacy concerns of the individuals referenced in the court order. If this is not possible, any directions regarding the property should be set out in distinct paragraphs with a direction to the Director of Titles.¹³

If your court order is complex, have it pre-approved by the LRO. While the LRO will not provide legal advice on drafting, they will approve/reject your draft order prior to registration.¹⁴ The challenge with this approach, however, is timing as the pre-approvals may take several days.¹⁵

Removal of Court Orders

With limited exceptions, court orders cannot be removed without a further court order. A mechanism around this requirement is to include language in your court order allowing for its deletion without a further court order. This can be done as follows:

1. Standard Compliance Clause

THIS COURT ORDERS that the *Director of Titles* shall delete this Court Order upon an Application to delete the Court Order which contains a statement that all terms of the Order have been complied with.

2. With Specific Law Statements

THIS COURT ORDERS that the *Director of Titles* shall delete this Court Order upon an Application to delete the Court Order which contains one of the following law statements:

- (a) [LAW STATEMENT]
- (b) [LAW STATEMENT], etc.

3. With the Deletion of Another Instrument

THIS COURT ORDERS that the *Director of Titles* is authorized to delete this Order, and any related Application, Notice, or other registration, from title to [the Property] when Instrument No. [NUMBER] is deleted.

- ### **4. Upon Sale to Third Party** – this allows for a removal statement to be added to a Transfer, or the registration of an Application after the fact (particularly when the order includes the sale of the property):

¹² Lem, Jeffrey W. “Best Practices Relating to Court Orders” (2019) *Safeguarding Real Estate Transactions*, Law Society of Ontario.

¹³ Lem, Jeffrey W. “Best Practices Relating to Court Orders” (2019) *Safeguarding Real Estate Transactions*, Law Society of Ontario.

¹⁴ Lem, Jeffrey W. “Best Practices Relating to Court Orders” (2019) *Safeguarding Real Estate Transactions*, Law Society of Ontario.

¹⁵ For a thorough review of best practices with court orders, review “Best Practices Relating to Court Orders” by Jeffrey W. Lem, Director of Titles for a comprehensive discussion on this topic.

THIS COURT ORDERS that this Order shall be deleted from title to [the Property] when [the Property] has been transferred to a third party, without the requirement of a further application to this Honourable Court, and the *Director of Titles* is authorized to delete this Order from title to [the Property] upon certification of the Transfer to a third party.

Note: **This one only allows for a removal statement in a Transfer if the parties do not take issue with the order being attached to the Transfer.**

Certificates of Pending Litigation

Unlike some other mechanisms to preserve real property, obtaining a Certificate of Pending Litigation (CPL) will require the applicant/moving party to show that they have interest in the land pursuant to ss. 103(1) of the *Courts of Justice Act*:

The commencement of a proceeding in which an interest in land is in question is not notice of the proceeding to a person who is not a party until a certificate of pending litigation is issued by the court and the certificate is registered in the proper land registry office under subsection (2).¹⁶

This includes a resulting or constructive trust.¹⁷ Possession, however, is not considered an interest in land.¹⁸

Practically speaking, a CPL is the most onerous mechanism to preserve real property. It can only be obtained by court order and can only be discharged by court order¹⁹ with limited exceptions: 1) by the registered owner (with evidence that the action has been discontinued); or by the registrant of the CPL with the consent of all Plaintiffs.²⁰ Since a court order is required for registration, more time and cost will be involved in obtaining it.

CPLs are not without risk if they are registered improperly. Under ss. 103(4) of the *Courts of Justice Act*, a party who has registered a CPL improperly is liable to the titleholder(s) for any damages that may result. Conversely, they are not subject to the tort of slander of title since obtaining a CPL is a court sanctioned process.²¹

S. 71 Cautions

¹⁶ *Courts of Justice Act*, R.S.O. 1990 c. C.43, ss. 103(1).

¹⁷ *Oliver v. Oliver* [1990] CarswellOnt 484 37 E.T.R. 271, 72 O.R. (2d) 275.

¹⁸ *Zita v. Zita* [1999] CarswellOnt 4245.

¹⁹ *Courts of Justice Act*, R.S.O. 1990 c. C.43, ss. 103(1) and ss. 103(6).

²⁰ Comments by Jeffrey W. Lem, Director of Titles, April 12, 2021.

²¹ *Pete & Martys (Front) Ltd. v. Market Block Toronto Properties Ltd.*(1985), 5 C.P.C. (2d) 97 at para. 16.

Unlike CPLs, Cautions can be registered immediately without a court order and can be removed with relative ease. They may be a more attractive option because they can be registered more quickly and cost less than a CPL.

Cautions under s. 71 are time-limited to 60 days and cannot be renewed.²²

A ss. 71(1) Caution can be a useful mechanism for preserving property if you have an agreement of purchase and sale (APS) where the seller is refusing to close and the buyers want to ensure that the seller does not transfer the property prior to any court determination.

The APS can be registered under ss. 71(1.1) but must also accompany the land transfer tax payment on the purchase price set out in the agreement. If the agreement has a formulaic closing date, the registrant must choose a specific date for registration.²³

The length of registration for an APS is not from the date of registration but from the date of the scheduled closing which may allow for a bit of 'breathing room' to obtain an additional court order, if necessary.²⁴

A recent case considered the misuse of Cautions and Notices under s. 71. *Hornstein v. Katz* dealt with the issue of inappropriate registrations in the context of a trust claim being advanced by the Plaintiff that was ultimately unsuccessful. The Plaintiff's Caution was eventually removed (it is unclear if it was removed due to expiry or court order).

The Plaintiff proceeded to register two notices under S. 71 – one with an expiry date and one that was indeterminate. The court determined that both notices were "unauthorized and improperly registered."²⁵

The court was also tasked with making a determination on whether the Plaintiff was liable for slander of title and noted that slander of title and damages under s. 132 of the *Land Titles Act*(LTA) are distinct. Malice is required to be successful with a slander of title cause of action whereas s. 132 of the LTA does not. The party advancing both claims for damages under s. 132 of the LTA and slander of title was not the owner of the property and was unsuccessful with both positions.

The court made comments in its analysis that s. 132 damages would only be available for an improperly registered Caution but not for a notice. Nonetheless, the party seeking damages was successful in convincing the court she was entitled to punitive damages for the improperly registered notices.²⁶ The Court of appeal later upheld the appeal but allowed the appeal regarding the punitive damages noting:

²² *Ontario Land Registry Bulletin* 2002-2, July 21, 2000.

²³ Comments by Jeffrey W. Lem, Director of Titles, April 12, 2021.

²⁴ *Ontario Land Registry Bulletin* 2002-2, July 21, 2000.

²⁵ *Hornstein v. Kats et al.*, 2020 ONSC 870, para 218.

²⁶ *Hornstein v. Kats et al.*, 2020 ONSC 870, para 254.

It is well established that there is no basis for an award of punitive damages in the absence of an independent actionable wrong: *Whiten v Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595. Punitive damages cannot be awarded simply on the basis of a party's misconduct. Given that the trial judge did not identify an independent actionable wrong, the award of punitive damages cannot stand.²⁷

In another recent case, *Mendes v. Mendes*, the court was unequivocal that a debt claimed against a landowner does not create a right to register a Caution on title.²⁸ And be forewarned: when a Caution is registered to gain leverage in a claim for a debt, the strategy may backfire, and the registrant may be subject to both damages and costs.

S. 71 Cautions can be used when a property has been transferred with the intention to defeat creditors as a fraudulent conveyance/preference but can only be used after the transfer and not before.²⁹

S. 71 Notices

General s. 71 notices attract many registrations because the initial language in s. 71(1) is broad, "Any person entitled to or interested in any unregistered estates, rights, interests or equities in registered land may protect the same from being impaired..." but is constrained by the balance of the section, "...authorized by this Act or by the Director of Titles."

In the appendices to the *LRO Bulletin 96001* are a list of documents that will be approved by the LRO but this list is outdated and there are many documents not listed that have been approved and some on the list that will not be.³⁰

Section 128 Cautions

Unlike s. 71 Cautions, s. 128 Cautions can prevent future dealings with land:

A person claiming to have an interest in registered land or in a registered charge of which the person is not the registered owner may apply to the Director of Titles for the registration of a Caution to the effect that no dealing with the land or charge be had on the part of the registered owner or other person named in the Caution without the consent of the Cautioner.³¹

²⁷ *Hornstein v. Kats*, 2021 ONCA 293.

²⁸ *Mendes v. Mendes*, 2020 ONSC 5205.

²⁹ Comments by Jeffrey W. Lem, Director of Titles, April 12, 2021.

³⁰ Comments by Jeffrey W. Lem, Director of Titles, April 12, 2021.

³¹ *Land Titles Act*, R.S.O. 1990, c L.5, ss. 128(1).

Note that the language is different than s. 71 of the *Land Titles Act* and that an interest in land is required.

Cautions under s. 128 of the *Land Titles Act* are also time-limited for 60 days and cannot be renewed but a further registration may be permitted by the Director of Titles.³² The right of renewal is discretionary, and you must get that permission in advance of registration. The question the LRO will ask is: what steps have been taken to get the CPL? These renewals are almost never approved but some of them were during the first wave of COVID-19 because they are designed to allow the registrant time to obtain a CPL which was not possible during the first wave. None have been approved since then.³³

If you register a s. 128 Caution improperly and it gets returned by the LRO and you register a subsequent caution, you will not get the benefit of the time for the first improper caution and a further 60 days. The time on title for the first improper caution will be deducted from the second registration by the LRO.³⁴

The *Ontario Director of Titles' Bulletin 2000-2* sets out some examples of when a Caution under s. 128 can be registered:

- 1) the interest of a beneficiary under a trust agreement where the beneficiary claims to be entitled to and to have called for a transfer of lands or charge to him/her from the trustee;
- 2) the interest of an optionee under an option to purchase when the optionee has exercised the option;
- 3) an interest that may be protected by way of a Caution pursuant to any Act of Ontario or Canada.³⁵

This is a non-exhaustive list.

A Caution under s. 128 also differs from a s. 71 Caution in that it will prevent future dealings with the land and the consent of the Cautioner is required to affect a transfer.³⁶ Practically speaking, this means that a s. 128 Caution will create a 'no dealings' indicator on the PIN whereas a Caution under s. 71 does not.

A Caution does not require a court order for registration or deletion from title which may make it more attractive than obtaining a CPL if the registering party requires a registration on an emergency basis. As well, its use is to preserve property on an immediate basis and give the registrant time to get a CPL.

Note that a Caution under s. 128 must be served on the registered owner of the land and any other persons having an interest in the land or charge.³⁷

³² *Land Titles Act*, R.S.O. 1990, c L.5, ss. 128(4).

³³ Comments by Jeffrey W. Lem, Director of Titles, April 12, 2021.

³⁴ Comments by Jeffrey W. Lem, the Director of Titles, April 12, 2021.

³⁵ *Ontario Land Registry Bulletin 2000-2*, July 21, 2000.

³⁶ *Land Titles Act*, R.S.O. 1990 c. L.5, ss. 129(1).

³⁷ *Land Titles Act*, R.S.O. 1990 c. L.5, ss. 129(2).

To have a Caution deleted from title, the registering party may withdraw it or any party with an interest in the land may request its removal 60 days after closing in an agreement of purchase and sale or 60 days after its registration.³⁸

Cautions, both under s. 71 and s. 128 are also subject to potential liability for their misuse under s. 132 of the *Land Titles Act*:

A person who registers a Caution without reasonable cause is liable to make to any person who may sustain damage by its registration such compensation as is just, and the compensation shall be deemed to be a debt due from the person who has registered the Caution to the person who has sustained damage.³⁹

While CPLs are not subject to the tort of slander of title, Cautions are. Bad faith and/or malice will be required to be successful with such a claim.⁴⁰

S. 118 Restrictions under *The Land Titles Act*

Unlike a Designation of a Matrimonial Home, Caution or a Joint Tenancy Severance, s. 118 Restrictions are registered with the consent of the title holder(s) and restrict the transfer or charge of land on certain conditions. They can be a creative tool in preserving property in the future by attaching restrictions on the transfer or charge of the property which can be removed on the consent of the parties; however, the Director of Titles has the discretion to refuse the registration of the restrictions.⁴¹

S. 118 can be used to restrict one party's ability to sever a joint tenancy, register an encumbrance or add an additional title holder, as examples.

The challenge with S. 118 restrictions in the context of litigation is the requirement for the title holder to consent to the registration, not unlike a mortgage used to secure a settlement obligation.

S. 118 restrictions that go beyond the consent of a party(s), i.e. multiple conditions to transfer or charge with the added requirement of approval by the land registrar will be problematic because the Director of Titles will not generally provide approval.⁴²

Also note that restrictions may continue. i.e. that if a transfer requires the consent of a person, they may consent to the transfer as a one-off but the restrictions continue to burden the land.⁴³

³⁸ *Land Titles Act*, R.S.O. 1990 c. L.5, para. 129(7)(b).

³⁹ *Land Titles Act*, R.S.O. 1990 c. L.5, s. 132.

⁴⁰ *Ryan v. Kauab* (2011) CarswellOnt 12853.

⁴¹ *Land Titles Act*, R.S.O. 1990 c. L.5, ss. 118(3).

⁴² Comments by Jeffrey W. Lem, Director of Titles, April 12, 2021.

⁴³ Comments by Jeffrey W. Lem, Director of Titles, April 12, 2021.

Conclusion

The different mechanisms at preserving property, discussed above, make it clear that there is no 'catch all' registration to prevent dealings with a property or provide notice to the world of an alleged interest in a property. This requires a careful analysis between solicitor and litigator as to which mechanism best suits the facts and may very result in a solicitor providing the bad news that a court application/action will be the only way to preserve the property in question.

Lastly, it is important to keep in mind the consequences for misuse and advise the registering party and their counsel, as applicable, of such consequences and risks.