



ALBERTA
LAW REFORM
INSTITUTE



DOWER ACT: LIFE ESTATE



REPORT FOR DISCUSSION

37

NOV 2021





Dower Act:
Life Estate

REPORT FOR || **37**
DISCUSSION

NOVEMBER 2021

ISSN 0834-9037

ISBN 978-1-896078-85-4

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.

This report can be found at www.alri.ualberta.ca/2021/11/dower-act-life-estate-report-for-discussion-37/

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/

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

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 changes that would maintain protection while bring 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
Website: 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	ix
Table of Abbreviations	xi
Common Terms	xiii
CHAPTER 1 Introduction	1
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</i> <i>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
CHAPTER 2 The Life Estate	11
A. The Dower Life Estate	11
1. Life estate in land	11
2. Election	12
3. Opting out	12
4. Life estate in personal property	13
B. Problems with the Life Estate	14
1. Life estates are rarely used	14
2. The life estate is an inflexible source of support	15
a. Lack of need	16
b. Difficulty liquidating a life estate	16
c. Difficulty valuing a life estate	17
3. Potential for conflict between a life tenant and the owner of the remainder interest	18

a.	Postponing inheritance	18
b.	Lack of clarity about responsibility for expenses during the life estate	19
4.	Uncertainty about how the life estate affects other claims.....	19
a.	Payment of debts.....	20
b.	Calculating the value of the estate for intestate succession..	20
c.	Family maintenance and support from an estate	21
CHAPTER 3 Does the Life Estate Still Serve a Valid Purpose?		23
A.	What Was the Historical Purpose of the <i>Dower Act</i> ?	23
B.	What Has Changed Since the <i>Dower Act</i> Was Enacted?	25
1.	Joint tenancy.....	25
2.	Inheritance under a will or by intestate succession.....	26
a.	Inheritance under a will.....	26
b.	Intestate succession.....	26
c.	The life estate is in addition to any other inheritance.....	27
3.	Family maintenance and support from an estate.....	27
4.	Temporary possession of the family home after the owner's death	28
C.	Who Is Protected by the <i>Dower Act</i> ?	28
D.	Should the Life Estate Be Abolished?	31
1.	Arguments in favour of abolishing the life estate	31
a.	Few people rely on the life estate.....	31
b.	An automatic life estate is not tailored to actual needs	32
c.	Abolishing the life estate would be consistent with most other Canadian jurisdictions	33
d.	Abolishing the life estate would be an easy route to modernization	34
2.	Arguments against abolishing the life estate	34
a.	A home is a special asset.....	34
b.	An automatic life estate offers protection without litigation...	35
c.	The life estate can be converted into other kinds of support.	35
3.	Are there other options?	36
4.	Preliminary recommendation	36
CHAPTER 4 Extending the Life Estate to Adult Interdependent Partners.....		39
A.	Spouses and Adult Interdependent Partners	39
B.	Are Any Adjustments Required to Treat Spouses and Adult Interdependent Partners Alike?.....	42
1.	Proving an adult interdependent relationship.....	42
2.	Overlapping rights	43
CHAPTER 5 How Could Reforming the Definition of Homestead Resolve Problems?.....		45
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	51
5.	Interests in land	53
6.	Mobile homes.....	55
7.	Property owned by someone other than an individual	57
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. Residential tenancies	61
3. Land on reserves.....	62
D. Summary	62
CHAPTER 6 How Can the Life Estate Be Improved?.....	65
A. Introduction.....	65
B. Effect of Separation.....	65
C. Valuation of the Life Estate	67
D. Clarifying the Obligations of a Life Tenant and the Owner of the Remainder Interest.....	70
E. Other Claims Against an Estate	72
CHAPTER 7 How Can the Life Estate in Personal Property Be Improved?	75
A. Does the Life Estate in Personal Property Serve a Valid Purpose?	75
B. Reforming Rights to Personal Property	77
1. Personal property to be included	77
2. Rights and responsibilities	79

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

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

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* that give a spouse a "life estate" after the homeowner dies. A life estate means the surviving spouse may keep the home for their lifetime. The other report examines the *Dower Act*'s consent to disposition 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.

This continued relevance of a life estate does not mean that the *Dower Act* should continue with all of its current flaws. The report also considers how to make the life estate work better 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. Only one home is needed for this purpose. A surviving spouse or partner should have a life estate for a home where the couple lived together. If they had more than one home, the surviving spouse or partner should have to choose one home for their life estate.

What types 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.

A home needs some furnishings, appliances, and other items to be useful. A surviving spouse or partner should be able to keep the deceased person’s household goods.

Should a surviving spouse or partner have a life estate if the couple had separated?

A life estate should be available while the couple lives together or shortly after separation. There should be a time limit after separation. The time limit should be consistent with other Alberta legislation. For spouses, a surviving spouse should not receive a life estate if they were living separate and apart from the homeowner for more than two years before the homeowner died. For adult interdependent partners, a surviving person should not receive a life estate if they and the homeowner had become former adult interdependent partners before the homeowner died.

How should a life estate affect a third party’s rights?

There can be problems if a deceased person’s other family members need support and a home is the only significant asset. A court should have the power to terminate or limit a life estate if necessary to provide maintenance and support to another family member.

What are ALRI’s preliminary recommendations?

ALRI makes the following preliminary recommendations in this report:

RECOMMENDATION 1

The surviving spouse or adult interdependent partner of a homeowner should automatically receive a life estate in a home when the homeowner dies.

RECOMMENDATION 2

Adult interdependent partners should have the same rights as spouses regarding the life estate.

RECOMMENDATION 3

A life estate should only be available for a home where both spouses or both adult interdependent partners lived together.

RECOMMENDATION 4

A life estate should be available if both spouses or both adult interdependent partners lived together in the home at any time.

RECOMMENDATION 5

A surviving spouse or adult interdependent partner should have a life estate for only one home.

RECOMMENDATION 6

If a homeowner dies owning more than one home, the surviving spouse or adult interdependent partner should have to choose one home for their life estate from among those where both spouses or both adult interdependent partners lived together.

RECOMMENDATION 7

A surviving spouse or adult interdependent partner should have a life estate for all the land included on the certificate of title for the land where the home is located.

RECOMMENDATION 8

A surviving spouse or adult interdependent partner should have a life estate if the homeowner had one of 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 9

A surviving spouse or adult interdependent partner should have a life estate in a mobile home.

RECOMMENDATION 10

A surviving spouse should not receive a life estate if they were living separate and apart from the homeowner for more than two years at the time of the homeowner's death.

RECOMMENDATION 11

A former adult interdependent partner should not receive a life estate if they and the homeowner had become former adult interdependent partners, by separation or otherwise, at the time of the homeowner's death.

RECOMMENDATION 12

Legislation should list the obligations of the life tenant and the owner of the remainder interest.

RECOMMENDATION 13

A life estate should pass to a surviving spouse or adult interdependent partner automatically, by operation of law. A life estate should not be considered part of a deceased's estate.

RECOMMENDATION 14

A court should have the power to terminate or limit a surviving spouse's or adult interdependent partner's life estate if necessary to provide maintenance and support to another family member.

RECOMMENDATION 15

A surviving spouse or adult interdependent partner should have the use and enjoyment of personal property related to a home.

RECOMMENDATION 16

A surviving spouse or adult interdependent partner should have a right to use and enjoy the deceased's household goods, meaning items used for transportation, household, educational, recreational, or health purposes.

RECOMMENDATION 17

Legislation should list the obligations of a surviving spouse or partner relating to personal property.

RECOMMENDATION 18

A surviving spouse or partner should be able to dispose of personal property without the consent if the personal property is no longer useful and has little or no value.

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

When a homeowner dies, should their surviving spouse or adult interdependent partner automatically receive a life estate in a home? ... 31

ISSUE 2

Should spouses and adult interdependent partners have the same rights and benefits regarding the life estate? 39

ISSUE 3

Who should have to live in a home to make a life estate available? 46

ISSUE 4

How long should a life estate be available if 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 available for a life estate? 50

ISSUE 6

What amount of land should be included in a life estate?..... 51

ISSUE 7

Which interests in land should be affected by a life estate? 53

ISSUE 8

Should a surviving spouse or adult interdependent partner have a life estate for a mobile home?..... 55

ISSUE 9

Should a life estate be available for a home co-owned with a third party? 58

ISSUE 10

Should a life estate be available for a home owned by a corporation or similar entity? 59

ISSUE 11

Should a life estate be available to a spouse or adult interdependent partner living separate and apart from the homeowner? 65

ISSUE 12

Should legislation include guidance on how to value a life estate? 67

ISSUE 13

Which expenses relating to a home should be the responsibility of a life tenant during a life estate? Which expenses should be the responsibility of the owner of the remainder interest?..... 70

ISSUE 14

Should the life estate have priority over other claims against an estate? 72

ISSUE 15

What rights should a surviving spouse or adult interdependent partner have regarding the deceased's personal property? 75

ISSUE 16

Which personal property should a surviving spouse or adult interdependent partner have a right to use and enjoy? 77

ISSUE 17

What rights or responsibilities should a surviving spouse or partner have relating to personal property? 79

Table of Abbreviations

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
<i>Wills and Succession Act</i>	<i>Wills and Succession Act</i> , SA 2010, c W-12.2

LAW REFORM PUBLICATIONS

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

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.

Life estate – An interest in land that lasts for a person’s lifetime. Ownership is divided between the life tenant and the owner of the remainder interest. The life tenant may occupy, use, and deal with the land for the rest of their life but cannot control who will receive it after their death. When the life tenant dies, the owner of the remainder interest becomes the owner of the land.

Life tenant – A person who has a life estate in land.

Owner of the remainder interest – A person who will become the owner of land when the life tenant dies.

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*.¹ This Report for Discussion focuses on the life estate. The other report is *Dower Act: Consent to Disposition*.

[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.²

[5] The *Dower Act* protects the 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 second feature: the life estate.

¹ *Dower Act*, RSA 2000, c D-15 [*Dower Act*].

² *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 14.³ 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.⁴ This recommendation has never been implemented. The prescribed form of affidavit remains inconsistent with the statute.⁵

[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.⁶ It also included a recommendation against automatic co-ownership of the matrimonial home.⁷

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

⁴ 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>. 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].

⁵ 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) online (blog): *ABlawg* <ablawg.ca/2017/03/14/the-harsh-consequences-of-ignoring-the-dower-act/> [perma.cc/2Z6T-NM7A].

⁶ 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>.

⁷ 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>.

[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.⁸ This recommendation was not implemented. Other recommendations in the project were nearly implemented but did not come into force.⁹

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.¹⁰

[14] At approximately the same time, court decisions highlighted difficulties applying certain parts of the *Dower Act*.¹¹ Professor Jonnette Watson Hamilton wrote blog posts exploring the issues.¹² 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.

⁸ 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>. 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>.

⁹ 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.

¹⁰ 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> [FR 112].

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

¹² Jonnette Watson Hamilton, “The Harsh Consequences of Ignoring the Dower Act” (14 March 2017) online (blog): *ABlawg* <ablawg.ca/2017/03/14/the-harsh-consequences-of-ignoring-the-dower-act/> [perma.cc/2Z6T-NM7A]; Jonnette Watson Hamilton, “The Impact of a Dower Life Estate on the Valuation and Distribution of Intestate Estates” (18 July 2017), online (blog): *ABlawg* <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.¹³

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.

¹³ 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 individuals 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.¹⁴ 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*.¹⁵

¹⁴ 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> [perma.cc/G335-B5D4].

¹⁵ *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*. 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.¹⁶

[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.¹⁷ 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.

¹⁶ 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.

¹⁷ 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; *Johnson Estate*, note 11 at para 19; Bruce Ziff, *Principles of Property Law*, 7th ed (Toronto: Thomson Reuters Canada Limited, 2018) at 221 [Ziff]. 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 the life estate. Chapter 2 reviews how the life estate works in practice and describes some of the problems with it. Chapter 3 considers whether the life estate is still useful. It reviews relevant social and legal changes since the *Dower Act* was enacted. Some parts of this discussion overlaps with the other report in this project. This report highlights the changes relevant to the life estate. Chapter 3 continues by outlining arguments for and against abolishing the life estate. It concludes with our preliminary recommendation to retain the life estate, with reforms.

[51] The third part discusses how the life estate 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. Chapter 6 proposes other reforms that could improve how the life estate works in practice. Finally, Chapter 7 proposes reforms that would improve upon the life estate in personal property.

CHAPTER 2

The Life Estate

A. The Dower Life Estate

1. LIFE ESTATE IN LAND

[52] One of the key features of the *Dower Act* is that a non-owner spouse automatically receives a life estate in a homestead when the owner dies. Section 18 says:

18 A disposition by a will of a married person and a devolution on the death of a married person dying intestate is, as regards the homestead of the married person, subject and postponed to an estate for the life of spouse of the married person, which is hereby declared to be vested in the surviving spouse.

[53] A life estate means ownership of land is divided between two owners. One (the “life tenant”) owns the land for the rest of their life but cannot control who will receive it after their death. The other (the “owner of the remainder interest”) becomes the full owner of the land when the life tenant dies.¹⁸

[54] A life tenant may occupy, use, and deal with the land until their death.¹⁹ They may live on it or rent it out to earn income.²⁰ A life tenant may not alter or exploit the land, or buildings on the land, in a way that reduces its value.²¹ They may not sell, transfer, or give away the land or do anything else that would prevent the owner of the remainder interest from receiving it when the life tenant dies. A life tenant may sell their life estate but the purchaser will only receive the original life tenant’s interest. That is, the purchaser will only own the land until the original life tenant dies. A life tenant may sell or surrender their interest to the owner of the remainder interest.²²

¹⁸ See generally Ziff, note 17 at 197, 204.

¹⁹ Jonnette Watson Hamilton, “The Impact of a Dower Life Estate on the Valuation and Distribution of Intestate Estates” (18 July 2017), online (blog): *ABlawg* <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].

²⁰ Nancy L Golding, “Comparing Common Law and Marriage Succession Rights in Alberta” (2019) 38:2 ETPJ 147 at 148.

²¹ See Ziff, note 17 at 208–10.

²² Alberta, Ministry of Service Alberta, *Land Titles Procedure Manual*, Procedure LIF-1 (Edmonton: Ministry of Service Alberta, 2021) at para 11, online: *Service Alberta* <www.servicealberta.ca/pdf/ltmanual/LIF-1.pdf> [perma.cc/AGL4-D3FQ] [Life Estate Procedure].

[55] The life estate created by the *Dower Act* takes effect regardless of what the owner's will says. That is, the life estate overrides an owner's testamentary freedom. If the owner does not have a will or the will does not deal with the homestead, the life estate overrides the rules for intestate succession.²³

[56] Under the *Dower Act*, a life estate is only available for land owned by an individual. If a couple's home is on land owned by a corporation or other entity, the land is not a homestead. A surviving spouse will not receive a life estate, even if the corporation was closely held or controlled by the deceased. Similarly, if the deceased co-owned the land with a third party, either as joint tenants or tenants in common, the land is not a homestead.²⁴ The surviving non-owner will not receive a life estate under the *Dower Act*.

2. ELECTION

[57] If an owner dies with more than one homestead, the surviving non-owner spouse receives a life estate in only one of them. The non-owner must choose one homestead and register their choice with the Land Titles Office.²⁵ There is a prescribed form to register their choice.²⁶

[58] If the non-owner spouse does not register their choice, the personal representative of the deceased owner's estate may apply for a court order.²⁷ The court will choose one of the homesteads for the surviving non-owner spouse's life estate.

3. OPTING OUT

[59] A non-owner spouse may give up their dower rights, including the right to receive a life estate. There are various reasons they might want to do so and several different ways to opt out of dower rights.

[60] While the owner is alive, common reasons include an arrangement to keep property separate during a relationship or to divide property after the couple has separated. The non-owner can give up their right to a life estate by consenting to

²³ The rules for intestate succession are found in Part 3 of the *Wills and Succession Act*.

²⁴ *Dower Act*, s 25(1).

²⁵ *Dower Act*, s 19.

²⁶ *Dower Act*, s 19(2); *Forms Regulation*, note 4, Form F.

²⁷ *Dower Act*, s 19(4).

a disposition of the homestead,²⁸ signing a release of their dower rights,²⁹ or making an agreement releasing dower rights.³⁰

[61] After the owner's death, a non-owner may want to give up their life estate because they do not wish to stay in the home or because they have reached a different agreement with the owners of the remainder interest. They may consent to a disposition of the homestead to a third party or surrender the life estate to the owner of the remainder interest.³¹

4. LIFE ESTATE IN PERSONAL PROPERTY

[62] A non-owner spouse who receives a life estate in the homestead also receives a life estate in certain personal property. Section 23(1) says:³²

When a life estate in the homestead vests in the surviving spouse on the death of [the owner spouse], the surviving spouse also has a life estate in the personal property of the deceased that is, pursuant to Part 10 of the *Civil Enforcement Act*, free from seizure under a writ of enforcement in the surviving spouse's lifetime and the surviving spouse is entitled to the use and enjoyment of that personal property.

[63] The life estate in personal property is automatic. Like the life estate in the homestead, it takes effect regardless of what the owner's will says and overrides the rules for intestate succession.

[64] The *Dower Act* does not list the items that comprise the personal property a surviving non-owner may use and enjoy for his or her lifetime. Instead, it refers to exemptions under *Civil Enforcement Act*.³³ The *Civil Enforcement Act* and its regulations include these exemptions:³⁴

- twelve months worth of food;
- clothing worth up to \$4,000;
- household furnishings and appliances worth up to \$4,000;

²⁸ If a disposition results in a transfer to a third party, the land is no longer a homestead: *Dower Act*, s 3(2)(a).

²⁹ *Dower Act*, s 7.

³⁰ *Dower Act*, s 9.

³¹ *Dower Act*, s 21; Life Estate Procedure, note 22 at para 11.

³² *Dower Act*, s 23(1).

³³ *Civil Enforcement Act*, RSA 2000, c C-15 [*Civil Enforcement Act*].

³⁴ *Civil Enforcement Act*, note 33, s 88; *Civil Enforcement Regulation*, Alta Reg 276/1995, s 37 [*Civil Enforcement Regulation*].

- a motor vehicle worth up to \$5,000;
- medical and dental aids; and
- personal property used to earn income from a non-farming occupation worth up to \$10,000, or the personal property needed to conduct a farming operation for twelve months.

[65] The list of items is limited and the amounts are quite modest. The life estate in personal property provides a surviving non-owner with some basic necessities but little else.

B. Problems with the Life Estate

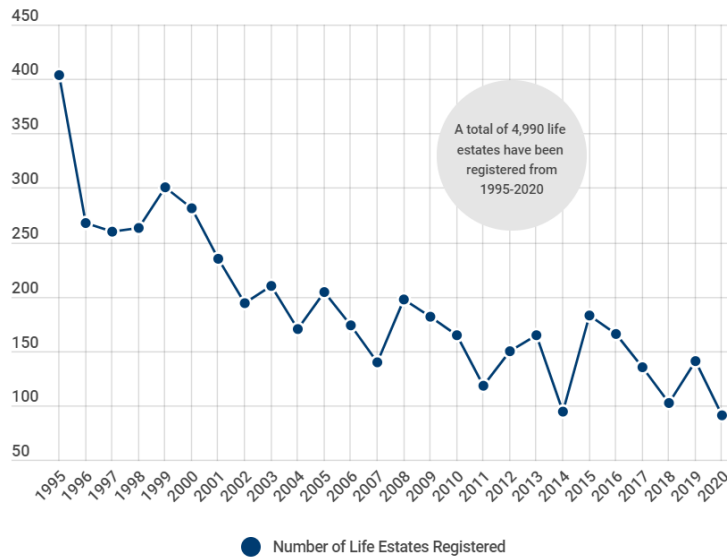
1. LIFE ESTATES ARE RARELY USED

[66] Statistics from the Land Titles Office suggest the life estate is rarely used. As of 23 March 2021, there were 2781 life estates registered with the Land Titles Office.³⁵ This number includes all life estates, not just those arising under the *Dower Act*. For example, it would include life estates created by will.

[67] The Land Titles Office also provided statistics showing the number of life estates registered each year since 1995. As the graph below shows, there is a declining trend. The number of life estates registered went from a high of 404 in 1995 to a low of 91 in 2020.

³⁵ Email from Jill Baker, Government of Alberta, to Jennifer Taylor, ALRI Counsel (23 March 2021). For context, there are more than 2 million certificates of title: Service Alberta, "Introduction to Alberta Land Titles" (13 May 2015) at 14, online: <open.alberta.ca/dataset/97a8d4b4-2438-4d58-b2bf-30e19138aaff/resource/611367b8-5a84-457e-95ee-264dc813b2aa/download/5649897-2012-lto-booklet-introduction.pdf> [perma.cc/VUH4-9Y4A].

Number of Life Estates Registered from 1995-2020



[68] These numbers probably do not tell the whole story. In early consultation, we heard that many life estates are never registered.

[69] We also heard that the true value of a life estate is often as a bargaining chip. A non-owner may prefer another kind of support and will agree to surrender their life estate in exchange for other compensation.

2. THE LIFE ESTATE IS AN INFLEXIBLE SOURCE OF SUPPORT

[70] The life estate can be understood as a form of support for the surviving non-owner.³⁶ Courts, legal academics, and some respondents in early consultation have said that the purpose of the *Dower Act* is to ensure that a surviving non-owner will not become homeless.³⁷ An automatic life estate does not always accomplish this purpose.

³⁶ See eg RFD 14 at 46: “Dower is premised on a support obligation owed by spouses to each other on the termination of a marriage by death.”

³⁷ *Kuehn v Otis Engineering* (1996), 179 AR 225 at para 6 (QB); *Havens Estate*, 2010 ABQB 91 at para 23; *Johnson Estate*, note 11 at para 19; *Ziff*, note 17 at 221.

a. Lack of need

[71] Some non-owners do not require support and are not at risk of becoming homeless. Some may have or inherit enough other assets to support themselves without a life estate. Some may have another home.

[72] Sometimes a non-owner may receive a life estate even though the property is not their home. For example, it may occur if a couple has been separated for a long time without divorcing. In early consultation, 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. In an informal settlement, they may not take the steps necessary to opt out of dower rights. The separated spouses may go their own ways and even lose contact but a non-owner retains their dower rights as long as they are legally married to the owner or until they release them. If the owner dies, the surviving non-owner would be entitled to a life estate in the owner's home. They may receive a life estate even if they have never lived in the home.³⁸ It is difficult to argue that a non-owner requires support or is at risk of becoming homeless in this situation.

b. Difficulty liquidating a life estate

[73] Even if a surviving non-owner requires support, a life estate may not provide appropriate support. There are many reasons why a life tenant may not wish to remain in the homestead indefinitely. They may want to escape conflict with the owner of the remainder interest. They may not want to or be able to maintain the home. The home may be too large or otherwise unsuitable for their needs. They may need to move to obtain care or a higher level of care as they age or if they become disabled.

[74] For these reasons, many life tenants may prefer to convert the life estate into a more liquid asset. Courts have often recognized that a life estate is impractical. In many cases, they have converted a life estate into full ownership as it is more useful to the life tenant.³⁹

[75] In theory, there are two ways a life tenant could use their interest in the homestead to pay for other accommodation. They can rent the home, or they can sell their interest. In practice, however, the second option is very limited.

³⁸ Land is a homestead if the owner lived there: see Chapter 5, below.

³⁹ See eg *Ebeling-Argue (Estate of) v Hutchinson*, 2008 ABQB 299; *Re Fliczuk Estate*, 2019 ABQB 946.

[76] There is no market for a life estate. It would be very difficult, if not impossible, to find someone willing to buy an interest that will end suddenly at some uncertain time in the future, when the life tenant dies. Alberta courts have recognized that there is little chance of selling a life estate.⁴⁰ The remainder interest is probably also nearly impossible to sell, for similar reasons.

[77] The most likely way to liquidate a life estate would be to sell it to the owner of the remainder interest. Other options are for the life tenant to buy the remainder interest, or for the life tenant and the owner of the remainder interest to agree to sell the land and split the proceeds.

c. Difficulty valuing a life estate

[78] One obstacle to liquidating a life estate is the difficulty valuing it. The *Dower Act* provides no directions on how to value a life estate and courts have given little guidance. Without a market, the concept of market value does not help.

[79] In practice, wills and estates lawyers have found other ways to value a life estate.⁴¹ We heard of at least two approaches that have been used in Alberta.

[80] One approach is to refer the question to an actuary. An actuary might calculate the value of the life estate with reference to the value of the property, the rate of return that might be earned if that amount were invested, and the life tenant's life expectancy, with an adjustment for present value. The calculations may also account for the possibility that the life tenant will leave the home before their death. Courts in other jurisdictions have approved of this approach.⁴² We heard that some lawyers may use a similar approach without help from an actuary.

[81] Another approach is based on the amount a tenant would pay to rent a similar home. The rent multiplied by the life tenant's life expectancy, adjusted for present value, is the value of the life estate. There is some support for this approach in at least one decision of the Tax Court of Canada.⁴³

⁴⁰ *Re Stojkovich Estate*, 2006 ABQB 467 at para 22 [*Stojkovich Estate*]; see also *Johnson Estate*, note 11 at para 22.

⁴¹ See generally Victoria A Jones, "Death & Dower: How Dower and a Family Maintenance and Support Claim Interact" (Paper presented to Canadian Bar Association, Wills, Estates, and Trusts Section Alberta North, Edmonton, 12 March 2019), online: de Villars Jones <sagecounsel.com/wp-content/uploads/2019/02/DEATH-DOWER-2019.pdf> [perma.cc/3HH8-AP4E].

⁴² See *Morice v Davidson*, [1943] SCR 94 at 97-98; *Re Zarowiecki*, [1982] 4 WWR 728 at 733-34 (Man Surr Ct); *Aho v Kelly* (1998), 57 BCLR (3d) 369 at paras 76-77 (SC).

⁴³ *Nauss v The Queen*, 2005 TCC 488 at paras 23-25.

[82] Alberta courts have not accepted either of these approaches, or any other way to value a life estate. In the two reported cases considering the issue, the Court of Queen's Bench rejected the use of actuarial reports without deciding what approach should be used instead.⁴⁴

3. POTENTIAL FOR CONFLICT BETWEEN A LIFE TENANT AND THE OWNER OF THE REMAINDER INTEREST

[83] If a surviving non-owner remains in the home, they may experience other problems. A life estate can be a source of conflict. It takes a degree of cooperation between a life tenant and the owner of the remainder interest to maintain the home and pay expenses. They each have obligations but often have competing interests. If they do not get along, they can end up in conflict.

[84] Our research and early consultation turned up examples of conflict between a life tenant and the owner of the remainder interest.⁴⁵ In many of these cases, the life tenant was a surviving spouse and the owner of the remainder interest was the deceased owner's child or children from a previous relationship. If the life tenant is relatively young, the conflict can go on for many years.

[85] If one or both parties do not or cannot meet their obligations, there is a risk that the home can be lost altogether. For example, in *Re Slager Estate* there was a line of credit secured against the homestead.⁴⁶ After the owner's death, neither the surviving spouse nor the estate paid it. The homestead was lost to foreclosure. In *Re Stadler (Estate)*, the deceased's adult children feared that the surviving spouse would not care for the homestead and may have let the insurance lapse.⁴⁷

[86] There seem to be two common sources of conflict.

a. Postponing inheritance

[87] The life estate provides security for a non-owner but at a cost to other heirs. Often, a home is the biggest asset in an estate. During a life estate, the owner of the remainder interest receives essentially no benefit from the home.

⁴⁴ *Stojkovich Estate*, note 40; *Johnson Estate*, note 11.

⁴⁵ See eg *Re Stadler (Estate)*, 2001 ABQB 408; *Lumley v Lumley Estate*, 2002 ABQB 326; *Ebeling-Argue (Estate of) v Hutchinson*, 2008 ABQB 299; *Re Slager Estate*, 2019 ABQB 191. We also heard anecdotally about examples of conflict.

⁴⁶ *Re Slager Estate*, 2019 ABQB 191

⁴⁷ *Re Stadler Estate*, 2001 ABQB 408

[88] This situation can be particularly problematic when the other heirs are minor children or otherwise in need.⁴⁸ In early consultation, we heard some anecdotes illustrating the problem. For example, we heard about a homeowner who died leaving a spouse and minor children from a previous relationship. The home was the only significant asset in the deceased's estate. The surviving spouse was relatively young and could expect to live many more years. In the meantime, there was no practical way for the children to receive any support from the estate.

b. Lack of clarity about responsibility for expenses during the life estate

[89] We heard that expenses often cause friction between a life tenant and the owner of the remainder interest.

[90] The *Dower Act* does not address who should pay for expenses related to the homestead during a life estate. The drafters of the *Dower Act* probably thought it was unnecessary to do so, as there are common law rules about payment of expenses during a life estate.⁴⁹ In general, the life tenant is responsible for recurring expenses like taxes, utilities, and regular maintenance, such as lawn care and snow shovelling. If there is a mortgage, the life tenant is responsible for paying interest on the mortgage. The owner of the remainder interest is responsible for capital expenses, like mortgage principal and repairs necessary to preserve the home, such as replacing a furnace or shingling a roof.⁵⁰

[91] Unfortunately, common law rules can be difficult to find and interpret. Some lawyers told us about being asked for advice about fairly small expenses, like property insurance. Sometimes the lawyers had to do research to advise their client, and did not always find clear answers. In cases like these, the legal fees may be disproportionate to the amount in dispute.

4. UNCERTAINTY ABOUT HOW THE LIFE ESTATE AFFECTS OTHER CLAIMS

[92] There is an unresolved conceptual issue about whether a life estate that arises from the *Dower Act* is part of the deceased owner's estate. On the one

⁴⁸ The other heirs might make an application for family maintenance and support under the *Wills and Succession Act*, s 88. As discussed below, it is doubtful whether a court has the power to make an order that would override a life estate that arises under the *Dower Act*.

⁴⁹ See generally Ziff, note 17 at 210–12; see also *Re Kachur Estate*, 2017 ABQB 786 at paras 97–109 [*Kachur Estate*].

⁵⁰ To our knowledge, there is no case law about responsibility for condominium fees and special levies if the homestead is a condominium unit. The *Condominium Property Act* says only that the registered owner of the fee simple estate is responsible: see *Condominium Property Act*, RSA 2000, c C-22, ss 1(1)(s), 39–42.

hand, the life estate passes to the non-owner by operation of law. It would make sense that it is therefore not part of the estate, similar to investments with a beneficiary designation or property in joint tenancy that passes by right of survivorship.⁵¹ On the other hand, there is some case law suggesting the entire value of a homestead is part of a deceased's estate.⁵²

[93] Although the issue is abstract, it has practical effect. There are at least three practical issues that may arise.

a. Payment of debts

[94] First, there is a question about whether a homestead can or should be sold to pay debts of the estate. There is at least one case where a court made an order allowing personal representatives to do so, but with very little analysis. In *Kosic v Kosic*, a 2002 decision of the Court of Queen's Bench, the deceased had a surviving spouse and two children from an earlier relationship.⁵³ The children were personal representatives of the estate. The only assets in the estate were a home that qualified as a homestead and a partial interest in a car. The funeral expenses were greater than the value of the estate's interest in the car. The court ordered that the home should be sold to pay the funeral expenses and the remaining proceeds divided between the spouse and children. The court only cursorily considered its power to make this order.⁵⁴ It did not consider whether the surviving spouse's life estate was an obstacle to the order.

b. Calculating the value of the estate for intestate succession

[95] Second, it is not clear how a surviving spouse's life estate should be considered in determining the net value of the estate. This issue arises in intestate succession if the deceased has a surviving spouse and children from another relationship. In that situation, the surviving spouse is entitled to a preferential share of the estate: either \$150,000 or 50 per cent of the net value of the estate, whichever is greater. The question is whether the value of the life estate is part of

⁵¹ See Victoria A Jones, "Death & Dower: How Dower and a Family Maintenance and Support Claim Interact" (Paper presented to Canadian Bar Association, Wills, Estates, and Trusts Section Alberta North, Edmonton, 12 March 2019) at 2, online: de Villars Jones <sagecounsel.com/wp-content/uploads/2019/02/DEATH-DOWER-2019.pdf> [perma.cc/3HH8-AP4E].

⁵² *Re Nelson Estate*, 2013 ABQB 15 at para 52.

⁵³ *Kosic v Kosic*, 2002 ABQB 325.

⁵⁴ *Kosic v Kosic*, 2002 ABQB 325 at para 45. The court relied on its power to dispense with a non-owner spouse's consent, under *Dower Act*, s 10(5). The court did not consider whether there were grounds to apply for an order dispensing with consent: see *Dower Act*, ss 10(1), 22.

the net value of the estate or whether it should be deducted to determine the net value of the estate.

[96] *Re Johnson Estate* illustrates the difficulty.⁵⁵ The deceased had a surviving spouse as well as children from a previous relationship. The deceased's only significant asset was a home that qualified as a homestead. The surviving spouse estimated the value of the home at \$270,000 and valued the life estate at \$190,265. She argued that the value of the life estate should be deducted from the value of the home. If her approach were accepted, the net value of the estate would be less than \$150,000 and she would receive the entire estate. Unsurprisingly, the children opposed her approach. The court declined to value the life estate. Instead, it resolved the case by notionally valuing the home at more than \$300,000 and ordering that the surviving spouse receive half of the remainder interest in the home as her preferential share of the estate. In Professor Watson Hamilton's view, the court's approach is flawed as it ignores that a life estate and a remainder interest are both present interests in land that have value.⁵⁶

c. Family maintenance and support from an estate

[97] Third, it is not clear if the homestead can be sold or transferred to provide support for another family member. A life estate that arises from the *Dower Act* clearly has priority over dispositions by will or distribution of an intestate estate, but the legislation is silent on whether the *Dower Act* prevails over a claim for family maintenance and support.⁵⁷

[98] The *Wills and Succession Act* refers to family maintenance and support being made from the deceased's estate, so the issue likely turns on whether a life estate is part of the deceased's estate.⁵⁸ In *Re Nelson Estate*, a 2013 decision of the Court of Queen's Bench, the court made an order requiring a non-owner to

⁵⁵ *Johnson Estate*, note 11.

⁵⁶ Jonnette Watson Hamilton, "The Impact of a Dower Life Estate on the Valuation and Distribution of Intestate Estates" (18 July 2017), online (blog): *ABlawg* <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].

⁵⁷ Both the *Dower Act*, s 18 and the *Wills and Succession Act*, s 2 state that dower rights prevail over dispositions by will or distribution of an intestate estate, but neither addresses how dower rights interact with family maintenance and support. *Wills and Succession Act*, s 2 states:

2 In the event of a conflict between the *Dower Act* and a provision of Part 2 [Wills] or 3 [Distribution of Intestate Estates] respecting a spouse's rights in respect of property after the death of the other spouse, the *Dower Act* prevails.

⁵⁸ See eg *Wills and Succession Act*, s 88(1), which states in part: "the Court may, on application, order that any provision the Court considers adequate be made out of the deceased's estate for the proper maintenance and support of the family member" [emphasis added]. The remainder interest in the homestead would be part of the deceased's estate, but it is usually impractical to use it as a source of support. For example, it would be difficult to sell a remainder interest so the proceeds could be used for support.

release their dower rights when dealing with a family maintenance and support claim.⁵⁹ The court did not directly consider whether a life estate is part of a deceased's estate but the result implies that it is.

⁵⁹ *Re Nelson Estate*, 2013 ABQB 15 at para 52.

CHAPTER 3

Does the Life Estate Still Serve a Valid Purpose?

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

[99] 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.⁶⁰ For the purpose of this report, only a small part of that history need be repeated.

[100] 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.⁶¹

[101] 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.⁶² 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.⁶³ The second was more abstract. They argued that women's work contributed to acquiring and

⁶⁰ 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; 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].

⁶¹ 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.

⁶² See Margaret E McCallum, "Prairie Women and the Struggle for a Dower Law, 1905-1920" (1993) 18:1 *Prairie Forum* 19. The campaign was focused in 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.

⁶³ 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.

[102] 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.⁶⁴ 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.

[103] 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.⁶⁵

[104] By 1948, the *Dower Act* had assumed its current form. It now included five dower rights, which applied equally to both spouses:⁶⁶

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

⁶⁴ *The Dower Act*, SA 1917, c 14.

⁶⁵ 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.

⁶⁶ *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;

[105] 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?

[106] 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

[107] Today, many couples choose to own their homes as joint tenants. Joint tenants are equal owners and share the whole property.⁶⁷ 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.

[108] Although the *Dower Act* applies to property that a couple holds as joint tenants, it rarely has any impact on joint tenants.⁶⁸ 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.

⁶⁷ 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.

⁶⁸ See *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": *Inland Financial Inc v Guapo*, 2020 ABCA 381 at para 24. See also *Karafiat v Webb*, 2012 ABCA 115 at paras 20–22; *Bank of Montreal v Pawluk* (1994), 158 AR 97, 1994 CanLII 9002 at para 53 (QB).

2. INHERITANCE UNDER A WILL OR BY INTESTATE SUCCESSION

a. Inheritance under a will

[109] Laws about inheritance under a will have not changed in ways that affect the need for the *Dower Act*. It was the case in the early twentieth century and remains the case now that a person may make a will to distribute their property after death. If the couple did not own their home as joint tenants, the surviving spouse or partner might nonetheless become owner by inheritance under a will. It is difficult to say if social changes have resulted in more testators leaving a home or their entire estate to their spouse or partner. We do not have data from 1917 or today but a snapshot from 1992 shows the vast majority of testators left their entire estate to the surviving spouse.⁶⁹

[110] For the minority of testators who do not intend to leave the homestead to their spouse, the *Dower Act* limits their testamentary freedom. The *Dower Act* prevails over the will, giving the surviving spouse a life estate in the homestead.⁷⁰

b. Intestate succession

[111] If a deceased person does not leave a will, intestate succession rules apply. In the years since the *Dower Act* was enacted, intestate succession rules have changed to provide greater benefits to a surviving spouse or adult interdependent partner. Around the time the *Dower Act* was enacted, a surviving spouse might receive as little as one-third of the deceased person's estate.⁷¹ Today, a surviving spouse or partner receives a preferential share of the estate. If the deceased person had any children from another relationship the preferential share is \$150,000 or half of the net value of the estate, whichever is greater. If the deceased person did not have any children, or if all their children were with the

⁶⁹ In research for *Reform of the Intestate Succession Act*, ALRI gathered data about 999 estates. There were more than 300 estates where the deceased had a will and was survived by a spouse. Of the 31 testators survived by a spouse but no children, 84% left the entire estate to the surviving spouse. Of the 260 testators survived by a spouse and children, 63% left the entire estate to the surviving spouse: Alberta Law Reform Institute, *Reform of the Intestate Succession Act*, Final Report 78 (1999) at 190, 192 online: <www.alri.ualberta.ca/wp-content/uploads/2020/05/fr078.pdf>.

⁷⁰ *Dower Act*, s 18.

⁷¹ *The Intestate Succession Act*, RSA 1922, c 143, enacted in 1920, consolidated and amended prior common law and legislated rules. Under *The Intestate Succession Act*, RSA 1922, c 143, s 3, a surviving spouse's share of an intestate estate depended on whether the deceased had children and how many children there were. It did not matter if the children were also the children of the surviving spouse. The surviving spouse's share ranged from the entire estate (if the deceased had no children) to one-third of the estate (if the deceased had two or more children).

surviving spouse or partner, the surviving spouse or partner receives the whole estate.

c. The life estate is in addition to any other inheritance

[112] It should be noted that if a deceased person owned a home, a surviving spouse or partner will often receive an interest in the home in addition to inheriting other assets. If the couple owned a home as joint tenants, the surviving spouse or partner would become the owner of the home by right of survivorship. They would also receive any assets left to them by will or the preferential share under intestate succession. If the deceased was the sole owner of a homestead, a surviving spouse would be entitled to a life estate in the homestead. Again, the life estate would be in addition to any assets left to them by will or the preferential share under intestate succession.⁷²

3. FAMILY MAINTENANCE AND SUPPORT FROM AN ESTATE

[113] Since at least 1910, Alberta law has allowed a court to grant additional support from an estate to a surviving family member. The language used to describe the rules has evolved over the years: from married women's relief, to family relief, dependents relief, and now family maintenance and support.

[114] When the *Dower Act* was first enacted, support was very limited. The *Married Women's Relief Act* allowed a widow to apply for support from an estate but only if the husband's will gave her less than the share she would have received under intestate succession rules.⁷³ Courts interpreted the statute so that the widow's share under intestate succession was also the maximum she could receive in support.⁷⁴ In many cases, the maximum support a widow could receive would be one third of the deceased's estate.

[115] Today, the rules about family maintenance and support are more flexible. If a surviving spouse or adult interdependent partner requires additional support, they may apply to court for maintenance and support from the estate. A court has a great deal of discretion to make an order appropriate to the circumstances. A court can "order that any provision the Court considers adequate be made out of the deceased's estate for the proper maintenance and

⁷² As discussed in Chapter 2, above, it is unclear whether the life estate should be deducted from the value of the estate to calculate the net value of the estate: see paras 95–96.

⁷³ *The Married Women's Relief Act*, SA 1910 (2nd Sess), c 18, s 2.

⁷⁴ *Re Matheson Estate* (1916), 9 WWR 996 (Alta SC); *McBratney v McBratney* (1919), 59 SCR 550.

support of the family member.”⁷⁵ It can balance the interests of different family members or beneficiaries and can impose conditions or restrictions.⁷⁶ There is no upper limit on family maintenance and support. In theory a court could award the claimant the entire estate.⁷⁷

4. TEMPORARY POSSESSION OF THE FAMILY HOME AFTER THE OWNER’S DEATH

[116] Finally, if the *Dower Act* does not apply, there is a statutory right to possess a family home for a 90 day period after the death of a spouse or adult interdependent partner.⁷⁸ This right was a new feature in the *Wills and Succession Act*, which was passed in 2010 and came into force in 2012.

[117] The right to possess the family home fills a gap, providing a short transition period for those who do not benefit from a life estate or other protections. People who might rely on the transition period include:

- adult interdependent partners,⁷⁹
- those who live in a family home co-owned by someone other than the spouses or partners;⁸⁰ and
- renters.

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

[118] 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 the life estate should apply to adult interdependent partners.

⁷⁵ *Wills and Succession Act*, s 88(1).

⁷⁶ *Wills and Succession Act*, ss 88, 93, 96.

⁷⁷ One does not have to look far to find cases where a court has granted a surviving spouse or adult interdependent partner the bulk of assets in an estate: see eg *Re Fliczuk Estate*, 2019 ABQB 946; *Re Slager Estate*, 2019 ABQB 191.

⁷⁸ *Wills and Succession Act*, s 75. The definition of a family home for this purpose (*Wills and Succession Act*, s 72(a)) is essentially the same as the definitions under the *Family Property Act*, s 1(a.2) and the *Family Law Act*, SA 2003, c F-4.5, s 67(1). A family home is one that the spouses or partners have occupied together. It may be owned or leased.

⁷⁹ Adult interdependent partners do not benefit from dower rights under the *Dower Act* and therefore would not receive a life estate.

⁸⁰ If a third party is a co-owner of a property, the property is not a homestead and dower rights do not apply: *Dower Act*, s 25(1). The situation could arise, for example, if a parent of one spouse was a co-owner of the family home.

[119] 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.⁸¹

[120] 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.

[121] 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.

[122] 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 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.⁸² If the

⁸¹ 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].

⁸² See *Family Property Act*, s 7(2):

7(2) If the property is

Continued

owner transfers the property into joint ownership, half of the exemption will be lost.⁸³ 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.⁸⁴
- 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 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.

-
- (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).

⁸³ See *Jackson v Jackson* (1989), 97 AR 153 (CA); *Harrower v Harrower* (1989), 97 AR 141 (CA).

⁸⁴ 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).

- 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.

[123] 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 Life Estate Be Abolished?

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

ISSUE 1

When a homeowner dies, should their surviving spouse or adult interdependent partner automatically receive a life estate in a home?

1. ARGUMENTS IN FAVOUR OF ABOLISHING THE LIFE ESTATE

[125] In our early consultation, about a third of respondents were in favour of repealing the *Dower Act*. Many of the arguments we heard focused on consent to disposition but some mentioned the life estate.

a. Few people rely on the life estate

[126] 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.

[127] Statistics from the Land Titles Office show that few life estates are registered and the number seems to be declining. The decline suggests that few

individuals rely on a life estate, possibly because they receive a greater interest in the couple's home.

[128] Many couples arrange their affairs so the surviving spouse does not rely on the *Dower Act* to protect them against losing their home. Many couples own their homes as joint tenants. If only one owns the home, the owner's will often leaves the home or the entire estate to the non-owner. For those who do not plan ahead, the surviving spouse or partner will often inherit the couple's home by intestate succession. If a surviving spouse or partner does not become owner of the couple's home by right of survivorship or inheritance, there is a safety net. They may make a claim for family maintenance and support. With all these protections, the *Dower Act* is often irrelevant.

b. An automatic life estate is not tailored to actual needs

[129] An automatic life estate is a one-size-fits-all solution, providing limited and inflexible support.

[130] For some, a life estate will be insufficient to meet their needs. It provides shelter but the life tenant must pay expenses like taxes, utilities, and regular maintenance costs. A surviving non-owner will not be able to stay in the home if they do not have a way to pay those costs.⁸⁵ It is very difficult, if not impossible, to raise cash if a life estate is a person's only asset.

[131] For others, a life estate may be unnecessary. Some non-owners may have or inherit more than enough other assets to support themselves. Some may own or inherit another home. They may not need or want to occupy the homestead.

[132] An automatic life estate to a surviving non-owner may also disadvantage other family members. If the deceased had minor children or other dependents, they may need support. The life estate prioritizes a spouse's interest without regard for others' needs.

[133] Given the diversity of Alberta families, a one-size-fits-all solution may no longer be appropriate. An automatic life estate limits testamentary freedom. Abolishing it would allow individuals more flexibility to decide who should receive their property when they die. They could plan for their specific family situation.

⁸⁵ See eg *Ebeling-Argue (Estate of) v Hutchinson*, 2008 ABQB 299; *Re Fliczuk Estate*, 2019 ABQB 946.

c. Abolishing the life estate would be consistent with most other Canadian jurisdictions

[134] Very few Canadian jurisdictions have legislation that provides rights comparable to the life estate. Only Manitoba has legislation that provides an automatic life estate to a surviving spouse or partner.⁸⁶ In British Columbia, legislation provides that a home must be held in trust for the life of a surviving spouse or partner, but only if the spouse or partner's interest is registered on the title to the home.⁸⁷ In other words, in British Columbia, a spouse or partner must proactively register their interest with the Land Titles Office before the owner dies. Newfoundland and Labrador has unique legislation that creates a statutory joint tenancy in a matrimonial home. Each spouse has a half interest in the home, even if only one of them is on title. The legislation creates a right of survivorship, so a surviving spouse will become the full owner of the home.⁸⁸

[135] All Canadian jurisdictions provide other protections for surviving spouses and often partners, although the details vary. In every jurisdiction couples may arrange their affairs so a surviving spouse or partner will receive a home, either by right of survivorship or by the terms of a will. If the deceased did not have a will, a spouse (or sometimes a partner) will receive share of the estate, although different jurisdictions have different formulas.⁸⁹ In every jurisdiction, a spouse who does not inherit enough to meet their needs may apply to court for additional support from an estate.⁹⁰ Some jurisdictions extend the same right to partners.⁹¹ Generally speaking, courts have broad discretion to award support

⁸⁶ *The Homesteads Act*, 1989, SS 1989-90, c H-5.1 [Saskatchewan Act]; *Homesteads Act*, CCSM, c H80, s 21 [Manitoba Act].

⁸⁷ *Land (Spouse Protection) Act*, RSBC 1996, c 246, ss 2, 4(1) [BC Act].

⁸⁸ *Family Law Act*, RSNL 1990, c F-2, ss 5-6, 8 [Newfoundland Act].

⁸⁹ See *Wills, Estates and Succession Act*, SBC 2009, c 13, ss 20-22; *The Intestate Succession Act*, 2019, SS 2019, c I-13.2, ss 4-6; *Intestate Succession Act*, CCSM c 185, s 2; *Succession Law Reform Act*, RSO 1990, c S.26, ss 44-46; arts 666, 671-672 CCQ; *Devolution of Estates Act*, RSNB 1973, c D-9, ss 22, 24; *Intestate Succession Act*, RSNS 1989, c 236, ss 4-5; *Probate Act*, RSPEI 1988, c P-21, ss 87, 89; *Intestate Succession Act*, RSNL 1990, c I-21, ss 4, 6; *Estate Administration Act*, RSY 2002, c 77, ss 80, 82; *Intestate Succession Act*, RSNWT 1988, c I-10, s 2; *Intestate Succession Act*, RSNWT (Nu) 1988, c I-10, s 2. In some jurisdictions, a spouse or partner may elect to keep a home as part or all of their share of the estate: see eg *Wills, Estates and Succession Act*, SBC 2009, c 13, ss 26-33; *Intestate Succession Act*, RSNS 1989, c 236, s 4(4); *Intestate Succession Act*, RSNWT 1988, c I-10, s 2(5); *Intestate Succession Act*, RSNWT (Nu) 1988, c I-10, s 2(5).

⁹⁰ *Wills, Estates, and Succession Act*, SBC 2009, c 13, s 60; *The Dependants' Relief Act*, 1996, SS 1996, c D-25.01, s 3; *Dependants Relief Act*, CCSM, c D37, s 2; *Succession Law Reform Act*, RSO 1990, c S26, s 58; art 684 CCQ; *Provision for Dependants Act*, RSNB 2012, c 111, s 2; *Testators' Family Maintenance Act*, RSNS 1989, c 465, s 3; *Dependants of a Deceased Person Relief Act*, RSPEI 1988, c D-7, s 2; *Family Relief Act*, RSNL 1990, c F-3, s 3; *Dependants Relief Act*, RSY 2002, c 56, ss 2, 6(2)(c); *Dependants Relief Act*, RSNWT 1988, c D-4, s 2; *Dependants Relief Act*, RSNWT (Nu) 1988, c D-4, s 2.

⁹¹ See eg *Wills, Estates and Succession Act*, SBC 2009, c 13, ss 2(1)(b), 60; *The Dependants' Relief Act*, 1996, SS 1996, c D-25.01, s 2(1)(d); *Dependants Relief Act*, CCSM, c D37, s 1 sv "dependant"; *Dependants Relief Act*,

that is appropriate in the circumstances, which might include a life estate or full ownership of a home.⁹² In some jurisdictions, a surviving spouse may also receive a share of family property automatically or have the option to claim a share of family property.⁹³

[136] Without the *Dower Act*, Alberta would have protections for a surviving spouse or partner similar to those available elsewhere in Canada. Abolishing the *Dower Act* would bring Alberta closer to the majority of Canadian jurisdictions, improving consistency between jurisdictions.

d. Abolishing the life estate would be an easy route to modernization

[137] 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.

[138] Abolishing the life estate 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 receive an automatic life estate.

2. ARGUMENTS AGAINST ABOLISHING THE LIFE ESTATE

[139] In our early consultation, a majority of respondents supported reforming the *Dower Act* instead of repealing it.

a. A home is a special asset

[140] 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 a death. If a surviving non-owner were

RSY 2002, c 56, s 1 “dependant”; *Dependants Relief Act*, RSNWT 1988, c D-4, s 1 “dependant”; *Dependants Relief Act*, RSNWT (Nu) 1988, c D-4, s 1 “dependant”.

⁹² *Wills, Estates, and Succession Act*, SBC 2009, c 13, s 64; *The Dependants' Relief Act*, 1996, SS 1996, c D-25.01, ss 6–7; *Dependants Relief Act*, CCSM, c D37, s 9; *Succession Law Reform Act*, RSO 1990, c S26, s 63; *Provision for Dependants Act*, RSNB 2012, c 111, ss 2, 8; *Testators' Family Maintenance Act*, RSNS 1989, c 465, s 6; *Dependants of a Deceased Person Relief Act*, RSPEI 1988, c D-7, s 6; *Family Relief Act*, RSNL 1990, c F-3, s 6; *Dependants Relief Act*, RSY 2002, c 56, s 6; *Dependants Relief Act*, RSNWT 1988, c D-4, s 5; *Dependants Relief Act*, RSNWT (Nu) 1988, c D-4, s 5.

⁹³ See eg *Family Law Act*, RSO 1990, c F.3, ss 5–6 [Ontario Act]; arts 414–416 CCQ.

to lose their home, money may not compensate for the loss of these intangible benefits.

b. An automatic life estate offers protection without litigation

[141] Several respondents told us one of the major benefits of the *Dower Act* is that it provides protection without litigation. The life estate protects a non-owner automatically. At least in theory, a surviving non-owner benefits from the life estate whether or not they know their rights, whether or not they have a lawyer, and whether or not they take any steps.⁹⁴

[142] Without an automatic life estate, there might be an increase in litigation. A non-owner who did not receive an interest in the couple's home would have to make an application for family maintenance and support if they wished to stay in the home. They would face barriers to access to justice. Litigation takes time, can be expensive, and has an uncertain outcome. A non-owner would face this cost and inconvenience at a difficult time, shortly after the death of their spouse or partner. They would have to act quickly to avoid being forced to vacate the property when the 90 day temporary possession period ends. Some non-owners may not have property or resources of their own, so they may be unable to pay legal fees or other expenses to litigate. As one respondent said, "you shouldn't be forced to litigate to stay in your own home."

c. The life estate can be converted into other kinds of support

[143] Some non-owners may not need or want to remain in the home but require a different form of support. One option is to rent out the home, which could provide them with an income. Another option is to negotiate with the personal representative or heirs of the deceased's estate to exchange the life estate for other compensation. A life estate gives a surviving non-owner something of value from the estate so they have some bargaining power in negotiations. They can offer to surrender their life estate in exchange for support suited to their actual needs.

⁹⁴ In practice, there is no independent oversight to ensure that a non-owner receives a life estate. It may depend on whether the personal representative of the deceased owner's estate knows or is informed of the *Dower Act*.

3. ARE THERE OTHER OPTIONS?

[144] It would be possible to replace the life estate with a different kind of interest or right. One alternative would be to create a statutory joint tenancy, as in Newfoundland and Labrador.⁹⁵ Another would be to require that a home be held in trust for a surviving non-owner, as in British Columbia.⁹⁶ In an earlier project, ALRI proposed that the life estate should be replaced with a right of occupancy.⁹⁷

[145] While any of these options would provide similar benefits to a life estate, we are not convinced any are clearly better. A life estate is a well established form of ownership. There is no need to define a new right or create new procedures. For example, the Land Titles Office already has procedures to register and issue certificates of title for life estates.⁹⁸ There is an existing body of case law about life estates. Replacing a life estate with a different right or interest would not necessarily resolve existing problems and might create new ones.

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

4. PRELIMINARY RECOMMENDATION

[147] After weighing all the arguments, our preliminary view is that the life estate should remain.

[148] Protection for the vulnerable is a key consideration. Other protections overlap with the automatic life estate but they have not completely replaced it. Most non-owners do not rely on the life estate but it acts as a safety net when other protections fail. Those who do not benefit from other protections are likely to be the most vulnerable. Without a life estate, these surviving non-owners would have to litigate or lose their home. The cost and inconvenience of litigation would be a barrier to access to justice, especially for those most in need. It would be unjust to put this burden on those least able to bear it.

[149] Our preliminary recommendation does not mean that the life estate must be preserved exactly as it is now, with all its flaws. In the following chapters, we propose reforms to improve some of the problems discussed in Chapter 2.

⁹⁵ Newfoundland Act, note 88, ss 5–6, 8.

⁹⁶ BC Act, note 87, s 4.

⁹⁷ RFD 14 at 58–60 (Recommendation 7).

⁹⁸ Life Estate Procedure, note 22.

[150] 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

The surviving spouse or adult interdependent partner of a homeowner should automatically receive a life estate in a home when the homeowner dies.

[151] We welcome any comments you may have in support of or in opposition to this preliminary recommendation.

CHAPTER 4

Extending the Life Estate to Adult Interdependent Partners

A. Spouses and Adult Interdependent Partners

[152] In Alberta legislation, spouse means a person who is legally married.⁹⁹

[153] 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*.¹⁰⁰ 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 spouses and adult interdependent partners have the same rights and benefits regarding the life estate?

[154] 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.

[155] 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.¹⁰¹ This number is approximately 17 per cent of all “persons in a couple” and approximately 10 per cent of the population

⁹⁹ *Interpretation Act*, RSA 2000, c I-8, s 28(1)(zz.1).

¹⁰⁰ See *Adult Interdependent Relationships Act*, SA 2002, c A-4.5, ss 1, 3 [*Adult Interdependent Relationships Act*].

¹⁰¹ 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]. 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.

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

[156] 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*.¹⁰² 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.¹⁰³ This position is consistent with our recent work, particularly our recent project on property division.¹⁰⁴ We also recognize the need for equal treatment regardless of sexual orientation – another analogous ground.¹⁰⁵ The 2016 census found approximately 62 per cent of same-sex couples in Alberta are common-law.¹⁰⁶ Legislation that excludes unmarried couples has a disproportionate impact on same-sex couples and could be vulnerable to a constitutional challenge.

[157] 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.¹⁰⁷

[158] 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*.

¹⁰² See *Miron v Trudel*, [1995] 2 SCR 418.

¹⁰³ 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.

¹⁰⁴ FR 112 at paras 229–59.

¹⁰⁵ See *Egan v Canada*, [1995] 2 SCR 513.

¹⁰⁶ See 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].

¹⁰⁷ 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, note 87, s 1 “spouse”; Saskatchewan Act, note 86, s 1(d)(ii); Manitoba Act, note 86, s 1; *Family Law Act*, SNWT 1997, c 18, s 1(1) “spouse” [NWT Act]; *Family Law Act*, SNWT(Nu) 1997, c 18, s 1(1) “spouse” [Nunavut Act]; *Family Homes on Reserves Act*, note 15, ss 14, 15.

Very few respondents seemed to be in favour of legislation that applied only to spouses. This result is consistent with results from other consultations.¹⁰⁸

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

[160] 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.

[161] 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.

[162] 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,

¹⁰⁸ In 2016, ALRI commissioned phone survey research for our Property Division project. There were 1208 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>. 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*.¹⁰⁹ Spouses or partners can make different arrangements if they prefer.

[163] 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.

[164] We have considered other approaches to reform. For example, we considered whether the life estate should extend to other types of relationships. There might be some benefits to providing a life estate to 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 several individuals could claim a life estate, which would make administering an estate much more complicated. In our view, it is not feasible to provide a life estate to those who are not spouses or adult interdependent partners.

RECOMMENDATION 2

Adult interdependent partners should have the same rights as spouses regarding the life estate.

[165] 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?

[166] In early consultation, we heard some concerns that providing a life estate to adult interdependent partners would create new problems.

1. PROVING AN ADULT INTERDEPENDENT RELATIONSHIP

[167] Many respondents pointed out that an adult interdependent relationship is more difficult to prove than a marriage. It may be difficult for an owner, their

¹⁰⁹ A spouse can release their dower rights in a property by executing a dower release: *Dower Act*, s 7. If the life estate is vested, the spouse may surrender their life estate to the owner of the remainder interest: Life Estate Procedure, note 22 at para 11.

personal representative, their heirs, or lawyers representing any of them to determine if the owner is or was in an adult interdependent relationship.

[168] 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.¹¹⁰ 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.¹¹¹ Sometimes partners have different perceptions, so they may not agree about whether their relationship meets the criteria.

[169] This problem has been successfully addressed in many other contexts. Spouses and adult interdependent partners are already treated alike in legislation about succession and inheritance, pensions and benefits, and parentage. For example, in intestate succession an adult interdependent partner is entitled to a preferential share of the estate, exactly as a spouse would be. These rules have been in place for nearly twenty years. There is now a body of case law that clarifies when a relationship meets the criteria.¹¹²

[170] On occasion there are disputes about whether a couple was in an adult interdependent relationship and the issue may have to be resolved by a court. It may occur when there is a dispute about intestate succession or family maintenance and support from an estate, among other things. It is possible that there would be more litigation if a life estate were also at stake. While it is desirable to avoid the need for litigation, it is impossible to eliminate it completely. When necessary, courts can resolve disputes about whether a couple were in an adult interdependent relationship and whether a claimant is entitled to a life estate.

2. OVERLAPPING RIGHTS

[171] 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.¹¹³

¹¹⁰ 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.

¹¹¹ See *Adult Interdependent Relationships Act*, note 100, s 1. For a full discussion of the criteria, see FR 112, c 5.

¹¹² In the context of intestate succession, see eg *Re Fricker Estate*, 2005 ABB 972; *Nelson v Balachandran*, 2014 ABQB 413, aff'd 2015 ABCA 155; *Re Lang Estate*, 2016 ABQB 16; *Desnoyers Estate v Desnoyers*, 2020 ABQB 120.

¹¹³ See *Adult Interdependent Relationships Act*, note 100, s 5(2).

[172] Only one other Canadian jurisdiction has legislation that anticipates the possibility of overlapping rights. In Manitoba, only one spouse or partner can have homestead rights – including a life estate – 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.¹¹⁴

[173] We considered whether there is a need for a legislated rule about overlapping rights. The most likely option would be to provide a life estate to only one spouse or partner, as in Manitoba. There would have to be a rule about which spouse or partner has priority. For example, the life estate might go to the spouse or partner from the earlier relationship, or to the spouse or partner who lived in the home most recently. If the owner had more than one property, a priority rule might determine which spouse or partner would have first pick.

[174] There are other ways to address this issue. Below, we propose reforms that would significantly reduce the likelihood of overlapping rights. We propose that a non-owner’s entitlement to a life estate would end after a certain period of separation, consistent with intestate succession rules. If this proposal were implemented, very few people would be affected by overlapping rights.

[175] Our preliminary view is that a legislated rule is not necessary, given our other preliminary recommendations. If problems arise, they could be resolved on a case-by-case basis.

¹¹⁴ Manitoba Act, note 86, 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.

CHAPTER 5

How Could Reforming the Definition of Homestead Resolve Problems?

A. The Definition of Homestead

[176] In early consultation, we heard that current definition of homestead contributes to practical problems. Problems were more likely to come up in the context of consent to disposition, although they may affect the life estate. Changing the definition could eliminate some of the issues.

[177] One of our guiding principles is to seek consistency between legal rules, particularly within Alberta legislation. It is desirable for consent to disposition and the life estate to affect the same property. We therefore propose using a definition that is generally consistent. There are a few special considerations for the life estate, which we discuss below.

[178] The *Dower Act* defines a homestead as:¹¹⁵

- 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.¹¹⁶

¹¹⁵ *Dower Act*, s 1(d).

¹¹⁶ 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/5CR4-QMCQ]; *Bank of Montreal v Pawluk* (1994), 158 AR 97 (QB).

[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 owner to swear that "Neither myself nor my spouse ... have resided on the within mentioned land at any time since our ... marriage."¹¹⁷

[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.¹¹⁸ 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 make a life estate available?

[183] A non-owner should receive a life estate 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.

¹¹⁷ *Forms Regulation*, note 4, Form B. 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>. 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*).

¹¹⁸ *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.

[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.¹¹⁹

[185] Either the third or fourth option would serve the purpose better. If the purpose of a life estate is to protect a non-owner from losing their home, it should be a place 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.¹²⁰

[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”.¹²¹ 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,

¹¹⁹ Compare *Dower Act*, s 1(d); *Forms Regulation*, note 4, Form B.

¹²⁰ 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.

¹²¹ *Family Law Act*, SA 2003, c F-4.5, s 67(1); *Family Property Act*, s 1(a.2); *Wills and Succession Act*, s 72(a).

- (D) a residential unit as defined in the *Condominium Property Act*, or
- (E) a suite.

[189] Every other Canadian jurisdiction uses the fourth option in legislation requiring consent for disposition. Consent is required only for a home where the spouses or partners lived together.¹²² Canadian jurisdictions with protections comparable to the life estate also use the fourth option.¹²³

[190] We propose using the fourth option. A life estate should be available if the owner and their spouse or adult interdependent partner live or have lived in the home.

[191] This change would better serve the purpose of the life estate. It would mean that a surviving non-owner will only receive a life estate if the property is or has been their home.

RECOMMENDATION 3

A life estate should only be available for a home where both spouses or both adult interdependent partners lived 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 a life estate be available if 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.

[194] In *Dower Act: Consent to Disposition*, Report for Discussion 36, we proposed a time limit based on occupancy for consent to disposition. Our preliminary

¹²² BC Act, note 87, s 1; Saskatchewan Act note 86, s 1(c); Manitoba Act, note 86, s 1; Ontario Act, note 93, s 18(1); art 395 CCQ; *Marital Property Act*, RSNB 2012, c 107, s 16(1); *Matrimonial Property Act*, RSNS 1989, c 275, ss 3(1), 8 [Nova Scotia Act]; *Family Law Act*, RSPEI 1988, c F-2.1, ss 19(1), 22 [PEI Act]; Newfoundland Act, note 88, 6(1); *Family Property and Support Act*, RSY 2002, c 83, ss 21(1), 23 [Yukon Act]; NWT Act, note 107, s 50(1); Nunavut Act, note 107, s 50(1); *Family Homes on Reserves Act*, note 15, s 2(1).

¹²³ BC Act, note 87, s 1 "homestead"; Manitoba Act, note 86, s 1 "homestead"; Newfoundland Act, note 88, s 6(1).

recommendation is that 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. The time limit would start to run when the couple, or one of them, moved out of the home. This time limit is generally aligned with those for making a claim under the *Family Property Act*. Consent to disposition protects a non-owner while they decide whether to seek an order for family property division or an order for exclusive possession of a family home. It preserves the right to make a claim.

[195] There are different considerations for the life estate. While consent to disposition preserves a claim, the life estate provides a non-owner with a home. In our view, a non-owner should not be deprived of this protection because of a move alone. For example, a non-owner should be protected if the owner had to move out of the couple's home into a care facility.

[196] We propose that a home should remain available for a life estate indefinitely, as long as other criteria are met. There would be no time limit based on occupancy.

[197] Other criteria would limit the effect of this rule so it would not impose disproportionate burdens on owners or their estates. A life estate would only be available for a home where the spouses or partners lived together and that the owner owned at the time of death. A surviving non-owner would only receive a life estate for one home, as we propose below. Further, there would be a time limit after separation, as we propose in Chapter 6. These limits would serve the purpose of the legislation better than a change to the definition of property affected. Finally, if a couple agrees that a home should not be available for a life estate, the non-owner could release their dower rights.

RECOMMENDATION 4

A life estate should be available if both spouses or both adult interdependent partners lived together in the home at any time.

[198] 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 available for a life estate?

[199] Under the *Dower Act*, an owner can have more than one homestead. There is no limit on the number of homesteads an owner may have.

[200] One scenario where an owner may have more than one homestead is if they move from one home to another. Sometimes a couple will move but keep their former home as a rental or investment property. Both properties would be homesteads because land remains a homestead even after a move. If a couple moves repeatedly, they could accumulate many homesteads.

[201] Another scenario where an owner may have more than one homestead is if they divide their time between two or more homes, like a primary home and a vacation home.

[202] A surviving non-owner is entitled to a life estate in one homestead. If the owner has more than one homestead, the surviving non-owner may elect one from those the owner had when they died.

[203] We do not propose to change the rule that a non-owner should only have a life estate for one home. In our view, the purpose of the *Dower Act* is to protect a non-owner from becoming homeless. Only one home is necessary for this purpose.

[204] We considered whether there is any need for a rule limiting the homes that a non-owner may choose from, but concluded there is not. It is appropriate to allow the non-owner to choose from among the places they lived with their spouse or partner. Every individual will have their own reasons for why a particular place is home. It will not always be the most valuable property, the one where they have spent the most time, or even the one where they lived most recently. They should have the opportunity to choose the property they consider to be their home, whatever their reasons are.

RECOMMENDATION 5

A surviving spouse or adult interdependent partner should have a life estate for only one home.

RECOMMENDATION 6

If a homeowner dies owning more than one home, the surviving spouse or adult interdependent partner should have to choose one home for their life estate from among those where both spouses or both adult interdependent partners lived together.

[205] We welcome any comments you may have in support of or in opposition to these preliminary recommendations or additional options for reform.

4. AMOUNT OF LAND

ISSUE 6

What amount of land should be included in a life estate?

[206] 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:¹²⁴

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.

[207] Like Alberta, Saskatchewan and Manitoba define the amount of land that maybe subject to homestead rights, although the details are slightly different.¹²⁵ In Saskatchewan the maximum size of a homestead is 65 hectares – equivalent to a quarter section – with no distinction between urban and rural homesteads.¹²⁶ 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

¹²⁴ *Dower Act*, s 1(d).

¹²⁵ In Manitoba, homestead rights include a life estate for a surviving non-owner: Manitoba Act, note 86, s 21. Saskatchewan’s *The Homesteads Act, 1989* requires consent to disposition but does not include an equivalent to the life estate: Saskatchewan Act, note 86.

¹²⁶ Saskatchewan Act, note 86, s 1(c).

quarter section or lot where the house is located.¹²⁷ Most other Canadian jurisdictions do not have a specific limit on the size of parcel.¹²⁸

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

[209] 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?

[210] 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?¹²⁹

[211] 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.¹³⁰ For a condominium, it would be one unit.

[212] The life estate should be 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, a surviving non-owner would be entitled to a whole lot even if part of it was used

¹²⁷ Manitoba Act, note 86, s 1 “homestead”.

¹²⁸ In most cases, these limits apply to consent to disposition. Only a handful of jurisdictions have an equivalent to the life estate: see Chapter 3, above. Eight jurisdictions have a provision that only the part of property used for residential purposes is affected by consent to disposition: see eg Ontario Act, note 93, 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 *Marital Property Act*, RSNB 2012, c 107, s 16(1); Nova Scotia Act, note 122, s 3(2); PEI Act, note 122, s 19(3); Newfoundland Act, note 88, s 6(2); Yukon Act, note 122, s 21(5); NWT Act, note 107, s 50(3); Nunavut Act, note 107, s 50(3). In two provinces, the number of dwellings on the land is relevant: see arts 404–405 CCQ; Newfoundland Act, note 88, s 6(4).

¹²⁹ A question about a subdivision arose in *Schwormstede v Green Drop Ltd.* (1990), 106 AR 143 (CA). 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.

¹³⁰ *Land Titles Act*, RSA 2000, c L-4, s 26(1) [*Land Titles Act*]:

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

(a) more than one section of land;

for business purposes, like a building with business premises on the ground floor and the couple's residence above. Similarly, they would be entitled to the whole lot even if it had more than one suite, ranging from a home with a basement suite to an apartment building.

[213] If a home is built on more than one lot, the life estate should apply to all the lots.¹³¹

RECOMMENDATION 7

A surviving spouse or adult interdependent partner should have a life estate for all the land included on the certificate of title for the land where the home is located.

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

5. INTERESTS IN LAND

ISSUE 7

Which interests in land should be affected by a life estate?

[215] 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."¹³² This definition is a very broad one, as there are many different kinds of estates or interests in land.

[216] Most other Canadian jurisdictions have similarly imprecise language. The jurisdictions that have an equivalent to the life estate usually refer to the owner

¹³¹ 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;

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

¹³² *Land Titles Act*, note 130, s 1(r).

of land.¹³³ For consent to disposition, most jurisdictions state that consent is required if one spouse (or in some jurisdictions, partner) is the owner of land¹³⁴ or has an interest in land.¹³⁵ A few state that consent to disposition is required only if the owner's interest is or could be registered under the applicable land titles system.¹³⁶ British Columbia's legislation includes a helpful clarification that the interest must be one that entitles the owner to possession.¹³⁷

[217] Case law clarifies that dower rights apply to a subset of possible interests: those for which a certificate of title could be issued.¹³⁸ Those interests are a fee simple estate, a leasehold estate for a term of more than three years, or a life estate.¹³⁹

[218] Dower rights also apply 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.¹⁴⁰

[219] A life estate cannot arise under the *Dower Act* if the owner's interest is a life estate. A life estate ends when the life tenant dies. There would be no interest left for a surviving non-owner.

[220] If the owner's interest is a leasehold estate for more than three years, provisional Metis title, or an allotment, the surviving non-owner's interest could not be greater than the owner's interest. The surviving non-owner could receive an interest in the property, but it would end when the lease ends or the surviving non-owner dies, whichever occurs first.

¹³³ BC Act, note 87, s 1; Manitoba Act, note 86, s 1; Newfoundland Act, note 88, s 6(1)(b).

¹³⁴ BC Act, note 87, s 1; Saskatchewan Act, note 86, ss 1(c), 1(e); Manitoba Act, note 86, s 1; arts 404–405 CCQ; Newfoundland Act, note 88, s 6(1)(b).

¹³⁵ BC Act, note 87, s 1; Ontario Act, note 93, s 18(1); Nova Scotia Act, note 122, s 3(1); PEI Act, note 122, s 19(1); Yukon Act, note 122, s 21(1); NWT Act, note 107, s 50(1); Nunavut Act, note 107, s 50(1).

¹³⁶ See eg BC Act, note 87, 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, note 86, s 1(e): "'owning spouse" means a spouse who is a registered owner of an interest in land." See also NWT Act, note 107, s 53(6).

¹³⁷ BC Act, note 87, s 1.

¹³⁸ *Bank of Montreal v Pawluk* (1994), 158 AR 97, 1994 CanLII 9002 at para 75 (QB).

¹³⁹ See *Land Titles Act*, note 130, s 32.

¹⁴⁰ 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 on a Metis Settlement); 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].

[221] In our view, the existing rules are appropriate. We do not propose any changes to the list of interests affected.

RECOMMENDATION 8

A surviving spouse or adult interdependent partner should have a life estate if the homeowner had one of 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.

[222] 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 a surviving spouse or adult interdependent partner have a life estate for a mobile home?

[223] 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.

[224] A significant number of people in Alberta live in mobile homes. The 2016 Census found 48,155 mobile homes in Alberta.¹⁴¹ The median owner-estimated value was \$125,239; the average was \$178,992.¹⁴²

[225] 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 be entitled to a life estate for the land. In theory, the mobile home might be considered part of the land if it is a fixture.¹⁴³ If it is not a fixture, the non-owner could receive a life estate in the

¹⁴¹ 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].

¹⁴² Statistics Canada, *Data Tables, 2016 Census: Value (owner-estimated) of Dwelling, Structural Type of Dwelling (10), Age of Primary Household Maintainer (9), Presence of Mortgage Payments (3) and Number of Bedrooms (6) for Owner Households in Non-farm, Non-reserve Private Dwellings of Canada, Provinces and Territories, Census Divisions and Census Subdivisions*, Catalogue No 98-400-X2016233 (Ottawa: Statistics Canada, 2017), online: [perma.cc/7DCY-Q9WP].

¹⁴³ ALRI raised this question in RFD 14 (1995) at 158–59.

mobile home as part of the life estate in personal property. They would be entitled to personal property up to the value prescribed in the *Civil Enforcement Act* and its regulations.¹⁴⁴ For a mobile home, the prescribed value is \$40,000.¹⁴⁵

[226] Other mobile homeowners do not own the land where their home is located. Instead, they rent a site. The *Mobile Home Sites Tenancies Act* governs the agreement between the owner of the site and the person who occupies it.¹⁴⁶ In most urban municipalities, mobile homes are invariably on rented sites because zoning requirements limit them to mobile home parks.

[227] If the mobile home owner rents the land where their home is located, there is no protection for the non-owner. They would not be entitled to a life estate in the mobile home, as the life estate in personal property is only available as a supplement to the life estate in the homestead.

[228] We propose that a non-owner should be entitled to a life estate in a mobile home, whether or not the owner owns the land where it is located. This preliminary recommendation is consistent with the one in our earlier project.¹⁴⁷

[229] We recognize that there will be some practical difficulties with a life estate in a mobile home. We heard in early consultation that it can be difficult to prove ownership of a mobile home, as there is no registry that records ownership. 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 contract or bill of sale but mobile homes may be sold in cash deals with no documents at all. There may be no written evidence that shows whether one spouse or partner was the sole owner of a mobile home or whether the spouses or partners co-owned it.

[230] A life estate may add to the difficulty. In the case of land, the life estate and the remainder interest can be registered at the Land Titles Office. Without a registry for mobile homes, it will be difficult to prove who has an interest in the mobile home and what kind of interest they have. It may be unclear whether a surviving spouse or partner has full ownership or a life estate. If it is a life estate, it may be difficult to prove who owns the remainder interest. The difficulty will

¹⁴⁴ *Civil Enforcement Act*, note 33, s 88; *Civil Enforcement Regulation*, note 34.

¹⁴⁵ *Civil Enforcement Regulation*, note 34, s 37(1)(e).

¹⁴⁶ *Mobile Home Sites Tenancies Act*, RSA 2000, c M-20.

¹⁴⁷ RFD 14 at 158-61 (Recommendation 28).

increase once both spouses or partners have died, as there may be no one else who knows who originally owned the mobile home.

[231] Although difficulty proving ownership 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".¹⁴⁸ The life estate should be no different.

RECOMMENDATION 9

A surviving spouse or adult interdependent partner should have a life estate in a mobile home.

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

7. PROPERTY OWNED BY SOMEONE OTHER THAN AN INDIVIDUAL

[233] The *Dower Act* applies only to property owned by an individual. Land is not a homestead if a third party is a co-owner.¹⁴⁹ Similarly, land is not a homestead if it is owned by a corporation.¹⁵⁰ If a couple lives in a home co-owned with a third party or owned by a corporation, a surviving non-owner will not receive a life estate.

[234] In early consultation, a few respondents raised concerns that these exclusions are loopholes that leave some non-owners unprotected.

¹⁴⁸ *Family Law Act*, SA 2003, c F-4.5, s 67(1); *Family Property Act*, s 1(a.2); *Wills and Succession Act*, s 72(a).

¹⁴⁹ *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.

¹⁵⁰ 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 130, s 27(1).

a. Co-owners

ISSUE 9

Should a life estate be available for a home co-owned with a third party?

[235] In early consultation, we heard about scenarios where one spouse or partner co-owns property with another 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. Sometimes we heard suggestions that 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.

[236] Although a non-owner would not receive a life estate in these circumstances, there is some protection to prevent them from losing their home immediately. The *Wills and Succession Act* gives a surviving spouse or adult interdependent partner a right to possess the home for 90 days from the date of death.¹⁵¹ They may remain in the home for that time even if a third party has become the owner of the home.

[237] The exclusion of co-owned property seems to be unique to Alberta. Other Canadian jurisdictions do not explicitly exclude co-owned property, but it is unclear whether a surviving non-owner could benefit from a life estate.¹⁵²

[238] There are arguments for and against changing the rule that excludes co-owned property.

¹⁵¹ *Wills and Succession Act*, s 75(1).

¹⁵² In Manitoba, homestead rights apply to land "occupied by the owner and the owner's spouse or common-law partner as their home": Manitoba Act, note 86, s 1. From our research, it appears that it is an open question whether homestead rights would apply to land that one of the spouses co-owned with a third party. In 1984, the Manitoba Law Reform Commission wrote "We are unaware of any Manitoba decision which has considered these questions": Manitoba Law Reform Commission, *Report on An Examination of "The Dower Act"*, Report 60 (1984) at 188. Our research did not turn up any cases since that time. In British Columbia, the *Land (Spouse Protection) Act* applies to "land or any interest in it entitling the owner to possession of it": BC Act, note 87, s 1.

[239] On the one hand, the exclusion leaves some non-owners with very little protection. While a surviving non-owner may remain for 90 days, it is a very short transition period. After it ends, they may lose their home. A non-owner who does not have enough resources to find another place to live could make an application for family maintenance and support from the estate but there are barriers to access to justice. They would have to act quickly after the death of their spouse or partner. They may be unable to pay legal fees. They would face litigation that may be long and uncertain.

[240] On the other hand, there would be practical difficulties with a life estate in co-owned property. If the deceased and a third party were joint tenants, the surviving joint tenant would usually become sole owner of the property by right of survivorship. Introducing a life estate for a non-owner would affect the surviving joint tenant's rights and complicate the transfer of ownership. If the deceased and a third party were tenants in common, there would be a complicated arrangement with three interests to balance: those of the remaining tenant in common, the surviving non-owner, and the other heirs of the deceased owner. In either case, a life estate for a surviving non-owner would add complexity to the law.

[241] If co-owned property continues to be excluded, it may be appropriate to consider whether the 90 day period of temporary possession under the *Wills and Succession Act* is adequate.

[242] ALRI is not making a preliminary recommendation on this issue, but we would welcome comments on it.

b. Property owned by a corporation

ISSUE 10

Should a life estate be available for a home owned by a corporation or similar entity?

[243] 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.

[244] If the deceased spouse or partner controlled the entity that owns a couple's home, their death will mean a change of control. The person who assumes control might change the arrangement for the home. They might cancel

an agreement, sell the home, or take other action that would push the surviving non-owner to leave the home.

[245] A non-owner might benefit from the statutory right to possess the home for 90 days but there may be gaps in protection. The *Wills and Succession Act* provisions apply if the couple lived in a home owned or leased by the deceased spouse or partner.¹⁵³ If a corporation is the owner and the occupants did not have a lease—for example, if they occupied the home under a license or an informal arrangement—it is unclear whether the surviving spouse could rely on the legislation.

[246] Other Canadian jurisdictions have legislation that defines matrimonial home or family home to include a home owned by a corporation.¹⁵⁴ Only one of these jurisdictions—Newfoundland and Labrador—has a right comparable to the life estate. Newfoundland and Labrador has legislation establishing joint tenancy in a matrimonial home. When one spouse dies, the other will become the full owner of the matrimonial home by right of survivorship.¹⁵⁵ A matrimonial home is one “occupied by a person and his or her spouse as their family residence and owned by either or both of them.”¹⁵⁶ It may include a home owned by a corporation:¹⁵⁷

6(3) The ownership of a share or an interest in a share of a corporation entitling the owner to the occupation of a dwelling unit owned by the corporation shall be considered to be an interest in the dwelling unit for the purposes of subsection (1)

[247] Introducing a life estate for property owned by a corporation or similar entity would protect non-owners but would make the law more complicated. It would ensure 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. At the same time, it would complicate property ownership for corporations. If the corporation has more than one shareholder, there would need to be consideration for how to balance the other shareholders’ interests against those of the surviving non-owner.

¹⁵³ See *Wills and Succession Act*, s 72(a).

¹⁵⁴ Ontario Act, note 93, s 18(2); *Marital Property Act*, RSNB 2012, c 107, s 17; Nova Scotia Act, note 122, s 3(3); PEI Act, note 122, s 19(2); Newfoundland Act, note 88, s 6(3); Yukon Act, note 122, s 21(4); NWT Act, note 107, s 50(2); Nunavut Act, note 107, s 50(2).

¹⁵⁵ Newfoundland Act, note 88, ss 5–6, 8.

¹⁵⁶ Newfoundland Act, note 88, s 6(1)(a).

¹⁵⁷ Newfoundland Act, note 88, s 6(1)(a).

[248] If property owned by a corporation continues to be excluded, it may be appropriate to consider whether any adjustments are necessary to ensure a surviving non-owner benefits from the period of temporary possession under the *Wills and Succession Act*. It may also be appropriate to consider whether the 90 day period of temporary possession is adequate.

[249] ALRI is not making a preliminary recommendation on this issue, but we would welcome comments on it.

[250] We would also like to hear about how this issue may 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 dower rights should apply to property other than a home. For example, some questioned whether dower rights should apply to all family property or all real property.

[252] 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 testamentary freedom. In Alberta, like most Canadian jurisdictions, either spouse or partner may acquire, hold, and dispose of property – including making a disposition by will – in their own name. While there are limits on testamentary freedom, adding new ones would be a significant change.

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

2. RESIDENTIAL TENANCIES

[254] Of the approximately 1.5 million dwellings in Alberta, over 400,000 are occupied by renters.¹⁵⁸ An individual who rents a house, condominium, or

¹⁵⁸ 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, online: [perma.cc/3SRN-KPW4].

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*.¹⁵⁹ 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 have a renter a leasehold estate. A residential tenancy agreement cannot be registered with the Land Titles Office or any other registry.

[255] We do not propose any changes to the rules affecting residential tenancies. We recognize that rental accommodations are homes and that those who live in rented homes deserve protection as much as anyone else. At the same time, a tenant's rights are limited. A tenant may occupy the property for the term of the residential tenancy agreement but has no lasting or long-term interest. The *Wills and Succession Act* already allows the surviving spouse or partner of a tenant to possess a rented home for up to 90 days. A longer period might be helpful but there is no practical way to provide a right comparable to a life estate.

3. LAND ON RESERVES

[256] 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 and Matrimonial Interests or Rights Act* would apply.¹⁶⁰

D. Summary

[257] The preliminary recommendations in this chapter would mean a surviving non-owner would have a life estate for one of:

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

if, at the time of their death, the deceased owner:

- owned the fee simple estate,
- had a leasehold estate for more than three years,

¹⁵⁹ *Residential Tenancies Act*, SA 2004, c R-17.1.

¹⁶⁰ See *Family Homes on Reserves Act*, note 15, ss 7, 12.

- held Metis title, provisional Metis title, or an allotment for land on a Metis Settlement, or
- owned the mobile home

and the deceased owner and their spouse or adult interdependent partner lived or had lived there together. If the deceased owner had more than one home that met these criteria, the surviving spouse or adult interdependent partner would have to choose one for their life estate.

CHAPTER 6

How Can the Life Estate Be Improved?

A. Introduction

[258] Redefining the property affected would address some of the issues discussed in Chapter 2, but not all. This chapter discusses other reforms that could improve how the life estate works in practice. We propose reforms to better serve purpose of the legislation, protect the vulnerable, and reduce conflict.

B. Effect of Separation

ISSUE 11

Should a life estate be available to a spouse or adult interdependent partner living separate and apart from the homeowner?

[259] Under the *Dower Act*, a surviving spouse is entitled to a life estate as long as the couple was legally married when the owner died. That is, dower rights end upon divorce.

[260] This rule goes farther than necessary to protect a non-owner from losing their home. In early consultation, we heard about couples who have been separated for many years but do not divorce. Some couples divide property informally and do not obtain dower releases. Sometimes, even if the couple has a formal agreement or order about property division, a dower release is overlooked. Meanwhile, at least one of the spouses will usually have moved elsewhere. If the non-owner has moved to a new home, they will not become homeless if they do not receive a life estate.

[261] Alberta succession legislation already recognizes that long-separated spouses or partners should not automatically receive property from an estate. One example is in intestate succession rules. If a person dies without a will, a spouse or partner will inherit only if the relationship was intact at the time of death or the couple had separated recently. A surviving spouse will not inherit if the couple “had been living separate and apart for more than 2 years at the time

of the intestate's death."¹⁶¹ In the case of adult interdependent partners, the survivor will not inherit if the couple had become former adult interdependent partners before the time of death.¹⁶² Among the list of events that can cause a couple to become a former adult interdependent partners is that the partners have lived "separate and apart for more than one year and one or both of [them] intend that the adult interdependent relationship not continue."¹⁶³ That means an adult interdependent partner will not inherit if the couple had been separated for more than one year.

[262] In *Dower Act: Consent to Disposition*, Report for Discussion 36, we proposed a time limit for consent to disposition that would start to run when the couple, or one of them, moved out of the home. This time limit would mean consent would not be required from a long-separated spouse. We proposed the limit be three years, which aligns with time limits under the *Family Property Act*.

[263] The life estate requires a different approach to excluding long-separated spouses. We propose a time limit consistent with the one for intestate succession. Instead of starting to run when the couple or one of them moves, the time limit would start to run upon separation.

[264] Consistency with other Alberta legislation is a key consideration. It is appropriate to have a time limit that aligns with those in succession legislation.

[265] We recognize that this approach does not provide identical time limits for spouses and adult interdependent partners. A surviving spouse would be entitled to a life estate for up to two years after separation, while an adult interdependent partner would usually remain entitled to a life estate for one year after separation and sometimes less. We have concluded that it is necessary to prioritize consistency with the *Wills and Succession Act* in this case.

[266] This proposal is comparable to legislation in British Columbia. Under the *Land (Spouse Protection Act)*, a spouse or partner's rights end after the couple separates, if they have an agreement or order about ownership of the home.¹⁶⁴

¹⁶¹ *Wills and Succession Act*, s 63(1)(a). Alberta succession legislation also includes a rule that means former spouses or partners would not inherit under a will, but the details are slightly different. A gift in a will to a spouse or partner does not take effect if the spouses were divorced or the partners had become former adult interdependent partners when the testator died: *Wills and Succession Act*, s 25.

¹⁶² See *Wills and Succession Act*, ss 1(1)(a), 60–62; *Adult Interdependent Relationships Act*, note 100, ss 1(1)(a), 1(1)(d), 10.

¹⁶³ *Adult Interdependent Relationships Act*, note 100, s 10(1)(b).

¹⁶⁴ BC Act, note 87, c 246, s 6.

[267] This proposal addresses the possibility of overlapping rights. While it is possible for an individual to have both a spouse and an adult interdependent partner, it would take an unusual combination of circumstances to have both entitled to a life estate.¹⁶⁵ An individual must be separated from their spouse to have an adult interdependent partner. The most common way to become adult interdependent partners is to live together for three years, by which time the spouse would no longer be entitled to a life estate.¹⁶⁶

RECOMMENDATION 10

A surviving spouse should not receive a life estate if they were living separate and apart from the homeowner for more than two years at the time of the homeowner's death.

RECOMMENDATION 11

A former adult interdependent partner should not receive a life estate if they and the homeowner had become former adult interdependent partners, by separation or otherwise, at the time of the homeowner's death.

[268] We welcome any comments you may have in support of or in opposition to these preliminary recommendations or additional options for reform.

C. Valuation of the Life Estate

ISSUE 12

Should legislation include guidance on how to value a life estate?

[269] There are many different situations where it is necessary to value a life estate. It can arise in negotiating a transaction between the life tenant and the owner of the remainder interest. For example, a life tenant may want to liquidate the life estate by selling it to the owner of the remainder interest. In that case, the parties would need to agree on a fair price. It can arise when there is a dispute or in civil enforcement or bankruptcy proceedings.

¹⁶⁵ It might be possible for an individual to have a spouse and an adult interdependent partner within two years of separation if the individual had a child with the new partner: see *Adult Interdependent Relationships Act*, note 100, s 3(1)(a)(ii).

¹⁶⁶ See *Adult Interdependent Relationships Act*, note 100, s 3(1)(a)(i). A person who is married cannot enter an adult interdependent partner agreement: see *Adult Interdependent Relationships Act*, note 100, ss 3(1)(b), 7(2)(b).

[270] We considered whether legislation should include guidance for valuing a life estate. We heard in early consultation that a life estate is often most useful as a bargaining chip. Putting a value on it might help a non-owner convert it into support better suited to their actual needs. In a dispute, directions or a formula might help parties reach agreement or narrow the issues in dispute, thus improving access to justice.

[271] To our knowledge, no Canadian jurisdiction has codified an approach to valuing a life estate. Case law is the only source of guidance. It shows a wide range of approaches.

[272] Litigants often rely on expert evidence. Most often, the evidence includes calculations from an actuary.¹⁶⁷ One reason is that the Supreme Court of Canada said in a 1943 decision that valuation of a life estate should be done by an actuary.¹⁶⁸ There are examples of cases, however, where litigants have relied on evidence from other kinds of experts. There are a few cases where real estate appraisers gave opinions about the value of a life estate¹⁶⁹ and one where a litigant relied on a calculation by a chartered accountant.¹⁷⁰

[273] A common way to calculate the value of the life estate takes into account the market value of the home (i.e., the combined value of the life estate and the remainder interest), the expected rate of return if that amount were invested, the life expectancy of the life tenant, and an adjustment for present value. Some of the numbers used in the calculation may be based on common reference sources. For example, in several cases experts based the expected rate of return on the interest rate for Government of Canada bonds.¹⁷¹ Some used Statistics Canada life expectancy tables.¹⁷² In other cases, experts relied on different factors, sources, or calculations. Some based the expected rate of return on another kind of investment or used different life expectancy tables.¹⁷³ Some experts used an

¹⁶⁷ Courts have sometimes accepted actuarial evidence: see eg *Re Zarowiecki*, [1982] 4 WWR 728 at 734 (Man Surr Ct); *Koshowski v Bell*, 2001 MBQB 240 at paras 15–16. There are other cases where litigants have presented actuarial evidence but courts have not accepted it: see eg *Re Blowers Estate* (1985), 33 Man R (2d) 131 at paras 47–49 (QB); *Khan v Khan Estate*, 2004 BCSC 186; *Stojkovich Estate*, note 40; *Johnson Estate*, note 11.

¹⁶⁸ *Morice v Davidson*, [1943] SCR 94 at 97–98.

¹⁶⁹ In two cases the court considered the appraiser's opinion but did not fully accept it: *Johnson v Johnson*, 1999 ABCA 362; *Vander Ende v Vander Ende*, 2010 BCSC 597 at paras 59–80. In one case, the court did not accept the appraiser's opinion: *Stewart v Stewart* (1992), 130 AR 293 (QB).

¹⁷⁰ *Aho v Kelly* (1998), 57 BCLR (3d) 369 at para 76 (SC).

¹⁷¹ See eg *Aho v Kelly* (1998), 57 BCLR (3d) 369 at para 76 (SC); *Stojkovich Estate*, note 40.

¹⁷² See eg *Re Zarowiecki*, [1982] 4 WWR 728 at 734 (Man Surr Ct); *Stojkovich Estate*, note 40.

¹⁷³ See eg *Vander Ende v Vander Ende*, 2010 BCSC 597 at para 77, where the real estate appraiser based the rate of return on the income that could be earned by renting the property and used an American life expectancy table.

entirely different method, like estimating the amount a buyer might pay for the life estate.¹⁷⁴

[274] While case law is instructive, it comes from the small minority of cases that are resolved in court. Litigation requires parties to present the strongest possible evidence. In a case about the value of a life estate, a party would often need evidence from at least two experts: one to provide an opinion on the market value of the home and another to calculate the value of the life estate. The number of experts can multiply if each party has their own. Expert evidence helps a court reach a fair result in individual cases, but it comes at a high cost.

[275] Most problems are resolved out of court. An approach that works in litigation may be impractical in negotiations. For example, consider a life tenant who wants to liquidate their life estate. They would sell their interest to the owner of the remainder interest if they can agree on a fair price. Hiring experts to calculate a fair price would take time and cost money. If the home is an average one, the cost of the experts might outweigh the amount at stake. The parties might benefit from a faster, easier way to estimate the value of the life estate, even if it is less precise.

[276] One of our guiding principles is that the law should promote access to justice. People should be able to resolve legal issues effectively and fairly, without undue time, cost, or inconvenience. Guidance on valuing a life estate might help them do so.

[277] At the same time, efficiency is not the only consideration. Access to justice also requires that the results be fair.

[278] We considered ways that legislation could clarify how to value a life estate. The options we discuss here are not the only ones, but they demonstrate some different possibilities.

[279] One option would be to prescribe a formula and sources that must be used. For example, legislation could require that calculations be based on the current yield for Government of Canada bonds and the most recent Statistics Canada life expectancy tables. In the United States, the Internal Revenue Service has gone farther. It has its own actuarial tables that must be used for various purposes, including valuing life estates.¹⁷⁵ This option could streamline valuation

¹⁷⁴ *Johnson v Johnson*, 1999 ABCA 362.

¹⁷⁵ See Internal Revenue Service, "Actuarial Valuations", Publication 1457, Catalog Number 63854M, online: <www.irs.gov/pub/irs-pdf/p1457.pdf> [perma.cc/WS6A-VRN7]; Internal Revenue Service, "Actuarial Tables", online: <www.irs.gov/retirement-plans/actuarial-tables> [perma.cc/24AJ-KGAM].

and improve certainty and consistency, as all parties would use the same method. Parties might still require experts to determine market value and perform calculations. This option would require some upfront work. It would require input from experts to develop a formula and choose sources that would reliably produce fair results. It might require regular review to ensure the formula and sources remain up to date.

[280] Another option would be a simplified formula. One example might be to multiply a percentage of the market value of the home by the life tenant's life expectancy. For illustration, the formula might be 2 per cent of the market value of the property multiplied by the life tenant's life expectancy. An even simpler formula would be to use a fixed percentage of the market value of the property. For example, legislation could state that the value of the life estate is 50 per cent of the market value.¹⁷⁶ This option would make it very easy to calculate the value of a life estate once market value were determined. It would, however, be a very rough estimate and might produce injustice in individual cases.

[281] It may be that no formula can reliably produce fair results. If so, parties or the courts should value each life estate on a case-by-case basis. They would have to consider all the relevant facts with help from experts. While this approach would be more burdensome than a formula, it may be the best option.

[282] ALRI is not making a preliminary recommendation on this issue but we would welcome comments on it. How should a life estate be valued? Would one of the options discussed here be appropriate? Are there other options we should consider?

D. Clarifying the Obligations of a Life Tenant and the Owner of the Remainder Interest

ISSUE 13

Which expenses relating to a home should be the responsibility of a life tenant during a life estate? Which expenses should be the responsibility of the owner of the remainder interest?

[283] We heard in early consultation that it would be helpful to clarify the responsibilities of the life tenant and the owner of the remainder interest. Rules

¹⁷⁶ See *Stojkovich Estate*, note 40 at para 24. The court considered whether a life estate could be valued this way, drawing an analogy between the value of a life estate and the statutory damages for a disposition without consent. The court ultimately rejected this approach.

that are clearly spelled out in legislation can help parties resolve issues and avoid disputes, whether or not they have legal advice.

[284] There is an example of this kind of provision in the *Wills and Succession Act*. It spells out the responsibilities of an estate and those of a surviving spouse or partner during a 90 day period of temporary possession.¹⁷⁷

[285] The existing common law rules are generally appropriate.¹⁷⁸ We propose only minor reforms. Some case law states a life tenant must pay interest on a mortgage and the owner of the remainder interest must pay the principal.¹⁷⁹ It is unclear whether a life tenant has the obligation to insure a property.¹⁸⁰ To simplify and avoid disputes, we propose that the owner of the remainder interest should pay all mortgage payments and the life tenant should pay insurance premiums. We also propose rules to clarify responsibility for condominium fees.

[286] We propose that the life tenant should be responsible for:

- paying property taxes for the home and the parcel of land where the home is located;
- insuring the home against damage, destruction and public liability;
- paying for utilities, including electricity, gas, water and any other utilities used at the home;
- paying the costs of any regular maintenance to the home, including minor repairs; and
- if the home is a condominium unit, paying condominium contributions assessed against the unit.

[287] The owner of the remainder interest should be responsible for:

- if there is a mortgage on the home, paying the mortgage payments;
- paying the costs of major repairs to the home; and,
- if the home is a condominium unit, paying any special levies assessed against the unit.

¹⁷⁷ *Wills and Succession Act*, ss 79-80.

¹⁷⁸ See Ziff, note 17 at 210-12; *Kachur Estate*, note 49 at paras 97-109.

¹⁷⁹ See eg *Re Morrison Estate* (1921), 68 DLR 787 (Sask QB).

¹⁸⁰ See eg *Powers v Powers Estate* (1999), 182 Nfld & PEIR 341, 1999 CanLII 19149 at paras 7-18 (Nfld SC(TD)).

[288] We would welcome comments about any other expenses or obligations that should be listed.

RECOMMENDATION 12

Legislation should list the obligations of the life tenant and the owner of the remainder interest.

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

E. Other Claims Against an Estate

ISSUE 14

Should the life estate have priority over other claims against an estate?

[290] It is unclear whether a life estate arising under the *Dower Act* has priority over other obligations or claims against an estate, like debts or claims for family maintenance and support. As discussed in Chapter 2, these questions arise because there is an unresolved conceptual issue about whether an automatic life estate is part of the deceased owner's estate.

[291] In our view, a life estate that arises because of legislation should not be considered part of the deceased owner's estate. There are both theoretical and practical reasons. Theoretically, it would be consistent with the treatment of other assets that pass by operation of law. Practically, it would protect a non-owner against losing their home. The life estate would have priority over debts or other claims. The home could not be sold to pay debts of the estate or to provide family maintenance and support for another family member – or at least, only the remainder interest could be sold. In cases of intestate succession, it would mean that the non-owner would receive the life estate in addition to the preferential share.

[292] We propose that legislation should clarify that a life estate that arises because of legislation is not part of a deceased's estate.

[293] While the law should protect non-owners from losing their homes unexpectedly, we recognize that a non-owner's interests must be balanced against those of others. In early consultation, we heard about a few cases where other family members had greater need for support than a non-owner. For

example, we heard about situations where the deceased had a spouse and minor children from a previous relationship. If a home was the deceased's only significant asset and the life estate were to take priority over other claims, there would be nothing left to support the children. The children may have a remainder interest but it would not benefit them until the non-owner dies. They would be left without adequate support in the meantime. As ALRI said in an earlier project: "It might be better, in some cases, for the home to be sold and for the proceeds to be shared by the surviving spouse and other dependents."¹⁸¹

[294] ALRI has previously considered competing claims by a non-owner and other family members. In *The Matrimonial Home*, Report for Discussion 14, ALRI concluded that a court should have the power to terminate a non-owner's rights, albeit with a strong presumption in favour of the non-owner.¹⁸²

[295] We make a similar preliminary recommendation now. A court should have the power to override a life estate when necessary to provide maintenance and support to another family member. The *Wills and Succession Act* already includes a provision allowing a court to terminate the 90 day period of temporary possession. Section 88(4) reads:¹⁸³

88(4) The order [for maintenance and support] may limit or terminate any period of temporary possession or any right of surviving spouse or adult interdependent partner under Division 1 if, and to the extent that, the Court considers the limitation or termination necessary to provide for the proper maintenance and support of another family member.

[296] The *Wills and Succession Act* could be amended to add a similar provision allowing a court to terminate or limit a life estate.

RECOMMENDATION 13

A life estate should pass to a surviving spouse or adult interdependent partner automatically, by operation of law. A life estate should not be considered part of a deceased's estate.

¹⁸¹ RFD 14 at 49.

¹⁸² RFD 14 at 58–60 (Recommendation 7). The preliminary recommendation included the following:

... Such an order should not be granted unless a court is convinced that the benefits of the home to the widowed spouse are substantially outweighed by the benefits that would accrue to those making a claim. The burden of proof should be a heavy one to provide the widowed spouse with security of tenure in the home. The factors to be taken into account should include financial and non-financial considerations.

¹⁸³ *Wills and Succession Act*, s 88(4).

RECOMMENDATION 14

A court should have the power to terminate or limit a surviving spouse's or adult interdependent partner's life estate if necessary to provide maintenance and support to another family member.

[297] We welcome any comments you may have in support of or in opposition to these preliminary recommendations or additional options for reform.

CHAPTER 7

How Can the Life Estate in Personal Property Be Improved?

A. Does the Life Estate in Personal Property Serve a Valid Purpose?

ISSUE 15

What rights should a surviving spouse or adult interdependent partner have regarding the deceased's personal property?

[298] The life estate in personal property ensures a non-owner has some basic necessities. Some of them, like furnishings and appliances, make a home useful. A house without any furniture or household items would be little use. As ALRI said in an earlier project: "The basic idea that some personal property should accompany the homestead is eminently sensible."¹⁸⁴

[299] There are both conceptual and practical issues with the life estate in personal property.

[300] The life estate in personal property complements a life estate in a home. It only arises when a non-owner receives a life estate in a home under the *Dower Act*.

[301] At common law, there is no such thing as a life estate in personal property.¹⁸⁵ Although the *Dower Act* creates a statutory life estate, it does not clarify the rights and obligations a life tenant. It is unclear what a life tenant may or may not do with personal property. For example, could a life tenant ever dispose of personal property? Most personal property depreciates quickly so it may not be worthwhile to keep the original property for the duration of the life estate. It seems absurd to require a life tenant to maintain a used vehicle or old appliances for the rest of their life to ensure the owner of the remainder interest receives the property intact.

[302] In practice, it may be difficult to determine ownership of personal property. Sometimes there may be a record of the legal owner. For example, vehicle registration documents would show the legal owner of a motor vehicle.

¹⁸⁴ RFD 14 at 64.

¹⁸⁵ See RFD 14 at 62-63.

There will be no such records for most kinds of personal property listed in the *Civil Enforcement Act* and its regulations. Further, couples often buy and use personal property together. It would be frustrating and silly to determine legal ownership of curtains, a toaster, or bedsheets. For this reason, lawyers generally presume that “household goods and furniture used by a married or cohabiting couple in their daily lives are considered joint property and become the property of the surviving spouse [or partner] after the death of the other.”¹⁸⁶ Few spouses or partners rely only on the statutory life estate in personal property.

[303] The *Dower Act* life estate in personal property is unique. No other homestead statute in Canada provides a surviving spouse or partner a similar lifelong right to keep personal property after the owner’s death.

[304] There are comparable provisions in other contexts. When a relationship breaks down, a court may grant a spouse or partner possession of personal property just as it may grant exclusive possession of a home. Under the *Family Property Act*, a court may make an order giving one spouse or partner exclusive use of household goods.¹⁸⁷ Other Canadian jurisdictions have similar provisions in their family property legislation.¹⁸⁸ The *Wills and Succession Act* says that a surviving spouse or partner may use household goods during the period of temporary possession of the family home.¹⁸⁹

[305] A surviving spouse or partner should keep the things that make a house useful. Most often they will become or will be presumed to be the sole owner of furniture and other household items. To avoid any doubt or dispute, it would be helpful for legislation to clearly state that a surviving spouse or partner may keep those things. This conclusion is consistent with ALRI’s proposals in *The Matrimonial Home*, Report for Discussion 14.¹⁹⁰

[306] We propose two reforms. First, a surviving spouse or partner’s right to keep personal property should not depend on having a life estate in real property. Renters, or anyone else who does not own their home, need furniture

¹⁸⁶ *Alberta Wills and Estates Practice Manual* (Edmonton: Legal Education Society of Alberta, 2020) at 4–12 (in Part I).

¹⁸⁷ *Family Property Act*, s 25.

¹⁸⁸ See eg *Family Law Act*, SBC 2011, c 25, s 90(2)(b); Ontario Act, note 93, s 24(1)(d); Newfoundland Act, note 88, s 15(1)(c).

¹⁸⁹ *Wills and Succession Act*, s 76.

¹⁹⁰ RFD 14 at 66 (Recommendation 9). ALRI’s preliminary recommendation was:

A surviving spouse enjoying a right of occupancy under Part 2 of the Matrimonial Property Act should also be entitled to possession of the household furnishings and appliances normally found in the house, and one automobile (unless the surviving spouse owns an automobile). ...

and household items just as much as homeowners. Second, rather than a statutory life estate it would be simpler to state that a surviving spouse or partner may possess the personal property. The *Family Property Act* and the *Wills and Succession Act* use the phrase “use and enjoyment” of household goods.¹⁹¹ It would be consistent to use the same wording.

RECOMMENDATION 15

A surviving spouse or adult interdependent partner should have the use and enjoyment of personal property related to a home.

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

B. Reforming Rights to Personal Property

1. PERSONAL PROPERTY TO BE INCLUDED

ISSUE 16

Which personal property should a surviving spouse or adult interdependent partner have a right to use and enjoy?

[308] It is less than ideal that the *Dower Act* refers to the exemptions in the *Civil Enforcement Act* and its regulations.¹⁹² It is inconvenient to have to refer to other legislation to find the list. Further, a list developed for enforcement debtors is not necessarily well suited to a surviving spouse or partner. On the one hand, it does not make sense to include consumable items, like food, or items that are personal to the deceased, like their clothing or medical and dental aids. On the other hand, a surviving spouse or partner may need more than \$4,000 worth of household furnishings and appliances to make a home useful.

¹⁹¹ *Family Property Act*, s 25; *Wills and Succession Act*, s 76.

¹⁹² For ease of reference, the exemptions include:

- twelve months worth of food;
- clothing worth up to \$4,000;
- household furnishings and appliances worth up to \$4,000;
- a motor vehicle worth up to \$5,000;
- medical and dental aids; and
- personal property used to earn income from a non-farming occupation worth up to \$10,000, or the personal property needed to conduct a farming operation for twelve months.

See *Civil Enforcement Act*, note 33, s 88; *Civil Enforcement Regulation*, note 34, s 37.

[309] One option would be to develop a new list of the personal property that a surviving spouse or partner may keep. In early consultation, one respondent told us about their practice when drafting a will that grants a beneficiary a life estate in a home. The lawyer includes a list of items to be included with the life estate. For example, a will might provide that the life tenant should receive all of the testator's "consumable stores, automobiles, snowmobiles, garden effects, domestic animals, plate, linen, china, glass, books, pictures, paintings, prints, furniture, jewellery, wearing apparel, musical instruments, computer equipment and articles of value." Where the home is part of a farm, the list might also include some or all of these items: "horses, harnesses, all vehicles used in the farming operation, all cattle, livestock, poultry, crops (growing and gathered) and all farm machinery and other farm or gardening equipment." Legislation could include a similar list.

[310] Another option would be to provide a right to use and enjoy household furnishings and appliances up to a certain value. The value should be significantly higher than the \$4,000 limit under the *Civil Enforcement Act*.

[311] A third option would be to use a definition of household goods, as in other Alberta legislation. The *Wills and Succession Act* and the *Family Property Act* have similar definitions of "household goods". The one in the *Wills and Succession Act* is:¹⁹³

personal property that, ... at the time of a deceased's death, was needed or being ordinarily used for transportation, household, educational, recreational or health purposes by the deceased's spouse or adult interdependent partner or by any [minor or adult disabled] child ... residing in the family home.

[312] We propose using the third option. It describes the kinds of things that make a house useful while remaining flexible. Each couple or family will have different circumstances. Lists or limits may not produce fair results in every case. Consistency with other legislation is also an important consideration. The provisions in the *Wills and Succession Act*, the *Family Property Act*, and the *Dower Act* all have the same purpose. It makes sense to use a similar definition, signalling that it should be interpreted similarly.

[313] It might be helpful to include a provision like section 23(2) of the *Dower Act*, which says, "[i]f a dispute arises as to the articles that are included in the

¹⁹³ *Wills and Succession Act*, s 72(c)(ii); see also *Family Property Act*, s 1(b).

personal property referred to in subsection (1), the question shall be submitted to the Court.”¹⁹⁴

RECOMMENDATION 16

A surviving spouse or adult interdependent partner should have a right to use and enjoy the deceased’s household goods, meaning items used for transportation, household, educational, recreational, or health purposes.

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

2. RIGHTS AND RESPONSIBILITIES

ISSUE 17

What rights or responsibilities should a surviving spouse or partner have relating to personal property?

[315] It might also be helpful to set out the responsibilities of the spouse or partner towards personal property. For example, legislation might require a surviving spouse or partner to:

- maintain the personal property and pay the costs of maintenance or repairs;¹⁹⁵
- pay any payments that fall due under a lease or loan in respect of the personal property; and
- insure the personal property.

[316] A surviving spouse or partner may not want to keep all of the personal property or may want to dispose of items that wear out or become obsolete. In most situations, the best solution will be to offer unwanted items to the person who would otherwise inherit them, whether under the deceased’s will or by

¹⁹⁴ *Dower Act*, s 23(2).

¹⁹⁵ Under the *Wills and Succession Act*, s 80, a surviving spouse or partner has the obligation during a 90 day period of temporary possession to “ensure that the family home and household goods are maintained and kept in a state of reasonable repair, taking into account the state of repair of that property at the time of the deceased’s death.” See also *Kachur Estate*, note 49 at paras 97–109. A surviving spouse or partner who uses and enjoys personal property for their lifetime should have a similar obligation. Considering that they may have the property for many years, it would be appropriate to also take into account the state of repair and age of the property after the deceased’s death.

intestate succession. The person could either take the item or give consent for the surviving spouse or partner to dispose of it.¹⁹⁶

[317] This process may not work in every situation, especially for items that have very little value. We propose that legislation should allow a surviving spouse or partner to dispose of personal property that is no longer useful and not worth repairing or maintaining. There should be a limit on the value of property that a surviving spouse or partner can dispose of unilaterally.¹⁹⁷

RECOMMENDATION 17

Legislation should list the obligations of a surviving spouse or partner relating to personal property.

RECOMMENDATION 18

A surviving spouse or partner should be able to dispose of personal property without the consent if the personal property is no longer useful and has little or no value.

[318] We welcome any comments you may have in support of or in opposition to these preliminary recommendations or additional options for reform.

¹⁹⁶ See *Kachur Estate*, note 49 at para 109.

¹⁹⁷ There are examples of similar provisions in other legislation. Under the *Residential Tenancies Act*, a landlord may dispose of goods that a tenant abandoned if the total value is less than \$2,000: *Residential Tenancies Act*, SA 2004, c R-17.1, s 31(2); *Residential Tenancies Ministerial Regulation*, Alta Reg 211/2004, s 5. Under the *Traffic Safety Act*, a peace officer may dispose of an abandoned vehicle that is “worthless”: *Traffic Safety Act*, RSA 2000, c T-6, s 77(2). A regulation clarifies that “‘worthless’ ... means a vehicle that is unlikely to have such value on resale as will allow for the full recovery of seizure costs and disposal costs likely to be incurred in the removal and storage of the vehicle”: *Vehicle Seizure and Removal Regulation*, Alta Reg 251/2006, s 1(2).

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



Web: alri.ualberta.ca

Phone: 780.492.5291

Email: lawreform@ualberta.ca

Follow us on Twitter! @ablawreform
