

6. It would be best for Mr. Whitbeck if the court denied the Plaintiff's request and ruled that the parties should comply with the escrow agreement until the appeal of the case is completed. That would avoid decision-making and liability for Mr. Whitbeck.

7. The Defendant believes the marital funds in the escrow account should be preserved until the appeal is complete to allow the funds to be available for distribution if the appeal is successful.

8. As an ancillary or preventive remedy, a writ of preliminary injunction may therefore be resorted to by a party to protect or preserve his rights and for no other purpose during the pendency of the principal action. See *China Banking Corporation v. Court of Appeals*, G.R. No. 121158, 333 Phil. 158, 173 (1996), citing *Bengzon v. Court of Appeals*, No. L-82568, 161 SCRA 745, 749 (1988) and *Calo & San Jose v. Roldan*, No. L-252, 76 Phil. 445, 451-452 (1946). Its object is to preserve the status quo until the merits of the case can be heard. See *Rava Development Corporation v. Court of Appeals*, G.R. No. 96825, 211 SCRA 144, 154 (1992), citing *Avila v. Tapucar*, G.R. No. 45947, 201 SCRA 148 (1991).

9. **A person, who is not a party in the main suit, cannot be bound by an ancillary writ in this civil case. He cannot be affected by any proceeding to which he is a stranger.** See *Matuguina Integrated Wood Products, Inc. v. Court of Appeals*, G.R. No. 98310, 263 SCRA 490, 505-506 (1996).

10. To make the writ applicable against Mr. Whitbeck, petitioner should have impleaded Mr. Whitbeck as an additional defendant in this case.

11. Rather than asking for an order to protect or preserve rights, the Plaintiff is asking for an order to stop protecting or preserving the rights of the Defendant during the appeal.

12. The Defendant has offered, both soon after the agreement was signed and again at the present, to agree to an equal partial distribution to the parties while the case is ongoing but the Plaintiff has refused his generous offer.

13. The fact that the Plaintiff has refused the Defendant's offer that would allow for debts to be paid and put an end to interest accruing demonstrates that the Plaintiff's interest in having the funds released now is not to pay bills but rather to ensure the funds are not available should she lose the appeal.

14. The Plaintiff has refused to negotiate the release of the escrowed funds for over 2 and ½ years, waiting a few more months should not be a problem.

15. The Plaintiff has also refused to comply with the terms of the distribution in the June 9th order, as she has not yet signed over the title to the Defendant of the 1993 Saturn that was distributed to the Defendant.

WHEREFORE the Defendant requests the MOTION of the Plaintiff be denied and that the funds be held in the escrow account until the appeal is completed unless the parties agree to distribution per the signed escrow agreement of 12/12/2003. Further as Ms. Vardy should have known the court could not grant her motion against a non-party, the Defendant asks the court to require her to pay for his time and expenses to travel 500 miles to attend this hearing.

**Respectfully Submitted,
Wesley C. Smith**

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing motion was served to Loretta Vardy and John Whitbeck via e-mail, this 6th day of July 2006.

Wesley C. Smith