



ALBERTA  
LAW REFORM  
INSTITUTE



# DOWER ACT: CONSENT TO DISPOSITION



REPORT FOR DISCUSSION

# 36

NOV 2021







***DOWER ACT:***  
**CONSENT TO DISPOSITION**

REPORT FOR  
DISCUSSION || **36**

**NOVEMBER 2021**

ISSN 0834-9037

ISBN 978-1-896078-84-7

ALRI claims copyright © in this work. ALRI encourages the availability and exchange of public information. You may copy, distribute, display, download and otherwise freely deal with this work on the following conditions:

- (1) You must acknowledge the source of this work,
- (2) You may not modify this work, and
- (3) You must not make commercial use of this work without the prior written permission of ALRI.

All reports published since ALRI's establishment in 1967 are available on our website, [www.alri.ualberta.ca](http://www.alri.ualberta.ca).

This report can be found at [www.alri.ualberta.ca/2021/11/dower-act-consent-to-disposition-report-for-discussion-36/](http://www.alri.ualberta.ca/2021/11/dower-act-consent-to-disposition-report-for-discussion-36/)

To ensure our reports are available as widely as possible – Final Reports, Reports for Discussion and Consultation Memoranda are available on the Canadian Legal Information Institute [CanLII] website: [www.canlii.org/en/commentary/reports/145/](http://www.canlii.org/en/commentary/reports/145/)

# Invitation to Comment

**Deadline for comments on the issues raised in  
this document is February 1, 2022**

**Please complete the online survey at:  
[www.surveymonkey.com/r/KRN532L](http://www.surveymonkey.com/r/KRN532L)**

This Report for Discussion by the Alberta Law Reform Institute [ALRI] reviews the *Dower Act*, a law that protects a spouse if the other spouse owns the couple's home. ALRI proposes reforms that would maintain protection while bringing the law up-to-date and reducing administrative burdens.

Issuing a Report for Discussion allows you the opportunity to consider these proposals and to share your views with us. You may respond to one, a few or all of the issues raised. Any comments sent to us will be considered when we make final recommendations.

You can reach us with your comments or with questions about this document on our website, or by mail or e-mail to:

Alberta Law Reform Institute  
402 Law Centre  
University of Alberta  
Edmonton, AB T6G 2H5

Phone: (780) 492-5291  
E-mail: [lawreform@ualberta.ca](mailto:lawreform@ualberta.ca)  
Website: [www.alri.ualberta.ca](http://www.alri.ualberta.ca)

**Law reform is a public process. We assume that comments on this Report for Discussion are not confidential.** We may quote or refer to your comments. We usually discuss comments generally and without attribution. If you do not want your comments attributed to you, you may request confidentiality in your response or submit comments anonymously.



# Table of Contents

Alberta Law Reform Institute .....	i
Acknowledgments .....	iii
Summary .....	v
Issues .....	xi
Table of Abbreviations .....	xv
Common Terms .....	xvii
<b>CHAPTER 1 Introduction .....</b>	<b>1</b>
A. Introduction .....	1
B. The Need for Reform .....	2
1. ALRI's previous work .....	2
2. Why revisit the <i>Dower Act</i> now? .....	3
3. What are the problems with the <i>Dower Act</i> ? .....	4
a. The <i>Dower Act</i> excludes adult interdependent partners .....	4
b. Social and legal changes have affected the need for the <i>Dower Act</i> .....	4
c. There are practical and theoretical problems with the <i>Dower Act</i> .....	5
d. The <i>Dower Act</i> is outdated .....	5
C. Scope of the Project .....	5
D. The Current Project .....	7
1. Online survey .....	7
2. Roundtables and meetings .....	7
3. Interviews and individual comments .....	8
4. Confidentiality .....	8
E. Guiding Principles .....	8
1. General principles .....	8
2. Access to justice and protection for the vulnerable .....	9
3. Equal protection for spouses and adult interdependent partners ..	9
F. Structure of this Report .....	10
<b>CHAPTER 2 Consent to Disposition .....</b>	<b>11</b>
A. The Requirement for Consent .....	11
B. Consent to Disposition .....	11
1. Ensuring compliance .....	11
a. Corporations and co-owners .....	12
b. Individual owners .....	12
2. Opting out .....	14
a. Dower release .....	14
b. Agreement releasing dower rights .....	15
3. Consequences for disposition without consent .....	15
a. Offence .....	15
b. Action for damages .....	16
C. Problems with Consent to Disposition .....	16
1. Inefficient requirements .....	16

a. Real estate procedures .....	16
b. Separated spouses.....	17
c. Other inefficiencies.....	17
2. Ineffective protections .....	18
a. Circumventing the requirement.....	18
b. Lack of informed consent .....	18
c. Ineffective protection in relationships with an imbalance of power.....	19
d. Gaps in protection .....	19
<b>CHAPTER 3 Does Consent to Disposition Still Serve a Valid Purpose? .....</b>	<b>21</b>
A. What Was the Historical Purpose of the <i>Dower Act</i> ? .....	21
B. What Has Changed Since the <i>Dower Act</i> Was Enacted? .....	23
1. Joint tenancy.....	23
2. Property division under the <i>Family Property Act</i> .....	23
3. Order for exclusive possession under the <i>Family Property Act</i> or <i>Family Law Act</i> .....	25
C. Who Is Protected by the <i>Dower Act</i> ? .....	27
D. Should the Requirement for Consent to Disposition Be Abolished? ...	29
1. Arguments in favour of abolishing consent to disposition .....	29
a. Few people rely on consent to disposition .....	30
b. Consent to disposition is not effective .....	30
c. There are other ways for spouses and partners to protect their interest in a home.....	30
d. Consent to disposition inconveniences many to protect a few .....	30
e. Abolishing consent to disposition would be an easy route to modernization .....	31
2. Arguments against abolishing consent to disposition .....	31
a. A home is a special asset.....	32
b. Consent to disposition offers protection without litigation .....	32
c. Consent to disposition provides protection upon relationship breakdown .....	32
d. Consent to disposition can protect an innocent person from fraudulent or secret dispositions.....	33
e. Abolishing consent to disposition might shift risk and inconvenience to the vulnerable .....	34
f. Consistency with other jurisdictions .....	35
3. Are there other options? .....	35
4. Preliminary recommendation .....	36
<b>CHAPTER 4 Extending Consent to Disposition to Adult Interdependent Partners .....</b>	<b>37</b>
A. Spouses and Adult Interdependent Partners .....	37
B. Are Any Adjustments Required to Treat Spouses and Adult Interdependent Partners Alike? .....	40
1. Proving an adult interdependent relationship.....	41
2. Overlapping rights .....	42
<b>CHAPTER 5 How Could Reforming the Definition of Homestead Resolve Problems?.....</b>	<b>45</b>
A. The Definition of Homestead .....	45
B. What Property Should Be Included?.....	46
1. Occupancy .....	46



2. Past occupancy .....	48
3. Multiple homes.....	50
4. Amount of land .....	52
5. Interests in land .....	54
6. Mobile homes.....	55
7. Property owned by someone other than an individual .....	58
a. Co-owners.....	58
b. Property owned by a corporation .....	59
C. What Property Should Be Excluded? .....	61
1. Property other than a home .....	61
2. Life estate.....	62
3. Residential tenancies .....	62
4. Land on reserves.....	63
D. Summary .....	64

<b>CHAPTER 6 How Can Procedures for Obtaining Consent to Disposition Be Improved?.....</b>	<b>65</b>
A. Introduction.....	65
B. How Could Reform Reduce Inefficiencies and Improve Protections? .....	65
1. Transfers between spouses .....	65
2. Capacity .....	66
3. Obtaining consent .....	68
4. Definition of disposition .....	70
C. Are Other Reforms Required?.....	71
1. Release of dower rights .....	71
2. Orders dispensing with consent.....	72
3. Caveats .....	73
4. Other improvements to forms or procedures.....	74

<b>CHAPTER 7 What Should Be the Consequences of Disposition without Consent?.....</b>	<b>75</b>
A. Should a Disposition Without Consent Be Void or Voidable? .....	75
1. Real estate purchase contracts before registration .....	76
2. Dispositions that do not result in a transfer of title .....	77
3. Purpose of consent .....	78
B. Remedies for Disposition Without Consent .....	79
1. Offence.....	79
2. Action for damages .....	79
a. Availability .....	80
b. Assessing damages .....	81
c. Factors to consider .....	83
d. Payment from the General Revenue Fund.....	84
e. Effect of the end of the relationship.....	85

<b>CHAPTER 8 How Should Debt Affect Consent to Disposition? .....</b>	<b>87</b>
A. Background .....	87
1. Civil enforcement and bankruptcy .....	87
2. Exemption for a principal residence .....	88
B. Protection for a Non-owner .....	89
C. Attaching a Non-owner's Rights.....	91



# Alberta Law Reform Institute

The Alberta Law Reform Institute (ALRI) was established on November 15, 1967 by the Government of Alberta, the University of Alberta and the Law Society of Alberta for the purposes, among others, of conducting legal research and recommending reforms in the law. Funding for ALRI's operations is provided by the Government of Alberta, the University of Alberta and the Alberta Law Foundation.

## *ALRI Board Members*

DR Cranston QC (Chair)  
 DM McKenna (Vice Chair)  
 A Barnsley-Kamal  
 B Billingsley  
 C Fox  
 Hon Judge DG Hancock  
 C Johnson, QC  
 J Koshan  
 DL Molzan QC  
 KA Platten QC  
 Hon Justice JM Ross  
 K Ryan QC  
 RJ Wood  
 M Woodley

## *Appointment Type*

Member at Large  
 Member at Large  
 Alberta Justice and Solicitor General  
 University of Alberta, Provost  
 Member at Large  
 Member at Large  
 Law Society of Alberta  
 University of Calgary, Faculty of Law  
 Alberta Justice and Solicitor General  
 Member at Large  
 Member at Large  
 Member at Large  
 University of Alberta, Faculty of Law  
 Member at Large

## *ALRI Staff Members*

L Buckingham  
 C Burgess  
 B Chung  
 I Hobin  
 J Koziar  
 K MacKenzie  
 M Mazurek  
 S Petersson  
 S Varvis

Counsel  
 Finance & Operations Manager  
 Communications Associate  
 Administrative Assistant  
 Executive Assistant  
 Counsel  
 Counsel  
 Executive Director  
 Counsel

ALRI reports are available to view or download from our website at:

[www.alri.ualberta.ca](http://www.alri.ualberta.ca)

The preferred method of contact for the Alberta Law Reform Institute is email:

[lawreform@ualberta.ca](mailto:lawreform@ualberta.ca)

402 Law Centre  
 University of Alberta  
 Edmonton AB T6G 2H5

Phone: (780) 492-5291  
 Twitter: @ablawreform



# Acknowledgments

ALRI would like to express our appreciation to everyone who participated in our early consultation to identify issues and challenges regarding dower rights in Alberta. We benefitted from the views of everyone who responded to our initial survey, who participated in a roundtable, meeting or interview, or who provided other input. We agreed not to identify individuals who participated in early consultation but we are grateful to them.

It is appropriate to recognize two scholars whose work on the *Dower Act* influenced this project. Professor Bruce Ziff led ALRI's previous project on the *Dower Act* and wrote *The Matrimonial Home*, Report for Discussion 14 (1995). We drew upon his work in developing our proposals for reform. Professor Jonnette Watson Hamilton's blog posts contributed to our decision to take on this project now. She identified several specific issues to be considered.

Special thanks are owed to the following people who provided information about the incidence of registered dower and similar interests:

- Curtis Woollard, Marie-Louise Vieira, and Jill Baker of the Land Titles Office
- Russell Davidson, Senior District Registrar, Teranet Manitoba

We also appreciate the insight of Professors Tamara Buckwold and Roderick Wood on the interaction of dower rights and insolvency.

We are grateful to the members of the following Canadian Bar Association sections for sharing their views:

- Creditor & Debtor Law (North)
- Real Property (North)
- Residential Real Property (South)
- Sexual Orientation and Gender Identity
- Wills, Estates & Trusts (North)

Within ALRI, Laura Buckingham, Legal Counsel, completed the preliminary assessment for this project. She also served as lead counsel and coordinated the research and consultation carried by other legal counsel contributing to this project: Katherine MacKenzie, Matthew Mazurek, Jennifer Taylor, and Stella Varvis. Laura Buckingham, Matthew Mazurek, Jennifer Taylor, and Stella Varvis were active in consultation discussions with various groups, including the CBA sections. Jennifer Taylor undertook additional research and writing on the subject of the dower life estate. Summer students Serena Eshaghurshan, Briggs Larginho, and Cailey Severson provided additional research. The main

work of writing the two reports for discussion in this project was done by Laura Buckingham. Jenny Koziar prepared the report for publication. Barry Chung provided support with communications and graphic design. Sandra Petersson, Executive Director, contributed project and editorial support.

# Summary

The *Dower Act* protects a spouse if the couple's home is owned by the other spouse. It applies to a "homestead" which is a parcel of land where the owner lives or has lived.

The *Dower Act* became law in Alberta over one hundred years ago. The last substantial reforms were in 1948. ALRI's research and consultation shows that the *Dower Act* functions largely as intended, but it is outdated.

This report is one of two in ALRI's *Dower Act* project. This report examines the parts of the *Dower Act* related to a spouse's right to prevent a "disposition" of the homestead by withholding consent to any sale, lease, mortgage, or other transfer of a homestead. The second report examines the *Dower Act*'s life estate provisions.

## **Are the protections in the *Dower Act* still needed?**

The *Dower Act* is now one of many legal protections for couples. Alberta's family, family property, and wills and succession legislation also provide important protections. These laws apply to both legally married spouses and to adult interdependent partners. The *Dower Act* applies only to spouses.

The *Dower Act* protects a spouse from becoming homeless due to circumstances largely beyond their control. Other legislation does not provide the same protection. This report concludes this protection is still necessary and should continue. This report also recommends that adult interdependent partners should have the same rights as spouses.

The continued relevance of consent to disposition does not mean that the *Dower Act* should continue with all of its current flaws. The report also considers how to make consent to disposition more efficient while continuing to protect the vulnerable. These issues include:

## **What homes should be included?**

The definition of "homestead" in the *Dower Act* does not serve its purpose well. Its purpose is to protect a spouse or partner from losing their home. The current definition of homestead is too broad for this purpose. Consent to disposition should be required for a home where the couple lives together.

Consent to disposition protects a spouse or partner when a relationship breaks down. It should be required after a couple or one of them moves out of a home, but not forever. There should be a time limit of three years.

### **What types of property should be affected?**

The definition of “homestead” in the *Dower Act* is also unclear. This report proposes reforms to clarify that a home means:

- A lot, quarter section, or area of land described on a certificate of title;
- A condominium unit, or
- A mobile home.

It also proposes reforms to clarify the interests in land affected and the effect if another person has an interest in a couple’s home.

### **How could consent to disposition be streamlined?**

There are practical problems with the process to obtain consent. This report proposes reforms to improve it. One reform would make it easier for a homeowner to transfer a home to their spouse or partner. Another would clarify whether a power of attorney allows another person to consent on behalf of a spouse or partner.

The report asks whether there are other reforms that could improve the process to obtain consent.

### **How could consent to disposition be more effective?**

Consent should be informed and voluntary. This report proposes that a spouse or partner should have to meet separately with an independent lawyer when giving consent to disposition or a release of dower rights.

### **What should happen if a homeowner makes a disposition without consent?**

On occasion, a homeowner may violate the *Dower Act* by making a disposition without consent. This report proposes abolishing an offence but maintaining a spouse or partner’s right to sue the homeowner. It also proposes reforms about assessment and collection of damages.

### **How should consent to disposition affect a third party’s rights?**

There can be problems if a third party has an interest in a home. It may happen if the homeowner agrees to sell the home to a third party. It may also happen if a third party seizes a home to collect a debt or because the homeowner is bankrupt. This report proposes reforms to clarify the rights of the spouse or partner when a third party has an interest in a home.



## **What are ALRI's preliminary recommendations?**

ALRI makes the following preliminary recommendations in this report:

### **RECOMMENDATION 1**

A homeowner should not be able to sell, mortgage, or otherwise dispose of a home without the consent of their spouse or adult interdependent partner.

A spouse or adult interdependent partner should have the ability to prevent a disposition of a home by withholding consent.

### **RECOMMENDATION 2**

Adult interdependent partners should have the same rights as spouses regarding consent to disposition.

### **RECOMMENDATION 3**

Consent to disposition should be required only for a home where both spouses or both adult interdependent partners live together.

### **RECOMMENDATION 4**

Consent to disposition should be required only if the spouses or adult interdependent partners have lived together in the home within the last three years.

### **RECOMMENDATION 5**

If the spouses or adult interdependent partners have lived in more than one home within the last three years, consent to disposition should be required for each home.

### **RECOMMENDATION 6**

Consent to disposition should be required for all the land included on the certificate of title for the land where the home is located.

### **RECOMMENDATION 7**

Consent to disposition should be required for the following interests in land for which a certificate of title can be issued: a fee simple estate, a leasehold estate for more than three years, Metis title, provisional Metis title, or an allotment.

### **RECOMMENDATION 8**

Consent to disposition should be required for a mobile home.

### **RECOMMENDATION 9**

If one of the spouses or adult interdependent partners co-owns a home with a third party, consent to disposition should be required for any disposition of that spouse's or adult interdependent partner's interest in the home.

### **RECOMMENDATION 10**

Consent to disposition should not be required if the homeowner's interest is a life estate.

### **RECOMMENDATION 11**

Consent to disposition should not be required when a homeowner makes a disposition in favour of their spouse or adult interdependent partner.

### **RECOMMENDATION 12**

An attorney appointed under a power of attorney should be able to consent to disposition on behalf of a spouse or adult interdependent partner.

**RECOMMENDATION 13**

A homeowner should only be able to consent to disposition on behalf of their spouse or adult interdependent partner if the homeowner is appointed as the attorney under an enduring power of attorney and the spouse or adult interdependent partner has lost capacity to give consent.

**RECOMMENDATION 14**

A spouse or adult interdependent partner should have to meet separately with an independent lawyer when giving consent to disposition or a release of dower rights.

**RECOMMENDATION 15**

Consent to disposition should be required only for dispositions that take effect during the lifetime of the homeowner.

**RECOMMENDATION 16**

A disposition should be unenforceable against a homeowner until their spouse or adult interdependent partner provides consent or until consent to disposition is no longer required.

**RECOMMENDATION 17**

The offence for making a disposition without consent should be abolished.

**RECOMMENDATION 18**

If a homeowner makes any disposition that requires consent without the consent of their spouse or adult interdependent partner, the homeowner should be liable to the spouse or adult interdependent partner in an action for damages.

**RECOMMENDATION 19**

A court should have discretion to assess damages for disposition without consent.

**RECOMMENDATION 20**

If a spouse or adult interdependent partner is awarded damages for disposition without consent but is unable to collect the damages or the full amount of damages from the homeowner, the spouse or adult interdependent partner should be able to seek payment of damages, excluding punitive damages, from the General Revenue Fund.

**RECOMMENDATION 21**

A court should be able to award damages for a disposition without consent after spouses have divorced or adult interdependent partners have become former adult interdependent partners.

**RECOMMENDATION 22**

If a civil enforcement agency seizes a homeowner's home or if a trustee in bankruptcy is appointed for a homeowner, the civil enforcement agency or trustee in bankruptcy should not be able to dispose of the home without the consent of the homeowner's spouse or adult interdependent partner or an order dispensing with consent.

**RECOMMENDATION 23**

Only a spouse or adult interdependent partner of a homeowner, or their attorney appointed under a power of attorney, should have the power to consent to a disposition of a home or prevent a disposition of a home by withholding consent. A creditor, a civil enforcement agency, a trustee in bankruptcy, or any other successor should not be able to consent or withhold consent in the place of the spouse or adult interdependent partner.

ALRI welcomes comments on these preliminary recommendations.

This report considers other issues. ALRI welcomes comments on all or some of these issues to help make the laws of Alberta more just and effective.



# Issues

## ISSUE 1

Should a homeowner be able to sell, mortgage, or otherwise dispose of a home without the consent of their spouse or adult interdependent partner? ..... 29

## ISSUE 2

Should adult interdependent partners have the same rights as spouses regarding consent to disposition?..... 37

## ISSUE 3

Who should have to live in a home to require consent to disposition?..... 46

## ISSUE 4

How long should consent to disposition be required where the spouses or adult interdependent partners no longer live in the home? ..... 48

## ISSUE 5

Should there be a limit on the number of homes that require consent to disposition? ..... 50

## ISSUE 6

What amount of land should require consent to disposition? ..... 52

## ISSUE 7

Which interests in land should require consent to disposition? ..... 54

## ISSUE 8

Should consent to disposition be required for a mobile home? ..... 55

## ISSUE 9

Should consent to disposition be required for a home co-owned by a third party? ..... 58

## ISSUE 10

Should consent to disposition be required for a home owned by a corporation or similar entity?..... 59

## ISSUE 11

Should consent to disposition be required if the homeowner's interest is a life estate? ..... 62

## ISSUE 12

Should consent be required for transfers between spouses or adult interdependent partners?..... 65

## ISSUE 13

Who can give consent if a spouse or adult interdependent partner lacks capacity? ..... 66

<b>ISSUE 14</b>	
Should a spouse or adult interdependent partner have an opportunity for independent legal advice when giving consent or a release of dower rights? .....	68
<b>ISSUE 15</b>	
Should consent be required for dispositions by will? .....	71
<b>ISSUE 16</b>	
Is there a need for reform about releases of dower rights?.....	71
<b>ISSUE 17</b>	
Is there a need for reform about orders dispensing with consent?.....	72
<b>ISSUE 18</b>	
Is there a need for reform about caveats based on dower rights?.....	73
<b>ISSUE 19</b>	
Is there a need for reform to forms or procedures relating to consent to disposition? .....	74
<b>ISSUE 20</b>	
When should a disposition without consent be enforceable? .....	78
<b>ISSUE 21</b>	
Should the offence for making a disposition without consent be abolished? .....	79
<b>ISSUE 22</b>	
When should an action for damages be available for a disposition without consent? .....	80
<b>ISSUE 23</b>	
How should damages be assessed?.....	81
<b>ISSUE 24</b>	
Should legislation include a list of factors for a court to consider? Which factors should be listed? .....	83
<b>ISSUE 25</b>	
If the homeowner cannot pay damages, should compensation be available from the General Revenue Fund? .....	84
<b>ISSUE 26</b>	
Should the action for damages survive divorce or the end of the relationship?.....	85
<b>ISSUE 27</b>	
What protection should there be for a spouse or adult interdependent partner if a home is seized in civil enforcement proceedings or vested in a trustee in bankruptcy?.....	89

**ISSUE 28**

Should a creditor or trustee in bankruptcy of a spouse or adult interdependent partner be able to consent or withhold consent in the place of a spouse or adult interdependent partner?..... 91





# Table of Abbreviations

## ALBERTA LEGISLATION

<i>Dower Act</i>	<i>Dower Act</i> , RSA 2000, c D-15
<i>Family Property Act</i>	<i>Family Property Act</i> , RSA 2000, c F-4-7

## OTHER CANADIAN LEGISLATION

BC Act	<i>Land (Spouse Protection) Act</i> , RSBC 1996, c 246
CCQ	<i>Civil Code of Québec</i>
Manitoba Act	<i>The Homesteads Act</i> , CCSM, c H80
New Brunswick Act	<i>Marital Property Act</i> , RSNB 2012, c 107
Newfoundland Act	<i>Family Law Act</i> , RSNL 1990, c F-2
Nova Scotia Act	<i>Matrimonial Property Act</i> , RSNS 1989, c 275
Nunavut Act	<i>Family Law Act</i> , SNWT (Nu) 1997, c 18
NWT Act	<i>Family Law Act</i> , SNWT 1997, c 18
Ontario Act	<i>Family Law Act</i> , RSO 1990, c F.3
PEI Act	<i>Family Law Act</i> , RSPEI 1988, c F-2.1
Saskatchewan Act	<i>The Homesteads Act</i> , 1989, SS 1989-90, c H-5.1
Yukon Act	<i>Family Property and Support Act</i> , RSY 2002, c 83

## LAW REFORM PUBLICATIONS

RFD 14	Alberta Law Reform Institute, <i>The Matrimonial Home</i> , Report for Discussion 14 (1995), online: < <a href="http://www.alri.ualberta.ca/wp-content/uploads/2020/06/rfd14.pdf">www.alri.ualberta.ca/wp-content/uploads/2020/06/rfd14.pdf</a> >
FR 112	Alberta Law Reform Institute, <i>Property Division: Common Law Couples and Adult Interdependent Partners</i> , Final Report 112 (2018), online: < <a href="http://www.alri.ualberta.ca/wp-content/uploads/2020/03/FR112.pdf">www.alri.ualberta.ca/wp-content/uploads/2020/03/FR112.pdf</a> >



# Common Terms

**Owner** – A spouse or adult interdependent partner who is the sole owner of the couple’s home.

**Non-owner** – A spouse or adult interdependent partner of an owner, who is not an owner of the couple’s home.

**Spouse** – A person who is legally married.

**Adult interdependent partner** – A term used in Alberta legislation for unmarried partners who qualify for rights, benefits, and obligations similar to those of spouses. Two adults become adult interdependent partners if they meet the criteria in the *Adult Interdependent Relationships Act* by:

- Living together in a relationship of interdependence for at least three years,
- Living together in a relationship of interdependence “of some permanence” if they have a child together by birth or adoption; or
- Entering an adult interdependent partner agreement.

Most adult interdependent partners are common-law partners; that is, they live in a marriage-like relationship without being married.

**Disposition** – A transaction where an owner gives another person an interest in land. A transfer, a sale, a lease, and a mortgage are examples of dispositions.

**Joint tenancy** – A type of co-ownership of land. Each co-owner is called a joint tenant. Joint tenants are equal owners of the property and share the whole property. If there are two joint tenants and one dies, the surviving joint tenant automatically becomes the sole owner of the property.

**Homestead** – Land where an owner lives or has lived. A homestead may be up to four lots in an urban area, up to a quarter section in a rural area, or a condominium unit.



## CHAPTER 1

# Introduction

## A. Introduction

---

[1] This Report for Discussion is one of two in ALRI's project on the *Dower Act*.<sup>1</sup> This Report for Discussion focuses on consent to disposition. The other report is *Dower Act: Life Estate*.

[2] In this project, ALRI asks two questions. Has the *Dower Act* outlived its usefulness? If it is still useful, what updates does it require?

[3] The *Dower Act* has been part of the law of Alberta for more than one hundred years. The last substantial reforms were in 1948. It still functions more or less as intended but it shows its age.

[4] The *Dower Act* is intended to protect a spouse (the "non-owner") if the couple's home is solely owned by the other spouse (the "owner"). It applies to a "homestead", which is a parcel of land where the owner lives or has lived.<sup>2</sup>

[5] The *Dower Act* protects a non-owner spouse from losing their home, either during the lifetime of the owner or after the owner's death. The key features are:

- The owner cannot sell, lease, mortgage, or otherwise transfer the homestead without the consent of the non-owner. In this report, we refer to this feature as "consent to disposition".
- The non-owner is entitled to a life estate in the homestead after the death of the owner. A life estate means the non-owner owns the property for their lifetime. They can live in it or use it as long as they live. In this report, we refer to this feature as "the life estate".

[6] This Report for Discussion is about the first feature: consent to disposition.

---

<sup>1</sup> *Dower Act*, RSA 2000, c D-15 [*Dower Act*].

<sup>2</sup> *Dower Act*, s 1(d).

## B. The Need for Reform

---

### 1. ALRI'S PREVIOUS WORK

[7] Issues about the *Dower Act* are not new and neither is ALRI's interest in reform. ALRI has reviewed aspects of the *Dower Act* several times over our history.

[8] We previously reviewed the entire *Dower Act* in *The Matrimonial Home*, Report for Discussion 14.<sup>3</sup> That report, published in 1995, included preliminary recommendations to retain the key features of the *Dower Act* but with significant reforms. The requirement that a non-owner consent to any disposition of a home would remain. The life estate would be replaced with a right of occupation based on Part 2 of the *Matrimonial Property Act*. There was no final report in this project. There was no action on the preliminary recommendations.

[9] Several other projects have addressed narrower issues. In our 1975 *Small Projects* report, ALRI (then the Institute of Law Research and Reform) recommended a change to the prescribed forms of affidavit, to correct a discrepancy between the statute and the form.<sup>4</sup> This recommendation has never been implemented. The prescribed form of affidavit remains inconsistent with the statute.<sup>5</sup>

[10] In the same year, we published *Matrimonial Property*, Final Report 18. It briefly considered the *Dower Act*, concluding that it should remain in force.<sup>6</sup> It also included a recommendation against automatic co-ownership of the matrimonial home.<sup>7</sup>

<sup>3</sup> Alberta Law Reform Institute, *The Matrimonial Home*, Report for Discussion 14 (1995), online: <[www.alri.ualberta.ca/wp-content/uploads/2020/06/rfd14.pdf](http://www.alri.ualberta.ca/wp-content/uploads/2020/06/rfd14.pdf)> [RFD 14].

<sup>4</sup> Institute of Law Research and Reform (Alberta), *Small Projects*, Final Report 17 (1975) at 4-5, online: <[www.alri.ualberta.ca/wp-content/uploads/2020/05/fr017.pdf](http://www.alri.ualberta.ca/wp-content/uploads/2020/05/fr017.pdf)>. Then and now, the act defined homestead as land where the owner resided. Yet in order to establish that the *Dower Act* does not apply to a disposition of land, the owner must make a sworn statement that “neither myself nor my spouse have resided on the within mentioned land at any time since our ... marriage”: *Forms Regulation*, Alta Reg 39/2000, Form B [*Forms Regulation*] [emphasis added].

<sup>5</sup> Professor Jonnette Watson Hamilton has also noted this issue. In an ABlawg post, she wrote the form of affidavit “needs to be changed because it is misleading as well as wrong”: Jonnette Watson Hamilton, “The Harsh Consequences of Ignoring the *Dower Act*” (14 March 2017), ABlawg (blog), online: <[www.ablawg.ca/2017/03/14/the-harsh-consequences-of-ignoring-the-dower-act/](http://www.ablawg.ca/2017/03/14/the-harsh-consequences-of-ignoring-the-dower-act/)> [perma.cc/2Z6T-NM7A] [Watson Hamilton, “Harsh Consequences”].

<sup>6</sup> Institute of Law Research and Reform (Alberta), *Matrimonial Property*, Final Report 18 (1975) at 144, online: <[www.alri.ualberta.ca/wp-content/uploads/2020/03/fr018.pdf](http://www.alri.ualberta.ca/wp-content/uploads/2020/03/fr018.pdf)>.

<sup>7</sup> Institute of Law Research and Reform (Alberta), *Matrimonial Property*, Final Report 18 (1975) at 141, online: <[www.alri.ualberta.ca/wp-content/uploads/2020/03/fr018.pdf](http://www.alri.ualberta.ca/wp-content/uploads/2020/03/fr018.pdf)>.

[11] In 2000, ALRI published *Division of Matrimonial Property on Death*, Final Report 83. It included a recommendation to replace the life estate with a right to occupation.<sup>8</sup> This recommendation was not implemented. Other recommendations in the project were nearly implemented but did not come into force.<sup>9</sup>

## 2. WHY REVISIT THE *DOWER ACT* NOW?

[12] The *Dower Act* came back to ALRI's attention by two routes.

[13] In our recent project about property division for common-law couples, ALRI noted that the *Dower Act* also affected family property but applied only to married spouses. Reform of the *Dower Act* was outside the scope of that project, as it raised additional issues.<sup>10</sup>

[14] At approximately the same time, court decisions highlighted difficulties applying certain parts of the *Dower Act*.<sup>11</sup> Professor Jonnette Watson Hamilton wrote blog posts exploring the issues.<sup>12</sup> The cases and blog posts suggested that the whole statute was in need of review.

[15] Our initial research confirmed multiple parts of the *Dower Act* are out of date and out of step with other Alberta legislation.

<sup>8</sup> Alberta Law Reform Institute, *Division of Matrimonial Property on Death*, Final Report 83 (2000) at 112-15 (Recommendation 17), online: <[www.alri.ualberta.ca/wp-content/uploads/2020/05/fr083.pdf](http://www.alri.ualberta.ca/wp-content/uploads/2020/05/fr083.pdf)>. The project included a Report for Discussion, published in 1998: Alberta Law Reform Institute, *Division of Matrimonial Property on Death*, Report for Discussion 17 (1998), online: <[www.alri.ualberta.ca/wp-content/uploads/2020/06/rfd17.pdf](http://www.alri.ualberta.ca/wp-content/uploads/2020/06/rfd17.pdf)>.

<sup>9</sup> When the *Wills and Succession Act*, SA 2010, c W-12.2 [*Wills and Succession Act*] was passed by the legislature in 2010, it included provisions to establish division of matrimonial property on death: *Wills and Succession Act*, s 117 as it appeared on 1 February 2012. After receiving negative feedback, the government did not bring these provisions into force with the rest of the *Wills and Succession Act*. They were ultimately repealed in 2013: see Bill 37, *Statutes Repeal Act*, 1st Sess, 28th Leg, Alberta 2013, cl 28 (assented to 11 December 2013), SA 2013, c S-19.3.

<sup>10</sup> See Alberta Law Reform Institute, *Property Division: Common Law Couples and Adult Interdependent Partners*, Final Report 112 (2018) at para 17, online: <[www.alri.ualberta.ca/wp-content/uploads/2020/03/FR112.pdf](http://www.alri.ualberta.ca/wp-content/uploads/2020/03/FR112.pdf)> [FR 112].

<sup>11</sup> *Joncas v Joncas*, 2017 ABCA 50 [Joncas]; *Estate of Johnson, Rick Allen (Re)*, 2017 ABQB 399.

<sup>12</sup> Watson Hamilton, "Harsh Consequences", note 5; Jonnette Watson Hamilton, "The Impact of a *Dower Act* Life Estate on the Valuation and Distribution of Intestate Estates" (18 July 2017), ABLawg (blog), online: <[www.ablawg.ca/2017/07/18/the-impact-of-a-dower-act-life-estate-on-the-valuation-and-distribution-of-intestate-estates/](http://www.ablawg.ca/2017/07/18/the-impact-of-a-dower-act-life-estate-on-the-valuation-and-distribution-of-intestate-estates/)> [perma.cc/4AE6-QNR5].

### 3. WHAT ARE THE PROBLEMS WITH THE *DOWER ACT*?

[16] There are many reasons why the *Dower Act* is in need of review. This section briefly summarizes the most important ones. In later chapters, we discuss specific problems in more detail and explain how our proposed reforms would address them.

#### a. The *Dower Act* excludes adult interdependent partners

[17] One of the obvious issues with the *Dower Act* is that it applies only to legally married spouses. It is out-of-step with other Alberta legislation that treats spouses and adult interdependent partners alike. When the amended *Family Property Act* came into force in January 2020, the *Dower Act* was left as the only significant legislation in Alberta that applies to spouses but not adult interdependent partners.<sup>13</sup>

#### b. Social and legal changes have affected the need for the *Dower Act*

[18] When the *Dower Act* was first enacted, there were few other protections for spouses. Few women owned property. It was common for a married man to be the sole legal owner of all or most of the couple's property, including their home. There were very few constraints on an owner's ability to sell or mortgage property during their lifetime or to give it away in their will. Without the *Dower Act*, there was a real risk that a man could unilaterally dispose of the family's home, leaving his wife and possibly children homeless.

[19] Today, there are many other protections for spouses and adult interdependent partners. It is common for couples to own homes together, so neither can dispose of the property unilaterally. Legislation now offers much greater protection than it did in the early twentieth century. Family property legislation has provisions that can prevent a spouse or partner from forcing the other to leave the couple's home. If one spouse or partner sells the couple's home or other property, the other can claim a share of the proceeds. Wills and succession legislation now puts greater emphasis on the welfare of a surviving spouse or partner than it did when the *Dower Act* was enacted.

---

<sup>13</sup> Bill 28, *Family Statutes Amendment Act*, 2018, 4th Sess, 29th Leg, Alberta 2018 (assented to 11 December 2018), SA 2018, c 18 amended the *Matrimonial Property Act*, changing its title to the *Family Property Act*, RSA 2000, c F-4.7 [*Family Property Act*] and extending property division rules to adult interdependent partners. These changes came into effect 1 January 2020. The legislation implemented recommendations ALRI made in FR 112.



[20] In Chapter 3, below, we discuss these legislative changes and consider whether they have eliminated the need for the *Dower Act*.

**c. There are practical and theoretical problems with the *Dower Act***

[21] Professionals who deal with the *Dower Act* told us about problems they encounter. Professionals who handle real estate transactions told us that obtaining consent to disposition can make transactions more complex. In some situations it adds delay and cost and occasionally creates the risk of a deal falling through altogether. Professionals who work in estate planning or administration told us that the life estate is often not useful to the surviving spouse and has the potential to create conflict between a surviving spouse and other heirs.

[22] Over the years, litigation has exposed ambiguities or problems with the application of the *Dower Act*. Case law has not resolved the issues and, at this point, it is unlikely that the courts could resolve them.

**d. The *Dower Act* is outdated**

[23] The *Dower Act* is much the same today as it was in 1948. Even a cursory reading shows that it is behind the times. On first glance, outdated language stands out. Words like “dower” and “homestead” are relics of a long-ago time. Other parts are similarly out of date. For example, the penalties for offences have not been updated since 1948.

[24] The *Dower Act* is overdue for a comprehensive review. If the policy remains sound, the legislation should be brought up to date with clear, modern, plain language drafting.

## **C. Scope of the Project**

---

[25] This project focuses on rights relating to a home. It is not a review of family property or succession law generally.

[26] In particular, the following issues are outside the scope of this project:

- Whether rules about division of family property require reform.
- Whether rules like those in the *Dower Act* should apply to all family property. In our early consultation, a few respondents questioned whether consent to disposition should be required whenever a spouse or partner disposes of any family property. Such a change would go

far beyond the current scope of the *Dower Act* and would be a major change to family property law.

- Whether rules about intestate succession or family maintenance and support from an estate require reform.
- Whether the *Adult Interdependent Relationships Act* or the criteria for becoming an adult interdependent partner should be reviewed.
- Whether people other than spouses or adult interdependent partners should benefit from protections like those in the *Dower Act*. We have heard arguments that other family members, like adult children who live with and are dependent on a parent, should have similar protections. While there may be merit to these arguments, this kind of change would raise many new issues beyond a review of the *Dower Act*.
- Whether Alberta law should recognize relationships involving more than two partners. We are aware that some people have relationships where more than two people share their lives at the same time. Reform may be needed to address the needs of people in these relationships but there are many interconnected issues. Reform should be considered broadly, not piecemeal.

[27] Any of these issues may deserve review but it would not be feasible to address them in a project focusing on a home.

[28] The recommendations in this project would not affect homes on reserve land or interests registered with the Indian Lands Registry System. The *Dower Act* does not apply to homes or land on reserves, as Alberta does not have jurisdiction over real property on reserves. A First Nation may enact its own laws about a spouse or partner's rights relating to a home on reserve land.<sup>14</sup> If it does not, the provisional rules in the *Family Homes on Reserves and Matrimonial Interests or Rights Act* apply. The provisional rules include some protections comparable to those in the *Dower Act*.<sup>15</sup>

<sup>14</sup> At the time of writing, only two First Nations with reserve land in Alberta have enacted their own laws: see Indigenous Services Canada, "List of First Nations with Matrimonial Real Property Laws Under the Act" (2 September 2020), online: <[www.sac-isc.gc.ca/eng/1408981855429/1581783888815](http://www.sac-isc.gc.ca/eng/1408981855429/1581783888815)> [[perma.cc/G335-B5D4](https://perma.cc/G335-B5D4)].

<sup>15</sup> *Family Homes on Reserves and Matrimonial Interests or Rights Act*, SC 2013, c 20, ss 14-15 [*Family Homes on Reserves Act*].

## D. The Current Project

---

[29] The preliminary recommendations in this Report for Discussion were developed with the benefit of some early consultation. To help us identify issues with the *Dower Act*, ALRI sought input from professionals who have experience dealing with the current rules.

[30] This Report for Discussion refers to some findings from our early consultation.

### 1. ONLINE SURVEY

[31] In fall 2020, ALRI made a short online survey available. The survey was aimed at professionals who deal with the *Dower Act* in their work. The survey had one multiple choice question, asking whether the *Dower Act* should be repealed, reformed, or neither. It had two open ended questions, asking about reasons for supporting repeal or reform and any issues the respondent had encountered with the existing rules. There were also several demographic questions and an option to sign up to provide further input.

[32] There were 105 respondents to the survey. The vast majority were lawyers but we also heard from real estate professionals, estate and financial planners, among others. There were survey respondents from all parts of Alberta. There were respondents from communities in northern, central, and southern Alberta, as well as Edmonton and Calgary.

### 2. ROUNDTABLES AND MEETINGS

[33] In November 2020, ALRI hosted three roundtable meetings. All the meetings were held virtually by videoconferencing. Most participants were recruited through the survey. All the participants were lawyers. One roundtable was aimed at academics, while the other two were aimed at practitioners. These discussions allowed us to explore issues in more detail and gather information about concerns that arise in practice.

[34] We also participated in a meeting of a professional association, where we led a discussion about the *Dower Act*.

[35] In spring 2021, we spoke at five different sections of the Canadian Bar Association. Our presentations included a preview of some of the preliminary

recommendations in this report. Lawyers attending these meetings provided comments.

### **3. INTERVIEWS AND INDIVIDUAL COMMENTS**

[36] ALRI conducted individual interviews with fifteen individuals. Most interviewees were recruited through the survey. Some interviewees were lawyers but we also interviewed other professionals. We used unstructured interviews. We did not use a prepared list of questions, as we wanted to focus on the issues most important to each interviewee. These interviews gave us in-depth insight into specific concerns and practical issues.

[37] We also received a handful of comments by email or phone.

[38] We considered all responses and comments when preparing this Report for Discussion.

### **4. CONFIDENTIALITY**

[39] At roundtables and in interviews, we made an agreement with respondents that ALRI could use the information provided but would not reveal the identity or affiliation of any respondent. Accordingly, this report will not identify any individuals who participated in early consultation.

## **E. Guiding Principles**

---

[40] ALRI has identified several principles to guide its preliminary recommendations. There are general principles that apply to all of ALRI's projects and some principles that are specific to this project.

### **1. GENERAL PRINCIPLES**

[41] An important general principle is that laws should be clear and produce predictable results. Another is that all provisions in legislation should serve the purpose of the legislation.

[42] Where possible, it is desirable for legal rules to be consistent with each other. Consistency can refer to different things. It may be consistency within a single statute, between different statutes in the same jurisdiction, or between jurisdictions, among others. In this project, we have prioritized consistency within Alberta legislation first. Many of the preliminary recommendations in this

report seek to harmonize rules about homes with rules under the *Family Property Act* and the *Wills and Succession Act*.<sup>16</sup> Where possible, we have also sought consistency with legislation in other Canadian jurisdictions.

## 2. ACCESS TO JUSTICE AND PROTECTION FOR THE VULNERABLE

[43] In all our work, ALRI considers how to advance access to justice. Access to justice is not only about access to courts or litigation. Rather, it means that persons can resolve legal issues effectively and fairly.<sup>17</sup>

[44] In this project, we are particularly concerned about access to justice for vulnerable individuals. The unifying idea of the *Dower Act* is that it protects a non-owner from becoming homeless.<sup>18</sup> In our view, this objective is an important one. Further, we recognize that some people are in relationships with significant power imbalances. These individuals stand to benefit the most from the protection the *Dower Act* provides.

[45] One of our guiding principles in this project is that the law should protect the most vulnerable. We believe the law should protect non-owners from losing their homes unexpectedly.

[46] It is also critical that the protection be effective. Rules on paper are not enough; there must also be systems to encourage or enforce compliance. We have considered how the rules work in practice and how individuals affected by the rules could resolve issues. It should be possible to achieve fair results without undue time, cost, or inconvenience.

## 3. EQUAL PROTECTION FOR SPOUSES AND ADULT INTERDEPENDENT PARTNERS

[47] Another guiding principle for this project is that spouses and adult interdependent partners should have the same rights, benefits, and obligations. Chapter 4 has a detailed discussion about our reasons for adopting this principle.

<sup>16</sup> *Family Property Act; Wills and Succession Act*, note 9.

<sup>17</sup> This definition of access to justice was expressed well by Justice Cromwell in *The Honourable Thomas A. Cromwell, "Access to Justice: Towards a Collaborative and Strategic Approach"* (2012) 63 UNBLJ 38 at 39:

I think we can agree that, in general terms, members of our society would have appropriate access to civil and family justice if they had the knowledge, resources and services to deal effectively with civil and family legal matters.

<sup>18</sup> Alberta judges and legal academics have said that it is the purpose of the *Dower Act*: *Kuehn v Otis Engineering* (1996), 179 AR 225 at para 6 (QB); *Havens Estate*, 2010 ABQB 91 at para 23; *Estate of Johnson, Rick Allen (Re)*, 2017 ABQB 399 at para 19; Bruce Ziff, *Principles of Property Law*, 7th ed (Toronto: Thomson Reuters Canada Limited, 2018) at 221. We heard the same idea from some respondents in early consultation.

## F. Structure of this Report

---

[48] There are three parts to this report.

[49] The first part is Chapter 1, which introduces the project. It is common to both Reports for Discussion in this project. It briefly summarizes the need for reform, describes the scope of the project, explains ALRI's early consultation, and explains the guiding principles we have adopted for this project.

[50] The second part focuses on consent to disposition. Chapter 2 reviews how consent to disposition works in practice and describes some of the problems. Chapter 3 considers whether consent to disposition is still useful. It reviews relevant social and legal changes since the *Dower Act* was enacted. Some parts of this discussion overlap with parts of the other report on this project. This report highlights the changes relevant to consent to disposition. Chapter 3 continues by outlining arguments for and against abolishing consent to disposition. It concludes with our preliminary recommendation to retain the requirement for consent to disposition, with reforms.

[51] The third part discusses how consent to disposition might be reformed. If it is still useful, how could it be improved? Chapter 4 discusses why the same rules should apply to spouses and adult interdependent partners. Chapter 5 explains how replacing the definition of "homestead" could solve many practical problems with consent to disposition. Parts of Chapters 4 and 5 overlap with the other report in this project. Chapter 6 proposes other reforms that could improve the process of obtaining consent to disposition. Chapter 7 considers the consequences for a disposition without consent. Finally, Chapter 8 discusses some specific issues that can arise when a couple's home is at risk of being seized and sold to pay debts.

## CHAPTER 2

# Consent to Disposition

## A. The Requirement for Consent

---

[52] One of the key features of the *Dower Act* is that a married owner cannot sell, lease, mortgage, or otherwise transfer a homestead without the consent of the non-owner spouse. The requirement is found in section 2(1):<sup>19</sup>

2(1) No married person shall by act inter vivos make a disposition of the homestead of the married person whereby any interest of the married person will vest or may vest in any other person at any time

- (a) during the life of the married person, or
- (b) during the life of the spouse of the married person living at the date of the disposition.

[53] The word “disposition” used in section 2(1) is a defined term. It includes a transfer, an agreement for sale, a lease for more than three years, a mortgage or encumbrance, and a devise made by will.<sup>20</sup>

[54] This chapter reviews how consent to disposition works as it currently applies to spouses. It also discusses problems with it. The next two chapters discuss whether consent to disposition should be abolished or reformed and why it, if retained, it should also apply to adult interdependent partners.

## B. Consent to Disposition

---

### 1. ENSURING COMPLIANCE

[55] There are procedures to ensure that a disposition cannot be completed without the non-owner spouse’s consent. The Land Titles Office checks every disposition of land for compliance. When the Land Titles Office receives a request to register a transfer of land, mortgage, or other disposition it must

<sup>19</sup> *Dower Act*, s 2(1).

<sup>20</sup> *Dower Act*, s 1(b).

ensure either that consent to disposition is not required or that the non-owner spouse has consented.<sup>21</sup>

**a. Corporations and co-owners**

[56] In some cases, the Land Titles Office can ascertain that consent to disposition is not required based on the title. Consent to disposition is only required if land is owned by an individual. If the land is owned by a corporation or other entity, the land is not a homestead and consent is not required. If the land is owned by two or more individuals, either as joint tenants or tenants in common, consent is not required.<sup>22</sup>

**b. Individual owners**

[57] If the owner of land is an individual, the Land Titles Office will not register a disposition without one of three things:<sup>23</sup>

- an affidavit establishing that consent to disposition is not required;
- a consent signed by the non-owner spouse and a certificate of acknowledgment completed by a witness; or
- a court order dispensing with consent.

**i. Affidavit establishing that consent is not required**

[58] If the owner is an individual but they are not married or the land is not a homestead, the owner must prove consent to disposition is not required by making an affidavit.<sup>24</sup> There is a prescribed form for this purpose.<sup>25</sup> The owner must select one of four options: the owner is not married, neither the owner nor their spouse have lived on the land since their marriage, the non-owner spouse

<sup>21</sup> Alberta, Ministry of Service Alberta, *Land Titles and Procedures Manual*, Procedure DOW-1 (Edmonton: Ministry of Service Alberta, 2021), online: <[www.servicealberta.ca/pdf/ltmanual/DOW-1.pdf](http://www.servicealberta.ca/pdf/ltmanual/DOW-1.pdf)> [[perma.cc/42XJ-2AJZ](https://perma.cc/42XJ-2AJZ)].

<sup>22</sup> If the co-owners are spouses of each other, the land is a homestead but the requirement for consent is fulfilled by each executing the documents to complete the disposition: *Dower Act*, s 25(2). If the co-owners are not spouses of each other, the land is not a homestead: *Dower Act*, s 25(1).

<sup>23</sup> Alberta, Ministry of Service Alberta, *Land Titles and Procedures Manual*, Procedure DOW-1 (Edmonton: Ministry of Service Alberta, 2021), online: <[www.servicealberta.ca/pdf/ltmanual/DOW-1.pdf](http://www.servicealberta.ca/pdf/ltmanual/DOW-1.pdf)> [[perma.cc/42XJ-2AJZ](https://perma.cc/42XJ-2AJZ)].

<sup>24</sup> *Dower Act*, s 4(6).

<sup>25</sup> *Forms Regulation*, note 4, Form B.



has released their dower rights, or the non-owner spouse has obtained a judgment for damages as a result of the owner's wrongful disposition.

**ii. Consent and certificate of acknowledgment**

[59] If the owner of land is an individual and the land is a homestead, the non-owner spouse must provide their consent in writing.<sup>26</sup> When signing the consent, the non-owner spouse must meet with a witness without the owner present.<sup>27</sup> In that meeting, the non-owner spouse must confirm that they are aware of the transaction, understand their dower rights, and are signing the consent voluntarily.<sup>28</sup> The witness then completes a certificate of acknowledgment. Both the consent and the certificate of acknowledgment must be in prescribed forms.<sup>29</sup>

[60] Real estate agents and brokers have also implemented additional safeguards to ensure a non-owner spouse consents to the sale of a house. In our early consultation, we learned that it is common practice to have a non-owner spouse sign a dower consent when the owner enters a listing agreement with a real estate agent. The standard form residential purchase contract has a space for the non-owner spouse's signature and includes a term where the owner promises to provide the non-owner spouse's consent. In all, when an owner sells a house, the non-owner spouse may be asked for approval at three different points in the transaction: when the house is listed, when an offer is accepted, and when closing documents are prepared.

**iii. Order dispensing with consent**

[61] In certain circumstances, an owner who cannot get the consent of the non-owner spouse can instead apply for a court order dispensing with consent.<sup>30</sup> The owner must rely on one of the grounds listed in section 10 of the *Dower Act*.<sup>31</sup>

<sup>26</sup> *Dower Act*, s 4.

<sup>27</sup> *Dower Act*, s 5(2).

<sup>28</sup> *Dower Act*, s 5(1).

<sup>29</sup> *Dower Act*, ss 4(2), 5(2); *Forms Regulation*, note 4, Forms A, C.

<sup>30</sup> *Dower Act*, s 10.

<sup>31</sup> *Dower Act*, s 10(1). For ease of reference, section 10(1) reads:

10(1) A married person who wishes to make a disposition of the married person's homestead and who cannot obtain the consent of the married person's spouse

(a) when the married person and the married person's spouse are living apart,

(b) when the spouse has not since the marriage lived in Alberta,

(c) when the whereabouts of the spouse is unknown,

(d) when the married person has 2 or more homesteads,

*Continued*

[62] In most cases the owner must give notice of the application to the non-owner spouse. The court may grant an exception, if the grounds for the application are ones where it may be difficult to contact the non-owner spouse: either that the non-owner spouse has not lived in Alberta during the marriage or that the whereabouts of the non-owner spouse are unknown.<sup>32</sup>

## 2. OPTING OUT

[63] There are various reasons a non-owner spouse might give up their dower rights. Often, the reason is that the couple have separated and divided property. Others might want to do it while the relationship is intact because of an arrangement to keep property separate, or for convenience if there are plans to dispose of property.

[64] Under the *Dower Act*, there are two ways a non-owner spouse can give up their dower rights.

### a. Dower release

[65] A non-owner spouse can give up all their dower rights in a specific property with a release of dower rights.<sup>33</sup> The non-owner spouse must sign two documents: a release and an affidavit. There are prescribed forms for both.<sup>34</sup> The affidavit requires the non-owner spouse to state that they are aware of their dower rights and are giving them up “freely and voluntarily without any compulsion” by the owner.<sup>35</sup> The non-owner spouse must meet with a lawyer to sign the documents. The owner cannot be present at the meeting and the lawyer must not be acting for the owner.<sup>36</sup> In other words, the lawyer must be independent. Once the release is registered with the Land Titles Office, the land

---

(e) when the spouse has executed an agreement in writing and for valuable consideration to release the claim of the spouse to dower pursuant to section 9, or

(f) when the spouse is a mentally incompetent person or a person of unsound mind for whom

(i) a trustee under the Adult Guardianship and Trusteeship Act does not have authority to make a disposition of the homestead, and

(ii) a certificate of incapacity is not in effect under the Public Trustee Act, may apply to the Court for an order dispensing with the consent of the spouse to the proposed disposition.

<sup>32</sup> *Dower Act*, s 10(2).

<sup>33</sup> *Dower Act*, s 7.

<sup>34</sup> *Forms Regulation*, note 4, Forms D, E.

<sup>35</sup> *Forms Regulation*, note 4, Form E.

<sup>36</sup> *Dower Act*, s 7(3).

is no longer a homestead. Preliminary data that the Land Titles Office provided to us shows there are approximately 200 dower releases filed each month.

[66] A non-owner spouse can unilaterally cancel a release and reclaim their dower rights by registering a caveat with the Land Titles Office.<sup>37</sup>

#### **b. Agreement releasing dower rights**

[67] The other option is to make an agreement releasing dower rights. The agreement must be in writing but there is no prescribed form.<sup>38</sup> An agreement to release dower rights could be part of a separation agreement.<sup>39</sup> The requirements for making an agreement are similar to those for a release. The non-owner spouse must meet with an independent lawyer, without the owner present, to sign the agreement.<sup>40</sup>

[68] There are two important differences between a release and an agreement releasing dower rights. A release applies to a specific parcel of land and can be registered on the title to that parcel. An agreement may apply to a specific parcel or to any homestead of the owner but it cannot be registered on title. In practice, an agreement only works in conjunction with a dower release or as grounds for an order dispensing with consent.

### **3. CONSEQUENCES FOR DISPOSITION WITHOUT CONSENT**

[69] If, despite all the safeguards, an owner disposes of a homestead without the non-owner spouse's consent, the owner could face consequences – at least in theory. The *Dower Act* includes two kinds of consequences.

#### **a. Offence**

[70] First, it is an offence to dispose of a homestead without consent. The offence is punishable by either a fine of up to \$1000, or a term of imprisonment “of not more than 2 years.”<sup>41</sup> It is unlikely that an owner would actually face this consequence, however. Our research suggests it is extremely rare for anyone to be prosecuted under this provision. There are no reported cases and we did not hear any anecdotal information about prosecutions.

<sup>37</sup> *Dower Act*, s 8.

<sup>38</sup> *Dower Act*, s 9(2).

<sup>39</sup> *Dower Act*, s 9(2)(e).

<sup>40</sup> *Dower Act*, s 9(2).

<sup>41</sup> *Dower Act*, s 2(3).

## b. Action for damages

[71] Second, the non-owner spouse may sue for damages. Under section 11 of the *Dower Act*, an owner who disposes of a homestead without consent may be liable to pay damages to the non-owner spouse.<sup>42</sup> Damages are only available if title has actually been transferred to another person.<sup>43</sup> If the disposition is a mortgage or other encumbrance, the non-owner spouse would not receive damages unless the encumbrance resulted in a transfer of title.

[72] Damages are potentially a very serious consequence for the owner, given how they are calculated under the *Dower Act*. Section 11(2) dictates that the non-owner spouse is entitled to an amount equal to:

- (a) 1/2 of the consideration for the disposition made by the [owner spouse], if the consideration is of a value substantially equivalent to that of the property transferred, or
  - (b) 1/2 of the value of the property at the date of the disposition,
- whichever is the larger sum.

## C. Problems with Consent to Disposition

---

### 1. INEFFICIENT REQUIREMENTS

[73] Some professionals who handle real estate transactions, such as real estate agents, real estate brokers, and real estate lawyers, told us they find the procedures for obtaining consent to disposition to be “cumbersome”, “an administrative burden”, or “red tape”.

#### a. Real estate procedures

[74] Some of the burden seems to come from procedures that are not strictly required by the *Dower Act* itself. For example, several respondents said real estate

<sup>42</sup> *Dower Act*, s 11(1).

<sup>43</sup> *Dower Act*, s 11(1):

11(1) A married person who without obtaining [consent] makes a disposition to which a consent is required by this Act and that results in the registration of the title in the name of any other person, is liable to the spouse in an action for damages.

In *Inland Financial Inc v Guapo*, 2020 ABCA 381, aff’g in part 2019 ABQB 15, aff’g 2018 ABQB 162, at para 14 [*Guapo*], the Court of Appeal confirmed that this remedy (a non-owner’s right of action for damages) is “limited to improper transfers of title”; it is unavailable where there has merely been an improper registration of a mortgage or other encumbrance.

practices requiring a non-owner spouse to provide consent more than once are redundant and inconvenient.

**b. Separated spouses**

[75] Problems also tend to arise when a couple is separated, especially if they have been separated for a long time without divorcing. We heard some couples settle their affairs informally, often because they cannot afford the cost of obtaining a divorce and property division agreement or order. Once the spouses have gone their separate ways, it can be difficult to get consent from a non-owner spouse. Sometimes spouses live far apart, lose contact, or do not want to cooperate. Respondents told us clients face increased costs and delays in these situations. If there is too much delay, the transaction may be at risk. A sale can fall through if the dower consent is not completed by the closing date. Some respondents were concerned that a non-owner spouse may try to extract concessions in exchange for their consent. In the words of several respondents, consent to disposition might be used as a sword rather than a shield.

[76] These problems can be particularly frustrating when the home is one that the non-owner spouse has never lived in. Because any residence where the owner lives or has lived is a homestead, a non-owner spouse may have to give consent regardless of whether the non-owner spouse has lived there. We heard that this issue commonly arises when one spouse buys a new home after separation.<sup>44</sup>

**c. Other inefficiencies**

[77] There are other, less common issues that increase burdens with little benefit. For example, a non-owner spouse is often asked to consent even when the disposition is for their benefit, such as becoming a joint tenant with the owner.<sup>45</sup> At least one respondent described this requirement as “silly”.

[78] Another example occurs if a non-owner spouse has lost capacity. Even if the non-owner spouse granted an Enduring Power of Attorney, the attorney

<sup>44</sup> This issue can also arise when a couple marries but never lives together. A few respondents told us about scenarios where a homeowner married someone living in another country. Even though the spouse never came to Canada, their consent was required to a disposition of the home. There can be difficulties getting a properly executed consent and certificate of acknowledgment from another country in a timely way.

<sup>45</sup> In *Scott v Cresswell* (1975), 56 DLR (3d) 268 (Alta CA), the Alberta Court of Appeal held that consent is not required when an owner makes a disposition in favour of their spouse. The Land Titles Procedures Manual mentions this exception but the standard forms do not reflect it: see Alberta, Ministry of Service Alberta, *Land Titles and Procedures Manual*, Procedure DOW-1 (Edmonton: Ministry of Service Alberta, 2021), online: <[www.servicealberta.ca/pdf/ltmanual/DOW-1.pdf](http://www.servicealberta.ca/pdf/ltmanual/DOW-1.pdf)> [[perma.cc/42XJ-2AJZ](https://perma.cc/42XJ-2AJZ)].

cannot consent on their behalf. The owner has to make an application to dispense with consent.

## 2. INEFFECTIVE PROTECTIONS

[79] We also heard that in many cases, consent to disposition fails to effectively protect vulnerable non-owner spouses.

### a. Circumventing the requirement

[80] The procedures for ensuring compliance with the requirement for consent to disposition are not infallible. An owner may circumvent the requirement for consent to disposition by making an incorrect affidavit.<sup>46</sup> Our early consultation suggests some owners deliberately lie to circumvent the requirements and some may do so by mistake.<sup>47</sup>

### b. Lack of informed consent

[81] Some respondents were concerned that non-owner spouses may give consent without understanding their rights. Although there are requirements intended to ensure a non-owner spouse's consent is informed and voluntary, they may not be effective. A non-owner spouse may receive little information about the effect of a dower consent.<sup>48</sup> There is no requirement that a non-owner spouse receive or have an opportunity to receive independent legal advice. Although the non-owner spouse must meet separately with a witness to sign the consent, the witness does not need to be a lawyer and is often acting for another party in the transaction.<sup>49</sup>

<sup>46</sup> There are at least two examples in recent reported cases: *Joncas*, note 11; *VirtualLEDGER Inc v Neilson*, 2021 ABQB 458. Anecdotal information from our early consultation suggests these are not isolated incidents.

<sup>47</sup> Some respondents told us of owners who believed they were "not married" because they were separated from their spouse. One real estate lawyer described what they do if they suspect a deponent is incorrectly claiming to be "not married". This lawyer said they explain the difference between separation and divorce and sometimes require the deponent to show a divorce certificate before they will commission the affidavit. The lawyer said they have refused to commission an affidavit if they suspect the deponent is lying. It is doubtful that all lawyers and commissioners for oaths would or could go to these lengths.

<sup>48</sup> The witness must confirm that the non-owner is aware of certain dower rights and gives them up voluntarily but there is no requirement that the non-owner receive any information beyond the prescribed forms. For example, the witness must confirm that the non-owner "is aware that the *Dower Act* gives her (or him) a life estate in the homestead ..." but the forms do not explain what a life estate is: *Forms Regulation*, note 4, Form C.

<sup>49</sup> In early consultation, we heard common scenarios include a non-owner spouse signing a consent before the owner's lawyer, an employee of the lender granting a mortgage to the owner, or a petroleum landman acting for the party acquiring rights from the owner.

**c. Ineffective protection in relationships with an imbalance of power**

[82] Another concern may arise when the relationship between the spouses involves domestic violence or coercive control. We heard that the certificate of acknowledgment does not perform its intended function and obtaining it can raise new problems. If a non-owner spouse is compelled to sign a dower consent, meeting separately with a witness does not counteract the compulsion. As soon as they leave the meeting, they will face the situation that compelled them in the first place.

[83] Further, if they disclose the compulsion to the witness, the witness is faced with a dilemma. One respondent clearly described the problem. If the witness refuses to complete the certificate of acknowledgment, they leave the non-owner spouse to face possible consequences from the owner. If they sign the certificate of acknowledgment, they would be making a false statement. The respondent said a possible third option is to advise the non-owner spouse to meet with another witness, without disclosing the compulsion. In any case, the non-owner spouse is no better off.

**d. Gaps in protection**

[84] Finally, the *Dower Act* applies only to property owned by an individual. Land is not a homestead and consent to disposition is not required if a third party is a co-owner.<sup>50</sup> Similarly, land is not a homestead if it is owned by a corporation and consent to disposition is not required.<sup>51</sup>

[85] In early consultation, a few respondents raised concerns that these exclusions are loopholes which leave some spouses unprotected. In particular, we heard that spouses of farmers or ranchers often do not benefit from the *Dower Act*, because it is common practice to hold agricultural land through a closely held corporation.

<sup>50</sup> *Dower Act*, s 25(1):

25(1) When a married person is a joint tenant, tenant in common or owner of any other partial interest in land together with a person or persons other than the spouse of that married person, this Act does not apply to that land and it is not a homestead within the meaning of this Act nor does the spouse have any dower rights in it.

<sup>51</sup> In this context, the term “corporation” includes any legal entity, other than an individual, that may own land. The *Land Titles Act* includes a list of the kinds of corporations that may hold an interest in land: *Land Titles Act*, RSA 2000, c L-4, s 27(1) [*Land Titles Act*].





## CHAPTER 3

# Does Consent to Disposition Still Serve a Valid Purpose?

## A. What Was the Historical Purpose of the *Dower Act*?

---

[86] The *Dower Act* was enacted in 1917 and amended in 1948. The origins of the *Dower Act*, its relationship to common-law dower, and its history have been thoroughly discussed elsewhere.<sup>52</sup> For the purpose of this report, only a small part of that history need be repeated.

[87] When the *Dower Act* was introduced, married women rarely owned property in their own names or jointly. Men usually had title to land, partly because of custom and partly due to legal requirements.<sup>53</sup>

[88] In the early years of the twentieth century, first-wave feminists in Alberta and the other prairie provinces campaigned for legislation that would recognize a married woman's interest in the family home.<sup>54</sup> In advocating for the legislation, they raised two related concerns. The first was a practical one. If a husband could unilaterally sell, mortgage, or give away the family home, his wife and children were at risk of becoming homeless.<sup>55</sup> The second was more abstract. They argued that women's work contributed to acquiring and

<sup>52</sup> See RFD 14 at 8–17; Margaret E McCallum, "Prairie Women and the Struggle for a Dower Law, 1905-1920" (1993) 18:1 *Prairie Forum* 19; Wilbur F Bowker, "Reform of the Law of Dower in Alberta" (1955) 1:6 *Alta L. Rev* 501 at 501-502 [Bowker]; Catherine Anne Cavanaugh, *The Women's Movement in Alberta as Seen Through the Campaign for Dower Rights 1909-1928* (MA Thesis, University of Alberta, 1986) [unpublished].

<sup>53</sup> See eg *Dominion Lands Act*, SC 1872, c 23, as repealed by *The Territorial Lands Act*, SC 1950, c 22, s 26; *The Veterans' Land Act*, 1942, SC 1942, c 33. Both statutes allowed men to obtain farmland at very low cost. Title to land was registered in the name of the homesteader or veteran, who were almost always male. Only in very rare circumstances could a woman qualify to obtain land under either statute.

<sup>54</sup> Margaret E McCallum, "Prairie Women and the Struggle for a Dower Law, 1905-1920" (1993) 18:1 *Prairie Forum* 19. The campaign was focused on the prairies because common-law dower had previously been abolished for the areas that are now Alberta, Saskatchewan, and Manitoba. Women in other provinces were protected by common-law dower rights well into the second half of the twentieth century.

<sup>55</sup> It is hard to know how often this risk actually materialized but those advocating for dower legislation raised its spectre. As Margaret E McCallum wrote in "Prairie Women and the Struggle for a Dower Law, 1905-1920" (1993) 18:1 *Prairie Forum* 19 at 22:

[A]rguments against the dower law ... were countered by heartrending tales of women left to fend for themselves and their children when their husbands mortgaged or sold the farm to run off with a younger woman, or squander the proceeds on drink. Many women worried that their husbands might lose everything in a bad business deal, or leave them penniless widows, dependent on the charity of their children.

maintaining property and women therefore deserved some rights in the property.

[89] The campaign eventually succeeded. Alberta and the other prairie provinces adopted the called-for legislation. Alberta's original *Dower Act* included the two key features that are part of the *Dower Act* today.<sup>56</sup> It prohibited a married man from selling, leasing, mortgaging, or otherwise disposing of his homestead without his wife's consent and upon a married man's death, it granted his widow a life estate in the homestead.

[90] Despite the connotations of the word "homestead," the *Dower Act* applies regardless of how the owner acquired title and has always applied to homes in both rural and urban areas.<sup>57</sup>

[91] By 1948, the *Dower Act* had assumed its current form. It now included five dower rights, which applied equally to both spouses:<sup>58</sup>

1(c) ...

- (i) the right to prevent disposition of the homestead by withholding consent,
- (ii) the right of action for damages against the married person if a disposition of the homestead that results in the registration of the title in the name of any other person is made without consent,
- (iii) the right to obtain payment from the General Revenue Fund of an unsatisfied judgment against the married person in respect of a disposition of the homestead that is made without consent and that results in the registration of the title in the name of any other person,
- (iv) the right of the surviving spouse to a life estate in the homestead of the deceased married person, and

<sup>56</sup> *The Dower Act*, SA 1917, c 14.

<sup>57</sup> The definition of "homestead" has been consistent since 1917, aside from a few cosmetic changes: see *The Dower Act*, SA 1917, c 14, s 2; *Dower Act*, s 1(d). Today, the definition reads:

1(d) "homestead" means a parcel of land

- (i) on which the dwelling house occupied by the owner of the parcel as the owner's residence is situated, and
- (ii) that consists of
  - (A) not more than 4 adjoining lots in one block in a city, town or village as shown on a plan registered in the proper land titles office, or
  - (B) not more than one quarter section of land other than land in a city, town or village.

<sup>58</sup> *Dower Act*, s 1(c). It is essentially identical to the 1948 version.

- (v) the right of the surviving spouse to a life estate in the personal property of the deceased married person that is exempt from seizure under writ proceedings;

[92] Other than a few housekeeping amendments, the *Dower Act* has been frozen in time since 1948. Meanwhile, social and legal changes have given spouses and adult interdependent partners other interests in property.

## **B. What Has Changed Since the *Dower Act* Was Enacted?**

[93] There have been both social and legal changes since the *Dower Act* was enacted. One could argue that these changes have effectively replaced the *Dower Act*, so it has outlived its usefulness.

### **1. JOINT TENANCY**

[94] Today, many couples choose to own their homes as joint tenants. Joint tenants are equal owners and share the whole property.<sup>59</sup> If one of the joint tenants dies, the other becomes the sole owner of the property. This feature is called the right of survivorship. It was uncommon for couples to own property as joint tenants when the *Dower Act* was enacted but it is common today.

[95] Although the *Dower Act* applies to property that a couple holds as joint tenants, it rarely has any impact on joint tenants.<sup>60</sup> They are unlikely to rely on dower rights, as they have greater protection. Both joint tenants must agree to a disposition and the surviving joint tenant will receive the whole property when one of them dies.

### **2. PROPERTY DIVISION UNDER THE *FAMILY PROPERTY ACT***

[96] One of the arguments for adoption of the *Dower Act* was that both spouses contributed to acquiring and maintaining property and therefore both should

<sup>59</sup> There is another kind of co-ownership, known as tenancy in common. Tenants in common may have unequal shares. For example, one could have a 75 per cent share in the property and the other 25 per cent. Tenants in common do not have a right of survivorship. If one dies, their share in the property will go to the beneficiary named in their will or the person who inherits their estate by intestate succession.

<sup>60</sup> *Dower Act*, s 25(2):

25(2) When a married person and the married person's spouse are joint tenants or tenants in common in land, the execution of a disposition by them constitutes a consent by each of them to the release of their dower rights and no acknowledgment under this Act is required from either of them.

The Court of Appeal recently confirmed that "[d]ower rights underlie a joint tenancy between married spouses": *Guapo*, note 43 at para 24. See also *Karafiat v Webb*, 2012 ABCA 115 at paras 20–22; *Bank of Montreal v Pawluk* (1994), 158 AR 97 at para 13, 1994 CanLII 9002 (QB) [*Pawluk* cited to CanLII].

have some interest in the property. For many years, the limited rights in the *Dower Act* were the way that the law recognized a non-owner spouse's contributions.

[97] Dower rights give a non-owner spouse some control over property while a marriage lasts but nothing if the marriage ends in divorce. This gap became evident as the divorce rate rose. By the 1960s and 1970s, many divorced and separated women found themselves with nothing to show for their contributions to family property.<sup>61</sup> Second wave feminists advocated for reform. ALRI made recommendations for new legislation in its 1975 *Matrimonial Property* report.<sup>62</sup> Most of the majority's recommendations were implemented when Alberta adopted the *Matrimonial Property Act* in 1978. In our 2018 *Property Division: Common Law Couples and Adult Interdependent Partners* report, ALRI recommended that the legislation apply to adult interdependent partners.<sup>63</sup> The legislature implemented those recommendations, amending the legislation and renaming it the *Family Property Act*.<sup>64</sup>

[98] Like the *Dower Act*, one aim of the *Family Property Act* is to recognize that both spouses or both partners contribute to property.<sup>65</sup> The *Family Property Act* does so in a tangible way by ensuring that each spouse or partner leaves a relationship owning a share of the property they accumulated together. The two

<sup>61</sup> Alberta, like most Canadian jurisdictions, had legislation establishing separation of property. Either spouse could acquire, hold, and dispose of property in their own name. Upon separation or divorce, each spouse kept their own separate property. In practice, for much of the twentieth century few married or cohabiting women had much property in their own names. The well-known case of *Murdoch v Murdoch* (1973), [1975] SCR 423 was often used to illustrate the need for reform. Irene Murdoch and her husband were ranchers in Alberta. They worked together, first hiring themselves out as a couple and then on their own ranch. For many years Mr Murdoch worked off the ranch for several months a year. During those times Mrs Murdoch took care of all the ranch work, as well as housekeeping and childcare. They separated in 1968 after an incident where Mr Murdoch broke Mrs Murdoch's jaw. She claimed an interest in the land and other ranch property, which was all in her husband's name. A majority of the Supreme Court held that Mr Murdoch was entitled to keep it all. In a less-often-discussed denouement, Mrs Murdoch was awarded an amount equal to about one third of her former husband's assets in the form of lump sum maintenance: *Murdoch v Murdoch* (1976), 1 AR 378 (QB). See Olive M Stone, "Matrimonial Property Law: The Movement Towards Equality - Separation or Community? Canadian (Especially Albertan) and English Experience" (1978) 16:3 Alta L Rev 375 at 383-4.

<sup>62</sup> Institute of Law Research and Reform (Alberta), *Matrimonial Property*, Final Report 18 (1975), online: <[www.alri.ualberta.ca/wp-content/uploads/2020/03/fr018.pdf](http://www.alri.ualberta.ca/wp-content/uploads/2020/03/fr018.pdf)>.

<sup>63</sup> FR 112.

<sup>64</sup> The *Family Statutes Amendment Act*, SA 2018, c 18 amended the *Matrimonial Property Act*, changing its title to the *Family Property Act* and extending property division rules to adult interdependent partners. These changes came into effect 1 January 2020.

<sup>65</sup> The Alberta Court of Appeal has described the purpose of family property legislation as "to legally recognise marriage as an economic partnership, founded on the presumption that the parties intend to share the fruits of their labour during and as a result of it, on an equal basis": *Jensen v Jensen*, 2009 ABCA 272 at para 1.

statutes are more complementary than overlapping. Dower rights apply during a marriage and end upon divorce. They apply only to a home. A non-owner spouse's interest is less than full ownership. In contrast, the *Family Property Act* comes into play when a relationship breaks down.<sup>66</sup> A former couple may make an agreement or either of them can apply for a court order about property division. An agreement or order may apply to all property owned by either spouse or partner, not just a home. There is a presumption that spouses or partners should share equally in most property acquired during the relationship.<sup>67</sup> Once property is divided, each former spouse or partner owns their share.

[99] When a person applies for property division order, they may also file a certificate of lis pendens on title to a home or any other real property.<sup>68</sup> The certificate of lis pendens gives notice of the claim to anyone else dealing with the property, like a potential buyer or mortgage lender.

[100] There are different ways to divide a home in a family property agreement or order. Sometimes it is sold and each person keeps a portion of the proceeds. Sometimes one spouse or partner keeps the home and the other receives money or other assets in exchange.<sup>69</sup>

### **3. ORDER FOR EXCLUSIVE POSSESSION UNDER THE *FAMILY PROPERTY ACT* OR *FAMILY LAW ACT***

[101] Along with property division rules, the *Matrimonial Property Act* introduced a way for a spouse to obtain possession of a home. A similar provision, which also applied to adult interdependent partners, was included in the *Family Law Act* when it was enacted in 2003.<sup>70</sup> Under either statute, a spouse

<sup>66</sup> The property division rules in the *Family Property Act* are an example of a model known as deferred sharing. During a marriage or adult interdependent relationship, spouses or partners may hold property in their own names or jointly. If the relationship breaks down, the legislation establishes default rules for dividing property. There is a presumption that spouses or partners should share equally in most property acquired during the relationship.

<sup>67</sup> *Family Property Act*, s 7(4)–(5).

<sup>68</sup> *Family Property Act*, s 35.

<sup>69</sup> It is wise for a spouse keeping a home to obtain a dower release from the other. We heard this step is sometimes overlooked, which can lead to problems obtaining consent later.

<sup>70</sup> When the *Family Law Act* was enacted, the *Matrimonial Property Act* applied only to spouses. The *Family Law Act* made it possible for an adult interdependent partner to seek an exclusive possession order. Today, the provisions in the two statutes are nearly identical and probably redundant. The key difference is that an order under the *Family Property Act* is available on its own; under the *Family Law Act*, an order for exclusive possession is only available as part of a support order: *Family Property Act*, ss 19–30; *Family Law Act*, SA 2003, c F-4.5, ss 68–76 [*Family Law Act*]. In cases of family violence, the *Protection Against Family Violence Act* also

or partner can seek a court order for exclusive possession of the family home.<sup>71</sup> There is a list of factors that a court must consider before granting an exclusive possession order.<sup>72</sup>

[102] If granted, an exclusive possession order may include features that are not available under the *Dower Act*. The *Dower Act* does not give a non-owner spouse any right to occupy or possess a homestead during the owner's life but an exclusive possession order may. An exclusive possession order may also require that one spouse or partner be evicted from the home or restrained from being at the home.

[103] If one or both spouses or partners owns the home, the spouse or partner living in it can prevent a sale, mortgage, or other disposition.<sup>73</sup> To benefit from this protection, the spouse or partner must take two steps. First, they must apply to court for an exclusive possession order. If the court grants the order, the spouse or partner can then register the order with the Land Titles Office.<sup>74</sup>

---

allows a court to make an order granting exclusive possession of a home to a person in need of protection: *Protection Against Family Violence Act*, RSA 2000, c P-27, ss 2(3)(c), 4(2)(c).

<sup>71</sup> *Family Property Act*, s 19; *Family Law Act*, note 70, s 68. The definition of a family home differs from the definition of a homestead under the *Dower Act* in two important ways. A homestead is a home occupied by the owner but a family home is one that the spouses or partners have occupied together. A homestead is property that one or both spouses own but a family home also includes property that is leased. For example, if a couple are tenants in a rental apartment it would be a family home. The wording in the *Family Property Act* and the *Family Law Act* are nearly identical: see eg *Family Property Act*, s 1(a.1) [emphasis added]:

- 1(a.2) "family home" means property
- (i) that is owned or leased by one or both spouses or adult interdependent partners,
  - (ii) that is or has been occupied by the spouses or adult interdependent partners as their family's home, and
  - (iii) that is
    - (A) a house, or part of a house, that is a self-contained dwelling unit,
    - (B) part of business premises used as living accommodation,
    - (C) a mobile home,
    - (D) a residential unit as defined in the Condominium Property Act, or
    - (E) a suite;

<sup>72</sup> *Family Property Act*, s 20; *Family Law Act*, note 70, s 69. The list in the *Family Law Act* is:

- 69 In exercising its powers under sections 67 to 76, the court shall have regard to
- (a) the availability of other accommodation within the means of both the spouses or adult interdependent partners,
  - (b) the needs of any children residing in the family home,
  - (c) the financial position of each of the spouses or adult interdependent partners,
  - (d) any order made by a court with respect to the property or the support or maintenance of one or both of the spouses or adult interdependent partners, and
  - (e) any restrictions or conditions of any lease involving the family home, if applicable.

The list in the *Family Property Act* is nearly identical but does not include the last factor.

<sup>73</sup> *Family Property Act*, s 22(3); *Family Law Act*, note 70, s 71(3).

<sup>74</sup> *Family Property Act*, s 22; *Family Law Act*, note 70, s 71. There is a similar process under the *Family Property Act* if the home is a mobile home but the order is registered under the Personal Property Registry: *Family*

*Continued*

### C. Who Is Protected by the *Dower Act*?

---

[104] The *Dower Act* does not and never has protected all spouses. It protects only the spouses of homeowners, and even then, only certain ones. It does not protect any adult interdependent partners, although if it is to be retained, we recommend consent to disposition should apply to adult interdependent partners.

[105] Nonetheless, the number of people potentially affected is very large, as a very large number of people in Alberta are homeowners. Nearly 75 per cent of Alberta households live in an owner-occupied residence. The 2016 census found that of approximately 1.5 million dwellings in Alberta, 1.1 million were occupied by the owner.<sup>75</sup>

[106] The protections in the *Dower Act* are most relevant when one spouse is on title. This arrangement was the norm when the *Dower Act* was enacted but is far less common today. Our research has not uncovered reliable statistical information about how couples hold property. It is probably impossible to know for sure how many of the couples that own their home are joint tenants, how many have only one person on title, and how many have some other arrangement.

[107] In the absence of statistical information, anecdotal information from our early consultation gives us some idea of how couples hold property. Respondents told us that the vast majority of couples they encounter in their practice are joint tenants. Many estimated that the number is 90 per cent or more. Even if ten per cent or less of couples live in a home owned by one spouse or partner, it still amounts to tens of thousands of couples in Alberta.

[108] In early consultation, we heard about some of the reasons that one spouse or partner might be the sole owner of the couple's home. It seems clear that joint tenancy will never be universal, as there are benefits to sole ownership. Reasons included:

- The owner owned the home before the relationship began and never transferred ownership. It is likely that many couples fall into this

---

*Property Act*, ss 23, 27. The *Family Law Act* does not include a provision about registration of an order affecting a mobile home.

<sup>75</sup> Statistics Canada, *Data Tables, 2016 Census: Structural Type of Dwelling (10), Tenure (4), Household Size (8) and Number of Bedrooms (6) for Private Households of Canada, Provinces and Territories, Census Divisions and Census Subdivisions*, Catalogue No 98-400-X2016220 (Ottawa: Statistics Canada, 2017), online: [[perma.cc/3SRN-KPW4](https://perma.cc/3SRN-KPW4)].

arrangement without much thought. It takes some additional effort and cost to add a new spouse or partner to title. Many people probably do not bother. A savvy owner is likely to make the same decision, though. Under the *Family Property Act*, the net value of the home at the time the relationship began would be exempt from division. That is, if the relationship breaks down the owner would be entitled to keep the equity they had in the property when the relationship began.<sup>76</sup> If the owner transfers the property into joint ownership, half of the exemption will be lost.<sup>77</sup> There is therefore an incentive to keep sole ownership of any property that predates the relationship.

- One spouse or partner inherited the home. As with property that predates the relationship, the heir may remain the sole owner because of inaction or a deliberate choice to preserve an exemption from family property division.
- It is a condition of a gift that one spouse or partner be the sole registered owner. For example, the parents of one spouse or partner may provide money to buy a home on condition that their child is the only person on title. As with the reasons above, they might prefer this arrangement to preserve an exemption from family property division.<sup>78</sup>
- It is a condition of a mortgage that one spouse or partner be the sole registered owner. We heard that lenders sometimes direct who may be on title. If one spouse or partner qualifies for a mortgage but the other

<sup>76</sup> See *Family Property Act*, s 7(2):

7(2) If the property is

(a) property acquired by a spouse or adult interdependent partner by gift from a third party,

(b) property acquired by a spouse or adult interdependent partner by inheritance,

(c) property acquired by a spouse before the marriage, in the case of spouses who were not in a relationship of interdependence with each other immediately before the marriage,

(c.1) property acquired by a spouse before the relationship of interdependence began, in the case of spouses who were in a relationship of interdependence with each other immediately before the marriage,

(c.2) property acquired by an adult interdependent partner before the relationship of interdependence began,

...

the market value of that property on the applicable date under subsection (2.2)(a), (b) or (c) is exempted from a distribution under this section.

Any increase in value during the relationship is subject to division, although not necessarily equal division: see *Family Property Act*, s 7(3).

<sup>77</sup> See *Jackson v Jackson* (1989), 97 AR 153 (CA); *Harrower v Harrower* (1989), 97 AR 141 (CA).

<sup>78</sup> In a variation on this theme, the benefactor may be registered as a co-owner of the home. In that case the *Dower Act* would not apply, as land owned with a third party is not a homestead: *Dower Act*, s 25(1).



has a bad or non-existent credit record, the lender may require that only the qualified borrower be on title.

- One spouse owns the home to protect it from creditors. For example, if one spouse or partner is an entrepreneur the couple may prefer to have the other as sole owner of the couple's home in case the entrepreneur has given personal guarantees for loans or faces liability for other reasons.
- Tradition or culture may influence who is on title. In early consultation some professionals shared their impression that it is more common for one spouse or partner to be on title among some older couples, in farming families, or among couples from some cultural or religious groups.

[109] Some respondents suggested that dower rights protect the most vulnerable. We heard concerns about relationships with an imbalance of power, where ownership of the couple's home might reflect financial control. We also heard that low-income couples may be particularly likely to have only one spouse or partner on title, perhaps because mortgage lenders require it.

## **D. Should the Requirement for Consent to Disposition Be Abolished?**

---

[110] Before considering possible reforms, it is important ask whether consent to disposition still serves a valid purpose. If not, it should be abolished instead of reformed. This section considers arguments for and against abolishing consent to disposition.

### **ISSUE 1**

---

Should a homeowner be able to sell, mortgage, or otherwise dispose of a home without the consent of their spouse or adult interdependent partner?

#### **1. ARGUMENTS IN FAVOUR OF ABOLISHING CONSENT TO DISPOSITION**

[111] In our early consultation, about a third of respondents were in favour of repealing the *Dower Act*. Many focused on consent to disposition. They made several related arguments for abolishing it.

**a. Few people rely on consent to disposition**

[112] The *Dower Act* was introduced to protect women and families at a time when women were economically disadvantaged. With advances in gender equality, the need is less obvious. It is less common now for a woman to be entirely dependent on a spouse or partner for housing and support. It is very common for couples to own property as joint tenants. Some respondents said consent to disposition is “outdated”, “was created to solve a problem that no longer exists,” and “no longer reflects the realities of the twenty-first century.”

**b. Consent to disposition is not effective**

[113] Some argue consent to disposition is ineffective. We heard that the vast majority of couples in intact relationships agree on disposition, so dower consent is purely a formality. Even if a non-owner does not agree, they may give consent anyway. Some non-owners may be unable to exercise their rights because of domestic violence or coercive control. If consent to disposition does not help these individuals, one might ask what good it does.

**c. There are other ways for spouses and partners to protect their interest in a home**

[114] There is an argument that consent to disposition is redundant, as it has been effectively replaced by other protections. We heard this argument from a significant number of respondents in our early consultation. Among those in favour of repeal, many said the *Family Property Act* provides all the protection spouses or adult interdependent partners need.

**d. Consent to disposition inconveniences many to protect a few**

[115] Consent to disposition adds complexity to real estate transactions. It requires additional forms like the dower affidavit, the dower consent, and the certificate of acknowledgment. It requires the non-owner, as well as the owner, to attend a meeting to sign documents. If the spouses are separated, the owner or their lawyer must go to extra effort to locate the non-owner and obtain their consent or apply for an order dispensing with consent. It requires the Land Titles Office to examine documents to ensure compliance. Abolishing consent to disposition would streamline real estate transactions for all homeowners and the Land Titles Office. As one respondent who supported this change said, “Let’s simplify something, for once.”

[116] A relatively small number of people rely on consent to disposition. Given the numbers, the costs may outweigh the benefits. Does it make sense to add extra steps to transactions for all homeowners, just in case it helps a few non-owners?

**e. Abolishing consent to disposition would be an easy route to modernization**

[117] The *Dower Act* is outdated and out of step with other Alberta legislation. If it were to be retained, it would require extensive reforms to bring it up to date. Repealing it – or part of it – would be the most direct route to modernization.

[118] Among other things, consent to disposition rests on some old assumptions: that a typical family has two spouses who are legally married, that one spouse is economically dependent on the other, and that default rules are necessary to protect dependent spouses. Consent to disposition is a one-size-fits-all solution. Given the diversity of Alberta families, a one-size-fits-all solution may no longer be appropriate. Abolishing consent to disposition would allow families more flexibility to arrange their affairs in the way that suits them best.

[119] Abolishing consent to disposition would be a straightforward way to achieve the goal of treating spouses and adult interdependent partners alike. All couples would be treated the same because no one would require consent to disposition.

## **2. ARGUMENTS AGAINST ABOLISHING CONSENT TO DISPOSITION**

[120] In our early consultation, a majority of respondents supported reforming the *Dower Act* instead of repealing it. Most respondents who made comments about consent to disposition favoured keeping it in some form. Although some of the original purposes are no longer relevant, these respondents believed it still serves a useful purpose.

[121] Consent to disposition acts as a safety net when other protections fail. Although other protections overlap, they have not completely replaced the protection consent to disposition provides.

[122] The *Dower Act* is the only law that requires an owner to inform and seek consent from a non-owner spouse before selling or mortgaging a home. Without it, an owner could dispose of a home unilaterally.

**a. A home is a special asset**

[123] There is an argument that a home is a special asset that deserves special protection. A home is often the most valuable asset a couple owns. It may also have value that cannot be measured in money. Many people have a sentimental attachment to their home. They may appreciate its location, the neighbourhood, or the neighbours. If children live in the home, their best interests should be considered. A move may be disruptive for children, especially if the family is going through other changes because of relationship breakdown. If an owner were able to unilaterally sell a home and force their family to move unexpectedly, money might not compensate for the loss of these intangible benefits.

**b. Consent to disposition offers protection without litigation**

[124] Consent to disposition protects a non-owner automatically. Unlike other protections, non-owners benefit whether or not they know their rights, whether or not they have a lawyer, and whether or not they take any steps. The Land Titles Office has procedures to ensure compliance in every disposition.

[125] Most other protections require some form of litigation which takes time, can be expensive, and has an uncertain outcome. Several respondents told us one of the major benefits of the *Dower Act* is that it provides protection without litigation.

**c. Consent to disposition provides protection upon relationship breakdown**

[126] Consent to disposition may be a formality while a couple is together but it is often critical around the time a couple separates. In early consultation, we heard that non-owner spouses rely on the automatic protection the *Dower Act* provides. The requirement for consent to disposition prevents an owner from selling or mortgaging the couple's home, which is often their biggest asset. More than one respondent expressed the concern in words to this effect: "without the *Dower Act*, one spouse could sell the home out from under the other spouse and run off with the money."

[127] Without the automatic protection of consent to disposition, a non-owner would have to take action to protect their interest in the home, such as making an application for exclusive possession, filing a caveat, or making a claim for property division and filing a certificate of *lis pendens*. It may not be feasible for a non-owner to act immediately. To do so, they need to know their rights and

understand the steps they must take. They will often require legal advice and representation. Cost and inconvenience can be barriers. There is often some delay. In the meantime, the owner would have an opportunity to dispose of property unilaterally.

[128] It is impossible to know how often this risk would materialize without the *Dower Act* but anecdotes from early consultation suggest the concern is not hypothetical. Several professionals told us about cases where an owner spouse had tried to sell a home shortly after separation or cases where an adult interdependent partner did so.

**d. Consent to disposition can protect an innocent person from fraudulent or secret dispositions**

[129] There are cases where the *Dower Act* has protected an innocent spouse from losing their home because of fraud. A recent case is a good illustration. In *Inland Financial Inc v Guapo*, the Court of Appeal held that a fraudulently obtained mortgage was void because one of the spouses had not consented.<sup>79</sup>

[130] The Guapos were a married couple who owned a home as joint tenants. One of the Guapos' children had the same name as his father. The son impersonated his father and, with his mother's cooperation, obtained a mortgage on the home. It was unclear if the mother fully understood the transaction as she did not speak English and relied on her son to explain. The son received the mortgage proceeds. He was eventually convicted of fraud. The mortgage went into foreclosure. The father only learned of the mortgage when foreclosure proceedings began.

[131] The Court of Appeal relied on the *Dower Act* to resolve the case. Although couples who co-own their home rarely rely on the *Dower Act*, they have dower rights.<sup>80</sup> The mortgage was a disposition that required both spouses to consent.

<sup>79</sup> *Guapo*, note 43. A similar issue arose in *Bentley v Hooton*, although it was eventually resolved on other grounds: *Bentley v Hooton*, 2018 ABQB 109, aff'd on other grounds 2019 ABQB 231. In that case, a husband mortgaged a home that he and his wife owned together. He signed the mortgage documents as himself and also signed on behalf of his wife, relying on a forged power of attorney. The lender sought to enforce the mortgage. A Master of the Court of Queen's Bench directed that the mortgage be removed from title, relying in part on the *Dower Act*. The Justice decided that the mortgage was a nullity because it was obtained by fraud. It was therefore not necessary to consider the *Dower Act*.

<sup>80</sup> The Court of Appeal recently confirmed that "[d]ower rights underlie a joint tenancy between married spouses": *Guapo* note 43 at para 24. See also *McNeil v Martin* (1982), 41 AR 473 (CA); *Pawluk*, note 60 at para 53; *Nicholson v Nicholson* (1994), 153 AR 200 at para 24 (QB); *Karafiat v Webb*, 2012 ABCA 115 at paras 20-22.

As the father had not consented, the mortgage was invalid.<sup>81</sup> The mortgage was removed from title. If the purpose of the *Dower Act* is to protect a vulnerable spouse from losing their home, it worked as intended in this case.

**e. Abolishing consent to disposition might shift risk and inconvenience to the vulnerable**

[132] There is an argument that abolishing consent to disposition would not eliminate burdens but rather would shift them from owners to non-owners. Currently, an owner may face cost and inconvenience to obtain consent or an order dispensing with consent. If consent to disposition were abolished, a non-owner might face cost and inconvenience to protect their interest in property.

[133] Without protection from the *Dower Act*, a non-owner would have to rely on other options to protect their interest in a home. Some family lawyers predicted they would file caveats and certificates of lis pendens more often, on more properties, and earlier if consent to disposition were abolished. There might be an increase in litigation, as more people sought exclusive possession orders or other remedies.<sup>82</sup>

[134] Shifting cost and inconvenience may be unjust if the burden shifts to someone less able to bear it. It is possible abolishing consent to disposition would do so.

[135] Consent to disposition burdens homeowners, who by definition own property. They face cost and inconvenience at the moment they dispose of property which is usually a time they will receive money. If they can afford the legal fees for a sale, mortgage, or other disposition, they can probably afford slightly higher fees to obtain consent or an order dispensing with consent.

[136] If the burden were shifted to non-owners, it could be a barrier to access to justice. Some non-owners may have property or financial resources of their own but not all will. They may face higher costs, especially if they have to go to court. Litigation will almost always be more expensive than the costs associated with dower consent. They will most often face cost and inconvenience at a difficult time. They may need to act quickly to protect their interest in property when a relationship breaks down but that is often a time when there are many priorities and resources are stretched thin.

<sup>81</sup> *Guapo*, note 43 at paras 23–26.

<sup>82</sup> For example, *Family Property Act*, s 10 allows a court to grant a remedy if a spouse or partner has transferred family property to defeat the other spouse's claim. At least one respondent noted that the remedy is available but "easier said than done in practice."

[137] One respondent summed up the argument this way: “Who do you force to go to court, the person who needs protection, or the person who is trying to make some money?”

**f. Consistency with other jurisdictions**

[138] Every Canadian jurisdiction has legislation that is comparable to the requirement for consent to disposition under the *Dower Act*.<sup>83</sup> British Columbia’s legislation is unique, because it applies only if a spouse or partner registers their interest with the land titles office.<sup>84</sup> In all other jurisdictions, consent is required automatically, so a spouse or partner does not need to take any action to benefit from it. While consistency with other jurisdictions is not the most important guiding principle, it is desirable. The fact that consent to disposition is required in all Canadian jurisdictions suggests a widespread view that there is value in the requirement.

**3. ARE THERE OTHER OPTIONS?**

[139] Although there may be other options for replacing consent to disposition, we have not identified any that are clearly better than abolition or reform.

[140] For example, we considered whether a notice system could replace consent to disposition. An owner would have to give a non-owner notice before completing a disposition, giving the non-owner time to take action to protect any interest they may have in the property. We determined it was not a feasible option. A notice system would have almost all the same disadvantages of consent to disposition, like difficulty finding or obtaining consent from a long-separated spouse or partner. There might be new disadvantages too, like additional delay to give a non-owner time to take action.

[141] We invite comments on any other options that we should consider.

<sup>83</sup> *Land (Spouse Protection) Act*, RSBC 1996, c 246, s 3 [BC Act]; *The Homesteads Act*, 1989, SS 1989-90, c H-5.1, s 5(1)(a) [Saskatchewan Act]; *The Homesteads Act*, CCSM, c H80, s 4 [Manitoba Act]; *Family Law Act*, RSO 1990, c F.3, s 21(1)(a) [Ontario Act]; arts 404–405 CCQ; *Marital Property Act*, RSNB 2012, c 107, s 19(1) [New Brunswick Act]; *Matrimonial Property Act*, RSNS 1989, c 275, s 8(1)(a) [Nova Scotia Act]; *Family Law Act*, RSPEI 1988, c F-2.1, s 22(1)(a) [PEI Act]; *Family Law Act*, RSNL 1990, c F-2, s 10(a) [Newfoundland Act]; *Family Property and Support Act*, RSY 2002, c 83, s 23(1)(a) [Yukon Act]; *Family Law Act*, SNWT 1997, c 18, s 53(1)(a) [NWT Act]; *Family Law Act*, SNWT (Nu) 1997, c 18, s 53(1)(a) [Nunavut Act]; *Family Homes on Reserves Act*, note 15, s 15(1).

<sup>84</sup> BC Act, s 2.

#### 4. PRELIMINARY RECOMMENDATION

[142] After weighing all the arguments, our preliminary view is that consent to disposition should remain a requirement.

[143] Protection for the vulnerable is a key consideration. It is desirable to reduce inconvenience for homeowners but not at the cost of forcing vulnerable spouses or partners to litigate or lose their home.

[144] There are other ways to reduce inconvenience to homeowners. Our preliminary recommendation does not mean consent to disposition must be preserved exactly as it is now, with all its flaws. In the following chapters, we propose reforms to reduce the burden and streamline procedures, while maintaining appropriate protection. Reform may not make consent to disposition perfect but there is room for significant improvement.

[145] Reform is also needed to treat spouses and adult interdependent partners alike. One of our guiding principles for this project is that spouses and adult interdependent partners should have the same rights, benefits, and obligations. The next chapter discusses the reasons.

##### **RECOMMENDATION 1**

---

---

A homeowner should not be able to sell, mortgage, or otherwise dispose of a home without the consent of their spouse or adult interdependent partner.

A spouse or adult interdependent partner should have the ability to prevent a disposition of a home by withholding consent.

[146] We welcome any comments you may have in support of or in opposition to this preliminary recommendation or additional options for reform.



## CHAPTER 4

# Extending Consent to Disposition to Adult Interdependent Partners

## A. Spouses and Adult Interdependent Partners

---

[147] In Alberta legislation, spouse means a person who is legally married.<sup>85</sup>

[148] The term adult interdependent partner is used in Alberta legislation to mean individuals who are not married to each other but qualify for rights, benefits, and obligations similar to those of spouses. To be recognized as adult interdependent partners, a couple must meet the criteria in the *Adult Interdependent Relationships Act*.<sup>86</sup> Adult interdependent partner has a similar meaning to common-law partner but the two terms are not interchangeable. Common-law partner is an everyday term for unmarried individuals who live in a marriage-like relationship. It does not have a technical meaning in Alberta law.

### ISSUE 2

---

Should adult interdependent partners have the same rights as spouses regarding consent to disposition?

[149] In this project, we have adopted the guiding principle that spouses and adult interdependent partners should have the same rights, benefits, and obligations. There are several reasons why ALRI adopted this guiding principle.

[150] First, the law should reflect social realities. A significant number of people now live in common-law relationships and the numbers have been increasing in recent decades. The 2016 census found there were 320,260 persons in Alberta living with a common-law partner.<sup>87</sup> This number is approximately 17 per cent of all “persons in a couple” and approximately 10 per cent of the population aged

<sup>85</sup> *Interpretation Act*, RSA 2000, c I-8, s 28(1)(zz.1).

<sup>86</sup> See *Adult Interdependent Relationships Act*, SA 2002, c A-4.5, ss 1, 3 [*Adult Interdependent Relationships Act*].

<sup>87</sup> Statistics Canada, *Families, Households and Marital Status Highlight Tables: Marital status and opposite- and same-sex status by sex for persons aged 15 and over living in private households for both sexes, total, presence and age of children, 2016 counts, Canada, provinces and territories* (Ottawa: Statistics Canada, 2017), online: [[perma.cc/WX3V-G8PF](https://perma.cc/WX3V-G8PF)]. Not all of these individuals would meet the definition of adult interdependent partners. Statistics Canada defines a common-law couple as two people living together who are not legally married to each other.

15 or more. When rights, benefits, or obligations are limited to legally married spouses, it excludes many families.

[151] Second, there are equality issues. For many years now, marital status has been recognized as an analogous ground under section 15 of the *Canadian Charter of Rights and Freedoms*.<sup>88</sup> While courts have sometimes found legislation providing rights only to married couples to be constitutional, we have concluded that fairness requires equivalent treatment for both kinds of couples.<sup>89</sup> This position is consistent with our recent work, particularly our recent project on property division.<sup>90</sup> We also recognize the need for equal treatment regardless of sexual orientation – another analogous ground.<sup>91</sup> The 2016 census found approximately 62 per cent of same-sex couples in Alberta are common-law.<sup>92</sup> Legislation that excludes unmarried couples has a disproportionate impact on same-sex couples and could be vulnerable to a constitutional challenge.

[152] Third, eliminating the distinction is consistent with other Alberta legislation. Adult interdependent partners already have most of the same rights, benefits, and obligations as spouses under Alberta legislation. Among other things, spouses and adult interdependent partners are already treated the same in legislation about support, property division, and succession. It is also consistent with legislation in some – although not all – other Canadian jurisdictions.<sup>93</sup>

[153] Finally, our early consultation found strong support for treating both kinds of couples alike. A large number of survey respondents said the exclusion of adult interdependent partners was a reason to reform or repeal the *Dower Act*.

<sup>88</sup> See *Miron v Trudel*, [1995] 2 SCR 418.

<sup>89</sup> See especially *Nova Scotia (AG) v Walsh*, 2002 SCC 83 and *Quebec (AG) v A*, 2013 SCC 5. In both cases, the Supreme Court upheld matrimonial property legislation that excluded unmarried couples.

<sup>90</sup> FR 112 at paras 229–59.

<sup>91</sup> See *Egan v Canada*, [1995] 2 SCR 513.

<sup>92</sup> Statistics Canada, *Families, Households and Marital Status Highlight Tables: Marital status and opposite- and same-sex status by sex for persons aged 15 and over living in private households for both sexes, total, presence and age of children, 2016 counts, Canada, provinces and territories* (Ottawa: Statistics Canada, 2017), online: [[perma.cc/WX3V-G8PF](https://perma.cc/WX3V-G8PF)].

<sup>93</sup> The same rules apply to spouses and common-law partners in British Columbia, Saskatchewan, Manitoba, Northwest Territories, Nunavut, and under the provisional rules in the federal *Family Homes on Reserves Act*: BC Act, s 1 “spouse”; Saskatchewan Act, s 2(d)(ii); Manitoba Act, s 1 “spouse”; NWT Act, s 1(1) “spouse”; Nunavut Act, s 1(1) “spouse”; *Family Homes on Reserves Act*, note 15, s 15(1).

Very few respondents seemed to be in favour of legislation that applied only to spouses. This result is consistent with results from other consultations.<sup>94</sup>

[154] In contrast, there are very few arguments for maintaining the distinction between spouses and adult interdependent partners.

[155] One of the strongest arguments for maintaining the distinction is that adding adult interdependent partners would undermine the simplicity of the *Dower Act*. As one practitioner said, one of the benefits of the *Dower Act* is that the rules are “black and white”, meaning that it is simple to apply and understand. In early consultation, several respondents raised concerns about the difficulty of proving an adult interdependent relationship. It is fairly straightforward to determine if a couple is married or not. It can be more difficult to determine if a couple meets the criteria under the *Adult Interdependent Relationship Act*. If the legislation applied to adult interdependent partners, there would be more uncertainty about whether it applies in particular cases.

[156] The potential for uncertainty is a problem but, in our view, not a reason to deny rights, benefits, or obligations to adult interdependent partners. As discussed below, there are ways to mitigate this problem.

[157] Very few respondents mentioned other reasons for maintaining a distinction between spouses and adult interdependent partners. There are two reasons that came up once or twice. The first reason that is that marriage is special and rights, benefits, and obligations should be reserved for this special relationship. The second reason is that individuals should have a choice about how to arrange their relationships. Those who marry have opted in to the rights, benefits, and obligations of marriage but unmarried partners may not want them. We note, however, that there are ways to opt out of most rights, benefits,

---

<sup>94</sup> In 2016, ALRI commissioned phone survey research for our Property Division project. There were 1,208 respondents. One of the questions was “Which of the following values is most important in any new law about dividing property between common-law couples when they split up?” The question asked respondents to select from four options. The most popular was “All couples should be treated the same, whether they are married or not,” with 44 per cent of respondents selecting it: Aleena Amjad Hafeez, *Albertan’s Perceptions and Attitudes regarding Common-Law Property Division Laws: Exploring Evidence from the Alberta Survey 2016*, Research Paper (2017) at 25, online: <[www.alri.ualberta.ca/wp-content/uploads/2020/06/AB\\_cohab\\_survey\\_results.pdf](http://www.alri.ualberta.ca/wp-content/uploads/2020/06/AB_cohab_survey_results.pdf)>. In an online survey we conducted in 2017, 77 per cent of the 181 respondents agreed that property division legislation should apply to adult interdependent partners: see FR 112 at para 205. In a 2002 phone survey commissioned by Alberta Justice, 800 people living in Alberta were asked: “Do you agree or disagree that the same benefits and obligations applied to married couples should be applied to common law and same-sex relationships[?]” Fifty-nine per cent agreed: Marcomm Works, *Alberta Family Law Reform Stakeholder Consultation Report* (2002) at 88.

and obligations, including those under the *Dower Act*.<sup>95</sup> Spouses or partners can make different arrangements if they prefer.

[158] On balance, we have concluded that the reasons for eliminating the distinction between spouses and adult interdependent partners are stronger than the reasons for maintaining the distinction.

[159] We have considered other approaches to reform. For example, we considered whether consent to disposition should extend to other types of relationships. There might be some benefits to requiring consent from any person or any adult who lives in a home. It would protect some people who may have a strong interest in remaining in the home, like an adult child who lives with a homeowner or all the members of polyamorous relationship living together. There would also be pitfalls. It would be very difficult to craft a rule that would distinguish between those who have important interests to protect and those who do not. It could mean that consent would be required from several individuals to make a disposition. Real estate transactions would be much more complicated if several individuals had to give consent. In our view, it is not feasible to require consent to disposition from those who are not spouses or adult interdependent partners.

## **RECOMMENDATION 2**

---

---

Adult interdependent partners should have the same rights as spouses regarding consent to disposition.

[160] We welcome any comments you may have in support of or in opposition to this preliminary recommendation or additional options for reform.

## **B. Are Any Adjustments Required to Treat Spouses and Adult Interdependent Partners Alike?**

---

[161] In early consultation, we heard some concerns that requiring consent to disposition from adult interdependent partners would create new problems.

---

<sup>95</sup> A spouse can release their dower rights in a property by executing a dower release: *Dower Act*, s 7.

## 1. PROVING AN ADULT INTERDEPENDENT RELATIONSHIP

[162] Many respondents pointed out that an adult interdependent relationship is more difficult to prove than a marriage. It may be difficult for an owner or their lawyer to determine if the owner is in an adult interdependent relationship.

[163] It is relatively easy for a person to prove they are married by showing a marriage certificate or prove they are divorced by showing a divorce judgment.<sup>96</sup> In contrast, there is no system for registering or issuing certificates to prove adult interdependent relationships. The criteria for establishing an adult interdependent relationship are subjective and difficult to measure.<sup>97</sup> Sometimes partners have different perceptions, so they may not agree about whether their relationship meets the criteria.

[164] The difficulty of proving an adult interdependent relationship might increase the risk of owners making incorrect affidavits. Some might mistakenly believe their relationship is not an adult interdependent relationship. Some might lie, knowing it will be difficult to disprove their statement.

[165] The concern is a legitimate one but we are not convinced it should stand in the way of reform.

[166] The existing system to check for compliance does not rely on documents to prove that a person is married or divorced. It relies mostly on self-reporting. An owner may prove that consent to disposition is not required by making an affidavit stating they are not married. Most of the time, no one investigates whether the statement is true. A lawyer or commissioner for oaths cannot search marriage or divorce records. At best, they can ask a client to provide a marriage or divorce certificate. We heard from at least one lawyer who sometimes makes this request but it seems unreasonable to expect all lawyers or commissioners for oaths to do so every time.

[167] Self-reporting works in many other contexts. Other legislation or government programs depend on individuals self-reporting common-law or adult interdependent relationships. For example, individuals have to report whether they are in a common-law relationship when filing taxes or applying for a firearms licence and have to report whether they are in an adult interdependent

---

<sup>96</sup> It is possible, of course, for a person to lie about their marital status. Although Alberta Vital Statistics keeps records of marriages performed in Alberta, it is not possible to search a registry to determine whether a person is married.

<sup>97</sup> See *Adult Interdependent Relationships Act*, note 86, s 1. For a full discussion of the criteria, see FR 112.

relationship for health care coverage and other government benefits, employment benefits, and pension plans, among other things.

[168] Other Canadian jurisdictions, including the ones that require consent from common-law partners, also rely on self-reporting to prove that consent to disposition is or is not required. Like Alberta, other jurisdictions rely on affidavit evidence to prove the owner's marital status.<sup>98</sup>

[169] There is some risk in any system that relies on self-reporting. Legislation cannot eliminate this risk.

[170] While we do not have any specific proposals for legislation, there may be options to make self-reporting work better in practice. Forms and procedures can play a role. Providing more information about the criteria for an adult interdependent relationship, the potential consequences for making a disposition without consent, or the potential consequences of making a false affidavit may help. If an owner is fully informed, they may understand the importance of an affidavit and take care that it is correct. There are various ways to provide this kind of information to owners. It could be included in prescribed forms. If a lawyer is involved in a transaction, the lawyer could explain and give legal advice about the owner's specific situation. Lawyers or organizations could develop and promote best practices, such as standard questionnaires or information sheets.

[171] In some borderline cases, it may be very difficult to determine if consent to disposition is required. One respondent had a simple solution: "When in doubt, get the dower consent." There may be some inconvenience to obtain consent but the alternative means a partner may lose their home unexpectedly.

## 2. OVERLAPPING RIGHTS

[172] Another issue is the possibility of overlapping rights. An individual who is separated but not divorced from their spouse may have both a spouse and an adult interdependent partner.<sup>99</sup>

---

<sup>98</sup> See eg *The Homesteads Forms Regulations*, RRS c H-5.1, Reg 1, Form D; Teranet Manitoba, *Land Titles Forms*, Transfer Form 5P, online: <[www.teranetmanitoba.ca/wp-content/uploads/2019/11/transfer\\_5pe-1.pdf](http://www.teranetmanitoba.ca/wp-content/uploads/2019/11/transfer_5pe-1.pdf)> [[perma.cc/N4FF-GHY5](https://perma.cc/N4FF-GHY5)].

<sup>99</sup> See *Adult Interdependent Relationships Act*, note 86, s 5(2).

[173] Only one other Canadian jurisdiction has legislation that anticipates the possibility of overlapping rights.<sup>100</sup> In Manitoba, only one spouse or partner can have homestead rights – including consent to disposition – in a property. The earliest relationship has priority. A later spouse or partner cannot have homestead rights until the first one’s rights have been extinguished.<sup>101</sup>

[174] We considered whether there is a need for a legislated rule about overlapping rights. There are at least two options. One would be to require consent from only one spouse or partner, as in Manitoba. There would have to be a rule about which spouse or partner has priority. For example, consent might be required only from the spouse or partner in the earlier relationship, or from the spouse or partner who lived in the home most recently. The other option would be to require consent from both the spouse and the partner.

[175] There are other ways to address this issue. Below, we propose reforms that would significantly reduce the likelihood of overlapping rights. Requiring consent to disposition only for a home where the couple lived together would eliminate some and a time limit would eliminate many others.<sup>102</sup> If both reforms were implemented, very few people would be affected by overlapping rights.

[176] Our preliminary view is that a legislated rule is not necessary, given our other preliminary recommendations. It would be rare for an owner to have both a spouse and an adult interdependent partner who have lived in the same home within the last three years. If problems arise, they could be resolved on a case-by-case basis.

---

<sup>100</sup> Overlapping rights can only arise in the six jurisdictions that require consent to disposition from both spouses and common-law partners.

<sup>101</sup> Manitoba Act, s 2.2:

2.2 A second or subsequent spouse or common-law partner of the owner does not acquire homestead rights in a property previously occupied by the owner and his or her previous spouse or common-law partner until the following conditions are satisfied:

- (a) if the previous spouse or common-law partner acquired a homestead right in the property, that right has been released or terminated in accordance with this Act;
- (b) if the previous spouse or common-law partner has an ownership interest in the property, that interest has been transferred to the owner or another person;
- (c) if the previous spouse or common-law partner has a claim under *The Family Property Act* for an accounting and equalization of assets, that claim has been satisfied.

Manitoba’s legislation also specifically addresses the situation where an owner obtains consent from the wrong spouse or partner: Manitoba Act, s 16(1)–(1.1).

<sup>102</sup> A three-year time limit would substantially reduce the likelihood of overlapping rights because the most common way to become adult interdependent partners is to live together for three years: see *Adult Interdependent Relationships Act*, note 86, s 3(1)(a)(i). This solution is not perfect. There would still be scenarios where overlapping rights could arise but they would be rare.





## CHAPTER 5

# How Could Reforming the Definition of Homestead Resolve Problems?

## A. The Definition of Homestead

---

[177] The current definition of homestead contributes to many of the practical problems discussed in Chapter 2. Changing the definition could eliminate some of the issues.

[178] The *Dower Act* defines a homestead as:<sup>103</sup>

1(d) “homestead” means a parcel of land

- (i) on which the dwelling house occupied by the owner of the parcel as the owner’s residence is situated, and
- (ii) that consists of
  - (A) not more than 4 adjoining lots in one block in a city, town or village as shown on a plan registered in the proper land titles office, or
  - (B) not more than one quarter section of land other than land in a city, town or village.

[179] Neither “parcel of land” nor “owner” is defined in the *Dower Act*. Gaps in the definition have been filled piecemeal by other legislation and case law, so relevant rules are scattered across different sources.<sup>104</sup>

[180] Although the statute only refers to the owner’s residence, in practice, land is treated as a homestead if either the owner or the non-owner have ever lived there. The reason is that the prescribed form of affidavit that must be used to prove land is not a homestead is inconsistent with the statute. It requires the

<sup>103</sup> *Dower Act*, s 1(d).

<sup>104</sup> See *Dower Act*, s 1(d); *Condominium Property Act*, RSA 2000, c C-22, s 75; *Metis Settlements Act*, RSA 2000, c M-14, s 222(1)(v); *Metis Settlements Land Registry Regulation*, Alta Reg 361/1991, s 79; Metis Settlements General Council, *Land Policy*, Policy GC-P9201 (Edmonton: Metis Settlements General Council, 1992) s 7.3, online: <msgc.ca/wp-content/uploads/2019/10/policy-land\_policy\_part\_2.pdf> [[perma.cc/5SCR4-QMCQ](https://perma.cc/5SCR4-QMCQ)]; Pawluk, note 60 at para 72.

owner to swear that “neither myself nor my spouse have resided on the within mentioned land at any time since our marriage [emphasis added].”<sup>105</sup>

[181] Land remains a homestead until the owner sells or transfers it, the non-owner releases their dower rights, or the non-owner obtains a judgment for damages to compensate for a wrongful disposition.<sup>106</sup> It does not matter if the owner or non-owner has moved out.

## **B. What Property Should Be Included?**

---

[182] The purpose of the *Dower Act* is to protect non-owners from losing their home. The definition of homestead does not serve this purpose well.

### **1. OCCUPANCY**

#### **ISSUE 3**

---

Who should have to live in a home to require consent to disposition?

[183] Consent to disposition should be required for a home but what makes a house a home? There are four options:

- A home is where the owner lives or has lived;
- A home is where the owner or the non-owner lives or has lived;
- A home is where the non-owner lives or has lived;
- A home is where the owner and the non-owner live or have lived.

[184] Currently, either the first or the second option applies, depending on whether one relies on the *Dower Act* itself or the prescribed form of affidavit.<sup>107</sup>

<sup>105</sup> *Forms Regulation*, note 4, Form B [emphasis added]. In 1975, ALRI recommended correcting the discrepancy: Institute of Law Research and Reform (Alberta), *Small Projects*, Final Report 17 (1975) at 4-5, online: <[www.alri.ualberta.ca/wp-content/uploads/2020/05/fr017.pdf](http://www.alri.ualberta.ca/wp-content/uploads/2020/05/fr017.pdf)>. The recommendation has never been implemented. The *Forms Regulation* was amended in February 2021 but this form was not affected by the amendments: see OC 63/2021, 2021 A Gaz II, 121 (*Dower Act*).

<sup>106</sup> *Dower Act*, s 3. The last requirement is probably superfluous. The action for damages is only available if the owner spouse makes a disposition “that results in the registration of the title in the name of any other person”: *Dower Act*, s 11(1). A non-owner spouse could not obtain a judgment for damages unless the property had been transferred and therefore ceased to be a homestead.

<sup>107</sup> Compare *Dower Act*, s 1(d); *Forms Regulation*, note 4, Form B.

[185] Either the third or fourth option would serve the purpose better. If the purpose of consent to disposition is to protect a non-owner from losing their home, it does not make sense to have it apply to a place where they may have never lived. The third or fourth option would protect places where they actually lived.

[186] It could be argued that the third option best protects a non-owner. Besides protecting their interest in a home where the couple lived together, it would protect them if one spouse or partner lives in a home owned by the other. It could happen during an intact relationship if a couple is “living apart together”, meaning they are in a relationship but live apart. It could also happen when a couple separates.<sup>108</sup>

[187] Although enhanced protection for a non-owner in the third option is attractive, it would be inconsistent with other Alberta legislation and with other jurisdictions.

[188] Other Alberta legislation uses the fourth option. The *Family Law Act*, the *Family Property Act*, and the *Wills and Succession Act* all have a nearly identical definition of “family home”.<sup>109</sup> The version in the *Family Property Act* is representative:

1(a.2) “family home” means property

- (i) that is owned or leased by one or both spouses or adult interdependent partners,
- (ii) that is or has been occupied by the spouses or adult interdependent partners as their family’s home, and
- (iii) that is
  - (A) a house, or part of a house, that is a self-contained dwelling unit,
  - (B) part of business premises used as living accommodation,
  - (C) a mobile home,
  - (D) a residential unit as defined in the *Condominium Property Act*, or

<sup>108</sup> See eg *Dowd v Bowman*, 2020 ABQB 38. The wife was the sole legal owner of a rental property. Her husband sometimes stayed at the rental property when the couple was experiencing marital problems.

<sup>109</sup> *Family Law Act*, note 70, s 67(1); *Family Property Act*, s 1(a.2); *Wills and Succession Act*, note 9, s 72(a).

(E) a suite.

[189] Every other Canadian jurisdiction uses the fourth option in legislation requiring consent to disposition. Consent is required only for a home where the spouses or partners lived together.<sup>110</sup>

[190] We propose using the fourth option. Consent to disposition should be required for a home if the owner and their spouse or adult interdependent partner live or have lived in the home.

[191] This change would solve some practical issues. It would narrow the definition, so consent would be required less often. It would eliminate situations where a non-owner must consent to the disposition of a property where they have never lived. An owner who buys a home after separation would not have to seek a spouse or partner's consent to sell, mortgage, or otherwise dispose of it. A non-owner who has never lived in a home would not be able to prevent a disposition or use consent to disposition as a sword.

### **RECOMMENDATION 3**

---

Consent to disposition should be required only for a home where both spouses or both adult interdependent partners live together.

[192] We welcome any comments you may have in support of or in opposition to this preliminary recommendation or additional options for reform.

## **2. PAST OCCUPANCY**

### **ISSUE 4**

---

How long should consent to disposition be required where the spouses or adult interdependent partners no longer live in the home?

[193] Under the *Dower Act*, land remains a homestead indefinitely, even after the couple has moved out. Sometimes a couple will move but keep their former home as a rental or investment property. The non-owner would have to consent to any disposition of the former home, even though it is no longer the couple's

<sup>110</sup> BC Act, s 1; Saskatchewan Act, s 2(c); Manitoba Act, s 1; Ontario Act, s 18(1); art 395 CCQ; New Brunswick Act, s 16(1); Nova Scotia Act, s 3(1); PEI Act, s 19(1); Newfoundland Act, s 6(1); Yukon Act, s 21(1); NWT Act, s 50(1); Nunavut Act, s 50(1); *Family Homes on Reserves Act*, note 15, s 2(1).

home. There is no limit on the number of homesteads an owner may have. If a couple moves repeatedly, they could accumulate many homesteads.

[194] Under the current rules, consent to disposition is required as long as a couple remains legally married. As discussed above, we heard consent to disposition can cause problems when couples have been separated for many years. Some couples divide property informally and do not complete dower releases. Sometimes, even when there is an agreement or order about property division, a dower release is overlooked. It can be difficult to obtain a non-owner's consent years after separation, especially if they have moved far away or the spouses have lost contact.

[195] The current rules go farther than necessary to protect a non-owner from losing their home. A non-owner will not become homeless if the owner sells a rental or investment property that used to be the couple's home. A non-owner who has lived elsewhere for many years will not become homeless if the owner sells a home years after separation.<sup>111</sup> The focus should be on a home where a couple lives at the time of disposition. A non-owner should not be able to prevent disposition indefinitely.

[196] It would not be fair, however, if consent were no longer required as soon as a couple or one of them moves out of a home. One of the benefits of consent to disposition is that it protects a non-owner upon relationship breakdown. A spouse or partner may not always have a choice about moving out. For example, they may have to leave suddenly because of domestic violence. Consent to disposition protects a non-owner at this time, so they do not have to immediately make an application for exclusive possession or make a claim for property division and file a certificate of *lis pendens*.

[197] We propose that consent to disposition should be required while a couple lives together in a home and for a period of time afterwards. In other words, there would be a time limit.

[198] The time limit should give a non-owner enough time to learn about their rights and decide whether to take action to protect their interest in the home. The time limit should allow some time for negotiation, so couples are not pushed towards litigation. A year may not be sufficient. It would be helpful if the limit aligned with time limits for making a property division claim under the *Family*

---

<sup>111</sup> If the home is family property, a non-owner may have a claim to a share of the proceeds. That claim could be resolved under the *Family Property Act*.

*Property Act* but it is not feasible to achieve perfect alignment.<sup>112</sup> For one thing, spouses can restart the time limit under the *Family Property Act* by applying for divorce.

[199] We suggest three years would be an appropriate time limit. It would allow time to explore options but would encourage a non-owner to bring any claim within a reasonable time.

[200] The time limit should be measured from the time the spouses or partners last lived in the home together. Effectively, the requirement for consent to disposition would expire three years after a move or separation.

[201] The time limit should be the same for spouses and adult interdependent partners and should not be cut short even if the couple divorces or becomes former adult interdependent partners.<sup>113</sup>

[202] There would still be an option for a non-owner to release their rights sooner. A non-owner could provide a dower release before the three years is up. A separation agreement or order might require them to provide a dower release.

#### **RECOMMENDATION 4**

---

Consent to disposition should be required only if the spouses or adult interdependent partners have lived together in the home within the last three years.

[203] We welcome any comments you may have in support of or in opposition to this preliminary recommendation or additional options for reform.

### **3. MULTIPLE HOMES**

#### **ISSUE 5**

---

Should there be a limit on the number of homes that require consent to disposition?

<sup>112</sup> *Family Property Act*, ss 6–6.1.

<sup>113</sup> Compared to a marriage, an adult interdependent relationship can end very quickly. Spouses remain legally married until a divorce is finalized. In most cases, spouses must be separated for a year before they can obtain a divorce and it often takes longer to finalize the divorce. Adult interdependent relationships usually end after a year of separation and can end more suddenly. For example, a relationship ends immediately if one of the partners marries a third party: *Adult Interdependent Relationships Act*, note 86, s 10(1).

[204] A person can have more than one homestead. It can occur if a couple moves from one home to another, as discussed above. It can also occur if a couple divides their time between two homes they own, like a primary home and a vacation home.

[205] This rule is not unique to Alberta. Other Canadian jurisdictions recognize that a couple may have more than one home.<sup>114</sup>

[206] Arguably, only one home is necessary for the purpose of protecting a non-owner. The difficulty would be determining which one. If the purpose is to protect a non-owner from losing their home, the question is which property the non-owner considers to be their home. It would be very difficult to establish a general rule. A home is not necessarily the most valuable property or the one where a person spends the most time. Every individual will have their own reasons for why a place is their home.

[207] Some jurisdictions have systems for designating a property as a home or requiring consent to change a designation.<sup>115</sup> While there is merit in letting individuals choose the property that they consider to be their home, we doubt that the benefit outweighs the administrative burden.

[208] We have concluded there is no need to limit the number of homes affected. It is not unreasonable to require consent to disposition for more than one property. The time limit proposed above will narrow the properties potentially affected so consent will only be required for homes where the couple lives or have lived within the last three years.

## **RECOMMENDATION 5**

---

---

If the spouses or adult interdependent partners have lived in more than one home within the last three years, consent to disposition should be required for each home.

[209] We welcome any comments you may have in support of or in opposition to this preliminary recommendation or additional options for reform.

---

<sup>114</sup> Some jurisdictions have legislation explicitly stating that a couple may have more than one home: see New Brunswick Act, s 16(2); Nova Scotia Act, s 3(4); Newfoundland Act, s 6(6); Yukon Act, s 21(3). In other jurisdictions, it is implicit: see eg Ontario Act, s 18(1). In Manitoba, a person may have only one homestead: Manitoba Act, s 2.

<sup>115</sup> Manitoba Act, ss 7, 9; Ontario Act, s 20.

#### 4. AMOUNT OF LAND

##### ISSUE 6

---

What amount of land should require consent to disposition?

[210] The term “parcel of land” is used in both the *Land Titles Act* and the *Dower Act* but not defined in either. A parcel can apparently consist of more than one lot. A parcel may be:<sup>116</sup>

1(d) (ii) ...

- (A) not more than 4 adjoining lots in one block in a city, town or village as shown on a plan registered in the proper land titles office, or
- (B) not more than one quarter section of land other than land in a city, town or village.

[211] Like Alberta, Saskatchewan and Manitoba define the amount of land that may be subject to consent to disposition, although the details are slightly different. In Saskatchewan the maximum size of a homestead is 65 hectares – equivalent to a quarter section – with no distinction between urban and rural homesteads.<sup>117</sup> In Manitoba, a homestead in a city, town, or village may be up to six lots, one block, or one acre. A rural homestead may be up to a half section and must include the quarter section or lot where the house is located.<sup>118</sup> Most other Canadian jurisdictions do not have a specific limit on the size of parcel.<sup>119</sup>

[212] There are a few minor issues with the limits in the *Dower Act*.

[213] First, the distinction between land “in a city, town, or village,” and “land other than land in a city, town or village” could leave some gaps. What about agricultural land within the boundaries of an urban municipality, or lots on a registered plan outside one?

<sup>116</sup> *Dower Act*, s 1(d).

<sup>117</sup> Saskatchewan Act, s 2(c).

<sup>118</sup> Manitoba Act, s 1 “homestead”.

<sup>119</sup> Eight have a provision that only the part of property used for residential purposes is affected by consent to disposition: see eg Ontario Act, s 18(3):

18(3) If property that includes a matrimonial home is normally used for a purpose other than residential, the matrimonial home is only the part of the property that may reasonably be regarded as necessary to the use and enjoyment of the residence.

See also New Brunswick Act, s 16(1); Nova Scotia Act, s 3(2); PEI Act, s 19(3); Newfoundland Act, s 6(2); Yukon Act, s 21(5); NWT Act, s 50(1); Nunavut Act, s 50(3). In two provinces, the number of dwellings on the land is relevant: see arts 404–405 CCQ; Newfoundland Act, s 6(4).



[214] Second, there is some ambiguity about which lots or areas of land are included. Does a homestead include more than one lot even if some of the lots have no structures on them? If a lot or quarter section has been subdivided, do all the newly created lots remain part of the homestead?<sup>120</sup>

[215] We propose that the land affected should usually be all the land included on one certificate of title. In urban areas, it would usually be one lot. In rural or unsubdivided areas, it would usually be one quarter section. At most, the land affected would be up to one section, which is the maximum amount of land that may be included on one certificate of title.<sup>121</sup> For a condominium, it would be one unit.

[216] Consent to disposition would be required for the whole lot, quarter section or other area of land, or condominium unit if any part of it is the couple's home. For example, consent would be required to dispose of a lot even if part of it was used for business purposes, like a building with business premises on the ground floor and the couple's residence above. Consent would also be required if the couple lives on a lot with more than one suite, ranging from a home with a basement suite to an apartment building.

## **RECOMMENDATION 6**

---

Consent to disposition should be required for all the land included on the certificate of title for the land where the home is located.

[217] We welcome any comments you may have in support of or in opposition to this preliminary recommendation or additional options for reform.

[218] If a home is built on more than one lot, the obvious solution is to assume that consent is required to dispose of either or both.<sup>122</sup> Under the *Dower Act* a

<sup>120</sup> A question about a subdivision arose in *Schwormstede v Green Drop Ltd* (1994), 155 AR 302, 1994 ABCA 259 (CanLII). A married couple lived on a quarter section. The husband owned the quarter section. The husband proposed to sell a portion of the quarter section to Green Drop. The wife objected and filed a caveat against the whole quarter section. The husband subdivided the land to make two lots: one of about 151 acres (including the couple's home) and another of about 9 acres. He sold the 9-acre lot to Green Drop. The Court of Appeal held that the disposition was in violation of the *Dower Act*, implying that both lots remained homesteads.

<sup>121</sup> *Land Titles Act*, note 51, s 26(1):

26(1) A certificate of title shall not include the following:

(a) more than one section of land;

...

<sup>122</sup> This solution is more or less the one that ALRI proposed in 1995: RFD 14 at 155. ALRI also proposed that a court should have the power to delineate a smaller portion to "avoid unfairness arising from this expansion of the normal dimensions of the home (at 155). In this project, we have reconsidered that

*Continued*

person may have more than one homestead. We do not propose to change that rule. If a couple lived on two or more lots, consent to disposition would be required for either or both.<sup>123</sup>

[219] If a lot or quarter section is subdivided, consent to disposition should be required for any of the new lots – at least for a time. The time limit we proposed above would apply after a subdivision. If the couple’s home is on one of the newly created lots, the time limit would start to run for the other lots, just as it would if the couple had moved. This rule would prevent an owner from using subdivision to circumvent the requirement for consent to disposition, without tying up property indefinitely.

## 5. INTERESTS IN LAND

### ISSUE 7

---

Which interests in land should require consent to disposition?

[220] The word “owner” is not defined in the *Dower Act*. It is defined in the *Land Titles Act* as “a person entitled to any freehold or other estate or interest in land, at law or in equity, in possession, in futurity or expectancy.”<sup>124</sup> This definition is a very broad one, as there are many different kinds of estates or interests in land.

[221] Most other Canadian jurisdictions have similarly imprecise language, stating that consent to disposition is required if one spouse (or in some jurisdictions, partner) is the owner of land<sup>125</sup> or has an interest in land.<sup>126</sup> A few state that consent to disposition is required only if the owner’s interest is or could

---

proposal. We now conclude that the possibility of delineation would add complexity without much obvious benefit.

<sup>123</sup> The *Municipal Government Act*, RSA 2000, c M-26, s 1(1)(v) has a definition of “parcel of land” that seems to capture the same general idea:

1(1)(v) “parcel of land” means

- (i) where there has been a subdivision, any lot or block shown on a plan of subdivision that has been registered in a land titles office;
- (ii) where a building affixed to the land that would without special mention be transferred by a transfer of land has been erected on 2 or more lots or blocks shown on a plan of subdivision that has been registered in a land titles office, all those lots or blocks;
- (iii) a quarter section of land according to the system of surveys under the *Surveys Act* or any other area of land described on a certificate of title; ...

<sup>124</sup> *Land Titles Act*, note 51, s 1(r).

<sup>125</sup> BC Act, s 1; Saskatchewan Act, ss 2(c),(e); Manitoba Act, s 1; arts 404–405 CCQ; Newfoundland Act, s 6(1)(b).

<sup>126</sup> BC Act, s 1; Ontario Act, s 18(1); Nova Scotia Act, s 3(1); PEI Act, s 19(1); Yukon Act, s 21(1); NWT Act, s 50(1); Nunavut Act, s 50(1).

be registered under the applicable land titles system.<sup>127</sup> British Columbia’s legislation includes a helpful clarification that the interest must be one that entitles the owner to possession.<sup>128</sup>

[222] Case law clarifies that consent to disposition is required only for a subset of possible interests: those for which a certificate of title could be issued.<sup>129</sup> Those interests are a fee simple estate, a leasehold estate for a term of more than three years, or a life estate.<sup>130</sup>

[223] Consent to disposition is also required if a person has an interest in land that can be registered with the Metis Settlements Land Registry, including Metis title, provisional Metis title, or an allotment.<sup>131</sup>

[224] With one exception, the existing rules are appropriate. Below, we propose that the life estate should be excluded. Otherwise, the list of interests affected should remain unchanged.

## **RECOMMENDATION 7**

---

Consent to disposition should be required for the following interests in land for which a certificate of title can be issued: a fee simple estate, a leasehold estate for more than three years, Metis title, provisional Metis title, or an allotment.

[225] We welcome any comments you may have in support of or in opposition to this preliminary recommendation or additional options for reform.

## **6. MOBILE HOMES**

### **ISSUE 8**

---

Should consent to disposition be required for a mobile home?

<sup>127</sup> See eg BC Act, s 1: “‘homestead’ means land or any interest in it entitling the owner to possession of it that is registered in the records of the land title office in the name of the spouse ...”; Saskatchewan Act, s 2(e): “owning spouse” means a spouse who is a “registered owner of an interest in land.”

<sup>128</sup> BC Act, s 1.

<sup>129</sup> *Pawluk*, note 60 at para 75, 96–99.

<sup>130</sup> See *Land Titles Act*, note 51, s 32.

<sup>131</sup> See *Metis Settlements Act*, RSA 2000, c M-14, s 222(1)(v) (which provides that the Metis Settlements General Council may make policies providing whether the *Dower Act* applies to interests in land); *Metis Settlements Land Registry Regulation*, Alta Reg 361/1991, s 79; Metis Settlements General Council, *Land Policy*, Policy GC-P9201 (Edmonton: Metis Settlements General Council, 1992) s 7.3, online: <msgc.ca/wp-content/uploads/2019/10/policy-land\_policy\_part\_2.pdf> [[perma.cc/5CR4-QMCQ](https://perma.cc/5CR4-QMCQ)].

[226] The *Dower Act* does not protect all homeowners in Alberta. It applies only if the owner has an interest in land. Many people who own mobile homes do not have an interest in the land where the mobile home is located and therefore consent to disposition is not required under the *Dower Act*.

[227] A significant number of people in Alberta live in mobile homes. The 2016 Census found 48,155 mobile homes in Alberta.<sup>132</sup> The median owner-estimated value was \$125,239; the average was \$178,992.<sup>133</sup>

[228] Some individuals own both a mobile home and the land where it is located. In this scenario, there is some protection for a non-owner. If the mobile home is a couple's home, the non-owner would have to consent to a disposition of the land. In theory, the mobile home might be considered part of the land if it is a fixture.<sup>134</sup> In practice, a real estate purchase contract will usually state whether the mobile home is included or not included in the sale.<sup>135</sup> Consent to disposition would not be required, however, if the owner removed the mobile home from the land and sold it separately.

[229] Other mobile homeowners do not own the land where their home is located. Instead, they rent a site. The *Mobile Homes Sites Tenancies Act* governs the agreement between the owner of the site and the person who occupies it.<sup>136</sup> In most urban municipalities, mobile homes are invariably on rented sites because zoning requirements limit them to mobile home parks.

[230] There is no registry that records ownership of mobile homes and mobile homes can be bought and sold without the involvement of a lawyer. We heard in early consultation that it can be difficult to prove ownership of a mobile home. If a purchaser borrows money to buy the mobile home, the lender may register a financing statement at the Personal Property Registry. Otherwise, the owner is often the only person with proof of ownership. They may have a purchase

---

<sup>132</sup> Statistics Canada, *Data Tables, 2016 Census: Age of Primary Household Maintainer (15), Tenure (4), Structural Type of Dwelling (10), Condominium Status (3) and Household Type Including Census Family Structure (16) for Private Households of Canada, Provinces and Territories, Census Metropolitan Areas and Census Agglomerations*, Catalogue No 98-400-X2016226 (Ottawa: Statistics Canada, 2017), online: [[perma.cc/795J-KM3W](https://perma.cc/795J-KM3W)].

<sup>133</sup> Statistics Canada, *Data Tables, 2016 Census: Value (owner-estimated) of Dwelling, Structural Type of Dwelling, Age of Primary Household Maintainer, Presence of Mortgage Payments and Number of Bedrooms (6) for Owner Households in Non-farm, Non-reserve Private Dwellings of Canada*, Catalogue No 98-400-X2016233 (Ottawa: Statistics Canada, 2017), online: [[perma.cc/7DCY-Q9WP](https://perma.cc/7DCY-Q9WP)].

<sup>134</sup> ALRI raised this question in RFD 14 at 158–59.

<sup>135</sup> The standard form Residential Purchase Contract that real estate agents use includes a description of items included or not included in a sale. There is also a standard form Manufactured Home Schedule that can be included in a contract to describe a mobile home included in a sale.

<sup>136</sup> *Mobile Home Sites Tenancies Act*, RSA 2000, c M-20.

contract or bill of sale but mobile homes may be sold in cash deals with no documents at all.

[231] In an earlier project, ALRI made a preliminary recommendation that consent to disposition should be required for mobile homes.<sup>137</sup> We have come to the same conclusion in this project.

[232] We recognize that there are practical problems with requiring consent to disposition for a mobile home. The main benefit of consent to disposition is that it provides automatic protection. Interests in land are registered at the Land Titles Office, which checks for consent to disposition. Without a registry for mobile homes, there is no way to provide the same kind of protection. There is no independent entity that could check for compliance. It would be outside the scope of this project to recommend establishing an entirely new registration system. Responsibility for ensuring compliance will fall to real estate agents and lawyers, if they are involved in a transaction. There is no doubt that there will be gaps in protection. Consent to disposition may be overlooked or ignored, especially when there are no professionals involved.

[233] Although the inability to check for compliance is a problem, in our view it is not a sufficient reason to deny protection to some individuals. Those who live in mobile homes are equally deserving of protection as those who own land or condominium units. Just like other kinds of homes, a mobile home may be a special asset. It can be a couple's most valuable asset and also be important for reasons that cannot be measured in money. Individuals living in mobile homes already have most of the same rights, benefits, and obligations as those living in other kinds of housing. Other Alberta legislation includes mobile homes in the definition of "family home".<sup>138</sup> Consent to disposition should be no different.

## **RECOMMENDATION 8**

---

Consent to disposition should be required for a mobile home.

[234] We welcome any comments you may have in support of or in opposition to this preliminary recommendation or additional options for reform.

---

<sup>137</sup> RFD 14 at 158-61 (Recommendation 28).

<sup>138</sup> *Family Law Act*, note 70, s 67(1); *Family Property Act*, s 1(a.2); *Wills and Succession Act*, note 9, s 72(a).

## 7. PROPERTY OWNED BY SOMEONE OTHER THAN AN INDIVIDUAL

[235] The *Dower Act* applies only to property owned by an individual. Land is not a homestead and consent to disposition is not required if a third party is a co-owner.<sup>139</sup> Similarly, land is not a homestead if it is owned by a corporation and consent to disposition is not required.<sup>140</sup>

[236] In early consultation, a few respondents raised concerns that these exclusions are loopholes that leave some spouses unprotected.

### a. Co-owners

#### ISSUE 9

---

Should consent to disposition be required for a home co-owned by a third party?

[237] In early consultation, we heard about scenarios where one spouse or partner co-owns property with a third person. Sometimes there is an obviously legitimate reason, like an estate planning arrangement where one spouse and their parent are joint tenants on a property originally owned by the parent. Another scenario would be former spouses or partners who remain co-owners of a home while a family property claim is resolved. Sometimes we heard suggestions that the co-ownership can be part of a plan to keep the non-owner from having rights in the property. For example, we heard about parents contributing money to buy a house for a child and the child's spouse, with a condition that the parents are put on title with their child. Some respondents suspected that parents might insist on this arrangement to discourage a family property claim and prevent the spouse from exercising dower rights.

[238] The exclusion of co-owned property seems to be unique to Alberta. Most other Canadian jurisdictions have fairly broad language that does not exclude co-owned property. For example, in Ontario consent to disposition is required for

<sup>139</sup> *Dower Act*, s 25(1):

25(1) When a married person is a joint tenant, tenant in common or owner of any other partial interest in land together with a person or persons other than the spouse of that married person, this Act does not apply to that land and it is not a homestead within the meaning of this Act nor does the spouse have any dower rights in it.

<sup>140</sup> In this context, the term "corporation" includes any legal entity, other than an individual, that may own land. The *Land Titles Act* includes a list of the kinds of corporations that may hold an interest in land: *Land Titles Act*, note 51, s 27(1).

“[e]very property in which a person has an interest ...” and where the spouses lived together.<sup>141</sup>

[239] We propose that a non-owner’s consent should be required if their spouse or partner disposes of their interest in the couple’s home. The non-owner’s consent would not be required for the third party to dispose of their interest. It should be remembered that a non-owner’s consent would only be required if the couple live or had lived in the property together.

[240] In our view, this proposal strikes a balance. It closes a gap in protection, so non-owners cannot easily be shut out of decisions about their home. At the same time, it has minimal effect on third parties and should not interfere with legitimate planning. This preliminary recommendation would not affect the right of survivorship for joint tenants. If a spouse or partner were a joint tenant with a third party, and one of the joint tenants died, the surviving joint tenant would become the sole owner of the property. It would not be a disposition requiring consent as the change in ownership occurs automatically by operation of law.

### **RECOMMENDATION 9**

---

If one of the spouses or adult interdependent partners co-owns a home with a third party, consent to disposition should be required for any disposition of that spouse’s or adult interdependent partner’s interest in the home.

[241] We welcome any comments you may have in support of or in opposition to this preliminary recommendation or additional options for reform.

#### **b. Property owned by a corporation**

### **ISSUE 10**

---

Should consent to disposition be required for a home owned by a corporation or similar entity?

[242] In early consultation, we heard that some couples live in homes owned by closely held corporations. It seems this arrangement is most common among farmers or ranchers but it may occasionally occur in urban areas. A couple might also live in a home owned by another type of entity, like a partnership or a trust. Consent to disposition is not required if a corporation or similar entity owns a home. If one spouse or partner controls the entity that owns the couple’s home,

<sup>141</sup> Ontario Act, s 18(1).

they could cause the entity to sell the home, mortgage it, or make any other disposition unilaterally.

[243] Eight Canadian jurisdictions have legislation that requires consent to disposition if a couple's home is owned by a corporation.<sup>142</sup> The provision in Ontario's *Family Law Act* is a representative example. Under that legislation, a matrimonial home is one "in which a person has an interest" and where that person lived together with their spouse.<sup>143</sup> The next section says a matrimonial home may include one owned by a corporation:<sup>144</sup>

18(2) The ownership of a share or shares, or of an interest in a share or shares, of a corporation entitling the owner to occupy a housing unit owned by the corporation shall be deemed to be an interest in the unit for the purposes of subsection (1).

[244] There are arguments for and against adopting a similar rule in Alberta.

[245] On the one hand, consent to disposition ensures a non-owner does not lose their home unexpectedly. Those who live in homes owned by corporations deserve the same protection as any other spouse or partner.

[246] On the other hand, requiring consent to disposition in these situations might increase the administrative burden. If procedures were otherwise unchanged, it would require all owners to provide a dower affidavit, dower consent, or an order dispensing with consent. It would be an extra step every time a corporation makes a disposition.

[247] The only practical way to check whether a property owned by a corporation is a couple's home would be to have the corporate representative make a statement. For example, a corporate representative might have to make an affidavit stating that a property has not been occupied by a person who controls the corporation and their spouse or partner. As with any system that relies on self-reporting, it would be possible to circumvent the requirement by making an incorrect statement.

[248] Consent to disposition would not provide complete protection for a spouse or partner who lives in a home owned by a corporation. The person who owns shares in the corporation could sell or transfer the shares. It would be difficult to implement a rule requiring consent to disposition of shares. It would

<sup>142</sup> Ontario Act, s 18(2); New Brunswick Act, s 17; Nova Scotia Act, s 3(3); PEI Act, s 19(2); Newfoundland Act, s 6(3); Yukon Act, s 21(4); NWT Act, s 50(2); Nunavut Act, s 50(2).

<sup>143</sup> Ontario Act, s 18(1).

<sup>144</sup> Ontario Act, s 18(2).



be impossible for the Land Titles Office to check for compliance, as ownership of shares is not reflected on a certificate of title. It would require establishing an entirely new system to ensure compliance, which is not desirable or feasible.

[249] ALRI is not making a preliminary recommendation on this issue but we would welcome comments on it. Would a provision like the one in Ontario's *Family Law Act* be appropriate? How could it be enforced?

[250] We would also like to hear about how a provision like this one would affect couples living in property owned by entities other than closely held corporations or how it might affect those entities. For example, would it affect housing co-operatives or those who live in them?

## **C. What Property Should Be Excluded?**

---

### **1. PROPERTY OTHER THAN A HOME**

[251] Some respondents in early consultation questioned whether consent to disposition should be required for all family property or all real property. Some thought such a requirement would protect against an owner dissipating assets before property is divided at the end of a relationship. Others suggested it would be fair for a spouse or partner to have a say when they contribute to property. For example, one respondent thought it was unfair that a non-owner spouse who has contributed to the success of a farm can prevent disposition of the home quarter but not the rest of the farmland.

[252] Although there may be merit to these views, adding requirements about other property would expand this project far beyond the original purpose of reviewing the *Dower Act*. Further, such a change would have a major impact on property owners. In Alberta, like most Canadian jurisdictions, either spouse or partner may acquire, hold, and dispose of property in their own name. No other Canadian jurisdiction has legislation that requires consent to disposition for all property owned by either spouse or partner.

[253] This project focuses on the home. We are not making any recommendations about property other than a home.

## 2. LIFE ESTATE

### **ISSUE 11**

---

Should consent to disposition be required if the homeowner's interest is a life estate?

[254] We propose that consent to disposition should not be required if the owner's interest is a life estate. This exclusion would be an exception to the general principle that consent to disposition should be required if the interest is one for which a certificate of title could be issued.

[255] Few life estates are registered. According to statistics provided by the Land Titles Office, there were certificates of title for 2781 life estates as of 23 March 2021.<sup>145</sup>

[256] It will be rare that a life tenant will dispose of their interest. A life estate is nearly unmarketable. The most likely scenario is that the life tenant would sell or transfer their interest to the owner of the remainder interest.

[257] It is doubtful that consent to disposition would be a significant benefit for the spouse or partner of a life tenant. A life tenant's interest is limited and will end upon their death. Even if a spouse or partner could prevent disposition during the life tenant's lifetime, it does not necessarily mean they will be able to remain in the home. The administrative burden of requiring consent to disposition would outweigh any benefits.

### **RECOMMENDATION 10**

---

Consent to disposition should not be required if the homeowner's interest is a life estate.

[258] We welcome any comments you may have in support of or in opposition to this preliminary recommendation or additional options for reform.

## 3. RESIDENTIAL TENANCIES

[259] Of the approximately 1.5 million dwellings in Alberta, over 400,000 are occupied by renters.<sup>146</sup> An individual who rents a house, condominium, or

<sup>145</sup> Email from Jill Baker, Government of Alberta, to Jennifer Taylor, ALRI Counsel (23 March 2021).

<sup>146</sup> Statistics Canada, *Data Tables, 2016 Census: Structural Type of Dwelling (10), Tenure (4), Household Size (8) and Number of Bedrooms (6) for Private Households of Canada, Provinces and Territories, Census Divisions and*  
*Continued*

apartment has a residential tenancy agreement with the landlord. The agreement may be written or unwritten. In either case it is governed by the *Residential Tenancies Act*.<sup>147</sup> Most residential tenancy agreements are for a relatively short term. A residential tenancy agreement does not give a renter an interest in land. Although residential tenancy agreements are commonly called leases, they do not give a renter a leasehold estate. A residential tenancy agreement cannot be registered with the Land Titles Office or any other registry.

[260] We do not propose to require consent to disposition for a residential tenancy. We recognize that rental accommodations are homes and that those who live in rented homes deserve protection as much as anyone else. The spouse or partner of a renter should have a say in decisions about the tenancy.<sup>148</sup> Nonetheless, consent to disposition is not the right mechanism to protect those who live in rented homes. A tenant's rights are limited. The tenant may occupy the property for the term of the residential tenancy agreement but has no lasting or long-term interest. It would not be practical to require a spouse or partner's consent to an assignment of a residential tenancy agreement. There would be little benefit to the spouse or partner of a tenant because the right to occupy the property would be short-lived. There would be no system to check for compliance. It would add complexity to the law and could increase administrative burdens. The drawbacks outweigh any possible benefits.

#### 4. LAND ON RESERVES

[261] As mentioned above, the *Dower Act* does not apply to homes or land on reserves. Either the laws enacted by a First Nation or the provisional rules in the *Family Homes on Reserves Act* would apply.<sup>149</sup>

---

*Census Subdivisions*, Catalogue No 98-400-X2016220 (Ottawa: Statistics Canada, 2017), online: [[perma.cc/3SRN-KPW4](https://perma.cc/3SRN-KPW4)].

<sup>147</sup> *Residential Tenancies Act*, SA 2004, c R-17.1.

<sup>148</sup> There are specific issues that may deserve review in another context. For example, some scholars have identified gaps in legislation that make it difficult for victims of domestic violence to stay in rental accommodations: see Professor Lois Gander & Rochelle Johannson, *The Hidden Homeless: Residential Tenancies Issues of Victims of Domestic Violence* (Edmonton: Centre for Public Legal Education & University of Alberta, 2014) at 24-26, online: <[www.cplea.ca/wp-content/uploads/2015/01/FINAL-Report-The-Hidden-Homeless.2014Jun05.pdf](http://www.cplea.ca/wp-content/uploads/2015/01/FINAL-Report-The-Hidden-Homeless.2014Jun05.pdf)> [[perma.cc/A5KY-R2MC](https://perma.cc/A5KY-R2MC)]; Jonnette Watson Hamilton, "Reforming Residential Tenancy Law for Victims of Domestic Violence" (2019) 8 Annual Review of Interdisciplinary Justice Research 245 at 260-62; Jennifer Koshan, "Mapping Domestic Violence Law and Policy in Alberta: Intersections and Access to Justice" (2021) 58:3 Alta L Rev 521 at 540.

<sup>149</sup> *Family Homes on Reserves Act*, note 15, ss 7, 12.

## D. Summary

---

[262] The preliminary recommendations in this chapter would mean consent to disposition would be required for:

- a lot, quarter section, or area of land described on a certificate of title,
- a condominium unit, or
- a mobile home

if at least one of the residents:

- owns the fee simple estate,
- has a leasehold estate for more than three years,
- holds Metis title, provisional Metis title, or an allotment for land on a Metis Settlement, or
- owns the mobile home

and that resident and their spouse or adult interdependent partner live or have lived there together within the last three years.

## CHAPTER 6

# How Can Procedures for Obtaining Consent to Disposition Be Improved?

## A. Introduction

---

[263] Many of the practical problems discussed in Chapter 2 are about the process of obtaining consent to disposition. Redefining the property affected would address some of those issues, but not all. This chapter discusses other reforms that could improve the process of obtaining consent to disposition. We consider options for reform that could reduce administrative burdens, strengthen protections, or a mix of both.

## B. How Could Reform Reduce Inefficiencies and Improve Protections?

---

### 1. TRANSFERS BETWEEN SPOUSES

#### ISSUE 12

---

Should consent be required for transfers between spouses or adult interdependent partners?

[264] There is no reason why a non-owner should have to consent to a transfer to themselves. Such a requirement would not protect anyone. There is case law stating consent to disposition is not required in these circumstances but it seems to be often overlooked.<sup>150</sup>

[265] This issue is a relatively simple one to correct, by clearly stating an exception to the statute and forms. There are models in other Canadian jurisdictions. For example, Saskatchewan's *The Homesteads Act, 1989* requires consent for a disposition "to a person other than the non-owning spouse" and the required form of dower affidavit has an option for the owner to state "My spouse ... is the transferee ... named in this disposition."<sup>151</sup> If the owner makes this statement, the spouse or partner does not need to consent to the transaction.

<sup>150</sup> *Scott v Cresswell* (1975), 56 DLR (3d) 268 (Alta CA) at 296.

<sup>151</sup> Saskatchewan Act, s 5(1); *The Homesteads Forms Regulations*, RRS c H-5.1, Reg 1, Form D.

[266] We propose a similar exception should be included in Alberta legislation.

### **RECOMMENDATION 11**

---

Consent to disposition should not be required when a homeowner makes a disposition in favour of their spouse or adult interdependent partner.

[267] We welcome any comments you may have in support of or in opposition to this preliminary recommendation or additional options for reform.

## **2. CAPACITY**

### **ISSUE 13**

---

Who can give consent if a spouse or adult interdependent partner lacks capacity?

[268] If a non-owner does not have capacity to consent to a disposition, the owner must make an application to dispense with consent.<sup>152</sup> In early consultation, some respondents thought this requirement was unnecessarily burdensome. They thought an attorney under an enduring power of attorney should be able to consent, even if the attorney is the owner.

[269] On the one hand, there is an argument that there should be some oversight to protect a non-owner's interests in this situation, especially if the owner is their attorney. No doubt in the vast majority of cases the attorney is well-intentioned and will consider the non-owner's best interests but there may be times when the non-owner requires additional protection.

[270] On the other hand, this level of protection exceeds that required in other situations. If a couple were joint tenants, an attorney would be able to dispose of land on behalf of the spouse or partner who lacks capacity. It does not make sense that a spouse or partner who is also an attorney could dispose of land if the

---

<sup>152</sup> *Dower Act*, s 10(1)(f). In some cases, a substitute decision maker may be able to consent on behalf of the spouse who lacks capacity but the conditions are narrow. A trustee under the *Adult Guardianship and Trusteeship Act* may consent to the disposition of the homestead but only if the trusteeship order specifically grants the trustee authority to do so: *Adult Guardianship and Trusteeship Regulation*, Alta Reg 219/2009, s 13(2). If the Public Trustee acts as trustee, it appears that they may consent on behalf of the non-owner spouse: see *Dower Act*, s 10(1)(f)(ii); *Public Trustee Act*, SA 2004, c P-44.1, s 25(1):

25(1) Notwithstanding the *Adult Guardianship and Trusteeship Act* but subject to subsection (3), the Public Trustee, while acting as trustee of the property of a represented adult, may administer, sell, dispose of or otherwise deal with the property to the same extent as could be done by the represented adult if the represented adult had capacity to deal with the property.

couple were joint tenants but has to seek a court order to dispose of land if they are the sole owner.

[271] Saskatchewan and Manitoba both have legislation addressing this issue. In Saskatchewan, an attorney may not give consent on behalf of a spouse or partner.<sup>153</sup> In Manitoba, an attorney may give consent in certain narrow conditions. Among others, the power of attorney must specifically authorize the attorney to consent to a disposition of the homestead and the owner cannot be the attorney.<sup>154</sup>

[272] The Law Reform Commission of Saskatchewan recently considered this rule.<sup>155</sup> It concluded that an attorney should be able to consent to a disposition, even if the owner is the attorney. It suggested only one limit: an owner should only be able to consent on behalf of the non-owner if the non-owner does not have capacity to consent. It recommended that an owner should have to make an affidavit stating the non-owner lacks capacity. These recommendations have not been implemented.

[273] The recommendations of the Law Reform Commission of Saskatchewan are well-thought out and seem appropriate. We propose a similar reform in Alberta.

## **RECOMMENDATION 12**

---

An attorney appointed under a power of attorney should be able to consent to disposition on behalf of a spouse or adult interdependent partner.

## **RECOMMENDATION 13**

---

A homeowner should only be able to consent to disposition on behalf of their spouse or adult interdependent partner if the homeowner is appointed as the attorney under an enduring power of attorney and the spouse or adult interdependent partner has lost capacity to give consent.

[274] We welcome any comments you may have in support of or in opposition to this preliminary recommendation or additional options for reform.

<sup>153</sup> Saskatchewan Act, s 6(4).

<sup>154</sup> Manitoba Act, s 23.

<sup>155</sup> Law Reform Commission of Saskatchewan, *Reform of The Homesteads Act, 1989*, Final Report (2017) at 9–16, online: <[www.lawreformcommission.sk.ca/Final-Report-on-the-Homesteads-Act.pdf](http://www.lawreformcommission.sk.ca/Final-Report-on-the-Homesteads-Act.pdf)> [[perma.cc/X3YF-5SEK](https://perma.cc/X3YF-5SEK)].

### 3. OBTAINING CONSENT

#### ISSUE 14

---

Should a spouse or adult interdependent partner have an opportunity for independent legal advice when giving consent or a release of dower rights?

[275] The required process for a dower consent and certificate of acknowledgment is intended to ensure a non-owner's consent is informed and voluntary. Some respondents were concerned that the requirements are ineffective. We heard that non-owners often sign the consent without understanding their rights.

[276] A non-owner must meet separately with a witness to sign the consent and make the acknowledgment.<sup>156</sup> The witness does not need to be a lawyer and there is no requirement that the witness be independent. In fact, the witness is often someone acting for another party in the transaction. The non-owner may not receive any information beyond the basic information in the certificate of acknowledgment. Often the witness cannot provide independent legal advice, either because they are not independent or they are not a lawyer.

[277] There is a discrepancy between the requirements for a disposition and those for a release of dower rights. For a disposition, a non-owner must meet with a witness. For a release of dower rights they must meet with an independent lawyer.<sup>157</sup> Yet both can extinguish a non-owner's dower rights. If the disposition is a transfer, the effect is permanent. In contrast, a release can be revoked.<sup>158</sup>

[278] There was an effort to address this discrepancy in 2013. The Legislature passed amendments to the *Dower Act* that would have required a non-owner spouse to make the acknowledgment before a lawyer other than the lawyer acting for the owner.<sup>159</sup> The amendments were not proclaimed into force.

[279] This change should be implemented. Our preliminary recommendation is that a non-owner should have to meet separately with an independent lawyer

---

<sup>156</sup> The witness must be "a person authorized to take proof of the execution of instruments under the *Land Titles Act*": *Dower Act*, s 5(2). The *Land Titles Act* includes rules about who may witness an instrument and who may commission an affidavit: see *Land Titles Act*, note 51, ss 155-59.

<sup>157</sup> *Dower Act*, s 7(3).

<sup>158</sup> *Dower Act*, ss 3(2), 8.

<sup>159</sup> *Statutes Amendment Act, 2013 (No 2)*, SA 2013, c 23, s 5.



when signing either a consent or a release of dower rights. The lawyer should confirm that the non-owner understands the consent or release. This requirement does not mean that the non-owner must actually receive independent legal advice, although they would have the opportunity to do so if they wished.

[280] This requirement would be consistent with those for other agreements where a spouse or partner gives up rights related to property. For example, to make an agreement about family property, a spouse or partner must meet separately with an independent lawyer and make an acknowledgment.<sup>160</sup>

[281] We recognize that this requirement would add some cost and inconvenience to transactions, especially if the non-owner is outside Alberta. It would be best for a non-owner to meet with an Alberta lawyer, as a lawyer in another jurisdiction would not necessarily be able to provide advice about the effect of giving up dower rights. In the past, this might have been an unreasonable burden but today there are more options. Technology can be part of the solution. The emergency use of videoconferencing to witness documents during the COVID-19 pandemic has shown how procedures might be adapted. A non-owner should be able to meet remotely with an Alberta lawyer to sign a consent or a release of dower rights.

[282] A requirement to meet separately with an independent lawyer will not always ensure consent is voluntary. As discussed above in Chapter 2, a separate meeting does little to counteract ongoing domestic violence or coercive control. Unfortunately, this problem cannot be resolved by legislation alone.

[283] Although our proposals would not eliminate compulsion, a small change could at least address a dilemma for lawyers. The current certificate of acknowledgment requires a witness to state that the non-owner is “executing the document freely and voluntarily without any compulsion on the part of the married person.”<sup>161</sup> If the non-owner discloses compulsion, the witness must

<sup>160</sup> *Family Property Act*, s 38. The person must acknowledge:

38(1) ...

- (a) that the party is aware of the nature and the effect of the agreement,
- (b) that the party is aware of the possible future claims to property the party may have under this Act and that the party intends to give up these claims to the extent necessary to give effect to the agreement, and
- (c) that the party is executing the agreement freely and voluntarily without any compulsion on the part of the other party.

There are other examples of similar requirements outside the family law context. For example, a guarantee is not effective unless the person making the guarantee meets with an independent lawyer to sign a certificate. The lawyer must be satisfied that the person understands the guarantee: *Guarantees Acknowledgment Act*, RSA 2000, c G-11, ss 3–4.

<sup>161</sup> *Dower Act*, s 5(1)(d); see also *Forms Regulation*, note 4, Form C.

either refuse to complete the certificate or make a false statement. One option may endanger the non-owner; the other is an ethical breach. The problem could be fixed if the certificate did not require an acknowledgment that the non-owner consents freely and voluntarily. It might be enough to acknowledge that the non-owner understands the consent or release.<sup>162</sup>

#### **RECOMMENDATION 14**

---

A spouse or adult interdependent partner should have to meet separately with an independent lawyer when giving consent to disposition or a release of dower rights.

[284] We welcome any comments you may have in support of or in opposition to this preliminary recommendation or additional options for reform.

#### **4. DEFINITION OF DISPOSITION**

[285] The *Dower Act* defines disposition as follows:

- 1(b) (i) means a disposition by act inter vivos that is required to be executed by the owner of the land disposed of, and
- (ii) includes
  - (A) a transfer, agreement for sale, lease for more than 3 years or any other instrument intended to convey or transfer an interest in land,
  - (B) a mortgage or encumbrance intended to charge land with the payment of a sum of money, and required to be executed by the owner of the land mortgaged or encumbered,
  - (C) a devise or other disposition made by will, and
  - (D) a mortgage by deposit of certificate of title or other mortgage that does not require the execution of a document;

[286] We did not hear any specific concerns about this list. It seems to include all the kinds of transactions that might deprive a spouse or partner of their home.

---

<sup>162</sup> Like the *Dower Act*, the *Family Property Act*, s 38 requires a lawyer to provide a certificate stating, among other things, that the person who executed an agreement did so “freely and voluntarily without any compulsion on the part of the other party.” In contrast, the *Guarantees Acknowledgment Act*, RSA 2000, c G-11, s 4 requires only that a lawyer satisfy themselves that the person making the guarantee “is aware of the contents of the guarantee and understands it”.

[287] British Columbia, Saskatchewan, and Manitoba have comparable definitions of disposition, although the details vary.<sup>163</sup>

### **ISSUE 15**

---

Should consent be required for dispositions by will?

[288] There is one thing that is out of place. A devise or disposition made by will is not an act inter vivos and, in any case, the life estate would defer any disposition by will. We propose that it should not be included in the definition of disposition.

### **RECOMMENDATION 15**

---

Consent to disposition should be required only for dispositions that take effect during the lifetime of the homeowner.

[289] We welcome any comments you may have in support of or in opposition to this preliminary recommendation or additional options for reform.

## **C. Are Other Reforms Required?**

---

[290] There are several other issues where we are not making specific recommendations but would welcome comments.

### **1. RELEASE OF DOWER RIGHTS**

#### **ISSUE 16**

---

Is there a need for reform about releases of dower rights?

[291] As discussed above, having a non-owner sign more than one consent for a transaction is clearly burdensome. It would be preferable if a non-owner could consent once to the whole transaction. A release of dower rights could be used this way. Once the release is registered at the Land Titles Office, the land is no longer a homestead. The owner can complete all the other steps in the transaction unilaterally: entering a listing agreement, entering an agreement to sell the home, and completing the closing documents.

---

<sup>163</sup> BC Act, s 1 “disposition”; Saskatchewan Act, s 2(b); Manitoba Act, s 1 “disposition”.

[292] It seems that releases of dower rights are rarely used to streamline transactions. In early consultation, we asked about reasons and heard about cost and inconvenience. Compared to a consent and certificate of acknowledgment, a release of dower rights can take a little more effort, mostly because the non-owner must meet separately with an independent lawyer to sign the release. There is also an additional step to register the release at the Land Titles Office.

[293] With our preliminary recommendation above, the cost and inconvenience would be similar for either a consent or a release of dower rights. We would welcome comments on this topic. Is there a role for releases of dower rights in reducing administrative burdens? Are there other reforms that would make releases of dower rights more useful?

## 2. ORDERS DISPENSING WITH CONSENT

### **ISSUE 17**

---

Is there a need for reform about orders dispensing with consent?

[294] The grounds for seeking an order dispensing with consent are listed in section 10 of the *Dower Act*:

10(1) A married person who wishes to make a disposition of the married person's homestead and who cannot obtain the consent of the married person's spouse

- (a) when the married person and the married person's spouse are living apart,
- (b) when the spouse has not since the marriage lived in Alberta,
- (c) when the whereabouts of the spouse is unknown,
- (d) when the married person has 2 or more homesteads,
- (e) when the spouse has executed an agreement in writing and for valuable consideration to release the claim of the spouse to dower pursuant to section 9, or
- (f) when the spouse is a mentally incompetent person or a person of unsound mind for whom
  - (i) a trustee under the *Adult Guardianship and Trusteeship Act* does not have authority to make a disposition of the homestead, and
  - (ii) a certificate of incapacity is not in effect under the *Public Trustee Act*,

[295] A court may impose conditions.<sup>164</sup> It seems this power is rarely used but it may be useful. For example, a court might dispense with the requirement for consent but require that proceeds be kept in trust until a claim for property division is resolved.

[296] We heard very few concerns about the process for obtaining an order dispensing with consent. There were some general concerns that it adds an extra step to a transaction but it seems that orders are routinely granted when one or more of the required grounds are present.

[297] We would welcome comments about any other reforms that might be required.

### 3. CAVEATS

#### **ISSUE 18**

---

Is there a need for reform about caveats based on dower rights?

[298] A non-owner spouse may register a caveat on title to a property, giving notice that they claim dower rights.<sup>165</sup> Once registered with the Land Titles Office, a caveat has priority over any disposition or claim registered afterwards. Although this option is available, it seems it is rarely used in Alberta.

[299] Many other Canadian jurisdictions have some form of optional registration.<sup>166</sup> Once registered with the land titles office, the title will show that the land is a homestead or matrimonial home. It is difficult to know how often spouses or partners register their interest but it is likely that only a small minority do so.<sup>167</sup>

[300] An optional registration system can be useful. It can help a non-owner protect their home. If a non-owner registers their interest, it may prevent an

<sup>164</sup> *Dower Act*, s 10(6).

<sup>165</sup> Alberta, Ministry of Service Alberta, *Land Titles and Procedures Manual*, Procedure CAV-1 (Edmonton: Ministry of Service Alberta, 2021), online: <[www.servicealberta.ca/pdf/ltmanual/CAV-1.pdf](http://www.servicealberta.ca/pdf/ltmanual/CAV-1.pdf)> [[perma.cc/JL3D-CQJS](https://perma.cc/JL3D-CQJS)]; see also *Schwormstede v Green Drop Ltd* (1994), 155 AR 302, 1994 ABCA 259 (CanLII).

<sup>166</sup> See eg Saskatchewan Act, s 14; Manitoba Act, s 19; Ontario Act, s 20. In British Columbia, consent to disposition is required only if a spouse or partner registers their interest with the land titles office: BC Act, ss 1 "homestead", 2-3.

<sup>167</sup> Teranet Manitoba, which administers Manitoba's land titles office, provided us with some statistics about registration of homestead notices in Manitoba. There were 239 notices registered in a three-year period: email from Russell Davidson, Senior District Registrar, Teranet Manitoba to Cailey Severson, ALRI student (10 May 2021).

owner from circumventing the requirement for consent. The registration would refute an incorrect affidavit.

[301] A registration system should have clear procedures for registering an interest and for removing interests that should not have been filed or that have become outdated. For example, there should be a straightforward way for an owner to have a caveat removed after a relationship has ended and the time limit has expired. Alberta has procedures for registering and removing caveats but they are not specific to the *Dower Act*.<sup>168</sup> In contrast, the statutes in Saskatchewan and Manitoba both describe how a non-owner may register their interest with the land titles office and how registrations may be removed.<sup>169</sup>

[302] We would welcome comments on this topic. Are the existing procedures for registering and removing caveats appropriate for dower interests? Would it be helpful to have statutory provisions about registering dower interests? Are there reforms that could make a registration system more useful?

#### 4. OTHER IMPROVEMENTS TO FORMS OR PROCEDURES

##### **ISSUE 19**

---

Is there a need for reform to forms or procedures relating to consent to disposition?

[303] Some of the practical problems we heard about could be addressed in forms or procedures. It would not make sense to recommend specific changes to forms until basic policy questions are settled but at a later stage of the project, we might consider whether to recommend any specific changes.

[304] We would welcome comments about any reforms that might be required.

<sup>168</sup> See Alberta, Ministry of Service Alberta, *Land Titles and Procedures Manual*, Procedure CAV-1 (Edmonton: Ministry of Service Alberta, 2021), online: <[www.servicealberta.ca/pdf/ltmanual/CAV-1.pdf](http://www.servicealberta.ca/pdf/ltmanual/CAV-1.pdf)> [perma.cc/JL3D-CQJS]; Alberta, Ministry of Service Alberta, *Land Titles and Procedures Manual*, Procedure CAV-2 (Edmonton: Ministry of Service Alberta, 2021), online: <[www.servicealberta.ca/pdf/ltmanual/CAV-2.pdf](http://www.servicealberta.ca/pdf/ltmanual/CAV-2.pdf)> [perma.cc/RH63-GG5C].

<sup>169</sup> Saskatchewan Act, ss 14-17; Manitoba Act, ss 19-20.

## CHAPTER 7

# What Should Be the Consequences of Disposition without Consent?

## A. Should a Disposition Without Consent Be Void or Voidable?

---

[305] A previous version of the *Dower Act* stated that a disposition without consent was “null and void for all purposes”.<sup>170</sup> This provision undermined the certainty of the land titles system and so was removed in the 1948 reforms.<sup>171</sup>

[306] It is now clear that once title is registered in the name of a bona fide purchaser for value, the transfer cannot be set aside. A non-owner’s remedy is to seek damages from the owner.

[307] If the transfer is not completed, or if the disposition is less than a transfer of the property – like a mortgage, encumbrance, or lease – it is unclear whether it can be set aside. Professor Wilbur Bowker clearly stated the issue just a few years after the 1948 reforms:<sup>172</sup>

It was not long before queries were raised as to the effect of a sale made without a validly executed consent and objected to by the spouse or even by the vendor before registration of a transfer, and as to the validity of a mortgage, lease, oil lease, or easement. It is quite clear that these are all dispositions, but are not followed by the issue of a new title so the spouse never can have an action for half the purchase price.

[308] Despite litigation over the life of the *Dower Act*, these questions have not been completely resolved.

[309] Most other Canadian jurisdictions have a rule that a disposition cannot be set aside if the person acquiring the interest was innocent.<sup>173</sup> Ontario’s provision is representative:

---

<sup>170</sup> *Dower Act*, RSA 1942, c 206, s 3.

<sup>171</sup> Bowker, note 52 at 504-505.

<sup>172</sup> Bowker, note 52 at 505.

<sup>173</sup> Ontario Act, s 18(3):

18(3) If property that includes a matrimonial home is normally used for a purpose other than residential, the matrimonial home is only the part of the property that may reasonably be regarded as necessary to the use and enjoyment of the residence.

Ontario Act, s 21(2); see also New Brunswick Act, s 19(2); Nova Scotia Act, s 8(2); PEI Act, s 22(2); Yukon Act, s 23(3); NWT Act, s 53(2). Compare the Saskatchewan Act, s 12; Manitoba Act, s 6.

21(2) If a spouse disposes of or encumbers an interest in a matrimonial home in contravention of subsection (1), the transaction may be set aside on an application under section 23, unless the person holding the interest or encumbrance at the time of the application acquired it for value, in good faith and without notice, at the time of acquiring it or making an agreement to acquire it, that the property was a matrimonial home.

[310] The *Dower Act* does not include an equivalent provision.

## 1. REAL ESTATE PURCHASE CONTRACTS BEFORE REGISTRATION

[311] There is an unresolved issue about whether a real estate purchase contract is void or voidable before a non-owner signs the prescribed form of consent.<sup>174</sup>

[312] In most residential real estate transactions, the seller and purchaser sign a residential purchase contract when the offer is accepted. The non-owner may also sign the contract but their signature is not enough to be an effective consent under the *Dower Act*. They usually sign the prescribed form of dower consent and certificate of acknowledgment later, when the other closing documents are signed.

[313] Problems sometimes arise when a party has agreed to buy or sell property but does not want to close. In several cases parties who wanted to withdraw from a deal before closing argued that a residential purchase contract was not binding because it was not accompanied by a dower consent in the prescribed form.<sup>175</sup> If a contract without proper dower consent is void, neither party could enforce the residential purchase contract. If it is voidable, the transaction can still be saved by providing the proper consent.

[314] Alberta trial courts face conflicting binding authority about whether a contract is binding without a proper dower consent. In *Meduk v Soja*, the Supreme Court held that the purchase contract was void.<sup>176</sup> In *Schwormstede v Green Drop Ltd.*, the Alberta Court of Appeal did not consider *Meduk* but said that “the better view is that the transaction is voidable”.<sup>177</sup> In *Charanek v Khosla*, a Master of the Court of Queen’s Bench concluded that summary judgment was

<sup>174</sup> See Jonnette Watson Hamilton, “No Dower Act Consent? Is the Transaction Void or Voidable?” (27 May 2010), ABlawg (blog), online: <[www.ablawg.ca/2010/05/27/no-dower-act-consent-is-the-transaction-void-or-voidable/](http://www.ablawg.ca/2010/05/27/no-dower-act-consent-is-the-transaction-void-or-voidable/)> [[perma.cc/485E-E4D2](https://perma.cc/485E-E4D2)].

<sup>175</sup> *Meduk v Soja*, [1958] SCR 167; *Senstad v Makus*, [1978] 2 SCR 44; *Charanek v Khosla*, 2010 ABQB 202.

<sup>176</sup> *Meduk v Soja*, [1958] SCR 167.

<sup>177</sup> *Schwormstede v Green Drop Ltd* (1994), 155 AR 302 at para 39, 1994 ABCA 259 (CanLII) [cited to CanLII].



not available because “the consequence of non-compliance with the consent requirements of the *Dower Act* remains an open question”.<sup>178</sup> At this point, there is little chance the issue can be resolved by litigation.<sup>179</sup>

## 2. DISPOSITIONS THAT DO NOT RESULT IN A TRANSFER OF TITLE

[315] With other kinds of dispositions, courts have generally found a disposition without consent to be void.

[316] In several reported cases, lenders or creditors have found that their mortgage or encumbrance was void because the non-owner spouse did not consent.<sup>180</sup> Often, they did not realize anything was wrong until long after they provided funds and registered their interest on title. They only discovered the lack of compliance after the owner defaulted and they attempted to enforce their mortgage or encumbrance.

[317] Our early consultation did not uncover widespread problems with void mortgages. Other than the reported cases, we did not hear anecdotes about mortgage lenders finding out their mortgage was void during foreclosure proceedings.

[318] Nonetheless, these cases raise questions about who should bear a loss. For example, consider *Inland Financial Inc v Guapo*.<sup>181</sup> Assuming that the purpose of the *Dower Act* is to protect a vulnerable spouse from losing their home, it worked as intended in this case. Meanwhile, the mortgage lender – also a victim of the fraud – lost the \$245,000 it had advanced. It is not clear if it had any way to recover the loss.<sup>182</sup>

<sup>178</sup> *Charanek v Khosla*, 2010 ABQB 202 at para 61.

<sup>179</sup> As Professor Watson Hamilton points out, the conflict could be fully resolved by the Supreme Court but it is highly unlikely that it would grant leave to appeal on the issue: Jonnette Watson Hamilton, “No Dower Act Consent? Is the Transaction Void or Voidable?” (27 May 2010), ABLawg (blog), online: <[www.ablawg.ca/2010/05/27/no-dower-act-consent-is-the-transaction-void-or-voidable/](http://www.ablawg.ca/2010/05/27/no-dower-act-consent-is-the-transaction-void-or-voidable/)> [[perma.cc/485E-E4D2](https://perma.cc/485E-E4D2)].

<sup>180</sup> *British American Oil Co. v Kos* (1963), [1964] SCR 167; *Nicholson v Nicholson* (1994), 153 AR 200 (QB); *Karafiat v Webb*, 2012 ABCA 115; *Guapo*, note 43. There are also reported cases where a lease or similar interest was void for lack of dower consent, although they are not recent: *Reynolds v Ackerman*, [1953] 32 WWR 289 (Alta SC TD); *Champagne v Aljean Construction Ltd* (1979), 11 Alta LR (2d) 1 (QB).

<sup>181</sup> *Guapo*, note 43. The facts of the case are recounted in Chapter 3, above.

<sup>182</sup> In theory, the son is liable. He was a defendant in the case and judgment was granted against him. But the judgment is a hollow victory if the son has no assets. The Assurance Fund was also a defendant but it is questionable whether compensation would be available in this situation. None of the reported judgments considered the claim against the Assurance Fund. The relevant parts of the *Land Titles Act* are difficult to interpret and it is not obvious that they apply. There are other complicating factors. One is that one of the

### 3. PURPOSE OF CONSENT

#### **ISSUE 20**

---

When should a disposition without consent be enforceable?

[319] To resolve these issues, it helps to focus on the purpose of consent to disposition. In our view, the purpose of consent to disposition is to protect non-owners from losing their homes unexpectedly.

[320] A rule that a disposition without consent is void goes farther than necessary to achieve this purpose. Sometimes, it may even be used to the detriment of the non-owner. In *Charanek v Khosla*, for example, the owner and non-owner spouse both wanted to sell their home. It was the purchasers who attempted to rely on non-compliance with the *Dower Act* to escape a real estate purchase contract.<sup>183</sup>

[321] We propose a narrower rule: a disposition should be unenforceable against the owner until the non-owner provides consent or until the home ceases to be one for which consent is required. This rule would protect a non-owner as long as the property is the couple's home and for a transition period afterwards. They could prevent the disposition by withholding consent. If the couple or the non-owner moves out of the property, however, the disposition would become enforceable at the end of the time limit. In the meantime, the contract, mortgage, or other disposition would be valid and enforceable against other parties. Registrations on title, like a caveat or a mortgage, would not have to be discharged. We believe this rule would provide effective protection to a non-owner, while balancing the rights of other parties.

#### **RECOMMENDATION 16**

---

A disposition should be unenforceable against a homeowner until their spouse or adult interdependent partner provides consent or until consent to disposition is no longer required.

[322] We welcome any comments you may have in support of or in opposition to this preliminary recommendation or additional options for reform.

---

owners cooperated with the fraud. Another is that the Assurance Fund is a payor of last resort: see *Land Titles Act*, note 51, ss 168, 172; see also Curtis D Woollard, "Land Titles Assurance vs Title Insurance: What's Covered and What Isn't" (Paper prepared for the Legal Education Society of Alberta, delivered at the 45th Annual Refresher Course on Real Estate, Lake Louise, 6–8 May 2012) [unpublished].

<sup>183</sup> *Charanek v Khosla*, 2010 ABQB 202.

## B. Remedies for Disposition Without Consent

---

### 1. OFFENCE

#### **ISSUE 21**

---

Should the offence for making a disposition without consent be abolished?

[323] As discussed in Chapter 2, it is an offence to dispose of a homestead without consent. No other Canadian jurisdiction has a similar offence. ALRI previously made a preliminary recommendation to abolish the offence.<sup>184</sup>

[324] Completing a disposition without consent would usually require submitting false documents to the Land Titles Office. In some cases, it may be an honest mistake. If a person deliberately makes or submits false documents, criminal law could apply. Depending on the details, knowingly making or submitting a false document could be perjury, forgery, fraud, or another offence.<sup>185</sup>

[325] Our preliminary recommendation is that this offence should be abolished. We doubt that it is an effective deterrent, especially if it is rarely or never enforced. The possibility of criminal liability should be sufficient.

#### **RECOMMENDATION 17**

---

The offence for making a disposition without consent should be abolished.

[326] We welcome any comments you may have in support of or in opposition to this preliminary recommendation or additional options for reform.

### 2. ACTION FOR DAMAGES

[327] If the offence were abolished, the action for damages would be the main deterrent against a disposition without consent.

---

<sup>184</sup> RFD 14 at 117-18 (Recommendation 17).

<sup>185</sup> For example, swearing a false affidavit may be perjury which is punishable by up to fourteen years' imprisonment: *Criminal Code*, RSC 1985, c C-46, ss 131-132. See also RFD 14 at 117-18.

[328] Unlike the offence, there is at least one reported case where a non-owner spouse has successfully claimed damages.<sup>186</sup> In early consultation, we heard anecdotally that others have at least considered making this kind of claim.

[329] Damages are only available if title has actually been transferred to another person.<sup>187</sup> If the disposition is a mortgage or other encumbrance, the non-owner would not receive damages unless the encumbrance resulted in a transfer of title.

[330] This consequence is only useful in certain situations. It requires that a non-owner know of their right to prevent a disposition, know that the disposition occurred, and initiate an action against the owner. They might do so if the relationship has already broken down but there would be little point in suing if the relationship is intact. Damages would only transfer money from one spouse or partner to the other. With legal fees, the couple would suffer a net loss.

[331] Saskatchewan, Manitoba, and Newfoundland and Labrador have similar provisions giving a non-owner a right of action for damages in the case of disposition without consent.<sup>188</sup> There is very little case law applying these provisions.<sup>189</sup>

#### a. Availability

## ISSUE 22

---

When should an action for damages be available for a disposition without consent?

<sup>186</sup> *Joncas*, note 11.

<sup>187</sup> *Dower Act*, s 11(1):

11(1) A married person who without obtaining

(a) the consent in writing of the spouse of the married person, or

(b) an order dispensing with the consent of the spouse,

makes a disposition to which a consent is required by this Act and that results in the registration of the title in the name of any other person, is liable to the spouse in an action for damages.

In *Guapo*, note 43 at para 14, the Court of Appeal confirmed that this remedy (a non-owner spouse's right of action for damages) is "limited to improper transfers of title"; it is unavailable where there has merely been an improper registration of a mortgage or other encumbrance.

<sup>188</sup> Saskatchewan Act, s 12.1; Manitoba Act, s 16(1); Newfoundland Act, s 14(1)(e). The legislation in Newfoundland and Labrador describes the remedy as a substitute for the matrimonial home:

14(1)(e) where a false affidavit is made under section 10 or where a matrimonial home or an interest in it is disposed of contrary to section 10, [the court may] direct

...

to substitute other real property for the matrimonial home or to set aside money or security to stand in place of the matrimonial home, subject to the terms and conditions that the court considers desirable.

<sup>189</sup> We found only one reported case where a court outside Alberta awarded damages for disposition without consent: *Dowse v Dowse*, 2003 MBQB 8.

[332] A transfer of title has the most potential to harm a non-owner. A transfer to a bona fide purchaser for value cannot be set aside. If an owner succeeds in transferring a couple's home without the non-owner's consent, the non-owner would lose their home permanently. Damages are the only possible remedy.

[333] Other types of dispositions are unlikely to cause permanent harm, especially given our preliminary recommendation above that they should be unenforceable until a non-owner provides consent.

[334] Nonetheless, there may be situations where a disposition other than a transfer harms a non-owner. In other Canadian jurisdictions that provide a right of action to a non-owner, a non-owner may seek damages for any wrongful disposition.<sup>190</sup>

[335] ALRI previously made a preliminary recommendation that "[a]n action for damages should be available for a wrongful disposition of any kind."<sup>191</sup> We make a similar preliminary recommendation now.

[336] Our preliminary recommendation below about assessment of damages should ensure damages are proportionate to the actual harm.

### **RECOMMENDATION 18**

---

If a homeowner makes any disposition that requires consent without the consent of their spouse or adult interdependent partner, the homeowner should be liable to the spouse or adult interdependent partner in an action for damages.

[337] We welcome any comments you may have in support of or in opposition to this preliminary recommendation or additional options for reform.

#### **b. Assessing damages**

### **ISSUE 23**

---

How should damages be assessed?

[338] Damages are potentially a very serious consequence for the owner, given how they are assessed under the *Dower Act*. Section 11(2) dictates that a non-owner is entitled to an amount equal to:

<sup>190</sup> Saskatchewan Act, s 12.1; Manitoba Act, s 16(1); Newfoundland Act, s 14(1)(e).

<sup>191</sup> RFD 14 at 115 (Preliminary Recommendation 15(1)).

- (a) 1/2 of the consideration for the disposition made by the [owner], if the consideration is of a value substantially equivalent to that of the property transferred, or
  - (b) 1/2 of the value of the property at the date of the disposition,
- whichever is the larger sum.

[339] As courts cannot vary this formula, a damages award resulting from a prohibited disposition can exceed the amount that the owner actually receives from the sale. In *Joncas v Joncas*, an owner sold a homestead for \$325,000 without his spouse's consent.<sup>192</sup> After paying a line of credit registered against the property and some other amounts, the owner's net proceeds were \$121,019. The non-owner spouse sued and the court awarded her damages. Under the formula in the *Dower Act*, the award was \$162,500—more than the owner had actually received from the sale.

[340] Professor Jonnette Watson Hamilton briefly reviewed arguments for and against fixed damages in one of her blog posts.<sup>193</sup> She noted that the fixed damages will almost always be punitive but that some might argue punishment is appropriate.

[341] While the formula may punish the owner, it does not necessarily make a non-owner whole. As one respondent pointed out in early consultation, half the value of the homestead is not enough to buy a comparable home.

[342] None of the other jurisdictions with an action for damages have provisions prescribing the amount of damages. Manitoba's legislation explicitly states that the court has discretion to assess the damages:<sup>194</sup>

16(5) The court may, in its discretion, determine the amount of a spouse's or common-law partner's damages under this section, subject to such terms and conditions as the court considers appropriate

[343] Both ALRI and the Manitoba Law Reform Commission have considered the assessment of damages. In *The Matrimonial Home*, Report for Discussion 14, ALRI proposed that a court should have discretion.<sup>195</sup> The Manitoba Law Reform

<sup>192</sup> *Joncas*, note 11. The owner was able to sell the house without consent because he swore a false affidavit, in which he said that neither he nor his spouse had lived in the house during their marriage. See also Watson Hamilton, "Harsh Consequences", note 5.

<sup>193</sup> Watson Hamilton, "Harsh Consequences", note 5.

<sup>194</sup> Manitoba Act, s 16(5).

<sup>195</sup> RFD 14 at 115. Preliminary Recommendation 15(2) was:

Commission came to a similar conclusion in its 2010 *Review of Compensation for the Loss of Homestead Rights*. It acknowledged that it is difficult to value the loss but that a fixed formula would “create unnecessary complications and could unduly restrict a court’s discretion.”<sup>196</sup>

[344] ALRI’s preliminary recommendation is the same as in our previous project: to eliminate the fixed formula, leaving damages to the discretion of a court.

## **RECOMMENDATION 19**

---

A court should have discretion to assess damages for disposition without consent.

[345] We welcome any comments you may have in support of or in opposition to this preliminary recommendation or additional options for reform.

### **c. Factors to consider**

## **ISSUE 24**

---

Should legislation include a list of factors for a court to consider?  
Which factors should be listed?

[346] Replacing the formula for damages with court discretion would increase flexibility. It would also mean uncertainty about how damages will be assessed, especially until there is a body of case law about damages.<sup>197</sup> Courts might award substantial damages, making a non-owner whole and punishing an owner. Or they might award nominal damages which could make the action for damages irrelevant.

[347] It may be useful to provide a list of factors that a court should consider. In *The Matrimonial Home*, Report for Discussion 14, ALRI proposed the list should

---

The quantum of damages to be awarded should be left to the discretion of the court. In assessing damages, a court should take into account all the circumstances of the case, including the costs of relocation and comparable accommodation, and any inconvenience caused to a spouse or the children of the marriage. In the case of a wrongful mortgage, a court can assess damages at the level of the monies advanced, together with any incidental affects associated with the mortgage.

<sup>196</sup> Manitoba Law Reform Commission, *Review of Compensation for the Loss of Homestead Rights*, Informal Report 25 (2010) at 7, online: <[www.manitobalawreform.ca/pubs/pdf/additional/informal\\_report\\_homestead.pdf](http://www.manitobalawreform.ca/pubs/pdf/additional/informal_report_homestead.pdf)> [[perma.cc/8KL7-5NH4](https://perma.cc/8KL7-5NH4)].

<sup>197</sup> In the only reported case we found from outside Alberta, *Dowse v Dowse*, 2003 MBQB 8, the Manitoba Court of Queen’s Bench awarded \$8,955, which included damages for the loss of the non-owner’s life interest, loss of a tactical advantage in family litigation, and punitive damages.

include “the costs of relocation and comparable accommodation and any inconvenience caused to the spouse or the children of the marriage.”<sup>198</sup> It might also be appropriate to include whether the non-owner lived in the home at the time of disposition, the value of the home, the consideration for the transaction, the net proceeds, and specific or general deterrence.

[348] We would welcome comments about this issue.

#### d. Payment from the General Revenue Fund

### ISSUE 25

---

If the homeowner cannot pay damages, should compensation be available from the General Revenue Fund?

[349] The *Dower Act* guarantees payment of damages to a non-owner. If a non-owner is awarded damages but cannot enforce the judgment against the owner, the non-owner can apply to have the damages paid from the General Revenue Fund. The non-owner must take all possible proceedings to collect from the owner first.<sup>199</sup>

[350] This feature is only found in Alberta and Saskatchewan.<sup>200</sup>

[351] ALRI previously recommended that this feature be retained, with some adjustments.<sup>201</sup>

[352] We believe that this feature provides important protection for a non-owner and should be retained.

[353] The General Revenue Fund should remain a payor of last resort. We propose a limit to its responsibility, however. If a court awards punitive damages, the General Revenue Fund should not be required to pay them. The purpose of punitive damages is to punish a wrongdoer. They are not compensation for the wronged person and it would be inappropriate to use public funds to pay them.

<sup>198</sup> RFD 14 at 115 (Recommendation 15(2)).

<sup>199</sup> *Dower Act*, ss 13–15.

<sup>200</sup> *Dower Act*, s 13(1); Saskatchewan Act, s 13.

<sup>201</sup> RFD 14 at 116–17 (Recommendation 16).



## RECOMMENDATION 20

---

If a spouse or adult interdependent partner is awarded damages for disposition without consent but is unable to collect the damages or the full amount of damages from the homeowner, the spouse or adult interdependent partner should be able to seek payment of damages, excluding punitive damages, from the General Revenue Fund.

[354] We welcome any comments you may have in support of or in opposition to this preliminary recommendation or additional options for reform.

[355] It may be appropriate to have other limits on the responsibility of the General Revenue Fund. For example, it might be appropriate to place a cap on the total amount payable. We would welcome comments about whether there should be other limits on the responsibility of the General Revenue Fund and if so, what they should be.

### e. Effect of the end of the relationship

## ISSUE 26

---

Should the action for damages survive divorce or the end of the relationship?

[356] In a 1965 case, *Clark v Clark*, a majority of the Court of Appeal held that the right to damages ends upon divorce.<sup>202</sup>

[357] In early consultation, we heard anecdotally of spouses postponing their divorce until the action for damages was resolved. It seems undesirable that the law would require a separated spouse to decide to either remain married through years of litigation or to abandon their claim.

[358] For adult interdependent partners, this rule would have even more severe effects. It is likely that an adult interdependent partner could never receive damages. An adult interdependent relationship usually ends after the partners have been separated for one year.<sup>203</sup> It may end sooner, if they make a separation

<sup>202</sup> *Clark v Clark* (1965), 55 DLR (2d) 218 (Alta SC AD). A married couple separated and shortly afterwards the husband transferred his interest in all his land to his father. The wife did not consent to the disposition. She commenced divorce proceedings and an action for damages. The divorce was finalized before the trial of the action for damages. Justice Johnson's reasons expressed the majority's decision: *Clark v Clark* (1965), 55 DLR (2d) 218 at 227 (Alta SC AD) Johnson JA:

[W]hile the appellant's dower rights existed when the action was commenced, the plaintiff, because of the intervening divorce, was unable at trial to prove any damages since her dower rights which were the subject matter of the action, had ceased to exist because of the divorce.

<sup>203</sup> *Adult Interdependent Relationships Act*, note 86, s 10(1)(b).

agreement or if one marries or enters an adult interdependent partner agreement with a third party.<sup>204</sup> It would be nearly impossible to complete litigation within a year or less, especially since the defendant would have an incentive to delay.

[359] Our preliminary recommendation is to reverse this rule. A claim for damages should survive divorce or the end of an adult interdependent relationship.<sup>205</sup> To be clear, damages would be available only if the disposition was wrongful at the time it was made. If the owner disposed of property without consent while the couple lived in the home or within three years after they last lived in the home together, a court could award damages. It would not matter if the relationship ended before the action was resolved. This preliminary recommendation would not affect the time limit discussed above or the limitation period for making a claim.

### **RECOMMENDATION 21**

---

A court should be able to award damages for a disposition without consent after spouses have divorced or adult interdependent partners have become former adult interdependent partners.

[360] We welcome any comments you may have in support of or in opposition to this preliminary recommendation or additional options for reform.

---

<sup>204</sup> *Adult Interdependent Relationships Act*, note 86, ss 10(1)(a), (c)-(d).

<sup>205</sup> ALRI previously made a similar preliminary recommendation in RFD 14 at 112-13, 115 (Recommendation 15(1)).

## CHAPTER 8

# How Should Debt Affect Consent to Disposition?

## A. Background

---

[361] Alberta's *Dower Act* was inspired by American homestead legislation. Homestead legislation generally protected a spouse in three ways: by requiring the spouse's consent to disposition, by giving the spouse rights to the home after the owner's death, and by protecting the home from creditors.<sup>206</sup>

[362] In Alberta, protection against creditors is not an explicit feature of the *Dower Act* but there are various ways that the *Dower Act* can affect the rights of debtors and creditors.

### 1. CIVIL ENFORCEMENT AND BANKRUPTCY

[363] Although civil enforcement and bankruptcy are entirely different processes, there are similar issues about the interaction with the *Dower Act*. This section deals with the two together.

[364] A judgment creditor can seize and sell land from a debtor, including land that is the debtor's homestead. There are several steps that must occur before a judgment creditor can seize or sell land.<sup>207</sup> First, they must obtain a judgment from court, requiring the debtor to pay money. If the debtor does not pay voluntarily, the creditor may obtain and register a writ of enforcement. The creditor must register the writ with the Property Security Registry and against title at the Land Titles Office before instructing a civil enforcement agency to seize and sell a particular parcel of land.

[365] If a person becomes bankrupt, all their property vests in the trustee. The trustee can deal with the property, including selling or otherwise disposing of land.

---

<sup>206</sup> See Bowker, note 52.

<sup>207</sup> See generally *Civil Enforcement Act*, RSA 2000, c C-15, ss 25.1-42, 67-76.

## 2. EXEMPTION FOR A PRINCIPAL RESIDENCE

[366] Certain kinds of property are exempt from writ proceedings, including a debtor's principal residence.<sup>208</sup> The *Bankruptcy and Insolvency Act* adopts provincial exemptions so the same property is exempt in bankruptcy.<sup>209</sup>

[367] There are two kinds of exemptions. Some kinds of property are completely exempt and cannot be seized. Other kinds of property are exempt up to a prescribed amount. They can only be seized and sold if the net proceeds will exceed the prescribed amount. In that case, the debtor is entitled to keep the prescribed amount from the proceeds.<sup>210</sup>

[368] A principal residence on a farm may be completely exempt, if several conditions are met. The debtor must be a farmer and the principal residence must be on their farm. If so, the home quarter (up to 160 acres) including the residence will be completely exempt no matter how valuable the land and residence may be.

[369] All other principal residences are exempt up to a prescribed amount. The prescribed amount is a maximum of \$40,000.<sup>211</sup> Although it would be only a fraction of the amount required to buy another home in most Alberta communities, Alberta's exemption for a principal residence is among the most generous in Canada.

[370] ALRI noted the difference in *Enforcement of Money Judgments*, Final Report 61 which was published in 1991.<sup>212</sup> It did not recommend any changes to the exemption. It would be beyond the scope of this project to recommend changes to the kinds or amounts of exemptions.

<sup>208</sup> *Civil Enforcement Act*, RSA 2000, c C-15, ss 88–89.

<sup>209</sup> *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s 67(1)(b).

<sup>210</sup> There are some nuances and exceptions but it is not necessary to delve into them for the purpose of this discussion.

<sup>211</sup> *Civil Enforcement Act*, RSA 2000, c C-15, s 88(g); *Civil Enforcement Regulation*, Alta Reg 276/1995, s 37(1)(e). If the debtor co-owns the residence with someone else, the exemption is reduced to the amount proportionate to the debtor's interest. For example, if the debtor co-owns the property with one other person and they have equal shares (ie, each owns half), the debtor's exemption would be \$20,000 (half of \$40,000).

<sup>212</sup> Alberta Law Reform Institute, *Enforcement of Money Judgments*, Final Report 61 Volume 1 (1991) at 177, online: <[www.alri.ualberta.ca/wp-content/uploads/1991/03/fr061-v1.pdf](http://www.alri.ualberta.ca/wp-content/uploads/1991/03/fr061-v1.pdf)>.

## B. Protection for a Non-owner

---

### ISSUE 27

---

What protection should there be for a spouse or adult interdependent partner if a home is seized in civil enforcement proceedings or vested in a trustee in bankruptcy?

[371] The *Dower Act* does not protect a non-owner from losing their home to an owner's creditors. In *McNeil v Martin*, a 1982 decision, a majority of the Alberta Court of Appeal held that a homestead can be seized and sold in writ proceedings without a non-owner's consent.<sup>213</sup> One of the reasons the majority gave was that if consent to disposition were required, the non-owner could always prevent the sale. In effect, it would make the homestead completely exempt.

[372] In our view, this rule undermines the purpose of consent to disposition. An owner cannot mortgage a home without a non-owner's consent but can run up other debts without the non-owner's knowledge or consent. If the owner cannot pay their debts, creditors can seize and sell the couple's home. In most cases, the exemption will be insufficient to replace the home. The couple will be left without a home or the means to buy another one.

[373] We are also troubled by the different level of protection for farming couples compared to all others. If a couple lives on a farm, the non-owner has comprehensive protection against losing their home unexpectedly. Either they will have the opportunity to withhold consent or the exemption will apply.<sup>214</sup> Those living elsewhere would have the opportunity to withhold consent to a

<sup>213</sup> *McNeil v Martin* (1982), 41 AR 473 (CA). The case was decided before the enactment of the *Civil Enforcement Act* but the principle has not changed. The majority's decision added a curious wrinkle: although a non-owner cannot prevent disposition of the homestead, their life estate is not affected by the disposition. The homestead may be sold but the purchaser's interest is subject to the non-owner's contingent life estate. Justice Belzil, who dissented, pointed out the practical problems with a contingent life estate (*McNeil v Martin* (1982), 41 AR 473 at para 47 (CA), Belzil JA, dissenting):

In my view, and with all due respect, an interpretation of the Act which would authorize the sheriff to sell the homestead property of the husband subject to the contingent life estate of the wife leads to such an absurdity. The concept lacks realism and would be termed absurd in the marketplace at least in this jurisdiction. Upon sale, the wife is ejected from her home to await her husband's death, when she may then reoccupy it. A purchaser of such an interest entitled to the possession of it during the husband's life, be it a month or 50 years, becomes a trespasser upon his death and must surrender possession of it to the widow for the rest of her life be that a month or 50 years. Who will buy this pig in a poke? It is inconceivable that the legislators ever intended to foist such a mischievous arrangement upon surviving spouses as part of the scheme for preservation of the family home.

It is very unlikely a non-owner would ever take possession of a property relying on a contingent life estate but we heard it is sometimes useful as a bargaining chip.

<sup>214</sup> A homestead and a principal residence are not exactly the same but the definitions are similar. Both apply to a home quarter.

mortgage but have minimal protection against losing their home to other creditors.

[374] We prefer a different approach, modelled on Saskatchewan legislation. *The Homesteads Act, 1989* includes a provision stating that a non-owner does not lose their rights when the owner has a trustee in bankruptcy:<sup>215</sup>

18(1) Where a trustee in bankruptcy of the property of an owning spouse is appointed, for the purposes of any dealing with the Land Titles Registry, this Act applies, with any necessary modification, as if the trustee in bankruptcy was the owning spouse and the non-owning spouse was his or her spouse.

[375] A trustee in bankruptcy may apply to dispense with a non-owner's consent.<sup>216</sup>

[376] We propose a similar rule for Alberta but it should apply to both civil enforcement and bankruptcy. A civil enforcement agency or a trustee in bankruptcy would step into the shoes of the owner. The non-owner could prevent a disposition by withholding consent, just as they could if the owner were making a disposition. The civil enforcement agency or trustee in bankruptcy could apply for an order dispensing with the non-owner's consent. In our view, this proposal would balance the interests of creditors with the purpose of protecting a non-owner from losing their home unexpectedly.

## **RECOMMENDATION 22**

---

If a civil enforcement agency seizes a homeowner's home or if a trustee in bankruptcy is appointed for a homeowner, the civil enforcement agency or trustee in bankruptcy should not be able to dispose of the home without the consent of the homeowner's spouse or adult interdependent partner or an order dispensing with consent.

[377] We welcome any comments you may have in support of or in opposition to this preliminary recommendation or additional options for reform.

<sup>215</sup> Saskatchewan Act, s 18(1).

<sup>216</sup> Saskatchewan Act, s 18(2).

## C. Attaching a Non-owner's Rights

---

### ISSUE 28

---

Should a creditor or trustee in bankruptcy of a spouse or adult interdependent partner be able to consent or withhold consent in the place of a spouse or adult interdependent partner?

[378] There are a few reported cases where a non-owner was the debtor and a creditor attempted to attach their dower rights.<sup>217</sup> In both *Kuehn v Otis Engineering* and *Phan v Lee*, courts decided that a creditor cannot do so, at least while the owner is alive. While the owner is alive, the non-owner only has the right to prevent a disposition by withholding consent. If a creditor could withhold consent, it would put pressure on the owner to pay. As Justice Kent put it:<sup>218</sup>

[T]he creditor who purchases the dower interest has the upper hand because the property cannot be disposed of without the creditor's consent who will presumably attempt to hold out for maximum value. That is not protecting one spouse's dower interest; it is punishing the other spouse.

[379] Although case law makes it clear that a creditor cannot attach a non-owner's rights, it would be helpful to have a clear statement to that effect in legislation.

### RECOMMENDATION 23

---

Only a spouse or adult interdependent partner of a homeowner, or their attorney appointed under a power of attorney, should have the power to consent to a disposition of a home or prevent a disposition of a home by withholding consent. A creditor, a civil enforcement agency, a trustee in bankruptcy, or any other successor should not be able to consent or withhold consent in the place of the spouse or adult interdependent partner.

[380] We welcome any comments you may have in support of or in opposition to this preliminary recommendation or additional options for reform.

<sup>217</sup> *Kuehn v Otis Engineering* (1996), 179 AR 225 (QB); *Phan v Lee*, 2005 ABCA 142. A trustee in bankruptcy attempted something similar in a recent Manitoba case, with a different result: *Chartier v Chartier Estate (Trustee of)*, 2013 MBCA 41, rev'g 2012 MBQB 176, leave to appeal to SCC refused, 35483 (23 January 2014).

<sup>218</sup> *Kuehn v Otis Engineering* (1996), 179 AR 225 (QB) at para 9.







Deadline for comments on the issues raised in  
this document is **February 1, 2022**

Please complete the online survey at:  
[www.surveymonkey.com/r/KRN532L](http://www.surveymonkey.com/r/KRN532L)



**Web:** [alri.ualberta.ca](http://alri.ualberta.ca)

**Phone:** 780.492.5291

**Email:** [lawreform@ualberta.ca](mailto:lawreform@ualberta.ca)

**Follow us on Twitter!** @ablawreform

---